Mergers & Acquisitions

Contributing editor
Alan M Klein

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Preface

Mergers & Acquisitions 2017

Eighteenth edition

Getting the Deal Through is delighted to publish the eighteenth edition of *Mergers & Acquisitions*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Myanmar and the Netherlands, and new pieces on cross-border M&A and franchising in M&A.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.

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Global overview

Alan M Klein

Simpson Thacher & Bartlett LLP

Following a year of record-breaking activity in 2015, M&A activity remained robust in 2016. The total value of announced deals last year was US$3.7 trillion according to Thomson Reuters, representing a 16 per cent decrease from the previous year, and making 2016 the third strongest annual period for global M&A since records began in 1980. Despite lower volume, 2016 saw a 1 per cent increase in the number of announced deals as compared to 2015, with 46,055 deals announced globally in 2016. Notably, this high level of M&A activity occurred despite the outcome of the United Kingdom's EU referendum, uncertainty regarding the US presidential election, increased regulatory scrutiny and concerns regarding economies in Europe and Asia. Continued low interest rates, large corporate cash reserves and limited prospects for organic growth fostered conditions for M&A activity in 2016. The year began slowly, with M&A activity in the first quarter of 2016 down by 47 per cent as compared with the fourth quarter of 2015. By the fourth quarter, however, M&A activity by volume returned to levels seen in 2015. The fourth quarter was the only quarter in 2016 to surpass US$1 trillion in total deal volume, with US$1.2 trillion of deals announced. October in particular was an exceptional month, with the highest volume of deals ever recorded in a single month, according to Dealogic. Five of the 10 largest deals in 2016 were announced in October (each above US$30 billion), including AT&T's US$107.9 billion proposed acquisition of Time Warner, British American Tobacco's US$58.1 billion proposed acquisition of Reynolds American and Qualcomm's US$47 billion proposed acquisition of NXP Semiconductors.

The decrease in total deal value seen in 2016 reflects a decrease in the number of blockbuster deals. Just 35 deals with a value of US$10 billion or higher were announced in 2016, a decrease of approximately 40 per cent as compared to 2015. Likewise, whereas the top eight deals announced in 2015 each exceeded US$50 billion in value, just four deals announced in 2016 exceeded US$50 billion in value – AT&T's proposed acquisition of Time Warner was the largest deal in 2016 with a value of US$107.9 billion, followed by Bayer's proposed acquisition of Monsanto for a value of US$66.3 billion, British American Tobacco's proposed acquisition of Reynolds American for a value of US$58.1 billion and Sunoco Logistics Partners' proposed acquisition of Energy Transfer Partners for a value of $51.5 billion. Despite the decline in M&A volume in 2016, as noted above, the total number of deals announced worldwide in 2016 increased by 1 per cent as compared to 2015, reflecting robust activity in the middle market. In particular, the number of deals with a value under US$500 million increased by 1.1 per cent in 2016.

Although the number of blockbuster deals decreased, 2016 saw the continuation of an important characteristic of the M&A market since 2014: it was a seller's market. The 2016 M&A market continued to be dominated by strategic buyers, who are better able to engage in larger transactions than financial buyers. Fourteen of the 15 largest deals announced in 2016 involved strategic buyers, while financial sponsor buy-side activity accounted for just 11.9 per cent of total M&A volume in 2016. This dominance of strategic buyers is perhaps unsurprising given that strategic buyers have needs for expansion as a result of years of slow organic growth, have substantial cash reserves built up since the financial crisis and still benefit from historically low interest rates. As a result, private equity buyers appear to have been priced out of certain deals: private equity buy-side activity decreased for the first time in seven years, with the total value of private equity buy-side deals falling below the levels seen in 2015 and 2014.

In addition, 2016 was also noteworthy for the number of deals withdrawn. Deals valued at more than US$800 billion were withdrawn in 2016, representing the highest volume of deals withdrawn in any year since 2008. This high volume of withdrawals reflects that parties and their advisers may have been over-exuberant in certain proposed transactions in 2015, that regulators applied more scrutiny to overly ambitious transactions and that certain targets successfully defended against takeover bids. More than 1,000 deals were terminated in 2016, including Pfizer's US$191.5 billion proposed acquisition of Allergan and Energy Transfer Partner's US$55.9 billion proposed acquisition of the Williams Companies.

M&A activity in 2016 reflected a balanced distribution across business sectors. The top industries in terms of M&A activity for 2016 were energy and power, which accounted for 16.6 per cent of deal value in 2016, followed by technology, materials, industrials, real estate and financials, each of which accounted for 13.3 per cent, 10.7 per cent, 10 per cent, 9.8 per cent and 9.6 per cent, respectively, of deal value in 2016. Ten of the top 15 announced transactions of 2016 involved a target in one of these industries. Also, as highlighted by the deals discussed above, cross-border M&A was a notable feature of the 2016 M&A market. The volume of cross-border deals decreased by only 3 per cent as compared to cross-border volume in 2015, and accounted for 38 per cent of total M&A volume in 2016, the highest percentage since 2008. Nine of the top 15 transactions announced in 2016 were cross-border transactions.

By region, activity in the Americas, driven by activity in the United States, led the global M&A market, with US$2.2 trillion in activity from 17,146 announced transactions. US-targeted deals alone accounted for 46 per cent of global deal volume. Ten of the 15 largest transactions announced in 2016 involved US targets. Although the value of US-targeted deals declined by 16.8 per cent as compared with 2015, US inbound cross-border M&A hit a record high of US$524 billion, a 19 per cent increase over 2015. Nonetheless, the US M&A market was largely driven by US domestic deals.

It was another strong year for M&A activity in Asia-Pacific. In Asia-Pacific, 13,363 deals were announced in 2016, a record number for the region. Although the volume of M&A activity declined modestly, M&A activity in the region once again surpassed US$1 trillion. China also had a noteworthy year. The country doubled its outbound cross-border M&A activity as compared with 2015, with US$220.9 billion in deals, the largest of which was the US$45.8 billion acquisition of Switzerland-based Syngenta AG by the China National Chemical Corporation. With its impressive global dealmaking, China ranked second behind the United States for outbound M&A volume. It remains to be seen whether this volume of activity will be maintained in 2017, as Chinese regulators have indicated that outbound transactions may be subject to greater scrutiny.

The European M&A market saw a 13 per cent decrease in the value of deals with European targets. Nonetheless, the European M&A market still saw a fair number of blockbuster M&A deals, including Qualcomm's US$47 billion proposed acquisition of NXP Semiconductors. European outbound cross-border M&A activity by value increased over 2015, and on the whole, cross-border activity in the region was relatively balanced between inbound and outbound transactions. In addition, the European M&A market was a bright spot for financial sponsors in 2016. Financial sponsor buy-side activity with

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European targets increased in terms of value over 2015. The European M&A market had a relatively strong year for dealmaking considering the political and economic uncertainty that faced the region. Surprisingly, the value of deals announced in the European market following Brexit surpassed the value of deals announced before Brexit.

Building on the momentum of the fourth quarter of 2016, 2017 has got off to a record-breaking start. By mid-March, global M&A volume reached US$705 billion, the first time that year-to-date volume has surpassed US$700 billion since 2007. The largest deal to date in 2017 is Johnson & Johnson's proposed US$31.4 billion acquisition of Actelion. As demonstrated by the performance of the M&A markets thus far, despite political and economic uncertainty globally, the factors that have fostered a booming M&A market in years past remain in place: low interest rates (although they are starting to rise in the United States), large corporate cash reserves and limited prospects for organic growth. In addition, the proposed policies of the new administration in the United States, in particular a lower corporate tax rate, a tax holiday for repatriation of funds and relaxed regulations, have engendered the confidence of dealmakers. Nonetheless, it remains to be seen whether such corporate-friendly policies will be enacted and whether cross-border activity will be subject to greater regulatory scrutiny.

For over 15 years, this publication has sought to provide information of use to practitioners and clients around the world. There have been tremendous changes in the technology available to legal practitioners and the pace of the globalisation of the M&A economy has far outstripped what anyone could have predicted. In that time the global economy has gone through several cycles and suffered cataclysmic reverses and huge booms. We hope throughout that time and for some time to come that this publication has been and will continue to be a resource of great use to those who seek it out.

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Cross-Border Mergers & Acquisitions: The View from Canada

Ian Michael

Bennett Jones LLP

Market overview

Resilience has defined the cross-border M&A market in Canada in the first few months of 2017. M&A transactions for Canadian companies continue at a pace that matches global M&A markets. Investors have demonstrated an ability to rise above the many political and economic uncertainties of the day. According to Thomson Reuters data, the value of global cross-border M&A transactions in the first quarter of 2017 has reached a 10-year high, showing a 13 per cent rise from the first quarter of 2016 (US$299 billion Q1, 2016 to US$337 billion Q1, 2017). Canada's share of the inbound and outbound global cross-border M&A activity is notable in comparison to Canada's modest size. In the first quarter of 2017 the United States continued to dominate global M&A markets with inbound deal flow valued at just over US$70 billion spread across 527 transactions. Canada's inbound deal flow in the first quarter of 2017 ranked 10th in the world by value (at approximately US$13 billion) but 5th in the world by number of deals with 134 transactions announced - just behind China.

The global position of Canada among outbound acquirors is even more significant with Canada's reported outbound transactions ranking third in the first quarter of 2017 with 202 transactions worth approximately US$25 billion, just behind a total outbound deal value for China of $26 billion in the first quarter in 2017. Canada's outbound investments remain strong in large part owing to the global investment appetite of Canada's large pension funds, which continue to build on a global reputation for successful large-scale direct investments and also because many of Canada's financial institutions continue to expand worldwide operations and diversify their risk portfolio. The close comparison to China's outbound deal value in Q1 2017, however, may be temporary. China's year-over-year outbound deal value fell 70 per cent since the first quarter of 2016 and is nearly 10 per cent below even the first quarter of 2015 – in large part likely a reaction to the tightening of Chinese foreign exchange regulations at the end of 2016.

Another perspective on cross-border M&A activity involving Canada is to compare Canadian investments in certain foreign jurisdictions as compared to Chinese investments in those same jurisdictions. Keep in mind that 2016 was a year in which China set a record pace for outbound deal value generally. According to data from Mergermarket's M&A deals database, in 2016 Canadian investors announced 155 investments (US$110.6 billion) into the US, almost double Chinese investments in the US, which numbered 79 with a total value of US$63.6 billion. The story in Central and South America, again comparing Canadian and Chinese outbound investments in that area, is similar. In 2016 Canadian companies acquired 20 companies in Central and South America with a total value of US$12.3 billion, with Chinese investors announcing eight transactions with a total value of US$15.9 billion. Perhaps not surprisingly, 89.4 per cent of the value of Canadian investments in the region were in energy, mining and utilities.

From an industry perspective energy and mining continue to lead the way in Canadian cross-border market activity. Recovering commodity prices in some areas, early signs of increasing demand from China as well as some tentative recovery in the price of oil have sparked renewed financing activity in those industries and also led more buyers and sellers to agree on price both for strategic investments and entire asset or company transactions in the first four months of 2017.

Macro market considerations: uncertain change

Cross-border M&A activity in Canada in 2017 is occurring in the face of significant uncertainty, both politically and economically, with a new US administration and the UK proceeding with its exit from the EU. However, despite several predictions in the lead-up to the US presidential election of a pause in the M&A markets, dealmaking has proven to be resilient. Shortly before the US election in 2016 Intralinks, a global M&A technology provider, conducted a survey of around 1,700 global dealmakers and found that 73 per cent of the respondents believed that Hillary Clinton would win the presidential election. In addition, 23 per cent of the respondents believed that a Clinton presidency would negatively impact M&A activity and 54 per cent thought it would have no impact. Interestingly in hindsight, 27 per cent of dealmakers in that survey thought Donald Trump would win the election, with 52 per cent believing that a Trump presidency would have a negative impact on M&A activity and only 24 per cent thinking it would have a positive impact. At that time, it was reasonable to think that unpredictability if nothing else might hinder transaction activity. M&A deal flow data and the US market indices, however, tell a different story since that time – at least for the moment.

Cross-border activity involving Canada also needs to consider the regional impact of Brexit and the implementation of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). The withdrawal of the UK from the EU will remove the UK from CETA. Without the UK, CETA will remain important for Canada, offering it preferential access to a market of some 440 million people and an economy in excess of US$15 trillion. However, within the EU, the UK is the single most important trading partner for Canada. It is the second-largest EU member state economy (and the fifth-largest national economy in the world), the destination for more than 40 per cent of EU-bound Canadian merchandise exports, and accounts for more than 25 per cent of two-way Canada–EU merchandise trade and roughly one-third of two-way services trade, including financial services.

The relative good news for Canada is that the outcome is not expected to have much effect on bilateral Canada–UK trade in goods, at least in a short term for two reasons. Firstly, the UK is a World Trade Organization (WTO) member in its own right and will continue to be bound by the most-favoured-nation tariff rates that form part of the EU's WTO commitments and vice versa for Canada with respect to imports from the UK Furthermore, the most-favoured-nation rates on most goods between Canada and the UK are already low or zero. Again, while the geopolitical uncertainty created by a UK withdrawal from the EU may be dramatic, the impact on trade and the implications for cross-border M&A should be comparably benign.

The impact on Canadian cross-border M&A arising from the prospect or actual renegotiation of the terms of the North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico may be more significant and is the subject of much current speculation. With automakers and their suppliers employing 115,000 people according to Statistics Canada, and creating C$79.8 billion in exports alone based on Canadian customs data, even a 'tweak' to NAFTA could have far-reaching impacts on Canadian businesses. To put the centrality of NAFTA in perspective, nearly three-quarters of all Canadian exports are to the United States with Canada's next closest trading partner, the EU, not even reaching a 10 per cent share.

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Micro considerations: Canadian deal points and private transactions

Moving further from a general context to specific features of cross-border M&A from a Canadian perspective are the specific private target deal points that are studied by cross-border deal lawyers. The most commonly documented comparisons of particular deal points is made between Canadian and US deal documentation. Notwithstanding the close connection between the Canadian and US M&A markets and high level of cross-pollination among Canadian and US financial and legal advisers, there are several consistent and identifiable differences in deal points. Some of these may be grounded in legislative differences such as tax exemptions or limitation periods but others do not easily lend themselves to a rational explanation.

A review of the '2015 US Deal Points Study', where the American Bar Association's M&A Committee analysed transactions completed in 2014 involving US private targets, and the recently released '2016 Canadian Deal Points Study' where a Canadian working group of the ABA M&A committee analysed transactions involving private targets in Canada completed in 2014 and 2015, reveals some statistically meaningful differences in deal points. As with many comparisons between US and Canadian facts, the studies note that the US data set included mostly stock deals, that there was a smaller number of deals available for analysis in Canada and that typically the deal size in Canada was smaller and more likely to be in the resource sector. The distinctions noted below are also consistent with Bennett Jones' own internal review of 145 private M&A transactions in Canada randomly selected from the period 2000 to 2015 (where the data set was composed of 83 per cent strategic transactions versus 17 per cent private equity transactions and 63 per cent share transactions versus 37 per cent asset transactions).

Representations and warranties

Canadian deals are half as likely to require that a target's representations be accurate when made as compared to at the closing of the transaction. When it comes to the effect of double-materiality statements being carved out in a bring-down confirmation by the Vendor on closing, Canadian deals are 25 per cent less likely to include a double-materiality carve out – though the gap between this practice in the United States and Canada has decreased dramatically over the past five years.

Legal opinions of target counsel are more commonly requested in Canada, though this practice, and presumably the perceived utility, has decreased steadily both in the United States and in Canada.

When it comes to 'sandbagging' provisions in purchase agreements (seeking post-closing indemnification for breaches of representations and warranties, which breaches that party was aware of prior to signing or closing), this is an example of a deal point that has equalised in its treatment in Canada versus the United States based on recent data. This deal point has matured in Canadian documentation over the past five years. In the 2012 and 2014 Canadian deal points studies by the ABA, approximately 70 per cent of transactions were entirely silent on sandbagging in Canada versus approximately 50 per cent of deals in the study in the United States over the same period. Historically, roughly 40 per cent of US private purchase agreements included pro-sandbagging (benefit of the bargain) language versus roughly 20 per cent of Canadian transactions. However, in the most recent Canadian and US studies referred to above, pro-sandbagging provisions were included in 31 per cent of Canadian acquisition agreements (versus 35 per cent in the US) and now in fact more Canadian agreements actually refer to sandbagging provisions of one kind or another as compared to US agreements (46 per cent in Canada versus 44 per cent in the United States).

Indemnity baskets

While it is extremely rare for a transaction to be documented in the US without an indemnity basket of some kind, one out of 10 deals in Canada (and even more historically) have no basket provision at all. Where basket provisions are included in transactions the experience in Canada is more likely by a significant margin as compared to the experience in the United States to have a 'tipping basket' aka a 'first-dollar basket', as compared to a deductible, such that the threshold referred to in the basket becomes payable in the event of an indemnity claim instead of being treated as a deductible that is never exposed to indemnification (26 per cent of baskets in the US have a first-dollar feature versus 45 per cent of baskets in the Canadian transactions studied).

Furthermore, the quantum of the basket, whether it be a deductible or a tipping basket, is generally higher in Canada. The average deductible in Canada in the 2016 deal study was 2 per cent of transaction value versus 0.69 per cent in the 2015 US study and the tipping basket threshold was on average 0.81 per cent of transaction value in Canada versus 0.47 per cent of transaction value in the US. The gap between the maximum reported deductible and tipping basket quantums was even more extreme in the same manner.

Indemnity caps

Probably the most striking and persistent example of a market difference in deal terms between Canada and the United States, is the difference in the typical indemnity cap as a percentage of transaction value. The experience in the two different markets is almost exactly opposite. Based on the study data it is much more common to have a liability cap that is higher in Canada, often to the entire purchase price, while in the United States the liability cap is most commonly less than 10 per cent of the transaction value. For transactions completed in 2014 in the US the study reports that only 3 per cent of deals had a liability cap equal to the purchase price and more than 50 per cent of transactions had a liability cap of less than 10 per cent. Conversely, in Canada the most common liability cap was to the entire purchase price (23 per cent of transactions) and only 7 per cent of transactions had a liability cap of less than 10 per cent of the total transaction value – the least common outcome in Canadian transactions. Bennett Jones' internal review of 145 randomly selected private transactions in Canada between 2000 and 2015 also showed that 44 per cent of transactions had a liability of cap equal to the purchase price and the average, taking all transactions together, was 66 per cent of transaction value. While this distinction has existed

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for several years it is probable that the Canadian experience will migrate to the US experience over time, especially as between active participants in the M&A market and on mid-market and larger transactions.

Escrow/holdback amounts as a percentage of transaction value
Somewhat surprisingly given the significant difference in liability caps as a percentage of transaction value, the quantum of escrow or holdback amounts as a percentage of transaction value is relatively similar when one compares Canadian transactions to US transactions that were the subject of the ABA studies. If any pattern can be discerned, escrow and holdback quantums, as a percentage of transaction value, are actually slightly lower in the Canadian data.

Conclusion
As with many jurisdictions, cross-border M&A involving Canada will take on different dynamics depending on whether a foreign or domestic target is involved, how large the transaction is and which global uncertainties of the moment are most likely to have an impact on the relevant market and trading relationships. Domestic political uncertainty arising from pending federal, or sometimes even more relevantly, provincial, elections in the normal course can often be an important factor in cross-border M&A tactics where a foreign buyer seeks a domestic target. All of these contextual considerations are, of course, in addition to the strictly legal and usual considerations posed by competition clearances, foreign investment review approvals, industry specific Canadian ownership requirements, securities law disclosure requirements and other regulatory considerations that may be applicable depending on the particular facts.

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Franchise M&A

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Introduction

Franchise systems present a valuable investment proposition for both strategic and financial investors. The franchise business model as an expansion strategy has been on the rise across the globe for many years, and its growth together with its contributions to national gross domestic product and job creation have outperformed other sectors and business models. Moreover, franchise systems have progressed well beyond traditional quick-service restaurants to many other industries and sectors. Unsurprisingly, franchise businesses have increasingly become a focus for M&A deals, some of them large and complex. Take, for example, the recent Burger King C$14.6 billion acquisition and tax inversion involving Tim Hortons.

Mergers and acquisitions of franchise systems have become more commonplace and more sophisticated over the past decade, a trend that looks set to continue into the future. This is in part owing to increased interest and investment from private equity. Franchise systems have caught the attention of private equity firms attracted by the robust, long-term and diversified royalty revenue stream (less subject to swings in the general economy), the proven (often international) business concept, the potential for organic and rapid growth or expansion, the inherent leverage on operating costs once a certain system size is achieved, the pre-existing network of experienced operating partners, together with the goodwill and strength of an established brand that franchise systems can provide. Also important for private equity is the low capital investment required to expand franchise systems (as compared with other business structures), as well as the fact that the financial and investment community is now familiar with, and supportive of, the franchise business model.

Franchise business model

The franchise business model is by its nature unique. Understanding its framework and its moving parts is paramount for advising on any franchise M&A transaction. Franchise systems mostly comprise intangible assets like intellectual property (eg, trademarks, patents and trade secrets), relationships (eg, supply arrangements, franchisee relations, consultants or agents and customer goodwill), material contracts (eg, franchise arrangements of all types and supply contracts) and human capital (eg, the management team and key staff managing international operations). Accordingly, the assessment of franchise systems is different from the assessment of traditional 'bricks and mortar' businesses.

Franchise systems have also evolved into more complex creatures as various arrangements and structures have been adopted across multiple jurisdictions including joint ventures, master franchising, area development, area representation arrangements, etc. In addition, the franchise sector has been subject to increasing regulation across the world, both direct (through franchise laws) and indirect (eg, through relationship laws), and has typically been a highly litigious area.

In light of its distinctive features, acquiring a franchise system involves a number of unique considerations that are pertinent throughout the process: initial strategy discussions, letter of intent and due diligence stages, the drafting and negotiating of the transaction documents, closing of the transaction and beyond. The following discussion provides some insight into the kinds of unique considerations that are addressed by professionals when advising on franchise M&A transactions.

Strategy in franchise M&A

There are generally four types of buyers of franchise systems:

- entrepreneurs or existing franchisors (the next generation in the life cycle of a franchise system);
- strategic 'distribution network' buyers (looking to acquire a distribution channel for existing products);
- strategic 'competitor' buyers (seeking to obtain additional market share through acquiring a direct competitive brand, a complementary brand or by eliminating a competitor altogether); and
- financial buyers (acquiring the franchise system for a return at some point in the future).

Notwithstanding some overlap, the motivations and resulting strategies for each of these buyers are distinct. It is essential that specific strategic objectives be assessed against the intangible assets of the franchise system to ensure that a prudent and measured investment is made. To illustrate this point, consider the following scenarios.

Franchise agreements clearly describe the products and services that a franchisee may offer for sale from their franchise unit, and expressly set out the rights that franchisors have to make system modifications. Entrepreneurs and strategic 'distribution network' buyers should review the franchisor's rights and obligations under the franchise agreements at the strategy stage to ensure that there is ample scope for the introduction of new products or services. A strategic 'competitor' should ensure that the target's franchise agreements do not contain any prohibition or obstacles (direct or indirect) on the franchisor owning and supporting competitive brands. Consider, for example, a target franchise system that grants franchisees exclusive territorial rights precluding the franchisor from operating, not only corporate businesses under the same brand in the designated area, but also competitive businesses under a different brand. A strategic 'competitor' buyer acquiring such a brand might find itself in default under each and every franchise agreement upon the completion of the transaction.

Franchise-specific due diligence

At a high level, the fundamental purpose of due diligence is to evaluate the nature and value of what is being acquired together with the associated issues, risks and potential liabilities. The acquisition of a franchise system presents a number of unique considerations, potential issues and challenges which inform and shape the due diligence process. Before discussing these in detail, it is worth noting that the following indicators should raise immediate red flags when considering the acquisition of a franchise system:

- high franchisee turnover and poor franchisee satisfaction;
- weak unit-level economics, declining same-store sales, and challenges with respect to macroeconomic and political environments;
- lack of financial or accounting controls across the franchise system;
- poorly drafted franchise agreements, significant variation between agreements, and incomplete or poorly maintained franchisee files;
- poor management (including with respect to compliance and enforcement) of the franchise system;
- material ongoing litigation; and
- obsolete technology investments (particularly given the importance of cybersecurity in the midst of the data or privacy breach epidemic of recent times).

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The following (non-exhaustive) franchise-specific due diligence inquiries provide examples of the sorts of unique questions or issues that arise in the context of franchise M&A transactions.

Brand strength
Does the franchise system demonstrate a proven and replicable business concept, adaptable across markets? Has the franchise system experienced consistent growth by number of franchise units across all jurisdictions? Taking into account the size of the franchise system, has the franchisor built a solid operating platform and sound infrastructure to support existing operations as well as future growth and expansion including with respect to its manuals, training, ongoing consultation, franchisee communication strategies, compliance monitoring, marketing, technology, processes for modification and updating of products and services? Despite brand strength, are there any potential changes to the industry, such as regulatory shifts or emerging market disrupters?

Financial viability
Stress testing the royalty stream is quintessential. The focus should be on the relative certainty and recurring nature of the main revenue source (ie, long-term royalty stream) as distinct from one-time fees (eg, initial franchise fees). Purchasers should consider the remaining term on franchise arrangements (the source of the royalty stream) and the likelihood of renewals, age demographic and level of sophistication of the franchisee population, jurisdiction and regional trends or differences, and whether there are any patterns of payment delinquencies. Consideration should also be given to the future royalty potential, whether through increased sales from existing units, an increase in the number of franchisees, the introduction of new products or services, or other strategies (eg, the purchaser planning to take on the supply of products or services to franchisees for an additional fee).

Unit economics
The financial success of a franchise system is subject in large part to the performance of each member of the franchisee population. Buyers should be concerned with the financial information and trends as they relate to franchisee same-store sales, as well as comparisons or benchmarking between stores in a given jurisdiction. Is there a wide discrepancy in franchisee results and, if so, what are the reasons? Two other important measures to assess include turnkey development costs (the major investment cost for a franchisee) and annual net profit. Are there strategies for increasing revenues (eg, improved products or services), reducing operating costs or reducing development costs (initial and refurbishment)?

Human capital
Unless the purchaser is looking to replace the management team (usually not the case, particularly with financial buyers), then due diligence on each member of the team and their specific roles is crucial. Consider whether there will be required changes post-closing (eg, owing to economies of scale). The purchaser should interview and consult with those executives and managers they believe are important to the long-term plans of the franchise system (particularly those with unique skill sets who are difficult to replace, eg, franchise sales executives and international operations managers), and may also consider incentivising those individuals to remain following the completion of the transaction. Separately, purchasers should investigate and consider unfavourable arrangements and obligations with respect to retirement or termination of senior management (eg, golden parachutes, poor non-compete provisions, etc).

Intellectual property
The intellectual property assets of a franchise system go well beyond the trademark(s) prominently featured outside of a franchise unit location. Franchise systems are often based on trade secrets (know-how, processes, techniques, manuals), which may include proprietary software and copyrights (eg, in the blueprints for unit location premises). Does the franchisor own, or have the appropriate licences to use, all of the intellectual property rights? Such inquiry is particularly crucial where, for example, developers have been involved in the creation of proprietary software. Have the intellectual property assets been correctly classified, protected (whether through registration, negative covenants and consistent corresponding conduct, or licensing) and policed? Especially with respect to trademarks, are registrations available in jurisdictions where the buyer intends to expand (but where registrations have not currently been filed)?

Advertising funds
A unique feature of franchise systems and often a common source of disputes between franchisors and franchisees is the administration of advertising funds. Franchisors typically have broad discretion over the application of advertising funds, and franchisees usually have a clear idea as to how they believe the advertising funds can be deployed to best serve their franchise unit(s). Buyers should analyse past performance and consider future obligations of advertising funds. Are there sufficient forecast contributions to pay for contractual obligations to third parties (eg, ad agencies)? Has the franchisor complied with its obligations under the franchise agreements including the percentages of expenditure permitted or required across various forms of advertising and the administrative costs? Has there been any correspondence from franchisees disputing the operation or administration of the advertising funds?

System health
Characteristically, the franchisor operates its franchise system and business through its franchisees. It stands to reason that the relationship between a franchisor and its franchisees is quintessential to the franchise system. Therefore, determining the general attitude and disposition of franchisees toward the franchisor – sometimes referred to as 'taking the temperature' of franchisees – is all-important. One helpful metric in this regard is the 'flip rate' – the rate at which franchisees leave the franchise system. Discerning the reason for such departures is also meaningful. More broadly, purchasers should review the history of renewals, extensions, terminations, transfers, turnover (trends), events of default, delinquencies, franchisee holding over and franchisees that are in financial difficulty or have been identified as non-viable (predicted to close). Franchisee files can provide great insight into the health of the franchise system by uncovering troubled relationships, potential disputes, (threatened) litigation, general dissatisfaction, non-compliance, as well as the franchisor's monitoring (or lack thereof) of the franchise system as a whole. In addition, a savvy purchaser will look to identify real and apparent expectations created by the franchisor's conduct and communications, and gain a sense of the existing franchisor's strengths and weaknesses.

Franchisee associations
Given various titles, and constituted by various structures, franchisee associations (typically established by a group of disgruntled franchisees) and franchisor advisory councils (most of the time established by franchisors) are bodies or committees set up to represent, and be the voice for, franchisees on matters pertaining to their franchisor and the franchise system. Reviewing an association's or council's by-laws, minutes of meetings, website content, together with all correspondence and communications with the franchisor and franchisees, can provide a wealth of information about the performance of the franchisor. Moreover, it can reveal the challenges and issues facing the franchise system. The corollary being that the buyer can gain insight from such review on what may improve the operations and value of the franchise system.

Franchisee disposition
The presence of a franchisee community differentiates franchise systems from other businesses. Perilously, a frequently overlooked element of a franchise system is the cultural or emotional sensibilities of the franchisee community; the organism at the heart of the franchise system. Franchisees tend to band together and carry with them significant power to influence the terms of an acquisition as well as its post-closing success (through both legal and contractual rights). Accordingly, the purchaser is best advised to 'take the temperature' of the franchisees as it relates to a proposed transaction, and the likely predilections and inclinations of the franchisee population in this regard (particularly where the purchaser operates a competing brand). Investigate whether franchisees have unified as a group on previous occasions with respect to major changes or, more pertinently, previously proposed M&A transactions. As stated above, information and

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records of a Franchisee Association or Franchisor Advisory Council (if they exist) can be a gauge on some of these matters.

Regulatory compliance

Franchise disclosure, business opportunity, and relationship laws (regulating franchise systems) are increasingly being enacted (and re-enacted with more stringent obligations) across more jurisdictions. Some jurisdictions subject franchisors to multi-level regulatory schemes (eg, in the US, regulation occurs at both the federal level as well as in a number of states). Consequently, due diligence on 'compliance with laws' in such circumstances can be a complex inquiry, but is critical as the remedies available to franchisees are often extensive and even draconian against franchisors. The due diligence process includes scrutinising: (i) the accuracy and consistency of franchise sale documentation and processes (especially for those franchisees whose arrangements are within the 'rescission' period); (ii) earnings projections or financial performance representations; (iii) registrations in the relevant jurisdictions; and (iv) ongoing compliance with franchise-specific laws. Deficiencies in this regard can lead to stricter covenants in the purchase agreement (discussed below) or, if sufficiently serious, can be deal-breakers. Buyers should particularly investigate inconsistencies between franchise disclosure documents provided to franchisees (at the time of sale) and the ultimately executed franchise agreement. Mistakes and misalignments between the two can foil the buyer's future plans for the franchise system, or worse, result in potential future claims.

Franchise agreements

Franchisees are at the heart of a franchise system, and therefore the franchisor's arrangements with franchisees are paramount to an assessment of a franchise system. The inquiry becomes more complex where there are different categories of arrangements entered into by the franchisors (eg, area representation, area development and master franchise arrangements) across various jurisdictions. Buyers should carefully consider specific terms in the franchise agreements such as:

- term and renewal provisions (numerous contracts coming up for renewal in the short term may be desirable or undesirable depending on the plans of the purchaser; also watch for 'perpetual' or 'evergreen' contracts);
- royalty rebates and concessions given to franchisees that can erode the royalty stream;
- the precise terms and breadth of rights that the franchisor has to modify, and implement changes to, the franchise system (eg, to respond to changes in the marketplace or to execute the purchaser's proposed plans);
- the nature and scope of the territorial rights granted to franchisees (including exclusivity) together with the rights reserved to franchisors (eg, with respect to other franchise or business activities) to determine whether there are any impediments to the purchaser's plans for expansion;
- change of control or assignment provisions to determine the requirements for the proposed transaction; and
- termination rights; preferably not overly lax for franchisees and not too restrictive on the franchisor (and ideally including a franchisor buyout right). Importantly, buyers should also be aware of the potential for different versions of franchise agreements to exist as well as one-off 'side deals' and other random concessions given to one or more franchisees (particularly where due diligence is undertaken on a sample of franchise arrangements).

Franchise manual and compliance

The franchise manual sets out in finer detail the operational requirements of the franchise system, and is a primary tool used by the franchisor to effect franchise system change. The franchise agreement expressly mandates compliance with the franchise manual. There are two important inquiries with respect to the franchise manual: is the manual drafted sufficiently to ensure that the franchise system operates in a uniform and functional manner, and is the manual's content robust enough to shield the franchisor from potential vicarious liability, including liability with respect to joint employer rulings, cyber security and data breaches, menu labelling obligations, human rights violations, and breaches of disability laws to name a few? In addition, purchasers will want to determine whether the franchise system has maintained good management of its franchise units and undertaken consistent implementation of compliance measures. Consider the implications for a purchaser in the following scenarios multiplied across several hundred franchise units: (i) the franchisor failing to police insurance obligations (ie, collecting specific insurance certificates naming the franchisor), and the purchaser later discovering that one or more franchisees have not obtained appropriate insurance, or (ii) poor compliance measures being taken to monitor gift card programmes or warranty policies offered by franchisees to their customers (which often have complex terms and conditions) resulting in gratuitous benefits or extensive unintended warranties being granted to customers in breach of system requirements. Avoiding full-blown disputes over non-compliance issues can be desirable within a franchise system, but a laissez-faire approach to enforcing standards leads to a 'weak' franchise system and a potential minefield of issues for an incoming franchisor.

Joint/common employer

Franchisors in various jurisdictions are experiencing increased risk of being classified as a joint/common employer with their franchisees as a result of evolving laws (whether judicial or legislative). Such classification can have far-reaching effects, leaving franchisors exposed to claims by franchisee employees for unpaid wages, overtime or vacation pay, benefits, termination notice, pay in lieu of notice, severance pay, wrongful and constructive dismissal claims, human rights claims and payroll taxes, as well as increased risk of employee unionisation across franchisee lines. Consequently, this is both a serious and chief concern for purchasers when conducting due diligence. Purchasers must carefully review and analyse the existing franchisor's approach to reserving and exerting control over their franchisees' businesses in light of the joint or common employer standards.

Technology and cybersecurity

Has the franchisor maintained, updated and made investments in its technology systems in an optimum manner? Whether it be point of sale systems, inventory software systems, marketing technology or the computer hardware itself (depending on the nature of the business), obsolete technology spells disaster. In addition, the purchaser will want to ensure that the systems used by the franchisor are compatible, and can be integrated, with its own systems. On another front, franchisors are facing a precarious three-way intersection of increased accountability and regulation over consumer privacy, the growing volume and sophistication of cyberattacks on consumer data, and the expanding boundaries of franchisor liability for matters arising at the franchise unit level. Purchasers should closely assess the franchisor's compliance with privacy laws (in all jurisdictions) and PCI requirements together with cybersecurity programmes, policies and measures taken by franchisors, to ensure that they have adequately assessed potential exposure.

There are a few more points worth making with respect to franchise-specific due diligence. Firstly, where a franchisor has entered into one or more master franchise arrangements, it is important to note that there is no privity of contract between the franchisor and the once removed unit franchisees (which are the franchisees of the master franchisee). Accordingly, due diligence on the franchisee population under a master franchise arrangement must be assessed through the master franchisee. Second, when dealing with a franchise system comprising global operations and various structures or arrangements, the task of reviewing each and every agreement may extend beyond the scope of the buyer's due diligence mandate. In those circumstances, it is not uncommon for the scope of due diligence to be limited by segregating the information and documentation by one or more of the following: date, jurisdiction, franchise type, issues of concern, etc, and then proceeding to undertake comprehensive due diligence on a sample from each category.

Purchase agreement provisions

Drafting and negotiating purchase agreements in the context of a franchise M&A transaction involves franchise unique drafting, the inclusion of tailored representations and warranties, and risk allocation mechanisms to address issues raised by the franchise-specific due diligence process. For instance, the definition of 'franchise agreement' in the purchase agreement should be carefully crafted to ensure that

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it captures all relevant permutations of the franchise system including joint ventures, partnerships and alternative licensing arrangements (in addition to the various structures referred to above, ie, master franchising, area development and area representation arrangements). In some cases, it may be necessary to include several definitions (for the various arrangements) to give proper meaning to the terms and conditions of the purchase agreement. The chief goal is to ensure that the representations and warranties (and corresponding indemnities) are not undermined by missing or mixing the various forms of arrangement. Customised and detailed representations and warranties addressing franchise-specific matters as well as the above franchise-specific due diligence considerations form an integral part of well drafted franchise M&A purchase agreements. These include statements that speak to the franchise materials and documents in existence, specific regulatory registrations and compliance, the specific obligations of franchisors under the franchise agreements (including administration operations of the advertising funds) and the communications or interactions with the franchisee population. Finally, the purchase agreement will address the deficiencies arising from the franchise-specific due diligence through the representations and warranties, specific indemnities, covenants to remedy (whether post or prior to closing) and other mechanisms (such as holdbacks or escrows).

Deal dynamics and beyond

Ironically, notwithstanding that the franchisee population is at the heart of the franchise system, the buyer's access to the franchisee population (for due diligence purposes) is almost always a contentious issue. The matter is inextricably tied to the franchisor's determination of the most appropriate time to disclose the existence of a potential transaction to its franchisees. Franchisors are reluctant to inform franchisees of an impending sale transaction for a number of reasons including: (i) the distraction that it may cause for franchisees; (ii) franchisees with potential disputes can take advantage in the circumstances of the proposed transaction (eg, by holding out for a larger settlement); and (iii) the potential negative consequences for the system if the deal is not completed. Ultimately, the determination of when to inform franchisees of the proposed transaction, and when to allow the buyer access to the franchisees (as well as what that access will involve), is dependent on a number of factors including the size and condition of the system, the relative bargaining power of the parties, and the due diligence protocols adopted by the buyer. It is worth noting that in some cases franchisors are provided access to the franchisees just prior to completion of the transaction, and in some scenarios only through third-party administered surveys (ie, no direct access).

From a regulatory perspective, there is no statutory obligation to disclose the proposed transaction to existing franchisees, even where they continue to develop and establish new units (pursuant to an existing franchise agreement). However, the situation with prospective franchisees is different. Franchise disclosure laws may require that the proposed transaction be included in disclosure documents. The determination of when the proposed transaction has reached a point in time where its existence must be disclosed to franchisees (typically as a 'material fact') is dependent on the facts and the particular laws of a jurisdiction. Once that point is reached (usually the point in time where the transaction is more than likely to proceed), the franchisor must either include the existence of the transaction in its disclosure documentation or refrain from selling any further franchises (referred to as the practice of 'going dark').

Notwithstanding the point in time at which the franchisees are informed of the proposed transaction, the tone and content of the communication from that point on is crucial. A well-executed communication plan and programme can go a long way to engaging and motivating franchisees to buy into the purchaser's future leadership and plans. Prudent buyers will look to pre-empt the expectations of franchisees by addressing the following kinds of matters (that franchisees want comfort on):

- Will the buyer understand, and be committed to, the franchise business model and its associated obligations?
- Will encroachment issues result from the purchaser's intended expansion (or its existing competitive brands)?
- Are significant changes contemplated, and will they involve additional investment by the franchisee?
- What will the management team look like post-closing?
- What are the likely effects or changes to the culture of the franchise system arising from the purchaser's ownership?

Conclusion

Sector and industry-specific considerations exist in most M&A transactions, franchise M&A transactions are no different. An understanding of the franchise business model, the underlying assets, and the sorts of issues and challenges that can arise in that context is critical to competently advising on franchise M&A transactions. This chapter (which is by no means exhaustive) is intended to provide some insight and valuable practice tools for practitioners in this growing area. Private equity has increasingly brought its capital, expertise and other resources to bear on the franchise sector, buying and improving franchise systems. It will be interesting to watch the interplay between franchise systems and private equity, and further consolidation in the franchise sector, over the coming year.

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Argentina

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1 Types of transaction

How may businesses combine?

Business combinations in Argentina include starting up a new business by incorporating a new Argentine entity, acquiring participation in an already existing Argentine company, setting up a branch, transfer of an ongoing concern, and reorganisations as mergers or spin-offs, as well as different types of joint ventures.

To conduct business in Argentina on a permanent basis, a foreign company may incorporate a local company (subsidiary) through the different types regulated by Argentine Companies Law No. 19,550 which include corporations, limited liability companies, or has the possibility to set up a branch, or acquire equity participation in an already incorporated Argentine company.

In order for a foreign entity to hold equity of an Argentine company or be part to a joint venture, it has to be registered before the Public Registry of the jurisdiction of incorporation of the local company and attest that its main activity is developed abroad.

An ongoing concern transfer can be made pursuant to Law No. 11,867. This regime establishes certain publicity requirements to protect potential sellers' creditors. It is a common practice to acquire certain types of businesses in order to avoid the creation of a new corporate entity.

Among reorganisations, mergers include mergers by consolidation, where two or more companies transfer their assets and liabilities to a new company which, as consideration, issues shares to the shareholders of the merged companies which are then dissolved; and mergers by absorption, where one or more companies transfer their assets and liabilities to an existing company which, as consideration, issues shares to the shareholders of the absorbed companies, which are then dissolved. Spin-offs include the demerger of certain assets and liabilities from a corporation to a newly incorporated corporation or to an already existing one. For a merger or spin-off to have legal effect as regards third parties, it has to be mandatory registered before the Public Registry of the jurisdiction of incorporation of the corporate entity.

Joint ventures are structured under Argentine law mainly as transitory unions, which is a collaboration agreement by which the parties cooperate in a certain business through joint efforts. These joint ventures are not treated as independent legal entities different from their partners, except for certain specific purposes as tax and labour matters.

It is important to point out that foreign investment is regulated by Law No. 21,382, which grants equal rights and obligations status to local and foreign investments and allows the foreign investor to select any of the legal business organisations permitted by Argentine law. Argentina has also entered into numerous bilateral investment promotion and protection treaties with different countries, including Australia, Canada, China, Denmark, Germany, France, Italy, Russia, the United Kingdom and the United States.

Other vehicles of investment that are commonly used in Argentina are trusts, which have their specific regulations.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws that govern business combinations in Argentina are the following:

- Civil and Commercial Code;
- General Companies Law No. 19,550, as amended;
- Antitrust Law No. 25,156, as amended;
- Capital Markets Law No. 26,831, as amended;
- Labour Contract Law No. 20,744;
- General Environmental Policy Law No. 25,675, as amended; and
- Income Tax Law No. 20,628, as amended.

Pursuant to the Argentine Constitution, international treaties duly approved by Congress and ratified by the Executive Branch, take precedence over federal and provincial laws.

3 Governing law

What law typically governs the transaction agreements?

Pursuant to Argentine law, choice of foreign law is valid and admissible in all contracts or private agreements governing economic matters that do not involve issues concerning Argentine national public policy.

If the parties involved in the transaction are located in Argentina, the law that typically applies is the Argentine law. However, when the transaction involves non-resident parties, then the parties often choose New York State Law to govern the transaction.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Reorganisations and ongoing concern transfers must be registered before the Public Registry in order to have legal effects as regards third parties.

The transfer of shares of corporations does not need to be registered before the Public Register and only needs to be notified to the issuer and registered with the stock ledger book of said issuer. Transfers of participations in, limited liability companies must be registered before the Public Registry in order to be opposable to third parties.

Pursuant to Antitrust Law No. 25,156, subject to certain thresholds, transactions resulting in economic concentrations may require the notification and approval of the Antitrust Commission.

Stamp tax generally applies to the transaction documents, which rate varies among local jurisdictions, being the standard rate of 1 per cent, calculated on the economic value of the document.

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5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

To incorporate a company in Argentina as well as in mergers and spin-offs, a notice referring to said transaction including among others the corporate name, domicile, shareholders and members of the board information, principal place of business, capital stock, etc, must be published in the Official Gazette of the jurisdiction of the company's registration and in a newspaper of said jurisdiction with nationwide circulation in the case of mergers or spin-offs.

Regarding ongoing concern transfers, the notice to be published in the Official Gazette and the newspaper of the business jurisdiction shall include the type and location of the business to be transferred, as well as personal information of the transferor, the transferee and of the notary public that takes intervention in the transfer.

Please see question 6 in respect of publicly held companies.

In addition, if the companies involved in the business combination perform certain regulated activities, then additional filings and disclosure of information might be required (see question 17).

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Although owners of privately held companies do not have disclosure requirements, except for specific business sector regulations, all companies, including foreign ones, as well as joint ventures, have to file before the Public Registry a sworn affidavit stating its final beneficiary, which pursuant to the applicable law is the individual that holds at least 20 per cent of the capital stock or votes of a certain company, or that actually controls directly or indirectly said company. This requirement is also applicable to trusts.

Regarding publicly held companies, disclosure obligation applies to any person (other than controlling shareholder), to the extent any transaction involves 5 per cent or more of the total voting rights in such a public issuer (regardless of such transaction effectively granting voting rights at such time), when a person, directly or indirectly, or acting together with other persons: (i) acquires or sells securities of a public issuer or acquires a put or call option on any such securities; (ii) changes its direct or indirect holding in a public issuer; (iii) converts its debt securities of a public issuer into shares of such public issuer; (iv) exercises a put or call option in connection with securities of a public issuer; or (v) changes its intention in connection with its holding in a public issuer.

Similar information must be provided each time there are changes in holdings that have been already informed until such person becomes the controlling shareholder of the public issuer. Hence, a disclosure is required every time there is any change on the respective holding regardless of the percentage (ie, even if it is a 0.1 per cent change in holding). If such person becomes the controlling shareholder of a public issuer, these disclosure obligations related to a threshold cease and separate obligations arise in connection with such person becoming the controlling shareholder of the public issuer.

Publicly held companies, regardless of the market on which they are listed or traded have to file with the Argentine Securities Exchange Commission, the name and domicile of the shareholders or partners that hold more than 5 per cent of its capital stock, in decreasing order according to their equity percentages, and specifying, if applicable, their corporate type or functional equivalent and their nationality.

In addition, the members of the board of directors, members of the surveillance committee and controlling shareholders of a public company shall disclose the amount of publicly offered shares or debt securities (including convertible debt securities) and any put or call options on shares or debt securities (including convertible debt securities) that they hold or, as the case may be, manage, directly or indirectly, in such public company.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The directors of the company must perform their duties with loyalty and with the diligence of a prudent businessman. Those who breach these fiduciary duties shall be joint and severally liable for damages, as well as for infringement of the law, the by-laws or internal regulations and for any other damage resulting from malicious fraud, abuse of powers or material fault, as regards the company, the shareholders and third parties.

Companies Law No. 19,550 establishes that any dealings between a director and the company that do not meet certain conditions require prior approval of the board of directors. The annual shareholders' meeting must be informed of these dealings. If the shareholders' meeting rejects any such contract entered into by the directors, the director engaged in said self-dealing shall be liable for the damages suffered by the company.

In addition, directors must disclose to the board of directors and to the syndics any conflict of interest they may face and must refrain from participating in any related discussion, and they may not engage in activities that compete with the company, except with the express authorisation of the shareholders' meeting.

In addition, General Companies Law No. 19,550 requires that a company holding at least a 25 per cent of the equity of another company shall communicate this fact to the latter in its first ordinary shareholders meeting after the acquisition of said participation.

In respect of publicly held companies, the members of the board of directors and surveillance committee of a public issuer must disclose as a relevant event any changes in the shareholding of the public issuer affecting the composition of the controlling group or any event or situation that is suitable for its importance to materially affect the placement of securities or the course of trading. Hence, if a publicly held company acquires another business or company and such acquisition may affect the course of trading of its securities it must be informed to the public.

All of said disclosures must be made to the Argentine Securities Commission and also to any market where the affected securities are listed or traded. The disclosure regime applies to any issuer legally entitled to issue securities of any kind and offer them to the public in Argentina.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Mergers and spin-offs are subject to prior shareholder's approval. By-laws may increase the quorum or majority voting legal requirements or both.

Whenever shareholders of a privately held company approve a merger in which their company is not the surviving company, any shareholder who voted against such action or did not attend the meeting may withdraw from the company and receive the value of its shares. The value of the shares must be determined on the basis of the company's most recently approved balance sheet or which should have been approved in compliance with legal provisions.

Withdrawal rights must be exercised within five days following the close of the meeting adopting the resolution in the event the dissenting shareholder voted against such resolution, or within 15 days following such date if the dissenting shareholder did not attend the meeting.

Shareholders of publicly held companies do not have similar withdrawal rights.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Argentine Law No. 26,831 is the main law regulating the activities performed in connection with the marketing and sale of securities through a public offering in Argentina. The authority responsible for regulating such activities is the National Securities Commission (CNV), a national

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entity that is separate from the central government with jurisdiction over the entire territory of Argentina. The CNV supervises companies authorised to issue and offer securities to the public in Argentina, the trading of securities (whether or not such securities are issued in Argentina) in the Argentine secondary market, and all individuals and legal entities involved by any means in the public offering of securities (including initial public offerings of securities) and secondary market transactions involving securities.

In such capacity, the CNV issues regulations (the CNV Regulations), which together with Law No. 26,831, as amended, and other legal sources constitute the regulatory framework for public offerings of securities and the secondary market of trading of securities in Argentina.

Section 2 of Law No. 26,831 defines a 'public offer' of securities as the invitation to the public generally in Argentina or to specific groups of persons (either individuals or legal entities) in Argentina to participate in any type of transaction with securities, whether made by the issuer of the securities or by individuals or entities that are dedicated exclusively or non-exclusively to trading in securities, by means of personal offerings, publications in writing (eg, newspapers, magazines, etc), radio or television transmissions, posting or signs, pamphlets, electronic means, communications or any other means of diffusion.

Thus, a person that with the purpose to take control of a publicly traded company acquires an amount of shares that grants weather directly or indirectly significant participation in the capital stock or voting rights of said company, then a mandatory public offer of acquisition has to be made. In addition, if control is taken over a company, even if it is not a publicly traded one, if it participates directly or indirectly in the capital stock of a third publicly traded company, it will have to make a public mandatory offer if as a consequence of said taking of control certain participation thresholds are surpassed.

Any tender offer of shares with voting rights of a company whose shares are admitted to the public offer system must be addressed to all holders of those shares, including the holders of subscription rights or options, of convertible debt securities or other similar securities, that directly or indirectly, may entitle to a right to underwrite, to purchase or convert into shares with voting rights rateably to their holdings and the amount of participation intended to be purchased. The offer shall be made at an equitable price.

Tender (or exchange) offers require previous approval by the CNV. The regulations require equal treatment to the shareholders regarding economic and general conditions of purchase, as well as fair price, reasonable time to decide and detailed information sourcing.

In case of hostile bids, the target's board of directors must issue a report regarding the tender offer including pros and cons of the bid (especially the price fairness) and technical recommendations to the owners of the securities about accepting or rejecting the offer. For directors or managers who are also shareholders, an announcement of their decision regarding the proposed offer shall be included.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Argentine law does not establish specific regulations regarding break-up fees, and it is not frequent for the parties to agree on a break-up fee.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Besides antitrust authorisations, business combinations related to energy, oil and gas, and public services activities may require the prior approval of government agencies. In addition, business combinations involving bank and insurance companies shall also comply with specific authorisations (see question 17).

Moreover, certain business transactions are restricted to foreign investors. In that sense, Rural Land Law No. 26,737 imposes limits on the ownership or possession of rural land by foreign individuals or foreign legal entities (which pursuant to said law include Argentine companies controlled by foreign companies). The law sets a limit of 15 per cent of the total rural land of Argentina that can be owned by foreign persons, which limit shall also apply to provincial and municipal rural land, and foreigners of a same nationality are allowed to own as of 30 per cent of the total rural land percentage authorised to be held by foreign persons.

The law distinguishes a special zone called a 'core zone', which is the most productive rural land of the country. In said core zone, a foreign person is allowed to own as of 1,000 hectares, and an equivalent amount in the rest of the country (to be determined by an special committee created for said special purpose).

Furthermore, foreign persons are not allowed to own lands containing or adjacent to large and permanent water bodies, and also located in border security areas. As per bilateral investment treaties signed by Argentina, the purchase of rural lands shall not be considered as an investment, since rural lands are non-renewable natural resources contributed by the host state.

Furthermore, Law No. 26,522 that regulates media and broadcasting, establishes a threshold of 30 per cent of the capital stock and votes that a foreign investor can hold in a media company.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

A tender offer procedure shall ensure and provide for an equal treatment of shareholders both in the economic and financial conditions and in any other condition for the purchase of all shares, securities or rights of the same class or kind. Also, if the offer is subject to conditions, these have to represent objective causes, that must be clearly included and highlighted in the offer prospectus, and whenever provided by the enforcement authority, the guarantees required according to the consideration offered consisting of cash, marketable securities or securities already issued or securities whose issue has not yet been agreed by the offeror.

A public tender offer can be settled as a purchase and sale or as an exchange offer, in which case securities listed in a stock market in Argentina or abroad (with previous CNV authorisation) can be offered as consideration. Consideration is in most cases agreed as a cash payment through bank deposits or wire transfer. However, securities or a combination of cash and securities are also offered as consideration. The CNV regulates the requirements and restrictions related to the different types of consideration.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Pursuant to Argentine law, the parties to an M&A transaction are free to choose financing schemes. There is no mandatory legal obligation of seller to assist the buyer's financing. In general, buyers engage in bank loan agreements, but also sellers loans secured with pledge of shares or escrow agreements are commonly used.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Regarding publicly traded companies, any shareholder holding directly or indirectly 95 per cent or more of the capital stock of a public issuer: (i) may be required at any time by any minority shareholder, to conduct a mandatory tender offer to all the minority shareholders in respect of the residual shares held by the non-controlling shareholders; or (ii) may conduct, within six months from the date it becomes the owner of 95 per cent of the issuer, a mandatory tender offer to all the minority shareholders in respect of the residual shares held by the non–controlling shareholders.

The controlling company or person and the controlled company shall communicate to the CNV and the market where the controlled

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company shares are listed, the fact that a 95 per cent control has been reached. No squeeze-out may be realised until compliance with the aforesaid communications.

It should be pointed out that for purposes of the squeeze-out rights a 95 per cent control shall be deemed satisfied if two or more persons or entities (which individually do not reach to the threshold) exercise common control over the issuer on a permanent basis.

Upon a formal request to the controlling person to squeeze out the minority shareholders, it may opt to make a tender offer or make a statement of acquisition.

In the event the controlling person is a corporation that shares are listed in local or foreign markets as authorised by the CNV, the controlling or parent company, additionally to a cash offer, may offer to all minority shareholders of the company to opt to exchange their shares for shares of the parent company.

If after a 60-business-day period, the controlling person does not issue a tender offer or a statement of acquisition, any minority shareholder may require an statement that its shares have been acquired by the controlling person, and that an equitable or fair price in cash be set for its shares by the competent judiciary or arbitral court.

It is a condition for the validity of the statement of acquisition of minority shares issued by the controlling person, that the acquisition comprises all the outstanding shares, as well as all other securities convertible into shares that are held by third parties. The statement of acquisition shall include the equitable price to be paid by the controlling person for each remaining share held by the minority shareholders. Whenever appropriate, the statement of acquisition shall also contain the fair price to be paid for each security convertible into shares. The statement of acquisition, the price and other conditions shall be published for three days in the Official Gazette of the market where the shares are listed, in the *Boletín Oficial de la República Argentina* and in one newspaper with general circulation in the Republic of Argentina.

Within five business days from the approval issued by the CNV, the controlling person is required to deposit with a specific bank the amount corresponding to the total value of the shares and other convertible securities included in the statement of acquisition. In the case of exchange offers, the certificates representing the shares accepted in exchange for minority shareholders who had expressed their will to that effect shall be deposited in the accounts of entities approved by the CNV.

After the CNV's authorisation and compliance with certain publicity requirements, the statement of acquisition shall be passed into a notarial public deed by the controlling person, containing certain terms and conditions.

The public deed containing the statement of acquisition shall be registered with the Public Registry and submitted to the CNV, and the market where the company shares were listed.

The controlling person under the public deed shall become the owner of the shares and convertible securities. The controlled company shall cancel previous securities and issue new securities to the order of the controlling company, and shall register the change of ownership in the register of shareholders or in the register of book-entry shares, as applicable. The statement of acquisition shall imply, as a matter of law, the withdrawal of shares from the public offer after the date of the public deed.

The voluntary withdrawal of the price for the shares paid to the minority shareholders shall imply the acceptance of the equitable or fair price assigned by the controlling person to the shares and other convertible securities. Minority shareholders may challenge the price under specific proceedings set forth in the Capital Markets Law.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no specific regulations in Argentine law applicable to cross-border transactions. The parties are free to select a different law than Argentine law to govern their agreements, provided that it does not contravene issues concerning Argentine national public policy.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

From a corporate law point of view, the merger requires the following steps to be taken:

- Preparation of special merger balance sheets: for each merging company and a consolidated merger balance sheet, as well as the execution of a preliminary merger agreement approved by the board of directors of each of the merging companies involved. The preparation of the special and consolidated merger balance sheets generally takes from 45 to 60 days.
- Shareholders' meetings: of each of the companies involved, resolving upon the approval of the preliminary merger agreement. The preliminary merger agreement is the first corporate document implementing the merger that will, at the end, be followed by the final merger agreement.
- Publication of notices: during three days with the Official Gazette in each company's jurisdiction and in a newspaper of nationwide circulation. The Official Gazette generally takes a week between the date of filing of the notices for publication and the date of the first publication.
- Creditors' objections: As from the last published notice mentioned above, creditors of the merging companies have a 15-day term to file oppositions to the merger. Creditors who file oppositions may be secured or paid off by the merging companies or, in case the merging companies do not recognise their credit they may obtain a judicial lien. However it should be pointed out that the objections filed by any creditor do not prevent the merger, but the execution of the final merger agreement will be suspended for a further 20-day period after the initial 15-day period mentioned above has expired. As indicated, this is to allow opposing creditors who are not paid off or whose debts are not duly secured by the merging companies, to obtain judicial liens. If no creditors have filed objections, the final merger agreement may be executed immediately after the expiry of the initial 15-day term.
- Execution of the final merger agreement: Once the above mentioned steps are fulfilled, the merging companies are able to execute the final merger agreement. In addition, notices with respect to the by-laws of the new company, or capital increases or amendments to the by-laws of the absorbing company, as the case may be, must be published for one day in the Official Gazette. Notices with respect to the winding-up without liquidation of the dissolved companies must also be published for one day in the Official Gazette.
- Shareholder's right of withdrawal: Whenever shareholders of a company approve a merger in which their company is not the surviving company, any shareholder who voted against such action or did not attend the meeting may withdraw from the company and receive the value of its shares. Withdrawal rights must be exercised within five days following the close of the meeting adopting the resolution in the event the dissenting shareholder voted against such resolution, or within 15 days following such date if the dissenting shareholder did not attend the meeting. The exercise of withdrawal rights will entail amendments to the merger balance sheet and may also modify exchange ratios.
- Registration of the merger with the Public Registry: The law requires that the final merger agreement and amendments to the by-laws of the continuing company be registered with the Public Registry. If they are not registered, the merger will have no legal effect as regards third parties. Merger registration procedures may take between 60 and 90 days after the filing has been made.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Certain industries are specifically regulated by Argentine law, and generally include the authorisation of specific government agencies of business combinations and transactions related to said sectors.

Telecommunications, media, natural gas and electricity are among those industries. In addition, publicly held companies, as well

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as insurance and financial entities, have to comply with notifications before certain governmental authorities.

In case of a change of control: (i) regarding companies included in the gas industry regulated by the gas law (No. 24.076), the ratification of ENARGAS (the agency responsible for regulating, controlling and resolving disputes arising from the gas utility) is required; (ii) as per companies subject to the electricity law (No. 24.065), notification ex post to ENRE (the agency in charge of regulating the electrical activity) is necessary; and (iii) for telecommunications (by application of Law No. 27.078 recently amended by Decree No. 267/15) approval from ENACOM (the national telecommunications agency) is also required. In addition, transfer of pharmacies, drug stores and distributors subject to health regulations requires special authorisations. Moreover, the assignments of exploration permits and exploration concessions under national and provincial laws of hydrocarbons require prior approval.

Furthermore, Law No. 21,526 (the Argentine Financial Institution Law), as amended, regulates the banking activities in Argentina. Said law empowers the Central Bank to regulate and supervise the Argentine banking system, conferring numerous powers on the Central Bank, including the ability to grant and revoke bank licences, to authorise the establishment of branches outside Argentina, to approve bank mergers, capital increases and certain transfers of stock, to fix minimum capital, liquidity and solvency requirements to grant certain financial facilities to financial entities in cases of temporary liquidity problems and to promulgate other complementary regulation. In addition, the financial activity is also regulated by resolutions, circulars instructions and rulings issued by the Central Bank.

18 Tax issues

What are the basic tax issues involved in business combinations?

Argentina has national, provincial and municipal taxes, which may apply depending on the business combination. The Income Tax Law No. 20,628 regulates the tax applicable income resulting from mergers, spin-offs and ongoing concern transfers. Said law also establishes certain requirements for tax-free reorganisations, which if fulfilled shall exempt the transaction from income tax as well as other taxes that may apply to them.

In addition, Law No. 26,893 states that the capital gains resulting from sale of shares or participations in Argentine private corporations are subject to taxation, with different tax rate depending whether the transferor is a local or foreign resident. In general VAT applies to sale of goods, provision of services and import of goods, and also to transfer of business.

Moreover, stamp tax is a local tax levied by each of the provinces and the City of Buenos Aires on public or private instruments executed in Argentina or with effects in Argentina. Tax rates and assessment rules are established by each jurisdiction. The standard rate is 1 per cent, calculated on the economic value of the document.

Argentina has entered into treaties concerning double taxation with many countries including Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Italy, Norway, Spain, Sweden, Switzerland, the Netherlands and the United Kingdom, which are usually useful to reduce the tax impact of a transaction.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Argentine labour law No. 20,744 establishes that in case a business combination results in the transfer of the business establishment, then the purchaser shall assume all the obligations arising from the employment contract that the seller had with the employees at the time of the transfer. Therefore, the employees would continue to perform their duties for the purchaser, and the employees shall maintain their labour rights as well as their years of service.

In addition, employees have the right to consider extinguished their labour contracts if as a consequence of the transfer they suffer a material detriment in their labour rights (eg, the functions, position or employment are materially altered).

Seller and purchaser shall be jointly and severally liable for the obligations arising from the labour contracts existing at the time of transfer.

Update and trends

In September 2016 a new Bill amending Capital Markets Law 26,831 and other related statutes was sent by the Executive Branch to Congress. Such Bill, among other amendments, introduces changes to the calculation of the equitable price to be paid to minority shareholders in public mandatory tender offers and tender offers related to squeeze-out proceedings. The Bill provides more objective proceedings for establishing the equitable price to be paid to minority shareholders and makes amendments to triggering events of a public mandatory tender offer.

In addition, another bill is currently being prepared before the Argentine Congress. The Executive Branch intends that the Congress pass a law holding companies criminally liable for corruption crimes. To date only individuals may be held liable for corruption crimes. This Bill establishes that legal entities may be held liable for corruption crimes perpetrated by shareholders, members, representatives, directors, managers or any other officer performing supervisory or management activities for the company, to the extent the wrongdoing has been made in its interest and such wrongdoing has resulted from an inadecuate control or supervision.

If an entity is found liable for corruption offences in accordance with the Bill, then it may be charged with the following sanctions: (i) fines ranging between 1 per cent and 20 per cent of the gross income of the entity corresponding to the latest fiscal year; (ii) total or partial suspension of activities, which suspension shall not exceed 10 years; (iii) suspension of use of trademarks and patents, which suspension shall not exceed 10 years; (iv) loss or suspension of governmental benefits and subsidies; (v) prohibition to participate in public tender offers related to the Argentine state; (vi) publications of sanctions in newspapers; and (vii) cancelation of the legal entity.

The Bill also provides that liability may be extended to the controlling shareholders of a company being held liable of corruption, and to any successor of such company to the extent adequate due diligence and measures to terminate with corruption practices have not been adopted by the successor entity.

Finally, the Bill lays down a cooperation regime that will result in a reduction in sanctions.

This Bill is the result of the new administration in Argentina intentions to gain more transparency in public affairs matters and to reduce corruption.

Furthermore, the assignment of staff without the transfer of the business establishment requires the express written consent of the employee to be transferred. Despite of said consent, seller and purchaser shall be jointly and severally liable for all obligations resulting from the existing labour contracts at the time of assignment.

Nevertheless, usually the parties agree on the transaction agreements the rights and obligations of purchaser and seller regarding the transferred employees, which generally include indemnity provisions. It is important to point out that these contractual provisions would only have legal effects between the parties but not as regards the employees.

Under Argentine Law, the transfer of shares of a company, even the transfer of a controlling participation in a company, does not trigger any right of the employees of the target company as their labour contracts remain the same with their employer (in this case the target company). Other labour rights may be triggered by a change of control, depending on the particulars of the labour contract agreed with the specific employee (eg, golden parachutes).

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The main focus of the Argentine bankruptcy law (No. 24,522) is to preserve viable business organisations suffering economic difficulties. It also focuses in recovering businesses to avoid market reductions thus helping to maintain open and competitive markets.

The Argentine bankruptcy law has established the following proceedings:

- out-of-court restructurings: to those who find themselves in financial problems, even if this happens before suspension of payments

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and before the initiation of reorganisation proceedings. Under these proceedings the debtor will seek an out-of-court agreement with its creditors, which if it is accepted by a certain majority of registered creditors it will be extended to all creditors. The out-of-court agreement reached under these proceedings will then be approved by the correspondent judge;
- reorganisation proceedings: these proceedings have been established to benefit the debtor allowing him to manage his business with certain limitations, while he reaches a settlement with his creditors that allows him to overcome the critical situation of the business. Under this proceeding the debtor shall present to its creditors a reorganisation plan which must be approved by a certain majority of its creditors and by the intervening judge. Once the reorganisation plan is approved by the judge it will be applied to all creditors; and
- bankruptcy: a proceeding seeking a liquidation of the debtor's assets and distribution of the proceeds thereof among all creditors holding allowed claims in accordance with an order of priority established by law.

Sales of assets or transactions made under an out-of-court restructuring will depend on the limitations reached with the creditors under the relevant agreement.

If a person is under a reorganisation proceeding, any sale of assets or transaction outside of the ordinary course of business will be subject to prior judicial approval. In addition any sale of personal or real property that is subject to registration with a particular registry will also need prior judicial approval.

Any sale of securities of a company under a reorganisation proceeding is not subject to judicial approval or notification.

Under a bankruptcy proceeding, a syndic is appointed, who, in this case, displaces the debtor from the administration of the debtor's assets. Upon the declaration of bankruptcy, actions taken by the debtor in respect of its estate, as well as payments made or received, are, by operation of law and without judicial declaration, ineffective as regards the creditors. The debtor's former managers are required to deliver custody of the business (including all books, records, real estate and equipment) to the syndic and are required to assist the court and the syndic as they may require in order to clarify the state of the debtor's business and to verify the claims against the estate.

The syndic may ask the court to be granted authority to continue to operate the debtor's business as a going concern, by providing evidence that a closedown will result in irreparable damage to the creditors and to the preservation of the bankrupt's net worth.

However, the syndic's main duty shall be to liquidate the debtor's assets to pay the credits allowed to the bankruptcy proceedings with the priority in payment established by law. The Argentine bankruptcy law imposes different proceedings in order to sell the assets of the debtor, all of which will need the prior approval of the court.

The Argentine bankruptcy law provides that a variety of transactions entered by the debtor are voidable if they occurred during a clawback period defined as the period, prior to the commencement of the bankruptcy (or of the commencement of reorganisation proceeding – if the reorganisation proceeding ended in bankruptcy), which shall not exceed two years, starting on the date of the occurrence of the act that proved that the debtor was unable to regularly meet its obligations as they became due. The date of such act is referred to in the Argentine Bankruptcy law as the 'cessation of payments date'.

Among the facts that the court may consider as evidence of a debtor's inability to meet its obligations are:
- recognition by the debtor, judicially or otherwise, of the cessation of payments;
- payment defaults;
- concealment or absence of the debtor or its managers without providing for representatives with sufficient authority and means to meet the debtor's obligations;
- closing of legal domicile or business office where the debtor conducts its operations;
- sales of goods below market prices or the repayment of financial obligations in kind; and
- judicial revocation of transactions intended to defraud creditors; and
- any ruinous or fraudulent means taken to obtain resources.

Transactions during the suspicion period which the Argentine bankruptcy law declares void are as follows: donations of corporate assets, prepayments of financial obligations maturing after the bankruptcy petition date, and the pledge or delivery of collateral for unsecured debts. However, the Argentine bankruptcy law also provides that other transactions during the clawback period may be voided if it is proved that the counterpart in the transaction had knowledge of the debtor's cessation of payments.

The syndic may bring recovery actions against managers, directors and others for wrongful conduct. The period of liability for such claims is potentially larger than the two-year clawback period, as it extends back to one year prior to the actual date of cessation of payments.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Argentine criminal law punishes public officers who receive money or any other gift or accept a promise, directly or indirectly, to perform, delay or omit any act related to its function, or to assert its undue influence to a public official, so that this rushes, delays or prevents him or her from doing anything related to his of her functions.

In addition, the law punishes a public official who steals cash or effects whose administration, perception or custody has been entrusted, as well if directly, through an intermediary or simulated act, pursues its own benefit in any contract or transaction involved in by reason of its position as public officer.

In addition, the Anti-Corruption Office of Argentina was created in 1999 by Law 25,233, as amended. The main functions of the office

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comprise: (i) conducting preliminary investigations upon evidence received and upon its own initiative in all suspicious cases without the approval by any other government body; (ii) conducting preliminary investigations on any institution or organisation receiving funding (direct or indirect) from the government, whenever a reasonable doubt exists indicating irregularities in the administration of the funding; (iii) participating as a party in trials, in which damages on state property could be established; and (iv) elaboration of programmes for prevention of corruption and strengthening transparency in public governance, as well as advising government bodies on implementing policies and programmes for prevention of corrupt practices. The importance of this office relies on the fact that if there is evidence of wrongdoing, it can bring charges and request prosecution to the judicial courts.

In addition, Law 25,188 regarding ethics in the public service, establishes a set of duties, prohibitions and incompatibilities applicable without exception to all persons who perform public functions at all levels and hierarchies, permanently or temporarily. Pursuant to the law, all subjects included must comply with all duties and standards of ethical conduct, including among others: honesty, probity, rectitude and good faith; to safeguard the interests of the state in all their acts aimed at the satisfaction of general welfare, and consequently granting a privilege to public interest over individual interest; refrain from receiving any undue personal benefit in connection with the performance, delay or omission of any act; to show the greatest transparency in all decisions; and protect and preserve the property of the state and to employ its assets only for authorised purposes. Moreover, the law imposes certain officers the obligation to submit a comprehensive financial disclosure statement, which must be annually updated. Finally, by means of Decree 202/2017 a new regime has been established to avoid conflicts of interests between official officers and individuals or entities contracting with the Argentine state. Such Decree provides that public contractors shall file before the relevant authority an affidavit indicating any relationship with the President, Vice president, chief of ministers and ministers or any other person with power to make decisions in respect of the engagement of such person as contractor. Such affidavit will be delivered to the Anticorruption Office and the General Supervisory Authority, for them to evaluate any further investigation in respect of possible conflicts of interests.

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Australia

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1 Types of transaction

How may businesses combine?

The principal methods of business combinations are:
- on-market or off-market takeovers under Chapter 6 of the Corporations Act 2001 (Corporations Act);
- schemes of arrangement under Part 5.1 of the Corporations Act; and
- private treaty sale and purchase transactions.

Takeover offers and schemes of arrangement are primarily used for transactions involving publicly listed issuers that are subject to Chapter 6 of the Corporations Act.

An on-market takeover is effected through the market platform and can only be used for listed issuers, and only cash consideration can be offered on an unconditional basis.

Schemes of arrangement are a court-supervised procedure, involving meetings of shareholders (or classes of shareholders). If the requisite majorities are obtained, and the court gives its approval, a scheme binds all shareholders, and can be used to effect the transfer of 100 per cent of the shares of the target.

The terms of private treaty transactions involving business assets or target companies not subject to Chapter 6 of the Corporations Act are subject to negotiation between the parties.

Listed issuers and companies with more than 50 shareholders are subject to Chapter 6 of the Corporations Act, and an acquisition of more than 20 per cent of the voting shares in the company or listed entity can only be undertaken by way of a permitted method of acquisition. These methods include:
- on-market or off-market takeovers (see above);
- schemes of arrangement (see above); and
- acquisitions approved by non-associated shareholders.

The Takeovers Panel is the primary forum for resolving disputes concerning takeovers under Chapter 6, and has power to declare circumstances 'unacceptable' having regard to the effect of the circumstances on the control of the target company, and to make remedial orders.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations governing business combinations are:
- the Corporations Act 2001;
- the Foreign Acquisitions and Takeovers Act 1975; and
- the Competition and Consumer Act 2010.

The Australian Securities and Investments Commission (ASIC) issues regulatory guides outlining ASIC's approach to administration of the Corporations Act. The Takeovers Panel issues guidance notes outlining its policy approach to various matters arising under Chapter 6.

For publicly listed companies, the relevant listing rules (principally the Australian Securities Exchange (ASX) Listing Rules) are an additional key source of regulation.

3 Governing law

What law typically governs the transaction agreements?

Transactions are typically governed by the law of a state or territory, generally the most closely connected jurisdiction, for example, the jurisdiction of incorporation of the target.

The general (non-statutory) law of the states and territories is essentially uniform and Commonwealth statues apply uniformly in all states and territories of Australia. Different jurisdictions have different local statutes covering subjects such as environmental regulation. In some cases, legislation is uniform (for example, work health and safety laws).

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Filings

Takeover statements

A takeover bidder under an on-market or off-market takeover offer must file a 'bidder's statement' with ASIC before commencing a takeover bid, at least 14 days before the bidder's statement is sent to the target shareholders, unless the target board consents to a shorter period.

A target company must likewise file a 'target's statement'. Takeover statements must be accompanied by filing fees when filed. For example, the fee for filing a bidder's statement is currently A$2,350.

Schemes of arrangement

The scheme (target) company must issue an explanatory statement (commonly called a scheme booklet). This must be filed with ASIC before it is sent to shareholders, as well as being approved by the relevant court.

The filing fee for a draft explanatory statement is A$783.

Continuous disclosure notices

A listed bidder or target's continuous disclosure obligations may be relevant in a business combination.

Material (that is, price-sensitive) information must be disclosed immediately to the ASX (and becomes publicly available), unless covered by exceptions from disclosure, including confidential information relating to incomplete proposals or negotiations, provided a reasonable person would not expect disclosure.

Similar obligations can apply to unlisted issuers with more than 100 shareholders in certain circumstances, requiring filings with ASIC.

Business combinations may be readily considered price sensitive, and generally the signing of definitive documents requires disclosure. Earlier disclosure may be required, for example, if the transaction ceases to be confidential.

Substantial holder notices

See question 6.

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Competition and Consumer Act (CCA)
Business combinations that would, or would be likely to, result in a substantial lessening of competition in a market are prohibited under the CCA, absent an 'authorisation' from the Australian Competition Tribunal on public benefit grounds.

It is also possible to apply for formal or informal clearances from the Australian Competition and Consumer Commission (ACCC) in relation to merger control matters.

Foreign Acquisitions and Takeovers Act (FATA)
If the transaction is subject to approval under FATA, a filing may be required and fees are payable since 1 December 2015. See question 11.

Filing may also be required for the purpose of the register of foreign ownership of agricultural land and a similar register to be established in respect of water entitlements.

Other filings
Various corporate actions that may be associated with M&A transactions may require separate filings with ASIC, such as share buy-backs, capital reductions, share issues, change of name, changes of office-holder, etc.

Other fees
Applications to ASIC for exemptions or modifications of Chapter 6 of the Corporations Act require a fee of A$1,169.

Other filings with ASIC may attract filing fees.

Other fees may be levied in the context of application for, or transfer of, permits, licences and approvals under state, territory or Commonwealth legislation.

Stamp duties
Stamp duty may be levied on the transfer of unlisted shares and trust interests located in certain jurisdictions, and business assets such as real estate in most jurisdictions. Stamp duty rates may vary between jurisdictions. Listed securities are generally not subject to stamp duty.

However, landholder duty may also be imposed in the context of business combinations, on the acquisition of a significant interest in a 'landholder' as defined (essentially a 'land rich' entity).

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Information may need to be disclosed publicly in a continuous disclosure notice (see question 4).

In a takeover bid, the bidder's statement will become publicly available and must include information concerning the bidder, its intentions for the business and assets of the target, funding of cash consideration, and any other material information.

If securities are offered, the bidder's statement must contain prospectus-level disclosure. If the issuer is not listed in Australia, the level of disclosure is equivalent to initial public offering (IPO)-level disclosure.

A target's statement includes information material to a target shareholder's decision, to the extent the information is in the possession of the target's directors.

An explanatory statement for a scheme of arrangement includes essentially the same information as a bidder's statement and target's statement for an off-market takeover bid, and will typically be accompanied by an independent expert's report opining on whether the transaction is in the best interests of shareholders.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

A person (alone or with 'associates') acquiring control over securities with 5 per cent or greater of the voting rights of a listed issuer must file a substantial holder notice with the issuer and with the ASX within two business days.

A notice is also required for each 1 per cent or greater change, or when ceasing to control 5 per cent or more of the voting rights.

The Corporations Act does not regulate disclosure of equity derivative positions. However, the Takeovers Panel has issued guidance requiring disclosure of long derivative positions in excess of 5 per cent when a control transaction is under way.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors and officers
Directors and company 'officers' (as defined in the Corporations Act) owe fiduciary and statutory duties to the company, including duties to act with due care and diligence, and act in good faith in the best interests of the company.

As a general rule, the duties of target directors do not require an auction process in the event of a control proposal for the company or seeking out alternative offers, although many target boards do undertake such a process.

Target directors are required to ensure that shareholders have sufficient information to assess a control proposal. There are limited circumstances in which it would be appropriate for directors to seek to frustrate a control proposal. Doing so could lead to a breach of directors' duty claim or a takeovers panel declaration of 'unacceptable circumstances' in relation to 'frustrating action'.

Controlling shareholders
Controlling shareholders do not have fiduciary or statutory duties to the company or other shareholders. However, minority shareholders may seek remedies under Part 2F.1A of the Corporations Act if they are treated oppressively or in an unfairly discriminatory or prejudicial manner.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Listing Rule approvals
Certain acquisitions and disposals by listed issuers may require approval by shareholders, for example, disposal of 'main undertaking', 'significant changes to the nature or scale of activities' or certain transactions with related parties or substantial holders.

Schemes of arrangement
Under a scheme of arrangement, approval is required at a scheme meeting of the relevant class(es) of shareholders by a majority representing 75 per cent by value and generally a majority in number of the shareholders who attend and vote at the meeting in person, by proxy, by attorney, or, where applicable, by direct voting, subject to confirmation by the court having jurisdiction over the scheme.

Compulsory acquisition in takeovers
For compulsory acquisition following a takeover offer a bidder must receive sufficient acceptances so that the bidder's and their associates' 'relevant interest' (as defined in the Corporations Act) in the target's voting shares exceeds 90 per cent and must receive acceptances for 75 per cent of shares of non-associated offerees.

Shareholders can object to the court on the basis that the acquisition does not represent fair value, but the onus rests with the objecting shareholder and there is no recent example of such an objection being successful.

Compulsory acquisition may also be available if the bidder has (together with any related bodies corporate) 'full beneficial interests' in at least 90 per cent by value of the company's shares. This 'general' compulsory acquisition procedure requires a report from an independent expert that the consideration is 'fair value'. Shareholders can object on the basis that the consideration is not fair value. The acquirer has the onus of establishing fair value.

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Appraisal rights
Shareholders do not have 'appraisal rights' as such in business combination transactions. Shareholders' rights to object to compulsory acquisition on the grounds of 'fair value' are noted above. Under a scheme of arrangement, shareholders can object to the court on the grounds of fairness of consideration.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

An on-market or off-market takeover can be utilised for an unsolicited or hostile transaction, because the cooperation of the target and its board of directors is not required to implement a takeover.

While cooperation is required for a scheme of arrangement, it is possible to make an unsolicited approach to propose a scheme of arrangement. Such approaches are regularly disclosed publicly (immediately or subsequently) in the hope that this will encourage or pressure the target to engage with the bidder.

Bidders undertaking a hostile transaction may to have to respond to a Takeovers Panel application by the target or a shareholder.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees – more commonly called 'break fees' – and reverse break fees are not prohibited.

However, in transactions subject to Chapter 6, fees that are coercive to target shareholders or anticompetitive in relation to control of the target, may be declared 'unacceptable' by the Takeovers Panel and rendered unenforceable.

Generally, a fee not exceeding 1 per cent of the target's equity value should be not 'unacceptable', but a fee that is triggered by shareholders failing to approve a transaction could nevertheless be 'unacceptable'.

Other common break fee triggers relate to a change to the target directors' recommendation, or a superior proposal being implemented.

Other forms of deal protection, such as 'no talk', 'no shop' (non-solicitation) and 'no due diligence' provisions, notification rights and matching rights, are common in takeovers and schemes. The Takeovers Panel may find unduly anticompetitive deal protections 'unacceptable'.

A 'no talk' provision must be qualified so that the target directors are permitted to respond to a third-party bidder to enable them to discharge their fiduciary duties (a 'fiduciary carve-out').

Break fees generally should relate to losses that may be suffered by a bidder, so that they can be characterised as liquidated damages. Otherwise, break fees could be challenged as unenforceable penalties.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Leaving aside merger control under the Competition and Consumer Act and ASIC, the main government agency that can affect business combinations is the Foreign Investor Review Board (FIRB).

The FIRB advises the Commonwealth Treasurer under the FATA and government's published foreign investment policy. Certain acquisitions are subject to approval of the Treasurer on the basis of Australia's national interest. There are thresholds over which transactions must be notified under FATA. FATA was rewritten in 2015 with the new legislation coming into effect on 1 December 2015.

Currently there is a threshold of A$252 million that applies generally to notification of business acquisition transactions. The threshold is approximately A$1.1 billion for non-government investors from certain countries with which Australia has free trade agreements, namely Chile, China, Japan, New Zealand, South Korea and the United States.

There is no minimum notification threshold in relation to 'direct investment' by foreign governments and their controlled entities such as government pension funds, sovereign wealth funds and state-owned enterprises. These rules may also apply to other entities (such as investment funds) in which government-controlled entities have investments under tracing rules.

There are different notification thresholds for land acquisitions, including A$55 million for developed commercial real estate. There is no minimum notification threshold for residential land, mining and production tenements and media businesses.

For rural land, prior approval must be obtained by private (that is non-government) investors for any proposed acquisition of rural land where the cumulative value of rural land owned by the foreign investor and its associates, including the proposed purchase, is A$15 million or more. This is subject to a number of different exceptions involving private investors from certain countries with which Australia has free trade agreements.

There is a A$55 million threshold for agribusiness and sensitive commercial land.

If the Treasurer does not object to a notified acquisition, the Treasurer cannot later order divestiture on national interest grounds.

In February 2016, the Commonwealth government announced that it would impose conditions on foreign investment approvals designed to ensure that foreign investors pay Australian taxes. Increasingly, taxation issues seem to be relevant to applying the 'national interest' test.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Takeovers
An on-market takeover must be unconditional (although it may be withdrawn in certain circumstances).

An off-market takeover can be subject to various conditions (including minimum acceptance or material adverse change conditions, ACCC clearance, foreign investment approval), but cannot be subject to a maximum acceptance condition or any condition within the control of the bidder or an associate.

A 'due diligence' condition based on the bidder's opinion is prohibited.

Schemes of arrangement
Generally, a scheme of arrangement – and the related implementation agreement – may be subject to any sufficiently certain condition, including those within the control of the bidder or an associate. Suitability of conditions is a matter for the relevant court. A scheme can be subject to a 'due diligence' condition.

Takeovers Panel
The Takeovers Panel may disallow reliance on a takeover condition in certain circumstances, primarily where the Panel considers that reliance is not genuinely material. In some circumstances the Panel will expect a bidder to elect whether or not to rely on a triggered condition.

Disclosure of conditions
If a bidder wishes to make a takeover offer subject to a condition, the condition must be specified at the time of the first public announcement of the offer – an offer must be made on terms no less favourable than the terms announced.

Financing conditions
An off-market takeover can be subject to financing conditions. However, in practice such conditions are rare and few shareholders are likely to accept an offer while it remains subject to finance – the offer may be considered illusory and accepting shareholders will limit their ability to accept alternative offers.

For cash bids not subject to a financing condition, Takeovers Panel policy requires the bidder to have a reasonable basis for believing that financing will be available.

A bidder who announces a bid without having a reasonable basis for believing financing will be available on completion of the offer, could also breach Corporations Act provisions relating to reckless announcements.

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13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Private treaty

In private treaty transactions, it is possible for a transaction to be subject to a condition that the buyer obtains financing. Generally, the buyer would have an express or implied best or reasonable endeavours obligation to seek to satisfy the condition.

Takeover offers

In relation to an off-market takeover offer, see question 12 regarding financing conditions.

In addition, a bidder is required to disclose, in its bidder's statement, the sources of the cash consideration for the bid. This includes the bidder's own cash holdings and the arrangements under which third parties, such as financiers or related entities, will provide cash to the bidder.

Schemes of arrangement

In relation to a scheme of arrangement, implementation of the scheme will be conditional on the cash consideration being available to complete the acquisition. Typically, the cash consideration must be placed in a trust account under the control of the target held for the benefit of the target shareholders, before the target shares can be transferred under the scheme.

Financial assistance

The Corporations Act prohibits companies providing financial assistance to acquire shares, unless the assistance does not materially prejudice the company, its shareholders and the company's ability to pay its creditors, or is subject to a shareholder approval process.

This prohibition may prevent a target guaranteeing, or giving security in respect of, acquisition debt, absent shareholder approval.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

See question 8 for the conditions for compulsory acquisition of minority shareholders.

Post-bid compulsory acquisition is typically commenced immediately after the close of the offer period by sending a notice to shareholders, and can be completed around four to six weeks afterwards, absent objection proceedings.

General compulsory acquisition must be commenced within six months of the bidder becoming entitled to do so, by sending a notice to shareholders, and can be completed approximately four to six weeks afterwards, absent objection proceedings.

Schemes of arrangement

For schemes, if the requisite majorities and court approval are obtained (see question 8), shareholders who voted against the scheme or did not vote will be subject to compulsory acquisition.

The acquisition of all the securities in the target company under a scheme is generally implemented within two weeks of receiving court approval.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Subject to the implications of foreign investment regulation (see question 11), cross-border transactions are generally implemented in the same way as domestic transactions. There are many examples of foreign bidders utilising takeovers, schemes and private treaty acquisitions subject to Australian law to effect business combinations.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Leaving aside procedures for merger clearance under the Competition and Consumer Act, the main waiting or notification periods are as follows:

- Foreign investment – compulsory pre-notification must take place at least 40 days before a binding agreement is reached (although conditional agreements are permitted, the waiting period may be extended by Treasurer's order and applications are sometimes withdrawn and resubmitted).
- Takeovers – a 14-day period after filing a bidder's statement before offers can be sent to target shareholders (unless the target board consents to a shorter period), a minimum one month offer period and mandatory extensions in certain circumstances.
- Schemes of arrangement – ASIC generally requires at least 14 days to review a draft explanatory statement, for listed issuers 28 days' notice must be given of the scheme meeting, and typically around two weeks must be allowed between court approval and implementation.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Sector-specific legislation relevant to business combinations exists in relation to airports, aviation, banking, broadcasting and insurance. For example, acquisitions of banks and insurance companies require specific approvals, having regard to prudential regulation issues.

In addition to the sector-specific foreign investment requirements noted in question 11, special foreign investment rules under the Foreign Acquisitions and Takeovers Act apply in relation to 'prescribed sensitive sectors' including broadcasting, defence, media and transportation (including transport infrastructure). In these sectors, acquisition proposals by acquirers from certain countries with which Australia has a free trade agreement are subject to a lower A$252 million notification threshold rather than approximately A$1.1 billion that would otherwise apply.

18 Tax issues

What are the basic tax issues involved in business combinations?

The Australian taxation system, administered by the Australian Taxation Office, is based primarily on a national uniform income tax regime (including taxation of capital gains) coupled with a value added tax (goods and services tax (GST)).

Income tax is levied on individuals on a progressive basis with rates up to 45 per cent (plus certain levies). Companies pay a flat 30 per cent rate. Trusts are taxed on a 'pass through' basis, except for widely held trusts that conduct active businesses (in contrast to passive investment).

States and territories also levy stamp duties, landholder duties, land taxes and payroll taxes.

Taxation of vendors

Vendors who are subject to Australian taxation are taxed on the disposal of assets if the disposal proceeds exceed the cost (for income tax purposes) or the statutory 'cost base' (for capital gains tax purposes).

Resident individuals may be entitled to receive a 50 per cent capital gains discount for assets held for more than 12 months on capital account.

Resident shareholders may be able to achieve tax deferral in share-for-share mergers under 'rollover relief' for shares held on capital account, in certain circumstances.

Non-resident shareholders

Non-resident shareholders will not be subject to capital gains tax on assets located in Australia, unless the assets are 'taxable Australian property', or are assets used in carrying on a business through a permanent establishment in Australia. Generally, shareholdings are

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Update and trends

Commodity price volatility, the Brexit vote and the US presidential election were all factors with which the Australian M&A market had to contend during 2016.

Nevertheless, public markets transaction numbers were similar to 2015, and private treaty deals also remained at similar levels, albeit affected by the A$16 billion Ausgrid partial privatisation. The outlook for the coming year is positive, with general expectations for similar M&A volumes, possibly underpinned by recoveries in commodity prices.

On 9 March 2017, the Treasury announced streamlined approval procedures, with a number of non-sensitive business-related FIRB applications to be considered by the Australian Taxation Office, rather than the FIRB.

not 'taxable Australian property' unless the shareholding is over 10 per cent in an entity whose principal assets are 'taxable Australian real property'.

Dividends

Dividends may carry 'franking credits' representing tax paid by the company in respect of profits from which the dividend is paid. Dividends may also be 'unfranked'. In some cases, where dividends are part of the capital proceeds of disposal of an asset, 'franking credits' may not be applicable.

Resident shareholders will be entitled to a tax credit for tax paid in respect of 'franked dividends'.

Non-resident shareholders will not be liable for withholding taxes in relation to dividends to the extent that the dividend is 'franked'.

Withholding taxes

Non-residents will be subject to interest withholding tax, dividend withholding tax on 'unfranked dividends' and royalty withholding tax.

Certain other payments may be subject to withholdings, including domestic payments where the payee does not quote an Australian business number.

From 1 July 2016, a new withholding regime will apply to disposals of direct or indirect interests in Australian real property, including mining and petroleum tenements. This measure has the potential to affect business combination transactions.

Purchasers may need to deduct 10 per cent of the consideration and remit it to the Australian Tax Office, subject to a number of exceptions, including in the case of direct interests a clearance certificate from the Australian Taxation Office or in the case of an indirect interest, the seller providing a written declaration to the effect that the seller is an Australian tax resident.

Foreign investment tax conditions

As noted in question 11, the Commonwealth government has announced the imposition of conditions on foreign investment approvals designed to ensure payment of Australian taxes by foreign investors.

Transfer pricing

Companies transacting with foreign-related companies need to have regard to arm's-length transfer pricing requirements under tax legislation. In particular, in the 2015–2016 Federal Budget the Commonwealth government announced a new anti-avoidance measure (known as MAAL) to apply from 1 January 2016 in relation to artificial or contrived arrangements designed to avoid the attribution of income to Australia. The measure only applies to 'significant global entities' with income of A$1 billion or more.

Other

Wholly owned groups (including trusts taxed as companies) can elect to be taxed on a consolidated basis.

Business combinations often involve 'deconsolidation' of an entity from a consolidated group or the formation of a new consolidated group, which may have material taxation implications in the context of the transaction. The acquirer may be able to set a new tax base for the assets of the acquired company.

Australian companies are subject to thin capitalisation rules that may limit deductions for interests payments, based on debt-to-equity ratios or arm's-length debt financing principles.

Companies transacting with foreign-related companies need to have regard to arm's-length transfer pricing requirements.

Tax losses may be carried forward in an entity, subject to 'continuity of ownership' or 'same business' tests. A sale of the majority of shares in an entity will typically cause the entity to fail the 'continuity of ownership' test.

Goods and services tax

Transactions are generally subject to 10 per cent GST, subject to certain exemptions including financial supplies (including issue or sale of shares) and supply of a going concern business (subject to conditions).

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Overview

All Australian employment relationships are fundamentally contractual in nature, with an overlay of statutory provisions and industrial instruments (awards and enterprise agreements).

The key legislation is the Fair Work Act 2009. The Act provides for a set of statutory minimum national employment standards, covering things such as: maximum weekly work hours, parental leave (unpaid), annual leave (paid), notice of termination and redundancy pay. The Act is supplemented by awards (which may cover an industry or occupation) and enterprise agreements, which provide for further minimum terms and conditions in the circumstances in which they apply (for example, to a particular industry or work site).

Other regulation relates to:

- long-service leave;
- contributions to superannuation (pension) funds on behalf of employees;
- anti-discrimination;
- work health and safety;
- workers compensation;
- payroll tax; and
- unfair dismissal.

Business combinations

In a share purchase, an acquirer will, in effect, take over the employment of existing employees and liability for employee claims and entitlements, along with any applicable employment contracts, awards and enterprise agreements.

In an asset purchase, employees do not automatically transfer to the buyer and there is no obligation on the buyer of the assets of a business to take over the employment of employees.

However, a buyer who does so may be required to give recognition for prior service in relation to certain accrued employee entitlements, owing to 'transfer of business' rules under the Fair Work Act and other legislation (sick or carer's leave, parental leave and long-service leave). A buyer may choose to recognise prior service for the purpose of annual leave and redundancy. If the buyer does not recognise prior service for redundancy purposes, the employee will be entitled to a redundancy payment on termination of their employment with the vendor.

A buyer will typically seek an adjustment to the purchase price for the financial impact of recognising prior service of employees.

In order to effect a transfer of employment, a buyer will need to offer employment to employees and each employee will need to accept the offer. If employees do not accept the offer and the vendor does not have suitable alternative employment, the vendor may be liable for redundancy payments for the employees, unless the buyer has offered employment on no less favourable terms and offered to recognise prior service for redundancy purposes.

Absent an order from the Fair Work Commission, the buyer of a business with an enterprise agreement will be required to assume the obligations under the enterprise agreement, where 'transfer of business' occurs.

Employers may have consultation obligations under the Fair Work Act or awards or enterprise agreements that could be triggered by a business combination.

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20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Insolvent companies are typically placed in administration by the directors under Part 5.3A of the Corporations Act. The administrator (a registered insolvency practitioner) will endeavour to sell the assets, or restructure or recapitalise the company under a deed of company arrangement (DOCA) approved by creditors.

The administrator's powers are subject to the rights of secured creditors, who may appoint a receiver over the secured assets, who may seek to realise the assets by way of sale.

Shares in a company in administration can be acquired through a DOCA, without the consent of the shareholders, with court approval.

If an administrator cannot sell the assets or secure a DOCA, the company is then placed in liquidation.

A company in liquidation can also be restructured through the use of a creditors' scheme of arrangement.

Typically, acquisitions of assets from administrators, receivers or liquidators will be accompanied by few (if any) warranties and indemnities, and the administrator, receiver or liquidator will seek to ensure that they do not undertake personal liability in connection with the transaction.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Bribery and corruption

Australian legislation prohibits certain domestic and foreign corrupt practices.

The Criminal Code provides that bribery of foreign public officials by Australian citizens, residents or companies is an offence under Australian law. The Commonwealth Criminal Code also prohibits corrupt acts by Commonwealth officials. State and territory legislation prohibiting corruption by officials also exists.

On 1 March 2016, new false accounting offences were enacted in the Criminal Code. These new offences have potentially a wide field of application, outside of foreign or domestic corrupt practices.

Sanctions

Australia has sanctions laws that implement UN Security Council sanctions and Australia's autonomous sanctions regime (for example, involving Syria and Zimbabwe).

AML/CTF

Australia also has legislation relating to anti-money laundering and counter-terrorism financing, which may be relevant to businesses operating in Australia.

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Austria

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1 Types of transaction

How may businesses combine?

As to business undertakings, Austrian law provides for corporate and non-corporate legal forms. The most common legal types of corporations are the limited liability company (GmbH) and the joint-stock company (AG). The most important non-corporate legal forms are the sole entrepreneurship (eU), the civil law partnership (GesbR), the general partnership (OG) and the limited partnership (KG). Unless explicitly provided otherwise, this summary focuses on corporations.

Business combinations may occur in the following forms:

- acquisitions of shares or assets;
- mergers and other reorganisations; and
- joint ventures (cooperations).

Acquisitions may be done by way of share deal or asset deal. Share deals can be either private or public. No specific regime applies to privately negotiated acquisitions; if public, the Takeover Act may apply. Asset deals may be structured as the acquisition of parts of a business or the whole business. The structure chosen usually depends on tax factors (goodwill depreciation, group taxation, etc).

Mergers and other reorganisations are mainly, but not exclusively, set forth in the Reorganisation Tax Act.

A merger combines two or more legal entities in one single legal entity under one name. All assets and liabilities will be transferred from the transferring company or companies by way of universal succession to an already existing (merger by absorption) or a new company (merger of several companies into a new company – merger by formation). Mergers can be effected upstream, downstream and side-stream.

Assets and liabilities can be demerged from a company by spin-off of parts of the assets to a newly formed or already existing company.

Assets and liabilities can be contributed to a company in the course of the establishment of a new company or a capital increase.

The legal form of a company can be changed: GmbHs can be transformed into AGs or vice versa; corporations can be transformed into partnerships; however, partnerships cannot be transformed into corporations, but only contributed in the course of the establishment of a new company or a capital increase.

Joint ventures (cooperations) can be formed by way of corporate combination (two shareholders in one company) or contractual agreement (eg, franchise, licence, agency, contractual joint venture).

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The mains laws governing business combinations in Austria are:

- the General Civil Code;
- the Austrian Commercial Code;
- the Limited Liablility Company Act;
- the Joint Stock Corporation Act (AktG);
- the Act on Societas Europaea;
- the Demerger Act;
- the Minority Shareholders Squeeze Out Act (GesAusG);
- the Takeover Act;
- the Stock Exchange Act;
- the Cartel Act;
- the Reorganisation Tax Act;
- the Labour Constitution Act;
- the Employment Contract Adaptation Act; and
- the EC Merger Regulation.

Additionally, sector laws may apply to specific (regulated) industries (eg, the Banking Act (BWG), the Insurance Supervisory Act (VAG) or the Trade Act) (see also question 17).

3 Governing law

What law typically governs the transaction agreements?

Acquisition (share or asset purchase) agreements may be governed by any law of choice; solely the rights in rem, that is the actual transfer modalities, are mandatorily governed by Austrian law (no transfer occurs if Austrian law transfer modalities, including form requirements, are not complied with).

Mergers and reorganisations are necessarily carried out under Austrian statutory corporate law.

Agreements for cooperation (eg, franchise, licence, agency, contractual joint venture) may be governed by any law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Commercial register filings

Shareholders of a GmbH are listed in the commercial register and all changes in the shareholdings must be reported from the managing directors to the commercial register without undue delay after a change has occurred. The commercial register will then register the change; note, however, that the transfer of the share to the new shareholder is already legally effective upon completion of the required transfer steps.

In AGs, registration of the owner in the share ledger is required (this applies to the class of name shares that has become the rule for new AGs).

Asset deals by which a business (or part of a business) is transferred require registration as well; however, as is true for share deals (see above), the transfer occurs already with completion of the required transfer steps.

In mergers and other reorganisations, the entities involved need to file the draft documentation in advance (typically one month) of the actual transfer with the commercial register; this should ensure protection of minority shareholders and creditors. Completion of the reorganisation will have to be notified again and registered. Additionally, publication requirements in the Official Gazette may apply.

Stock exchange filings

In the event of the sale or purchase of shares in a listed company, the transfer of shares has to be reported to the Vienna Stock Exchange, the Financial Market Authority and the company whose shares are traded within two trading days if the shareholding of one shareholder reaches, exceeds or falls below 4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75

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or 90 per cent. This also applies to certain financial instruments issued by the company.

Merger control

Pursuant to the Austrian Cartel Act the acquisition (merger) of an undertaking, a part of an undertaking (25 per cent or more), the establishment of cross-directorships or the agreement of a joint venture which fulfils, on a lasting basis, all the functions of an autonomous business has to be reported to the Federal Competition Authority if the previous year's turnover of the parties involved exceeded together €300 million worldwide or €30 million in Austria, or if at least two of the involved undertakings had a worldwide turnover of at least €5 million each.

If the combination meets certain thresholds (ie, either (i) worldwide turnover of all the merging entities of over €5 billion, and an EU-wide turnover for each of at least two of the entities of over €250 million or (ii) worldwide turnover of all merging entities of over €2.5 billion, a combined turnover of all the merging entities over €100 million in each of at least three member states, a turnover of over €25 million for each of at least two of the entities in each of the three member states included under (ii), and an EU-wide turnover of each of at least two firms of more than €100 million), EU merger clearance provisions apply and fully replace Austrian merger control clearance obligations.

Real estate

Acquisition of a business (asset deal) holding real estate requires a change in the land register; the transfer of the property is legally binding only after the new owner is registered with the land register.

The purchase of real estate may (depending on the province, the real estate is located in) furthermore be subject to the prior notification or approval of the respective real estate commission. For EU entities, such approval is typically granted; note, however, that certain provinces require that the ultimate shareholder is disclosed or that the property is used as the primary home or business premises.

Financial institutions

Specific notification or approval requirements to or by the Austrian Financial Market Authority apply to the transfer of interests in financial institutions like banks, insurance companies and other companies active in the financial industry.

Transfer tax, fees and stamp duties

Courts and land registers usually charge (minimal) transactional and registration fees; transfer taxes have been abolished save for real estate for which 3.5 per cent of either purchase price or fictional value assessed by authority apply.

Further, certain legal transactions, as, for example, the assignment of rights or provision of security, are subject to stamp duties (eg, 0.8 per cent on assignment agreements and 1 per cent for certain kinds of security agreements, each time of the value of the relevant transaction).

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Filing requirements for business combinations are set forth in section 4 above; in addition, certain reorganisations need to be published in the Official Gazette.

Listed companies are required to disclose any new facts or occurrences that could materially influence the quoted price; according to the Vienna Stock Exchange, price fluctuations of 5 per cent or more are considered material.

In takeovers of listed companies, the intention to launch a bid for a listed company has to be kept confidential unless rumours could materially influence the quoted price. The intention to launch a bid also needs to be disclosed if the management and the supervisory board of the bidder have resolved to launch a bid or if circumstances have occurred that have triggered the obligation to launch a bid (mandatory bid).

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Shareholders in both GmbHs and AGs (irrespective of the size of the shareholding) need to notify the company (in which they are holding the share) of their shareholding to allow exercise of their rights in the shares, including the voting rights.

Shareholders of a GmbH are listed in the commercial register and all changes in the shareholdings must be notified from the managing directors to the commercial register without undue delay after a change has occurred. The commercial register will then register the change; note, however, that the transfer of the share to the new shareholder is already legally effective with completion of the required transfer steps.

In AGs, registration of the owner in the share ledger is required (this applies to the class of name shares which has become the rule for new AGs; existing AGs may still have bearer shares outstanding if certain conditions have been met).

In the event of the sale or purchase of shares in a listed company, the transfer of shares has to be reported to the Vienna Stock Exchange, the Financial Market Authority and the target company which shares are traded within two trading days if the shareholding of one shareholder reaches, exceeds or falls below 4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75 or 90 per cent.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

General duties

Managing directors of GmbHs and AGs have the general duty to act in the best interest of the company and have the obligation to manage the business with the care of a diligent and conscientious manager. In GmbHs, the managing directors may be instructed by the shareholders to carry out certain actions (as long as not prohibited by law); managing directors of AGs are generally free to act in the best interest of the company and generally do not need to follow instructions of the shareholders. The AktG specifically requires that the management balances the interests of the company, the shareholders, the employees and the public and treats shareholders equally. Breach of these duties can result in the personal liability of a managing director.

Creditor protection

Financial assistance rules ensure the protection of creditors by requiring transactions of companies with shareholders (and sister companies) to be at arm's length and for the corporate benefit of the company. Group security in acquisition financings needs to be carefully structured to ensure compliance with these rules.

Minority protection

Transparency and disclosure requirements ensure minority shareholder protection in mergers and other reorganisations; in acquisitions, the rights and obligations of shareholders (eg, rights of first refusal, tag or drag along rights, etc) are usually set forth in either the articles of association or the shareholders agreement.

Public tender offers

The Takeover Act stipulates that the acquisition of a controlling shareholding in a (listed) target company (more than 30 per cent) triggers the obligation to launch a public takeover bid to the remaining shareholders (mandatory takeover bid). A controlling holding of between 26 and 30 per cent must be notified to the Takeover Commission within 20 trading days.

Actions of the target that could have negative effects on the offer require the prior resolution of the shareholders' meeting. This includes, inter alia, the issuing of new shares to prevent the gaining of control, entering into a transaction that is outside the company's day-to-day business, taking actions or conducting business that could seriously jeopardise the financial situation of the company, acquiring treasury shares or other securities conferring rights on the treasury shares,

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or taking any actions that might frustrate the bid, unless the target company has obtained the prior consent of the general meeting. The management of the target company's management board is explicitly entitled by the Act to search and negotiate with other potential bidders (white knight). The Takeover Act comprehensively regulates the rights and obligations to disclose information in a bidding process: inter alia, the management board and the supervisory board have to publish a clear statement with regard to the offer documents and an appraisal of the offered consideration for each share and no measures may be set by the target which could negatively effect the bidding process without the prior consent of the shareholders.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

While extraordinary transactions require a prior consent of the shareholders (GmbH) or the supervisory board (AG), no general approval requirement of shareholders for share or asset deals is stipulated by law. However, such rights or requirements may be included in the articles of association.

Mergers and other reorganisations typically require a shareholder resolution with a quorum of 75 per cent of the share capital; non-proportionate demergers, the transformation of a corporation to a partnership and the transfer of all assets of the company to the majority shareholder require a consent of 90 per cent of the share capital.

Minority shareholders may request judicial review of the exchange ratio or cash contributions in the case of mergers and non-proportionate demergers.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile takeovers are regulated by the Takeover Act, but occur very rarely in Austria due to the relatively limited number of listed companies. Very recent examples of these include the hostile takeover war between CA Immo AG and Immofinanz AG in which both companies have announced the intention to acquire substantial stakes in the other company's shareholding.

Anti-takeover strategies have been discussed in legal literature, but have rarely been tested. Potential strategies include staggered boards, self-tenders and employee stock offer plans. The two-tier board system (supervisory board and board of directors) cannot prevent a hostile takeover, but may hinder – for a while – the prompt establishment of overall control of the acquirer.

The main principle of Austrian Takeover Law requires the equal treatment of all shareholders of the target. The Takeover Act sets forth the obligation of objectiveness and neutrality and prohibits measures likely to deter competing bids. Violation of these obligations may result in administrative fines and the personal liability of managing directors.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

In negotiated transactions, selling shareholders are generally free to choose to whom they sell their shares without the legal right of the target board to object the sale. In takeover situations governed by the Takeover Act, the target board is required to remain neutral and is prohibited from initiating actions likely to deter competing bids.

Break-up fees and reverse break-up fees are legally permissible but uncommon; similarly, damage claims for incurred costs in case of termination of negotiations are theoretically possible, but do not stand a high chance of success as legal doctrine essentially requires the party breaking off the negotiations to have lulled the other party into a false sense of (deal) security.

Break-up fees payable by the target company are likely to violate Austrian financial assistance rules unless a corporate benefit is provided to the target company for having agreed to such break-up fee. Violation of capital maintenance rules results in the nullity of the agreement and the obligation to refund the fees paid.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

There is no general approval requirement for business combinations under Austrian law.

However, the acquisition of a controlling shareholding (resulting in a shareholding of the acquirer of more than 25 per cent of the voting rights) by foreign individuals, foreign companies and also Austrian companies controlled by foreign individuals in an Austrian company engaged in business sectors affecting the security and public organisation of Austria (eg, weaponry industries or telecommunication, energy providers) with an annual turnover of more than €700,000 requires a prior approval by the Austrian Ministry of Economy, Research and Science.

Further exceptions include merger control clearance requirements (see question 4), notification or approval requirements for transactions in specific industries (eg, financial industry, see question 17) and the approval requirements for the acquisition of real estate (see question 4).

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The conditionality of an offer is generally within the discretion of the parties involved; conditions precedent as are usual in European (private) M&A transactions (eg, seller's bring-down statement, availability of financing and material adverse changes) can also be seen in Austrian transactions.

For listed companies, the Takeover Act states that an offer may only be conditional and the right to withdraw the offer may only be reserved if it is objectively justified. Such justification exists if the offer is conditional on the fulfilment of certain legal obligations or obtaining consent of the competent administrative authority (eg, consent of the financial market authority or merger control commission) or if the withdrawal of the offer does not just depend on the discretion of the bidder.

Mandatory offers must be unconditional and the only permitted form of payment is cash unless otherwise provided by law.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

There are in general no statutory limitations to the financing of private acquisitions, but structuring of the financing has to take financial assistance (eg, debt push-downs are possible but need to comply with Austrian financial assistance rules) and other corporate limitations (eg, no interim dividend distributions in GmbHs; profits can be distributed only after determination of the financial statements) into account.

Conditions precedent requiring evidence of available financing at a certain point in the transaction are rare (and have become even rarer now after the high times of the credit crisis) but do exist.

In a public bidding process the bidder is required to ensure and secure that the payment of the consideration is in cash and in accordance with the Takeover Act prior to the publishing of its bid. It is furthermore legally required that an expert examines the offer documents, the procedure and if the bidder is able to fulfil its obligation of consideration.

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14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Under the GesAusG, minority shareholders may be squeezed out of a company by the majority shareholder; this applies to both public and private companies. The sole requirement is the holding of a minimum of 90 per cent of the outstanding share capital. The resolution to squeeze out can be passed by simple majority of the votes cast. Minority shareholders cannot block the squeeze-out, but can in certain circumstances request a review of the compensation offered under the squeeze-out transaction.

If the squeeze-out takes place within three months of the end of the offer period of a mandatory public offer or a public offer that results in a 90 per cent plus shareholding of the bidder, there is a rebuttable presumption that the compensation for the squeeze-out is adequate if it corresponds to the highest cash consideration paid in the public offer.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions involving Austrian corporations may be structured as mergers, straight acquisitions or takeovers.

Cross-border mergers benefit from the EU Directive on Cross-Border Mergers and the national transformation legislation. Certain Austrian entities (ie, limited liability companies, joint-stock companies and European joint-stock companies) may merge with non-Austrian EU entities and vice versa.

Save for the ones outlined in questions 4 and 5, no restrictions apply to acquisitions or takeovers involving non-Austrian parties.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Waiting and notification periods in reorganisations are standard and meant to ensure the protection of the minority shareholders and creditors. The typically month-long period gives the co-shareholders and the creditors time to review and potentially object the envisaged reorganisation. In addition, certain reorganisations require a balance sheet to be drawn up and reviewed (eg, merger) or a valuation of assets to be carried out (eg, contribution). Reorganisations are typically carried out in line with the provisions of the Tax Reorganisations Act to ensure tax neutrality and mostly require registration with the Austrian Commercial Register to become effective.

No general waiting or notification periods (save for the ones stipulated in question 5) apply to private acquisitions; the timing of such transactions is left for the parties to decide.

The Takeover Act provides for certain waiting and notification period in connection with public acquisitions; in particular, offer documents have to be submitted to the Takeover Commission within 10 trading days of announcing the intention to issue an offer.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Sectors having specific rules in relation to business combinations are, among others, the financial (credit institutions, insurances and other companies active in the financial industry) and public interest sectors.

The BWG, VAG and other acts specific to companies active in the financial industry, generally provide for a notification period and a right of the Financial Market Authority to review the new shareholders ('fit and proper' tests). This applies to acquisitions as well as mergers.

The Foreign Trade Act provides that acquisitions of 25 per cent or more in Austrian enterprises by foreign investors require advance approval by the Austrian Ministry of Economic Affairs. This provision is only applicable for specific industries in which protecting the public is a major interest, such as defence equipment industry, security service, energy and water supply, traffic and telecommunication. The purpose is to maintain public order and security.

Update and trends

Public and private M&A have remained strong throughout 2016 with the majority of the deals focusing on real estate, technology and financial institutions. Also, the venture capital market has seen a strong boost in activity as opposed to recent years. Corporate venture arms and business angels dominate the scene and have been responsible for most of the major investments in Austria.

As to the Austrian corporate governance regime, both the Austrian Limited Liability Companies Act and the Austrian Stock Corporation Act were amended in 2016 to introduce the Business Judgement Rule (BJR). The Austrian BJR applies to members of the management and supervisory board and intends to protect entrepreneurial decisions. It provides for safe harbour from personal liability if decisions are made free of conflict of interest, are based on appropriate information and are made in the honest belief to act in the best interest of the company. The burden of proof for showing that the conditions were met is on the manager or board member. The following measures are recommended to be taken to reduce the liability risk as much as possible:

- use of standardised documentation;
- ongoing evalutation of such documentation;
- disclosure of potential conflicts of interest;
- monitoring if every analysis is based on realistic values;
- obtaining of independent expert advice; and
- implementation and observation of all company compliance regulations.

In any case, the new rules require board members to be diligent in recording the basis for their actions and ensure that such records are available even after they have left the company.

18 Tax issues

What are the basic tax issues involved in business combinations?

Mergers and reorganisations

Unlike reorganisations that simply change the legal form of a company (and leave its assets generally unchanged), reorganisations by transfer (transfer of assets to a receiving entity) lead to the realisation of hidden reserves and therefore to a tax obligation. The Austrian Reorganisation Tax Act is aimed at permitting reorganisation by transfer to occur with no additional tax burden. It requires that basis carryover be performed such that the pending nature of the tax obligation associated with hidden reserves passes over to the legal successor. The act defines six different types of reorganisation: merger, transformation, demerger, asset transfer, combination and asset partition.

The EU Merger Directive covers cross-border EU reorganisation, but only mergers, demergers and asset transfers (as well as share exchanges) when companies from two or more member states are involved. Basis carryover and non-taxation of hidden reserves also apply in this case.

Acquisitions and takeovers

If certain conditions are met, financing costs can be deducted for tax purposes and goodwill depreciated in both share and asset deals.

Under the Austrian group taxation regime, tax losses of group members can be offset against tax profits of other group members. Formation of a corporate group requires a financial affiliation of more than 50 per cent of the share capital or cooperative capital and voting rights. In the case of foreign group members, only tax losses proportional to the interest held can be allocated (no allocation of foreign profits).

In 2011, stamp duty on credit agreements was abolished, which has led to more straightforward acquisition financing structures and has removed the need for elaborate stamp duty avoidance schemes. Further, as of 1 January 2016, capital transfer tax has been abolished, which has led to cheaper equity financing of the purchasing or target entity.

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19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Reorganisations typically provide the universal succession of assets, including employees. Hence, the employment contracts would typically transfer as part of the reorganisation without any further additional action required. Employment agreements, including benefits and pension schemes, remain in place and are not affected by the transfer.

For transfers of undertakings, as asset deals for the acquisition of a business, section 3 of the Employment Contract Adaptation Act prescribes the mandatory transfer of all existing employment contracts, including benefits and pension schemes.

However, the transferee may object the transfer of the pensions or the granted protection for individual employees; if this is done, the transferring employees have the right to terminate the employment contract.

The (new) applicable collective bargaining agreements and shop agreements have to be reviewed in each case individually.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The Insolvency Act and the Enterprise Reorganisation Act (URG) govern the handling of companies in insolvency or near-insolvency situations.

Upon meeting certain financial thresholds (own capital rate is lower than 8 per cent and fictious debt repayment time exceeding 15 years) but prior to being qualified as legally insolvent, companies have the option to reorganise their business in line with the URG. In practice, this reorganisation proceeding is rarely used as companies shy away from potential negative effects caused by publication of the proceeding. However, foreign investors should be aware that managing directors can be held personally liable up to €100,000 in case such reorganisation thresholds are met and no reorganisation is commenced.

In case of insolvency proceedings, an insolvency administrator is responsible for winding up the business of the company and selling off its assets. Comprehensive transparency rules apply and the insolvency administrator requires the company's creditors, in whose interest he or she acts, to approve all actions. A sale of a material asset (eg, a business or part of a business held by the company) hence needs to be announced publicly and the final sae agreement approved by the creditors and the insolvency court.

While a purchaser may be generally held liable by law (capped by the purchase price) for certain obligations of the seller in case of an asset deal (and independent of a contractual agreement to the contrary), these liability regimes do not apply in the case of the acquisition of a business that is already subject to insolvency proceedings.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Breaches of anti-corruption and anti-bribery provisions under the Austrian Penal Code are punishable by up to 10 years' prison sentence. Further implications of such breach include potential damage claims of third parties, nullity of agreements associated with the criminal offence and exclusion from procurement proceedings.

Further, the Corporate Criminal Liability Act provides that a company can be held liable even if the company was not aware of an employee's or management's misconduct. The company is generally responsible for the offence if it has not established preventive organisational measures against corruption within the company. As a consequence, due diligence on the existing compliance system has become standard in big-ticket M&A transactions.

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1 Types of transaction

How may businesses combine?

The Belgian Companies' Code of 7 May 1999 (the Company Code) lays out the regime for mergers and demergers. Companies can merge into a newly incorporated company or the merger can be implemented through the absorption of one company by another. Similarly, a company can (partially) demerge into an existing company into or one or more newly incorporated companies. Combinations of the different structuring methods are also possible.

The acquisition of a company may be structured as a share deal, an asset deal or a combination of both. In case of an asset deal the assets may be purchased individually or as a universality of goods or branch of activities.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations are governed by a wide range of EU, national and regional legislation, including contract, company and insolvency law. Of particular importance is the Company Code as well as Book IV of the Code of Economic Law of 28 February 2013 (the Economic Code) on the Protection of competition.

In relation to listed companies, the Act of 1 April 2007 on public takeovers (the Takeover Act) as well as the Royal Decree of 27 April 2007 on public takeovers (the Takeover Decree), and the Royal Decree of 27 April 2007 on squeeze-out bids (the Squeeze-out Decree) bear particular relevance.

3 Governing law

What law typically governs the transaction agreements?

It is market practice that Belgian law governs the share purchase agreement in the case of the acquisition of a Belgian target company.

Parties may in principle also opt for foreign law to govern a share purchase agreement relating to the transfer of shares in a Belgian company. However, in such case the parties should ensure that the formalities for transferring shares in a Belgian company are complied with. Further, in case of public takeover bids, certain Belgian regulation mandatorily applies.

In addition, difficulties may arise where parties had their transaction documentation governed by foreign law and chose a foreign jurisdiction as the relevant forum. A foreign court may be unfamiliar with particular issues that are to be interpreted from a Belgian law perspective, such as the impact of environmental or tax issues, rules relating to the management of the company, meaning and scope of the warranties or the meaning of certain terms used in the transfer agreement that are defined by reference to the relevant Belgian law concepts.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Filings

Pursuant to the Company Code, the board of directors of a company that is involved in a merger or demerger must prepare a merger or demerger proposal, which must at least discuss a number of important aspects of the proposed merger or demerger. When the proposed transaction has been approved by a qualified majority of the shareholders, the proposal needs to be filed and subsequently published in the annexes to the Belgian Official Journal.

Provided that the transaction is not subject to EU merger control and the Belgian turnover thresholds are reached (see below), mergers, acquisitions and joint ventures that result in a sustainable change of control over the companies concerned must be notified to, and approved by, the Belgian Competition Authority before implementation.

Concentrations are only subject to Belgian merger control if they meet both turnover thresholds:

- the undertakings concerned have a combined turnover in Belgium of more than €100 million; and
- at least two of the undertakings concerned, each have a turnover in Belgium of at least €40 million.

If the European thresholds are met, the parties must notify the proposed concentration to, and obtain approval from, the Commission of the European Union.

In the case of a public takeover, the offeror will have to notify the Financial Services and Markets Authority (FSMA) and disclose the relevant information (see question 6).

Stamp duties and government fees

Provided that a number of conditions are met, mergers, demergers, transfers of branches of activity or universal transfers of assets are, as a rule, exempt from registration duties. No stamp duties are due on the sale of shares in a Belgian private company.

When acquiring real estate, registration duties must be paid, amounting to, in principle, 12.5 per cent in the Walloon and Brussels regions, and 10 per cent in the Flemish region. In the Walloon region the registration duties on properties (partially or entirely) used for residential purposes, amount to 15 per cent, in case the acquirer already owns at least two other properties located in Belgium or abroad. In addition, a private deed or notarial deed relating to the transfer or declaration of property situated in Belgium or relating to the lease or transfer of lease of the property must be registered (see also question 18). In the case of an asset deal, other taxes may be applicable.

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5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

In general and subject to transparency obligations (see question 6) and the requirements in relation to the treatment of inside information, the board of directors of the target freely determines which information will be disclosed and under which conditions such disclosure is made. In this context, the board needs to balance different interests, including its corporate interest, equal treatment of shareholders, the risk of insider dealing and competition concerns.

In case of a public takeover bid, the Takeover Decree requires that the same information is provided to any competing offeror. The offeror must also avoid receiving inside information. If the offeror nevertheless obtains inside information, it must disclose it in the prospectus. Inside information is defined as 'non-public information relating to the company or its financial instruments, that, if made public, could have a significant effect on the price of those financial instruments'.

In the case of a hostile takeover bid, the target's board of directors must inform the FSMA and the offeror of its views on the bid through a memorandum in reply, which is typically attached to the bid prospectus.

Finally, the employees need to be informed of a transaction as well (see question 19).

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The disclosure and transparency requirements are set out in the Act of 2 May 2007 and its implementing royal decrees, which originate from Directive 2004/109/EC on transparency requirements for securities admitted to trading on a regulated market (the Transparency Directive).

An acquisition of voting securities in a listed Belgian company must be disclosed to the FSMA and to the target, when the total stake of the acquirer represents, as a consequence of the transaction, 5 per cent or more of the total voting rights exercisable at the time of the acquisition. Notification is also required when the shareholding crosses the threshold of 5 per cent or any other multiple of 5 per cent of the total voting rights as a result of an acquisition or transfer (including through a sale) of shares, a change of the breakdown of the voting rights (eg, capital increase or decrease) or an agreement to act in concert. Further, the target's articles of association may provide for additional thresholds (1 per cent, 2 per cent, 3 per cent, 4 per cent and 7.5 per cent).

The shareholdings of affiliates and parties acting in concert with the acquirer are included to determine whether a threshold is reached. There are, however, certain exemptions from the disclosure obligation (eg, market making and trading book exemptions).

The disclosure notification must be made by the acquirer to the target and the FSMA without delay and no later than four trading days from the date of the event triggering the disclosure obligation. The target must publish the information contained in the notification within three trading days from the date of receipt.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The board of directors of the target company has a fiduciary duty to exercise its powers in the company's best interest. In the case of a public takeover bid, the board of a target company needs to inform the FSMA whether it considers the draft prospectus to be complete and indicate any gaps or misleading information. Further, the board of directors of the target company must submit a memorandum in reply to the FSMA. It must also ensure that the rights of the employees are respected (see question 19).

Controlling shareholders have no statutory duties, but they must comply with certain obligations (see question 6).

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Share or asset purchase

In case of a share deal, the target company's shareholders will in principle negotiate the sale of its shares in the company directly with a candidate buyer. In some cases, transfer restrictions may be included in the articles of association (see question 9).

In contrast, the decision to sell assets of the company is in principle made by the board of directors or, depending on the value of the deal, the managing director, of that company. However, when the transfer concerns a universality of goods, the approval of the shareholders will nevertheless be required.

Merger or demerger

In addition to the merger or demerger proposal (see question 4), the board of directors must prepare a special report in which it clarifies, from a legal and economic point of view, the proposed transaction. Further, the statutory auditor must prepare a report on the proposed share exchange ratio. These three documents will be presented in a general shareholders' meeting during which the shareholders vote on the approval of the proposed transaction.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile takeovers are allowed in Belgium but do not occur very often. The Takeover Act allows the board of directors of the target company to contemplate measures to safeguard the corporate interest and to frustrate a hostile bid.

The articles of association or a shareholders' agreement may, for example, contain restrictions on the transfer of shares such as pre-emption, first refusal or approval clauses, stand-still provisions as well as tag-along rights. These restriction clauses must always be in the company's interest and limited in time. The transfer of securities may in any case not be blocked for more than six months.

The articles of association may, within certain limits, also allow the board of directors to take various defensive measures to frustrate takeovers, such as the increase of the share capital pursuant to the authorised capital procedure or the acquisition of a share buy-back without the prior approval of the shareholders. It should be noted that the board requires the prior approval of the shareholders' meeting to do this. Such approval could be valid for up to five years.

In case the target company is a listed company, its shareholders may decide to prohibit frustrating actions, or apply the breakthrough rule to limit the defensive measures that may be used by the target towards takeovers.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

A no-shop clause, break fee or exclusivity clause may be inserted in preliminary agreements to safeguard the deal. However, it may be delicate to enforce these clauses as it could be argued that they are not in the interest of the target company.

In the case of a hostile takeover, certain frustrating actions may be taken (see question 9).

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The decisions of the FSMA may have significant impact on business combinations. This can be illustrated by the requirement of its approval of any conditions precedent to the offer (see question 12) and

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the (draft) prospectus as well as its possibility to, in case of a mandatory offer, allow or require a change of price of a mandatory offer, or add conditions.

Specific rules apply in the case of a merger or demerger in specific industries, such as in the insurance and banking sector (see question 17).

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

A public offer may be subject to certain conditions, which need to be pre-approved by the FSMA. In any case the bid should normally allow the offeror to achieve the intended result. An offer may, for example, be subject to obtaining a minimum percentage of shares, eg, 60 per cent.

In the case of a cash offer the necessary funds need to be in place and evidence thereof needs to be provided to the FSMA. The funds need to be available on a bank account, or as an unconditional and irrevocable appropriation. They will be blocked to guarantee the payment or used exclusively for this purpose. Therefore, a cash acquisition may not be subject to a financing condition. Also in the case of an exchange offer, the offeror needs to have the necessary securities at its disposal or the authority to issue or obtain the required amount of securities.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

While public offers may not be subject to financing conditions (see question 12), this is possible for private offers and it may be inserted as a condition precedent in the letter of intent or even in the final legal documentation.

A company that wishes to offer financial support to a third party to acquire its shares must fulfil the following requirements:

- the transaction shall be conducted under the responsibility of the board of directors and at fair market conditions. In addition, the creditworthiness of the borrowers needs to be assessed;
- the transaction is subject to the prior approval of the general assembly, deciding with a qualified majority;
- the board of directors needs to draft a special report addressing different elements, including the reasons for the transaction, the interest of the company in the transaction and the terms and conditions under which the transaction is implemented; and
- the amount of the support needs to be available for distribution and the company is required to take on a reserve equal to the aggregate financial assistance amount on its the balance sheet, which shall be unavailable for distribution.

However, the Company Code provides certain exemptions to the requirements for transactions concluded by financial institutions in the ordinary course of business or implemented within the framework of a management buyout.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Squeeze-out following a public offer

The offeror may reopen the offer to force the hold-out shareholders to sell the remaining securities when:

- he or she owns an interest of 95 per cent of the capital;
- he or she owns 95 per cent of the voting securities (including the voting securities held by parties acting in concert with the acquirer); and
- following the acceptance of the bid, he or she has acquired securities representing not less than 90 per cent of the capital carrying voting rights to which the bid related. This last condition only applies in the case of a voluntary takeover bid.

The offeror needs to reopen his bid within three months of the end of the acceptance period, and on the same terms and conditions. This acceptance period of the reopened offer needs to be at least 15 working days. The securities that have not been offered upon termination of the acceptance period, will be deemed to have been transferred to the offeror. After the bid, the market operator of shall ex officio delete the securities that were admitted to trading on this market.

Squeeze-out offer

When a private individual or company holds 95 per cent of the voting securities (including voting securities held by parties acting in concert with the offeror and by the company itself) in a listed company, he or she may initiate an offer to acquire the remaining voting securities.

The procedure contains a number of similarities with the regular takeover procedure. Once again, the FSMA plays a key role. An expert shall assess the price offered.

The securities that have not been offered will be deemed to have been transferred to the offeror at the end of the procedure.

Sell-out

In addition, the remaining shareholders have a sell-out right in the event of a public takeover offer, when following the public takeover offer, the bidder owns 95 per cent of the capital carrying voting rights and 95 per cent of the voting securities (including voting securities held by parties acting in concert with the offeror and by the company itself) when the offeror, through acceptance of the bid, has acquired securities representing not less than 90 per cent of the capital carrying voting rights comprised in the bid. The security holder who wishes to invoke his or her right, needs to notify the offeror (or a person appointed by him or her) by registered mail, within three months after the expiration of the acceptance period of the bid. The offeror, in turn, will notify the FSMA of all such requests.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Although the Company Code provides for a specific regime in case of cross-border mergers, there are no specific provisions regarding other cross-border transactions.

As discussed, it is in line with market practice that Belgian law governs the share purchase agreement for an acquisition by a foreign entity of a Belgian target company. The transaction documents may, however, also be subject to foreign law in case parties from other countries are involved (see also question 3).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In the case of a public takeover bid, the following (strict) timetable applies.

The bidder must make an initial (confidential) notification to the FSMA and provide the FSMA with a draft prospectus. Subsequently, at the latest on the day after having received the initial notification, the FSMA publishes the notification and makes an official announcement to the target, the public and, if applicable, the stock exchange.

Within five business days after filing of the draft prospectus the board of the target must indicate whether it considers the draft prospectus to be incomplete or misleading. As soon as the FSMA receives a complete file, it must decide within 10 business days whether it approves the draft prospectus. If the FSMA has not taken a decision at the end of this period, the bidder can urge it to do so. If the FSMA does not react within 10 business days after having received this notification, the prospectus is deemed to be denied.

When the prospectus is approved, it must be published and made available to the public. In addition, within five business days after receiving the prospectus approved by the FSMA, the board of the target must file a response memorandum with the FSMA for approval. When the FSMA receives a complete file, it must decide on the approval of the response memorandum within five business days after receipt. Once approved, the response memorandum must also be published promptly.

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Update and trends

While the Belgian M&A market, experienced a temporary cooldown owing to the Brexit referendum and the Brussels attacks of 22 March 2016, it appears to be getting back on track and economic indicators continue signalling limited growth. With an anticipated 1.5 per cent growth rate in 2017, the National Bank of Belgium is cautiously positive about the Belgian economy. The key deals of 2016 were the merger between Delhaize and Ahold and the takeover of SABMiller by AB Inbev. With a deal value of approximately €92 billion, the latter transaction is the largest ever involving a Belgian bidder. Given the limited size of the Belgian stock market, the number of private M&A transactions significantly outweighs the deals involving listed entities.

One of the main factors that may influence the investment climate in Belgium are the government's efforts to make the tax regime increasingly business-friendly. The 'tax shift' envisages lowering the cost of employment by shifting the tax burden to other forms of fiscal income. This shift was implemented in 2014. In addition, Belgian minister of finance Johan Van Overtveldt presented a proposal to gradually decrease the corporate tax rate from 33.99 per cent to 20 per cent at the beginning of 2016. However, owing to a political tug of war, it is currently unclear if and when the reform will be implemented.

A number of global developments may also have an impact on the Belgian M&A market in the months and years to come. In recent years, the Belgian M&A market has witnessed an increasing flux of investments from the People's Republic of China. The Chinese government, however, announced in late 2016 that it would install stricter capital controls to slow capital outgoings. This would also include limits on corporate investments abroad.

The effects on the Belgian market remain still uncertain. For its part, European governments also started taking a more protective stance towards foreign investments. The contemplated investment by Chinese state-owned company State Grid in the Belgian publicly held energy distributor Eandis collapsed in part because of political pressure. It appears that this is part of a wider global trend. The governments of Germany and the United States recently blocked transactions, citing national security concerns. It remains to be seen whether these protectionist measures will continue to rise and, if so, whether it will enhance home-grown investment or lead to a cool down of the M&A market. Finally, the uncertain outcome of the Brexit negotiations may perhaps prove to be the biggest game changer in the years to come.

The bid must start no earlier than five business days from the approval of the prospectus or the response memorandum by the FSMA, whichever takes place the earlier. The bid must remain open for a minimum of two weeks and a maximum of ten weeks. However, this period may be extended with two weeks if a shareholders' meeting of the target is convened to approve actions that could significantly affect the target's assets and liabilities (for example, a capital increase or asset sale). The publication of the results of the bid must be published by the bidder no later than five business days from the closure of the bid.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Specific rules apply in case of a merger or demerger of insurance companies and credit institutions. The prior notification to the FSMA of a merger or a transfer of a credit institution will be required. The merger or transfer of an insurance or reinsurance company will equally have to be notified to the supervising authority. A change of control, merger or demerger in the energy sector needs to be notified in some cases to the Flemish electricity and gas market regulator in Flanders, the Walloon commission for energy in Wallonia, or the energy regulator for the Brussels capital region.

18 Tax issues

What are the basic tax issues involved in business combinations?

Private income tax

In principle, no taxes are due on capital gains realised by individuals on the transfer of shares, when the transfer is within the scope of the normal management of his private estate. This principle has been highly disputed, but proposals to remedy the situation did not attract sufficient political support.

However, when a private individual sells his or her interests in a Belgian company in which he or she holds a substantial interest (more than 25 per cent), to a company outside the EEA, taxes may be due.

Company tax

Capital gains resulting from the sale of shares are exempt from company tax. This exemption is only applicable in case the dividends on the shares qualify for the participation exemption and if the shares have been held in ownership for at least one year. However, even if both conditions are met, the capital gains realised by large and medium-sized companies will still be taxed at a reduced rate of 0.412 per cent. In case the shares have not been held for more than one year, any added value arising from a share deal will be taxed at 25.75 per cent. If the capital gains do not qualify for the participation exemption regime, the capital gains will be taxed at 33.99 per cent. The controversial speculation tax, due by private individuals acting outside their professional on gains realised on the sale of listed shares when the shares are sold within six months following the acquisition has been abolished as from 1 January 2017. The trading tax has, however, been raised.

VAT and transfer taxes

No VAT or transfer tax is due on the sale of shares in a Belgian company. VAT will, however, be due on the costs related to the transfer of shares, such as the fees of the Belgian financial intermediary who intervenes in the sale of the shares.

In the context of an asset deal, the applicable VAT and transfer tax rates will depend on the nature of the assets transferred and the region in which the assets, such as real estate property, are located (see question 4). In addition, the seller must in principle pay VAT of 21 per cent on the sale price of the assets concerned. However, the seller may benefit from a VAT exemption in case the assets acquired constitute a universality of goods or a branch of activities of the target.

In order to encourage investment, several incentives are put in place, including tax rulings and notional interest deduction (NID).

Investors who wish to obtain upfront legal certainty on how tax laws will be applied to their (future) situation, may choose to receive an advance ruling. The procedure is straightforward, efficient and free of charge. The ruling is an advance decision that is issued within three months and is legally binding for up to five years. Part of this system has come under scrutiny by the European Commission.

The NID alleviates the differences in tax treatment between external financing and financing raised through equity capital. The system allows companies to deduct from their tax base a notional interest charge corresponding to a specific percentage of their adjusted equity capital.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Transfer of a business

Pursuant to Collective Bargaining Agreement (CBA) No. 32-bis of 7 June 1985 (CBA No. 32-bis), the employees relating to the target business will be automatically transferred to the acquiring company with preservation of the employees' rights and obligations resulting from the employment contract.

However, an exception is made for certain benefits under a supplementary social welfare scheme, such as a retirement, or invalidity scheme. As a result, the acquirer is not compelled to proceed with such schemes upon acquisition, unless the benefit schemes are contained in a CBA or legally binding.

In principle, employees belonging to the transferred business will be transferred automatically. The acquirer is thus not allowed to choose which employees will be transferred. However, CBA No. 32-bis contains specific rules in this regard for the transfer of a business of a company in bankruptcy (see question 20). In any event, the transfer of

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a business may not in itself be considered to be a justified ground for dismissal of an employee. Further, the existing working conditions of the transferred employees may not be altered to the detriment of the employees by the acquirer. Such an alternation would be considered to be an unjustified and unlawful termination of the employee's employment contract by the company.

Share deal

In case of a share sale, the target company will remain the employer upon implementation of the transaction. The employee's situation will thus not be affected by the transaction. Consequently, the dismissal of one or more employees of the target company will be subject to the general employment termination rules.

Information and consultation

CBA No. 9 of 9 March 1972 offers information and consultation rights to the employees of a target company in case of a structural change in the control over or a transfer of (part of) that company.

The employer must notify the works council (or, in its absence, the committee for prevention and protection at work or the trade union delegation) in good time and prior to any publication of the decision. The information provided must relate to the economic, financial and technical factors of the proposed transaction and the social implications thereof for the company and its employees.

The company must consult the works council in good time on the envisaged measures in relation to the employees.

In principle, the consultation and information rights may not obstruct the deal. Violation of these information and consultation rights may lead to administrative or criminal sanctions.

The Takeover Act lays down a number of additional information and consultation rights for employees in the case of a public takeover bid.

The target board and the offeror must first inform their employees' representatives or, in the absence thereof, the employees, about the bid, as soon as the bid has been announced.

Further, the employees' representatives of both the offeror and the target must receive a copy of the prospectus.

The target board must also inform the employees' representatives about its opinion on the bid.

Unless unanimously decided otherwise by its members, the target's works council must convene a hearing to consult the representatives of the offeror on its industrial and financial policy, its strategic plans for the target and the possible impact on the workforce and the operational sites of the target thereof. The hearing must be convened no later than 10 business days after the opening of the bid.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Bankruptcy

In case of bankruptcy, the court will appoint a bankruptcy trustee who will act as the company's representative. The bankruptcy trustee has the power to decide whether to continue running the business or to sell the assets or the business of the company. A party interested in acquiring the business of a company in bankruptcy must contact and negotiate with the trustee in bankruptcy. The acquisition of the company, or part of it, will only be valid upon the approval of the competent court.

The employees of a company in bankruptcy have the same information and consultation rights as described above (see question 19). In the case of an acquisition of a company in bankruptcy, the acquirer can in principle decide which employees will be retained.

In addition, the acquirer may negotiate the employment conditions freely. However, the acquired seniority of the employee concerned must be taken into account when the formal notice period or the corresponding notice indemnity is determined. In addition, the acquirer will remain bound by any collective bargaining agreement concluded by the bankrupt company.

Judicial reorganisation

Companies that face financial difficulties that could threaten their continuity on the short or medium–long term, may opt for one of the three judicial reorganisation procedures contained in the Act of 31 January 2009 on the continuity of enterprises (the WCO Act) (equivalent to the Chapter 11 procedure under US law).

In the first two types of judicial reorganisation, the board of directors remains competent to run and represent the company but has the possibility to force, within certain boundaries, a haircut on its creditors. As part of that procedure, it could envisage selling (part of) the activities or business of the distressed company.

The third type of judicial reorganisation provides the court the possibility to order the transfer of the company's business with the purpose of safeguarding the continuity of that business. In that case, the court will appoint a judicial representative who will manage the transfer. The transfer may also occur without the company's consent. If several, comparable offers are received, the judicial representative must give priority to the offer that best preserves the employment of the company.

The position of the employees in the judicial reorganisation procedures is similar to their position in case of bankruptcy (see above). However, the acquirer's choice whether to retain an employee must be justifiable by technical, economical and organisational reasons.

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21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Active passive bribery is criminalised by the Belgian Criminal Code of 8 June 1867 (the Criminal Code).

Active private bribery consists of the direct or indirect proposal, to a director, proxy holder, agent or employee of a company or a private individual, of an offer, a promise or an advantage, of whatever nature for such person or a third party, in order to perform or refrain from performing an act that falls within the scope of or that may be facilitated by that person's function. In order to qualify as bribery, the act must occur without the consent of the board of directors, the general assembly, the principal or the employer of the 'bribed' person.

In addition, the Criminal Code criminalises the situation where the director, proxy holder, agent or employee requests or accepts, directly or indirectly, such advantage, of whatever nature (passive bribery).

If the person concerned performs public duties, the (active or passive) bribery will be qualified as public bribery, which may give rise to more severe sanctions. In this regard, not the status of the person but the public nature of the duties performed is considered to be the relevant factor.

Bribery may be sanctioned with imprisonment (between six months and three years for private bribery and between six months and 15 years for public bribery) and/or a fine (between €800 and €400,000 for private bribery and between €800 and €800,000 for public bribery).

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Bulgaria

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1 Types of transaction

How may businesses combine?

The following types of business combinations are possible under Bulgarian law:

- acquisition of shares or assets;
- acquisition of a going concern or part thereof (as a special form of an asset deal);
- reorganisations (mergers, spin-offs, split-ups, etc); and
- joint venture agreements.

Acquisition of shares

Any natural person or legal entity without limitations of nationality may acquire shares in Bulgarian corporate entities (eg, joint stock company, limited liability company), whereas different procedures apply for the share transfer, depending on the form of the corporate entity. Specific restrictions apply in relation to the acquisition of shareholdings in banks, insurance companies, pension funds, etc.

By way of exception, the Bulgarian Offshore Companies Act prohibits any acquisitions of shares by offshore companies in Bulgarian legal entities active in sensitive public sectors such as media, public–private partnerships, energy, insurance, banking, etc.

In the case of a public company (listed joint stock companies), further rules apply for share transfers. Since public companies may only issue dematerialised securities in the form of shares and bonds, only members of the Bulgarian Central Depository (banks, investment intermediaries, regulated market operators, etc) may register transactions with them.

Acquisition of assets

The acquisition of assets is usually undertaken when the buyer would like to avoid complications that could arise from purchasing a legal entity (eg, when due diligence of the seller is not possible or has indicated legal risks related to it). Asset deals are generally not the preferable option from a tax perspective (VAT).

Acquisition of a going concern

Acquisition of a going concern of a company is a specific case of an asset deal. In this scenario, the purchaser acquires all of the rights, obligations and factual relations belonging to the seller's enterprise. The sale of a part of the going concern (eg, branch of an entity) is also possible.

Re-organisations

The Bulgarian Commercial Act and the Bulgarian Public Offering of Securities Act (specifically for public companies) regulate the different reorganisation forms under Bulgarian law, namely:

- merger – transfer of the business of two or more legal entities into one new company, followed by the (automatic) liquidation of the merging parties;
- acquisition – transfer of the business of one or more legal entities into one existing company, followed by the (automatic) liquidation of the transferring company;
- split-up – transfer of all the business of one company into two or more other legal entities, followed by the (automatic) liquidation of the distributing party; and
- spin-off – transfer of only part of the business of an enterprise into one or two already existing companies, without liquidation of the former.

Joint venture agreements

Joint venture agreements are contractual cooperation agreements without establishment of a separate legal entity or corporate combinations.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

General legislation

- The Commercial Act;
- the Contracts and Obligations Act;
- the Commercial Registry Act;
- the Public Offering of Securities Act;
- the Special Purpose Investment Companies Act; and
- the Anti-money Laundering Act.

Special legislation applying to companies in different sectors

This includes:

- the Credit Institutions Act;
- the Markets in Financial Instruments Act;
- the Medical-Treatment Facilities Act;
- the Public Procurement Act;
- the Commodity Exchanges and Wholesale Markets Act; and
- the Insurance Code.

3 Governing law

What law typically governs the transaction agreements?

In a regular case, the transaction agreements are under Bulgarian law. If a foreign party is involved, the choice of alternative governing law is also possible. However, there are a number of exceptions when mandatory Bulgarian law provisions should be complied with (notwithstanding the agreement between the parties):

- transfer of ownership rights in real estate assets located in Bulgaria;
- form of the agreement and form of the corporate decisions, if the transfer agreement is to be registered in Bulgaria;
- specific regulatory requirements such as preliminary and subsequent controlling (where applicable); and
- public tender offers and public tender proceedings.

It is also very common for local and foreign parties to conclude the sale-purchase agreement under a foreign jurisdiction, and agree all of the commercial terms between them therein. Consequently, short-form transfer deeds are executed only in order to comply with mandatory provisions under Bulgarian law.

Parties may also keep Bulgarian law as governing law, but agree on a foreign court authority to be competent for any disputes arising out of the agreement (ie, where a foreign party is involved).

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4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Commercial Register filings and fees

Most business combinations require a filing with the Bulgarian Commercial Register. In the case of share transfers in a limited liability company, the managing director should register the change with the Commercial Register within a seven-day term. Any changes of the parties to a partnership should be also registered with the Commercial Register.

In contrast, in the case of a share transfer in a joint stock company, the transfer is effectuated by an endorsement, in case of registered shares, and by handover, in case of bearer shares. Under certain circumstances, a Commercial Register filing may be required (eg, sole-owned joint stock company).

In the case of a reorganisation, for purposes of minority shareholders' protection, the entities involved need to file the draft documentation in advance (typically one month) prior the actual transfer with the Commercial Register taking place. Completion of the reorganisation will again have to be notified and registered.

In general, the fees of the Commercial Register are relatively moderate.

Single asset filings and fees

The transfer of a going concern (or part thereof) requires registration with the Commercial Register and the Property Register (in respect of real estate assets, included in the going concern). The fee for registration of a real estate transfer with the Property Register is equal to 0.1 per cent from the purchase price. In addition, local transfer tax of up to 3 per cent of the value of the real estate as well as notary fees (up to €3,000) apply.

Merger control filings and fees

According to the Bulgarian Law on Protection of Competition, concentrations resulting from mergers or acquisitions must be notified to the Bulgarian Commission for Protection of Competition if:

- the aggregate turnover of all undertakings concerned generated on the territory of the Republic of Bulgaria during the last financial year exceeds €12,780,000; and
- the turnover of each of at least two of the undertakings concerned generated on the territory of Bulgaria during the last financial year exceeds €1,530,000; or
- the turnover of the target undertaking generated on the territory of Bulgaria during the last financial year exceeds €1,530,000.

An initial fee of €1,030 is paid in advance by the buyer. If the Bulgarian Commission for Protection of Competition clears the transaction, there is an additional state fee of 0.1 per cent (but no more than €30,810) of the combined turnover of the undertakings concerned, generated in Bulgaria during the last financial year.

Financial institutions

Acquisition of shares in financial institutions like banks, financial leasing companies, etc, shall be approved by the Bulgarian National Bank in advance. Further, specific notification and, or approval requirements to, or by the Bulgarian Financial Supervising Authority apply to the transfer of qualified participations in insurance and reinsurance companies.

Transfer tax and fees

Fees due in connection with business combinations are usually pre-fixed or calculated according to applicable special tariffs. In case of an asset deal, a transfer tax and a registration fee will be due simultaneously.

In case the transfer agreements require a notary certification, the notary fee will be calculated based on a special tariff. The notary fees are progressive and consider the asset values.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Disclosure of information with the Commercial Register

The Bulgarian Commercial Register is centralised and public source of information for the structure, management, seat and registered address, registered capital and shareholding of any company in Bulgaria. Third parties may undertake checks with the Commercial Register and therefore any filings of share transfers and reorganisations will be made automatically public. However, it should be noted that all documents filed with the Commercial Register are accessible only for persons with authorised access, eg, electronic signatures.

Public companies

Public companies are obliged to disclose on a regular basis information about any substantial circumstances, which are expected to materially influence the financial results of the company as well as any significant related-party transactions. Public companies are also required to preliminary disclose with the Bulgarian Financial Supervising Authority any planned reorganisations and management changes. The deputy of the Chief Executive Officer of the Bulgarian Financial Supervising Authority is authorised to approve or refuse these changes.

Special investment purpose companies

Among other information that should be made public, the real estate special investment purpose companies are obliged to disclose any asset deals of values higher than 5 per cent from the value of the securitised assets.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Material disclosure requirements apply generally to public companies (listed joint stock companies). A person acquiring 5 per cent or more of the capital of a public company is under the obligation to disclose this to the company itself and to the Bulgarian Financial Supervising Authority. Specific rules apply also for banks, insurance companies, pension funds, financial institutions, etc.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

General duties

The managing directors of a company have the general duty to act in the best interest of the company and have the obligation to manage the business with the care of a diligent and conscientious manager.

In limited liability companies, the managing directors may be instructed by the general meeting of the shareholders to perform specific actions; managing directors of joint stock companies are generally free (independent) to act in the best interest of the company and do not need to follow instructions of the shareholders. The general meeting of the shareholders could authorise the managing directors to undertake actions, which are in the sole discretion of the general meeting of shareholders such as to dispose over assets of certain value, over the going concern of the company, etc. Breach of the duties of the managing directors can result in their personal liability towards the company, the shareholders or under certain circumstances (eg, insolvency) the creditors.

Obligations of controlling shareholders

The Commercial Act does not provide for any specific obligations on the controlling shareholders in a corporate entity. On the contrary, unlimited liable partners in partnerships are jointly and severally liable with the partnership.

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8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Share deal

In limited liability companies, general partnerships and limited partnerships, any share transfer to a new shareholder requires by law the prior approval of the shareholders as follows: more than three-quarters of the registered capital in limited liability companies and 100 per cent from all partners in general partnerships and limited partnerships.

Share transfers in joint stock companies do not require by law any approvals of the shareholders, unless share transfer restrictions are provided for in the articles of association of the company.

Asset deal with real estate properties

In limited liability companies, general partnerships and limited partnerships, any disposal or acquisition of real estate assets requires the prior approval of the shareholders as follows: more than half of the registered capital in limited liability companies and 100 per cent from all partners in general partnerships and limited partnerships.

In joint stock companies, the articles of association may provide for certain restrictions in relation to the disposal of assets (in particular real estate). In case of asset deals whose value is more than the half of the joint stock company's assets, a general meeting approval, taken with the majority of the present shares, is required. The articles of association may authorise the management body to agree on this unanimously.

Transfer of going concern (including part thereof)

In limited liability companies, general partnerships and limited partnerships, the transfer of a going concern requires by law the prior approval of the shareholders as follows: more than three-quarters of the registered capital in limited liability companies and 100 per cent from all partners in general partnerships and limited partnerships.

In joint stock companies the decisions about transfer of going concern must be taken by a simple majority of the shareholders.

Reorganisations

In a limited liability company, the decision on reorganisation of a company must be taken by a majority of more than three-quarters from the registered capital. In a general partnership and in a limited partnership, a reorganisation has to be decided unanimously by all partners. In case of a joint stock company, the decision on reorganisations is to be taken by a three-quarters majority of the present shareholders with the right to vote (in case no bigger majority is provided for in the articles of association).

In each scenario above, the majorities may be higher (where applicable), if this is provided for in the articles of association of the respective company.

Appraisal rights

In a reorganisation, the shareholders have to receive a report by a licensed auditor confirming the fairness of the exchange rate at which their shares would be exchanged, argumentation for the determined price on the basis of the generally accepted pricing methods, and the other measures offered to shareholders with specific rights.

In case of a mandatory tender offer in a public company, the shareholders have to receive a report from the management of the company on the proposed offer and its effect on the employees, employment relations, place of business and the calculation of the price.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

In relation to public companies, takeover bids must be followed by an offer to the other shareholders of the target, who have voting rights, to purchase or exchange their shares. The offer needs to be simultaneously submitted to the Bulgarian Financial Supervision Commission for approval and to the managing body of the target. In such case, the managing body may not take, without the general meeting's prior approval, any measures (other than encouraging competitive bids) that aim at compromising the transaction.

The target's managing body must present the offer to the attention of the target's employees and present a reasoned opinion to the Bulgarian Financial Supervision Commission. The target's employees are allowed to present to the Bulgarian Financial Supervision Commission their own reasoned opinion on the bidder's offer, as an attachment to the one prepared by the managing body.

The Bulgarian Financial Supervision Commission may only refuse the offer by a reasoned decision where the offer is non-compliant with regulatory requirements. New offers to the other shareholders could still be made.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees and reverse break-up fees are generally permitted under Bulgarian law. They are usually structured as penalties to be paid by the party backing out of the transaction. There are no limits on the amount of the fees.

However, if the seller is an individual (not a merchant) and the break-up fee is negotiated as a 'penalty', then the seller can claim its amount is excessive if it is materially higher than the damages actually suffered by the potential buyer. In this case, the courts are entitled to reduce the amount of the penalty if they are deemed to be disproportionately high as compared with the value and importance of the secured obligation. Nevertheless, such reduction is limited by the amount of the actual damages suffered.

Companies may use a wide range of deal protection methods and the law do not specify any particular limitations on them. However, the directors must assess whether agreeing to such clause is in the best interest of the company and its shareholders or not. Should the directors agree to such a provision in the latter case, they could breach their duty of professional care and be liable for any damages.

Financial assistance rules apply generally to joint stock companies – the company cannot provide loans, credits or securities to third parties in connection with the acquisition of its own shares.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Generally, government officials are not in a position to influence private transactions, which are not in an explicitly regulated industry. However, the parties' failure to comply with Bulgarian laws will constitute a reason to restrict a business combination.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The conditionality of an offer is generally within the discretion of the parties involved; conditions precedent are not unusual in the private M&A transactions in Bulgaria (eg, availability of financing, material adverse changes, merger clearance, etc).

Financing may be conditional in a cash acquisition. It is very common for financing documentation in acquisition deals to contain conditions precedent that are linked to the acquisition. There are no specific rules for such conditions.

The Bulgarian Public Offering of Securities Act regulates the rules in relation to tender offers for public companies. The main rule is that if a person acquires more than one-third of the shares in a public company, where there are no persons who own more than 50 per cent of the votes in the general meeting, the buyer shall either make an offer to the remaining shareholders or sale such an amount of shares, so as to decrease its shareholding in the company below 33.3 per cent.

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13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

There are in general no statutory limitations to the financing of private acquisitions. Conditions precedent requiring evidence of available funds at a certain point in the transaction are admissible and could apply based on the free will of the negotiating parties.

The seller would normally not be required to assist with the buyer's financing, however, the financing institution may require an access to the seller's business documentation in order to perform a preliminary due diligence check and evaluate the possible risks of the financed transaction as well as the introduction of further securities after the completion of the transaction.

Bulgarian joint stock companies may not provide loans or securities for the acquisition of their own shares.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

No rights for squeeze-outs are provided for non-public companies. Minority stockholders of Bulgarian public companies may be squeezed out only by a stockholder holding 95 per cent or more of the target's registered capital and voting rights. The squeeze-out must be for all of the remaining shares and must be executed within three months of the takeover bid. Squeeze-out is subject to approval by the Bulgarian Financial Supervising Authority which shall be issued within 14 days after receiving the required notification. The transfer of the shares and the payment of the purchase price is performed simultaneously within seven business days following the publication of the invitation for the squeeze-out.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are usually structured in accordance with the applicable law, chosen by the parties. In case the governing law is not Bulgarian, the mandatory provisions of the Bulgarian corporate law will still apply.

The Commercial Act contains special provisions on cross-border re-organisations. A cross-border reorganisation involves at least one company based in a different member state of the European Union or the European Economic Area and at least one Bulgarian limited liability company or joint stock company.

The Public Offering of Securities Act provides for the possibility foreign persons or entities to perform a public offering in Bulgaria and vice versa – Bulgarian persons or entities to perform public offering abroad. These activities are limited by numerous restrictions and require the involvement of the Bulgarian Financial Supervising Authority.

Please see question 3 for further information.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

There are no mandatory notification and waiting periods according to the Bulgarian law.

In general, any filings with the Commercial Register shall be done within a seven-day term as of the date of the respective change and are completed within a couple of days.

In the case of reorganisations, the reorganisation documentation must be notified and filed with the Commercial Register within not less than 30 days before the competent body approves the reorganisation.

A transfer of bearer shares is completed with their handover. A transfer of ordinary registered shares requires endorsement. Transfer of dematerialised shares must be registered with the Bulgarian Central Depository.

Registration of cross-border reorganisations with the Commercial Register takes not less than 14 days as of the filing.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Business combinations in certain industry sectors such as the financial sector (including insurance, capital markets, banking, investment intermediaries), require additional approvals or notifications from different regulatory bodies for the acquisition of a certain percentage of voting rights or share capital, or both, for execution of a shareholders' agreement, etc. The regulatory bodies are, among others, the Bulgarian Financial Supervision Commission, Bulgarian National Bank, etc.

18 Tax issues

What are the basic tax issues involved in business combinations?

VAT

Value added tax in the amount of 20 per cent applies in case of an asset deal (some exceptions apply in case of real estates). Value added tax does not apply in case of the acquisition of going concern or company shares or quotas.

Local taxes

Local taxes in the amount of up to 3 per cent from the transaction's value apply only in cases of acquisition of real estate assets.

Corporate Income Tax

Disposal of shares or assets located in Bulgaria by foreign individuals triggers Bulgarian income tax obligation, in the form of a withholding tax. Where an entity acts as a selling party, the participation exemption will apply for EEA registered companies (if certain EU legislation conditions are met).

Currently, Bulgarian corporate income tax is 10 per cent.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The Bulgarian Labour Code and the Commercial Act regulate the implications arising out of business combinations, whereas the employer has a general obligation to inform representatives of the employees and trade union representatives about any significant economic changes.

Business implications with regard to employment will not arise from any kind of business combinations. Transfers of shares do not affect the employment relationships with the company in any way.

In general, the transfer of a going concern as well as any kind of reorganisation, leads to an automatic transfer of the employment relationships with a company to its legal successor. However, some applications are to be observed. The employer is required to inform the employees' and the trade union representatives on certain matters (eg, the exact kind of planned reorganisation, the expected date of the reorganisation, the expected effect on the employees, the planned measures with regard to the staff, etc), not later than two months prior to the anticipated reorganisation. Specific informational and consultation procedures are applicable to the employees in multinational undertakings.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Generally, a company in insolvency proceedings may not enter into a business combination.

As an exception, if the company's creditors approve a recovery plan, any business combination is possible under certain conditions, namely: resolution of the company's creditors; approval by the supervising body; and final approval by the insolvency court.

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The sale of the entire going concern or parts thereof in an insolvency proceedings is also possible if the creditors' committee and the insolvency court approve such a sale.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Under Bulgarian law, commercial bribery is defined as offering or receiving of a bribe with regard to the fulfilment or non-fulfilment of regular business obligations. The sanctions for this crime are a fine of up to €7,500 or imprisonment for up to three years.

In addition, the Anti-Money Laundering Act provides for strict obligations on a large number of entities or persons, such as: financial institutions, investment intermediaries, pension funds, public notaries, legal consultants, etc to identify the clients if entering into a commercial relationship with them. Identification of the client refers to the identification of its ultimate shareholder. Furthermore, the purpose and the financing (in some cases) of the anticipated transaction is to be also verified. Origin of funds has to be established for transactions in the amount of €15,000 and more. A lower threshold in the amount of €5,000 applies to certain entities subject to the application of the act (eg, financial institutions).

EU, US and UN sanctions apply respectively in Bulgaria.

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1 Types of transaction

How may businesses combine?

A business combination involving a publicly traded issuer is generally structured as either a takeover bid or a court-approved plan of arrangement, but can also be accomplished through a statutory amalgamation, sale of assets or other fundamental corporate reorganisation.

Takeover bid

In general, a takeover bid (being the Canadian equivalent of a US tender offer) is an offer to acquire outstanding voting or equity securities where the securities subject to such offer, together with the shares already owned by the potential acquirer, constitute 20 per cent or more of the voting or equity securities of the class subject to the offer. Amendments to the Canadian takeover bid regime, as set out in National Instrument 62-104: Takeover Bids And Issuer Bids, came into force on 9 May 2016. Under the amended regime, all non-exempt takeover bids will be subject to the following requirements:

- Equal treatment of shareholders: bids must be made to all shareholders of the class of securities subject to the bid and all shareholders of the same class of securities must be offered identical consideration (which can include cash, shares or other securities or a combination).
- 105-day bid period: bids will be required to remain open for a minimum of 105 days, subject to two exceptions. First, the target issuer's board of directors may issue a 'deposit period news release' providing for an initial bid period that is shorter than 105 days but not less than 35 days, in which case all outstanding or subsequently launched bids are only required to be open for not less than the shortened bid period. Second, the target issuer may issue a news release that it has entered into an 'alternative transaction', effectively a friendly change of control transaction that is not a bid, such as an arrangement, in which case all outstanding or subsequently launched takeover bids are only required to be open for 35 days from their date of commencement.
- 50 per cent minimum tender requirement: bids will be subject to a mandatory minimum tender requirement of more than 50 per cent of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned, or over which control or direction is exercised, by the bidder and its joint actors.
- 10-day extension requirement: following the satisfaction of the 50 per cent minimum tender requirement and the satisfaction or waiver of all other terms and conditions, bids will be required to be extended for at least an additional 10-day period.

Plan of arrangement

A court-approved plan of arrangement is a multi-step transaction, subject to court approval, which may involve, among other things, an amalgamation, an amendment to the corporation's articles, a transfer of property, an exchange of securities and a compromise with creditors. The principal disclosure document is the information circular, which is mailed to the target's security holders in respect of the meeting called to approve the plan of arrangement. A plan of arrangement involves two court appearances and a shareholders' meeting. The court may approve the arrangement as proposed or as amended by the court. The plan of arrangement becomes effective once the necessary documents, which include the final order, are filed with the applicable corporate registry and, in certain circumstances, a certificate is issued by the corporate registrar in respect of the business combination.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Generally, corporate transactions (including court-approved arrangements) are governed by applicable corporate statutes while takeover bids are governed by applicable securities legislation.

Canadian securities regulation is governed primarily by laws and agencies established separately by each of the provinces and territories. Canada has no federal securities regulatory agency, thus each province and territory has its own legislative framework and system that regulates, among other things, takeover bids; however, the rules have been largely harmonised and are generally very similar if not identical in most cases. Securities regulators generally have the power to intervene in transactions considered to be contrary to the public interest. Some provinces have imposed rules designed to protect minority shareholders in connection with certain types of 'related party' transactions (related parties include shareholders owning 10 per cent or more of the voting securities of an issuer); the rules include requirements, subject to the applicability of exemptions, for approval by a 'majority of the minority' shareholders, the preparation and disclosure of valuations, and additional disclosure requirements.

In September 2014, the federal government and the governments of British Columbia, New Brunswick, Ontario, Prince Edward Island, Saskatchewan and the Yukon signed a memorandum of agreement to formalise the terms and conditions of a new proposed cooperative capital markets regulatory system. Participating jurisdictions are aiming to enact the uniform provincial-territorial Capital Markets Act and the complementary federal Capital Markets Stability Act by 30 June 2018, with the Capital Market Regulatory Authority expected to be operational in 2018.

Companies have the option to incorporate under the federal Canada Business Corporations Act or one of the largely similar provincial or territorial business corporations acts. Extraordinary corporate transactions (such as plans of arrangement and statutory amalgamations used to complete business combinations) must generally be approved by a special resolution of shareholders (typically two-thirds of the votes cast). Shareholders generally have dissent rights, provided for under the corporate statutes, from extraordinary corporate transactions and the right to demand payment of the 'fair value' of their shares (as ultimately determined by a court, if challenged). Further, under Canadian corporate statutes, Canadian courts have been given broad remedial powers to intervene in respect of such transactions that are viewed to be oppressive or unfairly prejudicial to, or that unfairly disregard the interests of, shareholders and other stakeholders.

Canada's senior equity exchange is the Toronto Stock Exchange, but other stock exchanges in Canada include the TSX Venture Exchange, which attracts small to medium-size issuers, and the Montréal Exchange, which focuses on derivatives trading. In addition, there are a number of alternative exchanges, including the Canadian Securities Exchange and the Aequitas NEO Exchange. These exchanges may regulate certain aspects of business combinations. For example, the

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Toronto Stock Exchange requires a listed acquirer to obtain approval of its shareholders if the acquisition would result in the issuance of more than 25 per cent of the outstanding shares of the acquirer on a non-diluted basis.

Business combinations may be subject to a number of industry-specific regulatory laws, as well as laws of general application, including the Competition Act (Canada) and the Investment Canada Act (ICA) (which are discussed in questions 4 and 11).

3 Governing law

What law typically governs the transaction agreements?

The governing law of a takeover bid is the law of the province or territory in which the shareholders of the target issuer reside, subject to de minimis exemption, if applicable. The acquirer and the target may enter into a support agreement, which renders the transaction a 'friendly' takeover bid. The acquirer may also enter into 'lock-up agreements' with shareholders of the target, for the purpose of obtaining their commitments to support the transaction. These agreements are contractual in nature, and therefore there is no set rule to determine their governing law. In practice, the governing law is that of the jurisdiction in which the target is incorporated.

The governing law of transaction agreements for corporate transactions (in the case of a plan of arrangement, typically an arrangement agreement), is also a contractual matter, which may be negotiated. The governing law for such agreements is often the jurisdiction in which the target is incorporated.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The form of business combination determines the necessary filings. In a formal (non-exempt) takeover bid, there are two main filings to be made with the applicable securities regulators: (i) the acquirer must file the takeover bid that describes the terms of the offer along with other required disclosure; and (ii) the target company must file a directors' circular, which is prepared by the board of the target company, and includes the target board's recommendations concerning the bid, if any, along with other required disclosure. Also, if the terms of the takeover bid change, notices must be filed disclosing such changes.

In a corporate transaction requiring shareholder approval at a meeting, a management information circular (also referred to as a proxy circular) and other supplemental materials must be filed with the applicable securities regulators. The content and timing of the filings must comply with the applicable statutory requirements, but are not subject to a review or clearance process. The fees payable in connection with these filings depend on the structure and size of the transaction and the federal and provincial jurisdictions involved.

Neither takeover bid nor directors' circulars filed in connection with bids nor management information circulars filed in connection with corporate transactions are reviewed by securities regulators, though there is statutory civil liability for misrepresentations in those documents. If the consideration for a business combination includes the issuance of securities of the acquirer that are listed on a stock exchange, filings will need to be made with the appropriate stock exchange to obtain the necessary listing approvals. Fees will vary based on the stock exchange and the number of securities issued.

If a business combination involves the acquisition of a business that holds assets in Canada and certain thresholds are met (relating to the size of both the parties and the transaction itself), notice of the business combination must be provided to the Commissioner of Competition pursuant to the Competition Act (Canada). If a business combination is subject to a pre-merger notification requirement, the parties may not close the transaction unless notice has been given to the Commissioner. The Commissioner and staff at the Competition Bureau will review the transaction to assess the competitive effects of the business combination. In addition to, or in lieu of filing a notification, the parties can request a formal clearance of the business combination from the Commissioner in the form of an advance ruling certificate (ARC) or, in the alternative, a 'no-action' letter. The filing fee for notification filings and ARC requests is C$50,000. However, only one fee is required where a notification is submitted together with an ARC request.

Any non-Canadian proposing to establish a new business or acquire an existing business in Canada may be required to provide notice under the ICA, which governs investments in Canada by non-Canadians. Under the ICA. Moreover, certain acquisitions of control of, or establishments of new cultural Canadian businesses by non-Canadians are subject to review if the prescribed financial thresholds are exceeded. Such review is typically carried out by the Investment Review Division of Innovation, Science and Economic Development Canada. Before a reviewable investment may be completed the appropriate Minister must determine that the investment is likely to be of 'net benefit to Canada'. The ICA contains a national security review mechanism that allows the Canadian government to review, prohibit or impose conditions on a broad range of direct and indirect investments by non-Canadians on the basis of national security concerns. There are no filing fees under the ICA.

Canada does not have stamp taxes.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The scope of public disclosure depends on the structure of the business combination. A corporate transaction, such as a plan of arrangement, requires the parties to have agreed to the transaction and its material terms in advance of the public announcement by way of a news release of such transaction. Once terms are agreed and announced, the target company will prepare a management information circular, which is then filed with the governing securities regulator and mailed to shareholders of the target company. The management information circular will set out certain prescribed information with respect to the transaction including, inter alia, a description of the background to the transaction and the negotiation process that occurred between the parties and, more specifically, will include information that is material to the shareholders in order for them to make a reasoned decision to approve, and vote in favour of the plan of arrangement, or reject the transaction and vote against the transaction at a duly called and properly constituted meeting of shareholders.

As discussed in question 4, takeover bids require the acquirer to file a takeover bid circular with the applicable securities regulators. The takeover bid circular must be mailed to shareholders of the target company. A takeover bid circular must contain certain required information, including:

- the terms of the offer;
- the acquirer's intentions in respect of the offer, including a second stage transaction, historical trading in the securities of the target company; the acquirer's holdings of the securities of the target company;
- sources of financing for the offer;
- any arrangements between the acquirer and any director, officer or shareholder of the target company; and
- any other information that would be material to the shareholders' decision to accept or reject the offer.

The takeover bid circular must include prospectus-level information (about the acquirer) if any securities of the acquirer are offered as consideration for the business combination. By way of response to an offer, directors of the target company must file a directors' circular with the governing securities regulator and mail it to the shareholders within the prescribed time period. This circular contains certain prescribed information, including the directors' reasoned recommendations as to whether the shareholders should accept or reject the offer to shareholders (or if no recommendation is made, the directors' justification for that position), and outline the intentions of the directors and officers of the target corporation, to the extent they are known.

When the business combination involves a 'related party' of the target company, certain additional information must be included in the disclosure documents (including, unless an exemption is available, a summary of a formal independent valuation of the subject matter of the transaction).

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6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

When a purchaser acquires beneficial ownership of, or control or direction over, 10 per cent or more of a class of voting or equity securities of a public company, the purchaser becomes an 'insider' of the public company for purposes of Canadian securities laws. Upon crossing the 10 per cent threshold, the purchaser must (i) comply with Canada's 'early warning' regime by promptly issuing and filing a news release (announcing its holdings in the public company, the purpose for which the securities were acquired and any future intentions to acquire additional securities of the public company) and, within two business days, filing an early warning report with the Canadian securities regulators in respect of the foregoing, and (ii) file an insider report on Canada's System for Electronic Disclosure by Insiders (SEDI) publicly reporting the purchaser's beneficial ownership of, or control or direction over, voting or equity securities of such public company. Under the early warning regime, the purchaser must promptly file further news releases and early warning reports upon (i) the acquisition or disposition of each additional 2 per cent or more of the outstanding class of voting or equity securities of such public company, (ii) the holdings of the insider decreasing below 10 per cent of the outstanding class of voting or equity securities of such public company, or (iii) a change in a material fact contained in the most recently filed early warning report in respect of such public company. In addition, while an insider of the public company, the purchaser must, from time to time, report on SEDI any changes in its holdings of the class of voting or equity securities of such public company. Also, it should be noted that where the public company is the target of a takeover bid, the reporting threshold under Canada's early warning regime decreases to 5 per cent.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

All corporate statues in Canada impose certain fiduciary duties on directors and officers. In general, directors and officers have a duty to manage or supervise the management of the business and affairs of the corporation and, in so doing, must act honestly and in good faith with a view to the best interests of the corporation (referred to as the 'duty of loyalty'); and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (referred to as the 'duty of care').

The duty of loyalty means, among other things, that directors owe a fiduciary duty to the corporation (but not to any individual shareholder or other stakeholders). In the context of the duty of loyalty, the stated requirement to act in the 'best interests of the corporation' highlights the principle that directors and officers owe an overriding fiduciary duty to the corporation and not directly to the shareholders or any other group of stakeholders. The duty of care requires directors and officers to exercise the care, diligence and skill that a 'reasonably prudent person' would exercise in comparable circumstances. A principal aspect of this duty is an obligation to act on an informed basis after due consideration of the relevant materials, appropriate deliberation and input, as required, from expert and experienced advisers.

The board is resonsible for determining the best interests of a corporation. In *BCE Inc v 1976 Debentureholders* (*BCE*), the Supreme Court of Canada held that, depending on the circumstances, it may be appropriate for the board of directors to consider, among other things, the interests of those who are affected by corporate decisions, including shareholders, creditors, employees, consumers, governments and the environment. In *BCE*, the Court indicated that directors are required to 'act in the best interests of the corporation viewed as a good corporate citizen', which implies a consideration of interests other than those of shareholders. However, it is important to note that the Court implicitly recognised the importance of shareholder interests in director decision-making. In the change of control context, market pressures and the reality that shareholder approval is crucial to allowing a transaction to proceed mean that, in practice, boards will continue to make an important focus of their analysis whether a transaction offers the highest value reasonably available to shareholders, even as they consider the best interests of the corporation and the impact of the transaction on other stakeholders.

In Canada, the decisions of directors and officers are (in most circumstances) treated deferentially by courts, due to the 'business judgement rule'. Under this rule, courts will not, with the benefit of hindsight, substitute their business judgement for the determinations of a board that undertook a diligent and appropriate process.

Shareholders, including controlling shareholders, do not generally owe other shareholders any duties. However, if the acquirer is a 'related party' of the target company (ie, if it owns 10 per cent or more of the voting shares of the target company), the transaction will generally be required to include enhanced procedural fairness protections, which (subject to certain exceptions) include a formal valuation of the target company's shares by an independent and qualified valuer; the approval by a 'majority of the minority' of disinterested shareholders; and enhanced disclosure requirements.

Majority shareholders are also kept in check by the federal or provincial statutory 'oppression remedy'. The oppression remedy provides courts with very broad remedial powers, where it is determined that conduct of the majority is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, any complainant, which can include any security holder, creditor, director or officer.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Corporate transactions require approval by two-thirds of the target company's shareholders who also vote in respect of the approval of the transaction. As discussed in question 7, corporate transactions involving a related party, generally require approval by a majority of the minority of unrelated shareholders of the target company.

In the context of a takeover bid for all of the issued and outstanding shares of the target, once the shareholders decide whether to tender to the bid or not, they are then required to deliver their shares to the offeror who, following completion of the bid, is able to effect a second stage transaction or statutory squeeze-out (a mechanism provided for under Canadian corporate and securities laws) to facilitate the acquisition by the offeror of those shares not otherwise tendered under the bid. However, at this stage the offeror will have typically acquired sufficient votes to guarantee a favourable outcome.

Dissenting shareholders generally have dissent and appraisal rights in connection with the shareholder vote undertaken for a corporate transaction (and also in second stage transactions or squeeze-outs subsequent to takeover bids). If the dissenting shareholder contests the fair value of its shares of the target company placed on them by the acquirer, an application may be made to the court to fix a fair value for such shares.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Unlike a negotiated or 'friendly' transaction that can be accomplished by way of plan of arrangement or takeover bid, an unsolicited transaction or 'hostile bid' can generally only be completed by way of a takeover bid. This allows the hostile bidder to appeal directly to the target company's shareholders, thus avoiding the need to deal specifically with the management and board of directors of the target company and come to agreed terms and conditions with them in advance of launching the transaction.

On 9 May 2016, National Instrument 62-104 Takeover Bids and Issuer Bids was amended to include a 105-day minimum deposit period, subject to reduction on consent (possible reduction to a minimum of 35 days), a mandatory minimum (50 per cent) tender condition and a mandatory 10-day extension of the deposit period on satisfaction of the minimum tender condition.

The new rules provide target boards with an extended period of time to either negotiate with the bidder or search for other potential bidders. The ability for the target board to shorten the bid period

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will likely deter hostile bids for those bidders looking to complete the acquisition quickly and avoid being potentially outbid by others. The newly adopted rules have also made it difficult for bidders to acquire a material equity position in the target without first acquiring a majority interest.

Issuers subject to a hostile bid may use a variety of means to deter or delay hostile bids. Historically the most common approach in Canada has been the use of shareholder rights plans (or 'poison pills'), which unless waived or terminated, would dilute a hostile acquirer's voting rights and economic interest in the target. Owing to the new takeover bid rules, in particular the extension of the deposit period to essentially 115 days, shareholder rights plans have become less prevalent. Shareholder rights plans may still be useful in specific situations. Exempt bids, such as bids made through the normal course purchase and private agreement exemptions, are not subject to takeover bid rules. As such, shareholder rights plans can still be effective in situations where an exempt bid is launched, or to protect against 'creeping bids' where a substantial share position will be acquired through exemptions in order to avoid triggering the formal takeover bid rules.

There is recourse to the courts when disputes arise concerning hostile bids. If, for example, an issuer is subject to a hostile bid, they may challenge such bid on the basis of non-compliance with statutory requirements. Conversely, a bidder may seek redress for defensive actions taken by the target board to frustrate a bid, for example, on the basis of breach by the target issuer's directors of their fiduciary duties as outlined above (see question 7).

In recent years, shareholder activism has been on the rise in Canada. The new takeover bid rules may result in acquirers that previously would have sought to acquire control of an issuer through a hostile bid, reconsidering such approach and instead consider acquiring control by means of a proxy contest.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

While commonly used and often discussed, deal protection measures such as break fees, right to match provisions, non-solicitation covenants, asset options and so on, are not specifically regulated under Canadian corporate or securities laws, and can be disputed by reference to the directors' fiduciary duties discussed in question 7. There is little argument that the most commonly utilised deal protection method is the break fee. Break fees are agreed upon payments that a target company will pay to a potential acquirer in the event a business combination is not completed. Break fees are generally included to either protect a potential acquirer from the impact of another contemplated bid, or to compensate them where the proposed acquisition is unsuccessful. Break fees are often set based on the enterprise value of the target issuer, however, the typical break fee percentage in Canada has consistently remained in the range of 2 to 5 per cent for several years (with variations to this standard occurring in certain transactions based on the particular facts of that situation). The size of the break fee is always negotiated, and is therefore affected by the relative bargaining strength of the parties involved and other considerations specific to the transaction. Where the directors are discharging their fiduciary duties to facilitate a transaction, the limited Canadian jurisprudence suggests that defensive measures will generally be permissible, provided management of the company utilising them can establish a clear rationale and explanation for so doing. However, a balance must always be struck to ensure such measures are not negatively impacting the ability of potential acquirers to 'come to the table' and transact.

Reverse break fees are payable by the potential acquirer to the target in the event a transaction is not closed for specified reasons (examples have included the rejection of the acquirer shareholders or failure to satisfy certain regulatory conditions), are also not regulated. Theoretically, reverse break fees could be challenged on the basis of the directors' fiduciary duties, but reverse break fees are not subject to the same potential scrutiny of break fees because the latter may have auction-ending implications.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The ICA is Canada's federal statute of general application governing the acquisition of control of Canadian businesses by non-Canadians. Jurisdiction over investments rests with the Department of Innovation, Science and Economic Development Canada and reviews are carried out by the Investment Review Division (IRD) within this department. An investment governed by the ICA is either notifiable or reviewable depending on the value of assets of the Canadian business being acquired, the identity of the investor, and the structure of the transaction.

Before a reviewable investment may be completed, the appropriate Minister must determine that the investment is likely to be of 'net benefit to Canada'. The ICA requires the Minister to take the following factors into account, where relevant, in making their determination:

- the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilisation of parts, components and services produced in Canada and on exports from Canada;
- the degree and significance of (continued) participation by Canadians in the Canadian business (in particular at the director and officer levels) and in any industry or industries in Canada of which the Canadian business forms a part;
- the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- the effect of the investment on competition within any industry or industries in Canada;
- the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
- the contribution of the investment to Canada's ability to compete in world markets.

The review process often includes negotiating contractual commitments or undertakings that are requested by the IRD to satisfy the Minister that the investment will be of net benefit to Canada. These undertakings usually have a duration of three to five years and may include commitments to maintain jobs and facilities in Canada, to retain Canadian management, to make capital expenditures in Canada, to comply with environmental regulations, to conduct research and development in Canada and to provide Canadian suppliers the fair opportunity to provide goods and services to the Canadian business. Given the politicisation of the ICA review process, the investor will want to ensure that the transaction is well understood by all potential stakeholders in government (federal, provincial and local), and relevant civilian groups, whose stakeholders could negatively influence opinion shapers and the public perception of the transaction.

In addition, the ICA contains a national security review mechanism that allows the Canadian government to review, prohibit, or impose conditions on a broad range of direct and indirect investments by non-Canadians on the basis of national security concerns. On December 19, 2016, the federal government released new guidelines on national security reviews (NS Guidelines). The NS Guidelines set out the factors considered by the government when assessing national security risk including, in particular: the effect on Canada's defence capabilities, transfers of sensitive technology or know-how, critical infrastructure, the enablement of foreign surveillance or espionage, the hindering of law enforcement operations and the potential involvement of illicit actors, such as terrorists or organised crime syndicates. The NS Guidelines also mention as factors the impact on the supply of critical goods and services to Canadians, the supply of goods and services to the federal government, and the impact of an investment on Canada's international interests or foreign relationships.

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12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Generally speaking, there are no restrictions on the type of conditions that may be included in a business combination provided they are not coercive or abusive of securityholders. One notable exception is that transactions completed by way of a takeover bid with cash consideration cannot be subject to financing and funds must be readily available to the offeror. Sufficient financing to cover the cash component of a bid must be arranged in advance of the bid being launched such that the purchaser reasonably believes financing is available even if some conditions to actually receiving funds are applicable. However, a business combination completed by way of an amalgamation or plan of arrangement does not carry such a prohibition.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Where a business combination involves a financing condition, the transaction agreement typically provides for a covenant of the purchaser that it take all steps necessary to obtain acquisition financing. At the same time, the target company typically covenants to cooperate with the purchaser and the financing sources by: giving access to management, including participation in road shows and due diligence sessions; assisting with the preparation of customary materials for rating agencies, offering and private placement memoranda, prospectuses and similar documents; executing any pledge and security documents; and providing any required financial statements or other information.

Where a financing condition is in place, the target company often has a reverse break fee where it is entitled to a significant payment from the purchaser in the event the financing condition is not satisfied prior to closing and the business combination is unable to be completed as a result.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In the context of a takeover bid, most Canadian corporate statutes provide that where a takeover bid has been accepted by shareholders (other than the purchaser and its affiliates) representing 90 per cent or more of outstanding shares of a class, the remaining shares can be acquired or squeezed-out at the same price by operation of law, subject to rights of dissent and appraisal. Upon acquisition of 90 per cent or more of the outstanding shares of a target, the purchaser may send a notice to remaining shareholders that it is exercising its rights to acquire the remaining shares. Each shareholder has the right to dissent in respect of this process and apply to a court to establish a fair market value for the shares. The exercise of dissent rights does not prevent the purchaser from acquiring the shares of the dissenting shareholder, however, the purchaser inherits a court process that is completed following the acquisition, where a court hearing is held to determine the fair value of the dissenting shareholder's shares. Depending on the outcome of this court process, the purchaser will be required to pay the former shareholder the fair value set by the court, which can be higher or lower than the bid price. The court process requires the former shareholder and the purchaser to adduce evidence as to the fair value of the shares. In some circumstances the fair value process is settled as between the former shareholder and the purchaser prior to the conclusion of the court process.

Alternatively, a second step acquisition transaction is available to purchasers who do not reach 90 per cent ownership but manage to acquire two-thirds of the target's outstanding shares (or 75 per cent pursuant to some corporate statutes) and any majority of the minority required. In this case, the purchaser can propose an amalgamation, arrangement, share consolidation or other transaction in order to acquire the remaining shares. In all cases the shareholder vote required will be carried by the purchaser's holdings. A minority shareholder often has similar rights of dissent an appraisal in the context of such a second step acquisition transaction.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

A Canadian plan of arrangement is often the preferred acquisition method where shares will be issued as consideration for the Canadian target's shares. In respect of cross-border acquisitions involving Canadian companies with shareholders resident in the United States, section 3(a)(10) of the US Securities Act of 1933 (1933 Act) provides an exemption from the registration requirement for the issuance of securities if the issuance has been approved by a court of competent jurisdiction after a hearing on the fairness of the terms and conditions of issuance, of which all of the target's security holders that may be arranged receive notice and have an opportunity to attend and be heard. The US Securities and Exchange Commission (SEC) has recognised that Canadian plans of arrangement satisfy the requirements of section 3(a)(10). As a result, a plan of arrangement is often used by purchasers if securities are being issued to any shareholders resident in the United States, since doing so permits the purchaser to complete the acquisition without filing a registration statement in the US.

In addition, Canadian foreign private issuers generally are exempt from the SEC proxy rules. Therefore, the SEC proxy rules should also not apply.

Exchangeable share transactions also may be used in cross-border acquisitions involving a Canadian target company and a foreign purchaser using share consideration. The purpose of this structure is to provide Canadian resident shareholders of the target company with a tax-deferred rollover on the exchange of their shares of the Canadian target company for exchangeable shares of a Canadian acquisition company. A roll-over is not available if the exchange is made directly for shares of the foreign parent, which may result in the selling shareholder realising a capital gain on the disposition. The shares of the Canadian acquisition company received by target shareholders are exchangeable at the holder's option for common shares of the foreign public parent. This exchangeable share structure will normally defer the taxation of the capital gain until the shareholder sells the exchangeable shares or exercises the exchange right for the publicly traded shares of the foreign parent company.

The Canada-US multi-jurisdictional disclosure system (MJDS) provides that an eligible takeover bid made for a Canadian target company in compliance with Canadian requirements will generally also comply with US federal requirements provided that certain prerequisites are met. In particular, the MJDS provides that a takeover bid that is being made for a target company that is: (i) organised under the laws of Canada or any Canadian province or territory; (ii) a foreign private issuer under applicable US rules; and (iii) not an investment company registered or required to be registered under the US Investment Company Act of 1940, may also be made in the United States to US security holders in accordance with Canadian takeover bid requirements, provided that US holders hold less than 40 per cent of the securities of the class subject to the bid. Applicable MJDS rules and forms provide for the filing of Canadian takeover bid materials, wrapped in the appropriate MJDS schedule, in order to meet US tender offer filing requirements. If the consideration offered under the takeover bid includes shares, the purchaser must also comply with the registration requirements of the 1933 Act. All bids must be extended to each holder of the class of securities in the United States and Canada upon terms and conditions not less favourable than those offered to any other holder of the same class of securities, and the transaction itself must be subject to (and not exempt from) the formal Canadian takeover bid rules.

With regard to specific laws and regulations relating to cross-border transactions, see also the description of the ICA in question 11.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

A takeover bid must remain open for a minimum of 105 days, subject to the ability of the target company consenting to a shorter bid period of

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not less than 35 days. Furthermore, the bid may be open for longer and may be extended by the purchaser. Thus, hostile takeover bids must comply with a 105-day bid period. On successful completion of the bid, if the purchaser is seeking to squeeze out non-tendering shareholders, it can do so pursuant to the procedures described in question 14.

An amalgamation, plan of arrangement or other transaction structure that requires the approval of the target shareholder at a shareholders' meeting typically requires 50–60 days in order to comply with applicable laws relating to notice periods for shareholder meetings.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Certain industries, particularly those relating to national security or those that are classified as 'cultural businesses' are subject to additional regulations. In addition, certain legislation applicable to certain industries may specify a minimum of Canadian-resident ownership. For example, the requirements of the Canada Transportation Act that currently at least 75 per cent of the voting interests of Canadian airlines must be held by Canadians and the requirements of the Telecommunications Act (Canada) that at least 80 per cent of the voting interests of certain holders of radio authorisations and broadcasting licences be Canadians.

18 Tax issues

What are the basic tax issues involved in business combinations?

Many tax issues are raised in the context of a business combination, including: (i) capital gains taxes for target shareholders and the ability to defer the payment of such taxes; (ii) exchangeable shares and the tax benefits arising from their use; (iii) the impact of withholding taxes on non-Canadian shareholders and any applicable obligations of purchasers in respect thereof; (iv) the treatment of stock-based incentive securities, including stock options; and (v) issues arising from the acquisition of control of a Canadian company (including the loss of tax carry-forwards).

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The employment relationship in Canada is governed by obligations arising from three sources: statutory law, contract provisions and common law (or Civil Code in Quebec), all of which are relevant to employee transfer issues in acquisitions. In terms of statutory obligations, most employers will be provincially regulated with respect to employment matters; therefore, such employers must comply with the provincial laws in each province in which their employees work, as opposed to a single federal law that applies to all operations across the country.

In terms of contractual obligations, it is best practice in Canada for employers to use written contracts to document their relationship with each of their employees. Written contracts can rebut certain terms normally implied at common law but cannot contract out of, or avoid, minimum statutory obligations.

With respect to the third source of obligations, all Provinces in Canada except Quebec use a common law legal system where decisions of our courts imply legal principles affecting the employment relationship, including rights related to transfer of employment. Quebec varies materially in two respects. First, it has a civil law system. Second, its French language laws require the use of French in connection with most business activities.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The Companies' Creditors Arrangement Act (CCAA) and the Bankruptcy and Insolvency Act (BIA) are the statutes that govern the restructuring of insolvent issuers. The CCAA generally offers greater flexibility for reorganisations and restructurings. CCAA proceedings are court supervised debtor-in-possession proceedings, with a goal of restructuring the debtor entities. Under the BIA, there are two common forms of court-supervised proceedings, being receiverships and bankruptcies. Receiverships and bankruptcies are not restructuring proceedings, but are designed to allow for the liquidation of a debtor's assets. In all of these proceedings, out of the ordinary course sales of all the debtor's assets are permissible. Typically, the purchaser of assets in such proceedings will receive the benefit of a Court order, approving the transaction and vesting title in the assets in the purchaser, free and clear of all existing creditor claims against the debtor entity. However, purchasers in such scenarios will not be able to rely on receiving meaningful representations, warranties or indemnities from the vendor (the debtor company, a receiver or a trustee in bankruptcy).

Usually, to approve such a transaction, the Court will require evidence that the purchaser is offering fair value. This evidence is typically provided by way of appraisals, valuations or an actual marketing process having been conducted for the assets.

In Canada, creditors' claims take priority to the claims of shareholders. Therefore, if purchasers wish to acquire the shares rather than the assets of an insolvent debtor, it will be necessary either to pay all the insolvent debtor's creditors in full, or to compromise their claims for less than the full amount of those claims. In the latter (compromise) scenario, the creditors must be given the opportunity to vote to approve the compromise of their claims.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Canada is a signatory to the 1997 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transaction (OECD Anti-Bribery Convention). The Corruption of Foreign Public Officials Act (Canada) (CFPOA) was adopted to implement the OECD Anti-Bribery Convention. Pursuant to the CFPOA, bribery of a foreign public official is a criminal offence and occurs where a person, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions. An offer alone can trigger liability for the CFPOA's bribery offence.

The CFPOA asserts jurisdiction over all Canadian citizens and corporations regardless of where the alleged offence is committed.

Update and trends

Canadian takeover bid legislation has been recently amended to increase the minimum bid period for takeover bids from 35 days to 105 days. This bid period may be reduced to a period of not less than 35 days with the consent of the target entity. These legislative amendments have significantly impacted the Canadian landscape for non-consensual (hostile) takeovers to make the Canadian takeover regime less acquiror-friendly. Previously, offerors would seek to place an offer before target shareholders as quickly as possible, and target issuers would seek to extent this period through the use of mechanisms such as shareholder rights plans (poison pills). The advent of the 105-day bid period has to a large extent obviated the utility of takeover defences such as poison pills in Canada. Moreover, the requirement for a 105-day bid period places significant risk upon the acquiror, as the target entity has a significant period of time within which to source and negotiate an alternative transaction with a white knight third-party acquiror.

In addition, the Canadian federal government continues to evaluate the thresholds for the application of the ICA to the acquisitions of Canadian businesses by non-Canadians. Recently, the Canadian government has indicated an intention to increase the review threshold for acquisitions by non-Canadians to C$1 billion from, generally, C$800 million.

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Amendments to the CFPOA in 2013 include the elimination, on a date to be determined, of the current exception for facilitation payments, which permits payments made to expedite routine acts. In the case of an individual, section 3(2) provides that the maximum penalty is imprisonment for a term of up to five years and in the case of a corporation there is no maximum fine. Penalties and sanctions arising from the violation of the CFPOA are significant and the Canadian federal government is aggressively enforcing the CFPOA. For example, in 2011 a C$9.5 million fine was issued and in 2013 a C$10.35 million fine was issued.

In relation to private corporate relationships, section 426 of the Criminal Code addresses 'secret commissions' and prohibits providing any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal. Payment of a secret commission is an indictable offence and liable to imprisonment for a term not exceeding five years.

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Cayman Islands

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1 Types of transaction

How may businesses combine?

Businesses, specifically Cayman Islands companies and limited liability companies (LLCs), may combine by any of the following means:

- acquiring a majority of the voting shares in a target company thereby giving control of the target company to the acquiring shareholder or shareholders. Such acquisitions most commonly occur by private agreement, tender offer or public takeover;
- acquiring assets of a target company with the target company ceasing to do business thereafter;
- establishing a joint venture between two businesses, either on a contractual basis or utilising a joint venture entity;
- merger or consolidation of two or more business entities pursuant to either section 233 of the Cayman Islands Companies Law (as amended) (Companies Law), or section 46 of the Cayman Islands Limited Liability Companies Law (as amended) (LLC Law), applicable to LLCs only; or
- utilising a scheme of arrangement under section 86 of the Companies Law or section 42 of the LLC Law in the case of an LLC.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The principal Cayman Islands laws relevant to business combinations are the Companies Law, the LLC Law, the common law and the Cayman Islands Stock Exchange Company Law, 1996.

In respect of the Companies Law and the LLC Law (which contain similar provisions):

- schemes of arrangement are permitted by section 86 of the Companies Law and by section 42 of the LLC Law;
- merger and consolidation provisions are set out in sections 232 to 239 of the Companies Law and in sections 46 to 52 of the LLC Law;
- a minority squeeze-out procedure is permitted pursuant to section 88 of the Companies Law and section 44 of the LLC Law subject to compliance with certain stipulated criteria; and
- an LLC may merge or consolidate with one or more exempted companies subject to compliance with certain stipulated criteria applicable to the exempted company and the LLC, pursuant to section 50 of the LLC Law.

In respect of the common law:

- the Grand Court of the Cayman Islands (the Court) has its own body of case law upon which the common law of the Cayman Islands is based;
- the Cayman Islands is a British overseas territory with the Privy Council in England as its final court of appeal. As a consequence, the authorities of courts in the Commonwealth (and England and Wales in particular), though not technically binding, are persuasive in the Court; and
- on certain points of law, such as the determination of 'fair value' as detailed below at question 14, the law of both Delaware and Canada may be influential on the Court following the decision In the Matter of Integra Group.

In respect of public offers:

- where a target has a listing on the Cayman Islands Stock Exchange (CSX), the Cayman Islands Code on Takeovers and Mergers and Rules Governing the Substantial Acquisitions of Shares (the Code) may apply. The Code is to ensure fair and equal treatment of all shareholders in relation to takeovers by providing an orderly framework within which takeovers are conducted. Those who do not conduct themselves in accordance with the provisions of the Code may be sanctioned and may find that the facilities of the CSX markets are withdrawn; and
- the offering of securities to the public in the Cayman Islands is governed by the Securities Investment Business Law (as amended) and the Companies Law.

Other regulatory statues that tend to be of application in practice but the extent of their relevance are dependent on the nature of the businesses that are being combined are:

- the Banks and Trust Companies Law (as amended);
- the Mutual Funds Law (as amended);
- the Insurance Law (as amended); and
- the Local Companies (Control) Law (as amended).

3 Governing law

What law typically governs the transaction agreements?

There is no restriction pertaining to the choice of law by contracting parties who are therefore free to choose the governing law of their contracts. In practice, the jurisdiction tends to follow the governing law of the underlying transactions and, accordingly, most commercial agreements are governed by the laws of England and Wales or a law of one of the states of the United States.

A judgment obtained in a foreign court (other than certain judgments of a superior court of any state of the Commonwealth of Australia) will be recognised and enforced in the Court without any re-examination of the merits at common law, by an action commenced on the foreign judgment in the Court, where the judgment:

- is final and conclusive;
- is one in respect of which the foreign court had jurisdiction over the defendant according to Cayman Islands conflict of laws rules;
- is either for a liquidated sum not in respect of penalties or taxes or a fine or similar fiscal or revenue obligations or, in certain circumstances, for in personam non-monetary relief; and
- was neither obtained in a manner, nor is of a kind that enforcement of which is contrary to natural justice or the public policy of the Cayman Islands.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The filings and fees in connection with a business combination will depend largely on the nature of the relevant transaction.

Where a transaction involves the merger or consolidation of entities, then the transactions must be filed with the Registrar of

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Companies of the Cayman Islands or the Registrar of Limited Liability Companies of the Cayman Islands, as applicable, and the relevant fee paid.

The prior written consent of the Cayman Islands Monetary Authority (CIMA) is required in connection with a change of control of an entity regulated by it, and, in some instances, upon a change of a shareholder or shareholders holding 10 per cent or more of the voting rights of the regulated entity.

For entities listed on the CSX, depending on the level of acquisition of shares, notifications may be required under the Code.

Cayman Islands stamp duty is payable on documents that are executed in or brought to the Cayman Islands or produced before the Court. The extent of stamp duty payable will depend upon the provisions of the relevant transaction documents.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

No information is required to be made public except where the business combination involves a takeover offer made in respect of an entity listed on the CSX or is effected by a scheme of arrangement pursuant to the Companies Law or the LLC Law.

Where the target company is listed on the CSX, an announcement of a firm intention to make an offer shall be made:

- when the board of the target company has been notified in writing of a firm intention to make an offer from a serious source, irrespective of the attitude of the board to the offer; or
- immediately upon an acquisition of shares which gives rise to an obligation to make a mandatory offer under the Code.

The announcement shall not be delayed while full information is being obtained. Additional information can be the subject of a later supplementary announcement.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

There are no public disclosure requirements for owners of shareholdings in a Cayman Islands company. There are, however, disclosures that are to be made by a company to its service providers (for example, law firms, registered office providers, accountants, etc) as part of the strict 'know your client' and anti-money laundering and anti-terrorism checks. As part of those checks, information must also be provided in respect of shareholders owning 10 per cent or more of the voting capital of such a company.

In the context of a business combination, where the purchaser would, as a consequence of the business combination, hold 10 per cent or more of the target company, then the 'know your client' and anti-money laundering checks and information required would, ideally, need to be provided in advance to the relevant service providers of the target company so as to avoid any delays to the transaction becoming effective.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The general principle, which flows from the common law of England and Wales, is that the directors of a Cayman Islands company owe their duties to the company and not to its shareholders. Directors owe a duty to, at all times, act in the best interests of the company as a whole.

Managing members of an LLC, which are the equivalent of directors in a traditional Cayman Islands company, do not owe any duty, fiduciary or otherwise, to the LLC or any member or other person in respect of the LLC other than a duty to act in good faith, which may be expanded or restricted by the terms of such LLC's limited liability company agreement (LLC Agreement). The managing members of an LLC may be expressly permitted in the LLC Agreement to act in a manner which they believe to be in the best interests of a particular member or group of members, even though it may not be in the best interests of all of the members or the LLC.

Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by a company at a time when that company was unable to pay its debts within the meaning of the Companies Law, and made or granted in favour of a creditor with a view to giving that creditor a preference over the other creditors of the company, would be invalid if made, incurred, taken or suffered within the six months preceding the commencement of a liquidation of the Cayman Islands company. Such actions will be deemed to have been made with a view to giving such a creditor a preference if it is a 'related party' of the company. A creditor shall be treated as a related party if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions. These provisions in the Companies Law apply in the same way to LLCs.

Any disposition of property made at an undervalue by or on behalf of a Cayman Islands company or an LLC and with an intent to defraud its creditors (which means an intention to wilfully defeat an obligation owed to a creditor), shall be voidable:

- under section 146(2) of the Companies Law at the instance of the company's or LLC's official liquidator; and
- under the Fraudulent Dispositions Law, at the instance of a creditor thereby prejudiced.

That is, provided that in either case, no such action may be commenced more than six years after the date of the relevant disposition.

Shareholders do not have any similar duty towards the company. However, controlling shareholders should take care not to use their dominant position to oppress minority shareholders. The same also applies for members of an LLC.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

As a general rule the requirement for shareholders/members to consent to a business combination would be subject to the terms set out in the articles of association of the target company (the Articles) (where it is a traditional Cayman Islands company), in the LLC Agreement (where it is a Cayman Islands LLC) or as set out in the contractual agreement between the transaction parties (or a combination of the contractual agreement and the Articles or the LLC Agreement, where appropriate).

Depending on the terms of the transaction, shareholder consent may be necessary, for example, where the authorised share capital of the company needs to be increased in order to issue the shares contemplated by the business combination.

A business combination effected by way of a scheme of arrangement under Cayman Islands law would require the consent of a majority in number, representing 75 per cent in value, of the shareholders or members of each class who attend and vote in person or by proxy at meetings of the holders of each class of shares or interests, as well as requiring the sanction of the Court.

In the case of a merger or consolidation involving a Cayman Islands company, the consent of at least 66.6 per cent of the voting share capital of the relevant company present in person or by proxy at a meeting of the shareholders, or 100 per cent in the case of a written resolution of the shareholders, is required.

Where the merger or consolidation involves two or more Cayman Islands LLCs, the plan of merger or consolidation must be authorised by each LLC by the approval of at least a two-thirds majority in number of the members of each LLC. The LLC Agreement may specify a higher or lower threshold for approval or another type or method of authorisation.

Dissenting shareholders to a merger may avail themselves of appraisal rights in certain circumstances where the relevant provisions of the Companies Law or the LLC Law are complied with.

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9 Hostile transactions

What are the special considerations for unsolicited transactions?

Under Cayman Islands law there are no legal restrictions on the making of a hostile bid. It should be noted, however, that since a scheme of arrangement under Cayman Islands law requires the consent of the target board of directors, utilising a Cayman Islands scheme of arrangement would not be available in a hostile bid scenario.

The Code applies to all companies, including LLCs, listed on the CSX other than open-ended mutual funds, and sets down certain provisions that should be adhered to by a bidder of a company listed on the CSX:

- an offer must be put to the board of the offeree company or to its authorised advisers;
- information about companies involved in an offer shall be made equally available to all shareholders as near as possible at the same time and in the same manner;
- favourable deals with some shareholders requires consent of the council executive of the CSX; and
- special provisions apply to share purchases made before or during an offer period.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There is no specific legislation in the Cayman Islands that prohibits or regulates the use of break-fees in transactions.

At common law, the directors of a Cayman Islands company are required to exercise their power and authority in an informed and independent fashion in what they consider to be in good faith in the interests of the company. Any agreement that conflicts with such duties of the directors may be unenforceable; however, whether or not this is the case would depend on the extent of the break-fee and the circumstances of the particular transaction. As the LLC is a very new form of Cayman company, no similar cases have yet been heard which determine the duty of managing members of an LLC in respect of the use of break-fees; however, it is likely to depend on the specific wording of the LLC Agreement.

If a break-fee is to be used, an agreement to pay a break-fee must not be outside the scope of the target company's memorandum and articles of association or the LLC's LLC Agreement. While it is usual for a Cayman Islands company to have objects set out in its memorandum of association that are unrestricted and that would permit the payment of a break-fee, the position is not always free from doubt.

There is no prohibition on Cayman Islands companies giving financial assistance to companies in order to acquire them.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The consent of CIMA is required for change of control (and in some cases a change in ownership of 10 per cent or more of the voting share capital) in respect of entities that are licensed under the Banks and Trust Companies Law (as amended), the Mutual Funds Law (as amended) or Insurance Law (as amended). In respect of companies that provide services to the public in the Cayman Islands, there are some further ownership control measures contained in the Local Companies (Control) Law (as amended), which may be relevant, but are beyond the scope of this summary.

Update and trends

The number of Cayman Islands companies incorporated on an annual basis continued to increase over the past 12 months. The increase reflects sustained economic growth internationally which has resulted in a steady flow of international M&A transactions. The use of Cayman Islands LLCs for joint ventures has been prominent since the enactment of the LLC Law and we expect this growth trend to continue over the next year. No major legislative changes or reviews are currently scheduled for the Companies Law over the next 12 months.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

As a general principle, parties are free to determine the conditions that are to apply to the bilateral purchase arrangement between them. Where the target business is regulated with CIMA, it would be expected and usual for any offer to be conditional upon the consent of CIMA to the proposed transaction.

A tender offer is an offer for the entire issued share capital of the target business, which can be made conditional on offerees holding, at least, a certain percentage of shares in the target business having accepted the offer.

A scheme of arrangement requires the approval of a majority in number, representing 75 per cent in value of a target company's shareholders of each relevant class who attend and vote in person or by proxy at a meeting of the target company, and additionally needs to be sanctioned by the Court. This threshold applies equally to members of an LLC.

Where the target company or LLC is listed on the CSX and unless a dispensation is granted, an offer should not be subject to conditions that depend solely on the subjective judgement of the offeror or the fulfilment of which is for the offeror.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

This is usually a contractual matter for the parties to determine and set out within the transaction documents. If buyer-financing is needed, then it is usual for this to be a condition precedent to the completion of the transaction.

There is no obligation under Cayman Islands law for a seller to assist in the buyer's financing, but neither is there any prohibition. Specifically in this regard, there is no prohibition on a target company providing financial assistance for the acquisition of its shares.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Where a tender offer to acquire all of the shares of the target company or LLC not held by the offeror has, within four months of the making of the offer, been approved by the holders of not less than 90 per cent in value of the shares or LLC interests affected, then:

- the offeror may, at any time within two months of the expiration of the said four-month period, give notice to any dissenting shareholder or member that it shall be entitled and bound to acquire those shares or LLC interests on the same terms;
- a dissenting shareholder or member may, within one month from the date on which such notice is given, apply to the Court for an order excluding it from the compulsory acquisition procedure;
- within one month of the notice being given to the dissenting shareholder or member (if no application has been made to the Court for an order referred to above, or if an application has been made and an order is pending, following such order being disposed of) the offeror shall provide a copy of the notice to the target company

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or LLC and pay the target company or LLC the consideration for the dissenting shares or interests upon which the register of members is updated to reflect the offeror as the owner of the dissenting shares or interests; and
- the target company or LLC holds the consideration in a separate bank account on trust for the dissenting shareholders or members.

It is also important to note that dissenting shareholders have the ability during the squeeze-out process under a takeover offer to seek fair value for their shares. The Court recently considered and handed down some much-anticipated guidance on the determination of 'fair value' in the context of a claim brought by dissenting shareholders In the Matter of Integra Group. The Court noted the significant influence of the law of both Delaware and Canada on the drafting of the Cayman Islands merger provisions and accepted the proposition that the meaning of fair value should be determined with reference to those jurisdictions.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no statutory provisions specifically regulating cross-border transactions, other than the provisions of the Companies Law and the LLC Law that address the legal requirements for cross-border mergers and consolidations involving a Cayman Islands company or Cayman Islands LLC.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In order to invoke the minority shareholder or shareholders squeeze-out mechanism described above, the tender offer must be open for at least four months. The same applies to LLCs.

The Code prescribes that the offer period should be open for at least 28 days in respect of an offer for a company listed on the CSX.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The consent of CIMA is required for change of control (and in some cases a change in ownership of 10 per cent or more of the voting share capital) in respect of entities that are licensed under the Banks and Trust Companies Law (as amended), the Mutual Funds Law (as amended) or Insurance Law (as amended). In respect of companies that provide services to the public in the Cayman Islands, there are some further ownership control measures contained in the Local Companies (Control) Law (as amended), which may be relevant.

18 Tax issues

What are the basic tax issues involved in business combinations?

There are currently no Cayman Islands income taxes, capital gains tax, withholdings, levies, registration taxes or other similar taxes imposed on business combinations in the Cayman Islands.

Stamp duty of varying levels is payable if the original of a document is executed in the Cayman Islands or brought into the Cayman Islands or brought before the Court.

No stamp duty is ordinarily payable in respect of the issuance or the transfer of shares or LLC interests.

Stamp duty at varying levels is payable in respect of the purchase of property in the Cayman Islands.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The change of control of a company is unlikely to affect the contractual terms of an employee's contract as the target company will continue to be the employer post-transaction.

There are no provisions under Cayman Islands law requiring that employees are notified of, or consulted with in respect of, any acquisition of a Cayman Islands company.

Where a target company has employees who are based in the Cayman Islands, the following laws are applicable:
- the Labour Law (2011 Revision) (as amended);
- the Immigration Law (2013 Revision);
- the Health Insurance Law (2013 Revision);
- the National Pensions (Amendment) Law 2016; and
- the Workmen's Compensation Law (1996 Revision).

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

In buying assets from a liquidator or receiver, the first question is to determine whether the appointment is valid and whether the appointee has the power to enter into the transaction.

Where a receiver or liquidator has been appointed, a purchaser is unlikely to receive substantive representations and warranties and, as a result, a high level of due diligence should be undertaken in respect of the target company. The position is a little easier in the case of an asset purchase as the due diligence can be limited to the assets under consideration. It may also be appropriate for a purchaser to consider whether the receiver or liquidator should obtain sanction from the Court (if appropriate) to complete the transaction.

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Schemes of arrangement are often used in restructurings to deal with the acquisition of assets (and they are often used in conjunction with a liquidation).

Buyers of assets from a company or an LLC in the twilight of insolvency should be aware that any subsequently appointed liquidator has the power to seek to set aside antecedent transactions where, for example, there has been a preference or a transaction at an undervalue.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Anti-Corruption Law (2016 Revision) (the ACL) was originally brought into force in January 2010 and gives effect to the United Nations Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The ACL creates a number of offences including, but not limited to, offences such as bribery of public officers and members of the legislative assembly, bribing a foreign public officer, failure to report, secret commissions and fraud on the government.

The ACL allows for varying penalties if convicted of an offence. The penalties range from US$1,000 and three months' imprisonment to 14 years' imprisonment.

Companies from the United States and the United Kingdom should ensure that they comply with the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (2010).

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China

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1 Types of transaction

How may businesses combine?

In China, 'business combination' is a legal concept – in simple terms, it generally means bringing together two (or more) separate companies into a single business.

The combination of companies can generally be divided into two types: absorption and consolidation. Absorption and consolidation are both types of merger.

Absorption is where a company absorbs another company or companies. The absorbing company will continue to exist while the company or companies being absorbed will be brought to an end.

Consolidation is where a completely new company is established and the two or more companies being consolidated are brought to an end.

For both absorption and consolidation, the remaining company shall take over all the credits and debts of the original companies.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations governing business combinations in China are as follows:

- The Company Law of the People's Republic of China (PRC), effective since 1 January 2006, revised on 28 December 2013; amendments came into effect on 1 March 2014: this law sets out some general procedures and conditions relating to business combinations, for example, the quorum required to pass a shareholder resolution with regard to a business combination.
- The Securities Law of the PRC, effective since 1 January 2006, revised on 31 August 2014: this law governs the purchase of listed companies (one of the ways of effecting a business combination).
- The State-Owned Assets of Enterprises Law of the PRC, effective since 1 May 2009. This law sets out some general requirements for combining state-owned companies: for example, an assessment of assets may be required before combination.
- The Accounting Standards for Enterprises No. 20 – Business Combination, effective since 23 July 2014: this regulation focuses on the accounting standards for business combinations.
- Circular on the Merger and Separate Establishment of Foreign Investment Enterprises, effective since 1 November 1999, recently revised on 28 October 2015: this regulation sets out the conditions, requirements and procedures around the combination of foreign-funded businesses.
- Notice of the Ministry of Finance and the State Administration of Taxation on Several Issues Concerning the Enterprise Income Tax Treatment on Enterprise Reorganisation, effective since 1 January 2008: this regulation stipulates the treatment of enterprise income tax in relation to enterprise reorganisations.
- Announcement No. 4 [2010] of the State Administration of Taxation – Measures for the Enterprise Income Tax Administration of Enterprise Reorganisations, effective since 1 January 2010: this regulation sets out relevant tax matters in relation to enterprise reorganisations.
- Anti-Monopoly Law effective from 1 August 2008 as certain business combinations may also trigger a review by the Anti-Monopoly Bureau, which is a part of the Ministry of Commerce.

3 Governing law

What law typically governs the transaction agreements?

In general, PRC laws govern transaction agreements with regard to business combinations taking place in China. According to articles 22 and 24 of the Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors (revised in 2009), the equity purchase agreement, capital increase agreement and assets purchase agreements should be governed by Chinese law.

Contract Law of the PRC expressly provides that three types of contract shall be governed by PRC laws only: Sino-foreign equity joint venture contracts, Sino-foreign contractual joint venture contracts and Sino-foreign cooperation contracts on developing natural resources.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Filings

All company combinations shall be filed with the local Administration of Industry and Commerce (AIC) of the city where the company is consolidated or absorbed. They shall also be filed with the authorities issuing the relevant company certificates (eg, tax bureaux) if the combination results in the establishment of a new company or in any change on such certificates.

Prior approval is required for specific companies as follows:

(i) business combinations relating to solely state-owned companies shall be approved by the State-owned Assets Supervision and Administration Commission (SASAC). In addition, a business combination in relation to important solely state-owned companies must also be approved by the People's government of the city where the company is incorporated after examination by the SASAC; and

(ii) a business combination in relation to foreign-funded companies shall be approved by the local Commission of Commerce).

Fees

There are no statutory fees or taxes charged for the approval or registration of business combinations.

However, a registration fee for a company's establishment will be charged by the AIC. Registration is free from 1 January 2015; the registration fee for a company change is a fixed amount (usually 100 yuan) per registration.

If the business combination is effected via share transfer, income taxes may be imposed on the seller on the income deriving from the sale of its shares.

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5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

For companies without a foreign investor, all the creditors shall be informed about the decision to combine within 10 days and the decision to merge shall be announced in a newspaper (usually locally) within 30 days of the resolution of combination being executed.

For foreign-funded enterprises, all the creditors shall be informed of the decision to combine within 10 days and the decision shall be announced at least three times in a provincial or upper level newspaper published nationwide within 30 days of the preliminary approval being made by the competent administration. After registration of the business combination, an announcement about such registration shall also be published in a nationwide published provincial or upper level newspaper within 30 days of the company change being registered or a new business licence being issued.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

There is no specific requirement for disclosure of large shareholdings in an ordinary company except the following for listed companies:

- Any investor owning a shareholding reaching 5 per cent of the issued shares of a listed company shall report such shareholding to the China Securities Regulatory Commission (CSRC) and to the Stock Exchange, shall inform the listed company and announce such shareholding via the local agency of the CSRC within three days of such shareholding threshold being reached.
- Any investor holding 5 per cent or above of the issued shares of a listed company shall report and announce its shareholding for every 5 per cent increase or decrease in the issued shares in accordance with the above- mentioned procedure.

In addition, an investor shall disclose further information as follows.

If it holds more than 5 per cent but less than 20 per cent of the issued shares of a listed company while it is the first majority shareholder or actual controller of the listed company, or if it holds more than 20 per cent but less than 30 per cent of the issued shares in a listed company, it shall disclose:

- the structure of the controlling shareholder, actual controller and the controlling relationship of the investor and his or her partner;
- the price of obtaining the relevant shares, the required capital amount, the source of the capital, or other payment arrangement;
- whether there is competition, continuous transaction between the business of the investor and the listed company; if any, whether the corresponding arrangement is conducted to ensure the independence of the listed company;
- the subsequent plan for the adjustment of the assets, business, personnel, organisation or articles of association of the company in the coming 12 months;
- any important transaction between the investor and the listed company during the past 24 months; and
- evidence and documents demonstrating the good faith of the investor.

If the purchaser's shareholding reaches 30 per cent of the issued shares in a listed company and it continues to purchase shares, it shall issue an offer of purchase to all the shareholders of the listed company. However, in the event that the shareholding exceeding 30 per cent is due to the business combination being approved by the government or SASAC, such shareholder may apply to the CSRC for an exemption from the offer procedure.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

There are no specific duties of the directors, managers or controlling shareholders of an ordinary company, while the following duties apply for listed companies:

General duties

The directors and managers of a listed company shall be loyal and diligent to the company, and shall be fair and equitable to all the purchasers.

The controlling shareholder of a to-be-purchased listed company shall not harm the company or the other shareholders by abusing its shareholders' rights.

Regarding purchase by offer

The board of directors of a listed company shall examine and investigate the identities and credit situations of the purchasers, advise the shareholders on whether to accept the offer to purchase and hire independent financial consultants for professional advice.

The board of directors shall submit the report of the board and the professional advice of the independent financial consultant to the CSRC within 20 days of receiving the offer of purchase.

After the purchaser announces the offer and before the purchase is completed, the board of directors shall not, without the approval of the shareholders' meeting, dispose the assets of the company, or adjust the main business of the company, or provide guarantees or loans on behalf of the company, or take any other actions that seriously affect the assets, debts, rights or operation of the company.

The directors of the company to be purchased shall not resign during the purchase period.

Regarding purchase by agreement

The board of directors of a listed company to be purchased shall disclose promptly any situations that may damage the company. For example, the board of directors shall disclose if the controlling shareholder has not paid off a debt to the company, or if the guarantee provided to the company has not been released.

The controlling shareholder, who intends to transfer his or her shares of the listed company to the purchasers by agreement, shall investigate the identity, credit situation and offer from the purchasers and disclose information of such investigation in a report regarding the change of shareholding.

Regarding indirect purchase

If the actual controller and the shareholder controlled by the actual controller of the listed company do not report or announce such controlling relation, the board of directors of the company shall refuse the proposal submitted by such controller or shareholder, and shall report such situation to the CSRC and the Stock Exchange.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Shareholders have the power to approve the resolution of business combination. Specific requirements are as follows:

- for limited liability companies, the business combination shall be approved upon by at least two-thirds of all the shareholders with voting rights, whether present at the shareholders' meeting or not; and
- for companies limited by shares, the business combination shall be approved upon by at least two-thirds of all the shareholders with voting rights present at the meeting.

There is no specific regulation regarding the appraisal or similar rights of the shareholders in business combinations.

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9 Hostile transactions

What are the special considerations for unsolicited transactions?

The laws and regulations of the PRC do not expressly define the term 'hostile transactions' or stipulate detailed countermeasures for hostile transactions.

However, the considerations of disclosure of substantial shareholdings in question 6 cover the unsolicited transactions.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There is no statutory 'break-up fee' stipulated by Chinese laws and regulations.

However, regarding limited liability companies, if any of the shareholders wants to transfer his or her shares to a third person, or the company is proposed to be combined with other companies, the other shareholders who disagree with such transfer or combination could have the following options to restrict the 'break-up' or transfer, according to PRC Company Law:

- to purchase the shares to be transferred at the equivalent price offered by the third person; or
- to request the company to purchase their shares at a reasonable price.

Besides the above-mentioned regulations, the 'break-up fees' could also be based on the termination and damage terms, if any, in the joint venture agreement between the shareholders. The parties of a contract could either set a fixed amount or rate of liquidated damages for the break-up or stipulate that the damages shall be subject to actual losses therefrom.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Government agencies do influence or restrict the completion of a business combination if it relates to solely state-owned companies or state-owned assets. See (i) under 'Filings' in question 4.

Such regulations are believed to aim at protecting state-owned assets for the purpose of national security.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In practice, there are various types of transaction that occur in China, such as leveraged buyouts, venture capital, mezzanine capital and growth capital transactions, angel investments and private investment in public equity.

Financing may be conditional in a cash acquisition.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

The buyer and the seller shall include all the transaction details (ie, term, conditions, period) in the transaction agreements. In China, most of the certificates, application letters and reports shall be submitted to the relevant and competent authority for approval. As a consequence, the seller is responsible for providing the related documents to the buyer or the relevant authority, such as the company's business licence, the audit report, the verification report, the asset assessment report, the resolution of the board of directors or shareholders, the proof of tax payments, etc.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

According to the laws and regulations of the PRC, minority stockholders may be evicted.

In a limited liability company, stock can be transferred among stockholders. However, if the stockholder wishes to transfer to any non-stockholder, he or she shall be subject to the approval of more than half of the other stockholders. The stockholder shall notify the other stockholders in written form about the transfer of stock for their approval. If any of the other stockholders fails to give a reply within 30 days after the receipt of the written notice, it shall be deemed to have agreed to the transfer. If half or more of the other stockholders disagree with the transfer, the stockholders who disagree with the transfer shall purchase the stock to be transferred. If they refuse to purchase shares, they shall be deemed to have agreed to the transfer. Under the same conditions, the other stockholders have a pre-emptive right to purchase the stock rights to be transferred upon their approval.

In a joint-stock limited company, stock shall be transferred to anyone in a lawfully established stock exchange or by any other means as prescribed by the State Council. In addition, the stock held by the initiators shall not be transferred for a period of one year starting on the day of incorporation of the company.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Apart from the limitations on foreign investments, China adopts a strict foreign exchange control policy which brings complexity to cross-border transactions if the target company is a Chinese public company. The foreign acquiring party must apply for approval to open a bank account in foreign currency in order to receive capital for the transaction with the local Administration of Foreign Exchange where the listed company is located within 15 days upon its receipt of the official approval from the Ministry of Commerce. All transactions must generally be completed within 180 days upon receipt of the official approval. If the foreign acquiring party fails to complete the whole transaction within the above time limit, the official approval will become invalid automatically. The foreign acquiring party shall, upon the approval of the Chinese Administration of Foreign Exchange, purchase foreign currency and remit the capital abroad.

The Catalogue of Industries for the Guidance of Foreign investment was issued jointly by the National Development and Reform Commission and the Ministry of Commerce to regulate the restricted and prohibited industry to foreign investments. For example, the industry of production of radio, television programmes and movies only allows foreign investments in the form of cooperative joint venture. For press organisations, foreign investments are completely forbidden. Hence, it is suggested that the foreign investor should first check whether the industry to be entered is restricted or forbidden to foreign investments.

Specific laws and regulations apply to cross-border transactions:

- Interim Provisions on Restructuring State-owned Enterprises with Foreign Investment, which took effect on 1 January 2003;
- Ministry of Commerce on Promulgation of the Provisions on M&A of a Domestic Enterprise by Foreign Investors, which took effect on 22 June 2009;
- Provisions for the Alteration of Investors' Equities in Foreign-funded Enterprises, which took effect on 28 May 1997; and
- the Catalogue of Industries for the Guidance of Foreign Investments (revised in 2015), which took effect on 10 March 2015.

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16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

As mentioned in question 15, the foreign acquiring party must apply for approval to open a bank account in a foreign currency in order to receive capital for the transaction with the local Administration of Foreign Exchange where the listed company is located within 15 days upon its receipt of the official approval from the Ministry of Commerce. All transactions must generally be completed within 180 days upon receipt of the official approval.

In addition, when merging a domestic enterprise to establish a foreign investment enterprise, the foreign investor shall, within three months upon the day the foreign-funded invested enterprise's business licence has been issued, pay all the consideration to the shareholders who transfer to them equities or to the domestic enterprise which sells the assets. In the case of any particular circumstance under which such period would need to be extended, the foreign investor, upon approval by the relevant authority, shall pay 60 per cent or more of the consideration within six months as of the day the business licence of the foreign-funded enterprise has been issued, and shall pay in full the consideration within one year, and the proceeds shall be distributed according to the proportion of investments it has actually contributed.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The most important industry specific regulatory scheme in China is the Catalogue for Guidance for Foreign Investment (CGFI), which indicates the Chinese government's directions in controlling foreign investments. Industries have been classified into four different categories: allowed, encouraged, restricted and prohibited.

For restricted industries, these categories also reflect the extent to which foreign participation is allowed when investing in China. For example, foreign shareholdings in a life insurance company shall not exceed 50 per cent, and those in a securities company shall not exceed one-third of the total shares, and the Chinese shareholder shall be the majority shareholder of a joint-venture security company (articles 7.2 and 7.3 of the Restricted Industries section of the CGFI). These may represent limits on potential targets and may have an impact on investment strategies, as exit strategies are more difficult to implement when one is not the majority shareholder.

18 Tax issues

What are the basic tax issues involved in business combinations?

The main taxes due in case of business combinations are described below.

Stamp duty

Stamp duty shall be charged to the buyer and seller at a rate of 0.05 per cent of the consideration for the transfer of shares.

Individual tax

The shareholders of the target company (both individual and corporate) shall also be subject to income tax, whether individual (article 2 of the Individual Income Tax Law) or enterprise (article 3 of the Enterprise Income Law), based on the purchase price of the transaction; however, none of the parties shall pay any business tax (article 1 and 2 of the Circular Caishui (2002) No. 191).

Value added tax (VAT)

Under Chinese tax laws, a share acquisition is more tax-effective than an assets acquisition. For instance, when purchasing tangible assets, VAT shall apply to the purchasing party according to the tax rate applicable to each type of asset (article 1 of the Interim Regulations of the PRC on VAT). When transferring ownership of real estate or intangible assets, the business tax was replaced by the VAT. The transferring ownership of real estate is subject to 11 per cent VAT, while the transferring of intangible assets is subject to 6 per cent VAT and the buyer shall pay a deed tax varying between 3 per cent to 5 per cent if the assets involve land-use rights or property titles (articles 1 and 3 of the Interim Regulations of the PRC on deed tax).

The payment method further influences the tax payable in a transaction. In the event that the buyer will pay by cash, the cash received by the shareholder of the target company shall be subject to income tax. If the acquirer pays with unconvertible bonds, the interest earned on the bonds received by the shareholder shall also be subject to income tax, but the interest paid by the acquirer shall be deducted prior to taxation. If the acquirer pays with convertible bonds, the acquirer can defer the process of converting the bonds to shares. By doing so, the interest paid by the acquirer shall be deducted from the taxable amount and the tax on capital gains from the conversion shall also be deferred, which is beneficial to the acquirer.

Finally, if the transaction was carried out through the swapping of shares, it shall be exempted from income tax, as no actual monetary income was earned as a result of the transaction.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Mergers and acquisitions of a company will not directly influence the current employment relationship between the acquired company and its employees If the new shareholder wishes to terminate the employment relationship with the employees, severance pay shall be given in accordance with the related labour laws and regulations (articles 47 and 87 of the Employment Contract Law of the PRC). Employment issues, especially the compensation of senior managers of the target company or the compensation to settle the laid-off employees in a state-owned enterprise are important issues to be addressed in the purchase agreement and may sometimes influence the costs of the entire transaction.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

According to the Company Law of the PRC, all the debts of the acquired company shall be borne by the acquiring company or the new company after combination. Therefore, a due diligence report issued by a law firm, a verification report issued by an accounting firm and other relevant documents (ie, asset certificate of the acquired company) are necessary and taken into account to determine the total amount of debts.

Update and trends

The government is strengthening the control over foreign exchange. On 28 December 2016, the People's Bank of China (the PBOC) promulgated a new order – Administrative Measures for the Reporting of Large-value and Suspicious Transactions by Financial Institutions (Revised in 2016) (the Measures), which is to be implemented on 1 July 2017. In particular, the Measures lower the threshold for the reporting of the large-sum transactions.

In March 2017, the vice-president of PBOC, Mr Pan Gongsheng, commented that 'in 2016, China's overseas direct investment increased rapidly. And the purpose of some enterprises' oversea investment in foreign football club is to transfer asset overseas.'.

Sino-Europe Sports' acquisition of AC Milan Football was supposed to be completed at the end of 2016. However, under the above background, the transaction was delayed to March 2017 and was close to collapse. To avoid the control over foreign exchange, the deal is finally closed and it is said that the buyer resorted to a US hedge fund.

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21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

There are no specific rules relating to anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations, therefore, general rules of criminal law on corruption, bribery and economic sanctions will apply to business combinations.

As to corruption, it is only applicable to any state functionary, and any person authorised by state organs, state-owned companies, enterprises, institutions or people's organisations to administer and manage state-owned property who, by taking advantage of his or her office, appropriates, steals, swindles public money or property or by other means illegally takes it into his or her own possession. The threshold of the crime is 5,000 yuan or above, or the amount is less than 5,000 yuan, but the circumstances are relatively serious.

As to the bribery, it is applicable to any individual or legal entity who offers money or property to any state functionary, any person authorised by state organs, state-owned companies, enterprises, institutions or people's organisations to administer and manage state-owned property, and any state organs, state-owned companies, enterprises, institutions or people's organisations for the purpose of gaining illegal benefits. Bribery is defined as illegal benefits obtained by blackmailing.

In addition, corruption and bribery are subject to financial sanctions. Any person who takes into his or her own possession illegal gains derived from bribery shall be convicted and punished in accordance with the Criminal Law.

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Colombia

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1 Types of transaction

How may businesses combine?

Business combinations may be structured in many different ways in Colombia. A business combination will take place whenever there is a merger; a consolidation; a direct or indirect control acquisition over any given company or, in general, any kind of legal or economic concentration; or any market integration executing any agreement that results in a market concentration. The most commonly used business combinations, among others, are:
- share purchases;
- asset purchases;
- mergers, that is, absorption of a given company by another company or amalgamation of companies, always with stock considerations (except in simplified corporations in which the consideration can be in cash, stock or stake in any other company or any other asset);
- purchases of going concerns (commercial establishments);
- public tender offers (OPA);
- incorporation of a joint company by competitors;
- acquisition of control (consolidation);
- spin-off of a division that is thereafter merged into another company; and
- joint venture or collaboration agreements (different from the incorporation of a joint company by competitors), provided that they: eliminate a competitor from the market indefinitely or for a long term, changing the structure of the relevant market; unify a line of business or a market and not just specific activities made on a daily basis; and that it has full function in the market or has the potential to develop in an autonomous way in the market. If such agreements are made for a defined short or medium term, and either actual or potential competition is maintained between competitors, the joint venture will not be subject to business combinations regulation but to the restrictive agreements and dominance provisions of antitrust regulation which are reviewed under an ex-post analysis by the Superintendency of Industry and Trade.

A business combination can be of the following two types:
- horizontal integration: whenever it takes place between companies that perform the same or similar economic activities (such as whenever it occurs between competitors); and
- vertical integration: whenever it takes place between companies that participate in the same economic process but in different stages of the value chain (such as whenever it occurs between a manufacturer and its suppliers of raw materials or its distributors).

Irrespective of the legal form of the transaction, a business combination is considered to take place whenever there is a horizontal transaction between competitors and competition ceases in a market on which before the transaction competition existed, and after the transaction competitors are considered as a single market agent; and whenever there is a vertical transaction among agents in different levels of the production, distribution or commercialisation chain and after the transaction competitors are considered as a single market agent and competitors are foreclosed by limiting their access to sources of supply or to customers.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Colombia has issued the following regulations governing business combinations:
- the Code of Commerce and Law 222 of 1995, which regulates share purchases, asset purchases, mergers, spin-offs and purchases of going concerns in general;
- the Organic Statute for the Financial System and its amendments, which governs the different business combinations of financial institutions, for example, banks, financial corporations, etc;
- the Regulations of the Finance Superintendency, in particular Decree 2,555 of 2010 with all of its amendments, governs the business combinations of public listed companies, such as OPA; and
- Law 155 of 1959, Decree 1,302 of 1964, Decree 2,153 of 1992, Law 1,340 of 2009 and the regulations of the Superintendency of Industry and Trade, in particular the Unified Circular and Resolution 10,930 of 2015 and the guidelines for merger review, regulate antitrust clearance proceedings.

Moreover, the Superintendencies of Companies and of Finance have specific circulars that regulate the procedures to obtain their authorisation in order to amend the by-laws of companies subject to its supervision or control in the case of mergers, spin-offs, changes of type of company, capital reductions, etc.

Privatisation processes of government companies are governed by Law 226 of 1995.

In addition, the Finance Superintendency has specific antitrust procedures for business combinations among financial institutions, and Aerocivil regulates certain specific types of business combinations in the air transportation industry, such as code-sharing agreements, joint operations, use of charter aircraft and exchange and blocking of slots.

For simplified corporations, created by Law 1,258 of 2008, there is a special merger procedure whenever a merger takes place between a parent company that has a shareholding interest of more than 90 per cent and its subsidiary. In this case the merger may be approved by the officers of the company or by the board of directors. Furthermore, the regulation of simplified corporations allows for consideration to the shareholders in the case of a merger to be made in cash, stock or stake in any other company or any other asset.

3 Governing law

What law typically governs the transaction agreements?

In addition to the laws and regulations described in question 2, as a general principle, all transactions carried out in Colombia between Colombian companies must be governed by Colombian law. Nevertheless, whenever foreign companies participate in transaction agreements, the governing law may be agreed among the parties if Colombia is not the place of performance of the agreement's obligations; however, regulatory issues regarding financial institutions, telecommunications, television, agriculture, energy and air transportation, as well as securities and antitrust laws, when applicable, will govern specific matters of transaction agreements.

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In that sense, it is important to point out that in some industries there are specific regulations setting limits to concentrations or vertical integrations, such as energy and gas, health providers and financial institutions.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

In general, a request for clearance for the business combination must be filed with the Superintendency of Industry and Trade for an ex-ante analysis for antitrust purposes whenever there is a business combination under which at least one of the following thresholds are met:

Subjective thresholds

- The relevant companies pursue the same economic activity (horizontal transactions), or;
- the relevant companies are part of the same value chain (vertical transactions). Vertical transactions in each market are analysed separately to determine whether the transaction is reportable.

Objective thresholds

- The combined annual operational income is equivalent to the amount established from time to time by the Superintendency of Industry and Trade (for 2017, 60,000 times the minimum legal monthly wages – 44.2 billion Colombian pesos – or more); or
- the total combined assets of the relevant companies is equivalent to the amount established from time to time by the Superintendency of Industry and Commerce (for 2017, 60,000 times the minimum legal monthly wage – 44.2 billion Colombian pesos – or more).

If none of the above-mentioned subjective and objective thresholds are met, the business combination does not require any type of clearance procedure with the Superintendency of Industry and Trade.

However, if the business combination meets at least one of the subjective and one of the objective thresholds but the combined market share held by the parties involved is less than 20 per cent of the relevant market, the business combination only needs to be notified in advance to the Superintendency of Industry and Trade. Under current regulations, once the notification is filed the parties may close once the Superintendency acknowledges receipt of the notification. However, if the market definition or the market shares informed by the parties are proven incorrect, the Superintendency may require the parties to conduct a full pre-evaluation filing if closing has not occurred or it will begin a proceeding to sanction the parties if the transaction has already closed.

If the business combination meets the thresholds and equals or exceeds 20 per cent of the relevant market, the procedure for antitrust clearance is subject to the following rules:

- pre-evaluation filing (phase 1): the parties interested in obtaining antitrust clearance must file a summary of the business combination and a pre-evaluation filing with the Superintendency of Industry and Trade;
- review of the pre-evaluation filing: the Superintendency has 30 business days to determine whether the business combination is approved without further information requirements or whether a full review must be carried out; or
- full evaluation filing: if the Superintendency decides that a full (phase 2) review must continue, the interested parties must file all the information required for its complete study. After the complete filing is made, the Superintendency of Industry and Trade has three months to decide if it approves, rejects or imposes conditions for its clearance. If the Superintendency fails to issue a decision within three months as of the date when information required for the phase 2 analysis, the transaction is deemed as authorised.

Pursuant to Law 1,340 of 2009, the Superintendency of Industry and Trade is the only government antitrust authority responsible for issuing antitrust clearance when applicable, with the exceptions of business combinations among financial entities under the supervision of the Finance Superintendency and in certain business combinations in the air transport industry. Regarding combinations of financial entities, the Finance Superintendency will decide on the antitrust clearance, but in any case it will first require a non-binding preliminary opinion from the Superintendency of Industry and Trade. In the air transport industry, Aerocivil has authority to approve business combinations, whenever they consist of code-sharing agreements, joint operations, use of charter aircraft or exchange and blocking of slots. If the business combination has the structure of a merger or a spin-off, the legal procedure for amending the by-laws of the interested companies will be authorised by the Superintendencies of Companies or of Finance, as applicable. For non-financial companies, by-law amendments for mergers and spin-offs shall only be previously authorised by the Companies Superintendency for companies subject to its supervision or control, whenever the companies involved fall within any of the categories expressly listed in External Circular 001 of 2007 (prior authorisation regime), issued by said Superintendency. If no authorisation is required, certain documents have to be submitted to the Superintendency of Companies, including a special report addressed to the creditors (automatic authorisation regime) pursuant to External Circular 220-007 of 2008 of the referred authority.

In the case of takeovers or bids for listed companies, a bid must be filed with the Finance Superintendency for the acquisition of 25 per cent of the outstanding shares with voting rights of the listed company, and if a beneficial owner holds at least 25 per cent it will also be required to file a bid if it intends to increase its interest in more than 5 per cent of the outstanding shares with voting rights. In any case, the minimum bid allowed is for 5 per cent of the outstanding shares with voting rights of a listed company.

Furthermore, a filing before the Finance Superintendency must also be made for the approval of share purchases of 10 per cent or when a shareholder with a 10 per cent interest acquires any number of additional shares of a financial, insurance or stockbroker institution.

The above-mentioned filings would only entail governmental fees when the antitrust clearance is subject to conditions set forth by the Superintendency of Industry and Trade. In this respect, Law 1,340 and Resolutions 66,916 of 2009 and 72,896 of 2010 of the Superintendency of Industry and Trade set forth the requirement of a 'follow-up fee' for the agency to periodically review the fulfilment of the conditions imposed for a business combination.

Furthermore, depending on the type of legal operation, business combinations may incur one or more of the following: notary fees of 0.3 per cent, registration tax at the Chamber of Commerce of 0.7 per cent and registration tax of 1.5 per cent in the real estate registry.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

If the business combination is a merger, spin-off or sale of a going concern an advertisement including the particulars of the companies and the amount of their assets and liabilities must be published in a national newspaper and a written notice must be sent to the creditors of the companies involved. Merger and spin-offs of companies under the general authorisation regime shall prepare, and post at the companies' domicile, a special report addressed to the creditors disclosing the following information:

- financial statements of the companies;
- appraisal of their assets;
- status and amount of existing pledges or encumbrances over assets;
- judicial proceedings actually pending against the companies and the amounts of their respective provisions;
- description of the assets and liabilities to be transferred; and
- description of the methodology used to appraise the companies and the synergies that will result from the merger or spin-off.

Under applicable Securities Regulation, listed companies are generally required to inform the market through the Finance Superintendency of all material information in a truthfully, clearly and in good time. Any events related to the merger or acquisition of a company must be reported. Disclosure duties entail all material information that would have been reviewed by a prudent and diligent expert to decide whether to buy, sell or keep certain securities related to the proposed business combination.

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As mentioned above, business combinations that entail a market integration, in which the companies hold less than 20 per cent of the relevant market, need only be notified in advance to the Superintendency of Industry and Trade, and the following information will have to be provided:

- the parties of the business combination;
- the structure of the transaction;
- the definition of the relevant market (product and geographical markets) or the affected markets and the criteria used for such definition;
- the competitors in the relevant market;
- the market share in the relevant markets of the parties of the business combination and its competitors, and the methodology and sources used for such calculation. The complete calculations or studies used should be filed before the Superintendency of Industry and Trade;
- the indication of the specific legal provisions that set forth maximum market shares in the relevant market or that restrict a party involved in the transaction; and
- the certificates of incorporation, good standing and incumbency of the company and the corresponding powers of attorney, in case the filing is made through attorneys in fact.

In the case of business combinations entailing a market integration of 20 per cent or more of the relevant market, a request for clearance of the business combination must be filed before the Superintendency of Industry and Trade for antitrust purposes with a pre-evaluation filing (phase 1), that needs to include very detailed information regarding:

- the structure of the business combination and the intervening parties;
- the relevant market (product and geographical markets); and
- the competitors, distributors and retailers of the relevant market.

If the Superintendency decides that a full (phase 2) review must be made, then the following additional and detailed information has to be filed:

- the structure of the relevant market;
- the existing barriers to entry to the market; and
- the raw materials or inputs required for the production.

During the beginning of the antitrust pre-evaluation filing (phase 1) notification of the business combination will be published on the Superintendency's website and the Superintendency may also order it to be published in a nationwide or regional newspaper to allow third parties to intervene in the proceedings. A redacted version of the decision from the Superintendency (clearing, clearing with conditions or blocking the operation) will also be published on its website. However, the parties of the business combination may request to the Superintendency to waive the publication requirement based on reasons of public order and evidence of risks arising out of the publication. The Superintendency may either accept or reject the request to avoid the publication of the transaction.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

In all mergers and spin-offs, all of the shareholders have an inspection right to review the basis of the operation, such as the merger agreement, the spin-off project, the appraisal of the companies and the financial statements. Individuals or a group of individuals representing one beneficial owner who intends to acquire 25 per cent or more of any given listed company are required to make a public disclosure of their intent through a public offer (known as an OPA). Likewise, a beneficial owner that holds 25 per cent or more of a listed company is required to make a public disclosure of the intent to acquire 5 per cent or more of such company through an OPA. During the six months following the disclosure of an OPA, any stockholder may solicit the offeror to provide information pertaining to the proposal and request the offeror to acquire their stock.

In the event of an OPA, documentation must be filed with the Finance Superintendency as follows:

- the offering memorandum;
- draft of the OPA advertisement;
- board of directors resolution authorising the interested party to submit the OPA;
- certificate of incorporation and good standing issued within the past three months;
- copy of the clearance required from any other Superintendency (for example, the Superintendency of Industry and Trade), if applicable;
- representation made under oath by the interested party stating that there are no other pre-agreements different from those disclosed in the offering memorandum; and
- any other documents or additional information requested by the Finance Superintendency to verify that the purposes of the law are satisfied. A copy of the disclosed pre-agreements should be filed, along with the other OPA documents.

Special rules apply to concurrent offers and exchange offers.

In the event that 100 per cent of the stockholders have previously agreed in writing to sell or buy, the OPA mandatory procedures would not be applicable.

Regarding concurrent offers, see question 9 about unsolicited transactions.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

According to the Code of Commerce, directors and managers have the legal representation of the company, with the limitations and powers established in the by-laws. Their duty is to act with loyalty, good faith and due diligence.

As a general rule, only mergers, spin-offs, capital reductions, changes in the type of legal entity and the approval of financial statements required for initial public offerings must be approved at the shareholders' meeting; however, the by-laws may contemplate their approval for other types of business combinations such as asset sales or purchases, entering into joint venture agreement, etc.

Further, directors or managers shall guarantee that shareholders have the right to inspect the company's records before a shareholders' meeting in order to approve the above-mentioned business combinations or whenever financial statements of the company must be approved. Also, the agenda of shareholders' meetings where a merger, spin-off or changes in the type of legal entity shall be approved must include specific consideration of the withdrawal right to which dissident or absent shareholders are entitled if the transaction lessens their economic rights or implies higher liability for such shareholders. In these cases, the board of directors shall take into account the best interests of the company when making its recommendation.

The directors and managers must protect the rights of the minority shareholders whenever a shareholders' meeting decision may unjustly affect their rights. The same duty is imposed on the controlling shareholders. Corporate decisions, which may be considered as an abusive exercise of the majority or minority rights, can be voided by the Companies Superintendency. Exercising the shareholders' rights with the intent of harming the company or another shareholder may also be declared as an illegal act by the Companies Superintendency. Parties harmed by the conducts of other shareholders are allowed to file claims before the Companies Superintendency to seek compensation for any damages they suffered.

Whenever a business combination involves a merger, a spin-off or a purchase of going concerns, a public advertisement including their particulars shall be published. In addition, a special communication will be sent individually to each creditor in the case of mergers and spin-offs. The purpose of this information is to allow creditors to request additional guarantees for their credits if deemed necessary.

Controlling shareholders have the duty to register either the situation of control or the entrepreneurial group before the corresponding chamber of commerce within 30 days after control is acquired. A situation of control arises when, among other cases, the controlling shareholder: holds more than 50 per cent of the share capital of the controlled

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company; holds voting right for the majority of the votes required to take a decision in a shareholders' assembly or board of partners or to appoint the majority of members of a board of directors; or is allowed to exercise a dominant influence in the decisions of the directors or managers of a company owing to a contract or another legal obligation.

An entrepreneurial group comes about when, in addition to the situation of control, there is a sole direction and purpose between the controlling shareholder and the controlled company.

The following obligations arise under a situation of control:

- controlling shareholders will consolidate financial statements between the controlling company and the controlled companies if they are all domiciled in Colombia. If the controlling company is not domiciled in Colombia, the controlled company domiciled in Colombia with the highest equity will consolidate the financial statements with all other controlled companies domiciled in the country. Such consolidated financial statements will be approved by the corresponding shareholder assemblies or board of partners and if required submitted to the appropriate Superintendency and to the tax authority (DIAN);
- controlled companies shall not hold shares or quotas in the controlling companies. Any such transactions will be considered legally ineffective;
- the corresponding superintendency may verify the transactions made by the controlling shareholder and the controlled company which could be considered unreal or made in terms different to arm's-length principles, and against the interest of other shareholders of the controlled company or of third parties. The superintendency may impose fines or order the suspension of such transactions;
- a controlled company may only pay stock dividends to the shareholders that expressly accept it;
- reorganisation or judicial liquidation proceedings may be initiated for all or some of the controlled companies;
- under reorganisation proceedings the reorganisation agreements shall be approved by external creditors, which excludes creditors that are part of the same situation of control or entrepreneurial group; and
- controlling shareholders may be held ancillary liable for the liabilities of the controlled company, if the reorganisation or judicial liquidation proceedings of the controlled company are brought about by acts made by the controlling shareholder on its own benefit or for the benefit of any of its affiliate companies and against the interest of the controlled company.

For entrepreneurial groups, in addition to the obligations mentioned above for situations of control, a special report with regard to the intensity of the economic relations between the companies pertaining to such group shall be prepared by the directors and managers of the controlling and controlled companies and submitted for approval by the corresponding shareholders assemblies or board of partners.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

As a general rule, only mergers, spin-offs, capital reductions and changes in the type of the corporate structure and the financial statements required for initial public offers must be approved at a shareholders' meeting. In these cases, the general principle is that the quorum and majorities are the following:

- quorum: two or more shareholders jointly accounting for over 50 per cent of the company's shares must be present or represented at the shareholders' meeting in order to validly undertake any discussion pertaining to the company's affairs. Except for listed companies, the by-laws may establish a higher quorum for the approval of such decisions; and
- majority: shareholders may approve a business combination when the majority of the votes at the meeting are affirmative.

Nevertheless, the by-laws or shareholders' agreements may require the shareholders' approval for other types of business combinations.

In the case of a merger, spin-off or change of type of corporate structure of the company that entails a higher liability for the shareholders or implies that it lessens their economic rights (for example, the share participation of the shareholder in the company is reduced, the market value of the share is reduced or the nominal value of the share is reduced, provided that there is a capital reduction, or the negotiability of the shares is limited or decreased), the dissident or absent shareholders are entitled to a withdrawal right. The shares of the withdrawing shareholder shall be offered to the remaining shareholders at pro rata of their share participation. If the shares are not entirely acquired, the company will acquire them as long as there are liquid profits or a special reserve has been created for such purpose. The prices of the shares shall be agreed between the parties, and if no agreement is reached, it shall be subject to expert appraisal. In the event of mergers or spin-offs the shareholders must approve the appraisal of the companies involved.

In the event of mergers of financial institutions, minority shareholders who hold no less than 5 per cent of the outstanding shares of one of the intervening companies may request an independent appraisal of the companies involved, which shall be mandatory for the companies involved, unless at least 85 per cent of the outstanding shareholders of each intervening company vote against it. In this last case, the shareholders who did not approve the majorities' appraisal of the shares shall be entitled to a withdrawal right and their shares shall be paid at the price set forth in the independent appraisal from a capital reduction or reacquisition of the company's own shares, under the terms and conditions set forth by the Financial Superintendency. Whenever the combination involves a capital contribution in kind, the appraisal of the contribution shall be approved at the shareholders' meeting.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile takeovers are not common since Colombian companies, even listed companies, have highly concentrated share participations by one or a few beneficial owners.

Despite this, there can be unsolicited transactions in listed companies, which are governed by the provisions of the OPA rules. During an OPA proceeding, it is legally possible for other interested parties to compete by submitting a new OPA, in which case such a competing OPA must comply with the same requirements as to the original OPA. Pursuant to Decree 2,555 of 2010, the following are the requirements that should be met by a competing OPA:

- the offeror of a competing OPA cannot be the same beneficiary as the original OPA;
- the first advertisement of the competing OPA should be published at least two days before the expiration date of the acceptance period of the original OPA;
- the competing OPA cannot be for a lesser amount or lesser price than the original OPA;
- the competing OPA must be better than the original OPA. It is understood as a better offer if the price is at least 5 per cent higher or if the amount of stock to be acquired is at least 5 per cent higher or, if the price or the amount of stock is equal to that in the original OPA, if the minimum amount of shares to be accepted to trigger the OPA is less than the minimum amount in the original OPA;
- if the original OPA contemplates consideration in securities, then the competing OPA may offer cash and securities; likewise, if the original OPA contemplates consideration in cash, then the competing OPA can only offer consideration in cash;
- if the original OPA contemplates upfront payment, then the competitor has to offer the same form of payment; on the other hand, if the original OPA contemplates payment in instalments, then the competing OPA has to present the payment under the same terms or better;
- once the first advertisement of the competing offer is published, any acceptance already made to the original OPA will be automatically made to the competing offer; and
- in any case, the interested party may at any time improve the conditions of the original OPA, following the same procedure for competing offers.

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10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Under public policy principles, no actions against the securities market's transparency are allowed. Thus, any attempt to frustrate additional bidders must be undertaken in accordance with concurrent OPAs.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In general, governmental agencies cannot intervene in, influence or restrict the completion of a business combination.

The Companies or Finance Superintendencies, as applicable, may restrict a merger or a spin-off whenever the applicable procedures are not abided by, and creditors or minority shareholders rights are affected.

Under securities regulations, the Finance Superintendency may influence or restrict the completion of a business combination whenever market transparency may be affected. Furthermore, the Finance Superintendency may block mergers among financial institutions if such a transaction affects the public interest or the financial system's stability.

Under the bankruptcy statute, the Companies Superintendency shall approve certain transactions that may involve business combinations.

Pursuant to antitrust law, the Superintendency of Industry and Commerce may block or impose behavioural or structural conditions on any business combination if it may create a monopoly, foster an eventual abuse of a dominant position, foreclose markets, affect competition, or allow cartelisation in the specific market of the combining companies.

Foreign investment in Colombia is allowed in all sectors of the economy with the exception of the following: activities related to defence and national security; processing and disposal of toxic, hazardous or radioactive waste not originated in the country; private security and surveillance (which in some specific cases such as private security companies can only be provided by legal entities whose equity holders are Colombian individuals, and in others such as valuables transportation foreign individuals or companies can also be equity holders); and, legal entities operating open television services (for which foreign investment cannot exceed 40 per cent of the company's capital stock). In case a business combination violates such prohibition the transaction could be considered null and void.

In certain telecommunication markets, in which the use of the electromagnetic spectrum is licensed by the state, combination may require divestment of licences if, by virtue of the transaction, the thresholds of the maximum licensed spectrum are exceeded.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

OPAs shall be addressed to all the shareholders of the same class of shares of the target company in equal conditions. The only condition for the acceptance of the OPA that can be imposed is that the acceptance is made for 'all or none of the shares', in which case the acceptance of the OPA is made only if all of the shares from the offeree are acquired by the offeror.

Acquisitions through an OPA may be paid in cash, in foreign currency (subject to Colombian foreign exchange regulations) or with securities.

In cash acquisitions, the availability of financing would not be allowed as a condition to a cash offer. Furthermore, before presenting the OPA, the interested party shall constitute collateral, as additional security for performing its obligations under the OPA. If the consideration is in cash, then the collateral may be a cash deposit in a Colombian or a foreign bank, a standby letter of credit, a performance or blanket bond issued by an insurance company, treasury bonds issued or guaranteed by the Republic of Colombia or the assignment of rights in collective investment fund. The beneficiary of the collateral shall be the stock exchange.

Pursuant to Decree 2,555 of 2010, when the consideration for the acquisition (through an OPA) consists of securities, they must be free of any liens or limitations of ownership and must be pledged as collateral for satisfaction of the payment. Further, in these cases in which the payment of the acquisition is to be made with securities, at least 30 per cent of the shares to be acquired through the OPA must be offered to be paid in cash.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Financing, whenever applicable to these types of transactions, is in most cases a contractual issue. Hence, financing is not generally dealt with in the transaction documents as such. As a general rule, financing comes from third parties such as banks and would, most of the time, come down to the negotiation and execution of a credit agreement. When a credit agreement is executed by the purchaser of assets or shares, the purchaser may agree to lien the assets of the target company or the assets acquired, or to pledge the shares.

The financing of the acquisition of shares of Colombian companies may be made either by foreign financial institutions or by Colombian financial institutions pursuant to Colombian exchange regulations. If the financing is made by Colombian financial institution for the acquisition of shares of the same financial institution or of a third financial institution, it can only be made provided that the shares are offered in an initial public offer or in a privatisation process and that the financing is made over other securities which hold a value of at least 125 per cent of the financed amount.

Taking into account that financing is generally regulated by contract, the obligations that may be agreed by the seller to assist the buyer's financing must also be included as contractual matters. As a general practice, parties agree that the seller must collaborate with the buyer to obtain the financing by supplying the information of the target company or of the assets that may be required by the financial entity.

Finally, Law 1,676 of 2013 and Decree 400 of 2014 have set forth a legal framework for moveable guarantees, which provide higher access to financing and may be used for financing business combinations. These regulations create a simple and non-expensive registry for moveable guarantees; provide publicity that makes a guarantee effective against third parties; allows for guarantees to be granted under different priorities (first, second, etc) to different creditors; and, for direct payment to the creditor with the guaranteed asset (which previously was prohibited in Colombia at the time of granting the guarantee due to the prohibition of recission clauses) or simplified enforcement proceedings of the moveable guarantee by a notary public, a Chamber of Commerce or a judicial instance.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Simplified corporations regulated by Law 1,258 of 2008 may include events for the exclusion of shareholders in the by-laws. In such events, reimbursement of their investment must follow the general rules set forth in Law 222 of 1995 for the withdrawal right.

Colombian law does not contemplate specific squeeze-out procedures. However, pursuant to Law 222 of 1995, in business combinations structured by means of a merger, transformation or spin-off, dissident and absent shareholders may withdraw from the company, provided that the transaction entails a higher liability for the shareholders or implies that it lessens their economic rights. The shares of the withdrawing shareholders will be offered to the remaining shareholders at pro rata of their share participation, if the shares are not fully acquired, the company shall acquire them as long as there are liquid profits or a special reserve created for such purpose. The price of the shares shall be agreed between the parties, and if no agreement is reached it will be set forth by an expert.

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The same procedures are applicable whenever, as a result of a business combination, a listed company is delisted from the stock exchange.

Minority shareholders may be diluted by means of capital contributions approved by the controlling shareholders. A capital reduction in order to reimburse the corresponding capital to the minority shareholders can also be made, which would require the approval of the Superintendency of Companies, provided that the company has no outstanding liabilities, or that once the reduction is made the assets double the liabilities of the company, or that the creditors of the company accept it expressly in written form. If the external liabilities correspond to labour obligations authorisation from the Ministry of Labour is also required.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions have the same benefits and may be structured with the same flexibility as local business combinations. The Foreign Investment and Exchange Regulations provide the respective legal framework. Foreign investors in general are allowed to enter into transactions in Colombia by investing in all industries, except for activities related to defence and national security; processing and disposal of toxic, hazardous or radioactive waste not originated in the country; and private security and surveillance (which in some specific cases such as private security companies can only be provided by legal entities whose equity holders are Colombian individuals, and in others such as valuables transportation foreign individuals or companies can also be equity holders); and legal entities operating open television services (for which foreign investment cannot exceed 40 per cent of the company's capital stock). Certain regulatory conditions or approvals may apply, for example, for foreign investment in financial institutions.

Foreign investors must register their investments with the central bank after the transaction takes place. The purpose of this registration is to obtain the proper exchange rights for their investment, such as drawing rights abroad over net profits and capital reimbursements.

External financing to Colombian companies or individuals may now be obtained not only from foreign financial institutions but also from foreign companies. Nevertheless, foreign indebtedness must be reported to the central bank before or at the same time of disbursement.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In addition to the waiting period for obtaining antitrust clearance, under merger, spin-off and changes in the type of the corporate structure, shareholders shall be convened to a meeting with at least 15 business days' notice in order to inspect the documents in order to approve the transaction.

Approval of the amendment of the by-laws due to the merger or spin-off after the approval by the shareholders' meeting is subject to an authorisation by the applicable Superintendency (Finance or Companies).

Bondholders will be convened to a meeting with at least eight business days' notice so as to consider the merger.

A notification period of 30 business days to creditors is mandatory.

The whole merger or spin-off process may take between three and six months. If no authorisation is required by the applicable superintendency, a special report addressed to the creditors and shareholders shall be prepared and posted at the company's domicile (General Authorisation Regime) for 30 business days as of the date on which the merger advertisement is published in a newspaper.

In the event of going concern transfers, a two-month notification period for creditors is necessary to terminate the joint and several liability of the transferor with the transferee.

In OPAs a minimum period of 10 business days and a maximum of 30 business days should be granted to stockholders for the acceptance of the OPA.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The following industries are subject to additional regulations:

- financial, insurance and banking: Decrees 633 of 1993 and 2,555 of 2010 and the regulations from the Treasury Ministry and the Finance Superintendency;
- television industry: Laws 14 of 1991, 182 of 1995, 335 of 1996, 680 of 2001 and 1,507 of 2012 and the regulations of the National Television Agency, Communications Regulation Authority and the Spectrum National Agency;
- aviation industry: the Commerce Code and Colombian Aeronautical Regulations;
- health services: Laws 100 of 1993, 1,122 of 2007 and 1,438 of 2011 and the regulations from the Ministry of Health and Social Protection;
- agricultural industry: Laws 101 of 1993 and 811 of 2003 and the regulations from the Agriculture Ministry;
- public utilities services: Laws 142 of 1994, 143 of 1994 (electricity) and 689 of 2001 and the regulations from Public Utilities Superintendency; and
- telecommunication: (other than the television industry): Law 1,341 of 2009 and the regulations from the Information and Communication Technologies Ministry and the Communications Regulation Commission.

Companies holding governmental concessions or licences must follow the necessary proceedings for amending said concessions or licences if as a result of a business combination the holder of the concessions or licence changes.

18 Tax issues

What are the basic tax issues involved in business combinations?

Depending on the structure of the business combination as well as the nature of the parties involved there are different tax consequences.

Income tax

Income tax is levied over the gains in share, asset and going concern transfers. These gains would be equivalent to the difference between the fiscal cost of the shares or assets and the transfer price. For tax purposes, the transfer price between unrelated parties cannot differ by more than 25 per cent from the market value (in the case of shares of non-listed companies, the commercial value corresponds at least to 115 per cent of the intrinsic value of the shares). The tax is partially exempted in the event of the transfer of shares listed on the stock exchange whenever the amount of shares transferred does not exceed 10 per cent of the company's outstanding shares.

If the shares were held for more than two years, capital gains tax over its profits will be of 10 per cent. If the shares were held for less than two years, then the profits are charged with income tax at the rate determined on a yearly basis, which for 2017 is 40 per cent (the 34 per cent income tax rate plus a 6 per cent surcharge). If the seller is located or domiciled in Chile, Spain, Canada, Mexico, Switzerland, South Korea, India, Portugal, the Czech Republic or countries of the Andean Community of Nations (Equator, Peru and Bolivia), by applying double taxation treaties, lower rates may apply. In any case, if the seller is an entity domiciled abroad, it would be required to file an income tax return and pay the corresponding tax for the transfer of the shares or assets, if any, within one month from the date in which the transfer takes place. This filing is mandatory regardless of the capital gain or loss arising from the transfer. When deciding whether to establish a special purpose vehicle (SPV) in Colombia to pursue a business combination, the rules regarding thin capitalisation have to be taken into account because, for income tax purposes, interest payments may only be deducted for a value up to three times the SPV equity.

Wealth tax

Law 1739 of 2014 created a new net wealth tax to be levied against liquid assets valued above 1 billion Colombian pesos. This tax will be applicable for the tax years 2015, 2016 and 2017. For the purposes of determining

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the taxable liquid assets corporate inventories and assets are included but shares are excluded. The applicable rate for 2017 is 0.05 per cent.

Value added tax
The sale of immaterial goods (such as shares, unless registered as fixed assets in which case the VAT is not triggered) and the sale of fixed assets trigger VAT. In general, the sale of inventory is subject to VAT at a rate of 19 per cent.

Industry and trade tax
Municipalities have the autonomy to set rates between 0.2 per cent and 1.4 per cent. The most common rate is 1 per cent for inventory purchases.

Taxes in the event of mergers or spin-offs
Pursuant to Law 1,607 of 2012 only under specific conditions are mergers and spin-offs considered tax-exempted regarding income tax. First, Law 1,607 of 2012 made a distinction between 'acquisitive' mergers and spin-offs (carried out among unrelated parties) and 'reorganisational' mergers and spin-offs (carried out among related parties). Second, when a reorganisation process takes place between two foreign entities with assets located in Colombia, this operation will be taxable in Colombia regarding those Colombian assets if they exceed more than 20 per cent of the total worldwide assets. On the contrary, if the assets in Colombia are less than 20 per cent, then the reorganisation of those assets in Colombia would be tax-free.

The following is a comparative chart with the requirements needed in each type of operation in order for it to be considered tax-free:

Acquisitive mergers and spin-offs (unrelated parties)	Reorganisational mergers and spin-offs (related parties)
No income tax if shareholders holding at least 75 per cent of the outstanding shares before the merger or spin-off keep the same proportion in the holdings after the merger or spin-off	No income tax if shareholders holding at least 85 per cent of the outstanding shares before the merger or spin-off keep the same proportion they after the merger or spin-off
Shareholders must receive at least 90 per cent of value in shares as payment for the operation	Shareholders must receive at least 99 per cent of value in shares as payment for the operation
If shareholders holding at least 75 per cent of the outstanding shares sell their shares within two years after the merger or spin-off, they must increase their income tax payment by 30 per cent	If shareholders holding at least 75 per cent of the outstanding shares sell their shares within two years after the merger or spin-off, they must increase their income tax payment by 30 per cent

Transfer pricing rules
Transfer pricing rules (TP rules) were introduced in Colombia by Law 788 of 2002, amended by Law 863 of 2003 and have been enforceable from fiscal year 2004 onwards.

TP rules apply to income taxpayers that enter into transactions with an economic affiliate party domiciled abroad (cross-border and inter-company transactions). These rules will only affect the income tax calculation regarding ordinary and extraordinary income, expenses and deductions.

Asset purchase agreements are subject to the TP rules if they imply cross-border and inter-company transactions and affect income tax in Colombia. In such cases the transaction price will be fixed on an arm's-length basis. Consequently, a transfer pricing analysis will be prepared. In addition, the filing of an information return is mandatory on a yearly basis.

Finally, it is assumed that transactions made between Colombian residents and tax haven residents are considered as transactions performed between related parties and thus subject to TP rules. Decrees 1966 and 2095 of 2014 list the countries considered in Colombia as tax havens.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

According to the Labour Code, once a share purchase takes place, the employees may continue as employees of the resulting company. In the case of a merger, spin-off and purchase of going concerns there is a mechanism called the employer's substitution by means of which the former employer may be substituted by the new employer (transfer of undertaking). Employees may claim their rights and benefits from the former or new employer, which are jointly and severally liable to the employees until the moment of the employer's substitution is completed, and thereafter, the new employer shall bear the labour liabilities. Nevertheless, among employers of the companies involved, as a general rule, the former employer is only responsible for the labour obligations prior to the employer's substitution, and the new employer only is responsible for the labour obligations after the employer's substitution, unless the employers agree in different terms in writing.

The rights and obligations arising from the individual labour contracts are not affected. In addition, the principle of 'the same pay for the same work' regarding the employees of the resulting company, should be applied.

Update and trends

Perhaps the biggest change made in the past year in Colombia that affects M&A activity was the adoption of a comprehensive tax reform by which important changes were made both in terms of taxable transactions and tax rates. The new tax regulations are discussed in question 18, but it is important to note that the income tax for equity and its surcharge were terminated in favour of a single income tax with a temporary surcharge.

Also in 2017, the Superintendency of Industry and Commerce lowered the antitrust clearance reporting thresholds by 40 per cent ompared with the 2016 figures. Hence, it is expected that a larger group of transactions will now have to be reported to the antitrust authority, affecting timetables for transactions that previously were exempted from review.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Pursuant to Law 1,116 of 2006, if the target company is undergoing restructuring proceedings, no sale of assets, going concerns, spin-offs or mergers are allowed without the previous authorisation from the relevant superintendency.

Once the restructuring agreement is in force, it shall be reviewed to ascertain whether there are limitations to carrying out business combinations. Special consideration must be given in the case of a merger, as the resulting company will be responsible for all the obligations under the agreement with the target's creditors.

Furthermore, the restructuring committee will also have powers over the resulting company, and the shareholders, managers and directors will be subject to the codes of conduct adopted with the restructuring agreement.

During restructuring proceedings in case of a merger or a spin-off the following rights are suspended: withdrawal rights of the shareholders; special provisions for bondholders; and the rights of the creditors for requesting better guarantees. In addition, in the case of sale of a going concern the creditors may not oppose to the sale.

In the event that the target company has been declared in dissolution, a merger may only take place within 18 months from the date of dissolution, and the absorbing or resulting company shall have the same corporate purpose as the absorbed company. Furthermore, a new company may be incorporated in order to purchase the assets of the company under dissolution and continue with the same business.

If the business is under mandatory liquidation, no special considerations should be accounted for in the sale of assets, provided that the deal is made on an arm's-length basis.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Law 1,474 of 2011 enacted the anti-corruption statute that contains several provisions sanctioning corrupt practices. This statute created the criminal offence of 'private corruption' that sanctions any person that

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bribes a director, employee or adviser of a company, in order to favour itself or a third party, against the interest of the company, with four to eight years of prison and a fine of 10 to 1,000 minimum legal monthly wages. In addition, the director, employee or adviser who accepts the bribe will be sanctioned with the same penalty and fine. In the case of the conduct representing economic damage to the company, the crime may be punished with prison terms of between six and 10 years.

Furthermore, pursuant to the anti-corruption statute, the criminal offence of 'disloyal management' for the director, shareholder, employee or adviser of a company that for its own benefit or benefit of a third party, abuses its duties, and commits fraud in order to dispose of the assets of the company or to create obligations for the company, shall be sanctioned with four to eight years in prison and a fine of 10 to 1,000 minimum legal monthly wages.

The use by employees, advisers, directors or managers of a company's privileged non-public information known because of their office or duties, in order to profit from it, either for themselves or for third parties, shall be sanctioned with one to three years' imprisonment and a fine of five to 50 minimum legal monthly wages. The same penalty would be applicable to any person that due to its profession or office, obtains profit for itself or for third parties, by using privileged information for the negotiation of securities, if such information is not publicly known.

In addition, the Anticorruption Statute provides an absolute prohibition on former public officials managing private interests. Therefore, it is forbidden for public officials, for up to two years after leaving public office, to directly or indirectly provide advice or represent the interests of companies regarding matters related to the public entity to which the former public official rendered its services, or that were subject to inspection, surveillance, control or regulation by the public entity to which the former public official rendered its services. This prohibition is indefinite with respect to particular matters that were decided by the former public official.

In early 2016, Colombia enacted Law 1778 of 2016 by which the OECD standards against bribery and corruption were adopted. Under this new law, bribery (including transnational bribery) and corrupt acts can be punishable not only as a criminal offence, but also through an administrative proceeding conducted by the Companies Superintendency. The new sanctions provide for fines to companies involved in local and transnational acts of corruption of up to 200,000 times the minimum monthly wage (in 2016, 137 billion pesos), and can even lead to the suspension or the cancellation of the corporate chart.

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Czech Republic

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1 Types of transaction

How may businesses combine?

Generally, there are five models of business combination in the Czech Republic:

- transformation;
- acquisition of shares;
- joint venture;
- trust; and
- silent partnership.

Transformation

Transformation of a company can be processed by the following legal forms:

- merger of companies in the form of:
  - absorption; or
  - combination;
- demerger of the company in the form of:
  - split-up; or
  - spin-off (a split-up or spin-off may be implemented upon the simultaneous formation of new entities or in the form of absorption by an existing entity);
- transfer of all company assets to a shareholder;
- cross-border translocation of the company's registered seat; and
- change of legal form of the company.

Change of legal form and cross-border translocation of registered seat do not represent a real combination of businesses. These are internal changes within the same entity. Therefore, we will only discuss merger, demerger and transfer of assets.

Merger

When two or more companies merge, whether in the form of absorption or combination, the company (or companies) is dissolved and all its assets and liabilities are transferred to a successor entity.

Absorption is where a company merges into an existing entity. Combination is where two or more companies merge into a newly founded entity.

Demerger

A demerger or split-up is where a company is dissolved and all its assets and liabilities are transferred to existing entities or newly founded entities (successors), or both.

A spin-off is where all company assets and liabilities are transferred to existing entities or successors, or both. The company to be partially divided via spin-off continues to exist.

Transfer of assets

When a company's assets and liabilities are transferred to one shareholder (successor) the company is dissolved.

Generally, all company assets and liabilities (for instance, termination of existing contractual relationships, sale of assets) must be settled before the company is dissolved. In case of a transformation, no settlement is required if all company´s assets and liabilities are transferred to a successor.

Acquisition of shares

Upon an acquisition of shares, a natural person or legal entity becomes a shareholder of a corporation (target). The existence of the acquirer and the target continues; only the structure of the shareholders in the target has changed.

Acquisition of shares often occurs in limited liability companies (sro) and joint-stock companies (as), which are the most common types of companies in the Czech Republic.

Joint venture

Two or more natural persons, legal entities, or both, may create a joint venture in order to achieve a common goal.

Under the Czech Civil Code, a joint venture is not a legal entity. Therefore, the members of the joint venture have to enter into contractual relationships with third parties (subcontractors) on their own. In order to overcome the missing legal capacity of the joint venture, the entrepreneurs may found a special purpose vehicle (SPV) in the form of a corporation (eg, a limited liability company or joint-stock company) and become its shareholders.

Trust

A trust is a new legal relationship that can be created as of 1 January 2014 according to the new Czech Civil Code. The basic setup copies well-known solutions, particularly in common law jurisdictions. Hence, the purpose of a trust is to set aside specific assets with the aim of creating a fund from which specific beneficiaries draw their defined benefits. The trust is to be administered by a trustee, while the trust as such and the function of the trustee are governed by statutes. The statutes are subject to strict formal requirements set forth by law. From 1 January 2018, trusts will be obligatorily registered in the Registry of Trusts. Trusts or similar arrangements of property set up by law of a different state operating in the Czech Republic shall be subject to the registration as well. Entrance in the registry will contain public and private information, whereas information relating to beneficiaries and settlor will not be publicly available. However, access to the private part of the Registry of Trusts will be granted to public authorities.

Silent partnership

This legal relationship is based on a written contract between a company and a 'silent shareholder'. Under this contract, the silent shareholder puts certain assets into the company, such as money or real estate, and participates in the company's profits or losses.

A silent partnership is simply a legal relationship between two persons; it is not subject to any registration duty (unlike the shareholders of a limited liability company). The silent shareholder is liable for the company's obligations only if the silent shareholder is included in the name of the company.

The tax duties of a silent shareholder arising out of participation in the company's profits and losses remain unaffected by the silent partnership.

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2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Mergers, demergers and the like are generally regulated by the Transformation Act (Act No. 125/2008 Coll). The acquisition of shares is regulated by the Act on Business Corporations (Act No. 90/2012 Coll.), while joint ventures are primarily regulated by the Civil Code (Act No. 89/2012 Coll).

In special cases, other regulations are to be observed.

Protection of competition against restrictions

If businesses that are to be combined reach a certain limit of aggregate turnover, the following shall also apply:

- the Act on the Protection of Competition (Act No. 143/2001 Coll), with regard to combinations with possible impact only on the Czech market; or
- European Regulation (EC) No. 139/2004, on the Control of Concentrations between Undertakings (the EC Merger Regulation), with regard to combinations with possible impact on the common EU market.

Stock exchange

If stocks of a Czech joint-stock company are listed on a regulated stock market, the following shall also apply:

- the Act on Takeover Bids (Act No. 104/2008 Coll), with regard to takeover bids towards other shareholders of the company being acquired; and
- the Act on Business Activities on the Capital Market (Act No. 256/2004 Coll), with regard to notifications to the Czech National Bank if someone acquires a certain amount of shares in a listed joint-stock company.

Bankruptcy

Combining bankrupt businesses is possible in principle. In such a case, insolvency (Act No. 182/2006 Coll, on Bankruptcy and Modes of its Solution) is to be observed.

Employment

If there are employees affected by the contemplated combination of businesses, the strict regulation of the Labour Code (Act No. 262/2006 Coll) shall apply.

Regulated entities

Other special laws shall apply when combining banks, insurance or reinsurance companies, security brokers, investment companies or funds.

3 Governing law

What law typically governs the transaction agreements?

Corporations founded in compliance with Czech law are usually governed by Czech law. If there is an international element, such as a merger of a Czech company with a foreign company or a foreign shareholder of a Czech company, foreign laws may apply if the participants choose it for the deal.

However, the compulsory provisions of Czech corporate law, namely the Civil Code, the Act on Business Corporations or the Transformation Act, are always to be followed. These include, for example, the formal requirements with regard to share purchase agreements (SPAs).

A joint venture has no legal capacity under Czech law; it is merely a legal relationship between its members. Therefore, they can choose the governing law in compliance with Regulation (EC) No. 593/2008, on the Law Applicable to Contractual Obligations (Rome I) if there is an international element (such as different domiciles of members of the joint venture).

If there are several international parties in an agreement, it is also possible to agree on any rules of international arbitration in case of dispute arising from such an agreement, and a neutral governing law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Commercial register filings

Transformation of a company is always subject to registration in the Czech commercial register. At the moment of issuing the final legally effective registration decision, the transformation is legally effective.

If a company is dissolved due to a transformation, there is no fee with regard to the erasure of this company from the commercial register. A newly founded company must always be registered; otherwise it does not exist according to the law. Registration of a new limited liability company is subject to a court fee of 6,000 Czech koruna and registration of a new joint-stock company is subject to a court fee of 12,000 Czech koruna. Newly set up companies may be registered also by a notary, which carries a fee of 2,700 Czech koruna for registration of a limited liability company and 8,000 Czech koruna for registration of a joint-stock company.

Every change in registration of a registered entity (for example, change of shareholders of a limited liability company on the basis of an SPA or change to the amount of registered capital) is subject to a court fee of 2,000 Czech koruna. The fee duty may be paid via stamps stuck on the application form or bank transfer to the account of the respective court in the case of an electronic application.

Furthermore, many legal steps required for registration in the commercial register must be executed in the form of a notarial deed (articles of association of a limited liability company or joint-stock company), and the signatures of authorised representatives on SPAs and the like must be officially verified by a notary, municipal authority or post office. These formalities are subject to other fees; for example, the notary fee for execution of a power of attorney for the company's foundation, articles of association of a limited liability company or a joint-stock company depends on the amount of the company's registered capital. For the minimum statutory amount of registered capital (one Czech koruna for a limited liability company and 2 million koruna for a joint-stock company), the notary fee would be approximately 3,200 and 7,400 Czech koruna respectively, plus VAT of 21 per cent.

The notary or administrative fee for verification of one signature is 30 Czech koruna.

Stock exchange filings

Any person must notify the issuer and the Czech National Bank if their share in the voting rights of a listed joint-stock company equates to or exceeds the following thresholds: 3 per cent (if the issuer's registered capital is more than 100 million koruna), 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 40 per cent, 50 per cent or 75 per cent, or if any person reduces their share to below such limits. This notification is not subject to any administrative fee.

The respective share is to be calculated on an aggregated basis, that is, all shares of persons acting in concert in the voting rights of the same entity are to be summed up.

If a person fails to report the acquisition of shares over the limit, the person would be prohibited from exercising voting rights ascribed to the share that the person possesses.

Antitrust authorities' filings

Pursuant to the regulation on protection of competition against restrictions, the businesses intending to combine must inform the European Commission in the prescribed form in advance if the contemplated combination may influence the common EU market, and must inform the Czech Antitrust Authority if the contemplated combination may influence only the Czech market. For the Czech Antitrust Authority, the administrative fee for the notification is 100,000 Czech koruna.

If a combination triggers the thresholds according to EU merger control law and the Commission needs therefore to be notified of the combination, there is no obligation to inform the Czech antitrust authority.

The obligation to file the application for a contemplated combination to the respective antitrust authority depends on the aggregated turnover of the businesses intending to combine.

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Regulated entities
If someone intends to acquire a certain share (threshold) in the voting rights of a Czech bank, insurance or reinsurance company, security broker, investment company or fund, the prior consent of the Czech National Bank is required. Voting rights acquired without this consent cannot be exercised. The application for the consent of the Czech National Bank is subject to an administrative fee of 20,000 Czech koruna.

If the share in the voting rights of the regulated entities is reduced to below the thresholds prescribed by law, the Czech National Bank must be notified of this fact.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Various kinds of information are to be disclosed depending on the type of transaction (for instance, transformation or acquisition of shares) and the character of the target (whether, for example, it is a listed or unlisted company).

Commercial register
The commercial register is a general source of public information about corporations registered in the Czech Republic. The commercial register keeps the Collection of Deeds, where documents have been published electronically since 2007.

With regard to the transformation of a company, the transformation project is to be filed in the Collection of Deeds of the commercial register. Alternatively, this project may be disclosed on the company's website. The transformation project contains the necessary information for company shareholders or creditors. As the commercial register is open to the public, a significant part of the documentation prepared in connection with the transaction, such as the merger agreement, financial statements, the merger report and the special audit report, will be available for inspection upon filing.

If the shareholder structure of a limited liability company (sro or spol sro) changes owing to a share acquisition, this must be recorded in the commercial register and the respective SPA is to be filed in the Collection of Deeds. For a joint-stock company, the shareholder structure is not registered in the commercial register unless there is only one sole shareholder in the company. According to the new Act on certain measures to enhance the transparency of joint-stock companies (No. 134/2013 Coll) it is further not possible to own bearer shares. All of the shares of the company are with effect from 1 January 2014 automatically to be converted into registered shares; the joint-stock company is obliged to keep the owner of the shares in the list of shareholders.

In compliance with the Act on public registers (Act No. 292/2013 Coll) and the company's articles of association, shareholders are to be informed in advance of the date and the place of a shareholders′ meeting that shall decide about transformation. The invitation may be placed on the company's website or in the public journal or newspapers, pursuant to the company's statutes. Since the new law came into effect on 1 January 2014, the invitation has to include drafts of the resolutions that the shareholders' meeting is called to pass.

Public offer and listings
Companies listed on the stock exchange must disclose information regulated according to the specific stock exchange market. For example, there is a duty to inform about a transfer of significant share in the company.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

For listed companies, if anybody, such as a party to a business combination, acquires shares of a listed joint-stock company up to or over certain limits (see question 4), it must notify the Czech National Bank or any other authority supervising a stock market where the company is listed, as well as the issuer of the shares of this acquisition. Once the limit is reached or exceeded, there is a mandatory notification duty regardless of the reason for the acquisition or business combination.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Duties of directors and managers
Under Czech law, members of a statutory body that are registered in the commercial register are entitled to act in the name of the limited liability company (the executive) or joint-stock company (the board of directors). Since 1 January 2014, individuals as well as legal entities can be appointed as members of the statutory bodies of a company. In such a case, however, the company being appointed has to nominate an individual who executes the function of the statutory body concerned. This person will not be registered in the commercial register.

The statutory body shall exercise its range of powers with due managerial care and is not allowed to disclose confidential information and facts to third parties if such disclosure may be detrimental to the company. If it fails to fulfil the duty to exercise its powers with due managerial care, the members of the statutory body may become personally liable to the company and its shareholders. Furthermore, a member of the board of directors can be considered criminally liable.

Members of the statutory body who caused damage to the company by breaching legal duties while exercising their powers shall be liable for such damage. They must follow the principles and instructions approved by the shareholders' meeting, provided that they are legal.

In the course of transformation of a company, members of the statutory body of the companies involved have several information duties towards company′sshareholders and creditors and other subjects. They must, in particular:

- draw up a transformation project that outlines the main aspects of the intended transaction and that must contain specific terms set by law;
- file the transformation project in the Collection of Deeds of the commercial register;
- notify the company's creditors of their statutory rights triggered from the contemplated transformation;
- deliver the transformation project to every particular shareholder of a limited liability company; and
- make the transformation project available for shareholders of a joint-stock company at the company's registered seat.

The shareholders' meeting of a limited liability company or a joint-stock company must approve the intended transformation. The shareholders shall be informed by the company's statutory body about the details of the shareholders' meeting (see question 5), including its agenda.

Pursuant to the articles of association of a limited liability company or a joint-stock company, transfer of shares of the company may be subject to the consent of the shareholders' meeting. In this case, the rules for arranging the shareholders' meeting (notification of shareholders in advance, etc) shall also apply.

Under the Labour Code, the corporations involved in a merger must inform the employees in writing before the merger becomes effective.

Duties of controlling shareholders
If someone acquires at least 30 per cent of shares of a listed joint-stock company, a compulsory takeover bid must be offered to the other shareholders of the target company within 30 days of the acquisition of the defined share.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Approval rights
In the case of a limited liability company or joint-stock company, transformation of the company is generally subject to a previous decision of the shareholders' meeting of companies involved. In a merger, whether effected by absorption or by combination – and for demergers – the

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Transformation Act requires a resolution of the shareholders' meeting approving the merger with a supermajority vote, namely at least three-quarters of the votes represented at the shareholders' meeting, unless the articles of association require an even higher majority. The decision of the shareholders present at the shareholders' meeting approving the intended transformation must be adopted in the form of a notarial deed.

In case of transfer of shares of a limited liability company or a joint-stock company, the company's articles of association may subject this transfer to the previous consent of the shareholders' meeting (see question 7).

Appraisal rights

In the course of transformation, every shareholder of a limited liability company involved in the transformation may demand that an expert review the transformation project.

For a joint-stock company, an expert must always review the transformation project in principle, not only upon request of a shareholder.

If the exchange rate for shares held by individual shareholders of particular companies involved in a transformation as set in the transformation project is deemed to be inadequate, the shareholders shall receive adequate compensation.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

For unsolicited transactions consisting in a takeover of a joint-stock company, the general rules of the Act on Business Corporations may apply. If a company is listed, the Takeover Bids Act shall be observed. Only in the case of listed companies shall the bidder make a public announcement of a contemplated takeover. The public announcement is the moment when the company's board of directors learns about the contemplated takeover if the bidder does not approach them directly.

There is no mandatory public announcement with regard to unlisted companies. In this case, the information potential of the company management is limited because the bidder may approach particular shareholders in private.

As soon as the company learns of a contemplated hostile transaction, the management may take some pre-emptive measures. In any case, every member of the board of directors must always carry out a due diligence with regard to the company's interest. They may obstruct the transaction only if the company's shareholders' meeting agrees to do so.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

In general, there are no statutory or judicially determined limits as to whether break-up fees or reverse break-up fees are permissible in principle, and if they are permissible, in which amount. A break-up fee that correlates to the costs incurred by the other party in connection with the intended transaction of the company would be acceptable. Pursuant to the Czech Civil Code, however, the court can reduce a disproportionately high contractual penalty, taking into account the value and significance of the secured obligation, and can do so in an amount corresponding to the damage which arose prior to the judicial decision and which was caused by a breach of the contractual obligation to which the contractual penalty applies. If a contractual penalty is agreed, the creditor has no right for compensation of a damage caused by the breach of the obligation to which the contractual penalty is related.

Furthermore, there are general statutory limits with regard to transactions between a limited liability company or a joint-stock company and persons who are related to the company (members of its statutory body, shareholders of this company or persons related to them). These restrictions shall apply in general, that is, also in case of break-up or reverse break-up fees with regard to business combinations.

According to these statutory limits and restrictions:

- a company may only conclude a credit or loan contract with a member of its statutory body, supervisory board, proxy or another person authorised to conclude such an agreement in the name of the company, or with persons close to them, or transfer the company's property to them for free only with the prior consent of the shareholders' meeting and only under terms customary in business transactions; and
- if a company or a person controlled by the company acquires property for a consideration from its founder, shareholder or a person involved in concerted conduct with them or a member of its statutory body, supervisory board, proxy or another person authorised to act in the name of the company, or with persons close to them, or from persons controlled by the company or persons belonging to the same group, or if a company transfers its property to any such person for a counter performance in an amount equal to at least one-tenth of the company's subscribed registered capital at the day of acquisition, the value of such property must be determined on the basis of a court-appointed expert's opinion; if this acquisition occurs within three years of incorporation of the company, it must be approved by the shareholders' meeting.

These restrictions may affect business combinations of companies belonging to the same group.

Further, a limited liability company or a joint-stock company may protect deals from third-party bidders through acquisition of their own shares or granting so-called 'financial assistance' in order to acquire shares in this company. These instruments are allowed, however, to a very limited extent and under strict conditions set by law.

Financial assistance

Unless the articles of association provide for other conditions, limited liability companies may provide financial assistance under the following terms:

- the financial assistance is provided on a fair conditions in trade basis, in particular relating to the interests or securing the provision of financial assistance to the benefit of the company;
- the executive director prepares a report with content required by the law; and
- the provision of financial assistance is approved by the shareholders' meeting in advance, otherwise it is not valid, even if the other conditions are met.

For a joint-stock company, the financial assistance may be provided under more specific rules, where the provision of financial assistance must be allowed under the company's articles of association or the board of directors examines the financial eligibility of the person to whom financial assistance is provided. In any event, the company has to create a special fund equivalent to the amount of the financial assistance provided.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Basically, there is no government influence except in antitrust and regulated sectors such as banking and insurance. Accordingly, the proposed acquisition of a certain bundle of shares in regulated subjects is to be announced to a regulating authority or approved by it. If the shares are acquired without previous announcement or approval, the acquirer cannot exercise voting rights under these shares.

With regard to national security, the government may access and use the property of individuals and companies. There are no special provisions on restrictions of business combinations in emergency situations. If national security is jeopardised, the parliament may adopt laws that restrain business combination, for example in a simpler way.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Conditional offers are specifically regulated only with regard to the takeover bid of listed joint-stock companies. In this case, the takeover

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bid may only be subject to a condition if accomplishing this condition does not depend only on a consideration of the bidder or person cooperating with the bidder. The condition may consist in a minimal acceptance level by shareholders, regulatory approvals, or both.

In cases not regulated by the Takeover Bids Act, such as cash acquisitions backed up by a financing bank, only general rules for conditioned legal acts set by the Civil Code are to be observed. Therefore, conditions precedent or subsequent may be used in the course of a business combination process. In these cases the frequency and character of the conditions depends on the process of negotiation between the parties and the financing bank.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Generally, in private transactions, financing conditions and representations as to financing may be included in the transaction document. If there is a financing bank on the side of a buyer involved in a transaction (which is the most typical case), then the bank usually has wide disclosure and guarantee rights and the parties to the transaction have corresponding duties. Therefore, the bank usually requires continuous reports of findings and issues arising in the course of due diligence.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Pursuant to the Act on Business Corporations, anybody who holds at least 90 per cent of shares in a Czech joint-stock company may exercise the squeeze-out right in accordance with the law (see question 9). The company's shareholders' meeting must decide on the squeeze-out of the minority shareholder, whereas 90 per cent of the votes of all shareholders are required to adopt the decision of the shareholders' meeting on squeeze-out. The decision must always be adopted in the form of a notarial deed. The minority shareholders are entitled to an adequate financial consideration.

The company's statutory body (board of directors) must arrange the shareholders' meeting deciding on the squeeze-out within 30 days after the request of the majority shareholder. After the decision of the shareholders' meeting on the squeeze-out of minority shareholders is adopted, it must be registered in the commercial register. One month after the decision has been made public in the commercial register, ownership of the shares of minority shareholders is transferred to the majority shareholder.

A majority shareholder of a joint-stock company who holds at least 90 per cent of shares may require the company's statutory body to arrange a shareholders' meeting that will decide on transfer of other company shares to this majority shareholder. The majority shareholder shall determine an adequate price for the shares to be transferred. The majority shareholder must prove the adequacy of the financial consideration by an expert analysis.

In the case of listed companies, the Czech National Bank must approve the squeeze-out.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Generally, the same rules apply for domestic and cross-border business combinations. There are some specific rules with regard to cross-border transactions. The main issue in this respect is usually the question of governing law.

Transformation

Transformations of companies are regulated by the Act on the Transformation of Corporations and Cooperatives and the respective EU regulations (only with respect to EU and European Economic Area-settled corporations). Cross-border transformation with regard to a foreign entity settled outside the EU and EEA area would be only possible on the basis of an international treaty. Such an international treaty, where the Czech Republic would be party, has not been concluded yet.

Laws of particular EU member states regulating cross-border transformations are strongly influenced by EU regulations. Therefore, the course of a transaction and all necessary steps in connection therewith are similar in member states (transformation project, appraisal report of an independent expert, approval of the transformation by shareholders' meetings of companies involved, registration in respective national registers of member states, share exchange).

Acquisition of share

Pursuant to the Act on Business Corporations, a foreign person may participate in the forming (founding) of a Czech legal entity or become a partner or member in an already existing Czech legal entity, that is, the person may acquire shares in a Czech limited liability company or a joint-stock company. The parties to the respective SPA may even choose a foreign governing law. However, the formal and procedural rules of the Act on Business Corporations must always be followed, in particular, verified signatures on the SPA or registration of new shareholder in the commercial register.

Chaining prohibition cancelled

Chaining prohibition meant a special restriction of business combinations pursuant to Czech law until 31 December 2013. A single-member limited liability company could not form or be a single-member of another single-member company. This chaining prohibition was cancelled by the new Civil Code and the Act on Business Corporations effective from 1 January 2014, which will be appreciated by foreign investors. Also, one individual could be a member of not more than three limited liability companies. This restriction was removed as well.

In addition, investments of foreign persons from certain countries may be protected under international treaties.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The Act on Business Corporations, the Act on the Transformation of Corporations and Cooperatives and the Takeover Bids Act set a number of waiting and notification periods in order to protect shareholders and creditors of businesses being combined. In particular:

- the company involved in the transformation must file the transformation project in the Collection of Deeds of the commercial register and notify the creditors of the intended transformation at least one month before the company shareholders' meeting decides on the transformation;
- the statutory body of the company shall invite shareholders to the shareholders' meeting, which shall decide on the transformation at least 15 days in advance for a limited liability company and 30 days in advance for a joint-stock company; and
- employees must be notified of the intended transformation at least 30 days prior to the effectiveness of the transformation if the employees are to be transferred to a new employer as a result.

Update and trends

A significantly revamped Czech corporate law entered into force on 1 January 2014. Even after more than three years, there is still a number of unanswered questions as to how specific matters should be dealt with. There is also an array of provisions that are evidently flawed. Those flaws are set to be removed within the coming years. None of these, however, has really been negatively affecting M&A transactions.

The M&A climate in the Czech Republic is overall still quite positive. Investors are eagerly searching for investment opportunities across the board. At the same time, there is an increasing number of business owners aiming at exiting their businesses. With money being presently fairly cheap thanks to low interest rates, and banks being more generous again in providing acquisition financing, we expect to see an increasing number of deals in the near future.

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17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Additional regulations and statutes apply to financial market subjects in particular, namely banks, insurance and reinsurance companies, security brokers, investment companies and funds. If someone intends to acquire a share in any of these regulated entities that equals or exceeds 10, 20, 30 or 50 per cent, the prior consent of the Czech National Bank is required. In case of decrease of shares under these limits, the Czech National Bank must be notified in advance.

18 Tax issues

What are the basic tax issues involved in business combinations?

The main sources of the Czech tax law are the following acts:
- the Income Taxes Act;
- the VAT Act;
- the Tax Procedure Code;
- the Tax on Immoveable Property Acquisition; and
- the Transfer Taxes Act.

The Czech Republic is also a party to over 70 income tax treaties. The most relevant taxes for corporations are:
- corporate tax, with a tax rate of 19 per cent;
- value added tax (VAT), with a basic tax rate of 21 per cent;
- income tax if the company pays a dividend to the shareholders, with a tax rate of 15 per cent; and
- wage tax with respect to remuneration paid to employees.

Transformation

Tax laws, in particular the Tax Administration Act (Act No. 280/2009 Coll), and the Act on Income Tax (Act No. 586/1992 Coll), recognise a tax succession, provided that a legal entity was dissolved and there is a legal successor. The transformation project must contain the 'decisive day'. Before the decisive day, the company being dissolved due to transformation shall close its accounts. As on the decisive day, the acting of this company, even if not dissolved yet, ie, before the registration of the transformation in the commercial register, is attributed to its successor with regard to accountancy and therefore also tax consequences. After the transformation is registered in the commercial register, the company's legal successor dissolved due to the transformation shall file a statement of taxable income (if any) for this company.

According to the new Act on Tax on Immoveable Property Acquisition (Act No. 340/2013 Coll), assets transferred due to the transformation are exempted from the tax on the transfer of real estate.

Sale of shares and assets

In case of sale of shares, the income of the seller is subject to income tax. A tax exemption could apply under certain circumstances if the seller was a natural person. For legal entities, a tax exemption is generally not possible. Only certain transactions between persons belonging to the same group may be subject to the tax exemption.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Pursuant to the Labour Code, employers must inform their employees about certain circumstances set by law, such as the legal status of the employer and changes to it.

Transformation

In case of a cross-border transformation, the Act on the Transformation of Corporations and Cooperatives grants other information rights to the employees of Czech entities involved in the transformation.

Owing to a transformation, the employment relationships of employees may be transferred to the legal successor of the entity being dissolved. In this case, the affected employees are entitled to terminate their employment upon a termination notice with effect on the date of the proposed transaction at the latest, regardless of whether or not the general statutory termination period of two months has expired.

Acquisition of shares

The legal status of the company remains unchanged following an acquisition of shares; only the shareholder structure changes. Employees shall be informed about the internal structure of their employer. There are no special benefits in this respect. The union contract, if concluded between the employer and the respective trade unions, might stipulate otherwise.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The Act on the Transformation of Corporations and Cooperatives explicitly allows combination of bankrupt businesses. In such a case, special regulation of the Insolvency Act is to be observed. All legal acts in the name of the bankrupt company shall be performed by an appointed administrative trustee instead of the company's statutory body.

During the insolvency proceedings, the creditors of the bankrupt company have a strong position. They form a special creditor body according to the Insolvency Act, which influences the decisions of the insolvency trustee in the course of the insolvency proceedings with regard to the company's assets or its further business activity.

Prior to filing for insolvency there are no special restrictions for the acquisition of shares or assets from a seller that may become insolvent. However, if insolvency proceedings over the assets of the seller are commenced after the acquisition is completed, there is a risk that the insolvency trustee may challenge the transaction arguing that it was

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to the disadvantage of the insolvency creditors of the seller. This can also occur if the purchase price paid by the purchaser was adequate and represented the fair value for the target. The consequence of a successful challenge may be that the purchaser would have to return anything acquired from the seller. These assets would then become a part of the insolvency mass. There is a risk that the insolvency mass might be lower than the purchase price and there might be other creditors of the insolvent debtor (seller). Therefore, the claim of the purchaser to get the purchase price repaid (due to the unsuccessful transaction) would fail. In this case, the purchaser would only receive an aliquot portion of the insolvency mass.

Acquisition during the insolvency proceedings is possible under Czech law. The insolvency trustee is granted the authority to sell the assets of the insolvent entity. The insolvency trustee is prepared to provide only limited transaction guarantees, which also influences the determination of the purchase price.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

In case of business combinations, there are no specific regulations with regard to corrupt practices pursuant to Czech law. Corruption is a criminal offence for any natural person involved. Pursuant to the Czech law of criminal liability of legal entities, a company that profits from corruption can be subject to criminal forfeiture so that it loses anything gained as a result of the corruption.

Anti-corruption

The general anti-corruption regulations of the Penal Code (Act No. 40/2009 Coll) shall also apply to business combinations. Under the Penal Code, a person is guilty of bribery if, in connection with his or her business or that of a third party, he or she:

- takes a bribe himself or through an intermediary for himself or a third party or lets another person promise a bribe (taking a bribe); or
- provides, offers or promises a bribe to a third party or for a third party (bribery).

Moreover, legal entities are subject to criminal responsibility. The Act on the Responsibility of Legal Persons for Criminal Offences (Act No. 418/2011 Coll) sets out a list of specific criminal offences legal person might commit, thereby specifying the more general definitions in the Penal Code (Act No. 40/2009 Coll).

Sanctions

The state authorities may impose sanctions in case of a breach of regulatory laws, in particular:

- antitrust laws and regulations with regard to a control of combinations; and
- reporting duties with regard to acquisition of shares in regulated or listed entities.

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Denmark

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1 Types of transaction

How may businesses combine?

Under Danish law the basic forms of business combinations are:

- acquisition of either assets (with or without liabilities) or shares in the target company;
- mergers of public or private limited companies, including merger by absorption and merger by incorporation of a new entity; and
- public tender offers, including exchange offers, with regard to acquisition of all or part of the shares in a listed company.

The consideration in any of the above forms of combinations may be either cash or shares or other contribution in kind, or a combination thereof.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The legal basis for business combinations in Denmark is essentially formed by the Danish Sales of Goods Act and the Danish Contracts Act together with the Danish Companies Act. The Companies Act regulates both private and public limited companies.

In addition, inter alia, the following legislation may apply:

- the Danish Securities Trading Act, the Takeover Order (implementing the Takeover Directive (2004/25/EC)) and Regulation (EU) no. 596/2014 on Market Abuse (MAR), applicable to companies listed on Nasdaq Copenhagen and First North or other Danish regulated or alternative markets;
- Stock exchange regulations issued by Nasdaq Copenhagen;
- the Danish Competition Act (including Danish merger control regulation);
- the Danish Bankruptcy Act;
- the Danish Act on Employees' Rights in the Event of Business Transfers;
- the Danish Act on the Processing of Personal Data; and
- various pieces of tax legislation, including the Danish Corporate Tax Act, the Danish Value Added Tax Act, and the Danish Act on Taxation of Capital Gains on Shares.

Legislation from the European Union must be considered in certain larger transactions, particularly in regard to merger control. Further, sector-specific requirements must be considered within certain industries such as the financial sector. Transactions within this sector will, in the main, require prior approval by public authorities.

3 Governing law

What law typically governs the transaction agreements?

Generally, transaction agreements fall within the scope of party autonomy under Danish private international law and are therefore, subject to Danish public policy, as the main rule governed by the law chosen by the parties.

Where the parties have not agreed on the governing law, asset transfer agreements will normally be governed by the laws of the country in which the target company is domiciled, whereas share transfer agreements may be governed by foreign law, for example, in the event that the seller is domiciled outside of Denmark. To avoid uncertainty, it is advisable to specify the governing law in the transfer agreement.

Certain Danish mandatory regulation with respect to form and procedure for different types of business combinations may, however, apply irrespective of the parties' choice of law. The Danish Companies Act, for example, sets out procedures with regard to mergers, including cross-border mergers, and the Danish Securities Trading Act and the Takeover Order set out procedures with regard to public tender offers.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Generally, no government filings are necessary in connection with a business combination. However, filings may be necessary in the following situations.

Share transfers

Pursuant to the Danish Companies Act, shareholders of both listed and unlisted companies shall notify the company of substantial shareholdings (ie, upon attaining 5 per cent of the share capital's voting rights or nominal value and upon subsequently exceeding or falling below the threshold of 5, 10, 15, 20, 25, 33.33, 50, 66.66, 90 or 100 per cent of the voting rights or nominal value of the share capital, respectively). Such information shall be registered by the company and the register is available for inspection by public authorities, shareholders and board members.

Further, a company must register such notifications of substantial shareholdings in the Danish Business Authority's (DBA) IT-system (the Public Shareholders' Register) in which this information is made publicly available.

With regard to listed companies, the above information shall also be notified immediately (on the date of the transaction) by the purchaser to the Danish Financial Supervisory Authority and the company shall make the information available to the market without delay.

Violation of the notification obligations is punishable by a fine.

Holders of bearer shares in public limited companies attached with less than 5 per cent of the share capital's voting rights or nominal value are obligated to register their shareholding with the DBA. This requirement does not apply to shareholders in listed companies. The registered information is not made publicly available and is only accessible by public authorities for inspection purposes.

Asset transfers

Depending on the nature of the acquired assets, notifications to public authorities may be required or be advisable.

All rights over real estate, including ownership rights, rights of use of another person's real estate, mortgages and other rights must be perfected by registration with the Danish Land Registry in order to obtain protection against legal proceedings against the property and in relation to subsequent bona fide beneficiaries of rights to the real estate. The registration fee varies depending on the type of right to be registered, the most expensive being ownership rights and mortgage

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where the fee amounts to a percentage of the purchase price and of the secured amount, respectively.

Ownership rights to industrial property under Danish law, including registered trademarks, industrial designs, patents and utility models, are registered with the Danish Patent and Trademark Office and a business transfer will often necessitate amendments to the registered information.

Mergers

In general, all amendments to the articles of association of limited companies shall be registered with the DBA, for example, change of company name, increases or reductions of the share capital, and so on.

With regard to mergers, the DBA shall be notified of both the participating companies' merger plans (as the main rule) and the actual execution of such plans. Accordingly, the DBA shall receive copies of merger plans after the signing hereof and any subsequent resolutions to carry out the mergers shall be notified to the DBA within two weeks from the resolution date.

In mergers where all participating companies are private limited companies (ApS), it may, subject to satisfaction of certain requirements, be resolved that the merger shall be implemented as an immediate merger, which implies that the merger may be resolved, executed and registered with the DBA without any prior notification to the DBA of a merger plan or any other publication of information on the merger.

Merger control

Mergers and acquisitions shall be notified to the Danish Competition and Consumer Authority in the event that one of the following thresholds is exceeded:

- the aggregate annual turnover in Denmark of all of the undertakings involved is at least 900 million Danish kroner and the aggregate annual turnover in Denmark of each of at least two of the undertakings concerned is at least 100 million Danish kroner; or
- the aggregate annual turnover in Denmark of at least one of the undertakings involved is at least 3.8 billion Danish kroner and the aggregate annual worldwide turnover of at least one of the other undertakings concerned is at least 3.8 billion Danish kroner.

If a merger or acquisition has an EU dimension as defined in the EC Merger Regulation (2004/139/EC) (for example, if the aggregate worldwide annual turnover of all the undertakings concerned exceeds €5 billion and the aggregate turnover within the EU of each of at least two of the undertakings concerned exceeds €250 million), the merger or acquisition shall be notified to the European Commission instead of the Danish Competition and Consumer Authority.

Fees

Registration with the DBA of incorporation of and subsequent changes made to limited liability companies are subject to fees. The registration fee varies depending on whether the registration is made using a paper registration form or online via the DBA's IT system. Further, a fee must be paid when filing a merger notification with the Danish Competition and Consumer Authority. The fee for a simplified notification is 50,000 Danish kroner, while the fee for a full notification amounts to 0.015 per cent of the combined annual turnover in Denmark of the undertakings concerned, subject to a maximum of 1.5 million Danish kroner. Otherwise no fees are charged with regard to the above notifications.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Rules regarding disclosure of information apply in different situations. General disclosure obligations for companies listed on a regulated market in Denmark or another country within the European Union are set forth in the Danish Securities Trading Act. Such companies shall disclose inside information if this information pertains directly to their activities; inside information in this context means information that has not been made public and is likely to have a notable effect on the price formation of the company's shares if made public, for example, business combination agreements.

Public tender offers, both mandatory and voluntary, shall be made in accordance with the requirements set out in the Danish Securities Trading Act and the Takeover Order. When a mandatory offer is required or a decision to make a voluntary offer has been made, this shall be communicated to the public by the bidder by means of an announcement to this effect to be disseminated through electronic media which, as a minimum, covers the public in the countries where shares of the target company are being traded on a regulated or alternative market. Further, the bidder shall make public an offer document containing information on the financial and other terms of the offer, including the deadline for acceptance of the offer and any other information considered necessary for the shareholders to reach an informed decision on the offer. A statement in which the offer is reviewed by the board of directors of the target company shall be disclosed to the public together with the board's opinion on any advantages and disadvantages within the first half of the offer period.

As regards business combinations by merger, the Danish Companies Act provides that the board of directors of each of the merging companies shall furnish a written statement to the shareholders explaining the merger plan in more detail, including information on the pricing of the shares. The statement may be omitted if all of the shareholders unanimously decide so. Further, an impartial appraiser shall in each of the merging companies prepare a written opinion on the merger plan, including statements regarding the position of the companies' creditors. These opinions shall also be submitted to the DBA. Both the opinion on the merger plan and the statement regarding the position of the creditors may, however, be omitted if so decided unanimously by all shareholders.

With regard to employees, the Danish Act on Rights of Employees in the Event of Business Transfers (implementing Directive No. 2001/23/EC) provides that the employees shall be informed of the business transfer, to the extent possible, within a reasonable time. The employees shall be informed of the date of the business transfer, the reasons behind the transfer, financial and social consequences for the employees, and so on. In the event of mass redundancies, the employer is required to give notice to certain public employment boards prior to terminating any employment contracts.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Owners of substantial shareholdings in both listed and unlisted companies, limited partnerships and certain other legal entities shall disclose information to the company if certain changes are made to the size of their shareholdings and, in addition, this information shall be registered in the DBA's IT system in which this information is made public available; see question 4 for further details. With regard to listed companies, the above information shall also be notified to the Danish Financial Supervisory Authority and the Company shall make the information available to the market without delay.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Members of the board of directors and the management in Danish companies are, by virtue of their position with the company, subject to a fiduciary duty to act in the best interest of the company. In this context, the interests of the company are not necessarily equated solely with the interests of the shareholders, but must be considered from a broader point of view, comprising other stakeholders such as employees, the company's creditors, and so on.

This fiduciary duty, which is not subject to any general regulation, comprises in addition to a general duty of care and loyalty – several more specific duties, some of which are manifested in special provisions under Danish law. The Danish Companies Act thus provides that directors and the management are prohibited from taking part in the discussion and decision-making of issues if the person in question has a major interest therein, which may be contrary to the interests of the

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company. Further, the members of the company's board of directors and management are prohibited from entering into transactions on behalf of the company that may cause an unjust advantage to certain shareholders or a third person over the company or other shareholders.

In addition, the employment agreements of the management often comprise a duty for the management to be of assistance and therefore play an active role in connection with a business combination.

Shareholders are entitled to act in their own interest and are only in extraordinary circumstances obliged to take the interests of other stakeholders into consideration, for example, in companies with a majority or sole shareholder, if such shareholder acts in his or her own private interests through a position in the management.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

It has not been finally established in Denmark whether the board of directors is competent to resolve on the disposal of all (or substantially all) of the company's assets and liabilities or if such disposal must be resolved by the shareholders. In the DBA's opinion the board of directors is competent. However, in practice the approval of the shareholders is often obtained to avoid uncertainty as to the validity of such a disposal.

Shareholders' approval rights may be (and often are) prescribed in the company's articles of association or in a shareholders' agreement, or both.

Mergers shall in most cases be resolved by the shareholders of the discontinuing company, whereas the central governing body is the competent body in the continuing company, provided that the merger does not require a capital increase or other amendments to the articles of association of the continuing company, in which case the merger must be approved by the shareholders.

Voluntary public tender offers are usually conditional upon the acceptance from shareholders representing a specified percentage of the nominal share capital or voting rights (or both) of the target company. The relevant percentage depends on the aim the bidder is seeking to achieve. Ordinary amendments of the articles of association require two-thirds of both votes and capital, while squeeze-out and delisting requires more than nine-tenths of both votes and capital.

The Danish Companies Act provides that a minority shareholder may demand that a single majority shareholder holding more than nine-tenths of both the shares and capital buys all of the shares of that minority shareholder.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Danish law on public tender offers applies equally to voluntary tender offers irrespective of whether these are recommended or contested by the board of directors in the target company.

Several Danish companies have implemented measures against hostile takeovers in the articles of association, including limitations on voting rights, voting ceiling and division of the company's shares into classes, typically into a class of unlisted shares with the majority of the voting rights and a listed class of shares with minimum voting rights. Given this fact, hostile takeovers are not frequently experienced in Denmark. However, the Danish Companies Act provides that shareholders representing at least two-thirds of both votes and capital may at a general meeting adopt a resolution suspending all special rights or restrictions associated with a shareholding or specific shares if a public tender offer is submitted to the company. This 'break-through' rule, which is based on the Takeover Directive (2004/25/EC), only applies to special rights or restrictions established after 31 March 2004. Furthermore, such suspension may be restricted only to a public tender offer submitted by a company within the European Union or European Economic Area.

When a voluntary tender offer is made, the board of directors must weigh the interests of the shareholders against other relevant interests, including the interests of the company itself (if contrary to the shareholders), the company's creditors and the employees. However, the shareholders' interests will be prominent in most situations. Measures available for the board of directors include: refusal to have due diligence carried out by the bidder, a recommendation to the shareholders to refuse the submitted tender offer, determining the possibility of a more favourable competing bid, and so on. Alternatively, the board of directors may decide to act actively against the takeover by the use of a capital increase directed at friendly third parties, 'poison pills', conducting merger negotiations with third parties, and so on. However, these measures should be carefully considered as the directors risk incurring liability if not acting in the best interest of the company. It is generally advisable (and in accordance with the Danish Corporate Governance Recommendations) to involve the shareholders in such actions. Further, under the Danish Companies Act shareholders representing at least two-thirds of both votes and capital may at a general meeting resolve to introduce a procedure whereby the board of directors must obtain the approval of the general meeting before taking any actions that may hinder or frustrate a takeover bid, other than resolving to seek alternative bids.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees and other fees of this type are not governed by any specific regulation. Such fees may, however, be modified or set aside, in whole or in part, pursuant to the general clause of the Danish Contracts Act if it is considered manifestly unfair or contrary to the principles of good faith to enforce them.

Furthermore, under Danish law a company is as a general rule prohibited from providing financial assistance to a third party for the purpose of acquiring shares in the company or shares issued by its parent company, if any. However, financial assistance is allowed provided that:

- a credit assessment has been obtained;
- the company's board of directors has submitted a written report to the shareholders indicating the reasons for the financial assistance, the interest of the company in providing such assistance, the conditions on which the assistance is provided, the risks involved in respect of liquidity and solvency of the company, and the price at which the third party is to acquire the shares in the company;
- the report from the board of directors is made public via the DBA's information system;
- the shareholders approve such assistance in advance;
- the assistance is sound in the context of the company's financial status;
- the financial assistance is granted on market terms; and
- the financial assistance does not exceed an amount that could otherwise have been distributed as dividends to the shareholders.

A company shall therefore refrain from granting loans, providing assets as security or otherwise making assets available in connection with such acquisitions unless the above requirements are met. Consequently, potential financial assistance aspects of a business combination should be considered carefully, including with respect to break-up fee arrangements. The board of directors may otherwise risk personal liability where the company has defrayed such fees.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Except for the Danish Competition and Consumer Authority and rules regulating the sector-specific industries including the financial sector, governmental agencies cannot in general influence or restrict the completion of a business combination.

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12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Business combinations with regard to unlisted companies may in general be subject to any condition agreed by the parties involved, the only restriction being the general clause in the Danish Contracts Act according to which agreements may be modified or set aside, in whole or in part, if it would be manifestly unfair or contrary to the principles of good faith to enforce it.

Business combinations involving listed companies must meet certain legal requirements. The Danish Securities Trading Act and the Takeover Order provides that mandatory public tender offers may not be conditional at all. The Danish Financial Supervisory Authority has power to grant an exemption from this rule.

Further, voluntary public tender offers must not be conditional upon financing; thus, the bidder's financing must be in place prior to submitting an offer. Further, according to the practice of the Danish Financial Supervisory Authority, an offer may not include conditions the fulfilment of which the bidder has influence on. Otherwise, the bidder would in practice be able to determine whether or not an offer should be kept open. Apart from the aforesaid conditions, no restrictions apply. Voluntary public tender offers are usually conditional, for example, upon a certain level of acceptance from the shareholders, approval from the Danish Competition and Consumer Authority, non-occurrence of material adverse changes, and so on.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

From a buyer's perspective it is often desirable to make a transfer agreement conditional upon the buyer being able to obtain the financing necessary for its acquisition of the target business. Due to the recent credit crisis it has become more difficult to obtain such financing from banks (and other external financiers) and sellers have thus become very reluctant to accept such a condition precedent in the agreement.

In connection with structured auctions processes, sellers often require that a bidder has either entered into final financing agreements with its bank (or other external financier) or has obtained a firm commitment from the bank to provide the necessary financing.

A prearranged financing package may also be offered by the selling party to a bidder in an acquisition (stapled financing).

A buyer will often need to finance both the acquisition and to refinance the existing interest-bearing debt of the target company. The completion of such refinancing may be a closing obligation in the transaction documents.

The seller may assist in the buyer's financing in a number of ways, typically by issuing a vendor note regarding part of the purchase sum (often subordinated in relation to bank loans obtained for the financing of the acquisition), by accepting a deferred payment of the purchase price or by distribution of dividends or other reduction of excess cash of the company prior to completion of the acquisition.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

A single majority shareholder holding more than nine-tenths of the shares in a company and a corresponding proportion of the voting rights, may demand that the remaining shareholders have their shares redeemed by the majority shareholder. Each minority shareholder of the company has a corresponding right to demand redemption by such a single majority shareholder.

The minority shareholders shall be invited to transfer their shareholdings within four weeks. Such invitation shall set forth the terms of redemption and the basis on which the redemption price has been determined. If the redemption price cannot be agreed upon, it must be determined by an appraiser appointed by the courts. The invitation must include a statement by the board of directors on the general terms of the redemption. Any minority shareholders who have not transferred their shares to the majority shareholder before the expiry of the four-week period shall be invited, through a notification published with the DBA, to transfer their shares within a period of not less than three months. Such notification shall repeat the above-mentioned information. Any shareholdings not transferred to the majority shareholder upon expiry of the three-month period will be considered cancelled upon the majority shareholder's deposit of the redemption sum in favour of the relevant shareholders.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Danish law does not set out any specific rules in regard to cross-border transactions other than the EU-based legislation on cross-border mergers (Directive No. 2005/56/EC implemented in the Danish Companies Act) and European Companies (Regulation No. 2001/2157/EC and the Danish Act on the European Company). In addition, the Danish Companies Act also includes specific rules regarding cross-border demergers and rules governing the cross-border transfer of a company's registered office.

The structuring of cross-border transactions is often tax-driven and it is common practice to acquire the whole or parts of a company through one or more holding companies established in jurisdictions with beneficial tax legislation.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Apart from waiting periods under Danish and EU competition law, business combinations are not in general subject to waiting periods as such.

The Danish Securities Trading Act and the Takeover Order provide that business combinations structured as public tender offers include a minimum offer period of at least four and not more than 10 weeks. As a special exception to this rule, the offer period may be extended to a total of nine months pending required public authority clearances. If a shareholder as a result of a voluntary public tender offer obtains control of the target company, any subsequent tender offers or squeeze-out of remaining shareholders will entail further waiting periods.

The rights of the employees in the event of business combinations structured as an asset purchase are regulated by the Danish Act on Rights of Employees in the Event of Business Transfers (TUPE regulation). The act provides that the purchaser assumes the rights and obligations pursuant to any collective or individual agreement that existed at the time of the transfer. Accordingly, the purchaser may be subject to certain notification obligations. As a minimum requirement, the purchaser must inform the employees about the transaction in advance.

The merger and demerger procedures pursuant to the Danish Companies Act include some notification and waiting periods. Merger and demerger resolutions must in most cases be approved by the shareholders of the discontinuing company, and often also by the shareholders of the continuing company. Such general meetings must be convened with a minimum of two and a maximum of four weeks' notice, however requirements as to form and notice under the Danish Companies Act and the articles of association may be waived by unanimous consent of the shareholders. The merger and demerger resolution may not be adopted until four weeks after the DBA's publication of the merger or demerger plan submitted by the participating companies, except in the case of immediate mergers; see question 4 for further details.

Waiting periods may also arise in connection with tax-exempt transactions should an approval from the Danish taxation authorities be required. This may be necessary with regard to tax-exempted contributions of assets or share conversions under the Danish Merger Tax Act and the Danish Capital Gains on Shares Act, respectively. In connection with tax-exempt mergers, the Danish Merger Tax Act provides that the date of the merger shall coincide with the commencement of the financial year of the acquiring company, which may in practice also imply a waiting period.

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Update and trends

Deal activity in Denmark in terms of both deal count and total deal value remained strong throughout 2016 after a record year in 2015. We expect that the M&A activity 2017 will remain at a high level boosted by the liquidity available in the Danish market, including the continued improved access to financing with Danish banks on competitive terms. Denmark is well past the credit crises, and the repercussions hereof on the financial markets have subsided.

The regulatory regime in Denmark continues to be business friendly and extremely efficient without any planned national regulatory changes that we expect will have a material adverse effect on the prospects for the M&A activities in Denmark. To create greater transparency with respect to the ultimate beneficial ownership of companies and other legal entities and counter tax evasion and money laundering, a new public register of the ultimate beneficial owners (physical persons only) of companies and other legal entities is about to be introduced and is expected to become effective on 23 May 2017.

Transactions within specific business sectors such as banking and other financial services will, as a main rule, require the prior approval by public authorities.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Sector-specific requirements must be considered within certain industries such as the financial sector. Transactions within this sector will as main rule require the prior approval by public authorities.

18 Tax issues

What are the basic tax issues involved in business combinations?

Danish companies are subject to corporate income tax of 22 per cent. A shareholding of 10 per cent or more in a company is considered a subsidiary investment (provided that the shareholding qualifies for a tax reduction under the Parent Subsidiary Directive (2011/96/EC) or an applicable tax treaty). Dividends received from subsidiary investments (including as a general rule outbound cross-border dividends) and capital gains realised on the transfer of shares in subsidiary investments are tax-exempt and not subject to Danish withholding tax. Also, capital gains realised on the transfer of shares by a company holding less than 10 per cent of the share capital (and having no controlling influence) in an unlisted company are tax-exempt and not subject to Danish withholding tax.

Interest is generally deductible for Danish corporate income tax purposes. The deductibility of interest payments may, however, be reduced under applicable Danish thin capitalisation rules as well as asset and earnings before interest and taxes (EBIT) limitation rules. The thin capitalisation rules prescribe a debt-to-equity ratio of four to one. Any interest on debt to related parties in excess of this ratio will be subject to deductibility limitations. This rule applies, however, only if the debt to related parties exceeds 10 million Danish kroner and the financing is not made on market terms. Under the EBIT limitation rule, net financing expenses in excess of 80 per cent of the EBIT are subject to deductibility limitations. Under the asset limitation rule, deduction of net financing expenses is only allowed if they do not exceed a cap computed by applying a standard rate of return on the tax base of the company's qualifying assets. The EBIT and asset limitation rules only apply to interest in excess of 21.3 million Danish kroner, but the rules are not limited to interest on debt to related parties.

Asset transfers

Asset transactions usually give rise to capital gains taxation on the seller's side. In asset transactions the purchase price shall be allocated among the groups of assets comprised by the transaction, including goodwill, and the different groups of assets are assessed individually. Initial purchase prices (where applicable) and sales prices are compared in order to identify capital gains and losses. Further, depreciation recovery may occur and any depreciation recovered will in general be taxable.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The legal basis for protection of employees in connection with asset transfers (as opposed to share transfers) is essentially formed by the Danish Act on Rights of Employees in the Event of Business Transfers (implementing Directive No. 2001/23/EC). Pursuant to this act, the transferor's rights and obligations in respect of its employees as per the date of the business transfer shall, by reason of such transfer, be transferred to the transferee. All individual employee rights will thus be maintained following the business transfer (while collective bargaining agreements may be terminated pursuant to a separate procedure laid down in the act). The business transfer will not in itself constitute a reasonable cause for termination. Furthermore, the employees shall be informed of the business transfer in advance, to the extent possible, within a reasonable time.

The employees of the target company shall also be informed of a transfer of shares in the company if such share transfer has a material impact on the employees' employment; see the Danish Act on information and consultation of employees, which implements Directive No. 2002/14/EC.

The Danish Act on Employment Clauses, which came into effect on 1 January 2016, contains mandatory regulation of job clauses, non-competition and non-solicitation clauses, including provisions regarding compensation. Further, pursuant to the Danish Act on Salaried Employees, salaried employees who are remunerated by commission or other performance bonuses are entitled to receive a pro rata share of such bonuses in the year where their employment is terminated. Similar, but less strict, protective regulation applies to stock option programmes and the like.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

When a target company has been or risks being declared bankrupt, special precautions must be taken to avoid subsequent disputes with the creditors of the target company. Warranties and guarantees from an insolvent target company are rarely of any value to the buyer and it is customary that the target company is acquired 'as is' and without any liabilities for the seller. This increased risk on the buyer side is often reflected in the purchase price.

The purchase of assets from an insolvent target company may be voidable if the purchase price does not reflect the fair market value for such assets. Likewise, business combinations in which some creditors of an insolvent target company are given preferential treatment over others may be voidable.

The purpose of the Danish reconstruction rules is, inter alia, to keep viable businesses in operation while considering the interests of the creditors. A reconstruction must, as a minimum, contain elements of compulsory composition of the distressed company's debts or a transfer of its business (in whole or in part).

Reconstruction may be commenced when a debtor is insolvent and upon request from the debtor or a creditor. The bankruptcy court will then appoint one or more reconstructors and an accounting expert representative. Further, a date is fixed for a meeting to be held no later than four weeks after the commencement of the reconstruction process with the creditors, at which the creditors shall vote on the reconstruction plan prepared by the reconstructors and the accounting expert representative. Provided that the creditors vote in favour of the reconstruction plan, the initial meeting shall, no later than six months later, be followed up by another meeting, at which the creditors vote on the reconstruction proposal. The bankruptcy court may extend the time limit for voting on the reconstruction proposal twice by two months each time, meaning that the reconstruction process cannot extend beyond 11 months.

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21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Anti-corruption and anti-bribery are not subject to any general regulation. However, the offering, giving, receiving or soliciting of any item of value to influence the actions of an official or other person in charge of a public or legal duty, namely bribery, is prohibited by the Danish Penal Code. Violation of this prohibition is punishable by fine or imprisonment for up to six years. Also illegal kickbacks (secret commission) in private deals are prohibited and penalised by prison under the Danish Penal Code.

In addition, anti-corruption initiatives have been made by several organisations in Denmark, the key public and private business-relevant organisations being the Danish Export Credit Agency, the Trade Council of Denmark and the Confederation of Danish Industries. These initiatives are, however, focused on providing Danish companies operating in foreign markets with anti-corruption tools.

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Dominican Republic

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1 Types of transaction

How may businesses combine?

Business combinations are frequent transactions in the Dominican Republic, in which one entity gains control, or at least a controlling interest, in another entity. The preferred method of business combination is by way of a merger or voluntary acquisition. We do not have hostile takeovers in our jurisdiction.

One of the more common approaches to a business combination is the business merger. By this model, two or more businesses choose to combine their assets in order to form a new company or special purpose vehicle that is stronger and more capable or may be able to grasp a majority interest in the marketplace. The goods and services offered by the combined entity may consist of the combined product lines of the individual businesses, or be a revamped product line that takes the best sellers of each and couples them with a few new products developed by the new entity.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

In addition to the company's by-laws, which are to some extent the regulatory framework agreed upon by the parties, the following statutes apply:

- the Law on Corporations No. 478-09, as amended; and
- the Dominican Tax Code and the Regulations for its application.

If a public company or a company that is registered on the Dominican Republic Securities Exchange is involved, then Law 19-00 may also apply. Law No. 42-08 on the Defence of Competition, which recently entered into force, will apply to business combinations in respect of antitrust matters.

Additional regulations may apply to specific industries. For instance, in the banking and insurance sectors the Monetary and Financial Law and the Insurance Law would apply. Likewise, in the energy and telecommunications sectors, the Law on Electricity and the Law on Telecommunications would also have to be taken into account at the time of structuring the transaction.

3 Governing law

What law typically governs the transaction agreements?

If the transfer of shares or assets of a Dominican company is involved, at some point Dominican Law would apply to some of the agreements. However, frequently New York law is used to the extent that it does not contravene any public policy and in the understanding that at some point the documentation may have to be translated (if executed in a language other than Spanish) for local registration purposes or to be filed before the authorities, if the need arises.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

If the company is registered on the Dominican Stock Exchange, the transaction would have to be notified as a 'relevant event'. From a tax perspective it is not unusual to notify the tax administration of a potential merger at least 15 days prior to the execution of the transaction to the limit the joint liability of the parties for any pre-existing taxes or future capital gains. As for stamp taxes they are not applicable; registration and transfer taxes may not apply in the context of a corporate reorganisation, which would have to be approved by the tax administration. If assets need to be transferred from one entity to another, taxes may vary depending on whether moveables are involved (18 per cent transfer tax, which operates like a VAT as is deductible as such) or real estate (2 per cent transfer tax calculated on the value of the property).

In addition to the foregoing, the prior consent of certain governmental authorities or additional filings may be necessary for companies in regulated industries such as banking, telecommunications and energy. As to antitrust matters, the law regulating competition does not provide for an antitrust review of transactions prior to the completion of the same and thus, there is no requirement for the filing of business combination documents before authorities. Nonetheless, dominant positions in the market may not be abused, and antitrust authorities are empowered to initiate investigations relating to behaviours deemed anticompetitive.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The tax administration reserves the right to request any information it deems appropriate to assess the nature of any given transaction involving local assets, including registered intellectual property rights. On the other hand, if it involves local companies, a shareholders' meeting may have to take place and usually such meeting is called by means of public notices. Assuming full quorum, the notice requirement may be waived; however, the minutes of the meeting and the new shareholding structure or any amendment to the by-laws would have to be registered at the Mercantile Registry, thus making the document public.

Additional publicity may apply depending on the approach chosen by the parties with respect to the workforce, namely, if the employees are transferred to a new entity a notice to that effect would have to be published at a visible place at the company and notified to the Ministry of Labour. Further formalities may be required if a trade union is involved or if a collective bargaining agreement is in place.

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6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Such disclosure requirements apply to companies in certain regulated industries, such as banking or companies that participate in the Dominican stock market. For the banking industry, business combinations require authorisation from the monetary and financial authorities and there are disclosure requirements for shareholders owning more than 3 per cent of stock in a financial intermediary entity. Business combinations constitute 'relevant facts' under the Dominican Stock Market Law; therefore, the companies participating in the Dominican stock market must notify such transactions to the Superintendency of Securities.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The board of directors and directors individually are subject to fiduciary duties. They owe to shareholders and to the company a duty of loyalty, of care and of disclosure. The law refers to the behaviour of a reasonable businessman. In the context of a business combination, directors have the duty to act on an informed basis, which includes the appointment of a vigilance officer who shall issue a report on the business combination. Additionally, directors shall act in the best interest of the company and its shareholders, abstaining from undertaking transactions where there are conflicts of interest, and in any case complying with its duty to disclose any conflicts of such natures, shall they exist.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Shareholders have approval rights and the majority is set forth under the by-laws. As for appraisal, it is a condition precedent to the approval, and is usually done by an expert, who will render a report and submit it to the company for the review of all the shareholders within a reasonable time prior to the meeting.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

There are no hostile takeovers of commercial entities under Dominican law. This may be because no Dominican company has gone public, to this date.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

As indicated in question 9, there are is no particular regulation applicable to hostile takeovers. Nonetheless, there is no express limitation regarding the inclusion of break-up and reverse break-up fees provisions on any acquisition agreement.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

No. Industries that deal with national security remain under the direct or indirect control of the state.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Tender offers are regulated within the company's by-laws. In a cash acquisition the financing may be conditional if the parties agree upon such provision.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Obtaining financing would typically be a condition precedent for the closing of the transaction, as for the assistance of seller it may vary depending on the industry. In some cases when governmental approval may be involved the cooperation of the seller is essential to expedite the authorisation process. Likewise, assisting the lenders in the due diligence process (by giving access to the premises, key employees and the like) are frequently included among seller's covenants during the signing and closing period. Additionally, providing the lenders with access to the execution version of the documents, to the sellers' legal counsel and coordinating a working group that works toward the same goal is key for the successful outcome of the transaction for all parties involved: sellers, buyers and lenders.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

No, they may not. Nonetheless, they have the prerogative to request of a court the enforcement of any of their information rights, against the company or any other stockholders.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Except when they involve matters of public policy, which require the application of certain statute or the laws of the Dominican Republic, parties may structure cross-border transactions in the manner that they deem most cost and time-efficient.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

If the combination involves a corporate reorganisation, which requires the approval of the tax administration, the waiting period is normally between four and six months.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

See question 2.

18 Tax issues

What are the basic tax issues involved in business combinations?

Capitalisation taxes may have to be paid if the capital of one of the existing entities needs to be increased. Alternatively, if a new entity is incorporated, capitalisation taxes would have to be liquidated based on the type of entity and the amount of the capital. Capitalisation taxes currently amount to 1 per cent of the difference for the capital to be increased in the entity.

Depending on the structure of the transaction, transfer taxes on real estate property and moveable assets may apply and subject to the participants involved such amounts may have to be withheld in the

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hands of the payer. Transfer taxes currently amount to 2 per cent of the value of the asset being transferred. That the transfer of real estate property may not be possible if such asset is not up to date in the payment of the property tax, which currently amounts to 1 per cent per year calculated over the total amount of real estate property in favour of the company.

Value added tax may also be applicable. The current rate of the VAT is 18 per cent.

In the event of any capital gains in the disposal shares or fixed assets (eg, land), the seller shall have to pay taxes on such gains at a rate of 27 per cent. The capital gains are determined by deducting the acquisition or production cost adjusted for inflation from the sales price or value of the respective asset. Additionally, in a share acquisition, purchaser shall withhold 1 per cent of the purchase price to be paid to the seller, and pay such tax to the tax authorities as an advance payment of the potential capital gain to be generated from the transaction.

A substantial portion of these taxes may be reduced depending on the structure of the transaction that is whether or not it qualifies as a corporate reorganisation under the rules of the Dominican Tax Code.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The basic regulatory framework is the Dominican Labour Code and the Law on Social Security. Also, if the entities involved belong to a union, the Collective Bargaining Agreement may have an impact on the transaction. Fringe benefits, to the extent that they are consistently given to employees will be considered as part of the salary. Also it is usual to have written agreements for temporary employees (namely, those hired for a specific period of time or task) or high-level executives or expats, which may have contractual arrangements setting forth the conditions for their entrance and golden parachutes in the event of change of control or early termination of their employment.

The transfer of employees from one entity to another is subject to the provisions of the Labour Code and entails a notice to the Ministry of Labour, a copy of which will be published at a place in the company where it can be seen by all the personnel. The assignee and assignor remain jointly liable regarding the employee and the employee retains his or her seniority from the original date of employment notwithstanding the date on which the transfer occurs. In other words, there is a continuation of the original employer–employee relationship although there may be a new employer.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Pursuant to Law No. 141-15 on the Restructuring and Liquidation of Commercial Entities and Merchants, the legal or de facto managers or administrators of companies that are in a restructuring process have the obligation of notifying the court-appointed Verifier and the court overseeing the process of any act of administration or disposition of assets which directly or indirectly implies, inter alia, any merger, business combination or act in prejudice of the debtor's patrimony. In general, it also important to note that a court appointed of overseeing a restructuring process may void any transaction executed by the debtor after the initiation of the restructuring process if it violates any provision of Law No. 141-15.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The anti-corruption and anti-bribery sanctions currently in force in the Dominican Republic are not linked specifically to business combinations, they are broadly applied and if one of the conducts sanctioned under the existing legal framework occurs in the context of a business combination the liable parties will be held liable.

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Ecuador

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1 Types of transaction

How may businesses combine?

The Ecuadorian market is increasingly becoming the stage for several types of business combinations. These are mainly horizontal combinations that have brought competing firms together under single ownership; and vertical combinations, resulting from the integration of businesses that are engaged in different stages of production. The main structures available for business combinations are the following:
- Statutory mergers – resulting from a combination where one company continues to operate and the other is liquidated into the survivor.
- Statutory consolidations – resulting from a business combination resulting from two companies being liquidated into a newly created organisation.
- Acquisition of shares – where a company acquires a percentage of another company's stock in order to be able to set and enforce operating policies.
- Acquisition of assets – acquisition of assets rather than stock.
- Spin-offs – which result in the creation of an independent company through the sale or distribution of new shares of an existing business or division of a parent company.
- Joint ventures – a contractual agreement that results in two parties joining to undertake a particular business.

The Ecuadorian Companies Act establishes the following two types of mergers:
- when two or more companies merge to form a new one that acquires its rights and obligations; and
- when one or more companies are absorbed by another that continues to subsist.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Depending on the type of company, its industry or the sector of the economy in which it operates, different laws and regulations will be applicable to business combinations. In general, the legal framework governing business combinations in Ecuador is composed of the following laws and regulations:
- the Ecuadorian Companies Act, enacted on 5 November 1999;
- Antitrust regulation: The Organic Law for the Regulation and Control of Market Power, enacted on 13 October 2011;
- Resolution No. 4 issued by the Superintendency of Companies for the Regulation of the Transfer of Shares, enacted on 8 May 2013;
- the Internal Tax Regime Law, enacted on 17 November 2004;
- the Regulation of the Internal Tax Regime Law, enacted on 8 June 2010;
- the Organic Act for Production Incentives and Tax Fraud Prevention, enacted on 29 December 2014; and
- the Reformatory Law for Fair Taxation, enacted on 29 December 2007.

3 Governing law

What law typically governs the transaction agreements?

All business combinations that take place in Ecuador or involve Ecuadorian entities are bound by local laws and regulations. However, parties can typically choose the applicable law during the transaction, as long as these do not contravene Ecuadorian legislation. The parties are bound by domestic law in order to enforce contractual obligations and indemnifications before Ecuadorian courts. In order to enforce an award, granted by a foreign judge or arbitrator, Ecuadorian judges will analyse the case's substance and form subject to Ecuadorian law. Thus, parties will often choose Ecuadorian law for transaction agreement. However, parties usually feel more comfortable and prefer a neutral foreign jurisdiction for arbitrational procedures.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

In Ecuador, government or stock exchange filings are merely for informational purposes; therefore, there are no filings required before the Superintendency of Companies in order to get clearance for business combinations. As per the Ecuadorian Companies Act, transfers of shares of companies incorporated in Ecuador need to be notified to the Superintendency of Companies within eight days of the closing date.

As per article 35 of the Financial and Monetary Act, when the transaction involves 10 per cent or more of the shares of a corporation listed in the Public Registry of the stock market, the parties must inform the Superintendency of Companies, five business days prior to the transaction completion date.

With regards to partnerships, the transfer of shares is completed when the public deed of transfer of shares along with the shareholders' meeting minutes stating that there has been unanimous consent for the transfer the shares, is duly executed in the mercantile registry.

Regardless of the type of company being affected, other institutions may be notified, ex-post, about the business combination; such as labour, environmental institutions and tax authorities. Additionally, depending on the industry in which the company operates, additional filing and fees may be necessary prior to a business combination. In Ecuador, the sectors that are particularly regulated are natural resources, telecommunications and public services.

With regards to stamp taxes, article 352 of the Companies Act establishes that transfers of assets and liabilities, made in spin off or merger processes are not subject to any provincial or municipal taxes, including income taxes and taxes on the gains from the sale of real estate.

However, request for clearance for the business combination must be filed with the antitrust authority when the following thresholds are met:
- Operations where the total turnover exceeds 2,000 basic salaries (basic salaries are subject to adjustments every year).
- Operations where economic operators that are engaged in the same economic activity obtain a market share of 30 per cent or more.

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Antitrust regulation in Ecuador is relatively new considering that the Organic Law for Market Power Control and Regulation (LOCPM) was enacted on 13 October 2011. This law created the Superintendency of Control of Market Power, the governmental authority in charge of enforcing the LOCPM. The LOCPM establishes an ex ante system for requesting authorisation for mandatory economic concentration operations. According to the LOCPM, the Superintendency of Control of Market Power can impose conditions or deny the operation.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information that needs to be made public during a business combination will depend on the type of company. In the case of corporations, there is no need to disclose the transaction documents to complete the transaction; however, when it comes to partnerships transaction documents as well as the minutes of the general shareholders' meeting where shareholders unanimously approved the business combination are needed.

Even though it is not a requirement for business combinations, the tax authorities may request the disclosure of the transaction documents such as the share purchase agreement for tax purposes.

In the case of transactions that require clearance from the antitrust authorities, parties will have to disclose the full transaction agreements.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

According to the Companies Act, every January Ecuadorian companies must disclose the following information related to foreign shareholders:

- Certification given by the corresponding authority from the country of origin where the foreign company has domicile, accrediting its legal existence. Such certification must be apostilled or legalised at the Ecuadorian consulate.
- List of all of the shareholders (individual persons or legal entities) of the foreign company. This list must contain full names, domicile, nationality and civil status (if applicable). Should the foreign shareholder trade its shares on the stock market, the list of individual shareholders does not need to be presented, but rather a sworn statement by the corresponding official of the foreign company, indicating that all of its capital is represented by nominative shares.

The obligation to disclose the information previously mentioned with regards to shareholdings is not affected if the issuer is a party to a business combination.

Additionally, the Ecuadorian tax authorities require the disclosure of the ultimate beneficiary of the shares, this being an individual or a publicly traded company.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Ecuadorian law does not require companies to have a board of directors; however, the Companies Act establishes that when the administration of the company is jointly entrusted to several persons, they constitute a board of directors and all the relevant provisions regarding rights, obligations and responsibilities of managers are applicable to the board members.

By law companies in Ecuador require a legal representative that will be held liable and is responsible for all of the company's obligations against third parties. This legal representative needs to be Ecuadorian or a foreigner with residence in Ecuador.

Managers may either hold or share the legal representation of the company, owing fiduciary duties to the company's shareholders, including that of acting in their best interest. Managers are elected by shareholders and their responsibilities and limitations are established in the company's by-laws. Managers who hold the legal representation of the company are in charge of registering the transfer of shares in the Book of Shares and Shareholders. Ecuadorian law establishes that the transfer of ownership of shares will only take effect against the company or third parties from the date of registration in the Book of Shares and Shareholders. This entry shall be made valid with the sole signature of the legal representative of the company.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Approval rights depend on the type of company subject to a business combination.

In partnerships, in order for shares to be transferable, inter vivos, the party interested in transferring its shares must obtain the unanimous consent of the shareholders, while in corporations there are no limitations to the transfer of shares.

Even though appraisals are not contemplated in Ecuadorian laws, a minority of shareholders representing at least 25 per cent of the total paid in capital may appeal decisions taken by majority. This appeal must be presented before the civil judge of the district where the defendant company is domiciled, within 30 days of the general shareholders' meeting where the decision was taken. Appeals are not applicable for business combinations due to the fact that in corporations, there are no limitations to the transfer of shares and shareholders do not require the general shareholders' meetings consent for the transfer of shares.

Commonly, in Ecuador, appraisals are subject to foreign jurisdictions and are established in shareholders' agreements that aim to protect minority shareholders.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Ecuadorian legislation does not provide special considerations for hostile transactions. There are no specific legal provisions governing these types of transactions.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There are no specific legal provisions in Ecuadorian legislation for break-up or reverse break-up fees. However, parties can always agree to establish an indemnity in a private agreement such as an MOU.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Other than competition regulators or specific industries where business are regulated, government agencies may not influence or restrict the completion of business combinations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

There are no specific legal provisions in Ecuadorian legislation regulating conditions to a tender offer, exchange offer or other forms of business combinations. However, parties can agree on private documents with similar conditions as those applicable to a tender offer, exchange offer or other forms of business combinations.

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13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In Ecuador, there are no obligations of the seller to assist in the buyer's financing. Every business combination agreement must indicate the consideration to be paid; however, there are no specific legal provisions regarding the financing of the transaction.

There are no legal obligations for the seller to assist in the buyer's financing and in Ecuador, it is not customary for sellers to provide assistance in the buyers financing. However, parties can agree on financing conditions on private documents.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

There are no legal provisions in Ecuador authorising the squeeze-out (ie, mandatory sale of shares) of minority shareholders.

However, the Companies Act establishes that minority shareholders are entitled to separation when in disagreement with certain shareholders' meeting decisions such as mergers or transformations. Thus, the company will have to reimburse the separating shareholder's shares.

In Ecuador, a majority position may accomplish a squeeze-out through capital increases by diluting minority shareholders. Ecuadorian law allows for corporation shareholders to participate in any call for additional capital in proportion to their ownership; therefore, dilution would occur only when the minority shareholder is unwilling or incapable of contributing further capital.

With regards to partnerships, article 114 of the Companies Act states that shareholders have a right to not be forced to a capital increase. Thus, limitations to capital increases can be established in the company's by-laws protecting minority shareholders.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions involving Ecuadorian companies can be structured rather flexibly, as long as they comply with Ecuadorian law. However, these types of transactions are not a prevalent practice in our jurisdiction, given that Ecuadorian companies are regularly the target companies of foreign cross-border transactions.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

As mentioned previously, in Ecuador, government or stock exchange filings are merely informative when it comes to Corporations. As per the Ecuadorian Companies Act, transfers of shares of companies incorporated in Ecuador need to be notified to the Superintendency of Companies within eight days of the closing date.

However, with regards to partnerships, the transfer of shares is completed when the public deed of transfer of shares, along with the certificate issued by the legal representative of the company stating that there has been unanimous consent from the shareholders to transfer the shares, is duly executed in the mercantile registry.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

In the past seven years, laws that specifically regulate business combinations for media, mining, hydrocarbons and financial institutions have been enacted.

In 2012, the Ecuadorian National Assembly passed the Regulation for the Transfer of Shares of Media Companies, prohibiting directors or major shareholders of private national communication companies from holding, directly or indirectly, stocks and shares in companies outside the communicational activity.

In 2009, the Mining Act was enacted, requiring that any business combinations involving the direct or indirect transfer of shares or equity rights of mining concessionaries that represent more than 10 per cent voting rights must be registered in the Mining Registry. For this purpose, the legal representative of the concessionary companies must inform the line ministry within 30 days of recording the transfer of shares in the corresponding corporate books.

Hydrocarbons are also subject to additional regulations, as per the Hydrocarbons Act, the transfer or assignment of rights of the contracts for exploration and exploitation of hydrocarbons, as well as its related activities such as transport, storage, processing and marketing of hydrocarbons, is subject to an authorisation that must be issued by the corresponding line ministry. With regards to financial institutions, as per Resolution No. 3034 of the Superintendency of Banks, for business combinations involving institutions of the private financial system, the Superintendency of Banks and Insurance must qualify the responsibility, adequacy and solvency of the assignee, whether it is a national or foreign financial institution, prior to the registration of the transaction in the Book of Shares and Shareholders.

18 Tax issues

What are the basic tax issues involved in business combinations?

Though tax implications may vary on a case-by-case scenario, the basic tax issues involved in business combinations in Ecuador are the following:

Income tax on capital gains

The Organic Act for Production Incentives and Tax Fraud Prevention, enacted on 29 December 2014, established that capital gains generated from the direct or indirect transfer of shares is subject to income tax.

Capital outflow tax

The Reformatory Law for Fair Taxation introduced a 5 per cent capital outflow tax on the value of all operations and monetary transactions made abroad; thus applicable to all transfers of funds made abroad with or without the intermediation of financial institutions pertaining to the Ecuadorian financial system.

Whenever the consideration of a business combination is paid abroad, it is subject to a 5 per cent capital outflow tax, even if the transfer of funds occurs aside the Ecuadorian financial system.

Value added tax on the sale of assets

The sale of fixed assets triggers a value added tax.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The Ecuadorian Labour Code provides the regulatory framework governing labour and employee benefits in business combinations. As a general rule, whether the business combination results in a company that continues to operate and the other is liquidated into the survivor, or results in two companies being liquidated into a newly created organisation, the employer may not diminish employee's rights, benefits or seniority.

After the business combination takes place, the employer is responsible for labour obligations arising prior, during or after the transaction.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The Financial Restructuring Law enacted on 21 December 2006 provides companies potentially facing bankruptcy with a procedure that enables debtors to renegotiate with the creditors and avoid bankruptcy proceedings. Should the business combination take place during a financial restructuring proceeding the acquiring company shall be liable for the debts of the company that is being acquired.

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21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Ecuadorian legal framework lacks specific anti-corruption, anti-bribery regulations for the private sector, while the public sector is highly regulated with regards to such practices. Anti-corruption regulations applicable for business combinations in the private sector include the Inter-American Convention against Corruption and the United Nations Convention against Corruption.

Since the recent enactment of the Organic Criminal Act in February, 2014, legal entities are responsible for crimes committed by those individuals acting on behalf of or under instructions of the legal entity, committed for its own gain or its associates' gain.

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England & Wales

Michael Corbett

Slaughter and May

1 Types of transaction

How may businesses combine?

The basic forms of business combination are:
- private purchase of shares of the target company;
- private purchase of the target's underlying business;
- public offer for shares in the target company (a 'takeover offer'); and
- a scheme of arrangement under parts 26 and 27 of the Companies Act 2006.

Under any of the above forms of merger, an acquirer may pay in cash, securities or a combination of both.

A takeover offer may be quicker than a scheme of arrangement and is capable of being successful with a lower level of support from offeree shareholders. A scheme of arrangement requires a majority in number representing 75 per cent in value of the creditors or members, or class of members, present and voting either in person or by proxy at the court meeting to sanction the scheme of arrangement. By contrast, under the City Code on Takeovers and Mergers (the Takeover Code), it is possible for the acceptance condition in respect of a takeover offer merely to require the offeror to acquire, or agree to acquire, shares carrying over 50 per cent of the voting rights. A scheme of arrangement provides an all-or-nothing result: if the offeror is successful, it will acquire all of the shares of the offeree; or, if it fails, it will acquire none.

UK companies may also combine with other European Economic Area (EEA) businesses using the European merger procedures provided by the Companies (Cross-Border Mergers) Regulations 2007 (the Cross-Border Mergers Regulations; see question 15). Furthermore, a sale of the target's business may be effected as part of a liquidation scheme under section 110 of the Insolvency Act 1986. Special procedures apply to transfers of business by insurance companies, building societies and banks.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Parts 26 (Arrangements and Reconstructions), 27 (Mergers and Divisions of Public Companies) and 28 (Takeovers) of the Companies Act 2006 provide the fundamental statutory framework and, together with the law of contract, form the legal basis for the purchase and sale of corporate entities.

In addition, the Takeover Code provides for regulation of takeovers by the Panel on Takeovers and Mergers (the Takeover Panel), which is designated, pursuant to the Companies Act 2006, as the supervisory authority for the purposes of the European Directive on Takeover Bids (2004/25/EC) (the Takeover Directive). The Takeover Code applies if the offeree (or potential offeree) is a UK public company and, sometimes, if the company is private or is dual listed. The Takeover Code also applies to, and includes specific provisions dealing with, schemes of arrangement.

The Financial Services and Markets Act 2000 (FSMA) regulates the financial services industry and makes provision for the official listing of securities, public offers of securities, and the communication of invitations or inducements to engage in securities transactions. FSMA also establishes a regime to prevent market abuse. However, this, along with the UKLA Sourcebook of Rules and Guidance, will be amended in 2016 to take account of the new Market Abuse Regulation, which will apply from 3 July 2016. Following changes made to the financial regulatory regime pursuant to the Financial Services Act 2012, since 1 April 2013, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) (together with the Bank of England) has replaced the Financial Services Authority as the regulator of financial services firms.

The UKLA Sourcebook of Rules and Guidance (which includes the Listing Rules, the Prospectus Rules, and the Disclosure and Transparency Rules (DTRs) made by the FCA as the UK Listing Authority (UKLA)) includes various obligations applicable to business combinations involving listed companies and contains prospectus rules for public offers by both listed and unlisted issuers. In addition, the European Securities and Markets Authority has issued recommendations, previously issued by the Committee of European Securities Regulators, for the consistent implementation of the European Commission's Regulation on Prospectuses (No. 809/2004) which should be considered whenever there is a requirement to produce a prospectus.

The Criminal Justice Act 1993, together with the Listing Rules, the DTRs and the Takeover Code, regulates insider dealing and market abuse. The requirement under the DTRs that companies must maintain 'insider lists' (namely, lists of those people party to inside information at any time) should be borne in mind at an early stage in any proposed transaction.

The relevant secretary of state may only intervene in exceptional cases involving public interest considerations, which include mergers relating to newspapers, broadcasting, financial institutions, water or sewerage services, and mergers where the stability of the UK financial system or national security is potentially at issue (see question 17 for further details).

The merger control rules of the UK are contained in the Enterprise Act 2002 (as amended), although the rules do not generally apply to mergers in relation to which the European Commission has exclusive jurisdiction under the EU Merger Regulation (EUMR) (see question 15 for further details). The Enterprise Act 2002 applies to transactions if they result in the creation of a relevant merger situation, which arises where:
- the turnover of the target business in the UK exceeds £70 million; or
- as a result of the merger, the parties obtain or increase a 25 per cent or more share of supply of any goods or services in the UK or a substantial part of it; and
- the parties to the transaction are brought under common ownership or control.

For these purposes, 'control' can be de jure control (namely, a controlling interest), de facto control (namely, effective ability to control the policy or strategic direction of the acquired enterprise, without having an actual controlling interest) or material influence.

'Material influence' is not a strictly defined concept. It depends on the individual circumstances but has been found in cases with shareholdings as low as 17.9 per cent (*BSkyB/ITV*). Relevant factors include whether the acquiring company has the ability to influence the board or shareholders (for example, where the other shares are held disparately

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or where the acquirer has the ability, in practice, to block special resolutions of the acquired enterprise), or whether the acquiring company has the ability to constrain the target company's ability to implement its own commercial policy (eg, by obstructing potential M&A activity, or blocking or forcing the divestment of assets) (*Ryanair/Aer Lingus*).

The Enterprise Act 2002 prescribes a voluntary notification system, meaning that there is no obligation on the parties to notify a transaction to the UK competition authority, the Competition and Markets Authority (CMA), before its completion (or at all). However, the CMA can review cases at its own initiative for up to four months after a merger has been made public.

The CMA is responsible for conducting initial investigations at Phase I to determine whether a merger may be expected to result in a substantial lessening of competition (SLC) and should therefore be subject to an in-depth Phase II investigation by an independent panel of experts. It is free to take decisions on mergers without making referrals to the relevant secretary of state (with the exception of cases involving public interest considerations).

Key features of the CMA regime include:

- a statutory deadline of 40 working days for the CMA to conduct a Phase I investigation and a statutory deadline of 24 weeks for a Phase II investigation (which may be extended by a further eight weeks if there are special reasons for doing so);
- a timeline of five working days from receiving the CMA's initial SLC decision for parties to offer undertakings in lieu of a Phase II investigation;
- powers for the CMA to prevent companies from taking steps to integrate in the context of both completed and anticipated mergers;
- investigatory powers for the CMA and the ability to impose penalties in the event parties fail to comply with the exercise of such powers (including in respect of providing false or misleading information to the CMA); and
- prescribed forms for the notification of a merger to the CMA and the submission of remedies in lieu of a Phase II investigation.

3 Governing law

What law typically governs the transaction agreements?

Agreements are almost always governed by English law. Private acquisitions of businesses or shares in a target company are normally effected by a sale and purchase agreement. The purchase of a target's underlying business may require formal conveyances of some assets (for example, real property) and individual novation agreements in relation to liabilities to be assumed. There is no general power under English law to transfer an obligation without the agreement of the obligee.

In the past, acquisitions of listed companies were normally made by a formal offer by the acquirer's agent (typically a bank or broker); however, there is no longer any requirement that this be the case and usually the acquirer will make the offer itself.

A prospectus may be required if share consideration is offered and, depending on its size relative to the acquirer, the acquisition may need approval by a general meeting of the acquirer's shareholders.

A scheme of arrangement under parts 26 and 27 of the Companies Act 2006 is effected by means of a court procedure. The principal document is the scheme circular to the target's shareholders explaining the terms of the scheme of arrangement and convening the requisite shareholder meetings to approve the scheme of arrangement.

Combinations under section 110 of the Insolvency Act 1986 require an agreement between the company liquidator and the acquirer, and need shareholders' approval by special resolution.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Under the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (as amended), the CMA can levy fees in certain circumstances where there is a relevant merger situation. These fees range from £40,000 to £160,000, depending on the value of the UK turnover of the enterprises acquired, and are generally payable once the CMA has made a decision following a Phase I investigation. No fees are payable in respect of notifications to the European Commission under the EUMR. In general, no other filings are required in the sale of private companies apart from such filings of conveyances as may be needed to transfer property.

Formal documents in public offers governed by the Takeover Code must be sent to the Takeover Panel and, if listed shares form part of the consideration, a prospectus relating to those shares is normally required to be approved by the UKLA and filed with the FCA.

Stamp duty at 0.5 per cent is payable on share transfers where the amount or value of the consideration is more than £1,000. Stamp duty land tax (SDLT) is imposed on purchases of non-residential property over £150,000. From 17 March 2016 a 'slice' system, under which that portion of the consideration falling within a particular band is taxed at the rate applicable to that band, replaced the previous 'slab' system, under which the whole of the consideration was taxed at a single applicable rate. The SDLT bands for non-residential property are currently 2 per cent on the portion of consideration from £150,001 to £250,000 and 5 per cent on the portion of consideration in excess of £250,000.

(See question 15 for information about filings in relation to cross-border transactions.)

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The DTRs require a listed company to immediately disclose 'inside information' directly concerning it by means of notification to an approved regulatory information service (RIS). 'Inside information' means precise information not generally available that relates directly or indirectly to one or more issuers of qualifying investments or to one or more of the qualifying investments themselves and would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments. There are certain exceptions to the immediate disclosure requirement where disclosure may prejudice an issuer's 'legitimate interests', including impending developments that could be jeopardised by premature disclosure, but the issuer must be able to ensure the confidentiality of that information and the absence of disclosure must not be likely to mislead the public.

A prospectus, if required, must contain all information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer, and the rights attaching to the securities in question. In addition to this overriding requirement, there are detailed rules as to content, including a description of the business, audited financial information for the latest three financial years, an operating and financial review of that period and a confirmation that the issuer has sufficient working capital for its present requirements (namely the next 12 months). There is an exemption from the requirement to produce a prospectus in connection with securities offered in connection with a takeover or merger; however, a document containing information equivalent to that in a prospectus will generally still be required. One disadvantage of an 'equivalent' document is that it cannot be passported into other EU jurisdictions. The requirements for a prospectus do not apply to securities that are not 'transferable' (for example, non-transferable loan-notes, which have become quite common in takeovers since the implementation of the Prospectus Directive).

Some types of information provided by a listed company to its shareholders will require the preparation of a circular. The Listing Rules set out the content and approval requirements for circulars to shareholders, and also the circumstances in which they must be prepared.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

There are complex disclosure requirements in the DTRs and the Takeover Code. Under the DTRs a person must, within two trading days (or four trading days in the case of a non-UK issuer), notify a company whose shares are admitted to trading in the UK of the percentage of voting rights that it holds as a direct or indirect holder of shares, or

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through an instrument (including, for example, options, futures, swaps and other derivatives) entitling it to acquire, dispose of or exercise voting rights in that company if that percentage reaches, exceeds or falls below 3 per cent or more, and each time further acquisitions or disposals take its interest through each percentage point greater than 3.

The thresholds for non-UK issuers that have shares admitted to trading on a UK regulated market and whose home state is the UK are 5, 10, 15, 20, 25, 30, 50 and 75 per cent.

A listed company is obliged by the DTRs or AIM Rules (depending on the market on which its shares are traded) to notify an RIS of notifications it has received from shareholders.

From April 2016, all UK companies save for issuers subject to DTR requirements will also have to keep a register of people with significant control over the company, which should include those who hold more than 25 per cent of the company's shares, who have a right to appoint or remove a majority of the board of directors, or who otherwise have the power to exercise significant influence over the company.

During an offer period, the Takeover Code requires any dealings by certain persons (including any person who is interested in 1 per cent or more of any relevant securities of any party to the offer, other than a cash offeror) in any relevant securities of any party to the offer (other than a cash offeror) to be notified to an RIS within a prescribed time period following the date of the transaction. Among other things, the disclosure regime in the Takeover Code also requires such persons to disclose details of interests or short positions in any relevant securities of any party to the offer following the start of an offer period and, if later, following the announcement that first identifies an offeror, regardless of whether or not any dealings take place (an 'opening position disclosure').

A public company may, under section 793 of the Companies Act 2006, require a person who it knows or reasonably believes is or was, in the previous three years, interested in shares of the company to provide details of the nature of that interest. Where a person fails to provide the requested information, the company may disenfranchise the shares that are subject to the notice. Failure to comply with a notice under section 793 is also an indictable offence with a maximum sentence of two years' imprisonment or a fine, or both unless it can be shown that the request was frivolous or vexatious.

While not required under the DTRs, the FCA's Financial Stability and Market Conduct Sourcebook contains a notification obligation for net short positions (excluding any interest held in the capacity of a market maker) representing an economic interest of 0.25 per cent or more of the issued capital of a UK financial sector company (a 'disclosable short position'). Failure by a person who has a disclosable short position in a UK financial sector company to provide adequate ongoing disclosure is behaviour which is market abuse. 'Adequate ongoing disclosure' means disclosure when the position reaches, exceeds or falls below a disclosable short position of 0.25, 0.35, 0.45 or 0.55 per cent of the issued share capital of the company and each 0.1 per cent threshold thereafter.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The Companies Act 2006 codified directors' duties, which previously existed under the common law. Directors have a duty:

- to act in accordance with the company's constitution and exercise powers for the purposes for which they were conferred;
- to promote the success of the company;
- to exercise independent judgement;
- to use reasonable care, skill and diligence;
- to avoid conflicts of interest;
- not to accept benefits from third parties; and
- to declare interests in proposed transactions and arrangements.

Directors' duties are owed to the company. The duty to promote the success of the company requires a director to act in the way he or she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. When exercising their powers, directors must have regard to various factors including the likely long-term consequences of a decision, the interests of employees, the need to foster the company's business relationships, the community and the environment, the company's reputation and the need to act fairly as between the members of the company.

The managers of a company are required to act in accordance with the directions of the board. Controlling shareholders do not have any similar duty, except that they may not use their position to oppress a minority.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

For listed companies, the Listing Rules provide that acquisitions of a certain size (broadly, at least 25 per cent of the size of the offeror) or with parties connected to the company (eg, a director or substantial shareholder) must be approved by a general meeting of the company's shareholders.

Some provisions of the Companies Act 2006 may give shareholders indirect approval rights. If the acquisition is to be funded through shares, shareholder approval may be required to authorise the directors to allot shares and, depending on the structure used, to disapply the requirement that new shares must first be offered to existing shareholders. If the transaction is of sufficient size in relation to the company and involves a director or substantial shareholder (or someone connected to a director or substantial shareholder), shareholder approval will be needed.

The company's constitutional documents may also require the approval of shareholders (or a class of them) for certain actions.

A scheme of arrangement under parts 26 and 27 of the Companies Act 2006 requires approval by a majority in number representing 75 per cent in value of shareholders present and voting (either in person or by proxy) at the relevant meeting.

A members' voluntary liquidation under section 110 of the Insolvency Act 1986 and the subsequent sale of all or part of a business in exchange for securities must be approved by a 75 per cent majority in value of those shareholders present and voting.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

A number of provisions in the Takeover Code (although technically applying to all offers) often need to be considered carefully in hostile transactions. The following are particularly noteworthy:

- the offer must first be put to the board of the offeree company or its advisers;
- all offeree company shareholders (of the same class) should be treated equally;
- any information given to one offeror or potential offeror must, on request, be given equally and promptly to any other offeror or bona fide potential offeror;
- there are constraints on share purchases before or during an offer period, the offer price and the type of consideration that can be offered;
- there are restrictions on the board of the offeree company taking actions that might frustrate the willingness or otherwise of an offeror to make an offer or complete an offer already made. The Takeover Code lists some particular actions that may not be carried out to frustrate a bid without shareholder approval, including issuing shares, issuing or granting options, and disposing of material assets; and
- advisers cannot be incentivised by the payment of a fee conditional upon the failure of a bid.

Whereas in a recommended bid situation a joint document will be issued, the process is more adversarial in a hostile situation. Both the offeree and the offeror issue their own circulars; the offeree's board sends a defence document to its shareholders explaining why it thinks the offer should be rejected.

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10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

In the past, break fees payable by an offeree were very common in UK takeover bids as a mechanism to protect a potential offeror. Other arrangements to provide comfort to potential offerors were also often used, such as matching arrangements (giving the offeror the chance to match or better any competing bid) and exclusive break fees (involving the offeree agreeing not to enter into break fee arrangements with any competing offeror).

However, in September 2011, the Takeover Panel amended the Takeover Code to include a general prohibition against certain offeror deal protection measures. Break fees, exclusivity and non-solicitation agreements, matching arrangements, implementation agreements and similar offeror protections are no longer permissible for public acquisitions, subject to certain limited exceptions. The Takeover Panel will permit an offeree to enter into a break fee arrangement with an offeror if the offeree board seeks a 'white knight' in the context of a hostile offer, or if the offeree has put itself up for sale by means of a formal process or is in serious financial distress. Such exceptional break fee arrangements are normally limited to 1 per cent of the value of the offeree calculated by reference to the offer price.

Despite the Takeover Code prohibitions, break fee arrangements are still available in private acquisitions. There are a number of legal issues involved when entering into break fee arrangements. Directors must be careful to comply with their duties to the company. Under the Companies Act 2006, directors must act in good faith to promote the company's success for the benefit of its members as a whole. Break fee arrangements are generally only acceptable where the board can take a bona fide view that, in the absence of the company agreeing to pay such a fee, the shareholders would be deprived of an offer the board would otherwise recommend and, even then, only if the fee is relatively small. Under the Listing Rules, if the break fee is greater than 1 per cent of the value of the listed company calculated by reference to the offer price, then it will be deemed to be a 'class 1 transaction' and shareholder approval will be required.

The Takeover Code does not prohibit the payment of a reverse break fee by an offeror to an offeree. Such reverse break fee arrangements tend to be granted infrequently (for example, where an offeror shareholder approval is required).

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Not normally, although the most obvious exception to this would be a combination by companies involved in the defence and armaments industries (for example, the attitude of the UK and other European governments was considered to be an important factor in the withdrawal of the *BAE Systems/EADS* merger). Governmental agencies may also have some de facto influence in other regulated sectors (utilities, etc), while the secretary of state for culture, media and sport may intervene in mergers in the media sector on 'public interest' grounds (eg, *News Corporation/BSkyB*).

Following the global instability experienced by financial markets, the UK government has been active in the completion of business combinations in order to strengthen stability and confidence in the UK banking system. This is illustrated by HM Treasury's purchase of stakes in RBS and Lloyds Banking Group. Legislation was passed in the context of the financial crisis to strengthen the UK banking system, as demonstrated when the UK government extended the categories in which it may intervene in merger control decisions to include 'maintaining the stability of the UK financial system'. The Banking Act 2009 also provides HM Treasury, the Bank of England and the PRA with a variety of powers for dealing with failing banks and certain other types of financial institutions. The extent of government influence in business combinations is also reflected by amendments made to the Takeover Code to ensure that none of the banks acquired or recapitalised by the UK government is treated as 'acting in concert' due to its respective shareholdings.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

A takeover offer will be subject to an acceptance condition which will usually be set, initially, at the 90 per cent level, being the percentage required for the offeror to be able to activate procedures for buying out outstanding minority shareholders, but can be lowered to the minimum level of 50 per cent imposed by the Takeover Code. No offer that, if accepted in full, would give the offeror more than half the offeree's voting rights can become unconditional unless the offeror has acquired or agreed to acquire shares carrying over 50 per cent of the voting rights.

Although it is common for offerors to include wide-ranging conditions in the terms of an offer, the practical effect of these is limited by the Takeover Code and the Takeover Panel's approach to the application of the rules. Under the Takeover Code, an offer must not normally be subject to conditions that depend solely on subjective judgments by the directors of the offeror or the fulfilment of which is in their hands. With the exception of UK or EU competition conditions, an offeror should not invoke any condition so as to cause an offer to lapse, unless the circumstances that give rise to the right to invoke the condition are of material significance to the offeror in the context of the offer and the Takeover Panel has given its consent for that condition to be invoked. The availability of finance would not normally be permitted to be a condition to a cash offer.

Preconditions may also be included whereby the offer does not have to be made (namely, the offer document does not have to be posted) unless each precondition is satisfied. Preconditions can only be used if the Takeover Panel has been consulted in advance. Generally, preconditions are allowed when material official authorisations are needed or there are regulatory clearances required that relate to the offer and the Takeover Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the offer timetable.

A scheme of arrangement requires the approval of a majority in number representing 75 per cent in value of an offeree company's shareholders present and voting (either in person or by proxy), and needs to be sanctioned by the court.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Cash consideration does not have to be guaranteed and it is rare for there to be a bank guarantee for the full amount. However, the offer announcement for a cash offer (including a compulsory offer and any voluntary offer with a cash element) must include confirmation by the offeror's financial adviser or another 'appropriate' third party that sufficient funding is in place for the offeror to satisfy full acceptance of the offer. The person giving the confirmation will not normally be required to produce the cash itself, provided they have acted responsibly and taken all reasonable steps to assure themselves that the cash is available.

A description of how the offer is being financed and the source of finance (including the repayment terms and names of lenders, etc) must be included in the offer document.

Subject to limited exceptions, an English public company may not provide financial assistance directly or indirectly for the purpose of the acquisition of the shares in itself or its holding company. Financial assistance includes guarantees, security, indemnities, loans and any other financial assistance given by a company that has no net assets or the net assets of which are thereby reduced to a material extent. The main exception is that dividends declared out of distributable profits would not normally constitute financial assistance. The prohibition on financial assistance only applies to public companies. However, a private company is prohibited from giving financial assistance for the purpose of the acquisition of shares of a public parent company.

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14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Under the Companies Act 2006, an offeror that acquires not less than 90 per cent of the relevant shares to which the offer relates and 90 per cent of the voting rights carried by those shares may purchase the remainder of the shares on giving notice to the holders, provided that:

- notice is given before the expiry of a three-month period, beginning with the day after the last day on which the offer can be accepted; or
- for offers to which the Takeover Directive does not apply (namely, offers for companies whose securities are not admitted to trading on a regulated market), notice is given before the expiry of a six-month period beginning with the date of the offer, if that period ends earlier than the usual three-month period; and
- the other procedural requirements of the Companies Act 2006 are complied with.

In addition to a successful offeror's squeeze-out rights, once the relevant 90 per cent thresholds are achieved, the remaining minority shareholders can exercise 'sell-out' rights requiring the successful offeror to purchase their shares.

Once a scheme of arrangement becomes effective it binds all shareholders and a bidder will acquire a 100 per cent shareholding in the target.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

The EUMR provides a mechanism for the control of mergers and acquisitions at the EU level. It applies to any 'concentration' with an 'EU dimension' as defined in the EUMR. The national authorities of the EEA member states may not apply their own competition laws to these mergers, except in certain limited circumstances. (Such transactions may, of course, be subject to the competition laws of non-EEA member states). Cross-border transactions not falling within the EUMR may still be subject to the competition laws of the EEA and non-EEA jurisdictions. The European Commission's Consolidated Jurisdictional Notice explains how it will apply the various aspects of the EUMR regime.

The term 'concentration' under the EUMR is broad and depends on the acquisition of 'control' of one undertaking by another, which generally means the ability to exercise decisive influence over the acquired undertaking (for example, through share ownership, voting rights or veto rights). A concentration will have an EU dimension where certain thresholds for worldwide and EU-wide turnover set out in the EUMR are met. These thresholds are fairly high, so that only large-scale concentrations that significantly affect trade within the EU are caught. In addition, each of the undertakings concerned must not achieve more than two-thirds of its EU-wide turnover in one and the same member state. While generally transactions that meet the EUMR thresholds must be notified to the European Commission, there are procedures by which parties and national authorities may request that jurisdiction be transferred from the European Commission to a national competition authority where it would be simpler, more appropriate or more advantageous to consider the transaction at national level. It is also possible to request that jurisdiction be transferred from national authorities to the European Commission in certain circumstances.

The test under the EUMR is whether the concentration would 'significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'.

Notification of transactions falling under the EUMR is mandatory. Transactions cannot be implemented unless and until they have been cleared by the European Commission. The regime is enforced by the Directorate General for Competition of the European Commission in Brussels.

Under Regulation EC No. 802/2004, the Implementing Regulation (Consolidated), the forms to be filed when notifying deals to the European Commission are Form CO, for a full-form notification, or Short Form CO, which may be used when notifying concentrations unlikely to raise competition concerns. Commission Implementing Regulation EU No. 1269/2013 amended the Implementing Regulation to provide for a more streamlined Form CO and Short Form CO. Separate forms are required for requests by the parties to transfer jurisdiction to review the transaction to or from the European Commission. No fees are levied by the European Commission for a notification.

The European Commission recently conducted a public consultation on certain procedural and jurisdictional aspects of the EUMR. In particular, it sought feedback on the effectiveness of purely turnover based thresholds (specifically, whether they need to be supplemented by other thresholds to capture the acquisition of high value transactions in certain sectors, such as digital services and pharmaceuticals, which currently escape scrutiny as the target companies do not generate significant turnover), the further simplification of procedures in relation to cases that do not typically raise competition concerns, and the simplification of referral mechanisms between EU member states and the European Commission. The outcome of the consultation may lead to some proposals to amend the EU merger control regime.

The Cross-Border Mergers Regulations implement the Cross-Border Mergers Directive. The Cross-Border Mergers Regulations establish a facilitative framework for cross-border mergers to occur between UK companies and companies elsewhere in the EEA where such companies choose to merge. It is assumed that only companies that consider they would benefit from such a cross-border merger would choose to participate in it. The Cross-Border Mergers Regulations recognise the following forms of mergers: by absorption (namely, an existing company absorbs one or more other merging companies); by absorption of a wholly owned subsidiary; and by formation of a new company (namely, two or more companies merge to form a new company). These types of merger all involve the transferor company being dissolved, without going into liquidation, resulting in its assets and liabilities being transferred to a different entity. Of the companies involved in the merger, at least one must be UK-incorporated and at least one other must be formed and registered in another EEA state. The Cross-Border Mergers Regulations prescribe a two-step process for conducting the merger, as well as key provisions relating to employee participation. The employee participation rules require the transferee to abide by the relevant employee participation rules in force in the EEA state in which that company will be registered. Although the UK does not have any relevant employee participation rules, the Cross-Border Mergers Regulations provide for some circumstances in which a UK transferee company will have to put employee participation agreements in place.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Other than the minority squeeze-out provisions described above and particular requirements applicable to the businesses of specific industries, there are no waiting or notification periods generally applicable.

Mergers and acquisitions in the financial services sectors have for some years been subject to change of control provisions. In 2007, Directive 2007/44/EC (the Acquisitions Directive) on mergers and acquisitions in the financial services sector required the amendment of the supervisory regime with a view to improving transparency and clarity of the process. In accordance with the Acquisitions Directive, the UK substantially changed its requirements in March and April 2009. Accordingly, acquisitions or increases of significant shareholdings in UK banks, investment firms, insurance companies, asset managers and certain brokers and other persons authorised under FSMA require the prior approval of the appropriate regulator (either the PRA or FCA). The names of UK-authorised persons appear in a register kept by the FCA.

The FCA must be notified when a person decides to take a significant shareholding or gains control indirectly. The assessment period is 60 working days, which may be interrupted no more than once. For banks, investment firms, asset management companies and insurance companies, the threshold is 10, 20, 30 or 50 per cent. For other authorised firms (non-directive firms), the UK also operates a change of control regime and there is a single threshold of 20 per cent. In both cases, certain shareholders are disregarded, but shares held by a person with whom the acquirer is 'acting in concert' must be aggregated. The FCA may refuse to approve the change of control only if there are reasonable grounds for doing so on the basis of certain specified

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matters (namely, the reputation or financial soundness of the acquirer, the reputation and experience of any person who will direct the business of the UK-authorised firm, the ability of the UK-authorised firm to comply with its prudential requirements, the structure of any group of which the UK-authorised firm will become a part and the risk of money-laundering or terrorist financing being committed), or if the information provided by the proposed controller is incomplete. Failure to notify a change of control to the FCA is a criminal offence and the FCA may require the shares to be sold or otherwise restrict the rights attaching to the shares.

There are also change of control requirements in relation to recognised investment exchanges, where the thresholds are a 20 or 50 per cent shareholding, and the assessment period is three months.

Transfers of banking and insurance businesses will normally be effected by a scheme requiring court approval.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The EU and UK merger control regimes are described in questions 2 and 15.

The relevant secretary of state is able to intervene only in exceptional cases involving public interest considerations. The Enterprise Act 2002 specifies the public interest considerations in relation to which the secretary of state may intervene, and includes mergers involving companies in the defence, newspaper and broadcast sectors. For example, News Corporation's proposed acquisition of BSkyB was referred by the secretary of state for culture, media and sport to the Competition Commission, amid concerns regarding media plurality, notwithstanding that the European Commission had cleared the transaction on competition grounds.

The Enterprise Act 2002 also allows new grounds for intervention to be added by statutory instrument if the need arises. In October 2008, this power was exercised to allow the secretary of state to intervene in any UK merger that he or she considers raises 'the interest of maintaining the stability of the UK financial system'. This power was introduced in the context of the autumn 2008 crisis in the financial markets and was used by the secretary of state for business in relation to the Lloyds TSB bid for HBOS.

Mergers in the water and sewerage sectors are subject to special rules on referral to the CMA, if certain minimum turnover thresholds are met. Sectoral regulation may also have practical implications in a merger.

18 Tax issues

What are the basic tax issues involved in business combinations?

Corporate sellers that are stand-alone trading companies or members of a trading group are entitled to a capital gains exemption on selling a substantial shareholding in any trading company or holding company of a trading group (the substantial shareholdings exemption or SSE). Currently, a shareholding is substantial if it constitutes at least a 10 per cent holding in the company and has been held for at least a 12-month period, beginning not more than two years before the disposal takes place. No allowable loss can arise on the disposal of such a shareholding. Certain amendments are expected to be made to the SSE with effect from 1 April 2017 including: removing the requirement that a corporate seller be a stand-alone trading company or a member of a trading group; extending the period in which the substantial shareholding condition can be met from two years before the disposal takes place to six; and extending the scope of the exemption to non-trading companies in which institutional investors hold a significant interest. The substantial shareholding exemption provides many UK corporate sellers with the equivalent of the common European 'participation exemption' and leaves the UK holding company in a competitive situation when compared to its European counterparts, because no withholding tax is imposed on dividends paid by UK companies, and dividends from UK and non-UK companies paid to UK companies are (subject to some exceptions) exempt from tax. Traditionally the UK has had generous interest relief rules generally allowing relief for the interest cost of genuine borrowings used to acquire UK or foreign subsidiaries subject only to a 'worldwide debt cap' that restricts tax deductions for interest claimed by the UK members of a large multinational group to the level of the worldwide group's gross external financing expense. However, the UK has been an enthusiastic early adopter of the OECD's BEPS proposals, which is likely to affect the amount of deductible finance expense arising to UK holding companies in future, particularly where that finance is used to acquired foreign subsidiaries. In particular, the UK is proposing to introduce a restriction on the deductibility of interest (and interest-like) expenses with effect from 1 April 2017 following the OECD's recommendations on BEPS Action 4. Very broadly speaking, under the new rule deductions for net interest expense will be capped at 30 per cent of taxable EBITDA, subject to a group ratio rule based on the net interest expense to EBITDA ratio of the worldwide group, and a £2 million net interest expense de minimis intended to take smaller groups out of scope. The UK has also implemented a new hybrid mismatch regime with effect from 1 January 2017 following the OECD's recommendations on BEPS Action 2.

The purchaser of shares in a UK company will generally be liable for stamp duty on the purchase at 0.5 per cent. It can claim no form of tax depreciation for the purchase. Although it acquires the whole tax history of the company acquired it would generally expect to recover, through indemnities from the seller, any unprovided for tax liabilities that may come to light.

By contrast, the tax treatment is quite different on the sale of the business assets of a company. The consideration will have to be allocated among the various assets disposed of: the element attributable to stock will be brought into account as with any other receipts on trading account; the element attributable to assets that have qualified for capital allowances may give rise to recapture of earlier tax depreciation or an allowance of further relief; and the element attributable to capital assets will generally give rise to a capital gain or loss. Profits arising on the disposal of goodwill and other intangible assets may be taxed as either income or capital under the rules relating to the taxation of intangible property depending, among other things, on their time of creation.

The SSE referred to above on sales of shares does not apply to the sale of assets but, if the proceeds of disposal of certain qualifying fixed assets are reinvested in other qualifying fixed assets, then the gain can be deferred until sale of the replacement assets, and if capital losses are available to the seller, it can offset them against any gains. Sellers of business assets may try to make use of the SSE by hiving the business into a new company in preparation for sale. The Finance Act 2011 made the SSE available for the sale of the shares in a new company so long as the hived assets have been used in the trade of another member of the group for 12 months before the hive-down. The degrouping charge that arises on the sale of the shares in respect of the hive-down of capital assets (but not intangible property or loans or derivatives) can be covered by the same substantial shareholding exemption, as the charge would be treated as an adjustment to the gain arising on the sale of shares (instead of a separate tax charge that arises on the new company).

From the perspective of the purchaser, the implications of acquiring business assets as distinct from shares are quite different. A company acquiring assets other than shares and marketable securities is not subject to stamp duty on the transaction; but stamp duty land tax is imposed on purchases of non-residential property over £150,000. From 17 March 2016 a 'slice' system, under which that portion of the consideration falling within a particular band is taxed at the rate applicable to that band, replaced the previous 'slab' system, under which the whole of the consideration was taxed at a single applicable rate. The SDLT bands for non-residential property are currently 2 per cent on the portion of consideration from £150,001 to £250,000 and 5 per cent on the portion of consideration in excess of £250,000. There is no charge on the purchase of other assets, such as goodwill.

The purchaser of business assets has to allocate the price paid between the various assets and can claim capital allowances in respect of expenditure on qualifying assets. For example, in the case of depreciable plant and machinery, capital allowances are available on a reducing balance basis at various rates depending on the type of asset and the level of expenditure incurred. Capital allowances represent a valuable tax advantage of an asset purchase. Tax relief is also available for the depreciation or amortisation of certain intangible assets in accordance with the accounts (although this no longer applies, for acquisitions on or after 8 July 2015, to goodwill and other customer-related intangibles).

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The availability of different reliefs and exemptions may, therefore, generate a seller preference to sell shares and a purchaser preference to acquire business assets.

Public offers for shares in a target company are broadly similar to the private purchases mentioned in the first paragraph, but with practical differences. The SSE will not apply unless the relevant shareholder's holding is substantial (see the first paragraph), but portfolio shareholders may be attracted to consideration in the form of shares or loan notes in the acquiring company either for general investment purposes or because the seller should be able to defer tax on capital gains until the subsequent sale or redemption of the consideration shares or loan notes (where the exchange is for bona fide commercial reasons and not part of a tax avoidance scheme). Tax exposures within the target company will almost invariably not be the subject of any warranty or indemnity protection.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Private acquisitions of, or public offers for, shares in a target company will not generally affect the terms of the individual's contract of employment with that target company. The employee remains employed by the target company on his or her existing terms. Senior executives may have a contractual right, for example, to resign or be paid an agreed sum on a change of control, although such payments are rare and contrary to institutional investor guidance.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) govern the transfer of an undertaking, business or part of an undertaking or business situated in the UK immediately before the transfer (in cases where there is a transfer of an 'economic entity' that retains its identity) and certain service provision changes (that is broadly, outsourcing, insourcing and changing outsourcing providers where there is an organised grouping of employees situated in the UK with a principal purpose of carrying out activities on behalf of the client other than in connection with a single specific event or task of short-term duration, or where the activities consist wholly or mainly of the supply of goods). The main effect of TUPE, in very general terms, is that the contracts of employment for those employees who are assigned to the relevant undertaking or the organised grouping of resources or employees providing the relevant service that are subject to the relevant transfer, are transferred automatically to the purchaser of the business or the new service provider. The purchaser or the new service provider is treated as if he or she had always been their employer and therefore becomes liable for any breaches of contract or other acts or omissions of the transferor (for example, failure to pay wages or discrimination), although criminal liability does not transfer.

Therefore, the terms and conditions of the contract of employment will not be affected by the transfer, except for terms relating to an occupational pension scheme (and which relate to benefits for old age, invalidity or survivors – terms which have been the subject of much judicial consideration), which do not transfer under TUPE.

There is a minimum element of protection of rights under occupational pension schemes for relevant employees who are subject to a TUPE transfer. Where applicable, a transferee must offer either defined benefit arrangements meeting prescribed requirements or a defined contribution or stakeholder arrangement to which (in each case) the transferee must make matching contributions of up to 6 per cent (or up to the transferor's level of employee contributions). Rights under death benefit-only schemes and personal pension schemes do transfer under TUPE. The continuance of terms under TUPE may raise practical difficulties in circumstances where the contract provides for specific benefits which are conferred as part of a group scheme operated by the transferor and which the purchaser will find difficult to replicate. The purchaser or the new service provider must, in such circumstances, offer a benefit of substantial equivalence.

TUPE restricts the transferee from changing the terms of employment of transferring employees if the sole or principal reason for the change is the transfer itself, although changes will be permitted where the sole or principal reason is an economic, technical or organisational reason entailing changes in the workforce. The practical implication of this restriction is that any changes detrimental to an employee are at risk of challenge. If an individual objects to the transfer of his or her employment to the purchaser or the new service provider, he or she will be treated as having resigned unless the transfer would involve a substantial and detrimental change in his or her working conditions or otherwise give grounds to claim constructive dismissal in which case it will be treated as a dismissal. Further, if an employee is dismissed where the sole or principal reason is the transfer itself, that dismissal will be treated as being automatically unfair. This will not be the case if the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce; in these circumstances, the dismissal will not be automatically unfair, and will be judged by the ordinary test for unfair dismissal.

Transferors must provide certain information about the transferring employees (known as 'employee liability information') to the transferee, usually at least 28 days before a relevant transfer or service provision change. Failure to do so can result in an order by an employment tribunal for the transferor to pay compensation of at least £500 per employee to the transferee.

Importantly, TUPE obliges the transferor (and sometimes the transferee) to provide employee representatives with prescribed information (namely, that the relevant transfer is to take place, its timing and the reasons for it, its legal, economic and social implications, any measures, such as redundancies, which are proposed, and information about the use of agency workers). Where 'measures' are envisaged (which can include a positive act or omission by the employer and is interpreted widely), the employer then has a further duty to consult his or her employee representatives about those measures, with a view to seeking their agreement to the measures to be taken. Failure to comply with the duties to inform and consult can result in an award of up to 13 weeks' pay per employee and the transferor and transferee will be jointly and severally liable for any such failure.

Separate consultation obligations will apply if either the transferor or the transferee plans to undertake collective redundancies (ie, if it proposes to dismiss 20 or more employees at one establishment within a period of 90 days or less). In those circumstances, the Trade Union and Labour Relations (Consolidation) Act 1992 requires that the employer must consult with representatives of affected employees for a minimum period of 30 days; this period increases to 45 days if 100 or more redundancies are proposed. If the transferee proposes collective redundancies after a relevant transfer, it can (with the transferor's agreement) undertake the relevant consultation before the transfer takes place.

There are further obligations to consult employees and provide them with information pursuant to the EC Directive on Informing and Consulting Employees (2002/14/EC), which was implemented in the UK by the Information and Consultation of Employees Regulations 2004. However, it is worth noting that the onus is on employees to ask for information and consultation arrangements under these regulations to be agreed and employers are only obliged to set up arrangements where 10 per cent of the workforce ask for this. It is therefore always sensible to ascertain whether such arrangements have been agreed. There is also a possibility that consultation obligations may be triggered under the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.

In the case of a scheme of arrangement, TUPE will apply to a transfer or change if it involves the transfer of a business or (potentially) a change in service provider (even if it is intra-group).

In the case of a public offer, the Takeover Code requires the offeree to make any announcement of a possible offer available to its employee representatives (or, where there are no employee representatives, to the employees themselves). At the same time, the offeree must inform the employee representatives of their right to have an opinion on the effects of the offer on employment appended to the offeree board's circular, as well as the offeree's responsibility for the costs incurred by the employee representatives in obtaining advice on that opinion. In addition, the offer document must include a statement of the offeror's strategic plans for the offeree company and their likely repercussions on employment.

The treatment of share option schemes in the target group, in essence, tends to be a matter of the construction of the relevant rules. Where the shares or business of a target company, or both, are acquired by private acquisition, it is common for options to become exercisable for a limited time. The rules must be carefully checked to ensure that the employees' options do not lapse. In the case of a public offer or

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Update and trends

UK M&A activity in 2016 was down from 2015's record high, as political and economic uncertainty (principally caused by the Brexit vote in June 2016) prompted businesses and investors to take a more cautious approach. However, in spite of this uncertainty, the sharp devaluation in the value of the pound, cheap financing made possible by low interest rates and availability of capital to deploy have provided attractive opportunities for overseas investors, with relatively strong bid activity levels during the final quarter of 2016. Highlights have included SoftBank Group's £24.4 billion offer for ARM Holdings and Twenty-First Century Fox's £11.7 billion offer for Sky. Britain remained the third largest M&A market in the world after the United States and China, and the outlook for UK M&A activity in 2017 seems generally positive (albeit with a somewhat reduced value and volume of transactions being expected relative to 2016).

Public acquisitions

During 2016, 26 firm offers were announced for Main Market companies (down from 32 in 2015, but up from 24 in 2014), and 25 firm offers were announced for AIM companies (up from 20 in both 2014 and 2015). The Brexit effect can, in particular, be seen in respect of deal value rather than volume: total M&A activity fell to £144.5 billion; less than half of the £321.5 billion recorded in 2015. Only five offers with a value of over £1 billion were announced in 2016, compared with 14 offers in 2015.

Continuing the trend from previous years, schemes of arrangement remained the most popular way of structuring recommended bids. Thirty-one out of 51 firm offers announced in 2016 were structured as a scheme of arrangement, rather than a contractual offer.

The changes made to the Takeover Code in January 2015 which introduced a new regime for post-offer undertakings (POUs), where a party commits to take, or not to take, certain action after an offer period, had a limited discernible impact on market practice in 2015. That changed in 2016, when SoftBank Group announced an offer for ARM Holdings. SoftBank gave a number of POUs in the scheme document, including that, by the fifth anniversary of the scheme becoming effective, it would double the number of UK ARM employees and that, for this five-year period, ARM group would keep its global headquarters in Cambridge. These POUs, which were given in response to concerns that the takeover would result in a loss of jobs in the UK, are an example of how an offeror can be tied down to takeover-related obligations several years after the takeover itself completes.

Following the Department for Business, Energy and Industrial Strategy's announcement in September 2016 (in the context of the Hinkley Point C nuclear power station deal) that the government aims to reform its approach to ownership and control of 'critical infrastructure' to ensure that foreign ownership does not negatively affect national security, POUs could become more common in certain sectors. Prime Minister Theresa May has also stated that, in due course, the government will develop proposals to further regulate takeovers in relation to matters of national security and critical national infrastructure. The Enterprise Act 2002 already allows the Secretary of State to intervene where it is deemed that a merger could cause certain public interest concerns (including in respect of national security and media plurality). Whilst this may indicate that a more interventionist approach could be adopted by the government going forward, there is unlikely to be any radical change in the regulatory framework as there remains widespread recognition that it is in the national interest for the UK to be seen as 'open for business'.

Of course, in addition to potential regulatory/political intervention at a national level, there can also be intervention at a European level: the proposed merger between Deutsche Börse and the London Stock Exchange Group was recently blocked by the European Commission following EU competition concerns, among other things.

Private acquisitions

Consistent with observations in 2015, the private M&A market in 2016 has been broadly more seller-friendly than in previous years. Material adverse change clauses in favour of buyers remain rare. However, it remains common for deals to be conditional on obtaining certain regulatory clearances or consents (typically, antitrust authorisation).

One noteworthy development in late 2015 has been the Supreme Court's clarification of the long-standing principle that 'penalty clauses' are unenforceable. Rather than simply strike down such a clause, the courts will now look at whether it is a 'primary' obligation that is conditional on an act not being performed or a 'secondary' obligation intended as an alternative to damages. If the former, the clause will (other things being equal) be enforceable. If the latter, the clause will (other things being equal) be enforceable unless it imposes a detriment on the defaulting party out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. What exactly that means in practice is still potentially unclear, but – subject to other relevant factors, including the nature of the parties involved – it does indicate a greater willingness on the part of courts to uphold such provisions.

scheme of arrangement for shares in the target company, it is likely that change of control provisions in the share option scheme rules will cause some or all of the options to be exercisable for a limited period after the change of control.

Where the target company or business participates in a wider group pension scheme (namely, it is not the principal employer of the scheme), the treatment of pensions will normally be a question of negotiation between the parties (subject to the provisions of the Pensions Act 2004 described below). The target company or business will usually cease to participate in the pension scheme, although it may be useful for the target company (or the purchaser of the business) to continue to participate (or to participate) in the scheme for a limited period as a transitional measure (although this is becoming less common as liabilities can arise that could otherwise be avoided). The purchaser would then provide replacement pension benefits for the employees' future service in its own pension scheme. It is also possible (depending on the bargaining position of the parties) to offer employees a transfer amount (to represent the value of their accrued rights) to the purchaser's new or existing scheme. If (as is normally the case for a defined benefit pension scheme) the pension scheme is in deficit on an annuity buyout basis, the target company will become liable to contribute its share of that deficit when it ceases to participate in the group pension scheme under the Pensions Act 1995. It would be usual for the purchaser to seek an indemnity against this type of liability.

In the case of a public offer, the Takeover Code requires the offeree to make any announcement of a possible offer available to the trustees of its group-wide defined benefit schemes. At the same time, the offeree must inform the trustees of their right to have an opinion on the effect of the offer on the pension scheme appended to the offeree board's circular. There is no requirement for the offeree company to pay any costs incurred by the trustees in obtaining advice on that opinion. Nor is there a requirement for the offer document to include a statement of the effect of the offeror's strategic plans for the offeree company on the offeree's company pension scheme.

The Pensions Act 2004 and related secondary legislation provide for a Pensions Regulator. Buyers and sellers should be aware of various powers of the Pensions Regulator which could be triggered by the transfer of a company or business (including the requirement to notify the Pensions Regulator of certain events, the ability of the Pensions Regulator to impose a requirement for connected or associated persons of a company to provide financial support to the pension scheme and the power to impose an obligation to make a contribution into the scheme). In certain circumstances, the parties to the transaction may opt to seek clearance in advance from the Pensions Regulator.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

It will be important for a buyer to satisfy itself that the receiver, administrator or liquidator has been validly appointed.

Only limited warranties will be available from any receiver, administrator or liquidator. The increased risks this brings to a share acquisition may be mitigated or offset by:

- conducting a rigorous investigation of the target to limit the scope for hidden liabilities;
- retaining a part of the purchase price to be set off against any unexpected liabilities arising in a certain period; or
- paying less.

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The advantage of structuring transactions involving an insolvent target company as an asset sale is that the buyer will only inherit liabilities that it has agreed to assume. The buyer will need to ensure that it receives good title to the assets, free from any third party interests. The buyer should also consider and carefully review provisions in English insolvency law that allow a court (on the application of an administrator or liquidator) to set aside transactions at an undervalue and preferences granted to creditors within certain periods before the onset of insolvency.

If the target company uses a hive-down to transfer assets into a new company, then a buyer can purchase the shares in the new company without inheriting the liabilities of the parent.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

In the context of business combinations, purchasers should consider the potential liabilities arising from non-compliance with the UK sanctions, anti-corruption and money-laundering regimes (whether in relation to dealings with counterparties, pre-existing deficiencies affecting the target business or otherwise).

The UK sanctions regime is established by way of EU regulations, which are directly effective in the UK, and by a number of separate statutory instruments, which implement sanctions imposed by the UN or ensure UK law effectively implements EU regulations. In addition, the Terrorist Asset-Freezing etc Act 2010 established a framework that meets the UK's obligations under UN Security Council Resolution 1373 on freezing the assets of those whom the UK designates as involved with terrorism.

The Office of Financial Sanctions Implementation (OFSI), a unit of HM Treasury is responsible for the implementation and administration of the financial sanctions regime, which currently targets several thousand individuals and entities (generally referred to as 'designated persons'). OFSI assumed its responsibilities in March 2016, and works closely with law enforcement agencies to help ensure that financial sanctions are properly understood, implemented and enforced by relevant private sector organisations. Sanctions are imposed on new targets either by way of a new statutory instrument made in relation to each new group of targets to be made subject to sanctions, or by way of an HM Treasury notice that draws attention to a change made through an EU regulation. The HM Treasury financial sanctions website contains full details of statutory instruments, as well as lists of asset freeze targets and investment bans. The work of HM Treasury in respect of financial sanctions is distinct from the UK trade sanctions regime, which is administered separately by the Export Control Organisation within the Department for International Trade.

HM Treasury also has the ability to impose UK own-initiative sanctions under schedule 7 to the Counter Terrorism Act 2008 (known as 'Schedule 7 orders'). These are sanctions directed against countries that pose 'a significant risk to the national interests of the United Kingdom' by virtue of money laundering, terrorist financing or weapons of mass destruction proliferation activities. HM Treasury first made use of these powers in November 2011 against Iran.

The offences set out in the various statutory instruments generally include:

- dealing with funds or economic resources owned, held or controlled by, or on behalf of, a designated person (unless authorised by a licence granted by HM Treasury under the relevant statutory instrument);
- making funds or economic resources available (directly or indirectly) to, or for the benefit of, a designated person (unless authorised by a licence granted by HM Treasury under the relevant statutory instrument); and
- participating, knowingly and intentionally, in activities the object or effect of which is (directly or indirectly) to circumvent the prohibitions on making funds available or dealing with funds; or to enable or facilitate the commission of those offences.

The offences under the UK sanctions regime may be committed by any person in, or carrying on business in, the UK (including companies) or by any person elsewhere who is a UK citizen or an entity incorporated under the laws of the UK. The overseas branch of a UK company will, therefore, be subject to the UK sanctions regime in addition to any local law requirements, whereas, in principle, an overseas subsidiary will not. The commission of an offence under the UK sanctions regime is punishable by imprisonment or a fine and, where a body corporate commits an offence, in certain circumstances, officers of the entity may also be guilty of an offence. Penalties for offences committed under the UK sanctions regime are typically set out in the relevant statutory instruments implementing individual sets of sanctions. It may be possible in some cases to obtain a licence from HM Treasury permitting specific transactions or payments that would otherwise be subject to a sanctions regime and there are otherwise only very limited statutory exclusions and exemptions from the regime. OFSI published guidance, in December 2016, which sets out its approach to the implementation of the UK's financial sanctions regime, and the limited circumstances in which it would consider granting exemptions from the regime.

Sanctions laws, whether originating from the UN, EU or other jurisdictions, have proliferated in recent years and this has resulted in many more sanctions regimes having an impact on persons doing business in the UK and other EU countries. Regulators and other enforcement authorities are also demonstrating a greater willingness to take enforcement action against those who breach sanctions.

Separate to the UK sanctions regime, the Bribery Act 2010 recasts the basic offences of giving or receiving bribes. This gives the UK courts jurisdiction where any part of the offence occurs in the UK and over persons who have a close connection with the UK regardless of where the relevant offence takes place. It also provides for two other offences:

- bribing a foreign public official; and
- in the case of a commercial organisation (including a company) that carries on business in the UK, an offence of failing to prevent bribery.

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The second of these two offences can be committed by virtue of the fact that a person associated with the commercial organisation (namely, a person performing services for it, such as an employee, agent, subsidiary or even a third party contractor) has bribed another person intending to obtain or retain business for the commercial organisation, or to obtain or retain an advantage in the conduct of its business. Both UK companies and partnerships carrying on business anywhere in the world and non-UK companies and partnerships carrying on business in the UK are potentially caught. It will be a defence, in such circumstances, for the commercial organisation to establish that it had in place adequate procedures designed to prevent bribery. The Ministry of Justice has published guidance on the procedures that commercial organisations should consider putting in place with a view to preventing persons associated with them from undertaking bribery.

Note that, unlike the position in certain other jurisdictions, the Bribery Act 2010 does not exempt facilitation payments; this was emphasised by the UK Serious Fraud Office in guidance published in December 2012. Offences under the Bribery Act 2010 are punishable by an unlimited fine or (in the case of individuals) imprisonment. Offenders may also face the prospect of civil recovery of profits attributable to their offence.

The Serious Fraud Office has published 'Serious Economic Crime: a boardroom guide to prevention and compliance, which provides companies with guidance on the Bribery Act 2010', among other anti-corruption measures, and guidance on its approach to prosecuting bribery offences. The British Bankers' Association has also produced guidance to help the banking sector comply with the Bribery Act 2010.

Companies and other undertakings and persons operating in the UK, and particularly those operating in the financial services sector, should also have regard to the provisions of the Proceeds of Crime Act 2002 (as amended), the Terrorism Act 2000 (as amended), the Money Laundering Regulations 2007 and other provisions of the Counter-Terrorism Act 2008. These contain further anti-crime, counter-terrorism and anti-money laundering provisions, and should be considered alongside the sanctions and anti-bribery regimes outlined above. This continues to be an evolving area of law, with the EU currently considering proposals to update the EU's Fourth Money Laundering Directive, political agreement on which is expected to be reached in the course of 2017. Any consequential changes to EU law would, if implemented prior to the date on which the UK ceases to be a member of the EU, need to be implemented in the UK (whether or not such changes are directly effective as a matter of EU law, or require transposition via UK legislation).

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Finland

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1 Types of transaction

How may businesses combine?

Under the laws of Finland, businesses mainly combine by way of:

- acquisition of shares or assets of non-listed companies;
- acquisition of the securities of listed companies through a public tender offer, being either voluntary or mandatory;
- merger or amalgamation of non-listed companies or merger of listed companies generally following a tender offer; and
- redemption of shares through a squeeze-out procedure, applying to both listed and non-listed companies.

Likewise, Finnish limited liability companies may merge with a comparable company registered within the European Economic Area (EEA) (see question 15 for further details). Both domestic and cross-border mergers and amalgamations of private companies are typically intra-group arrangements.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The Finnish Companies Act provides the general legal framework for both public and private limited liability companies. The act applies to mergers and also needs to be complied with, for instance, when considering directors' fiduciary duties. The Companies Act also sets out the rules for squeeze-outs.

With respect to Finnish public takeovers, the main laws and regulations are set out in Chapter 11 of the Securities Market Act (SMA), the Helsinki Takeover Code issued by the Securities Market Association (Takeover Code) and the Regulations and Guidelines 9/2013 on Takeover Bid and Obligation to Launch a Bid issued by the Finnish Financial Supervisory Authority (FSA). The foregoing regulations apply to companies listed on the OMX NASDAQ Helsinki Exchange. Under certain exchange offer circumstances, the offer document also have to comply with the EU prospectus regime. Moreover, certain rules and regulations of OMX NASDAQ are relevant in combinations of listed companies. The First North, an alternative marketplace for smaller companies, is maintained by the OMX NASDAQ Helsinki and has generally more flexible regulations than the main market.

If certain financial thresholds are met, acquisitions or mergers may be subject to the merger control rules set out in the Finnish Competition Act or the European regulations.

It is typically agreed that the Finnish Sale of Goods Act shall not apply to acquisitions of shares or business assets.

3 Governing law

What law typically governs the transaction agreements?

If the target company is Finnish, the transaction agreement is most often governed by Finnish laws. However, it is possible to agree on other applicable law.

Public takeover documentation generally includes an offer document; the transaction or combination agreement; a stock exchange release following the offer; commitments (irrevocable) of largest shareholders; and Board recommendation. A prospectus will be required in the event that the consideration includes securities (a prospectus is generally a part of the offer document). These are governed under Finnish laws, save for some combination agreements.

The Finnish Companies Act provides the legal framework with respect to mergers and cross-border mergers, and these need to be governed by Finnish laws.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Acquisitions of shares or assets of non-listed or listed companies are not required to be filed with the Finnish Trade Register. However, many transaction-related changes need to be notified, such as change of Board Members, change in number of outstanding shares, change of the articles of association and the like. The fees are some hundreds of euros depending on the matter being notified. Should the transaction be subject to transfer tax (see question 18), generally a one-page short-form share transfer agreement is attached to the tax notification (instead of the full share purchase agreement).

Public takeovers are supervised by the FSA. For instance, the tender offer document, the prospectus or the merger prospectus shall all be approved by the FSA. The FSA interprets the SMA and other regulations related to the public takeovers. As regards disclosure requirements, please see question 5 for further details.

In case of mergers, the Finnish Trade Register is involved to large extent in the following stages of the merger procedure: the merger plan is submitted to the Trade Register for registration; a public summons is issued by the Trade Register to the creditors; notification to implement the merger is filed and registered; and final accounts of the merging company are registered. Certain minor registration fees need to be paid in connection with some of the phases of the merger. The stages mentioned above also apply to cross-border mergers with certain additional requirements.

Should certain turnover or market share thresholds be exceeded, business combinations may need to be notified to the Finnish Competition Authority or the European Commission.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

There are generally no mandatory disclosure requirements with respect of acquisition of shares or assets of non-listed companies. However, competition law or sector-specific regulations may oblige certain information to be disclosed. Moreover, should the transaction be subject to transfer tax, certain terms of the transaction document need to be disclosed to the tax authorities. Further, any documents filed in the Trade Register become public.

In case of public takeovers, the amount of information to be disclosed depends upon whether the offering is made by cash or other consideration. For instance, the latest audited financials of the target and grounds for determining the offer price need to be included in the

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offer document in case of a cash tender offer, whereas detailed financial information (historic financial information for the past three years, etc) needs to be disclosed in the event that securities of the offeror are provided as consideration. If transferable securities are offered, the offeror shall publish a prospectus.

In case of mergers, the merger plan and other filed documents will become public following the registration of such documents.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The SMA sets out the legal framework with respect of public companies' flagging obligations. A shareholder has an obligation to notify the offeree company and the FSA its holdings and proportion of voting rights (flagging obligation), when its proportion reaches, exceeds or falls below 5, 10, 15, 20, 25, 30, 50 or 90 per cent or two-thirds of the voting rights or the number of shares of the offeree company. The rule may apply also if the shareholding is divided among various entities but under common control. The agreement or other arrangement must qualify as a 'financial instrument' under the amended SMA in order to trigger a flagging obligation.

The Companies Act provides the regulatory framework for minority squeeze-outs (the 90 per cent threshold). The ownership entitling to squeeze-out needs to be registered in the Trade Register. See question 14 for further details.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Chapter 1 of the Companies Act provides the general principles of directors' fiduciary duties. The management of the company shall act with due care and promote the interests of the company. Duty is owed to the shareholders and the company (not to other stakeholders). In case of a takeover, the target company's management is under a duty to ensure that the company's shareholders receive the best possible price from the acquisition. In addition, the general meeting, the board of directors and the managing director cannot make a decision or take other measures that are likely to result in undue benefit to a shareholder or another person at the expense of the company or another shareholder. The foregoing needs to be taken into account should, for instance, different kinds of merger consideration be offered to different shareholder groups.

Both the Companies Act and the SMA also include a chapter regulating liability. Anyone who wilfully or through negligence causes damage to another person through conduct in violation of the provisions of the Companies Act, articles of association, SMA or certain other regulations, shall be liable to compensate the damage caused. Since all target shareholders shall be treated equally, the same consideration shall be offered to all shareholders. Likewise, different share classes shall be treated equitably in respect of the offered consideration.

The Takeover Code also sets certain duties to the board such as the duty of the board to consider alternatives available to the company (other than the bid itself).

The obligation to disclose substantial shareholding is covered in question 6. The controlling shareholders do not have any fiduciary duties in connection with a business combination, but should they contribute to a breach of the Companies Act or the articles of association, they may be liable for any damages caused by such breach or in the ultimate case be obliged to redeem the shares of the minority shareholders.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In case of voluntary public offers, the offer is most often conditional on its acceptance by more than 90 per cent of the shares and votes of the target company or two-thirds of the shares and votes if the consideration is all shares. The 90 per cent threshold provides the bidder the opportunity to commence the squeeze-out procedure. According to the SMA, a mandatory takeover bid triggers if a shareholder's proportion of voting rights increases to over 30 per cent, or to over 50 per cent should the bidder already have more than 30 per cent.

In case of share purchases of private companies, the shareholders' agreement typically contains terms that provide the majority shareholders or investors with approval or refusal rights over the proposed transaction in addition to drag-along rights, forcing the minority shareholders to sell if the transaction is approved by the majority. The articles of association typically also contains redemption and consent clauses. Should an asset deal be contemplated, the divestment may have to be approved by the general meeting of shareholders should the divestment form a substantial part of the seller company's business.

The general meeting approves the merging company's merger resolution whereas the board's resolution is sufficient with respect to the acquiring company. However, a mere decision of the board is also sufficient should the merging company be wholly owned (subsidiary merger). The merger resolution, should it be decided at a general meeting, shall be made by qualified majority (decision is supported by at least two-thirds of the votes cast and the shares represented at the meeting).

9 Hostile transactions

What are the special considerations for unsolicited transactions?

As regards public takeovers, the SMA regulates both friendly and hostile takeovers. Hostile takeovers have been rare. Only publicly available information (such as shareholders' register, financials, disclosure material, etc) is available to the bidder in case of hostile takeovers. However, the Takeover Code regulates the possibility of conducting a due diligence review in the target company. In a takeover bid situation, the board of the target company shall seek the best possible outcome for the shareholders. If a satisfactory due diligence review is a precondition for a public takeover bid, and if the bid is beneficial considered from the viewpoint of the target's shareholders, allowing the review may usually be considered to be in the interests of the shareholders even in hostile offers. The scope and the schedule of the review shall, however, always be considered separately by taking into account the circumstances of each individual situation, possible aspects of competition law and the possibility that the bid may not be completed.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

The SMA does not have specific provisions concerning break-up fees in public takeover situations. However, the Takeover Code sets out that the board of the target company should be careful in agreeing to pay a break-up fee. Without a justified reason, the target company board shall not make such commitments that would limit the ability of the shareholders to consider freely whether they want to accept the bid or decide on possible measures for frustrating the bid in a general meeting convened for this purpose. The foregoing does not forbid the target board on agreeing a break-up fee so long as the duty of care is complied with, the offer is regarded as favourable and the break-up fee is not unreasonable.

Likewise, the SMA does not have specific provisions concerning no-shop clauses in public takeover situations. It is set out in the Takeover Code that sometimes it may, however, be justified for the board to commit to a limited negotiation prohibition or non-solicitation commitment. The commitment shall be of a limited duration only and in the interests of the shareholders. Commitment to a limited negotiation prohibition may be in the interest of the shareholders, for example, in a situation where the offeror sets a negotiation prohibition as a precondition for making a bid beneficial to the shareholders. The negotiation prohibition shall not, however, prevent the board from examining a potential competing bid and thereby from acting in accordance with its duty of care and loyalty in situations in which the board has received a competing contact, provided that the board did not itself initiate such contact, or if the circumstances otherwise change substantially. Under

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the Finnish public takeover practice, break-up fees, no-shop clauses as well as undertakings (irrevocable) from the largest shareholders are generally used as protection.

As regards acquisition of shares or assets of non-listed companies, break-up fees and no-shop clauses are to some extent used in transactional agreements. However, the fiduciary duties shall be taken into account when agreeing to such restrictions.

Financial assistance restrictions are set out under question 13.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Please see question 17 for further details.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Financing-related conditions are set out in a more detailed manner under question 13.

In case of takeover bids, the offeror may often itself decide, for instance, the amount and kind of consideration offered. Conditions may be set for the exercise of the offer, but the shareholders of the target company must be able to reasonably assess whether the conditions are likely to be met. Takeover bids may be restricted to a certain kind of security, but all holders of the same kind of security must be offered equal consideration. Considerations for securities of different kinds (for example, Series A or B shares, or shares and warrants) may differ, but have to be in a reasonable and fair proportion to each other. Other conditions accepted by the FSA in voluntary offers include regulatory approvals, completion of due diligence, obtaining financing or certain acceptances and absence of material adverse effect.

In non-listed company transactions, conditions precedent clauses are often used. Such conditions may, for instance, include the receipt of regulatory approvals, completion of due diligence, sellers' warranties being true and correct, obtaining financing for the buyer or refinancing for the target, receiving certain resolutions or acceptances, absence of material adverse effect and obtaining at least nine-tenths of all shares and votes for minority squeeze-out purposes.

Merger plans sometimes also include conditions precedent clauses, especially if a merger is executed among independent non-group companies.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In voluntary takeovers, it may be set out in the offer document that the bid is conditional upon the offeror receiving needed finance (reserves the right to waive conditions that have not been fulfilled). Such finance conditions have been accepted by the FSA, but, correspondingly, the target shareholders may be allowed to withdraw their acceptance during the validity period of the offer.

In non-listed company transactions the existing debt of the target company is sometimes refinanced and securities may be released or replaced with new ones. However, the provisions of the Companies Act lay down a financial assistance restriction. Accordingly, a company shall not provide loans, assets or security for the purpose of a third party acquiring shares in the company or its parent company. In addition to the financial assistance restriction, the corporate benefit of the companies involved needs to be carefully taken into account should the buyer or an acquisition vehicle of the buyer be assisted in its transaction financing.

In case of mergers, the acquiring company may also be refinanced as part of the merger process for creditor protection reasons.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

A shareholder with more than nine-tenths of all shares and votes in the company shall have the right and obligation to redeem the shares of the other shareholders at the fair price. The existence of the redemption right needs to be registered in the Trade Register. If a voluntary deal is not achieved, any disputes about the squeeze-out right and the redemption price shall be referred to arbitration proceedings. The Redemption Committee of the Central Chamber of Commerce appoints the requisite number of arbitrators. Both the redeemer and the minority shareholders may commence the proceeding. The redeemer shall bear the costs of the arbitration, unless the arbitrators for a particular reason deem that it is reasonable to order otherwise. There is a possibility to get the title to the shares subject to the redemption even prior to the end of the proceedings should a security be placed over the payment of the redemption price. The arbitration proceedings generally take circa four to nine months.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

In case of an acquisition of the shares or assets of a public or private company, the structuring of the transaction is largely driven by tax considerations (use of a purchase vehicle, tax treaties, capital gains, etc).

The Companies Act provides the legal framework with respect of cross-border mergers. Finnish limited liability companies may merge with a comparable company registered within other EEA member states. Likewise, such cross-border transaction can be executed as a combination merger so that the acquiring company to be established will be registered within the EEA. Cross-border mergers have some additional requirements but otherwise they follow the same pattern as purely domestic mergers.

Purchase price payable in shares of an acquirer (share swap) domiciled outside of EEA will trigger sellers' taxation (unlike if the acquirer is domiciled in the EEA and certain other conditions are being met). Accordingly, an additional cash component is often included to cover taxes.

Please see also question 17 with respect to specific laws.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

It is set out in the SMA that the time allowed for the acceptance of a takeover bid may not be less than three or more than 10 weeks. The time allowed for the acceptance of a takeover bid may, for a special reason, be more than 10 weeks provided that the business operations of the target company are not hindered for longer than is reasonable. A notice of the closing of the takeover bid shall be given at least two weeks prior to the closure of the bid. The FSA may, upon an application by the target company and, where necessary, without hearing the offeror, order that the time allowed for the acceptance of the takeover bid be extended so that the target company can convene the general meeting to consider the bid. Due to such extension, the target shall have the right to waive the bid within five banking days of being informed of the FSA's decision.

Mergers are generally implemented within four to six months. One of the most important waiting and notification period in mergers is a three-month objection period reserved for those creditors of the merging company, whose receivables have arisen before the registration of the merger plan, having the right to object the merger. The objection period also applies to the creditors of the acquiring company if the merger could jeopardise the payment of the acquiring company's debts according to the statement of an auditor.

There are generally no mandatory waiting or notification periods in share or asset purchases of private companies with the exceptions set out in employment (see question 19) and competition laws as well as certain sector-specific approvals may need to be obtained. The minority squeeze-out procedure and its time schedule are described under question 14.

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Update and trends

The Finnish M&A and private equity sector has shown a clear sign of recovery after the credit crisis and foreign capital is particularly attracted by early-stage companies from venture capitalists across the globe. However, the M&A deal volume is not yet at par with the volumes of the pre-credit crisis period. The Finnish gaming sector has witnessed several notable acquisitions and financing rounds but the so-called mega-deals seem to be slowing down. Likewise, the NASDAQ Helsinki has finally after several quieter years attracted several listings and more are likely to follow. It looks as though the deal flow in the Finnish M&A market will also continue apace in 2017. Kalliolaw represented First Quantum Minerals Ltd in its sale of the nickel-copper-platinum Kevitsa mine in Finland to Boliden Mineral AB for US$712 million. The transaction was closed on 1 June 2016 and the transaction was the biggest private company transaction in Finland during the first quarter of 2016.

Owing to the implementation of the EU Market Abuse Regulation N:o 596/2014 (MAR), the Finnish Securities Market Act and other related Finnish acts were amended. The legislation entered into force on 3 July 2016. The MAR has replaced most of the domestic laws related to market abuse. Moreover, Nasdaq Helsinki and the FSA has issued guidelines and regulations related to the MAR. Likewise, the Directive on criminal sanctions for market abuse 2014/57/EU (MAD II) entered into force on 3 July 2016. The provisions of the MAD II were implemented into Chapter 51 of the Criminal Code of Finland. MAR and MAD II replaced the previous Market Abuse Directive 2003/6/EC (MAD). The key change introduced by the national implementation of the MAD II Directive is that criminal liability for market abuse, such as insider dealing, unlawful disclosure of inside information and market manipulation, has been expanded. However, no substantial changes to what constitutes inside information have been made. The definition of inside information is now set out in article 7 of the MAR, and the issuer's obligation to disclose inside information to the general public is regulated by article 17 of the MAR.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies operating under certain business fields may be subject to specific rules or regulatory approval such as companies providing certain financial services (approval of the FSA, for instance).

In addition, the Act on Monitoring Foreign Corporate Acquisitions in Finland sets out certain monitoring principles and also restrictions if a vital national interest so requires. If a corporate acquisition is considered a potential threat to a vital national interest, the Ministry of Employment and the Economy may refer the processing of its confirmation or refusal to the government plenary session. The act allows Finnish public authorities to exercise control over the ownership of companies considered essential in terms of national emergency supply and national security. If necessary, foreign ownership in such companies may also be restricted. All corporate acquisitions in the defence and dual-use goods sector are subject to confirmation by the public authorities. In the civilian sectors, the monitoring targets to Finnish companies that are considered critical for securing vital functions within society. In other respects, monitoring will only apply to foreign owners residing or domiciled outside the EU and EFTA states.

Tekes, a governmental funding agency for technology and innovation, provides public funding to a large number of Finnish companies, especially those in their early stages. Tekes loan agreements or grant decisions may contain terms that force companies to notify foreign acquisitions to Tekes, provide Tekes approval rights of the proposed acquisition and under certain circumstances recovery rights to already granted loans or grants. Such terms are generally triggered only in the event that the foreign buyer is domiciled outside the EU or EEA states.

18 Tax issues

What are the basic tax issues involved in business combinations?

Subject to certain exceptions, a transfer of securities (shares for instance) and real property is most often subject to Finnish transfer tax, being currently 4 per cent in respect of real property and 1.6 per cent in respect of securities. Mergers are generally planned so that no transfer tax is payable for new shares issued as merger consideration. Should neither the seller nor the buyer of the securities be a tax resident in Finland, the transfer of securities is exempted from Finnish transfer tax, but a notification should be made.

Finnish tax legislation also allows tax-exempt sales of shares under certain circumstances. Such tax-exempt sale may be triggered when, among other requirements, the buyer has owned the shares of the target for at least a year, the buyer has owned at least 10 per cent of the share capital of the target, the target is not a real estate or a housing company and the seller is not engaged in private equity or venture capital activities. An asset sale, on the other hand, is always subject to tax for a seller having tax residency in Finland, but may be tax-exempt to a non-Finnish resident depending upon the type of assets being sold.

A purchase price payable in the shares of the acquirer (share swap) domiciled in the EEA may be structured so that there will be no income tax implication for the sellers if certain specific conditions have been met.

The right to carry forward losses from preceding financial periods is forfeited if more than 50 per cent of the shares in the target change ownership. There are, however, exceptions to the rule and a dispensation ruling may be sought so that the tax losses of the target are not forfeited.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The basic regulatory framework governing labour and employee benefits in a business combination differs depending on the size of the company, the type of the transaction (public or private) and whether it is a cross-border merger or not.

The Act on Co-operation within Undertakings imposes an obligation for the employer to consult, in the spirit of cooperation, with the employees before taking a final decision that could substantially affect the operations of the company. It is essential to finalise the whole cooperation procedure before an actual decision is taken on the matter. The act is applied when there are at least 20 employees in a company. A cooperation negotiation procedure must be carried out, inter alia, in the case of a transfer of business, an expansion or reduction of company's operations, or a merger. The list is not exhaustive.

In the case of a purchase of shares, the acquirer is not obliged to hold cooperation negotiations with the employees of the target company as the employer status does not change as a result of the acquisition. The cooperation rules only apply in case of transfer of business (ie, asset deal). Since the employees left outside a transfer of business may contest the transfer, the business operations to be transferred shall be defined clearly. Note, however, that other reasons for carrying out a cooperation procedure may exist on a case-by-case basis.

According to the Companies Act, cross-border merger plans shall contain an account of certain procedures regarding employees' participation rights. Following such procedures, it shall be determined under which rules the employees can take part in the definition of employees' participation rights in the acquiring company. In addition, the board in each company shall draw up an account of the anticipated impact of the transaction on the employees, in so far as it is not accounted for in the merger plan. An account shall be made of the anticipated impact of the merger on employment.

With regard to listed companies and takeover bids, the Securities Markets Act obligates both the bidder and the target company to keep their employees duly informed about the transaction at various stages of the transaction procedure. The offeree company must also make an assessment on the likely effects of the offer on the employees. The representatives of the employees are entitled to append their opinion to such assessment of the offeree company.

Furthermore, where the Act on Co-operation within Undertakings is applicable (ie, when there are at least 20 employees in the company), the following duties to inform have to be complied with. Both the transferor and the transferee company have to inform about the (intended) time of the transfer, its reasons, legal, economic and social consequences to the employees, as well as planned measures regarding the employees. This information shall be given in good time before the completion of the transfer.

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The receiving company shall always treat the employees equally, also with regard to the transferred employees. In case of transfer of business (as set forth in the Employment Contracts Act), the employees to be transferred to the target company are those employed at the transferor at the time of the transfer. The employees' earlier rights and obligations, and contracts of employment are automatically transferred as such from the seller to the purchaser. Existing (ie, old) benefits of the transferred employees shall not be trampled upon. It should be noted that, according to the Employment Contracts Act, the transferor and the transferee company are jointly liable for the employee's pay or other claims deriving from the employment relationship that have fallen due before the transfer.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Bankruptcy and restructuring proceedings are conceived as separate legal procedures with preconditions, procedures and legal effects of their own. Restructuring proceedings may be undertaken only in respect of such companies whose business is deemed viable after tailored measures, such as restructuring of loans, have taken place, given that a sufficient number of the company's creditors support the proceedings.

As a general rule, all net assets of a bankruptcy estate may be bought. The estate administrator is the sole representative of the bankruptcy estate and is responsible for, among others, the sale of the bankruptcy estate's assets. The estate administrator determines the method to be used for the liquidation of the bankruptcy estate's assets (eg, free sale, auction) together with bankruptcy estate's largest creditors. In this context, bankruptcy estates typically give only limited representations and warranties in respect of assets or business entities offered for sale and this has its impacts on the terms of the deal. The precondition for the liquidation of assets is that the sale must be executed in the most advantageous manner possible. In practice, the largest creditors are consulted before the sale.

Transactions with companies that are undergoing the restructuring process often relate to the administrator's plan to ensure the viability of the distressed company's business operations. The plan needs to be approved by the majority of the creditors (or creditor groups). Despite the mandatory laws providing the framework and starting point to the negotiations, the deals are basically negotiated on a case-by-case basis.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Finland is a party to the UN's, the EU's and the OECD's anti-corruption and bribery conventions, and the local legislative regime was revised in 2010 in correspondence with the recommendations of the Group of States on Corruption, GRECO. Under the Criminal Code of Finland, the acts of bribery and the acceptance of a bribe in business are considered offences. Legal entities may be penalised by a corporate fine and individuals may be prohibited from engaging in business in connection with bribery offences. Furthermore, the provisions regarding anti-money laundering, accounting offences and market abuse complement the local sanctions regime against corruption and bribery.

As part of the due diligence review of the target company, the buyer should consider if there is a risk of potential criminal or tort liability (or reputational risks) owing to corrupt or otherwise illegal practices by the target company or its group companies.

It is also important to note that anti-corruption and anti-bribery legislation often applies extraterritorially and hence the practices of target company's potential foreign group companies should also be reviewed.

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France

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1 Types of transaction

How may businesses combine?

Under French law, business combinations may be structured as follows:
- acquisitions of shares or assets: an investor can either acquire the assets and liabilities of an existing business (the going concern) or acquire a company's shares;
- subscription to an capital increase: a controlling interest can also be acquired by subscribing to an increase in a target company's capital;
- contributions (contributions of assets, of a branch of activity or of the entire business);
- spin-off: a spin-off is a transaction whereby the assets of one company are split and transferred to two or more existing or newly formed companies. The company that transfers its assets dissolves;
- partial spin-off: in contrast to a spin-off, a partial spin-off is a transaction in which a company transfers a substantial portion (but not all) of its assets to one or more companies. The company that transfers its assets does not dissolve in the case of a partial spin-off;
- mergers: mergers can be achieved in two ways. A company can transfer all of its assets to an existing company (merger by absorption) or to a newly formed legal entity (merger by incorporation); and
- public takeover bids of a target company (cash bids, exchange bids, or both). If the stock of a company is traded on a regulated market, the purchase of a controlling stake is possible through a public tender offer. These transactions are governed by special regulations applicable to the operation of the stock market, which prescribe, inter alia, the:
  - disclosure requirements;
  - prohibitions against insider trading;
  - acquisition procedures;
  - price and number of shares that may be purchased;
  - methods for handling competing tender offers; and
  - contractual joint-venture: a joint venture can be created by two or more companies for a commercial or civil purpose.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

In France, business combinations are regulated under various bodies of laws and supervised by financial and other authorities.

Corporate law (codified in both the Civil Code and the Commercial Code) regulates the transfer of shares, mergers, spin-offs, etc.

Commercial law (codified in the Commercial Code) regulates the transfer of assets, including going concerns.

Securities law (codified in the Monetary and Financial Code) and the General Regulation of the French Financial Markets Authority (AMF) regulates the financial markets. In addition, the AMF performs various roles of regulation, authorisation, supervision and enforcement as well as overseeing transactions involving the securities of publicly traded companies (initial public offerings, capital increases, mergers, etc) and public tenders.

Tax law (codified in the General Tax Code) provides various rules applicable to business combinations, such as the registration duties that are further detailed under question 18.

Competition law (codified in the Commercial Code) provides rules aimed at avoiding business combinations that create or strengthen a dominant position, as a result of which effective competition would be significantly impeded, and rules governing the French Antitrust Authority.

Labour law (codified in the Labour Code) protects the employees whose company is a party to a business combination. Thus, business combinations do not affect the rights and obligations of employees (see question 19 for more details).

3 Governing law

What law typically governs the transaction agreements?

Share purchase agreements can be governed by any law at the discretion of the parties, such as the law of the selling or acquiring entity.

However, the transfer of 'French shares' must comply with the applicable French formalities according to the type of company involved (share transfer order forms, etc).

Transactions, such as contributions of assets, spin-offs or mergers involving a French entity, will be governed by French law by virtue of lex societatis.

In international mergers involving a French company, such company will remain subject to French law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Acquisition of shares

The acquisition of shares does not require a formal filing in France apart from registration of the transfer in the official company books, registration of the share acquisition by the acquiring company with the relevant tax authorities and for shares representing ownership interests in a company that is not a public limited company, simplified joint-stock company or limited partnership (namely, shares referred to as *parts sociales*), registration of the transfer with the trade registry of the relevant commercial court.

Registration fees for share transfers are detailed under question 18.

Acquisition of assets

The acquisition of assets in France generally requires filings, which differ depending on the nature of the assets acquired.

The acquisition of a going concern should be registered with the relevant tax authorities and commercial court (see question 18).

The acquisition of real estate in France requires a notarial deed and should be registered with the relevant mortgage registrar. In addition to notarial fees, registration fees are also due (amounting to 5.8 per cent of the total price).

The acquisition of trademarks and patents should be registered with the relevant French authorities (The National Institute for Industrial Property (INPI)).

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Reorganisation of companies
Reorganisation decisions must be filed with the relevant trade and companies' registry and published in a periodical authorised to carry official notices. Low fees are associated with these filings and publications.

Public takeovers
See questions 5 and 16.

French concentration filing
A concentration must be notified to the French Antitrust Authority or the European Commission if certain thresholds are met. Pursuant to article L430-2 of the Commercial Code, the thresholds for notification to the French Antitrust Authority are the following:
- global turnover of all parties of more than €150 million;
- turnover attained in France by at least two of the parties of more than €50 million; and
- concentration does not have a Community dimension (in which case the concentration should be notified to the Commission).

Lower thresholds apply to the retail industry and to the French overseas territories.

The time frame of the merger control process before the French Antitrust Authority is as follows:
- phase I: 25 working days from complete filing, which may be extended by 15 working days if the notifying parties submit remedies; and
- phase II: if the French Antitrust Authority decides to open an in-depth investigation, a further period of up to 65 working days, which may be extended by 20 working days if the parties submit remedies. The minister of economy may overrule the decision of the French Antitrust Authority in very specific cases.

The contemplated concentration is suspended until clearance, but a derogation may be granted under specific circumstances.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The nature and level of information that needs to be made public in a business combination depends on the type of structure involved.

Generally, share deals of privately held companies do not require specific public disclosure. However, anyone who prepares a transaction must share the relevant information with the works council prior to the transaction and eventually with the relevant merger control authority. Anyone initiating a bid for the securities of a public French company is required to disclose the main characteristics of his or her offer as soon as possible.

However, if confidentiality is temporarily required and possible, the disclosure may be exceptionally delayed.

Furthermore, any company listed on a regulated French stock exchange must immediately disclose any information to the public that is likely to have an impact on the French issuer, its stock quotation or the situation and rights of the holders of such shares. The issuer may assume responsibility for deferring disclosure of privileged information in order to protect its legitimate interests, provided such non-disclosure is unlikely to mislead the public and provided the issuer is in a position to ensure confidentiality by controlling access to such information.

In the case of a public takeover bid, the AMF General Regulation sets forth some disclosure requirements that the target company and the bidder must observe.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The acquisition or the sale of a significant number of shares in a company listed on a regulated French stock exchange is governed by specific regulations. The Commercial Code sets forth disclosure mechanisms (article L233-7) that require any person or legal entity that acquires, alone or in concert with third parties, shares causing that person's or legal entity's aggregate shareholding to exceed a threshold of 5, 10, 15, 20, 25, 30, 33.33, 50, 66.66, 90 or 95 per cent of the capital or the voting rights of a company based in France and admitted to trading on a regulated market or a financial instruments market, to inform the company of the number of shares or voting rights that such person or legal entity owns. In addition, such person or legal entity must inform the AMF. The AMF then provides the information to the public. Since 1 October 2012, the method for calculating threshold crossings in the capital of listed companies has changed as per the provisions of the law of 22 March 2012 relating to the simplification of the administrative procedures, by including henceforth an additional category of securities giving access to the share capital in the computation.

The information above is also required if the equity participation or voting rights fall below the thresholds indicated above.

The by-laws of a company may provide for additional disclosure requirements based on a lower threshold than those set out above.

The same obligation applies when the thresholds are 'passively' exceeded, for example, further to a capital reduction, a merger or a reorganisation.

The above requirements are not affected if the company is a party to a business combination.

Furthermore, the annual report of the management presented to the shareholders must indicate information regarding the shareholding. In respect of the crossing of substantial shareholdings, the Banking and Financial Regulation Law of 23 October 2010 also lowered the threshold for mandatory public takeovers from 33.33 to 30 per cent of the share capital (article 234-2 of the AMF General Regulation), making consequently the same obligation applicable to any investor, holding alone or in concert, between 30 and 50 per cent of the share capital or voting rights of a listed company, should they increase their shareholding by more than 2 per cent within a rolling 12-month period (article 234-2 of the AMF General Regulation).

The mandatory public offer procedure was extended by the Banking and Financial Regulation Law to Alternext, the French exchange-regulated market aimed at small and medium-sized businesses but the public offer is only triggered when the threshold of 50 per cent of the share capital is crossed (article 235-2 of the AMF General Regulation).

The Banking and Financial Regulation Law also extended the definition of acting in concert, which already concerned agreements to implement a common policy, to agreements to gain control of a company (article L233-10 of the Commercial Code). This change, which follows recent French case law, recognises that the concept of common policy not only relates to the management of the company, but also to how the parties manage their shareholdings.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Duties owed by the directors
Directors have a general duty to act in the best interest of the company, within the corporate purpose, and to respect the provisions of the law and by-laws. In this respect, directors must give their opinion as to the merits of a transaction (takeover bid or a squeeze-out procedure, merger, etc). Directors also have a duty of discretion as regards certain information that they receive in their capacity as directors.

Finally, the board of directors or management have a duty to inform and consult the works council or other employee representative bodies before any business combination transaction.

Duties owed by the controlling shareholders
Controlling shareholders do not owe any specific duties to the company or to the minority shareholders under French law in connection with a business combination. However, French case law has held controlling shareholders liable for abuse of majority positions when they vote in favour of resolutions considered against the company's interest and exclusively in the controlling shareholders' interests or detrimental to the interest of the minority shareholders.

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8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

The approval rights of the shareholders depend on the type of business combination that is contemplated.

In share and asset deals, there is no formal approval required from the shareholders of the companies involved, unless the by-laws state otherwise. However, if the transaction is very significant in relation to the size of the companies involved or if it does not fall fully within the corporate purpose of the companies, it may be advisable to convene a shareholders' meeting in order to have the operation approved. In addition, banks usually also require shareholders' approval even if it is not strictly necessary from a legal standpoint in certain transactions.

In corporate reorganisations, such as mergers, spin-offs or contributions in kind, the shareholders of the companies involved must approve the transaction with a qualified majority.

In addition, shareholders' agreements may also contain stipulations affecting the situations in which the shareholders of the companies involved should approve the transactions and by what majority.

Under French law, a contribution in kind or a reorganisation (merger, spin-off) will require the appointment of a court appointed expert appraiser in order to ascertain the value of the assets and liabilities contributed.

The report of the expert appraiser must be placed at the disposal of the shareholders.

Furthermore, in such transactions involving listed companies, an independent financial expert must be appointed.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

The implementation of the European Takeover Directive 2004/25/EC of 21 April 2004 (Law No. 2006-387 of 31 March 2006) modified French law on hostile tender offers, notably in relation to anti-takeover measures.

One of the major feature of the 2006 anti-takeover law is the implementation of 'poison pills' under French law (article L233-32 of the Commercial Code). A shareholders' general meeting can authorise the board to issue warrants prior to the bid. The warrants are based on the threat of dilution of the equity holding and voting rights of the target company. The exercise price of the warrants is freely determined by the shareholders' general meeting.

In addition, French law has introduced the 'put up or shut up' principle, pursuant to which the AMF may require a potential bidder to make public its intention to launch a public takeover bid (articles 223-32 et seq of the AMF General Regulation).

Public takeover law was amended by a law known as the Florange Law, passed on 29 March 2014, with the adoption of new measures against hostile takeovers and creeping acquisition of control in listed companies and abandon the board neutrality principle of a French listed company during offer periods, giving boards discretion to take frustrating measures without prior shareholder approval.

The reform reverses the principle of the neutrality of the target's board of directors in a takeover, by making the board's neutrality the exception. Therefore, in a hostile bid, the target's board of directors is now able to immediately take defensive measures without the shareholders' prior approval.

Since the Florange Law, takeover rules now:

- require any bidder to provide for a minimum acceptance threshold equal to 50 per cent + 1 of the target shares or voting rights;
- reduce the rate at which a person can acquire between 30 per cent and 50 per cent of the shares or voting rights in a French listed company without triggering the obligation to make a mandatory bid;
- favour long-term shareholders through automatic double voting rights. For companies listed on the regulated market, double voting rights are now automatic for shares held in registered form by the same shareholder for two years, except if the by-laws provide otherwise. The two-year period began on 2 April 2014; and
- reinforce target works councils' powers (see question 16).

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

The payment of break-up fees or reverse break-up fees is becoming more and more common in France. Break-ups are legally valid provided that:

- they are a reasonable forecast of the transaction costs; and
- they comply with the company's corporate interest.

In the case of a break-up fee qualified as a penalty clause, judges are empowered to reduce or increase the agreed break-up fee when it is obviously excessive or unreasonably low.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Generally, in France no restrictions apply to business combinations involving foreign entities or to foreign investments. Except in some specific sectors traditionally subject to restrictions and for which a prior authorisation from the French administration is required (for example, the defence sector), foreign investors are free to invest in France, subject only to a prior statistical declaration (this declaration must also be submitted when incorporating a company in France). Note that 2014 saw the abolition of the obligation for foreigners who were not citizens of a country of the European Economic Area or Switzerland to process their criminal records with the prefectural authorities to be able to be appointed as legal representatives of a French company.

Prior authorisation from the French Ministry of Economy is required for foreign investments in specific sectors; see question 17.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The tender offer may be conditional upon the tendering of a minimum number of securities. Usually, this minimum number is set to allow the tender offer to gain control of the target.

The tender offer may also be conditional upon obtaining approval from the antitrust authorities. In the case of a tender offer (cash acquisition), the financing may not be conditional.

The prospectus filed with the AMF must set forth the financing of the tender offer.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

For a transaction involving the acquisition of shares not admitted on a regulated market, the acquisition offer must be made subject to a condition precedent of obtaining adequate financing.

As a general rule, French law requires the parties to negotiate in good faith. During the acquisition process, the seller is therefore bound by a duty of good faith in its relation with the buyer, which implies in particular assistance to the buyer in the completion of the condition precedent of obtaining adapted financing. Such duty may be outlined by the parties in a letter of intent.

As a consequence, the seller is, for example, required to communicate to the buyer all information the latter may need for the purpose of performing a due diligence of the target company as well as to guarantee the accuracy of such information, and to obtain the approval of the target company's main contractors (clients, suppliers) pursuant to agreements containing a change-of-control clause.

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14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Monetary and Financial Code and the AMF General Regulation set up the legal framework for the squeeze-out procedure. This procedure gives the majority shareholder of a publicly traded company, which already owns at least 95 per cent of the shares in such company, the possibility to own 100 per cent of the shares (article L433-4 of the Monetary and Financial Code). Such a procedure may only be implemented immediately following a tender offer, in which the majority shareholders buy back the shares of the minority shareholders. In this respect, when a tender offeror discloses its intention to launch a public buyout offer (OPR), it must simultaneously indicate to the AMF its intention to then proceed with a squeeze-out procedure (article 237-2 of the AMF General Regulation).

The tender offeror must also provide the AMF with a valuation of the securities to be acquired. This valuation must be made by an independent expert approved by the stock market authorities. The minority shareholders receive an indemnity for the transfer of their shares, which is equal to the higher of the valuation and the price proposed for the OPR. This indemnity must be approved by the AMF.

The tender offeror is also required to appoint a bank to act as a clearing house for the indemnity to be paid to minority shareholders. When the squeeze-out becomes effective, the amount corresponding to the indemnity must be transferred to the banks. On the same day the bank credits the accounts of the minority shareholders, and any securities still held by the public are transferred to the tender offeror. The target company's securities are delisted from their respective markets on that day.

Also, it should be noted that although by-laws of all privately held companies already offered the possibility to include a squeeze-out clause pursuant to which a shareholder could be compelled to transfer his or her shares under certain conditions, the Banking and Financial Regulation Law of 23 October 2010 extended the squeeze-out procedure to privately held companies listed on Alternext.

In addition, a new procedure implemented for mergers of non-listed companies allows a shareholder holding at least 90 per cent of the share capital of the merged company to squeeze out the minority shareholders by exchanging their shares in the merged company with shares in the capital of the merging company.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies has been implemented into French law by Law No. 2008-649 dated 3 July 2008, which modified both the Commercial Code (articles L236-25 et seq) and the Labour Code (articles L2371-1 et seq). As a result, the procedural steps for domestic and cross-border mergers are now very similar from a corporate standpoint, although some additional regulations have been added to facilitate the employee participation rights in a cross-border merger.

In addition, it may be noted that Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE) has been implemented into French law by Law No. 2005-842 dated 26 July 2005 (articles L229-1 of the Commercial Code).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

AMF notification (companies listed on regulated markets or listed on Alternext)

Before making a takeover bid, the tender offeror must file an application with the AMF that must state, inter alia, the tender offeror's intentions, the number of shares that it already owns in the target company and the minimum number of securities that must be tendered and below which the tender offeror will have to withdraw the offer.

Update and trends

Even though the volume of transactions fell by 17 per cent in 2016, French M&A is now way past its phase of recovery and is heading towards stabilisation. In fact, 2016 was a record year for mega-deals. This small downturn in volume is not the consequence of a lack of enthusiasm but mostly of aborted operations (namely, in France, the Bouygues–Orange failed merger). However, those small setbacks can be interpreted as a good sign for the market as they tend to show that the spectacular growth of 2015 was not a bubble on the verge of busting.

The main trend is still in consolidations, particularly in the telecom, healthcare and industry sectors, giving corporate dealmakers in other sectors the confidence to be just as proactive. Furthermore, senior management shake-ups in energy and defence (TOTAL, Thales) are setting the stage for more mergers and acquisitions. Sensitive deals, however, have been slowing down as the upcoming presidential election is somewhat affecting the efficiency of the administration when state intervention is required.

Nevertheless, it appears that the political context, whether domestic or foreign, only has a slight impact on the French M&A market.

Upon receipt of the tender offeror's application, the AMF may decide to suspend the listing of the shares of the companies involved and disclose the information to the public. Within 10 days from this application, the AMF must decide whether the offer is acceptable or not. In order to do so, the AMF may require additional guarantees or explanations or even that the terms of the tender offer be amended. At the end of this period, the notice containing the AMF's decision will be published and the tender offeror must prepare and file a prospectus with the AMF.

The target company must then file an information notice with the AMF no later than five trading days after the approval of the tender offeror's application by the AMF.

The period between the publication of the target's company information notice and the closing date of the tender offer may not be less than 25 trading days or more than 35 trading days (L232-2 of the General Regulation of the AMF).

The tender offeror can modify its offer provided that its new offer price is at least equal to 102 per cent of the price indicated in its former offer.

Labour notification

Under French law, the works council has an economic role including giving its opinion on any modification of the legal organisation of the employer, in particular if such modifications result from a business combination (article L2323-19 of the Labour Code).

When a business combination is contemplated, the works council of each concerned entity must, before any decision-making, be informed and consulted on the project of the contemplated business combination.

The consultation is organised through one or several meetings. For each meeting an agenda and accurate information or documents on the project must be communicated to the members of the works council (article L2325-16 of the Labour Code).

During the meetings, the works council can make observations and submit questions to the employer, who generally replies to the works council by a reasoned answer.

Through the information and consultation process, the works council can decide to consult the Health, Safety and Working Conditions Committee on specific aspects of the project. In that case, the works council must wait for the Health, Safety and Working Conditions Committee's opinion before issuing its own opinion.

The works council can also request an expert to give advice on specific issues. In that case, the works council must wait for the expert's report before issuing its opinion.

The works council formulates a negative or positive opinion on the project. The opinion of the works council is not binding upon the employer.

If the restructuring project entails redundancies, the works council must be consulted (article L1233-28 of the Labour Code) in accordance with a specific procedure. If the project involves at least 10 redundancies, a collective redundancies plan must be presented.

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Florange Law, passed on 29 March 2014, has reinforced target works councils' powers through an information-consultation procedure before the opening of a takeover bid which may adversely impact the timetable of the transaction.

In order to be able to issue such opinion, the works council is entitled to request to hear the bidder and to appoint an expert responsible for preparing a report on the bidder's strategy. Its opinion has to be sent to the target's board of directors before the latter rules on the takeover and, provided all necessary information has been duly given to the works council, at the latest within one month from the filing of the draft offer.

On 1 November 2014, the provisions of articles 19 and 20 of the Social and United Economy Act of 31 July 2014 introduced a new additional obligation, applying to small and medium-sized French companies, requiring employers to inform their employees two months prior to any share sales or business transfers. The purpose of this measure is to enable the employees to potentially make an offer for the shares or the business. Since August 2015, the sanction for failing to comply with such obligation is now a fine that is capped at 2 per cent of the sale price.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Business combinations are regulated in certain sectors, such as media and broadcasting sectors.

With respect to the media sector, article 11 of Law No. 86-897 dated 1 August 1986 states that a natural or legal person cannot own or control, directly or indirectly, daily newspapers with publications representing more than 30 per cent of the total publications on the national territory.

Law No. 86-1067 dated 30 September 1986 governs the broadcasting sector. Under article 41-4 of this law, when the French competition authority has to control a merger in this sector, it must request an opinion from a specific authority, the Conseil Supérieur de l'Audiovisuel.

With a new decree of 15 May 2014, referred to as the Alstom Decree, the French government granted itself powers to veto foreign takeovers by expanding the list of sectors for which foreign investments require the prior authorisation of the French Ministry of Economy. The Decree includes additional 'strategic' sectors: energy and water supply, transportation networks and services, electronic communications networks and services, facilities or structures of vital importance, as defined by French law, and the public health sector.

18 Tax issues

What are the basic tax issues involved in business combinations?

A proportional duty is levied on sales of real property (amounting to 5.8 per cent of the total price) and on the transfer of going concerns (zero per cent up to €23,000, 3 per cent from €23,000 up to €200,000 and 5 per cent above €200,000).

Since 1 August 2012, transfers of shares classified as actions (for example, shares in SA and SAS), are taxed at a rate assessed on the value of the transferred shares amounting to 0.1 per cent.

For shares classified as *parts sociales* (for example, shares in SARL), the transfer duties amount to a fixed rate of 3 per cent assessed on the transfer price of the shares. A deduction of €23,000 divided by the total number of shares is applied to the transfer price used for the calculation of the transfer duties.

However, the rate is increased to 5 per cent without any cap or deduction for transfers of participating interests in companies whose predominant activity is real estate investment.

Capital increases in cash or by incorporation of earnings, reserves or provisions are liable to a fixed duty of €375 if the company's share capital is less than €255,000 or €500 if it is €255,000 or more.

Capital reductions, whether shareholders are reimbursed or not, are also liable to a fixed duty of €375, or €500 for companies with share capital of €255,000 or more.

The €375 duty is payable on mergers, spin-offs and partial business transfers between companies liable for corporation tax where the company's capital is less than €255,000 (€500 where the capital is €255,000 or more). Contributions for valuable consideration resulting from a merger are liable to the transfer duty indicated above; however, where the company making the takeover assumes the liabilities that encumber the contributions, they are then exempt from any transfer or land registration duty.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

In the event that the legal situation of the employer is modified in connection with, inter alia, a sale, merger, transformation, spin-off or certain types of reorganisations, all employment agreements in effect at the time of such modification continue as between the employees and the employer in its new form or the employer's successor-in-interest (article L1224-1 of the Labour Code). It is unnecessary for the former employer to remain in existence. All that is required is that the activity carried out by the former employer continue and that, as a consequence of the continuation of such activity, the employees' positions are maintained.

It should be noted that the continued validity of employment agreements despite a modification of the legal situation of the employer is binding on both the employer and the employee. Therefore, an employee may not refuse to work for the new employer.

Similarly, except where the former employer has modified its legal situation in connection with a bankruptcy proceeding, the new employer is required to respect all of the obligations imposed on the former employer by the employment agreement, including, without limitation, the duty to pay paid vacation indemnities and work-related accident indemnities that accrued before the effective date of the modification, and all employee benefits. If an employee is dismissed on economic grounds prior to the transfer of the undertaking for which

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he or she works and the activity of the former employer is continued by the new employer following the transfer, such dismissal could be challenged. The employee may request that his or her employment agreement be continued by the new employer or that he or she be paid damages by the former employer or the new employer or both.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Four types of bankruptcy proceedings are available; safeguard, reorganisation, liquidation and, for proceedings opened from 1 March 2011, financial safeguard. The latter, which was introduced by the Banking and Financial Regulation Law of 23 October 2010, allows a debtor to force dissenting minority financial creditors to accept a pre-insolvency restructuring that has been approved by a majority of the debtor's financial creditors without opening the process to unaffected trade creditors. In reorganisation procedures and sometimes in safeguard procedures, third parties may make offers to purchase some or all of the debtor's business or subsidiaries. Such proposals are transmitted to the judicial administrator and discussed by all of the proceeding's participants and the creditors.

The terms of the transfer plan are set by the court in its judgment adopting the plan.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

As a general principle in French law, the buyer is not liable for corrupt practices initiated by the target company's directors, agents or employees prior to the acquisition.

However, the criminal liability of the company's new directors is likely to be triggered if it is proven that corrupt practices that were initiated in France or any other country continue to produce their effects after the acquisition, and that no adequate anti-corruption procedure was implemented by the company's new directors. The fact that the latter were not aware of such practices is not taken into account by French law.

In France, there is no legislation such as the UK Bribery Act 2010. However, this legislation, which creates a new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf, will apply not only to UK companies, but also to foreign companies that have or conduct part of their business in the United Kingdom. Consequently, it will be a defence for companies prosecuted under the provisions of the UK Bribery Act 2010 to demonstrate that they have adequate procedures in place to prevent bribery.

In response to this global trend towards the implementation of anti-corruption legislation, several of the biggest French companies are currently implementing anti-corruption plans on a global scale in all their subsidiaries.

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Germany

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1 Types of transaction

How may businesses combine?

Focusing on business combinations of stock corporations (AG), there are, in principle, three major categories of combinations: reorganisations and mergers; acquisitions; and cooperation models.

Reorganisations and mergers
The German statutory law on reorganisations recognises and regulates four basic structures:
- merger or consolidation by transferring assets of one entity to another pre-existing entity or by transferring the assets of two existing entities to a new entity;
- splitting assets and liabilities of one entity and transferring them to another;
- transfer of assets for cash; and
- change of legal form, such as conversion into a partnership.

Acquisitions (of shares and assets)
Shares of a listed stock corporation can be acquired by private acquisition from certain shareholders, via the stock exchange (both subject to mandatory offer thresholds, see below) or by public takeover (or a combination). Shares may be acquired by tender offers for cash and also by way of exchange offers for shares (or again, a combination of both). However, a foreign bidder (in particular a non-European one) offering shares as the only consideration in a takeover offer will have to have such shares listed on an organised market within the European Economic Area. Thus, shares listed on the NYSE or Nasdaq may not be used as sole consideration.

The acquisition of assets may likewise be paid for in cash or with shares. However, in acquiring the essential assets of a business or part of a business, the purchaser will also be deemed to have accepted a transfer of existing employment contracts and may need to comply with further, often stringent, requirements under the Works Constitution Act.

Both types of acquisitions (namely, of shares and of assets) may be effected through a special purpose acquisition vehicle (for example, national or foreign new company). The choice of the acquisition vehicle is most often related to international taxation issues.

Cooperation models
As is the case in most western jurisdictions, there are a number of forms of cooperation available to German entities, from joint venture agreements (mostly through a JV-NewCo) to agency, distribution, licence or franchising agreements.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The key German laws governing business combinations consist of the following legislation:
- the Takeover Act;
- the Stock Corporation Act;
- the Reorganisation Act;
- the Securities Trading Act;
- the Act against Restrictions on Competition;
- the Stock Exchange Act;
- the Securities Prospectus Act;
- the Insolvency Act;
- the Limited Liability Company Act;
- the Commercial Code; and
- the Civil Code.

In addition, depending on the structure of the business combination, the following may also apply:
- the Co-Determination Act;
- the One-Third Participation Act; and
- the Works Constitution Act.

European Union law (particularly regarding merger control) must also be considered in certain (generally larger) transactions.

3 Governing law

What law typically governs the transaction agreements?

The legal documentation required will depend on the type of business combination chosen, namely, reorganisations and mergers; acquisitions; or cooperation models.

The requirements for acquisitions of shares of a German stock corporation will depend on the type of shares being acquired (namely, bearer shares, registered shares, etc). Depending on the structure of the transaction, more documentation than only a share purchase agreement (SPA) may be required. Typically, these SPAs are governed by German law.

The Reorganisation Act sets out certain requirements as to form and procedure for the respective types of reorganisations and mergers under the Act.

A public tender offer will require an offer document governed by German law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

To acquire shares in a listed Stock Corporation via a public takeover requires the bidder to file a tender offer document with the Federal Financial Supervisory Authority (BaFin) (see also questions 3 and 5). Depending on the size and structure of the transaction, in public and private deals, merger control filings and certain notifications may be triggered.

Act against Restrictions of Competition
The following types of transactions are caught by the German merger control rules:
- acquisition of at least 25 per cent of the capital or of the voting rights of the target company;
- acquisition of the assets or of a substantial part of the assets of the target company;
- acquisition of control over another company; and

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- any other agreement or combination between companies in which a company can exercise a competitively significant influence over another company.

A duty to notify the proposed concentration to the German Federal Cartel Office exists (subject to certain exceptions) if:
- the combined worldwide group turnover of all of the parties concerned exceeds €500 million;
- at least one participating party has a group turnover exceeding €25 million in Germany;
- at least one other participating party has a group turnover exceeding €5 million in Germany; and
- a notification with the European Commission is not required according to Regulation No. 139/2004 (EC Merger Regulation) (in which case the European Commission – according to the 'one-stop shop principle' – would be competent to review the concentration instead of the antitrust authorities in the respective member states).

The final proposal of the ninth amendment to the Act against Restrictions of Competition seeks to establish a duty to notify even if the €5-million-turnover threshold is not met in case the value of the consideration exceeds €400 million and the target is active to a significant extent on domestic markets. The amendment is expected to enter into force within the first half of 2017.

Generally only the opening of second-stage proceedings and formal clearance or prohibition decisions rendered by the Federal Cartel Office in second-stage proceedings must be made public, making it more difficult for third parties to challenge or even to oppose the approval of a concentration. However, the Federal Cartel Office also publishes a list of notified transactions on its website (www.bundeskartellamt.de) on an informal basis.

Without the required antitrust approval being granted a transaction may not be implemented.

It is important to realise that the same German merger control rules also extend to business concentrations taking place outside Germany or involving non-German entities, provided that the concentration has an appreciable effect on the German market (assuming the thresholds have been exceeded).

Notification to unlisted stock corporations

The Stock Corporation Act requires companies holding shares in a German-domiciled unlisted stock corporation to notify the stock corporation in writing upon attaining (including indirectly, for example, by way of a call option) or subsequently no longer maintaining each of the following percentages:
- more than 25 per cent of the total par value of the shares of such stock corporation; and
- more than 50 per cent of the total par value of the shares of such stock corporation or the voting rights of such stock corporation.

Failure to make such disclosures will render the rights attached to the shares, for example, voting rights, ineffective.

As regards disclosure of shareholdings in listed stock corporations, see question 6.

Notification to Commercial Registry

Reorganisations and mergers as well as some agreements and other measures in connection with acquisitions, such as domination and profit and loss transfer agreements and capital increases, need to be registered with the commercial register to become effective.

Notarisation and stamp taxes

In Germany, there is no stamp duty. Depending on which type of shares are acquired, however, notarisation of the SPA may be required. Furthermore, some agreements in connection with business combinations (for example, merger agreements or purchases of real estate) will need to be notarised to be effective. Notarial costs depend on the transaction value – and additional costs may be triggered by documents in the English language.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

What information needs to be made public depends on the structure of the transaction.

No general disclosure obligation

In Germany, there is no public database containing all purchase agreements or other substantial agreements entered into in connection with a business combination or a respective general disclosure obligation. If, however, the business combination is subject to approval of the general meeting of a party thereto, the shareholders have to be put in a position to make an informed decision. Thus, the purchase agreement (including the purchase price and the mechanisms of its determination) and other substantial agreements, if any, entered into in connection with the transaction may have to be disclosed to the shareholders.

In a public takeover, the bidder will have to publish an offer document in which it will have to disclose, inter alia, its future intentions with regard to the target company, its management and employees.

As to disclosure relating to listed securities acquired or sold in another stock corporation, see question 6.

Periodic and ad hoc disclosures of listed securities

To a listed business combination, detailed rules requiring certain periodic and ad hoc disclosures apply.

By way of example of a periodic disclosure, an issuer of securities listed on an organised market is required to inform the public via the electronic German Federal Gazette about the issuance of new shares and the exercise of exchange and subscription rights. This also applies to business combinations financed by the issuance of new shares.

Furthermore, ad hoc disclosures to the public are required so that the public is made aware of new facts that may have a significant impact on the stockmarket price. Examples of business combinations and restructurings that would be most likely to require such disclosure are major asset or share sales and purchases and mergers. Since 3 July 2016 the duty to publish ad hoc disclosures is governed by the EU Market Abuse Regulation.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Shareholders of listed stock corporations of German origin (that is, in principle, whose registered office is located in Germany) are required to notify the stock corporation and the BaFin in writing without undue delay (at the latest within four trading days) of directly or indirectly reaching, exceeding or falling below thresholds of 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent of the voting rights in the stock corporation in a single announcement showing the aggregated voting rights, held directly or indirectly. Failure to lodge the required notices renders the rights attached to the shares (for example, voting rights) ineffective. If the shareholder fails to meet such notification requirements intentionally or due to gross negligence, the voting rights will remain ineffective for a period of six months after the required notifications have been finally submitted. In addition, such failures may result in shareholder liability with fines, with respect to individual persons of up to €2 million and with respect to legal entities of up to the higher of €10 million or 5 per cent of the turnover of the whole group of companies in the relevant business year. Furthermore, measures and sanctions will be published on BaFin's website with the names of the respective responsible person.

There is a whole set of rules as to when certain voting rights are attributed to certain shareholders, for example, because somebody is holding shares on their behalf or they own call options. In addition, legislation, which came into effect in February 2012 and was amended in November 2015, tightened disclosure obligations, so that cash-settled derivatives and other instruments enabling the holder to acquire shares also trigger disclosure obligations.

Shareholders reaching or exceeding the threshold of 10 per cent or a higher threshold need to inform the issuer about the purpose of the acquisition; and the source of the financial means used for the

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acquisition. Upon receipt of such information, the issuer is obliged to publish it. This rule does not apply if:

- the articles of association of the issuer include a provision releasing the shareholder from the obligation to inform the issuer;
- the shares are acquired by the financial-market stabilisation fund (the state fund incorporated to ease certain conditions in connection with the financial crisis, as defined in the Act to Stabilise the Financial Markets); or
- the threshold has been reached via a public offer as defined in the Takeover Act.

Under the EU Market Abuse Regulation which replaced the Directors' Dealings Rules of the Securities Trading Act as of 3 July 2016, directors and officers (as well as closely related persons) of listed stock corporations have to disclose any sale and purchase of their own company's shares to the company and to the BaFin. Such transactions have to be disclosed by the company via media with European-wide coverage such as an electronic news provider, must be transmitted to the company register, and are disclosed in the annual document and on the website of the BaFin.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

General duties of board members and shareholders

The members of the management board and supervisory board of a stock corporation have to act in the best interest of the corporation and are under a duty to manage the business with the care of diligent and conscientious managers. Breach of this duty (for example, gratuitous disclosure of confidential business information) can lead to personal liability on the part of the respective members. Shareholders of a stock corporation also have certain duties to each other and to the stock corporation (for example, not to commit fraud against minority shareholders). The powers and duties of the shareholders are defined in the Stock Corporation Act.

Duties of bidding stock corporation in a public tender offer

Under the Takeover Act, the bidder's management must:

- treat shareholders equally, in particular with regard to information provided and price paid for shares;
- provide target shareholders with sufficient time and information to take a reasoned decision;
- proceed without unnecessary delay, so as not to obstruct the target in the pursuit of its business unnecessarily;
- not distort the market;
- secure financing of the bid; and
- comply with the disclosure requirements, for example, publication of the offer document; publication of all purchases of target shares after the publication of the offer document; and disclosure to the public of the number of target shares held at the beginning of the offer period, then the number of tendered shares on a weekly basis. In the last week of the offer period, the bidder must disclose the number of tendered shares on a daily basis.

Duties of target stock corporation in public tender offer

Duties of the target stock corporation's management board in a public tender offer include:

- acting in the best interest of the target company, but not necessarily in the interest of the shareholders;
- abstention by the management board from any measures that could influence the success of the offer (however, with certain exceptions);
- compliance with certain disclosure requirements (including ad hoc publicity);
- equal treatment of all shareholders;
- publication of a substantiated statement on the offer (not later than two weeks after the tender offer has been published);
- execution of the process as expeditiously as possible;
- seeking cooperation with its supervisory board; and
- ensuring no market distortions regarding the trade in shares of the target or bidder or other companies affected by the offer are created.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Reorganisations and mergers

Pursuant to the Reorganisation Act, any reorganisation (merger, demerger, transfer of assets or change of legal form) requires a resolution of the general meeting approving the reorganisation with a majority of at least 75 per cent of the capital represented at the general meeting.

Acquisitions (share deal or asset deal)

Share or asset transfers generally do not require approval by the shareholders.

However, case law (the *Holzmüller* doctrine as amended by *Gelatine*) requires shareholders' approval by a majority of at least 75 per cent of the share capital represented at the general meeting to complete certain transactions that affect almost all of a company's assets. If all assets are disposed of, not case law but statutory law, (namely, the Stock Corporation Act) requires that 75 per cent of the share capital represented at a general meeting approve of such disposal.

Cooperation models

An ordinary business cooperation does not require shareholders' approval. Shareholders only have their general right to information about the company's affairs.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Unsolicited takeover attempts are still rare in Germany. However, as liquidity and transparency of capital markets have developed and private investors and institutional investors increasingly encouraged stock corporations to focus on shareholder value, the general attitude has become less negative with regard to hostile transactions than it was in the past.

Nonetheless, the Takeover Act provides for the target company to defend itself against hostile transactions (see below). Germany has opted out of the stricter rules provided for in the European Takeover Directive and there is no inclination of corporations to voluntarily opt in. Typically, however, while the target may make it difficult for the bidder or provoke a higher offer price, if an unsolicited offer is attractive, the target has only very rarely the means available to prevent the takeover once it was launched – and most of the time it is rather a PR battle than a legal one. Thus, it is not the defence mechanisms, but more the comparably low free float of many German stock corporations and the tightening of undisclosed stakebuilding (see question 6) that decreases the possibility of seeing too many hostile takeovers for years to come.

The largest unsolicited takeover offer since the introduction of the Takeover Act was Merck's bid for Schering in 2006, which, however, failed owing to Bayer's higher competing offer. It is followed by; 2015's hostile offer of Vonovia for Deutsche Wohnen which lacked sufficient acceptance and Schaeffler's bid for Continental, which as far as the tender offer is concerned, ended in a friendly mode. An interesting transaction was also the initially unsolicited bid for Techem in 2007, which ended being a joint bid by BC Partners and Macquarie – and failed because it did not exceed the required acceptance threshold. It is important for a bidder to realise that the 'effective control' threshold lies at 75 per cent of the voting rights, as this is the majority required at the shareholders' general meeting for major structural changes to the target stock corporation. Macquarie launched another – successful – takeover offer after having acquired more than 75 per cent of the shares in Techem by several share purchases outside the stock exchange. The unsolicited takeover offer of ACS for Hochtief is one of the rare examples of an unsolicited offer that did not end in a friendly mode or failed owing to a higher competing offer. It was also, however, not a fully fledged takeover, but the offer was at a minimum price and only

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targeted to use the possibilities granted under the law to build a larger stake once the control threshold is crossed without being subject to the statutory minimum price rules. In recent years, there have been several hostile takeover attempts, which, however, did not trigger comparable discussions about the rules governing takeovers. Interestingly, though, in 2014 we saw for the first time a successful takeover defence when Weidmüller's takeover attempt of R Stahl failed, and in 2015/2016 the first hostile 'virtual' offer by Potash for K+S, which was withdrawn, the failed takeover attempt by Vonovia for Deutsche Wohnen with a rather low premium, as well as Tocos hostile take-over of Hawesko notably initiated by an entity owned by a supervisory board member of the Target.

As regards defence against hostile transactions, owing to the 'duty of neutrality', after the decision to launch an offer has been published, the management board must not take any action that could prevent the success of the takeover offer.

However, the following actions of the management board (including defensive measures) are permitted (without approval at the shareholders' meeting):

- searches for a 'white knight';
- any action within the scope of the management board's powers if approved by the supervisory board and if the law (for example, the Stock Corporation Act) does not set forth further requirements; and
- actions that would have reasonably been taken if no offer had been launched, for example, measures in the ordinary course of business, measures to execute contractual obligations entered into before the bid or measures executing the established strategy of the target company.

Furthermore, the shareholders may under certain restrictions authorise the management board to take actions within the scope of the powers of the shareholders' meeting before and independent from any takeover offer.

These provisions provide a wide scope to management. However, their impact is mitigated by the fact that pressure from institutional shareholders will prevent most listed companies from using the mechanisms available and because of the necessary compliance with other legal requirements (for example, Stock Corporation Act), in particular the duty to act in the best interest of the company. Also, the duty to treat all shareholders equally as set out in the Stock Corporation Act restricts the ability of the target to, for example, use a poison-pill defence (namely, 'flip-in' or 'back-end' provisions) as it is known in other countries.

The shareholders' meeting may also, as provided under the EC Takeover Directive (Directive No. 2004/25/EC of 21 April 2004), impose a stricter 'duty of neutrality', which would then mean that only certain actions of the management board would be permitted. However, in practice, this is irrelevant because no company opts for such a stricter duty voluntarily.

Maximum or multiple voting rights, for example, such that each shareholder has only one vote or that certain shareholders' shares count twice, are impermissible.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Increasingly demanded in cross-border transactions, break-up fees are sometimes seen in private acquisitions and in agreements with shareholders of public companies. Nevertheless, break-up fee arrangements (and, even more so, reverse break-up fee arrangements) with a target that is a German public company are not yet common and are subject to a number of limitations (for example, the target company's management board can only enter into them if they are in the best interests of the target).

Even without a break-up fee arrangement, there may be, subject to rather strict prerequisites, pre-contractual liability if one party breaks off negotiations unreasonably after it has induced confidence that an agreement would be reached.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Unlike in other European countries, there is no such thing as a 'golden share' in Germany. A notable exception is the VW Act, which creates a special legal situation for Volkswagen. The VW Act has been found to be partly inconsistent with Community provisions on the free movement of capital by the European Court of Justice (ECJ). In November 2008 the German parliament amended the VW Act (only) slightly. The ECJ has approved these amendments in October 2013.

Under the German Foreign Trade Act, the federal government may prohibit foreign investment of 25 per cent or more in German defence businesses (including, among other things, the cryptosystems sector). According to an amendment of the Foreign Trade Act, which came into effect in April 2009, the German federal government has additionally been granted a veto right or right to stipulate conditions for participations (direct or indirect ones) of more than 25 per cent by a non-EU and non-EFTA investor if the 'public order and security' of Germany is affected. Upon application the responsible ministry may issue a compliance certificate, ideally at an early stage of the transaction. So far, experience with this provision has not confirmed fears of protectionism that some raised when it was implemented.

Except for antitrust reasons as well as supervision of banks, insurance and media companies, government agencies cannot influence or restrict the completion of business combinations based upon legal considerations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Under the Takeover Act, a bidder may only make a bid conditional upon the occurrence of events beyond its own control. For example, common conditions include that the required permits are granted (in particular antitrust clearing from German, EU and US authorities); and that a minimum number of shares are tendered.

If an offer is subject to (the bidder's) shareholder approval, such approval has to be granted five days prior to the end of the offer period.

Material adverse change (MAC) conditions have become a common feature in takeovers since 2003/2004. The first business MAC in an offer document was accepted in *Bosch/Buderus* and has been used in different forms ever since. The first market MAC was introduced in the *Blackstone/Celanese* offer document. However, the BaFin has established several requirements with which MAC conditions have to comply. In recent years, compliance conditions have also been introduced and are often included in offer documents.

Tender offers must no longer be structured such that the shareholders are invited to tender their shares to the bidder (and acquisition is completed when the bidder accepts the offer of the shareholders). Under the Takeover Act, the bidder has to make a binding offer to the shareholders (acquisition is completed when the shareholders accept the offer of the bidder).

Private acquisitions of shares can also be made subject to the condition of provisions of acceptable financing and that no material adverse change has occurred.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

According to the Takeover Act, the bidder in a public offer must, prior to the publication of the offer document, take the necessary steps to ensure that he or she has at his or her disposal the necessary means for paying the consideration to the shareholders accepting the offer. Where the offer provides for a cash payment as consideration, an investment services enterprise, typically a bank, shall confirm in writing that the

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bidder has taken the above-mentioned financing measures. The offer document must contain information on such financing measures as well as details of the expected consequences of a successful offer for the bidder's financial position, financial performance and earnings position.

If shares in a certain company are transferred via a share purchase agreement (SPA) rather than public offer, details about the purchaser's financing measures and his or her financial position might be mentioned in the SPA or agreed upon in detail. This, however, is at the parties' disposal.

During the financial crisis, obligations of the seller to (at least indirectly) assist in the purchaser's financing became more common. The parties can, for example, establish an earn-out mechanism, which allows the purchaser to defer the payment of a part of the purchase price depending on the achievement of certain goals regarding the target company's performance. Another possibility for seller's assistance in the purchaser's financing is to conclude a vendor note, that is, a loan of the seller to the purchaser regarding a part of the purchase price. In Germany, vendor notes are, however, still not very common.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

There is a general squeeze-out mechanism provided for in the Stock Corporation Act, as well as special ones in connection with public takeovers or via a merger.

If a shareholder holds 95 per cent of the entire share capital of a stock corporation, the general meeting may resolve to squeeze out the remaining minority shareholders. The resolution has to be registered with the commercial register. On registration, the shares of the outstanding shareholders are transferred by law to the principal shareholder, who must indemnify the former shareholders for the transfer. The principal shareholder must provide a guarantee as security for such indemnification. An independent auditor evaluates whether the indemnification is adequate. Although the question of whether the indemnification is adequate may be an area of dispute, the resolution by the general meeting (and, therefore, the squeeze-out) cannot be challenged on such grounds.

Following a takeover, the bidder also has a right to squeeze out the remaining minority shareholders by court decision (namely, shareholders' resolution is not required). If a bidder holds 95 per cent of the registered share capital carrying voting rights, he or she can apply for a transfer of the remaining shares carrying voting rights; if the bidder also owns 95 per cent of the entire registered share capital, he or she can apply for a transfer of the remaining preference shares without voting rights. Remaining shareholders have a right to request the bidder to buy their shares if the bidder meets the requirements for such takeover-related squeeze-out. Both the right of squeeze-out and the right of sell-out can only be exercised within three months after the end of the acceptance period of the preceding takeover. For different reasons, however, the 'takeover squeeze-out' is irrelevant for practical purposes.

There is also the possibility of a 'merger squeeze-out', which requires a stock corporation to hold 90 per cent of the registered share capital carrying voting rights of another stock corporation.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

In principle, cross-border acquisitions of German corporations may be structured as straight acquisitions (if you have a privately held corporation), mergers or takeovers. Since the EC Merger Directive was implemented into the Reorganisation Act on 19 April 2007, German entities may merge into non-German EU entities and vice versa. The provisions provide for detailed regulations regarding the procedure, the legal consequences and how such merger becomes effective. The most important documents are the common draft terms, the management report, the independent expert's report and the pre-merger certificate.

Furthermore, German stock corporations must have a two-tier board structure with both a management board and a supervisory board. Particularly in cross-border transactions, the requirement that a supervisory board be composed of up to 50 per cent labour representatives is a feature that commonly leads to confusion and misapprehension by non-German entities and their advisers. Since the EC Merger Directive with respect to regulations about co-determination of employees was implemented, the co-determination regime of the domicile country of the merged company generally prevails, subject to certain exceptions. Furthermore, it is now possible to negotiate a certain level of co-determination in an elaborate process described in the Regulation about Co-Determination of Employees on Cross-Border Mergers. If the negotiations fail, a substitutional legal provision applies.

There are also a number of tax considerations in a cross-border transaction. In recent years tax legislation has facilitated such transactions. In light of the requirements of EU law and in connection with the introduction of the European company (SE), there have been changes to the Reorganisation Tax Act with respect to cross-border transactions and reorganisations. In brief, reorganisations (mergers, changes of legal form, split-ups, contributions against shares) can also be performed tax-neutrally in cross-border cases if the participating entities are EU-based and to the extent that the right of Germany to tax hidden reserves is not excluded or restricted. The same applies for a migration of a German company abroad. It should be noted that the new law does not apply to non-EU-based companies (in particular US companies, but also, for example, Swiss companies do not benefit from the amended rules), and the condition of a non-restricted German tax base raises various questions and concerns.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

There are a number of time periods under the Takeover Act, including:

- the publication of the decision to launch a tender offer via the internet and an accepted electronic information system in Germany has to be made without undue delay after the decision has been taken;
- without undue delay, the bidder must send the publication to the stock exchange and to the BaFin, and must inform the management of the target company (which must inform its works council) and its own works council;
- the bidder must prepare the offer document and file it with the BaFin within four weeks after publication of the decision to tender;
- within 10 business days, the authorities have to review the tender offer document and:
  - allow publication of the offer document;
  - prohibit tendering the offer;
  - grant a further period of up to five business days to correct any mistakes; or
  - issue no decision at all (then the bidder may publish the offer document after 10 business days);
- the offer period must be no less than four weeks and not more than 10 weeks;
- both the management board and the supervisory board of the target company must publish a substantiated statement regarding the takeover offer without undue delay after receipt of the same; and
- if completion of a business combination requires registration of a document with the commercial register, additional waiting periods have to be considered.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Specific rules apply to insurance companies and banks. For example, if a shareholder intends to acquire at least 10 per cent of the capital or the voting rights in a German bank or a German insurance company or, having held such stake, intends to reach or exceed the thresholds of 20, 30 or 50 per cent, the shareholder needs to notify the respective supervisory authority. Under certain circumstances (for example, if it finds that the new shareholder or its representatives are not sufficiently reliable for the respective business or the new shareholder is considered to be financially weak) the supervisory authority can prohibit the envisaged acquisition.

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As far as transactions in the broadcasting sector are concerned, the transaction has to be notified to the state media agency that granted the broadcasting licence. If a nationwide broadcaster is involved, the Commission on Concentration in the Media (KEK) has to be involved. The purpose of the KEK procedure is to prevent a single entity from exercising a controlling influence on public opinion. Moreover, for transactions in the media sector the calculation of the parties' turnover under the German merger control rules (see question 4) is to be based on the twentyfold value of the actual turnover in the case of revenues generated from broadcasting activities and the eightfold value of the actual turnover in the case of revenues generated from activities relating to newspapers and magazines.

Furthermore, German telecommunications law imposes certain notification and permit requirements in addition to those contained in the Takeover Act (for example, with respect to the holding of interests in more than one mobile phone licence).

A provision in the German Foreign Trade Act enables the federal government to prohibit foreign investment of 25 per cent or more in German defence businesses. For further information see question 11.

18 Tax issues

What are the basic tax issues involved in business combinations?

The most relevant taxes for corporations are:

- corporate tax with a single corporate tax rate of currently 15 per cent;
- solidarity surcharge with a tax rate of 5.5 per cent on the corporate tax;
- trade tax with a tax rate around 14 per cent depending on the multiplier applied by the respective municipality;
- real estate transfer tax, which will be triggered by a direct or indirect transfer of 95 per cent or more of the shares in a company owning German real estate, the rate of which ranges between 3.5 and 6.5 per cent on the (near) market value of the real estate;
- value added tax (VAT), currently 19 per cent (reduced rate of 7 per cent applies on certain consumer goods and daily services); and
- wage tax with respect to remuneration paid to employees.

Companies have considerable flexibility in arranging their taxable income to reduce the impact of the high marginal rates, for example, by tax grouping, loss carry-forwards and loss carry-backs. However, without limitation loss carry-forwards can only be set off up to €1 million and, beyond that amount, up to 60 per cent of the remaining annual profit. This rule applies to corporations as well as to individuals, to income and corporate tax as well as to trade tax.

Moreover, in principle, if more than 25 per cent of the shares in a corporation are directly or indirectly transferred within a five-year period to a single acquirer or related persons or to a group of acquirers acting with aligned interests, losses and loss carry-forwards expire pro rata. If more than 50 per cent in a corporation's shares are transferred, the entire losses and loss carry-forwards expire. However, there are exceptions (eg, for intra-group transactions). Further, if the target has hidden reserves the (pro rata) losses and loss carry-forwards do not expire up to the amount of the allocated hidden reserves. Another recent exception applies if the target has been continuously operating the same business operations for at least the past three years and continues to do so until the losses are set off. However, due to some restraints preventing tax arbitrage, this new provision will in practice rather apply to start-ups only than to mid/large cap business groups.

Under the general interest barrier 'excess net interest expenses' are disallowed. For the calculation of this excess net interest expenses in a first step, interest expenses have to be netted with interest income. Then the taxable earnings before interest, taxes, depreciation and amortisation (taxable EBITDA) has to be calculated. The amount by which the net interest expenses exceed 30 per cent of the taxable EBITDA is disallowed. Disallowed interest expenses and unused taxable EBITDA can be carried forward. In the latter case, however, this applies only for a period of five years. The interest barrier in principle only applies to businesses with net interest expenses above €3 million per year. Under an escape clause rule, the deduction of all net interest expenses is allowed if the equity ratio of the German business is equal to or higher than the worldwide equity ratio of the group. The corporate taxpayer has to meet further requirements in order to escape from the interest barrier. Details are complicated and still under discussion (though now backed by an EU anti-avoidance-directive, even its conformity with the constitution is in doubt), so this can only be a very general overview.

Individual shareholders holding their shares as business assets have to pay taxes on 60 per cent of the dividends received and on 60 per cent of capital gains. However, as a general rule, in this case only 60 per cent of the related expenses will be deductible and only 60 per cent of the total amount of capital losses will count as tax losses. Shareholders holding their shares as private assets will be subject to a definite withholding tax on both dividends and capital gains at a rate of 25 per cent plus solidarity surcharge. No tax for disposing of the shares in principle accrues if the shares have been acquired before 2009, are held as private property, amount to less than 1 per cent of the shares of the company and have been held for more than one year.

Corporate shareholders directly holding 10 per cent or more of the corporation's nominal share capital at the beginning of the calendar year are 95 per cent exempt from corporate income tax on dividends. Dividends of corporate shareholders directly holding less than 10 per cent are taxable in full for corporate income tax purposes. For trade tax purposes, dividends of corporate shareholders from a German corporation are 95 per cent exempt from tax provided they hold 15 per cent or more of the corporation's nominal share capital at the beginning of the tax assessment period. Such exemption from trade tax is possible also for dividends of corporate shareholders from foreign corporations if certain additional conditions are met (for example, minimum shareholding, activity clause). Dividends of corporate shareholders directly holding less than 15 per cent are taxable in full for trade tax purposes. Operating expenses in connection with shareholdings are, as a general rule, deductible for corporate and trade tax purposes. Corporate shareholders are economically 95 per cent exempt from corporate and trade tax on capital gains by a sale of shares, subject to certain exceptions. Debates whether to fully tax capital gains of corporate shareholders holding less than a certain amount of the corporation's nominal share have so far shown no results, but have not ended yet.

A withholding tax of 25 per cent (plus solidarity surcharge) on dividends applies to dividends paid to shareholders by a company that is tax-resident in Germany. This percentage is credited or refunded for domestic shareholders not subject to the definitive withholding tax and may be reduced under double taxation treaties for foreign shareholders. If the European parent-subsidiary directive applies (namely, EU corporate shareholder holding 10 or more per cent of the corporation's nominal share capital) the rate for dividends is zero per cent. Otherwise, German tax law only provides for a general reduction of the rate for dividends to 15 per cent if the recipient of the dividend is a corporate entity. There is an anti-treaty provision that may deny the reduction or refund of the withholding tax if the recipient does not have sufficient substance. Interest payments to a parent company on a fixed interest loan, as general rule, do not trigger a withholding tax obligation in Germany.

Real estate transfer tax will be triggered by a direct or indirect transfer of 95 per cent or more of the shares in a company owning German real estate. Recently, following a constitutional court order, a new scheme to determine the tax base has been introduced to better reflect the current the market value of the real estate (effectively raising the real estate transfer tax rate). Further, it is currently being debated whether to lower the transfer threshold triggering the real estate transfer tax from 95 per cent of the shares down to 75 per cent or even 50 per cent.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Employees generally exert more influence over large stock corporations than in most other jurisdictions, including in questions relating to the operation and organisation of a business as a whole. The two levels of representation are co-determination of the works council and board-level co-determination.

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Update and trends

While global and European M&A activity was down in 2016 compared to 2015, Germany had a very strong M&A year with deal values close to the record high in 2007. The overall value of transactions almost doubled compared to 2015, reaching well over US$200 billion. The market cooled down a bit after the Brexit vote in the UK, but it picked up again significantly by the end of the year.

The sellers' market in Germany continues and is stronger than ever. The good assets on the German market are chased by many interested parties, which leads to deal terms that are at times extremely favourable for sellers. There are nonetheless a number of potential targets that are held back by their owners. In the persistent low interest rate environment a cash consideration cannot generate the returns a good asset does and when sellers weigh their options, they often still decide against a sale. However, if they decide to sell, you almost always see several bidders auction for such assets. Some financial Buyers, whether traditional private equity funds or family offices are – sometimes desperately – seeking for investment opportunities and corporates have cash reserves to invest. While buyers are not always willing to match the sellers' high price expectations, risk averseness has decreased over the past 12 months despite substantial political and economic uncertainty.

The two largest deals announced in 2016 were – as in 2014 and 2015 – outbound transactions: Bayer's offer for Monsanto was said to be at the edge of turning into a hostile attempt, but Monsanto gave in without Bayer being forced to push the envelope. The merger between Linde and PraxAir seems on its way in its second attempt, but still faces some opposition. Both deals are valued at over US$60 billion and show that German companies look for strategic options abroad and that the US is still the country of choice for those kind of transactions. Another large, this time European, transaction with German involvement was Deutsche Börse/London Stock Exchange, a merger that, however, failed in 2017 – formally because no merger clearance was granted; in substance, however, it seemed rather like a victim of Brexit.

In 2016 there was also a record increase in Chinese inbound M&A transactions into Germany, and it could be remembered as the year where the steady increase of Chinese investment came to a halt. The reason would then be the takeover of Aixtron, which was stopped after initial clearance for foreign investment control reasons.

The start of 2017 is very promising. Despite a pronounced sellers' market the interest in investments in Germany is high and the risk averseness of German companies has decreased. Because they are looking for transactions at home and abroad to take on the disruptive changes that industry is facing over the next years, unless political uncertainty deteriorates further, we could see another strong 12 months of Germany M&A activity ahead.

Co-determination of the works council

The Works Constitution Act entitles employees at workplaces with five or more permanent employees to elect a works council, having certain rights of information, consultation, cooperation, veto rights, rights of consent and other rights of co-determination with regard to a wide range of employment matters. In addition, in companies employing more than 100 permanent employees, a finance committee must be established by the works council. The finance committee usually consists of members of the works council and is the first point of (mandatory) contact for the employer in larger enterprises, especially in most mergers.

Board level co-determination

Two main pieces of legislation provide employees with representation at board level:

- the One-Third Participation Act: companies that have, together with their dominated subsidiaries, over 500 employees must have a supervisory board, which is composed of one-third of employee-elected members and two-thirds of shareholder-elected members; and
- the Co-Determination Act: this applies to companies and their subsidiaries with over 2,000 employees, requiring the supervisory board to then consist of equal numbers of shareholders and labour representatives; the chairman of the supervisory board, who typically is a shareholder-elected member of the supervisory board, having a casting vote in the event of a tie. The supervisory board appoints the management board.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The main differences between business combinations in a normal situation and those involving a target that is insolvent or on the verge of insolvency, arise from legal provisions set forth in the German Insolvency Code. Such provisions may apply if the seller faces insolvency, for example, in the case of a share deal the selling shareholder and in the case of an asset deal the selling company.

Acquisition prior to filing for insolvency

Prior to filing for insolvency there are, by and large, no special restrictions for the acquisition of shares or assets from a seller that may become insolvent.

However, if insolvency proceedings over the assets of the seller are commenced after the acquisition is completed, there is a risk that the insolvency administrator may challenge the transaction, arguing that it was to the disadvantage of the insolvency creditors of the seller. This can even be the case if the purchase price paid by the purchaser was adequate and represented the fair value for the target. As a consequence of a successful challenge, the purchaser would have to return to the insolvency estate anything that was transferred by the seller (namely, the shares or the assets, respectively). In return, the purchaser would have a claim for the repayment of the purchase price from the insolvency estate. However, the purchaser faces the risk that the insolvency estate no longer (completely) contains the purchase price or that such purchase price is not held separate from other assets of the insolvency estate and therefore that the claim for the return of the purchase price would fail. In such a (highly likely) event, the purchaser would only be entitled to receive the insolvency quota for its claim. Furthermore, if at the time of the opening of the insolvency proceedings the underlying acquisition agreement has not been completely executed by at least one party, the insolvency administrator has the right to reject the performance of this agreement and impede completion of the transaction.

Acquisition in the pre-opening period

The pre-opening period is the period between the filing for insolvency and the formal opening of the insolvency proceedings by the insolvency court. During this period, which regularly lasts up to three months, the insolvency court in the absence of self-administration, usually appoints a preliminary insolvency administrator who acts on behalf of the failed company or at least has the power to veto transactions.

Because transactions at this stage bear a higher risk of being challenged by the final insolvency administrators, executing acquisitions at this stage of the insolvency proceedings remains a theoretical alternative only. The final insolvency administrator (even being the same person as the preliminary insolvency administrator) may also reject the performance of the underlying acquisition agreement after the opening of the insolvency proceedings if the agreement has not already been fully performed by at least one party by the time the insolvency proceedings are opened. In any case, the parties should seek the insolvency court's approval of the transaction.

Acquisition during the insolvency proceedings

At this stage, transactions with the insolvency administrator are very common. The final insolvency administrator is granted the authority to sell the assets of the insolvent company. The final insolvency administrator has no right to challenge such transactions or to reject the performance of a transaction agreement that he or she himself or herself concluded with the purchasers. It is, however, important be familiar with the particularities of M&A transactions with the insolvency administrator. For example, the insolvency administrator is prepared to provide only rather limited guarantees, which is important to take into consideration in the determination of the purchase price.

Furthermore, the debtor or the final insolvency administrator may develop (sometimes together with a potential purchaser) an insolvency

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plan to reorganise the insolvent company. An insolvency plan provides various ways and modalities to acquire assets of or shares in the target. The importance of insolvency plans has increased since the amendment of the German Insolvency Code by the Act to Facilitate the Restructuring of Companies in 2012. This act improved the insolvency plan proceedings in order to accelerate them and implemented the possibility of a debt-to-equity swap, a transfer of shares or other corporate measures (eg, reorganisations as part of the insolvency plans). In particular, an insolvency plan (including a debt-to-equity swap, a transfer of shares or other corporate measures) can be adopted even without shareholders' approval. By derogation from the general principle, creditors who participate in a debt-to-equity swap based on an insolvency plan do not face any liability risk because of a potential overvaluation of their claims. Against this background, the acquisition of shares in an insolvent target under an insolvency plan is an option to be taken into consideration.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

In the context of business combinations, there exist no specific regulations in regard to corrupt practices. Corruption is a criminal offence for any natural person involved. Companies that profit from corruption can be subject to criminal forfeiture so that the company loses anything gained as a result of the corruption. There is no limit on the amount subject to forfeiture. If management is involved, the company can also be subject to an administrative sanction. Currently, there are discussions on the establishment of criminal liability for companies in Germany by statutory law. However, the incumbent grand coalition is still assessing whether or not a specific corporate criminal law is actually required.

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Ghana

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1 Types of transaction

How may businesses combine?

In Ghana, business combination takes various forms, namely:
- acquisition of shares;
- creation of joint ventures;
- acquisition of business assets;
- merger of two or more companies into one of the existing companies;
- merger of two or more companies into a new entity set up for that purpose;
- amalgamation or arrangement with court approval;
- creation of new holding companies for existing entities; and
- acquisition of state-owned business entities or assets from the Ghana government under its divestiture programme in accordance with PNDC Law 326.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations governing business combinations are:
- the Companies Act 1963 (Act 179) (the Companies Act) is the primary legislation governing business combinations in Ghana. The Companies Act provides for the manner in which business combinations should be effected. It provides for schemes of arrangement and amalgamation as the modes of achieving business combinations for companies incorporated in Ghana. These schemes found in sections 230 and 231 of the Companies Act are usually initiated on the basis of a shareholders' special resolution and consummated with or without court approval;
- the Securities Industry Act 2016 (Act 929) (the Securities Industry Law), the Securities and Exchange Commission Regulations 2003 (LI 1728), the Securities and Exchange Commission Takeovers and Mergers Code (the Takeovers Code), the Central Securities Depository Act 2007 (Act 733), and the Securities and Exchange Commission (SEC) Compliance Manual all serve to govern and regulate trading in securities in publicly listed companies. The Takeovers Code, also provides for the obligations and procedures to be complied with during M&A activity. The Takeover Code applies to:
  - all takeovers and mergers where the target company is a public company; and
  - all takeovers and mergers between or among public companies, whether listed or unlisted on the Ghana Stock Exchange (GSE); and
- it is pertinent to note that in addition to the above laws, parties are also required to comply with the applicable provisions in the Companies Act.

Specific sectoral legislation also regulates business combinations. These include:
- the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930) (the Banking Act), which regulates the banking industry;
- the National Communications Authority Act 2008 (Act 769), the Regulations 2003 (LI 1719) and the Electronic Communications Act 2008 (Act 775), which regulate the telecommunications industry;
- the Insurance Act 2006 (Act 724), which regulates the insurance industry;
- the Minerals and Mining Act 2006 (Act 703), as amended by the Minerals and Mining (Amendment) Act 2015 (Act 900), which regulates the minerals and mining industry;
- the Petroleum (Exploration and Production) Act 2016 (Act 919);
- the Fisheries Act 2002 (Act 625);
- Petroleum (Local Content and Local Participation) Regulations, 2013 (LI 2204); and
- the Ghana Investment Promotion Centre Act 2013 (Act 865).

3 Governing law

What law typically governs the transaction agreements?

Transaction agreements are typically governed by Ghana law or any other law that the parties to the agreement voluntarily choose.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Generally, the filings and fees in connection with business combinations largely depend on the nature of the transaction.

Where the transaction involves the merger or acquisition of shares, documents related to the transactions must be filed with the registrar of companies.

For publicly listed companies, companies are required to pay prescribed fees to the SEC for any filings to be made with the SEC or any statement required under the Takeover Code, for any takeover, consolidation or merger offer.

Under the Companies Act, Ghanaian companies must file returns with the registrar of companies to record changes in directors and officers, changes in the authorised and issued share capital and other statutory matters, including an annual return of particulars of the company. The Companies Act places an obligation on all companies in Ghana to file shareholders' resolutions that make changes to their Regulations (the equivalent of the memorandum and articles of association in other jurisdictions) as a result of any business combination.

All the above-mentioned filings require payment of relatively nominal filing fees to the registrar of companies. Mergers or takeovers involving banks and financial institutions must be notified to the Bank of Ghana for approval under the Banking Act. No filing fees are payable.

Where the stated capital increases as a result of any business combination, a stamp duty is paid on the increases in the stated capital of the combined business.

The transfer of shares in a company as a result of a business combination is exempt from all stamp duties. However, under section 66(2) of the Companies Act, every company that increases its stated capital must send particulars of the increase within 28 days to the registrar of companies for registration.

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5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

In all business combinations, the companies involved are required to disclose certain information to their shareholders, the registrar of companies and the SEC if they are publicly listed companies. This information largely determines whether approval of a merger, acquisition or takeover would be granted by the SEC. The SEC is authorised by section 3 of the Securities Industry Law to 'review, approve and regulate takeovers, mergers, acquisitions and all forms of business combinations in accordance with any law or code of practice requiring it to do so'.

Under the Companies Act, the registrar of companies is empowered under section 279 to accept for registration every prospectus relating to an invitation to the public to acquire or dispose of shares in a public company. Section 275 of the Companies Act provides, inter alia, that within six months prior to the making of an invitation there should have been delivered to the registrar and registered by him, a prospectus relating to the shares complying, in all respects, with all relevant provisions of the Companies Act.

Section 276 of the Companies Act requires that a prospectus making an invitation to the public shall contain the details of the offer, a brief corporate history of the offeror, the offeror's shareholding structure and various professional reports relating to the offeror.

The SEC Regulations also provide that a prospectus or offer document issued in connection with or in respect of an offer or invitation to the public to acquire corporate securities shall be submitted to the SEC for examination and approval.

Issuers of prospectuses will have to ensure that the prospectus complies with the provisions of the Companies Act and the SEC Regulations.

According to the law, a person may not acquire more than 25 per cent of the voting rights of a company unless he or she notifies the GSE and fulfils the conditions of a takeover offer.

The board of directors of the offeree company upon receiving the offeror company's statement shall inform the SEC and the GSE. In addition, an announcement by press notice of the proposed takeover offer should be made within 24 hours of receipt of the offeror company's statement.

A press notice shall be made in at least two English-language daily newspapers of national circulation and shall include all material information contained in the offeror company's statement.

The takeover offer document shall state the following:

- whether the offer is conditional upon acceptance of the offer for a minimum number of issued voting shares of the offeree and, if so, the percentage;
- where the shares are to be acquired in whole or in part for cash, the period within which payment will be made and the method of such payment;
- where the shares are to be acquired through a share swap, the proportion of the share swap and the period within which the offeree's shareholders shall receive the new shares;
- whether the offeror is engaged in the same line of business as the offeree;
- whether the offer is conditional upon receiving approval under any law in Ghana or other regulatory approval outside Ghana where the transaction involves companies incorporated outside Ghana;
- whether the offer is conditional upon maintenance of a minimum percentage of shareholding by the general public to satisfy the continuing eligibility requirements for listing; and
- the circumstances that shall apply in the event that the conditions listed above are not fulfilled.

If during the takeover period a director of the offeree company is offered a job or position with the acquiring company, then that director is obliged to disclose and excuse him or herself from decision-making of the offeree company's board of directors.

Listed companies on the GSE must reveal to the exchange any information or transactions whose impact on the company's assets, financial position and business generally will cause substantial share price movements.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

According to the law the purchase of a substantial amount of shares or the securing of control of a company by acquiring the securities of those who control the company shall give rise to a takeover bid. Thus, a person may not acquire more than 25 per cent of the voting rights of a listed company unless he notifies the GSE and fulfils the conditions of a takeover offer.

Pursuant to the Takeover Code, where a person (or persons) acting in concert acquires or intends to acquire more than 30 per cent but less than 50 per cent of voting shares of a public company in any 12-month period; or acquires or intends to acquire 50 per cent or more of the voting shares of the public company; or acquires a company that holds effective control in the public company or, together with shares already held, will result in acquiring effective control of the public company, then that person shall be obliged to make a mandatory takeover offer of such public company and shall be required to comply with the takeover procedures set out in the Takeover Code. Exemptions may, however, be granted by the SEC with respect to these rules where deemed applicable.

No person shall make an offer to acquire shares or voting rights of a public company which may entitle such person to exercise effective control in the target company without complying with the takeover procedures provided for in the Takeover Code.

The Takeover Code also provides that no person shall acquire effective control over a target company unless such person makes the same offer to all shareholders of the same class of such company in accordance with the Takeover Code.

The mandatory takeover offer requirement may not apply to the following situations:

- any purchase of shares from unissued shares provided that the acquisition will not result in a 50 per cent or more ownership of shares by the purchaser;
- any purchase of shares from an increase in authorised share capital;
- acquiring of shares through inheritance;
- purchase in connection with foreclosure proceedings involving a duly constituted pledge or security arrangement where the acquisition is made by the debtor or creditor;
- purchases in connection with privatisation undertaken by the government of Ghana; and
- purchases in connection with liquidation or insolvency under court supervision.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under the Companies Act, directors stand in a fiduciary relationship towards the company and the directors are obliged to observe the utmost good faith towards the company in any transaction with it or on its behalf. Directors owe a duty to the company to act at all times in the best interests of the company as a whole so as to preserve its assets, further its business and promote the purposes for which it was formed.

The Companies Act provides, in the relevant part, that in considering whether a particular course of action or transaction is in the best interests of the company, a director may have regard to the interest of the employees and shareholders of the company. In addition, when the director is appointed as a representative of a class of shareholders, employees or creditors, the director may give special, but not exclusive, consideration to the interests of that class. The directors shall not exceed the powers conferred on them by the Companies Act or Regulations, except with the approval of an ordinary resolution of the company.

Where a takeover offer document has been sent to the board of directors of the offeree company, the board shall within 15 days after the receipt of the takeover document issue a statement to the holders of voting shares in the offeree company to which the takeover offer relates.

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This statement shall indicate whether or not the board recommends to holders of the voting shares the acceptance of the takeover offers made by the offeror company. The offeree company's statement to the shareholders must contain all that is required or specified in the Takeover Code.

It is the law that no director shall place himself in a conflict of interest where his fiduciary duty to the company conflicts with personal interests or duties to other persons.

Controlling shareholders do not have similar duties.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Generally, acquisition transactions must be consented to by shareholders pursuant to the Companies Act.

For example, if the transaction involves a company issuing new shares beyond what it is authorised and beyond what may already have been approved by the company in a general meeting, the issue must be approved at an extraordinary general meeting.

Private companies that are not subject to specific statutory control may have the requirement for shareholders' approval prescribed in the regulations of the company.

The Companies Act allows dissenting shareholders during a merger or acquisition to receive a fair value of their shares in cash.

In a business combination where one company is liquidated, a liquidator can purchase the shares of dissenting shareholders. However, the price payable for the shares shall be determined by agreement or, in default of agreement, by a single arbitrator appointed by the president for the time being from the Institute of Chartered Accountants in Ghana.

The purchase money shall be paid before the company is dissolved.

Dissenting or minority shareholders during a merger or acquisition can also apply to the court in order to receive a fair value for their shares.

The court may make an order and set what it thinks fit as a fair value for their shares. Before making an order, the court may refer the matter to the registrar of companies who shall appoint one or more competent reporters to investigate the fairness or otherwise of the offer and to report its findings to the court.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Although hostile transactions generally do not take place in Ghana, there is no legal impediment to making a hostile bid. However, there may be cases of a competing takeover offer where two or more entities have interests in the same target. In such an instance, the competing offeror shall serve a competing takeover offer document as required by the Takeover Code. This must be done at least 10 days prior to the closure of the original offer period and this period shall also apply to revisions that may be made to the competing offer.

Any information given to any offeror, including particulars of shareholders shall be furnished equally and promptly on request to any other competing offeror who has made a competing offer in terms of the Takeover Code.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There is no specific legislation in Ghana dealing with break-up or reserve break-up fees. Thus, nothing prevents the parties from providing for such fees in their agreements.

The Takeover Code provides for cases of a competing takeover offer where two or more entities have interests in the same target. Under the Takeover Code, withdrawal of a takeover offer may occur where: the offeree's shareholders have rejected the takeover offer; events occur rendering either the offeror or offeree or both incapable of fulfilling their obligations under the takeover offer; or a counter-offer is accepted by the offeree.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Yes. The 1992 Constitution of Ghana gives the government of Ghana the responsibility to ensure that the nation's interests are always protected and promoted. As such, any business combinations that may affect the nation's security or may be deemed not to be in the nation's best interest would be blocked.

Other ways in which business combinations may be restricted or influenced by government agencies are as follows:

- the Bank of Ghana may disapprove of share transfer if:
  - the transferee may exercise influence to the detriment of the bank or specialised deposit-taking institution;
  - the sale of shares by a person with controlling interest in the bank could be detrimental to the bank or specialised deposit-taking institution; or
  - the Bank of Ghana has reason to believe that the transaction will be detrimental to the bank or specialised deposit-taking institution; and
- in the mining sector, the minister may restrict a person from becoming a controller of a mining company in Ghana if it would prejudice the public interest.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In public takeovers, the Takeover Code states that the preliminary public announcement and offer document must stipulate the conditions applicable to the offer. For example, it must be clearly stated whether approval under any law in Ghana or other regulatory approval outside Ghana is required.

Where the offer is conditional upon the acceptance of a minimum percentage of shares being received, the offer shall specify a date that is not more than 30 days from the date of service of the takeover offer or such later date as the SEC may allow on which the offeror can declare the offer to have become free from conditions.

From the reading of the law, it is presumed that the offeror would have the financial capability to complete the offer.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

The Takeover Code requires the takeover offer document to state where shares are to be acquired in whole or in part for cash, the period within which payment will be made and the method of such payment.

The seller does not have any express obligation to assist in the buyer's financing. According to the Takeover Code, the obligation of the seller during a transaction involves informing the relevant securities exchange (if it is a listed company) and the SEC, and making the required public announcement on receiving the buyer's bid.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Companies Act provides for the compulsory acquisition of a minority shareholding if the acquirer has obtained at least 90 per cent in value of the shares of its target within four months of making the offer. The acquirer is mandated, within two months after achieving the 90 per cent, to send a notice to the shareholders who have not accepted the offer advising of its intention to acquire their shares.

The minority shareholders may apply to the court against such compulsory acquisition within two months of receiving notice. The court may prevent the acquirer from purchasing these shares or may set

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Update and trends

There have been no substantial changes in the law of mergers and acquisitions in Ghana, save the promulgation of the Securities Industry Act 2016 (Act 929), which repealed the Securities Industry Act, 1993 (PNDCL 333) and the Securities Industry (Amendment) Act 2000 (Act 590).

The Securities Industry Act established the Securities and Exchange Commission, which is the Regulatory body mandated, inter alia, to review, approve and regulate takeovers, mergers, acquisitions and all forms of business combinations in accordance with any other law or code of practice requiring it to do so.

The Act also mandates the Security and Exchange Commission to examine and approve invitations to the public made by issuers other than the government.

Further, Ghana has enacted a new Act to regulate banks, specialised deposit-taking institutions, financial holding institutions, and their affiliates. The Act has repealed the erstwhile Banking Act 2004 as amended. The Act regulates among others, business combinations in or involving entities in the banking sector.

We expect that there will be a promulgation of a new Companies Act in Ghana. The Companies Bill 2013 is currently before Parliament, and is expected to be passed. However, there is no indication as to when it will be passed. The Bill, when passed, will make changes in the Law of Mergers and Acquisitions in Ghana.

For instance, the Bill provides, among other things, a buy-out remedy for dissenting shareholders. Thus, the Bill introduces provisions that confer on a dissenting shareholder in any form of business combination, the right to require the company to purchase the shares of that shareholder at a fair value either agreed between the company and the shareholder or determined by way of arbitration in accordance with the Bill. This right arises in relation to transactions such as schemes of arrangement, mergers or both.

The Bill also seeks to provide a procedure for the restatement of shares if within one year from the date of the passage of a special resolution that has given rise to the right to purchase the shares the company has been unable to carry out the proposed object of the business activities that have been contemplated.

The credit crisis has had significant effect on M&A activity in Ghana. The stock exchange market has seen relatively fewer acquisitions or takeovers of significant amounts. Most of the M&A deals that have been closed have taken place between private companies and have been on a relatively smaller scale.

terms for such a purchase. However, if they do not apply to the court, the acquirer can compulsorily purchase the shares.

In addition, the Takeover Code makes it clear that, where a takeover results in the offeror's acquiring 90 per cent or more of the offeree's voting shares, the offeror shall offer the remaining shareholders a consideration that is equal to the prevailing market price of the voting shares or the price offered to the other shareholders, whichever is higher.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no specific laws and regulations that apply to cross-border transactions. However, all such transactions may be treated as foreign investment transactions.

Applicable laws and regulations that may affect such a transaction include the Foreign Exchange Act 2006 (Act 723) and the Ghana Investment Promotion Centre (GIPC) 2013 (Act 865).

The Foreign Exchange Act requires that any foreign currency or financing to be used for the acquisition must be effected through any of the authorised banks in Ghana.

The GIPC Act requires that all foreign investors register their investments with the centre to ensure the free expatriation of profits, obtain automatic work permits and other benefits.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

An offeror must keep a takeover offer open for acceptances for a period of 30 days from the date the takeover offer document is first served in accordance with the Takeover Code or such period as may be determined by the SEC.

An offer (period) shall be deemed to have lapsed:

- in the event of the non-fulfilment of any obligations by the offeror under the Takeover Code; or
- where all conditions to which the offer is subject are not fulfilled within 21 days of the first closing date of the offer or on the date the offer becomes unconditional as to acceptances; or
- upon the non-acceptance of the offer after the expiry of the offer period.

In the case of an offer which lapses in the event of non-fulfilment of any obligations by the offeror under the Takeover Code, the offeror shall be prohibited from making any offer for the acquisition of shares of any listed company for a period of 12 months from the date of failure to fulfil the obligation.

Where an extension of an offer is allowed by the SEC, the offeror shall inform the shareholders of the target company of the next closing date by press announcement on the floor of the GSE (in the case of a listed company), in the electronic media and in at least two daily newspapers of national circulation.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Generally, commercial, trading and manufacturing concerns do not need any general approvals. The relevant ministries such as trade and industry have their regulations but do not directly supervise activity in the way that the Minerals Commission or the Bank of Ghana have statutory supervisory functions in mining and banking respectively.

In the banking sector, the Bank of Ghana is the controlling agency during amalgamations and acquisitions. The Bank of Ghana is responsible for granting licences and approval for such activity.

Under the Banking Act, a three-month notice to, and the written approval of, the Bank of Ghana is required in any acquisition or sale of shares of more than 5 per cent. Further, the approval of the Bank of Ghana is required for existing shareholders who intend to increase their shareholding above any of the supervisory thresholds. Currently, the supervisory threshold has been set at 5, 10, 20 30 and 74 per cent. In addition, under section 52 of the Banking Act, the Bank of Ghana must approve any agreement or arrangement that would lead to the sale, disposal or transfer of the whole or part of the business of a bank or a specialised deposit-taking institution or financial holding company; or the amalgamation or merger of a bank, specialised deposit-taking institution, financial holding company or with another bank or any other institution; or the restructuring of a bank, specialised deposit-taking institution or financial holding company

Under Ghana's Insurance Act, a person who owns or holds a significant interest in an insurance business shall not sell, transfer, charge or otherwise dispose of the interest in the insurance business, or a part of the interest, except with prior written approval of the sector regulator, which is the National Insurance Commission.

In the mining industry, strict approval procedures are required by the law. Mergers and acquisitions by share transactions are tightly regulated. Section 14 of the Mining and Minerals Act 2006 (Act 703) provides that no mineral right or interest therein shall be transferred, assigned or dealt with in any other manner without the prior approval in working of the sector minister.

Failure to meet notification requirements on acquiring any controlling interest in the mining industry constitutes an offence punishable by a fine or a term of imprisonment, or both.

Under the Fisheries Act 2002 (Act 625), any fishing craft operating in Ghana's coastal waters and rivers in connection with any fishing activity must be licensed. Pursuant to the Fisheries Act, licences

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granted under the act are not transferable to another person without the permission of the Fisheries Commission.

Thus, where a merger or an acquisition leads to the formation of a new company, a licence granted to a fishing vessel owned by the old company will not as a matter of course be transferred to the new company unless the permission of the Fisheries Commission has been obtained. There are also nationality restrictions that may affect the extent to which mergers and acquisitions are effected. For example, the owner of a local industrial or semi-industrial fishing vessel licensed under the act shall employ a master, officers and crew of whom no less than 75 per cent shall be Ghanaians.

The Petroleum (Exploration and Production) Act 2016 (Act 919) principally regulates the petroleum sector. For example, where the merger or acquisition results in the creation of a new company, any petroleum agreement cannot be assigned to the new company without the sector minister's consent. The consent of the minister is also required for the transfer of control of at least 5 per cent of the shares in a petroleum company. If the merger or acquisition leads to the company ceasing operations, the Ghana National Petroleum Corporation shall have the first option in the purchase of its assets.

Under the regulations of the National Communications Authority (NCA) (LI 1719), if the transfers of shares in a licensee company would result in a change of control of the company and also cause that company to breach licence terms relating to its ownership structure, then the NCA must approve such a transfer. However, if no change in control or no breach results from the transfer then a mere notification of the transfer to the NCA will be sufficient.

18 Tax issues

What are the basic tax issues involved in business combinations?

The recently promulgated Income Tax Act 2015 (Act 896) (ITA) replaces the Internal Revenue Act 2000 (Act 592) and all other laws inconsistent with the ITA.

Under the ITA, there is no capital gains and gift tax for companies. However, in lieu of these, unless exempt, gains from assets and liabilities realised are included in the chargeable income of resident companies and taxed at their respective corporate income tax rate.

Gains arising from reorganisation, amalgamation or merger of a business are exempt from taxation where there is a continuity of underlying ownership in the assets of at least 50 per cent. Gains from the replacement of assets are also tax-exempt.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The legislation governing labour and employee benefits is the Labour Act 2003 (Act 651).

According to the law, if the employees lose their jobs as a result of the business combination or suffer any diminution in their terms and conditions of employment, the target company would have to make redundancy payments to the workers.

In determining whether a worker has suffered a diminution in the terms and conditions of employment, account is taken of the past service and accumulated benefits of the worker with the target company before the acquisition or merger.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The buyer should be prepared to take over the liabilities and obligations of the target company. Apart from the usual due diligence required to assess the liabilities of the target company, there are no special considerations.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Criminal Offences Act 1960 (Act 29) provides for sanctions for corruption in general. Under the Criminal Offences Act, both demand and supply sides of corruption are criminal. The sentence for a conviction for corruption under the Criminal Procedure Code is a prison term not exceeding 25 years.

Also, companies from the United States and the United Kingdom should ensure that they comply with the Foreign Corrupt Practices Act and the UK Bribery Act (2010).

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Hungary

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1 Types of transaction

How may businesses combine?

Businesses may combine by share acquisition, asset acquisition, or merger, which may take the form of either an amalgamation (whereby one or more companies merge into one another and cease to exist, with the merged company becoming the legal successor) or a consolidation (whereby two or more companies merge into a newly established company, which becomes the legal successor of all of the companies participating in the merger). Complex transactions can sometimes involve a combination of the above techniques.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

- Act V of 2013 on the Civil Code, as amended (the Civil Code), regulates the basic principles of contract law and company law, including the formation and operation of companies, merger of companies and the acquisition of controlling interests in companies;
- Act CLXXVI of 2013 on Transformations, Mergers and Demergers of Certain Legal Entities (the Transformations Act);
- Act CXCVI of 2011 on National Assets (the National Assets Act);
- Act CXL of 2007 on Cross-Border Mergers of Limited Liability Companies (the Cross-Border Mergers Act);
- Act CXXXVI of 2007 on the Prevention and Combating of Money-Laundering and Terrorist Financing (the Money-Laundering Act);
- Act V of 2006 on Public Company Information, Company Registration and Winding-up Procedures, as amended (the Companies Registration Act), regulates the registration, the filing requirements and the winding-up of companies;
- Act CXX of 2001 on Capital Markets, as amended (the Capital Markets Act) regulates transactions involving public offers, disclosure obligations and insider trading;
- Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (the Competition Act) regulates merger control; and
- Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings, as amended, regulates the liquidation and bankruptcy of companies.

3 Governing law

What law typically governs the transaction agreements?

The laws of Hungary typically govern transaction agreements. Where parties from different jurisdictions are involved in a transaction, English law, or sometimes New York law, is usually selected as the governing law instead of Hungarian law.

In the case of the transfer of national assets as defined in the National Assets Act, the governing law must be Hungarian law and the governing language must be Hungarian.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Court of Company Registration

An application for the registration of a merger (and, if relevant, the deregistration of the predecessor company) must be submitted to the relevant court of company registration within 60 days of signing, as well as, in the case of a consolidation, the merger agreement and the deed of foundation of the successor company or, in the case of an amalgamation, the merger agreement and the amended deed of foundation. The amount of duty payable in the cases of change of corporate form and amalgamation, an acquisition of dominant influence, the establishment of a recognised group of companies, as well as the registration of changes in a public company is 50,000 forints, which also includes the duty payable for the changes requested simultaneously with the above-specified events. However, in the case of a transformation of a private company limited by shares into a public company limited by shares, the amount of duty payable is 500,000 forints. For the registration of corporate changes, a publication fee of 3,000 forints is payable.

Hungarian Competition Authority

In Hungary, a notification report must be filed with the Competition Authority if the total domestic net sales revenue of the groups of companies involved exceeds 15 billion forints overall, and within such groups there are at least two groups with net domestic sales revenues of 1 billion forints or more in the last closed business year. A concentration must also be reported to the Competition Authority if the total domestic net sales revenue of the groups of companies involved exceeds 5 billion and it is not immediately apparent that the concentration does not significantly reduce competition in the relevant market.

The notification report can only be filed once a binding agreement is entered into or a tender offer is launched, however, prior to that, confidential pre-notification discussions can already be initiated with the Competition Authority. Based on the notification report, the Competition Authority will decide, within eight days, whether to (i) reject the notification because the case is not admissible; (ii) close the case in the apparent absence of any significant competition issues and issue an official certificate thereof; or (iii) initiate an investigation in the presence of potential competition concerns. In the last case, the Competition Authority issues its decision within 30 days of receipt of the notification (or its supplements, if needed) if it finds that the level of competition will not decrease significantly as a result of the transaction (Phase I review). In any other case, the Competition Authority will issue its decision within four months of receipt of the notification (or its supplements, if needed) (Phase II review). The Competition Authority may extend the deadline of a Phase I review by 20 days and that of a Phase II review by two months. The filing fee is 1 million forints for the initial notification report, additional 3 million forints if the procedure enters Phase I and further 12 million if the procedure enters Phase II.

The Hungarian government may, in the form of a government decree, declare mergers to be of national strategic importance and thereby exempt such mergers from the mandatory notification procedure.

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In line with the one-stop-shop principle, no filing is required in Hungary, if the concentration is of EU dimension and must therefore be notified to the European Commission.

Hungarian National Bank

A person or persons acting in concert wishing to acquire direct or indirect control of more than 33 per cent of the voting shares in a public company limited by shares (or of more than 25 per cent if no shareholder other than the offeror owns 10 per cent or more of the voting shares) must make a prior public tender offer for all of the voting shares of the company and submit an offer document containing certain information about the offeror, the terms of the offer, and the intentions of the offeror regarding the future of the target. It must also submit the offer for approval to the Hungarian National Bank (MNB), the state body responsible for overseeing the operation of the capital markets and financial institutions. MNB must approve or reject the offer within 10 business days from submission. It must approve it if it meets certain legal requirements (for example, minimum offer price, security for the consideration and non-discrimination among shareholders) that are set out in the Capital Markets Act. The Capital Markets Act and the listing rules of the Budapest Stock Exchange require listed public companies to publish material information relating to a business combination they participate in, but combinations are not subject to stock exchange or MNB approval (except for financial institutions where MNB's approval is required).

In regulated industries, such as energy, communications and media, a notice to, or approval by, the competent regulatory authority is required before a combination may take effect.

Other than the relevant registration court fees, competition clearance fees and MNB fees, no material governmental fees are payable on a business combination. While there are no stamp duties, transfer taxes (which are similar to stamp duties) may apply to the transfer of real properties whether structured in an asset transaction or a share transaction.

See question 18 for more information on the applicable capital gains tax, transfer tax and VAT rates in Hungary.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Different information must be made public depending on the structure of the business combination and on whether the companies involved are public or private.

Private or public companies involved in a merger must publish, in the Companies Gazette, an announcement containing the main details of the merger, including:

- the name, seat and company number of each company involved in the merger;
- the name, seat and company form of the merged entity;
- the date of the articles of association of the merged entity;
- certain key information from the balance sheet of each company involved in the merger and the merged entity;
- the main business activity of the merged entity;
- the name and address of each director of the merged entity; and
- a notice to creditors advising them of certain of their rights in connection with the merger (such as the right to request security for their claims).

The publication of the announcement must be initiated within eight days from the execution of the articles of association.

A purchaser who directly or indirectly acquires at least 75 per cent of the voting shares of a private company limited by shares or the votes of a private limited liability company must notify the court of registration of its acquisition within 15 days of its occurrence. Share acquisitions below this threshold need not be notified.

Asset acquisitions by private companies do not need to be publicly disclosed. Public companies must disclose the relevant details of any business combination by way of asset acquisition to the extent that such information may affect listed share prices.

Please also see question 4 in relation to the publication requirements of a public tender offer, and question 6 in relation to disclosure requirements when a significant shareholder increases or reduces its shareholding in a public company.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Shareholders acquiring or ceasing to hold voting rights exceeding 5 per cent of the voting shares (and every multiple of 5 per cent up to 50 per cent, then 75, 80, 85, 90 per cent and then every further 1 per cent) in a public company limited by shares must notify MNB and the issuer of the shares within two days. The above disclosure requirements do not apply if the parent company has already complied with the obligation, or if the parent company is also a controlled company and its own parent company has already complied with the obligation.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

As a general rule, a director must act with the degree of care reasonably expected of a person in his or her position. A director must act primarily in the company's interests.

In certain circumstances (for example, imminent insolvency of a company) directors primarily owe fiduciary duties to the company's creditors and employees (see question 20). If a managing director wilfully causes damage to a third party in connection with his or her activities as managing director, the managing director and the company are subject to civil liability jointly and severally towards such third party. The managing director is subject to a civil liability towards the company for damages caused by a breach of his or her fiduciary duties.

A managing director of a limited liability company cannot be instructed by the shareholders' meeting or the individual shareholder. However, in the case of a wholly owned company, the sole shareholder may withdraw authority for certain matters from the managing director and instruct the managing director regarding such matters in writing. In such case, the managing director must comply with such instructions; however, he or she is exempt from civil liability towards the company as described above.

In the event of termination of the controlled company without a successor, the dominant shareholder will be liable for any unfulfilled claims by creditors, provided that the termination of the company is a result of the detrimental business conduct of the dominant shareholder. This provision is not applicable in the event of voluntary winding-up.

Dominant shareholders may exercise control over their subsidiaries in a regulated manner; that is, they may establish a recognised group of companies (which is established if one or more private limited liability companies over which the dominant shareholder effectively exercises a dominant influence decide to enter into a control contract for the pursuit of common business interests and operates in the form of a recognised group), or be deemed to have a de facto group of companies.

In order to establish a recognised group of companies, a control contract must be concluded by the respective parties and the group will be registered by the competent court. In the event of liquidation of any controlled company of the recognised group of companies, the dominant company is liable for the unfulfilled claims of creditors of the controlled company. The dominant company may not be liable for such claims if it is able to prove that the controlled company's insolvency did not arise as a consequence of the group's common business strategy.

A de facto group of companies is deemed to exist if the dominant company has control over the controlled company without concluding a control contract, provided that the following conditions are met: at least one dominant company and at least three controlled companies are engaged in operations under a common business strategy for at least three consecutive years. At the request of any person with a legal interest, the court may order the de facto dominant company and the controlled companies to conclude a control contract and to have the group registered with the competent court.

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8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Mergers are subject to the approval of a general meeting of shareholders holding 75 per cent of the company's voting shares, unless the articles require a higher majority. An independent auditor must approve the share exchange ratio and the merger balance sheets. These documents are also subject to the approval of the shareholders' meeting and the supervisory board, which must act in the shareholders' interest.

Hungarian law provides a right of first refusal in favour of existing shareholders in relation to share or quota transfers in limited liability companies. This right can be excluded by a company's articles of association.

Also, share or quota transfers can be made subject to shareholder approval; transfers of certain legal titles (such as swaps and contributions-in-kind) can be prohibited and the board of directors can be authorised to block share transfers in specified circumstances. In the case of a company limited by shares, the deed of foundation of the company may require the company's approval. Such approval falls within the scope of the board of directors, provided that the deed of foundation does not provide otherwise.

Asset transfers are only subject to shareholders' approval if the articles of association so provide.

Any combination may also require a separate vote of a class of shareholders if it adversely affects such class.

There are no statutory appraisal rights in favour of shareholders.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Acceptance levels in a public tender offer may not be set at above 50 per cent plus one vote.

The board of directors, the management board and the supervisory board of the target company may adopt a decision aiming to hinder a hostile transaction, unless it is prohibited in the deed of foundation of the target company. The deed of foundation may include breakthrough provisions, pursuant to which any restrictions on the transfer of shares set forth in the deed of foundation cannot be applied during the time allowed for the acceptance of the bid.

See question 10 regarding the limitations on the board's ability to frustrate a bid.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There is no specific legislation or court practice on break-up fees or reverse break-up fees. They are rarely applied in Hungary and, where they are applied, it is usually in a transaction involving UK or US-based sellers running an auction process. Certain principles of Hungarian law limit the ability of parties to commit to pay break-up fees or reverse break-up fees, for example, the (partial) invalidity of agreements involving obviously disproportionate consideration, and the power of the courts to limit the agreed amount of the break-up fees or reverse break-up fees if it is considered penal or excessive.

The general duty of directors to act in the best interests of the company limits their ability to frustrate rival bids that may be more beneficial to the company than a pending bid. Also, if the deed of foundation of the target company so provides, from the time that the board of directors, management board or supervisory board become aware that a public offer may be made, they are prohibited from doing anything capable of disrupting the offer (such as proposing to decrease the capital or causing the target company to acquire its own shares) except for soliciting a counter-offer, or implementing an earlier shareholders' meeting resolution that falls within the ordinary course of business. The board of directors may, however, convene a shareholders' meeting at which the shareholders may decide to take, or authorise the board of directors to take, measures to frustrate a bid. A reciprocity rule provides that the limitations on the directors' power to frustrate a bid do not apply if similar limitations would not apply to the offeror (or the company directly or indirectly controlling the offeror) if it were a target company in a public tender offer.

Financial assistance by target companies that are not public limited companies, such as limited liability companies, private companies limited by shares and partnerships, is not prohibited. Share acquisitions are often structured by the lender requiring that the acquiring entity (the initial borrower) and the target merge as soon as possible after closing. Although this structure has been characterised as financial assistance in some countries, it is recognised in Hungary as a permissible way to overcome the financial assistance prohibitions.

The Civil Code allows for public limited companies to provide financial assistance to third parties for the acquisition of shares issued by the public limited company under market conditions, from the assets available for the payment of dividends, provided that the shareholders' meeting approved such decision by a 75 per cent majority of the votes upon the recommendation of the board of directors.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In the case of share transfers, the court of registration may order the company to submit its audited balance sheet with a reference date as of the date of the share transfer, if the Hungarian Tax Authority establishes that the company has public obligations in excess of 2 million forints.

Other than the foregoing, government agencies may not influence or restrict business combinations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Parties are free to set conditions for mergers, asset acquisitions and share acquisitions involving private companies.

However, the only conditions that an offeror may set in a public tender offer are the obtaining of relevant merger clearance, and the acquisition of more than 50 per cent of the voting shares in the target company. The offeror may not set a higher acceptance threshold even though certain fundamental organisational decisions (for example, a merger, capital decrease or winding-up) in a company require, under the Civil Code, a 75 per cent majority vote of its shareholders. Obviously, a legal merger or a capital decrease is often an important post-closing condition in acquisition finance transactions.

Financing of a public tender offer must be unconditional and fully secured by either a cash deposit, government bonds issued by an EU or Organisation for Economic Co-operation and Development (OECD) member state, or a bank guarantee issued by a bank located in an EU or OECD member state.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

As a result of the financial crisis and difficulties in bank lending, the availability of financing is now increasingly a condition precedent to completion. In such cases, often a break-up fee is payable by the buyer to the seller if financing is not received and the transaction does not complete.

The seller's obligations in connection with the buyer's financing vary from transaction to transaction and depend on the agreement of the parties. Generally, the seller has disclosure and cooperation obligations in relation to the financial institution providing financing for the buyer.

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Update and trends

Over the past couple of years, the M&A market in Hungary has continued to grow in terms of the value of transactions and is expected to remain fairly active. The busiest sectors have been manufacturing, IT and technology, financial services and energy. It seems that, contrary to previous years, the Hungarian state's significant role in M&A transactions (focused mainly on the energy and financial services sectors) has somewhat decreased. The most notable transaction involving the Hungarian state was the sale of MKB Bank to a consortium of investors and, according to media reports, Hungary is expected to sell Budapest Bank (which it acquired from General Electric two years ago) in the near future. Transactions involving the sale and purchase of non-performing loan portfolios continued in the past year. Also, there has been substantial volume of real estate acquisition and disposal transactions. Bank financing for acquisitions remains difficult to obtain and parties are increasingly sharing responsibility for the break-up of transactions that are not completed owing to a lack of financing. As regards legal developments, the uncertainty surrounding the interpretation of many provisions of the new Civil Code (which came into effect three years ago) remains in the forefront, but the current 'hot topic' is the recent change to the merger control thresholds, which will certainly affect future M&A transactions.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Minority shareholders of a public company limited by shares can be squeezed out by an offeror following a successful public tender offer (voluntary or mandatory) for all of the company's shares.

The offeror may exercise a squeeze-out right if it has at least 90 per cent influence over the target company within three months after the closing of a public tender offer, indicated in the public tender offer document its intention to squeeze out minority shareholders, and proves that it has sufficient funds to acquire such shares. The offeror must notify MNB of its intention to squeeze out minority shareholders and must publish a squeeze-out declaration within three months after the closing of the public tender offer. The declaration must include details of the price of the shares, the payment terms and the details for the handover of the shares. The minimum price payable for shares in a squeeze-out is the higher of the offer price and the net asset value per share of the company based on its latest (consolidated) accounts.

In circumstances when a squeeze-out right is exercisable, but is not exercised, minority shareholders are granted a statutory put option to sell their shares to the offeror for a price calculated in the same way as the squeeze-out price.

Minority shareholders of a private company cannot be squeezed out. There are also no general squeeze-out rights afforded to majority shareholders.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Pursuant to the Cross-Border Mergers Act, in conformity with the applicable EU regulations, the merger of companies resident in different states of the EU is possible under certain conditions.

In addition, a European public company, a special form of legal entity that has been available in Hungary since 2004, can be established in order to effect a cross-border merger that might not otherwise be legally possible (for example, a merger between a Hungarian limited liability company and a UK-based limited company).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

See question 5 in relation to private companies.

In the case of public tender offers, the bidder must submit the bid and an application for approval to MNB and simultaneously notify the board of directors of the target company of the bid. MNB has 10 business days to either approve or reject the bid (and an additional three business days in the event that it requests an amendment). If the application is approved by MNB, the bidder must publicly announce the approved bid and the offer period.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Banks, financial institutions and insurance companies are subject to specific, additional regulations. For example, prior permission from MNB must be obtained for any merger of a financial institution and for the acquisition (directly or indirectly) of 10 per cent or more of the voting shares (a qualifying participation) of a financial institution. Additional permission from MNB is required if a qualifying participation is subsequently increased or decreased beyond certain relevant thresholds, or disposed of entirely. Any financial institution must notify MNB within five business days of gaining knowledge of any increase or decrease beyond any relevant ownership interest threshold.

Similar notification and approval regulations apply to the energy, communications and media industries.

18 Tax issues

What are the basic tax issues involved in business combinations?

Mergers are not taxable at the level of the shareholder provided that the conditions of the EU Merger Directive are met. At their discretion, the merging companies may revalue their assets and liabilities to fair market value. If they revalue their assets this may create a taxable gain. Acquisition of real properties by way of merger is also subject to transfer tax under the main transfer tax rules. No capital gains tax and transfer tax liability arises, however, if the merger qualifies as a preferential merger within the meaning of the EU Merger Directive and certain other conditions are also met. In general, VAT liability should not arise in the case of a merger, except for cross-border mergers, which in certain circumstances may trigger VAT liability.

In the case of a share sale, if the seller is a Hungarian company then the capital gain arising from the sale, under the general rules, will be subject to the corporate income tax at a flat rate of 9 per cent. A special tax rule, however, makes it possible for the capital gain realised on certain investments to be tax-exempt. Accordingly, if a taxpayer holds at least 10 per cent of the registered share capital of a domestic legal entity or foreign entity for at least one year, the amount of gain deriving from the sale of such reported shares may be exempt from corporate income tax, provided that the taxpayer has reported its election for tax-exempt treatment to the tax authority within 75 days after the original share acquisition. The capital gain derived by a non-Hungarian entity or person selling shares in a Hungarian company is not taxable in Hungary, unless the shares are of a real estate holding company. An entity will be deemed a real estate holding company if on the balance sheet day the book value of the Hungarian real properties of the company represents more than 75 per cent of the total book value of its assets. If such a company has a shareholder (with any shareholding) on at least one day during the given year that is a tax resident of a country with which Hungary has no double taxation treaty, or the treaty allows Hungarian withholding taxation of capital gains realised on real estate share transactions, then the share transaction will be subject to 9 per cent capital gains tax. In addition, the acquisition of at least a 75 per cent stake in a Hungarian real estate holding company is subject to transfer tax, except in the case of an exchange of shares within the meaning of the EU Merger Directive and in the case of intra-group acquisitions. An entity may qualify as a real estate holding company for transfer tax purposes if the book value of the Hungarian real properties of the company represents more than 75 per cent of the total book value of its assets. An entity may also qualify as a real estate holding company if it holds at least a 75 per cent stake (directly or indirectly) in a company in which the book value of the Hungarian real properties represents more than 75 per cent of the total book value of its assets. The transfer tax base is such part of the fair market value of the real properties that corresponds to the ratio of the transferred interest. The transfer tax is payable by the acquirer. In the case of commercial properties, the applicable rates of the transfer tax are 4 per cent up to 1 billion forints of the market value and 2 per cent above that level, with the tax liability capped at 200 million forints per property. VAT is not payable on a share sale.

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In the case of an asset sale, the corporate seller will be subject to a flat 9 per cent corporate income tax on the gain in the value of the assets. Exemption may apply to gains realised on the sale of intellectual property, provided that the seller reported the acquisition or development of the intellectual property to the tax authority and meets the one year minimum holding period. The after-tax profit can then be distributed to the company's shareholders tax-free. If assets are transferred as a business (namely, they constitute an autonomous unit capable of operating on its own), then the whole transfer can be treated as a non-VAT-able transaction if certain conditions are met. If, however, the assets are not transferred as a business, the VAT consequences should be examined separately in respect of each asset. In addition, the sale of certain assets (principally immoveable property) is subject to transfer tax, except for the transfer of immoveable property between related parties or if the immoveable property is transferred as part of a 'transfer of assets' within the meaning of the EU Merger Directive, provided that certain other conditions are also met.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

An acquisition of shares in a target company will not generally affect the terms of the individual employment contracts with the target company.

In accordance with the EC Acquired Rights Directive, Hungarian law provides a mandatory transfer of all existing employment contracts (and benefits) from the business sold (in the case of asset acquisition) or transferred (in the case of a merger) to the other company as legal successor.

According to Act I of 2012 on the Labour Code, the previous employer and the new employer are jointly and severally liable for certain employment-related claims incurred prior to the asset transfer if such claims are enforced within one year from the date of the asset transfer.

Furthermore, the previous employer and the new employer must, at least 15 days before the completion of the asset transfer, inform the workers' council or, if there is no workers' council, the employees affected by the asset transfer, of the details of the asset transfer and initiate talks aimed at reaching an agreement concerning proposed actions that affect the employees. If an employer violates the rights of the workers' council or employees, the workers' council or employees may seek redress in court.

Under the Transformations Act, the workers' representation organisations operating at the merging companies must be informed of the planned merger.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

In these circumstances business combinations normally take the form of asset transactions, where the whole or a part of the business of the target is sold. Parties must be mindful of the rules relating to fraudulent conveyance and unlawful preference of creditors.

A liquidator or a creditor is able to challenge the validity of a sale agreement within 90 days of becoming aware of, but not later than one year from the publication of, the order on the debtor's liquidation, on the basis that either the agreement (if concluded within 90 days prior to the submission of a petition for the debtor's liquidation) unduly preferred a creditor, the agreement (if concluded within two years before the submission of a petition for the debtor's liquidation) contained consideration that was obviously disproportionate to the fair value of the assets sold, or the aim of the agreement (if concluded within five years before the submission of a petition for the debtor's liquidation) was to conceal the debtor's assets, if the debtor's intent was to defraud creditors, and the other contracting party had or should have had knowledge of such intent.

Pursuant to the Civil Code directors of a company facing insolvency owe fiduciary duties primarily to the company's creditors and can face personal and unlimited liability for a breach of such duties if the company becomes insolvent. If a court establishes a director's liability in its final and binding decision and the director does not fulfil his or her payment obligation, he or she is then prohibited from becoming a director or sole or majority shareholder of another company for a five-year period following the unsuccessful enforcement procedure.

Combinations involving distressed companies usually involve incentives for the seller to avoid bankruptcy within at least the initial one-year period after the closing of the transaction.

See question 7 for information on dominant shareholders' liability for debts of a controlled entity.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Under the Money-Laundering Act, financial institutions, insurance companies, real estate agencies, auditors, accountants, tax advisers, law offices and notaries public, among others, must comply with certain anti-money-laundering and 'know your client' obligations, and must report to the competent authority suspicious transactions and information that may relate to money-laundering or terrorist financing.

Act C of 2012 on the Criminal Code penalises different forms of bribery, including active and passive bribery, irrespective of whether the offender is a government official or not.

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India

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1 Types of transaction

How may businesses combine?

Asset acquisitions

It is common for companies to acquire or sell entire businesses or undertakings. Alternatively, an acquirer may wish to cherry-pick certain key assets (for example, IP and employees) and leave certain assets (for example, trade debts) behind. Both forms of business combinations (ie, asset transfers or business transfers) are popular in India. Asset acquisitions may be preferred where the acquirer is wary of past liability issues and prefers to acquire segregated assets rather than acquire the target company as a whole.

Share acquisitions

Often, it is simpler for an acquirer to take over 100 per cent of the share capital of the target company than to seek to acquire key assets or the whole of the target's business undertakings. India's foreign exchange control regime has been considerably liberalised to allow 100 per cent foreign ownership in most sectors of the economy, barring a small negative list where foreign investment is prohibited (for example, betting and gambling, lottery business, atomic energy, etc). In certain sectors, the government has prescribed foreign shareholding caps (for example, banking, insurance sectors, etc) and in some sectors foreign investment is subject to conditions (for example, construction, telecom, single-brand retail trading, etc). Further, share deals may be preferred over asset acquisitions in sectors where key operating licences or assets cannot be transferred easily or in a timely manner (for example, telecom and asset management companies).

In case of transactions between a resident seller and a non-resident buyer, deferred consideration and escrows for an 18-month period after the date of the agreement and indemnities with a value of no more than 25 per cent of the full purchase price are permissible without Reserve Bank of India's (RBI) approval.

Joint ventures

Joint ventures are another popular form of investment for many foreign investors wishing to enter India. Given the recent judicial trends in India, pre-emption rights and share transfer restrictions are enforceable in the case of a private limited company in India. Such pre-emptive rights must, however, be incorporated in the articles of association of the company for such rights to be enforceable against the company. Prior to the Companies Act 2013 (the Act) coming into force, pre-emptive rights and share transfer restrictions in the case of public limited companies were highly debated and there were doubts regarding the enforceability of such terms by courts in India. The Act, however, recognises that provisions regulating the inter se transfer of shares among shareholders as being enforceable. Furthermore, in a complete reversal of its earlier position (since 1969), in October 2013, the Securities Exchange Board of India (SEBI) issued a notification recognising the validity of pre-emption, tag and drag-along rights. SEBI also recognised put and call options, subject to the conditions that the shares in question have been held for a minimum period of one year, the strike price and consideration complies with applicable pricing norms (for share transfers) in India; and) the contract is settled by actual delivery of the underlying securities. Since these rules prescribed by SEBI apply only prospectively, the enforceability of options over the shares of a public limited company entered into prior to October 2013 remains a grey area under Indian law.

In July 2014, the RBI rationalised the pricing guidelines for issue and transfer of equity shares, compulsorily convertible preference shares or compulsorily convertible debentures as regards non-residents (including such instruments with in-built options). As per the prevailing exchange control norms, the pricing for the eligible instruments is as follows: in case of listed companies, the pricing as per the SEBI guidelines; and in case of unlisted companies, any internationally recognised pricing methodology. Regardless of whether the instruments are straight equity or convertible, the spirit of the rules (prescribed by the RBI) is that a non-resident investor cannot be provided any assured or fixed rate of return on its investment.

Mergers and demergers

In India it is possible to either combine two distinct entities into a single entity by way of a merger or to split two distinct undertakings into separate entities by way of a demerger, in either cases through a court-sanctioned scheme.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The following principal laws play an important role in establishing the structure and form of business combinations:

Companies Act 2013

Under the Act, the sale of an 'undertaking' by a public company needs shareholder consent (section 180(1)(a) of the Act) by way of a special resolution (75 per cent majority) unless, with reference to the previous financial year, the investment of the company in such 'undertaking' is 20 per cent (or less) of its net worth as per the audited balance sheet of the previous financial year or such 'undertaking' generates less than 20 per cent of the total income of the company. Since June 2015, private companies have been exempt from this requirement.

Authorisations under the Act

Where an Indian entity is the acquirer it should be noted that under section 179(3)(e) read with sections 179(3)(j) and 186(5) of the Act, the power to invest funds, or acquire a substantial or controlling interest in another company, must be exercised at a meeting of the board through unanimous approval of the directors present at such meeting. No company shall directly or indirectly acquire any securities where the amount of investments exceeds 60 per cent of paid-up share capital and free reserves, or 100 per cent of free reserves and securities premium, whichever is more, unless: the board resolution sanctioning the proposed acquisition is unanimously approved by all directors present at the board meeting; and a special resolution (75 per cent majority) of the shareholders in general meeting is obtained. Indian companies seeking to make acquisitions require prior approval of any public financial institutions to whom loans are outstanding where either: the amount of investments exceeds 60 per cent of paid-up share capital and free reserves, or 100 per cent of free reserves and securities premium; or

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there exists any payment default towards amounts due to such public financial institution by the acquirer. Indian companies in default in repaying deposits are prohibited from making any acquisitions.

Schemes of amalgamation

Under the newly notified provisions in relation to Compromises, Arrangements and Amalgamations under Indian law (sections 230 to 232 of the Companies Act 2013), it is possible to merge two entities such that all the assets, liabilities and undertakings of the transferor entity are transferred to and vested in the transferee undertaking with the transferor company being dissolved. A scheme of amalgamation must be approved at a duly convened meeting by a majority in number and three-quarters in value of the creditors (or class of creditors) and members (or class of members), present and voting and thereafter sanctioned by the court. Amalgamation would be tax neutral in the hands of an amalgamating company if the conditions prescribed under section 2(1B) of the Income Tax Act 1961 (the Tax Act) are satisfied. Tax losses of an amalgamating company can be carried forward and set off against the profits of the amalgamated company, subject to fulfilment of certain conditions.

Please note that unlike the erstwhile companies Act 1956, the new provisions have made certain changes in the procedure involved in the approval of schemes. The National Company Law Tribunal (NCLT) is now vested with the power to sanction schemes of Compromises, Arrangements and Amalgamations, instead of the High Court, and accordingly, all the schemes presently pending before the High Courts, would stand transferred to the respective NCLT bench. Apart from certain procedural changes, the new provisions also provide for fast-track and simplified procedure for mergers and amalgamations of certain class of companies such as holding and wholly owned subsidiary, and small companies, without approval of NCLT.

Demerger

Where the business of an entity comprises two distinct 'undertakings', it is possible to split up the entity into two entities. Generally, shareholders of the original entity would be issued shares of the new entity. Where a demerger is completed through a court process and fulfils certain conditions prescribed under the Tax Act, it will not result in capital gains for the seller (section 2(19AA) of the Tax Act) or sales tax liability. In addition, tax losses of a demerged company relatable to the demerged 'undertaking' can be carried forward and offset against the profits of the resulting company, subject to fulfilment of certain conditions.

Takeovers

SEBI regulates the Indian securities market. In September 2011, SEBI replaced the erstwhile SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the Takeover Code).Under the new Takeover Code, where an acquirer acquires, either directly or indirectly, 25 per cent or more of the shares or voting rights of a listed company, the acquirer is required to make an offer to the public to acquire at least 26 per cent of the voting capital of the company at the minimum offer price. The open-offer obligation is also triggered in the case of change in control of the target company. In addition, if an indirect acquisition exceeds the prescribed threshold of 80 per cent of the net asset value or sales turnover or market capitalisation of the entity of the business being acquired as per the recent audited annual financial statements, such indirect acquisition shall be regarded as a direct acquisition of the target company and will trigger a mandatory open offer obligation in India. Therefore, great care has to be taken while structuring transactions where the offshore target has an Indian listed subsidiary.

Listing agreement and SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (Listing Regulations)

SEBI issued the Listing Regulations on 2 September 2015, which became effective on 1 December 2015. With the coming of the new Listing Regulations, mere contractual obligations (including in respect of disclosures to stock exchanges) under the erstwhile listing agreement have now been embodied in the Listing Regulations and such obligations have statutory basis. The Listing Regulations has also replaced the erstwhile long-form of the listing agreement with a more concise version of the listing agreement, and listed companies need to execute fresh agreement in the new format with the stock exchanges by June 2016. The Listing Regulations inter alia specifies continual disclosure obligations for listed companies.

Also, sale of a 'material subsidiary' by a listed company which reduces the listed company's shareholding in such subsidiary to less than 50 per cent or listed company ceases to exercise control on such subsidiary requires approval of shareholders of the listed company by way of a special resolution pursuant to the Listing Regulations. Similarly, sale or disposal of assets amounting to 20 per cent of the assets of the material subsidiary on an aggregate basis during a financial year also needs shareholders' approval by way of special resolution, except where such divestment is part of a court scheme. The Listing Regulations define a 'material subsidiary' as a subsidiary of a listed company, whose income or net worth exceeds 20 per cent of the consolidated income or net worth respectively, of the listed companies or its subsidiaries in the immediately preceding accounting year. Further, in case of public listed companies, SEBI has prescribed additional compliances for schemes of arrangements for mergers, amalgamations and other restructurings involving listed companies under the Listing Regulations and SEBI circular dated 30 November 2015 (SEBI Circular), being effective from 1 December 2015. Among other compliances, schemes of arrangement involving listed companies and promoter or promoter group, inter alia, needs approval of majority of minority shareholders, and such approval of shareholders being obtained by way of e-voting and postal ballot.

Competition Act 2002

The relevant provisions of the Competition Act, 2002 (Competition Act) and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (as amended) came into effect on 1 June 2011. Accordingly, acquisitions of shares or voting rights or assets or control or mergers or amalgamations that breach the specified asset or turnover threshold (combination) must be notified to the Competition Commission of India (CCI) and cannot be effective without the prior clearance of the CCI. This is generally the acquirer's responsibility. However, in cases of mergers or amalgamations, the responsibility lies on all the concerned parties to the merger or amalgamation. The thresholds vary, depending upon the nature of the transaction and parties involved, as below:

Scenario 1: Combination of standalone acquirer and target (Indian presence only)		
Combined assets >20 billion rupees	or	Combined turnover >60 billion rupees

Scenario 2: Combination of standalone acquirer and target (worldwide with Indian presence)		
Combined assets >US$1 billion including Indian presence of 10 billion rupees	or	Combined turnover >US$3 billion including Indian presence of 30 billion rupees

Scenario 3: Combination of group, acquirer and target (Indian presence only)		
Combined assets >80 billion rupees	or	Combined turnover >240 billion rupees

Scenario 4: Combination of group acquirer and target (worldwide with Indian presence)		
Combined assets >US$4 billion including Indian presence of 10 billion rupees	or	Combined turnover >US$12 billion including Indian presence of 30 billion rupees

Scenario 5: Acquisition of a target (company A) where the acquirer has existing control over another enterprise in the same or similar business (company B) (Indian presence only)		
Combined assets >20 billion rupees	or	Combined turnover >60 billion rupees

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Scenario 6: Acquisition of a target (company A) where the acquirer has existing control over another enterprise in the same or similar business (company B) (worldwide with Indian presence)		
Combined assets >US$1 billion including Indian presence of 10 billion rupees	or	Combined turnover >US$ 3 billion including Indian presence of 3 billion rupees

The Regulations also provide for certain categories of transactions which need not normally be notified to the CCI. There is also an exemption for transactions involving small targets, namely, targets with assets of less than 3.5 billion rupees in India or turnover of less than 10 billion rupees in India. This exemption is applicable only in case of acquisitions and is available until March 2021.

The Competition Act prescribes a fine up to 1 per cent of the combined assets or turnover of the combination, whichever is higher, for a failure to notify a transaction to the CCI or for delayed notification to the CCI. In addition to provisions for non-filing of material information, the Competition Act also includes provisions for proceedings against persons and individuals responsible for the conduct of the business and affairs of companies.

Certain amendments were introduced to the Regulations recognising certain categories of transactions that are not likely to cause an appreciable adverse effect to competition, including the following:

- an acquisition of less than 10 per cent equity share capital or voting rights of the target enterprise would be considered to be made 'solely as an investment' provided that (i) the acquirer did not acquire any special rights and would have the ability to exercise only such rights that are exercisable by the ordinary shareholders of the target enterprise to the extent of their respective shareholding; and (ii) the acquirer is not a member of the board of directors of the target enterprise and does not have the right or intention to nominate a director on the board of directors of the target enterprise and does not intend to participate in the affairs or management of the target enterprise. Provided that such an acquisition made 'solely as an investment' does not entitle the acquirer to hold more than 25 per cent or more of the total shares or voting rights in the target enterprise, and is made without any acquisition of control, such an acquisition would not require prior approval of the CCI; and
- in a situation where an acquirer or its group already holds more than 25 per cent and less than 50 per cent of shares or voting rights in the target enterprise, then the acquirer or its group can acquire additional shares or voting rights without seeking the prior approval of the CCI, provided that the transaction does not result in acquisition of sole or joint control of such target enterprise by the acquirer or its group.

3 Governing law

What law typically governs the transaction agreements?

Typically, Indian law is preferred as the governing law of transaction agreements where the target is based in India or the assets are based in India. In some cases (for example, project documents or foreign currency-denominated loans), it is possible to negotiate some other governing law. Foreign judgments passed in other jurisdictions are enforceable in India as a decree if such a country is one of the reciprocating territories as notified by the central government under the provisions of the Civil Procedure Code, 1908.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Exchange control regulation

India has a strict and highly prescriptive exchange control regime that applies to acquisitions with a cross-border element. For example, in the case of a transfer of shares of an Indian company by an Indian resident to a non-resident, shares must not be transferred at a price less than the price determined in accordance with the pricing norms of the RBI, India's central bank. Broadly, this means that the price per share must not be less than the price worked out as per any internationally accepted pricing methodology for valuation of shares on an arm's-length basis, duly certified by a chartered accountant or a SEBI-registered merchant banker in case of unlisted companies, or SEBI guidelines in case of listed public companies. In the case of a share transfer, a report must be filed with an authorised dealer bank in the prescribed form (Form FC-TRS) within 60 days of the receipt of remittance towards sale of shares. An acknowledged copy of Form FC-TRS from the resident party's authorised dealer bank is required to enable registration of the transfer of shares in favour of the acquirer in the books of the company. Recently, the RBI has prescribed mandatory electronic filing of Form FC-TRS and discontinued physical filing as was prescribed earlier. In addition to this, at the time of exit (namely, transfer of shares of an Indian company from non-resident to resident), the pricing norms are required to be complied with. The RBI has liberalised its policy in connection with the transfer of shares from a non-resident to a resident to some extent by clarifying that no prior RBI approval is required in the event the pricing norms are not satisfied in circumstances where the original and the resultant investment complies with the foreign direct investment policy and the pricing of the transaction otherwise adheres to pricing norms prescribed by SEBI (for example, the pricing norms prescribed for delisting, IPO, block deals, takeover, etc), and a chartered accountant certifying compliance with relevant SEBI's pricing guidelines has been obtained.

Stock exchange reporting

SEBI issued the SEBI (Prohibition of Insider Trading) Regulations 2015 (SEBI Insider Trading Regulations) on 15 January 2015, which came into effect on 15 May 2015 and repealed the erstwhile SEBI (Prohibition of Insider Trading) Regulations 1992. The new SEBI Insider Trading Regulations have, inter alia, broadened the definitions of unpublished price sensitive information (UPSI), insider and connected persons, and provides a stricter code for protection of shareholders' interests. The new SEBI Insider Trading Regulations prohibit communication of UPSI by an insider, procurement of UPSI by other persons, and trading in securities by an insider in possession of UPSI. In the case of companies whose shares are publicly listed in India, under the SEBI Insider Trading Regulations, information regarding amalgamation, mergers or takeovers is deemed to be UPSI. However, carve-outs have been provided for communication or procurement of UPSI for legitimate purposes or discharge of legal obligations. Further, unlike the earlier regulations, in the interest of M&A deals, SEBI has introduced specific carve-out for communicating or procuring UPSI during diligences in cases: (i) if an open offer is triggered, then such communication of UPSI is permissible where the board is of the informed opinion that the proposed transaction is In the best interest of company; or (ii) if no open offer is triggered, then such communication of UPSI is permissible where the board is of the informed opinion that the proposed transaction is in the best Interest of company and such UPSI is disseminated to be made generally available at least two trading days prior to the proposed transaction being effected in such form as the board of directors may determine so as to rule out any information asymmetry in the market.

Further, the new Listing Regulations are more comprehensive in terms of disclosures, and require disclosure of any events or information which in the opinion of board of directors of the listed company is material. Information or events have been classified as: (i) deemed material (such as acquisitions, merger, amalgamations, demergers, other restructurings, etc), for which disclosure needs to be made to the stock exchanges within 24 hours from the occurrence of the event of information; and (ii) disclosure of events for which the board can formulate materiality policy (such as expected default in timely payment of interests, preference dividend or redemption or repayment of debt securities, any change in general character of business of the company, disruption of operation owing to natural calamity, etc).

Stamp duty

Stamp duty is payable on the instrument for the transfer of physical shares at the rate of 0.25 per cent of the value (or consideration) of the shares transferred. Such stamp duty is exempt if shares to be transferred are held in dematerialised or electronic form. In addition to this, stamp duty is required to be paid on investment agreements, share purchase agreements, asset transfer or business transfer agreement, etc, as per the applicable stamp duty rates under specific local state stamp laws.

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Competition

As mentioned under question 2, if the specified thresholds are triggered, a filing will have to be made with the CCI in Form I or Form II. Form I is a simple form and the parties may, at their option make a Form I or Form II filing. The parties may make a Form II filing in two instances: (i) the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is more than 15 per cent in the relevant market; or (ii) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than 25 per cent in the relevant market. In the case of Form I and Form II filing, the CCI must be notified within 30 calendar days of the execution of the agreements relating to acquisitions of shares or voting rights or assets, or board of directors' approval for proposed merger or amalgamation. The filing fees to be deposited with the CCI in case of Form I filing is 1.5 million rupees, and for Form II is 5 million rupees.

In the case of acquisitions by public financial institutions, foreign Institutional investors, banks or venture capital funds pursuant to any covenant of a loan or investment agreement, the CCI must be notified in Form III within seven days of the acquisition. Form III is a post facto notification.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

In contrast to public listed companies where the extent of disclosure is relatively high due to dealings taking place on the stock exchange and related reporting obligations (refer to response to question 4), in the case of private company acquisitions, there is no mandatory requirement to make any public disclosures. However, in our experience, details of private deals are often leaked.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the Takeover Code, an acquirer must disclose its shareholding if it acquires more than 5 per cent of the shares or voting rights of the listed target company. An acquirer who holds 5 per cent of the shares or voting rights of the listed target company is required to disclose every acquisition or disposal of 2 per cent or more of the shares or voting rights of the listed target company to the company and the stock exchanges where its shares are listed. Such disclosures must be made at each stage of acquisition and are to be made to the company and to the stock exchanges on which the shares of the company are listed.

Under the SEBI Insider Trading Regulations, every promoter, employee and director of every company listed on a stock exchange in India is required to disclose to the company the number of such securities acquired or disposed of within two trading days of such transaction if the value of the securities traded, whether in one transaction or a series of transactions over any calendar quarter, aggregates to a traded value in excess of 1 million rupees. Further, every company shall notify the particulars of such trading to the stock exchange on which the securities are listed within two trading days of receipt of the disclosure or from becoming aware of such information.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors' duties

Directors' duties have now been codified under Indian law (section 166 of the Act). The principal duties of directors under Indian law are similar (but not identical) to those under English law. So, under Indian law, a director's relationship with the company is fiduciary in nature. A director must act in good faith in order to promote the objects of the company for the benefit of its members as a whole. A director must act with due and reasonable care, skill and diligence. A director must avoid any actual or potential conflict between his or her own and the company's interests. A director must not achieve or attempt to achieve any undue gain or advantage to himor herself or his or her relatives or partners or associates. However, under the Act, directors' duties have been muddled by requiring directors to act not only in the best interest of the company but also its employees, the shareholders, the community and for the protection of the environment. There is no guidance for directors regarding which duties override in case of any actual or potential conflict between duties to different stakeholders.

If a company proposes to enter into any arrangement or contract in which the director is directly or indirectly concerned or interested, the director is under a statutory obligation to declare such interest at a meeting of the board (section 184 of the Act). Normally the declaration of an interest must be made at the first such meeting at which the matter is considered and thereafter at the first meeting of the board in every financial year or whenever there is any change in the declarations already made. Under the Act, interested directors cannot constitute or form part of a quorum or vote on matters in which they are interested, except in case of private companies where interested directors may participate in a board meeting after disclosure of his or her interest before the board as permitted by a recent notification in June 2015. Please note that the Tax Act contains provisions relating to recovery of the non-recoverable income tax liability of a private limited company from its directors in certain cases.

Statutory restrictions on directors

Board approval is required for any contract between a company and any 'related party' (which expression includes directors, or certain persons connected with the directors, key managerial personnel or his relative, holding, subsidiary or associate companies, etc) in relation to the sale, purchase or supply of goods or services or for leasing, buying or selling of property of any kind or for underwriting subscription to any securities or derivatives thereof of the company (section 188 of the Act). Moreover, certain transactions with a 'related party' also require the prior approval of the company's shareholders by way of an ordinary resolution (50 per cent majority) (the requirement of a special resolution has been relaxed after Companies (Amendment) Act 2015 effective from 29 May 2015). However, transactions with a related party by the company in the ordinary course of the business and at arm's-length basis will not require the board or shareholders' approval. Further, relaxation from this requirement of shareholders' approval is also available for transactions between a holding company and its wholly owned subsidiary whose accounts are consolidated with the holding company and placed before the shareholders for approval at a general meeting.

Shareholders' duties

Under Indian law, controlling shareholders are not subject to similar duties as directors. However, as in English law, controlling shareholders are obliged not to deal with the minority in an unfairly prejudicial or oppressive manner (section 241 of the Companies Act 1956). Courts have wide-ranging powers in the case a claim of unfair prejudice is successfully made.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Shareholder approval (75 per cent majority) is necessary where a public company proposes to dispose of a substantial part or the whole of an 'undertaking'. In the case of a merger or demerger, shareholder approval is necessary provided that a majority in number and three-quarters in value of the shareholders and creditors approve such transaction. Listed companies need shareholders' approval by special resolution in case of disposal of a material subsidiary or sale or disposal of assets of a material subsidiary as mentioned in question 2. Further, approval of majority of minority shareholders is required in certain cases involving schemes of arrangement between a listed company and promoter or promoter group entities.

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It should be noted that listed Indian companies tend to be closely held by an individual or a family. Therefore, deal protection can be achieved by ensuring that the controlling shareholders are committed to the proposed transaction.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Historically, unsolicited transactions in the case of publicly listed entities have been scarce in India due to the concentration of controlling interests in a few individuals or families. Most public deals involve a degree of due diligence by the acquirer and fairly robust representations and warranties package backed by the seller. Accordingly, 'public takeovers' closely resemble private M&A transactions, with the exception of the acquirer having to complete an 'open offer' process in accordance with the Takeover Code and make mandatory disclosure under the Takeover Code.

The new Takeover Code provides for hostile takeovers of listed Indian companies and has laid down conditions upon satisfaction of which an acquirer can make a 'voluntary offer' to acquire shares of an Indian listed company. These conditions, inter alia, include:

- a voluntary offer can be made only by a person who holds at least 25 per cent shares or voting rights in a company, but not more than 75 per cent (taking account of the maximum permissible non-public shareholding);
- a voluntary offer can be made only by a person who has not acquired any shares in the target company in the preceding 52 weeks prior to the offer;
- during the offer period, the acquirer cannot acquire shares other than through the voluntary offer; and
- once the voluntary offer is completed, the acquirer shall not acquire further shares in the target company for six months after completion of the offer. However, this excludes acquisitions by making a competing offer.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Although much more common in relation to private deals (especially where financial investors are involved or in the case of termination due to non-satisfaction of a condition), deal protection devices such as break fees (payable by the target or promoters to the bidder) and reverse break fees (payable by the bidder to the target or promoters) are extremely rare in connection with public deals India. It is not clear whether SEBI would approve an offer letter involving such payments, especially if these arrangements cast a potential payment obligation on the target company.

Under the Act, it is unlawful for any public company to give financial assistance in connection with the acquisition of shares (section 67 of the Act). Further, the consequences of a breach are stringent and liability of the company is subject to a fine of a maximum of 2.5 million rupees, and every officer of the company who is in default is liable to imprisonment for a term which may extend to three years and with fine of a maximum of 2.5 million rupees. We believe making 'financial assistance' an offence with potential criminal liability under the Act (with no 'whitewash' procedure) will give rise to several challenges in the future.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Yes. If there is a perceived risk to national security, the government can influence or restrict the completion of a business combination. For instance, under the exchange control policy, foreign investments requiring government approval in defence, railway infrastructure, broadcasting or telecom sectors are scrutinised from a security standpoint. Although there is no formal record, it is reported that the central government had rejected certain investment proposals owing to political or national security reasons in sectors such as telecom.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In the case of a private deal, the parties are free to negotiate the conditions to completion. However, we have rarely seen financing conditions even in the case of private deals.

In the case of public transactions that have also triggered a (regulated) mandatory tender offer, the parties have much less flexibility, as the tender offer would necessarily require fund confirmation on the part of the acquiring entity. Further, in case of tender offers SEBI does not allow acquirers to rely on any commercial preconditions other than Indian statutory approvals and other conditions that are not in control of acquirer to withdraw the tender offer.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Pure leverage cross-border deals are not common in India. Where a transaction is debt-financed outside India, normally an offshore security package is put in place by the acquirer as taking security over Indian assets needs prior approval from the RBI. In such a scenario, funds are normally drawn down and available at the time of signing the acquisition documents and making the public announcement in order to satisfy the merchant banker that necessary financing is available. Even in the case of purely domestic deals, financing conditions are rarely sought for, or accepted.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Companies Act 2013 provides that the majority shareholders who are the owner of 90 per cent or more of the equity shares of a company shall have the right of offer by notice to the remaining shareholders of the company to compulsorily acquire the shares. The Companies Act 2013 also gives such a right to the minority, to require the offeror to buy them out on the terms of the offer. The offer to be made by the minority shareholders to the majority shareholders for buying the equity shares shall be at a price determined on the basis of valuation undertaken by a registered valuer.

In the case of an unlisted company and a private company, the offer price shall be determined after taking into account the following factors:

- the highest price paid by the acquirer, person or group of persons for acquisition during the last 12 months; or
- the fair price of shares of the company to be determined by the registered valuer after considering valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shares of such companies.

Further, the Companies Act 2013 requires the company to act as the transfer agent (for receiving and disbursing the price or taking delivery and delivering the shares) between the parties and imposes an obligation on the majority shareholders to deposit the squeeze-out consideration amount in a separate bank account. The separate bank account is required to be operated by the company for at least one year; however, the company is required to disburse the consideration amount to the minority shareholders within a period of 60 days from the date of deposit of the consideration amount by the majority stockholders.

In addition to it, the transferee company, may make an offer to the shareholders of another company, in the form of a scheme or a contract to acquire shares of the transferor company. In the event of the holders of nine-tenths of the value of the shares of the transferor company

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accepting the offer of the transferee company within four months from making the offer, the transferee company shall have the right to give a notice to the dissenting shareholders (holders of one-tenth of value of shares) to acquire their shares at any time within two months after the expiry of the said four months.

Another possible method of squeeze-out is by way of capital reduction under section 66 of the Companies Act 2013. Though section 66 of the Companies Act 2013 does not provide strictly for squeeze-out, the interpretations offered by the Indian courts under section 100 (corresponding provision under the Companies Act 1956) have added a different colour.

Squeeze-out through reduction of capital was discussed by the division bench of the Bombay High Court in *Sandvik Asia Limited v Bharat Kumari Padamsi* ([2009] 92 SCL 272 (Bom)). The High Court held that it will not withhold its sanction to a resolution resulting in a squeeze-out of minority shareholders through reduction of capital if it is established that reduced shareholders are being paid fair value of their shares, the overwhelming majority of the shareholders voted in favour of the resolution and reduction is in complete compliance with the Companies Act and articles of the company. Therefore we can inferfrom this decision that majority shareholders (more than three-quarters of the company) can remove minority shareholders by extinguishing the share capital held by the minority shareholders alone if the broad conditions as stated above are satisfied. The Bombay High Court in another case, *Elpro International Limited* ([2009] 149 Comp Cas 646 (Bom)) held that a scheme of reduction can be made applicable to a select group of shareholders so long as conditions under the Companies Act have been followed.

An appeal preferred before the Supreme Court of India against Bombay High Court's *Sandvik Asia* decision was not admitted by the apex court, meaning effectively that the apex court did not think it fit to interfere with the original decision of the Bombay High Court.

Another possible method of squeeze-out for listed companies is delisting the shares from the stock exchange pursuant to SEBI (Delisting of Equity Shares) Regulations 2009 (Delisting Regulations). For this, among other compliances, delisting must be approved by a special resolution of the target company (Delisting Resolution) in a general meeting by a two-thirds majority of shareholders present and voting. It is important to note that the special resolution is to be acted upon only if the votes cast by public shareholders in favour of the proposal amount to at least two times the number of votes cast by public shareholders against it. The pricing of shares for the delisting process is determined by the reverse book-building process with a minimum floor price arrived as per the Takeover Code. For the delisting offer to be successful:

- the post-offer shareholding of the promoter together with persons acting in concert along with shares accepted through eligible bids at the price arrived as per the Delisting Regulations, reaches 90 per cent of the total shares of that class (excluding shares held by custodians and against which depository receipts are issued); and
- at least 25 per cent of public shareholders existing on the date of the Delisting Resolution tender in the reverse book building process (however, such a requirement can be relaxed, in the event acquirer and merchant banker to the offer is able to demonstrate that they have contacted all the public shareholders either through registered post or speed post or courier or hand delivery with proof of delivery or other prescribed means).

In the event the delisting offer is successful, any remaining public shareholder holding equity shares of the delisted company may tender his or her shares to the promoter up to a period of at least one year from the date of delisting and, in such a case, the promoter is required to accept the shares tendered at the same final price at which the earlier acceptance of shares was made.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Generally, prior to consummating a share acquisition in India, offshore buyers typically incorporate a holding company in a jurisdiction with a friendly tax treaty with India (for example, Mauritius, Singapore, the Netherlands, etc) in order to secure favourable tax treatment at the time of exit. Needless to say, the holding company should have 'commercial substance', else it could be regarded as a device for tax avoidance by tax authorities. Also, Indian transfer pricing regulations would apply to international transactions entered into between related enterprises.

Apart from tax considerations, India's exchange control regime applies to cross-border deals. Earlier, foreign investors could not acquire listed shares directly on-market unless they were registered as foreign institutional investors with SEBI. However, the RBI has removed this restriction and has clarified that foreign investors including non-resident Indians are eligible to acquire shares on the recognised stock exchanges through a registered broker under an FDI scheme subject to compliance with certain conditions. The Ministry of Finance had announced a new category of investors, qualified foreign investors (QFIs), to directly invest in the Indian equity markets in order to widen the class of investors and attract more foreign funds. Recently, SEBI notified the SEBI (Foreign Portfolio Investors) Regulations, 2014 (FPI Regulations), and with this SEBI has harmonised foreign institutional investors (FIIs), sub-accounts and QFI regimes into a single investor class – foreign portfolio investors (FPI) and provided a single window clearance through designated depository participants. The FPI route is a unified market access route for all portfolio investments in India aimed at rationalising and simplifying the process for foreign portfolio investments with a unified access route.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Where an acquisition relates to a sector where foreign investment is restricted and therefore needs prior regulatory approval from the central government, the waiting period for such approvals can range from six to eight weeks. The central government has delegated authority to the Foreign Investment Promotion Board (FIPB) under the aegis of the Ministry of Finance to grant such approvals on its behalf. In practice, delays are not uncommon and the definitive timing to obtain FIPB approval is hard to predict.

The central government has proposed to close the FIPB, the government agency responsible for regulating foreign investment and which granted approvals to foreign investment in regulated sectors. Currently, a Group of Officers has been constituted to prepare a roadmap to phase out FIPB. RBI is expected to formulate standard operating procedure for approval of FDI proposals. Going forward, the approval requirements for foreign investment in regulated sectors may be determined by the respective governmental agencies responsible for regulating those sectors.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Yes. For example, foreign investment in the insurance sector is restricted to 49 per cent of the share capital of the Indian insurance company. In addition, the Indian insurance company is required to obtain a licence from the Insurance Regulatory and Development Authority and adhere to several reporting, solvency and accounting requirements. Accordingly, in addition to exchange control laws, it is important to evaluate the local industry-specific regulations prior to finalising any investment proposal in India.

18 Tax issues

What are the basic tax issues involved in business combinations?

Share sales

Under Indian tax laws, any gain arising out of transfer of Indian shares is liable to tax in India. Accordingly, it is important to determine whether the gains are long-term or short-term capital gains (depending upon whether the shares are held for: a duration exceeding 12 months or less in case of listed shares; or a duration exceeding 24 months or less in case of unlisted shares). The currently prevailing rates for resident and non-resident corporate sellers are as follows:

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Particulars	Non-resident seller**		Resident seller*	
	Long-term capital gains	Short-term capital gains	Long-term capital gains	Short-term capital gains
Where securities (equity shares and units of equity oriented mutual fund) are listed on a recognised stock exchange in India and the transaction of sale takes place on the stock exchange such that the transaction is subject to securities transaction tax (STT)	Nil (refer to note 1)	15% (refer to note 2)	Nil (refer to note 1)	15% (refer to note 2)
Listed bonds or listed debentures	10% (refer note 2)	40%	10% (refer note 2)	30%
Where securities (other than bonds or debentures) are listed on a recognised stock exchange in India and the transaction of sale does not take place on the stock exchange and thus, not subject to STT	10% (refer to note 2)	40%	10% (refer to note 2)	30%
Unlisted shares and securities	10%	40%	20%	30%
	20%	40%	20%	30%
Equity shares sold in an offer for sale to public included in the initial public offer and where such securities are subsequently listed on a recognised stock exchange	Nil	15%	Nil	15%

* To be further increased by applicable surcharge and education cess of 3 per cent. In case of a domestic company, surcharge is applicable at the rate of 7 per cent (where the total income exceeds 10 million rupees but does not exceed 100 million rupees) and 12 per cent (where the total income exceeds 100 million rupees).

** In case of a foreign company, a surcharge is applicable at the rate of 2 per cent (where the total income exceeds 10 million rupees but does not exceed 100 million rupees) and 5 per cent (where the total income exceeds 100 million rupees).

Note 1: The Finance Bill, 2017 proposes that this exemption shall be available only if the STT has also been paid at the time of acquisition of equity shares sought to be transferred (subject to exceptions as may be prescribed). Further, though such long-term capital gains are exempt from capital gains tax under normal provisions, the companies are required to pay minimum alternate tax at the rate of 18.5 per cent (to be further increased by applicable surcharge and education cess of 3 per cent) for resident corporations and non-resident corporations having a permanent establishment in India or place of business in India or are required to seek registration In India relating to companies.

Note 2: In the case of listed securities there is an option to avail of a tax of 10 per cent after certain adjustments or 20 per cent without such adjustments. These adjustments are not applicable in case of the underlying security being bonds and debentures or non-residents. Since the adjustments are not applicable in case of non-residents, there has been litigation around availability of the lower rate of 10 per cent to non-residents, however, as per the judicial precedents available as on date, the benefit of 10 per cent rate should be available.

Note 3: The above table is applicable in case of Foreign Direct Investments only.

The concessional tax regime for FPIs is as under:

	Long-term capital gains (period of holding exceeds 12 months)	Short-term capital gains (period of holding is 12 months or less)
Where securities are listed on recognised stock exchange and transaction of sales takes place on the stock exchange by FPIs	Nil	15%
Other securities	10%	30%

Above-mentioned rates to be further increased by applicable surcharge and cess. Surcharge applicable to FPIs is same as applicable to foreign companies as mentioned above.

FPIs are also accorded concessional rate of withholding on interest payments at the rate of 5 per cent (plus applicable surcharge and cess) on certain debt instruments such as (listed NCDs, long-term infrastructure bonds) provided the rate of interest on such NCDs does not exceed 500 bps over SBI base rate and are issued before 1 July 2017. In case the conditions mentioned under the Tax Act are not met, withholding on interest payments would be at the rate of 20 per cent (plus applicable surcharge and cess).

Indirect transfer of Indian assets

As per the IT Act, any share or interest in a foreign company is deemed to be situated in India if its value is derived, directly or indirectly, substantially from Indian assets. Accordingly, transfer of such offshore share or interest will be taxable in India. 'Substantial value' means if at least 50 per cent of its value is derived from India and value of Indian assets exceeds 100 million rupees. The manner of determination of value of the Indian assets as regards global assets of the foreign company is to be determined in the prescribed manner. The provisions of the applicable tax treaty between country of residence of non-resident and India would also be relevant to determine such taxability in India.

Some transactions have been kept outside the purview of these provisions by way of safe harbour provisions. This should be borne in mind while undertaking an offshore or global deal. The Finance Bill 2017 proposes that the scope of the indirect transfer tax provision shall not cover within its ambit, direct or indirect investments held by non-resident (NR) taxpayers in FPIs that are registered as Category-I or Category-II with the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations 2014.

Deferred consideration

Earn-outs or deferred consideration are taxed upfront in the year of transfer of shares itself irrespective of its contingent nature. Hence, it is imperative to structure the deferred consideration in the most tax-efficient manner.

Other considerations

Additionally, it will be good if the buyer insists that the seller furnishes a tax clearance certificate before transfer of certain specified assets (eg, shares, immoveable property) as under the Indian tax laws the tax authorities in certain circumstances can treat the transaction as void to the extent of outstanding tax demand. Likewise, in case of acquisition of business, the Indian tax laws provide that the buyer as a successor can be held liable for the past tax dues of the seller, in certain circumstances. Suitable contractual protection is usually agreed upon to cover against such risks. In the case of acquisition of shares it would also be important for buyer and seller to have permanent account number (which is a tax registration number in India), which needs to be quoted in relevant transaction documents subject to certain exceptions.

Buy-back of shares

Currently, a 20 per cent tax (plus applicable surcharge and cess) is imposed on the company on its distributed income on account of the buy-back of unlisted shares by a company from its shareholder. The distributed income is the difference between buy-back price and the amount received by the company for the issue of the shares. Such income is not further taxed in the hands of the shareholder.

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Asset sales
Ordinarily, asset sales (other than shares and depreciable assets) also involve the sellers being liable for capital gains. In the case of assets held for more than 36 months, the capital gains tax rate for a non-resident corporate seller is 20 per cent (to be further increased by applicable surcharge and education cess of 3 per cent) and in the case of assets held for up to 36 months, the capital gains tax rate is 40 per cent (to be further increased by applicable surcharge and education cess of 3 per cent). In addition, value added tax (VAT) will be levied on sale of moveable assets (including intangibles assets) as per rates prescribed under respective state laws. If any consideration is paid for a non-compete obligation, service tax will be payable on such consideration; and for income tax purposes, the non-compete fee could either be characterised as 'business income' or capital gains.

Slump sale
Another option is to sell the business as a whole. Though this would also involve capital gains implications for the seller, the mode of computing such capital gains would differ. There are special provisions dealing with the taxability of capital gains arising on a 'slump sale'. Accordingly, the sale consideration for transfer of an undertaking is reduced by the net worth of the undertaking to arrive at the taxable capital gains. If the undertaking was held for more than 36 months before the transfer, then capital gains are taxed as long-term capital gains at the rate of 20 per cent (to be further increased by applicable surcharge and education cess of 3 per cent), otherwise the gains are taxed as short-term capital gains at the rate of 30 per cent (to be further increased by applicable surcharge and education cess of 3 per cent). Most of the states have specifically exempted transfer of business or a division as whole from VAT if transferred as going concern. Generally a judicial view has been taken that sale of business as whole is not subject to VAT since business as whole is not goods, even where the VAT law of a state do not specifically exempt, such transaction. Services by way of transfer of a going concern, as a whole or as independent division of a business is exempted from service tax.

General Anti-Avoidance Rules
General Anti-Avoidance Rules (GAAR) were effective from 1 April 2017 and may be invoked where the main purpose of an arrangement is to obtain a tax benefit. GAAR provisions empower the tax authorities to investigate any such arrangement as an 'impermissible avoidance arrangement' and consequently disregard entities in a structure, reallocate income and expenditure between parties to the arrangement, alter the tax residence of such entities and the legal situs of assets involved, treat debt as equity and vice versa, and the like. By doing so, the tax authorities may even deny tax benefits conferred under a tax treaty.

It is provided that GAAR shall not apply, inter alia, to (i) arrangements where the aggregate tax benefit in a relevant year, to all the parties involved, does not exceed 30 million rupees; and (ii) any income or gains on transfer, accruing, arising or deemed to accrue or arise to any person from investments made prior to 1 April 2017.

Tax residency certificate
Non-resident taxpayers are mandatorily required to furnish a tax residency certificate along with the prescribed information such as status of the taxpayer, country of incorporation, tax identification number, etc, for claiming the benefit of an applicable tax treaty.

Withholding tax
Where the payee is a non-resident or a foreign company, there is a legal obligation on the payer (whether resident or non-resident) to deduct tax at source when making any remittance to the former, if such payment constitutes income which is chargeable to tax under the Tax Act read with the applicable tax treaty. Payment of withholding tax becomes a point of negotiation in cross-border M&A deals involving share sales and taxpayers resort to solutions like tax indemnity, escrow mechanism, etc. Payments of a certain nature made to a resident also attract deduction of tax at source, whether the payer is a resident or a non-resident.

Entry pricing
There are specific pricing provisions that may be relevant for the target or the investor on the primary issuances as well as secondary purchases. If shares are issued at a huge premium to resident investors then in certain circumstances the target can be taxed on the excess premiums. Despite that, no such similar provisions apply if shares are issued to a non-resident investor, the recent trend has been that the Indian tax authorities are examining excess premium charged by Indian companies on allotment of shares to non-residents and are attempting to tax the Indian companies on such excess premiums. Also, there are pricing provisions from an investor's perspective and in certain cases if they acquire shares at a discount then they can be taxed too. The Finance Bill 2017 seeks to widen the scope of these provisions impacting a buyer as well as a seller. Hence, this definitely calls for a robust valuation report supporting the share allotment and premium value.

Demerger
To ensure that a demerger of an undertaking is tax-neutral, the following conditions need to be satisfied:
- transfer is pursuant to a scheme of arrangement under sections 230 to 232 of the Companies Act 2013;
- transfer of all assets and liabilities of the undertaking;
- transfer of assets and liabilities at book value;
- consideration for transfer settled solely by issue of shares in the resulting company (except where resulting company is itself a shareholder of the demerged company);
- shareholders holding at least three-quarters in value of the demerged company to become shareholders in the resulting company; and
- transfer on a going-concern basis.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The Industrial Disputes Act, 1947 (the ID Act) defines an undertaking as a unit of an industrial establishment carrying out any business, trade or manufacture. The ID Act provides for compensation to 'workmen' in the event of transfer of ownership or management of undertakings from one employer to another by agreement or by operation of law. The term 'workmen' applies to those employed in an industry to carry out manual, unskilled, technical, operational, clerical or supervisory work for hire or reward. It also includes persons employed in a supervisory capacity who earn less than a specified amount (currently 10,000 rupees per month). Other employees are governed by the terms of their employment contract. Further, in the case of a business combination involving the transfer of employees, it is mandatory to ensure that employees consent (in writing) for their transfer resulting from transfer of undertaking and are hired by the transferee on terms no less favourable than their original terms of employment.

In the event of a transfer of an undertaking, all workmen who have been in continuous service for a period of at least one year are entitled to one month's notice and compensation equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months, as if such workmen have been retrenched. However, compensation need not be paid when:
- the service of the workman is not interrupted by such transfer;
- the terms and conditions of service applicable to the workman after a transfer are not in any way less favourable than his or her terms and conditions prior to the transfer; and
- the new employer, under the terms of such transfer or otherwise, is liable to pay compensation, in the event of his or her retrenchment, on the basis that his or her service has been continuous and has not been interrupted by the transfer.

The above exceptions are cumulative and all the conditions must be met if the current employer is to be released from his or her liability to compensate the workmen on the transfer of the undertaking. The new employer will be responsible for paying compensation to a workman in such circumstances.

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Update and trends

There is currently a significant amount of stress in India's banking system and much of this relates to corporate debt. We expect to see substantial de-leveraging taking place, including through sales of non-core assets and debt issuances. Financial investment into India has generally been biased towards equity, partly because India's exchange controls are restrictive in relation to debt and partly because of difficulties in enforcing security interests. Reports indicate, however, that net debt inflows into India have increased steadily. Some of this can be attributed to structures that have evolved to facilitate foreign investment in certain debt products and the introduction of 'masala' bonds (rupee-denominated bonds issued overseas by Indian issuers). From October 2016, registered FPIs can also invest in unlisted debt that is issued by Indian issuers (only listed debt was permitted earlier). SEBI still needs to amend its securities rules to fully effect this change. A new set of creditors (ie, security trustees in respect of listed debt securities and specified non-banking financial companies) can now access the enforcement procedure under SARFAESI Act 2002, a special law that allows specified secured creditors to enforce their security interests without taking recourse to a formal court or administrative procedure. Previously, only banks, asset reconstruction companies, and notified financial institutions were eligible as secured creditors under the SARFAESI Act 2002.

Foreign investment through Indian holding companies have been tricky, as further investment by these Indian companies are deemed to be foreign investment in certain cases. In this regard, the Supreme Court's judgment in *IDBI v Hubtown* is helpful as it indicates that such Indian companies can now choose from a range of instruments including OCDs for downstream investments. In this case, the foreign investor had purchased equity and convertible securities in an Indian company, which had in turn purchased debt from its operating subsidiaries, and one of the principal allegations was that the foreign investor was gaining indirect exposure to Indian debt (while investing through the more open equity route).

Furthermore, the recent past has witnessed an increase in buyout deals by private equity investors, pursuant to an increasing pressure on companies to repay debt and an increasing trend among foreign institutional investors to take operational control of firms.

In the past few years, India has witnessed an increase in M&A transactions, both in terms of value and volume. The total quantum of announced deal value for 2016 is estimated at US$52.6 billion, sharply higher than US$31.3 billion in 2015. The M&A activity in 2017 is expected to be on a surge owing to continued interest of financial and strategic investors in the Indian economy. Several sectors, including e-commerce, technology, life sciences, telecom and financial services are expected to attract significant attention. The Indian government has recently initiated several steps towards reforms to boost both domestic and offshore investor sentiment. For instance, the government has opened the railways, defence and insurance sectors for foreign investors. The 'Make in India' and 'Demonetization' initiative of the government is another such example. The government has taken steps to reduce regulatory timelines significantly, and each of the states in India are taking steps towards increasing ease of doing business in India. Most of the regulatory processes for obtaining or renewing licences and registrations have now been made online and the government is working towards single-window clearance to ease doing business in India. With all these measures, we strongly feel that M&A activity in India will continue to increase significantly in the future.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

By way of background, under Indian law, a company or a corporate debtor is regarded to be 'insolvent' where it has committed a default of a minimum of INR 1 lakh rupees and an application for insolvency resolution of such a corporate debtor (CIRP) under the provisions of the Insolvency and Bankruptcy Code 2016 (Code) by a financial creditor, operational creditor or the corporate debtor itself has been accepted by the National Company Law Tribunal (NCLT).

Insolvency Resolution under the Code (CIRP): Once an application has been admitted, a statutory moratorium or a cure period of 180 days (extendable to a further period of 90 days by the NCLT under special circumstances) that is concurrent with the duration of the CIRP under the Code is initiated. The moratorium is a period of insulation granted to the corporate debtor by an order of the NCLT against the institution or continuation of suits, execution of judgments or orders, enforcement of security interest over the assets of the corporate debtor, etc. Significantly, with the initiation of the CIRP under the Code, the board of directors of the corporate debtor stands suspended and its powers are exercised by a resolution professional (or an administrator) under the scrutiny of a committee of creditors (COC). The COC consists of financial creditors of the corporate debtors with voting powers commensurate to the extent of financial debt owed to them. The COC is empowered by the Code to have the final say on specified matters pertaining to the operations and management of affairs of the corporate debtor (including in relation to a sale of assets of the corporate debtor, any change in the capital structure of the corporate debtor, etc), which decision is required to be made by a 75 per cent vote of the COC in a meeting held in such regard. A scheme for revival of the corporate debtor or a 'resolution plan' is required to be formulated and affirmed by the COC prior to getting it approved by the NCLT. In the event of a failure of the CIRP, the corporate debtor may be liquidated if: (i) the COC cannot agree on a workable resolution plan within the period of the CIRP, or (ii) if the COC decides to liquidate the corporate debtor during the period of the CIRP; or (iii) If the NCLT rejects the resolution plan; or (iv) where the corporate debtor contravenes the provisions of a resolution plan that has been approved by the NCLT.

Buying assets under the Code: The Code has not adopted the 'UK pre-pack' or the 'US section 363' asset sale models (ie, fast-track sales where the administrator or court finds that the company cannot be revived as a going concern not without selling some assets). However, under the Code, once the NCLT admits an application for CIRP, no assets sales are permitted without approval. On the formation of the COC, no asset sales are permitted without consent of 75 per cent of the COC. The Code does provide a 'small sale exemption' for sale of small value unencumbered assets in the ordinary course of business, but that will not help with large strategic sales. Furthermore, no transfer of shares of the corporate debtor is permitted except with the consent of 75 per cent of the committee by value. Therefore, for the moment, a potential buyer has two options: (i) execute the sale with the consent of the COC or (ii) execute the sale under a resolution plan approved by the COC and blessed by the NCLT as being in compliance with the Code. While (i) will likely be quicker, (ii) is likely to provide more certainty to the transaction with less likelihood of challenge and easier transfer of customers and business licences.

Important considerations: the Code arms the resolution professional with a full suite of anti-avoidance powers for identified transactions undertaken in the twilight period (ie, an identified period under the Code prior to the liquidation of the corporate debtor). Potential buyers should be mindful of provisions contained in the Code against: (i) preferential transactions (ie, where a transfer of property (or an interest thereof) puts a creditor in a beneficial position than it would have been had the assets of the corporate debtor been distributed at liquidation); (ii) undervalued transactions (ie, where a transfer of assets of the corporate debtor is undertaken for a consideration, the value of which is significantly less than the value of the consideration provided by the corporate debtor); and (iii) transactions defrauding creditors (ie, an undervalued transaction deliberately entered into by the corporate debtor for keeping its assets beyond the reach of any person entitled to make a claim against the corporate debtor).

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

There is no single comprehensive legal framework in India to deal with anti-corruption and economic sanctions considerations in relation to business combinations such as the Foreign Corrupt Practices Act 1977

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(in the United States) or Bribery Act, 2010 (in the United Kingdom). In India, the anti-corruption and economic sanctions regime in relation to business combinations is largely covered by the Act, Indian Penal Code, 1860 (IPC), Prevention of Corruption Act 1988 (POCA), Prevention of Money Laundering Act 2002 (PMLA) and foreign exchange laws and regulations. A corrupt practice or bribe by any public servant, company or its officers may amount to a criminal offence (breach of trust, cheating, fraud, etc) under the IPC and is punishable with imprisonment or a fine, or both.

The PMLA forms the core of the legal framework put in place by India to combat money laundering. The PMLA and rules notified thereunder impose obligations on banking companies, financial institutions and intermediaries to verify the identity of clients, maintain records and furnish information to the relevant authorities. The PMLA defines money laundering offences and provides for the freezing, seizure and confiscation of the proceeds of crime. Where a company has committed a money laundering offence under the PMLA, every person in charge of and responsible to the company for the conduct of its business at the time of commission of the offence is deemed to be guilty unless he or she proves that the contravention took place without his or her knowledge or that he or she exercised all due diligence to prevent such contravention. This effectively reverses the burden of proof as far as the individual is concerned.

India is also a signatory to the United Nations Convention against Corruption, and has ratified the same. Further, to give effect to its obligations under the United Nations Convention Against Corruption, the government of India has given its assent to amend the POCA through the Prevention of Corruption (Amendment) Bill 2013, which is pending before upper house of the Indian parliament, the Rajya Sabha.

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Indonesia

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1 Types of transaction

How may businesses combine?

This chapter discusses business combinations involving private limited liability companies (PT) and public companies (PT Tbk). Combination of unincorporated entities (such as partnerships and firms) that are used by professionals to do business (such as attorneys and accountants) are not addressed.

Under Law No. 40 of 2007 on Limited Liability Companies (the Company Law), PTs and PT Tbks may combine by way of acquisition, merger or consolidation.

Acquisition is defined in the Company Law as the acquisition of shares of a target PT resulting in the transfer of control. Acquisition can be accomplished by purchasing existing shares directly from shareholders or by subscription of new shares in the PT. Existing shares can be purchased directly from the shareholders or through the management of the Company. In the latter case it may take longer time.

The Company Law does not provide a definition of 'control' with respect to private PTs, but in practice, 'control' is commonly interpreted to mean the ability to influence the management and policy of the company, which can be evidenced by ownership of more than 50 per cent of shares, control over the majority of voting rights or the ability to appoint key management. Consolidation of a subsidiary's financial statements can be considered de facto evidence of control. However, for PT Tbks, Bapepam-LK Rule No. IX.H.1 on Acquisition of Public Companies explicitly defines 'controlling shareholder' as a party that owns more than 50 per cent of shares, or has the ability to decide on the management or policies of the PT Tbk. Meanwhile, for banks, pursuant to Bank Indonesia (BI) Regulation No. 12/23/PBI/2010 on the Fit and Proper Test, the threshold to be considered a controlling shareholder is lower, with at least 25 per cent of share ownership, or an ability to decide the management or policies of the bank, or both.

Merger is defined as one or more PTs merging into an existing PT (surviving PT). All assets and liabilities, including business operations and financial losses, transfer to the surviving PT by operation of law upon completion of the merger. The merging PTs are dissolved without liquidation. The shareholders of the merging PTs become the shareholders of the surviving PT.

Consolidation is defined as two or more existing PTs combining to form a new PT. All assets and liabilities transfer to the new PT by operation of law. The consolidating PTs are dissolved without liquidation. The shareholders of the consolidating PTs become the shareholders of the new PT.

Mergers and consolidations between Indonesian and foreign entities are not recognised under the law.

The Company Law also recognises business separation in the form of pure demerger (in which all assets and liabilities of a PT are transferred to two or more PTs) and spin-off (transfer of some of a PT's assets and liabilities to one or more PTs), as well as transfer of assets or business.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

General

The primary law covering business combinations is the Company Law, with implementing provisions provided in Government Regulation No. 27 of 1998 on Mergers, Consolidations and Acquisitions.

PT Tbk

Business combinations involving PT Tbks are also subject to Law No. 8 of 1995 on Capital Markets (the Capital Markets Law) and implementing regulations issued by the chairman of the Financial Services Authority (OJK)). OJK assumed the functions, duties and authorities of the Financial Institutions Supervisory Body (Bapepam-LK) as of 31 December 2012. Although Bapepam-LK was replaced by the OJK, all prevailing Bapepam-LK regulations remain in force until replaced or revoked.

Regulations of the Indonesia Stock Exchange apply to the listed shares of PT Tbks.

Foreign capital investment companies (PT PMA)

For PTs with foreign capital investment (PT PMA), Law No. 25 of 2007 on Capital Investment (the Investment Law) and its implementing regulations must be observed, including Capital Investment Coordinating Board (BKPM) Regulation No. 14 of 2015 on Guidelines and Procedures for Investment Principal Licence, as amended by BKPM Regulation No. 8 of 2016, BKPM Regulation No. 15 of 2015 on Guidelines and Procedures for Investment Licences and Non-licences, and Presidential Regulation No. 44 of 2016 on the List of Business Fields Closed, and Business Fields that are Open, with Conditions, for Foreign Investment (known as the Negative Investment List), which prescribes specific foreign shareholding limitations and other restrictions for various sectors based on type of activity and scale of business. The Negative Investment List is subject to amendment from time to time, based on changes in policy and market conditions. Investors from ASEAN member states enjoy a higher percentage of foreign share ownership for certain lines of business, for example, in shipping. For past investments which have been approved, foreign shareholding limitations are grandfathered, unless new provisions are more beneficial for the investors. PMA companies whose shares are listed in the capital market are not subject to the Negative Investment List, although they may still be subject to sector specific shareholding limitations prescribed in other laws (see below).

Acquisition of shares of an existing PT PMA and conversion of a domestic PT to become a PT PMA both require specific approval by BKPM, which will examine the proposed shareholding to determine if it complies with the Negative Investment List and sector-specific limitations on foreign shareholding, such as those that apply in the financial services, transportation, mining, media, public works, and construction, among others. Under the Investment Law, any amount of foreign shareholding (whether at the PT or parent level) makes a PT a PT PMA, which must comply with the rules limiting foreign ownership. For foreign investment channelled through Indonesian venture capital companies, the shares held by those companies must be divested within 10 years.

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Antimonopoly laws
Law No. 5 of 1999 on Prohibition of Monopoly Practices and Unfair Business Competition (the Antimonopoly Law) prohibits unaffiliated PTs from any business combination that will lead to a monopoly or unfair competition. If a business combination causes combined asset value or total sales to exceed minimum thresholds, the Commission for Supervision of Business Competition (KPPU) must be notified within 30 working days from the date the business combination takes effect. Government Regulation No. 57 of 2010 on Mergers, Consolidations and Acquisitions that Cause Monopoly Practices and Unfair Business Competition sets minimum thresholds of 2.5 trillion rupiah for combined assets and 5 trillion rupiah for total sales. For the banking sector, the threshold is turnover in excess of 20 trillion rupiah. A draft bill revising the Antimonopoly Law has been under discussion in the House of Representative and is included in the priority list of laws to be issued in 2017.

Specific laws and regulations depending on lines of business
Other laws and regulations may impose specific limitations on shareholding, divestment requirements and shareholder eligibility criteria, depending on the lines of business of the PTs involved. For example:
- Law No. 7 of 1992 on Banking, and its amendment, as well as Bank Indonesia and OJK regulations and decrees, including those governing the fit and proper test for controlling shareholders, single presence policy, and single ownership limitation;
- Law No. 40 of 2014 on Insurance and certain Ministry of Finance and OJK regulations and decrees governing insurance businesses;
- Law No. 4 of 2009 on Mineral and Coal Mining, Government Regulation No. 23 of 2010 on Implementation of Mineral and Coal Mining Business Activities (as lastly amended by Government Regulation No. 1 of 2017) and Minister of Energy and Mineral Resources Regulation No. 9 of 2017 regarding Procedures for Share Divestment and Determination of Share Price – mining is subject to a 'one company, one licence' policy, so merger or consolidation among mining companies is generally not permitted;
- Law No. 13 of 2010 on Horticulture, in which divestment is stipulated, but to date procedural regulations have not been issued; and
- Law No. 36 of 1999 on Telecommunications and Law No. 32 of 2002 on Broadcasting governing media businesses.

3 Governing law

What law typically governs the transaction agreements?

For mergers and consolidations involving Indonesian entities, Indonesian laws typically (although not always) govern the agreements. For acquisitions, the parties may agree on a foreign law to govern the transaction agreements. In either case, Law No. 24 of 2009 on Flag, Language, National Coat of Arms and National Anthem requires that any agreement involving an Indonesian party be written in the Indonesian language (bilingual is acceptable). There is no requirement, however, that Indonesian must be the governing language.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Mergers and consolidations
In a merger or consolidation, the board of directors of each PT involved must prepare a merger or consolidation proposal for approval by their boards of commissioners and shareholders, including, among others:
- procedures for share valuation and conversion;
- method for settling the status, rights and obligations of employees, creditors and dissenting shareholders; and
- three years' financial statements for each PT involved and pro forma financial statement of the surviving company or new consolidated company.

The parties then draft a notarial merger or consolidation deed in Indonesian language, which contains the terms of the plan and the proposed articles of association (AoA) of the surviving or new PT. In a merger, the surviving PT must file the merger deed for approval by the Ministry of Law and Human Rights (MOLHR), if the merger involves an amendment of the PT's AoA, or simply notify the MOLHR if the merger does not involve amendment of the AoA. In consolidation, the new PT must file the consolidation deed for approval by the MOLHR. The amended AoA are then published in the State Gazette.

For merger or consolidation of a PT Tbk, within two working days after the merger or consolidation plan is approved by the boards of commissioners of the relevant companies, a merger or consolidation statement must be filed with the OJK to obtain an effective letter from the OJK.

Acquisitions
In direct acquisition of shares from existing shareholders of the target PT, no acquisition plan is required, usually just a sale and purchase of shares agreement and a notarial deed for transfer of shares after the normal due diligence procedure. For acquisition by subscription of new shares, after due diligence, a subscription agreement will be executed and approved by a general meeting of shareholders. Issuance of new shares requires an amendment of the AoA, which must be approved by the MOLHR and published in the State Gazette.

Direct transfer of shares without amending the AoA needs only to be notified to, rather than approved by, the MOLHR.

The acquisition of a PT Tbk may also be conducted by way of purchasing shares from existing shareholders, or by way of subscription (Rights Issue) with the following provisions:

In an acquisition of a PT Tbk from the existing shareholders, Bapepam Rule IX.H.1 obliges a mandatory tender offer to the public shareholders. In this case, after the acquisition, the acquirer shall purchase the shares owned by the public at a premium price (based on the average trading price for a certain period).

In an acquisition of a PT Tbk by way of Rights Issue, based on OJK Regulation No. 32/POJK.04/2015 on Capital Increase with Rights Issue, the PT Tbk shall firstly submit a Registration Statement to OJK to obtain the effective letter for Rights Issue, and the Rights Issue itself shall be approved by the GMS. In this case, the acquirer shall be exempt from the mandatory tender offer obligation.

A PT Tbk can also increase its capital without pre-emptive rights (private placement), including by way of an Employee Share Ownership Programme or Management Share Ownership Programme, to avoid the lengthy process of Rights Issue. In this case, disclosure of information is required pursuant to OJK Regulation No. 38/POJK.04/2014 on Increase of Capital of Publicly Listed Companies without Pre-emptive Rights. However, the acquirer can only purchase maximum of 10 per cent of the issued and paid-up capital of the PT Tbk.

Foreign investment companies (PT PMA)
Any business combination involving a PT PMA requires prior approval from BKPM. Transfer of shares of a PT PMA and conversion from domestic PT to PT PMA both require BKPM approval before the amended AoA can be submitted to the MOLHR. In the case of conversion to PT PMA, BKPM will issue a principal licence approving the company's status as a foreign investment company. Regarding the Indonesian subsidiaries of a PT PMA, the Investment Law requires all companies with ultimate foreign shareholding to be converted to PMA status, albeit with no stipulated time frame for conversion to be accomplished.

Sector-specific requirements
As noted above, certain fields of business are subject to additional oversight and regulation. For instance:
- financial services companies must obtain approval from the OJK;
- mining companies must obtain approval from the relevant licence-issuing authorities (central or regional governments) and the Ministry of Energy and Mineral Resources; and
- some types of companies may need recommendations from the relevant technical ministry. For example, conversion of a plantation company from a domestic PT to PT PMA because of acquisition by a foreign shareholder requires a recommendation from the Director General of Plantations of the Ministry of Agriculture.

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Stamp duty and fees

For private companies, there is no fee charged in relation to a business combination except for the 6,000 rupiah stamp that is affixed to each transaction document.

For PT Tbks in the financial services sector, Government Regulation No. 11 of 2014 on Levies imposes certain fees for business combinations reviewed by OJK based on the type of corporate action performed by the PT Tbk, as follows:

- acquisition through purchase of existing shares: 25 million rupiah fixed fee;
- acquisition through voluntary tender offer to existing shareholders: 25 million rupiah fixed fee;
- acquisition through rights issue: 0.025 per cent of the issuance value with maximum amount of 500 million rupiah; and
- merger or consolidation: 0.05 per cent of the combined asset value of a transaction (based on financial statements), with a maximum amount of 250 million rupiah.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

General

A summary of the merger, consolidation or acquisition plan must be announced in a national Indonesian language newspaper and notified to the employees of each PT involved not later than 30 days before the general meeting of shareholders that will approve the business combination.

The announcement satisfies the requirement to notify creditors, who will have 14 days from the date of the announcement to register their objections. All objections must be settled by the board of directors or presented to the general meeting of shareholders to be resolved before the business combination can proceed.

The PTs are required to make a second announcement in one Indonesian language newspaper within 30 days after the merger, consolidation, or acquisition is completed.

PT Tbks

For PT Tbks, several provisions in OJK require public disclosures in the event of a business combination.

Specific information disclosure on merger or consolidation

OJK Regulation No. 74/POJK.04/2016 requires that the merger or consolidation plan be announced in one nationally circulated Indonesian language newspaper and on the PT Tbk's website. The announcement must include a summary of the following information, inter alia:

- general information of the company (name, domicile, capital structure, management structure, shareholding structure, etc);
- schedule of the merger or consolidation;
- reasons for the merger or consolidation;
- share conversion procedures;
- draft amendment of the AoA of the surviving company or draft deed of establishment of the consolidated company;
- financial statements for each PT involved and pro forma financial statement of the surviving company or new consolidated company (the last two years if the merger or consolidation involves two PT Tbks or the last three years if the merger or consolidation involves a PT Tbk and a private PT);
- independent valuation of the share value and the PTs' assets;
- legal opinion from an independent legal consultant registered with OJK regarding legal aspects of the merger or consolidation; and
- settlement of status, rights and obligations of employees, creditors and minority shareholders.

In the event the merger or consolidation will result in the entering of new controlling shareholder, the merger or consolidation plan shall also include information on the new controlling shareholder.

Specific information disclosure on acquisition from an existing shareholder

At the negotiation stage, the acquirer may (but is not obliged to) disclose to the public and OJK about the negotiation process, including an estimate of the number of shares to be acquired, information about the acquirer, and the negotiation method. The acquirer would then update the public and OJK of any progress in the negotiation process.

After completion, the acquirer is required to announce the information related to the acquisition (total shares acquired, information on the acquirer, and purpose of acquisition) in at least one national Indonesian language daily newspaper and deliver the same to the OJK and the Indonesia Stock Exchange within one working day.

Specific information disclosure on acquisition by way of rights issue

The company must disclose general information during the announcement of GMS and more detailed information in the Prospectus of Rights Issue.

In the GMS announcement, the following must be disclosed, among others:

- number of new shares to be issued;
- approximate timeline;
- analysis on the effect of the rights issue to the company's finances and existing shareholders; and
- general forecast on the purpose of the funds raised under the rights issue.

In the prospectus (which will be issued before and after the book-building), the following must be disclosed, among others:

- use of proceeds;
- debt statements;
- management discussion and analysis;
- risk factors (industry risk, business risk, country risk, shareholding risk, etc);
- business prospects;
- equity;
- financial statement; and
- timeline of rights issue.

After completion, as regulated under OJK Regulation No. 31/POJK.04/05 on Information Disclosure or Material Facts by Issuer or Public Company, the PT Tbk shall announce the business combination in a newspaper and on the company website within two working days.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

For private companies, there is no requirement to disclose shareholdings other than to the MOLHR and the Ministry of Trade. For PT Tbks, OJK Regulation No. 60/POJK.04/2015 on Disclosure of Information on Certain Shareholders ('Bapepam Rule X.M.1') requires both the company and any party obtaining 5 per cent or more of the paid-up shares to report the change of ownership to the OJK within 10 calendar days.

For certain regulated industries, for instance, financial services and mining, additional submissions regarding shareholding are required by the relevant regulator.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors and commissioners of a PT have a fiduciary duty to act in good faith for the interests of the PT.

The Company Law requires that a business combination take into account the interests of the PT itself, minority shareholders, employees, creditors, business partners, the public and fair competition in business.

Under the Company Law, the boards of directors of the PTs involved in a business combination are required to prepare a plan of the business combination to be announced to the shareholders, employees and creditors of each PT.

Controlling shareholders do not have similar duties, except for controlling shareholders of PT Tbks, who, in order to avoid insider

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trading, must sign a non-disclosure agreement with prospective buyers before due diligence on the PT can commence.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Shareholder approval by three-quarters of valid votes cast at a general meeting of shareholders attended by at least three-quarters of voting shares is required for all business combinations (including transfer of substantial assets of the PT).

A shareholder who opposes a business combination can require the controlling shareholders (or the PT itself) to purchase their shares at a reasonable price.

Minority shareholders holding at least 10 per cent of shares can request a district court to instruct the PT to provide data and information if there is any suspicion that the PT or its board of directors or board of commissioners may cause damage to the PT, its shareholders, or a third party.

For PT Tbks, the transaction value of the business combination (for a merger or, if the PT Tbk intends to acquire a private company) shall be appraised by an independent appraiser. In the event that based on the appraisal the transaction value of the business combination is not in the normal price range, OJK may not approve the business combination. Further, the shareholders who do not agree to the proposed business combination may object to the transaction by requesting the PT Tbk to buy back their shares, or if the business combination violates any capital market regulations in Indonesia, the objecting shareholders may file to the court.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Unsolicited transactions are uncommon and difficult to complete for non-publicly listed PTs in Indonesia, because transfer and issuance of shares both require approval by a general meeting of shareholders.

For PT Tbks, an acquirer may launch a voluntary tender offer of shares. Based on OJK Regulation No. 54/POJK.4/2015 on Voluntary Tender Offers (OJK Reg. 54/2015), in order to launch a voluntary tender offer, the acquirer shall first submit a statement of voluntary tender offer to OJK to obtain an effective letter. The statement of voluntary tender offer itself shall include information on the securities that will be purchased, the price, identity of the acquirer, purpose of tender offer and sufficiency of funds to settle the tender offer.

Pursuant to section IV of OJK Reg. 54/2015, the price of the tender offer will depend on the objects of the tender offer (shares, warrants or convertible bonds), as well as their recent trading history.

OJK Reg. 54/2015 provides for a tender-offer period of 30 to 90 days. If no (or an insufficient number of) shares are offered by the existing shareholders, then the tender offer may be cancelled or cannot be completed. During the period of a voluntary tender offer, the PT Tbk is prohibited from performing any transaction with the sole purpose of preventing the change of control that would result from completion of the voluntary tender offer.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up and reverse break-up fees are determined contractually between the parties to compensate either the seller or the buyer if the deal is terminated. For instance, when a seller signs a letter of intent or enters into a conditional share purchase agreement with a buyer, the seller will require the buyer to put a certain amount on deposit in (normally) an escrow agreement to 'bind' the buyer. If the transaction fails to close, the seller will be entitled to retain the deposit as its break-up fee.

There are no limitations on how a non-publicly listed PT can protect itself from bids by third parties. Under the Company Law, most (if not all) AoAs will have provisions restricting transfer of shares or creating a right of first refusal that requires a shareholder to first offer its shares to the other current shareholders before it can accept an offer from a third party. The other shareholders have the right to maintain their proportional ownership in the PT, which frustrates any attempt at dilution. Moreover, AoAs generally include provisions that require prior approval from a general meeting of shareholders for any transfer of shares or issuance of new shares. With these measures, the PT and the shareholders can prevent undesired bidders from becoming shareholders.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

BKPM has the authority to approve or deny business combinations, based on statutory limits on foreign shareholding contained in the Negative Investment List and sector-specific regulations. In addition to foreign shareholding restrictions, the Negative Investment List sets out various requirements for certain lines of business, such as approval from licensing agencies or restrictions as to what type of entity can engage in certain sectors. The Negative Investment List also protects SMEs by reserving certain lines of business only for them. Politically controversial sectors, such as alcoholic beverage production, and sectors affecting security, such as weapons or explosives production, may be closed to investment altogether, or at least subject to more stringent oversight. OJK may require certain disclosures or amendments to filings related to PT Tbks before a proposed business combination can proceed, and with respect to financial services companies, OJK has the authority to approve or deny prospective shareholders based on the outcome of the fit and proper test.

Business combinations involving state-owned enterprises or region-owned enterprises are subject to approval from the Indonesian parliament, the central government, or the relevant regional parliament or regional government, in accordance with their authority.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In business combinations involving privately held PTs, the conditions are determined and agreed upon by the parties. Conditions typically pertain to the availability of funding and the allocation of risks and liabilities.

In a mandatory tender offer (an offer to purchase publicly traded shares in connection with acquisition of privately held shares), the offeror is not permitted to impose special conditions, as after the closing of the acquisition, the new controlling shareholder must offer to purchase shares held by the public at a mandatory price. If a mandatory tender offer results in the offeror holding more than 80 per cent of shares in the PT, the offeror is required to refloat enough shares on the stock exchange so that its shareholding will be reduced to 80 per cent, unless the amount it acquired from the previous controlling shareholder was greater than 80 per cent, in which case the offeror need only refloat enough shares to reduce its holding to the amount acquired from the previous shareholder.

In a voluntary tender offer (an unsolicited offer to buy publicly traded shares), the offeror may impose special conditions such as, it will only purchase the shares if a minimum number of shares can be obtained.

In both mandatory and voluntary tender offers, financing for payment of the tendered shares cannot be a condition of the offer.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Availability of buyer's financing is most often included as a condition precedent to the transaction or at least a condition before further negotiations can proceed. For acquisitions of non-publicly listed PTs, the

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Update and trends

Mining commodity prices have been elevated since 2016 and are expected to increase throughout this year. However, potential investors must keep aware of the new regulations on divestment. This mandatory divestment applies for all mining companies in Indonesia, including for holders of a contract of work and coal contract of work. The obligation for mining companies to divest foreign shares will be imposed gradually commencing from the fifth year of production up to not more than 51 per cent of their foreign shares by the tenth year.

The latest Presidential Economic Policy Package highlighted e-commerce, a fast-growing sector in Indonesia in recent years. The President is preparing an E-Commerce Road Map to support his vision to make Indonesia the biggest digital economy in Southeast Asia. Implementing regulations on e-commerce are expected to be issued in the near future. In connection with this, new Business Classification Numbers (Klasifikasi Baku Lapangan Usaha-KBLI) are anticipated to accommodate new lines of business, particularly in e-commerce.

The infrastructure budget has significantly increased in 2017. There is a huge push for cooperation between the government and investors for projects in power, roads, transportation, rails, ports, among others.

In banking, the government has, since 2016, encouraged consolidation to maintain sound capitalisation and liquidity. In 2017, OJK identified five commercial banks planning to conduct mergers.

The Minister of State-Owned Enterprises (BUMN) announced the 2017 formation of a BUMN holding bank that will hold shares in several BUMNs.

Further, the Minister of BUMN expects that in 2017 several subsidiaries of BUMNs in construction will list their shares on the IDX in order to raise capital for major infrastructure construction.

In the capital market, 15 companies conducted IPOs in 2016. In 2017, IDX is targeting 35 companies to IPO and list shares on the IDX. IDX believes the increase results from many companies postponing their IPO in 2016 owing to unconducive market factors.

To increase the liquidity of shares, IDX is planning to allow penny stock trading in the first semester of 2017.

In 2016, approximately 40 per cent (about 88 million) Indonesians were active internet users (15 per cent increase over 2015). With the increasing numbers of internet technology and mobile phone users, a Financal Technoclogy (Fintech) is expected to open new financing options for the SMEs scattered over thousands of islands in Indonesia. Fintech is also expected to reduce the cost of credit risk assessment by conventional banks and speed up loan distribution in the regions, especially in unbankable areas.

As there is no limitation on the source of funds or types of lenders, Fintech is also expected to channel funds from foreign loans to Indonesia and open up new access for SMEs to foreign credit markets.

parties may agree that the buyer obtaining financing is a condition to the closing of the transaction.

Similarly, obligations of the seller to assist in the buyer's financing, to the extent there are any, will be agreed by the parties. The seller's obligations may include a covenant to maintain the target PT as a going concern and a covenant not to take any action that will reduce the value of the target PT during the transaction period until the closing.

Typically, lenders will conduct limited due diligence to ensure that effective transfer of valid title to the borrower can occur.

If the financing for the transaction originates from offshore loan proceeds (including issuance of convertible bonds to an offshore investor or financer), then the buyer is obliged to (i) report the loan to Bank Indonesia, pursuant to BI Regulation No. 16/22/PBI/2014 on Reporting of Foreign Exchange Flows and Reporting of Implementation of Prudential Principles in the Management of Offshore Loans for Non-bank Corporations (PBI 16/22), and (ii) always comply with the prudential principles regulated under BI Regulation No. 16/21/PBI/2014 on Implementation of Prudential Principles in Managing Offshore Loans of Non-bank Corporations, as amended by BI Regulation No. 18/4/PBI/2016 (PBI 16/21), that includes provisions on liquidity ratio, hedging, and credit rating requirements.

It is common for an investor or financier to impose as a covenant that the borrower will always comply with the requirements of PBI 16/22 and PBI 16/21.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

While the Company Law requires business combinations to consider the interests of minority shareholders, in reality, shareholders with 25 per cent of shares or less can be squeezed out, because shareholders with at least 75 per cent of shares have the power to approve a business combination in a general meeting of shareholders.

In order to approve a business combination, the majority shareholders will request the board of directors to convene a general meeting of shareholders. Within 15 days, the board of directors must deliver notice of a general meeting of shareholders to be held at least 14 days after the date of the notice. The notice must be delivered to all shareholders by registered mail or announced in a newspaper. If the board of directors fails to deliver notice of the meeting, the board of commissioners may issue or deliver the notice. If neither the board of directors nor the board of commissioners delivers notice of the meeting, shareholders representing at least 10 per cent of shares can request a district court to allow a shareholder to call the meeting or to order examination of the PT if they can reasonably claim that the company or its directors or commissioners have acted detrimentally to the shareholders or third parties.

Although they may not be able to block a business combination, dissenting shareholders are entitled to demand that the other shareholders (or the PT itself) buy back their shares or find a third-party buyer. A PT may not hold more than 10 per cent of its issued shares as treasury stock.

For PT Tbks, any shareholder (regardless of size of shareholding) can claim for compensation if they suffer damages as the result of a business combination, insofar as such business combination violates capital market regulations in Indonesia.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions involving Indonesian PTs must comply with relevant laws and regulations in Indonesia. Acquisition of shares in a PT by a foreign party is subject to the requirements set forth in the Company Law, the Investment Law, the Negative Investment List, the Capital Markets Law (for PT Tbks), as well as regulations of the BKPM and laws governing specific industries such as banking, insurance, mining, media, shipping, etc. Currently, it is not possible to combine (by way of merger or consolidation) a PT and a foreign entity.

As mentioned above, a company listed on the Indonesian capital market (PT Tbk) will be exempted from the foreign investment restriction (except for business sectors that are closed for foreign investment) under the Negative Investment List. However, if a foreign shareholder is mentioned in such PT Tbk's deed, such PT Tbk shall convert into a PT PMA and it shall subject to certain compliance of PT PMA.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

To complete a business combination, there are several waiting and notification periods. A newspaper announcement must be made 30 days before the general meeting of shareholders to approve the business combination. After announcement, creditors have 14 days to object. Thereafter, until the date of the general meeting of shareholders, the PTs must settle any creditor objections.

Employees must be notified at the same time the newspaper announcement is made, in effect giving employees 30 days to decide whether they wish to continue or leave employment.

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17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

As mentioned earlier, there are specific regulations governing shareholding (particularly foreign shareholding) and procedures for financial services, mining, telecommunications and media companies. Certain other industries are subject to additional regulations such as transportation, shipping, horticulture, and construction. In agriculture, there is a cap on the total number of hectares that can be held by a single 'group' of companies, which serves as a de facto limit on business combinations in the plantation sector. Business combinations in the field of mining and horticulture are subjected to divestment obligations without regard to previously approved foreign shareholding.

18 Tax issues

What are the basic tax issues involved in business combinations?

In a business combination that involves a transfer of assets from one entity to another entity, the potential tax implications include value added tax, income tax and statutory tax on transfer of shares.

If a transfer of shares or assets uses the market value, the margin between the market value and the book value of the assets will be subject to income tax. However, in a merger or consolidation, if the pooling-of-interest method is used for merger between affiliates, where assets of the PTs are combined using the book value, there will not be any income, and as such no income tax will be imposed. Certain conditions must be fulfilled to use this method.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

As set out in Law No. 13 of 2003 on Manpower (the Manpower Law), statutory benefits are triggered upon termination of employment in connection with a business combination.

Under the Manpower Law, in a merger, consolidation, acquisition or change of entity status (going public or delisting) employees may elect not to continue their employment, and the employer must pay statutory termination benefits, including basic severance pay, reward for tenure pay, and compensation for fixed allowances.

If the employees decide to continue working for the PT, the employer and the employees can agree to simply continue employment (with all rights, benefits and tenure being sustained), or they can agree to effectively be terminated and rehired by the surviving or new company, meaning that the employees will receive a basic termination package (ie, cash in hand, based on the calculation for voluntary termination), but they will lose all tenure and terms of employment, because employment will have commenced afresh.

Provisions of existing collective labour agreements transfer to the new employer and remain in force until expiration or renegotiation. If two or more collective labour agreements are already in place among merging or consolidating PTs, the most protective provisions will prevail.

In merger, consolidation or change of entity status (but not in acquisition), the employer may initiate termination for redundancy, in which case the employees are entitled to enhanced severance pay, reward for tenure pay and compensation for fixed allowances.

Because employers do not have the right to terminate employment in connection with an acquisition, acquirers often choose to negotiate enhanced termination packages with employees or groups of employees whom they wish to terminate. Alternatively, the employees can be terminated, rehired and later terminated for redundancy after a suitable period of time has elapsed after the acquisition is complete.

Even in cases of voluntary resignation, all termination arrangements must be submitted for approval by the labour court, along with proof of payment of compensation.

Unless stipulated otherwise in the transaction agreements, the Manpower Law places responsibility for employee rights, including rights related to termination, on the new employer (ie, the surviving company, new consolidated company or new ownership of the acquired company).

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

In bankruptcy, the bankrupt PT is managed by a receiver who is supervised by a judge from the commercial court. All actions of the bankrupt PT must be approved by the receiver. In certain cases, the receiver will need to get approval from the supervising judge and seek advice from a committee of the bankrupt PT's creditors before it can take a proposed action. In bankruptcy, the objective of the receiver is to maximise the bankruptcy estate for the purpose of settling the liabilities of the bankrupt PT. Accordingly, the receiver will determine whether a proposed business combination will be beneficial to the bankruptcy estate.

Indonesia adopts the principle of *actio pauliana*, with the consequence that any transaction conducted up to one year prior to a PT being declared bankrupt can be examined and nullified if it is determined that the transaction was detrimental to creditors or the managers of the PT acted in bad faith to transfer assets of the company.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

There are no anti-corruption or anti-bribery sanctions related to transactions between private parties if there are no state or regional government funds involved.

Possible economic sanctions and criminal economic sanctions may apply if a business combination breaches the Antimonopoly Law.

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Ireland

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1 Types of transaction

How may businesses combine?

Businesses may combine by:

- a private purchase of shares in a target company, which is typically documented by means of a share purchase agreement;
- a private purchase of a target's underlying assets and, if applicable, liabilities, which is typically documented by means of an asset and business transfer agreement;
- an offer by a bidder to acquire shares in a target that is an Irish incorporated listed public limited company; or
- a scheme of arrangement under the Companies Act 2014 (the Companies Act). This is a statutory procedure which binds all shareholders of the target if it is: (i) approved by a majority in number representing at least 75 per cent in value of the target shareholders voting in person or by proxy at the shareholder meeting; (ii) sanctioned by the High Court of Ireland; and (iii) registered with the Irish Companies Registration Office.

A purchaser may pay in cash, securities or a combination of both.

Irish companies may also combine with other European Economic Area (EEA) companies pursuant to the European Communities (Cross-Border Mergers) Regulations 2008, as amended (the Cross-Border Merger Regulations); or with certain other Irish companies pursuant to the domestic statutory merger regime under the Companies Act.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Together with the law of contract, the following are the main laws and regulations governing the legal basis for business combinations:

- The Companies Act governs various aspects of mergers and acquisitions, both public and private.
- The Irish Takeover Panel Act 1997, Takeover Rules 2013 (the Irish Takeover Rules) provide the main regulatory framework for the conduct of takeovers of Irish incorporated listed public companies. The Irish Takeover Rules are a principles-based regime based on seven underlying general principles. The spirit, as well as the strict reading, of the Irish Takeover Rules and general principles must be adhered to. The Irish Takeover Rules are not concerned with the financial or commercial advantages or disadvantages of a takeover or other relevant transactions.
- The Irish Takeover Rules establish timelines within which offers must be conducted and declared unconditional in all respects. There is greater flexibility around the timeline applied to takeovers carried out by way of scheme of arrangement than by way of offer.
- The Irish Takeover Rules are administered by the Irish Takeover Panel, which operates principally to ensure fair and equal treatment of all target company shareholders in relation to takeovers (whether structured by way of offer or scheme of arrangement) and certain other relevant transactions. The Irish Takeover Panel is the designated competent authority under the European Communities (Takeover Bids (Directive 2004/25/EC)).
- The Substantial Acquisition Rules (SARs) are a separate set of rules issued and administered by the Irish Takeover Panel. The SARs apply to public limited companies and provide the means by which acquisitions of shares in public limited companies may be made. The main aim of the SARs is to give target companies adequate warning of stake building. Subject to limited exceptions, a person may not, in any period of seven days, acquire shares (or rights over shares) in a target company which carry 10 per cent or more of its voting rights, if, following such acquisition, that person would hold shares or rights over shares carrying 15 per cent or more, but less than 30 per cent, of the voting rights in the target company.
- The Competition Acts 2002 to 2014 (the Competition Act) govern various aspects of the Irish merger control regime. The Competition Act established the Competition and Consumer Protection Commission (the CCPC), which is primarily responsible for the enforcement of the Irish merger control regime. The CCPC shares responsibility for media mergers with the Minister for Communications, Climate Action and Environment (the Minister for Communications). The Irish courts have jurisdiction to adjudicate on any allegation of breach of the Competition Act and on any appeal against a merger decision by the CCPC.
- The Cross-Border Mergers Regulations apply where the transaction involves a merger of an Irish incorporated entity with at least one other EEA company.
- Companies whose shares are listed on the main market of the Irish Stock Exchange (ISE) must comply, where applicable, with the requirements of various European Directives (and implementing measures in Ireland) including:
- the Prospectus (Directive 2003/71/EC) Regulations 2005;
- the Transparency Rules which set out procedural and administrative requirements and guidance in respect of the Transparency (Directive 2004/109/EC) Regulations 2007 (as amended) (the Transparency Rules);
- the EU Market Abuse Regulation (EU 596/2014)(MAR) which took effect in July 2016 and has direct effect in all EU member states and the Irish (Market Abuse) Regulation 2016 (the Market Abuse Regulation), which transposed the EU Market Abuse Directive on criminal sanctions for market abuse (Directive 2014/57/EU) and elements of MAR, and Market Abuse Rules published by the Central Bank of Ireland (Market Abuse Rules). MAR and the Market Abuse Rules impose significant obligations on issuers and strengthen the rules in relation to insider trading and market manipulation;
- the Markets in Financial Instruments Directive (Directive 2004/39/EC), and its implementing measure in Ireland, the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 (as amended); and
- the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (the Takeover Bids Regulations).

Companies whose shares are listed on the Main Market of the ISE need to comply with the Irish Listing Rules, whereas companies whose shares are listed on the Enterprise Securities Market of the ISE (ESM) need to comply with the ESM Rules.

Companies whose shares are listed on the ESM must comply with, where applicable, the requirements of various European Directives (and implementing measures in Ireland), including MAR and the Market Abuse Rules.

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Compliance with certain regulations, rules and statutory provisions is monitored by the Irish regulator, the Central Bank of Ireland (the Central Bank).

Depending on the industry, additional regulators may be involved in a business combination (for example, the Minister for Communications in respect of media mergers).

3 Governing law

What law typically governs the transaction agreements?

Transaction agreements are typically governed by Irish law. However, it would not be unusual for English law and (occasionally) US law to apply to share purchase agreements.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Under the Irish merger control regime, a transaction may require a notification to be made to the CCPC. Each 'undertaking involved' in the transaction must submit a merger filing. In practice, joint filings are submitted and the purchaser tends to take the lead on drafting the filing. A filing fee of €8,000 (for each filing) currently applies.

Certain documents relating to public offers governed by the Irish Takeover Rules require the Irish Takeover Panel's approval. The Irish Takeover Panel Act 1997 gives the Irish Takeover Panel the power to impose charges for the purpose of defraying expenses incurred by it in performing its functions.

A prospectus, if required, has to be submitted to and approved by the Central Bank prior to being published, together with the appropriate filing fee.

See question 18 (Tax issues) for information in relation to stamp taxes.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Before a public announcement concerning an offer or possible offer of an Irish incorporated listed public company to which the Irish Takeover Rules apply, the fundamental obligation is that all persons with confidential information (including the bidder and target, their respective directors and other persons acting in concert with them and their respective advisers) must maintain strict confidentiality in respect of the offer or contemplated offer. Every person who is privy to confidential information, and particularly price sensitive information, concerning an offer or contemplated offer is obliged to treat the information as secret and may only pass it to another person if it is necessary to do so and if that person accepts the need for secrecy. All relevant persons must conduct themselves so as to minimise the possibility of an accidental leak of information.

On 3 July 2016, the Market Abuse Regulation came into effect in Ireland replacing and repealing the framework that was in place since 2005. The Market Abuse Regulation extends the application of the market abuse and inside information regime beyond issuers with shares admitted to trading on regulated markets, such as the Main Market of the ISE, to include issuers of securities traded on multilateral trading facilities such as the ESM. The Market Abuse Regulation requires companies with traded securities within the scope of the regulation to disclose inside information directly concerning them to the public as soon as possible. An issuer may delay an announcement pertaining to inside information so as not to prejudice its 'legitimate interests', provided that certain conditions are met (including that the information can be kept confidential and that delayed disclosure would not be likely to mislead the market). Where an issuer chooses to delay its disclosure of inside information so as not to prejudice its legitimate interests, the issuer will be required to inform its regulator in writing, and immediately after the information is disclosed to the public, of its decision to delay the announcement. The Market Abuse Regulation also requires an issuer to provide its regulator with a written explanation of how the conditions for the delay were satisfied.

A prospectus, to the extent required, must contain all information necessary to enable investors to make an informed assessment of the assets and liabilities, the financial position, the profits and losses, and the prospects of the issuer, as well as the rights attaching to the securities in question. In addition to this overriding requirement, there are detailed rules as to content, including a description of the business, audited financial information for the latest three financial years, an operating and financial review of that period and a confirmation that the issuer has sufficient working capital for its present requirements (the next 12 months). There is an exemption from the requirement to produce a prospectus in connection with securities offered in connection with a takeover or merger. However, a document containing information equivalent to that in a prospectus will generally still be required. One disadvantage of an 'equivalent' document is that, unlike a prospectus, it cannot be passported into other EU jurisdictions.

The preparation of a circular will be required for certain categories of information to be provided by a listed company to its shareholders. The Irish Listing Rules and the ESM Rules set out the content and approval requirements for circulars to shareholders, and also the circumstances in which they must be prepared.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Up to the time of announcement of a firm intention by a bidder to make an offer under the Irish Takeover Rules, the SARs apply to a person acquiring shares. The SARs restrict the speed with which a person may increase a holding of shares in the target. Rule 6 of the SARs states that, subject to limited exceptions, an acquirer is obliged to disclose to the target and the Irish Takeover Panel any acquisition of voting rights in a target which when aggregated with its existing holding exceeds 15 per cent of the target's voting rights, or if the acquirer already holds between 15 and 30 per cent of the voting rights of the target, any acquisition that increases their percentage holding. Where any such notification obligation arises, it is to be discharged no later than 12 noon on the day following the relevant acquisition. SARs 3 and 4 also provide restrictions on timing of acquisitions. They provide that a person may not, in any period of seven days, acquire shares (or rights over shares) in the target carrying 10 per cent or more of its voting rights if, following the acquisition, that person would hold shares (or rights over shares) carrying 15 per cent or more, but less than 30 per cent, of the voting rights in the target. Stake-building will also be totally prohibited if it constitutes insider dealing.

Dealings in the securities of a target company that is in an offer period under the Irish Takeover Rules (and in certain circumstances dealings in the securities of a bidder) may trigger a disclosure requirement. A person with more than a 1 per cent interest, or who acquires more than a 1 per cent interest in the securities of such a target company or, in certain circumstances the bidder, must publicly disclose all such dealings during the offer period.

The Transparency Rules require a stakeholder to notify a listed company once the percentage of voting rights acquired by that stakeholder reaches, exceeds or falls below 3 per cent; and then each 1 per cent thereafter.

The Companies Act introduced a statutory disclosure regime (replacing the regime existing under previous legislation) requiring notification within a prescribed time frame where there is a change in the percentage of shares held by a person in a public limited company resulting in:

- an increase from below to above the 3 per cent threshold;
- a decrease from above to below the 3 per cent threshold; or
- where the 3 per cent threshold is exceeded both before and after the transaction, but the percentage level, in whole numbers, changes (fractions of a percentage being rounded down).

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (the 2016 Regulations) came into operation on 15 November 2016. The 2016 Regulations require Irish companies to gather and maintain information on individuals

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described as their 'ultimate beneficial owner'. The 2016 Regulations do not apply to certain listed companies. Broadly speaking, a shareholding or ownership interest (direct or indirect) above 25 per cent is indicative of beneficial ownership. It is expected that legislation to be introduced in 2017 will require beneficial ownership information to be submitted to a publicly accessible central register.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Each director of an Irish incorporated company has a duty to ensure that the company complies with the Companies Act. Upon their appointment, a director is required to acknowledge that, as a director, he or she has legal duties and obligations imposed by the Companies Act, other statutes and at common law.

Directors of all public limited companies (excluding certain investment companies), and private limited companies whose balance sheet total and amount of turnover exceed €12.5 million and €25 million respectively for the relevant year, are required to include in their statutory directors' report for each financial year commencing on, or after, 1 June 2015, a statement:

- acknowledging that the directors are responsible for securing the company's compliance with certain prescribed company law and tax obligations (referred to as 'relevant obligations');
- confirming that each of the following has been done (or, if it has not been done, specifying the reasons why it has not been done);
- a statement setting out the company's policies (that in the directors' opinion, are appropriate to the company) respecting compliance by the company with its relevant obligations has been drawn up;
- appropriate arrangements or structures, that are, in the directors' opinion, designed to secure material compliance with the company's relevant obligations have been put in place; and
- during the financial year to which the relevant statutory directors' report relates, a review of the arrangements or structures referred to above has been conducted.

The Companies Act contains a non-exhaustive list of fiduciary duties owed by a director to a company. The relevant provisions essentially codify the duties that apply to directors under common law and equity, as well as amending and restating the applicable statutory obligations under existing company legislation.

The eight primary fiduciary duties set out in the Companies Act are as follows:

- a director must act in good faith in what the director considers to be the interests of the company;
- a director shall act honestly and responsibly in relation to the conduct of the affairs of the company;
- a director shall act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
- a director shall not use the company's property, information or opportunities for his or her own or anyone else's benefit unless that is expressly permitted by the company's constitution, or the use has been approved by a resolution of the company in general meeting;
- a director shall not agree to restrict the director's power to exercise an independent judgement unless this is expressly permitted by the company's constitution, or approved by the company's members in general meeting;
- a director shall avoid any conflict between the director's duties to the company and to the director's other (including personal) interests, unless the director is released from this duty in accordance with the company's constitution, or by a resolution of the company's members;
- a director shall exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both the knowledge and experience that may reasonably be expected of a person in the same position as the director, and the knowledge and experience which the director has; and
- a director shall have regard to members' interests (in addition to the duty to have regard to the interests of the company's employees in general).

If a company is insolvent, even if not yet in liquidation, the directors must have regard to the interests of the company's creditors. A company is considered to be insolvent if it is unable or is deemed to be unable to pay its debts as they fall due. Directors must not ignore the interests of creditors if there is a significant risk that the company will become insolvent. Where a company's situation is such that any creditor could cause it to be wound up on the ground of insolvency, the company ceases to be the beneficial owner of its assets. The directors have a duty to the creditors to preserve the assets or at least not to dissipate them in such circumstances.

Breaches of the Companies Act may give rise to criminal or civil liability on the part of the director. The Companies Act also provides a statutory right of indemnity and account of profits in relation to breach of certain duties. In times of financial distress, directors may find themselves and their actions exposed to increased scrutiny, whether by shareholders, the Office of the Director of Corporate Enforcement, or the Irish courts.

Controlling shareholders are not subject to the above duties in their capacity as shareholders. However, the Companies Act allow an oppressed minority shareholder to apply to court to obtain an order to end the oppression.

Individuals who are not formally appointed to the board of directors but act as directors and occupy the position of director (de facto directors) are bound by the same duties and obligations and are subject to the same liabilities as formally appointed directors.

A shadow director is an individual who has not been formally appointed to the board of directors but is a person in accordance with whose directions or instructions the directors of the company are accustomed to act. In most respects, Irish company law treats such a person as a director and holds him or her to the same duties and liabilities.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

For companies listed on the Main Market of the ISE, the Irish Listing Rules provide that acquisitions of a certain size (broadly, at least 25 per cent of the size of the bidder), or with parties connected to the company (for example, a director or substantial shareholder), must be approved by a general meeting of the company's shareholders.

The constitutional documents of a company may confer a right of approval on the shareholders (or a class of them). If the transaction is to be funded wholly or in part through shares, shareholder approval may be required to authorise directors to allot new shares, or to disapply pre-emption rights. Shareholder approval may also be required if the transaction involves a director or a substantial shareholder.

Rule 21 of the Irish Takeover Rules (which applies to companies listed on the ISE, the London Stock Exchange, NASDAQ and NYSE) prohibits a target board from taking any of the following actions (except pursuant to a contract previously entered into) without shareholder approval or the consent of the Irish Takeover Panel or both, either in the course of an offer, or if the target board has reason to believe that a bona fide offer may be imminent:

- the issue of any share;
- the grant of share options;
- the creation or issue of any convertible securities;
- the sale, disposal or acquisition of material assets of a material amount;
- the entry into of contracts otherwise than in the ordinary course of business; or
- any other action, other than seeking alternative bids, which may result in frustration of an offer or shareholders being denied the opportunity to consider it.

A scheme of arrangement must be approved by the shareholders of the target and sanctioned by the Irish High Court. A scheme will require the approval of a majority in number representing at least 75 per cent

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in value of the target shareholders voting in person or by proxy at the shareholder meeting to consider the scheme of arrangement.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

A number of provisions in the Irish Takeover Rules (although technically applying to all public offers, whether hostile or recommended) should be given special consideration in hostile transactions. The following are particularly noteworthy:

- the offer must first be disclosed to the board of the target company or its advisers;
- all target shareholders of the same class must be treated equally;
- there are a range of restrictions and obligations on persons dealing with target stock;
- a target board is prohibited from taking certain actions (except pursuant to a contract previously entered into) without shareholder approval or the consent of the Irish Takeover Panel or both, either in the course of an offer, or if the target board has reason to believe that a bona fide offer may be imminent; and
- with limited exceptions, information given by a target to one bidder must be made available to all bidders. A second or subsequent bidder will have to request specific information; it is not entitled, by asking in general terms, to receive all information supplied to the first bidder.

The Irish Takeover Rules provide that the board of the target must obtain competent independent advice on every offer in respect of the target and must dispatch to its shareholders a circular setting out the substance and source of such advice, together with the considered views and opinion of the board of the target on the offer. An independent committee may need to be established to consider the offer in the event that any directors have a conflict of interest. As an Irish company, the fiduciary duties and other obligations of target directors will be governed by Irish law. These duties and other obligations will apply to the target directors in deciding whether to engage in a process with a potential bidder which may result in an offer for the target, and ultimately in deciding whether to recommend, or not recommend, an offer.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break fees are permissible under the Irish Takeover Rules. However, Rule 21.2 expressly prohibits arrangements for break or inducement fees from being agreed without the consent of the Irish Takeover Panel. The consent of the Irish Takeover Panel, if granted, will normally be limited to specific quantifiable third-party costs subject to a cap of 1 per cent of the value of the offer and to receiving confirmation in writing from the target board and its financial adviser that they consider the break or inducement fee to be in the best interests of the target shareholders.

The offer document is required to contain details of any break fee agreed to by the target company.

The target may enter into an exclusivity agreement, however, this is subject to the Irish Takeover Rules (the shareholders cannot be denied the opportunity to decide on the merits of an offer) and to the directors' fiduciary duties. The directors of the target company may also agree to non-solicitation requirements and may sign irrevocable undertakings to accept the offer.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In addition to the Irish merger control regime, several industries are subject to additional regulations, such as financial institutions, insurance undertakings, pharmaceutical companies, airlines and telecommunications operators.

See also question 16 (Waiting or notification periods) and question 17 (Sector-specific rules).

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Although it is common for bidders in a public offer to include wide-ranging conditions in the terms of an offer, the practical effect of these is limited by the Irish Takeover Rules and the Irish Takeover Panel's approach to the application of the rules. Save with the consent of the Irish Takeover Panel, or in the case of Competition Act or European Merger Regulation conditions, an offer may not be made subject to any condition the satisfaction of which depends solely on subjective judgements of the bidder, or which is within its control. A bidder may not invoke a condition to lapse an offer unless the circumstances giving rise to the right to invoke are of material significance to the bidder in the context of the offer and the Irish Takeover Panel, being satisfied that in the prevailing circumstances it would be reasonable to do so, consents to the condition being invoked. In practice it is very difficult for a bidder to invoke a condition, other than a material regulatory condition, acceptance condition or a condition that is required in order to implement the transaction (such as bidder shareholder approval).

Preconditions may be included whereby the offer does not have to be made (namely, the offer document does not have to be posted) unless each precondition is satisfied. The Irish Takeover Panel must be consulted in advance in order to employ the use of preconditions. Preconditions may only be used where they relate to material official authorisations or regulatory clearances, and the Irish Takeover Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the offer timetable.

In a private acquisition, the parties may contractually agree that certain conditions, including the availability of financing to the purchaser, are conditions to completion of the transaction.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In financing a transaction, consideration offered by a bidder may take the form of any combination of cash or securities or both. The securities offered may be securities of the bidder or of another company.

In a public offer and in the event that the offer of consideration includes securities of a company, the offer document must include additional financial and other information in relation to that company and dealings in its securities under the Irish Takeover Rules. A valuation report must also be provided in the case of an offer structured as a scheme of arrangement.

A bidder may only announce a firm intention to make an offer under the Irish Takeover Rules (a Rule 2.5 announcement) when it and its financial adviser are satisfied, after careful and responsible consideration, that the bidder is in a position to implement the offer. Where the offer is a cash offer or there is a cash alternative, the Rule 2.5 announcement must include a confirmation from the bidder's financial adviser (or another appropriate person) that cash resources are available sufficient to satisfy full acceptance of the offer. Any required debt and equity funding for the offer must be fully and, save with respect to conditions relating to closing of the offer, unconditionally committed prior to the Rule 2.5 announcement. If the confirmation proves to be inaccurate, the Irish Takeover Panel may direct the person who gave the confirmation to provide the necessary resources unless the Irish Takeover Panel is satisfied that the person acted responsibly and took all reasonable steps to ensure the cash was available. A bidder that makes a Rule 2.5 announcement is bound to proceed with a formal offer. The Rule 2.5 announcement must contain all the terms and conditions of the offer; these terms cannot subsequently be altered without the Irish Takeover Panel's consent.

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An offer document issued under the Irish Takeover Rules must include a description of how the offer is being financed and the source of finance (including the repayment terms and names of lenders).

Subject to limited exceptions set out in the Companies Act, an Irish company may not give any financial assistance, directly or indirectly, for the purpose of an acquisition made or to be made by any person of any shares in the company, or, where the company is a subsidiary, in its holding company. Financial assistance includes the provision of guarantees, security, indemnities and loans. The giving of financial assistance may be validated by the carrying out of a summary approval procedure, which requires a directors' declaration of solvency and approval of at least 75 per cent of the shareholders of the company. The summary approval procedure is not available to public limited companies.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

When an offer is made in order to gain 100 per cent control of the target, the buyer may use a statutory procedure to compulsorily acquire the shares of dissenting shareholders (a squeeze-out procedure).

Under Regulation 23 of the Takeover Bids Regulations, the relevant threshold for triggering the squeeze out procedure where the target is fully listed on a regulated market in any European Union or EEA member state (such as the main markets of the ISE or the London Stock Exchange) is the acquisition of 90 per cent of the issued share capital. A bidder has three months from the last closing date of the offer in which to give notice to dissenting shareholders that it wishes to exercise its rights under Regulation 23. Once a notice has been served, a dissenting shareholder has 21 days to apply to the Irish High Court for relief.

The relevant threshold for triggering the squeeze out procedure where the target is listed on ESM, the AIM Market of the London Stock Exchange, NASDAQ or NYSE, is set out in the Companies Act. A bidder must receive 80 per cent acceptances in value within four months of the publication of the offer in order to trigger the squeeze out procedure. If the bidder already holds 20 per cent or more of the shares in the target, it must receive acceptances from shareholders holding 80 per cent in value of the remaining target shares and receive acceptances from at least 50 per cent in number of the holders of the target shares which are the subject of the offer. Once a notice has been served, a dissenting shareholder has one calendar month to apply to the Irish High Court for relief.

In addition to the squeeze-out procedure, once the relevant threshold is achieved, the remaining minority shareholders can exercise buy-out rights requiring the bidder to purchase their shares.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Directive 2005/56/EC (implemented in Ireland by the Cross-Border Mergers Regulations) facilitates cross-borders transactions in Ireland.

A cross-border merger may be effected in one of three ways:

- acquisition – a company acquires the assets and liabilities of one or more companies which are dissolved without going into liquidation. The acquiring company issues shares to the members of the dissolved companies in consideration of the transaction;
- absorption – a parent company absorbs the assets and liabilities of a wholly owned subsidiary, which is dissolved without going into liquidation; and
- formation of a new company – a newly incorporated company acquires the assets and liabilities of one or more companies, which are dissolved without going into liquidation. The acquiring company issues shares to the members of the dissolved companies in consideration of the transaction.

The procedures for a cross-border merger vary depending on the type of merger undertaken, but each involves the preparation of common draft terms of the merger between the companies involved (the contents of which are prescribed by the Cross-Border Mergers Regulations), the drafting of an explanatory report by the directors that must be made available to the Irish company's shareholders and an advertisement of the proposed merger.

The Irish High Court must also review and approve both outbound and inbound mergers involving Irish companies. Where applicable, employee protection provisions involving employee participation must also be observed. In certain cases, an auditor's report on the merger will be required.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In 2009, the European Communities (Assessment of Acquisitions in the Financial Sector) Regulations 2009 (the Assessment of Acquisitions in the Financial Sector Regulations) came into effect in Ireland implementing Directive 2007/44/EC into domestic law. The main objectives of these regulations were to do the following:

- create greater transparency in the financial services sector;
- assist the local financial services regulators in their supervisory roles over the sector;
- harmonise information provided by relevant firms on the notification and assessment procedures to be followed with regard to acquiring and disposing transactions in the financial services sector; and
- enhance the existing anti-money laundering regime in Europe.

The Central Bank is the body designated to supervise acquiring or disposing transactions in the Irish financial sector and has issued a notification form to notify of a proposed acquisition of, or increase in, a direct or indirect qualifying holding in respect of any of the prescribed categories of Irish authorised entities under these regulations. The Central Bank uses the information provided in the form to examine whether there are prudential grounds upon which it should object to the transaction and if it ought to impose any conditions on an approval of the acquisition.

The Assessment of Acquisitions in the Financial Sector Regulations apply to the following categories of entities:

- credit institutions;
- insurance or assurance undertakings;
- reinsurance undertakings;
- investment firms or a market operators of regulated markets (MIFID firms); and
- UCITS management companies.

The Assessment of Acquisitions in the Financial Sector Regulations apply to transactions involving the acquisition, directly or indirectly, of a 'qualifying holding' in a target entity. They also apply to the direct or indirect increase in a 'qualifying holding', whereby the resulting holding would reach, or exceed, 20, 33 or 50 per cent of the capital of, or voting rights in, a target entity, or a target entity would become the proposed acquirer's subsidiary.

A qualifying holding means 10 per cent or more of the capital of, or voting rights in, a target entity or a holding that makes it possible to exercise a 'significant influence' over the management of a target entity.

The Assessment of Acquisitions in the Financial Sector Regulations also apply on the disposal of a qualifying holding or a holding which results in the disposer's interest in the target entity falling below the thresholds above or results in the target entity ceasing to be a subsidiary of the disposer.

A complete notification must be acknowledged in writing by the Central Bank within two working days of receipt of the notification form and it is required to carry out the assessment of a proposed acquisition within 60 working days of the date of the written acknowledgement. The Central Bank may request additional information in respect of a proposed acquisition no later than the 50th working day. Such a request for additional information will interrupt the assessment period until a response is received or 20 working days have elapsed. In certain circumstances the interruption period may be extended to 30 working days.

The Central Bank may, based on a prudential assessment of the proposed acquisition, decide to oppose or to approve of a proposed acquisition. In assessing a proposed acquisition, the Central Bank will look at:

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- the likely influence of the proposed acquirer on the financial institution concerned; and
- the suitability of the proposed acquirer and the financial soundness of the proposed acquisition based on the reputation of the entities, whether the entity can and will continue to comply with financial legislation.

The Central Bank may set a maximum period within which the proposed acquisition is to be completed or may impose additional conditions or requirements to be met in respect of a proposed acquisition. If it decides to oppose an acquisition, it must, within two working days of the decision being made and before the end of the assessment period, inform the proposed acquirer in writing and outline the reasons for its decision. This decision may be appealed to the Irish High Court.

See also questions 2 (Statutes and regulations), 14 (Minority squeeze-out) and 17 (Sector-specifc rules).

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

There is a special regime for media mergers contained in the Competition Act to protect the plurality of the media and to ensure the 'diversity of ownership and diversity of content'.

The Competition Act provides for additional steps 'where two or more undertakings involved carry on a media business in Ireland or one or more of the undertakings involved carry on a media business in Ireland and one or more undertakings carry on a media business elsewhere'. The term 'media business' is defined in the Competition Act and has been expanded to include online news sources and online broadcast of certain audiovisual material.

To carry on a media business in Ireland requires an undertaking to have either a physical presence in Ireland and make sales to customers located in Ireland or to have made sales in Ireland of at least €2 million in the most recent financial year.

In addition to the requirement to notify the national competition authority, the CCPC, the Competition Act requires a separate notification to the Minister for Communications who has an additional responsibility for consideration of media mergers. The Minister has 30 working days, commencing 10 days after the determination of the CCPC, to consider the media merger. If the Minister is concerned that the merger is contrary to the public interest in protecting the plurality of the media, the Minister will request that the Broadcasting Authority of Ireland (the BAI) carry out a 'Phase II' examination. Within 80 working days of receipt of the request, the BAI must prepare a report for the Minister for Communications outlining its view on the merger with regard to media plurality and recommending whether the merger should be put into effect (with or without conditions). An advisory panel may be set up to assist the BAI in its review. The Minister for Communications will make the ultimate decision, taking into account the BAI report and, if applicable, the view of the advisory panel. The Minister for Communication's final determination must be made within 20 working days of receipt of the BAI report.

18 Tax issues

What are the basic tax issues involved in business combinations?

The most significant tax issue relevant to purchasers in the context of asset or share acquisitions is stamp duty. Stamp duty is payable by the purchaser and is payable on the higher of the consideration and the market value of the shares or assets being acquired. The rate of stamp duty payable on transfers of shares is 1 per cent and on the transfer of non-residential property is 2 per cent. The 2 per cent rate generally applies to transfers of property that is non-residential property, however, certain exemptions and reliefs can apply. For example, the transfer of intellectual property and loan capital is broadly exempt from Irish stamp duty. In addition, relief is available for intra-group transfers or reorganisations.

In recent years, the paper stamping system was abolished and replaced with e-stamping which means that stamp duty returns and stamp duty payments must be made online through Irish Revenue Commissioner's Online Service (ROS). A full 'self-assessment' regime for stamp duty now applies which means that each stamp duty return must contain an assessment of the amount of stamp duty that, to the best of the purchaser's knowledge, information and belief, ought to be payable. Stamp duty due must be paid within 30 days of the date of execution of the transfer instrument. However, in practice, the Irish Revenue Commissioners allow a further period of 14 days in which to file an e-stamping return and pay the stamp duty.

The most significant tax issue for vendors is capital gains tax. Capital gains tax is generally payable by the vendor on gains arising on the disposal of assets (including shares) at a rate of 33 per cent. Irish tax-resident individuals and companies are subject to capital gains tax on gains arising on the disposal of worldwide assets. The above mentioned self-assessment regime also applies to capital gains tax. For disposals made between 1 January and 30 November, capital gains tax must be paid by 15 December in the same tax year and for disposals made between 1 December and 31 December, capital gains tax must be paid by 31 January in the following tax year. A tax return disclosing information regarding the disposal must be made to the Irish Revenue Commissioners by 31 October in the year following the year in which the disposal was made.

Another tax issue which can arise in the context of certain asset or share sales is withholding tax. Withholding tax can apply to the sale of Irish 'specified assets', which broadly means Irish land or buildings, shares deriving their value from Irish land or buildings and goodwill of a trade carried on in Ireland. In these circumstances, the purchaser must withhold 15 per cent of the gross purchase consideration and remit it to the Irish Revenue Commissioners. However, this withholding obligation can be avoided if the seller of the shares obtains a tax clearance certificate prior to the consideration being paid or delivered to the seller. The Irish Revenue Commissioners will issue a clearance certificate (called a CG50A) if the seller is resident in Ireland, no capital gains tax is payable in respect of the sale or the capital gains tax liability has been paid.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

In the context of an asset sale, the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the Transfer Regulations) apply in circumstances where there is a transfer of an undertaking, business or part of an undertaking or business from one employer to another employer as a result of a legal transfer or merger. The Transfer Regulations can also apply to an assignment or forfeiture of a lease, the outsourcing or insourcing of a service, and a change in service provider. Where the Transfer Regulations apply, the employees of the target company will transfer to the buyer on the same terms and conditions of employment (with the exception of certain pension rights), with their continuity of service intact.

A lapse in time between the transferor ceasing business and the transferee resuming the business does not necessarily prevent there being a transfer of the business for the purposes of the Transfer Regulations. In assessing whether or not the Transfer Regulations apply, consideration must be given to the type of business concerned, whether there has been a transfer of assets, whether any employees have been transferred, whether customers have transferred and to what extent the activity carried on pre- and post-transfer is similar.

The Transfer Regulations impose information, and in certain circumstances, consultation, obligations on both the transferor and the transferee, which must take place where reasonably practicable, not later than 30 days before the transfer is carried out, and otherwise in good time before the transfer is carried out. In practice, employee representatives of the affected employees must be informed of the reasons for the transfer, the legal, economic and social implications of the transfer for the employees, and also of any measures that are envisaged in relation to the employees. Where there are no employee representatives, the relevant employers must put in place a procedure whereby representatives can be appointed from the employees themselves. Therefore, time to appoint employee representatives should be factored into the timing of any transaction.

The transferee (buyer) will require considerable information from the transferor in order to enable it to adequately match the transferring employees' terms and conditions and incorporate them into

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Update and trends

After a successful year for M&A transactions in Ireland during 2015, deal making slowed in 2016, amid macroeconomic and political uncertainty.

However, an increase in M&A activity in the Irish market is expected for 2017. This increase is expected to be driven by the following factors:

- financial buyout transactions returning to volumes recorded in 2014 and 2015;
- further acquisitions of Irish technology companies by international investors; and
- resurgence in M&A activity by internationally focused Irish companies who were particularly active in 2014 and 2015.

According to published sources, the top three sectors expected to see the biggest increase in global M&A activity in 2017 are: Fintech, Digital Health/Biotech and the Internet of Things. A number of key multinational companies in these sectors operate out of and through Ireland.

In 2016, Ireland's economic growth (4–5 per cent) was one of the highest recorded in the European Union. The European Commission forecasts that Ireland will remain one of the fastest growing economies in Europe in 2017, predicting a growth rate of 3.6 per cent GDP. Along with positive growth forecasts, Ireland also has a number of strong performing sectors that are expected to continue to attract dealmakers both internationally and domestically such as TMT, PMB, Industrials and Financial Services.

Ireland is also one of the most targeted countries for US investment, valued at approximately US$434 billion. In the first nine months of 2016, US investment in Ireland rose by 6.8 per cent from the same period in 2015, to in excess of €31 billion.

The Companies Act became operative on 1 June 2015. It consolidated the existing Irish Companies Acts and many of the related statutory instruments into one single statue while concurrently introducing significant reforms to Irish company law. The Companies Act runs to over 1400 sections and is the largest substantive statute in the history of the Irish state. The Companies Act introduced many key innovations, including new domestic procedures to merge and divide private companies for the first time, and a simplified form of private company limited by shares.

The transitional period under the Companies Act expired on 30 November 2016 meaning that private limited companies that had not undergone a prescribed conversion process by that date automatically defaulted to the new model company type on 1 December 2016. The Companies Act is in the process of being amended by the Companies (Accounting) Bill 2016 (Accounting Bill), which is expected to be signed into law in early 2017. The main purpose of the Accounting Bill is to transpose EU Accounting Directive 2013/34/EU into Irish law; it also introduces a new concept of 'micro company' into Irish law with relaxed accounting and disclosure obligations.

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 came into operation on 15 November 2016 meaning that most Irish companies must gather and maintain information on individuals described as their ultimate beneficial owner. Ireland acted early to implement these measures mandated by the Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Fourth EU Anti-Money Laundering Directive). Each EU member state must establish a national beneficial ownership register. It is likely that, when the remaining provisions of the Fourth EU Anti-Money Laundering Directive are transposed into Irish law later in 2017, the national beneficial ownership register will be publicly accessible.

Three related pieces of legislation came into force on 17 June 2016, reforming the law on the conduct of audits and the regulation of auditors: the EU Audit Regulation (Regulation (EU) No 537/2014) applicable only to 'public-interest entities', EU Audit Directive (Directive 2014/56/EU) applicable to all statutory audits and the Irish Audit Regulations (European Union (Statutory Audits) (Directive 2006/43/EC, as amended by Directive 2014/56/EU and Regulation (EU) No. 537/2014) Regulations 2016), some parts applicable to public-interest entities only and some parts of general application. The new measures impact public-interest entities most by reforming the auditor selection and appointment process, curtailing non-audit services that the auditor can provide and introducing mandatory auditor rotation for those entities. The General Scheme of the Companies (Statutory Audits) Bill 2017 was published in February 2017. When enacted, this statute will further transpose the EU statutory audits legislation above and will repeal the Irish implementing regulations, moving the relevant provisions to a new Part of the Companies Act.

its workforce. Under the Employees (Provision of Information and Consultation) Act 2006, a transferor is required to notify a transferee of all the rights and obligations arising from a contract of employment existing on the date of transfer which will be transferred to the transferee, on receipt of a written notice from the transferee to the transferor setting out what information the transferee believes may be in the possession of the transferor and requesting same.

Furthermore, where the Transfer Regulations apply, it is not permissible for the new employer (the transferee) to vary the terms and conditions of the transferred employees where the reason for the variation is the transfer itself. The Transfer Regulations also prohibit the dismissal of an employee where the grounds for the dismissal are the transfer itself, unless the employee is dismissed for 'economic, technical or organisational reasons which entail changes in the workforce'. However, this defence is generally only available to the transferee. This makes it difficult for employers to implement changes before the sale of their business to make the business more attractive to prospective purchasers.

Unlike an acquisition of assets, a public or private acquisition of shares will not generally trigger a duty to inform and consult employee representatives or the automatic transfer of contracts of employment under the Transfer Regulations. Employees will remain employed by the target company and such a transaction will not generally affect the terms of employment of the employees of the target company. In certain circumstances, employees will have negotiated a change of control clause in their contract that may grant additional rights (for example, the right to resign without giving the statutory notice period or the right to be paid a severance sum). In addition, there may be broader obligations to inform and consult with trade unions or other employee representatives bodies (including any works councils that may exist) about a proposed takeover, perhaps under the terms of any separate information and consultation agreement, collective agreement, agreement with a works council or with any other employee representative body. In any event, best practice would be to keep employees informed of the transaction so as to avoid employee relations issues.

Further, subsequent business restructuring or rationalisation measures could trigger a requirement for the relevant employing entity to make redundancies, in turn possible triggering collective redundancy consultation obligations under the Protection of Employment Act 1977, as amended (the Collective Redundancies Legislation), and exposure to potential liability for employment-related claims, including unfair dismissal, discriminatory dismissal, etc. Failure to comply with the appropriate notification and consultation obligations under the Collective Redundancies Legislation (where applicable) may result in a claim against the employer by any one of the employees where an Adjudication Officer of the Workplace Relations Commission can award compensation of up to four weeks' gross remuneration per employee. Criminal sanctions may also be imposed on an employer for failure to comply with the provisions of the Collective Redundancies Legislation, which include a potential fine of up to €250,000 where collective redundancies are effected by an employer before the expiry of the 30-day period.

Under the Cross-Border Mergers Regulations, an employee's rights and obligations arising from his contract of employment will transfer to the successor company. The Cross-Border Merger Regulations also specifically protect 'employee participation rights' if a system for such employee participation currently exists in any of the merging companies.

In a public offer governed by the Irish Takeover Rules, a bidder is obliged in its offer document to state its strategic plans for the target company and their likely repercussions on employment and on the locations of the target's places of business, together with its intentions with regard to safeguarding the employment of the employees and management of the target and of its subsidiaries (including any material change in the conditions of employment).

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Simultaneously with the dispatch of the offer document, both the bidder and the target must make the offer document readily available to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

The board of the target company is required to state in its response circular its opinion on: the effects of implementation of the bid on all the target's interests including, specifically, employment; the bidder's strategic plans for the target and their likely repercussions on employment and on the locations of the target's places of business, as set out in the offer document; and the board's reasons for forming its opinion.

The response circular, to the extent that it is not incorporated in the offer document, must be made available to the target's employee representatives or, where there are no such representatives, to the employees themselves. Provided it is received in good time before the dispatch of the circular, the target board must append to the response circular any opinion that it receives from the target company's employee representatives on the effects of the offer on employment.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Any buyer of a target company (or assets of a target company) that is in receivership or liquidation will need to satisfy itself that the receiver or liquidator (as appropriate) has been validly appointed.

An advantage of structuring an acquisition involving an insolvent target company is that a buyer can 'pick and choose' assets it wishes to acquire, by means of an asset purchase, and can ensure that it will only inherit the liabilities it has decided to take over. The buyer will need to ensure that it receives good title to the assets, free from any third party interests. The buyer should also consider provisions in Irish insolvency law that may allow a court (on the application of a receiver or liquidator) to set aside transactions at an undervalue and preferences granted to creditors within certain periods before the onset of insolvency.

In a share purchase involving a company in liquidation, the buyer should ensure that it has performed detailed due diligence of the target to be aware of any potential liabilities and consider deferring parts of the consideration in the event of certain liabilities arising. This is particularly important as a receiver or liquidator will be reluctant to give any warranties and if any are provided they are likely to be limited in nature.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

When considering a business combination, purchasers should consider potential liabilities arising from non-compliance with the Irish, anti-corruption and bribery regimes and the sanctions which may result.

Anti-corruption legislation in Ireland generally prohibits bribery of both public officials and private individuals committed in Ireland and, in certain circumstances (where the donor has a connection with Ireland), committed abroad. In contrast with other jurisdictions, the offences provided for under Irish legislation do not generally distinguish between the bribery of persons working in a public or private body with limited exceptions (for example, the presumption of corruption only applies to public officials).

The primary legislation governing corruption and bribery are as follows:

- the Public Bodies Corrupt Practices Act 1889, as amended by the Prevention of Corruption Act 1916 and the Ethics in Public Office Act 1995 (the Public Bodies Act); and
- the Prevention of Corruption Act 1906, as amended by the Prevention of Corruption (Amendment) Act 2001 and the Prevention of Corruption (Amendment) Act 2010 (the Prevention of Corruption Act).

The offences under the Public Bodies Act deal with corruption in Irish public office and apply in situations where a corrupt payment is being made to, or for the benefit of, an office-holder, their special adviser, a director, or an employee of an Irish public body and a presumption of corruption can be applied to certain offences under this regime.

The Prevention of Corruption Act prohibits the following three offences that apply both in respect of public and private bribery:

- corruptly accepting a gift, consideration or advantage;
- corruptly giving a gift, consideration or advantage; and
- making a false statement.

A company can itself be found liable under common law for the criminal acts carried out by its officers and employees by way of vicarious liability. Vicarious liability deems the company liable for the acts of its employees, but those acts remain the acts of the employees and not of the company. The company can also be directly liable where crimes of the company's controlling officers are viewed as those of the company. This 'identification' doctrine has been accepted by the Irish courts in a civil context, although there are no reported decisions of the Irish courts in a criminal context.

Irish anti-bribery law does not provide for the prosecution of foreign companies for bribery outside the Irish state. The Prevention of Corruption Act is based on the concept of territoriality – acts committed outside Ireland can only be prosecuted, if certain connections to Ireland can be shown, such as the offence having involved the bribery of an Irish official, or the person carrying out the bribe being an Irish citizen or company.

Under the Prevention of Corruption Act, an officer of a company that commits an offence under the legislation will also be guilty of an offence, if the offence is proved to have been committed with the consent, connivance or approval of the officer, or is attributable to the neglect of the company's officers. However, to date, there are currently no recorded prosecutions of companies or their officers under Irish anti-corruption legislation.

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Depending on the nature of the transaction, a successor entity can be held liable for a prior offence committed by the target entity of bribery of foreign officials. For instance, where the transaction is by way of a share purchase, the successor entity will be liable. If the transaction is structured by way of asset purchase the successor entity can avoid taking on any liabilities of the target entity, such as potential or existing legal actions arising from an alleged breach of bribery laws.

There are a number of criminal and civil sanctions open to companies if found guilty of an offence under Irish anti-bribery and anti-corruption law.

Under the Prevention of Corruption Act, a person or business guilty of either a corruption offence or the discrete offence of corruption in office, is liable on summary conviction to a minor fine or imprisonment for a term not exceeding 12 months. A person convicted on indictment is liable to an unlimited fine or imprisonment for a term not exceeding 10 years or both.

On summary conviction for an offence under the Public Bodies Act, a person or business may be liable to a minor fine or imprisonment for up to 12 months, or both. On indictment, an individual may be liable to a substantial fine or imprisonment for up to seven years, or both.

There are restrictions on tendering for public contracts at both Irish and EU level following a conviction for an offence under anti-bribery or anti-corruption law. Where a breach of Irish bribery law is committed by a company in connection with a project funded by the World Bank and other international financial institutions, such companies may be debarred from bidding on contracts funded by the World Bank, International Monetary Fund and other international financial institutions, and publicly named.

The Criminal Justice (Corruption) Bill has been on the Irish legislative agenda for a number of years, having been first published in 2012. It has not yet been brought into law. The draft scheme proposes to repeal numerous pieces of anti-corruption legislation in Ireland and replace them with one consolidated piece of legislation. Some features which will be of interest to businesses considering combinations include the following:

- Companies will also be liable for corruption offences of their employees, agents, subsidiaries, officers, secretaries, managers and directors, where there is an intention by those persons to obtain or retain business for the company. This will make it easier for companies to be prosecuted for corruption.
- It will be a defence for a company to be able to show that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

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Italy

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1 Types of transaction

How may businesses combine?

Under Italian law, there are the following types of transaction:
- purchase of quotas or shares, respectively, in the case of a limited liability company or in the case of a joint-stock company;
- public offering;
- transfer of a going concern or part of a going concern;
- merger; and
- demerger.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The most important law regulating business combinations is the Civil Code (ICC), adopted by Royal Decree No. 261 of 16 March 1942, as further amended over the years.

Other than the ICC, there are various laws and regulations that apply to business combinations. In particular, the most important are the following:
- Legislative Decree No. 58 of 24 February 1998, the Italian Financial Act (TUF), implemented also with regulations issued by Consob (the Italian authority responsible for regulating the Italian securities market) and by the Bank of Italy;
- the most important of the above-mentioned regulations issued by Consob, with reference to relevant transactions, is Consob Regulation No. 11971 of 14 May 1999 as further amended over the years;
- Law No. 287 of 10 October 1990, on the protection of competition and the market (the Antitrust Law);
- Law No. 300 of 20 May 1970, on the protection of employees (the Workers Statute); and
- Royal Decree No. 267 of 16 March 1942, on insolvency proceedings and bankruptcy (the Bankruptcy Law).

Furthermore, EU laws and regulations may be applied to relevant transactions, if executed between companies of two or more EU countries.

3 Governing law

What law typically governs the transaction agreements?

As regards the purchase of quotas or the purchase of shares, as well as the transfer of a going concern or part thereof, usually these kinds of transactions are governed by an agreement between the seller and the purchaser, to be executed pursuant to the provisions of the ICC and the laws mentioned above, where applicable. Quotas are freely transferable, unless the articles of association provide for particular limitations, such as pre-emption rights in favour of the non-selling quota-holders, or the subordination of the transfer to the agreement of the corporate bodies. Their transfer must be certified by a notary public and the transfer filed at the competent Registry of Enterprises.

Also as regards shares, the articles of association may set limitations on the right to transfer them. The deed transferring the shares must be executed before a notary public, who shall then endorse the relevant share certificates.

The ICC also provides that agreements for the transfer of a going concern or part of it must be in writing and must be filed at the Registry of Enterprises. It is, however, now possible to transfer quotas by an agreement undersigned with the digital signatures of the contracting parties which is then filed by an authorised intermediary at the Registry of Enterprises.

Public offerings are governed by article 101-bis and following of the TUF and the Consob Regulations, which define a purchase or exchange public offering as one addressed to more than 150 subjects and having a securities value amounting to at least €5 million.

As regards mergers and demergers, the most important rules are contained in the ICC. Article 2501 of the ICC provides that mergers can be effected by establishing a new company or by the absorption of one or more other companies into another company. The same provisions are applicable to both these cases. However, particular rules apply in the case of leveraged buyout operations, namely mergers in which one of the companies has contracted debts to purchase the other company, when as an effect of the merger the assets of such latter company represent the general security for or the source of repayment of said debts, as well as in the case of absorption of wholly owned companies and the absorption of 90 per cent-owned companies.

In the case of demergers, a company transfers all of its assets and liabilities to more than one company, pre-existing or newly incorporated, or part of its assets and liabilities (in the latter case even to only one company) and the related shares or quotas to their shareholders or quota-holders. Some of the provisions concerning mergers are applicable to demergers, with the necessary adjustments.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The purchase of shares and quotas as well as the transfer of a going concern or of part of it must be filed at the Registry of Enterprises.

The decision to launch a public offering, as well as the arising of the duty to do so, shall be promptly communicated to Consob and to the target company, together with the offering document, and a form to be used for accepting the offer. After Consob's approval of the offering document, the company shall promptly communicate Consob's approval to the market and then publish the offering document on websites or in newspapers. Furthermore, Consob regulations provides for certain formalities regarding the offering, and the price per share and its communication.

In the case of mergers and demergers, the project, the financial statements for the previous three financial years of the companies participating in the operation and the merger or demerger balance sheet of the companies shall remain deposited at the companies' registered offices for at least 30 days before the approval of the operation by the companies' bodies. During this term, the shareholders of the companies may review these documents and obtain a copy of them.

The resolution approving the merger or demerger must then be filed at the competent Registry of Enterprises along with the above-mentioned documents. The operation is effective only after 60 days have elapsed from the last filing, unless the creditors consent to the

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merger or demerger, or the creditors who do not consent are paid the amount due to them, or if a sum equal to the amount of their debts is deposited at a bank, or if the companies participating in the merger or demerger are audited by the same audit firm, it states that financial and asset situation of the companies does not require any guarantee to protect their creditors.

In the case of a concentration that meets certain turnover thresholds, it must be notified to the Antitrust Authority. Concentrations are defined as cases in which:

- two or more companies merge; or
- one or more subjects controlling at least one company or one or more companies acquire, by purchasing participations or assets or by means of an agreement or otherwise, direct or indirect control of the whole or part of one or more companies, or in case two or more companies proceed by a common enterprise, by means of incorporating a new company.

Pursuant to article 16 of the Italian Antitrust Law, a concentration must be notified to the Antitrust Authority if:

- the aggregate turnover of the participating companies amounts to over €495 million; and
- the total turnover of the target company, realised at national level, amounts to over €50 million.

These thresholds are revised annually (the last revision occurred on 14 March 2016) to take into account increases in the GDP deflator index. The updated thresholds will be published in the Competition Authority's Bulletin once this increase in index is announced officially.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

As regards the transfer of shares, quotas, a going concern or a part of it, there are no mandatory rules on information that must be disclosed for the execution of these agreements. However, article 1337 of the ICC contains a duty of the parties to act in good faith during the negotiations for the execution of any kind of agreement. The courts have held that one of the duties covered by this good faith principle is the duty to inform the other party of all the elements necessary to form an opinion on the agreement.

As regards public offerings, the communication to Consob shall indicate that the request for authorisation to purchase shares has been submitted to the authorities at the same time, as well as that the competent bodies have resolved on the issue of possible financial instruments to offer as consideration. The most important elements of the offering, such as the related guarantees, the participations held or purchasable by the offering company or other subjects acting jointly with it and the names of eventual consultants must also be communicated to Consob. The offering document shall contain the following information:

- any data useful for appraising the offer and an evaluation on the offering by the directors of the company, indicating the majorities adopting the resolution as well as dissenting directors, if any;
- the eventual decision to call the shareholders' meeting in order to authorise acts or operations that may affect the offering;
- updated information on the direct or indirect ownership of the company's shares or of its affiliates' shares of the company itself or the directors, as well as on the shareholders' agreements, if any, with reference to the company's shares;
- updated information on the directors' and the general managers' remuneration;
- relevant facts not indicated in the most recent financial statements or in the last published interim accounts; and
- recent developments and forecasts.

As regards mergers and demergers, please see question 4. With particular reference to merger and demerger projects, they must contain the following information:

- the type and the name of the company, the registered offices of the companies participating in the merger or demerger;
- the articles of association of the new company resulting from the merger or demerger or of the absorbing or beneficiary company with the amendments, if any, deriving from the merger or demerger;
- the exchange ratio of the shares or quotas, as well as the cash adjustments, if any;
- the procedure for the allocation of the shares or quotas of the company resulting from the merger or demerger or of the absorbing or beneficiary company;
- the date from which such shares or quotas participate in the profits;
- the date as of which the operations of the companies participating in the merger or demerger are charged to the accounts of the company resulting from the merger or demerger or of the absorbing or beneficiary company;
- the treatment, if any, reserved to particular categories of shareholders and to the holders of securities different from shares;
- the particular benefits, if any, proposed in favour of the subject entrusted with the management of the companies participating in the merger or demerger; and
- for demergers only, an accurate description if the asset and liability items to be transferred to each of the beneficiary companies together with the cash adjustment, if any.

We would note that under Legislative Decree No. 123/2012, the merger or demerger project may be published on the company's website as an alternative to the filing with the Registry of Enterprises. Furthermore, the same Decree has introduced the possibility of omitting the filing of some documents if agreed by all the shareholders and owners of other financial instruments.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Notification requirements for substantial shareholdings are provided for listed companies.

In particular, anyone who participates in the share capital of a listed company shall inform the company and Consob:

- should the threshold of 3 per cent be exceeded if the company is not a SME (if the company is a SME the threshold is 5 per cent) (according to the definition contained under article 1, §1 lett. w-quater 1) of the Italian Financial Act a SME is a listed small or medium enterprise, which, on the basis of its approved financial statements for the last financial year, also prior to its admission for trading, has turnover lower than €300 million or average market capitalisation in the last calendar year lower than €500 million. Issuers of listed shares which have exceeded both the aforesaid thresholds for three consecutive financial, or calendar (as the case may be), years are not considered SMEs);
- should the thresholds of 5, 10, 15, 20, 25, 30, 50, 66.6 and 90 per cent be reached or exceeded; or
- should the investment falls below the above indicated thresholds.

Such communication must also be made should the thresholds be reached or exceeded, or the holding falls below them, as a result of changes in the share capital.

This communication should be given within four business days of the date of the transaction leading to the obligation (regardless of the date on which it is executed), or from the date on which the party obliged to make a disclosure has been informed of events that involve changes in the share capital that will cause the reaching or exceeding of a relevant threshold.

Moreover, whoever, following acquisitions or increased voting rights, holds a stake greater than the 30 per cent threshold or holds more than 30 per cent of the voting rights of the same, shall promote a takeover bid addressed to all security holders for all the securities admitted for trading on a regulated market in their possession.

In companies other than SMEs, the offer can be promoted also by anyone who, subsequent to acquisitions, comes to hold a stake greater than the threshold of 25 per cent, where there is no other shareholder with a higher stake.

A bidder coming into possession, following a global takeover bid, of a holding of at least 95 per cent of the capital represented by securities in an Italian listed company shall have the right to squeeze out the

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remaining securities within three months of expiry of the time limit for bid acceptance, if the intention to exercise said right was declared in the takeover bid document.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors have a general duty to perform their office in compliance with the law and the company's by-laws, acting with due diligence. In the event of a breach of these duties, directors can be liable towards the company, as well as towards the shareholders or quota-holders.

Furthermore, a director must inform other directors and the board of statutory auditors of any interest he or she has on his or her own behalf or on behalf of third parties in a transaction of the company, specifying its nature, terms, origin and relevance; in the case of a managing director, he or she must abstain from the transaction, informing the board of it or reporting it to the shareholders' meeting, in the case of a sole director. In this case, the board of directors must adequately justify the reasons and the advantages for the company of such transaction.

In the event of non-compliance with the above or if the resolutions of the board of directors are adopted with the determining vote of the director in a conflict of interest situation, the resolution, if it could cause detriment to the company, may be challenged by the directors and by the board of statutory auditors within 90 days of the date of its adoption. Any person who consented with his or her vote to the resolution, if the information requirements mentioned above have been complied with, cannot challenge it. In any event, rights acquired by third parties in good faith on the basis of acts performed in implementation of the resolution are preserved.

The directors are liable for damages to the company for their actions or omissions and also for the damage that may be caused to the company from the use for their own benefit or that of third parties of data, information or business opportunities obtained in connection with their appointment.

Under article 104 TUF, in the event of public offerings, unless express authorisation from the shareholders' meeting is obtained, the company shall not fight the execution of the public offering. In any case, the directors and the general manager are liable for any act performed.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

An extraordinary shareholders' meeting (in the case of an SpA) and a quota-holders' meeting to be held before a notary public (in the case of an Srl) is competent to resolve on any transaction that may involve amendments in the company's by-laws (in particular mergers and demergers). The company's by-laws, however, may reserve to shareholders' or quota-holders' meetings further items and in Srls, the management of the company may be granted to the quota-holders.

A right of withdrawal is granted to any shareholder who has not consented to the amendment of the company's corporate purpose, to any operation that causes any amendment in the company's by-laws or any relevant amendment to the shareholders' rights.

As regards the appraisal rights, article 2501-sexies ICC provides that for mergers and demergers, one or more experts for each company participating in the transaction draw up a report on the adequacy of the share or quota exchange ratio, indicating the methods adopted to establish the proposed exchange ratio and the values resulting from the application of each method and the difficulties in valuation, if any. Furthermore, the report shall contain an opinion on the adequacy of the methods followed to establish the exchange ratio and the relevant importance attributed to each of them in establishing the value adopted.

In any other transaction, shareholders may make their own appraisal.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

A public offering is considered hostile when the directors do not agree to its execution. In any event, they are liable for any acts and operations performed in this regard (see questions 5 and 7).

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees may be provided by the parties in a letter of intent or in a preliminary agreement. The party who breaks off the negotiations without any reasonable cause may be considered liable under article 1337 of the ICC, which provides that the parties have a duty to conduct negotiations in good faith (see question 5).

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Particular regulations may be applied to banks, financial intermediaries and insurance companies, as well as anti-Mafia regulations that are applicable to all companies, in particular to those utilising public works or service tenders or public aid, or carrying out business in locations with a particularly high risk of Mafia infiltration.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Under Italian law any condition may be inserted in a business transaction.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Typically, if the buyer needs to obtain financing in order to execute a transaction, this is provided as a condition for the transaction or the financing agreement is executed at the same time as the transaction agreement.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The only possibility of squeeze-out is provided by article 111 TUF, under which a bidder coming into possession, following a global takeover bid, of a holding of at least 95 per cent of the capital represented by securities in an Italian listed company shall have the right to squeeze out remaining securities within three months of the expiry of the time limit for bid acceptance, if the intention to exercise said right was declared in the takeover bid document. Where more than one class of securities is issued, the right to squeeze out exists only for classes of securities for which the 95 per cent threshold is reached. The transfer shall be effective from the time when the notice of the deposit of the consideration with a bank is given to the issuing company, which shall make the consequent entries in the shareholders' register.

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15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

The same rules provided for national transactions are applied to cross-border transactions. However, EU law shall apply with reference to antitrust matters, as well as EU Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations.

From a corporate tax standpoint, mergers, divisions, partial divisions, transfers of assets and exchanges of shares involving an Italian company and a company of another EU member state, have to be considered fiscally neutral according to the EU Merger Directive (Council Directive 2009/133/EC of 19 October 2009) (see question 18).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

With reference to the notice to be given to the Antitrust Authority in the case of a concentration exceeding the above-mentioned thresholds, within 30 days of receipt of the notice, the Antitrust Authority may start an inquiry in order to ascertain whether the concentration that the company wishes to put in place is forbidden. On the other hand, if the Antitrust Authority does not consider it necessary to start an inquiry, it communicates this to the companies participating in the concentration within 30 days of receipt of the notice. However, the Antitrust Authority may start an inquiry after this 30-day term has expired only if the information provided by the companies is shown to be wrong, incomplete or false.

As regards mergers and demergers, see question 4.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

In specific circumstances (mainly concerning the industry and nature of the business carried out by the companies involved in the transaction), Italian mergers and acquisitions may be subject to the supervision or authorisation of other Italian authorities, such as: the Italian Competition Authority; the Italian Insurance Regulatory Authority; the Bank of Italy, which supervises the activities of banks and financial intermediaries; the Consob, which supervises the activities of investment companies; the Italian Electronic Communications and Media Authority; and the European Central Bank.

18 Tax issues

What are the basic tax issues involved in business combinations?

In the case of the purchase of shares or quotas, the seller will be subject to standard corporate tax (IRES) at a rate of 24 per cent, while in this kind of transaction regional income tax (IRAP) is not applied. The seller may benefit from a substantial exemption rule, under which it will not pay any tax on 95 per cent of the capital gain at the time of the sale of the shares or quotas, while the remaining 5 per cent is subject to full IRES, if the following conditions are met:

- the participation has been held uninterruptedly for more than 12 months, starting from the most recent date of transfer or acquisition of shares or quotas (according to the LIFO method);
- the participation has been listed among the financial fixed assets in the first financial statements closed during the period of possession;
- the participating company is resident in a state or a territory that does not enjoy a privileged tax treatment (the 'blacklist'); and
- the participating company carries out a commercial business.

The requirements under the final two points above must exist uninterruptedly at the time of the sale, at least at the beginning of the third tax period prior to the same sale, or where the participated company has been incorporated for less than three years, for the shorter period running between the deed of incorporation and the sale of the holding.

Lastly, such transactions are not subject to VAT, and a fixed registration tax amounting to €200 is due.

On 1 March 2013, the 'Tobin Tax' was introduced in Italy. In certain circumstances, the purchase of shares is subject to a 0.2 per cent tax (the rate is reduced to 0.1 per cent if the transaction refers to a listed company).

In the case of purchase of a going concern or part of it, the seller will be subject to full IRES taxation (24 per cent) on the capital gain, while IRAP is not applied. The capital gain may, at the seller's option, be included in the taxable income for its full amount for the year in which it is realised or in equal instalments for the current and following fiscal years, not exceeding the fourth fiscal year, provided that the ongoing business has been held by the seller for at least three fiscal years.

The buyer is entitled to write down the difference between the price paid and the book value of the ongoing business acquired. If this value is considered as goodwill, it is depreciated for tax purposes over an 18-year period, notwithstanding the fact that the buyer is an enterprise that has adopted the IAS/IFRS (the International Accounting Standards or International Financial Report Standards which do not provide for the depreciation of the goodwill). In order to obtain a tax depreciation of such difference on assets, it must be demonstrated that the higher value is true and justifiable for statutory purposes. VAT is not applied on these kinds of transactions.

Furthermore, the purchase of a business is subject to a registration tax at the rate of 9 per cent for real properties and lands (15 per cent for agricultural land) and at the rate of 3 per cent for goodwill and other values. Said rate applies on the commercial value of the business sold, net of all liabilities resulting from statutory accounting records.

Moreover, a real estate transfer is subject to mortgage and cadastral taxes equal to the amount of €50 each. If the buyer and the seller do not estimate the value of each asset, the entire business is taxed applying the rate of the asset with the highest rate. In other words, if the business includes real estate, goodwill and other values, the tax rate of 9 per cent will be applicable. Please note that the aforesaid rates (9 per cent registration tax and €50 mortgage and cadastral taxes) have been subject to considerable changes (see Law Decree No. 104/2013) with effect from 1 January 2014. The taxable base is equal to the fair market value of the sold ongoing business.

It should be noted that the transfer of a going concern can also be performed by incorporating a new company to which the going concern transferred is contributed and the new company's shares are then sold to the purchaser. In fact, this mechanism of transferring a going concern is tax-neutral, while the sale of shares and quotas is subject to the taxation described above.

Mergers and demergers are neutral for income tax purposes and they are not subject to VAT. Transfer of a branch of business activity made by a company in exchange for shares of the receiving company is fiscally neutral from an income tax standpoint if certain conditions are met.

Moreover, it is not subject to VAT and it is subject to a registration tax of €200.

According to the EU Merger Directive, mergers, divisions, partial divisions, transfers of assets and exchanges of shares involving an Italian company and a company of another EU member state, have to be considered fiscally neutral from a corporate tax standpoint. More specifically, these corporate reorganisations cannot give rise to any taxation of capital gains in Italy calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes. Tax neutrality is allowed when the assets and liabilities of a branch of business involved in a cross-border merger (in which the foreign company absorbs the Italian one or in which the transferee company is an Italian company) or involved in a cross-border demerger (in which the foreign company is the receiving company) remain effectively connected with an Italian permanent establishment of the foreign receiving company.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Article 2112 of the ICC provides that in the event of a transfer of a going concern the relationship continues with the transferee and the employees maintain all rights deriving from it. The transferor and the transferee are jointly liable for all claims that the employee had at the time of the transfer. By the procedure set forth in articles 410 and

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Update and trends

Italy's M&A market grew significantly in 2015 with a positive trend that continued until the first half of 2016.

The second half of 2016 was characterised by a slower growth as compared to previous months, but the Italian market continues to have a strong appeal to foreign industrial investors. The sentiment and outlook for M&A market remains, substantially, very favourable.

It should also be noted that Italian companies represent an interesting investment opportunity not only in light of the strength of their brands, but also for the fact that many of them are facing problematic generational shifts, or need capital injections (and new management features) to support their expansion, or are in turnaround situations.

Also for the current year the main trend worth mentioning, in the negotiation of agreements for mergers and acquisitions, concerns warranty and indemnity insurance for transaction liability.

The adoption of this kind of insurance is spreading more and more, and increased in the past year, both in domestic and cross-border transactions.

Warranty and indemnity insurance provides protection against losses suffered by the buyer in the case of breach of the seller's warranties in an M&A contract.

Despite a thorough due diligence activity, unknown risks may remain, seriously affecting the value of the new company or the company acquired. Warranty insurance provides financial protection against this type of risk.

There are two kinds of warranty and indemnity policies.

Seller-side policy

A seller-side policy is constructed as third-party insurance. The policy-holder is the seller. By means of this policy the seller ensures that any compensation for damages suffered by the buyer in the event of the breach of the representations and warranties is covered.

This type of policy normally has a 'mirror structure' because its terms and conditions guaranteed, its ceiling and the period of coverage coincide with the representations and warranties, the amount of the contractual liability limit negotiated between the parties, and the period provided for in the purchase agreement.

In particular, the seller's representations and warranties are copied and rewritten in the policy, because they constitute the object of the insurance coverage. Even the definitions in the policy are the same as those in the acquisition or merger agreement.

In an acquisition agreement, this type of policy may have some advantages for the seller.

First of all, it can help the seller to negotiate a higher price for the target company. It can also avoid the use of *fidejussioni* (a type of personal guarantee), which are expensive, often hard to find and which transfer the risk to third parties. Furthermore, in a *fidejussione* contract, article 1950 of the ICC provides for the right of recourse of the guarantor against the principal debtor.

Instead, with an insurance policy, in case of losses the insurer has to indemnify the buyer, without any right of recourse against the seller.

Generally speaking the policy is usually 'tailor made' and based on the specific needs of the parties.

A possible negative effect of choosing warranties and indemnities insurance is the fact that the negotiation process may become more cumbersome as it will involve three parties and not just the buyer and the seller.

A second issue that may arise, concerns fraud on the part of the seller. In this respect article 1917 of the ICC states that the insurer is not obliged to indemnify the insured when the damages are caused by him intentionally.

Accordingly, the paradox would arise that in this case, the warranty and indemnity insurance would not cover the most serious case of breach (ie, when the seller fraudulently provides misleading representations and warranties).

Buyer-side policy

The buyer-side policy is constructed as a first party insurance (or insurance for damages).

The buyer is the policyholder who ensures that he has an extra layer of protection compared to that provided in the acquisition agreement, in the event of breach of warranty by the seller.

This kind of policy is normally selected when there are limited possibilities of taking legal action to recover damages against the seller. Unlike the seller-side policy, this one does not have the above-mentioned 'mirror structure' but normally guarantees higher coverage to buyers (ceiling, duration and conditions) compared with what is provided by the seller in the agreement. For example, it may provide for an extension of the coverage period after that negotiated in the agreement, or an higher ceiling than that warranted by the seller.

For this kind of policy an issue could be the relationship between the duration of the seller's representations and warranties and the period of the warranty and indemnity insurance coverage.

According to Supreme Court ruling No. 16963 of 24 July 2014, the representations and warranties constitute an ancillary performance, different from the case of warranties for defects that the seller must provide in a sale contract pursuant to article 1495 of the ICC. According to this article, the buyer loses the right to the warranty against defects when they are not reported by the seller within eight days of their discovery, and, in any event, within one year. The representations and warranties, instead, as they are another type of warranty, are not subject to these short terms, but to the 10-year ordinary limitation period, provided by article 2946 of the ICC.

The issue arises because, insurance companies normally use to provide coverage for up to a maximum of seven years, and not for up to the 10-year limitation period. Accordingly, there could be an uncovered three-year period.

Timing

Finally, it normally takes about three weeks for the insurance policy to be issued, but when the insurance company has been involved from the very beginning of the negotiations, it is possible for the policy to be executed on the day of signing or on the closing date.

411 of the Italian Code of Civil Procedure the employee may consent to the release of the transferor from the obligations deriving from the labour relationship.

The transferee is bound to apply the financial and regulatory treatment provided by the national, territorial and company collective bargaining agreement prevailing at the time of transfer, until termination, unless they are replaced by other collective agreements applicable to the enterprise of the transferee. The replacement occurs exclusively between collective agreements of the same level.

While the right to resign in accordance with the provisions on termination of employment remains unaffected, the transfer of a going concern does not per se represent a cause for termination. An employee whose employment conditions are substantially changed in the three-month period after the transfer of the business may resign, maintaining a right of indemnity.

For the purposes of article 2112 of the ICC, a 'transfer of going concern' is defined as any transaction that, as a consequence of an assignment, a merger or a demerger, causes a change of title of an organised economic activity, with or without profit, for the purpose of the production or exchange of goods or services, pre-existing to the transfer and that maintains in the transfer its identity, irrespective of the agreement or the resolution pursuant to which the transfer of the going concern is executed, including the usufruct or the lease of a going concern.

Furthermore, the above-mentioned rules shall also apply to the transfer of part of a going concern intended as an autonomous part of an organised economic activity identified as such by the transferor and the transferee at the time of its transfer.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Under Italian law, bankruptcy is a compulsory liquidation procedure to be started should the company be insolvent. In order to proceed with it, the receiver appointed by the court may transfer individual assets or a going concern of the company or part of it, as well as lease a going concern or part of it.

In this case, sales may also be executed through competitive procedures by means of experts, on the basis of appraisals, of which adequate publicity is ensured to the interested subjects.

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Furthermore, the Bankruptcy Law provides for other proceedings if the company is not insolvent but is in a crisis state. First, the company may propose a composition among its creditors, a plan that has as its purpose to lead to the continuation of the company's business and that may provide for the following:

- debt restructuring and credit satisfaction, in any form, also by means of transfer of assets, transfers of shares or quotas or any kind of extraordinary transactions;
- attributing the activities of the company to an assumptor, which may even be constituted by the company's creditors;
- splitting of the creditors into different classes; and
- different treatment for creditors belonging to different classes.

However, this procedure may also lead to the company's liquidation.

Lastly, the Bankruptcy Law also provides for debt restructuring that may be voluntarily requested by the company, namely an agreement executed by the company and its creditors representing at least 60 per cent of the credit amount in order to ensure regular payment. The content of such an agreement is not provided by law and, therefore, it can include any kind of sale of assets, shares, quotas or ongoing business.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Article 317 of the Italian Criminal Code punishes with imprisonment a public officer who, abusing his or her office or authority, forces someone to unjustly give a promise to him or her or to a third person money or any other utilities.

Furthermore, pursuant to articles 318 to 321 and 322-bis of the Italian Criminal Code, corruption is sanctioned as a criminal offence and punished with imprisonment.

Furthermore, if the subject committing these criminal offences is a person serving the company as representative, or who holds an administrative or senior executive position within the body or an organisational unit of the same, and being financially and functionally independent, as well as by a person actually exercising the management and control of the same or by persons under the direction or supervision of one of the persons mentioned above, the company may be held liable under Legislative Decree No. 231/2001. If the company is considered liable, the penalties that may be applied are the following:

- fines;
- disqualification: this may be disqualification from exercising any activity; suspension or cancellation of authorisations, licences or concessions serving to commit the unlawful act; prohibition on entering into contracts with public bodies, unless done so in order to obtain a public service; exclusion from benefits, loans, contributions or subsidies and possible cancellation of those already granted; prohibition on advertising goods or services;
- seizure; and
- publication of the decision.

This liability may be waived if the company demonstrates that:

- it has adopted an organisational and management model capable of preventing offences provided in the decree;
- the task of overseeing compliance with the model and updating the same has been delegated to a body vested with powers to act of its own initiative and conduct monitoring;
- the persons committed the offence by fraudulently circumventing the organisational and management model; or
- there has been no omission or insufficient oversight on the part of the monitoring body.

Therefore, companies normally adopt such organisational models and related internal policies, in which anti-corruption measures can also be provided.

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Japan

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1 Types of transaction

How may businesses combine?

The following forms of business combinations are available under Japanese law:
- share acquisition;
- business transfer;
- merger;
- share exchange;
- share transfer; and
- corporate split.

A share acquisition and a business transfer are straightforward sales and purchases of shares or a business of a company between the seller and the purchaser.

A merger is a transaction between two or more companies whereby those companies merge with each other such that one surviving company remains (absorption type merger) or one new company is formed (incorporation type merger). In a merger, in general, shares of the merged company are exchanged for the shares of the surviving company or the newly formed company.

A share exchange is a transaction between two companies whereby one company becomes the 100 per cent shareholder of the other company. In a share exchange, in general, shares of the acquired company are exchanged for the shares of the acquiring company, namely the new parent company.

A share transfer is a transaction whereby an existing company newly forms a parent company and becomes its wholly owned subsidiary, that is, the shares of the existing company are exchanged for the shares of a to-be-formed parent company. This allows an operating company to create and shift to a holding company governance structure. In addition, because two or more companies may jointly implement a 'share transfer' to create a holding company owning all the shares of those companies, a share transfer is often used as a means of business combination.

A corporate split is a transaction whereby one company splits out a segment of its business. The split-out business can be transferred to a company to be newly formed as a result of a corporate split (incorporation type split) or to an existing company (absorption type split). In general, shares of the company to which the split business is transferred are issued to the transferring company that splits out the business, or to the shareholders of such company.

Under the Company Law, not only stock companies, but other types of companies (for example, limited liability companies) may become parties to the above types of business combinations. However, because most M&A transactions in Japan occur between stock companies either as parties or as vehicles, the answers to the questions below also assume that only stock companies are involved, unless otherwise indicated.

In addition, the consideration that may be used for absorption-type mergers, share exchanges, or absorption-type splits has been expanded so that, in addition to shares of the acquiring or successor company noted above (for example, the surviving company in a merger, an acquiring company in a share exchange and a succeeding company in a corporate split), cash, bonds, stock options and other assets may be used as consideration in these business combination transactions.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The most important law governing business combinations is the Company Law (Law No. 86 of 2005, as amended).

In addition, the following laws and regulations are important:
- the Commercial Registration Law (Law No. 125 of 1963, as amended);
- the Law Concerning Prohibition on Private Monopoly and Preservation of Fair Competition (Law No. 54 of 1947, as amended) (the Anti-monopoly Law);
- the Financial Instruments and Exchange Law (Law No. 25 of 1948, as amended) (the FIE Law); and
- the Foreign Exchange and Foreign Trade Law (Law No. 228 of 1949, as amended) (the FEFT Law).

3 Governing law

What law typically governs the transaction agreements?

Mergers, share exchanges, share transfers and corporate splits are statutory arrangements provided for by the Company Law, which is a part of Japanese law. Therefore, the agreements or other documents for those transactions must satisfy the relevant requirements under Japanese law, and will be governed by Japanese law. Agreements for share acquisitions and business transfers may be governed by the laws of any jurisdiction selected by the parties; however, in the majority of cases, the agreements for those transactions are also governed by Japanese law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Anti-monopoly Law

Under the Anti-monopoly Law, subject to certain threshold requirements and exceptions, a company accepting a business transfer, a company implementing a merger or a corporate split, and companies jointly implementing share transfer must file a prior notification of such transaction with the Japan Fair Trade Commission, after which there is a 30-day waiting period.

Further, under the Anti-monopoly Law, subject to certain threshold requirements and exceptions, if a company increases its shareholding in another Japanese or foreign company with certain amount of sales in Japan, and the resulting shareholding ratio exceeds ownership thresholds of 20 per cent, or 50 per cent, such company must file a prior notification with the Japan Fair Trade Commission, after which there is a 30-day waiting period.

FEFT Law

Under the FEFT Law, a foreign investor may be required to file ex post facto reports with the competent ministers through the Bank of Japan when it acquires shares of a Japanese company (see question 15).

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FIE Law

The FIE Law contains certain disclosure obligations relevant to business combinations and the tender offer regulations, as well as insider trading regulations (which are important in practice but are not covered by this chapter).

Under the FIE Law, if a party acquires more than 5 per cent of the shares of a publicly traded company (namely, a company listed on a stock exchange or registered for trading over the counter), such party is required to file a large shareholding report within five business days of the acquisition. An increase or decrease of 1 per cent or more in the shareholding ratio of the acquirer will trigger an obligation to file an amendment report (see question 6). Also, the FIE Law requires prior submission of a securities registration statement in the event of a merger, share exchange, share transfer or corporate split where, in addition to the other requirements, the acquired company (the dissolving company in a merger, the company becoming a subsidiary in a share exchange and a share transfer, or a splitting company in a corporate split) of such business combination is subject to continuous disclosure requirements under the FIE Law, and the securities to be distributed as consideration are not subject to disclosure requirements under the FIE Law.

More importantly in the context of M&A transactions, tender offers are governed by the FIE Law. Under the FIE Law, a tender offer is mandatory for a purchase or purchases of shares of publicly traded companies or other companies that are otherwise subject to continuous disclosure requirements under the FIE Law, if, inter alia: after such purchases from more than 10 sellers via 'off-market' transactions within a period of 61 days or less, the purchaser's shareholding is in excess of 5 per cent; after such purchases via off-market transactions or certain trade sale type market transactions, the purchaser's shareholding is in excess of one-third; or after a combination of off-market transactions or certain trade sale-type market transactions for shares in excess of 5 per cent in itself, and other acquisitions of shares (including subscription of newly issued shares), being implemented within a three-month period, the purchaser's shareholding increases by more than 10 per cent and is in excess of one-third in total. For the purpose of 'purchaser's' ownership percentage calculation, detailed rules are provided in the FIE Law, and shares owned by statutorily defined 'affiliates' are aggregated.

Where a tender offer is required, the purchaser must, at the time of commencing the tender offer, file a tender offer registration statement with the local financial bureau and make a public announcement, both in accordance with the applicable disclosure requirements under the FIE Law. The information to be disclosed includes the purchase price, the tender offer period (from 20 to 60 business days), the conditions to the tender offer, the outline of the business plan after the completion of the tender offer, the outline of purchaser, etc. Further, it should be noted that, if the purchaser intends to purchase two-thirds or more of the shares of the target company, such a purchaser is required to offer to purchase all the shares tendered.

Stamp duty and other governmental fees

No stamp duty or other governmental fee is imposed on a share acquisition agreement, share exchange agreement, or share transfer plan. A stamp duty of ¥40,000 is imposed on a merger agreement and a corporate split agreement (or corporate split plan). Stamp duty on a business transfer agreement varies depending on the price of the business being transferred; with the maximum amount being ¥600,000. A business combination often involves amendments to the company's commercial registration, which are subject to various registration taxes in amounts depending on the matters affected. There are no governmental fees charged for a tender offer.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

There are four categories of major disclosure requirements. The first is a public announcement required by the rules of the relevant stock exchange. The second, third and fourth are the filing of an extraordinary report, the filing of a large shareholding report, and the filing of a securities registration statement under the FIE Law. Regarding the details of such 'large shareholding report', see question 6. All information disclosed by these three means will become public information. The items required to be disclosed include an outline of parties, the outline of transactions, the reason for the transaction and the future prospects, etc. The details of such required disclosures differ according to the type of business combination. In addition, in the case of a tender offer, the purchaser is required to make a public disclosure in the tender offer registration statement (see question 4).

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the FIE Law, a party that becomes a more than 5 per cent shareholder of a publicly traded company is required to file a large shareholding report. In the report, such party must disclose its identity, as well as the number of shares it owns, the share acquisition and disposition history over the past 60 days, the purpose of acquisition, any material agreement relating to the shares (such as a security agreement), any financing source for acquisition funding and the identities of other cooperating shareholders. An increase or decrease of 1 per cent or more in the shareholding ratio will trigger an obligation to file an amendment report. The requirements are not affected even if the company is a party to a business combination.

In addition, the FIE Law requires a direct or indirect parent company of publicly traded companies to submit a report on its status within three months after the end of its fiscal year, except where such parent company itself is subject to the continuous disclosure obligations under the FIE Law. The report must contain information concerning its major shareholders, officers, and financial results, and shall be made public.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under the Company Law, the directors of a company owe a fiduciary duty to the company. This duty must be distinguished from a duty to the shareholders as a matter of legal theory. The Company Law provides that the directors of a company must be liable to third parties (including shareholders and creditors) who suffer any damage due to wilful misconduct or gross negligence of such directors in the course of performance of their duties as directors.

Under Japanese law, duties of controlling shareholders are not recognised. However, the Company Law provides that if a materially unfair resolution is adopted at a general meeting of shareholders as a result of affirmative votes cast by one or more interested shareholders, such resolution may be cancelled by legal action, which can be initiated by any shareholder, director or corporate auditor, etc.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In the case where a parent company sells its subsidiary via share acquisition and the shares of such subsidiary are a substantial part of its assets (ie, the book value of the shares of the subsidiary to be sold exceeds one-fifth of the total assets of the parent company) such share acquisitions must be approved by a super majority resolution (which is the resolution adopted with an affirmative vote of at least two-thirds of the votes at a general meeting of shareholders, where the shareholders present at such meeting hold at least a majority (which resolution requirements and quorum requirements can be modified by the articles of incorporation to the extent permitted under the Company Law) of the relevant voting rights). For the other cases, no such shareholder approval rights exist in case of share acquisitions, except for some closed companies where the articles of incorporation of such companies so provide. However, as a matter of course, each shareholder has a choice not to sell such shareholder's shares.

Mergers, share exchanges, share transfers, corporate splits and business transfers (however, as for transferor, only in the case of

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transfer of all or a substantial part of its business to another company, or, as for transferee, acceptance of all the business of another company) must be approved by a super majority resolution. In small mergers, share exchanges and corporate splits below certain threshold requirements – as well as for shareholders' approval at a subsidiary in any of those business combinations, implemented with its 90 per cent or more parent company – this shareholders' approval is not required. Dissenting shareholders have appraisal rights (except for the shareholders of the acquired company in a small corporate split).

9 Hostile transactions

What are the special considerations for unsolicited transactions?

In Japan, the number of hostile transactions is gradually increasing, but the number of those that have been successful is still very small, partly owing to the negative image associated with hostile transactions in the market. Since 2005, a number of listed companies have adopted anti-hostile takeover plans ranging from 'poison pills' to simple declarations by management that it will take anti-hostile-takeover measures whenever a hostile takeover is launched that is not in accord with the best interests of the company and its shareholders, and in 2007, the Supreme Court rendered a decision upholding the validity of the anti-hostile takeover plans using poison pills. It should also be noted that while the purchaser is not able to conduct a due diligence investigation of the target in the case of a hostile takeover, the disclosure of publicly traded companies in Japan is sometimes not necessarily sufficient.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees and reverse break-up fees provided in the definitive agreements are generally enforceable in Japan, as long as the amount of the fee is reasonable in view of the costs and damage to the parties. If the amount of the break-up fee or the reverse break-up fee is unreasonably high, there is a possibility that a court might hold that the arrangement is against the public interest and declare it null and void.

To our knowledge, break-up fee arrangements have recently tended to be adopted more often than in the past, while reverse break-up fee arrangements have not yet been very popular in Japan. Break-up fee arrangements could also be viewed as a means to back away from the deal, should a more favourable opportunity be presented by a third-party bidder. In particular, these aspects of break-up fee arrangements may become important for publicly traded companies in the future.

Break-up fee arrangements for exclusive negotiation obligations contained in a letter of intent or memorandum of understanding are also generally enforceable but in practice are normally limited to the recovery of costs and expenses. It should be noted that there is a high-profile transaction case where the Japanese courts denied a request for injunctive relief based on a letter of intent with binding exclusive negotiation provisions by stating that monetary compensation should be sufficient.

In addition, the target company in an M&A transaction should generally avoid offering its assets as collateral to secure acquisition finance for the acquirer in view of the interests of minority shareholders unless and until the target company becomes 100 per cent owned by the acquirer as a result of the transaction.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Other than in the two cases mentioned in the question and possible intervention in cross-border transactions under the FEFT Law (which is based on national security as well as other concerns), there are no means for governmental agencies in Japan to influence or restrict the completion of business combinations. It should be noted, however, that in many cases business combinations require commercial registration with the competent legal affairs bureau. Parties wishing to implement atypical business combinations may encounter objections from the officials of the legal affairs bureau when registering such atypical business combinations and should therefore consult with the legal affairs bureau in advance.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Conditions to a tender offer are statutorily limited to the following: if the number of shares tendered is less than a specified minimum number, no purchase of shares will be made; if the number of shares tendered exceeds a specified maximum number (if such specified maximum number is set, it must be less than two-thirds), purchase of shares will be on a pro rata basis; and a tender offer can be withdrawn upon occurrence of 'material adverse change' – events that are statutorily defined.

Financing can be conditional upon successful completion of the tender offer. However, such financing must be on a firm commitment-basis and thus a tender offer cannot be conditioned upon the financing.

Business combinations other than in the form of a tender offer can generally be subject to agreed upon conditions. However, in practice, business combinations via merger, share exchange, share transfer, or corporate split, etc, between publicly traded companies, are rarely subject to many conditions other than necessary shareholder approval, regulatory approval or competition law clearance.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In the case of a tender offer for which the buyer needs to obtain financing, it is necessary to attach a document to the tender offer registration statement showing a firm commitment of the financing. It is requested by the authority that such a document should include substantial conditions precedent to the drawdown of the loan, as well as the representations and warranties if they are referred to in such conditions. Since the law does not allow a tender offer be conditional on the financing (as mentioned in question 12), and therefore, in theory, the buyer will be in default (unless the offerors withdraw their offer) if a condition precedent to the drawdown of the loan is not satisfied.

There is no specific rule on how to deal with the financing in the transaction documents for business combinations other than in the form of a tender offer, and it is up to the parties.

Further, there is no typical obligation on the seller to assist in the buyer's financing.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Company Law authorises the use of straightforward squeeze-outs of minority shareholders, through cash-out mergers, cash-out share exchanges, etc. These squeeze-out transactions, including those with cash-out features, generally require both board approval and super-majority shareholders approval (two-thirds or more) of the companies concerned (the shareholders approval is not required at the target company, if the acquiring company already owns 90 per cent or more of the target company and at the acquiring company depending on the significance of the transaction). In the case of a publicly traded company, it normally takes at least several weeks to call a shareholders meeting. In addition, in certain cases, including mergers, creditor protection procedures require the observance of a one-month waiting period. In practice, the tender offer process often precedes a squeeze-out transaction in order to accomplish the share ownership of the target company required to implement the desired squeeze-out. One important caveat is that such squeeze-out transactions must be implemented on fair and commercially reasonable terms, otherwise the transactions may be challenged by minority shareholders through an attempt to cancel the

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Update and trends

During 2016, the M&A activities in Japan were still very active, and it is reported that both the number of acquisitions involving Japanese companies, and the amount thereof, increased in 2016. However, in contrast to the past few years, outbound acquisitions, which are acquisitions by Japanese companies targeting foreign companies, became active in the United States and Europe, but their number in the Asia region, including south-east Asia, decreased. There were also a number of large-scale outbound acquisitions in 2016. We do not see any drastic change in the above trends in the near future.

Concerning the regulatory framework, we may have to closely monitor the practical effect of the changes to the tax-free reorganisation regime as a result of the 2017 Tax Reform (as discussed in section 18) – to see whether they will stimulate or discourage reorganisation transactions in Japan. Other than this change in the tax laws, we do not expect any significant changes in regulatory or statutory framework that may affect business combinations.

We do not see any substantial impact of credit crisis in Europe on the activities of mergers and acquisitions and the regulatory framework in Japan.

required shareholders' approval, etc. In addition, the 'cash-out'-type mergers or share exchanges authorised by the Company Law cannot be used where a substantial premium is paid because of tax reasons, as discussed in the response to question 18. As an alternative, it is suggested in practice to use a recapitalisation-type transaction whereby the minority shareholders will effectively be squeezed out in cash. This alternative transaction also requires 'super majority' shareholder approval of the target company, but the 90 per cent ownership waiver for this shareholders approval is not available.

In addition, the Company Law, after its amendment came into effect on 1 May 2015, allows a company holding 90 per cent or more of shares in a certain company (target company) to squeeze out the minority shareholders, by forcefully purchasing all shares held by such minority shareholders in the target company. This purchase of minority shareholders' shares may be done with a board approval of the target company and notification to such minority shareholders. By using this system, the squeezing-out of the minority shareholders is, at the shortest, completed within approximately 20 days.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Business combinations resulting in a foreign investor holding 10 per cent or more of the shares of a Japanese publicly traded company or any shares of other Japanese companies will generally require a filing with the relevant ministries through the Bank of Japan under the FEFT Law. This filing is on an ex post facto basis in most cases. However, where the target company is engaged in a certain category of business that raises a concern for national security or other public interest (for example, military, aerospace, fishery, agriculture), prior notification must be filed, and with respect to protected business areas among such categories (for example, fishery, agriculture) the prior filing requirement functions as a de facto ban.

It should be noted that in order to implement a merger, corporate split, share exchange or share transfer, parties to these business transactions must be Japanese companies. However, triangular mergers are expected to allow foreign companies to effect a merger in Japan through a subsidiary, whereby the shares of the foreign parent company are offered to the shareholders of the target company upon the merger.

A business transfer requires the purchasing foreign company to have either a subsidiary or a branch in Japan. In contrast, in the case of a share acquisition, a foreign company may directly acquire the shares of a Japanese company. A foreign investor for the purposes of the FEFT Law includes a subsidiary or a branch of a foreign company.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Parties to a merger and certain other types of business combination transactions that involve transfer of debts – including corporate splits – must undertake a creditor protection procedure, which generally involves public and individual notice requirements and observance of a one-month waiting period. The parties may not consummate these transactions until the expiration of such waiting period.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Business combinations involving target companies in regulated industries (for example, banks, securities firms, insurance companies and broadcasting companies) are subject to certain regulatory approval processes under the relevant industry-specific laws and regulations.

18 Tax issues

What are the basic tax issues involved in business combinations?

Straightforward share acquisitions (including by tender offer) and business transfers are taxable transactions and the seller will be subject to income taxation for any gains. In the case of business transfers, the seller must pay consumption taxes too (Japanese VAT). If the seller of shares of a Japanese company in share acquisitions is not a resident of Japan, it could be subject to Japanese income taxation for the capital gains; however, an exemption may be available depending on the percentage of its ownership of the shares or the applicable tax treaty.

Statutory business combination transactions (namely, merger, corporate split, share exchange, and share transfer) can be implemented without income taxation at the time of the transaction (in substance, tax deferral) if such transactions satisfy the requirements for tax-qualified restructuring. Broadly speaking, such a transaction may satisfy the requirements for 'tax-qualified restructuring' if no consideration other than shares of the party taking over the business (including the shares of the parent company in the case of triangular mergers) is paid out (namely, cash-out for squeeze-out will disqualify the transaction), and:

- it is implemented between a parent and a wholly owned subsidiary or between wholly owned subsidiaries;
- it is implemented between a parent and a subsidiary or between subsidiaries, where 80 per cent or more of the employees continue to be engaged in the business concerned and the primary businesses are continued; or
- it is implemented to perform a 'joint operation', where:
- the businesses of the parties are related to each other, 80 per cent or more of the employees continue to be engaged in the business concerned and the primary businesses are continued;
- the ratio of the size of the businesses of the parties is within a range of 1:5 or the key management members remain the same; and
- with certain exceptions, where the ownership structure resulting from the transaction is expected to continue within the applicable parameters.

In the case of a 'tax-qualified' business combination, neither the seller company nor the target company is subject to income taxation at the time of the transaction and their tax bases for the relevant shares or assets remain intact after the transaction (thus, tax deferral) and in general the shareholders of the parties are not subject to income taxation (also, tax deferral). However, a cash-out transaction is not tax qualified, meaning that even the target company must recognise taxable gains, if any, from the transaction because its assets (including goodwill associated with the business) must be either deemed to have been sold or revalued on a mark-to-market-value basis for tax purposes.

The onerous nature of the tax treatment of cash-out transactions can effectively deny the use of cash-out mergers or cash-out share exchanges, etc, where a substantial premium is involved because a premium normally represents the value of goodwill.

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The 2010 Tax Reform adopted the 'group-based corporate taxation' regime, where business combination or other transactions taking place between a parent and a wholly owned subsidiary or between wholly owned subsidiaries (both Japanese companies) can be implemented without income taxation at the time of the transaction (in substance, tax deferral), regardless of whether such transaction is a statutory business combination or is a tax-qualified restructuring as mentioned above.

The 2017 Tax Reform has adopted some significant changes to the rules mentioned above relating to the tax-free reorganisation. Among other items, a cash-out merger or share exchange will qualify as a tax-free reorganisation (hence no immediate taxation upon the target company), if the buyer already owns at least two-thirds of the shares of the target company (ie, one-third of the shareholders may be cashed out). Also, certain squeeze-out transactions (as discussed in section 14) will be captured by the tax-free reorganisation rules; so the target company will be subject to income taxation as a result of the squeeze-out unless certain key requirements for the tax-free reorganisation are met. Further, a spin-off transaction (where a Japanese company will distribute the shares of its wholly owned subsidiary to its shareholders on a pro rata basis) will also be designated as a tax-free reorganisation.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

In general, employment relationships and relevant employee benefits at Japanese companies are primarily regulated by the internal rules (Work Rules) established by the employer company and the applicable statutory provisions. It is rare that a detailed employment contract is signed.

In the case of share acquisitions, share exchanges and share transfers, since there is no change in the status of the employer company, employment relationships and employee benefits will remain unchanged after the transaction.

In the case of mergers and corporate splits, the employment relationships and employee benefits will automatically be transferred to the surviving or succeeding company. Therefore, the Work Rules and employment benefits of the merged or transferring company will continue to apply to the ex-employees of the merged or transferring company, even after the merger or corporate split, unless appropriate arrangements for integration are made. In connection with a corporate split, it should be noted that the employees primarily engaged in the transferred business are entitled to transfer to the succeeding company even if they are excluded from the scope of transfer in the relevant documents, and the employees not primarily engaged in the transferred business are entitled to remain with the transferring company even if they are included in the scope of transfer in the relevant documents.

In the case of business transfers, the transfer of employment relationships is not automatic and such transfer of employment relationships requires agreement between the parties to the business transfer and the consent of the relevant employees. The parties can agree that the purchaser will accept only those employees who consented to the application of the current Work Rules and employment benefits of the purchaser.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

In the context of insolvency proceedings, acquirers should be careful in setting the timing of an acquisition (whether before the adoption of a restructuring plan or as a part of the plan) and identifying the party having authority to approve the acquisition (administrator, trustee, supervisor or court). It should also be noted that if the transaction is of the type in which an administrator or trustee is appointed in statutory insolvency proceedings, the transaction will have to be implemented on an 'as is' basis without any meaningful representations or warranties regarding the quality of the business. If the restructuring is under way as a private collective settlement outside the realm of statutory insolvency proceedings, the purchaser should possibly expect a difficult negotiation with the banks and other creditors.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Bribery of officials is generally prohibited under Japanese law, but such prohibition is not specific to bribery made in connection with business combinations. That is, bribery of foreign public officials with regard to an international commercial transaction for the purpose of gaining illicit profits is prohibited under the Unfair Competition Prevention Act and those who commit such bribery are subject to imprisonment of up to 10 years or criminal fines of up to ¥10 million or both. Further, bribery of domestic public officials with regard to such officials' duty is prohibited under the Criminal Code, and those who commit such bribery are subject to imprisonment of up to three years or criminal fines of up to ¥2.5 million or both.

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Korea

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1 Types of transaction

How may businesses combine?

Business combinations typically take the form of a share transfer or subscription, asset transfer (including business transfer), joint venture, merger or consolidation. Under Korean law, a spin-off and merger can be completed in one transaction. Notably, certain amendments to the Korean Commercial Code (KCC), which became effective in 2012, have introduced cash-out mergers and triangular mergers. The amendments also relaxed the requirements for small-scale mergers by allowing the merged company's shareholders approval requirement to be waived in a merger where the surviving company issues new shares that are less than 10 per cent of its total shares (the ceiling was 5 per cent prior to the amendment). The KCC was further amended effective as of 2 March 2016 and now permits a diverse range of M&A transaction structures widely utilised in other jurisdictions that had thus far been barred in Korea, namely triangular share exchange, reverse triangular merger and triangular spin-off and merger. Also, the amendment has simplified requisite corporate approval procedures for an acquirer to allow the board of directors, in lieu of shareholders, of the acquirer to approve a business or asset transfer or a small-scale share exchange meeting certain qualifications.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The KCC provides for general business and corporate regulations governing Korean companies, including regulations relating to the acquisition of shares or assets, mergers, spin-offs and other transaction structures. If the acquisition involves shares of a Korean company listed on the Stock Market Division of the Korea Exchange (KRX) or registered on the Kosdaq Market Division of the KRX, the Financial Investment Services and Capital Markets Act (Capital Markets Act) and other related rules and regulations will apply. M&A transactions are also subject to the reporting requirements of the Korea Fair Trade Commission (FTC) under the Monopoly Regulation and Fair Trade Law (FTL), which is the general antitrust statute. If the business combination is a cross-border transaction, the Foreign Investment Promotion Law (FIPL) or the Foreign Exchange Transaction Law, as applicable, would apply. In addition, the Special Act for Business Reinvigoration (commonly referred to as the One-Shot Legislation), a temporary legislation with a finite effective period of three years, became effective as of 13 August 2016. The One-Shot Legislation aims to facilitate the restructuring and reorganisation of companies operating in industries experiencing general oversupply problems through, among others, granting exemptions under the KCC to relax the conditions for small-scale mergers and requisite corporate approval and creditor protection procedures for M&A transactions in general and providing certain new tax benefits under the Special Tax Treatment Control Law.

3 Governing law

What law typically governs the transaction agreements?

Typical transaction documents include a share purchase or subscription agreement, an asset transfer agreement, a merger agreement or a joint venture or shareholders' agreement. The other legal documentation can vary depending on the particulars of the transaction. Typically, the share subscription agreement (involving issuance and purchase of new shares), a joint venture or shareholders' agreement (involving, among others, corporate governance matters) and the merger agreement are governed by Korean law. The governing law of the other transaction documents varies depending on the agreement of the parties.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

If the acquiring company is a foreign company, it must file a prior report on the acquisition of shares with the Ministry of Trade, Industry and Energy (MOTIE) through a foreign exchange bank pursuant to the FIPL. When a merger, spin-off or business transfer involves a listed company, in addition to the general disclosure requirements, the Capital Markets Act requires the listed company to file a report with the Stock Market Division or Kosdaq Market Division of the KRX and the Financial Services Commission (FSC). In addition, beneficial ownership of 5 per cent or more of the shares of a listed company triggers a filing requirement. A tender offer or proxy solicitation is also subject to a filing requirement. In certain circumstances, investments in a Korean company or a company that has business in Korea may trigger an antitrust filing requirement and a review by the FTC. Under the FTL, an antitrust filing should be made when the transaction involves, among others:

- the acquisition of all of (or a major portion of) the business or assets of a target company;
- the purchase of shares of an existing company, and as a result of such transaction, the acquirer (together with its affiliates) becomes a shareholder holding 20 per cent (15 per cent in the case of a company publicly listed (or registered) on the Stock Market Division or Kosdaq Market Division of the KRX) or more of the voting shares of the target company; or
- a merger between companies, and if for any of the above, one of the parties to the business combination has (together with its affiliates) assets or revenues equal to or exceeding 200 billion won and the other party has (together with its affiliates) assets or revenues equal to or exceeding 20 billion won.

Further, if either party to the transaction has assets or revenues equal to or exceeding 2 trillion won, in general a pre-closing filing will be required, in which case the transaction may not be consummated while the FTC is undergoing its 30-day review (which can be extended by an additional 90 days). If a transaction that satisfies the aforementioned thresholds for antitrust filing is not subject to pre-closing filing requirements, it will be subject to post-closing filing obligations. In such cases, the filing must be made within 30 days after the close of the transaction. Such post-closing filing will also be subject to a review period of 30 days, which can be extended by an additional 90 days. Certain overseas transactions having an effect on the Korean market may also trigger a Korean filing requirement based on the amount of revenue the relevant parties (together with its affiliates) have in relation to Korea.

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There are no stamp taxes or other governmental fees (other than stamp duties due under certain circumstances which are nominal in amount) relating specifically to business combinations. However, the transaction will be subject to various Korean taxes depending on the structure of the transaction (see question 18).

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

A publicly listed company involved in a merger must submit a merger report to the FSC and the Stock Market Division or Kosdaq Market Division of the KRX, as applicable, which is made publicly available. A merger report is required to disclose certain matters relating to the contemplated merger and the parties to the merger. In the case of a business or asset transfer or spin-off, a similar filing is required. A tender offer or proxy solicitation also requires certain information to be disclosed in the prescribed forms provided under the Capital Markets Act.

In the case of the report filed with the FTC under the FTL, the contents of such report are submitted to the FTC and are not available to the public.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the Capital Markets Act, once an investor (including specially related persons and other parties acting in concert) holds 5 per cent or more of the voting shares or certain other equity securities issued by a listed company, the investor must file a report regarding such acquisition with the FSC within five business days. For the purpose of this report, the investor is deemed to hold the shares upon entering into a share purchase agreement. An addendum report should be filed within five business days of any change of 1 per cent or more in such holdings (in the case of passive portfolio investment, by the 10th day of the following month). When filing this report, the investor must indicate whether the investment is a passive portfolio investment, or whether the investor has any intent to exert any influence over the management of the company. A filing obligation is also triggered if the purpose of the investment changes. In the case of an investment with the purpose of participating in the management of a company, a five-day cooling-off period will be applicable after the 5 per cent report is filed, during which period the investor may not exercise voting rights or purchase additional shares. Where the holdings of the investor reaches 10 per cent or more of the issued and outstanding voting shares of the listed Korean company, a separate report should be filed with the Securities and Futures Commission (SFC) within five business days, and any change in shareholding must be reported to the SFC within five business days of such change. In addition, a public company must disclose the details of all transactions with the largest shareholder (including affiliates) in its periodic reports filed with the FSC.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under Korean law, directors are deemed to be fiduciaries of the company and are considered to owe a duty of care and loyalty to the company. The applicable standard of care is one of a good manager. In the view of the majority of commentators, the standard of care is described as the same degree of fidelity and care needed, generally and objectively, as an ordinarily prudent man. Directors are required to act with care, in light of their actual knowledge and such knowledge as they should have gained by exercising reasonable care and skill. Under Korean law, the claim of breach of fiduciary duty could potentially result in criminal liabilities in some situations.

Korean law does not specifically impart any duties to controlling shareholders in relation to a business combination. However, a controlling shareholder may be found to be a de facto director, and thereby owe fiduciary duties to the company, if the controlling shareholder exercises control over the decisions made by a director.

In Korea, the target company and its board of directors are not active participants in a takeover bid process, and therefore, the fiduciary duty of the target's directors is of little import in the usual takeover transactions, except in certain leveraged buyout transactions (LBOs) (and merger or spin-off transactions where the target company itself becomes a party). Historically, LBOs in Korea, in which a purchaser would acquire a target via an acquisition financing scheme supported by the credit of the target, raised breach of fiduciary duty issues. There are three types of such LBO transactions: provision of an upstream guarantee or collateral, merger, and capital reduction or dividend payout. The issue became more apparent since the Korean Supreme Court holding in 2006 that a director of the target is liable for breach of fiduciary duty for directing the target to provide its assets as collateral in support of the purchaser's acquisition loans. Thus, a director of the target for such transactions who voted for a board resolution for the provision of collateral, merger or capital reduction (and a controlling person and a shareholder who aided and abetted such transaction) may be held liable for breach of fiduciary duty if such action caused damages to the target. Although the foregoing issue is still evolving, recently there have been several meaningful court decisions that provide additional guidance when structuring an LBO in Korea, and considerations and procedures that the board would have to take into account to uphold its fiduciary duty. For instance, in 2010, a Supreme Court decision held that the mere fact an LBO has occurred does not, in and of itself, give rise to criminal liability for breach of fiduciary duty, but rather, the courts should examine the specific actions taken by the directors during the LBO process, on a case-by-case basis, to determine whether there was in fact a breach of fiduciary duty. In the subject case, the Supreme Court found relevant directors not guilty of a breach of fiduciary duty with respect to a certain type of debt pushdown structure. In addition, with respect to a capital reduction or dividend type LBO, the Supreme Court recently held that it was not unlawful for the acquirer to utilise a special purpose company (SPC) to finance an LBO, and post-closing, to upstream cash from the target to the SPC via a capital reduction and dividend-out of the target company in order to repay the acquisition financing. In this case, the Supreme Court reasoned that:

- even though the target company's asset was reduced owing to a capital reduction and dividend-out, such an undertaking was the shareholder(s)' due exercise of their rights granted under the law;
- given the size or scale of the operating profits and assets of the target company at the time of the capital reduction, it could not be said that the creditors of the target company suffered losses from any flaw in such capital reduction process; and
- considering the per share capital reduction amount and the target's distributable retained earnings at the time, it could not be said that the capital reduction and dividend-out resulted in damages to the target company.

Two Korean court decisions on LBOs were rendered in the first quarter of 2015, providing M&A practitioners with meaningful, practical guidance in structuring LBOs. First, with respect to merger-type LBO (ie, LBO where an acquirer would incorporate an SPC that would borrow funds for the acquisition of the target and thereafter would merge the SPC with the target, thereby giving the creditor a direct recourse to the assets of the target), on 22 January 2015, the Seoul Central District Court held that the directors of the target company should not be held criminally liable for breach of fiduciary duty in the merger-type LBO underscoring, among others, the financial soundness of the SPC, the assets of the target not being encumbered to secure the acquisition financing obligations of the SPC, and the merger being consummated in accordance with applicable laws.

In the second decision rendered by the Korean Supreme Court on 12 March 2015 involving the provision of an upstream guarantee or collateral-type LBO, the Korean Supreme Court found the representative director of the target to be not guilty of criminal breach of fiduciary duty in providing the target's assets as collateral to support the acquisition financing of the purchaser in the LBO. Reiterating that courts should consider the totality of circumstances in deciding upon a breach of fiduciary duty matter in the context of LBOs, the Korean Supreme Court found the representative director to not have intentionally harmed the target to the benefit of the purchaser on the following

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basis: (i) the purchaser invested its own capital in funding a significant portion of the purchase price for the acquisition; (ii) the target became a wholly owned subsidiary of the purchaser, and therefore the interests of the two were completely aligned; (iii) the financial condition of the target improved and its interest payment burden was reduced following the acquisition; and (iv) the target indirectly became a public company through the acquisition.

The recent Korean court decisions appear to suggest that the courts will not categorically find either a breach or non-breach of fiduciary duty in an LBO transaction, but instead will consider the totality of the circumstances in order to determine the lawfulness of a given LBO transaction. In particular, the courts will consider factors such as whether the LBO transaction would be beneficial to the target company, the debt–equity ratio of the purchase price, and whether the transaction was carried out in a lawful manner and whether the interest of all parties were properly protected. However, as the Supreme Court's views on this matter are not yet conclusive, continuous monitoring of further developments is warranted.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Certain transactions such as mergers, the transfer of a whole or a significant part of a business or the acquisition of a whole or a part of a business of another company which significantly affect the acquiring company's business are subject to approval of a special resolution of the shareholders of the company. Special resolution of shareholders requires the affirmative vote of two-thirds of the shareholders at a shareholders' meeting, comprising at least one-third of the total issued and outstanding shares, unless the articles of incorporation of the company provides for a higher voting threshold for such special resolutions. In such cases, the shareholders have appraisal rights that are determined by a set formula in the case of publicly listed companies, by private negotiation, or by the court. Such appraisal rights are available to shareholders who have duly recorded their dissent to the proposed transaction at the relevant shareholders' meeting.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Korean law does not distinguish between hostile and voluntary takeover bids. They are both subject to the same takeover laws and regulations. The board of the target company is allowed, but not required, to express its opinion on the tender offer.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

In Korea, 'fiduciary-out' provisions are not common in the context of a share purchase transaction, in large part because a target company or its board of directors is usually not an active participant in the takeover bid or share acquisition process. The parties may negotiate and agree on 'go-shop' provision or break-up fee or reverse break-up fee to disincentivise either side from walking away from the deal, while, in practice, payment of earnest money deposit from the buyer at the signing is more used particularly in case of government or creditors (financial institutions)-driven transactions (but even in these instances, usually the buyer is technically not free to breach the contract by forfeiting the deposit.

On July 14, 2016, the Korean Supreme Court reversed the lower court decisions in a lawsuit brought by a consortium of investors for the return of a performance guarantee deposit delivered in an attempted acquisition. Based on long-standing principles that (i) a performance guarantee deposit delivered by a purchaser to a seller is presumed to constitute liquidated damages unless otherwise deemed as 'penalty' based on relevant facts and circumstances and (ii) liquidated damages, unlike penalties, may be reduced if deemed as unjustly excessive, the Korean Supreme Court found the performance guarantee deposit delivered by the proposed investors to constitute liquidated damages and ordered a reduction of the amount although the definitive agreement expressly stated that the deposit would constitute a penalty when delivered to the seller for the breach of the said agreement. As such, potential sellers are now advised to look beyond that language of the agreement and take the foregoing ruling into consideration before attempting a sale if the performance guarantee deposit, if any, is contemplated to be forfeited and delivered to the seller in whole without any reduction in the event of the purchaser's breach of the definitive agreement.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Other than through antitrust regulations, generally, government agencies do not have the authority to restrict the completion of a business combination. However, a cross-border transaction will be subject to certain government reporting or approval requirements, including foreign exchange regulations. Further, business combinations in certain regulated industries such as banking, telecommunication and defence may be subject to certain approval requirements or other restrictions under the relevant laws and regulations. Also, certain cross-border transactions may be restricted for reasons of national security (eg, impeding local manufacturing of defence industry items or disclosure of state secrets) and protection of core technology.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Under the Capital Markets Act, only the following conditions are permitted in a tender offer: if the total number of tendered shares is less than that intended to be purchased by the tender offeror, the offeror will not purchase any of the shares tendered; or if the total number of tendered shares exceeds the number intended to be purchased by the tender offeror, the offeror will purchase pro rata from tendering holders the number of shares the offeror intended to purchase. A tender offeror is required to present evidence that it holds cash or cash equivalent of the entire funds required for the tender offer.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

We do not see any significant difference in terms of how the acquisition financing condition is dealt with in the transaction documents in Korea, as compared to other jurisdictions. It is a matter of negotiation and contract between the parties. It is not uncommon for a buyer to provide a representation and warranty regarding its financing capabilities. A buyer may attempt to add successful financing as a condition to closing, but sellers are usually reluctant to accept such condition. In Korea, a seller often runs an auction for the contemplated M&A transaction, in which case, bidders are usually required to submit appropriate evidence of their financing capabilities (including a proper acquisition financing arrangement) and such financing capability is one of the major factors affecting the selection of the preferred bidder by the seller.

It is a matter of contract whether acquisition contracts contain a seller covenant to cooperate with the buyer in obtaining financing. With regard to 'financial assistance' provided by the target to an acquirer for purposes of financing the transaction, the parties may need to take into account the risk of a violation of the FTL which prohibits 'unfair assistance' as well as the risk of breach of fiduciary duty on the part of the target company's directors that approved the provision of such support.

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14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

As certain amendments to the KCC became effective in 2012, a minority squeeze-out by the major shareholder at fair value is allowed if the major shareholder has at least 95 per cent of the outstanding shares in the relevant company. In such cases, the major shareholder will have a right to request minority shareholders to sell their shares at fair value. There are also some procedural requirements for squeeze-outs. For instance, prior shareholders' approval must be obtained during a general meeting of shareholders. Minority shareholders must sell their shares within two months after receiving a request from the controlling shareholder. Also, purchase price is to be determined through negotiations with the minority shareholders. If the parties are unable to reach an agreement within 30 days, a court will determine the fair purchase price, upon a request by either party, based on the company's financial status and other relevant circumstances.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

By virtue of the Korean government's liberalisation policy, the number of restricted or prohibited business activities has been reduced so that almost all areas of Korean business are open to foreign investment. Korea uses a negative list system, which means that a business is open to foreign investment unless it is specifically restricted. There are a number of business sectors that are still restricted and certain cross-border transactions may be restricted for national security reasons. For example, with respect to certain telecommunications companies, the aggregate foreign ownership of such companies cannot exceed 49 per cent of the total outstanding shares. With respect to electricity transmission companies and electricity distribution companies, the aggregate foreign ownership must be less than 50 per cent of the total outstanding shares, and the largest shareholder cannot be a foreign investor. Foreign direct investment (generally meaning a purchase by a non-Korean entity of 10 per cent or more of the shares of a Korean company) is subject to the reporting requirements in accordance with the FIPL. In addition, certain aspects of cross-border transactions (especially when accompanied with the outflow of funds from Korea) are subject to the reporting or approval requirements under the Foreign Exchange Transaction Law. The Capital Markets Act requires the trading of listed stock that is open to foreigners under the Foreign Exchange Transaction Law to be made through a qualified stock exchange, with some exceptions.

Effective as of 2012, under the Act on Prevention of Disclosure and Protection of Industrial Technology (Core Technology Act), certain restrictions were imposed on a foreign investor's acquisition of, or merger with, a Korean company possessing 'national core technology' designated by the MOTIE. Under the Core Technology Act, if a foreign investor (including a Korean company owned and controlled by a foreign investor) acquires, 50 per cent or more of the shares of a Korean company (or, if acquiring less than 50 per cent, if the acquiring company will become the largest shareholder having substantial control over the management of the target company), and such target Korean company owns 'national core technology', the target company must report such acquisition to the MOTIE prior to the closing of such transaction. Under the Core Technology Act, the MOTIE may issue an order to prohibit or undo such transaction if it determines that the consummation of the transaction can materially affect national security.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Mergers and consolidations require a certain creditor protection procedure. For a period of at least one month after the approval of the transaction by the shareholders at a shareholders' meeting, the creditors may demand repayment of their debt or the company must provide appropriate security to the relevant creditor.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Acquisition of shares in companies operating in certain regulated industries such as banking, telecommunication, broadcasting and defence is subject to additional laws and restrictions. For example, acquisition of shares in a bank may be subject to filing and approval requirements of the FSC under the Bank Act. Similarly, acquisition of shares in a telecommunication service provider may be subject to filing and approval requirements of the Ministry of Science, ICT and Future Planning under the Telecommunications Business Act.

18 Tax issues

What are the basic tax issues involved in business combinations?

The tax treatment of a business combination will depend on the structure of the transaction.

In the case of a share transfer, the transaction will subject the seller (or the purchaser if the seller is a foreign entity with no permanent establishment in Korea) to capital gains tax and a securities transaction tax (0.3 per cent to 0.5 per cent of the transfer price). If the seller is a foreign entity with no permanent establishment in Korea and the capital gains derived by the seller are not exempted under the applicable tax treaty, the purchaser is required to withhold and pay the lessor of 11 per cent of the transfer price and 22 per cent of the capital gains, including relevant surtax. A share transfer transaction can also subject the purchaser to a deemed acquisition tax equal to the net book value of certain properties (such as real property and vehicles) of the target company multiplied by the purchaser's shareholding ratio of the target company when the purchaser becomes a majority shareholder having more than 50 per cent of the shares of the target company.

In the case of an asset transfer, the profit realised by the seller from the transfer of its business or assets is subject to ordinary corporate income tax (ie, 11 per cent, including surtax, for the first 200 million won, 22 per cent, including surtax, for the taxable income between 200 million won and 20 billion won, and 24.2 per cent, including surtax, for any amount exceeding 20 billion won).

For the purchaser of assets, an acquisition tax is payable on the acquisition of certain properties (including real property and vehicles), normally at the rate of 4.6 per cent of the acquisition price. This rate is increased to 9.4 per cent if the real property acquired is located in the Seoul Metropolitan area (Seoul and its surrounding areas), subject to certain exceptions. In addition, the purchaser of real property may be required to purchase a certain amount of housing bonds depending on the government posted value of the real property.

If the purchase transaction is treated as a comprehensive business transfer, no value added tax (VAT) will be imposed. Otherwise, the seller is required to collect and pay VAT at the rate of 10 per cent of the purchase price allocated to those assets subject to VAT, which include inventories, machinery and equipment, buildings and goodwill. Land or accounts receivable, however, are not subject to VAT. If it is payable, the purchaser would generally be able to credit VAT (except, for example, the VAT on small passenger cars) paid against its VAT payable (or obtain a refund later if there is a shortfall) when it files a VAT return.

Korean tax laws generally treat a merger as a taxable event. Corporate income tax is due upon the non-surviving company from the merger for capital gains resulting from the merger. The shareholders of the non-surviving company may also be subject to taxation on their deemed dividend income. The surviving company's gains realised from a merger owing to a low purchase price are generally treated as taxable income.

If certain requirements are satisfied, however, the merger transaction may qualify for certain tax exemptions or deferrals, or both. Even if such requirements are not satisfied, however, some tax benefits are available in mergers between a parent company and a 100 per cent subsidiary.

The surviving company must also pay a registration and licence tax on increased paid-in capital due to the issuance of new shares and is also subject to property acquisition tax with regard to the registration of the title transfer, unless an exemption is available.

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Update and trends

Regulatory landscape

Consistent with the hard-line stance taken by the FTC in its recent flat-out rejection of the large telecommunications merger between SK Broadband and CJ HelloVision, the FTC has declared its intent to further strengthen the scrutiny of proposed M&A transactions. In its 2017 enforcement plan announced in January 2017, the FTC indicated that it would aggressively review any M&As that are expected to substantially affect the Korean market, including proactive reviews of global M&As through closer coordination with foreign competition agencies, and strengthen policing of unreported M&As and non-compliance with behavioural remedies. The FTC nonetheless expressed its intent to expedite the review of, and otherwise provide support to, M&As relating to industrial restructuring or business reorganisation that can generate significant social benefit. As such, M&A players should thoroughly prepare for, and carefully coordinate, merger filings to avoid and effectively respond to the increased scrutiny by the FTC when contemplating any transactions with anticompetitive effects or other material impact on the Korean market.

Recent case in sandbagging

On 15 October 2015, the Korean Supreme Court ruled that a purchaser in an M&A transaction may claim damages against the seller for the seller's breach of its representations and warranties made in a definitive agreement even where the purchaser knew of the breach at the time of execution of the agreement. The court held that, unless the definitive agreement makes clear that a seller's obligation to compensate for damages arising from a breach of representation or warranty does not apply to breaches known by the purchaser, the intent of the parties would be that the seller compensate the purchaser for damages arising from the breach, regardless of the purchaser's knowledge of the breach at the time of execution of the agreement. While lower courts were previously split on this sandbagging/anti-sandbagging issue, the Korean Supreme Court set forth a principle in favour of sandbagging where the relevant definitive agreement does not contain an anti-sandbagging provision. M&A practitioners should nonetheless carefully manage and proceed with M&A transactions as the ultimate holding on the anti-sandbagging issue is likely to be determined based on the relevant facts and circumstances.

Beneficial ownership

The Korean Supreme Court, on 14 July 2016, handed down a decision favourable to the taxpayer in a beneficial ownership case involving the issue of which entity within an organisational chain of companies should be deemed to be the beneficial owner of Korean source income for assessment of Korean tax and, if applicable, entitlement to benefits under tax treaties. Beneficial ownership of Korean source income has been one of the key dispute areas between the Korean tax authorities and taxpayers in recent years. In this case, the Korean tax authorities denied the application of a 5 per cent withholding rate under the Korea–UK tax treaty on dividends paid by a Korean taxpayer to its direct shareholder, a UK intermediate holding company, and instead treated such UK company as a conduit and deemed its French parent company to be the beneficial owner of the Korean source dividends in applying a 15 per cent withholding rate under the Korea–France tax treaty. The Korean Supreme Court overruled the decisions of the lower-level courts and cancelled the Korean tax authorities' withholding tax assessment, recognising the UK intermediate holding company to be the beneficial owner of the Korean source dividends. This decision is a meaningful precedent for future beneficial ownership cases as it is the first Korean court case to respect the beneficial ownership and substance of a foreign intermediate holding company that does not have any employees.

Other tax developments

The tax law amendments in 2016, which are generally effective as of 1 January 2017, include expansion of tax benefits for corporate reorganisations (eg, mergers and spin-offs), including (i) expansion of the scope of corporate reorganisations for which tax deferrals from prior vertical spin-off or contribution in-kind remain intact, (ii) expansion of the scope of securities eligible for tax deferral on gains upon a transfer as part of a spin-off and (iii) tax deferral on gains in a merger between directly wholly owned (sister) foreign subsidiaries.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

With respect to share acquisitions, there is no change in the company's relations with its employees. For mergers, the surviving company assumes each of the non-surviving company's labour liabilities by operation of law.

In an asset transfer, the purchaser will automatically assume the historical labour liabilities if the transaction is deemed to be a 'business transfer' under the standards provided in the labour laws. If the transaction is deemed to be a business transfer, the purchaser will be bound by the terms of existing employment agreements and other commitments by operation of law (unless the employees voluntarily agree otherwise) for the employees being transferred to the purchaser. The transferee may not offer employment terms to the transferring employees that are less advantageous to the transferring employees than those terms of employment provided by the transferor.

Labour union or employment issues that investors may face include union demands relating to job security, bonuses, or certain concessions under collective bargaining agreements, and issues regarding disadvantageous changes to labour conditions and unpaid wages. Investors need to conduct appropriate due diligence on, and properly manage, potential major HR issues at the time of investment. For instance, an investor should take into account: (i) the calculation of ordinary wage issue that arose from the Korea Supreme Court's decision rendered in December 2013; (ii) the 'M&A bonus'; and (iii) job security issue, all of which may have significant financial implications for potential investors.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Acquisitions of companies under insolvency proceedings will be subject to the Debtor Rehabilitation and Bankruptcy Law and supervised by the court and court-appointed receiver. The acquisition transaction will also require approval by certain groups of creditors unless the transaction is permitted under the terms of an already approved plan.

For certain insolvent companies, separate out-of-court workout procedure is available under Korean law. Specifically, pursuant to the new Corporate Restructuring Promotion Act, which became effective on 18 March 2016 and which is scheduled to expire on 30 June 2018, the workout procedures may be initiated only upon request by the insolvent company to its main creditor bank and, upon initiation of the workout procedure, the creditors of the insolvent company may participate in a creditors' committee responsible for organising and implementing the workout procedures. In particular, the creditors' committee is authorised to prohibit such creditors from exercising their rights against the borrower, commence workout procedures and approve or make revisions to a reorganisation plan prepared by the lead creditor bank, the borrower and external experts. Once the approval requirements are met, any decision made by the creditors' committee is binding on all creditors of the borrower, except for certain creditors who were excluded pursuant to a committee resolution at the initial meeting of the creditors or already exercised their right to request that their claims be purchased.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Various anti-corruption statutes and laws in Korea, including the Criminal Code, the Foreign Bribery Prevention Act and the Act Concerning Aggravated Punishment of Specific Economic Crimes, regulate the provision of gifts to public officials and others, by which corruption-related activities may be subject to criminal sanctions as well as civil liabilities. Furthermore, recently, a new anti-bribery legislation entitled the Act on the Prohibition of Improper Request and Provision/Receipt of Money and Valuables, commonly referred to as the Kim Young-Ran Law (named after the then head of the Anti-Corruption

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and Civil Rights Commission who led the preparation of the original bill), was passed by the National Assembly on 3 March 2015 and became effective as of 28 September 2016.

As a whole, the Kim Young-Ran Law contains several noteworthy features that represent significant departures from the existing anti-bribery regime in Korea, including the following:

- While the anti-bribery provisions under the Criminal Code do not impose liability on corporations for bribes made by employees, under the Kim Young-Ran Law, corporate criminal liability may be imposed for the provision of a payment or benefit by employees unless the corporation exerted due care and supervision to prevent such provision.
- Contrary to the anti-bribery provisions in the Criminal Code, which require the crime of official bribery to include a showing that a payment or benefit was provided or received in connection with the receiving official's duties in order for liability to attach, under the Kim Young-Ran Law, criminal liability would be imposed without showing such link to the public official's duties, as long as the value of benefits received by the public official exceeds 1 million won in a single instance or the aggregate value of benefits in a one-year period exceeds 3 million won.
- While the public bribery prohibition under the Criminal Code applies to provision of bribes to public officials and deemed public officials (eg, employees of state-owned enterprises and state-invested corporations), the Kim Young-Ran Law applies not only to public officials but also to employees of private schools and kindergartens, members of the media which are registered under Korean law, and civilians who perform public functions according to relevant laws.

Notably, only natural persons can be found criminally liable for bribery (whether official or commercial) under the Criminal Code and the Act on Aggravated Punishment of Specific Economic Crimes. In contrast, under the Foreign Bribery Prevention Act and the Kim Young-Ran Law, if a representative, agent or employee of a corporation or other legal entity is involved in bribery in connection with the business of such corporation or other legal entity, the corporation or other legal entity will become the subject of criminal liability together with the individual who actually committed bribery. In addition, parties aggrieved by bribery occurring in Korea (whether official or commercial) may bring a claim in a court of law for damage compensation, in which case corporations may be exposed to such civil liabilities. Given the foregoing, acquirers in business combinations are not automatically liable for the corrupt practices of the target company under Korean law (other than in the case of mergers where the surviving company, by operation of law, will assume the civil liabilities of the non-surviving company). However, it is still possible for the acquirer or its relevant employees involved in the transactions to be exposed to criminal or civil liabilities should they be found somehow to be involved in the corruptive practices of the target company under Korean law (owing to limited number of case precedents on point, general guidance would be difficult to provide). In addition, acquirers must further consider whether they will be liable for the corrupt practices of the merged target non-surviving company under the laws of their own jurisdiction.

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1 Types of transaction

How may businesses combine?

Pursuant to Kyrgyz laws, businesses may combine in the form of a reorganisation or by acquisition of shares or assets.

Article 92 of Part I of the Civil Code of the Kyrgyz Republic of 18 May 1996 (Civil Code) stipulates several ways of reorganising a legal entity, of which merger and consolidation may fall under M&A transactions. Under mergers two or more companies merge, thus creating a new legal entity or company. Under consolidation one company joins another existing company. In this case, the joining company ceases to exist, while all of its assets, rights and liabilities are transferred to the existing company.

Acquisition of shares is the most popular type of M&A transaction. While Kyrgyz laws do not stipulate a term of 'acquisition', shares or participatory interest are commonly acquired under an agreement on sale and purchase of shares in a target company. The acquisition of assets of a legal entity implies acquisition of an entire business.

Businesses may also combine in the form of a simple partnership by signing a simple partnership agreement, whereby two or more parties join their activities, including assets, with no new legal entity being established.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations are mainly governed by the following Kyrgyz laws:

- the Civil Code Part I No. 15 of 8 May 1996, and Part II No. 1 of 5 January 1998 (Civil Code);
- the Law on Business Partnerships and Companies No. 60 of 15 November 1996 (Company Law);
- the Law on Joint-Stock Companies No. 64 of 27 March 2003 (JSC Law);
- the Law on State Registration of Legal Entities, Branches (Representative Offices) No. 57 of 20 February 2009;
- the Law on Bankruptcy No. 74 of 15 October 1997 (Insolvency Law);
- the Law on the Securities Market No. 251 of 24 July 2009 (Securities Market Law);
- the Law on Investment No. 66 of 27 March 2003;
- the Law on Competition No. 116 of 22 July 2011; and
- the Law on National Bank of the Kyrgyz Republic, Banks and Banking No. 206 of 16 December 2016 (to be entered into force in June 2017).

3 Governing law

What law typically governs the transaction agreements?

Parties to M&A transactions are free to select a governing law. Typically, if one party is a foreign entity, the M&A transaction may be governed by foreign law. However, it should be noted that any M&A transaction must comply with mandatory conflict of law (private international law) rules envisaged in the Civil Code. By way of example, an agreement on sale and purchase of shares in a joint-stock company (JSC) may be governed by English law; however, specific public duties (tax, corporate, competition, etc) are imposed pursuant to Kyrgyz laws (Civil Code, Tax Code, Company Law, JSC Law, Competition Law, etc).

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

As a general rule, any corporate restructuring in a limited liability company (LLC), including reorganisation, changes in a charter capital, shareholding (participants) or any other amendment to a company's constituent documents, must be filed with the Unified State Register of Legal Entities and Branches (Representative Offices), administered by the Ministry of Justice.

Further, any issue of shares in JSC must be filed with the State Service of the Kyrgyz Republic for Regulation and Supervision of the Financial Market (Securities Market Authority). Any changes in shareholding of JSCs must be registered with a registrar of shareholders.

Changing of shareholding, amendments in constituent documents and charter capital of banks and financial and credit institutions must be approved by the Kyrgyz National Bank.

Certain reorganisation (merger or consolidation) deals entailing establishment of a dominant or monopolistic entity require approval of the State Antimonopoly Regulatory Agency for the reorganisation (merger or consolidation).

No stamp taxes exist in Kyrgyzstan; however, government fees (state duties) may be charged for filings, although the amount of the fees is small.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Kyrgyz laws require legal entities to make public disclosure of information about reorganisation thereof. In particular, a company must publish an announcement on reorganisation in the Official Gazette not less than two months prior to (re)registration of such company with justice authorities. The announcement shall specify, inter alia, the term during which creditors of the company may file claims.

In addition, Kyrgyz laws stipulate more stringent public disclosure requirements with respect to open JSCs, whose public announcement must include such significant facts as: changes in the list of shareholders holding 5 per cent of securities (shares) or more, as well as share increase or decrease held by shareholders of securities (shares) of 5 per cent or more; changes in the list of legal entities where the company holds 20 and more per cent of the charter capital; appearance in the company's register of a shareholder holding more than 5 per cent of the company's voting shares; reorganisation of subsidiaries and dependent companies of such JSC.

An open JSC is also required to publicly disclose information by notifying the Securities Market Authority about a transaction on acquisition of shares if executives of the company, shareholders holding 20 per cent or more of the voting shares or their relatives or affiliated persons:

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- are a party to such transaction;
- hold 20 per cent or more of the voting shares of a legal entity which is a party to the transaction; or
- are executives of the legal entity that is a party to the transaction or its representative or intermediary.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the Securities Market Law and Regulation on the Disclosure of Information at the Securities Market dated 27 May 2011 a shareholder shall disclose information on the ownership or changes in the ownership of 5 per cent and more of a charter capital of JSC. Such information shall be disclosed to the Securities Market Authority and shall include the following:

- name of the holder;
- types of stocks and registration number thereof;
- name of the issuer; and
- number of stocks owned by the shareholder.

Failure to disclose the required information may entail administrative liability in the form of administrative fine varying from as little as 1,000 som up to 50,000 som imposed on the issuer or officials thereof.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

A decision on reorganisation is adopted at the general meeting of shareholders or participants. The duties of the directors of the reorganised company include certain actions that they must exercise within the context of a reorganisation procedure (for instance, in a JSC the board of directors provides the justification for the reorganisation to the general meeting of shareholders).

A merger agreement may prohibit or restrict directors from undertaking certain transactions on behalf of the company until the reorganisation procedure is over.

In the case of a merger or consolidation of JSC, the board of directors of each company shall submit a decision on the reorganisation, merger or consolidation agreement, and an asset transfer deed for approval of the general meeting of shareholders. Should the reorganisation be approved by the general meeting of shareholders, alongside the aforementioned actions, the board of directors shall notify the company's creditors of the reorganisation (see question 5) and file notification on the reorganisation procedure with the justice authorities. The creditors may within two months from the date of publication of the announcement on reorganisation claim early termination or performance of obligations of the company before the creditors.

Kyrgyz laws do not provide for specific duties of controlling shareholders in connection with a business combination. Typically rights and obligations of shareholders (whether controlling or not) are stipulated in a charter of a JSC, and may include specific duties of controlling shareholders with respect to a business combination.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Pursuant to Kyrgyz laws, the rights of shareholders over business combinations may include approval of a decision on reorganisation of a company, large-scale transactions (exceeding 50 per cent of the company's assets), increase of a charter capital, etc.

Typically, shareholders exercise appraisal rights if shares are acquired in exchange of assets, which need to be assessed. It should be noted that pursuant to Kyrgyz laws, assessment by an independent appraisor is required if the cost of shares of a company exceeds 20,000 som.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile or unsolicited transactions are not recognised by Kyrgyz laws. However, such criminal offences as fraud, extortion, forgery, etc, may qualify as actions under hostile transactions.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Kyrgyz laws do not stipulate for break-up and reverse break-up fees; however, parties to an M&A transaction are free to stipulate such fees in a merger or consolidation agreement. The amount of such fees should be reasonable.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Pursuant to the Law on Strategic Facilities, for the purpose of national security the government of Kyrgyzstan has the pre-emptive right to purchase a strategic facility regardless of the form of ownership of the facility. Strategic facilities include, inter alia, companies operating in TV, railroad, telecommunication, air navigation, airport, hydro power, mining and other areas. Shares or participatory interest of legal entities that own strategic facilities, as well as of individuals or legal entities that may have direct or indirect influence on the decisions of legal entities – owners of strategic facilities may also be referred to strategic facilities. The list of strategic facilities is approved by the government of Kyrgyzstan.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Neither a tender offer nor exchange offer is recognised in Kyrgyz laws. The parties are free to set conditions of business combinations thereof in the respective agreements, including conditional financing in a cash acquisition.

If a buyer is willing to acquire a participatory interest in an LLC or shares in a closed JSC, the buyer should be aware that participants of the LLC or shareholders of the closed JSC have a priority right to purchase the participatory interest or shares (unless otherwise provided in the constituent documents of the LLC).

If a buyer is willing to acquire 50 or more per cent of ordinary shares in an open JSC, the buyer must send a written offer to the JSC with indication of a price the buyer is willing to pay for the shares. Such offer must be sent not later than 30 days prior to the anticipated date of acquisition.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Kyrgyz laws do not stipulate for specific provisions regulating financing under M&A transactions. Often the buyer uses its own working capital or borrowed funds for financing purposes. A seller is not obliged to assist the buyer with financing; however, such an obligation may be included into the merger or consolidation or share purchase agreement as a condition precedent.

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14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Kyrgyz laws do not regulate the issue of squeezing out of minority shareholders in a JSC or LLC.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no specific structures applicable to cross-border transactions. In practice, significant cross-border transactions may be performed via a special purpose vehicle registered abroad. Parties to a cross-border transaction are free to structure the deal provided that the terms and conditions of the transaction are compliant with mandatory provisions of relevant Kyrgyz laws (see question 3).

There are also no specific laws and regulations applicable to cross-border transactions, which may be governed by foreign law (however, please also note the sector-specific rules outlined in question 17).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

As mentioned above, shareholders of closed JSCs and LLCs have priority right over the acquisition of shares or participatory interest in the said companies (unless otherwise is stipulated in constituent documents of the LLC). Shareholders of a closed JSC have five days to exercise the priority right, whereas shareholders of an LLC have 30 days to exercise the priority right. In both cases constituent documents of the closed JSC and LLC may provide for a shorter or longer waiting period. Should shareholders of the closed JSC or LLC refuse to exercise the priority right, the shares or participatory interest may be acquired by the JSC or LLC itself.

Pursuant to Kyrgyz laws, the JSC or LLC must inform their creditors about approval of reorganisation by the general meeting of shareholders (by publishing an announcement in an Official Gazette); however, there are no specific periods within which the JSC or LLC must publish such an announcement and thus notify the creditors. The latter have a two-month period from the date of announcement publication for filing claims against the JSC or LLC (that will cease to exist after merger) on early termination or performance of obligations (as discussed in question 5).

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies operating in specific industries are subject to special rules that may affect a process of merger or consolidation or acquisition. Such rules are codified in special laws, such as the Law on National Bank of the Kyrgyz Republic, Banks and Banking, Air Code and other respective laws regulating mining, land and other sectors. For instance, foreign ownership in a local air company is restricted to 49 per cent of shares or participatory interest. There is also a requirement to the minimum size of a charter capital of a bank. As of 2017, the minimum size of a charter capital of a bank is 600 million som. The Kyrgyz Land Code prohibits foreign entities from owning agricultural land. Furthermore, in case of acquisition of over 19 per cent of shares by a foreign entity in a local company that owns land, such company may no longer own the land and will have only temporary right (lease for 49 years) of use to such land.

18 Tax issues

What are the basic tax issues involved in business combinations?

Tax issues involved in business combinations are regulated by the Tax Code and double taxation treaties of Kyrgyzstan. Basically two taxes may arise in M&A transactions, tax on capital gain and tax on dividends.

In the case of a reorganisation (merger or consolidation), a new company will acquire rights and obligations of the reorganised company, including tax liabilities. Generally, if shares or participatory interest is acquired, a seller will bear tax liability (the rate of income tax or corporate income tax is 10 per cent). However, if the seller is a foreign entity, capital gain is not taxed in Kyrgyzstan. Dividends paid to a foreign shareholder shall be taxed at 10 per cent.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The Labour Code provides for basic regulatory framework governing labour and employment relations in a business combination. Reorganisation or acquisition of shares or participatory interest in a local company shall not serve as a ground for termination of employment agreements with employees of such company. However, should an employee refuse to continue working for the company owing to a business combination, such refusal may serve as a ground for termination of the employment agreement with such employee.

Upon completion of the business combination a new owner of the company shall have the right to terminate an employment agreement with the management (director, deputy director) and chief accountant of the company or execute a new employment agreement with them. The new owner shall exercise such right within three months from the date of completing the business combination (such date may vary depending on the type of business combination).

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20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Pursuant to the Insolvency Law, reorganisation of an insolvent company is not forbidden subject to specific restrictions provided in the said law. In particular, if a target company is in bankruptcy or similar restructuring process, it may develop a rehabilitation plan that must be approved by the court or creditors committee. Such rehabilitation plan may include, inter alia, reorganisation of an insolvent company. Further, during the reorganisation procedure an insolvent company or debtor may restructure its debt or sell all or part of its assets to an investor, who will pay the debt and thus restore the solvency of the company.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Kyrgyz laws stipulate no special anti-corruption sanctions with respect to business combinations. General laws regulating anti-corruption issues include the Law on Fighting Corruption, Law on Combating Financing of Terrorism and Legalisation of Illegally Generated Revenues (Money Laundering), relevant provisions of the Code on Administrative Liability and the Criminal Code of Kyrgyzstan, among others. Kyrgyzstan is a member of the United Nations Convention Against Corruption as of 10 December 2003.

Corruption offences (bribery, negligence of official duty, etc) entail administrative or criminal liability such as fines, termination of office and restriction on serving as a corporate officer for a certain period of time and imprisonment. The liability is imposed both on a bribe-giver and a bribe-receiver. Legal entities are not subject to criminal liability. In January 2017, a new Criminal Code of the Kyrgyz Republic was adopted, pursuant to which such offences as insider transactions with securities and raider-related crimes, including, inter alia, illegal actions discriminating, limiting or violating shareholders' rights, entail criminal liability. The new Criminal Code will enter into force starting from 1 January 2019.

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Latvia

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1 Types of transaction

How may businesses combine?

There are several forms of combination used in Latvia:
- purchase of shares in the target;
- purchase of the target's assets or business;
- mergers or demergers; and
- acquisition by using a contractual joint venture.

Purchase of shares is the most common method of structuring M&A deals in Latvia. A purchase of shares is a straightforward way to combine. Less common and more complex is acquisition of the target's business. In the case of a business transfer both the seller and the acquirer may be liable for all liabilities of the seller associated with the business for a period of five years from the transfer date. No such liability issues arise if an undertaking of an insolvent company is acquired (by way of acquisition during insolvency proceedings). Transfer of assets by banks, insurers or state-controlled entities is subject to special regulations and the same applies to acquisition of shares in these businesses.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations are primarily governed by:
- the Civil Law, which governs all civil transactions;
- the Commercial Law, which governs all company matters including special commercial transactions;
- the Competition Law, which deals with merger control and all other competition law areas; and
- the Group of Companies Law, which deals with company groups, holdings and multilayered company structures.

If the companies' bonds or shares are publicly traded then the Financial Instruments Market Law also applies. The Law on State and Municipality Owned Shares and Companies mostly regulates transactions with state (municipality) owned shares.

In addition, the acquisition of shares in insurance companies or their portfolio is governed by the Insurance and Reinsurance Law. Transactions with the shares (or transfer of loan portfolios) in banks or similar financial entities is governed mainly by the Credit Institutions Law.

3 Governing law

What law typically governs the transaction agreements?

In case of private share and asset transactions the parties may choose the governing law. However, some aspects of the transaction are always governed by Latvian law (especially in relation to registration of the shares or real estate transfer as well as other mandatory requirements).

For instance, the Commercial Law prescribes what documentation is necessary in case of reorganisation (shareholders' decisions, reorganisation agreement, auditor's reports, etc) and what procedures should be followed (always ensuring that the interests of the shareholders and creditors are duly taken into account). In case of a public offer the necessary documentation and information to be included is prescribed by the Financial Instruments Market Law.

It is acceptable for a transaction to be subject to non-Latvian law, but owing to its connection with Latvia it might also be necessary to execute local transfer documents.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The Company Register is involved at a certain stage in almost every business combination as it performs, inter alia, registration of share transfers (in case of limited liability companies) and reorganisations, and contains information related to beneficial owners. The standard fees for such registration vary from approximately €15 to €350. Share transfers in private limited liability companies (SIA) are subject to public notary verification. The costs of such verification range from €100 to €1,000.

In case of a merger the parties have to submit a notice to the Competition Council if the combined turnover of the merger participants during the previous financial year exceeds €35,572,000 or the total market share of the merger participants in any relevant market exceeds 40 per cent. The notification procedure does not apply if there are no more than two merger participants and if their combined turnover during the previous financial year did not exceed €2,134,000. Failure to notify the merger makes it void. In practice, however, the Competition Council has up to date issued the post factum permissions for mergers, but imposed the fines for failure to issue timely notification of the merger. The fine is set in the amount of €1,400 per each day of failure to submit the notification to the Competition Council.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information to be disclosed depends on the type of combination as well as on the type of companies involved in the combination. In the case of private share deals or asset deals no disclosures are generally required. Certain information has to be disclosed in the case of reorganisations and public offers. Companies that have their bonds or shares publicly traded are obliged to disclose information in other cases, as well.

As mentioned above (see question 4) the companies involved in reorganisation are required to make certain filings with the Company Register. Namely, the Company Register has to be notified on the fact of reorganisation (by, inter alia, filing the reorganisation agreement). This fact also has to be published in the Official Gazette. The companies involved in reorganisation are obliged to duly inform all shareholders and to ensure that all shareholders are provided with an opportunity to review the documents related to organisation. After the reorganisation agreement is approved by the shareholders' meeting, each company involved in reorganisation has to notify its creditors (as well as publish a notification in the Official Gazette).

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Public tender offers also require disclosure of certain information. For instance, within five business days after permission to make the public offer has been granted by the Financial Supervision Authority (FSA), information on the offer has to be published in the Official Gazette. Afterwards, the board of the target company is obliged to prepare its opinion (within five business days) on the expressed tender offer. This opinion has to be expressed by means of mass media to ensure that this message reaches as many interested persons as possible. The market organiser as well as the employees of the target company must also be informed about the opinion of the board of directors.

Public companies are required to disclose certain information on an ongoing basis. For instance, a listed company is obliged to disclose such information that is related to the company or financial instruments issued by it that might materially influence the price of these financial instruments.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The disclosure requirements for owners are prescribed in the Commercial Law (as regards beneficial owners), the Financial Instruments Market Law and the Group of Companies Law.

The general duty of disclosure of the beneficiaries applies to non-EU shareholders. Pursuant to the requirements of the Commercial Law the companies are required to disclose information to the Company Register (this information is not public) about their beneficial owners after such information is received from the shareholders. A shareholder who holds or acquires at least 25 per cent of the shares in his name but for the benefit of another person is obliged to disclose who the beneficiary (natural person) is.

Specific duty of disclosure is incorporated in the Financial Instruments Market Law and the Group of Companies Law, which require disclosure when the shareholding reaches a certain level.

In accordance with the Group of Companies Law, the shareholder should inform the company about the changes in the shareholding. Thereafter, the company must submit a notice in the Company Register if the shareholding of the particular shareholder surpasses or falls below 10, 25, 50, 75 or 90 per cent. A shareholder is also obliged to notify the Company Register in case a qualifying shareholding is acquired.

The Financial Instruments Market Law requires a notification to the company and the FSA when the percentage of voting rights of a shareholder (in a listed public company) reaches, exceeds or falls below 5, 10, 15, 20, 25, 30, 50 or 75 (and 90 or 95 in case the domicile of the company is Latvia) per cent.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

There is a general obligation of the management and supervisory board members to act with the due care of an honest and diligent owner and they are jointly liable for the losses caused to the company. This general obligation also serves as protection for the creditors and minority shareholders because creditors and minority shareholders may submit a claim against the management and supervisory board members for losses caused due to the breach of this general obligation. Claims against board members of insolvent companies are often brought by insolvency administrators. The Insolvency Law was recently amended increasing the liability of the management board members. It is now prescribed that in case the accounting documents (sufficient to assess the company's financial standing during the previous three years) are not handed over to the insolvency administrator the management board members might be personally liable for the whole amount of the outstanding debts towards the company's creditors.

There are also more specific obligations of directors. As already mentioned, the board of directors of the listed target company is required to prepare an opinion on the proposed public offer. It is prohibited for the board of directors to impede the process of the public offer by any acts or inaction. In case of reorganisation the board of directors of the company to be dissolved or acquired is obliged to inform the shareholders and the acquiring company of all material changes in the financial standing of the company before the authority of the respective board of directors is terminated.

The controlling shareholders also have some duties. A shareholder who is a legal person and holds at least 90 per cent of the shares is obliged to purchase the minority shareholder's shares if the minority shareholder so requests. If the respective parties cannot reach an agreement on the share price, it is determined by the court. The controlling shareholder must also refrain from exercising such influence on the company that would induce the company to conclude a disadvantageous transaction or would cause any other detriment, unless any loss of the company (and in some instances also direct losses of minority shareholders) is compensated.

A shareholder in a listed company has to make a mandatory bid for the remaining shares in the company if its ownership reaches more than 50 per cent of the votes.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Initiation of any reorganisation requires a resolution of shareholders. In case of private limited liability companies (SIA) two-thirds of votes (unless the articles prescribe a higher number) are required to pass such resolution. In case of public limited liability companies (AS) the number is three-quarters (unless the articles prescribe a higher number). Active shareholders will use their right to review the draft documents (among others, the reorganisation agreement, reorganisation prospectus, auditor's report and financial accounts of the company) and to request the board of directors to provide information related to the draft documents, legal and economic consequences of the reorganisation and other aspects of reorganisation. The shareholders are also entitled to challenge the validity of the decision of the shareholders' meeting to initiate reorganisation (such decision may be declared invalid if it is adopted in violation of law or the articles of association).

The company share transfers may be subject to right of first refusal. In the case of mergers disagreeing minority shareholders may request buyout of their shares. An auditor may be involved to assess the value of the shares. The auditor's valuation can be challenged in the courts.

In addition to mandatory bid offer obligation in case of listed companies, non-listed companies have a similar obligation. Under the Group of Companies Law, if one of the shareholders owns 90 per cent or more shares, the minority shareholders may demand buyout of their shares.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

The laws of the Republic of Latvia do not make any distinction between friendly and hostile transactions and the same regulatory framework is applicable in both cases.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

The laws of the Republic of Latvia do not contain any special regulation on break-up and reverse break-up fees. The parties are free to include such provisions in their transactions. As already mentioned, it is prohibited for the board of directors to impede the process of the public offer by any acts or inaction.

It should be noted that there is a general prohibition for the public companies (AS) to finance, directly or indirectly, acquisition of their own shares. This restriction does not apply to SIA. The court practice in cases when illegal acquisition finance is successfully jeopardised by the creditors or minority shareholders is under development.

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11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In general there are no restrictions except for land ownership near country borders and companies owning important infrastructure assets that may require consent of the National Security Council under the National Security Law. In case of sale of the state-owned companies, the government of Latvia may impose restrictions or qualification criteria on potential bidders.

A natural person may be restricted by a court decision to carry out certain commercial activities or hold certain positions in companies.

If the company owns a land plot and the new shareholder is subject to restrictions to acquire such land plot, a consent from the local municipality is required to allow the target company to keep the land plot in its possession. If such consent is not received, the target company is obligated to sell the land plot within two years (unless there is a further change of shareholding and the new shareholder is not subject to similar restrictions).

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The laws of the Republic of Latvia provide requirements on what should be included in the offer (price, terms of the offer, procedure for the acceptance of the offer, etc). There are no provisions on the terms of conditional offers.

Any deviation from the standard provisions of the law should be discussed and clarified with the FSA.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

There is no special regulation as regards financing for a transaction in the laws of the Republic of Latvia. The parties are free to reflect on the financing method in the transaction documents. Obtaining financing by the buyer may be set as a precondition of the transaction. The financial provider may require registration of a charge (in Latvia it is called a 'commercial pledge') over the target shares, which is usually required to be registered simultaneously with the registration of the share transfer. It is typical that it requires a consent of the seller and its creditor, but in practice they are not supportive.

Local banks are used to use the borrower's other assets as collateral for financing and after closing these collaterals are replaced with the target's assets.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Financial Instruments Market Law prescribes that a shareholder who has acquired at least 95 per cent of the voting rights of a listed public company may require the rest of the shareholders to sell their shares. This is called a final buyout offer and the minority shareholders are obliged to sell their shares in this case. A buyout offer may be expressed within three months after at least 95 per cent of the voting rights were acquired. The buyout offer is subject to the decision of the company to leave the regulated market and permission from the FSA.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are usually structured as sale of shares. Cross-border mergers are also possible in which case the regulation on cross-border mergers prescribed by the Commercial Law (implementing the Directive 2005/56/EC) should be observed. Establishment of a European Company (Societas Europaea) is regulated by EC Regulation No. 2157/2001 (which is implemented by the Law on European Companies).

Cross-border structuring depends on the tax burden and because under Latvian law there is no capital gains tax on profit gained from the sale of the shares by a Latvian company (no minimum holding period required) it is standard practice to organise a Latvian structure for the sale of the shares.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

There are several waiting and notification periods that might be relevant. For instance, in case of private share deals the shareholders (unless the articles of association provide otherwise) of the target company will have statutory first refusal rights. These rights can be exercised within a month after notification. In case of transfer of an undertaking the employees have to be informed about it at least one month before.

The reorganisation process will also involve waiting and notification periods. The draft reorganisation agreement and financial documents should be available at least one month before the shareholders' meeting in which it is planned to approve the reorganisation agreement. After it is approved and the shareholders' meeting passes a resolution on reorganisation (business combination), the creditors of the involved companies have to be informed and information on the initiated reorganisation should be published in the Official Gazette. After publication, the creditors should have at least one month to submit their claims, if any. The final documents can be submitted to the Company Register and the reorganisation can thus be finalised not earlier than three months after the official publication. Typically reorganisation takes between four and six months.

In case of public tender offers the persons expressing the offer (or obliged to express the offer) should immediately notify the board of directors of the target company and submit offer documentation to the FSA (the FSA should review the offer within 10 days). Following permission being granted by the FSA to express the offer, the offeror should publish a notification in the Official Gazette. The term of the offer should be 30 to 70 days.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

There are sector-specific rules in relation to some industries, for instance banking and insurance. To acquire a qualified shareholding (above 10 per cent) in a company operating in the banking or insurance sector the person should submit a notification to the FSA and meet certain criteria. The FSA should also be notified whenever the shareholding surpasses or falls below 20, 33 or 50 per cent.

The real estate sector is subject to more and more strict regulation and restrictions mostly relate to agricultural land, forests and land near to borders and the seashore. It is now forbidden for one person to acquire more than 2,000 ha of agricultural land (the local municipalities are entitled to prescribe lower amount). Moreover, the purchaser should conform with certain criteria (eg, has no tax debts, has confirmed that will commence agricultural activities and has received single area payments under Regulation 73/2009 for at least a year during the last three-year period, etc).

18 Tax issues

What are the basic tax issues involved in business combinations?

In general, reorganisations are tax neutral. However, additional tax liability of the surviving company might be triggered in some cases. So far the approach of the State Revenue Service has not been consistent in this regard.

Share transfers and asset deals may be subject to income tax. Any profits earned by a Latvian company on sale of assets are subject to 15

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per cent corporate income tax. Any profits earned by a Latvian company on sale of the shares in a Latvian or non-Latvian company are exempt from corporate income tax.

Individuals, sellers of the shares, may also be taxed at the rate of 15 per cent on capital gains.

It is always advisable to carry out a tax due diligence of the target company prior to closing of the transaction. If the accounting of the target company has been inaccurate in any aspect then there is a high risk that the Latvian taxing authority will spot these inaccuracies during its audit and will impose a substantial fine on the target company.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

As already mentioned (see question 16), employees have to be informed in advance about the planned reorganisation and its legal, economic and social consequences. In case of reorganisation employees automatically transfer to the receiving company which should comply with existing collective employment agreements (if they exist) until they are terminated or new agreements are executed. Such collective employment agreements cannot be amended for the detriment of employees within one year of completion of the reorganisation. Furthermore, reorganisation or transfer of the company itself cannot serve as a basis to terminate employment contracts. However, the employment agreements can be terminated on the basis of company restructuring (economic, technological, organisational or similar restructuring).

In theory, in the case of a transfer of undertaking the employees connected with a specific group of assets should become employees of the transferee. There have been mixed results in the courts when employees tried to dispute their layoff shortly before an asset transfer transaction.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Acquisition of an insolvent company or acquisition of assets from an insolvent company are regulated by the Insolvency Law and the Civil Procedure Law. There are no restrictions to conclude agreements with a company that is de facto insolvent, but has not yet been declared insolvent by the court. However, such transactions can be challenged by the insolvency administrator when the insolvency proceedings are commenced (ie, when the company is declared insolvent by the court). The insolvency administrator may challenge any transaction made five years before insolvency and whether these transactions were not made at arm's length (ie, the insolvent company suffered losses).

After the commencement of insolvency proceedings the insolvency administrator should identify all the assets of the company and prepare a plan for the sale of these assets. The assets can be sold separately or the company (or its part) can be sold in one transaction (if such transaction is more beneficial). The liabilities of the insolvent company do not transfer to the acquirer of the company (or its part).

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The general rules on anti-corruption, anti-bribery, money laundering and terrorism financing also apply in case of business combinations. Latvia is also a party to the international anti-corruption treaties. For breach of these rules banks and other financial institutions may suffer a penalty up to €142,000 and other companies up to €14,000. The major obligation to control the origins of the financing is imposed on the banks.

* *The information in this chapter is correct as of April 2016.*

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Luxembourg

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1 Types of transaction

How may businesses combine?

Business combinations can roughly be divided into the following:
(i) purchasing of shares;
(ii) the purchasing of a business or part of a business;
(iii) legal mergers; and
(iv) public offers for shares.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

In Luxembourg, business combinations that fall into categories (i) through (iii) in question 1 are, first and foremost, subject to the provisions of the Law of 10 August 1915 on commercial companies, as amended, (the Company Law). Takeover bids, which fall into the above category (iv), are predominantly governed by the provisions of the Law of 19 May 2006 transposting Directive 2004/25/EC of the European Parliament and the Council of 21 April 2004 on takeover bids (the Takeover Law).

Business combinations can further be governed by the following main laws and regulations:
- the Law of 5 April 1993 on the financial sector, as amended;
- the Law of 10 July 2005, as amended, on prospectuses for securities, as amended;
- the Law of 23 December 2016 on market abuse (the Market Abuse Law) and Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (the Market Abuse Regulation);
- the Law of 11 January 2008 on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as amended (the Transparency Law);
- the Law of 19 December 2002 on the register of commerce and companies and the accounting and annual accounts of undertakings, as amended;
- the Law of 24 May 2011 on the exercise of certain rights of shareholders in general meetings of listed companies, as amended;
- the Law of 21 July 2012 relating to squeeze-out and sell-out (the Squeeze-out Law);
- the Law of 12 July 2013 relating to the alternative investment fund managers, as amended (the AIFM Law);
- the Law of 18 December 2015 on the failure of credit institutions and certain investment firms, as amended, transposing Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the BRRD Law);
- the Law of 6 April 2013 relating to dematerialised securities;
- the Law of 10 March 2014 on the statute for a European Cooperative Society;
- the Law of 28 July 2014 relating to the immobilisation of bearer shares and the holding of the register of registered shares and of bearer shares (the Immobilisation Law);
- the Law of 18 December 2015 relating to the annual financial statements and the consolidated financial statements of certain types of undertakings;
- the Civil Code;
- the rules and regulations of the Luxembourg Stock Exchange;
- circulars of the Luxembourg financial sector supervisory authority (CSSF); and
- further laws and regulations in relation to tax, labour law and the domiciliation of companies.

3 Governing law

What law typically governs the transaction agreements?

In principle, the law applicable to the target company or target asset also governs the transaction agreements. However, depending on the nationality of the parties and interests involved in a multi-jurisdictional business combination, the parties often take advantage of the freedom to subject the transaction agreements to a law other than Luxembourg law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Generally, a business combination may require administrative filings and publications, such as:
- registration with the Luxembourg Register of Commerce and Companies (the RCSL) and publications in the Recueil Electronique des Sociétés et Associations (RESA);
- notifications to the CSSF or the Luxembourg Stock Exchange;
- storage of information with the Luxembourg Stock Exchange in its capacity as the officially appointed mechanism under the Transparency Law;
- declarations to the Direct Tax Administration;
- declarations to the Joint Centre for Social Security; and
- registrations with the relevant professional chambers.

In case of a transfer of shares in a Luxembourg company, only the acquisition or disposal of shares in a private limited liability company requires a filing with the RCSL and publication of the amount of shares transferred and the identity of the transferee.

For mergers, the common merger proposal and the minutes of the extraordinary general meeting of the company located in Luxembourg approving the merger have to be filed with the RCSL. They will also be published in the RESA.

In the context of a takeover falling under the Takeover Law, the bidder must draw up an offer document to be submitted to the CSSF within 10 working days from the day the bid was made public.

In business combinations involving listed companies, the Luxembourg Stock Exchange requires the communication to it in advance of events affecting those securities that are admitted to trading at the Luxembourg Stock Exchange and of other information useful for the protection of investors.

A business combination that affects the securities of an issuer, the shares of which are admitted to trading on a regulated market and for which Luxembourg is the home member state, can trigger notification requirements of the shareholders and the issuer to the CSSF. Notification requirements of shareholders in relation to the acquisition or disposal of major holdings pursuant to the Transparency Law are set

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out in more detail in question 6. The alternative investment fund managers (AIFMs), when acquiring control over either a non-listed company or a listed company, are subject to notification requirements with the CSSF pursuant to the AIFM Law as set out in more detail in question 6. Moreover, an issuer will have to disclose to the public, file with the CSSF and store with the Luxembourg stock exchange (OAM) the total number of voting rights and capital at the end of a calendar month if the business combination affected the total issued capital and voting rights. An issuer would also be subject to notification requirements in case of an acquisition of its own shares if such acquisition would result in it holding a proportion of its own shares that reaches or exceeds the thresholds of 5 per cent or 10 per cent of the voting rights.

Further filings with the CSSF and disclosures to the public may be necessary under the provisions of the Market Abuse Regulation. For example, persons discharging managerial functions within the meaning of the Market Abuse Regulation with an issuer having its registered office in Luxembourg and whose securities are admitted to trading on a regulated market or a multilateral trading facility (MTF) shall, once such transactions reach a cumulative value of €5,000 (or its equivalent in other currencies) within a calendar year, declare to the CSSF and the issuer the existence of transactions conducted on their own account in such securities promptly and no later than three business days after the date of the transactions (manager's transactions).

As a principle, no stamp taxes or transfer duties are payable for the transfer of shares in Luxembourg.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The type of information to be made public largely depends on the type of structure used and whether the parties are listed companies or not.

Business combinations in relation to privately held companies do not usually require any information to be disclosed except in a case of a transfer of shares in a private limited liability company, which requires the filing of the amount of shares transferred and the full identity of the transferee with the RCSL and publication in the RESA. Also, if the business combination resulted in a modification of the articles of association of a Luxembourg company, these amendments would have to be filed with the RCSL and published in the RESA. Moreover, all mergers, divisions and similar operations will require, in particular owing to the corporate resolutions and actions that must be taken, among others, filings with the RCSL and publications in the RESA.

With regard to business combinations that relate to companies, the securities of which are admitted to trading on a regulated market or MTF market, disclosure requirements pursuant to the Market Abuse Law, the Market Abuse Regulation, the Transparency Law (only in the case of admission of the securities to a regulated market) and the rules and regulations of the Luxembourg Stock Exchange may apply (see question 4).

In connection with a takeover bid, the offeror is obliged to disclose, among other things, information such as:

- the decision to launch an offer;
- the approved offer document;
- information in case of an extension of the offering period;
- information on a squeeze-out or sell-out; and
- forms of acceptance.

Moreover, the offeror and the offeree company must provide the offer document required to be drawn up under the Takeover Law to the representatives of the employees or the employees themselves of the offeror company and the offeree company.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

In accordance with article 8 of the Transparency Law, a shareholder who acquires or disposes of shares, including depositary receipts representing shares, of a company whose shares, including depositary receipts representing shares, are admitted to trading on a regulated market and for which Luxembourg is the home member state and to which voting rights are attached, shall notify the company of the proportion of voting rights of the company held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5, 10, 15, 20, 25, 33.3, 50 and 66.6 per cent. The shareholder shall at the same time notify the CSSF. The voting rights shall be calculated on the basis of all the shares, including depositary receipts representing shares, to which voting rights are attached, even if the exercise thereof is suspended. The notification obligations also apply to certain financial instruments referenced to shares and those financial instruments shall be aggregated with the shares for the purposes of determining the above thresholds.

Under the AIFM Law, if an alternative investment fund manager (AIFM) manages an alternative investment fund (AIF) which acquires, disposes of or holds shares of a non-listed company (excluding certain small and medium-size enterprises that are defined in article 2(1) of the Annex to the Commission Recommendation 2003/361/EC and special purpose vehicles with the purpose of purchasing, holding or managing real estate) (non-listed company), such AIFM must notify the CSSF of the proportion of the voting rights of the non-listed company held by the AIF any time when such proportion reaches, exceeds or falls below the thresholds of 10, 20, 30, 50 or 75 per cent.

In addition, an AIFM managing an AIF which acquires, individually or jointly, control (which corresponds to holding more than 50 per cent of the voting rights of the relevant entity) over a non-listed company, shall (i) notify such acquisition to the non-listed company, the shareholders of the non-listed company and the CSSF (the notified parties) and (ii) disclose to the notified parties the identity of the AIFM, its conflict of interest policy and the policy for external and internal communication relating to the controlled company. The disclosure requirement mentioned in point (ii) above also applies in case an AIF acquires control over a a company having its registered office in the European Union and whose shares are admitted to trading on a regulated market.

As far as the Squeeze-out Law applies, the holder of the securities shall disclose to the company and the CSSF the information where it becomes a majority holder within the meaning of this law or it falls below the threshold of 95 per cent or where it is a majority shareholder and acquires additional securities of the relevant company.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors or managers of a Luxembourg company have duties based on their mandates and they may be held liable for management mistakes or violation of the Company Law or the articles of association of their company. On such basis they should take any necessary or useful action to perform the business combination within the limits of the law, the company's corporate object and according to the company's articles of association. In addition, directors or managers are under a general principle to act competently and in good faith.

They also have to act in the company's corporate interest (which is generally considered as going beyond the sole interest of the shareholders of the company and also encompasses the interest of a larger group of stakeholders such as employees or even creditors).

As a result, the directors or managers should act in the best interests of the company on a case-by-case basis in the context of the contemplated business combination and act as a careful manager or director would act, undertaking all the necessary steps and actions required in the context of business combinations, notably in the context of operations involving numerous actions to perform such as a takeover for shares or cross-border merger.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Any transfer of shares in a private limited liability company to a third party is subject to the approval given in a general meeting of shareholders representing at least three-quarters of the corporate capital (the

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articles of association of the relevant company may reduce such threshold to half of the corporate capital). Shares in a public limited liability company can be freely transferred except if the articles of association of such company provide for a limitation of the right to transfer the shares. The approval of an extraordinary general meeting of shareholders is also required where a business combination entails a capital increase.

In the context of a national merger and cross-border merger, the general meeting of shareholders of the absorbed company and the general meeting of shareholders of the absorbing company must normally approve the merger. However, in national and cross-border mergers there are generally no appraisal rights and there is no cash alternative for objecting shareholders. The Company Law does not provide for specific rights of minority shareholders to block a national and cross-border merger.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Takeover bids regarding a Luxembourg company whose shares are admitted to trading on a regulated market in Luxembourg are governed by the Takeover Law and supervised by the CSSF. If the target's board wants to block a hostile bid, it must obey one of the main principles of the Takeover Law (ie, that the board must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid). However, Luxembourg used the possibility under the takeover Directive 2004/25/EC to make anti-takeover measures and the neutralisation of protection measures optional. Thus, only if the general meeting of shareholders of the target 'opted-in' may its board have to obtain prior authorisation of the shareholders at a general meeting before taking any defensive measures (save for seeking alternative bids).

The offeror, in particular in a hostile takeover, must be aware of the following main principles:

- all holders of the same class of securities of the offeree company must be afforded equivalent treatment;
- the holders of the securities of the offeree company must have sufficient time and information to reach a properly informed decision on the bid;
- false markets must not be created in the securities of the offeree company, of the offeror company or of any company concerned in the bid;
- an offeror must announce a bid only after ensuring that it can fulfil in full any cash consideration; and
- an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a takeover bid (maximum six months from the publication of the decision to make a takeover bid).

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees are legally and theoretically possible, but there has not been any development on doctrine or market price in Luxembourg yet.

When considering entering into a break-up fee arrangement, this has to be discussed in the context of the doctrine of corporate interest, as it might turn out as an advantage or disadvantage for the target company. The arrangement of break-up fees is solely a matter of negotiation with and judgement by the target company's board.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Generally, there are no specific rules or competences given to the Luxembourg authorities to influence or to restrict any business mergers.

In certain specific sectors, powers may be granted to certain authorities to influence business combinations. For instance under the BRRD Law, a resolution authority may exercise certain resolution powers that may result in combinations of credit institutions or investment firms or transfers of their assets.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In the context of a takeover, the offeror can impose certain conditions such as the acquisition of a certain threshold of capital and voting rights of the target or obtaining the approval of authorities. However, the financing cannot be conditional since the bid can be announced only after the offeror has ensured that it can fulfil in full any cash consideration, if offered.

In other business combinations other than a takeover bid, it may occur that a financing can be conditional.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In Luxembourg, the financing for a transaction is typically obtained by two different means:

- The seller itself can participate to the financing of the transaction by mechanisms such as vendor loan notes, earn out clauses or deferred purchase price arrangements.
- The buyer may also call on external financing such as banks or co-investors, which are generally major private equity houses.

Under Luxembourg law, there are no express obligations from the seller to assist the buyer in its financing. However, there is a general rule that the parties to a contract must perform such contract in good faith. Thus, if the obtention of the financing is a condition precedent to the acquisition, the seller will be in the obligation to provide the buyer with assistance for the satisfaction of such condition. In addition, it could be possible for the parties to insert in the legal documentation specific covenants such as for instance the obligation for the seller to communicate to the buyer any information related to the target company that may be necessary for obtaining the financing.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The right to squeeze out minority shareholders in Luxembourg is governed by the Takeover Law and the Squeeze-out Law.

The right to squeeze out minority shareholders can be exercised following a takeover bid pursuant to the Takeover Law. The offeror in a takeover holding at least 95 per cent of the capital carrying voting rights and 95 per cent of the voting rights of the target company can require all remaining shareholders to sell to it the remaining securities at a fair price. Where the target issues several categories of securities, the squeeze-out right may only be exercised in relation to those securities where the 95 per cent thresholds have been met. The offeror must exercise its squeeze-out right within three months from the end of the offer acceptance period during which the holders of securities, to which the public offer has been addressed, have been able to decide to accept or refuse the offer. The offer acceptance period cannot be less than two weeks nor more than 10 weeks from the date of the publication of the offer document by the offeror, unless the 10-week period is extended further.

The decision to squeeze out must be disclosed as soon as it is taken by the offeror (ie, if it is made at the same time as the takeover bid, it must be included in the published offer document) and the CSSF should be informed in advance.

The Squeeze-out Law provides that the majority shareholder, when it acquires or disposes of securities resulting in attaining, falling below or exceeding a previously attained threshold of 95 per cent, must notify the company and the CSSF of it as soon as possible and no later than four days thereafter. In the case of a squeeze-out, the majority shareholder

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Update and trends

The year 2016 could be viewed as a new foundation year in the area of mergers and acquisition in Luxembourg. Indeed, after a legislative marathon of about 10 years, the Luxembourg parliament adopted on 13 July 2016 the Bill of Law 5730 modernising the law of commercial companies of 10 August 1915 and amending, inter alia, some articles of Luxembourg Civil Code related to companies. The new regime came into force on 23 August 2016.

The new reform shows the willingness of the Luxembourg legislator, on the one hand, to favour the contractual freedom of the shareholders and, on the other hand, to reassure the legal certainty for third parties. The reform purports to assert the attractiveness of Luxembourg as a major financial centre for international investors.

The reform brought significant changes in our legislation. The reform confirmed current practices, offered new instruments for the investors, harmonised rules applying to different legal forms and created a new legal form the *société par actions simplifiée* (SAS). Thus, for instance, the law now recognised the practice of the issuance of tracking shares, the voting agreements are expressly authorised by the law, the board of managers or the board of directors (as the case may be) of the companies has the possibility to suspend the voting rights of shareholders which are in breach of their obligations under the articles of association, shareholders may waive all or part of their voting rights, temporarily or permanently and the companies can issue shares with different nominal value and voting rights.

Luxembourg has traditionally been a jusrisdiction where major private equity houses structure their investment holding platform in view of the acquisition of their target companies. Owing to the important available funds that the private equity funds collected, we have seen in the recent years an increasing number of major M&A deals being made via Luxembourg. By creating a legal environment favourable to the investors it is likely that such trend will continue to steadily increase.

must appoint a qualified independent expert who will draw up a report in order to determine the fair price to be paid to the minority shareholder within a month of the notification to the CSSF of its intention to effect a squeeze-out. Similarly, where a minority shareholder requests that the majority shareholder purchases its securities at a fair price, the majority shareholder is to appoint a qualified independent expert to determine the fair price to be paid to the minority shareholder. In the event of an opposition in situations of both squeeze-out and sell-out the CSSF shall decide, on the basis of a second report, the price to be paid within three months of the expiry of the opposition deadline.

The squeeze-out and sell-out mechanism is still unavailable where the Luxembourg company has never been listed.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

As a principle, cross-border mergers with foreign companies are allowed in Luxembourg on the condition that they are not prohibited by the provisions of the applicable foreign law.

Luxembourg has transposed the European Directives relating to cross-border mergers, notably Directives 2005/56/EC and 2007/63/EC. Cross-border mergers are subject to the Company Law. On 3 August 2011, the Luxembourg parliament amended the Company Law completing the transposition of Directive 2009/109/EC concerning the reporting and documentation requirements in the event of mergers and divisions.

A cross-border merger can be realised through a merger by absorption or by incorporation of a new entity, a merger by migration to Luxembourg or by migration from Luxembourg to another jurisdiction or through an upstream merger or a reversed merger.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

As far as the Takeover Law applies, an offeror shall communicate the offer document to the CSSF for its approval, which shall be received by the CSSF within 10 working days from the day on which the bid has been made public. The CSSF notifies its approval to the offeror within 30 working days following the submission. However, if the document was incomplete or additional information is necessary, the time delay only runs from the date on which the offeror provides the requested information.

The time period for the acceptance of a bid may not be less than two weeks and not more than 10 weeks from the date of publication of the offer document. However, the 10-week period may be extended under certain conditions.

However, the target company shall not be hindered in the conduct of its affairs for longer than is reasonable by a takeover. The time period shall not exceed six months from the date on which the decision to make the bid was made public.

For cross-border mergers, there is a waiting period of at least one month between the day of the publication of the common merger proposal in the RESA and the date of the shareholders' meeting approving the proposal to merge.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Credit institutions, other professionals of the financial sector, insurance companies and investment funds are subject to specific regulations and specific approval rules by a supervisory authority.

18 Tax issues

What are the basic tax issues involved in business combinations?

From a tax point of view there are three different main kinds of business combinations in Luxembourg (ie, merger, division and contribution of assets). Generally speaking the tax law facilitates such combinations by granting neutrality or exemption treatment in a wide array of cases.

Regarding the shareholders of the transferor company, the exchange of shares should be considered as a sale followed by an acquisition (article 22(5) of the Luxembourg Income Tax Law (the LITL)) and capital gains realised by the shareholders upon the sale are taxable.

However, shareholders rewarded by new shares should be tax-exempt from the realisation upon the transfer of the shares (rollover relief, under certain conditions) but they are tax liable upon disposal of shares received in exchange (article 22-bis LITL).

In the context of mergers and divisions, any operation that results in the transfer of the entire assets and liabilities of a company to another person is treated as a liquidation for tax purposes and, thus, taxable at the level of the transferring company according to article 169 LITL.

However, the profit arising from the transfer of assets and liabilities of a Luxembourg-resident company to a Luxembourg-resident fully taxable company or a company resident in another EU member state should be tax-exempt provided that the receiving company issues shares with a balancing payment in cash not exceeding 10 per cent of the shares' value to the shareholders of the transferring company or the shares held by the receiving entity in the transferring company are cancelled, and provided that the exempt profit is transferred under such conditions that its future taxation remains possible in Luxembourg where such profits would not have been otherwise exempted.

A shareholder transferring his or her entire participation is viewed as liquidating the investment held before the cancellation (ie, the participated company is partially liquidated). Note that no dividend withholding tax applies in cases of full or partial liquidation of Luxembourg companies. According to the current administrative practice, the same should apply to the deemed partial liquidation (ie, classes of shares).

In relation to the contribution of assets, there should be a tax-neutral exchange for the transferor if the contribution is at book value and to the extent that the contributed assets comprise a business unit or an autonomous part of business and the transferor and the transferee

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are resident companies fully taxable or the transferee is located within the EU or European Economic Area.

The Luxembourg Income Tax Law contains also a favourable tax regime for cross-border divisions.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The rights and responsibilities of employers and employees are primarily governed by the Luxembourg Civil Code and the Labour Code. For a transfer of an undertaking or business or part of an undertaking or business located in Luxembourg as a result of a business combination, article L.127 et seq of the Labour Code applies. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer are transferred to the transferee. Thus, the Labour Code effects an automatic transfer of the employment contracts that bind the transferor, the transferee and the employees. Luxembourg legislation does not provide for any right of objection by which an employee may prevent the transfer of his or her employment. An employee refusing the transfer is generally considered by the court as a resigning employee. On the other hand, the transfer itself cannot constitute grounds for dismissal by the transferor or the transferee.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The Company Law allows the merger with a company incorporated in Luxembourg subject to restructuring or bankruptcy. This provision applies when the company subject to restructuring or bankruptcy is incorporated in Luxembourg and the absorbing company is a foreign company. However, the Luxembourg legal provisions do not exclude the application of this provision to a foreign company that is subject to restructuring or bankruptcy if the foreign laws are not opposed.

The entering into a business combination with a company subject to insolvency or bankruptcy in Luxembourg during its suspect period, defined as starting at the date of its cessation of payment until the date of the judgment, should be closely analysed as it could be challenged regarding the definition of the cessation of payment.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Companies and persons operating in Luxembourg, particularly those operating in the financial sector including AIFMs, are subject to the provisions of the Criminal Code and the Laws of 12 November 2004 and 27 October 2010, as amended, concerning the fight against money laundering and terrorism financing.

To further strengthen the means for the fight against corruption, Luxembourg legislation adopted a law of 13 February 2011, which amended the Labour Code, the Criminal Code and other laws. Corruption can be penalised by a prison sentence and a fine of up to €250,000 depending on the function of the person having committed the offence.

For passive and active bribery committed by or against directors or managers of companies, the Criminal Code provides for imprisonment of one month to five years and a fine of €251 to €30,000. Legal entities are liable for the offence, including extortion, bribery (public or commercial), trading influence and corruption offences, and may be punished by one or more of the following penalties, in addition to the compensation of damage to the person who has suffered owing to the fraudulent act:

- a fine, in the conditions and modalities provided for in article 36 of the Criminal Code;
- specific confiscation;
- disqualification from public tenders; and
- dissolution, in the conditions and modalities provided for by article 38 of the Criminal Code.

In case of takeovers, an administrative sanction in the form of a fine between €125 and €12,500 may be imposed in the case of an infringement of the Takeover Law, which is likely to breach the general principles set out in article 3(a) to (e) of the Takeover Law. Further, the omission of notifications or provision of information to the CSSF or to the representatives of the employees can in certain cases result even in criminal sanctions.

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Macedonia

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1 Types of transaction

How may businesses combine?

According to Macedonian legislation, a business combination can be achieved through an acquisition, status changes (accession, merger and division), cross-border mergers and changes of legal form. In this area of law, Macedonian legislation is harmonised with the EU *acquis communautaire*.

An acquisition can be made in the form of purchasing shares, stakes or assets, which is followed by a respective procedure pursuant to the Trade Companies Law. One or more companies may be acquired (company subject to accession) by another company (acquiring company) by transferring its entire assets and liabilities, without conducting a liquidation procedure, in exchange for parts or shares in the acquiring company. Two or more companies may merge without conducting a liquidation procedure, by founding a new company beneficiary, to which the entire assets and liabilities of the merging companies are transferred, in exchange for parts or shares of the new company beneficiary. In accordance with the latest changes to the Trade Company Law, a cross-border merger can be made between Macedonian joint-stock companies and limited liability companies, and limited liability companies registered in the European Union. A cross-border merger is possible only for limited liability companies, excluding companies managing investment funds and companies with the main business of acquiring funds for financial investment (article 537-b).

A company may, by way of division, simultaneously transfer its entire assets and liabilities to two or more newly founded companies, or to two or more existing companies, whereby the company subject to division shall be wound up without conducting a liquidation procedure. A company may, by way of division, transfer part of its assets and liabilities to one or more newly founded companies, or to one or more existing companies, whereby the company shall not be wound up. Additionally, the possibility of public-private partnerships is provided in the Law on Concessions and Other Forms of Public-Private Partnership.

A public–private partnership is a venture undertaken by a private partner for the needs and benefit of the public partner with a paid contribution.

In accordance with this law, the public partner may be Macedonia, the municipalities or the city of Skopje, public enterprises and other public institutions, trade companies established by Macedonia, the municipalities or the city of Skopje, companies where the state or the bodies of the municipalities and the city of Skopje have direct or indirect influence over the ownership over them (namely, if they own a significant amount of the capital of the company, if they have a majority of the shareholders' votes and more than half of the members of the management board of the company), as well as other legal entities that execute public duties following public authorisation. In these cases the private partner can be a foreign or domestic natural or legal entity, or a consortium, to which the public–private partnership contract is awarded.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The following laws and regulations govern business combinations:

- the Trade Companies Law;
- the Takeover Law;
- the Securities Law;
- the Law on Obligations;
- the Competition Law;
- the Foreign Exchange Law;
- the Profit Tax Law;
- the Labour Law; and
- the Law on Concessions and Other Forms of Public-Private Partnership.

3 Governing law

What law typically governs the transaction agreements?

In general, the private acquisition of shares, stakes or assets of a company is realised through sale and purchase agreements, whereas the governing law is usually determined by the contractual parties.

A foreign law and jurisdiction is designated when the subject of the transaction involves a foreign element. An arbitration clause is also usually agreed upon by the parties.

If the transaction involves real estate, the exclusive authority of Macedonian law and its jurisdiction shall apply.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Acquisitions must be reported to the Central Trade Register (CTR) within 15 days from the date they occur. When a business combination involves the accession, merger or division of a joint-stock company, a compulsory notification is to be made to the Central Security Depository, no later than eight days from the day the transaction is made. The notification concerns the executed reorganisations. At the same time, a request for changes to the shareholders' register is to be made or for a shareholders' register to be opened.

In a business combination that involves statutory changes, the management bodies of the companies that concluded the agreement and the management body of the company subject to division by separation shall, no later than one month prior to the convening of the members' meeting or the shareholders' general meeting, jointly publish a notification on the concluded agreement or the adopted plan on division in the Official Gazette of the Republic of Macedonia and in at least one daily newspaper. The same term shall apply for submitting the agreement or the plan on division to the CTR for pre-registration.

Once the pre-registration has been entered, a notification shall be published in the Official Gazette of Macedonia stating that the pre-registration has been entered in the commercial register and that the agreement or plan on division is available for inspection. The agreement or the plan on division shall be reviewed by one or more certified auditors. Certified auditors shall be appointed for each company separately by the management bodies of the companies that participate in the accession, merger or division. The certified auditors may audit each of the companies participating in the accession, merger or division, if appointed by the court upon their joint request. Also, where the

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company is aware of creditors whose claims exceed the equivalent of €10,000 in denar they shall be notified in writing.

Each company participating in the accession, merger or division shall enable the members or shareholders, at least one month prior to the date on which the members, members' meeting or the shareholders' general meeting decides upon the adoption of the agreement or plan on division, to review the documents relevant to the accession, merger or division. The agreement or the plan on division shall become effective once members, the members' meeting or the shareholders' general meeting of the companies involved in the accession, merger, and division approve it. If the acquiring company owns at least 90 per cent of the parts or shares represented by the core or charter capital of the company subject to the accession, or the company subject to division by separation with a takeover or a spin-off with a takeover, the consent of the members, the members' meeting or shareholders' general meeting of the acquiring company shall not be required.

The administrative fees payable to the CTR ranges from of €10 to €150, depending on the subject of registration.

If the business combination qualifies as a concentration pursuant to the Competition Law, a compulsory notification to the Competition Commission is required.

A concentration shall be deemed to arise where a change of control on a lasting basis results from the merger of two or more previously independent undertakings or parts of undertakings or the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means prescribed by an order of law, of direct or indirect control of the whole or parts of one or more other undertakings. The following thresholds shall apply when the concentration is subject to compulsory notification to the Competition Commission:

- the aggregate turnover of all participating undertakings, generated by the sale of goods or services on the world market, is more than the equivalent of €10 million in denar, realised during the business year preceding the concentration and provided that at least one participant is registered on the territory of Macedonia;
- the aggregate turnover of all participating undertakings, generated by sales of goods or services on the territory of Macedonia, is more than the equivalent of €2.5 million in denar, realised during the business year preceding the concentration; or
- the participation on the market of one of the undertakings is more than 40 per cent or their joint participation on the market is more than 60 per cent.

The administrative fees for notification amount to approximately €100.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

If the business combination considers any legal entity that either has conducted a public offering of securities or has a basic capital in excess of 1 million denar and more than 100 shareholders or is listed on a stock exchange (a reported company), that legal entity has to notify the Security Commission of any changes in the ownership of the company that occurs. A compulsory public announcement is to be made on the proposal for the cross-border merger, with the conditions thereof, in the Official Gazette of Macedonia and on the official website (if any) of the company at least one month before taking the decision of the general assembly of the company for accepting or refusing the cross-border merger. In other cases, only the shareholders of the companies involved in the business combination are to be notified.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

When any legal entity or natural person purchases or otherwise acquires securities issued by a reporting company in an amount such that the owner, directly or indirectly, owns in aggregate more than 5 per cent of any class of security issued by the reporting company, the owner shall file a report with the Commission and the issuer disclosing the ownership within five business days after the settlement of a contemplated transaction. Any legal entity or natural person who, directly or indirectly, owns more than 5 per cent of any class of security issued by a reporting company shall report all subsequent acquisitions and dispositions of all securities issued by the reporting company to the Commission and the issuer within five business days, regardless of the legal grounds of the change.

An entity that acquires shares of an open joint-stock company amounting to €25,000 or more, is obliged to publicly announce the acquisition, with prior approval from the Security Commission.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The agreement or the plan on division, and all elements deemed as constituent parts of it, are to be made available to all the members or shareholders in the registered office of the companies participating in the accession, merger, or division. The notification referred to above is to specify the time-frame and other details significant for each member or shareholder in regards to the inspection.

The creditors of whom the company is aware, whose claims exceed the equivalent in denar of €10,000 are to be notified in writing, individually, at their place of residence or at their registered office if the creditor is a legal person.

Creditors who are not entitled to request settlement from the companies involved in the accession, merger or division, owing to their claims not having yet matured and who consider that the accession, merger, or division shall endanger the settlement of their claims, are to file a request to obtain security for their claims with the companies subject to accession, merger or division, within 30 days of the date announcing the notification. In the event that the companies subject to accession, merger or division fail to respond to the creditor's request within 15 days of the date of the filed request or fail to provide the required security, the creditor may, within the next eight days, submit a claim to the court to terminate the procedure for accession, merger or division. If the court determines that in the course of the procedure for accession, merger or division the creditor's request was not considered or that the required security was not provided, it may suspend the procedure, pursuant to the creditor's claim, until the companies subject to accession, merger or division submit evidence to the court, within the specified term, that the claim of the creditor has been secured.

The management bodies that have concluded the agreement or the plan on division are to prepare a written report, which is to be made available to the shareholders at least one month prior to the general meeting of the shareholders, explaining the following in detail:

- the reasons, or the objective to be achieved by the accession, merger or division;
- the legal and business issues, as well as the proposed legal and economic grounds for the accession, merger and division;
- the criteria and methods that determine the exchange ratio of the parts or shares and the criteria for their distribution;
- the contents of the documents and the draft agreements for accession, merger or division;
- any difficulties that occurred in the course of the procedure for the appraisal of the assets and liabilities;
- the non-monetary contributions transferred, as well as any problems that arose from the appraisal carried out in accordance with article 35 of the Trade Companies Law and a reference to the reports on the basis of which they were appraised and the manner in which such reports have been made available;
- any change in the assets and liabilities that occurred between the date of concluding the agreement, or the adoption of the plan on division and the date of convening the members' meeting or the shareholders' general meeting at which a resolution for accession, merger or division shall be decided upon; and
- any amendments made in the agreement or the plan on division due to an obligation to act in accordance with the recommendations of the certified auditor.

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The management body of a Macedonian company in a cross-border merger, as well as the proposal with the conditions thereof, is obligated to announce the following details:
- the form, name and registered seat of each company involved in the merger;
- the register where each of the companies that are involved in the merger is registered and their registration number; and
- for each company involved in the merger, the terms and conditions under which minority shareholders are acquiring their rights, form of settlement for the creditors and the address where free-of-charge information can be obtained concerning the above.

Also, the management body must prepare a report for cross-border mergers including an explanation justifying the legal and economic aspects of the cross-border merger and the possible consequences for and influence over the shareholders, creditors and employees.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

The decision on the business combination is made by the shareholders at the shareholders' meeting, by giving approval to the settlement signed by the managing bodies of the companies taking part in the combination. In a cross-border merger, the proposal with the terms and conditions of the merger is subject to a compulsory appraisal by an authorised appraiser, who will prepare an official report.

If the combination is to result in increasing the obligations of the shareholders, the decision on the business combination is to be made unanimously.

The agreement or the plan on division becomes effective once the shareholders' assemblies of the companies involved in the business combination approve it.

If the acquiring company owns at least 90 per cent of the parts or shares represented in the core or charter capital of the company subject to the accession, or the company subject to division by separation with a takeover or spin-off with a takeover, the consent of the shareholders' meeting of the acquiring company is not required.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

In accordance with some of the latest changes to the Company Takeovers Law (article 15, paragraph 3), during the takeover procedure, the managing board and the supervisory board of the joint-stock company to which the bid refers to must act in the interests of the company as a whole, and must not deter the owners of the shares from taking a decision regarding the advantages of the takeover bid.

The board of directors, namely, the managing board or the supervisory board of the joint-stock company to which the takeover bid refers, are to prepare a document in which they express their opinion on the influence and the business operations of the joint-stock company that is listed in the takeover bid and the reasons on which their opinions are founded.

The fact that the management must not deter the owners of the shares from taking a decision on the takeover bid gives reason to believe that the management must be neutral, and cannot take any actions to stop or impede the takeover.

Moreover, there are set limitations imposed on the management board during the time the procedure is active.

In accordance with the Company Takeovers Law, once the purchase offer of the offeror for the takeover of the company is published, certain limitations are imposed on the managing body of the company. In accordance with these provisions, from this moment to the moment of publishing the outcome of the purchase offer, the managing body cannot take the following steps without a resolution of the shareholders' meeting:
- increase the basic capital;
- take actions that do not form part of the regular course of work of the company;
- take actions that could endanger the further working of the company;
- gain own shares or other types of own securities from which a right to swap or acquire own shares arises; or
- take actions whose only purpose is to prevent or to make the acceptance of the purchase offer more difficult (article 36 Company Takeover Law).

Based on the information published by the offeror on whether the purchase offer was successful, the Securities Commission brings a resolution on the success of the purchase offer.

In the 12 months following the resolution of the Commission, the offeror cannot make new purchase offers and cannot purchase the securities to which the purchase offer referred to, if those securities, along with the remaining securities that the offeror already possesses give him or her more than 25 per cent of the securities with the right to vote, if:
- the purchase offer was unsuccessful;
- the purchase offer was revoked;
- the obligation was terminated as a result of a required approval, permit or other consent by an authorised body; or
- the obligation was terminated as a result of a resolution on the increase of the basic capital not being adopted by the managing body, if such resolution has been foreseen with the purchase offer.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

No fees are prescribed where the offeror decides to cancel the intention to purchase. However, in this case, the offeror cannot make a new offer before the expiry of a one-year term from the day of the cancellation.

The new offer can be given in a shorter period in the case of the cancellation of the intent being made based on the Securities Commission's consent.

In the case of third-party bidders, it is prescribed in the Company Takeover Law that the offeror can withdraw from the negotiations for the acceptance of the offer. This can be done in the period from the publishing of the purchase prospect until the expiry of the term for the acceptance of the offer. The offeror is to publish the withdrawal from the purchase offer within one day from the date of the withdrawal and inform the Securities Commission and the Central Depository for the withdrawal of the offer.

As for third-party purchase offers, they can only be given by a person who is not connected through capital, that is, management with the person giving the previous purchase offer and not a bank or a broker house giving the offer in the name and on behalf of the offeror.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In general, apart from the competition regulations, legislation in Macedonia imposes no restrictions on business combinations. Official bodies can object to cross-border mergers only if they breach competition law and other regulations concerning the public interest.

Special provisions are only defined for financial institutions, as well as the legal entities performing activities of transfer of real estate, revision and accounting, as well as other similar activities through which real estate is acquired.

The entities are obliged to pay special attention to the more complex and unusually big transactions or the transactions that are performed on an unusual way, which does not have obvious economic justification or evident lawful purpose. They must determine the risk of money laundering and financing terrorism before introducing in use new technologies or technologies in development, new products or services, also as determining the risk of using the new technologies for money laundering and financing terrorism. The entities are obliged to perform analysis of the purpose and the intention of the activities and

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they must prepare written report for the analysis (article 16 of the Law on Preventing Money Laundering and Financing Terrorism).

Also, the Securities Commission may reject the issuance of a permit for a competition purchase offer if it determines that it is an offer whose sole intent is to alter the price of the securities to which the purchase offer refers.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The takeover can be conditioned by the smallest quantity of securities to which the purchase offer refers to, which is to be accepted, so that the purchase offer is considered successful.

As for conditional financing in a cash acquisition, the purchase offer is to specify the price and conditions of purchase or where the case is an exchange offer, the exchange ratio must be specified. The offeror cannot change the offer or the conditions in the purchase offer apart from the cases where it is approved by the Securities Commission.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Financing for a transaction can be made by a financial institution, with performance of the payment directly from the said institution. A possible way of performing the financing is opening an escrow account, with documentation that explains the purchase transaction. After several conditions are met, and upon joint approval of the parties, a financial transaction can be closed successfully. Also, the buyer can obtain a loan from the financial institution, strictly for the transaction to be made, so the payment can be made directly from the financial institution. The conditions for obtaining a loan depend on the rules and regulations of the financial institutions separately.

Generally the seller does not have an obligation to assist the buyer in the financing; however, if this is agreed upon, it shall then depend on the mutual agreement between the seller and the buyer, as this issue is not regulated by law.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Yes, but only in certain cases.

According to article 63 of the Takeover Law, when the offeror in a takeover procedure buys a minimum of 95 per cent of the shares with voting rights of the company to which the takeover bid refers, he or she has the right to buy the shares from the remaining shareholders that do not accept the takeover bid. This additional buying must be done according to the same terms and conditions that refer to the takeover bid.

If the offeror uses this right, he or she must submit a request to the Central Depository of Securities, offering to purchase the shares of the shareholders that do not accept the takeover bid, setting out the same terms and conditions for buying the shares as those set in the public offer; he or she must also pay the amount necessary for buying these shares into the account of the Central Depository of Securities. The Central Depository of Securities will then inform all remaining shareholders of the submitted request for the offered purchase and call them to provide the Central Depository of Securities with the data for the bank account to the payment will be conducted.

The request for an offered purchase of shares of the shareholders that do not accept the takeover bid, can be submitted by the offeror in a time period no longer than 90 days from the day of announcement of the decision regarding the successfulness of the takeover bid by the Commission, in the Official Gazette of the Republic of Macedonia.

The request for offered purchase of shares of the shareholders that do not accept the takeover bid, must be announced by the offeror in the Official Gazette of the Republic of Macedonia, as well as in one public newspaper that is published nationally in the whole territory of Macedonia.

In the request for the offered purchase of shares of the shareholders that do not accept the takeover bid, one of the alternatives for the payment of the shares must be cash payment, disregarding any other method of payment offered and used in the public offer. The Central Depository of Securities conducts the payment of shares on behalf of the offeror and the transfer of the shares on behalf of the name of the offeror; all costs for such transactions shall be borne by the offeror.

According to article 64 of the Takeover Law, when the offeror in a takeover procedure buys a minimum of 95 per cent of the shares with voting rights of the company to which the takeover bid refers, he or she has the obligation to buy the shares from the remaining shareholders that do not accept the takeover bid, if those shareholders submit in front of the Central Depository of Securities, a request for the forced purchase of shares. All of the above stated terms and conditions for conducting the procedure when the offeror states the offered purchase apply to the procedure when the remaining shareholders request a forced purchase.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are regulated by the Foreign Exchange Control Law.

According to this law, cross-border transactions are defined as current and capital transactions.

Current transactions are defined as transactions between residents and non-residents, the objective of which is not a transfer of capital. The payments and transfers for a current transactions shall include:

- payments due on the basis of goods and services exchanges, as well as the usual short-term banking payment instruments and credit instruments connected with an exchange of goods and services;
- interest payments for credit and net income payments from other investments;
- repayment of a reasonable balance of credit or payments arising from depreciation of direct investments; and
- reasonable remittances for covering the costs of living.

Capital transactions are defined as transactions between residents and non-residents with the aim of transferring capital, as follows:

- direct investments;
- investments in real estate;
- securities operations;
- transactions with documents for participation in investment funds;
- credit operations,
- sureties and guarantees;
- deposit operations; and
- transfers in performance of life assurance and credit insurance.

Direct investments are defined as investments by an investor with the aim of establishing lasting economic links or realising a right to manage the trade company or other legal entity in which he or she is investing. The following shall be deemed as direct investments:

- creating a trade company or extending the equity of a trade company in full ownership of the investor, establishing branches, or the acquisition of full ownership of the existing company;
- participation in a new or existing trade company if the investor holds or acquires more than 10 per cent of the participation in the equity of the trade company, that is, more than 10 per cent of the voting rights;
- long-term loan with a maturity period of five years, when it is a matter of a loan from the investor and it is intended for a trade company in his or her full ownership; and
- long-term loan with a maturity period of five years and more, when it is a loan intended for establishing lasting economic links and if such loan has been granted between economically associated entities.

Direct investments of non-residents in Macedonia shall be free, unless otherwise provided by a separate law.

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Within 60 days of the performance of the capital transactions serving a legal basis for making a direct investment in Macedonia, non-residents are obliged to report the investment and all subsequent changes thereof to the Ministry of the Economy.

The Ministry of the Economy shall register the investment and all subsequent changes thereof in the register of direct investments of non-residents in the Republic of Macedonia. The Ministry of the Economy shall keep a registry of direct investments of non-residents in Macedonia.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

A notification obligation is imposed on the president of the managing board to notify the Central Securities Depository of the status change within eight days from the day of the recording of the new company (or the merger or the division of the joint-stock company). A warrant is to be given in this term for the changes to be recorded in the shareholders' book, namely, for opening a new shareholders' book.

Also, each company must submit an application for the recording of the merger, division or takeover in the trade register.

The submission of the application must be accompanied by a statement given by the members of the managing board, that all the decisions for the combination have not been challenged in the prescribed period, or that the challenge has been refused with final court decision (article 536 Company Law). In cross-border mergers, a period of at least one month is set forth between announcing the proposal for a cross-border merger and the decision by the shareholders' assembly. After taking the decision for accepting the proposal for the cross-border merger, the merger company must submit a request for a certificate for the pre-merger from Central Register. The Central Register shall issue a certificate for pre-merger within three days, counting from the date that the completed documents together with the request are received (article 537-3, paragraph 8). The Central register shall issue a final decision on registering the completed cross-border merger within eight days from the day of submitting the completed documents of the new company.

The legal consequences of the combination occur from the date of publishing the recording of the inscription of the combination in the trade register.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Some regulated activities may be subject to additional approvals with regard to mergers and acquisitions. For example, the banking and insurance sectors are regulated. The regulator of banks is the National Bank of the Republic of Macedonia and for any status changes, the National Bank of the Republic of Macedonia must issue a permit for the status change before it is carried out.

The relevant regulatory body for insurance companies is the Insurance Supervision Agency, which must give prior consent for direct or indirect acquisition of qualified participation in an insurance company.

18 Tax issues

What are the basic tax issues involved in business combinations?

In accordance with VAT Law, no VAT is paid on trading with securities. However, when the seller of the securities is a legal entity, income tax shall be paid on the gain made by the selling of securities, and this amount is included in the tax basis of the company selling the securities.

The capital gain represents the difference between the selling price of the securities and their purchase price. The capital gain made from the selling of securities is included in the tax basis at 70 per cent.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Business combinations are regulated by the Company Law and the Labour Law. The Company Law prescribes certain elements that the merger settlement and the division plans are to contain, such as the conditions under which the working relationship will be continued with employees of the company subject to takeover. This settlement is made between the managing bodies of the company subject to the company combination, and the division plan is made by the managing body of the company that is subject to division.

Pursuant to the Labour Law, all rights and obligations concerning the Employment Agreements are transferred to a new employer, resulting from a business combination. The new employer is obliged to keep the employees at least one year. In the case of a business combination, if the rights of the employees are reduced and this results in the cancelling of the employment contract, it shall be considered that the employer cancelled the employment contract for business reasons.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Mergers, takeovers and divisions of companies can be conducted for a target company that is in bankruptcy on condition that the open bankruptcy procedure will be stopped for the reorganisation of the company, when it has been prescribed in the reorganisation plan of the bankruptcy manager.

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21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

While significant enforcement practices in relation to white-collar crime have yet to be established in Macedonia, a new Law for Preventing Money Laundering and Financing Terrorism has been adopted with which new Directorate for financial counterintelligence has been established. The new Directorate has stronger authorisations that mainly refers to wider control of the entities that are subject to the control and bigger cooperation with the Public Prosecutor and the relevant institutions.

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Malaysia

Addy Herg and Quay Chew Soon

Skrine

1 Types of transaction

How may businesses combine?

The combination of business in Malaysia may occur in numerous ways. The most common ways include:

- acquisition of shares in a company;
- acquisition of business or assets of a company by another company;
- formation of a joint venture company through contractual means; and
- the acquisition of certain companies, such as public companies listed on the Malaysian stock exchange, may also be subject to mandatory takeover requirements under the Malaysian Code on Take-Overs and Mergers 2016 (Code).

Other ways also include:

- selective capital reduction under the Companies Act 2016 (Companies Act); and
- a scheme of arrangement sanctioned by court order under the Companies Act.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations that govern business combinations are as follows:

- the Companies Act (which came into effect on 31 January 2017 and repealed the previous Companies Act 1965) govern companies incorporated in Malaysia and branches of foreign company registered under the Companies Act, and will therefore be applicable to business combinations involving companies;
- the Capital Markets and Services Act 2007 (CMSA) and the subsidiary legislation made thereunder (such as the Code, the guidelines and directives issued by the Securities Commission of Malaysia (SC)), which govern public takeover involving public listed companies and capital markets conduct and products;
- Bursa listing requirements (Listing Requirements), which govern among others listed companies' conducts, transactional matters, and disclosure obligations; and
- contract laws codified in the Contracts Act 1950, which govern contractual principles and matters in Malaysia.

Other laws may also be applicable depending on the types of industry of the target companies to which the combination business relates. Different regulatory bodies may be given power to issue and stipulate guidelines, conditions or licensing requirements under specific legislations requiring specific approvals to be obtained in respect of combination of businesses. For example, the Financial Services Act 2013 (FSA) requires that the Minister of Finance's approval be obtained for the acquisition of control over financial services providers such as banks and insurers. The FSA also requires that transfer of business be done by way of a scheme of arrangement requiring approval from the Minister of Finance, and is to be sanctioned by court order.

3 Governing law

What law typically governs the transaction agreements?

The transaction agreements are generally governed by the general principles of the common law, and the contract laws codified in the Contracts Act 1950. The parties to the transaction agreements are also free to agree on the choice of law of the transaction agreements. Generally, the Malaysian courts will recognise and give effect to such choice of law clauses save and except in certain cases whereby there have been, for example, a breach of public policy in that regard.

Other applicable laws or legal regulations may also come into play depending on the nature of the transactions or the parties or target companies involved. For example, it is common to incorporate the requirements under the Code into transaction agreements if the transactions involves the takeover of a public company listed in Malaysia.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Governmental or regulatory filings

Depending on the nature of the transactions or the target companies involved, certain filings with the governmental or regulatory agencies or bodies may be required, which, among others, include:

- In cases of transactions or takeover involving public companies to which the Code applies, the offer must be accompanied with an offer document and must be submitted to the SC for its clearance and guidance. If the transaction involves, for example, the issuance of securities, a prospectus or information memorandum may be necessary and will have to be lodged or deposited with the SC.
- In cases of transactions or takeover involving public listed companies, if the transaction value exceeds the stipulated percentage ratio (calculated based on the formulas or scenarios stated under the Listing Requirements), the relevant listed company is required to make an announcement to Bursa on the stock exchange (see question 8).

Under the Companies Act, notification is required to be made to the Companies Commission of Malaysia (CCM), the SC and a relevant public company in respect of a person who holds 5 per cent or more voting shares in the said relevant public company. Notification is also required to be made whereby there is a change in such shareholding in the relevant public company.

It is common that a regulatory body may impose notification requirements as conditions to the licence granted to a company in a specific industry, requiring the company to notify the regulatory body in respect of change of control or shareholder of the company. For example, the Ministry of International Trade and Industry (MITI) often imposes a licensing condition on a manufacturing company to notify MITI in the event of a change of shareholder or control in the manufacturing company.

Transfer of lands or real properties may be subject to certain restrictions or conditions imposed on the land titles of these properties, requiring approval to be obtained from the relevant land authorities.

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Transfer of intellectual properties rights is also subject to registration and filing requirements with the Intellectual Property Corporation of Malaysia.

Statutory and regulatory fees

In respect of filings or lodgement with the SC or Bursa, they may be subject to certain processing fees or clearance fees, depending on the nature and scope of the proposed transactions. For example, there is a fee of 15,000 ringgit payable to the SC in respect of an application for exemption from mandatory takeover offer obligations. On the other hand, there is a fixed fee of 2,000 ringgit payable to Bursa in respect of processing an application for the waiver, modification or extension of time to comply with the provisions of the listing requirements.

Instruments of transfer of business or assets will be subject to ad valorem stamp duty ranging from 1 per cent to 3 per cent depending on the value of the transaction.

The transfer of shares of a private company or a public company not listed on stock exchange will attract ad valorem stamp duty on the instrument of transfer at a rate of 0.3 per cent of the value of the shares transferred.

Transfer of shares of a public listed company will attract stamp duty at a rate of 0.1 per cent of the value of the shares subject to a cap of 200 ringgit for each contract note.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Disclosure or announcement requirements are not strictly dependent on the type of structure used, but rather are dependent on the activity or the companies or parties involved.

In respect of a takeover offer to acquire control over a company to which the Code applies (ie, public listed companies or such other companies specified by the SC), the offer must be announced by the offeror and the offeree. The announcement made by the offeror shall include, among other things, the following information:

- identity of the ultimate offeror, offeror and all persons acting in concert with the offeror;
- basis of the offer price;
- basis of consideration;
- the terms and conditions of the takeover offer;
- types and numbers of the voting shares of the offeree which are held or acquired, directly or indirectly, by the offeror or any person acting in concert with the offeror; and
- confirmation by the main adviser that resources are available to the offeror sufficient to satisfy the full acceptance of the offer.

In respect of transactions or takeover involving public listed companies, announcements may be required to be made on Bursa if the transaction value exceeds the percentage ratio stipulated under the Listing Requirements (see question 4). In addition, information that may have a material effect on the price, value or market activity of any of the listed companies' securities or the decision of a holder of securities of the listed companies or an investor in determining his choice of action, must also be announced to Bursa. Such information may include, among other things:

- the entry into a joint venture agreement or merger;
- change in management;
- borrowing of funds;
- purchase or sale of an asset;
- the making of a tender offer for another corporation's securities; and
- entry into a memorandum of understanding.

There is also a requirement to disclose holding or change of shareholding exceeding 5 per cent in a public company to the SC, the relevant company and the CCM (see question 4).

There is generally no disclosure requirement in respect of private company involved in business combination transactions.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

(See question 4). A person with a shareholding in the voting shares of a public company must notify that company, the SC and the CCM of such shareholding, and must notify those parties in respect of any change to that shareholding.

The Listing Requirement requires disclosure by way of announcement to Bursa by a listed company of any acquisition (including subscription) or disposal of shares that results in the holding being 5 per cent or more (or less in the case of disposal) of that listed company.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors

The duties of the directors are codified under the Companies Act. Under the Companies Act, directors are required to, at all times, exercise their powers in accordance with the Companies Act, for a specific purpose and in good faith in the best interest of the company. The directors of a company shall exercise reasonable care, skill and diligence with the knowledge, skill and experience that may reasonably be expected of a director with those responsibilities; and any additional knowledge, skill and experience that the director in fact has.

The director who makes a business judgement (ie, any decision on whether or not to take action in respect of a matter relevant to the business of the company) meets the requirements to exercise reasonable care, skill and diligence if he or she:

- makes the business judgement for a proper purpose and in good faith;
- does not have a material personal interest in the subject matter of the business judgement;
- is informed about the subject matter of the business judgement to an extent the directors reasonably believe to be appropriate under the circumstances; and
- reasonably believes that the business judgement is in the best interest of the company.

Further, the directors in exercising their duties as directors may rely on information, professional or expert advice or opinions including financial statements and other financial data, prepared or made by:

- any officer of the company who the director believes on reasonable grounds to be reliable and competent on the matters concerned;
- as to matters involving skills or expertise, any other person retained by the company in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;
- another director in relation to matters within the director's authority; or
- any committee to the board of directors on which the director did not serve in relation to matters within the committee's authority.

The directors' reliance is deemed to be made on reasonable grounds if it was made in good faith, and after making an independent assessment of the information or advice or opinions, including financial statements and other financial data, having regard to the director's knowledge of the company and the complexity of the structure and operation of the company.

Having said the above, in cases of a takeover offer where the Code applies, the Code specifies that an offeree's board of directors shall act in the interests of the shareholders as a whole and shall not deny the shareholders the opportunity to decide on the takeover offer.

Controlling shareholders

Controlling shareholders do not have similar statutory duties to those of the directors under the Companies Act. However, controlling shareholders shall not oppress or unfairly discriminate against the minority shareholders as such acts may be challenged in court. The court has

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the power to sanction a remedy against the matters complained of or challenged by the minority shareholders.

The Code also specifies that in cases of takeover, all shareholders of an offeree shall, so far as practicable, be treated equally in relation to a takeover offer and have equal opportunities to participate in benefits accruing from the takeover offer, and that all shareholders, particularly minority shareholders, shall not be subject to oppression or disadvantage by the treatment and conduct of the acquirer or offeror, as the case may be, or of the board of directors of the offeree.

Save as provided above, there is generally no prohibition against the controlling shareholders acting or voting in their own interests in business combinations situations.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Shareholders' approval or passing of resolutions by shareholders shall be subject to the provisions of the Companies Act and also the constitution of the relevant company.

The shareholders have appraisal or approval rights in respect of business combinations involving certain aspects. Under the Companies Act, the shareholders' approval is required for issuance of shares, acquisition or disposal of an undertaking or property of a substantial value, and transactions with a director, substantial shareholder or persons connected with such director or substantial shareholder (as the case may be) in respect of an acquisition of disposal of shares or non-cash assets of the requisite value. Any of the aforementioned transactions carried out without the shareholders' approval shall be void.

In addition, shareholders' approval is also required in respect of a scheme of arrangement under the Companies Act.

In respect of business combinations involving listed companies, the business combinations will also be subject to the provisions of the Listing Requirements. A listed company that intends to enter into a major transaction (being a transaction with a percentage ratio of 25 per cent or more), requires the prior approval of the shareholders in a general meeting. On the other hand, if the listed company intends to enter into a transaction with a related party (this includes a director or major shareholder, or persons connected with such director or major shareholder, as the case may be) and the transaction has a percentage ratio of 5 per cent or more, then prior approval by the listed company's shareholders is also required.

The basis of the calculation of percentage ratio is set out under the listing requirements, and it includes, among other things:

- the value of the assets that are the subject matter of the transaction, compared with the net assets of the listed company;
- net profits of the assets that are the subject matter of the transaction, compared with the net profits attributable to the owners of the listed company;
- the aggregate value of the consideration given or received in relation to the transaction, compared with the net assets of the listed company;
- the equity share capital issued by the listed company as consideration for an acquisition, compared with the equity share capital previously in issue (excluding treasury shares);
- the aggregate value of the consideration given or received in relation to the transaction, compared with the market value of all the ordinary shares of the listed company (excluding treasury shares); and
- the total assets that are the subject matter of the transaction compared with the total assets of the listed company.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

In respect of a takeover offer to which the Code applies, a hostile bid is permitted but is generally uncommon in Malaysia, as the bidder will normally not be allowed by the target to conduct due diligence on the company and the bidder will have to rely on information that is available in the public domain.

The Code and the rules made pursuant to the Code introduce auction procedures in respect of a competing takeover offer which continues to exist in the later stages of the offer period, whereby the SC will require revised offers to be announced in accordance with an auction procedure, the terms of which will be determined by the SC.

While a bid may be considered hostile by the board of directors of the offeree, the Code requires that a notice of the takeover bid must be served on the board of directors of the offeree and the board of directors of the offeree is required to dispatch a copy of the written notice to all offeree shareholders within seven days of receipt of the notice. During the offer period, the board of directors of the offeree shall not undertake any action or make any decision without obtaining the approval of the shareholders at a general meeting on the affairs of the offeree, as it could effectively frustrate any bona fide takeover offer or the shareholders could be denied an opportunity to decide on the merits of a takeover offer.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Payment of break-up fees is generally not common practice in Malaysia in takeover offer situations. In transactions involving companies not listed on the stock exchange, it is common practice to request the potential purchaser to pay a deposit to enter into the transaction and provides for the deposit to be forfeited in the event the potential purchaser backs out from the deal.

While payment of break-up fee by the parties to the transaction is not prohibited under the Code, financial assistance is prohibited under the Companies Act. A company is prohibited from giving – whether directly or indirectly, and whether by means of a loan, guarantee or the provision of security or otherwise – any financial assistance for the purpose of or in connection with a purchase or subscription for any shares in the company. As such, the target company of the transaction is prohibited from paying any break-up fee in respect of an acquisition of shares in the said target company.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In addition to specific industries in which business combinations are regulated by regulatory agencies, government may through regulatory bodies or agencies impose foreign equity restriction or threshold applicable on a target company to be acquired by a potential purchaser.

Government may also through regulatory bodies or agencies impose licensing conditions on regulated companies whereby regulatory approval is required for a change of control or shareholder of the target company. Non-compliance with the licensing condition may result in the licence being revoked or suspended.

Government may also exercise influence through a significant shareholding in government-linked entities or promote a policy to encourage mergers or investment in specific sectors through tax incentives and reliefs or stamp duty exemptions.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The CMSA requires a person who obtains control in a public listed company to make a takeover offer, or a person who has obtained control in a public listed company not to acquire any additional voting shares in the relevant company except in accordance with the requirements of the Code and the Rules made thereunder.

Mandatory offer

A bidder is required under the Code to make a mandatory offer to acquire all the shares of a target public listed company that he or she or

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Update and trends

The Companies Act 2016 came into operation and effect on 31 January 2017 and repealed the previous Companies Act 1965. The new Companies Act introduces various different regimes and concepts such as the abolition of the par value of shares system, the introduction of the constitution of a company and abolition of authorised share capital of a company. The new Companies Act also brought about numerous new statutory prescribed forms to be observed and adopted by companies incorporated under the Companies Act. Business combinations that must adopt these statutory forms shall observe the requirements under the Companies Act accordingly. In addition, the Minister of Finance revoked the previous Malaysian Code on Take-overs and Mergers 2010, replacing it with the new Malaysian Code on Take-overs and Mergers 2016 and also the Rules on Take-Overs, Mergers and Compulsory Acquisition 2016. The changes introduced indicate a shift to a balanced and proportionate regulatory regime, with more guidance provided by the SC on takeover transactions.

persons acting in concert with him or her do not already own, if the bid by him or her together with persons acting in concert is to:

- acquire more than 33 per cent voting shares or rights of the target company (mandatory threshold); or
- acquire more than 2 per cent of the voting shares or rights of the target company in any period of six months whereby the bidder and persons acting in concert with him or her hold over 33 per cent but not more than 50 per cent of the voting shares or rights of the target company (creeping threshold).

Mandatory offers may also be required to be made in situations of:

- acquisition of an upstream company that holds or controls more than 33 per cent of the voting shares or rights of a downstream company whereby the former controls the latter either directly or indirectly through intermediate entities, or the former's holdings when aggregated with those held by the person or group, would secure or consolidate control of the downstream company; and
- acquisitions under the mandatory threshold that, in the SC's judgment, trigger the requirement for a mandatory offer (the SC will take into account the degree of control the vendor has over the retained shares, the payment of price for the shares and whether the retained shares are a significant part of the company's capital.

A mandatory offer must be conditional strictly and only upon the offeror having received acceptances that would result in the offeror and persons acting in concert holding in aggregate more than 50 per cent of the voting shares or voting rights of the offeree.

In respect of a mandatory offer, the offeror shall provide a wholly cash consideration or other consideration accompanied by a wholly cash alternative.

Voluntary offer

A bidder is allowed to make a takeover offer for the voting shares or rights of a public listed company where he or she has not incurred an obligation to make a mandatory offer. In addition, a bidder shall not make a partial offer (ie, a voluntary takeover offer in which a person offers to acquire less than 100 per cent of any class of the voting shares or rights of a company from all offeree shareholders) unless approved by the SC.

A voluntary offer must be conditional upon the offeror having received acceptances that would result in the offeror holding in aggregate more than 50 per cent of the voting shares or rights of the offeree. A voluntary offer may also include other conditions, other than conditions whose fulfilment depends on the subjective interpretation or judgement of the offeror, or whether or not a particular event happens, this being an event that is within the control of the offeror.

In respect of a voluntary offer, the offeror shall provide a wholly cash consideration as an alternative where (i) 10 per cent or more of the voting shares or rights of the offeree to which the takeover offer relates have been purchased for cash by the offeror and persons acting in concert during the offer period and within six months, or (ii) the SC determines that it is necessary to give effect to the requirement under the Code.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In transactions involving entities or targets to which the Code applies, while there is no specific requirement for the financing for a takeover to be dealt with or incorporated in the transaction documents, the offer document must contain, among others, information such as the offer price and its basis for the securities of the offeree, and a confirmation by the offeror and the offeror's financial advisers that resources available to the offeror are sufficient to satisfy full acceptance of the offer (where the offer consists of or includes cash).

The buyer may obtain financing through internally generated funds, group borrowings or raising money from financial service providers such as banks.

Provision of financial assistance by the seller to the buyer in respect of the transaction is prohibited under the Companies Act.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Minority shareholders are permitted to be squeezed out in a takeover situation under the Code.

The CMSA permits an offeror who has made a takeover offer for all the shares or all the shares in any particular class in an offeree, and has received acceptances of not less than 90 per cent in the nominal value of the offer shares (Compulsory Acquisition Conditions), to within four months of the date of the takeover offer, acquire the remaining shares or remaining shares in any particular class in the offeree, by issuing a notice to the dissenting shareholders. Such compulsory acquisition right is exercisable if the notice is issued within two months from the date of achieving the Compulsory Acquisition Conditions and is accompanied by a copy of a statutory declaration by the offeror that the conditions for the giving of the notice are satisfied.

In respect of a situation to which the Code and CMSA do not apply, the Companies Act permits an offeror to compulsorily acquire minority shareholders under a scheme of arrangement if the transfer involving holders of not less than 90 per cent of the nominal value shares or of the shares of that class has been approved.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

It is common for parties to factor tax considerations into structuring cross-border transactions, but there is generally speaking no applicable Malaysian law that governs cross-border transactions.

It is common (see question 11) for the government to also exercise an influence through promoting policy to encourage mergers or investment in specific sectors through tax incentives and reliefs or stamp duty exemptions.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The governing law in respect of competition is the Competition Act 2010. However, there is no merger control regime or regulations in Malaysia.

Takeovers to which the Code applies are required to comply with the takeover offer timeline specified under the Code and the Rules made thereunder, which relate to the announcement of the offer, dispatch of the offer document, independent advice circular, release of sensitive information, timeline for a revised offer, acceptance of satisfactory conditions and acceptance of offer.

In transactional situations to which the Code does not apply, there is usually no relevant waiting or notification period stipulated by law. The parties are generally free to contract and agree on the timeline of the transaction by taking into account factors such as the conduct of

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due diligence, negotiation of transactional documents, satisfaction of conditions precedents and completion of the transaction.

However, transactions that are subject to regulatory approval may be subject to a lengthy waiting time. For example, acquisition of control in financial services providers in Malaysia under the FSA requires the prior approval of the Minister of Finance and the application for approval process is normally lengthy and time consuming. Similarly, in transactions involving transfer of land whereby the land authority's prior approval is required, the approval application process can be lengthy and time consuming.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Yes, see questions 2, 11 and 16.

There are certain industries that are heavily regulated such as the oil and gas industry or the financial services industries, whereby the completion of the transactions may be subject to the prior approval of the regulatory body. Target companies in other industries or sectors may be subject to regulations or applicable laws under which the regulatory body may issue guidelines for the target company to comply with. It is also common that the regulatory body exercises influence through imposition of licensing conditions, a foreign equity threshold, minimum paid-up capital requirements, regulatory approval requirement for change of ownership or director, or notification requirement for a change of ownership or director.

18 Tax issues

What are the basic tax issues involved in business combinations?

There is no capital gains tax on business combinations in Malaysia, except that transfer of real property or acquisition of shares in real property companies (ie, a company controlled by persons who own real property with a defined value of not less than 75 per cent of its total tangible assets) may attract real property gains tax payable on the gain of the transfer.

Ad valorem stamp duty is payable on the transfer of shares or non-shares assets in respect of business combinations (see question 4).

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

In cases of acquisition of a company, the employment status of the employees of the target company will not be affected by law. Nevertheless, the Employment Act 1955 (EA) governs the entitlement and protection of employees falling within the ambit of the EA (which mainly include employed persons with wages not exceeding 2,000 ringgit a month), which includes annual leave, medical leave and overtime. It is common practice for the purchaser to request the seller to provide warranties in respect of the target company's compliance with the applicable employment laws.

In cases of a transfer of business, the employment regulations in Malaysia provide that unless the existing employees of the transferor have been offered equally favourable terms by the employer, the employment of such employees shall be deemed to have been terminated, in which case termination benefits will be payable.

The Employees' Provident Fund and the Social Security Fund are statutory contribution schemes to which the employer is required to contribute in respect of its employees.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Thorough and cautious due diligence and investigations should be carried out on the subject matter of the transfer or acquisition, as the transfer of assets by a receiver or liquidators is typically on limited warranties and on an 'as is where is' basis. Due diligence should be carried out to ensure that the purchaser acquires good title of the target, and is not subject to any undisclosed liabilities or encumbrances.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The anti-corruption laws in Malaysia are governed by the Malaysian Anti-Corruption Commission Act 2009. The legislation does not provide for situations specifically in relation to business combinations, but stipulate offences in respect of a wide range of bribe or corruptive acts that are caught under the legislation. For instance, any bribery or donation made by a person to an official to abuse his or her position to achieve the said person's purpose (including the facilitation of obtaining regulatory approval or sanction) is an offence under the legislation.

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Malta

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1 Types of transaction

How may businesses combine?

Business combinations may be structured in a variety of ways under Maltese law, but the most common are the following:

- transfer of shares;
- subscription to a new issue of shares;
- merger by acquisition;
- merger by formation of a new company;
- joint venture agreements; and
- transfer of property upon the incorporation of a business.

A transfer of shares must on pain of nullity be made in writing and all the documentation has to be registered with the Registrar of Companies at the Malta Financial Services Authority (MFSA).

In a merger by acquisition, the acquiring company succeeds to all the assets, rights, liabilities and obligations of the companies being acquired, even with regard to third parties. In turn the shareholders of the companies being acquired become shareholders of the acquiring company, following which the companies being acquired cease to exist.

The nature of a merger by formation of a new company is similar to a merger by acquisition, with the main difference being that two or more companies merge to create a new company altogether which will hold all the assets, rights, liabilities and obligations of the merging companies.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations are regulated under a number of legislative provisions including:

- the Maltese Companies Act (Chapter 386 of the Laws of Malta) and its subsidiary legislation, which are the main legislative instruments regulating companies in Malta;
- for companies with securities admitted to a regulated market, the Listing Rules, issued under the Financial Markets Act (Chapter 345 of the Laws of Malta); of particular importance is Chapter 11 dealing with takeover bids;
- the Maltese Civil Code (Chapter 16 of the Laws of Malta), which provides the basis for the establishment of contractual relationships; and
- the Maltese Commercial Code (Chapter 13 of the Laws of Malta), which contains provisions dealing with general commercial transactions.

There are various other legislative provisions that may be applicable in specific situations, such as the Competition Act (Chapter 379 of the Laws of Malta), the Control of Concentration Regulations (LN294 of 2002) and the Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta).

3 Governing law

What law typically governs the transaction agreements?

Maltese law generally governs the transactions between two Maltese parties or involving companies registered in Malta. However the parties, by agreement, are free to choose any other jurisdiction to govern their agreements if any foreign interest is involved.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Any transfer of shares requires submitting the necessary and relevant forms with the Registrar of Companies, most notably a 'Form T'. No transfer of shares will be registered unless evidence is provided to the Registry of Companies that the necessary stamp duty has been paid.

Any change requiring an amendment to the memorandum and articles of association (such as an increase in authorised share capital) is not effective until the same is registered with the Registrar of Companies.

When combining through a merger, the directors of the acquiring company and of the companies being acquired are bound to prepare the draft terms of merger, which, once signed by at least one director and the company secretary of each of the companies, will then be submitted to the registrar of companies for registration. These draft terms in essence contain information regarding the company, its shares, dates for accounting purposes and shareholder rights. This is then examined by an independent expert approved by the registrar and a written report is drawn up for the shareholders.

A merger control filing might be required in case of deals exceeding certain market thresholds.

If a deal involves the acquisition of immoveable property, a public deed must be made in front of a notary public and enrolled in the public registry.

Taxation matters are dealt with separately and in more detail in question 18.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information that needs to be published relates to the type of structure used.

There are no mandatory rules for disclosure in relation to transfer of shares in companies that are not listed.

With regard to mergers, the draft terms of a merger as indicated in question 4 are publicly available in the records held by the Registrar of Companies. When the draft terms of a merger are approved, a notice must be published in a newspaper.

For listed companies, the acquisition by a person or by persons acting in concert with such person of a controlling interest (deemed to be more than 50 per cent of the voting rights) triggers the mandatory bid provisions set forth by the takeover rules. When a person acquires a

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controlling interest, he or she is duty bound to make a takeover bid as a means of protecting the minority shareholding of that company. Such person (the offeror) must inform the listing authority and announce his or her decision to launch such bid within seven days of acquiring a controlling interest. An offer document is then drawn up and made public within 21 days of this announcement stating all relevant information to enable the holders of the offeree company's securities to reach a properly informed decision about the bid.

The offer document must include information regarding the terms of the bid; the identity of the offeror; the securities for which the bid is made; the consideration for each security; any compensation offered for restrictions on transfers and votes that could ensue; the maximum and minimum amount of securities that the offeror undertakes to acquire; the conditions to which the bid is subject; the offeror's intentions for the future of the business and how any changes might affect employees; the time allowed to accept the bid; information concerning any securities included in the offeror's consideration; information regarding the financing for the bid; the identity of persons acting in concert with the offeror or offeree company; and the national law that will govern the contracts concluded between the offeror and the holders of the offeree company's securities following the bid and the competent courts to settle any disputes.

The offeree company must also make public a document with its opinion of the bid and including its views on the effects of its implementation on the company's interests and on employment including its strategic plans.

Once a bid is concluded, the offeror and the offeree company must inform the listing authority and publish the necessary, relevant and complete results of a takeover within 10 days from the closing of the acceptance period. The announcement must contain the number of securities by type acquired by the offeror, the ratio of the different classes and types of securities included in the bid and separate calculations for the participation and voting rights acquired.

Listed companies are also duty-bound to make a company announcement in accordance with the provisions of the Listing Rules and the Prevention of Financial Markets Abuse Act.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

For listed companies, the offer document in a takeover bid must, as a requirement, include details of any existing holdings the offeror or persons acting in concert with him or her may have in the offeree company.

Where a shareholder in a Maltese company acquires 5 per cent or more of the shares of a listed company (the issuer) to which voting rights are attached, the issuer is bound to immediately inform the shareholder of his obligation to notify the issuer and the listing authority of any changes in major holdings. A shareholder is so bound if as a result of the acquisition or disposal of shares, the proportion reaches, exceeds or falls below the thresholds of 5, 10, 15, 20, 25, 30, 50, 75 and 90 per cent, including when this occurs as a result of events changing the breakdown of voting rights. This information is also given in respect of all the shares that are in the same class and to which voting rights are attached.

This is an individual obligation incumbent upon each shareholder, or each natural person or legal entity, or both if the proportion of voting rights held by each party reaches, exceeds or falls below the above-mentioned thresholds. When the duty to make a notification lies with more than one natural person or legal entity, notification may be made by means of a single common notification but this does not release any of those persons from their responsibilities in relation to the notification.

The notification will include the following information:

- the resulting position in terms of voting rights;
- the chain of controlled undertakings through which voting rights or financial instruments are effectively held, if applicable;
- the date on which the threshold was reached or crossed;
- the identity of the person entitled to exercise voting rights, even if that person is not entitled to exercise voting rights; and
- for instruments with an exercise period:
- an indication of the date or time period where shares will or can be acquired, if applicable;
- the date of maturity or expiry of the instrument; and
- name of the underlying issuer.

Upon receipt of the notification by the shareholder as indicated above but by no later than three trading days thereafter, the issuer makes the notification available to the public and makes a company announcement including all the information contained in the notification.

Furthermore, when an issuer is advised or otherwise becomes aware of an impending share negotiation or transaction involving a substantial shareholding (defined as the entitlement to exercise or control the exercise of 10 per cent or more of the voting rights or the entitlement to appoint a majority of directors) it must promptly make a company announcement.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

As a general rule, directors owe their duties to the company and not the individual shareholders. They are obliged to act in the company's best interests and promote its well-being. The Maltese Companies Act as originally enacted did not contain any general statement of directors' duties. These were then introduced through the 2003 amendments to the Companies Act, being thereby bound to act honestly and in good faith, exercise due care, diligence and skill and not engage in self-dealing and not misuse their powers.

The directors of the merging companies must prepare a detailed written report regarding the draft terms of the merger, the relevant legal and economic grounds and describing any special valuation difficulties which may have arisen. They must also inform their company's general meeting and the directors of the other companies that they must inform their shareholders at their own general meeting, of any material changes to the assets and liabilities of the company that may have occurred between the date of preparation of the draft terms and the date of the general meeting. However, in the case of acquiring a company in which the acquiring company has 90 per cent or more of the shares, this duty can be done away with.

The directors or experts drawing up the report on the draft terms of the merger may be liable for damages caused to any shareholder of the amalgamating companies if any wilful or negligent misconduct is found to have taken place. This liability does not apply when a company is acquired by another that holds 90 per cent or more of its shares since there is no requirement to draw up a report as mentioned.

Directors of merging companies are equally bound when forming a new company through merger.

The board of directors is also duty-bound to inform the employees' representatives or the employees themselves once a bid is announced and give them the offer document once it is published.

The board of directors cannot allow any action that might frustrate an offer or lead to denying the holders of securities of the target company any opportunity to decide on the merits of an offer upon receiving a takeover notice or if there is reason to believe that a bona fide offer is imminent.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Listed companies

The Listing Rules applicable exclusively to listed companies require that acquisitions and realisations be classified in accordance with the following tests:

- gross assets test: calculated by dividing the gross assets the subject of the transaction by the gross assets of the issuer;
- profits test: calculated by dividing the profits attributable to the assets the subject of the transaction by the profits of the issuer; and

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- consideration test: calculated by taking the consideration for the transaction as a percentage of the aggregate market value of all the ordinary shares of the issuer.

If any test amounts to more than 5 per cent but less than 35 per cent, such transaction is classified as a class 1 transaction. The listed company must make a company announcement as soon as possible after the terms of the transaction are agreed.

Where any of the tests amount to 35 per cent or more, apart from the company announcement, the company must send an explanatory circular to shareholders and obtain the shareholders' prior written approval in a general meeting.

It is important to note that the listing authority may, in certain circumstances, decide to aggregate acquisitions or realisations that have taken place since either the publication of the last accounts or the issue of the last circular (whichever is the later) during the 12 months prior to the date of the latest transaction.

Furthermore, the purchase price for securities that are the object of a mandatory bid must be equitable. The equitable price to be paid is the highest price determined by the following criteria:

- the price offered for the security should not be below the weighted average price of the security or the security transactions made on a regulated market in the preceding six months;
- the price offered for the security should not be below the highest price paid by the offeror or persons acting in concert with him in the preceding six months;
- the price offered for the security should not be below the weighted average price paid by the offeror or persons acting in concert with him in the preceding six months; and
- the price of the security should not be lower than 10 per cent below the weighted average price of the security of the preceding 10 trading days.

If after the bid is announced but before it closes for acceptance, the offeror or any person acting in concert with him purchases securities priced higher than the offer price, the offeror must increase his offer to match the highest price paid.

In addition to these criteria, to establish a fair price, the offeror must appoint an independent expert to draw up a report to determine which price for those securities would be considered of fair and reasonable value. The price must, however, be equivalent to or higher than the equitable price.

General rules

A merger by acquisition can only be approved by an extraordinary resolution which will include both the draft terms of merger and also any amendments to be made to the memorandum and articles of the company. If there are different classes of shares, a separate vote must be taken on such resolution by each class of shareholders which will be affected by it. The resolution needs to be adopted at least one month after the publication of the draft terms, but not later than three months afterwards. This also applies to a company acquiring another company in which it already has 90 per cent or more of the shares. Shareholders and holders of securities mentioned hereunder can also benefit from the rights mentioned above in the case of a merger.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

For listed companies, as soon as a mandatory bid is placed and announced, the board of directors of the offeree company and the offeror are bound to inform the representatives of the employees thereof. The board must advise and give its views on the effects of the implementation of the bid on employment, conditions of employment and the locations of the company's places of business.

If the board proposes taking action that may frustrate the bid, it must issue a statement explaining the reasons behind this decision and the significance of such action.

The Listing Rules also include provisions regarding the defensive tactics that may be adopted. Thus if the company being taken over (target company) has received a takeover notice or has reason to believe that a bona fide offer is imminent, its board of directors must not take or permit any action that could affect the affairs of the company in such a way that the offer is frustrated or the holders of securities of the target company would be denied the opportunity to decide on the merits of the offer. Such action may only be permitted by the board of directors if:

- the action was approved by an ordinary resolution of the company;
- the action is taken or permitted under a contractual obligation or in implementing proposals approved by its board of directors, and the obligations were entered into, or the proposals approved before the target company received the takeover notice or became aware that the offer was imminent; or
- if the above two points do not apply, the action is taken or permitted for reasons unrelated to the offer with the listing authority's prior approval.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Though this matter is not yet subject to any definite case law, it could be argued that break-up fees agreements could be construed as a form of financial assistance given by the target.

The prohibition of financial assistance is further explained in question 13.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The Cross-Border Mergers of Limited Liability Companies Regulations (SL386.12) stipulates that if there is a law empowering an authority to oppose a merger between companies registered in Malta on grounds of public interest, this should also apply to cross-border mergers.

For further information about provisions for specific industries, see question 17.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The offer document of a mandatory bid must include all information regarding the conditions to which the bid is subject.

For further information about financing see question 13.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

The consideration for a takeover bid may consist in securities, cash or a combination of both, but in all cases, a cash consideration must be offered. A bid must only be announced after the offeror ensures that he can fulfil in full any cash consideration and after taking all reasonable measures to secure the implementation of any type of consideration.

The offer document of a mandatory bid must include all information concerning the financing of the bid. A report is also drawn up by one or more experts who are independent of the offeror or offeree company and appended to the offer document; primarily it must confirm that the offeror has sufficient resources to meet the consideration to be provided on full acceptance of the offer and that debts incurred in connection with the offer can also be paid.

Maltese law prohibits, subject to limited exceptions, a Maltese public company in providing financial assistance.

Accordingly a public company is not allowed to subscribe for, hold, acquire or otherwise deal in shares in a company that is its parent company; or give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of an acquisition or subscription made or to

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be made by any person of or for any shares in the company or its parent company.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Listed companies

Squeeze-out rights are solely applicable to listed companies and come into play when the offeror holds securities, or after having a bid accepted, has acquired or is firmly contracted to acquire securities representing a minimum of 90 per cent of the capital carrying voting rights or the same amount of voting rights in the offeree company. The squeeze-out rights enable and allow the offeror to require all the holders of the remaining securities to sell him or her those securities at a fair price. An independent expert is appointed to establish such fair price, being equivalent to or higher than the equitable price.

The right of squeeze-out can only be exercised within three months allowed to accept the bid.

Conversely, the holders of the remaining securities in such a scenario may also require the offeror to buy their securities at a fair price. The same procedure whereby a report is drawn up by an independent expert is followed.

General application

A merger by acquisition may only be made if it has been approved by an extraordinary resolution of each of the merging companies. Each of such companies is required to redeem the shares held by the dissenting members, if they so request, on such terms as may be agreed or as the court, on a demand by either the company or the dissenting members, thinks fit to order.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

The Cross-border Mergers of Limited Liability Companies Regulations transpose Directive 68/151/EEC into Maltese law, which provides safeguards required by member states of companies (within the meaning of the second paragraph of article 58 of the Treaty establishing the European Economic Community) for the protection of the interests of members and others, with a view to making such safeguards equivalent throughout the European Union.

The regulations apply to mergers of companies whose registered office, central administration or principal place of business is within the EU, provided at least two of the companies are governed by the laws of different member states and that at least one is registered in Malta. They apply to cross-border mergers if the law of one member state allows the relevant cash payment to exceed 10 per cent of the nominal value or the accounting par value of the securities or shares that represent the capital of the new company following the merger.

The management or administrative organ of each of the merging companies is bound to draw up the common draft terms of cross-border merger. The Maltese merging company is then bound to deliver such draft to the registrar of companies for registration and a statement in this regard is then published. A report is drawn up by the board of directors of the Maltese merging company which is to be given to its shareholders to explain and justify the legal and economic aspects of the merger and explaining its implication. Independent experts are also appointed to examine the draft terms and draw up a written report. These reports are then taken into consideration at the general meeting of the Maltese company to decide on the approval of the draft terms by extraordinary resolution. Once approved this resolution is delivered to the registrar for registration and then published. Such registrations may also be contested by any interested party.

A Cross-Border Pre-Merger Certificate is issued to each Maltese merging company by the registrar to attest to the proper completion of the pre-merger acts and formalities. Once the registrar has performed all verifications that the cross-border merging company has complied with all relevant regulations and provisions, including the payment of applicable fees, it issues the Certificate of Completion of Cross-Border Merger as conclusive evidence thereof. From then on, all the assets, rights, liabilities and obligations of the company being acquired, are transferred to the acquiring company, the members of the company being acquired become members of the acquiring company, and ultimately the company being acquired ceases to exist.

Update and trends

There are currently no proposals to amend the laws relating to mergers and acquisitions in Malta. However it is important to note that the European Commission recently conducted a consultation process which ended in January 2017, whose aim was to evaluate the procedural and jurisdictional aspects of EU merger control. It remains to be seen what changes to the Merger Regulation may be proposed.

The credit crisis has left the Maltese economy relatively unscathed and it has therefore not particularly affected M&A activity in Malta. The regulatory regime in place has withstood all the tests and proven to be sound.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The main time periods relative to mandatory bids are the following:

(i) obligation to announce the decision to launch a bid within seven days of acquiring a controlling interest;
(ii) the obligation to draw up and make public the offer document within 21 calendar days from the announcement set forth in (i); and
(iii) the offer document of a mandatory bid must include the time allowed for acceptance of the bid. This time allowance, however, must be between four and 10 weeks from when the offer document was made available to the public. This time period is meant to ensure that the holders of the securities of an offeree company have sufficient time and information to reach a properly informed decision.

Where there are competing bids and the initial offer is not withdrawn, the period for acceptance of the initial bid is extended automatically to the time of acceptance of the competing bid, which in turn has an acceptance period between four and 10 weeks from becoming available to the public.

A bid may be revised to extend the time period for its acceptance, but this must not exceed the maximum period of 10 weeks. This revision may only be made not later than 14 calendar days before the end of the period for acceptance.

If the bid lapses (that is, if the offer was not successful) the offeror cannot make a new offer for the same company within one year of the lapsing. The necessary, relevant and complete results of the takeover must be made public and the listing authority is to be informed thereof within 10 calendar days of the closing of the acceptance period.

It is important to note that for the purpose of obtaining the prior authorisation of the shareholders, a general meeting can be convened at a shorter notice than that stipulated in the memorandum and articles of association provided that the meeting does not take place within two weeks of notification.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Numerous companies in Malta fall within the ambit of a specific regulatory authority depending on the nature of their business. While companies in general fall within the purview of the Companies Act and the regulations of the MFSA, other sector-specific obligations apply. In light of this, gaming companies are bound by the rules of the Malta Gaming Authority, whereas insurance companies, financial and credit institutions are bound by the MFSA and other regulations apart from the Companies Act.

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18 Tax issues

What are the basic tax issues involved in business combinations?

Transfer of shares is subject to income tax on capital gains by virtue of the Income Tax Act, and stamp duty by virtue of the Duty on Documents and Transfers Act.

Transfers of shares of a listed company are exempt from the payment of capital gains. In 2017, the Maltese government introduced changes so that shares of a listed company acquired prior to the company being listed would also be exempt from the payment of the 15 per cent tax on capital gains upon a transfer.

Capital gains are added to the taxpayer's income for the year and tax is charged on the total amount (a company in Malta pays tax at a fixed rate of 35 per cent). Provisional tax is payable at the time of such transfers at the rate of 7 per cent of the consideration.

There is an exemption from capital gains tax in the case of transfers made between companies in the same group or companies controlled and beneficially owned directly or indirectly as to more than 50 per cent by the same shareholders. Moreover, there is an exemption from tax on capital gains accruing to persons not resident in Malta (where such persons are not owned and controlled by, directly or indirectly, nor act on behalf of individuals who are ordinarily resident and domiciled in Malta) arising from the transfer of shares in a company that is not deemed to be a property company.

Stamp duty is chargeable, among other things, on immoveable property at the rate of 5 per cent of the transfer value and on the acquisition of marketable securities at the rate of 2 per cent. Where shares are held in a property company, duty is chargeable at 5 per cent (a company is a property company if the value of the immoveable property held is at least 75 per cent of the total value of all its assets, excluding current assets but including immoveable property).

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The transfer of an undertaking that retains its identity as an organised group of resources having the objective of pursuing an economic activity must comply with the Transfer of Business (Protection of Employment) Regulations and shall not in itself constitute sufficient grounds for dismissal of the employees.

The transferor and the transferee must provide the employees and the director of employment with written information about the date of the transfer, the reasons behind it, the legal, economic and social implications of the transfer for the employees and the measures envisaged in relation to the employees. Failure to abide by such obligations may lead to a fine of not less than €1,164.69 for each employee affected by the transfer.

When a transfer comes into effect, the contract of employment of an employee employed by the transferor remains in effect as if it had been made with the transferee from the start. The transferor thereby transfers to the transferee all its rights, powers, obligations and liabilities under or in connection with its contracts of employment. The only exception is statutory bonuses and income supplements relating to the period of employment by the transferor but falling due following the merger.

Maltese law includes specific legislation regarding employee involvement in the case of cross-border mergers of limited liability companies (SL452.103). These regulations apply to the merger of companies within the European Union, provided at least two of these companies are governed by the law of different member states and at least one of the companies is registered in Malta.

The rights and obligations that arise from contracts of employment or employment relationships in such companies are transferred to the new company formed following the cross-border merger on the date on which such merger takes effect.

The new company must then follow the rules of employee participation of the member state where it has its registered office. This general rule does not apply if one of the merging companies had an average workforce of more than 500 employees under an employee participation system within the six months prior to the publication of the draft terms of merger; or the national law applicable to the new company does not provide for the same level of employee participation as for the merging companies; or the national law applicable to the new company does not provide the same participation rights to employees of a merging company which is situated in another member state in comparison to employees employed in the member state of the new company. This is all in line with EC Regulation No. 2157/2001 on the Statute for a European Company and in accordance with specific provisions of the Employee Involvement (European Company) Regulations. Failure to comply with such obligations may lead to a fine between €1,164.69 and €11,646.87.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A person who fails to discharge an obligation that he or she contracted will, under the Maltese Civil Code, be liable for damages. One of the most prominent remedies available is the actio pauliana. Thus a creditor may bring an action in his own name to impeach an act of the debtor, commonly a contract with another party, seeking damages for fraud caused by such contract.

Two elements must be present for this action to subsist: first, there must be prejudice caused to the creditor by the debtor who by his or her acts has prejudiced his own financial status; and second, the intention of the debtor to do harm to the creditor and the participation of a third party in this intention.

The debtor in such cases may plead the benefit of discussion, in which case a list is made of the Maltese property held by the debtor, to show that it is sufficient to satisfy the claim of the creditor. Where the

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actio pauliana is raised regarding acts under an onerous title, the creditor must prove that there was fraud both on the part of the debtor and the other party with whom he or she contracted. Where on the other hand the acts are under a gratuitous title, it is enough for the creditor to prove fraud on the part of the debtor alone.

The action can only be exercised by a person who has a debt which is certain, liquidated and due. Who qualifies as a creditor in this sense is not interpreted restrictively and includes a person who has a financial credit that is ascertained.

Thus in the ambit of a bankrupt debtor, the creditor may be able to bring the actio pauliana in cases where it can be proved that such debtor, fraudulently acted so as to deprive the creditor of what is due to him or her. The credit due to the creditor must also precede the act impugned as a rule. Furthermore, the debtor's insolvency must be of a continuous nature; that is, if at any time during the proceedings until final judgment is delivered, the debtor recovers solvency, the action will stop. Thus, the creditor in such a scenario would need to prove that he or she obtained the status of creditor at a point in time preceding the fraud and that fraud subsequently subsisted due to the debtor's dealings with a third party (for instance, disposing of his assets prior to declaring bankruptcy when he or she knew that it was imminent).

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Corruption provisions apply to persons who are entrusted with or have functions relating to the administration of a statutory or other corporate body with its own distinct legal personality, being employed therein. They also apply to employees or other persons who direct or work in the capacity for and on behalf of a legal person operating in the private sector, who is knowingly, in the course of his or her business activities, directly or through an intermediary, in breach of his or her duties. The term 'breach of duty' includes any disloyal behaviour constituting a breach of a statutory duty, or a breach of professional regulations or instructions.

If the person found guilty of such charges is the director, manager, secretary or other principal officer of the company or a person who has the power of representation or the authority to take decisions on its behalf or to exercise control within that body and the offence of which that person is guilty was committed for the benefit, in part or in whole, of that company, he or she shall be liable to the payment of a fine of between €1,164.69 and €1,164,686.70.

A public officer or servant who, in connection with his or her office or employment, requests, receives or accepts for himself or for any other person, any reward or promise or offer of any reward in money or other valuable consideration or of any other advantage to which he or she is not entitled, would be liable to imprisonment. If through such conduct he or she is induced to do what he is duty-bound to do, the term is between six months and three years. If he or she is induced to refrain from doing something it is his duty to do, the term is between nine month and five years, whereas if he or she actually fails to do such duty, the term is between one and eight years.

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Mexico

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1 Types of transaction

How may businesses combine?

Mexican and foreign entities may use different structures to implement a business combination. The most common structures are equity acquisitions, asset transfers or legal mergers. Stock purchase and asset transfer are both regulated by Mexican law, permitting terms and conditions thereof to be generally agreed by the parties. Legal mergers consist of the combination of two or more Mexican entities, where one entity (the merging entity) ceases to exist and the surviving entity acquires all of its assets and liabilities, or alternatively, in the combination of two or more entities, all of which cease to exist, and a new entity is created with all the assets and liabilities of the merging entity.

In the acquisition of shares or merger of public traded companies, the bidder will be required to obtain the authorisation from the National Banking and Securities Commission (CNBV) and the Mexican Stock Market (BMV) to issue an acquisition public offer (OPA) through a tender offer. Once the bidder has launched the tender offer, the shareholders of the target entity are entitled to accept or reject the offer made by the bidder.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The most relevant laws and regulation in Mexico applicable to business combinations are:

- the General Business Organisations Law, which provides the corporate legal framework applicable for business organisations and the formalities to implement a legal merger;
- the Commercial Code and Federal Civil Code, which provide the general contractual provisions for M&A agreements;
- the Federal Antitrust Law (Antitrust Law), which sets forth the thresholds for those operations that require the prior approval of the Mexican Antitrust Commission (Cofece); and
- the Stock Exchange Law (LMV) and secondary regulations, which set forth the requirements and formalities for the acquisition or merger of public traded companies.

3 Governing law

What law typically governs the transaction agreements?

Mexican law usually applies for this type of transactions. Asset transfer and stock purchase agreements may be submitted to foreign law; however, the parties usually submit to Mexican law to facilitate implementation and enforcement as the target entity or assets or both would be located in Mexico.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

There are no specific governmental filings requirements or fees applicable to business combinations in Mexico, except for: (i) the registration with the Public Registry of Commerce of the extraordinary shareholders' meetings approving the acquisition (if required) or the legal merger, (ii) the registration of the transfer of certain type of assets (for example, real estate transfer requires its registration with the Public Registry of Property), and (iii) the filing of an application and the payment of the corresponding duties to obtain clearance from the Cofece, if the transaction meets the thresholds set forth in the Antitrust Law. If the target entity is a regulated entity, such as a financial entity, the business combination may be subject to further filings or fees to obtain authorisations from the respective regulator.

Also, if the target company is a public traded company, the prior authorisation from the CNBV and the BMV is required. In this case, the bidder must file an application with such authorities, and pay the corresponding duties to the CNBV and the fees to the BMV for the analysis and authorisation process of the tender offer.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Regarding legal mergers, the extraordinary shareholders' meetings approving the legal merger must be registered with the Public Registry of Commerce and published in the electronic system of the Ministry of Economy. The minutes of the extraordinary shareholders' meeting must include, among others, the balance sheet, the merger agreement and the capital structure after the merger.

The LMV and its secondary regulations contain disclosure obligations applicable to public traded companies with respect to any facts or circumstances that are likely to have a material effect on the price of the shares. Regarding an OPA, the LMV provides that the acquisition by any person or group of persons of the beneficial ownership of the shares from the target through an OPA shall have to be disclosed to the public no later than the immediately following day. In this case, the bidder must also inform the terms and conditions of the tender offer, whether it intends to acquire a significant influence over the target or not, and any other information that may be deemed relevant for the purpose of the tender offer.

Other than the foregoing, there are no specific requirements on the information to be made to the public in business combinations.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

There are no special disclosure requirements for substantial shareholders. Please note, however, that there may exist limitations on shareholding of public companies, which may lead to disclosure requirements. In general, public traded companies have the obligation to provide and disclose corporate information about its shareholders. Such information is provided to the CNSF and made public through the BMV.

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7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The directors or managers of the target company are not required to comply with specific duties to the company's shareholders, creditors and other stakeholders in connection with a business combination. In general, the directors or managers shall comply with their fiduciary duties and act in the best interest of the company and its shareholders, and must disclose any conflict of interest that may arise from a proposed transaction.

Regarding public companies, the board of directors of the target company shall be neutral and will be required to adopt a public position on the tender offer within 10 business days after the tender offer has been launched and, together with the general manager, publicly state how they are planning to act in connection with the shares they currently own from the target. The board of directors of the target shall conduct itself in a neutral and transparent manner complying, in all material respects, with their respective duties and disclosing any conflict of interests that may arise in connection with the tender offer or the bidder.

The LMV also requires that, from the date of the tender offer until conclusion of the same, the board of directors and the relevant officers of the target shall refrain from taking any action that may hinder the development of a tender offer. In case any of them fail to comply with their duties before the target and cause any economic damage to it, they will be personally liable for the monetary damages and losses caused.

Controlling shareholders are not required to comply with similar duties as those provided for directors or managers.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In the case of a merger of public limited companies, the merging entities must approve such transaction in an extraordinary shareholders' meeting with a minimum quorum of 75 per cent of the total shareholders, and resolutions must be validly adopted with, at least, the vote of 50 per cent of the voting shares. If the by-laws of any of the merging companies provide a higher quorum or approval threshold, such a threshold will be required to approve the transaction.

Minority shareholders of a public limited company representing 25 per cent of the voting shares and minority shareholders of an investment promoting corporation representing 20 per cent of the voting shares may exercise their opposition rights to the resolutions adopted by a shareholders' meeting, in case certain requirements are met, including that the resolutions were adopted in contravention or without the formalities set forth in Mexican law or the corporate by-laws.

Other than the foregoing, there are no additional approval rights of the shareholders set forth in Mexican law regarding business combinations. Also, there are no specific appraisal or similar rights of the shareholders in business combinations. Minority rights, including veto rights, may be generally adopted for all sorts of Mexican companies. Some regulated companies may have restrictions in this regard.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

There is no specific regulation on hostile takeovers in Mexican law. Regarding public traded companies, the LMV allows friendly and hostile takeovers to take place. In the case of hostile takeovers, the board of directors of the target has limited powers to prevent such types of acquisitions since the board of directors of the target must maintain its neutrality over the acquisition, and is limited to give its opinion on the fairness of the offered price and inform how they will act with respect to shares owned by its members.

Notwithstanding the foregoing, the corporate by-laws of the target company may include special provisions or mechanism to prevent the acquisition of shares or the control of the company or both.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There are no specific regulations or restrictions in Mexican law applicable to break-up fees or mechanism to frustrate additional bidders. As it is not regulated, the parties to the transaction may freely agree and adopt break-up fees or similar mechanisms. In case of public traded companies, such fees must be approved by the board of directors of the target and disclosed to the public.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Other than the authorisations and clearance required under Mexican law for a specific business combination (antitrust or regulatory), government agencies do not influence or restrict the completion of business combinations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

There are no restrictions in Mexico regarding conditional offers. Any condition to a business combination will be valid and enforceable provided that it is not contrary to law, morals or public policy; therefore, a bidder is entitled to subject its tender offer, exchange offer or other form of business combination to any condition or term that the same deems convenient, in the understanding that such a condition or term is expressly provided in the offering memorandum. In case of cash acquisition, the financing may be conditional.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In case of financing of the buyer, the M&A transaction documents and the financing documents are usually executed at the same time. The seller must obtain sufficient comfort from the financing entity that the disbursements would be made at closing, and the M&A transactions should be subject to the condition of full disbursement of the loan and payment for the acquisition. The seller must provide the financing entities of all information and documentation required by the financing entities and permit a due diligence to the target company to obtain prior approval for the financing.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In principle, under Mexican law minority squeeze-outs are not possible; however, shareholders may adopt in the corporate by-laws of private or public limited companies call options or resolve other mechanisms that may lead to a minority squeeze-out. The process and the mechanisms for the valuation of shares are usually provided in the corporate by-laws or in a shareholders' agreement.

Also, the majority shareholders may dilute the participation of minority shareholders by approving capital increase in a shareholders' meeting; however, all shareholders have a pre-emptive right to acquire the shares issued by the company from the capital increase in the same proportion to their participation in its capital stock. The shareholders must exercise this right 15 days following notification of the approval of the capital increase, otherwise the other shareholders may exercise such right, diluting the participation of the non-exercising shareholders.

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Update and trends

The M&A market in Mexico is still following a dynamic pace. Despite the current international environment, in special, the direct impact in Mexico of the US administration and policies, it is expected that the M&A market will continue its growth as in recent years. The liberalisation of the oil and gas industry in Mexico is still considered an upcoming trend that could provide a boost to the Mexican M&A market in the following years. The recently enacted regulations have created the foundations for energy-related real estate investment trusts commonly known as 'Fibra E'. These vehicles are allowed to invest in qualified energy, electricity and infrastructure assets and it is aimed that these will be eventually traded in recognised local and foreign stock markets. Moreover, Mexican companies and projects have become more attractive to foreign investors owing to the peso's devaluation, which can boost foreign investment participation in the local market. Notwithstanding the foregoing, there are still elements that provide uncertainty to the M&A market. The NAFTA negotiations will be conclusive for the definition of M&A in Mexico for the coming years.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Except for certain foreign investment restrictions, Mexican law and regulations do not restrict or limit in any manner whatsoever the acquisition of foreign shareholders of a participation in the capital stock of Mexican companies, nor require a specific structure to implement cross-border transactions. The Mexican Foreign Investment Law (LIE) restricts or limits foreign investment in certain activities, such as national inland transportation services (passengers and cargo) and certain technical and professional services, which are exclusively reserved to Mexican nationals or Mexican companies with a foreign exclusion clause. Other activities subject to foreign investment restrictions or limitations are, among others, domestic air transport, air taxi transport and specialised air transport, radio broadcasting services, local newspaper publishing and shipping companies dedicated to the commercial exploitation of inshore navigation and coastal fishing.

Foreign companies whose intention is to publicly trade securities in Mexico will be subject to the same requirements and regulations applicable to Mexican companies.

Finally, it should be noted that Mexico is party to several free trade agreements, which may provide additional advantages, benefits and special treatments, as well as limitations or requirements, for foreign investors in their participation in Mexican companies.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Legal mergers

The extraordinary shareholders' meetings approving the legal merger must be registered with the Public Registry of Commerce and published in the electronic system of the Ministry of Economy. The merger will be effective until three months following the completion of the above-mentioned registration. Within such term any creditor of the merging companies may oppose the merger by filing a complaint with the competent court, in which case the legal merger will be suspended until the competent court issues its final resolution. Alternatively, the legal merger will be effective as of the date of completion of the above-mentioned registration: (i) if the merging companies agree on paying all the debts with creditors; (ii) if the merging companies deposit the amount corresponding to such debt in a financial institution; or (iii) with the prior consent of their creditors.

Public trade companies

Upon receiving the authorisation from the CNBV and the BMV to the OPA, and when all transaction documents are approved, the tender offer will be made public for at least 20 business days and for additional periods of five business days, in case material changes to the original terms and conditions of the tender offer arise, which must be previously approved by the CNBV. The board of directors of the target company must take a public position on the tender offer within 10 business days following the launch of the tender offer and, jointly with the general manager, disclose to the public their position as regards the tender offer with regard to their shares in the target company. Upon expiration of the 20 business days given for the tender offer and no later than three business days following the expiration date of the tender offer, the BMV will settle the tender offer.

Foreign investment authorisations

If the transaction requires the prior approval of the National Commission of Foreign Investments (Foreign Investment Commission) based on the target economic activity, an application must be filed before such authority. The Foreign Investment Commission shall issue its resolutions within 45 business days of the day of filing of the respective application; on the understanding that if the Foreign Investment Commission does not issue its authorisation within such term, it should be understood that the authorisation was granted for the foreign participation in the Mexican company pursuant to the terms of the application.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

If the business combinations involves a Mexican financial entity (including banks, insurance companies, brokerage companies, retirements investment funds, among others), an authorisation from the respective authority must be obtained prior to the completion of the business combination.

Also, if the target entity's main activity is based under a concession title or special permit (such as mining, telecom, transportation operations, among others), the business combination will be subject to the prior authorisation from the respective authority.

18 Tax issues

What are the basic tax issues involved in business combinations?

Tax issues in business combinations in Mexico may vary significantly depending on the structure used for their implementation. One of the main reasons for the parties to adopt any specific structure is the tax benefits or costs that may derive from any particular type of business combinations. The basic tax issues and implications involved in business combinations are the following.

Equity acquisition

The seller is subject to income tax for any capital gain arising from the sale of its participation in the target company. If the seller is a Mexican company, any capital gain will be levied at an income tax rate of 30 per cent, and subject to the authorised deductions. If the seller is a foreign entity, in principle, the income tax would be an amount equivalent to 25 per cent of the overall purchase price, without any deduction; however, the seller has the option to determine the income tax on the actual capital gain obtained from the sale of its participation in the target company, at a tax rate of 35 per cent and subject to the authorised deductions, provided that, among other requirements, the seller has a representative in Mexico (who must be a Mexican resident or foreign resident with permanent establishment in Mexico), and that the income tax was determined based on a tax opinion issued by a certified public accountant.

Asset transfer

Tax implications will vary depending on the type of asset to be transferred. In principle, a sale of assets is subject to value added tax at a current rate of 16 per cent, payable by buyer. Other tax or duties may apply depending on the assets to be transferred (for example, in case of transfer of real estate, such transfer will be subject to the Transfer of Real Estate Tax payable by buyer, in addition to any income tax or value added tax).

Legal mergers

In principle, legal mergers between Mexican resident companies would not be considered for tax purposes as a sale and transfer of assets and,

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therefore, would not have any tax implication for the surviving entity, provided that the following requirements are met: (i) a cancellation of registration for legal merger notice is filed with the Tax Payer Registry; (ii) the surviving entity continues to carry out the same activities as those carried out by the merging entity; and (iii) the surviving entity prepares and files the tax returns of the merging entities before the Mexican tax authorities. If these requirements are not met, the legal merger would be considered for tax purposes as a sale of assets subject to the applicable tax rates.

Finally, please note that Mexico is part to several tax treaties for avoiding double taxation, which must be considered for the structuring of the business combinations.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The Federal Labour Law (LFT) sets forth the legal framework governing labour and employee benefits. There are no specific labour and employee benefits provided in the LFT arising from a business combination. From a labour standpoint, the business combination should not have an impact on the labour relationship of the target company with its employees, and such labour relationship should be maintained at least on the same terms and conditions with no negative impact for the employees. If there is a change of employer arising from the business combination (ie, as a result of a legal merger), it would be understood that the resulting entity is the new employer and shall maintain the same labour terms and conditions as the previous employer (including the recognition of seniority). If the employee is negatively affected in its labour terms and conditions (owing to a change of location, change of daily work hours, change of employee benefits and perks, among other things), the employee may have the right to claim the termination of the labour relationship before labour courts requesting payment of the corresponding indemnification and severance payment. Often business combinations entailing transfers of employees may include agreements regarding the respective change of employer and the obligations assumed by each of the parties with respect to the employees.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

If the target company is declared in bankruptcy or receivership, in principle the shareholders must obtain at least the approval of the majority of the recognised creditors under the proceeding to carry out a business combination, except in the case of legal mergers, where any creditor may suspend the process until a final resolution is issued in the bankruptcy proceeding. At all times, any resolution regarding the target entity must aim to preserve creditors' rights.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

In Mexico, there is no specific law or regulation governing anti-corruption or anti-bribery practices applicable for business combinations. Bribery, corruption and facilitation payments are criminalised under Mexico's Federal Penal Code and subject to general administrative regulations under the new National Anti-Corruption System to be fully implemented in July 2017.

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Myanmar

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1 Types of transaction

How may businesses combine?

Companies may combine in Myanmar through share purchases, business (asset) transfers and schemes of arrangement.

Investment law restrictions relevant to business combinations
Generally, for any investment in certain large-scale projects, a permit will be required from the Myanmar Investment Commission (MIC) under the 2016 Myanmar Investment Law (MIL). This includes investments that are strategically important, capital intensive, have a large potential impact on the environment or local community, use state-owned land and other designated investments. Foreign investors will also require an endorsement from the MIC to have the right to enter into a long-term lease of land or to obtain certain tax incentives even where a permit would not be required. There are also sectoral limitations on foreign investment, including under the MIL, as noted in question 17.

The approval of the MIC will also be required for the direct or indirect acquisition of a majority of shares or controlling interest in a company with an MIC permit.

Share purchases
Definition of a Myanmar company
Companies incorporated in Myanmar are classified as either a 'foreign company' or a 'Myanmar company'. This distinction is important as there are a number of barriers to foreign companies doing business in Myanmar under various Myanmar laws and also in practice. For example, as noted in question 17, Myanmar's land laws prohibit the transfer of immoveable property to, or its acquisition by, foreign companies.

Under the 1914 Myanmar Companies Act (MCA), a Myanmar company was defined as a company with no foreign shareholders. The Directorate of Investment and Company Administration (DICA), which administers the MCA, maintained (and still maintains) different systems of registration for Myanmar companies and foreign companies. A foreign company's registration number has the letters 'FC' in it.

Removal of restrictions on transfer of shares
If a company changes classification from a Myanmar company to a foreign company (or vice versa), DICA requires that it apply to amend its registration number. Its previous practice under the MCA was to not permit a Myanmar company to change its registration to become a foreign company, effectively prohibiting the acquisition of Myanmar companies by foreign investors. However, this started to change in early 2017 and such change in classification is now possible. This means that foreign investors can now acquire Myanmar companies and as a result, share purchases are likely to become a more common form of combination.

In addition, under the Myanmar Companies Law (MCL), which is expected to replace the MCA in 2017, the definition of a Myanmar company will be liberalised to include companies with no more than the prescribed threshold amount of foreign ownership (currently expected to be 35 per cent).

It should be noted, however, that according to DICA, the 35 per cent foreign investment to be permitted in a Myanmar company will also take into account indirect foreign ownership (although it is unclear how this will be administered in practice).

Business (asset) transfers
Given the difficulties associated with acquiring shares in Myanmar companies under the MCA, the most common form of combination in the past has been a transfer of the business or assets of a business, and this will continue to be available as a method of business combination. As with share acquisitions, the MIC's approval will generally be required for the acquisition of 50 per cent or more of the assets of a company with an MIC permit.

Schemes of arrangement
Schemes of arrangement are also possible under the MCL and permit the acquisition of a company subject to court supervision where 75 per cent of the shareholders' vote has been obtained. While schemes of arrangement may theoretically also be possible under the MCA, they have not historically been used in Myanmar and it is likely there will be some uncertainty regarding their operation.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Myanmar has been rapidly developing as it has opened up to foreign investment and updated its laws relating to business combinations, and the legal environment for businesses more broadly is also changing rapidly. Many of these laws have been only recently implemented or have only recently begun to apply. In general, the Myanmar legal system has a lack of clear precedents to confirm the legal position. The answers given to these questions must be understood in this context.

The main laws governing business combinations are the MCA (which is expected to be replaced in 2017 by the MCL), the MIL and the 2015 Competition Law. In addition, Myanmar passed a Securities and Exchange Law in 2013 (SEL) and established the Yangon Stock Exchange (YSX) pursuant to that law in 2015. However, the YSX is still developing as a stock exchange and as of 31 March 2017, there are only four listed companies in Myanmar. As of 31 March 2017, under Instruction 1/2016 of the Securities and Exchange Commission, foreign companies cannot trade on the YSX. Many issues will need to be resolved before foreign investment is permitted in companies listed on the YSX.

As mentioned in question 1, the MIL, which was passed on 18 October 2016, simplified and deregulated the investment regime in Myanmar. It combined the previous local and foreign investment laws into one law and provided for a streamlined investment approval process.

The MIC, which administers the MIL, issued the 2017 Myanmar Investment Rules (MIR) on 30 March 2017 setting out the process of obtaining approval, and Notification No. 15/2017 titled List of Restricted Investment Activities, which is made in relation to section 42 of the MIL (MIL Notification) on 10 April 2017, setting out the types of investments that are restricted to foreign investment, require approval of a Myanmar government ministry or may only be made through a joint venture with a Myanmar company. The MIL Notification is intended to be a comprehensive list of all such restrictions.

The MCL, which is expected to pass in 2017, will modernise the MCA (for example, improving companies' ability to manage their capital structure) and remove some barriers to foreign investment.

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For example, it will broaden the definition of a Myanmar company to include companies with foreign investment of up to a prescribed amount (expected to be up to 35 per cent) and abolish the requirement for foreign companies to obtain a permit to trade (which in practice, was only very rarely given for foreign companies intending to engage in trading activities). Given the MCL's greater relevance to business combinations in future, we include more detailed comments on its provisions (as set out in draft 5 of the MCL, published on 8 November 2016) rather than those of the MCA. For completeness, we have indicated where the two differ substantively.

Myanmar's Competition Law (Law No. 9/2015) entered into force on 24 February 2017. This law prohibits business combinations that:

- have the purpose of 'extremely raising market dominance', or lessening competition in a limited market; or
- would result in a market share above the prescribed amount.

Business combinations prohibited under the Competition Law may be exempt in certain circumstances, including if the acquired business is at risk of insolvency or if it will promote exports, technology transfer or productivity. The Competition Law is a new law and it is not clear how its requirements will be applied in practice. As of 31 March 2017, no regulations have been issued under the Competition Law and the Competition Commission has not yet been formed.

3 Governing law

What law typically governs the transaction agreements?

Under Myanmar law parties are free in principle to choose any foreign law as the governing law of an agreement, subject to the operation of any applicable mandatory principles. In practice, state-owned enterprises and Myanmar government agencies will rarely agree to a choice of foreign governing law, and Myanmar private parties also prefer that Myanmar law applies to the transaction agreements. For agreements that are subject to scrutiny under the MIL, the MIC will generally require a choice of Myanmar law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

A notification of transfer must be filed with DICA within 21 days of a transfer of shares in a company incorporated in Myanmar. Other associated filings with DICA may also be required, for example, for a change in business name. Under the MCA (but not the MCL), if after a transfer of shares a company became a foreign company, it would need a permit to trade.

Under the MIL a notice must be filed with the MIC for any transfers of shares in, or the business of, a company with an MIC permit or endorsement. As noted in question 1, the prior approval of the MIC will be required for any direct or indirect transfer of shares in a company which has an MIC permit (or to transfer the business itself), if it will result in an entity that is not an affiliate of the transferor acquiring majority ownership or control of the shares, or more than 50 per cent of the assets, of the business.

For transfers of shares in companies listed on the YSX, under Notification 1/2016 an extraordinary report may be required, for example, if it results in a change in the parent company or major shareholder (defined as a shareholder with greater than 20 per cent shareholding), or a transfer of the company's material undertaking.

In addition, as noted in question 1, under the MIL, foreign investors will require an MIC permit for certain large investments, and an endorsement to obtain the right to enter into a long-term lease of land or to obtain certain tax incentives even where the investment would not otherwise require an MIC permit.

Under the Myanmar Stamp Act 1899, the amount of stamp duty payable depends on the document, but for share transfers, it will be 0.1 per cent of the value of the transfer price (under Notification No. 146/2016), and for joint venture agreements, it will generally be around US$100.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

There is no requirement currently in the law for public disclosure in relation to a business combination, other than the disclosure obligations for listed companies under Notification 1/2016 noted in question 4.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the MCL, companies are required to maintain a register of shareholders at their registered office or principal place of business and make their registers available to shareholders during business hours. Public companies (which means any company with more than 50 shareholders or that has issued to the public an invitation to subscribe for securities) also have to make their registers available to the general public for a reasonable fee. However, few companies currently comply with this requirement and in general information about the shareholders of unlisted companies incorporated in Myanmar is not publicly available.

The MCL provides for DICA's registers to be maintained electronically, and once this is implemented, it will give DICA greater capacity to ensure transparency of company information, and to itself make information publicly available. Any person may inspect DICA's registers and records on payment of the prescribed fee.

Companies are required to file an annual return with DICA. Under the MCA all shareholders must be listed and under the MCL, the annual return must list, for public companies, their 50 largest shareholders, and for private companies, all shareholders. In addition, disclosure obligations apply for listed companies under Notification 1/2016 as noted in question 4, and under the 2016 Financial Institutions Law (FIL), banks are required to submit an annual report to the Central Bank of Myanmar (CBM) of all shareholders having a substantial interest in the bank and their details (question 17 sets out the definition of a 'substantial interest').

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors owe fiduciary duties to the company, as well as statutory directors' duties under the MCL (but not under the MCA) such as to act with due care and diligence and in good faith in the company's best interest. Although not specifically referred to, this would also apply in the context of business combinations.

Minority shareholders also have rights under the MCL (but not under the MCA) to take action against conduct that is oppressive.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

As noted in question 1, 75 per cent of shareholders must approve a scheme of arrangement. In addition, under the MCL, the directors of a public company, a subsidiary of a public company or (if its constitution provides) a private company, cannot sell or dispose of such company's main undertaking without the consent of the company in a general meeting (the MCA has a similar provision, but refers to the company's 'undertaking', rather than 'main undertaking', although the difference between these two terms is unclear).

There are no general appraisal rights, but schemes of arrangement are subject to court supervision.

In addition, as noted in question 7, shareholders can sue against oppressive conduct under the MCL (but not under the MCA).

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9 Hostile transactions

What are the special considerations for unsolicited transactions?

Unsolicited, hostile transactions are in practice not possible in Myanmar. In relation to listed companies, there are currently no takeover regulations in Myanmar and there is no history of unsolicited transactions involving YSX-listed companies.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees and reverse break-up fees are not prohibited in Myanmar. There are no specific limitations on a company's ability to negotiate non-disclosure or non-solicitation obligations to protect deals from third-party bidders.

While the drafting of the financial assistance provisions of the MCL is not clear, they appear to permit private companies to give financial assistance in connection with the acquisition of their shares without limitation and for public companies (whether listed or not) to provide such assistance, with the approval of the board of directors and shareholders. In contrast, the MCA only permits private companies (but not public companies) to give such financial assistance.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Other than the Competition Law, the MIL is the main law through which business combinations are regulated by government. As noted in question 4, approval under the MIL is required for the purchase of shares in, or the business of, a company which has an MIC permit, or to invest in a business for which an MIC permit is required under the MIL.

The MIL restricts investment in certain sectors, including national security-related investments (eg, the manufacture of arms and ammunition for the Myanmar defence forces and related services), although this relates to investments generally rather than business combinations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In terms of conditional share purchase offers, Myanmar does not have any takeover regulations and there are no laws dealing with tender offers on the YSX. Conditions are not prohibited with respect to business transfers, such as for satisfactory due diligence, and schemes of arrangement could in principle be conditional subject to the court's supervision.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

The general practice in Myanmar is not to deal with financing in the transaction documents. In general, Myanmar's banking sector is still developing and the general practice is to obtain financing from offshore (see question 15).

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Schemes approved by 75 per cent of shareholders (or creditors) are binding on all shareholders (or creditors) and either by the order sanctioning such scheme or a subsequent order, a court can make provision for the transfer of a company's undertaking or its shares, pursuant to such scheme. In addition, the approval of an offer to buy the shares of a public company by 75 per cent of shareholders within four months of such offer will give rise to a right to compulsorily acquire the shares of dissenting shareholders upon notice within two months, subject to any objection proceedings.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are generally structured as investments by a company incorporated outside Myanmar, for example, in Singapore. This is partly owing to the tax advantages of investing from jurisdictions such as Singapore (see question 18), the availability of investor treaty protections and because it is generally easier for foreign investors to obtain finance offshore.

The previous practice was that offshore transactions involving companies holding an MIC permit were exited generally through sale of the shares in the offshore parent company, rather than the Myanmar project company, as this previously avoided the need to seek approval from the MIC for such transactions. However, the Myanmar-language version of the MIR (which is the binding version) now requires MIC approval for both direct and indirect transfers of a majority of shares in the Myanmar project company.

In terms of financing Myanmar investments, it is generally understood that in practice all transfers of funds into or from Myanmar are governed by the 2012 Foreign Exchange Management Law (FEML). Prior approval from the CBM is likely to be required in practice for loans, while equity fund transfers need only to be declared to the CBM.

Under the FEML and Notification 7/2014 of the CBM, Myanmar residents (including Myanmar incorporated companies) can open offshore foreign currency accounts with the approval of the CBM, provided they file monthly bank statements with the CBM. In practice, we understand the CBM has been willing, in the context of project financing, to approve Myanmar companies using offshore foreign currency accounts for the purpose of obtaining foreign currency-denominated loans. The funds from these loans are then transferred into Myanmar by the Myanmar company itself.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The main waiting periods in Myanmar for completing a business combination relate to the approvals required under the MIL to transfer a majority of the shares in, or the business of, a company which has an MIC permit, or to obtain an MIC permit or endorsement, as noted in question 4.

The MIC typically took around two weeks to one month to process transfers of shares in, or the business of, investments with permits under the 2012 Foreign Investment Law, and this is expected to continue under the MIL. In relation to applications for a permit or endorsement under the MIL, the MIC has 15 business days to undertake an initial assessment regarding whether the application is complete and a further 60 business days for a permit or 30 business days for an endorsement, to undertake a substantive assessment of the application and grant the permit or endorsement. The approval is required to be issued within a further 10 business days.

As noted in question 14, there are waiting periods with respect to the exercise of rights for minority squeeze-out for schemes of arrangements and acquisitions of public companies.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

There has recently been a significant liberalisation of sector-specific restrictions in Myanmar under the MIL. For example, the MIL Notification permits 100 per cent foreign investment in the establishment and operation of offices or commercial buildings. Foreign investors can also invest through a joint venture with a local partner

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Update and trends

The reform of Myanmar's company law (and its administration) is likely to drive the use of share purchases as a more important means of business combinations, as foreign investors can now acquire Myanmar companies. In addition, the MCL is expected to allow the ownership of up to 35 per cent of the shares in a Myanmar company by a foreign person without the need for reclassification of the Myanmar company as a foreign company. This will allow foreign investors to invest through a Myanmar company in activities where only local companies could otherwise invest.

As mentioned above, the MIL Notification further liberalised investment restrictions. The MIL also removes the effects of many other restrictions on foreign investment, including by allowing foreign investors to obtain long-term leases, and the MCL will abolish the requirement under the MCA for foreign companies to obtain permits to trade.

As Myanmar's economy matures, it is likely there will be further liberalisation, including in sectors like insurance and banking, and other related sectors such as non-bank financial institutions. Economic activities such as trading on the YSX may also be opened up over time.

The credit crisis had a minimal impact on Myanmar due to its isolation from the global banking system. However, the Ministry of Planning and Finance and the CBM have been updating Myanmar's banking regulations to liberalise foreign exchange controls and reinforce the supervision, and robustness, of the banking system. As Myanmar strengthens its financial institutions (in particular its state-owned banks) and the sector matures, this will help finance greater development of the country's economy.

(under the MIR, the Myanmar company is required to have at least a 20 per cent shareholding in such a joint venture) in a number of sectors including the development, sale and lease of residential apartments and condominiums.

In many sensitive sectors investment is only possible through a concession from, or a joint venture with, the government of Myanmar, reflecting the role of state-owned enterprises and regulation in Myanmar's economy. Under the MIL Notification, only Myanmar companies may undertake certain investments which are of a local character (such as printing local language periodicals) or relate to certain businesses, including artisanal oil wells and mini-markets. As noted above, the MCL is expected to permit up to 35 per cent foreign ownership in Myanmar companies.

The MIL Notification also lists sectoral approvals required prior to investment. For example, the approval of the Ministry of Health and Sports is required for investments in businesses for the supply of health services. The approval of the Ministry of Commerce is required for retailing services and wholesale services, and a note in the MIL Notification states that import or export activities shall be performed in accordance with the policy of the Ministry of Commerce. Because the policy of the Ministry of Commerce has historically been to not grant an import licence to foreign companies without an MIC permit, it is possible that foreign companies applying in future for an import licence without an MIC permit (and possibly also without an MIC endorsement) will experience difficulties in obtaining an import licence. It is also unclear whether the Ministry of Commerce will, in practice, grant approval to foreign companies for retailing and wholesale services.

There are also de facto restrictions in certain sectors. For example, no foreign insurer has been awarded a licence under the Insurance Business Law of 1996 to undertake an insurance business in Myanmar (they may only conduct such a business in partnership with Myanma Insurance, the state-owned insurer, or in special economic zones under Notification 2/2017 of the Insurance Business Regulatory Board of Myanmar).

Banking businesses are regulated by the CBM under the FIL. Under the FIL, a foreign bank may only sell its business or acquire a local bank's business (or a substantial part of either) with the approval of the CBM, and approval to acquire a local bank has not been provided to date (as of 31 March 2017). In addition, a person must obtain the approval of the CBM prior to acquiring (whether directly or indirectly) a 'substantial interest' in a bank (defined as 10 per cent or more of the shares in, or the capacity to control the management of, a bank).

Foreign banks may also offer corporate and wholesale banking services to foreign-owned companies and locally owned banks in Myanmar after establishing a branch in Myanmar with a licence from the CBM. Thirteen foreign banks have established branches in Myanmar (as of 31 March 2017).

Filings may also be required under sectoral laws. Rule 23 of the Licensing Rules made under the 2013 Telecommunications Law requires a person to obtain the approval of the Posts and Telecommunications Department of the Ministry of Transport and Communications prior to disposing of (or otherwise assigning) a controlling interest in a business holding a telecommunications licence.

In relation to business combinations in sectors involving significant land use (eg, retail, construction or agriculture businesses) the 1987 Transfer of Immoveable Property Restriction Act prohibits the transfer of immoveable property to, or its acquisition by, a foreign company. It also prevents foreign companies leasing land for more than one year. As noted above, a foreign company that has an MIC permit or endorsement may lease immoveable property with an initial term of up to 50 years (with two extensions of 10 years each). The definition of a Myanmar company under the MCL is also expected to include companies with up to 35 per cent foreign shareholding, and Myanmar companies do not have the same restrictions in leasing or owning land as foreign companies.

18 Tax issues

What are the basic tax issues involved in business combinations?

There are a number of tax implications of business combinations. Capital gains tax is payable on any capital income and stamp duty (as noted in question 4). The capital gains tax rate is 10 per cent in most sectors or around 40 per cent for oil and gas assets, while the amount of stamp duty varies depending on the nature of the instrument.

Withholding taxes also apply for certain categories of corporate income. Residents can offset the withholding taxes against their final end of fiscal year tax liability, while non-residents cannot. Under Notification 2/2017, the withholding amounts from 1 April 2017 are:

Category	Residents	Non-residents
Interest payments	0 per cent	15 per cent
Royalty payments	10 per cent	15 per cent
Payments under contract for work and procurements	2 per cent	3.5 per cent
Dividend payments	0 per cent	0 per cent

The withholding rates can be reduced if a person is a resident of a country that is party to a double tax treaty with Myanmar. Under the double tax treaty with Singapore, the amount withheld on interest payments will be reduced to 8 per cent if the payment is to a bank or financial institution or 10 per cent if it is to any other person; and the amount withheld on royalty payments will be reduced to 10 per cent for patents, designs or models. Myanmar has double tax treaties with India, the Republic of Korea, Laos, Malaysia, Singapore, Thailand, Vietnam and the United Kingdom and it is in the process of ratifying treaties with other jurisdictions.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Employment is regulated contractually in Myanmar, subject to the requirements of a number of labour laws regulating minimum standards in different aspects of employment, such as overtime and occupational health and safety. Myanmar has amended several of these laws, and there continues to be a push for further amendment.

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Under the 2013 Employment and Skills Development Law, an employer is required to finalise a written employment contract within 30 days of commencement of employment. The employment contract is required to be filed with the local township office of the Ministry of Labour, Immigration and Population.

However, there is a low level of compliance with this measure as typically, written employment contracts are not executed in Myanmar. It may therefore be difficult for an acquiring entity to determine the terms and conditions of the target company's employment arrangements or potentially to avoid liability for its non-compliance.

For business transfers, it is important to verify the terms and conditions of a target company's employment arrangements as part of due diligence, include this as a condition precedent, and deal with the mechanics of the transfer of employees to the acquiring company.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Companies may be wound up either by a court, voluntarily or under court supervision. A liquidator in a winding-up may sell the company's assets including by public auction or private contract. In addition, a company which is being, or about to be, wound up voluntarily may enter into a scheme of arrangement with its creditors as noted above.

The winding up provisions of the MCL (and the MCA) have not been widely used in Myanmar and it is unclear how an insolvent company's assets would be disposed of in practice. As of 31 March 2017, updated insolvency laws are in the process of being drafted under an Asian Development Bank initiative and this may clarify the application of the law in this area.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Myanmar's 2013 Anti-Corruption Law prohibits enterprises and their employees from offering bribes to public officials as well as public companies registered in Myanmar. However, the application of the law has not been tested in practice. Penalties of up to 10 years' imprisonment and a fine may apply for persons who breach this law. The 1861 Penal Code also prohibits the receipt of bribes by public officials in Myanmar.

In addition, the President's Office issued Guidelines on Receiving Gifts on 1 April 2016 requiring public officials to refuse gifts worth more than around US$20, or more than US$70 in a single year from a single organisation or person, as a practical measure aimed at preventing bribery. The Ministry of the State Counsellor's Office also announced on 2 November 2016 that it had set up a hotline to receive bribery and corruption complaints.

As a result of these initiatives, Myanmar has improved slightly in international measures of corruption such as Transparency International's Corruption Perceptions Index, moving up 11 places in the latest survey in 2016 to the 136th placed country (out of 176 countries).

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Netherlands

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1 Types of transaction

How may businesses combine?

The most common ways for businesses to combine are:
- share transfer (acquisition of shares);
- public offer;
- asset transfer (acquisition of a business);
- merger;
- demerger; and
- joint venture.

As in most other jurisdictions, the benefit of an asset transfer is that it allows for the transfer of specific assets and the exclusion of unwanted or unknown liabilities. This form is particularly popular in case of insolvent sellers (eg, when a business is sold out of a bankruptcy by the bankruptcy trustee).

The benefit of a share transfer is that it is easy to effectuate, since a transfer of shares avoids the transfer of individual assets and liabilities and generally reduces the need of third-party cooperation or consent.

Another form for combining businesses is through a legal merger or demerger.

In case of a merger, one entity by operation of law acquires all assets and liabilities of another entity ceasing to exist. Alternatively, a new entity may be incorporated that similarly acquires all assets and liabilities of at least two other entities ceasing to exist.

Within the European Union limited liability companies may also enter into a cross-border legal merger, effectively amalgamating the business of a company in one EU jurisdiction with the business of a company in another EU jurisdiction (see question 15).

In case of a demerger, all assets and liabilities of one entity – which entity ceases to exist – transfer by operation of law to several other entities. In case of a partial demerger, a part of the assets of one entity – which continues to exist – transfers by operation of law to one or several other entities, either existing or newly incorporated.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations are mainly governed by the Civil Code. There are no formal procedures that regulate the acquisition of a business as such. Public offers, however, are governed by the Financial Supervision Act, the Public Takeover Bid Decree and various ancillary regulations.

Other Dutch laws and regulations governing business combinations are:
- the Competition Act;
- the Works Council Act;
- the Merger Code; and
- the Corporate Governance Code.

European Union law and regulations (eg, on merger control) are also relevant.

3 Governing law

What law typically governs the transaction agreements?

Transaction agreements relating to a Dutch target legal entity are generally governed by Dutch law. However, this is not mandatory and parties are free to choose the law applying to the transaction documents except for the share transfer deed, which must be executed before a Dutch civil law notary.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

In the Netherlands, there are no stamp taxes or other government fees that need to be paid in connection with completing a business transaction as such. See question 18 for tax issues relating to business combinations involving real estate. Some business combinations need to be filed with the relevant authorities. Such authorities may charge filing fees. The most noteworthy filings are the following:

Mergers and demerger

In case of a merger or a demerger, the management boards of the merging or demerging entities have to prepare a merger or demerger proposal. This proposal needs to be filed with the trade register of the chamber of commerce and at the company's offices. The relevant entities also need to publish a notice of such filing in a daily newspaper with national circulation.

Competition filing

Under the Competition Act, certain transactions have to be notified to the Netherlands Authority for Consumers and Markets (ACM). A transaction has to be notified to the ACM if it qualifies as a concentration' and the turnover of the businesses concerned exceeds the ACM's jurisdictional thresholds. A concentration is defined as: (i) a merger of two previously independent businesses, (ii) the direct or indirect acquisition of control over a business, or (iii) the establishment of a joint venture that performs all the functions of an autonomous economic entity on a long-term basis. The ACM's thresholds are the following: the combined worldwide turnover of the businesses concerned exceeded €150 million in the calendar year preceding the transaction and at least two businesses concerned each realised a turnover of €30 million or more in the Netherlands. A transaction that has to be notified to the ACM may not be implemented prior to obtaining clearance from the ACM. If a transaction needs to be notified to the European Commission, no separate notification to the ACM is required.

Public offer

In case of a public offer the bidder needs to prepare an offer memorandum that must be filed with and approved by the Netherlands Authority for the Financial Markets (AFM). See question 5 regarding the information that needs to be disclosed in an offer memorandum.

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5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

There are no general disclosure or publication requirements for business combinations by means of a private transaction.

In case of a public offer, the offer memorandum must include information on, among other things:

- the names of the bidder and target company;
- whether the bidder and target company are party to an agreement regarding the public offer (eg, a merger protocol);
- the proposed price or exchange ratio of the shares;
- a statement on the way the bid is financed;
- the (pre-)offer conditions;
- whether the bidder has acquired any irrevocable undertakings from shareholders;
- any price-sensitive information related to the bid that might be relevant to a reasonably acting investor;
- a statement on the consequences for current employees of the target company regarding the business combination;
- the total costs related to the transaction, and a statement which party bears these costs; and
- a Dutch summary of the offer memorandum in case the original version is drafted in English.

Ongoing disclosure requirements for listed companies

Companies listed on a regulated market in the Netherlands have an ongoing obligation to disclose any information which, if made public, would be likely to have a significant effect on the prices of its shares. This includes, for example, plans regarding acquisitions and divestments by listed companies. Pursuant to the Markets Abuse Directive such disclosure of information may, however, be delayed if: (i) immediate disclosure is likely to prejudice the legitimate interests of the company, (ii) the delay is not likely to mislead the public, and (iii) the company is able to ensure the confidentiality of the information.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The Financial Supervision Act includes certain ownership thresholds for shareholders of listed companies (3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent). A shareholder must notify the AFM if he obtains 3 per cent or more of the shares – or voting rights – in a listed company. Following such notification, the shareholder has to notify the regulator if his shareholding reaches, exceeds or drops below one of the aforementioned thresholds. This disclosure obligation also applies to economic interests in shares (through, for example, derivatives). Short positions also need to be notified to the AFM.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The management board and each of its members must perform their duties in the best interests of the company and its business. The interest of the company consists of the combination of the interests of all stakeholders of the company, including shareholders, employees, suppliers and customers. In case of an acquisition, the management board of the purchaser is, among other things, obliged to conduct proper due diligence on the target company.

The supervisory board of a company consists of the non-executive directors of a company. It is only mandatory for certain large companies. The supervisory board advises and supervises the management board.

The Dutch Corporate Governance Code contains several governance principles and best practices. The Corporate Governance Code only applies to listed companies, but many other (large) companies in the Netherlands also comply with the Corporate Governance Code. The focus of the Corporate Governance Code is on the continuity of the business and long-term value creation, bearing the interests of all stakeholders in mind.

Shareholders are, within the boundaries of reasonableness and fairness, free to pursue their own interests.

Public offers

The management board and supervisory board of a target company have a central role during a public offer. If the offer is friendly, the management board of the target company negotiates the financial and non-financial terms of the offer with the bidder. After the bidder has published the offer memorandum the boards of the target company have to inform the shareholders whether they support the public offer by publishing a position statement. Such position statement has to include a substantiated explanation of the position of the management board, stating, among other things, its opinion on the offer price and the considerations on which the offer price is based and the consequences of the offer for jobs and employment conditions. In the case of a friendly offer the position statement is usually published together with the offer memorandum.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Share and asset transfers

Shareholders of public limited liability companies have a statutory right to approve decisions of the management board relating to an important change in the identity or character of the company or its business. Such decisions include the transfer of all or substantially all of the business of the company and the acquisition or divestment of an interest in another company with a value of at least one-third of the company's assets. Although no similar provision exists for private limited liability companies, a transaction by which all of its assets are sold (ie, a factual liquidation) is generally held to be subject to shareholder approval. Moreover, further-reaching approval rights can be set out in the articles of association of a company.

Legal merger

In case of a legal merger or demerger, the decision to merge is subject to approval of the shareholders of the entity that ceases to exist.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Although most successful public offers are friendly, an increasing number of offers start out hostile or unsolicited but evolve into friendly offers at a later stage. The rules and regulations relating to public offers do not make any distinction between hostile and friendly offers. There are, however, certain ways for target companies to discourage hostile bidders.

Put up or shut up rule

Pursuant to the 'put up or shut up rule', the AFM can – following request by a potential target company – oblige a potential bidder to confirm whether or not he intends to launch an offer, if the potential bidder has disclosed information from which the target legitimately may deduce that an offer may be on its way. If the potential bidder does not confirm it intends to launch an offer, the potential bidder cannot make an offer for the target during the next six months.

Anti-takeover foundation

The most common defence mechanism against hostile takeovers is the so-called anti-takeover foundation. In short, a foundation is incorporated and enters into an option agreement with the relevant company pursuant to which the foundation has the right to call for newly issued shares in the capital of the company. As a consequence, the potential shareholdings and voting rights of a hostile bidder will be greatly diluted if the foundation exercises its option. Usually special preference shares are used in this mechanism, which may be issued against their nominal value. The anti-takeover foundation can therefore

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acquire a high number of voting rights against minimal costs. Typically the anti-takeover foundation has ongoing credit arrangements in place with banks or other institutions for the financing of its subscription to preference shares. This anti-takeover mechanism can therefore be utilised on short notice.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees are accepted as long as they are intended as reimbursement of the bidder's realistic expenses. They are often set as a percentage of the deal value. The fee may not serve as a de facto protection measure by substantially reducing the post-acquisition value of the target. The board of the target company should be able to consider and possibly support offers that are deemed superior. The definition of 'superior' can be negotiated between the bidder and the target board as it is not provided by law, although the threshold may not be set too high so as to ensure that the board can comply with its fiduciary duty to act in the best interest of the company and its stakeholders by supporting a competing offer that the board deems superior from an overall perspective. Provisions in confidentiality or standstill agreements, however, which prevent the target company form actively soliciting competing offers, are allowed. Reverse break-up fees are uncommon in the Netherlands. Financial assistance by the target company is restricted for public limited liability companies but allowed for private limited liability companies.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Other than the situations as stated in question 17, there is no formal government influence over business combinations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Conditional offers are allowed under Dutch law and there are generally no restrictions on the types of conditions attached to an offer, provided that the satisfaction of a condition is not controlled by the bidder (ie, potestative conditions are not allowed). Examples of frequently used conditions are:

- acceptance of the offer by a minimum percentage (usually 70–95 per cent) of shares;
- no material adverse change;
- no default by a party during the offer process;
- no competing offer by a third party;
- waiver by anti-takeover foundation of share option;
- no withdrawal of irrevocables;
- approval of post-completion restructuring and changes to the board; and
- approval of the competition authorities has been obtained.

The financing in a cash acquisition may not be conditional as the bidder must provide a certainty of funds statement prior to launching the offer.

In private acquisitions, completion of the transaction can be made subject to the condition precedent that the purchaser has obtained adequate financing.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

As mentioned above under question 12, the bidder in a public offer has to provide a certainty of funds statement. In this statement the bidder has to elaborate on the financing of the offer and provide information on how the payment for the shares is ensured.

In private transactions, the parties are free to arrange the financing obligations of the purchaser and the assistance of the seller therein. The transaction documentation may, for example, include a condition precedent that the purchaser has obtained adequate financing or an obligation for management of the target company to sign any necessary financing and security documents. In controlled auctions it is common that the purchaser has to provide the seller with debt or equity commitment letters at signing.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Civil Code provides two squeeze-out mechanisms for shareholders of Dutch companies. The first is a general mechanism that enables a shareholder who holds at least 95 per cent of the shares of a company to institute proceedings against the other shareholders jointly for the transfer of their shares to the claimant. The proceedings must be brought before the Enterprise Chamber of the Amsterdam Court of Appeal. The Enterprise Chamber will reject the claim against all defendants if, notwithstanding compensation, one of the defendants would suffer serious tangible loss by such transfer. The procedure cannot be started if shares with special voting rights are outstanding (eg, golden share or priority shares). The price for the shares is set by the court, usually – but not necessarily – on the basis of the offer price.

The second provision is only available to parties who hold at least 95 per cent of the shares of a company as a consequence of a public offer. This provision follows from the implementation of the EC Takeover Directive. The squeeze out claim must be filed with the Enterprise Chamber of the Amsterdam Court of Appeal within three months from the expiry of the term for acceptance of the offer. The court will set the price for the shares at the offer price unless less than 90 per cent of the shares were acquired in the offer.

If the 95 per cent threshold is not satisfied, bidders will typically explore alternative options to acquire full control over the business. Such control can be achieved, for example, by transferring the business of the target company to a special purpose vehicle owned by the bidder after completion of the offer. In recent years it has become increasingly common to pre-wire these alternative options as much as possible, amongst others by negotiating the relevant agreements between the bidder and the board of the target company in advance and acquiring shareholder approval for the business transfer before completion of the offer.

This could save valuable time following completion of the offer and increases deal certainty.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border asset transfers and cross-border share transfers are structured no differently from regular (ie, domestic) asset and share transfers. In a share purchase, a foreign purchaser will usually incorporate a Dutch special purpose vehicle, usually a private limited liability company. Tax considerations (notably the mitigation of Dutch dividend withholding tax) are relevant for the acquisition structure (which may include, for example, a Dutch cooperative or a Luxembourg holding company).

Specific rules apply for a cross-border merger, yet this is not a popular type of business combination. The rules for the cross-border merger apply when a Dutch public or private limited liability company merges with a limited liability company formed under the laws of another EU member state. The shareholders of a Dutch entity ceasing to exist who

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Update and trends

In recent years there has been a strong increase in the use of warranty and indemnity insurances (W&I insurance), in particular in competitive sale processes and where the selling shareholders are looking for a 'clean' exit. By taking out W&I insurance, the exposure of the sellers under the warranties and indemnities included in the share purchase agreement is transferred to the insurer.

Furthermore, there is an increasing debate whether the government should have influence over the creation of business combinations, among other things, by means of formal government approval rights. Recently the Minister of Economic Affairs presented a draft legislative proposal to prevent undesirable acquisitions of Dutch telecom service providers. The proposal grants the Minister of Economic Affairs the authority to prohibit acquisitions in the telecoms sector if they lead to a degree of influence in the Dutch telecom sector that could compromise national security or the public order.

voted against the merger as well as holders of shares without voting rights may request to be compensated in cash rather than shares. An independent expert will determine the amount of the compensation.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Apart from legal mergers, there are no general waiting or notification periods for completing business combinations.

In case of a merger, a merger proposal must be filed with the trade register of the chamber of commerce and the company's office. Subsequently, the merging entities must publish a notice of the filing in a daily newspaper with national circulation. After the filing and announcement by all the merging companies, there is a mandatory one-month waiting period. During this period, each creditor of the merging companies may object to the merger in the event none of the companies has provided the creditor with sufficient safeguards for payment of its receivable. The court will reject the objection in the event the creditor fails to demonstrate that the financial position of the acquiring company after the merger provides less certainty of payment of the receivable of the creditor. Once an objection to the merger has been made, the deed of merger may only be executed after the objection has been withdrawn or lifted.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies operating in certain specific industries are subject to notification and approval procedures with regard to business combinations.

In the energy sector, the Minister of Economic Affairs must be notified of any change of control over a power station with a production capacity above 250 megawatts. The business combination can be prohibited for reasons of national security or supply security.

In the healthcare sector, approval of the Dutch Healthcare Authority is required for a business combination involving a healthcare provider, if the healthcare provider involved has more than 50 employees.

In the financial institutions sector, a declaration of no-objection from the Dutch Central Bank is required before acquiring an equity or voting interest of 10 per cent in a financial institution. In the event the financial institution is a bank, a declaration of no-objection from the European Central Bank is required. The decision to grant a declaration of no-objection is based on, among other things, the integrity, suitability and financial soundness of the prospective purchaser. Changes in the interest held by the purchaser above certain thresholds and drops below those thresholds must be notified to the Dutch Central Bank.

18 Tax issues

What are the basic tax issues involved in business combinations?

The tax issues involved depend on the type of business combination involved.

Share deal

An acquisition of shares in a Dutch corporate entity is generally done by a foreign entity directly, or indirectly through a wholly owned Dutch acquisition corporate entity. A cooperative is often used as a shareholder of the acquisition corporate entity. Dutch cooperatives are in principle not subject to Dutch dividend withholding tax as they are not a company with a capital divided into shares (subject to certain anti-abuse rules). If the shares are acquired through a Dutch acquisition corporate entity, a fiscal unity is often formed by the acquiring entity together with the Dutch target entities, provided that certain criteria are met (notably the acquiring entity holds at least 95 per cent of the legal and economic ownership). If a fiscal unity is formed, the interest expenses on acquisition debt at the level of the acquisition entity can in principle be offset against the profits of the Dutch target entities (generally subject to specific interest deduction limitations in respect of, inter alia, excessive acquisition loans).

A point of attention is the corporate income tax anti-abuse rules in respect of foreign shareholders (or – if applicable – members in a Dutch cooperative). Pursuant to these anti-abuse rules, a foreign shareholder with a substantial interest (ie, generally a shareholding of 5 per cent or more) in a Dutch resident company, may under certain circumstances be subject to Dutch corporate income tax (statutory rate of 25 per cent) as a non-resident taxpayer in respect of dividends received or capital gains realised. Generally, these anti-abuse rules do not apply in case of active investment in Dutch targets. A tax treaty may shelter shareholders from these anti-abuse rules.

Share deals are in principle not subject to value added tax in the Netherlands. Real estate transfer tax at a rate of 6 per cent is levied on the acquisition of shares or similar rights in real estate companies if the buyer obtains, directly or indirectly, an interest of at least a third in such company (including shares and rights already in possession). A real estate company is a resident or non-resident company the assets of which consist of more than 50 per cent of real estate assets and at least 30 per cent of real estate situated in the Netherlands provided such real estate, as a whole, is or was mainly used at that time for the acquisition, sale or exploitation of such real estate. There are certain exemptions available.

Asset deal

An asset deal can generally be done directly by a foreign entity or through a Dutch corporate entity. Income realised upon the transfer of the assets is in principle taxable at the level of the Dutch corporate entity (or permanent establishment) transferring the assets. Subject to certain criteria, the Dutch tax due could be deferred by using a 'reinvestment reserve'.

Value added tax (21 per cent or 6 per cent for certain designated supplies) may be due upon the acquisition of assets. The acquisition of a business going concern is not subject to value added tax. Acquisitions of real estate are in principle subject to 6 per cent real estate transfer tax, provided that no exemptions apply.

Reorganisation

Subject to certain conditions, there are rollover provisions available for certain business reorganisations (including business enterprise mergers, legal mergers, demergers and spin-offs). Pursuant to these rollover provisions the transfer of assets or shares takes place on a non-recognition basis to the extent that the transferee records those items for the same value in its tax books.

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19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Works Council Act

Employees of Dutch companies are represented within the company through the works council. Companies with more than 50 employees are obliged to establish a works council. The rights of the works council are determined in the Works Council Act.

The works council must be given the opportunity to advise on intended economical, organisational and financial decisions of the company (among others, on the divestment of an important part of the business or a change of control over the business – also in the event a change of control is effectuated by a transfer of shares). The advice must be requested at such point in time that the works council's advice can (still) influence the actual decision. This means that the advice is to be requested when the contents of the contemplated decision are sufficiently determined, but before such decision is actually taken (ie, generally before a binding agreement is signed). When seeking advice, the reasons for the intended decision will have to be explained, as well as any consequences for the employees.

If the advice of the works council is neutral or positive, the company may start implementing the decision. If the advice of the works council is negative, the company is obliged to postpone the implementation of the decision for one month.

During the aforementioned one-month waiting period, the works council may file an appeal with the Enterprise Chamber of the Amsterdam Court of Appeal. During the postponement period and as long as the proceeding continues, the company may not implement its decision. The works council may also appeal to the Enterprise Chamber if the company implements its decision without seeking advice.

There is no specific time frame for completion of the advice process. The entire process generally takes a few weeks (four to eight), but may take longer if the transaction has serious consequences for the employees.

Merger Code

Under the Merger Code, the Dutch Social and Economic Council and the relevant trade unions may need to be notified of a transaction and the trade unions may need to be given the opportunity to share their views on the transaction.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

In the Netherlands, bankruptcy and insolvency proceedings are governed by the Bankruptcy Act. The Bankruptcy Act does not contain any special considerations for business combinations involving a bankrupt target company. If a company is in financial difficulties and heading towards insolvency, it is possible to pre-wire a restart of the company through a pre-pack transaction. There are currently no regulations on pre-packs, but proposals are pending to regulate pre-pack transactions through special legislation.

If a company is declared bankrupt, the court will appoint a bankruptcy trustee. The bankruptcy trustee is charged with the administration and liquidation of the bankruptcy estate and has power of disposal over the assets of the company. As a consequence transactions, including a transfer of assets or shares in a subsidiary of the bankrupt company, require the agreement of the bankruptcy trustee. Furthermore, several actions of the bankruptcy trustee require the prior approval of the bankruptcy judge – who supervises the bankruptcy trustee – or a special creditors' committee.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

There are no specific rules on anti-corruption, anti-bribery and economic sanctions in connection with business combinations. The Criminal Code prohibits corruption and bribery of both government officials (public sector bribery) and non-government officials (private sector bribery). Under the Criminal Code, both the giver and the receiver of a bribe can be held criminally liable. In addition, both individuals and companies can be held criminally liable in certain situations. If a company is prosecuted, individuals, for example, its directors or managers, can also be held criminally liable with regard to the offences that have been attributed to the company.

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Nigeria

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Templars

1 Types of transaction

How may businesses combine?

Businesses may combine by a transfer or amalgamation of assets or shares, or both, or other interests held in those entities (in the case of entities that are not limited by shares). The primary forms of business combinations in Nigeria are mergers, acquisitions, takeovers and external restructurings. These forms of combinations are defined under the primary laws that govern business combinations in Nigeria (set out in question 2) as follows:

A merger is the amalgamation of the undertakings or any part of the undertakings or interests of two or more companies or bodies corporate achieved in any manner including the purchase or lease of the shares, interests or assets of the other company or body in question, or amalgamation or other combination with the other company or body in question.

An acquisition involves the purchase of most (if not all) of a company's ownership stake in order to assume control of the target company.

A takeover is the acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company.

External restructuring entails a court-sanctioned restructuring of a group of companies and other related party transactions.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations governing business combinations in Nigeria are:

- the Investments and Securities Act 2007 (the ISA);
- the Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria (LFN) 2004 (the CAMA);
- the Securities and Exchange Commission (the SEC) Rules 2013 (as amended), which are made by the SEC pursuant to the ISA (the SEC Rules); and
- the Nigerian Stock Exchange Rule Book 2015 (applicable to public companies listed on the Nigerian Stock Exchange (NSE)).

There is also sector-specific legislation that applies to business combinations. These include:

- the Banks and other Financial Institutions Act Cap B3 LFN 2004 and the Procedures Manual for Applications for Bank Mergers/Take-overs 2004 issued by the Central Bank of Nigeria (applicable to the banking sector);
- the Insurance Act, Cap I18 LFN 2004 (applicable to the insurance sector);
- the Nigerian Communications Commission Act Cap N97 LFN 2004 and the NCC Competition Practices Regulations 2007 (applicable to the telecommunications sector);
- the Electric Power Sector Reform Act 2005 (applicable to the power sector);
- the National Broadcasting Commission Act Cap N11 LFN 2004 (applicable to the broadcasting sector); and
- the Department of Petroleum Resources Guidelines for obtaining Ministerial Consent (2014) (applicable to the oil and gas sector).

3 Governing law

What law typically governs the transaction agreements?

Typically, the transaction agreements are governed by Nigerian law but it is not uncommon for share purchase agreements and other transaction documents to be governed by foreign law. However, where parties elect to use foreign law, Nigerian courts have held that such choice of law must be real, genuine, bona fide, reasonable or consistent with public policy. If a foreign law is chosen to govern transaction documents, advice should be sought from Nigerian counsel on possible treatment and recognition of such law by Nigerian courts.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The applicable filings vary depending on the type and size of business combination, and the sector in which the business combination is occurring. In general, business combination schemes involve the following filings:

- applications to the regulator of the relevant sector (ie, specific regulatory authorities for a letter of no objection or consent (where applicable));
- pre-scheme notice to the SEC;
- applications to the Federal High Court (the Court) for a court-ordered meeting of the members of the company or companies (where applicable) and subsequently for a court sanction of the transaction;
- applications for formal approval to the SEC;
- filing of the special resolution of the respective companies from the court ordered meetings as well as the court sanction (after approval from the SEC) with the Corporate Affairs Commission (CAC);
- a notification of such business combination to the NSE (in the case of a listed company); and
- an application to the NSE for delisting any old companies and listing any new companies formed.

Certain business combinations will not require any filings, for example:

- holding companies acquiring shares solely for the purpose of investment and not to cause substantial restraint of competition or create monopoly;
- small mergers (mergers where the combined annual turnover or assets of the merging companies is less than 1 billion naira). However, the resulting company must inform the SEC after the merger; and
- an acquisition of a private company or unquoted company that has assets or turnover below 500 million naira).

In terms of fees, the following fees would be payable:

- SEC transaction fee;
- filing fees at the CAC;
- court filing fees;
- NSE transaction fee (where applicable); and
- central securities clearing system fees (where applicable).

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No stamp duty is payable on instruments for the transfer of shares. However, where a business combination involves an acquisition of assets, stamp duty will be payable on instruments transferring the assets. Please see question 18 in relation to the applicable stamp duty.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Publication requirements to the SEC, shareholders or the public are largely dependent on the nature of the business combination. In the case of a merger, the order of the Court sanctioning the scheme must be published in the Official Gazette and in at least one national daily newspaper. A detailed information memorandum on the scope and features of the transaction or scheme is required to be filed with the SEC as part of the approval process for mergers, acquisitions and external restructurings (as the case may be). The SEC may also request additional information.

Other specific requirements apply as follows:

- takeovers: publication of the bid by the offeror (with certain required particulars) in at least two national daily newspapers at the time of dispatching the bid to the shareholders of the target company;
- external restructurings: publication of the court order sanctioning the scheme in a newspaper; and
- acquisitions: publication of the transaction in at least two national dailies after completion of acquisition.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

A substantial shareholder under the CAMA is a person who (either directly or through a nominee or trustee) holds enough shares in the company to entitle such person to exercise at least 10 per cent of the unrestricted voting rights at any general meeting of the shareholders of a public company. A substantial shareholder is required to give a written notice to the company of substantial shareholding or change of substantial shareholding within 14 days of becoming, or ceasing to be, a substantial shareholder.

The NSE Rule Book also requires a disclosure of any person who holds substantial shareholding (5 per cent or more of the issued shares) in listed companies. The insider dealing rules of the SEC similarly require a shareholder that holds 5 per cent or more of the shares of a company to notify the SEC upon the purchase or sale of shares in that company.

There are also sector-specific shareholding restrictions and disclosures. For instance, the CBN Code of Corporate Governance for Banks and Discount Houses in Nigeria requires the disclosure of any equity holding of at least 5 per cent by an investor in Nigerian banks and discount houses. In the power sector, notification to the Nigerian Electricity Regulatory Commission (NERC) is required for the acquisition of 5 per cent or more of the shares of a licensee, while the prior approval of the NERC is required in respect of any acquisition or divestment that will materially change the ownership status of a licensee in the sector. The Nigerian Communications Commission must also consent to any transaction that involves the acquisition of 10 per cent or more of the share capital of a company licensed to operate in the telecommunications industry.

The above requirements are not affected if the company is a party to a business combination.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under the CAMA, the duties of directors or managers of a company are largely fiduciary in nature and include a duty to act in the best interest of the company. In carrying out these duties, regard must be had to the interests of the company's employees as well as the shareholders. These duties will apply in the context of a business combination.

With particular reference to takeovers, there is a statutory requirement for the target board to send a circular to every shareholder of the target and to the SEC. This circular will state the opinion and recommendation of the directors in relation to the takeover bid. Although the directors need not recommend that the shareholders accept the takeover bid, the rules are not explicit on whether a takeover bid can proceed if the directors do not issue the circular, and it is also not conclusive what rights the bidder would have to force an unwilling board to issue this circular.

Regarding creditors, the CAMA does not impose any duties on directors or managers in relation to the company's creditors. Although not codified or tested in the courts, it is arguable that in times of financial distress of a company, a director's duty could extend to consider the interests of the company's creditors.

With respect to controlling shareholders of a company, these do not have similar duties to the directors.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In the case of mergers, the approval of shareholders holding at least 75 per cent in value of the shares of members present and voting at the separate court-ordered meetings of each of the merging companies will be required.

In relation to acquisitions, under the approval procedure prescribed by the SEC Rules, the approvals of the separate boards and shareholders of the acquiring company and the target are required. There is no prescription on the threshold, as such that will be subject to the articles of the relevant company or any shareholders' agreement.

In the case of a takeover bid to be made by a company, the CAMA requires the approval of the board of directors of the company. However, shareholders may have certain approval rights (without prejudice to the board approval) under the articles of the company or shareholders' agreement.

Generally, if any business combination is to be implemented by way of a scheme of arrangement, the approval of a majority in number representing at least 75 per cent of the value of shares of members (or of the relevant class) present and voting at the court-ordered meeting will be required in order to approve the scheme. By virtue of the NSE Rules relating to board meetings and general meetings of issuers, if a meeting of the members is convened to approve a transaction (including a scheme), any related party and any interested party would be precluded from voting unless specific instructions as to voting are given.

Shareholders have appraisal rights in business combinations. This right is, however, only exercisable by dissenting shareholders who did not tender their shares in response to a takeover bid. Such shareholders may apply to the Court for an assessment and valuation of their shares, following which the offeror or transferee company (as the case may be) will be bound to purchase those shares at the price and terms determined by the Court.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

There is no legal framework in Nigeria in support of hostile takeovers. There are also no special considerations for unsolicited transactions. Typically, instances of unsolicited transactions in Nigeria will ultimately result in friendly and negotiated transactions.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There are no express limitations on the types or quantum of break-up or reverse break-up fees, except that the break-up or reverse break-up fees should not be punitive as to be considered or recharacterised as a penalty.

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There are also no limitations on a company's ability to protect deals from third-party bidders. As such parties can use break-up fees and lock-out arrangements to protect their deals from third party bidders. In fact, parties are known to have entered into exclusivity agreements in order to restrict the company from speaking with other potential buyers for an agreed period during the negotiation phase of the transaction. It should be noted that, in relation to takeovers, the NSE Rule Book provides that no offer may be conditional upon the payment of compensation for loss of offer, and, if any such payment is proposed, full particulars must be disclosed.

There are restrictions relating to financial assistance that may affect business combinations in Nigeria. Under the CAMA, financial assistance would arise where (i) a company and any of its subsidiaries directly or indirectly give financial assistance to a person acquiring or proposing to acquire shares in that company for the purposes of that acquisition before or at the same time as the acquisition takes place, or (ii) a company or any of its subsidiaries directly or indirectly gives financial assistance to a person who has acquired shares in a company for the purpose of reducing or discharging any liability incurred by that person or any other person for the purpose of the acquisition.

Financial assistance includes a gift, guarantee, security or indemnity, loan, any form of credit and any financial assistance given by a company that materially reduces the net assets of the company or that results in the company having no net assets. Where such financial assistance is given, it shall be unlawful and therefore unenforceable.

The prohibition on financial assistance does not apply to (i) the lending of money by a company in the ordinary course of its business, (ii) the provision of money by a company for the acquisition of fully paid shares in the company or its holding company pursuant to a scheme for the benefit of employees of the company, and (iii) the making of loans to persons (other than directors) bona fide in the employment of the company with a view to enabling them to beneficially acquire shares in the company or its holding company.

Although, the financial assistance provisions are not sufficiently tested by the Nigerian courts, in relation to break-up fees, there is a minority view that payment of break-up fees by a target company to a proposed acquirer could potentially be considered financial assistance to the acquirer before the acquisition takes place, and as such, care should be taken as to ensure that such fees will not constitute unlawful financial assistance.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Outside competition law regulation and industry specific approvals for regulated entities, government agencies may not ordinarily influence or restrict business combinations. However, in matters involving national defence or national security, the powers of the government are typically wide and peremptory and may be invoked to influence or restrict a business combination that could jeopardise national defence or security.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Generally, mergers and acquisitions can be conditioned on a number of events. The typical conditions in mergers and acquisitions include: industry-specific approvals; required third-party consents and notifications; relevant corporate authorisations; consent of the SEC (and initial approval of any required pre-scheme notifications); relevant amendments to corporate documentation, no material adverse change, reconciliation of company's registers with its filings at the CAC. These conditions are, however, not common in takeovers bids or offers, instead, the bid or offer will be conditioned upon terms on which the shares are proposed to be acquired.

Financing conditions are possible but are not commonplace. Typically, parties obtain requisite financing or at the very minimum have commitments (for example, letters of commitment from lenders or other financiers) for the required financing before proceeding with the transaction. For the purposes of the approval for acquisitions, the SEC Rules require the applicant to furnish evidence of source of funding for the acquisition. The ISA also requires the offeror in a takeover to make all arrangements to ensure that funds are available to make the payment for the shares.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

As previously stated, financing conditions are not commonplace in Nigeria. However, where the required funds are not obtained prior to the transaction, it is not unusual for parties to agree that financing conditions and representations as to financing be included in the transaction documents.

Given that the seller would be restricted by the financial assistance provisions, the seller may at best be required to assist in the buyer's financing on a reasonable endeavours basis.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Yes, minority shareholders may be squeezed out. To enable a squeeze out in a takeover scenario, the acquirer must have acquired at least 90 per cent of the shares of the company. For the purpose of calculating the 90 per cent threshold, shares already held by the acquirer prior to the takeover are not taken into account.

In terms of process and timelines:

- the bidder is required to state in the offer document if he or she intends to invoke the right to acquire the shares of the shareholders of the target who do not tender their shares;
- the takeover bid must be accepted by the holders of at least 90 per cent of the shares;
- the bidder may, within one month of having reached the 90 per cent acceptance threshold, give notice to the holders of the outstanding shares that (i) the takeover bid has been accepted; (ii) the bidder will take up and pay for the shares accepted; and (iii) the dissenting shareholders have the right to elect to either transfer their shares at the same price and terms as the other shareholders or at the independently assessed fair value of the shares. The notice will also detail the procedure for either option selected;
- within 20 days of receiving the notice, the minority dissenting shareholders shall send a notice to the bidder making their choice. If no choice is made, the dissenting shareholders will be deemed to have chosen to transfer their shares on the same terms as other shareholders;
- the bidder in turn, within 20 days after sending the notice to the dissenting shareholder, must transfer the amount of money or other consideration he or she would have to pay for the shares if the dissenting shareholder choose to be paid for their shares on the same terms as other shareholders, to the target company to keep in trust in a separate bank account;
- if the dissenting shareholders choose not to transfer on the same terms as others, the bidder may, within 20 days of paying the purchase consideration to the target company, apply to the court to fix the fair value of the dissenting shareholders' shares;
- if the bidder does not apply within the 20-day period, the dissenting shareholders can do so within a further period of 20 days; and
- once the application is made, the court will fix a fair value for the shares of all the dissenting shareholders who made the choice, which the bidder will be required to pay.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

The structure for cross-border transactions is no different from that of in-country transactions. However, certain laws and regulations are

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Update and trends

There have been increased calls to pass into law the Federal Competition and Consumer Protection Bill in order to regulate M&A activities across sectors and also establish a Competition Authority and Tribunal aimed at resolving issues that emanate from the proposed bill. The proposed bill aims to render invalid any agreement which has the effect of preventing, restricting or distorting competition in any market. Also, there are sector specific reforms being proposed in the mining, agricultural and insurance sectors which are expected to encourage foreign direct investment and foreseeably, increase M&A collaborations within these sectors.

In the insurance sector, there are proposed plans by the Nigerian Insurance Commission to introduce recapitalisation requirements and a risk-based supervision) model of underwriting policies by insurance companies. The primary feature of the policy is the redefinition of the nature of risks that can be underwritten by certain insurance companies and this would be assessed on the basis of capitalisation. Where implemented, business combinations will be impacted.

On a different note, there has been a credit and foreign currency liquidity crisis in Nigeria that has led to investor apathy on account of uncertainty of repatriation of investments, complications arising in the valuation of foreign currency investments, and unwieldy fiscal policies and interventions. Perhaps it is useful to add that the crisis, being a spin-off of the global decline in oil prices, led to significant divestments and demergers in the oil and gas industry. A number of operators in the oil and gas industry undertook divestments of their downstream and mid-stream businesses to facilitate focus on their core upstream operations.

In terms of the regulatory regime, the crisis partly informed an increased revenue drive of the government of Nigeria to shore up funds from various sources, and consequently, the Federal Inland Revenue Service and the SEC have in recent times taken steps to strictly enforce certain tax laws (such as the Stamp Duties Act) and regulatory fees applicable to M&A activity against large corporates.

Hopefully, the recent launch of the Nigerian Economic and Growth Recovery Plan (ERGP) (2017–2020) by the federal government will engender internal growth, spur investors' interest and incentivise capital influx. The ERGP is expected to deliver on five primary broad outcomes, namely: a stable macroeconomic environment, agricultural transformation and food security, sufficiency in energy (power and petroleum products), improved transportation infrastructure and industrialisation focusing on small and medium-scale enterprises (www.nationalplanning.gov.ng/index.php/news-media/news/current-news/781-fg-releases-economic-recovery-plan). In addition, we expect that more M&A activities will be driven by institutional investors and firms who are constantly seeking opportunities to invest in profitable sectors through a diversified pool of portfolio companies or to divest their holdings in any investee company.

particularly relevant in the context of an investment by a non-Nigerian in a Nigerian company. Also, on such transactions, tax efficiency would (as in almost all cases) be a primary concern for investors.

The Nigerian Investment Promotion Commission Act Cap N117 LFN 2004 deals with investments in Nigeria. The CAMA will be relevant in the incorporation and operation of any Nigerian companies in furtherance of the business combination. The ISA and the SEC Rules require the registration of an investment by a foreigner in a public company with the SEC. The Foreign Exchange (Monitoring and Miscellaneous) Act Cap F34 LFN 2004 and the CBN Foreign Exchange Manual 2006 will be relevant in relation to importation and remittance of foreign capital, and other exchange control related issues and the provisions of the National Office for Technology Acquisition and Promotion Act Cap N62 LFN 2004 will be relevant for transactions that require repatriation of fees for intellectual property rights or technology transferred, or both.

Apart from the above, certain industries require compulsory participation in or control of such businesses by Nigerians, and these will ultimately be relevant to the structuring of cross-border transactions. These industries include oil and gas, maritime, aviation and wireless telegraphy.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Other than the waiting periods applicable to a formal clearance or approval to be obtained from the SEC or from the regulator in which the business combination occurs, other relevant waiting or notification periods include the timelines involved in (i) application to Court for an order convening the relevant meetings and for sanctioning the scheme (if applicable), (ii) submission of the transaction agreements to the Federal Inland Revenue Service for stamping, and where applicable, to clear the tax treatment of the transaction (as highlighted in question 19), (iii) completion filings and registrations at the CAC, and (iv) notification to the NSE (if applicable).

In addition, in mergers involving companies in the aviation industry, parties are not to give effect to a merger until the expiry of a 60-day waiting period from the date of issuance of receipt of notification unless the sector regulator shortens the said period. The waiting period may also be extended by an additional 30 days with the approval of the merging entities. The telecommunications industry has a waiting period of 30 days from the date of submission of the application.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Yes. See question 2.

18 Tax issues

What are the basic tax issues involved in business combinations?

The tax issues will depend on the structure of the business combination – whether an asset or share deal is adopted, or whether it is a cross-border deal. Also, the nature of tax obligations that would arise would be affected by whether or not the business combination would be considered a reorganisation or a business sale.

In an asset deal, the purchaser is liable to pay stamp duty at an ad valorem rate of 1.5 per cent of the purchase consideration as well as value added tax (VAT) at the rate of 5 per cent of the purchase consideration (if the asset is not statutorily exempt). The seller in turn is liable to pay capital gains tax (CGT) at a rate of 10 per cent of its gain from the sale of the asset.

In the case of a share deal, stamp duty and CGT will not apply as a result of the relevant exemptions provided under the Stamp Duties Act, Cap S8 LFN 2004 and the Capital Gains Tax Act Cap C1 LFN 2004. However, in practice, the FIRS tends to exempt only the share transfer instruments from stamp duties, but could potentially assess the share purchase agreement at an ad valorem stamp duty of 1.5 per cent of the purchase consideration. The other transaction agreements will be liable to nominal stamp duty of approximately 1,000 naira. Transfer of shares are not subject to VAT in Nigeria.

It is important to mention that no merger, takeover, transfer or restructuring of a trade or business carried on by a company shall take place without first obtaining the direction of the FIRS. Also, companies involved in such business combination must also obtain clearance with respect to any tax that may be due and payable in respect of capital gains.

In cross-border transactions, there are generally no special tax considerations but parties typically consider structuring the investments in order to benefit from tax reliefs that may be available under double tax treaties between Nigeria and other jurisdictions.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The primary legislation governing employee benefits are the Labour Act Cap L1 LFN 2004, the Pension Reform Act 2014, the Personal Income Tax Act Cap P8 LFN 2004 and the Employee Compensation

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Act 2010. The general provisions of the law entail that benefits and compensation due to employees in a business combination are subject to the specific terms of the contract establishing their employment relations and where applicable (in the case of lower cadre or blue-collar workers), the provisions of the Labour Act, which mandates that consent be issued by an authorised labour officer before such employees are transferred.

It is helpful to note that there is generally no statutory obligation to retain all existing staff in an entity being acquired or in the resulting entity in a merger. However, where prior approval of the SEC is required for a business combination, the impact of such business combination on employees of the company will form part of the consideration of the SEC. Also, for acquisitions, the NSE Rulebook requires a listed company to provide and circulate circulars detailing the impact of the proposed acquisition on the employees and continuity of the business.

In certain industries (such as the oil and gas industry), the approval of the sector regulator is required for any proposal that involves the severance or transfer of employees, and some companies may also be bound by terms in collective agreements with their trade unions.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A business combination that involves a target company that is insolvent or subject to receivership will be conducted by a liquidator or receiver (as the case may be). These insolvency officers are empowered by law to deal in and dispose of the company's assets and property without direction of the board or management of the company as the powers of the board ceases once the company is in receivership or insolvent.

In a winding-up by the Court, any disposition of the property of the company, including things in action and any transfer of shares, or alteration in the status of the members of the company that is made after the commencement of the winding-up proceedings shall be void, unless the Court orders otherwise. For a creditors' voluntary winding-up, any transfer of shares (not being a transfer made to or with the sanction of the liquidator) and any alteration in the status of the members of the company shall be void.

Outside of strict insolvency proceedings (as mentioned above), the CAMA allows for a company to enter into a scheme of arrangement with its creditors or its members (or any specific class of either group) with the sanction of the Court. A business combination in that case may be subject to such terms as may be prescribed by the Court.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

There is no specific law which deals with anti-corruption, anti-bribery and economic sanctions in connection with business combinations in Nigeria. There are, however, broad provisions on anti-corruption, anti-bribery and economic sanctions that could be applied to business combinations in the underlisted laws:

- the Corrupt Practices and Other Related Offences etc Act 2003;
- the Economic and Financial Crimes Commission (Establishment) Act 2004;
- the Money Laundering (Prohibition) Act 2011 (as amended);
- the Criminal Code Act Cap C38 LFN 2004; and
- the Miscellaneous Offences Act Cap M17 LFN 2004.

The general thrust of the above-listed laws is to criminalise any act that seeks to induce action or inaction on the part of government officials or third parties for an advantage. This would be particularly relevant to business combinations transactions where regulatory approvals are sought. The applicable sanctions would entail fines and imprisonment for officers of the companies, possible liquidation of the company at the instance of the court in a winding-up petition.

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Norway

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1 Types of transaction

How may businesses combine?

Under Norwegian law, business combinations may be structured by:
- private purchase of target company's assets or stocks involving cash or stock consideration, or both;
- legal mergers (essentially an amalgamation of two companies) of public or private limited liability companies that use stock or stock and cash consideration;
- public tender offers, including exchange offers, for all or (rarely) part of the stock in a listed company; and
- partnerships and joint venture structures.

In transactions in which a legal entity divests part of its assets or liabilities to one or more acquiring entities, the parties may choose to effect the resulting business combination by way of a statutory demerger. The respective assets and liabilities of the divesting legal entity are transferred by operation of law to the acquiring company, and the stockholders of the divesting legal entity receive stocks or a combination of stocks and cash in the acquiring company as consideration.

Based on Council Regulation (EC) No. 2157/2001, which was implemented into Norwegian law in 2005, a business combination involving a European company (SE) may be formed in various ways, including by establishing a holding company (an SE) of a Norwegian limited liability company and another company incorporated in an EU jurisdiction. Since Norway has implemented Directive 2005/56/EC, it is further also possible to conduct a legal merger of a Norwegian company cross-border within the European Union and European Economic Area (EEA). However, public tender offers and other offer structures are often used instead of a legal merger, which cannot be used by foreign companies (outside the EU or EEA), only allows 20 per cent of the consideration to be given in cash, requires more formalities and documentation and normally takes longer to complete than a public offer.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The Limited Liability Companies Act, the Public Limited Liability Companies Act and the Partnership Act, provides the fundamental statutory framework and together with the law of contracts, and the Norwegian Sales of Goods Act, form the legal basis for the purchase and sale of corporate entities. In addition:
- the Competition Act gives the Norwegian Competition Authority (NCA) power to intervene against anti-competitive concentrations. Companies that are active in the Norwegian market must (generally in a large transaction) also consider and abide by the merger control provisions set out in the EEA Agreement. However, the 'one-stop shop' principle prevents duplication of competence of the EU Commission, the EFTA Surveillance Authority (the ESA), and the NCA;
- the Stock Exchange Act (SEA) and the Stock Exchange Regulation (SER) include the basic rules for listing on the Oslo Stock Exchange (OSE);
- public companies whose securities are listed on the OSE or another regulated market in Norway, are regulated under the Securities Trading Act (STA) and the Securities Trading Regulation (STR). These rules regulate prospectus requirements, information requirements, and establish a regime to prevent market abuse and insider dealing, and sets out more detailed regulations with respect to tender offers involving listed stocks under Norwegian law. These rules are supplemented by inter alia, guidelines and recommendations issued by the OSE and the rules and regulations of the OSE. Mergers and takeovers of private companies and unlisted public companies have no equivalent regulations;
- the tax legislation is normally crucial in deciding the alternative and optimal tax structure of a business combination;
- the Accounting Act, national accounting rules and practices. Norwegian companies listed on the OSE will also have to publish their consolidated accounts in accordance with IFRS;
- the Workers' Protection Act sets out detailed rules with respect to workforce reductions, dismissals and redundancy notice, transfer and relocating employees, etc, which will have to be observed in particular in a business combination that takes place as an asset deal. These rules are supplemented by notification and discussion obligations in connection with a business combination, set out in collective bargaining agreements, if applicable, with some of the Norwegian labour unions; and
- the Reorganisation Act of 2008 sets out detailed rules and imposes an obligation on the owner of a business if it is considered to conduct a workforce reduction that comprises more than 90 per cent of the company's workforce or if the business activity is considered to be closed down.

In addition, for some industries there are sector-specific requirements to consider, such as requirements for public permits and approvals. These industries are banking, insurance, petroleum, hydropower and fisheries, etc. Note that the Parliament resolved to adopt a revised Financial Institution Act in 2015. This new act entered into force from 1 January 2016, regulating the acquisitions of banks, insurance companies and other financial institutions under Norwegian law. In 2016, the Norwegian Media Authority's control over media ownership was finally abolished (see 'Update and trends').

Mergers are dealt with under the Limited Liability Companies Act and the Public Limited Liability Companies Act.

3 Governing law

What law typically governs the transaction agreements?

The purchase of stocks and assets is most commonly based on a stock purchase or asset sale agreement. If the target company is a Norwegian entity, the transaction agreement will normally be governed by Norwegian law, even though the parties may agree to have such agreements governed by another jurisdiction's law. A merger plan between Norwegian companies will, with more or less no exemption, be governed by Norwegian law.

Tender offers for stocks listed on the OSE are effected through an offer document drafted in accordance with the Norwegian STA and will for all practical purposes be governed by Norwegian law.

Norwegian law is based on the principle of freedom of contract, subject only to limited restrictions. According to the Contract Act of 1918, contracts, whether oral or written, are generally binding on the

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parties under Norwegian law. The parties may seek to enforce legally binding contracts before the courts of law pursuant to the general rules of civil procedure. While the parties are free to decide on the terms of the contract, the formation of contracts and the remedies available in the event of breach of contract, are largely regulated in statute and case law. The Contract Act of 1918 largely regulates the formation of contracts, the validity of contracts and the authority to act on behalf of another. In addition the Norwegian Sales of Goods Act provides certain protection in law for a buyer, including the seller's obligation to disclose information about the target company. The Norwegian Contract Act and the Sales of Goods Act both apply in so far as it is not contrary to agreement between the parties, commercial practice or custom. Also the laws and regulations mentioned in question 2 may have an impact on the agreement depending on in what form the business combination takes place.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

In general, no governmental filings are required for private business combinations. However, filings are required for merger control purposes either to the Norwegian Competition Authority (NCA) or to the EU Commission, if the business combination meets the relevant turnover thresholds. Mergers and acquisitions that meet the relevant turnover thresholds are prohibited from being implemented before they have been notified and reviewed by the NCA, unless an exemption is granted by such authority. As of 1 January 2014, an acquisition, merger or other concentration involving businesses will have to be notified to the NCA if the following conditions are met: the undertakings concerned have a group turnover in Norway exceeding 100 million kroner; the acquirer has a group turnover in Norway exceeding 100 million kroner; and the combined turnover of the acquirer and the target in Norway is 1 billion kroner or more. The NCA also has the power to issue decrees ordering that business combinations falling below these thresholds must be notified, if it has reasonable cause to believe that competition is affected, or if other special reasons call for investigation. A decree must be issued no later than three months from the date of the transaction agreement, or from the date control is acquired, whichever comes first.

In a tender offer, the offer document must be filed and published with the stock exchange. Norway has implemented the Prospectus Directive (Directive 2003/71/EC). Changes to the Prospectus Directive (Directive 2003/71/EC) were approved in Directive 2010/73/EC and the Norwegian government implemented these changes in 2012. If the business combination involves a new stock issue (irrespective of whether or not the bidder or target is listed), there will generally be a requirement to publish a prospectus, if such an offer is addressed to 150 or more persons in the Norwegian securities market, and involves an amount of at least €1 million calculated over a 12-month period. There are some exceptions to this obligation. Offers that involve issuing stocks above €1 million and less than €5 million are now subject to simplified requirements of a national prospectus to be filed with the Norwegian Register of Business Enterprises. However, offers that involve issuing stocks with a value at or exceeding €5 million, directed to 150 persons or more, will be subject to the requirements of a full prospectus in line with the contents requirement set out in the Prospectus Directive. Such prospectuses will have to be submitted to, inspected and approved by the Financial Supervisory Authority of Norway (FSAN). Pure tender-offer documents in connection with takeovers will be inspected and approved by the OSE. However, if the business combination involves a new stock issue so that it is necessary to issue a combined offer document, then such combined offer document will have to be inspected and approved both by the OSE and FSAN. We expect certain amendments to the Prospectus Directive to be implemented into Norwegian law in the near future (see 'Update and trends').

One should note that for business combinations in special sectors such as banking, insurance, shipping, mining, electricity, telecommunications, oil, gas and agriculture, additional sector-specific legislation applies under Norwegian law. Some of these rules require mandatory filing and clearance before a transaction can be implemented.

There are no stamp duties, stock transfer taxes or other government fees in connection with a business combination structured as a stock transfer or an asset transfer. There are furthermore no filing fees required under the Norwegian merger control regime.

However, the OSE levies a fee of 200,200 kroner, plus 68.70 kroner per million market value (for the stocks covered by a tender offer), totalling a maximum of 343,200 kroner for the approval of the public-tender document. If the tender document is subject to dual governing law in accordance with the STA and the Takeover Directive or if the tender document needs to be reviewed and approved by a foreign regulatory authority, or if the bidder offers consideration in stocks or other non-cash forms or a combination as settlement of the purchase price, the OSE levies an additional fee of 57,200 kroner to review and approve the public tender document. The same apply in the event that a squeeze-out procedure is combined with a mandatory offer. In order for a bidder to amend the offer or reduce the guarantee for settlement, OSE levies a fee of 22,900 kroner for processing such an application. Also note that if it is necessary to issue a prospectus, the FSAN levies a fee of 85,000 kroner for such approval.

Real property is transferred by a separate deed. It is recommended that the deed should be registered to perfect the purchaser's ownership. This attracts a registration tax, which is currently 2.5 per cent of the value of the property plus a nominal government fee. In the case of a legal merger or demerger, registration of such deeds is exempted both from registration tax and government fees. However, in such cases a nominal registration fee to the Norwegian Registry of Business Enterprises will still have to be paid in order to register the merger or demerger. Transfers of real estate and ownership to motor vehicles due to a transformation of a legal entity carried out at tax continuity have now also become exempt from such transfer/registration tax and registration fee, provided such conversion and accompanying transfers took place after 1 January 2016.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

No general publication requirements apply to business combinations involving unlisted or private companies. However, a listed company must publish the fact that a business combination agreement has been entered into, to the extent that it is assumed to have an effect or influence on the value of such a company's issued stocks. Listed companies must also observe certain thresholds set out in the rules: 'continuing obligations of stock exchange listed companies' imposing a duty of detailed announcement for certain business combinations and transactions.

If the business combination is structured as a tender offer, the information specified in the Norwegian STA must be included in the offer document, irrespective of whether the tender offer is voluntary or mandatory. The board of directors of a listed company must publish a statement evaluating the terms of the offer describing the board's view on the advantages and disadvantages of the offer. The statement shall give information about the offer and must include information on the employee's views and other factors of significance for assessing whether the offer should be accepted by the stockholders. If the board members and the manager effectively in charge have any views in their capacity as stockholders in the company, information regarding it must be given. Also note that the Norwegian Code of Practice for Corporate Governance regarding takeover offers (as last amended in October 2014) requires that agreements entered into between a target company and a bidder that are material to the market's evaluation of the bid should be publicly disclosed no later than at the same time as the announcement that the bid will be made is published. According to section 7 of the OSE's Continuing Obligations companies listed on the OSE/Axess shall confirm the application of the Norwegian Code of Practice and shall explain possible deviations from the code. The Code of Practice imposes requirements that go beyond the requirements of the STA.

If the business combination is structured as a legal merger, the board of directors will after signing a joint merger plan describing the general terms of the merger, have to issue a report to the stockholders explaining the reasoning behind the merger and how this may affect the company's employees, etc. If a Norwegian public limited liability

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company (ASA) is involved in a legal merger, there are more detailed requirements for the content of such a report. In addition each of the participating entities' boards shall ensure that a written statement, which contains a detailed review of the merger consideration payable to the stockholders of the participating companies, is issued, including an opinion of the fairness of such consideration, etc. Such statement is to be prepared and issued by an independent expert (such as an auditor). In cases where the participating entity is an ASA company, and in cases where the participating entity is a private limited company (AS) such statement may be issued by the board and confirmed by the company's auditor.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

For unlisted companies there are no specific disclosure requirements for large stockholders under Norwegian law. However for private limited liability companies, the Private Limited Companies Act requires any person who acquires an interest in stocks of a target company to immediately notify the company of such acquisition. For public limited liability companies, the Public Limited Companies Act requires any member of the board, accountant, general manager and other key employees of the company to immediately inform the company's board of any purchase or sale of stocks or other financial instruments of the company, including any such transaction conducted by persons from affiliated parties.

The STA sets out rules on disclosure of significant stockholdings. The rules on disclosure apply to stockholdings in listed companies in Norway. Pursuant to the STA, a stockholder or other person (namely, an acquirer) of such company is required to notify both the target company and OSE on behalf of FSAN of its holdings (taking into account holdings by controlled entities), when it reaches, exceeds, or falls below any of the following thresholds: 5, 10, 15, 20 or 25 per cent; one-third, 50 per cent, two-thirds or 90 per cent of the share capital, or corresponding proportion of the votes as a result of acquisitions, disposal or other circumstances. Specific rules apply with regard to the calculation of voting rights and share capital. Stocks held by various related parties are, for the purpose of the above calculation, deemed to be included in the stockholding of the disclosing party. The same notification requirements apply to the acquisition or disposal of subscription rights, options and similar rights. We expect that the Norwegian legislation in the near future will be amended so that derivatives with shares as underlying instruments, irrespective of such derivatives being cash-settled or settled by physical delivery of the underlying instruments will also be counted when calculating these disclosure thresholds (see 'Update and trends'). In this regard, it is also being proposed to abolish the current disclosure requirements that apply under Norwegian law for warrants and convertible bonds not linked to any issued (existing) shares.

Special disclosure requirements now further apply for certain private equity, hedge or venture funds which, subject to certain exemptions must notify the FSAN as soon as possible and in no event later than 10 business days after such funds has acquired control (more than 50 per cent of the votes) over a target company. This notification obligation is conditional upon the target company's stocks being admitted to trading on a stock exchange or another regulated market. However, the same notification obligation is triggered, irrespective of the stocks being listed or not, if such target employs 250 or more employees, and either has annual revenues exceeding €50 million or a balance sheet exceeding €43 million. If such funds acquire stocks in such non-listed companies, and the fund's portion of stocks reaches, exceeds or falls below 10 per cent, 20 per cent, 30 per cent, 50 per cent or 75 per cent of the votes, the fund's manager will have to inform the FSAN about the transaction.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors and managers of a Norwegian company all have a fiduciary duty to act in the best interest of the company, which is generally interpreted to mean that directors and managers should act in the joint interests of all stockholders and ensure that all holders of stocks of the same class are treated equally.

It is assumed that the directors' and managers' fiduciary duty also implies an obligation to duly consider the interests of other stakeholders such as employees, the company's creditors, etc (depending upon the company's financial situation) as well as the stockholders' joint interests. Such other stakeholders' interests are under Norwegian law primarily protected in rules of law set out in specific legislation, which the directors and managers have a general obligation to observe.

The directors' and managers' fiduciary duty should be interpreted to include two elements, a duty of care and a duty of loyalty. The duty of care includes a duty of the board to inform itself, prior to making a business decision, of all material information reasonably available to it. It is, however, under Norwegian law currently not clear as to what extent this duty of care also includes a requirement that the board reasonably informs itself of alternatives or actively seeks alternative bidders in connection with a business combination transaction. The duty of loyalty, however, requires that any decision by the board must be made on a 'disinterested' basis and not with a view to obtaining any personal benefit from the business combination. It must further be assumed that this duty mandates that the best interests of the company and its stockholders take precedence over any interest possessed by any member of the board or any particular group of the company's stockholders and that is not shared by stockholders generally.

A director or general manager of a company may under Norwegian law not participate in the discussion or decision of issues that are of such special importance to the director or general manager in question, or to any closely related party of said director or general manager, where the director must be regarded as having a major personal or financial special interest in the matter. The directors and the general manager are further under an explicit duty set out in the company legislation not to undertake an act or measure that is likely to cause unjust enrichment to a stockholder or a third person at the cost of the company or another person.

If a Norway-listed company becomes the subject of a public takeover offer, the board of directors is obliged to evaluate the terms of the offer and issue a statement to its stockholders describing the board's view on the advantages and disadvantages of the offer. Should the board consider itself unable to make a recommendation to the stockholders on whether they should or should not accept the bid, it shall therefore account for the reasons. According to the Norwegian Code of Practice it is recommended – for each and every bid – that the target company's board should arrange for a valuation by an independent expert, and that the board should make a recommendation to stockholders on whether or not to accept the offer. The valuation should include an explanation, and should be made public no later than at the time of the public disclosure of the board's statement Exemptions apply in situations where a competing bid is made. The recommendations of the Norwegian Code of Practice go beyond the requirements of the STA.

In cases where the members of the target company's board or management have been in contact with the bidder in advance of a bid, the Code of Practice for Corporate Governance also impose requirements that the board must exercise particular care to comply with the requirements of equal treatment of stockholders. Further, the board must also ensure that it achieves the best possible bid terms for the stockholders. Also note that if a bid is issued by someone who is a member of the target's board, or the bid is made in concert with the target's board, OSE will, in its capacity as the takeover supervisory authority, require that the target board's response statement is issued by an independent third party financial adviser on behalf of the target company.

In general, a controlling stockholder does not have any duty towards minority stockholders and is free to act in his or her own best interest. However, a controlling influence may not be exercised – at board or management level or at the company's general meeting of stockholders

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– in a manner that is likely to cause unjust enrichment to a stockholder or a third party at the cost of the company or another person.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

The articles of association and a stockholders agreement may contain provisions that give existing stockholders approval rights over a planned acquisition of stocks or assets in the target company. Asset transactions, especially if a substantial part of the target company's business is disposed of, may require the approval of the general meeting of stockholders of the target company.

If a business combination is effected using a voluntary tender offer, the approval rights of the stockholders will normally depend exclusively on the level of required acceptances set out by the bidder. A bidder seeking to obtain control over the board of directors will, from a legal perspective, require more than 50 per cent of the votes; to be in a position to amend the target's articles of association, which requires at least two-thirds of the votes and the capital; and to effect a squeeze-out and delist the target will require more than 90 per cent of the votes and share capital. Most takeover offers will include an acceptance condition of more than 90 per cent of the stock, a condition that can be waived by the bidder.

The stockholders' meeting must approve mergers, demergers, issuing new stocks and instruments that grant the holder a right to subscribe for stocks in the company. Such resolutions will generally require a two-thirds majority of the votes cast and the capital present at the meeting. Through the stockholders' meeting the stockholders may instruct the board of directors on specific issues.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Norwegian law does not distinguish between friendly and hostile public tender offers. A number of provisions in the Norwegian STA (while technically applying to both friendly and hostile offers) often need to be considered carefully in hostile transactions.

The target company is allowed to take a more or less cooperative approach in a takeover situation. There are however, restrictions on the board of the target company taking actions that might frustrate the willingness or otherwise of an offeror to make an offer or complete an offer that has already been made. Such restrictions apply after the target has been informed that a mandatory or voluntary offer will be made. These restrictions do, however, not apply to disposals that are part of the target's normal business operations or where a stockholders' meeting authorises the board or the manager to take such actions with takeover situations in mind. As a result of this, a fairly large number of Norwegian listed companies have started to adopt defensive measures aimed at preventing a successful hostile bid. However, advanced US-style poison pills are currently not common in the Norwegian market.

If such measures do not apply – or can be overcome – the normal reaction pattern of a Norwegian hostile board would be to seek to optimise the position for its stockholders in other ways. In this regard it should be noted that despite the restrictions on frustrating actions, several options remain, including: persuading stockholders to reject the bid; making dividend payments or using the Pac-Man defence; or finding a white knight or white squire.

The standard approach would in any event be to contact the chairman of the target's board prior to launching the offer. In a hostile transaction, it is of particular importance for a bidder to realise that the 'effective control' threshold lies at two-thirds of the voting rights and the share capital, as this is the majority required at the stockholders' general meeting for amending the target's articles of associations etc, and to effect a squeeze-out of the minority stockholders will require more than 90 per cent of the votes and the share capital.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

No Norwegian regulation exists with respect to break-up fees and as such there are no general prohibitions against agreeing upon such a fee. Break-up fees have, however, generally been less common in merger and acquisitions (M&A) transactions in Norway compared with other jurisdictions and are unusual in public takeovers in particular, but have occurred in some public transactions. The enforceability of a break-up fee arrangement under Norwegian law is however to some extent unclear. A break-up fee would have to be considered from the perspective of whether an agreement on such fee is in the best interests of the company and its stockholders. For listed companies this issue is very difficult, but any break-up fees that can be justified by reference to external costs incurred as part of the transaction would probably be acceptable. Some external compensation for internal costs such as management resources and for damage to the company's reputation would probably also be justifiable. If however, a break-up fee imposes limitations on the target company's board's ability to effectively fulfil their fiduciary duties towards the company and the stockholders in a takeover situation, or if payment of such fees (provided that it became effective) would put the target company into financial distress, it could be argued that the fee will not be enforceable and the target company's directors will be at risk of personal liability if they agree on such fees. In a private business combination, and provided that all parties agree, the scope for enforceable break-up fees would be wider.

However, the recommendations set out in the Norwegian Code of Practice for Corporate Governance regarding takeover offers (see questions 5 and 7). According to section 7 of the OSE's Continuing Obligations, companies listed at OSE/Axess shall confirm the application of the Norwegian Code of Practice and shall explain possible deviations from the code. As described above, the Code of Practice imposes requirement that go beyond the requirements of the STA. The code now unconditionally recommends that the board must not hinder or obstruct any takeover bids. The code also recommends that the target company should not undertake to pay compensation to the bidder if the bid does not complete (break-up fee) unless it is self-evident that such compensation is in the common interest of the target company and its stockholders. According to these recommendations any agreement for financial compensation (break-up fee) to be paid to the bidder should be limited to compensation for the costs incurred by the bidder in making a bid.

Except for certain exemptions adopted in 2013, Norwegian company law prohibits that the funds of a target company be used to finance acquisitions of stocks that are issued by itself or by its parent company. The rules imply that a target company may, inter alia, not provide security (subject to certain exemptions adopted in 2013) for any loans taken out by the purchaser in order to finance such business combinations. As a result of the rules, detailed consideration should be given to how an acquisition of a Norwegian company is financed. If certain conditions are fulfilled it would generally be possible for a Norwegian company to pay out excess funds as dividends to its stockholders following an acquisition. Consequently, the potential financial assistance aspects of a business combination should also be considered carefully, including with respect to break-up fee arrangements.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

If the relevant legal requirements have been complied with, government agencies do not have general authority to restrict completion of business combinations, except through relevant competition regulations, or in specific industries (including the financial sector) in which restrictions on ownership apply to all stockholders, domestic or foreign. Norway has not implemented any type of specific national security review of acquisitions as is sometimes seen in other countries, such as, for example, the type of review of acquisitions conducted by

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the US Committee of Foreign Investments. However, the Norwegian state owns stocks in many Norwegian companies, and the government therefore has influence as a stockholder in such companies.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In private company acquisitions under Norwegian law, the parties are in general free to contract on whatever terms they agree. In such transactions, financing can be, and often is, a condition to completion and will further ordinarily be conditional on Competition Authority, or other third-party consent, where applicable.

In a public company takeover under Norwegian law, any person or company that acquires stocks in a Norwegian company listed on the OSE, and as a result owning stocks representing more than one-third of the voting rights, must make a mandatory offer to buy the remaining stocks. It should be observed that following the implementation of the Takeover Directive, Norwegian law now has rules regarding repeated offer obligations at 40 per cent and 50 per cent. Such mandatory offers must be unconditional, embrace all stocks in the target company, and the offer settlement needs to be in cash. However, it is possible to also offer alternative forms of consideration under such a mandatory offer, (namely, such as stocks in the offeror), provided an option to receive the total offer price in cash is made available and that this option is at least as favourable as the alternative settlement. The settlement for such a mandatory offer must be unconditionally guaranteed by either a bank or insurance undertaking authorised to conduct business in Norway.

In a voluntary tender offer or exchange offer for a listed company there is, however, in general no limitation under Norwegian law as to which conditions such an offer may contain. Conditions such as a certain level of acceptance from existing stockholders (90 per cent or two-thirds of the stocks and votes), regulatory or competition approvals, completion of a satisfactory due diligence investigation and no material adverse change would regularly be included in Norwegian voluntary tender offer documents. Since voluntary tender offers issued in the Norwegian market are very often recommended by the board, it has become less common to include a due diligence condition in the offer document itself as the due diligence often has been completed prior to the offer being publicly launched. In some cases, the offeror may decide to include very few conditions in order to complete the transaction quickly or to avoid competing bids. In other cases, an offeror may decide to include more extensive conditions. In a voluntary offer, the offeror can offer consideration in stocks or other non-cash forms or a combination, also with cash as an element. In principle it is also possible to make a voluntary offer conditional upon financing, but the offer document must include information on how the acquisition is to be financed. If such voluntary offer is accepted, it triggers an obligation to issue a subsequent mandatory offer and several of the obligations relating to mandatory offers will also apply with regard to a voluntary offer, including an obligation of equal treatment of stockholders. However, the offeror is still free to decide which conditions such voluntary offer may contain.

Business combinations taking the form of a legal merger under Norwegian law are in general not regulated by the public takeover rules, but the provisions under the securities regulations apply to mergers involving at least one listed company. Also in such cases it is possible to adopt a conditional resolution to merge.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In private company acquisitions under Norwegian law, a buyer who needs to obtain financing for the transaction may seek to negotiate a right to withdraw from the deal if financing has not been obtained prior to closing. An alternative is to seek the inclusion of reverse termination fee provisions, which permit the buyer to terminate the acquisition for any reason simply by paying a flat fee determined as a percentage of the transaction value. A seller will normally seek to resist such takeover structures. However, if accepted by the seller, the conditions for the buyer's right to withdraw from a deal will normally be dealt with in the stock purchase or asset purchase agreement.

In Norway, debt finance for acquisitions is commonly provided by way of bank loans, often together with other banking facilities such as working capital, overdrafts, performance bonds, etc. The facilities may be granted by one bank or by different types of syndicated loans, all with agreed ranking in the case of an insolvency of the borrower. The terms of the acquisition finance will be documented in a discrete suite of finance documents between the buyer and the different debt providers. During the relative freeze in the debt market in 2008 to 2013, it also became more common for sellers participating in financing acquisitions to provide vendor finance to the buyer.

Using debt securities such as junk bonds for acquisitions has traditionally not been very common in Norway. Such instruments would generally be documented under New York or English law reflecting what traditionally used to be the main markets for such securities. Such instruments could, however, also be issued with Norwegian law as the governing law for issue in the local market. However, from 2012 and onwards until October 2014, we've seen an increasing number of private equity deals, in particular larger transactions, being financed by issuing bonds in the Norwegian market. Examples of private equity sponsors issuing such bonds in connection with Norwegian leveraged buyout (LBO) transactions include, among others, Ontario Teachers' acquisition of Helly Hansen in 2012, Altor's acquisition of Curato Røntgen in 2013, Altor's & Bain's acquisition of EWOS in 2013 and Nordic Capital's acquisition of Lindorff in 2014. Owing to the decline in oil prices witnessed in October 2014 and throughout 2015, it was challenging to raise new acquisition financing in the Norwegian high-yield bond market. As a result, we also started to see increased activity from non-bank (alternative) lenders and funds which are offering to replace or supplement traditional senior secured bank loans. The products these lenders are offering typically include term loan B facilities, unitranche loans, etc. Other forms of debt financing that may be used in acquisitions include securitisations, an even less common creature in Norwegian business combinations. However, at the beginning of 2017, the Norwegian high-yield bond market improved significantly, with some recent examples of acquisition financing being raised at favourable coupon rates (LinkMobility).

In auction processes, sellers will normally seek warranty protection from the buyer that the buyer has received binding financing commitments, and a commitment to submit copies of such financing commitments to the sellers.

If the buyer intends to finance the acquisition by equity finance or by a combination of debt and equity, the terms of the equity investments and the arrangements between the various equity investors will be set out in a further set of documents.

In a public company takeover under Norwegian law, a voluntary tender offer may be made conditional upon financing, but the offer document must then include information on how the acquisition is to be financed (see question 12). However, a mandatory offer for a public company cannot be made conditional upon financing (see question 12). The buyer will in such case need to obtain financing for the transaction prior to issuing the bid.

The buyer may also want to borrow funds from the target company (its subsidiaries following completion of the transaction). While, as a general rule, there are no major obstacles in this regard in an asset deal where the business assets are bought by the entity financing the deal, a 'debt pushdown' is substantially more difficult in the case of a stock transaction. Norwegian public and private limited liability companies are prohibited from providing upstream financial assistance in connection with the acquisition of stocks in the target company (or its parent company). This prohibition prevents any Norwegian target company participating as co-borrower or guarantor of any acquisition financing facilities. However, in practice there have always been a number of ways to achieve at least a partial debt pushdown through refinancing the target company's existing debt, which should not be regarded as a breach of the prohibition against financial assistance. In June 2013, the Norwegian parliament approved amending the Limited Liability Companies legislation aimed at easing Norwegian companies' ability to provide financial assistance by introducing a type of 'whitewash' procedure. The rule came into force on 1 July 2013. Under these rules, both private and public target companies can, subject to certain conditions,

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provide financial assistance to a potential buyer of stocks in the target. The financial assistance must be granted on normal commercial terms and policies, and the buyer must also deposit adequate security for his obligation to repay any financial assistance received from a target. Further, the financial assistance must be approved by the target's stockholders' meeting by a special resolution. The rule's requirement for depositing 'adequate security' for the target's borrower's obligation to repay any upstream financial assistance provided by a target in connection with M&A transactions means that it is quite impractical to obtain direct financial assistance from the target company in most LBO-transactions, owing to the senior financing banks' collateral requirements in connection with such deals. Consequently, in practice, the new rules have little impact on how LBO-financing is structured under Norwegian law, at least in private equity LBO-transactions. In most cases, the parties therefore continues to pursue debt pushdowns by refinancing the target company's existing debt, the same way as previously adopted. Note that in early 2016, the Ministry of Trade, Industry and Fisheries proposed to amend the current requirement for adequate security (see Update and Trends). From 1 July 2014, private equity sponsors must also ensure to observe the new anti-asset stripping regime that is set out in the new Act on Alternative Investment Fund Managers. These rules may limit the sponsor's ability to conduct debt pushdowns, depending on the status of the target company (listed or non-listed), the number of employees in the target company and the size of such target company's revenues or balance sheet.

Under Norwegian law there exist no particular obligations of the seller to assist in the buyer's financing. However, in large structured sales processes during 2010 and for the first half of 2011, stapled financing arranged by the seller using its banks seemed to be re-emerging as a tool for sellers looking to facilitate a deal. In such circumstances the seller and its advisers will normally negotiate with its bankers to obtain a commitment letter and term sheet containing the principal terms of the financing offered to the potential bidders in order to create a more competitive auction process. For the second half of 2011 and during the beginning of 2012, however, such staple financing offers became more difficult to arrange as a result of the sovereign debt worries in the eurozone. Nowadays, stapled financing offers have started to re-emerge, in particular for deals in which the sellers are pursuing an exit via dual-track processes.

It is also sometimes seen that the seller itself, under special circumstances, may be willing to provide finance for a buyout, either in the form of an earn-out arrangement, or by structuring a deferred consideration as vendor loan notes. If structured as vendor loan notes these will sometimes, but not always, be subordinated to the other elements of the acquisition finance. The vendor loan notes will then normally be on similar terms to the subordinated loan capital provided by the private equity house, but are usually priced to give a lower rate of return. The split between debt finance and true and quasi-equity will be determined on a transaction-by-transaction basis and particularly by reference to the underlying business and its funding requirements.

A seller may also be requested to assist in the buyer's financing by continuing to provide pre-closing working capital finance to the target's business during a post-closing transitional period. Such working capital facilities may take different forms and will be determined on a transaction-by-transaction basis.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Minority stockholders may under Norwegian law be subject to a squeeze-out. The Limited Liability Companies Act and the Public Limited Liability Companies Act provide that, if a parent company, either solely or jointly with a subsidiary, owns or controls more than 90 per cent of another company's stocks and voting rights, the board of directors of the parent company may, by resolution decide to squeeze out the remaining minority stockholders by a forced purchase at a redemption price. Minority stockholders have a corresponding right to demand the acquisition of their stocks by a stockholder with a stake of more than 90 per cent of the company's stocks.

The resolution shall be notified to minority stockholders in writing and registered in the Norwegian Registry of Business Enterprises. A deadline may be fixed, which cannot be less than two months, within which the individual minority stockholders may make objections to or reject the offered price. The acquirer becomes the owner of (and assumes legal title to) the remaining stocks immediately following; a notice to the minority stockholders of the squeeze-out and the price offered; and the depositing of the aggregate consideration in a separate account with an appropriate financial institution.

If any of the minority stockholders do not accept the redemption price per stock offered, they are protected by appraisal rights, which allow stockholders who do not consent, to seek judicially determined consideration for their stocks, at the company's expense. The courts decide the actual value of the stock. In determining the actual value, the starting point for the court will be to establish the underlying value of the company divided equally between all stocks. However, if the squeeze-out takes place within three months after expiry of the public tender offer period for a listed company, then the price is fixed on the basis of the price offered in such tender offer, unless special grounds call for another price.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Traditionally cross-border transactions have been structured as either an asset sale or a sale of stocks. A foreign buyer may prefer to establish one or more acquisition vehicles (SPVs) used to acquire different parts of the business in different jurisdictions in the most tax-efficient or legally beneficial manner. In general, the buyer will for tax purposes seek to arrange that a Norwegian SPV assumes the financing costs in combination with establishing a principal equity investment vehicle in a tax-friendly jurisdiction (perhaps Luxembourg or Netherlands).

However, within the EU and EEA at the present time, legal mergers can be completed cross-border under Norwegian law, insofar as the laws of both Norway and the other relevant jurisdictions allow. Such cross-border mergers have until recently required approval by the tax authorities in order to be tax-exempted (see question 18). The rules on taxation of cross-border transactions were, however, amended in 2011. Cross-border mergers and demergers between Norwegian companies and a company domiciled within the EU or EEA can, after implementation of the amended rules, be carried out as a tax-free merger or demerger subject to certain conditions being fulfilled. A fundamental condition is that the assets, rights and responsibilities of the Norwegian company (pre-merger or demerger) remain in a Norwegian branch of the foreign company (post-merger or demerger). Furthermore, an exchange of stock, by transferring at least a 90 per cent stake in a Norwegian corporation or public limited liability company in exchange for stocks in an acquiring limited liability company domiciled in another state, may be made without tax consequences for Norwegian stockholders.

The same applies where the acquiring corporation or public limited company is domiciled in Norway, and the transferring limited liability company is domiciled in another state. This applies both within and outside the EEA. The rules contains a general prerequisite for a tax-free cross-border merger, demerger or exchange of stock that the corporations involved are not domiciled in low-tax countries outside the EEA, or in low-tax countries within the EEA unless such corporations are actually established and run genuine economic activity in that relevant EEA state. The new tax rules implies that a merger or demerger between two foreign companies no longer will be considered a taxable event for Norwegian stockholders, provided that the companies are not domiciled in low-tax countries.

In general, the legal and regulatory framework is identical for internal Norwegian transactions and for cross-border transactions into Norway. Cross-border transactions may be subject to the provisions of EC merger regulations as well as national competition rules (see question 1).

In addition, there is a number of tax considerations in any cross-border transaction, in particular thin capitalisation issues and classification issues relating to hybrid financial instruments used in such transactions.

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16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Business combinations in general do not require consent from Norwegian authorities, consequently, no general waiting periods for completing business combinations apply except for the standard waiting periods applicable according to the relevant competition legislation. After the amended competition rules was adopted from 1 January 2014, the NCA has up to 25 working days to make its initial assessment of the proposed transaction, however, allowing for pre-deadline clearance, so that at any time during the procedure the NCA can state that it will not pursue the case further. The NCA must, prior to the expiry of this deadline, notify the parties involved that a decision to intervene may be applicable. In such notification, the NCA must demonstrate that it has reasonable grounds to believe that the transaction will lead to or strengthen a significant restriction of the competition not compatible with the intent behind the Norwegian rules. If the NCA issues a notice that it may decide to intervene and opens an in-depth (Phase II) investigation, it now has a basic period of 70 working days from the date the notice was received to complete its investigation and come to its conclusion on the concentration. This basic period can be extended under certain circumstances. As from 1 July 2016, the total case handling time may now amounts to 145 working days compared with 115 working days under the former regime. There is no deadline for filing a notification, but a standstill obligation will apply until the NCA has cleared the concentration. As under the EU merger rules, a public bid or a series of transactions in securities admitted to trading on a regulated market such as the Oslo Stock Exchange can be partly implemented, notwithstanding the general standstill obligation. In order for such exemption to be effective, the acquisition will have to be notified immediately to the NCA; 'immediately' in this regard will normally mean the day on which control is acquired.

For asset purchases there may, depending on the circumstances, and notably on the collective agreements applicable to the target, be a need to incorporate notification procedures with regard to the employees into the time schedule. At the very least there is an obligation to inform the employees as soon as possible of the transfer and its effects on the employees.

Business combinations structured as tender offers include a minimum offer period. The minimum and maximum offer period for a voluntary tender offer is between two and 10 weeks, and between four and six weeks for a (subsequent) mandatory offer. A subsequent squeeze-out of minority stockholders will also involve a waiting period.

A legal merger involves a process in which the stockholders have to be notified about the merger plan at least two weeks prior to the stockholders' meeting for private limited liability companies. For a public limited liability company, the advanced notice period is one month prior to such stockholders' meeting; and also involves a filing of the merger plan with the Register of Business Enterprises at least one month prior to such meeting. If approved by the stockholders' meeting, the merger decision, subsequent thereafter, has to be filed with the Register of Business Enterprises, which will publicly announce its receipt of such decision. Then there is a creditor notification period of six weeks from the date of the announcement before the merger may enter into force between the participating companies.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies in certain specific industries, including industries based on concessions or other public approval, are generally subject to notification or approval procedures in connection with a business combination depending on the relevant regulation. Such rules exists for sectors such as banking, insurance, petroleum, mining, hydropower, telecommunications, agriculture and fisheries, etc (see question 2).

In 2009 the Norwegian Financial Institution Act was modified in response to EU Directive 2007/44/EC regarding acquisitions in the financial sector. The amendment was aimed to bring the Norwegian regulations more aligned with the rest of Europe. Taking effect from 1 January 2016, a new Norwegian Financial Institution Act entered into force regulating the acquisitions of banks, insurance companies and other financial institutions. However, note that also the new act continues the former approval regime for an acquisition of stockholdings in a Norwegian financial institution exceeding certain thresholds is subject to approval from the Norwegian Ministry of Finance. Such approval may be declined if the new owner is not considered sufficiently qualified as owner of such an institution. In 2016, the Parliament resolved to abolish the Norwegian Media Authority's control over ownership in media companies (see 'Update and trends').

18 Tax issues

What are the basic tax issues involved in business combinations?

Norwegian companies have considerable flexibility in arranging their taxable income to reduce the tax impact by tax grouping, loss carry-forward and loss carry-backs. In addition to this the most basic tax issue involved in business combinations is, however, whether the transaction is taxable or tax-free to the acquirer, target and their respective stockholders.

Acquisition of stocks

Norwegian stockholders that are limited liability companies, as well as certain similar entities (corporate stockholders), are generally exempt from tax on dividends received from, and capital gains upon the realisation of, stocks in domestic or foreign companies domiciled within the EU and EEA states, and losses related to such a realisation are not tax deductible. Consequently, Norwegian corporate stockholders may sell stocks in such companies without being taxed on capital gains derived from the sale. Costs incurred in connection with such a sale of stocks are not tax deductible. Certain restrictions exist regarding foreign companies not located in the EU or EEA states as well as companies located in low income tax states within the EU and EEA, and that are not conducting business out of such countries (Controlled Foreign Companies Rules). In 1 January 2012 Norway abolished the 3 per cent clawback rule on capital gains so that capital gains earned by corporate stockholders have become tax-free. The amendment applies regardless of whether the exempted capital gain is derived from a Norwegian or a qualifying non-Norwegian company. Dividends received by a Norwegian company on business-related stocks in group subsidiaries within the EEA held directly or indirectly with more than 90 per cent inside the EEA are also exempted from Norwegian corporate tax on the part of the receiving corporate stockholders. However, the 3 per cent clawback rule will apply to dividends received by corporate stockholders holding less than 90 per cent of the stock as well as to foreign corporate stockholders having a permanent establishment in Norway that receive dividends from Norwegian companies, subject to such foreign corporate stockholders' participating or carrying out business in Norway to which such stockholdings are allocated. Under such circumstances 3 per cent of such dividends is subject to Norwegian taxation as ordinary income at a tax rate of 24 per cent (reduced from 25 per cent with effect from 1 January 2017) (giving an effective tax rate of 0.72 per cent).

Dividends received from, or capital gains derived from realisations of, stocks by stockholders who are Norwegian private individuals (personal stockholders) are, however, taxable as ordinary income. With effect from 1 January 2017, the government increased the tax rate on dividends received from, or capital gains derived from realisation of stocks held by Norwegian private individuals. According to the new rules the amount derived from such distributions, capital gains, etc. must be multiplied by 1.24 (an increase from 1.15 for 2016) and such grossed-up amount is thereafter to be taxed as ordinary income for such private individuals at a tax rate of 24 per cent. In effect, this increases the effective tax rate on such distributions or gains from the 28.75 per cent under the former tax regime to 29.76 per cent. Any losses are tax deductible against such personal stockholder's ordinary income.

Capital gains from realisation of stocks in Norwegian limited liability companies by a foreign stockholder are not subject to tax in Norway, unless certain special conditions apply. The extent of the tax liability of such foreign stockholders in their country of residence will depend on the tax rules applicable in such jurisdiction.

Normally, an acquisition of stocks in a Norwegian target company will not affect the target's tax positions, including losses carried forward, and such attributes normally remain with the target, unless the

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tax authorities can demonstrate that the transfer of stocks is primarily tax motivated.

Acquisitions of assets

On the sale by contrast of the business assets, the tax treatment is quite different to the tax treatment of stocks. Capital gains derived on the disposal of business assets or a business as whole is subject to 24 per cent tax. Losses are deductible. A Norwegian seller can defer the taxation by gradually entering the gains as income according to a declining balance method. For most assets the yearly rate is a minimum of 20 per cent, and this includes goodwill.

The acquirer will have to allocate the purchase price among the assets acquired for the purposes of future depreciation allowances. One should keep in mind that the acquirer will be allowed a stepped-up tax basis of the target's asset acquired. The part of the purchase price that exceeds the market value of the purchased assets will be regarded as goodwill. Recently, the tax authorities have, however, disputed the allocation to goodwill instead of other intangible assets with a considerably longer lifetime.

As gains from the disposal of stocks in limited liability companies are generally exempt from tax for corporate stockholders, this will in many instances make the sellers favour a stock transaction over an asset transaction. However, this will not be the case in transactions that involve a loss for the seller, as a loss will still be admitted for the sale of assets.

Mergers

Under Norwegian law an enterprise can be acquired through a tax-free legal merger in return for the stockholders in the transferor company receiving stocks as consideration. Such transaction will be tax-exempted both for the stockholders and for the merging companies. In order to qualify as a tax-exempted merger, all companies involved in the merger must, as a main rule, be domiciled in Norway. However, according to amendments made to the Norwegian tax regulations in 2011, cross-border mergers and demergers between Norwegian companies and a company domiciled within the EU or EEA (subject to certain conditions being fulfilled) can now be carried out as a tax-free merger or demerger under Norwegian law (see question 15).

To qualify as tax-free merger, all tax positions will have to be carried over without any changes, both at the company level and the stockholder level.

A cash element may be used as consideration in addition to stocks in the transferee company, but the cash element may not exceed 20 per cent of the total merger consideration. Such cash payments will be considered as dividend or as a capital gain, both of which will be taxable if the receiver is a personal stockholder. If such cash compensation shall be considered as dividends, it has to be divided between the stockholders in accordance with their ownership in the transferor company. Such dividend or gain will be tax-exempt if the stockholder is a corporate stockholder, except for the tax on 3 per cent of their dividend income derived from stocks in the merging companies, which is taxed at a tax rate of 24 per cent if the stockholder owns less than 90 per cent of the stocks in the merging companies.

Distribution of dividends and interests

A Norwegian subsidiary should be owned by a company resident within the EEA to avoid withholding tax on dividend distributions. Interest payments are not subject to withholding tax, even though payments are made outside the EEA. Note that the government has proposed a new tax reform, which includes a rule allowing the government to introduce withholding tax on interest and royalty payments (see 'Update and trends').

Restrictions in the right to deduct losses on receivables between related companies

A company may finance its subsidiaries either by loans or equity. If using a relatively high amount of loan financing, the parent company could deduct the losses on receivables ('bad debt') in cases of an unsuccessful investment while realising a tax-exempt gain on stocks where the investment is successful.

Effective from 6 October 2011, however, a parent company's right to deduct losses on receivables on related entities where the creditor has an ownership of more than 90 per cent has been restricted. The new limitation shall however not apply to losses on customer debt, losses on debts that represent previously taxed income by the creditor and losses on receivables arising from mergers and demergers.

Stockholder loans

Previously, interest arising on related-party debt has only been considered deductible for tax purposes to the extent that the quantum and terms of the debt was arm's length in nature. As of the income year 2014, a rule limiting the deduction of net interest paid to related parties entered into force. Additional restrictions to this rule were later implemented. From 1 January 2016, the limitation rule broadly caps the interest deductions on loans from related parties to 25 per cent of the borrower's 'taxable earnings before interest, tax, depreciation, and amortisations'. The rule aims to eliminate, or reduce the risk of the Norwegian base being excavated as a result of tax planning within international groups where the debt has been allocated to the Norwegian group companies. The term related party covers both direct and indirect ownership or control, and the minimum ownership or control required is 50 per cent (at any time during the fiscal year) of the debtor or creditor. Please note that loans from an unrelated party (typically a bank) that is nevertheless secured by a guarantee from another group company (ie, a parent company guarantee) will also be considered as an intra-group loan coming under these new rules. However, companies with total interest expenses (both internal and external) up to 5 million kroner are not affected by these limitation rules.

According to a regulation adopted by the Ministry of Finance, interests paid under a loan secured by a related party will not become subject to the interest limitation rule if the security is a guarantee from the related party of the borrowing company, and such related party is a subsidiary owned or controlled by the borrowing company. The same exemption rule applies on loans from a third party secured by a related party of the borrowing company if such related-party security either is a pledge over that related party's stocks in the borrowing company; or a pledge or charge over that related party's outstanding claims towards the borrowing company. For security in the form of claims towards the borrower, it is not required that such claim is owned by a parent company. Negative pledges provided by a related party in favour of a third-party lender are not to be deemed as security within the scope of the interest limitation rule. The Ministry of Finance has stated that it intends to continue its work to implement further restrictions under the limitation rule in the new proposed tax reform. In this regard, note that the EFTA Surveillance Authority has resolved to challenge the Norwegian interest limitation rules (see 'Update and trends').

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Under Norwegian law, employees are afforded protection through legislation, mainly the Workers' Protection Act (the Act), which implements the Acquired Rights Directive (EC Directive No. 2001/23/EC), and collective bargaining agreements. The Act further includes protection against unlawful dismissals, mass layoffs, etc.

Private acquisitions of, or public offers for, stocks in a target company will not generally affect the terms of the individual's contract of employment with the target company.

When a business (assets) is acquired, the employees, as a main rule, have, according to the Act, a right to have their respective employment contracts transferred to the purchaser of the business, and the purchaser therefore will assume all rights and obligations of the transferor relating to the transferred employees. The Act contains certain duties with respect to notification and consultations with employees and their representatives.

Similar provisions are often provided for in collective bargaining agreements in Norway and the provisions in such agreements may also apply to stock transactions.

The employees are protected against termination based upon a transfer of business, but terminations due to rationalisation measures may take place. Further, the Reorganisation Act (see question 2) must be observed prior to plant closings and mass layoffs.

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Update and trends

Norwegian transaction volume was up 19.2 per cent compared with 2016. A total number of 8 takeover offers for listed companies were issued in the Norwegian market during 2016, with Golden Brick's €1.121 billion failed takeover bid for Opera Sofware ASA, Lerøy Seafood Group's €440 bid for Havfist ASA and Solstad Offshore's hostile merger with Rem Offshore ASA being the most notable announced public takeover events in 2016. Intrum Justitia AB's €4,120 merger with Lindorff Group and Aker BP ASA's €1.12 billion acquisition of BP Norge AS became the two most notable private M&A transactions in the Norwegian market for 2016. For Europe on total, the 2016 M&A transaction volume was up 5.8 per cent compared with 2015. The transaction volume in Denmark; Finland and Sweden increased by 11.6 per cent, 7.1 per cent and 9.6 per cent respectively compared with 2015. The overall increase in Norwegian M&A volume came as a result of slightly improving oil and prices throughout 2016, combined with the fact that global M&A activity continued to be driven by difficulty finding organic growth, low financing costs, availability of credit, strong cash balances and high equity valuations. At the same time, most executives seemed to consider the global economy as stable and that earnings being back on track in many industries.

Throughout 2016, industrial players continued to take a large stake of the total M&A volume, and seven out of the largest 10 disclosed Norwegian M&A deals for 2016 had industrial or strategic investors on the buy side, which is one less compared with 2015. Also in 2016, four out of the 10 largest Norwegian M&A deals involved financial sponsors either on the sell side or on the buy side. Private equity sponsors were in general slightly less active in 2016. Compared with 2015, the Norwegian market declined 1.9 per cent in number of transactions involving private equity sponsors (either on the buy- or sell-side), but the average reported deal sizes for deals involving private equity sponsors improved significantly. The market continued to be driven by new investments and add-ons, but in 2016, we also witnessed a substantial increase in number of private equity exits.

Since the second half of 2014 continuing throughout 2015, increasing volatility in the debt capital markets resulting from declining oil and gas prices pushing many high yield bonds towards default substantially deteriorated the plans for those who were planning to raise new acquisition financing in the Norwegian debt capital market. Also for most of 2016, it continued to be difficult to obtain acquisition financing in the Norwegian high-yield bond market with increasing coupon rates. Nevertheless, the Norwegian banking sector remained strong throughout 2016. As a result, an increasing number of borrowers, in particular foreign sponsors started to turn elsewhere than the high-yield bond market and traditional banking financing, when considering financing packages for new acquisitions. On large transactions, there has been an increasing trend of unitranche or term loan B-style loans spreading globally. Funds offering these types of new loan products now also markets such products in the Norwegian market specifically towards private equity sponsors. However, at the beginning of 2017, we also have started to witness a substantial improvement of the Norwegian high-yield bond market, which has made an increasing number of acquirers again considering high-yield bonds as a feasible alternative for raising acquisition financing.

Last years' trend with increasing use of warranty and indemnity insurance used by vendors or buyers in an attempt to bridge the negotiation gap between them over important liability issues continued throughout 2016. Bidders also continue to use this type of insurance in the bidding process as a means to achieve competitive advantage. The insurance brokers all reported on increased interest among the various players about this type of products. We still expect to see an increasing use of such insurance policies in the years to come.

It continues to be difficult to predict where the Norwegian M&A market is going. For the immediate term, general capital market concerns may in combination with shelving of deal plans caused by political uncertainty globally, may contribute to muted deal activity going forward. Declining market volatility and continuing improvement of the stock markets might, however, lead to continuing uptick in the M&A activity going forward as 2017 matures. Overall, we are cautiously optimistic for the Norwegian M&A market also for 2017. Investors continue to view Norway as a good place to invest, owing to its highly educated workforce, technology, natural resources and well-established legal framework for M&A transactions. Nevertheless, we should not close our eyes to the fact that Norway over the past couple of years has become more exposed to the force of world events than in previous years, and the views expressed above will therefore all depend on global macroeconomic developments.

Legislative developments

The Merger control regime amended

In March 2016, the Parliament adopted certain amendments to the Norwegian merger control regime. As a result, from 1 July 2016, the market share thresholds for having to describe a market in detail are harmonised with those set out in Form CO of the Implementation Regulation under the EUMR. The simplified procedure will now be available if the combined market share with horizontal overlap is less than 20per cent (previously 15 per cent), or where none of the parties in a vertical relationship at either level has an individual or combined market share of 30per cent or more (previously 25 per cent).

Taking effect from 1 July 2016, the Norwegian substantive test, (which previously was based on a substantial lessening of competition test (SLC)), has now been aligned with the same SIEC-test (substantial impediment to efficient competition) as applicable under the EU rules. This means that Norway now must apply the same 'consumer welfare standard' as applied by the Commission, instead of the 'total welfare standard' as previously applied under the Norwegian merger control regime. From 1 July 2016, the statutory timetable for clearance under the Norwegian merger control regime was slightly amended. As a result, the total case handling time will now amount to 145 working days compared with 115 working days under the former regime.

Taking effect from 1 April 2017, the previous power held by the King Council to intervene in merger control cases will be been abolished. Instead, these powers will be transferred to an independent appeal board for handling appeals in merger control cases.

Acquisition of media companies

In July 2016, the Norwegian Media Authority's control over media ownership was abolished. Consequently, the review of changes in media ownership has now exclusively become the responsibility of the Norwegian Competition Authority.

EU initiatives – proposed amendments to the STA and SER

EU has over the last few years proposed or adopted several directives, regulations, and clarification statements regarding the capital markets. Some of these are of such a nature that also Norway in some form will have to adopt and implement in order to comply with its obligations under the EEA agreement. These initiatives from the EU, will most likely, directly or indirectly, have an impact on the regulatory framework for public M&A transactions in Norway in the years to come. As a result of these initiatives, several amendments to the STA are expected to take place over the next 12-month period.

In connection with these legislative initiatives, the Norwegian government has appointed an expert committee to evaluate and propose relevant amendments to the existing Norwegian legislation resulting from EU amending the Transparency Directive, the MIFID I, and the Market Abuse Directive. The committee was mandated to prepare three separate reports to the government. The committee has now issued two reports. In its first report, the committee, inter alia, proposes implementing certain amendments to the Norwegian Securities Trading Act (STA), with regard to disclosure requirements for derivatives with shares as underlying instruments. In its second report, published in January 2017, the committee, inter alia, proposes several amendments to the STA in order to implement MIFID II and MIFIR into Norwegian law. Additional reports from the committee are expected issued in 2017, proposing to implement the EU Market Abuse Regulation into Norwegian law.

New regime for timing of disclosure of inside information

Taking effect from 1 April 2017, Oslo Stock Exchange has updated its Code of Practice, in which the Stock Exchange has changed its interpretation of the wording 'without delay', now stating that stock exchange listed companies must disclose inside information 'without delay' also when arising outside of exchange trading hours.

Proposed amendments to the Norwegian Companies legislation

During 2016, the Norwegian Ministry of Industry, Trade and Fishery has issued certain proposals to simplify and adapt the rules of the Norwegian Companies Acts. The purpose of these proposed amendments is to simplify the burden on trade and industry, especially for small and medium-sized companies. Even though most of these amendments are not aimed at M&A specifically, some could have an impact both on the structuring and the financing (and on the financing structures) of M&A transactions. Among others, in February 2017 the Ministry proposed to abolish the requirement that a buyer (borrower) must deposit 'adequate security' towards the target company if such

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buyer receives any form of financial assistance from the target in the form of security for the buyer's acquisition financing. If this proposal is adopted by the Parliament in its current form, it looks as if Norway in the near future also will have implemented a type of 'whitewash procedure' that could work also for LBO-transactions.

New tax reform proposed – further amendments to the interest limitation rules expected

In October 2016, the government released its fiscal budget for 2017, inter alia, following up on a previous proposal for a broader tax reform (the Proposed Reform) issued in October 2015. As of the income year 2017, the Norwegian corporate income tax is decreased from 25 per cent to 24 per cent. Based on what originally was stated in the Proposed Reform a further decrease to 22 per cent was expected as from 2018. However, in the 2017 Fiscal Budget, the government now indicated a further decrease in the tax rate to 23 per cent (instead of 22 per cent previously indicated) as from 2018. In the Proposed Reform, the government originally also stated an intention to implement further restrictions on the Norwegian interest deduction limitation rule so that also external interest costs should be included in the scope for the interest deduction limitation rules, provided that deduction for 'genuine interest costs' is not denied. To the extent the scope of the interest deduction limitation rules is amended as to include external interest costs, an escape clause (eg, in line with the BEPS recommendations for a group ratio rule might be expected). The Ministry of Finance has stated that they are working with an aim of submitting a consultation paper during the spring of 2017.

In the Proposed Reform, the government originally also stated that it intended to adopt a rule allowing it to introduce withholding tax on interest and royalty payments. In the proposal for the 2017 Fiscal Budget, the government did, however, not for now, follow up on these previous proposals. It is not clear at this stage if legal changes will be implemented with regard to withholding tax on interest payments and on royalty and, if so, the potential timing of these changes or the applicable withholding tax rate. In March 2017, the Ministry of Finance has now also issued a report further elaborating on the Proposed Reform's original proposal to reduce the possibility for treaty shopping by implementing a rule stating that all entities established and registered in Norway will have Norwegian tax domicile, unless a treaty with other states leads to a different result. Consequently, companies registered in Norway shall in the future never be considered 'state-less'.

In the 2017 Fiscal Budget, the government also stated that it intends to submit a consultation paper for amending the Norwegian controlled-foreign-companies rules. Such consultation paper is expected to be issued during the course of 2017.

The Norwegian 'Interest deductions' challenged by the EFTA

At the end of the 2016, the EFTA Surveillance Authorities (ESA) issued a reasoned opinion stating that the Norwegian interest limitation rules of 2015 in its current form violates violates the freedom of establishment, and thereby article 31 in the EEA Agreement. The EFTA Surveillance Authority is of the opinion that the Norwegian interest limitation rules are deterring Norwegian companies from establishing a cross-border group relief scheme under which a company may make a 'group contribution' with affiliated group members in other EEA States (or, conversely, deterring companies from such states from establishing similar groups with affiliated group members in Norway). The EFTA Surveillance Authority requested Norway to take necessary measures to comply with the opinion. In a response dated 31 January 2017, the Ministry of Finance maintains that the Norwegian interest limitation rules are compatible with Norway's EEA obligations; however, the Ministry of Finance also describes certain changes to the rules that may be implemented with effect from 1 January 2018. The next step is now for ESA to decide whether they will take Norway to the EFTA court for infringing its EEA obligations.

Proposed amendments to the prospectus regime

The EU Commission has recently published a proposal for a new Prospectus Regulation, intended to replace the existing Prospectus Directive, in which the Commission proposes that the requirements of a prospectus or equivalent document no longer should apply to securities offered in connection with a takeover by means of an exchange offer, merger or division. The condition for this being that a document must be made available to the stockholders receiving the exchange offer, describing the transaction and its impact on the issuer. The existing Prospectus Directive are implemented into the Norwegian STA and the SER. If the regulation is finally adopted within EU, the new proposed Prospectus Regulation can only enter into effect for Norway after implementation under the EEA agreement, which most likely not will take place until mid-2017 at the earliest.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A business combination involving a target company that is unable to settle its debt when due, or that has opened bankruptcy proceedings, gives rise to special considerations.

The acquisition of assets from an insolvent target company may be challenged and may be voidable in a subsequent bankruptcy on the grounds that the purchaser has not paid fair market value for the assets. The same may apply if the business combination is structured in a way that favours some creditors of the insolvent company over others.

If a target company is unable to settle its debt when due, it may seek protection by the courts according to the rules on composition proceedings. These rules entail that creditors cannot execute or enforce their claims against the target company. The suspension of payments entails that the court appoints a supervisor who must approve all material dispositions of the company, including the sale of its assets. In such instances, the supervisor normally will present a conditional business combination to the creditors to establish whether any creditors oppose the transaction.

A business combination involving the assets of a target company in bankruptcy will be negotiated and agreed with the trustee appointed by the court. Normally no or very limited warranties will be available from any trustee, receiver, administrator or liquidator in an insolvency situation. The increased risks this brings to a stock acquisition may be mitigated or offset by: paying less; conducting a rigorous investigation of the target in order to limit the scope for hidden liabilities; or retaining a part of the purchase price to be set off against any unexpected liability arising in a certain period. Sometimes an insolvent target company uses a hive-down to transfer assets into a NewCo, and then let the acquirer purchasing the stocks in the NewCo prior to bankruptcy. Certain tax issues will need to be carefully considered in such transactions, since it may alter the priority of the creditors in the insolvent company, exposing the seller's board to potential liability.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Norway has ratified the Organisation for Economic Cooperation and Development's Anti-bribery Convention, the European Council's Anti-corruption Convention and the United Nations Convention on Cross-border Organised Crime. As a result of these conventions Norway introduced a new legislative regime on anti-corruption and anti-bribery in 2003. These provisions were later also implemented in the New Norwegian Criminal Code (2005), entered into force with effect from 1 October 2015, and criminalise both active and passive corruption. The term active corruption refers to the corrupt acts that consist of providing or offering anyone an improper advantage in connection with his or her position, office or commission. Passive corruption refers to the situation when a person in respect of a post, office or commission requires, receives or accepts an offer of such improper benefits. The Norwegian rules do not differentiate in general between corruption or bribery in the public sector and in a private commercial context. The Norwegian anti-corruption and anti-bribery rules also cover acts committed abroad by Norwegian nationals or persons domiciled in Norway. This applies regardless of whether the offence is punishable in the country where the action is performed. Note that the New Norwegian Criminal Code (2005) also apply to bribery committed on behalf of a body corporate registered in Norway.

The Norwegian anti-corruption rules also cover corrupt acts committed by foreigners abroad and such acts may be prosecuted in

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Norway. This applies regardless of whether such corrupt act is punishable under the law of the land in which the corrupt activity is carried out. Under Norwegian law, it is not just individuals who can be prosecuted. This type of criminal offences can also result in a body corporate (for example, a target company) to be subject to corporate punishment, including confiscation of the benefits or profits obtained by such practices. Recent cases also indicate a tougher line from the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim). In January 2014, a Norwegian listed company had to accept a fine of 270 million kroner and confiscation of proceeds of 25 million kroner following charges of corruption in Libya.

According to the Norwegian Tort Act, a target company may also be held vicariously liable towards a third party for such party's loss incurred as a result of corrupt acts by the target company's employees if corruption or bribery has occurred in connection with the execution of work or duties on behalf of the target company as an employer. This applies unless such target company can demonstrate that it had taken all reasonable precautions to prevent corruption or bribery, and that, from an overall assessment of the circumstances of the case, it will not be reasonable to impose liability on the target company as an employer.

Consequently a buyer should during its due diligence of the target company evaluate the risk involved for potential criminal or civil liability, or loss of reputation, resulting out of any corrupt practices by the target company, and what impact such practices may have on the target's valuation. Furthermore, note that other countries' anti-corruption legislation, because of its extra-territorial reach, may also be of relevance to a Norwegian target company carrying out business in other jurisdictions, and may have the consequences that such target company falls within the scope of such other countries' anti-corruption legislation.

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Poland

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1 Types of transaction

How may businesses combine?

In general, businesses combine through the acquisition of the target's assets or shares. It is also possible to combine businesses by merging or dividing companies.

Asset and share deals

An asset deal may by structured as the sale of bare assets not constituting a business, or as the sale of the target's business (or its organised part). The structure of the asset deal affects both the tax consequences for the parties as well as the buyer's liability. In theory, the buyer of a business is jointly and severally liable up to the value of the acquired business for obligations connected with its operations, unless at the date of transfer the buyer was not and could not have been aware of such obligation. However, in practice a buyer may obtain indemnities from the seller against claims that arise from the past activity of the business.

An asset deal (unlike a share deal) necessitates obtaining third-party consents to the transfer of obligations and reapplying for certain permits, concessions or reliefs enjoyed by the target. The formalities applicable to asset deals depend on the assets transferred (eg, if real estate is transferred a notarial deed is necessary).

Shares of limited liability companies are transferred by signing a share purchase agreement with notarised signatures. The formalities applicable to a transfer of shares of a private joint-stock company depend on whether the company has registered or bearer shares. The transfer of registered shares must be made in writing, by making a declaration on a share certificate or in a separate document, and requires delivery of the share certificate. The transfer of bearer shares does not require any specific form and the shares are transferred by delivery of the share certificates. Shares of joint-stock companies that are listed on the stock exchange (public companies) are dematerialised and are transferred by making the relevant entries in the securities accounts.

Shares of a public company can be acquired through block trades, on the stock exchange or through public tender offers. If the bidder intends to exceed the thresholds of 33 per cent or 66 per cent of the voting rights of the company, it must announce a mandatory tender offer for 66 per cent of the shares or all the shares, respectively. A tender offer for the desired increase in shares must also be announced when a shareholder intends to increase its stake by more than 10 per cent within a period shorter than 60 days and the shareholder holds less than 33 per cent of the voting rights, as well as when a shareholder intends to increase its stake by 5 per cent within a period shorter than 12 months and the shareholder already holds 33 per cent or more of the voting rights. Shareholders who purchase shares which should be purchased through a tender offer without announcing a tender offer can be fined up to 1 million zloty for each infringement and will be unable to exercise the votes arising from the purchased shares and, in certain cases, will be unable to exercise the votes arising from all shares held in that company.

The buyer may pay in cash or securities for both shares and assets.

Merger and division of companies

Companies may merge by transferring all the assets and liabilities of one company to another existing company or by transferring all the assets and liabilities of the merging companies to a newly formed company.

A company may be divided into two or more companies if all or some of its assets and liabilities are transferred to a pre-existing or newly formed company.

In the case of both merger and division of companies, the principal consideration for the transferred business is shares in the company acquiring the business. Additionally, the transferring companies may receive a cash payment (subject to a statutory maximum amount). Also, as part of the merger or division process, the transferring companies may be obliged to make a cash contribution to the company acquiring the business (also subject to a statutory maximum amount). Both mergers and divisions of companies generally result in the dissolution of the companies transferring all their assets and liabilities. Moreover, the companies acquiring the business through a merger or division are the legal successors of the transferring companies unless a specific statute or decision on the grant of a permit, concession or relief provides otherwise.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main statutes applicable to business combinations are:

- the Civil Code;
- the Commercial Companies Code;
- the Act on Competition and Consumer Protection;
- the Act on Commercialisation and Privatisation;
- the Labour Code;
- the Act on Trade Unions;
- the Act on Information and Consultation of Employees;
- the Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and Public Companies;
- the Act on Capital Market Supervision;
- the Act on Trading in Financial Instruments;
- the Act on Acquisition of Real Estate by Foreigners; and
- the Act on the National Court Register.

In addition, the EC Merger Regulation may apply in the context of a business combination.

Also, from 3 July 2016, capital market participants are obligated to apply the provisions of the Regulation No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation). For further details, please see question 6.

3 Governing law

What law typically governs the transaction agreements?

The parties are generally free to choose the governing law applicable to transaction agreements in both share deals and asset deals. Typically Polish law is chosen as the governing law but it is not uncommon for major transactions to be governed by foreign law such as English law. Nonetheless, even when a share purchase agreement is governed by

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foreign law, to effectuate a valid transfer it may be necessary to obtain shareholders' consent, deliver share certificates or prepare a tender offer document governed by Polish law. Similarly, even when an asset purchase agreement is governed by foreign law, it may be necessary to obtain shareholders' consent or subject the transfer of certain assets such as real estate to Polish law.

With the exception of cross-border mergers discussed in question 15, Polish law is the governing law applicable to mergers and divisions of Polish companies.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Registration with the National Court Register

Share purchases of private companies as well as mergers and divisions of companies should be registered in the companies register of the National Court Register. Mergers and divisions become effective upon registration, whereas share transfers are effective irrespective of registration. Registrations are subject to court and registration fees usually in the amount of 350 zloty.

Consent of the President of the Office of Competition and Consumer Protection

The types of business combinations which may be subject to notification and approval of the President of the Office of Competition and Consumer Protection (Competition Authority) are: mergers, takeovers of direct or indirect control, joint venture formations or acquisition of assets, which generate a turnover exceeding €10 million in any of the two financial years preceding the notification. Notifications are subject to a small filing fee.

A notification to the Competition Authority is only compulsory if at least one of the following conditions (subject to certain exceptions) is met:

- the combined worldwide turnover of the capital groups of both parties to the transaction in the financial year preceding the year in which the notification is made exceeded €1 billion; or
- the combined turnover of the capital groups of both parties to the transaction in Poland in the financial year preceding the year in which the notification is made exceeded €50 million.

For the purpose of the above calculations, in takeovers of control and asset acquisitions on the seller's side only the turnover of the target and its capital group is taken into account and not the turnover of the seller's entire capital group.

There are several exemptions from the obligation to notify the Competition Authority, including in the event of a takeover of control if the turnover of the target in Poland did not exceed €10 million in any of the two financial years preceding the filing.

Transactions that meet the above criteria require the consent of the Competition Authority. Transaction completion prior to clearance or lack of notification if it is required may result in a fine of up to 10 per cent of the turnover in the financial year preceding the year in which the penalty is imposed. Moreover, providing false or misleading information may be subject to a fine of up to €50 million. Members of the management board may also be fined up to 50 times the average remuneration for failure to notify the transaction or providing untrue or misleading information.

If the thresholds and conditions stipulated in the EC Merger Regulation are met, the transaction may be subject to compulsory notification to the European Commission. In such a case, the transaction does not require notification to the Competition Authority.

Consent of the Minister of the Interior and Administration

Generally, the direct or indirect acquisition by foreigners (individuals, companies and partnerships) of real property in Poland requires a permit issued by the Minister of the Interior and Administration. A transaction is null and void if the required permit is not obtained prior to closing, and a small fee is payable in connection with the permit application.

Foreigners from the European Economic area (EEA) are exempt from having to obtain the aforementioned permit. The Act of 14 April 2016 amending the Act of 11 April 2003 on Shaping of the Agricultural System binding from 30 April 2016 introduced certain legislative amendments which, significantly restricted transfers of agricultural land. Under the new provisions, only individual farmers or certain public entities are entitled to acquire agricultural land. Transfer of such land to other entities is limited and requires a permit issued by the President of the Agricultural Property Agency. In the case of a share-deal, the Agricultural Property Agency has the pre-emptive right over shares in companies that are owners of agricultural land, excluding shares admitted to trading on a regulated market and shares disposed by the State Treasury.

Registration in the Land and Mortgage Register

Direct changes in real estate ownership and perpetual usufruct (asset deal) are subject to registration in the Land and Mortgage Register. The transfer of real estate ownership occurs when a notarial deed is signed, whereas the transfer of perpetual usufruct occurs upon the registration of the transfer in the Land and Mortgage Register. Entries to the Land and Mortgage Register are subject to a minimal court fee.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information that needs to be made public depends on the type of transaction as well as the legal form and character of the target.

The corporate files of limited liability companies and joint-stock companies (including public companies) are kept in the National Court Register of the district court where the company has its registered office. These files are publicly accessible. Business combinations trigger the obligation to file some information and documents with the National Court Register such as new shareholder lists (share deals), drafts of merger or division plans and shareholder resolutions on mergers and divisions. Merger and division plans also need either to be formally announced or made available on the company's website.

Although there is no general obligation to disclose share purchase agreements, some courts request documents constituting the grounds for the share transfer when they receive a new shareholder list. Despite the wide disapproval of legal practitioners and commentators of such practice, the courts rely on a general legal provision stating that in case of doubts about the legal grounds for an entry into the National Court Register, the court is entitled to demand additional documents. In the case of such a request, it is recommended to prepare an excerpt from a share purchase agreement with all sensitive information redacted.

In the context of a tender offer for shares in a public company, the bidder publishes an offer document which contains information allowing the shareholders to make an informed decision on the tender offer, including the identity of the bidder, the number of shares covered by the tender offer, the proposed price, the subscription period, the bidder's intention with regard to the target, and whether the tender offer may be abandoned if another entity announces a tender offer for the same shares.

Asset purchase agreements are generally not made public, although the transfer of certain assets may become public, such as the transfer of real estate which is registered in the Land and Mortgage Register.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Shareholders of public companies who have achieved or exceeded (or fallen below) the statutory thresholds of 5, 10, 15, 20, 25, 33, 33.3, 50, 75 or 90 per cent of the voting rights of a company are subject to notification requirements. Moreover, a shareholder whose stake in a public company has exceeded 10 per cent of the voting rights of the company is required to notify any change of the stake by at least 2 per cent and a shareholder whose stake in a public company has exceeded 33 per cent of the total voting rights of the company is required to notify any change of the stake by at least 1 per cent. All these notifications

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should be made to the public company and the Financial Supervision Authority. Failure to make the required notifications may result in the Financial Supervision Authority imposing a fine of up to 1 million zloty on the shareholder.

Subject to certain limited exceptions, public companies are required to publish inside information (including precise information relating to an impending business combination affecting the company's assets or shares, which has not been made public and which, if made public, would be likely to have a significant effect on the share price). On 3 July 2016 the new EU Market Abuse Regulation took direct effect across EU member states (see also question 2). It introduced a material change with regard to the disclosure requirements of issuers, which now themselves have to determine whether a particular event should be regarded as an inside information and disclosed to the market.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Members of the management and supervisory board have a general duty to manage the business of the company with due care and in accordance with the law and the company's articles of association. The company's interests must come before the interests of its shareholders. The company may seek damages from board members in the case of a breach.

Shareholders also owe a general duty of loyalty to the company and to other shareholders, particularly in the context of exercising voting rights.

Besides notifying the shareholders of a planned merger or division, the management boards of companies undergoing restructuring must prepare for the shareholders a merger or division plan as well as a report justifying the proposed restructuring, and detailing any difficulties with share valuation.

Management boards of public companies whose shares are the subject of a tender offer concerning 66 per cent or 100 per cent of the shares are also obliged to publicly issue an opinion on the announced tender offer in order to assist the shareholders in deciding whether to sell their shares in the tender offer. The opinion addresses the effect of the tender offer on the company's interests (including its workforce), the bidder's strategic plans for the company and their likely effect on the workforce and the company's place of business, as well as the fairness of the offered share price.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In order to be valid, mergers and divisions of companies require the adoption of a shareholders' resolution by a three-fourths majority of the voting shareholders, representing at least half of the share capital (unless the articles of association stipulate a higher majority).

The disposal of a business or its organised part requires a shareholders' resolution. Such a resolution is also necessary when a joint-stock company acquires assets for a price exceeding one-tenth of its paid-up share capital from a founder or shareholder, or a company or cooperative controlled by a founder or shareholder, provided such acquisition occurs within two years of the company's registration date.

Shareholders' consent is also a requirement, but only if the articles of association of the company do not provide otherwise, in the case of a transfer of real estate, an acquisition of real estate or fixed assets at a price exceeding one-quarter of the share capital but no less than 50,000 zloty, within two years of the company's registration date (applies only to limited liability companies), and a disposal of a right or incurring an obligation with a value equal to more than twice the share capital (applies only to limited liability companies). Transactions carried out without the requisite shareholder approval are invalid.

The articles of association of a company may impose additional restrictions on transactions such as requirements for shareholder approval for share transfers or asset transactions above a certain value. Transactions carried out in breach of the articles of association are valid but the management board members may be held liable for such breach.

Minority shareholders subject to a squeeze-out in a private joint-stock company enjoy certain appraisal rights. In particular, a minority shareholder who does not agree with the price proposed by the expert (appointed either by the shareholders' meeting or the court) may apply to the court for the appointment of another expert to determine a fair price.

Generally, company merger and division plans are examined by a court-appointed expert. Although there is no individual shareholder right to demand the appointment of an expert, the expert valuation is required unless all the shareholders of the companies involved agree to forego this formality.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Unsolicited takeovers are rare on the Polish market. Polish law does not distinguish between hostile or recommended takeovers and, as a result, anti-takeover devices are not explicitly regulated. Besides encouraging the shareholders not to subscribe to the tender offer in the management board opinion on the bid, the management board acting alone or with the assistance of the supervisory board or the major shareholders may take certain measures to protect the company against a hostile takeover bid before it is announced as well as after its announcement. Such measures may include:

- agreements on high severance payments for dismissed management board members;
- agreements with the major shareholders under which the shareholders undertake not to sell shares to anyone other than the signatories of the agreement;
- confering upon an individual shareholder specific rights, in particular, the right to appoint or remove members of the management or supervisory board;
- increasing the share capital by issuing new shares to increase the cost of acquisition. The discouraging effect may be reinforced if new shares are issued to the shareholder least likely to accept the tender offer (by depriving the other shareholders of their pre-emptive rights);
- selling valuable company assets to decrease the company's value;
- purchasing shares in the acquiring company in a number granting the right to adopt a resolution suspending the further acquisition of the company's shares;
- acquiring companies or businesses in the acquiring company's sector to create anti-trust law obstacles; or
- acquiring and redeeming the company's own shares. Redemption raises the price of the remaining shares, thereby making the bid less favourable for the shareholders.

In practice, if the management board supports a takeover bid, it is more willing to disclose to the bidder the company's documents during the due diligence process.

Moreover, on 30 September 2015, the Act on Control of Certain Investments came into force to protect strategic Polish companies from hostile takeovers. For further details, please see question 11.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up and reverse break-up fees are not common in Poland but they are permissible as long as they are not excessive and do not breach generally applicable legal principles such as the principle of social co-existence. A break-up fee may be reduced by a court if it is found to be grossly excessive. In practice, the management board of the target is unlikely to agree to pay a transactional break-up fee because it would be difficult for it to justify that this is in the best interests of the target.

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11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Government agencies may influence business combinations in relation to certain strategic companies.

Golden shares, which governments use to maintain a certain level of control of privatised companies, especially those operating in strategic sectors, are still widespread among EU countries, with Poland being no exception. However, as such shares are an obstacle to the free movement of capital within the EU, they may only be maintained in certain justified circumstances, such as national security.

In response to ECJ rulings regarding golden shares, in 2010 Poland adopted legislation pursuant to which the Minister of the State Treasury may object to the disposal of a business or vital assets of companies in which the state is a direct or indirect shareholder. These regulations apply only to companies operating in strategic sectors such as energy, oil or gas fuels.

Moreover, new legislation aimed at protecting strategic Polish companies from hostile takeovers was introduced by the Polish parliament in the form of the Act on Controlling Specific Investments dated 24 July 2015. The need for such regulations was recognised in 2012, after the Russian company Acron bid for the Polish chemicals conglomerate, Grupa Azoty. This act obliges investors to notify Poland's Minister of Energy or Prime Minister of their intention to buy shares in a strategic company. The relevant authority then has 90 days to either allow or block the deal. The list of strategic companies has been determined by the Council of Ministers with the ordinance dated 8 December 2016 and includes seven Polish companies in the energy, oil, gas, fuel and chemicals.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Generally, business combinations may be subject to conditions agreed by the parties. There is no explicit list of permissible conditions but all conditions should comply with the general principles of law, such as good faith and fairness, and the fulfilment of a condition should not be subjective or at the sole discretion of one of the parties.

Under Polish law, a share or asset acquisition agreement can either be: preliminary in nature and require the execution of a second agreement transferring the shares or assets, or final in nature and only subject to the fulfilment of conditions precedent (if any). However, as the transfer of real estate under Polish law cannot be conditional, when real estate is one of the assets to be transferred and the transaction is subject to conditions, a preliminary acquisition agreement is executed followed by a final transfer agreement.

Tender offers can be conditional or unconditional. The most common tender offer conditions are the adoption of a shareholder or supervisory board resolution, the execution of a specified agreement by the target, regulatory clearance, or the bidder acquiring a minimum number of shares. However, the financing of the tender offer cannot be conditional (it must be secured at the time the tender offer is announced).

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

With regard to business combinations of non-listed companies, transactions may be conditional upon the buyer obtaining financing for the transaction. It is also common for acquisition documents to include a buyer's representation that it has the financial means to pay the purchase price. Escrow arrangements are also frequently used.

Provided certain requirements are met, limited liability companies and joint-stock companies can provide financial assistance for the acquisition of their shares, in particular by advancing funds or providing loans or security.

When a tender offer is announced the bidder must already have committed funding for all the tendered shares. This committed funding must be documented by a certificate issued by a bank or other financial institution that granted the funding or acted as an intermediary in the granting of the funding.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Minority shareholders of limited liability companies may not be squeezed-out. However, the articles of association of a limited liability company may provide for the possibility of a forced buy-back of shares in certain situations. Also, shareholders holding more than half of the share capital may apply to the court for the expulsion of a minority shareholder (or shareholders if allowed by the articles of association) with good cause. The shares of the expelled shareholder are taken over by the remaining shareholders or third parties for a fair market price as determined by the court.

Unless the articles of association provide more stringent requirements, minority shareholders of private joint-stock companies may be squeezed-out if: they hold no more than 5 per cent of the shares, the majority shareholders hold at least 95 per cent of the shares, and there are no more than five majority shareholders each holding not less than 5 per cent of the shares. The milestone steps of this squeeze-out procedure are:

- adoption of a squeeze-out resolution at a general shareholders' meeting by a qualified majority of 95 per cent of the votes (one share, one vote principle) – the general shareholders' meeting may be held at any time subject to three weeks' notice (two weeks' notice if all issued shares are registered shares and the meeting may be called by registered mail or courier);
- announcement of the squeeze-out resolution together with a call to deposit the share certificates of the squeezed-out shares with the company or a brokerage house;
- valuation of the squeezed-out shares either by an expert appointed by the general shareholders' meeting or the court (within the time period agreed with the company or set by the court) and announcement of the squeeze-out price;
- deposit of the share certificates by the squeezed-out shareholders with the company or a brokerage house (within one month of the announcement of the squeeze-out resolution for those not present at the meeting);
- payment of the squeeze-out price by the majority shareholders to the company – within three weeks of the announcement of the squeeze-out price; and
- transfer of share ownership and possession of the deposited share certificates to the majority shareholders and release by the company of the squeeze-out price to the minority shareholders – after the company receives the full purchase price (if the minority shareholders do not deposit all share certificates relating to the squeezed-out shares, the management board may cancel these share certificates and issue new ones in their place).

A different squeeze-out procedure applies to the minority shareholders of a public company. A majority shareholder of a public company who individually or together with its group companies and concert parties reaches or exceeds 90 per cent of the target's total vote, may purchase the remainder of the shares within three months from the date this threshold is reached or exceeded. In general, the tender offer price rules also apply to the squeeze-out price. Prior to the announcement of the squeeze-out, the offeror obtains collateral for the total squeeze-out price, documents the collateral with a certificate issued by a bank or other financial institution, and retains a brokerage house. The brokerage house notifies the Financial Supervisory Authority and the Warsaw Stock Exchange of the planned squeeze-out and its terms not later than 14 business days prior to the announcement of the squeeze-out. The squeeze-out announcement sets the terms of the squeeze-out, including the squeeze-out date. The squeeze-out date is the date on which the transfer of shares and purchase price occurs. The minority shareholders' shares are blocked on their securities accounts as soon as the Polish

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Securities Depositary is notified of the squeeze-out until the squeeze-out date.

Moreover, minority shareholders of both private and public joint-stock companies enjoy reverse squeeze-out rights if certain conditions are met.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

The structure of cross-border transactions is usually tax driven. It is typical for share acquisitions to be made through a company domiciled in a jurisdiction with which Poland has a favourable treaty on the avoidance of double taxation and asset deals to be made through a Polish subsidiary.

Sizeable cross-border acquisitions that significantly affect trade in the EU may be subject to merger control proceedings at the EU level instead of the national level in accordance with the EC Merger Regulation. Such transactions cannot be completed without clearance by the European Commission. Clearance depends on whether the transaction would significantly impede competition in the EU or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

Poland has implemented the EC Cross-Border Mergers Directive into the Commercial Companies Code, which now provides the framework for mergers of Polish companies with other EEA companies (cross-border mergers). The procedure applicable to cross-border mergers is similar to the procedure applicable to domestic mergers.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The relevant waiting and notification periods for minority squeeze-out procedures are discussed in question 14.

The tender offer procedure imposes the following timetable. The brokerage house notifies the Financial Supervisory Authority and the Warsaw Stock Exchange of the offeror's intention to announce the tender offer no later than 14 business days before the opening of the subscription period. No later than within 24 hours of this notification the tender offer is disclosed to the information agency that publishes the tender offer. If the tender offer relates to a subscription exceeding the thresholds of 33 per cent or 66 per cent, the management board of the target publishes its opinion on the announced tender offer no later than two business days before the opening of the subscription period. The subscription period applicable to a tender offer cannot be shorter than 14 calendar days (or 30 calendar days if the tender offer is for all the shares) nor longer than 70 calendar days.

In relation to other share or asset deals, obtaining the relevant corporate consents for the contemplated business combination may also result in the need to convene a shareholders' meeting or a management or supervisory board meeting.

In relation to domestic and cross-border mergers, the waiting period between the announcement of the merger plan or the notification of the shareholders of the intended merger and the shareholders' meetings at which the merger is put to a vote is one month. In the case of a division, the applicable waiting period between the announcement of the division plan or the notification of the shareholders of the intended division and the shareholders' meetings at which the division is put to a vote is six weeks.

If an expert opinion relating to the merger (including a cross-border merger) or division is commissioned, this may further extend the aforementioned waiting periods. Such an opinion is prepared no later than within two months of the appointment of the expert by the court, which appointment occurs after the merger plan is filed with the court. Moreover, the merger and division timetable has to take into consideration the right of the shareholders to inspect certain merger and division documents, including the merger or division plan as well as the expert opinion, for a period of one month prior to the shareholders' meeting at which the merger or division is put to a vote.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Business combinations involving companies operating in certain regulated sectors such as the financial, aviation, and gaming sectors are subject to additional statutory restrictions.

In accordance with the Banking Law, a contemplated acquisition of an equity stake equalling or exceeding 10, 20, 33 or 50 per cent in a Polish bank may be vetoed by the Financial Supervisory Authority. The same restrictions apply to share acquisitions of insurance companies pursuant to the Insurance Law.

In accordance with the Act on Trading in Financial Instruments, in general the shares of a stock exchange may only be held by specified entities such as the State Treasury, banks, insurance companies and issuers of securities traded on the exchange. Additionally, the Financial Supervisory Authority may veto an intended acquisition of an equity stake equalling or exceeding 5, 10, 15, 20, 25, 33 or 50 per cent in a stock exchange. Moreover, the Financial Supervisory Authority may veto the contemplated acquisition of control or a significant stake in a securities depositary and clearing house as well as a brokerage house. The triggering equity thresholds in the case of a securities depositary and clearing house are 10, 20, 33 and 50 per cent, whereas the triggering equity thresholds in the case of a brokerage house are 10, 20, 33 and 50 per cent.

In the aviation sector, the EU restrictions on foreign ownership of air carriers apply to Polish air carriers. In general, this means that Polish air carriers must be controlled directly or indirectly by EU entities. A Polish air carrier may lose its operating concession if it is the subject of a merger or takeover that results in it no longer complying with the aforementioned ownership requirements. Foreign ownership restrictions also apply to public airport operating companies. Moreover, a contemplated purchase of a controlling or significant stake in a company that owns a public airport or a majority stake in a public airport operating company must be notified to the Transportation Minister who may veto the transaction. Similarly, the Transportation Minister may also veto asset or business (or organised part thereof) disposals by public airport owners or public airport operating companies.

In the gaming sector, foreign ownership restrictions apply to companies operating certain types of licensed gaming activities. Additionally, changes in the ownership structure of the company operating a licensed gaming activity must be notified within seven days to the Minister of Finance and require his or her consent.

18 Tax issues

What are the basic tax issues involved in business combinations?

Asset deals

The tax effects of an asset deal depend on whether it constitutes a transfer of bare assets or a transfer of a business or organised part thereof. In practice, the classification of an asset deal may raise numerous doubts. Therefore, it is usually advisable to seek a tax interpretation.

The seller's income generated as a result of a sale of a business or an organised part thereof is subject to the corporate income tax rate of 19 per cent. Polish tax-resident companies (incorporated or managed in Poland) are subject to corporate income tax on all sources of their worldwide income, while non-residents are subject to corporate income tax only on income derived from the territory of Poland.

The sale of a business or an organised part thereof is not subject to VAT but is subject to the tax on civil-law transactions (at a rate of 1 per cent or 2 per cent of the market value of the asset, depending on the type of asset transferred). The civil-law transaction tax is payable by the buyer.

Generally, the buyer of a business or an organised part thereof is jointly and severally liable with the seller for any tax arrears relating to the business even if such arrears relate to the period prior to the business acquisition, but this liability may be limited or excluded by contractual indemnification or by obtaining a certificate stating the amount of the seller's tax arrears prior to the transaction. Buyers of bare assets are not jointly and severally liable with the seller for any tax arrears.

The seller's income generated as a result of a sale of assets is subject to corporate income tax of 19 per cent, and the sale of specific assets is

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subject to VAT at the basic rate of 23 per cent unless a reduced VAT rate or VAT exemption is applicable. For example, there is a VAT exemption for buildings and other structures under certain conditions. If a VAT exemption applies, the sale of the assets is subject to the tax on civil-law transactions at the rate of 2 per cent, which is payable by the buyer.

Transfer-pricing provisions may apply to transactions between related parties if they enter into transactions that are not at arm's length. In such cases, the tax authorities have the right to adjust the level of declared income.

Share deals

Generally, the seller's income generated as a result of a share sale is subject to corporate income tax of 19 per cent. However, if the seller does not have Polish tax residency, the income is taxed in Poland only if the shares are sold on the Polish stock exchange or if Polish real estate is the principal asset of the target.

The sale of shares is not subject to VAT but is subject to the tax on civil-law transactions at the rate of 1 per cent of the market value of the shares. Such tax is paid by the buyer. However, there are some exemptions from this tax in relation to a sale of shares in a joint-stock company, such as when a sale is made to domestic or foreign investment firms or conducted through such firms, conducted in organised trading or conducted outside organised trading by investment firms if they acquired the shares in organised trading.

Merger

With few exceptions, universal succession of tax rights and obligations applies to a company formed through a merger of companies as well as a company who acquires another entity through a merger.

In general, mergers of companies who are tax resident in Poland or elsewhere in the EU or EEA are tax neutral for the acquirer, the target as well as the shareholders of the target and merging companies. Moreover, if the acquiring company obtains assets of a higher value than the value of the shares allocated in the exchange to the shareholders of the target, such excess in the value of the assets received is not treated as income unless the acquirer holds less than 10 per cent of the target's shares or tax avoidance is one of the principal reasons for the transaction.

Division

With few exceptions, universal succession of tax rights and obligations applies to a company division if the assets assumed as a result of the division constitute an organised part of business. If such assets do not constitute an organised part of business, the acquirers are jointly and severally liable for the tax arrears of the divided company, up to the net value of the acquired assets.

In general, divisions of companies who are tax resident in Poland or elsewhere in the EU or EEA are tax-neutral for the acquirer, the divided company as well as the shareholders of the divided company and the acquirer, if the assets assumed as a result of the division constitute an organised part of business. If such assets do not constitute an organised part of business and the shareholders of the divided company receive shares of a value in excess of the value of the transferred assets, this excess may be treated as income of such shareholders. Moreover, if the acquiring company obtains assets of a higher value than the value of the shares allocated in the exchange to the shareholders of the divided company, such excess in the value of the assets received is not treated as income unless the acquirer holds less than 10 per cent of the divided company's shares or tax avoidance is one of the principal reasons for the transaction.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The employment contracts entered into by the target with its employees remain unaffected by a share deal. However, a prospective purchaser may be affected by change of control clauses in the target's contracts with its key employees or senior executives. Moreover, in the case of a tender offer for shares, the bidder and the management board should notify their employees of the announced tender offer.

In the event an asset deal entails a transfer of a work establishment, or an organised part of it, the employees assigned to the transferred assets are automatically transferred to the acquirer (article 23(1) of the Labour Code). Such employees should be notified of the contemplated transfer at least 30 days in advance. Generally, works councils and trade unions should also be notified and consulted prior to the transaction. Following the transfer, the employment contracts of the transferred employees remain unchanged, and they retain all their employment-related rights accrued prior to the transfer, including those connected with continuous employment. Importantly, the employment contracts of the transferred employees may be amended following the transaction. However, amendments that are disadvantageous to the employee can only be made in accordance with the provisions of the Labour Code and the transfer of the work establishment cannot be the sole or main reason for the amendments. A transferred employee may not refuse to work for the new employer, but has a right to terminate his or her employment agreement within two months of the transfer upon seven days' advance notification.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

If the target of a share deal is insolvent or threatened with insolvency, the legal due diligence process should ascertain whether restructuring or bankruptcy proceedings have been initiated and, if so, what the status of these proceedings is in order to assess the time, difficulty and cost of terminating such proceedings. The costs of repaying the target's debts should also be the subject of a detailed financial due diligence.

If the seller is insolvent or threatened with insolvency, it is also prudent to enquire if restructuring or bankruptcy proceedings have been formally initiated. In general, following the filing of the bankruptcy or restructuring petition but prior to the declaration of bankruptcy or the initiation of restructuring proceedings, significant asset disposals will either be prohibited or require the approval of a court-appointed supervisor or administrator. In restructuring proceedings, the seller is entitled to dispose of significant assets in accordance with the court-approved restructuring plan or upon approval of the creditors' committee. If liquidation bankruptcy is declared, the bankruptcy receiver is granted the authority to dispose of the seller's assets but the terms of the disposals must be approved by the judge-commissioner and, if appointed, the creditors' committee. Typically the bankruptcy receiver disposes of the assets by way of an unrestricted sale, at a public auction or at a public tender and is bound to sell the seller's business as a whole or at least as an organised part. In general, the assets sold in liquidation bankruptcy proceedings are sold free of encumbrances which may have been established prior to the sale. The purchaser acquiring the assets of the liquidated bankrupt is also not responsible for any tax arrears related to such assets.

Since 1 January 2016 a pre-pack sale of a bankrupt business is available, opening the possibility of faster and greater satisfaction of creditors and considerably shortening the duration of the bankruptcy proceedings. The motion for approval of the sale must be recognised simultaneously with the bankruptcy petition. The acceptation of the motion is only possible if, as a result of the pre-pack sale, creditors are satisfied to a greater extent than would be the case in a liquidation of assets.

If an arrangement within the course of bankruptcy proceedings is concluded, asset disposals are usually part of the arrangement with the creditors which must to be approved by the judge-commissioner and the insolvency court.

Moreover, there is a risk that during bankruptcy proceedings certain business combinations to which the bankrupt was party prior to bankruptcy are set aside, such as asset disposals made during the one year period prior to the bankruptcy petition filing if these were gratuitous or at an undervalue, and related-party transactions if these were performed within the period of six months prior to the bankruptcy petition filing. It is also possible to void transactions to which the bankrupt was party up to five years prior to the bankruptcy petition filing if these transactions were detrimental to the creditors.

Similar rules regarding the voidance of transactions apply in remedial proceedings, which are one of the four types of restructuring proceedings introduced on 1 January 2016 by the new Restructuring Law.

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Update and trends

Compared with 2015, which was a very busy year for Polish M&A with the value of deals growing by 79 per cent to €6.9 billion, 2016 has turned out to be less intense. Concerns about Poland's right-wing government continue. Foreign investors are mainly worried about the growing hostility between Warsaw and Brussels and seem to keep delaying major investments, waiting for the situation to settle. Moreover, many problems of the European Union, like the immigration and financial crisis, just don't seem to be going away and are likely to affect M&A in 2017.

Having said that, whatever criticisms one might have about the current government, it is dedicated to creating a business friendly environment in Poland by using tax incentives and simplifying some aspects of business regulations. Poland has remained a positive outlier in the CEE and there is simply no evidence that this will dramatically change in the coming months. Poland's largest PE deal by value, and the largest PE deal in CEE region in 2016, was the acquisition of online retailer Allegro for €3 billion by UK-based PE firms Cinven Partners, Permira Advisers and Mid Europa Partners from South African media company Naspers. Also, the financial services sector in Poland is likely to continue its wave of M&A, as the government is pursuing 'repolonisation', which aims for 70 per cent of Poland's financial services to return to domestic hands, and is aggressively pursuing divestments by foreign-owned subsidiaries.

The fact remains that Poland still beats the EU average in terms of GDP growth and, amid the World Bank's estimations of an increase in economic growth to 3.1 per cent in 2017, up from 2.5 per cent in 2016, we believe that Poland will continue to be a positive draw for investors.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Both individuals and organisations, including companies, may be criminally liable for corrupt practices in relations with public officials and institutions (including domestic and foreign) as well as companies (in particular, receiving or giving bribes as well as masterminding, attempting, instigating, aiding and abetting bribery) under the Criminal Code. Further to the Act on Liability of Legal Persons for Committing Criminal Offences, legal persons may bear criminally liability if a person acting on their behalf is guilty of corruption. In addition to being subject to criminal forfeiture of all proceeds of crime, legal persons may be fined up to approximately €1.16 million; however, it will be no more than 3 per cent of their turnover in the financial year in which the criminal offence was committed. Furthermore, the court may impose sanctions for up to five years relating to promotional activities, receiving public grants and subsidies or participating in the public procurement process. Finally, the court may, as an interim protective measure, put on hold mergers, divisions or transformations of companies as well as disposals or encumbrances of their assets. As regards individuals acting in their own name or on behalf of organisations, the offences are punishable by both fines or imprisonment.

Poland applies many restrictive measures that target designated countries, individuals and entities on the basis of EU regulations and specific legislation implementing UN sanctions. Therefore, certain business combinations falling within the scope of such measures are limited in Poland. The EU sanctions against Russia over the Ukraine crisis are an example of recent economic sanctions which may affect some business combinations as they prohibit, among others, EU nationals and companies from buying or selling shares of five major Russian banks, three major Russian energy companies and three major Russian defence companies, their non-EU subsidiaries and those acting on their behalf or under their control.

Under the Criminal Code, money laundering is a criminal offence punishable by imprisonment (in the case of individuals). Any person, including legal persons, profiting from such offence will be subject to criminal forfeiture with respect to all proceeds of crime. The Act on Liability of Legal Persons for Committing Criminal Offences applies in the same way as it does to corruption. However, unlike in some other jurisdictions, in Poland the offence of money laundering may only be committed intentionally unless the person committing such offence is an employee or representative of a bank, financial institution or other entity under statutory obligation to register potential money-laundering transactions.

Both share and asset deals fall within the scope of the Anti-Money Laundering Act, and as such these transactions are screened by financial institutions and other obliged persons, and may be temporarily blocked by the General Inspector of Financial Information on suspicion of money laundering. The latter may block transactions for up to 72 hours, while the Public Prosecutor may continue with this interim measure for up to three months.

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Portugal

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1 Types of transaction

How may businesses combine?

Companies may combine their businesses through several processes under Portuguese law including, in particular, mergers and acquisitions.

Mergers may be implemented through:

- absorption – the transfer of all assets and liabilities pertaining to one or more companies into a pre-existing company;
- consolidation – the transfer of all such assets and liabilities to a new company incorporated within and for the purpose of the merger; and
- merger-demerger – the spin-off of certain assets and their subsequent merger into either a pre-existing or a newly incorporated company.

Acquisitions may be structured as:

- share deals, whereby shares representative of the share capital of a company are acquired;
- assets deals, through the execution of a sale and purchase of certain assets; and
- transfers of going concern, which entail the transfer of the assets, rights and liabilities linked to the transferred going concern.

The acquisition structure of the transaction may include several features, including but not limited to tax assessment, due diligence exercises on the companies involved, and applicable requirements and formalities involved in the deal.

Joint ventures and consortium agreements are other possible processes of combination of businesses.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main Portuguese laws and regulations with relevance to business combinations are (all as amended from time to time):

- the Companies Code, approved by Decree-Law No. 262/86, of 2 September 1986;
- the Commercial Registry Code, approved by Decree-Law No. 403/86, of 3 December 1986;
- the Securities Code, approved by Decree-Law No. 486/99, of 13 November 1999;
- the Insolvency and Corporate Recovery Code, approved by Decree-Law No. 53/2004, of 18 March 2004;
- the Competition Law, approved by Law No. 19/2012, of 8 May 2012;
- the Employment Code, approved by Law No. 7/2009, of 12 February 2009;
- the Civil Code, approved by Decree-Law No. 47 344, of 25 November 1966;
- Decree-Law No. 231/81, of 28 July 1981, which governs consortium agreements;
- Law No. 4/73, of 25 August 1973, which governs joint ventures;
- the Corporate Income Tax Code, approved by Decree-Law No. 442-B/88, of 30 November 1988;
- the Value Added Tax Code, approved by Decree-Law No. 394-B/84, of 26 December 1984;
- the Stamp Duty Code, approved by Law No. 150/99, of 11 September 1999; and
- Decree-Law No. 215/89, of 1 July 1989, on tax benefits.

Additionally, laws and regulations applicable to specific sectors (eg, financial services, telecommunications or energy) and European Union laws (eg, on cross-border mergers) are also relevant.

3 Governing law

What law typically governs the transaction agreements?

European Union Regulation (EC) 593/2008 (Rome I) is applicable in Portugal – Rome I's scope includes situations involving a conflict of laws within contractual obligations in civil and commercial matters between two parties domiciled in the European Union.

Under Rome I, parties to a contract are effectively free to choose the law governing it, save to the extent such choice conflicts with overriding mandatory or public policy regulations. Where parties do not choose what law will govern the transaction, the applicable law is the law of the country where the party required to effect the characteristic performance of the contract has its habitual residence.

When one of the parties is domiciled in Portugal and the other party is not domiciled in the European Union, the conflict of laws is solved by Portuguese national law. Article 41 of the Civil Code states that the parties have the right to agree on the law they intend to govern the terms and conditions of the agreement to be entered into. Nevertheless, parties to an agreement can only choose a law that corresponds to a serious interest they have or that has a connection deemed acceptable under private international law with any element of the legal transaction.

Where the parties do not specifically agree on the law that shall govern the agreement, the law of the parties' domicile shall apply and, where the parties do not have residence in the same country, the applicable law shall be that of the place of execution of the agreement. In any event, there are certain (domestic) overriding mandatory laws and public policy provisions that shall apply (such as in respect of the capacity and powers of each contracting party) irrespective of the law chosen by the parties.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Combinations of companies may involve filings: (i) with the Commercial Registry, if the relevant facts are subject to registration (eg, mergers); (ii) the Competition Authority, in case the thresholds for merger control are reached (based on combined market share and combined turnover); and (iii) with sectorial regulators, such as the Bank of Portugal, the Insurance and Pension Funds Authority or the Energy Services Regulator.

Public offer rules will apply in case the business combination involves (i) an offer of securities addressed, wholly or partially, to unidentified recipients; (ii) an offer is addressed to all the shareholders of a public company, even if its share capital is represented by nominal shares; (iii) an offer that, wholly or partially, is preceded or

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accompanied by prospection or solicitation of investment intentions from unidentified addressees or by promotional material; or (iv) an offer addressed to at least 150 people who are retail investors resident or established in Portugal.

If of a public offer, the business combination may involve the approval of a prospectus and the prior registration of tender offer by the Securities Commission.

In asset deals involving the transfer of real estate assets, filings must further be made with the Real Estate Registry Office.

The fees applicable in each case are determined in accordance with the corresponding regulations. In addition, notarial fees may also be applicable in case the business combination structure entails the execution of any documents before a public notary.

Stamp duty is also applicable in a number of situations, including in some asset deals and the contracting of loans or guarantees to finance the transaction.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

As a general principle, combinations of privately held companies do not require disclosure of information to the public.

However, in the case of mergers, a merger project must be prepared by the management of the companies involved, registered with the Commercial Registry Office and published. The merger project shall include the information required by law, including balance sheets, changes in the by-laws, means of protection of creditor rights, etc.

Additionally, publicly traded companies must disclose any inside information that they possess. This general rule may entail the obligation to disclose to the market the main terms and conditions of any type of business combination, in case such transaction is deemed to be inside information of the company.

Furthermore, business combinations may involve the disclosure of information in a prospectus, in case they are executed through a voluntary tender offer or trigger the duty to launch a mandatory tender offer. Information to be included in the prospectus is exhaustively detailed by law and includes information on parties related to the offeror, plans of the offeror to the target after the combination, plans of the offeror as regards employees of the target, etc.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Shareholders of public companies must disclose their holdings whenever they reach a shareholding of 10 per cent, 20 per cent, one-third, 50 per cent, two-thirds and 90 per cent of the voting rights in the capital of such companies or when said shareholders reduce their shareholding to a percentage lower than any of the referred.

In the case of public companies that are listed on a stock exchange, the disclosure requirements apply whenever a shareholder reaches or reduces a shareholding of 2, 5, 15 and 25 per cent of the voting rights.

Additional thresholds may apply due specific rules that apply to long positions created by certain financial instruments (swaps, options, etc).

In some sectors of activity, the acquisition of large shareholdings is subject to notification to the regulatory authorities (eg, the Bank of Portugal, when 5 per cent of the share capital or voting rights is acquired) and even to their non-opposition prior to being implemented (whenever the shareholder intends to acquire significant influence).

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

According to the Companies Code, the directors have duties of care and diligence, as well as a general duty of loyalty, in the interest of the company and with consideration to the long-term interests of the shareholders and the interests of employees, creditors, clients and other stakeholders.

Additionally, directors must comply with information duties towards shareholders: (i) at shareholders' meetings, where any shareholder is entitled to ask for and receive reliable information on the matters in the agenda; (ii) in corporations, where shareholders holding more than 1 per cent of the share capital must be provided upon their request with certain documentation concerning the company (including the company's accounts, minutes of general meetings, etc).

Regarding mergers, as mentioned above the board of directors has the responsibility of preparing the merger project taking into account the interests of the stakeholders in the company.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Mergers have to be approved by the general meeting of each of the merging companies, by a majority of three-quarters of the votes in limited liability companies and of two-thirds of the votes in corporations. Additionally, the registration of the merger depends on the consent given by the shareholders negatively affected by the merger in case there is (i) an increase in shareholders' duties, (ii) an impact on special rights of certain shareholders or (iii) a change in the proportion of the shareholdings. The law or the by-laws may attribute an appraisal right to a shareholder voting against the merger.

In case a company reaches, for whatever reason, 90 per cent of the share of another company, the remaining shareholders have an appraisal right. There is a similar provision for certain situations where, following a tender offer, the offeror reaches 90 per cent of the voting rights of the public company and 90 per cent of the voting rights that were subject to the offer.

These appraisal rights give minority shareholders the opportunity to leave the company at a fair price, that may be determined by an independent auditor unless the fair price is identifiable under certain criteria set out in the law (eg, average market price).

9 Hostile transactions

What are the special considerations for unsolicited transactions?

In the case of public companies, potential defensive measures to be adopted by the board of directors of the target company in response to an unsolicited offer are subject to certain limitations. From the moment the board of directors is aware of an offeror's decision to launch a tender offer over more than one-third of the securities of a certain class, the powers of the board of the target company are subject to certain constraints that are applicable until the assessment of the offer results. In particular, the board of directors cannot perform during this period any actions that may materially affect the financial situation of the target company – as long as such actions are not deemed as the exercise of the day-to-day management of the company – and that may significantly affect the goals announced by the offeror.

However, the board may search for competing offers.

In private companies in general, it is common to establish limitations to the transferability of the shares, such as right of first refusal of existing shareholders in case of transfer of shares to third parties.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees and reverse break-fees are not very common in Portugal, although they are not prohibited and breaking off negotiations without cause may entitle the counterparty to reimbursement of frustrated costs according to Portuguese Civil Law. One reason for parties not using break-up fees in most transactions may be that break-up fees, when paid by the target (but not by its shareholders), could potentially violate mandatory Portuguese corporate law, which prohibits the financing (by provision of funds or guarantees) of the subscription or acquisition of shares in the target, subject to specific exceptions. Any

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agreements entered into or acts performed in breach of the aforementioned limitation are deemed to be null and void.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Government may influence combinations through the use of 'golden shares', which allow the Government to hold influence in companies at least in some strategic matters. In Case C-212/09 *Commission v Portugal,* 2012, they were deemed unlawful by the European Court of Justice and no longer exist in Portuguese companies.

In addition to competition and sector specific regulation, within business combinations affecting public service concessionaires the government may have decisionmaking powers that affect the terms and conditions of the combination.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

According to the Securities Code, tender offers and exchange offers may be subject to certain conditions, provided that such conditions correspond to a legitimate interest of the offeror and do not affect the normal functioning of the market. Nevertheless, conditions whose verification depends exclusively on the offeror are not admissible.

Conditions to which a tender offer could be subject may include success conditions (based on the number of recipients that accept the offer), legal conditions (based on mandatory authorisations to be granted), etc. The offeror should disclose the conditions to which the offer is subject in the preliminary announcement of the offer.

The possibility to subject mandatory tender offers to conditions is more restricted, considering the obligation of the offeror to launch the offer. In particular, success conditions should not be valid in the context of a mandatory tender offer.

In case the consideration for a public offer consists of cash, the offeror should deposit the total amount of the consideration in a financial institution or present an appropriate bank guarantee before registration of the offer, thus rendering inadmissible the conditional financing of the offer.

In the context of business combinations between private companies, in general the parties are free to subject the business to conditions, as well as the financing, provided that such conditions are not contrary to the law. Conditions that are physically or legally impossible are also forbidden.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Obtainment of financing for a transaction commonly represents a condition precedent to the completion of the transaction, although sellers may be reluctant to accept it owing to potential constraints that it may cause as regards the execution of the agreement. There are also transactions in which the parties agree to defer the payment of part of the purchase price to a time after the completion of the transaction.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Any shareholder of a listed company that, following a general tender offer, reaches or exceeds 90 per cent of the voting rights corresponding to the share capital of the target company, as well as 90 per cent of the voting rights covered by the offer, may in the subsequent three months acquire the remaining shares for a fair consideration in cash (squeeze-out).

The acquisition becomes effective upon publication, by the interested party, of the registration of the squeeze-out with the Securities Commission. Additionally, the use of this squeeze-out mechanism entails the loss of the target company's public company status, as well as the exclusion from trading on a regulated market of the shares or other securities carrying rights to shares, being the readmission forbidden for a period of one year.

Shareholders reaching at least 90 per cent of the share capital of a private company may also benefit from a squeeze-out mechanism foreseen in the Companies Code. Within 30 days of reaching the mentioned shareholding, the shareholder shall notify such fact to the company and afterwards implement a squeeze-out acquisition.

The shareholder will have the right to, within a period of six months, make an offer to acquire the outstanding shares, for a consideration in cash that shall be calculated in accordance with a report prepared by an independent auditor.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Directive 2005/56/EC on cross-border mergers was implemented in Portugal by Law No. 19/2009, of 12 May 2009, thus clarifying certain aspects of cross-border mergers within the European Union and involving Portuguese entities. One of the most important features of these rules is the prior certificate of legality of the merger (which is issued by the commercial registry services prior to the registration of the merger).

Issues related to the need to comply with formalities in different jurisdictions and which may be contradictory and issues related to conflicts of laws and competent courts continue to raise challenges in the implementation of cross-border transactions with parties outside the European Union.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In accordance with the law, the approval of the merger by the general meeting must occur in a period of 30 days counting from the registration of the merger project. After the publication of the registration of the merger project, the creditors of the merging companies whose credits precede the publication of the merger project may judicially oppose to the merger during a one-month period after said publication.

Update and trends

Although significant measures have been taken to address the economic crisis in Portugal, economic growth and recovery remain fragile and at risk. Continuing disruptions in the global economy and in the global markets, or a change in the current lending reference rates or in the European Central Bank's asset purchase programmes or its targeted longer-term refinancing operations may, therefore, have a material adverse effect on the mergers and acquisitions market in Portugal. As a result of the crisis, Portuguese companies have increasingly aimed at external markets, with relevance to Angola. However, with the recent crisis affecting the country, additional pressure has been placed on the Portuguese economy.

Notwithstanding the above, there have recently been interesting signs of recovery, most notably the recent cut in the Portuguese budget deficit to the lowest level in four decades.

As a result of the adaptation and ongoing restructuring of the Portuguese economy, the mergers and acquisitions market is expected to continue to be very active, notably in what concerns transactions affecting the banking and financial sectors that are required owing to resolution measures and other recapitalisation and restructuring commitments undertaken by the Portuguese government and financial entities, transactions concerning distressed assets maintained in banks' and other players' balance sheets, and the overall process of deleveraging under way in the Portuguese economy.

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17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Yes, transactions affecting companies from the banking, insurance and pension funds, financial services (eg, dealers and brokers), energy, telecommunications, water treatment and supply or healthcare and pharmaceuticals sectors are subject to additional rules.

18 Tax issues

What are the basic tax issues involved in business combinations?

Business combinations generally encompass the transfer of assets and liabilities from which tax consequences may arise. Companies involved in a business combination must consider several tax issues namely the tax base and fair market value of the assets being transferred, transferability of carried-forward tax losses and tax benefits. To undertake a tax due diligence prior to the conclusion of the negotiations is important not only to identify potential issues that may impact on the conditions of the transaction but also to guide the parties on choosing the best transaction model from a tax perspective (eg, asset deal v share deal).

The Portuguese Corporate Income Tax Code set forth a special tax regime (tax neutrality regime) applicable on eligible transactions such as mergers, divisions, contributions of assets and exchange of shares. In broad terms, the tax neutrality regime allows transactions to be undertaken without triggering tax consequences for any of the parties involved in the business combination.

Furthermore, the Portuguese Tax Benefits Code also provides several tax benefits for corporate restructurings, covering exemption of stamp tax, real estate transfer tax (in transactions involving transfer of real estate assets) and VAT. In certain cases the exemption may also encompass administrative fees and other legal charges.

Therefore, the Portuguese tax system foresees several tax benefits for corporate restructurings either by means of deferred taxation and likewise specific tax exemptions aiming to provide for tax neutrality in pure business decisions.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The Portuguese Labour Code foresees the legal framework regarding the employees' rights regarding situations of transfer of undertaking, specifically under articles 285 and 286, in line with the TUPE regulations (Directive 2001/23/EC). In case of mergers, transfers of business unit, share transfers or other operations, both the transferor and the transferee need to communicate their employees' representative structures – or, if non-existent, the employees themselves – the dates and justifying reasons for the transfer, as well as the legal, economic and social repercussions for said employees.

The obligation to communicate these aspects of the transfer takes place within a reasonable period prior to the effectiveness of the transfer, and at least 10 days prior to the consultation of the employees' representative structures. In fact, the employees' representatives have to be previously consulted in order to issue their opinion regarding the transfer and its consequences to the employees.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Once a company is declared insolvent, the court appoints a judicial administrator to guide the proceedings and, with the cooperation of the creditors, determine the future of the company that may, ultimately, be subject to either a reorganisation plan or a liquidation procedure.

The decision to reorganise the company shall always take precedence if it is deemed to be economically viable and the decision proves to best favour the company's creditors. In this scenario, the company may continue to operate, although on the terms and with the restrictions set out within the recovery plan.

If, on the other hand, the continuation of the company is not deemed to be viable or in the creditors best interests, the company shall be liquidated, whereby the insolvency administrator may decide to sell the company as an ongoing concern or liquidate the estate, so as to distribute the amounts received therefrom among the creditors, in accordance with the court's decision on the lodging, verification, admission and ranking of claims.

It is also to be noted that the Insolvency Code foresees a special recovery proceeding for companies that are facing a difficult economic situation (or a situation of imminent insolvency) but are not yet declared to be insolvent. This proceeding, commonly known as PER, allows companies to restructure and negotiate the terms of the debt held by its creditors while still maintaining their operations.

In spite of the above, in accordance with the Companies Code (article 97/3), a company may not participate in a merger if it is involved in insolvency proceedings.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Criminal Code provides a set of rules punishing the crimes of corruption in the public sector, Law No. 50/2007, of 31 August 2007 establishes offences of corruption in international trade and in the private sector, and bribery of a foreign public official falls under the criminal offence of active corruption damaging international trade, as provided for in Law No. 20/2008, of 21 April 2008.

Additionally, the following Portuguese legislation is the legal framework applicable as measures of anti-money laundering: Law No.

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25/2008, of 5 June 2008, on the Prevention and Sanctioning of Money Laundering and on Prevention and Combating of Terrorism Financing, Notice of the Bank of Portugal 5/2013, on conditions of exercise, mechanisms and procedures considered adequate and necessary for the execution of controls to monitor the fulfilment of legal duties concerning the prevention of money laundering and terrorism financing, and Notice of the Bank of Portugal 9/2012, on the annual report on prevention of money laundering and terrorism financing.

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Serbia

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1 Types of transaction

How may businesses combine?

The two most common types of business combinations in Serbia are purchase of shares in a limited liability company or purchase of shares in a joint-stock company. Serbian law differentiates joint-stock companies in terms of whether their shares are sold on the stock exchange or not. Thus, joint-stock company shares can be acquired on the stock exchange or directly from shares owners.

Businesses may also combine through asset deals, when one entity is acquiring assets of the other company (for example, in a privatisation process, both share deals and asset deals can be an option).

Besides the above-mentioned methods, according to the Law on Companies, businesses may combine through status changes as follows: merger by acquisition, merger by formation of new companies, division and separation.

Merger by acquisition means that one or more companies may be merged with another company by transferring their entire assets and liabilities to that other company. The merged company then ceases to exist without being liquidated.

Merger by formation of new companies means that two or more companies may be merged by formation of a new company, transferring their entire assets and liabilities to that company, whereupon both original companies cease to exist, without being liquidated.

Division of a company can be effectuated by transferring entire assets and liabilities of that company to:

- two or more newly formed companies – division by formation of new companies;
- two or more existing companies– division by acquisition; or
- one or more newly formed companies and one or more existing companies – mixed division.

The transferring company ceases to exist without being liquidated.
A company may be separated by transferring a part of its assets and liabilities to:

- one or more newly formed companies – separation by formation of new companies;
- one or more existing companies– separation by acquisition; or
- one or more newly formed companies and one or more existing companies – mixed separation.

The transferring company continues to exist after completion of the status change.

Pursuant to the Law on Companies, companies can be linked through participation in share capital or partnership interests (share capital linked companies), contracts (contract linked companies) or both capital and contracts (mixed linked companies).

Companies affiliated through one of the previous methods form a group of companies (a concern), a holding or companies with mutual participation in capital.

A corporate group (concern) exists when a controlling company carries on other activities in addition to the management of its subsidiaries.

A holding company implies that a company controls one or more companies, carrying out management and funding of the controlled companies as its sole business activity.

Mutually owned companies are companies in which every company holds a significant equity interest in the other company.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The most important laws governing business combinations are:

- the Law on Companies;
- the Law on Takeover of Joint-stock Companies;
- the Law on Capital Market;
- the Law on Protection of Competition;
- the Law on Privatisation;
- the Law on Contracts and Torts;
- the Law on Investments;
- the Law on Foreign Exchange;
- the Law on Procedure of Registration in Serbian Business Registers Agency; and
- the Law on Pledge Rights over Moveable Assets Entered in the Register.

Furthermore, there are special procedures for acquisition of a bank, insurance company or financial leasing company proscribed by:

- the Law on Banks;
- the Law on Insurance; and
- the Law on Financial Leasing.

All of these laws and other relevant laws are further addressed in question 17.

The Law on Companies regulates the legal status of companies and in particular their establishment, management, status changes, changes in legal form, termination and other issues of importance to their position, legal status of entrepreneurs, business procedures and in part business combinations. It also regulates squeeze-out procedure, transfer of shares in limited liability companies and several other aspects of importance for any acquisition.

The Law on Takeover of Joint-stock Companies regulates the conditions and procedures for the takeover of joint-stock companies based in Serbia, the rights and obligations of participants in acquisition and supervision over implementation of joint-stock company takeover procedure. Furthermore, a rather expanded definition of joint-stock company and details are regulated by rules concerning the number and percentage of shares held by the bidder and persons acting jointly with it. The law distinguishes between 'liquid' and 'illiquid' stocks, based on traffic volume of shares and determines a minimum price for a takeover bid for liquid and illiquid shares.

The Law on Capital Markets governs the public offering and secondary trading of financial instruments, multilateral trading platform, over-the-counter (OTC) market, provision of investment services and investment activities, including licensing and editing of investment companies and other capital market participants, disclosure of financial and other data, and the reporting obligations of issuers and public companies, prohibition of deceptive, manipulative and other illegal acts and acts in connection with the purchase or sale of financial instruments, as well as the exercise of voting rights in relation to securities issued by public companies, clearing, settlement and registration of

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transactions in financial instruments, and organisation and jurisdiction of the Central Depository and Clearing House. The law recognises international financial institutions such as the European Bank for Reconstruction and Development and the International Financial Corporation as authorised issuers of debt securities.

The Law on Privatisation regulates the conditions and procedures for change of ownership over socially owned or state capital and special procedure for such capital acquisitions.

3 Governing law

What law typically governs the transaction agreements?

Pursuant to Serbian regulations, it is possible to contract a foreign law as relevant (with certain exceptions and under an obligation to comply with imperative norms of Serbian law) and this is a common practice.

Agreements are mostly governed by Serbian law, but as different law may be contracted in transactions in Serbia, parties opt to contract using Swiss or English law.

Any conflict of laws is to be resolved in accordance with the Law on Resolving Conflict of Laws with Regulations of other Countries.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Depending on the type of transaction, the following fees are to be paid in connection with a business combination (subject to change from time to time).

The sale of shares in a limited liability company requires registration of transfer of ownership in the Serbian Business Register Agency (SBRA), while the sale of shares in a joint-stock company requires registration with the Central Securities Depository and Clearing House (the Central Register); those fees are insignificant.

The fee for the application of merger clearance filled with the Commission for the Protection of Competition can amount up to €50,000. Merger clearance must be applied for if the total annual income of all participants in concentration on the worldwide market is jointly €100 million for the previous accounting year, out of which the total income of at least one participant on the Serbian market is a minimum of €10 million. Another condition is that the total income for the previous accounting year of at least two participants is minimum €20 million on the Serbian market and that, in the previous accounting year, at least two participants in the concentration had income on the Serbian market amounting to more than €1 million each in the same period.

If a buyer intends to acquire more than 25 per cent of share capital in a joint-stock company, it is required to notify the financial regulator, meaning the Securities Commission (the Commission) and the target company and to make a public announcement, and thereafter to carry out public bid procedure (which implies its own notification and filing procedures). The party making a public announcement should provide a bank guarantee or deposit money in the amount that is equal to the value required for purchase of shares referred to in the bid.

The fee that must be paid by the buyer to the Commission – if acquiring more than 25 per cent of shares – is 0.2 per cent of the nominal value of the shares, but not less than 250,000 Serbian dinars, for the approval of the single prospectus. The fee for the approval of the bid announcement is 0.35 per cent of the fund provided for payment of all shares referred to in the takeover bid, but not less than 300,000 Serbian dinars. The commission to be paid to the Central Register for purchase transactions concluded on the stock exchange is valued at 0.1 per cent per order and not more than €12, and for purchase transactions concluded on the stock exchange market based on 'block-transactions' for shares it is valued at 0.12 per cent per order.

Also to be paid is the commission to the bank interfering in purchase of shares, the amount of which depends on the transferring bank.

There are no stamp taxes in Serbia, but certification of signatures on the limited liability company share transfer agreement before a public notary is necessary and it may cost up to €5,000, depending on the value.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Companies have an obligation to register with the SBRA data such as change of members, amount of share capital, seat, representatives, registered activity, company bodies and the official name.

According to the Law on Companies, in case of a status change, the company is obliged to make public the draft of the agreement on the status change or the draft of a division plan. A company is under the obligation to post these documents on its website and register them in the SBRA not later than one month before the shareholders' assembly session at which the status change will be decided on. Those drafts should be available to the public continuously for at least 60 days after the date of the shareholders' assembly when the status change was decided on.

Also, information regarding the place and time for review of documents related to the status change by the relevant public must be made available. This is a duty of public joint-stock companies only; other companies should send such notice to all shareholders.

The information that should be disclosed does not depend on the type of structure but on the type of company.

The Commission can permit a bidder's request to exclude some of the prospect data if publication of such data is not in the public interest, or if publishing of such data could cause substantial damage to the bidder, under the condition that not publishing such data would not mislead the public, bidder or guarantor.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

The Law on Capital Market envisages a compulsory disclosure of significant shareholdings. When a natural or legal person directly or indirectly reaches, exceeds or falls below 5, 10, 15, 20, 25, 30, 50 or 75 per cent of voting shares in the same joint-stock company, whose shares are traded with on the stock exchange, the Commission must be notified, as well as the company in hand and the regulated market or the relevant stock exchange. If a buyer intends to acquire more than 25 per cent of the public joint-stock company, besides the aforementioned disclosure obligation, it is further required to notify the financial regulator and the target company and to make a public announcement, and thereafter, to carry out a public takeover bid (which implies its own notification and filing procedures). For companies listed on the stock exchange, the rules of listing require notification to the stock exchange on changes in the shareholding structure by application of the same triggering thresholds as indicated above.

It is necessary to obtain consent from the National Bank of Serbia (NBS) if acquiring between 5 and 20 per cent, 20 and 33 per cent, 33 to 50 per cent or more than 50 per cent of voting rights in a bank, 10 per cent or more of voting rights in a leasing company. When it comes to insurance companies, a person intending to acquire 10 or more per cent of voting rights (ie, share capital (qualified participation)), or aiming to increase such qualified participation so that it exceeds 20, 30 or 50 per cent of voting rights or share capital must previously seek the NBS consent. Furthermore, a special consent from the NBS is needed for companies under its control (for example, when the concentration of companies is implemented by a bank, the NBS shall request the opinion of the Commission for the Protection of Competition).

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

There are no specific obligations in case of acquisition of shares in a limited liability or joint-stock company, except for the obligation of a joint-stock company board of directors to publish its elaborated opinion on the takeover offer within 10 days of the day the offer for takeover is announced.

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However, in case of status changes, according to the Law on Companies the board of directors or the executive board (if the management of a company is two tiered) has a duty to make a detailed written report with the following compulsory elements:

- goals to be achieved through status change, with an analysis of economic effects on companies taking part in a status change;
- explanation of legal consequences of entering into an agreement on status change or the adoption of a division plan;
- explanation of changes in proportion of shares;
- data on amendments to the agreement on status change or division plan, if such amendments are made based on the audit report of status change; and
- data on substantial change of property and duties of a company taking part in a status change that occurred after the date of financial reports compiling.

According to the Law on Companies, if a company has a two-tier management system, the director must inform the board of directors or the supervisory board on a conflict of interest in a legal transaction carried out by that company. A legal transaction where a conflict of interest exists should be approved by an authorised body of the company, otherwise the company can submit a claim for the annulment of such transaction.

Pursuant to the Law on Companies, a controlling shareholder who acquires shares representing at least 90 per cent of the basic capital of a company has a duty to purchase shares from every remaining shareholder on its written request. The purchase price of such shares is the same as the acquisition price of shares of the dissenting shareholder in question. The company is under an obligation to determine the purchase price of shares within 60 days as of the receipt of the remaining shareholder's request and to notify the controlling shareholder, as well as the remaining shareholder who submitted such a request. The controlling shareholder shall pay the purchase price within 30 days of the receipt of the remaining shareholder's notification on its intention to sell the remaining shares.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

If a company disposes of property where the value is 30 per cent or more of book value of the entire company's property listed in the last balance sheet, it is considered that the company is selling or acquiring major assets. Such sale or acquisition should be approved by the shareholders' assembly, with votes of three-quarters of all present shareholders having the right to vote. Any shareholder who does not agree with the proposed decision on the disposal of major assets (or with a decision on:

- change of the company's statute that reduces its rights guaranteed by statute or law;
- status change; change of legal form; change of company duration;
- withdrawal of one of more classes of shares from the regulated market

may request its shares to be bought by the company, at a market value, within 30 days, and the company is obliged to buy such shares. The market value of shares is determined pursuant to the appraisal rights.

The market value of joint-stock company shares traded on the stock exchange is determined as a weighted average price realised within six months preceding the date of the decision determining market value, provided that the turnover of shares of that class on the stock exchange during this period represented less than 0.5 per cent of the total number of issued shares of that class, and that, during at least three months within that six-month period, the turnover was at least 0.05 per cent of the total number of issued shares of this class on a monthly basis.

Market price will be determined by an authorised entity or a person (an auditor, court expert or other expert) if the turnover is not generated in a previously stated volume or in the case of issuance of new shares, and exceptionally if the opinion of an authorised person or entity on the price is accepted by the shareholders' assembly.

If one shareholder is selling its share in a limited liability company, other shareholders have a pre-emption right on this share. The seller is obliged to offer its share to all other shareholders, and they shall reply by sending a written notice within 30 days of receiving the offer, unless another term applies, provided that in any case it cannot be longer than 180 days. If two or more shareholders who accepted the offer do not agree on distribution of share being transferred, the distribution is made proportionally – meaning that each shareholder purchases the percentage proportional to the percentage of its share in the sum of shares of all shareholders who have accepted the offer.

Limited liability company shareholders who were not offered to exercise their pre-emptive rights are entitled to file a claim seeking the termination of share transfer agreement or other act on transfer of share or to seek a verdict that would replace the share transfer agreement. Such a claim can be submitted within 30 days from the moment a shareholder found out about the disputable share transfer agreement, but not later than six months from the moment such an agreement was concluded.

The decision on status change requires consent of a three-quarters majority of present shareholders, if the decision is adopted in a public joint-stock exchange company and unless a greater majority is prescribed under the founding act. If one shareholder is not satisfied with the shareholders' assembly's decision, the shareholder is entitled to submit a claim for annulment of the decision within 30 days of the day when that shareholder learned about such decision or within 30 days of the moment of registration of the decision, but in any case not later than three months from the moment the decision was made. The decision on status change cannot be annulled because of a determined change in proportions of shares.

Pursuant to the Law on Companies, shareholder of the transferring company who believes to have been damaged by determined proportion of share replacement may submit a claim against the acquiring company within 30 days from the day when the draft of contract on status change or draft of division plan was registered with the SBRA and also request a compensation payment.

Every shareholder of the transferring company acquires a share in the acquiring company proportionate to its share in the transferring company. The shareholder of the transferring company can agree to the substitution of its share in a different proportion or use its right to compensation payment.

Shareholder of the transferring company who disagrees with the decision on status change is entitled to compensation payment.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

A public offering may be announced and there is also a compulsory bid for other shareholders.

Announcement of a public bid may be unsolicited, but there is no mechanism to protect against it.

A public bid which is not compulsory may be optional, and it is described in more detail in question 12.

The Law on Takeover of Joint-stock Companies calls for a compulsory bid for an institution's takeover. Any person who acquires shares of the target company and, combined with shares it already holds, has more than 25 per cent of the total number of votes attached to the target company's voting shares (controlling threshold) is under an obligation to publish the takeover bid. After exceeding the controlling threshold, publication of the takeover bid is mandatory when one increases the percentage of voting rights by more than 10 per cent (additional threshold). As an exception, publication of the takeover bid is also mandatory when the acquiring party increases its participation by less than 10 per cent, if as a result it exceeds the threshold of 75 per cent of voting rights (final threshold). A duty to publish the takeover bid exists regardless of whether someone acquires the shares of the target company directly, indirectly, independently or acting jointly. A person holding at least 75 per cent of the voting shares in the target company, which were acquired in a public takeover bid previously described, does not have to publish the takeover bid if acquiring further shares in the subject target company.

Any publishing of the takeover bid that is not in accordance with the Law on Takeover of Joint-stock Companies is strictly forbidden.

Once the takeover bid is published, no one is allowed to influence the target company's shareholders by offering or promising gifts,

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services, property or other benefits, directly or through the media. In addition, after publication of the bid, third parties are not permitted to publicise the intention to acquire shares of the target company, but are obliged to publish a competitive takeover bid. Once the obligation to publish a takeover bid is incurred, and until the bid expires the bidder and the persons acting jointly with the bidder may not acquire voting shares of the target company, nor undertake to be obliged to acquire them other than by means of the bid.

The Commission can decide to deprive a person who failed to submit a request for approval of takeover bid of its voting rights in respect of all acquired shares of the target company, starting from the day when duty to make such a request incurred until its fulfilment. The Commission shall notify the Central Register about such a decision.

The bidder (ie, the acquiring party) and the persons acting jointly with the bidder cannot exercise voting rights based on all the acquired shares of the target company in the following cases:

- when upon incurrence of obligation to announce the takeover bid, they fail to request a permission for announcement of the takeover bid, within legally proscribed deadline – from the day this obligation has incurred until its fulfilment;
- when the Commission rejects or refuses the request for announcement of takeover bid – from the day when decision on refusal or conclusion on rejection of that same request became final until receipt of the decision under which the Commission approves the announcement of takeover bid; or
- when, after the Commission has approved announcement of the takeover bid, they do not publish it within the prescribed period of time – from the moment when they are delayed until the obligation to publish it is complied with.

The Law on Takeover of Joint-stock Companies provides for certain limitations of the authority of the board of directors, the supervisory board (ie, the executive board and the managing board when a bank is the target company). From the moment the notification on the intended takeover is announced, these bodies of the target company shall not:

- use the authority given to it by the law to increase basic capital by issuing new shares;
- decide on extraordinary affairs or issue decisions to conclude agreements which can be materially adverse to the status of property or duties of the target company. It can consider only ordinary affairs in relation to the activity of the target company;
- issue a decision on acquisition or disposal of its own shares; or
- publish the takeover bid of another company.

The managing board can undertake above stated forbidden actions only with the prior consent of the shareholders' assembly, which decides on those matters by simple majority of votes.

Within three days from the moment the takeover bid is announced, the board of directors, the supervisory board (ie, the executive board and the managing board when a bank is the target company) will inform employees of the target company on the takeover bid, who will then have another five days to give their opinion on the bid. Within 10 days of the announcement of the takeover bid, the board of directors, the supervisory board (ie, the executive board and the managing board when a bank is the target company) is under the obligation to publish its opinion on the takeover bid.

See question 21 where sanctions are further described.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Pursuant to the Law on Contracts and Torts, the negotiations preceding signing of the contract are not binding and each party may terminate them at any point. However, the party that took part in negotiations without the intention to conclude the contract shall be liable for damages resulting from conducting negotiations. On the other hand, the party that negotiates with the intention to conclude the contract but interrupts those negotiations without reasonable grounds will be liable for damages.

Before entering the transaction, the seller and the buyer may agree on the contractual penalty.

According to Law on Contract and Torts, the creditor and the borrower may agree on the contractual penalty, which means that the borrower will be obliged to pay a certain sum to the creditor or to provide some other material benefit if it does not fulfil its obligation. It should be noted that in Serbian law contractual penalty may be agreed only for a non-cash obligation.

A contractual penalty is usually agreed in following situations: for the exclusivity of negotiations – if it is agreed that the buyer will negotiate only with one bidder for a certain period of time and if the buyer concludes a contract with the other bidder within that same period – the buyer is obliged to pay a penalty; or, if the buyer does not provide the seller with accurate information or guarantees. The penalty amount should be reasonable, and it is usually agreed that, apart from costs made during negotiations, it will also cover costs of legal and financial due diligence and costs of legal fees.

The company may not, directly or indirectly, give financial assistance of any kind to its members, employees or third parties for them to acquire a stake in the company, and especially to give loans, guarantees, collateral, security, etc. One approach to overcoming this issue is through a status change, when a legal entity whose share is bought through a business combination (such as an upstream merger) becomes a debtor of the financier of the transaction.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In the procedure for takeover of joint-stock companies, the Commission gives its consent upon announcement of the takeover bid. While deciding on this matter, the Commission will verify (i) the completeness and credibility of the data listed in the bid, as well as the documents submitted with the bid; (ii) whether determined purchase price is lawful, and (iii) whether the bidder provided funds for acquisition of shares. If those conditions are not fulfilled, the Commission may decide to reject bid may.

The sale of social or state capital is under control of the Ministry for Economy, which replaced the Privatisation Agency. The procedure of acquisition of social or state capital is different from acquisition of private capital and it is regulated by the Law on Privatisation. State or social capital is sold by use of two different methods – public tender with and without public auction. There are four models for acquisition of social or state capital – sale of capital, sale of property, strategic partnership and free of charge capital transfer. In most cases, one of the main conditions is for the buyer to keep all or a substantial percentage of employees, with a limited number of employees whose employment contracts can be terminated within a prescribed period of time.

It should be noted that a foreign company or person cannot own arable land in Serbia, but can own shares in a company which is the owner of arable land.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Pursuant to the Law on Contracts and Torts the agreed conditions should be permissible and possible. If not, such a contract is void.

In line with the Law on Takeover of Joint-stock Companies, in a conditional takeover bid, the bidder seeks to acquire a specified minimum number or percentage of the target company's voting shares, thus ceasing to be binding in case the indicated minimum number or percentage is not achieved before expiry of prescribed deadline. Only a voluntary offer can be conditional.

One very common condition is that the deal will not go through if permission for concentration is not obtained from the Commission for the Protection of Competition.

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Update and trends

In the near future, Serbia expects an increase in several M&A transactions in the private as well as the public sector. Additionally, the latest change of the Law on Privatisation was made in December 2015 and the amendments began to apply as of 1 February 2016, when the Ministry of Economy replaced the Privatisation Agency as the authority responsible for conducting and controlling privatisation procedures. The Ministry of Economy, currenly in charge of implementation and control of all privatisation procedures in Serbia and the sale of public capital, acts in accordance with the law in the name and on behalf of the Equity Fund of the Republic of Serbia and performs other relevant activities. According to information from the Privatisation Agency, there are currently 166 companies undergoing privatisation and for 161 companies preparation for privatisation is under way, including one of the largest cow kennels, PKB Beograd. Currently, a call for the privatisation of five companies is open, including one of the largest pharmaceutical companies, Galenika, for which the opening of a new tender is expected in the next few months. Pursuant to the current law, the deadline for privatisation of social capital was 31 December 2015. It is expected that one of the biggest enterprises owned or controlled by the state will undergo corporate restructuring, namely Elektroprivreda Srbije (the largest electricity supplier). Another significant state-controlled enterprise, RTB Bor Grupa (the largest copper mine in Serbia), is also expected to undergo reorganisation. One of the largest expected projects in the public sector is the concession of the airport Nikola Tesla.

As a part of its stabilisation and the EU accession process, Serbia is on the verge of harmonising its legislation with EU directives, which will lead to the market opening in many industry fields. For example, as of 1 January 2015, in the energy sector, the electricity and natural gas market have been de-nationalised. Currently, 99 licensed electricity and 65 natural gas suppliers operate in Serbia. In January 2014, Serbia formally started negotiations with the European Union with respect to the country's accession. As a part of the accession process, Serbia has abolished customs duties on many products, which will significantly improve the country's reputation as a place in which to invest. In addition, Serbia is one of the few European countries that signed a trade liberalisation agreement with Russia. The country is also a member of CEFTA and EFTA. Serbia passed a law on public private partnerships and concessions in 2011 and is successfully implementing them in various projects.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

There are no provisions under Serbian law strictly regulating this matter, which means that it depends on the mutual agreement of the buyer and the seller.

The transaction can be financed by a financial institution, with performance of payment directly from that institution, and it can be conditioned by obtaining of the finances (except in case of public offer, when the finances must be secured before business combination is established). Furthermore, the transaction documents are often subject to bank's approval or checking.

Generally speaking, the seller does not have an obligation to assist the buyer in securing financing, but may agree that mortgages or pledges are inscribed over shares or property being acquired.

Financial aid is prohibited under the Serbian law.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The shareholder with shares representing at least 90 per cent of the share capital and having at least 90 per cent of votes is entitled to buy out shares of all the remaining shareholders. The shareholders' assembly decides on compulsory purchase of all shares of the remaining shareholders, along with payment of the price, which is determined according to the provisions on payment of dissenting shareholders. The statute of the company may even require a higher share percentage for such a decision to be rendered. The company must determine the price within 30 days of the rendering date of decision on the compulsory purchase and inform the Central Register, otherwise such decision shall have no effect. The party purchasing such shares is bound to deposit money in a special account of the Central Register not later than eight days from the day when notification on compulsory purchase was sent to the Central Register. The purchase price is paid to squeeze out shareholders within three days from the day when money was deposited.

In addition to the successful bidder's or holder's squeeze-out rights, once the relevant 90 per cent thresholds are achieved, the remaining minority shareholders can exercise 'sell-out' rights requiring the holder to purchase their shares.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no special provisions regulating the structure of cross-border transactions and it depends on the scope and type of the transaction. Transactions may be structured as directed, through various special purpose vehicles (SPVs).

Foreign investors' rights (consequently, rights acquired in cross-border transactions) are guaranteed by the Law on Investments. Basic goal of the law is formal and legal equalisation of domestic and foreign investors. The body competent for promotion and support of foreign investments is the Council for Economic Development and the Development Agency of Serbia. The Law on Investments allows foreign investors to acquire shares in Serbian companies or establish a new company in Serbia. However, business combinations through status changes (see question 1) are not possible with foreign legal entities. Most often in these transactions, the SPV appears as participant in the transactions and a common breach of bans related to financial aid is achieved through cross-border transaction in which a foreign entity gives the loan to an SPV registered in Serbia for the purpose of purchasing shares of the Serbian company. After that, by means of upstream merger, the target company becomes the owner of the borrower company.

Foreign investors enjoy the same treatment and have the same rights and duties as Serbian investors, unless prescribed otherwise. Foreign investor can acquire ownership, servitudes, pledges and other real rights on moveable assets and real estate in Serbia, in accordance with the law (this means that certain limitations in this respect do exist, such as prohibition on non-residents owning agricultural land). The Law on Investments establishes certain incentives for foreign investors, such as liberating equipment imported as stake into Serbia by a foreign investor from payment of customs and other duties, except in respect of motor vehicles and slot machines for entertainment and games of chance, provided that such equipment is in compliance with regulations governing health and safety of citizens and environment protection. Serbia has a long standing tradition when bilateral investment treaties are in question. Currently, around 50 bilateral investment treaties (BITs) are in force. The first BITs that Yugoslavia (legal predecessor of the Republic of Serbia) signed and which are still in force were with France in 1974 and Sweden in 1979. The most recent ones were signed with Kazakhstan and Canada in 2015, Algeria, Morocco and the United Arab Emirates in 2013. Serbia is also a signatory to the Convention on Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention). Currently, there are three pending cases against Serbia before the ICSID.

Apart from the Law on Investments and the BITs, the Law on Foreign Exchange (Official Gazette of the Republic of Serbia, No. 62/2006, 31/2011, 119/2012, 139/2014) regulates payments in foreign currencies.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

SBRA is the authority competent for registration of status change is registered in the (see question 5), which may not take more than five

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business days. Same applies to registration of transfer of shares in a limited liability company, which is also done by SBRA. Transfer of shares in a joint-stock company is registered within the Central Securities Depository and Clearing House and this procedure takes no more than two business days (transactions made on the stock exchange) or 10 to 15 days (OTC transactions).

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Apart from the Law on Companies, companies conducting the following business activities must comply with following specific rules:

- banks – the Law on Banks;
- companies operating in the field of financial leasing – the Law on Financial Leasing;
- insurance companies, insurance brokers and insurance agents – the Law on Insurance;
- associations for management of pension funds – the Law on Voluntary Pension Funds and Pension Plans; and
- investment funds and broker companies – the Law on Investment Funds, the Law on Capital Market and the Law on Takeover of Joint-stock Companies.

All companies operating in the above-mentioned fields are subject to control by the NBS, which has a specific authority to give permission for their establishment and the authority to control business operations of those companies. Also, acquisition of shares or establishment of control over a bank, insurance or financial leasing company is not feasible without the approval of the NBS, under the terms further stated in question 6.

Stock exchanges, investment funds, custody banks, companies for investment funds and broker companies are under the control of the Commission.

18 Tax issues

What are the basic tax issues involved in business combinations?

Pursuant to Serbian legislation, there is no obligation to pay tax for transfer of shares in a limited liability company or a joint-stock company.

According to the Law on Profit Tax of Legal Entities (Official Gazette of the Republic of Serbia, No. 25/01, 80/02, 43/03, 84/04, 18/10, 101/11, 119/12, 47/2013, 108/2013, 68/2014, 142/2014, 91/2015 and 112/2015), capital gain represents the difference between the selling price and the purchase price acquired through sale of shares.

This law distinguishes residents and non-residents – when residents acquire shares, capital gain is included in the taxable income. When a non-resident legal entity acquires income by selling shares to a resident legal entity, another non-resident legal entity, or a natural person who is either resident or non-resident, it is obliged to pay tax for acquired capital gain at a tax rate of 20 per cent, unless otherwise prescribed by a bilateral treaty on avoidance of double taxation. Serbia signed about 60 bilateral treaties on the avoidance of double taxation.

A status change of resident taxpayers postpones occurrence of tax obligation based on capital gains, which will be generated at the time when the property qualifying as capital gain which was acquired through status change is sold. Tax obligation will be postponed only if the owner of the transferring legal entity received shares of the acquiring company, as well as cash compensation, all in the amount not exceeding 10 per cent of the nominal value of acquired shares.

When acquiring company's assets (ie, moveable property or motor vehicles), the seller will pay absolute rights transfer tax, at a tax rate of 2.5 per cent of the agreed price. This tax does not apply if a company's assets are acquired through privatisation.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Private acquisitions or public offers for shares in a target company will not generally affect the terms of the target company's employees' individual employment contracts. The employees remain employed by the target company under same conditions, although senior executives may have a contractual right to, for example, resign or be paid an agreed sum if a change of control occurs.

Pursuant to the Labour Law (Official Gazette of the Republic of Serbia, No. 24/05, 61/05, 54/09, 32/13, 75/14 and 13/17), the company's internal collective agreement must apply at least one year from the moment the transaction takes place, except if the term for which it was concluded expires in the meantime or a new collective agreement is concluded.

Both the new and previous employers must inform the union representative, or the employees directly if there is no union, at least 15 days before the business transaction, on issues relevant for the status of employees.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Pursuant to the Law on Companies, a company in bankruptcy or liquidation cannot take part in a status change, unless the status change is performed as a measure of reorganisation in which case status change is one of the measures for implementation of the reorganisation plan.

Purchase of property belonging to a legal entity undergoing bankruptcy or purchase of a legal entity undergoing bankruptcy is part of the bankruptcy proceeding and both the court and the bankruptcy administrator take an active part in this procedure.

Special rules shall apply to receivership of the banks and bankruptcy of the banks.

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21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

A sentence of imprisonment of five years is prescribed for any person offering or promising shareholders, directly or through the media, gifts, services, financial or other benefits in order for the takeover bid to be accepted or rejected.

The offender can be punished by imprisonment of up to five years for giving bribes, which is fairly widespread, but he or she can be released from punishment if he or she reports the offence before discovery.

Takeover by use of privileged information will be punished by imprisonment for up to three years.

A person who intends to obtain unlawful material gain and, for that purpose, discloses privileged information to another person, or on the basis of such information recommends to others to acquire, purchase or sell shares of the target company being sold on the stock exchange or can be sold on regulated market of shares, can be punished by imprisonment for up to three years. The offender shall be sentenced to a prison term of up to one year or be obliged to pay a fine if the crime is caused by negligence. If such disclosure results in distortion on the organised market, the offender can be punished by imprisonment of up to five years.

Person spreading untrue information on legal and financial position of the target company and its business possibilities, or other untrue facts, or fails to disclose information relevant for the decision-making process, can be punished by imprisonment of up to three years. If such action results in distortion on the organised market, the offender can be punished by imprisonment of up to five years.

If the measures for removal of concentration, conduct contrary to the concentration, or required interruption of concentration are not fulfilled, the participant on the market may be ordered to pay a fine of up to 10 per cent of the total annual revenue.

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Singapore

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1 Types of transaction

How may businesses combine?

Mergers and acquisitions in Singapore are primarily governed by principles of contract and company law.

The most common forms of business combinations in Singapore are as follows:

- a purchase of shares with voting rights in the target company or an acquisition of the business or assets of the target company;
- a joint venture (which usually involves the incorporation of a new company) formed by two or more parties to pursue a common commercial goal;
- a takeover of the target company through an offer for the shares of the target company;
- a scheme of arrangement under section 210 of the Companies Act (Chapter 50 of Singapore) (the Companies Act);
- a scheme of amalgamation under sections 215A–K of the Companies Act; and
- a trust scheme constituting an acquisition of units in a business trust by way of an amendment of the trust deed constituting the trust following approval by unit-holders.

A scheme of arrangement is a legislative procedure allowing a company to be restructured under the Companies Act. The company may propose the scheme to its shareholders which, if approved by a statutory majority, is binding on all shareholders once sanctioned by the High Court of Singapore.

A scheme of amalgamation is another method of business combination introduced under the Companies Act which allows two or more Singapore incorporated companies to amalgamate and continue as one company through a voluntary amalgamation process without the need for a court order. The amalgamated company, which can be either of the amalgamating companies or a new company, will succeed to all the properties, rights and privileges as well as assume the liabilities and obligations of each of the amalgamating companies.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

For all companies incorporated, registered or carrying on business in Singapore, the relevant statutes are primarily the Companies Act and the Securities and Futures Act (Chapter 289 of Singapore) (the Securities and Futures Act) and their respective subsidiary legislation. Takeovers (including reverse takeovers and partial offers) and schemes of arrangement structured as takeovers are subject to the Singapore Code on Takeovers and Mergers (the Code) issued by the Monetary Authority of Singapore (MAS) pursuant to the Securities and Futures Act. While the Code is drafted with listed public companies, listed registered business trusts (BTs) and real estate investment trusts (REITs) in mind, unlisted public companies and unlisted registered BTs and REITs with 50 or more shareholders or unit-holders, as the case may be, and net tangible assets of S$5 million or more must also observe the general principles and rules of the Code wherever possible and appropriate.

All schemes of arrangements, trust schemes and schemes of amalgamation are also subject to the provisions of the Code (although those that satisfy certain conditions are exempted from these mandatory offer provisions, as well as some other Code provisions).

Other relevant legislation to REITs are the Securities and Futures Act and the Code on Collective Investment Schemes issued by the MAS. Companies whose shares are listed on the Singapore Exchange Securities Trading Limited (SGX-ST) must also comply with rules laid down by the SGX-ST, known as the Listing Manual. Under the Listing Manual, listed companies are required to disclose, obtain shareholders' approval, or both, for transactions such as acquisitions and disposals that meet certain thresholds.

Singapore also possesses a codified system of competition law under the Competition Act (Chapter 50B of Singapore) (the Competition Act). The Competition Act prohibits, among other things:

- agreements that have as their object or effect the prevention, restriction or distortion of competition within Singapore;
- conduct that amounts to the abuse of a dominant position in any market in Singapore; and
- mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.

The Competition Act further established the Competition Commission of Singapore, which is empowered to enforce the provisions of the Competition Act and is further empowered to conduct its own investigations as to infringements under the Competition Act. Takeover offers falling within the ambit of the Code as well as the Competition Act should comply with both the Code and the Competition Act.

Certain other companies regulated in the telecommunications and utilities industries are subject to quasi-statutory controls on behaviour that is anticompetitive and abuses market power. Certain regulated industries are also subject to statutory foreign shareholding limits.

3 Governing law

What law typically governs the transaction agreements?

Private acquisition

The private acquisition of shares or the business and assets of the target company is usually effected by a sale and purchase agreement. Prior to entering into the acquisition documentation, the parties may sign heads of agreement, a memorandum of understanding or a letter of intent which are often stated as 'subject to contract'. However, to mitigate the risks of a party pulling out of the negotiations without any good reason prior to signing the sale and purchase agreement, the parties may include lock-out or exclusivity clauses or break fees in the heads of agreement, which are legally binding on the parties. Acquisitions may also be structured as put-and-call arrangements. The contracting parties are free to decide on the governing law of these transaction agreements, but the law of the jurisdiction in which the target company is established or where the assets for sale are located is typically selected as the governing law of the agreements.

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Public takeovers
For public takeovers, the offer announcement and the offer document have to comply with the terms set out in the Code and there is usually an express statement in the offer document stating that the offer document is governed by the laws of Singapore.

Scheme of arrangement and scheme of amalgamation
Since the scheme of arrangement and the scheme of amalgamation are both statutory creations under the Companies Act, the documents prepared for the purposes of the schemes have to be in compliance with the Companies Act and the laws of Singapore in general.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

A Singapore company must lodge a return with the Accounting & Corporate Regulatory Authority of Singapore (ACRA) when the company makes any allotment of its shares.

A scheme of arrangement has to be approved by an order of court and the court order has no effect until it is lodged with ACRA. Upon such lodgement, the order will take effect from the date of lodgement or such earlier date as may be specified in the court order.

For the purpose of effecting a scheme of amalgamation, the amalgamation proposal that has been approved and other relevant documents will have to be filed with ACRA, together with payment of a prescribed fee. ACRA will then issue a notice of amalgamation as well as a notice of incorporation (in the case where the amalgamated company is a new company). The notice of amalgamation will state the effective date of the amalgamation. The amalgamated company can also apply to ACRA for a certificate of confirmation of amalgamation.

Certain fees are payable to the Securities Industry Council (the SIC), which administers the Code, upon the lodgement of offer documents and other whitewash circulars with the SIC.

See question 5 in relation to various disclosure requirements in public business combinations.

There is no capital gains tax in Singapore. For stamp duties and goods and services tax, see question 18.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The type of information to be disclosed to the public will generally depend on the business combination used and the structure of the transaction.

For public takeovers, an offer announcement should contain, among other things:

- the terms of the offer;
- the identities of the offeror and its ultimate holding company (if any);
- details of existing holdings in the target company held by the offeror and its concert parties;
- all conditions to which the offer will be subject;
- details of arrangements in relation to shares of both the offeror and the target company that may be material to the offer (if any); and
- where the offer is for cash or involves an element of cash, an unconditional confirmation that the offeror has sufficient financial resources to implement the offer in full.

An offer document, which is dispatched after the issue of the offer announcement, must set out in detail the terms of the offer, the intentions of the offeror relating to the target company and its employees, the shareholdings of the offeror and its concert parties in the target company, certain financial information relating to the offeror itself, the conditions attached to the offer and the acceptance procedure as well as the offeror's arguments in support of the offer.

The target company's independent directors must advise the shareholders of the target company of their recommendations as to the acceptance or rejection of the offer, in the form of an offeree board circular, having obtained competent independent advice. All the documents mentioned above have to satisfy the highest standard of accuracy and present the information contained therein adequately and fairly and contain the minimum information prescribed under the Code. Prior to the close of an offer, the offeror or the offeree (as the case may be) must also promptly announce any material new information or any material changes in information disclosed in an offer document or offeree board circular. Where material new information or material change in information is published, the target company's independent directors and their independent financial advisers have to take into consideration such information and, where appropriate, revise their recommendations.

The type of information required to be disclosed in a scheme of arrangement involving public listed companies is substantially similar to that set out in the offer document and the offeree board circular, except that a composite scheme document containing the requisite information is usually jointly issued by the offeror and the target company.

For a scheme of amalgamation in which an amalgamation proposal is required, the amalgamation proposal will contain, among other things:

- the terms of the amalgamation;
- the name and share structure of the amalgamated company;
- certain details of every director of the amalgamated company;
- the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company; and
- details of any arrangement necessary to complete the amalgamation and to provide for the subsequent management and operation of the amalgamated company.

Any major acquisition or disposal or very substantial acquisition by or reverse takeover (as defined in the Listing Manual) of an SGX-ST-listed company for the purposes of the Listing Manual will require the listed company to prepare a shareholders' circular for the purposes of seeking its shareholders' approval for the acquisition or disposal. Such shareholders' circular will contain information prescribed for such corporate actions as set out in the Listing Manual.

In addition to the above, an SGX-ST-listed company must also maintain a list of names of persons privy to the transaction, and the SGX-ST may request the privy list as and when necessary.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the Securities and Futures Act, substantial shareholders, directors and chief executive officers of a company listed on the SGX-ST must notify the company of their interests or changes in their interests in the company and the company must announce such information to the SGX-ST. A substantial shareholder is one who holds an interest in not less than 5 per cent of the voting shares of the company. The notification must be made within two business days of becoming aware of the relevant facts. For the purposes of notifying changes in a substantial shareholder's interest, only changes that exceed a discrete 1 per cent threshold above the minimum 5 per cent threshold (for example, when the shareholding crosses 6 per cent, 7 per cent, etc) are required to be reported. The disclosure regime also applies to foreign-incorporated corporations with a primary listing on the SGX-ST, as well as to managers and unitholders of collective investment schemes (CIS) REITs, and trustee-managers and unitholders of registered BTs listed on the SGX-ST.

Generally in a takeover, dealings by directors, related companies, associates and concert parties of the offeror and the target company in the target company's securities must be publicly disclosed. Where shares of the offeror are offered as consideration for the target company's shares, dealings by the target company in the offeror's shares must be publicly disclosed.

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7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

There is a statutory obligation imposed on company directors (alongside the usual directors' fiduciary duties under common law) to act in the best interests of the company, which can be equated with the collective interests of the shareholders of the company. This obligation is not limited to companies in a merger or takeover situation but is a general fiduciary duty to which all company directors must adhere.

Under the Code, there is a duty to give shareholders of the target company sufficient information, advice and time to enable them to reach an informed decision on an offer. Moreover, during the course of an offer or even before the date of the offer (if the board of the target company has reason to believe that a bona fide offer is imminent), the board must not, except pursuant to a contract entered into earlier, take any action without the approval of shareholders at a general meeting on the affairs of the target company that could frustrate the offer or deny shareholders an opportunity to decide on its merits. Soliciting a competing offer or running a sale process will not generally be treated as actions that could frustrate the offer or deny shareholders an opportunity to decide on its merits.

Although the board of the target company may delegate the day-to-day conduct of an offer to individual directors or a committee of directors, the board as a whole must ensure that proper arrangements are in place to enable it to monitor that conduct so that each director may fulfil his or her responsibilities under the Code.

There is also judicial recognition that the directors owe a duty to take into account the interests of the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited to the prejudice of the creditors, especially when the company is insolvent.

In a scheme of amalgamation, besides the duty to ensure that the amalgamation is in the best interests of the amalgamating company, the board of directors of each amalgamating company is also required to make solvency statements to confirm that the amalgamating company and the amalgamated company there is no ground on which they can be found to be unable to pay their debts (in respect of the amalgamated company, that as at the date of the effective date of the amalgamation, it will be able to pay its debts as they fall due), and that the value of their assets is not (or will not be in the case of the amalgamated company) less than the value of their liabilities (including contingent liabilities). Every director who voted in favour of the resolution and the making of the solvency statements will have to sign a declaration to confirm his opinion and to set out the ground for the opinion.

The controlling shareholders do not have any similar duties but a minority shareholder has statutory recourse in the event of minority oppression. The safeguard against minority oppression is a general principle which applies to both private and public-listed companies and is not dependent on the company being in a merger or takeover situation. Similar remedies for minority oppression are also available to unit-holders of registered BTs under the Business Trusts Act (Chapter 31A of Singapore) (BTA) and holders of units in a CIS REIT under the Securities and Futures Act (Chapter 289).

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Under the Companies Act, any proposals for the issuance of new shares or for the disposal of the whole or substantially the whole of the company's undertaking or property must first be approved by an ordinary resolution of the shareholders in a general meeting. When approval is sought, shareholders may exercise their votes in any manner they wish, as shareholders owe no fiduciary duties either to the company or to fellow shareholders in this respect.

For a public takeover, every takeover offer must be conditional upon a minimal level of acceptance. For both mandatory offers and voluntary offers, the level of acceptance is that which would result in the offeror (and persons acting in concert with it) holding more than 50 per cent of the voting rights. Voluntary offers that are conditional on a level of acceptance that is higher than the requisite 50 per cent are subject to approval of the SIC. The offeror has to satisfy the SIC that it is acting in good faith in imposing a high level of acceptance. Separate approval thresholds are prescribed for partial offers.

Under a scheme of arrangement, the company proposes the scheme to its shareholders, which, if approved by a majority in number representing at least three-quarters in value of the shareholders or class of shareholders present and voting either in person or by proxy, is binding on all shareholders or class of shareholders once sanctioned by the High Court of Singapore.

For a scheme of amalgamation, the amalgamation proposal has to be approved by the shareholders of each amalgamating company by special resolution or by any other person, if any provision in the amalgamation proposal requires the approval of that person. Before an amalgamation becomes effective, a member of an amalgamating company may apply to the Singapore courts on the ground that giving effect to the amalgamation proposal would unfairly prejudice the member. If the courts are satisfied with the application, it may make any order it deems fit, including an order not to give effect to the amalgamation proposal or modify the amalgamation proposal or direct the amalgamating company to reconsider the amalgamation proposal.

As mentioned in question 5, any major acquisition or disposal or very substantial acquisition by or reverse takeover (as defined in the Listing Manual) of an SGX-ST-listed company will require approval of the listed company's shareholders.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

In a hostile offer, the announcement of a firm intention to make an offer is usually made by the offeror (whether immediately after approaching the target company's board or not) to restrict the time for the target company's board to marshal its defences.

Usually, after an offer has been received in a hostile takeover, the defence includes seeking a 'white knight' or stating in the target company's documentation that the target company's independent directors do not believe that acceptance of the offer is in the best interests of the target company or its shareholders, or disclosing favourable factual information about the trading position or prospects of the target company to induce the shareholders to reject the offer. Under the Code, the target company's board is prohibited from taking any action to frustrate an offer or deny shareholders an opportunity to decide the offer on its merits, such as, but not limited to, issuing authorised but unissued shares, disposing or acquiring of assets of material amounts or entering into contracts other than in the ordinary course of business. Soliciting a competing offer or running a sale process will not generally be treated as actions that could frustrate the offer or deny shareholders an opportunity to decide on its merits. However, frustrating actions are allowed if they are carried out pursuant to a contract entered into before the offer or if the target company's shareholders at a general meeting approve the act. If the board of the target company considers that an obligation to take such acts or other special circumstance exists, although a formal contract has not been entered into, it should consult the SIC and obtain its consent to proceed without a shareholders' meeting.

Apart from the duty not to frustrate an offer, the target company's board must generally act in the best interests of the target company's shareholders as a whole.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees (imposed on a target company) and reverse break-up fees (imposed on an offeror) are generally allowed. However, if the payment of a break-up fee is triggered, the amount may not be enforceable if it has been assessed as a penalty rather than a genuine pre-estimate of loss. Furthermore, to protect shareholders of the target company, the Code also sets out certain rules governing break-up fees, including arrangements which do not actually involve any cash payment but have

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a similar or comparable economic effect. Most significantly, a break-up fee must not be more than 1 per cent of the value of the target company calculated by reference to the offer price, and guidelines as to how this 1 per cent limit should be calculated are set out in the Code. The board of the target company and the independent financial adviser must also provide certain written confirmations to the SIC, including confirmations that the break-up fee arrangements were agreed as a result of normal commercial negotiations and that the break-up fee is in the best interests of the shareholders of the target company. Additionally, the break-up fee arrangement must be fully disclosed in the offer document and the offer announcement. The SIC should be consulted at the earliest opportunity where a break-up fee or similar arrangements are proposed.

Another mechanism that may potentially frustrate additional bidders is a lock-out or exclusivity clause. A lock-out or exclusivity clause prevents the seller from actively seeking or negotiating with other prospective buyers for a specified period, thereby giving the buyer a period of exclusivity in which to negotiate the sale and purchase agreement. It should be noted, however, that the negotiation of break-up fees and lock-out clauses must be considered in light of the general duty of the board of the target company not to frustrate the offer as described in question 7.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The Singapore government has overriding discretion to avoid transactions against the national security or public policies of Singapore. Otherwise, government agencies do not generally have such overreaching influential or restrictive powers. However, if the target company is listed on the SGX-ST, the shareholders' circular (for any major acquisition or disposal or very substantial acquisition or reverse takeover (as defined in the Listing Manual)), the scheme document (for a scheme of arrangement) and the amalgamation proposal (for a scheme of amalgamation) will require the approval of the SGX-ST, while the shareholders' circular (for a takeover) may require the review of the SGX-ST in certain circumstances. The SIC which administers and enforces the Code has powers under the law to investigate any dealings in securities that are connected with a takeover or merger transaction. If the SIC finds that there has been a breach of the Code, it may have recourse to private reprimand or public censure or, in a flagrant case, to further action designed to deprive the offender temporarily or permanently of its ability to enjoy the facilities of the securities market.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

See question 8.

Subject to the consent of the SIC, a mandatory offer must not be subject to any condition other than the condition that the offeror receiving acceptances which would have the effect of the offeror and his concert parties holding more than 50 per cent of the voting rights. An offeror in a voluntary offer can subject the voluntary offer to a number of conditions; however, none of these conditions should be based on the offeror's subjective judgement. In addition, the offeror should not invoke any condition (except as to a minimum level of acceptance) causing the offer to lapse unless the circumstances giving rise to the offer lapsing are of material significance to the offeror in the context of the offer, and information about the condition is not available from public records or is not known to the offeror before the offer is announced. In most cases, the SIC's consent or consultation is required. An offeror may also announce a preconditional voluntary offer, where the announcement of a firm intention to make an offer is subject to the fulfilment of certain preconditions; similarly, the preconditions should be objective and reasonable. Additionally, the offeror must specify a reasonable period for the fulfilment of the preconditions, failing which the offer will lapse. The offeror should also not rely on a precondition to cause the offer to lapse unless the offeror has demonstrated reasonable efforts to fulfil the preconditions within the time period specified, and that the circumstances that give rise to the offer lapsing are material in the context of the proposed transaction.

Where the offer is for cash or involves an element of cash, the offer document must include an unconditional confirmation by an appropriate third party (eg, the offeror's banker or financial adviser) that resources are available to the offeror to satisfy full acceptance of the offer.

A scheme of arrangement must be approved by a majority in number of the shareholders or creditors (as the case may be) of the company representing three-quarters in value of the shareholders or creditors present and voting at the relevant meeting. Even if such approval is obtained, the scheme will be conditional upon the Singapore High Court's approval.

In a scheme of amalgamation, the directors of each amalgamating company have to resolve that the amalgamation is in the best interests of the amalgamating company and to make a solvency statement in relation to the amalgamating company and the amalgamated company. In addition, every director who votes in favour of the resolution and the making of the solvency statement has to sign a declaration confirming that certain conditions are satisfied. The scheme is further subject to the approval of the shareholders of each amalgamating company by special resolution.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In a private acquisition of shares or the business and assets of a target company, it is possible to have a financing condition imposed as part of the sale and purchase agreement to ensure that the obligations to complete the transaction is conditional upon the availability of financing. In practice, such condition would not be acceptable to most sellers.

A takeover, scheme of arrangement or scheme of amalgamation involving a public company would be subject to compliance with the provisions of the Code. Accordingly, the offer document or scheme document (as the case may be) must include an unconditional confirmation by an appropriate third party (eg, the offeror's banker or financial adviser) that resources are available to the offeror to satisfy full acceptance of the offer.

The seller usually has limited involvement in the procurement of financing by the buyer. In practice, the seller may assist in introducing the buyer to banks or financing institutions that are existing financiers to the target company in the event that the buyer intends to obtain financing for the proposed acquisition from the same banks or financing institutions or it wishes to get the assurance from them that the existing financing terms may continue as a result of the proposed acquisition. In some instances, the concept of stapled financing may be introduced by the financial adviser to the seller to facilitate a quicker decision on acquisition financing.

A public company, or a private company whose holding company or ultimate holding company is a public company is prohibited from giving financial assistance (either directly or indirectly) for the purpose of the acquisition of shares in itself or its holding company. Financial assistance can be given in many forms including gifts, loans, guarantees, giving security, waiving debts or other obligations or where, as a result of the assistance, net assets of the company giving assistance are reduced to a material extent. For example, there can be financial assistance if financing is obtained by a buyer for an acquisition and the lender requires the assets of the target company to be used as security for such financing.

Singapore law provides exemptions in certain circumstances for companies which, provided the legislative procedure is followed, allows the shareholders of a company to approve the financial assistance. One of these exemptions is known as the financial assistance whitewash procedure. As the financial assistance whitewash procedure would typically be carried out post-acquisition, Singapore lenders have come to accept that they may not necessarily have the security in place at the point of completion of the acquisition. In many instances, parties agree to a time frame pursuant to which the financial assistance

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whitewash procedure must be undertaken and the security documentation executed thereafter. There are detailed technical formalities to be complied with in order to invoke this exemption, and specific legal advice should be sought.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Where a takeover offer is made for a Singapore company and acceptances are received in respect of 90 per cent of the shares to which the offer relates within four months of the making of the offer, the offeror may compulsorily acquire the shares of the non-accepting shareholders. For the purpose of computing the 90 per cent acceptance threshold, the following are excluded:

- shares held by the offeror;
- shares held by a nominee on behalf of the offeror;
- shares held by a related corporation of the offeror or by a nominee of that related corporation;
- shares held in the offeree company as treasury shares; and
- shares issued by the target after the date of the offer.

However, shares subject to an irrevocable undertaking or shares acquired during the offer other than pursuant to acceptances of the offer can usually be counted towards the 90 per cent acceptance threshold.

Notices must be served on the non-accepting shareholders within two months of reaching the 90 per cent threshold and the non-accepting shareholders have a right to apply to the court for an order that the bidder shall not be entitled to acquire the shares or to specify terms of acquisition different from those of the offer.

A similar regime applies to the compulsory acquisition of units in a CIS REIT or a registered BT under the BTA if an offeror making a general offer for units in such CIS REITs or registered BT obtained acceptances of 90 per cent or more of the units offered.

Separately, where a scheme of arrangement is approved by a majority in number representing three-quarters in value of the creditors or shareholders of the company (as the case may be) present or voting by proxy in a scheme meeting and is subsequently approved by the High Court of Singapore, the scheme will be binding on all the creditors or shareholders of the company. In the event that the scheme calls for the transfer of all the company's shares, the entire share capital of the company will be transferred to the acquirer (including the shares of any dissenting shareholder).

A scheme of amalgamation becomes effective after the shareholders of the amalgamating companies approve it by special resolution and the amalgamation proposal and other relevant documents are filed with ACRA.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

In a cross-border transaction involving investment in a Singapore entity or certain business in Singapore, one of the main considerations in the structuring of the transaction is tax issues as the investor would want to take advantage of the various double taxation agreements that Singapore has entered into with other countries.

Certain industries in Singapore have statutory limits imposed on the absolute shareholding of a company permissible by a single entity. For example, no person is allowed to hold more than 5 per cent, 12 per cent or 20 per cent of the shares of a Singapore-incorporated bank unless so authorised by the MAS. Likewise, legislation relating to the telecommunication industry puts a cap of 12 per cent or 30 per cent of the total voting shares in a telecommunications company, whereas for print media companies the limit is 5 per cent and 12 per cent. The limit for insurance companies and finance companies is 5 per cent and 20 per cent.

Further, it will not be permissible for a person to enter into an arrangement that would result in his obtaining effective control of a capital markets intermediary (for example, a manager of a CIS REIT) without the prior approval of the MAS.

Subject to the relevant legislation for specific industries, there is no general statutory restriction under Singapore law on the size of a shareholding interest that a foreign entity may hold in a Singapore-incorporated company.

Singapore-incorporated companies are required to have at least one director who is ordinarily resident in Singapore and the company secretary, who cannot be a sole director, must be resident in Singapore. A foreign issuer applying for primary listing on the SGX-ST must have at least two independent directors, both of whom must be resident in Singapore.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The following is a simplified illustration of the key dates for a public offer in Singapore in accordance with the requirements of the Code (assuming there is no competing offer):

Key dates	Event
Day 0–21	Earliest possible date for offer announcement.
Day 0	Offer document dispatched (no earlier than 14 days but no later than 21 days after offer announcement).
Day 14	Last date for dispatch of response document by target company.
Day 28	Earliest date for first closing date.
First dealing day after first closing date (and all subsequent closing dates)	Announcement of acceptance levels and (if appropriate) extension of offer.
Day 46 (assuming first closing date is day 28)	Last day for revision of offer. An offer, if revised, must be kept open for 14 days. Since the offer period must end on day 60 unless it has previously become unconditional as acceptances (except for special circumstances), the last day for revision is day 46.
Day 60	Last date for fulfilment of acceptance conditions, otherwise last closing date.
Day 74	If an offer becomes unconditional on day 60, the closing date will fall 14 days thereafter.
Day 74 + 7 business days	Last day of settlement. Settlement will take place seven business days after an offer becomes unconditional or receipt of valid acceptances (whichever is the later).

The following is a simplified illustration of the key dates for a scheme of arrangement for a Singapore-incorporated company listed on the SGX-ST that will be delisted after the scheme becomes effective:

Key dates	Event
Day 0	Boards of acquirer and target company formally approve terms of the scheme. Scheme implementation agreement signed after close of trading day and joint announcement released.
Day 1–25	Preparation of scheme document.
Day 28	Submission of scheme document to the SGX-ST.
Day 28–49	Review by the SGX-ST of the scheme document.
Day 50	In-principle approval of the SGX-ST (assuming the SGX-ST reverts in three weeks).
Day 52	Application to Singapore High Court to convene scheme meeting of target company.
Day 59	Court hearing and obtaining of court order to convene scheme meeting (assuming early court hearing date is obtained in one week).
Day 75	Scheme meeting of shareholders of target company to approve scheme.
Day 82	Court hearing to sanction scheme (assuming early court hearing date obtained in one week).
Day 92	Lodgement of court order with ACRA and effective date of scheme.

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Update and trends

The first quarter of 2017 saw the passing of 2 key pieces of amendment legislation which impact the M&A and regulatory environment in Singapore – the Companies (Amendment) Bill 2017 and the Stamp Duties Amendment Act 2017.

The Companies (Amendment) Bill 2017 is meant to provide a further boost to Singapore's competitiveness as a business hub with the introduction of an inward re-domiciliation regime. This is to allow foreign corporate entities to transfer their registration to Singapore instead of setting up subsidiaries (eg, foreign corporate entities that may want to relocate their regional and worldwide headquarters to Singapore and still retain their corporate history and branding). An inbound foreign corporate entity that is re-domiciled to Singapore will become a Singapore company and be required to comply with the Companies Act like any other Singapore company. Re-domiciliation will not affect the obligations, liabilities, properties or rights of the foreign corporate entities. The Companies (Amendment) Bill 2017 also introduced changes to Singapore's corporate rescue and restructuring processes to position Singapore as a choice venue to conduct international debt restructuring.

The Stamp Duties Amendment Act 2017 which came into effect on 11 March 2017 introduces a new stamp duty treatment for the acquisition and disposal of equity interest in property holding entities (or PHEs). PHEs are defined as entities whose primary tangible assets are residential properties in Singapore. This new stamp duty treatment addresses the stamp duty rate differential that existed between the direct acquisition or disposal of residential properties, and the acquisition or disposal of equity interest in entities whose primary tangible assets are residential properties in Singapore. This may have effectively removed the more cost effective option for corporate buyers of residential properties which originally tended to favour the acquisition of residential properties via the acquisition of the shares in the PHEs owing to the lower rate of stamp duty for shares in the PHEs.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies in specific industries are subject to additional regulations and statutes. For instance, banks carrying on business in Singapore have to be licensed under the Banking Act (Chapter 19 of Singapore) or the Monetary Authority of Singapore Act (Chapter 186 of Singapore) and have to comply with the provisions of these Acts, their respective subsidiary legislation, as well as notices and directives from the MAS. Other legislation for specific industries include the Telecommunications Act (Chapter 323 of Singapore) for companies providing telecoms systems and services; various applicable legislation for companies in the mass media industry; and the Insurance Act (Chapter 142 of Singapore) for companies carrying on insurance business in Singapore. The above statutes or subsidiary legislation and codes promulgated under them contain restrictions as to change of shareholdings and control of companies.

18 Tax issues

What are the basic tax issues involved in business combinations?

Transfer taxes (or stamp duty) are payable on certain written agreements and transfer documents for the sale of shares. A disposal of shares effected by the cancellation and issue of new shares to the transferee will be treated as a transfer of shares, and stamp duty is payable on any document that effects, whether directly or indirectly and whether wholly or partially, any arrangement for the disposal of shares. Stamp duty is also payable on the conveyance or transfer of land.

The rate of stamp duty for the transfer of shares in a company incorporated in Singapore is currently 0.2 per cent. The amount of stamp duty payable is calculated based on the higher of the consideration paid per share or the net asset value of each share (determined by reference to the latest available audited financial statements of the company). The transfer of shares for qualifying M&A deals will be eligible for stamp duty relief capped at S$80,000 per year. This relief is available for qualifying M&A deals executed between 1 April 2016 and 31 March 2020 (both dates inclusive).

The rate of stamp duty for the transfer of land or certain property holding entities is 1 per cent for the first S$180,000, 2 per cent for the next S$180,000 and 3 per cent thereafter and this is usually paid by the buyer. In certain circumstances, the rate of duty is increased for the buyer and stamp duty is levied on the seller as well. Stamp duty must be paid if title needs to be proved or the agreements or documents are to be produced in evidence before a court in, or registered in, Singapore.

If an amalgamation of companies pursuant to the Companies Act involves a transfer or conveyance of shares in a Singapore-incorporated company or immoveable property situated in Singapore, ad valorem stamp duty will be chargeable on the transfer or conveyance of shares or immoveable property unless such amalgamation qualifies for relief from stamp duty under the Stamp Duties (Relief from Stamp Duty upon Reconstruction or Amalgamation of Companies) Rules.

The corporate tax rate for companies for the year of assessment 2017 is 17 per cent, and companies will be granted a corporate income tax rebate of 50 per cent for the year of assessment 2017 (subject to a cap of S$20,000). Partners in a partnership will be subject to tax in their personal capacity and, depending on their income tax bracket, they will be subject to a progressive tax rate up to a maximum of 22 per cent in the year of assessment 2017.

The transfer of assets may be subject to goods and services tax (GST), which is currently at the rate of 7 per cent. However, the transfer of a business as a going concern is treated as an excluded transaction outside the scope of the Goods and Services Tax Act (Chapter 117A of Singapore) and not subject to GST if it satisfies certain conditions.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Singapore companies do not have employee work councils, although participation in trade unions is common in certain sectors, such as manufacturing. Under the Industrial Relations Act (Chapter 136 of Singapore), recognised trade unions can negotiate with employers for a collective agreement on certain industrial matters.

Employees in Singapore enjoy certain protections in business purchases (as opposed to share acquisitions) under the Employment Act (Chapter 91) (the Employment Act). Such protections include:

- the automatic transfer of employment contracts of the employees employed in the business transferred on their existing terms to the buyer, together with all rights and duties attached;
- continuity in the employees' period of employment; and
- consultation rights with trade unions or other employee representatives prior to the transfer.

It should be noted that, under the Employment Act, the term 'employee' is narrowly defined; for example, employees in managerial or executive positions earning more than S$4,500 are generally not covered under the Employment Act except in limited circumstances. For employees not falling within the definition under the Employment Act, the protection afforded to them will be governed by the terms of their employment contracts.

Transfer of employees under the Employment Act takes place automatically upon the transfer of the business. In all other cases, transfers must be effected prior to, or simultaneously with, the completion of the sale of the business, although this is subject to contract.

It is also provided under the Employment Act that no employee who has been in continuous service with the same employer for fewer than two years is entitled to retrenchment benefits if retrenched from the company. The quantum of retrenchment benefits is not specified in the Employment Act and if not provided for in the contract of employment, it will be a matter for negotiation between the individual employee and employer.

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20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A company may be wound up or liquidated in three ways: members' voluntary winding-up, creditors' winding-up and a court-ordered winding-up.

Once a company is in liquidation, the power to run the company is taken from the board of directors and transferred to the liquidator. The duties of the liquidator are to wind up the company's business, realise the assets, pay off the creditors and return whatever is left to the members. A takeover of a public company which is being wound up is unlikely to occur as there cannot be an offer to acquire the company's shares without the court's approval. The court may sanction the share transfer if the bidder is capable of meeting its liabilities as a contributory. However, a takeover of a company that is being wound up can be structured as a scheme of arrangement. A scheme of arrangement is a legislative procedure allowing a company to be restructured. The liquidator proposes the scheme to the creditors or members, and, if approved by a statutory majority, it is binding on all creditors or members once sanctioned by the High Court of Singapore. A scheme of arrangement is subject to the Code unless certain conditions are met and, in such cases, exemptions from complying with material obligations of the Code can be obtained from the SIC which administers the Code. For a company listed on the SGX-ST, the SGX-ST may suspend the trading of the listed securities of the company when there is an application filed with a court for the liquidation of the company and the amount of debt alleged is significant.

A company typically enters into receivership when a receiver is appointed by the debenture holder or trustee for the debenture holders, or by the court upon the application of the debenture holder or trustee for the debenture holders. The main function of the receiver is to gather in the assets subject to the charge, realise them and pay off the creditors, but it has no power to run the company's business. There are no similar prohibitions of share transfer for a company going through receivership.

A financially troubled company may also be placed under judicial management where a judicial manager is appointed by the court to take control of the company from the directors in order to try and achieve one of the following: salvage the company as a going concern; effect a more advantageous asset realisation situation than if the company was subject to a winding-up process; or aid the approval of a scheme of arrangement with the shareholders and creditors. No restrictions on the transfer of a company's shares are imposed when it is under judicial management.

The Code does not provide for situations in which the target company is undergoing liquidation or receivership or is under judicial management.

Where a substantial corporate shareholder injects funds into a subsidiary or an associated company as part of a rescue package, it may be that the consideration for such funds will be in the form of newly issued shares from the company. In the event that the issue of such shares puts the corporate shareholder in the position of having to make a mandatory offer under the Code, a waiver or whitewash of the obligation to make such an offer may be requested. The specific requirements that will have to be met in order for such a waiver to be granted are listed in the Code.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The key legislation in Singapore that deals with corruption is the Prevention of Corruption Act (Chapter 241 of Singapore) (PCA). The Corrupt Practices Investigation Bureau is an independent body empowered under the PCA to investigate corrupt practices in the public and private sectors in Singapore and implement preventive measures against corruption.

It is an offence under the PCA for a person to corruptly solicit or receive or give, promise or offer any gratification as an inducement to or reward for doing or forbearing to do anything in respect of any matter or transaction. If an agent corruptly accepts or obtains, for himself or herself or others, any gratification as an inducement or reward for doing or forbearing to do any act in relation to his of her principals' affairs or business, or for showing or forbearing to show favour or disfavour to any person, both the agent and the giver will be guilty of an offence under the PCA. The agent will be guilty even if he or she did not have the power or intention to do or forbear to do such act or that the favour or disfavour was not in relation to his of her principals' affairs or business. Under the PCA, extra-territorial jurisdiction can be exercised against Singapore citizens who commit corruption offences outside of Singapore.

Any person found guilty under the PCA will be liable to a fine not exceeding S$100,000, or an imprisonment term not exceeding five years, or both. If the person found guilty under the PCA is a member of a public body, the imprisonment term can be increased to seven years. In addition, the courts can order a person who is convicted of an offence under the PCA by the acceptance of any gratification to pay a penalty equivalent to the value of such gratification, or to order the confiscation of properties found to be benefits of corruption offences from convicted corrupt offenders under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A of Singapore). The principal of an agent who has received any gratification in contravention of the PCA may also recover as a civil debt the gratification in money value from the agent or the person who gave the gratification.

Corruption risk is a relevant consideration in a business combination, particularly in cross-border transactions that involve companies with subsidiaries or operations in regions where corruption is pervasive. An acquirer of a target company with corruption risks will assume the liabilities that extend to such risks, such as potential loss of valuable contracts obtained through questionable practices. Therefore, it is important to mitigate such risks through pre-deal due diligence investigations and the establishment of anti-corruption compliance measures in the target company post-deal.

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Slovakia

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1 Types of transaction

How may businesses combine?

There are several forms of business combinations in Slovakia:

- Merger – a transaction in which the assets and liabilities of one or several companies are transferred to another, existing company participating in the merger, which becomes the legal successor of the merged companies (takeover merger), or the assets and liabilities of two or more companies are transferred to a newly established shell-company, which becomes, upon its incorporation, the legal successor of the merged companies (merger).
- Demerger – a transaction in which the assets and liabilities of a company are transferred to another, already existing companies, which become the legal successors of such demerged company (demerger by takeover) or newly established companies which shall become, upon their incorporation, the legal successors of the demerged company.
- Acquisition of shares (of joint-stock companies) and transfer of ownership interests (of limited liability companies) – the most common forms of business combinations in Slovakia. Share acquisitions are made under and pursuant to a share purchase agreement in accordance with the Securities Act (see below). Ownership interest transfers are made under and pursuant to an Ownership Interest Transfer Agreement in accordance with the Commercial Code (see below). In either type of transaction, the existence of the acquirer and target remain intact, but the shareholder structure changes.
- Sale of an enterprise – a transaction undertaken under and pursuant to a sale of enterprise contract in which a seller transfers to a buyer title to all of the assets, other rights and other tangible values that are utilised in operating the enterprise. If only part of an enterprise is transferred, it must be an independent organisational unit.
- Transfer of assets – a transaction under which either all or some assets of one company are sold or transferred to another company through special sub-contracts required to validly transfer ownership of such assets. For example, tangible assets are sold through a purchase contract while receivables are transferred through an assignment contract.
- Silent partnership – based on a contractual relationship between a silent partner and a target. A silent partner invests money or other asset required for business operations into a target and participates in the target's profits and losses. A silent partner is not registered in the public register as a shareholder of the target. The silent partner is liable for the target's obligations only if the silent partner's name is included in the business name of the target or if the silent partner declares that the silent partner jointly undertakes business activities with the target.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Generally, business combinations are governed by Act No. 513/1991 Coll, the Commercial Code, as amended (the Commercial Code). Share purchase agreements are governed by Act No. 566/2001 Coll, on securities and investment services (the Securities Act), as amended.

If combining companies reach certain turnover thresholds, the provisions of Act No. 136/2001 Coll on Protection of Competition, as amended will apply. If a combination can affect the European market, the provisions of the Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) will come into play.

If shares of a Slovakian joint-stock company are listed, special provisions of the Securities Act regarding takeover bids, or mandatory takeover bids and Bratislava Stock Exchange rules may apply.

If business combination is part of a restructuring, the provisions of Act No. 7/2005 Coll on bankruptcy and restructuring apply.

Act No. 92/1991 Coll on transfer of state property applies to privatisations of companies owned by the Slovak Republic.

Other special acts and regulations may apply with respect to business combination of regulated entities such as banks, consumer loans providers, insurance houses and energy companies.

3 Governing law

What law typically governs the transaction agreements?

Transaction agreements between Slovakian parties are usually governed by Slovakian law. If there is a non-Slovak party in a transaction, the parties often agree that a foreign law will govern transaction documentation. One of the most common neutral laws governing transaction agreements is English law. When foreign law governs an acquisition agreement involving a Slovakian target or merger agreement involving a Slovak participant, however, mandatory provisions of Slovakian law apply.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

All Slovakian companies must be registered with public register of companies known as the Commercial Register of the Slovak Republic (the Commercial Register). Most forms of business combinations require filings and registrations with the Commercial Register. The respective filing must attach all relevant documentation related to a particular business combination such as the respective agreements and corporate approvals.

A €66 fee is payable to register changes with the Commercial Register. If the corporate structure is changed, a €330 fee is payable to the Commercial Register. These fees are reduced by 50 per cent if the changes are submitted electronically.

Book-entry shares of Slovakian joint-stock companies must be registered with the Central Securities Depository of the Slovak Republic (CDCP). Parties to a transaction must file the share transfer with the CDCP. Various fees are payable to the CDCP, as set forth in the CDCP's pricelist.

A €5,000 fee is payable if the transaction requires notification to the Slovakian Competition Authority – Antimonopoly Office of the Slovak Republic.

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Takeover bids require filings with the National Bank of Slovakia. National Bank's approval of the takeover bid is subject to an administrative fee ranging from €350 to €1,000.

There is no stamp tax. Other costs include notary public's fees, which might be required under the Commercial Code to notarise certain agreements, minutes of general meetings, signatures and documents.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The scope of information to be made public varies depending on the form of business combination and on the form of the companies involved.

In case of a merger or demerger, an execution version of the merger agreement or demerger project must be filed with the Collection of Deeds, which is a publicly available database of certain corporate documents maintained by the Commercial Register. Additional public disclosure obligations apply in case a joint-stock company is involved in the merger or demerger or in case of a cross-border merger. In those cases, draft merger agreement or demerger project must be published before the merger or demerger is approved by the participating companies' shareholders.

Executed version of sale of enterprise agreement must also be submitted to the Collection of Deeds.

Starting from February 2017, individuals and legal entities that have entered into or will enter into an agreement with a state, local government or their controlled entities, must be registered in the register of public sector partners and disclose the information on their ultimate beneficial owner. The information in the register must be periodically verified. These obligations will also apply to a person acquiring shares, ownership interests or assets from public sector. The register is publicly available.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Disclosure requirements vary depending on the company form. Shareholders (or partners) of all company forms other than joint-stock company are published in the commercial register irrespective of the size of their shareholding. A joint-stock company allows shareholders to remain anonymous provided that there are at least two of them. If the joint-stock company has only one shareholder, its identity is published in the commercial register.

Special rules on disclosure of large shareholdings apply to listed joint-stock companies. If a shareholder acquires or disposes of shares of a listed joint-stock company, the shareholder must notify the issuer of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent and 75 per cent.

The prior approval of the National Bank of Slovakia is required to acquire a qualifying holding in banks, stock brokerage firms and insurance companies (the qualifying holding is defined as holding exceeding 20 per cent, 30 per cent or 50 per cent of share capital), consumer loans providers (the qualifying holding is defined as holding at least 10 per cent of the share capital or voting rights) and pension funds management companies (the qualifying holding is defined as holding exceeding 5 per cent, 10 per cent, 20 per cent, 33 per cent, 50 per cent or 66 per cent). The prior approval of the National Bank of Slovakia is also required for the CDCP to acquire an equity interest exceeding 33 per cent of the share capital in an entity.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Generally, executives of limited liability companies and directors of joint-stock companies must exercise their powers with professional care and in accordance with the interests of the company and all of its shareholders. If the executives or directors breach their duty of professional care in relation to a business combination, they are obliged to jointly and severally compensate the company for the damages. The claims for damages that a company has against executives or members of the board of directors may be exercised by any of the shareholders or by a creditor of the company (acting in its own name and on its account) if the creditor is unable to satisfy its claim from the company's property.

In case of a merger or demerger, directors of a joint-stock company and executives of a limited liability company must prepare a report for the shareholders explaining in detail the legal and economic aspects of the merger or demerger. Shareholders may waive the right to receive such report by a unanimous decision.

Controlling shareholders do not have any duties similar to those of the executives and directors. However, any shareholder may be liable for damage caused by exercising its shareholder rights to the detriment of other shareholders.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Usually, business combinations are subject to prior approval by shareholders of the companies concerned.

For example:

- mergers and demergers of joint-stock companies require a two-thirds majority of the votes of attending shareholders of each company;
- mergers and demergers of limited liability companies require two thirds of all votes of each company;
- transfer of an ownership interest in a limited liability company requires two-thirds of all votes of each company has to be approved by (at least) simple majority of attending shareholders; and
- sale of an enterprise (or a part of it) of both, joint-stock companies and limited liability companies has to be approved by (at least) a simple majority of attending shareholders.

Memoranda of association or by-laws may require a higher number of votes for the approval of various types of business combinations. However, even if a business combination is approved, outvoted shareholders may challenge the approval before the court on the grounds of its illegality or conflict with memoranda of association or by-laws.

Appraisal rights apply with respect to mergers, demergers and takeover bids. In a merger or demerger involving a joint-stock company, the exchange ratio and its calculation as well as the amounts of any additional payments to shareholders have to be appraised by an independent expert appointed by court. The appraisal right may be waived by a unanimous decision of all shareholders. In a merger or demerger involving a limited liability company, such appraisal is necessary only if requested by at least one of the shareholders. In a takeover bid, an independent expert appointed by the National Bank of Slovakia must appraise the offer price of shares. Appraisal of the purchase price may also be required with respect to a squeeze-out.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

In practice, hostile transactions are very sporadic particularly because there are only a handful of listed companies in Slovakia. Every takeover bid concerning listed shares must be notified to the board of directors of the target company and the National Bank of Slovakia.

Following the notification on the takeover bid and until the results of the takeover bid are published, the members of the supervisory

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Update and trends

In Slovakia, M&A transactions are generally structured as simple acquisitions of one company (target) by other company (buyer). Mergers, hostile takeovers or leveraged buyouts are rare. Since the Slovak capital markets are underdeveloped, most M&A activity involves only privately held companies. We do not see a change in these trends coming any time soon.

Currently, we are seeing that M&A activity is increasing in both mid-market and large deals. We believe that the continued fall in interest rates (resulting in cheaper borrowing) will boost mid-market M&A activity in the coming months.

Effective as of 1 January 2017, the Slovak law introduced a new form of company 'simple joint stock company' (SJSC). SJSC contains key characteristics conducive for investment. Shareholder liability is limited to the shareholder's investment and the SJSC's liability is limited to the amount of its assets. The SJSC may be established by one or more natural or legal persons. SJSC corporate governance rules require two mandatory bodies: the shareholders' meeting and board of directors (consisting of the appointment of at least one executive). A supervisory board may also be established but it is not mandatory. The SJSC minimum capital requirement is €1. The SJSC's registered capital is divided into shares which may have a nominal value in euros, eurocents, or any combination thereof. The SJSC may only issue book-entry shares – ordinary or preferential. Preferential rights may include (i) the right to a different profit share, (ii) more, fewer or no voting rights, or (iii) special information rights, and any such rights must be specified in the SJSC's by-laws. For the first time under the Slovakian legal regime tag-along, drag-along and shoot-out deadlock provisions are expressly recognised with regard to the new SJSC form.

Effective as of 1 January 2017, the corporate income tax has been reduced from 22 per cent to 21 per cent. However, the new dividend tax has been introduced (see question 18).

Slovakia also imposed direct criminal liability on corporations; although it was possible to impose criminal sanctions on corporations under previous legal framework, such measures have proved to be ineffective and have never been applied in practice.

board, board of directors and other executive bodies of the target company may not take any action that is likely to prevent the shareholders of the target company from making an informed free decision on the takeover bid. Furthermore, the board of directors, in cooperation with the supervisory board, must prepare a common position paper on the takeover bid (except for any such members who are involved in making a takeover bid). The position paper must include (among other things) a statement on whether the selling under the terms and conditions of the takeover bid is in the interests of the shareholders, employees and creditors of the target company.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break–up fees and reverse break-up fees are generally permitted under Slovakian law. They are usually structured as penalties to be paid by the party backing out of the transaction. There are no limits on the amount of the fees because penalty provisions are not prohibited under Slovakian law. However, courts are entitled to reduce the amount of the penalty if they are deemed to be disproportionately high compared with the value and importance of the secured obligation (in this case the obligation to pursue the transaction). Nevertheless, such reduction is limited by the amount of the damages.

Companies may use a wide range of deal protection methods such as no-shop clauses. Legal regulations do not specify any particular limitations in respect of deal protection forms. However, the directors and executives must assess whether agreeing to such clause is in the best interest of the company and its shareholders or not. Should the executives or directors agree to such a provision in the latter case, they could breach the duty of professional care and be liable for any damages.

Financial assistance rules apply to joint-stock companies and do not apply to limited liability companies. Under the Commercial Code, joint-stock companies may not provide advances, loans, credits or securities to third parties in connection with the acquisition of the joint-stock company's own shares.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The National Bank of Slovakia is authorised to suspend a takeover bid of a listed company if all statutory requirements are not met to its satisfaction.

Generally, the parties' failure to comply with Slovakian laws may constitute a reason to restrict a business combination that is subject to registration in the commercial register.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

The Securities Act permits conditional takeover bids (cash or exchange) for securities of listed joint-stock companies. However, the offeror's undertaking to acquire the shares may only be conditioned on a minimum number of acquired shares.

Financing may be conditional in a cash acquisition. It is very common for financing documentation in acquisition deals to contain conditions precedent that are linked to the acquisition. There are no specific rules for such conditions.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Normally, the acquisition of financing would be a condition precedent to completion. The seller would normally not be required to assist with the buyer's financing, unless in a more typical joint venture situation in which the seller was to remain with the company.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Minority stockholders of publicly listed Slovakian companies may be squeezed out for an adequate consideration. Only a stockholder holding 95 per cent or more of the target's registered capital and voting rights may squeeze out minority shareholders. The squeeze-out must be for all of the remaining shares and cannot be conditional. The squeeze-out must be executed within three months following the takeover bid.

Squeeze-out is subject to approval by the National Bank of Slovakia, which shall be issued within 10 business days after receiving the required notification.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are typically structured according to the governing law of the documentation governing the transaction. For example, if English law governs a cross-border transaction, the deal will generally be structured in accordance with English law principles, except to the extent that mandatory provisions of Slovakian commercial law must be complied with. Accordingly, if a Slovakian company is a target in an acquisition, the completion of the share transfer or interest ownership transfer will necessarily involve Slovakian law transfer requirements. In addition to specific transfer requirements, Slovakian

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law could also affect cross-border transactions, for example, in respect of anti-monopoly rules or general transaction rescission rules.

The Commercial Code contains special provisions on cross-border mergers. A cross-border merger is a takeover merger or a merger that involves at least one Slovakian company and at least on company based in other member state of the European Union or European Economic Area. Rules on cross-border mergers require that a number of formal steps are carried out (public disclosure obligations, employee participation rules, assessment of merger's impact on employees, etc) before the merger can be completed. If a Slovakian company is involved in a cross-border merger or demerger, respective provisions of the Commercial Code must apply. These rules, however, do not apply to other types of cross-border transactions (eg, acquisition of shares).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

There are no mandatory waiting periods in case of transfer of shares. A transfer of listed shares is completed by their handover. A transfer of order shares requires endorsement. Transfer of book-entry shares must be notified to and registered with the CDCP.

Transfer of ownership interest must be registered with the respective commercial register. Registration takes two business days. However, the transfer of ownership interest is effective between the contractual parties upon the signature of the transfer agreement, toward the target upon delivery of the transfer agreement to the representative of the target and towards third parties upon registration in the commercial register. Transfer of majority ownership interest (more than half of voting rights) is effective only upon the registration in the commercial register.

Registration of cross-border mergers with the commercial register takes 21 days.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Special regulations apply in financial sector where approval of the National Bank of Slovakia with respect to completion of business combination may be required (see question 6).

In media sector, certain business combinations between broadcasters (as well as between a broadcaster on the one side and a publisher of periodicals on the other side) are restricted in order to protect the pluralism of media within Slovakia.

No governmental approval of business combinations in the energy sector is required; however, ownership unbundling rules according to the EU's Third Energy Package and Slovakian energy legislation must be followed.

18 Tax issues

What are the basic tax issues involved in business combinations?

In case of sale of shares (joint-stock company), ownership interest (limited liability company) and assets, a seller is subject to income tax. Currently, corporate income tax is 21 per cent. Dividends paid to individuals from profits made after 1 January 2017 are subject to 7 per cent tax rate. Generally, dividends paid to companies domiciled in the EU or other double tax treaty jurisdictions are not subject to tax. Dividends paid to, or received from, residents (individuals, companies) of jurisdictions with no double tax treaty are subject to a special tax of 35 per cent. In addition to corporate income tax, some other taxes may apply in the transformation process, such as property transfer tax or VAT. Slovakia is also a party to double taxation treaties with 66 countries.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Rules on employment implications of business combinations are contained in the Labour Code and Commercial Code. The impact of business combinations on employees depends on the form of transaction. Transfers of shares and ownership interests have no effect on employees. In an asset deal, the rights and obligations arising from an employment relationship with a company are automatically transferred to its legal successor. The terms of such employment relationship must remain unaffected. A business combination must not result in collective redundancies without economical, technical or organisational reasons. An employee not willing to work for the acquirer may terminate his or her employment.

The Labour Code imposes certain obligations on the employer to consult various issues related to business combinations with representatives of the employees. At least one month before the transfer, target companies must inform the employees' representatives (or the employees directly) of the intended date of completion of the transaction, the reasons for the transaction, the labour, economic and social consequences for the employees and the planned measures that will affect the employees.

Pursuant to the Commercial Code, the employees of the surviving company of a cross-border takeover or merger have the right to participate in the company's management under certain conditions.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A company in restructuring proceedings may not enter into a merger or demerger.

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A company involved in bankruptcy proceedings can be merged or demerged only with the consent of the bankruptcy trustee. The same applies also to an acquisition or sale of such company or its assets. The bankruptcy trustee may sell the assets of the company individually or through a sale of enterprise contract.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Generally, persons who take a bribe or offer a bribe may suffer criminal sanctions under the Criminal Code. However, specific regulations may apply as well.

According to the Act on Protection Against Legalisation of Income from Criminal Activities, certain types of persons (such as banks, financial institutions, post offices, executors, auditors, trustees, notaries and attorneys) are obliged to provide 'basic care' towards their clients if they are entering into a commercial relationship (regardless of its value), or they are executing an occasional non-commercial relationship worth €15,000 or more, or such persons are suspicious or have doubts regarding identification data of their clients, or such persons are suspicious or have doubts that the client is executing a transaction which could lead to legalisation of incomes from criminal activities. 'Basic care' includes identification of a client and final user and their verification, obtaining information on the purpose and nature of the business relationship and conducting ongoing monitoring of the business relationship. In cases where higher risk is envisaged, provision of 'increased care' is required.

Moreover, the Security Act requires the CDCP or the stock exchange to identify the origin of funds of any person undertaking a transaction in an amount of €15,000 or more.

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Slovenia

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1 Types of transaction

How may businesses combine?

Joint-stock companies and limited liability companies may, in principle, combine through one or a combination of the following techniques: share deals, asset deals, corporate reorganisations and contractual cooperation models.

When dealing with acquisitions of a one-third share or more of the voting rights in public companies and certain other types of joint-stock companies, one has to consider the takeover legislation. Squeeze-out of the minority shareholders is possible only if a majority shareholder holds in excess of 90 per cent of a joint-stock company's shares.

The following basic corporate reorganisations are possible under Slovenian corporate law:

- mergers, which can occur either through absorption or through consolidation;
- spin-offs, which can occur in one of three ways:
  - through a transfer of all assets from one entity to a new or pre-existing entity and, after which, the transferring entity ceases to exist;
  - through a transfer of all or partial assets from one entity to a new or pre-existing entity and, after which, the transferring entity acquires shares in the new or pre-existing entity; or
  - through a transfer of partial assets from one entity to a new or pre-existing entity and, after which, the shareholders of the transferring entity acquire shares in the new or pre-existing entity;
- transfers of assets to the Republic of Slovenia or a Slovenian municipality;
- changes in legal form; and
- inclusion, which is possible if a joint-stock company is the holder of 95 per cent or more of the shares in another joint-stock company.

Various contractual cooperation models such as enterprise agreements (including profit-transfer agreements, profit-pooling agreements, management agreements, and plant lease agreements), joint ventures, franchising agreements, and the like, are also possible.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

In addition to the applicable EU legislation, the following national laws and their implementing regulations are the principal pieces of legislation that need to be considered in relation to business combinations in Slovenia:

- the Companies Act (the Companies Act);
- the Takeovers Act (the Takeovers Act);
- the Financial Instruments Market Act (FIMA);
- the Book Entry Securities Act;
- the Court Register Act;
- the Prevention of the Restriction of Competition Act;
- the Public-Private Partnership Act;
- the Corporate Income Tax Act (CITA);
- the Value Added Tax Act;
- the Real Property Transaction Tax Act;
- the Tax Procedure Act;
- the Auditing Act;
- the Employment Relationship Act;
- the Worker Participation in Management Act;
- the Act Regulating Employees Participation in Decision-Making in Cross-Border Mergers of Limited Liability Companies;
- the Participation of Workers in Management of the European Public Limited-Liability Company Act (SE);
- the Code of Obligations;
- the Law of Property Code;
- the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act;
- the Supportive Environment for Entrepreneurship Act;
- the Venture Capital Companies Act;
- the Prevention of Money-Laundering and Terrorist Financing Act;
- the Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act (the Bad Bank Act); and
- the Slovenia Sovereign Holding Act.

Depending upon the activities of the companies involved, one should also consider sector-specific legislation, such as the Banking Act, the Investment Funds and Management Companies Act, the Media Act, the Insurance Act, the Financial Conglomerates Act, the Energy Act and similar legislation.

3 Governing law

What law typically governs the transaction agreements?

Transaction agreements in relation to corporate reorganisations are typically governed by Slovenian law, and have to be governed by Slovenian law as far as the corporate aspects are concerned. Provided that the transaction involves a foreign element, share deals and asset deals may be (and often are) governed by laws other than Slovenian laws, such as the law of the selling or the acquiring entity, or a 'neutral' third country law. A public tender offer will require a prospectus containing information provided for in the Takeovers Act and its implementing regulations.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The Takeovers Act applies to the following companies:

- public companies, namely, issuers of securities listed on an organised market in Slovenia or another EU member state; and
- joint-stock companies, the shares of which are not traded on the regulated market and have (on the last day of the preceding year) at least 250 shareholders or total capital of not less than €4 million (according to the latest annual report of the issuer).

If the target is subject to the Takeovers Act, a takeover bid for the acquisition of the remaining shares shall be made by an acquirer holding (alone or together with persons acting in concert with the acquirer), at a minimum, the takeover threshold of a one-third share of the voting

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rights of the target. Once the acquirer acquires an additional 10 per cent share of the voting rights in the target (additional takeover threshold, over and above the minimum one-third threshold), the acquirer must then make subsequent takeover bids in successive 10 per cent increments until the acquirer acquires at least 75 per cent of the target's shares with voting rights by a successful takeover bid. The Takeovers Act contains certain exemptions, including, among others:

- an exemption applicable to banks achieving the takeover threshold or additional takeover threshold by the collection of collateral that encumbers the respective securities. Such banks are only obliged to make the takeover bid two years after they acquired the respective securities, but may not exercise their voting rights if they have acquired the respective securities by collection of collateral; and
- with a prior consent of the Securities Market Agency (SMA) an exception from the obligation to make a takeover bid also applies if the takeover threshold is achieved owing to financial restructuring of the target, performed with the intention of ensuring capital adequacy or long-term solvency before insolvency proceedings are initiated. Such an exception applies for five years following the acquisition of the shares, provided that no additional shares of the target are acquired by the respective acquirer.

If a takeover is mandatory, the SMA needs to approve the offer and the prospectus in advance, and several notification, publication and other formalities need to be completed prior to and during the takeover process. There are fees to be paid to the SMA and the Central Securities Clearing Corporation (the KDD).

When business shares in limited liability companies are acquired, the acquisition must be registered with the competent commercial register.

Acquisition of shares does not require a registration with the commercial register, but book-entry registered shares are transferable through registration with the KDD.

Mergers, demergers and other corporate reorganisations (including corporate reorganisations relating to Societas Europaea), as well as certain enterprise agreements, will also need to be registered with the commercial register in order to become fully effective.

Registration in the commercial register is free of charge, but notary fees for registration need to be paid (applications with the commercial register can be delivered only through authorised bodies, and mergers and demergers need to be registered via public notaries). Notary fees may also be payable as agreements on transfer of business shares in limited liability companies; corporate reorganisation agreements and some other agreements require the form of a notarial deed or signatures of the parties' representatives need to be notarised.

Transfer of real estate requires registration in the land register. Notary fees and court fees need to be paid for such transactions, and the transaction may be subject to the real property transaction tax. Other than the above, contractual transfers of assets generally do not need to be registered with the authorities.

If the business combination represents a notifiable concentration and is not subject to review by the European Commission pursuant to the EC Merger Regulation, it has to be reported to the Slovenian Competition Protection Agency. Concentrations (including concentrations involving acquisition of de facto control) are to be reported if the following threshold is reached:

- the aggregate annual turnover on the Slovenian market of the enterprises participating in the concentration (together with other members of their groups) exceeded €35 million in the last business year; and
- the aggregate annual turnover on the Slovenian market of the acquired enterprise (together with other members of its group) exceeded €1 million in the last business year, or, in the case of the creation of a joint enterprise, the aggregate annual turnover on the Slovenian market of at least two enterprises participating in the concentration (together with other members of their groups) exceeded €1 million in the last business year.

Also, even if the above threshold is not met, the Slovenian Competition Protection Agency must be informed of the transaction so that it has the opportunity to require notification if the enterprises participating in the concentration (together with other members of their groups) achieve more than a 60 per cent market share in the Slovenian market.

Fees are payable to the Slovenian Competition Protection Agency if a notification is filed. A transaction may not be implemented without the required Slovenian Competition Protection Agency approval, unless the Slovenian Competition Protection Agency has already provided for an allowance for the implementation of a specific step or event in the transaction, or if one of the limited exceptions applies.

Finally, there are sector-specific rules that require further filings, and there are usually administrative fees associated with these filings.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The type of transaction structure and the legal form of the entities involved will influence the scope and the content of the information to be disclosed.

The FIMA and its implementing regulations, as well as the EU Market Abuse Regulation, contain detailed rules on periodic and per event disclosures required to be made by public companies. One important category of information that needs to be disclosed by public companies is inside information. Important binding developments concerning foreseen business combinations generally represent inside information and, therefore, have to be published and disclosed to the SMA. Disclosure may be postponed under certain conditions to protect the respective public company's legitimate interests, but such postponement is made at public company's own risk, and the SMA has to be informed of the postponement.

If a takeover is required or voluntarily made, the acquirer has to inform the SMA, the management of the target and the Slovenian Competition Protection Agency of its intention to make a takeover offer, and must also publish such intention on the same day. This obligation has to be fulfilled, at the latest, within three business days after the takeover threshold is reached. The management of the target has the duty to inform the SMA within two business days following the publication of the takeover intention of any potential agreements or negotiations with the acquirer, or of the absence of such agreements and negotiations. The management of the target must also provide the SMA with a statement on potential direct or indirect pledges or other security over the assets of the target company granted to the benefit of the acquirer for the payment of the securities of the target company, as well as on any potential commitments to grant such a pledge or security.

Various disclosures are then required in the prospectus – which has to be published – and also during the takeover process (mostly to the SMA). These include disclosures by various persons including the acquirer, the target and the management and supervisory bodies of the acquirer and the target.

Certain disclosures to shareholders are mandatory in the case of corporate reorganisations and squeeze-outs. Business combinations that are subject to approval of the shareholders at the shareholders' meeting (ie, mergers, demergers, transfers of at least 25 per cent of the company's assets, and change of the legal form) shall be made public by way of convocation of the shareholders' meeting and through the prior submission of prescribed documents (such as the merger contract, annual reports, and reports of the management board, the supervisory board and the auditor) to the commercial register, thereby enabling review by the shareholders. After completion of the business combination, such resulting combination shall be made public by registering it with the commercial register. As a result, certain other documents pertaining to business combinations and squeeze-outs (such as related agreements and resolutions of the shareholders' meetings) will ultimately also become publicly accessible, since most documents filed with the commercial register can be publicly accessed, some even online.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Notifications on substantial shareholdings are required regarding companies covered by the Takeovers Act (see question 4 above) if the following thresholds of total voting rights are reached, exceeded or fall

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below: 5, 10, 15, 20 and 25 per cent; one-third, 50 and 75 per cent. Such notifications are required irrespective of whether the large shareholding was acquired or disposed of through a transaction, or whether it was the result of a corporate restructuring or any other activity of the respective issuer. Notifications must be made within the prescribed time periods (which can be very short) to the management of the target and to the SMA. The target's management has to publish the notifications received.

In accordance with the EU Market Abuse Regulation, persons discharging managerial responsibilities (and persons closely associated with them) have to provide notification on every transaction relating to the shares, as well as other financial instruments, once the initial €5,000 threshold has been triggered, even if none of the above-mentioned percentage thresholds are thereby reached, exceeded or fallen below.

In addition to shareholders, there are several other categories of persons that have to report their substantial interests (for example, persons entitled to exercise voting rights and entities controlling direct shareholders). One also has to carefully consider the applicable aggregation rules. Among others, notification duties also apply to holders of share put options and buyers who have entered into futures contracts concerning shares in companies covered by the Takeovers Act.

Several exemptions to disclosure or aggregation apply if certain conditions are fulfilled. There are, for example, exemptions applicable to custodians, parent undertakings of investment firms, and market makers.

With respect to companies not covered by the Takeovers Act, notifications are still due from them (including partnerships, but not individuals), irrespective of their registered office. They have to provide notification if their shareholding exceeds 25 per cent of share capital or 50 per cent of share capital or voting rights in another company with share capital having its registered office in Slovenia, and not covered by the Takeovers Act, as well as the fact that such thresholds are no longer exceeded. Such notification has to be made to the management of the target – which has to publish it – and the acquirer may not exercise its voting rights until the notification is made. There are no fees associated with such notification.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Members of the management and supervisory bodies must act with the diligence of a conscientious and fair manager in performing their tasks, and have to protect the company's business secrets. They shall be jointly and severally liable to the company for damages caused by a violation of their duties, unless they demonstrate that they have fulfilled their duties fairly and conscientiously, or unless the act that caused damage to the company was based on a lawful resolution passed by the shareholders at a shareholders' meeting (the latter does not exempt damage liability in certain situations involving self-dealing). Management board members shall not be relieved of their liability for damages if the respective action was approved by the supervisory board. The company may waive the compensation claims or set them off only after the expiry of three years after the claims arose, provided there is approval by the shareholders at a shareholders' meeting and minority shareholders holding at least one-tenth of the subscribed capital do not object on the record at the shareholders' meeting. Compensation claims of the company against members of the management and supervisory bodies may also be pursued by creditors of the company if the company is unable to repay its debts towards them. In such case, the members of the management and supervisory bodies cannot rely on the fact that the act that caused damage to the company was based on a lawful resolution passed by the shareholders at a shareholders' meeting, or that the company waived its claim against the respective members.

Persons who use their influence on the company (including the majority shareholders) to induce a member of the management or supervisory body, the procurator or a proxy, to act in a manner that causes damage to the company or its shareholders, must reimburse the company for the resulting damage. Shareholders shall be reimbursed for any damages they suffer in addition to the damage that was caused to the company.

Furthermore, the Companies Act provides that a dominant company shall be specially liable for damages caused when a dominant company induces a dependent company to carry out a legal transaction that is detrimental to it, or induces such dependent company to do something or not do something to its own detriment, without actually compensating for the loss by the end of the financial year or without providing the right to benefits determined for compensation. Liability of the management of a dominant and of a dependent company can also be claimed in such cases.

In the case of a merger or demerger (split), liability of members of the management and supervisory bodies of the merged company for damages caused can be invoked only through an ad hoc representative that files a lawsuit on behalf of all shareholders and creditors. The damages claim is statute-barred for five years after publication of the fact that the merger is entered into the commercial register.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Any corporate reorganisation will require a resolution voted upon by the shareholders at a shareholders' meeting approving the reorganisation with a majority of at least three-quarters of the represented share capital (the articles of association may determine another voting majority for the valid adoption of such resolutions). Audit of various documents by an authorised auditor is required in the case of mergers, demergers and squeeze-out procedures and, in such cases, minority shareholders may usually also apply for judicial review (appraisal) of the exchange ratio or the offered payment (indemnification).

Enterprise agreements (including profit-transfer agreements, profit-pooling agreements, and management agreements) shall also be approved by a majority of at least three-quarters of the share capital represented at the shareholders' meeting. Such agreements usually have to include the amount of compensation due to outside shareholders and the amount of severance pay that will be distributed when the outside shareholders decide to sell their shares to the dominant company.

Unless otherwise stated in the respective articles of association, business cooperation agreements do not require shareholder approval, however, shareholders have the right to be informed about important business cooperation agreements that concern the company's affairs and that fall within the scope of shareholder information rights.

The shareholders also have to approve asset deals if such transfers concern at least 25 per cent of all assets of the company. If the company does not have a supervisory board, the shareholders must approve transactions involving a company in which any member of the management (together with his or her family members) holds a 10 per cent or bigger share or is entitled to participate in the profits of such company.

Holders of business shares in limited liability companies have statutory pre-emption rights. Other than that, shareholders of the target do not usually have any approval rights in share deals, unless it is so provided in the target's foundation documents.

The adequacy of the offered takeover consideration must be audited unless the target is a public company.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

The Takeovers Act contains rules regarding the actions of a target's management and supervisory bodies that may – in the period from the date of the takeover intention until the publication of the takeover result – only be taken following shareholder consent. For example, such actions include share capital increases, transactions outside the ordinary course of business, acquisitions of treasury stock, and generally all actions that may result in frustration of the bid (opt-in pursuant to article 9 of the EC Takeover Directive). Companies subject to the Takeovers Act may opt out of these requirements in their articles of association. To do so, they have to follow the required procedure, achieve the prescribed majorities at the shareholders' meeting and inform the SMA.

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As a result of Slovenia deciding to opt out of article 11 of the EC Takeover Directive, and to opt into article 12 of the EC Takeover Directive, the shareholders have the right to waive certain formerly adopted restrictions (as put forth in the Takeovers Act) that may influence a pending takeover (ie, breakthrough). The SMA keeps a record of all resolutions passed at the shareholders' meetings on breakthrough and on reciprocity.

Otherwise, the general rules of the Takeovers Act apply equally to friendly and hostile takeover bids.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Letters of intent are often entered into in negotiated share and asset deals, and these usually contain provisions granting time-limited exclusivity to one prospective contractual party. Pre-contractual liability may also exist if a party entered into negotiations without having the intention of reaching an agreement, or if the party abolished such intention without a grounded reason.

Break-up and reverse break-up fees are generally allowed in binding agreements, provided that the principle of equal treatment of shareholders and the financial assistance prohibition are respected. Such fees would likely be considered to represent contractual penalties under Slovenian law, which has several important consequences, only some of which may be contractually altered.

Defence mechanisms that may be used by target companies against unsolicited takeover offers are described in question 9. Competitive tender offers are permissible.

With regards to financial assistance, targets are prohibited from assuring advance payments or loans (or any other transaction having a comparable effect) to third parties to acquire their shares.

Also, when a company involved in a merger holds more than 25 per cent of the shares of any other company involved in the merger, and has pledged or offered to pledge these shares as security for a loan or a similar legal transaction aimed at assuring funds for acquisition of these shares, approval by a specified majority of each company's creditors and employees is required in order to validate the merger contract.

Finally, there are restrictions in the takeover context: at the time of prospectus approval, the acquirer must prove to the SMA that it has not granted or committed to grant, in any manner, a pledge or other security over the shares in the target or other form of property of the target not owned by the acquirer, with the purpose to assist it in making its payment for the target's shares, and the target's management must also provide the SMA with a corresponding statement.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Generally, government agencies may not influence or restrict the completion of business combinations on legal grounds, unless there are antitrust concerns, the combination is occurring in a certain regulated sector (see question 17), or the combination involves a company owned directly or indirectly by the state.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

A takeover offer may only contain conditions expressly allowed by the Takeovers Act. Acquirers may condition the success of their takeover offers upon a certain acceptance threshold, and such threshold may generally be lowered during the takeover process, provided that some timing restrictions are respected. Other voluntary conditions are not allowed.

Certain conditions are mandatory. In case of a mandatory takeover offer made by an acquirer who does not yet hold a 50 per cent share of all voting shares in the target company, an acceptance threshold must be set and must equal to or be higher than 50 per cent plus one share. Most importantly, if any approval or consent is required for the acquisition of securities subject to the takeover offer, the offer has to contain a condition subsequent, pursuant to which it shall be revoked if such approval or consent is denied or not issued until the expiry of the period for acceptance of the offer.

Financing may not be conditional. Further, a guarantee issued by an EU member state bank shall be obtained for the entire takeover consideration or, alternatively, the entire takeover consideration shall be deposited prior to the takeover process.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

If a buyer needs to obtain financing, typically the transaction documents do not explicitly describe the financing, but have to be adjusted to enable the financing. Such adjustments may involve the addition or modification of provisions regarding permissible assignments of rights and obligations, provisions regarding permissible disclosure of documents to the financing provider (as an exception to the business secrecy requirement), provisions regarding the permissibility of creating encumbrances on the subject matter of the transaction, modifications of reps and warranties concerning the financial stability of the buyer, etc. Also, financing providers may require inclusion of specific provisions in the transaction documents.

The following provisions of Slovenian legislation are of particular importance when the financing structure is developed.

With regard to financial assistance, targets are prohibited from assuring advance payments or loans (or any other transaction having a comparable effect) to third parties to be used for the acquisition of the target's shares.

Also, when a company involved in a merger holds more than 25 per cent of the shares of any other company involved in the merger, and has pledged or offered to pledge these shares as security for a loan or a similar legal transaction aimed at assuring funds for acquisition of these shares, approval by a specified majority of each company's creditors and employees is required in order to validate the merger contract.

Pursuant to the Takeovers Act, at the time of prospectus approval, the acquirer has to prove to the SMA that it has not:

- granted or committed to grant, for the payment of securities to which the takeover offer relates, in any manner, directly or indirectly, a pledge or other security over securities issued by the target company that are not owned by the acquirer; and
- granted or committed to grant, for the payment of the securities issued by the target company (including securities that are already owned by the acquirer), in any manner, directly or indirectly, a pledge or other security over the assets of the target company.

In addition to consenting to the adjustments of contractual documentation in response to the requirements of the buyer's financing (as described in the first paragraph), the seller will typically assist in the buyer's financing by extending the terms for the payment of the agreed price. A seller's loan to the buyer (either secured or non-secured) and other forms of assistance (eg, guarantees or pledges) are also possible, but are not common.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In a situation where a single shareholder holds shares in a joint-stock company representing at least 90 per cent of the share capital, such majority shareholder has the right to propose at the shareholders' meeting of such company that it adopt a decision on transfer of shares by the other shareholders to the major shareholder, in exchange for payment of an adequate cash indemnification. The indemnification amount shall be determined by the major shareholder, taking into account the assets and profits of the company at the time of the shareholders' meeting. If the squeeze-out is performed within three months

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following a successful takeover offer, takeover compensation has to be offered instead of adequate cash indemnification, provided that at least 90 per cent of the share capital was reached through a mandatory takeover offer, or that a voluntary takeover offer was accepted by at least 90 per cent of its addressees. Consequently, squeeze-outs are most commonly performed within the three-month window following a successful takeover offer.

Before the shareholders' meeting is convoked:

- a bank has to agree to be jointly and severally liable for payment of the indemnification;
- the major shareholder has to prepare a special report;
- the indemnification generally has to be audited by one or more auditors appointed by the competent court upon proposal of the major shareholder; and
- the proposal for the shareholders' meeting has to be prepared, as well as copies of annual reports of the company for the past three business years.

All the above-mentioned documents have to be available to the minority shareholders once the agenda of the shareholders' meeting is published. The period between the convocation and the shareholders' meeting has to be at least 30 days.

If the shareholders resolve, by at least a 90 per cent majority, that the shares of the minority shareholders should be transferred to the majority shareholder in exchange for the payment of an adequate cash indemnification, the resolution must be registered with the competent court after the expiry of a certain period.

If there are no procedural mistakes, the minority shareholders may generally not challenge such resolution, but may initiate a special court procedure challenging the amount of the indemnification (appraisal right). Such court procedure does not delay the squeeze-out process.

The shares of minority shareholders are automatically transferred to the majority shareholder upon registration with the competent court, and a procedure with the KDD then has to be carried out in order to transfer such shares to the account of the major shareholder.

The aggregate duration of a squeeze-out procedure, together with the necessary time for preparation of documents, is around six months. The procedure may be delayed if minority shareholders challenge the resolution reached during the shareholders' meeting for procedural flaws.

In the event that the conditions for a squeeze-out are met, each minority shareholder has the right to request to be bought out.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are not subject to any special laws or regulations, except for cross-border mergers, which are regulated by the Companies Act in accordance with the 10th EU Directive on Cross-Border Mergers. Slovenian entities are allowed to merge with non-Slovenian EU entities and vice versa. The respective provisions of the Companies Act contain a detailed set of provisions (in line with the Directive) regulating procedural and substantive aspects of such cross-border transactions. The most important documents to be prepared in this respect are common draft terms, the management report, the independent expert's report and the pre-merger certificate.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Various notification requirements and waiting periods apply with respect to takeover bids. Among others, a takeover bid has to be launched within a period of 10 to 30 days after the intention to perform a takeover bid is published; and the takeover offer has to be valid between 28 and 60 days.

Waiting periods and registration requirements are also common in corporate reorganisations. If a shareholders' meeting of a joint-stock company is required in order to approve certain types of corporate reorganisations, it has to be convened and convocation published at least 30 days before such meeting is held, and also certain documents (eg, the merger contract, the annual reports, and the reports of the management board, the supervisory board and the auditor) have to be available for review from the day of the published convocation of the shareholders' meeting. In some cases, registration with the commercial register may not be applied for before the expiry of a certain period following the shareholders' meeting.

Unless excluded in the respective foundation documents, shareholders in limited liability companies have pre-emption rights. Otherwise, there are no general waiting or notification periods in share and asset deals. However, such periods can exist on the basis of a company's foundation documents, tax considerations, or industry norms under which the companies operate.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies in specific industries are subject to specific regulations that generally require approval of a supervisory body for the acquisition of a certain percentage of voting rights or share capital, or both, for execution of a shareholders' agreement, or similar. Such regulated industries include, among others, banking, insurance, media, brokerage, gaming and energy. The period required to obtain such approvals is usually strictly regulated and may be substantial.

18 Tax issues

What are the basic tax issues involved in business combinations?

In addition to VAT, corporate income tax considerations (including tax withholdings, goodwill depreciation, thin capitalisation, group taxation and treatment of financing costs) are usually the most relevant when structuring a business combination.

The CITA contains special rules on taxation of certain types of business combinations (transfer of assets, shareholding swaps, mergers and demergers). In case of demergers, it is common to seek confirmation of tax neutrality with the responsible tax authorities. Directive 90/434/EEC, as amended, is transposed into the CITA.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Labour and employment-related benefits are usually set forth in collective agreements, an employer's general acts and employment contracts. The contractual and other rights and obligations deriving from the employment relationship as of the day of transfer, shall be transferred from the employer-transferor to the employer-transferee if any change of the employer is carried out within the meaning of the

Update and trends

With respect to M&A activity involving targets directly or indirectly owned by the Republic of Slovenia, which still represents a large part of all M&A activities, the Slovenian Sovereign Holding is planning the disposal of shares in several investee companies in 2017, among others, in several Slovenian banks (including the largest Slovenian bank, NLB d.d.), the central securities depository (KDD d.d.), several companies within the entertaining sector (CASINO BLED, d.d., CASINO PORTOROŽ, d.d., HIT d.d. Nova Gorica), steel and other heavy metals industries (CIMOS d.d.), energy and the telecommunications sector. The Slovenian Sovereign Holding has already obtained the relevant consents for the disposal plan from the Slovenian National Assembly and the Slovenian government. In addition, several other M&A transactions not involving state ownership are currently under way or are expected to take place, some also in response to continuing financing troubles and consequent restructuring efforts (eg, with respect to telecommunications services provider T - 2 d.o.o. - v stečaju and the holding TUŠ HOLDING d.o.o., which owns one of the Slovenian supermarket chains).

Major legal reforms that could affect business combinations are currently not foreseen.

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Acquired Rights Directive (as implemented in Slovenia). The rights and obligations deriving from collective agreements applicable to the employer-transferor shall be generally assured by the employer-transferor for at least one year.

The employer-transferor and the employer-transferee shall inform the trade unions or, if no trade unions are established, all employees, in advance, and the employer-transferor shall, not later than 15 days before the transfer, consult with the trade unions about the legal, economic and social consequences of the transfer and the envisaged measures for the employees.

In addition, the employees may exercise their influence with respect to the business matters of the employer as a result of their right to participate in management either through the works council or employee representatives.

Representation via the works council (in companies with more than 20 employees) or workers' representative mainly involves exercising the employees' right to be informed and their right to joint consultations on the corporate status matters of the employer. The works council has also the right to co-decide on certain matters.

Employee nominees are appointed to the competent bodies of the employer. In the case of a two-tier management system, the works council may appoint members to the supervisory board (their number shall be determined by the articles of association, but may not be less than one-third and not more than half of all members), and in companies employing more than 500 employees also nominate an employees' director to the management board. In the case of a one-tier management system, the employees may participate in the management of the company through their representatives on the board of directors (their number shall be determined by the articles of association, but has to be at least one and may not be lower than one representative per each three members), and in companies employing more than 500 employees also with their nominee for executive director of the employer.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Concerning acquisitions prior to commencement of bankruptcy, it should be noted that the bankruptcy administrator and creditors may challenge the bankruptcy debtor's legal actions if performed to the detriment of (other) creditors within a period of one year before the bankruptcy initiation, and provided that the opposite party knew of the poor financial or economic position of the bankruptcy debtor. It shall be presumed that such knowledge exists if the challenged action took place within three months before the bankruptcy proposal. As a consequence of successful challenging, the opposite party would need to return to the bankruptcy estate anything that was transferred to it, and it may – provided that it duly reported its claim – request the payment of its claims pari passu with other creditors.

If neither of the parties fully fulfilled its contractual obligations before commencement of bankruptcy proceedings, the bankruptcy administrator may (subject to approval of the bankruptcy court) decide to withdraw from the contract or fulfil it as if the bankruptcy proceedings would not have been commenced.

During the bankruptcy proceedings, the bankruptcy administrator is authorised to sell the bankruptcy debtor's assets in order to (partly) repay the creditors, and certain secured creditors are allowed to sell the bankruptcy debtor's assets that represent security for their claims. The bankruptcy administrator and such secured creditors need to carry out the sale of assets in accordance with the detailed rules contained in the applicable legislation and the resolution of the bankruptcy court. Generally, the allowed methods of sale of the bankruptcy estate are public auction, invitation to tender and direct negotiations with potential purchasers. It is also possible to sell all assets of the bankruptcy debtor – except for the liabilities that remain with the bankruptcy estate – together, as a business unit. Such a method shall generally be used if it results in a better purchase price for the sold assets.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Slovenia adopted the Prevention of Money Laundering and Terrorist Financing Act (transposing Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money-laundering and terrorist financing), which contains the various measures for, the competent bodies involved in, and the procedures for the detection and prevention of money laundering and terrorist financing.

The Slovenian parliament also enacted the Integrity and Prevention of Corruption Act, which defines the term 'corruption' as including any activity that is contrary to the duty of officials or responsible persons in the public or private sectors, as well as the activities of any person who solicits and encourages another to engage in corrupt acts, or activities of any person that result in a profit or gain for themselves or for another, through a directly or indirectly promised benefit, an offered or given or demanded benefit, or an accepted or expected benefit. Public-sector entities and certain state-owned companies are obliged, in accordance with the Integrity and Prevention of Corruption Act, to include a special anti-corruption clause in any contract having a value greater than €10,000. A special anti-corruption clause is foreseen in transactions entered into by the Slovenian Sovereign Holding. The Integrity and Prevention of Corruption Act also enacted a ban on the acceptance of gifts by officials during the performance of their function, however, an exception applies to ceremonial gifts and gifts of a smaller value (ie, under €75). The concept of corruption under the Integrity and Prevention of Corruption Act is broader than the concept of corruption that is recognised as a criminal offence (for example, bribery). A special commission for the prevention of corruption operates under the Integrity and Prevention of Corruption Act, and is

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authorised to publish its non-binding opinions, views, recommendations and explanations covering the scope of this law.

If a certain act or omission committed in connection with business combinations represents a corrupt act as a criminal offence, the perpetrator being an individual can be penalised with imprisonment or a monetary fine or both, and criminal sanctions may also be imposed on legal entities pursuant to the Liability of Legal Persons for Criminal Offences Act. Furthermore, a transaction (business combination) induced by an act of corruption could be nullified (and an innocent party suffering damage could also seek recovery of damages).

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Spain

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1 Types of transaction

How may businesses combine?

The most common types of business combinations in Spain are:
- purchase of shares or assets;
- corporate reorganisations such as mergers, spin-offs, contributions of shares or assets;
- purchase of business units within insolvency proceedings;
- cooperation agreements such as joint ventures;
- takeover bids in listed companies to acquire control;
- EU cross-border transactions; and
- combinations of all the above transactions.

Under any of such transactions the acquirer may pay in cash, securities or a combination of both.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws and regulations that govern business combinations in Spain are:
- purchase of shares and assets: although conditions are left to the free autonomy of the parties, these transactions have general rules set in the Commercial Code published by Royal Decree, dated 22 August 1885 and in the Civil Code published by Royal Decree, dated 25 July 1889;
- corporate reorganisations (mergers, demergers, contribution of assets) are ruled by the Act 3/2009 on Structural Modifications of Corporations, and Law 27/2014, restating the Corporate Income Tax Act (CIT) that sets a special tax regime for corporate restructurings, mergers and spin-offs;
- acquisition of business units is ruled under Act 22/2003, on Insolvency Proceeding;
- takeover bids and acquisition of controlling stakes of listed companies are specifically ruled by the Stock Market Securities Act as amended and restated by Royal Legislative Decree 4/2015, and the Royal Decree 1066/2007 on Takeover Bid rules;
- labour law is codified in the Workers Statute Act, revised by Royal Legislative Decree, 2/2015;
- antitrust and competition are ruled under the Defence of Competition Act 15/2007; and
- corporate law is ruled mainly under the Spanish Corporations Act revised and restated by Legislative Royal Decree 1/2010.

3 Governing law

What law typically governs the transaction agreements?

Share purchase agreements can be governed by the law chosen discretionally by the parties, most often the law applicable to the target company, but it also can be the one applicable under the purchaser or the seller's jurisdiction.

However, even if the transaction agreements are governed under a foreign law, the transfer of shares of a Spanish company must comply with certain formalities under Spanish law.

Transactions consisting in corporate reorganisations such as contributions of assets, mergers, spin-offs, will need to comply with Spanish applicable laws as lex societatis with regards to the formalities for the valid transfer of assets or shares involved in the transaction.

For cross-border mergers, Law 3/2009 of Structural Modifications of Corporations foresees a common procedure for mergers between companies based within EU and EEC member states.

Transactions involving securities of listed companies at the Spanish Stock exchange will need to follow the requirements set by the Spanish applicable stock market laws.

Acquisition of business units or assets at insolvency proceedings will need to be transferred following the procedures set by Spanish applicable laws and regulations.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Generally, business combinations concerning private companies do not require filings with any authorities, except if antitrust notifications are required.

Mergers, spin-offs and contributions need formalisation before public Notary and are to be recorded at the Mercantile registry of the involved companies domicile. Communication of the corporate reorganisation to the tax authorities has to be made subsequent to its recording to confirm the application of the special tax neutrality regime.

When real estate is involved the transaction the transfer is to be notarised and recorded at the Property Registry.

Business combinations involving a public company listed at the Spanish Stock Exchange will require certain disclosures.

Takeover bids of public companies listed at the Spanish Stock Exchange must be filed and authorised by the National Securities Market Commission (CNMV).

Economic concentrations resulting from mergers, acquisition of control, joint ventures, subject to reaching certain thresholds need to be previously notified and approved by the National Market and Competition Commission.

Foreign investment in Spanish companies needs to be notified to the General Directorate for Trade and Investments or the Bank of Spain, as the case may be, for statistical and financial purposes.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information to be made public and the type of publicity will depend on structure of the business combination and the private or listed nature of the acquirer and target.

Share and asset deals of privately held companies do not generally require public disclosure.

When the business combination is structured through a merger, certain publicity has to be made in the interest of employees and creditors.

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Listed companies must disclose immediately any information that is likely to have an impact on the stock price of the shares or on the decision of an investor to buy or sell shares.

In practice, deal disclosures tend to be made when required to do so by law, but very rarely are they done beforehand.

Mandatory takeover bids must be made public immediately after the occurrence of the triggering event.

Voluntary bids must be made public as soon as a formal resolution to launch the offer has been passed by the bidder management body, provided that financing of the bid has already been committed.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Shareholders of listed companies, must report to the board of the company and to the CNMV for public release, the acquisition or loss of a significant stake either individually or acting in concert with third parties when it meets, exceeds or falls below the following thresholds: 3 per cent and multiples of 5 up to 50 per cent and thereof multiples of 10 per cent up to 90 per cent of the company's voting rights. Such acquisition may result either from the direct purchase of shares or from reorganisation transactions such as mergers, contributions or capital increases or reductions.

When a shareholder individually or acting in concert with others acquires a 30 per cent of a listed company's voting rights or if with a stake under 30 per cent it appoints within 24 months the majority of the board members, a takeover bid for 100 per cent of the company will need to be launched.

Directors of listed companies must report their number of voting rights, whether directly or indirectly held when they are appointed or removed and when they acquire or transfer any securities or voting rights in the company.

When the issuer of the listed shares is a party to a business combination these disclosure requirements are not affected.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors' duties include diligent administration, faithful defence of corporate interests, loyalty and confidentiality. The general duty includes specific provisions regarding the misuse of an influential position and insider trading information, to prevent conflicts of interests and maintain the secrecy of all confidential information.

Directors are liable to the company, its shareholders and its creditors for damage caused by illegal acts, acts contrary to the by-laws or carried out in breach of the duties to the office. All directors are jointly and severally liable. A director can only be released from liability if he or she proves that he or she did not participate in the adoption or execution of the harmful resolution and was unaware of it, or, being aware did everything reasonably possible to mitigate it or expressly opposed the resolution resulting in harm.

In the context of business combinations affecting listed companies, the board of directors and the management of the target company are prohibited from taking any action that could jeopardise the success of a takeover bid launched against the company (also called the passivity rule), except for searching competitive offers, in order to ensure that the interests of shareholders prevail over their own interests.

Controlling shareholders have no duties under Spanish law to the company or the majority shareholders in connection with a business combination other than not abusing their majority position when approving resolutions detrimental to the interest of the minority shareholders and for the benefit of the majority shareholders.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In share deals the by-laws or existing shareholders' agreements may foresee pre-emption or tag along rights between shareholders in the event of a transfer to a third party.

In asset deals approval from the shareholders will be required when the assets acquired, contributed or transferred constitute essential assets of the company. Being considered essential assets when they exceed 25 per cent of the value of the total assets of the company stated in the latest balance sheet.

In corporate reorganisations such as contributions, mergers and spin-offs, approval by reinforced majority of the shareholders of the involved companies will be required.

Reinforced attendance quorums are required to validly approve these transactions.

Creditors and bondholders may oppose to a merger or spin-off unless payment or collateralisation of their credits is made.

Takeover bids need to be launched at an equitable price (ie, the highest price the offeror has paid for the same securities during the 12-month period prior to the tender bid), or otherwise, the price calculated according to the valuation methodologies applicable to de listing bids. Under certain circumstances the CNMV can modify the price.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

'Hostile' tender offers (not supported by the board of directors of the target company) are quite rare in Spain since a tender offer rejected by the target board very often results in the failure of the takeover bid.

Spain has implemented the European Takeover Directive 2004/25/EC taking on the passivity or neutrality rule and the breakthrough rule, squeeze-out and sell-out rights.

Prior mandatory approval from the shareholders meeting is required for directors and managers to take actions designed to prevent the success of an unsolicited offer, except for searching competing bids ('white knights'). Obviously, the adoption of such measures will, at the same time, cause significant delays to the takeover bid process.

In addition, the target company's board of directors must issue a report on the takeover bid, stating whether or not they support it, which will certainly influence the target's shareholders.

The breakthrough rule needs to be approved by the shareholders meeting to enable the target to apply neutralisation rules to any restrictions to transfer rights on securities or on voting rights at a shareholders' meeting deciding on takeover protection measures, when the offeror has achieved 70 per cent or more of the voting rights. It will require adequate compensation for the loss of rights.

These rules may be avoided by the target company when the offeror is not reciprocally subject to equivalent rules according to its own legislation or has not adopted equivalent neutralisation measures.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up fees have been increasingly demanded in M&A private transactions; however, they are rarely accepted and tend to end up in the payment of reasonable costs only in restricted events.

In takeover bids the law allows the first offeror to agree a break-up fee to cover the expenses to prepare the tender bid in an amount not to exceed 1 per cent of the effective offer, only payable when the offer does not succeed as a result of a competing offer. This fee needs to be approved by the board of the target company, must have the favourable opinion of the financial advisers of the company and needs to be disclosed at the takeover bid prospectus.

Spanish corporate law prohibits a company giving financial assistance for the acquisition of its shares or of its holding company. The prohibition of financial assistance includes anticipation of funds, loans, guarantees, securities or any type of financial assistance. Two

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exceptions are applicable to corporations (SA): financial assistance to enable employees to acquire shares of the company and within ordinary transactions carried out by banks and financial institutions.

Breach of this prohibition can be sanctioned with a penalty equal to the face value of the shares acquired by a third party with financial assistance, and even though the law does not provide for the consequences of a breach, tribunals tend to consider null and void any transactions done in violation of this provision.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

As a general rule no significant restrictions are applicable by government agencies to business combinations other than competition regulations and specific industries where special regulations apply and depending on the particular circumstances of the transaction previous authorisation or notification can be required from state, regional or local authorities.

There are certain restrictions on foreign investments in sectors directly related to national defence (namely, manufacturing or trading of weapons, ammunitions, explosives or other war materials).

Foreign investments in Spain must be reported to the General Directorate for Trade and Investments, but only for administrative, statistical and financial purposes.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In private company acquisitions and business combinations the parties are free to insert any conditions they deem suitable including financing. Approvial by the competition authorities will be a condition for completion when applicable.

Mandatory tender offers involving listed companies, cannot be subject to conditions except from clearance by the antitrust authorities or any other regulatory approval.

Voluntary tender offers may be conditional provided CNMV considers that the condition complies with the law and may be verified prior to the end of the offer's acceptance period. They are often subject to minimum acceptances by shareholders, approval by the bidder's shareholders meeting or amendment of a targets' by-laws (eg, removal of voting caps, or other structural changes).

As a general rule financing cannot be conditional on a tender offer since it needs to contain guarantees of the fulfilment of the obligations derived from the offer.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In tender bids the offeror shall prove the CNMV the constitution of collaterals that ensure the offer obligations. In cash considerations the offeror by means of a bank guarantee or deposit in the aggregate amount of the cash payment. In exchange of securities justifying the availability and assignability of the securities.

In acquisitions involving private companies the financing is dealt by the purchaser, in parallel to the transaction negotiation and documents, usually it is completed simultaneously to the transaction but in independent documents. Complexity and multiple team intervening in these transactions require a proper and intelligent single legal project manager.

There are no typical obligations of the seller to assist in the buyer's financing.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In Spain squeeze-out and sell-out rights are provided for listed companies, when following a takeover bid the bidder holds at least 90 per cent of the target company's voting rights and the takeover bid has been accepted by shareholders representing at least 90 per cent of the voting rights to whom the offer was addressed.

The squeeze-out right must be exercised within the three months following to the expiry of the acceptance period of the offer at the same price. The prospectus must indicate the offeror's intention to exercise the squeeze-out right if the conditions are met. The offeror must provide guarantees to ensure the payment obligations resulting from its exercise.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Directive 2005/56/EC on cross-border mergers was implemented in Spain by Law 3/2009. As a result, a common legal procedure to carry out cross-border mergers involving EU and EEA limited liability companies has been implemented, resulting in intra-community mergers becoming a common reality in Spanish market practice.

On the other hand, the absence of specific regulation for non-European cross-border mergers presents legal uncertainties that can result in a costly and time-consuming process, making them unlikely.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

In share or asset deals of private companies there are no notification periods unless by-laws or shareholder agreements provide for pre-emption rights.

In corporate restructurings notice to creditors and employees is to be made through public announcements and they will have one month to oppose the operation unless their credits are guaranteed.

For tender bids, in broad lines, the main waiting and notice periods in the process would be:

- the CNMV will have 20 days to approve the takeover prospectus from the date of submission of all the documents to be filed for the request for authorisation (including further requirements from CNMV);
- the acceptance period upon publication of the bid and may last between 15 and 70 calendar days; and
- publication of the offer results and settlement will take approximately six days from the end of the acceptance period.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Foreign investment in energy, air transportation and radio industries, in industries relating to raw materials, minerals of strategic interest and mining rights, in television, gaming, telecommunications and private security industries, in industries concerned with the manufacturing, marketing or distributing of weapons and explosives and in national security-related activities (these latter activities are subject to the clearance rules) will be subject to the requirements imposed by the relevant bodies established by industry-specific legislation, although the general provisions may apply to them once those requirements are met.

The provision of banking activities and insurance activities has to be authorised by the Ministry of Economy. Investment advisory companies need authorisation from the CNMV.

Financial entities and insurance companies have to comply with specific rules regarding assets, investment accounting and reporting to the supervisory authority.

Electricity activities require verification of specific requirements and gas market activities require prior authorisation from the National Energy Commission.

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Public television broadcasting activity may be provided by means of public private partnership or indirect management observing the principles of publicity, transparency, competition, equality and non-discrimination.

Investments from tax havens are in general subject to prior administrative notification.

18 Tax issues

What are the basic tax issues involved in business combinations?

The main tax issues involved in business combinations to be considered by the parties are the following.

Asset deal or share deal

The transfer of shares may allow the seller to mitigate its capital gains tax, through participation exemption rules, but the purchaser cannot step up the tax basis in the assets of the target and inherits any hidden capital gains and contingencies (which will need to be covered by warranties and indemnities in the sale and purchase agreement).

The sale of assets normally produces a taxable capital gain for the selling company. However, the acquiring entity gains a stepped-up tax basis. The acquirer of individual assets does not assume the tax risks of the selling company unless the acquirer continues the business as a going concern.

The purchaser may limit its liability by obtaining a certificate from the Spanish tax authorities showing the tax liabilities and debts. The liabilities transferred then would be limited to those listed in the certificate, if any.

Goodwill

When certain requirements are met, goodwill can be depreciated for tax purposes at a maximum annual rate of 5 per cent. The price allocated to each asset is tax-depreciated according to the individual asset's depreciation profile.

A non-distributable legal reserve should be accounted for an amount at least equal to the goodwill tax depreciation.

Transfer taxes

VAT and transfer tax are not payable on the transfer of shares, except in certain cases mainly involving the sale of shares as a means of selling real estate. In such cases, where more than 50 per cent of the company's assets by value consist of real estate and the acquirer receives more than 50 per cent of the company's voting rights, directly or indirectly, the transfer of the shares may be subject to VAT or transfer tax, to the extent that the parties involved in the transfer of shares act with the intention of avoiding the tax otherwise due on the transfer of immoveable property.

Transfer tax and stamp duty is not payable, but brokerage or notary fees, which are normally less than 0.5 per cent of the price, are applicable.

Losses carry-forward

The offset of tax-losses carry-forward is restricted by the limitations set out in section 26 of Law 27/2014, of 27 November on the CIT Act.

Due diligence reviews

An important part of the due diligence process is an in-depth review of the tax affairs of the potential target company by the advisers to the purchaser.

Debt

The purchaser using a Spanish acquisition vehicle can fund the vehicle with debt, equity or a hybrid instrument that combines both. Since January 2012 interest expenses have not been deductible when derived from intragroup indebtedness incurred to acquire shares in other group companies, whether resident or not, unless the taxpayer provides evidence that the transaction is based on valid business reasons.

Tax consolidation groups

Under the recently approved amendments to the CIT the controlling entity can either be a resident or a non-resident company, and all entities under the controlling company having their tax residence in Spain have to be part of the tax group. The controlling entity must hold directly or indirectly a 75 per cent equity interest and majority of voting rights.

Corporate restructurings

Business combinations consisting of mergers, split-offs, contributions in kind, exchange of shares and other corporate reorganisations are covered by the special CIT regime approved by Law 27/2014 of 27 November, which embeds in the Spanish tax system the tax regime applicable to these transactions covered in EU directives. This special tax regime aims to achieve tax neutrality for corporate restructuring operations by deferring taxation until the acquiring company transfers the assets acquired under such neutral tax regime. Specific anti-avoidance provisions may apply.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The main regulatory framework governing labour relationships in a business combination is the Workers Statute and the relevant collective bargaining agreement applicable to each company.

On a business transfer, the contracts of employment in the business transferred are transferred to the acquirer, who is deemed to be subrogated in the seller's position as employer of the transferred employees. The acquirer must maintain all existing employment terms and conditions, so that the employees' rights in relation to their employment are not adversely affected or altered as a result of the transfer.

Employees do not have a right to object to the transfer. As an exception, key managers, employed under senior management contracts, have a period of three months to request termination of their senior management contracts (under compensation) provided the transfer involves a renewal of the management bodies (such as the board of directors) or if there is a change to their main duties.

Any liabilities arising from pension benefit schemes (determined by specific pension regulations) will likewise be transferred to the acquirer.

Information obligations

Both transferor and acquirer must notify their employee representatives or the affected employees of the transfer date, the reasons and any legal, economic or employment consequences as a result of the transfer, as well as any measures anticipated in respect of the employees.

Joint liability

The transferor and acquirer are jointly liable for three years after the transfer in respect of any obligations regarding payment of wages and social security obligations which originated prior to the transfer.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The main advantage when the target company is involved in an insolvency or bankruptcy proceeding is the possibility of not having to buy the company itself but its productive units, which has become common practice as an alternative to the sale of companies' assets individually.

This procedural solution permits companies to continue as a going concern, ensuring the maintenance of employment and avoiding the destruction of the business, by transferring the main assets, commercial relationships and workforce but not, with some exceptions, the company's liabilities.

The sale of productive units is made through a process defined in the liquidation plan of the company, however, the bidders may in their offers define the perimeter the offer refers to.

In general, the sale of a productive unit is made by auction, but in some exceptional cases a specialised entity can be appointed to carry out the sale process.

The final decision on the adjudication of a productive unit is made by the court upon a non-binding report from both the bankruptcy administrators and the works council, such decision not being subject to further appeal.

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With the exception referred to below, the assets and rights are transferred free of any charges, liens or seizures. The authorisations and contracts are automatically assigned to the buyer without the need for consent by the other parties or authorities.

The general rule is that no liabilities are transferred to the purchaser, with three important exceptions: (i) the purchaser will become jointly and severally liable, along with the company, for all the outstanding wages and compensations in the part not covered by the Spanish Wage Guarantee Fund – although this can be limited by the court to the liabilities referred to the employees being subrogated; (ii) the purchaser will also become jointly and severally liable for all pending debts to the Social Security department; and (iii) when any of the assets being part of the productive unit are subject to secured credits the bidder may either pay or subrogate in such secured credits or the secured creditors must approve the transaction.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

In 2015 Spain amended its criminal code to introduce criminal liability for corporations. Corporations can now be held liable for crimes committed by their legal representatives or persons entitled to take decisions or act on behalf of the corporation (either individually or in a committee) if the actions directly or indirectly benefitted the corporation.

Corporations may also be held liable for criminal actions committed by individuals in the company's benefit when the management had grossly breached the duties of supervision, surveillance and control.

Companies may be protected if they have an adequate compliance programme in place.

For a compliance programme to be effective the criminal code establishes the following items to be implemented:

- risk assessment;
- standards and controls to mitigate criminal risks detected;
- financial controls to prevent crimes;
- the obligation to report any violations of standards and controls through a whistle-blowing channel;
- a disciplinary system to sanction violations of the compliance programme; and
- periodic review of the compliance programme to make the necessary adjustments after serious violations or organisational, structural or economic changes.

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Sweden

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1 Types of transaction

How may businesses combine?

Under Swedish law businesses may combine in any of the following ways:

- acquisition of shares or assets of private companies against payment in cash or shares, or both;
- mergers of public or private companies involving cash or shares, or both, as consideration;
- public tender offers, including exchange offers, against payment in cash or by means of all or part of the stock in a listed company; and
- partnership and joint venture structures.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The Companies Act, Economic Associations Act and the Partnership and Non-registered Partnership Act provide the fundamental statutory framework for legal entities and, together with the Contracts Act, the Sales of Goods Act and the International Sales of Goods Act, form the legal grounds governing business combinations. In addition, inter alia, the following laws may apply:

- the Competition Act – the Swedish Competition Authority shall be notified if a concentration have had a turnover in the preceding financial year in Sweden of all the undertakings involved exceeding 1 billion Swedish krona, and at least two of the undertakings involved each have had a turnover in Sweden during the preceding financial year exceeding 200 million Swedish krona;
- the Annual Reports Act – the act sets out rules relating to the preparation and publication of annual reports, consolidated financial statements and interim reports;
- the Accounting Act – the act specifies different types of accounting principles;
- the Employment (Co-Determination in the Workplace) Act – the act sets out rules regarding the relationship between the employer and the employee, eg, right of association and the right of negotiation in relation to business combinations;
- the Employment Protection Act – sets out rules, inter alia, with respect to dismissals and transfers of employees;
- the Stock Market (Takeover Bids) Act – the act contains provisions governing takeover bids regarding shares and rules concerning mandatory bids;
- the Securities Market Act – the act provides rules and conditions regarding the securities market;
- the United Nations Convention on Contracts for the International Sale of Goods (CISG) – provides guidelines in respect of international purchase agreements;
- regulations issued by the Swedish Corporate Governance Board – including the Board's Takeover Rules;
- regulations issued by the market places – including basic rules for listing on the regulated markets and multilateral trading platforms and the adoption of the Board's Takeover Rules; and
- various tax laws, including the general framework rules in the Law on Income Tax, which can be crucial in a business combination.
- The EC Merger Regulation (2004/139/EC) applies when a concentration has a community dimension where the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion and the aggregate community-wide turnover of each of at least two of the undertakings concerned is more than €250 million.

3 Governing law

What law typically governs the transaction agreements?

The purchase of shares or assets is most commonly based on a share purchase agreement or an asset transfer agreement. If the target company is a Swedish entity the transaction agreements will as a main principle be governed by Swedish law, however, the parties are free to choose another jurisdiction's law to govern the agreement.

It is rather common that the parties choose arbitration in Stockholm, governed by Swedish law, to apply in case of a dispute. An arbitration proceeding under Swedish law will give the parties an opportunity to resolve the dispute confidentially.

Swedish law is based on the principle of freedom of contract, subject to minor restrictions. Contracts are in general considered binding, regardless of whether they are entered into in writing or orally. Contracts can be challenged and enforced through court proceedings pursuant to the general rules of civil procedure.

The parties are free to agree on the terms of the agreements; however the formation and the remedies available in the event of a breach are regulated in statute and case law. The Sales of Goods Act which provides certain protection for the buyer, eg, seller's disclosure obligation, applies on share transfers, even if it is common that parties agree to deviate from the Act. Swedish courts historically use the principles under the Act if the agreement itself is silent on a certain issue. The laws listed in question 2 may also affect how the agreement between the parties is drafted or interpreted depending on the business combination itself.

Mergers (domestic as well as cross-border) involving Swedish limited liability companies are governed by the Companies Act. As regards public tender offers, mandatory provisions of the Stock Market (Takover Bids) Act apply.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The acquisition of shares in limited liability companies is not subject to any registration requirements. Asset deals may, however, trigger requirements of notification and registration of certain assets to public authorities. Further, changes ancillary to the transactions such as changes of articles of association, board of directors or issuance of new shares are registered with the Swedish Companies Registration Office.

As regards listed companies, certain information has to be filed with the Swedish Financial Supervisory Authority. In connection with the announcement of a takeover bid, the offeror shall notify the Swedish Financial Supervisory Authority regarding the offer and the undertaking made to the stock exchange. The offeror shall, within four

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weeks, prepare an offer document and apply to the Swedish Financial Supervisory Authority for its approval.

In respect of mergers the merger plan needs to be registered, and notices made to the Companies Registration Office in respect of the execution and completion of a merger. Exceptions may apply if the absorptions are executed by a wholly owned subsidiary or if the merger only involves limited liability companies with all owners supporting the merger.

Regarding all business combinations, an obligation to notify the Swedish/European Competition Authority may apply; see question 2. Sector specific-rules are covered in question 17.

The registration fees in respect of mergers and changes to the articles etc. paid to the Companies Registration Office are modest. The fee for the approval and registration of the offer document for listed companies are higher, typically between 10,000–65,000 krona, depending on the scope of the bid. There are no stamp duty charges in a share acquisition. In asset deals stamp duty may apply to the underlying assets.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

There are no information requirements under Swedish law regarding business combinations relating to unlisted companies. Listed companies however, shall publish information regarding signing of a business combination agreement, provided that such information might be regarded as 'inside information' as defined in the Market Abuse Regulation (EU) No. 596/2014 (ie, influence the valuation of the listed security).

Listed companies are also subject to the general disclosure rules stated in the Rule Book for Issuers, and shall as soon as possible disclose inside information. Inside information means information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. Such event, triggering a disclosure duty, may be, for example, insolvency within a group, investments or divestments or other events of importance for the company and its shareholders, potentially affecting the stock price. For disclosure rules regarding substantial shareholding, see question 6.

If the business combination is structured as a tender offer, and regardless whether the offer is mandatory or voluntary, an offer document shall be issued in accordance with the disclosure requirements specified in the Financial Instruments Trading Act.

The offer document shall be submitted to the Swedish Financial Supervisory Authority for approval. The construction of the offer document is covered under question 12.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

For unlisted companies there are no specific disclosure requirements under Swedish law. However for owners of large shareholdings in listed companies certain rules apply.

Major shareholders are obliged to inform the Swedish Financial Supervisory Authority and the company, flag, when holdings of shares or certain share-based financial instruments (eg, options and futures) are passing, up or down, certain legal limits. The current limits being 5, 10, 15, 20, 25, 30, 50, 66.6 and 90 per cent of the voting rights or the number of shares issued by the company, to be calculated in certain ways when consolidating a shareholder's total holdings. The legal person or entity that was part of a transaction subject to notification requirements shall without delay notify the company and the Swedish Financial Supervisory Authority of such transaction and in any case at the latest within three trading days from the day of the triggering event.

Persons who qualify as persons discharging managerial responsibilities have to self-report to the Swedish Financial Supervisory Authority and the company itself any subsequent transaction once a total amount of €5,000 has been reached within a calendar year. This disclosure duty is additional to the obligation to inform or flag changes in shareholdings as described above. The reporting also applies to persons closely associated with such person.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Directors and managers of a company have a fiduciary duty to act in the best interest and care of the company, which further transcribes to act in the joint interest of all shareholders in the company. The principle of equality is a fundamental principle within Swedish company law. It means that all shares shall have equal rights in the company, unless otherwise stated in law or the articles of association.

The directors' and managers' fiduciary duty also includes a duty to consider the interests of other stakeholders such as employees, creditors, etc. Stakeholders' interest are generally protected under specific legislation (some mentioned in questions 1–2), which directors and managers are obliged to comply with and observe.

The board of directors represents the company and signs on its behalf. However, the authority for the board of directors has a limit, the directors of the target company are prohibited from taking defensive actions without the support of the general meeting in connection with a business combination.

A managing director of a listed company has to assess if and to what extent he or she can or should assist in the transaction, or if there may be a conflict of interest.

Under Swedish law, a controlling shareholder is free to act in its best interest and does not have any duties as such towards a minority shareholder. There is, however, a general loyalty provision in the Companies Act that protect minority shareholders from unjust actions taken by the majority to enrich or favour a shareholder or third party at the expense of the company or another shareholder. Further, the Companies Act provides certain minority rights. For example 10 per cent of the shareholders may appoint an additional auditor at the general meeting, certain decisions must be approved by a majority of two-thirds of the votes and the shares represented at the general meeting and some resolutions may only be taken if supported by 90 per cent of the shares and votes.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Approval rights over business combinations are often regulated under shareholders' agreements or the company's articles of association or both, and give existing shareholders or the board of directors approval right over contemplated transactions. Such regulations may include right of first refusal, pre-emption rights, drag along and tag along rights or other consents that in a certain way needs to be obtained prior to a share disposal. Disposal of a substantial part of a company's assets is normally decided by the general meeting of the shareholders, as the level of competence of the board of directors in such cases is rather unclear under Swedish law.

If a business combination is contemplated by way of a voluntary tender offer, the approval rights are often dependent on the bidder's level of required acceptances as set out in the offer. In order to control the board of directors, a holding of more than 50 per cent of the issued shares and votes of the target company needs to be obtained. In order to be able to amend the articles of association, two-thirds of the issued shares and votes must be obtained. If a 100 per cent holding is desirable, a threshold of at least 90 per cent of the shares and votes will be needed in order to utilise the squeeze-out mechanism. Many takeover offers will therefore include a condition of acceptance of more than 90 per cent of the issued shares.

Any business combination which involves a merger, demerger, issue of new shares or other instruments or contribution in kind, etc, shall be approved by the shareholders at a general meeting. When resolved upon by the general meeting, a qualified majority of two-thirds of the votes cast and the shares represented at the meeting is required.

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9 Hostile transactions

What are the special considerations for unsolicited transactions?

There is no distinction between hostile and friendly tender offers under Swedish law. The board of directors has the same obligation to act in the best interest of the company and its shareholders, meaning that a hostile bid in itself does not necessarily have to be a better or worse business case than a friendly bid when looking at the outcome for the company or its shareholders.

The board is entitled to take measures on behalf of the company and its shareholders in each situation, whether it is a hostile or friendly bid. For instance, the board may refuse the bidder to carry out a due diligence, or influence the shareholders' choice by recommending them to refuse the bid or seeking alternative capital investors and/or bidders. Such measures have to be made with great care in order for the board to avoid being held liable for not acting in the best interest of the company or its shareholders. In doubtful cases it may be necessary to take action in consensus with the shareholders or to have the general meeting approving the planned or proposed actions, especially if the actions involve hindering a bid.

Some companies may also have protection by skewed voting rights, such as in cases where a large amount of voting rights are tied to unlisted shares. Other considerations to be made are how to manage a bid where there is a great risk of not closing the deal, especially if a due diligence has been done. Competition law may in some cases also be an issue in this respect.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There are no general restrictions under Swedish law regarding the use of break-up fees or reverse break-up fees.

In public deals such provisions are rarely seen, nevertheless being allowed and enforceable between shareholders. However, as mentioned in question 7, the board of the target company shall pay attention to the interests of all shareholders and should not (without a justified reason) intervene or make commitments that limit the shareholders' ability to evaluate and make a decision on the bid or to call for measures to counter the bid. Thus, the target company itself is prohibited from agreeing upon any offer-related arrangement vis-à-vis the bidder, including break-up fees.

In private deals, the board of directors is also obliged to pay attention to the interests of all shareholders in accordance with the general principle on equality of the Companies Act, covered in questions 7 and 9. A resolution by the general meeting to approve, for example, the entering into a letter of intent containing break-up fees would, however, mitigate this potential problem. It is in general more common to use break-up fees in private than in public deals. Typically a fee is used to compensate for transaction costs, but there are however no restrictions on applying the clauses as pure penalty fees.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Government agencies do not have the general authority to restrict the completion of a business combination, except within some sector-specific industries such as the financial sector, whereby the acquirer and its management needs to be approved by the Swedish Financial Supervisory Board (see also question 17). The government may as well, like any other shareholder, exercise general shareholder rights within its portfolio companies and associated companies. Government interference may also be relevant within industries important for national security, such as the energy, nuclear and national defence sectors.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In acquisitions of private companies under Swedish law, the parties are in general free to contract on whatever terms they agree. In such deals, financing may be a condition to completion and will further ordinarily be conditional on the Competition Authority's, or other third-party consent, where applicable.

In a public voluntary offer there is in general no limitation as to which conditions such an offer may contain. Conditions such as a certain level of acceptance from existing shareholders (ie, 90 per cent shares and votes), regulatory or competition approvals and that no other party announces an offer to acquire shares in the offeree company on terms which are more favourable for the holder than the offeror's offer would regularly be included in voluntary offer documents. However, a condition to completion must be formulated in such a way that it can be determined objectively whether or not the condition has been satisfied. The condition may not give the offeror a decisive influence over its satisfaction. In a voluntary offer, the offeror can also offer shares as consideration or other non-cash consideration or through a combination of cash and non-cash elements. In principle, it is also possible to make a voluntary offer conditional on a lender disbursing an agreed acquisition loan, but the offer document must include information on how the acquisition is to be financed. A condition to completion may be waived, in whole or in part, if the offeror has reserved the right to do so.

If an entity (together with its affiliates) holds 30 per cent of a listed company's stock the entity is required to make a mandatory offer for all shares in the target company. The general rules relating to voluntary offers also apply to mandatory offers. However, a mandatory offer must embrace all shares in the target. The offer settlement needs to be in cash, however it is possible to also offer alternative forms of consideration (shares in offeror) provided an all-cash offer is made available and that this option is at least as favourable as the alternative settlement. The offeror is only allowed to make the offer conditional upon requisite official authorisations or regulatory clearances being obtained and an extension of the acceptance period for the cash offer is conditional upon there being no delay in payment of consideration to those who have already accepted the offer.

In respect of mergers of public companies the rules on voluntary offers generally apply. Some of the Takeover Rules, of course, need to be interpreted to match the certain special conditions of mergers. In addition, the rules on, eg, acceptance periods and the shareholders' obligation to honour their acceptances of the offer do not apply.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

The buyer of a non-listed target company may negotiate for the share purchase agreement to include a condition precedent that the buyer obtains financing. This is sometimes (but more often not) accepted by sellers. In a public takeover situation, the offer may not be made without ensuring sufficient financing. However, the offer may be conditional on a lender disbursing an agreed acquisition loan. If the lender fails to disburse the loan, eg, due to insolvency, the bidder may withdraw the offer under such condition. A summary of the buyer's financing will typically be included in the offer documents.

In a structured process, the seller will typically require evidence of financing before selecting a bidder. The level of certainty to be produced by the buyer depends on the dynamics of the specific transaction. In larger transactions the seller will often expect bidders to have fully signed loan documentation in place in time for final bids. In other transactions, a commitment letter from a financing bank or fund will be sufficient.

A seller may contribute to the financing of an acquisition by accepting a vendor note as part of the consideration or indirectly through a deferred purchase price mechanism. Further, if there is a significant cash reserve in the target company, the seller may (if legally possible)

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Update and trends

The Swedish M&A market remains active and the amount of transactions involving Swedish targets and/or Swedish investors continues to be high, although we have seen a slight decrease in volume during 2015 and 2016, compared to all-time-high in 2014. In recent times private equity as well as strategic players have remained active in the public markets and made divestments through IPOs owing to the high valuations present on the Swedish stock exchanges during 2015 and 2016. Quite contradictory, however, in 2016 the going-private transactions have also increased significantly. Among the strategic players, GE made an offer to the shareholders in Arcam (medical manufacturing) and Knorr-Bremse and ZF Friedrichschafen competed for shares in Haldex (automobile spare parts). Among the notable PE driven going-private transactions are Nordic Capital's offer for Nordnet Bank (financial institution), Blackstone's offer for D Carnegie & Co (real estate) and Norvestor's offer for Nordic camping & resorts (travel and leisure).

Among the recent notable regulatory changes in respect of public transactions, the Swedish Financial Instruments Trading Act entered into force in February 2016. The amendment was made to implement changes in the updated EU Transparency Directive, revising, inter alia, the duty to notify major stock holdings in listed companies. The duty to disclose public holdings to the Swedish Financial Supervisory Authority by 'flagging' has been expanded to include more financial instruments and derivatives than earlier. Financial instruments which are similar to a right to purchase shares are now included in the group of holdings when calculating the total holdings in relation to the statutory thresholds (5, 10, 15, 20, 25, 30, two-thirds or 90 per cent of the voting rights or shares). The broadened meaning of financial instruments may now include, eg, options, swaps and futures. The time limit for notifying the changes in holdings has been extended from one to three trading days, from the day of the triggering event. The sanction for violating the rules is now, for a legal entity, the higher amount of €10 million, 5 per cent of the annual turnover or twice the amount of the profits gained or losses avoided due to the breach. For a natural person the new fine is the higher amount of €2 million or twice the amount of the profits gained or losses avoided due to the breach.

Further, in July 2016 the Market Abuse Regulation (EU) No 596/2014 entered into force. The regulation comprises a new set of rules dealing with insider trading, issuer reporting and public disclosures. A slightly amended definition of inside information, along with a broadening of triggering transactions and reporting requirements has extended the scope of the rules. Besides the set of rules governing insider dealings, persons discharging managerial responsibilities, as well as persons closely associated with them, are obliged to report, to the Swedish Financial Supervisory Authority and the company itself, any transactions exceeding an aggregate amount of €5,000 for a calendar year. Persons discharging managerial responsibilities are further prohibited from trading with the issuer's financial instruments during a closed period of 30 calendar days before the announcement of an interim financial report or a year-end report. Market abuse related to insider issues is distinguished between three types of prohibited behavior; insider dealing, unlawful disclosure of inside information and market manipulation. The sanctions for breaches of the prohibitions are greatly sharpened, and under Swedish law punishable by prison and high-tariffed administrative fines.

procure for a dividend to be carried out prior to closing of the acquisition, to avoid the buyer having to finance the acquisition of excess cash. It should be noted in this context that Swedish law prohibits a target company from providing financial assistance for the acquisition of its own shares or those of a parent or sister company. Restrictions do not apply to the seller of a target company.

The target group is normally refinanced in connection with the closing of an acquisition. This is partly because the buyer may have obtained its acquisition financing from an institution other than that previously engaged with the target group; the new institution is then required to be able to provide the working capital financing and other banking business of the target group as part of the deal. It is often equally due to the fact that the capital structure or credit risk or both of a company changes in connection with an acquisition. The seller typically has an obligation to contribute to the closing of a refinancing, the release of its previous indebtedness and security and other practical matters.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

A majority shareholder, who directly or indirectly, holds more than 90 per cent of the shares in a company may redeem the remaining 10 per cent from the minority shareholders. Each minority shareholder of the company has a corresponding right to demand redemption by such majority shareholder. The board of directors shall inform the affected shareholders of the redemption request and publish it in the Official Swedish Gazette. The affected shareholders have two weeks to notify the board on which the arbitrator will represent them. If the redemption price is not accepted by the minority shareholders and cannot be agreed upon, it must be determined by three arbitrators. The redeemer shall bear the costs of the arbitration, unless the arbitrators for a particular reason deem that it is reasonable to order otherwise. There is a possibility to get the title to the shares subject to the redemption even prior to the end of the proceedings should a security be placed over the payment of the redemption price. Arbitration proceedings relating to redemption generally take 12 to 24 months.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are often structured by taking into account taxation issues and type of buyer. Financial investors may for instance set up an offshore holding structure of one or more private limited liability companies incorporated and tax-resident outside of Sweden and acquire the Swedish target company through a Swedish-incorporated and tax-resident special purpose vehicle (an SPV or BidCo). This is, however, typically not the case when it comes to strategic buyers. Other tax considerations as thin capitalisation issues and classification issues relating to hybrid financial instruments will also be considered in cross-border transactions.

Sweden has no foreign investments restrictions, save for certain sensitive areas such as the energy, nuclear and defence sectors and there are few laws and regulations that specifically deal with cross-border transactions. Regarding cross-border mergers, however, the Companies Act sets out certain restrictions, which are based on EU-legislation (Directive No. 2005/56/EC). According to the Companies Act, Swedish companies may only participate in mergers with legal entities domiciled in a European Economic Area state. The domicile of a legal entity is determined not only by its registered office (ie, official address) but also by the jurisdiction under which it has been incorporated. This means, for instance, that a company incorporated under American law, with its registered office in Denmark, may not merge with a Swedish company. Furthermore, when acquiring assets of a company, as opposed to shares, the International Sales of Goods Act may be applicable.

Cross-border transactions also trigger the question of conflict of laws, where, for example, a purchase agreement may be governed by a law different from that of the country where the target company is domiciled. If that is the case it might be necessary to analyse how the warranties in the purchase agreement relating to the target company are affected by the conflict of laws and to what extent certain provisions are enforceable in other jurisdictions. It is possible to apply Swedish law without regard to its conflict of law principles.

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16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Except for competition clearance, corporate transactions in general do not require consent from Swedish authorities, hence regular share purchases may be completed in accordance with the time schedule agreed upon by the parties. Some types of business combinations may, however, trigger certain mandatory waiting periods. For instance, public tender offers are subject to an offer period that must be no less than three weeks and no more than 10 weeks, according to takeover rules as set out by the Swedish Corporate Governance Board and the regulated marketplaces (Nasdaq Stockholm and NGM Equity). However, in some cases the offer period is longer (eg, minimum four weeks in MBO situations) or may under certain circumstances be prolonged. Furthermore, all mergers where a Swedish company participates are normally subject to a waiting period of two months, during which time creditors shall have the possibility to oppose the merger.

Where collective bargaining agreements are applicable, the time line of a completion of a business combination may be affected by negotiations with unions, as set out in question 19.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

If the target company is operating within certain industries or sectors, there may be specific requirements to consider (such as requirements for public permits, concessions and approvals). Such industries are, for example, banking, insurance, petroleum, hydropower, media, infrastructure and telecom.

18 Tax issues

What are the basic tax issues involved in business combinations?

The vast majority of the transactions on the Swedish market are conducted through share deals, as a share deal normally is tax-exempt for the seller under the Swedish participation exemption rules. When acquiring a Swedish limited liability company the buyer takes over the historical tax risks related to the acquired company. The reassessment period in Sweden is six years, meaning that tax issues for FY 2011 and forward (not openly disclosed) can be questioned by the Swedish tax authority until 2017. The type of tax risks depends on the business conducted by the target company. The corporate tax rate is currently 22 per cent. Under the Swedish participation exemption rules, a Swedish holding company can sell the shares in a Swedish wholly owned subsidiary tax-exempt.

In general, all type of salaries and benefits paid to an employee is considered an employment income taxed with progressive tax rates (30–55 per cent). Salary costs are also subject to social security contributions for the employer (31.42 per cent) which is a deductible cost for the employer.

Companies within the same group with more than 90 per cent ownership are allowed to even out the profit and losses of the companies in the group so that a profit-making company may contribute its profit (or part thereof) to a loss-making company and thereby avoid paying tax in the profit. This is done in connection with closing of the books. The companies involved in such transactions must all have been part of the group as from 1 January in the relevant year.

Share acquisitions are in general not classified as asset acquisitions for tax purposes. One exception worth mentioning is that Sweden has CFC rules stating that a foreign company registered in a low-tax jurisdiction owned by a Swedish company or Swedish individual should be disregarded for tax purposes, meaning that the Swedish company or individual for tax purposes are considered as holding the assets of the foreign company directly. As regards asset transactions, these usually give rise to capital gains taxation on the seller's side. If the seller is a corporate entity, the tax rate is 22 per cent.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The main regulatory framework governing labour and employee benefits in a business combination is the Employment Protection Act and the Employment (Co-determination in the Workplace) Act.

Upon a transfer of an undertaking, business or part of an undertaking or business, the Employment Protection Act provides all employees the right to have their employment transferred to the transferee on unchanged employment conditions. Further, the employees have the right to object to a transfer of their employment. This generally results in the employees being dismissed due to redundancy, as the business of the transferor no longer exist.

The Employment Protection Act also provides the employees protection against being dismissed and stipulates that a transfer of an undertaking is not a 'just cause' for dismissal.

The transferor and the transferee are both responsible to ensure negotiations with the relevant labour unions when an undertaking is transferred. The negotiations shall commence and finish before the adoption of a decision on the transfer. The negotiations shall include all labour unions for which the transferor and the transferee have entered into a collective bargaining agreement. If the parties have not entered into a collective bargaining agreement, then all the labour unions that the employees are members of shall be invited to the negotiations.

A share transfer as such is not considered as a transfer of an undertaking or business, because it does not entail a change of employer. The target company will remain the employer and the terms of the individual employment contracts will not be affected. Note, however, that the negotiations with the labour unions, described above, still apply to transfer of a susbstantial amount of shares.

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20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

It is very rare that the shares in a target company in bankruptcy are acquired since the purpose of the bankruptcy proceeding is to pay off all creditors of the company to the extent possible and then discontinue the business. All assets of a company in bankruptcy are taken over by a new legal entity: the bankruptcy estate, which is controlled by the bankruptcy receiver, appointed by the court. Therefore, acquisitions involving target companies in bankruptcy are carried out as asset deals. A buyer should note that the bankruptcy estate, in its capacity as seller, will not give the buyer any warranties and will normally not accept any compensation other than payment in cash on closing. The possibilities for the buyer to raise claims against the selling bankruptcy estate are thus very limited and the caveat emptor principle will apply.

The shares in a target company subject to corporate restructuring may be sold and the terms and conditions for such transaction may be freely negotiated between the seller and the buyer. Finding a new owner is sometimes one of the purposes of the corporate restructuring process. A buyer of such company should obtain information about the possibility to force through a public composition and the terms and conditions thereof (which normally is one of the measures taken in the corporate restructuring process), as well as about the financing of the company's activities during the corporate restructuring process, since such financing might be secured through a first-ranking priority right, making it difficult to obtain other financing, eg, from banks.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Swedish anti-corruption legislation, which has to be complied with during, for instance, business combinations, consists primarily of the Swedish anti-bribery legislation. The basic anti-bribery provisions are found in the 10th Chapter of the Swedish Penal Code. These provisions criminalise, inter alia, both the acceptance of a bribe and the giving of a bribe. Specific conditions must be fulfilled for an action to be deemed unlawful according to these provisions. The conditions focus on the persons involved (ie, that the accepting party is an employee or a contractor), the relationship within which the reward is given (ie, that the reward must be accepted in connection to the person's execution of employment or assignment) and the nature of the reward (ie, that it is assessed as being improper). Only wilful misconducts are punishable. Acts that violate these provisions are punishable by a fine or imprisonment for up to six years (if considered a gross offence).

The rules prohibiting the giving as well as the receiving of bribes are as a starting point universally applicable, and are with other words, applicable to bribery of both foreign and domestic subjects.

In addition, a company's financing of bribes is criminalised, if the financing is provided to an agent or intermediary who acts on behalf of the company and the financing with gross negligence encourages the giving of a bribe.

In accordance with established principles of Swedish law, all the aforementioned provisions on bribery can only result in liability for a physical person. Even negligence of the provision on a company's financing of bribery can only result in a punishment for a company's representatives.

During a due diligence review of a target company information on, inter alia, previous, ongoing and expected criminal investigations concerning the company, its board members and key persons is often emphasised. This entails that the existence of corrupt practices by the target company and its representatives is in focus. Information held by the Swedish government is typically disclosed and searchable. Through public searches it is possible to access information on, eg, board representation in different companies, lawsuits and pending trials and bankruptcy history.

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Switzerland

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1 Types of transaction

How may businesses combine?

In private transactions, businesses are usually acquired by the purchase of either shares or (all or part of) the assets and liabilities. Businesses can also be combined by a joint-venture agreement pursuant to which certain assets are transferred to a new corporation in exchange for shares. A public offer is the most common way to obtain control of a public company. Public offers may be structured as tender offers for cash or as exchange offers for securities or a combination of both (including mix and match).

Another way of obtaining control of a company, either public or private, is by a statutory merger. A statutory merger is effected by absorption (one company is dissolved and merged into another) or by combination (two companies are dissolved and merged into a newly formed company). In both cases, the assets and liabilities of the dissolved companies are transferred by operation of law to the surviving or new company. Shares and cash may be used as consideration. If shareholders are forced to accept compensation other than shares of the surviving company (squeeze-out), 90 per cent of all voting securities outstanding need to approve (see question 14).

As alternatives to a statutory merger, share-for-share transactions ('quasi-merger') or the formation of a new company, which takes over the assets and liabilities of the two combined companies in exchange for its own shares, can be pursued.

In transactions in which a company divests parts of its assets or liabilities to one or more acquiring entities, the parties may choose to effect the resulting business combination by way of a statutory demerger. In such case, the respective assets and liabilities of the divesting legal entity are transferred by operation of law to the acquiring company, and the shareholders of the divesting legal entity receive shares in the acquiring company as consideration.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations are, in general, governed by the Swiss Code of Obligations (CO) and by the Federal Act on Merger, Demerger, Transformation and Transfer of Assets (Merger Act). Public offers for listed shares are, in addition, subject to the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (Financial Market Infrastructure Act (FMIA)). The provisions governing public offers for listed shares have been transferred from the Federal Act on Stock Exchange and Securities Trading (SESTA) to the FMIA with effect as of 1 January 2016. The FMIA applies to cash or share exchange offers addressed publicly to the holders of equity securities of companies whose equity securities are listed on a Swiss exchange. It should be noted that the FMIA provides for a mandatory bid rule: a person acquiring, directly or indirectly, more than 33.33 per cent of the voting rights (regardless of whether such voting rights can be exercised) of a Swiss company listed in Switzerland or a foreign company with a primary listing in Switzerland is required to submit an offer for all listed securities of the target. A potential target company's articles of incorporation can provide for an 'opting-out' (no mandatory offer obligation) or an 'opting-up' (increase of the triggering threshold up to 49 per cent of the voting rights). In the case of a mandatory offer (including offers that would result in the triggering threshold being exceeded), the offer price may not be set below (minimum price):

- the weighted average stock price on the relevant Swiss exchange of the 60 trading days prior to the formal pre-announcement or the publication of the offer (if the stock is deemed not liquid, the minimum price corresponds to the value of the shares as valued by a qualifying expert); and
- the highest price paid by the bidder for shares in the company (including privately negotiated block trades) in the preceding 12 months.

Non-mandatory public offers need to comply with the best price rule only (the highest price paid to a shareholder after the formal pre-announcement or launch of the offer or within a period of six months following the additional acceptance period has to be offered to all shareholders). In the case of a cash purchase outside an exchange offer, a cash alternative needs to be offered to all shareholders. In the case of a mandatory offer, the offeror must in any case offer a cash alternative (if otherwise structured as an exchange offer).

If the business combination results in the listing of new shares on a stock exchange, the listing rules of the respective stock exchange need to be complied with (for example, Listing Rules (LR) of the SIX Swiss Exchange (SIX)). In contrast, there is no general requirement to register securities or their owners.

The Swiss Federal Act on Cartels and other Restraints of Competition, in combination with the Ordinance on Merger Control, regulates merger control.

In public transactions, business combinations may be subject to insider trading, market manipulation and publicity rules. An impending acquisition or merger is deemed to be price-sensitive inside information. Insider trading and market manipulation are considered a felony under the FMIA.

There are no general currency transfer limitations or restrictions on foreign investments (see questions 11 and 17).

3 Governing law

What law typically governs the transaction agreements?

The transaction agreement is typically governed by Swiss law. It is common in Switzerland to draft such acquisition agreements in an Anglo-American style, since the statutory remedies provide only for limited protection in the event of a misrepresentation or breach of warranty or non-performance.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The parties to business combinations are obliged to notify the Swiss Competition Commission (ComCo) if:

- the aggregate turnover of the enterprises concerned exceeds 2 billion Swiss francs worldwide or 500 million Swiss francs in Switzerland; and

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- the individual turnover in Switzerland of at least two of the enterprises involved exceeds 100 million Swiss francs.

Special rules apply for banks, savings institutions and insurance companies. In addition, companies that the ComCo found to hold a dominant position in a specific market also have to notify ComCo regarding their business combinations in this market and in neighbouring markets. A combination is deemed approved unless the ComCo decides within one month of notification to initiate an in-depth investigation. If this is the case, the final decision must be rendered within another four months. The merger may be: cleared, cleared subject to conditions or prohibited.

In public offers, the bidder must file the offer prospectus with the Swiss Takeover Board (TOB). Stock exchange filings are required if the business combination results in a listing of securities on a stock exchange. In such case, for instance with respect to the SIX, a listing application with listing particulars must be submitted to the SIX's Admission Board. In addition, filings with the stock exchange and publication of reports may be required based on ad hoc publicity rules set forth in the LR or if a shareholder's participation reaches or passes certain thresholds as a result of the transaction (see question 6).

In certain regulated industries, such as the financial industry, notifications or approvals are required in connection with merger and acquisition transactions (see question 17). Under Lex Koller (the law on foreign ownership of Swiss property), the acquisition by a foreigner or foreign-controlled company of rights in rem over properties or shares, and the acquisition of unlisted shares of a company owning such rights is subject to governmental approval if (rules of thumb):

- one-third or more of the target company's assets or consolidated assets (namely, including the assets of its subsidiaries), at market value, consists of real estate other than commercially used real estate;
- the legal entity's actual purpose is to acquire or trade in real estate, or both of the above; or
- the legal entity possesses considerable land reserves suitable for residential buildings or industrial land reserves that will not be used within two to three years, or both.

For taxes and other fees, see question 18.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Public offers and listings require the publication of a prospectus. In a public offer, the target company's board of directors, and in a statutory merger, as a rule, the board of directors of all involved companies, must issue a special report to the shareholders stating its position on the offer in order to enable the shareholders to make an informed decision.

Pursuant to the LR, a public company must inform the market of any price-sensitive facts (ad hoc publicity) that have arisen in its sphere of activity and that are not of public knowledge (for example, merger, business combination, etc).

The issuer must publish information without delay as soon as it has knowledge of the main points of the price-sensitive facts in question, unless:

- the new facts are based on a plan or decision of the issuer; and
- its dissemination is bound to prejudice the legitimate interests of the issuer. In this case, the issuer can postpone publication of price-sensitive facts as long as confidentiality of such facts is preserved.

A transaction effected under the rules of the Merger Act must be registered in the commercial register. As the commercial register is open to the public, a significant part of the documentation prepared in connection with such a transaction (for example, the merger agreement, financial statements, the merger report and the special audit report obtained in connection therewith) will be available for inspection upon registration. See question 6 with regard to the disclosure of substantial shareholdings.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the FMIA, whoever directly, indirectly (including as a result of a business combination) or acting in concert with third parties, acquires or sells, for his or her own account, securities in a Swiss company listed in Switzerland or a foreign company whose equities are primarily listed in Switzerland, and who thereby reaches, exceeds or falls below the thresholds of 3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent of the voting rights must report these participations to the company and to the stock exchange on which the shares are listed. The disclosure obligations are also triggered by put and call options as well as conversion rights. Both the intentional and the negligent violation of disclosure obligations are subject to fines.

Article 663c CO requires listed corporations to disclose, in their annual business report, the identity of shareholders or organised groups of shareholders with a title or beneficial interest of more than 5 per cent (subject to a lower percentage pursuant to the articles of incorporation) in the corporation's shares to the extent such interest is known to the corporation.

Pursuant to articles 697i et seq CO, the purchasers of bearer shares in a non-listed Swiss company must be reported to the company. Additionally, if shares representing 25 per cent or more of the share capital or the voting rights of a non-listed company are purchased, the beneficial owner has to be reported to the company. If a shareholder fails to observe these reporting rules, the membership and financial rights attached to the shares are suspended.

In the context of a public offer, the bidder and all shareholders holding more than 3 per cent of the voting rights of a listed target company must report all acquisitions and sales of equity securities in the target company and, if applicable, in the company whose securities are offered in exchange for the equity securities of the target company.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under Swiss law, directors and senior officers of a corporation are bound to perform their duties with due care, to safeguard the interests of the corporation in good faith and to extend equal treatment to shareholders under the same circumstances. If they fail to fulfil these duties, they may become personally liable to the company and its stockholders and, in the case of bankruptcy, to its creditors for the damage caused.

In the case of a public offer, directors and officers are bound to act in the best interests of the company and to abide by the requirement to treat all shareholders and all bidders equally (including due diligence access). In the context of a friendly takeover, the board of directors may, in normal circumstances, recommend acceptance without violating its fiduciary duties and without obligation to initiate an auction (for hostile transactions, see question 9).

As a rule, the corporations involved in a merger must consult the employees before the merger becomes effective. The employees may have the recording of the merger in the Commercial Register enjoined by the judge if such duty was violated.

Controlling shareholders owe no fiduciary duties to the company or its minority shareholders (unless acting as shadow directors of the company).

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Approval rights

The shareholders' rights over a business combination vary depending on how the parties have structured the business combination.

In a statutory merger, whether effected by absorption or by combination, the Merger Act requires a resolution of the shareholders' meeting approving the merger with a supermajority vote (namely, at least

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two-thirds of the votes represented and the absolute majority of the par value of the shares represented). No shareholder resolution is required with respect to intra-group mergers ('parent-subsidiary merger' and 'sister companies merger', respectively). In the case of a parent-subsidiary merger, the absorbing company must hold all of the voting securities in the transferring corporation (in some cases 90 per cent suffices), and in the case of a sister companies merger, a company, an individual or a group related by law or contract must hold all voting securities in the companies involved in the merger. Under such circumstances, a resolution passed at the shareholders' meeting is only necessary if the merger involves a capital increase, a name change or an amendment of the purpose of the company as defined in the articles of incorporation.

Statutory demergers effected under the Merger Act need to be approved by the respective shareholders, again with a super-majority vote.

If the transaction is structured as a purchase of either shares or all or part of the assets and liabilities of the target company, Swiss law does not require the shareholders of either company to approve the transaction. A shareholders' resolution of the acquiring company may, however, be required if the transaction involves an increase of the share capital of the acquiring company in order to provide for the share consideration. The shareholders of either company may have to adopt a resolution if the consummation of the transaction effectively means a change to the company's purpose as defined in the articles of incorporation. Such resolutions need to be passed with a supermajority vote.

Appraisal rights

Following a statutory merger or demerger, pursuant to the Merger Act, shareholders can file an appraisal action against the surviving company. If the consideration is deemed 'inadequate', the court determines an adequate compensation payment.

Procedural rights

In the case of a public tender offer for shares of a listed company, shareholders owning 3 per cent or more of the shares at the time of the launch may participate as parties in the procedures of the TOB, the Swiss Financial Market Supervisory Authority (FINMA) and the courts. Typically, such procedures are being used to claim a higher purchase price based on the minimum price or the best price rules.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

A bidder intending to launch a tender offer may directly disclose his or her intention to the public or launch the offer without having approached the target company's board of directors. If a bidder discloses its intention to potentially launch a takeover, the TOB may request it to proceed with an offer or to refrain from launching an offer for six months ('put up or shut up' rule).

Once a takeover offer has been publicly launched (or formally pre-announced) and until the publication of its final result, the board of directors of the target company must abstain from certain action that may impede the offer, irrespective of the offer being friendly or unfriendly and report intended defensive measures to the takeover board.

Before the pre-announcement the board may under certain circumstances undertake defensive measures, even if an offer is imminent. After the takeover offer has been formally pre-announced, only the shareholders' meeting of the target company may resolve any major defensive measures.

Defensive measures include shares with increased voting power. A company may issue registered shares with different nominal values or split existing shares and stipulate in its articles of incorporation that each share entitles its holder to one vote irrespective of its nominal value. However, the nominal value of common shares may not exceed 10 times the nominal value of shares with increased voting power. As minority shareholders (3 per cent or more) have a right to join proceedings in the context of a takeover, they may play an important role in trying to raise the price, fending off or supporting a bidder (hostile or not). All proposals or resolutions of the board of directors of the target company for defensive measures must be in line with the company's interest and the fiduciary duties of the board and, as a rule, respect the principle of equal treatment of shareholders.

Transfer restrictions

The articles of incorporation of a listed company with registered shares may provide for a percentage limit (usually between 2 and 5 per cent) above which registration in the share register with voting rights may be refused by the board of directors. Accordingly, in such situation, an offer can be made subject to the condition that the bidder will be registered or that such restrictions in the articles of incorporation are removed.

Restrictions on voting rights

The articles of incorporation can provide that no shareholder, directly, indirectly or acting in concert with third parties, may cast more than a certain percentage of votes (for example, 5 per cent). This restriction may apply to registered shares and bearer shares. A bidder may therefore make the offer subject to the prior removal of such restrictions.

Capital decrease and extraordinary dividends or capital increase

In some situations bidders can be deterred by extraction or infusion of cash by way of capital adjustments or dividends.

Requirements on changes of articles of incorporation

The above provisions on share transfers and voting restrictions can be further entrenched by imposing special majority voting requirements for their removal from the articles of incorporation of the company. However, the shareholders' vote on the removal of a voting restriction is itself also subject to the corresponding voting restriction.

Redemption of own shares

A corporation may purchase up to 10 per cent of its own shares (treasury shares). Selective share repurchases (and resales) by the corporation, however, are limited by the principle of equal treatment of shareholders in like circumstances, which might also prevent 'greenmailing'.

Poison pills, share placements with white knights or friendly investors

A poison pill mainly consists of options or subscription rights granted to all or some shareholders or third parties, but for the unfriendly bidder, entitling them to acquire new shares or other securities of the target at a substantial discount in the case of an unfriendly takeover attempt. Poison pills are hardly used in Switzerland and would only be lawful under limited circumstances. However, Swiss takeover law permits the use of authorised capital under exclusion of subscription rights of the existing shareholders in the context of a takeover if the articles of incorporation provide for such use.

Poison puts

By means of a poison put, in the terms of its financial instruments, a company makes immediately repayable a larger or smaller part of its private or public debt in the event of a takeover.

Disposal or acquisition of substantial assets

Without shareholder approval, the board of directors of the target company is not entitled to sell or acquire assets valued at more than 10 per cent of the target's assets or contribute more than 10 per cent of the revenues, either voluntarily ('scorched earth' tactics) or on the basis of a lock-up agreement, or to sell or encumber such part of the target's assets that has been designated by the bidder as being among its principal target assets ('crown jewels').

Golden parachutes

Special payments to the management of the target company in the case of an unfriendly takeover may be deemed unlawful defensive measures under the FMIA, if such payments are excessive. Since the entry into force of the ordinance against excessive payments (implementation of the say-on-pay vote in Swiss public companies) on 1 January 2014, golden parachutes are prohibited for members of the board and the senior management of Swiss-listed companies.

White knights

The search for a white knight is neither prohibited nor required. The board of directors or the management of the target company may also take over the company themselves by way of a management buyout.

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Staggered board
While staggered terms of board members do not prevent removal of board members by the shareholders prior to the expiration of their term, they nevertheless pose a hurdle for the election of bidder-friendly board members. Based on the ordinance against excessive payments, each member of the board, the chairman of the board and the member of the compensation committee must be elected on a yearly basis.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There are no statutory or judicially determined limits as to whether break-up fees or reverse break-up fees are permissible in principle and, if so, what break-up fee amount would be acceptable. Therefore, break-up fees are mainly restricted in light of fiduciary duties and shareholder rights. In transactions requiring shareholder approval (for example, a statutory merger or demerger), the board of directors may not agree to a break-up fee in an amount that would prejudice the outcome of the respective shareholder resolution. Break-up fees that correlate to the costs incurred by the other party in connection with the intended merger or demerger should be possible. Reverse break-up fees are rare, as they imply the right or at least the possibility that the buyer may withdraw.

Under the FMIA, the availability of defensive measures against unfriendly takeovers is limited. From the formal (pre) announcement of a public offer until the publication of its final result, a target's board may not (without shareholder approval) engage in any transaction that would significantly alter the assets or liabilities of the target, including the sale of those assets that are the main target of the bidder and that have been described as such in the offer (prohibition of lock-up agreements). Break-up fees are permissible if they do not deter potential competing bidders or coerce shareholders into tendering, and if they roughly correspond to possible costs or damages. See question 9.

Financial assistance
Swiss law does not contain specific financial assistance rules. However, financial assistance may be restricted, depending on the circumstances, by general principles of corporate and tax law such as the principle that equity cannot be (re)distributed to the shareholders, except through the procedures for dividends or capital decreases. Also, contributions to shareholders may trigger withholding and other taxes. Therefore, debt pushdown and similar transactions require careful structuring and, usually, an advance tax ruling.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Under Swiss law, there are no such general legal instruments as would allow governmental agencies to influence or restrict the completion of business combinations. In certain regulated industries, such as banking, supervisory authorities can take regulatory action that may include the withdrawal of licences or mandatory liquidation of the target if the purchaser does not meet the legal requirements. While the government does have certain powers in order to safeguard national security, it is unlikely that a business combination would be openly restricted for such reason.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Public offers may be made subject to conditions only if such conditions are beyond the bidder's control (for example, entry in the share register of the target company or regulatory approvals, shareholder approval to issue shares in an exchange offer, but not financing of the transaction). Where the nature of the conditions is such that the bidder's cooperation is required to satisfy them, the bidder must take all reasonable steps to ensure that the conditions are satisfied. At the close of the offer period, it must be clearly stated whether the conditions have been satisfied. With the approval of the TOB, the bidder may postpone this statement until closing of the offer if it demonstrates an overriding interest. Finally, the bidder may waive any or all of the conditions at any time. By law, closing of the offer results in all outstanding conditions being waived.

Mandatory bids may only be subject to conditions in justified cases (namely, if the condition is needed for completion, for example, government approval, to obtain control or abolishment of voting restrictions). Typical conditions include the following:
- minimum percentage reached;
- grant of regulatory approvals (such as approvals under the Act on Cartels regarding Merger Control, Lex Koller and Banking Acts);
- recognition of the bidder as a shareholder with voting rights; and
- no material adverse change to the economic substance of the target company.

In transactions that are not regulated by FMIA, conditions are only restricted by general principles of the law, such as the principle of good faith.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In private transactions, financing conditions and representations as to financing may be included in the transaction document. In public takeovers, however, the bidder and the independent review body must confirm that full financing is already in place. Furthermore, corporate and tax laws limit the use of funds of the target for its financing.

Finally, Swiss financial assistance rules (see question 10) limit the up and cross-stream financing and provision of security.

As a general rule, the seller does not have any obligations to assist in the buyer's financing in excess of the general obligation to act in good faith.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Following a successful public offer, a bidder may request a squeeze-out of the remaining shareholders, if, after the public offer, it holds more than 98 per cent of the voting rights in the target company. To that end, the bidder must file a request with the relevant court for cancellation of the remaining equity securities within three months of expiration of the public offer. The court orders the cancellation of the remaining equity securities (including derivatives issued by the target) and the target company must allot them to the bidder against payment of the offer price or fulfilment of the exchange offer in favour of the holders of the cancelled equity securities (no appraisal rights).

The Merger Act provides for the possibility of a squeeze-out merger irrespective of the type of company and without a prior purchase offer being required: if a merger resolution is passed with a majority of at least 90 per cent of all outstanding voting rights, the minority may be squeezed out for consideration other than shares of the surviving company. The minority shareholders are protected by appraisal rights.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Practice has shown that alternatives to statutory mergers are frequently chosen by the parties in cross-border transactions (such as quasi-mergers or formation of joint venture companies). A more recent development is the combination by way of reverse triangular mergers.

The Swiss Private International Law Act contains provisions on the cross-border (into or out of Switzerland) transfer of a company's domicile. Cross-border mergers and demergers are possible if the non-Swiss jurisdiction involved recognises such cross-border transactions. If a Swiss company is absorbed by or combines with a foreign company, it

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is further required that the assets and liabilities of the Swiss company pass to the foreign company upon the merger and the shareholders' equity rights will continue to be appropriately safeguarded in the foreign company. The creditors must be requested in a public notice in Switzerland to submit their claims, which the foreign company must secure unless it can prove that the claims are not jeopardised by the proposed transaction. In addition, the rules of Lex Koller must be complied with if the surviving company is a foreign or foreign-controlled entity (see question 4).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Public offer procedures are subject to certain time periods. After a cooling period of 10 trading days, the offer must be open for acceptance for a minimum of 20 trading days and a maximum of 40 trading days. Once the offer period has lapsed, the offer must be extended by another 10 trading days.

In a statutory merger a 30-day document review period applies between the issuance of the merger documentation (agreement, board report, etc) and the resolution by the general meeting of shareholders on the merger.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The acquisition of a significant interest in a Swiss bank or a Swiss securities dealer (generally any interest in excess of 10 per cent of the capital or votes) must be reported to FINMA. The reporting requirement extends to Swiss and foreign shareholders alike. In addition, certain laws specifically address the purchase of companies by non-Swiss (controlled) acquirers in certain sectors (for example, banking, insurance, transport, radio and television, telecoms and transport).

The purchase of an ongoing business that requires a licence or a concession (for example, insurance, transport, telecoms, media, health sector) may be subject to approval by the relevant authorities.

18 Tax issues

What are the basic tax issues involved in business combinations?

Sale of shares

If the seller is an individual, capital gains on his or her private portfolio are usually tax-exempt. In specific cases, however, the tax authorities tend to perceive capital gains as:

- de facto dividends (in 'transformations', if the individual sells his or her shares to a company that he or she controls);
- business income (if the seller qualifies as a professional securities dealer, which is also the case, according to jurisprudence, if an individual seller regularly and systematically deals with securities), which makes the seller subject to income taxation and social security contributions; or
- liquidation proceeds (in 'indirect partial liquidation', if the sale is refinanced by the assets of the acquired company), namely, if shares representing at least 20 per cent of the share capital of a company are sold from the private assets of an individual investor (or a group of individual investors) to the business assets of a corporate or individual buyer and the target distributes current assets not needed for business operations out of distributable profit or reserves within a period of five years after the sale of the shares with the cooperation of the seller.

If the seller is a company incorporated in Switzerland, subject to exemptions below, capital gains are subject to federal and cantonal income taxation of about 12 to 24 per cent (effective tax rate from profits before taxes), depending on the canton of residence and, in certain cantons and communes. However, if the seller qualifies as a company with cantonal holding or domicile privilege, only the federal income tax of 8.5 per cent (effective tax rate 7.8 per cent) applies. In addition, capital gains from the sale of a qualifying investment (namely, at least a 10 per cent participation), if held for at least one year, qualify for 'participation relief', usually leading to an almost full capital gains tax exemption at both the federal and the cantonal level. Qualifying investments may be transferred tax-neutrally to a Swiss or foreign group company.

Sale of assets

Capital gains on business assets sales are fully taxable by all Swiss sellers (individuals and companies). The seller of a business may avoid these tax consequences if his or her company first spins off the assets and liabilities to be sold into a new company in a tax-neutral reorganisation and the seller then sells the shares in the new company, provided that the spun-off activities and the activities left behind both constitute businesses to be continued by the old and the new company, respectively. Furthermore, the sale of assets is subject to 8 per cent VAT, which is recoverable by the purchaser if it qualifies as a Swiss VAT subject and uses the assets for Swiss VAT underlying activities. In the transfer of an entire group of assets (and liabilities) or a closed group of assets (and liabilities), the VAT liability can be discharged with a notification to the federal tax administration rather than payment of the tax.

Tax aspects for the purchaser

Purchase of shares

The tax base for the shares in the purchaser's books is equal to the purchase price. Except in particular cases (for example, if the acquired company encounters serious financial difficulties), it is not possible to write off the goodwill component for tax purposes. In contrast, in an asset purchase, the goodwill may be recorded separately and written off against taxable income.

Swiss tax law does not acknowledge the concept of tax grouping or tax consolidation, which makes it difficult to set off the acquisition debt or losses carried forward against operational income of an acquired company. Therefore, before the acquisition of a Swiss operating company or a group holding company, foreign investors very often form a Swiss leveraged acquisition vehicle (NewCo), which subsequently purchases the shares of the Swiss target company. If the NewCo and the target company are merged thereafter, the NewCo's debts will be taken up into the operating company. Tax authorities will likely qualify this with the result that the interests paid on debt are not tax-deductible (in certain cantons denial of deduction may be limited to the subsequent five years). If the NewCo is not merged with the target company, dividends paid out by the target company may serve to finance the acquisition debt. However, there is a risk that tax authorities could qualify such dividend payments in the case where the shares have been purchased from a private individual seller as an indirect partial liquidation, triggering unfavourable tax effects on the seller (see above). Even if the acquisition vehicle is not merged with the target company, it may be advantageous to incorporate such an acquisition vehicle.

An alternative to push down debt is to leverage the NewCo by having it repay its share capital and additional paid-in capital to the extent legally permissible against assumption of debt. Furthermore, additional leverage may be created by having the NewCo first sell qualified participations to subsidiaries outside Switzerland where the debt is deductible and distribute the sales receivables to the foreign investor. Dividends, which are taxable income for a Swiss resident individual or company, may be sheltered if the shares are held by a Swiss holding company or by an operational company taking advantage of the participation relief. If dividends are not sheltered, the company's income is taxed twice, as profit of the acquired company and as dividend income of the private individual shareholder. The taxation of dividends for private individuals holding qualified participations of 10 per cent in the stated capital of the company making the distribution is reduced by way of a reduction of the tax rate or the taxable amount. In any event, the distribution of dividends (but not repayment of stated capital and additional paid-in capital contributed after 1996) is subject to a 35 per cent withholding tax that may be fully recovered by a Swiss taxpayer or fully or partially recovered in the event of a foreign recipient under an applicable double taxation treaty. In cross-border transactions the tax authorities may refuse to refund all or part of the withholding tax if the purchaser, under an applicable double taxation treaty, is entitled to a refund that is higher than that which the seller would have obtained.

If the target company provides upstream or cross-stream security in the acquisition financing and has not received or will not receive the equivalent value in exchange for such security, then the entering into

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Update and trends

On 23 November 2016, the Swiss Federal Council published its proposal regarding a revision of Swiss corporate law. The bill covers matters as diverse as capital structure and capital changes, shares, shareholder rights and lawsuits, restructuring, executive compensation and gender representation. One aim of the revision is to modernise the capital structure and governance of public and private companies in Switzerland. In particular, the rules on incorporation, share capital and shares would become even more flexible than today, shareholder rights would be strengthened, and the rules on shareholders' meetings would be adapted to technological developments. Other proposals cover shareholder lawsuits and the financial restructuring of distressed companies.

After completion of the legislative process, the corporate law reform may take effect in the early 2020s.

Further, the Federal Council adopted the dispatch on the Financial Services Act (FinSA) and on the Financial Institutions Act (FinIA) at the beginning of November 2015. The FinSA and FinIA will create uniform competitive conditions for financial intermediaries and improve client protection. The FinSA contains code of conduct provisions with which financial service providers must comply as regards their clients. It also makes provision for prospectus duties and requires an easily understandable key information document for financial instruments. The FinIA essentially harmonises the authorisation rules for financial service providers. The bills are being debated by Parliament.

As of 1 March 2017, the Swiss rules on the disclosure of significant shareholdings in listed companies will be amended with respect to 'delegated voting rights'. The new rules are more flexible than the current rules, but require certain investors to update their filings by 31 August 2017. Investors who have current filings that include delegated voting rights will need to update their filings by 31 August 2017. In their disclosure notice, they may either no longer report the delegated voting rights held and exercised by their subsidiaries or add a note that 'delegated voting rights' are being reported on an aggregated basis. In the first case, those subsidiaries that reach or cross a reporting threshold with regard to their delegated voting rights (and potentially other reportable positions) individually will need to make a filing of their own.

In February 2015, the Federal Council presented the dispatch for a partial revision of the Federal Act on Value Added Tax (VAT Act) to the Federal Parliament. The goal of the partial revision is notably the removal of tax discriminations between domestic companies and foreign based companies. The model law has been deliberated in both chambers of the Federal Parliament in the ongoing session. It shall come into force on 1 January 2018.

or the performance of any obligation under such a security by the target company, may be classified as a conveyance of an economic benefit by the target company to NewCo or an affiliated company, for which the target company may, at the time of the entering into or the performance of any obligation under the security, as the case may be, be liable to a 35 per cent withholding tax on any actual or constructive dividend distribution resulting from such conveyance of an economic benefit.

Purchase of assets

In a purchase of assets, the tax base in the purchaser's book is equal to the purchase price of the assets purchased. The goodwill may, to some extent, be recorded separately and written off against taxable income. In a purchase of assets, the operating income of the purchase may be used for the payment of interests on the acquisition debt.

Transactional taxes

The sale of shares, whether by Swiss residents or non-Swiss residents, may be subject to a Swiss securities transfer stamp duty of up to 0.15 per cent (for shares of a Swiss company) or up to 0.3 per cent (for shares of a foreign company) calculated on the sale proceeds if it occurs through or with a Swiss bank or other securities dealer as defined in the Swiss Federal Stamp Tax Act. In addition to this stamp duty, the sale of shares by or through a member of SIX may be subject to stock exchange levy. The transfer of assets is subject to VAT (see above). The transfer of real estate is in many cantons subject to real estate gains tax, real estate transfer tax, or both.

Taxes on mergers

Shares issued in a statutory merger are exempt from the 1 per cent issuance stamp duty. Capital gains of individual shareholders of the acquired company resident in Switzerland are normally tax-free. Should the nominal value of the new shares exceed the nominal value (plus proportional additional paid- in capital) of the shares of the merged company, however, the difference may be subject to income tax. Corporate shareholders are not taxed if they retain the same tax base for the new shares. Squeeze-out payments and payments for fractional shares made by the merging companies may be subject to income tax. Corporate shareholders may claim participation relief for such payments if they hold a participation representing either a value of at least 1 million Swiss francs or at least 10 per cent of the stated capital of the other company. If in a reorganisation, assets and liabilities are transferred at book value, no income tax is usually incurred. Transfers of real estates in the context of a merger do not trigger a real estate transfer tax.

A share-for-share transaction (quasi-merger) where: the acquisition of shares of one corporation in exchange for newly issued shares of the acquiring company leads to the acquisition of at least 50 per cent of the voting rights of the acquired company; and not more than 50 per cent of the consideration for the shares in the acquired company is paid in cash (namely, at least 50 per cent of the consideration consists of newly issued shares of the acquiring company), is exempt from both the 1 per cent issuance stamp duty and securities transfer stamp duty. Treasury shares of the acquiring company used as acquisition currency are considered cash consideration.

The acquiring company using treasury shares as acquisition currency will be treated as having sold the treasury shares and, depending on the tax base and the market value of the treasury shares, realises a taxable gain or a tax-deductible loss on the treasury shares used for the acquisition. Except if deemed an indirect partial liquidation, a share-for-share transaction is tax-neutral for individual shareholders resident in Switzerland: cash consideration paid by the acquiring company constitutes a tax-free capital gain and an increase in nominal value of the shares in the acquiring company over the shares in the acquired company as a result of the exchange ratios is tax-neutral. Cash consideration paid to individuals that are deemed securities dealers or hold the shares in the acquired company otherwise within a business and corporate shareholders are not taxable for shares exchanged if they retain the same tax base for the new shares. Cash consideration paid to them is taxable. It may, however, be offset against a charge to expenses if an impairment is required. If the aforementioned conditions for a tax-free quasi-merger are not met, the 1 per cent issuance stamp duty and/or the securities transfer stamp duty of 0.15 per cent (for shares in a Swiss company) and 0.3 per cent (for shares in a foreign company) apply. If after a tax-neutral share-for-share transaction the acquired company is merged within five years with the acquiring company, the transaction will retroactively be taxed like a statutory merger (see above).

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

A business combination usually either involves the transfer of individual entitlements of Swiss employees under their Swiss pension plan or, if part of a business or a larger group of employees are affected by the combination, a partial liquidation of the pension plan. In the latter case, a proportion of the reserves or the underfunding, respectively, are being transferred as well. Swiss pension plans need to include the details of the requirements and procedures to be followed if the employees leave the plan in their regulations (to be approved by the supervisory authorities).

Also, as an ultima ratio, an employer can be forced to cover any underfunding as evidenced by actuarial calculations. Therefore, due diligence and indemnities in order to identify and address a potential underfunding are critical.

It should also be noted that in the case of an asset purchase regarding a business or part of a business, the employees working in such business are automatically transferred to the acquirer, unless the relevant employees would reject such transfer (with the consequence of termination upon expiration of the statutory notice period). The same rule

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applies in a statutory merger. In the case of such transfer, the acquirer and the former employer are jointly and severally liable for claims (including severance, etc) of the employees relating to the period prior to the transfer. In addition, in asset deals and mergers, certain information and consultation obligations are to be observed. If a combination involves a mass dismissal, special regulations apply. As of 1 January 2014, there is a duty to establish a social plan in case of mass layoffs. Companies not only have to implement a social plan, they also have to be agreed on its content with trade unions or the employees and if the parties fail to reach an agreement, an arbitral tribunal will establish the social plan.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Upon the commencement of insolvency proceedings, either in the form of a creditor moratorium and liquidation or bankruptcy, the acquirer may no longer effect a business combination by entering into a private transaction with that company. A company in insolvency can no longer freely dispose of or divest its assets.

In the case of bankruptcy, the administrator may sell specific assets or the entire business by auction or in a private transaction upon approval at the creditors' meeting. In a creditor moratorium, assets may be transferred and assigned in part or in their entirety to a third party pursuant to a reorganisation agreement negotiated by the administrator on behalf of the company in reorganisation with the creditors of the company. Such an agreement is deemed accepted upon the consent of:

- the majority of the creditors representing at least two-thirds of the claims determined to be admissible; or
- one-quarter of the creditors representing at least three-quarters of the claims determined to be admissible; and
- subsequent court ratification.

If necessary in order to maintain and safeguard the value of a business that may be able to survive under new ownership, the administrator is entitled to dispose of, or divest part of, the assets even before the company is formally liquidated or a reorganisation agreement has been reached with the creditors of the company. Such transaction will, however, need to be approved by the appropriate court.

The usual way to purchase a business from a reorganisation or bankruptcy estate would be by asset deal with the exclusion of liabilities and undesired contracts. Nevertheless, the employees active in the business may be automatically transferred to the purchaser. However, pursuant to recent court precedents, in an asset purchase from a bankruptcy estate, in contrast to the general rule, the acquirer is not liable for transferring employees' claims that relate to the period before the purchase.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Switzerland's anti-corruption laws have been heavily influenced by, and adhere to, the respective international conventions such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Council of Europe Criminal Law Convention on Corruption and the United Nations Convention against Corruption. Under Swiss law, it is a crime for any person to offer, promise or grant an official a bribe, or for an official to solicit or accept a bribe. This applies both to Swiss and foreign officials.

In addition, granting, or respectively accepting an advantage is also a crime under Swiss law. Unlike in the case of bribery, the advantage granted is not linked to any specific act or omission of the official, but is simply granted to the official for carrying out the official duties. The offence of granting, respectively accepting, an advantage only targets Swiss officials.

Bribery in the private sector may also constitute a crime pursuant to the Swiss Criminal Code. The offence consists of offering, promising or granting an employee, a member of a company, a representative or another auxiliary of a third party in the private sector an advantage for an activity that is contrary to his or her duty or that is in his or her discretion. As in the case of bribery of officials, the recipient of the advantage is equally punishable.

Under Swiss law, businesses may themselves also become criminally liable if bribery is committed in the course of doing business if the company has not established all reasonable and necessary procedures to prevent bribery. Hence, adequate compliance programmes and training are not only a matter of best practice from a corporate governance point of view, but also required to eliminate legal risks.

While Switzerland does not usually enact its own economic sanctions, it does regularly implement international economic sanctions imposed on a supranational level, such as sanctions imposed by the United Nations against certain states. Embargoes, in particular, are implemented in Switzerland by means of criminal sanctions in the case of their breach.

In the context of business combinations, due diligence is critical for identifying corruption and economic sanctions-related risks. Such risks should be examined particularly carefully if one of the involved businesses is active in industries or geographical regions susceptible to unlawful practices. Prior to completing a combination, identified risks should be eliminated, in particular by establishing adequate compliance procedures and, if necessary, investigating suspicious business practices discovered in the due diligence.

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Taiwan

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1 Types of transaction

How may businesses combine?

In Taiwan, business combinations may take one of the following forms: merger, consolidation or acquisition of a company.

In a merger, two or more companies come together and one of the participating companies survives and assumes all rights and obligations of the pre-existing companies. In a consolidation, on the other hand, all of the participating companies are dissolved to form and incorporate a brand new company. Except for this fundamental difference, merger and consolidation are virtually identical and quite often are collectively referred to as a 'merger'.

Acquisition of a company may be structured as stock acquisition, asset acquisition or general business transfer with the considerations being cash, acquirer's stock, other assets or any combination thereof.

Typical factors affecting deal structure in other countries such as nature of acquired business, tax considerations, deal economics and third-party consents are also applicable in structuring a business combination in Taiwan.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations involving Taiwanese companies are generally governed by the Company Act concerning matters like the duties of boards of directors, mergers, sales of assets, business transfer, voting requirements, formation and dissolution of corporations, etc.

Business combinations between two or more limited-by-shares type of companies are further regulated by the Business Mergers and Acquisitions Act, but for business combinations involving financial institutions, the following laws should also be applicable:

- the Law Governing Merger of Financial Institutions; and
- the Financial Holding Company Law and other relevant rules and regulations.

The following laws and regulations deal with the offerings or sales of shares of a public company, tender offers, proxy solicitation, and relevant disclosure requirements:

- the Securities and Exchange Law;
- Regulations Governing the Offering and Issuance of Securities by Securities Issuers; and
- other rules and regulations enacted under the Securities and Exchange Law.

Further, if the company's shares are also listed on the Taipei Exchange or the Taiwan Stock Exchange, the listing rules of the relevant stock exchange should also be consulted to ensure compliance with applicable reporting obligations and trading restrictions.

Business combinations are also subject to antitrust reporting obligations under the Fair Trade Act. Furthermore, if the transactions involve foreign ownership of Taiwan businesses, the Statute for Investment by Foreign Nationals and its enforcing rules would also apply.

3 Governing law

What law typically governs the transaction agreements?

Typical documents for business combinations include merger agreement, share swap agreement, share purchase or subscription agreement or asset transfer agreement. Ancillary agreements such as shareholders or voting agreement, transition agreement, escrow agreements, executive employment agreements are also common depending on underlying facts and circumstances of the transaction.

Typically, merger agreements, share subscription agreements and shareholders or voting agreements involving a Taiwan company are governed by Taiwan law. Governing law for other transaction documents, on the other hand, depends on the negotiation and agreement among the parties themselves.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Parties to the business company have to file a notification with the Fair Trade Commission (FTC) in advance and are subject to a waiting period of 30 days from the date the FTC accepts the complete filing materials if the following conditions are met:

- one of the involved parties will acquire one-third or more of the market share after the transaction;
- one of the involved parties has one-quarter of the market share before the transaction; or
- one of the involved parties' turnover from the preceding fiscal year exceeds the threshold amount publicly announced by the FTC.

Further, if the business combination involves offering of securities of a listed company, the offering application must be filed with and approved by the securities authorities (ie, Financial Supervisory Commission (FSC)), and additional listing application or filing with the relevant stock exchange may be required prior to the occurrence of the transaction. A tender offer or proxy solicitation is also subject to a filing requirement with the FSC.

For cross-border business combinations, an application needs to be filed by the foreign investor or acquirer to the Investment Committee for foreign investment approval. Furthermore, a foreign exchange settlement filing needs to be filed with the Central Bank if the acquirer or investor needs to fund the cash consideration with amounts wired from overseas in foreign currency.

Upon the completion of a merger transaction, an application for registration needs to be filed with Ministry of Economic Affairs within 15 days.

There are no regulatory fees or stamp tax payable with regard to business combinations. Notably, in transactions involving sales of issued stock securities, sellers of stock securities in Taiwan need to pay securities transaction tax based on the sale price at the rate of 0.3 per cent.

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5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

For all types of company in Taiwan, upon the completion of merger, the parties involved in the transaction shall immediately publish and notify each creditor of such merger and specify a period of not less than 30 days to allow objection being filed by the creditor, failing which the participating companies may not claim the legal effects of merger against such creditor.

For business combinations involving public companies, the involved public companies shall publicly announce and disclose relevant information on the designated website, including the background of the transaction and the principal terms of the transaction. Such announcement has to be made in a certain stipulated format as early as within two days of the approval of such transaction by the company's board of directors.

Besides, if the transactions involve public companies and require voting of the shareholders, the relevant company will need to publicly inform its shareholders of the shareholder meeting agenda and detailed information about the proposed transactions, including terms of the business combinations, valuation report, etc.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

In Taiwan, owners of large shareholding of public companies are primarily subject to the following disclosure requirements.

If an investor individually or jointly acquires more than 10 per cent of the total issued shares of a public company, it shall file a statement with the FSC within 10 days after the acquisition, stating the purpose and the funding source for the acquisition as well as other matters required to be disclosed by the FSC.

Timely amendment shall be made upon the change of any information in the initial report.

Such shareholder shall also file a report with the public company by the fifth day of each month on any change in the number of shares it holds that occurred in the preceding month.

Additionally, shareholders who, individually or collectively through affiliates, hold more than 5 per cent of the outstanding voting shares of a financial holding company have to report its holdings to the FSC within 10 days from the day of reaching the 5 per cent holding, and further report any change to such holdings exceeding 1 per cent. Similar reporting obligations are also imposed upon shareholders acquiring more than 5 per cent of banks, insurance companies and other financial institutions.

The above requirements are essentially independent reporting requirements and are not affected whether the company is a party to a business combination or not.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under the Company Act, directors and managers owe fiduciary duties to the company, and their duties could be further divided into two prongs: the duty of loyalty and duty of due care. Moreover, the Business Mergers and Acquisitions Act stipulates that the board shall fulfil its duty of care by acting in the best interest of the shareholders when passing the resolution for business combination transactions.

There are no similar legal duties imposed upon the controlling shareholders in Taiwan.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

A company should obtain approval from shareholders upon a majority vote at a shareholders' meeting attended by two-thirds of shareholders or more prior to the completion of a business combination. However, for the merger between the parent company and subsidiary in which the parent company holds more than 90 per cent of the outstanding shares, instead of shareholder approval, only approvals by the boards of directors of the merging companies are required.

Shareholders who have raised their objection to the business combination are entitled to appraisal rights where they may request the company to buy back their shares at a prevailing fair price.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile transactions have not been specifically addressed in our laws or regulations and hence are subject to the same laws and regulations as any other forms of takeovers. Notably, if a buyer, either alone or with others acting in concert, proposes to acquire over 20 per cent of total issued shares of a public company within a 50-day time frame, such acquisition (subject to certain exceptions) may trigger the mandatory tender offer rule and shall be made in the form of a public tender offer with identical purchase terms and conditions.

In Taiwan, hostile takeover is less common owing to negative public perception and possible intervention by the authorities, especially when financial institutions are involved. Anti-hostile takeover tactics such as poison pills and staggered board are not permissible under Taiwanese law.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break-up and reverse break-up fees are generally permissible in Taiwan under the principle of freedom of contract. The courts and regulatory authorities tend to uphold the covenants as agreed by the parties, unless the fees are excessively high compared to the underlying transaction value, in which case the court, if requested, may exercise its discretion to reduce the fee. In the acquisitions of public companies, however, termination fees and other deal protection mechanism are less common as a matter of practice.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

As mentioned in the foregoing questions, a foreign investment approval from the Investment Commission is required prior to the completion of a business combination involving foreign investors.

In reviewing the application, the Investment Commission has broad discretion and historically had taken into account other factors such as public opinions and political sensitivity in deciding whether and when to grant the approval. Nevertheless, substantial progress is currently being made by the government to improve the transparency of the reviewing process.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

A tender offer may be conditional only upon the minimum number of shares being tendered; in other words, the offeror will not be obligated to purchase any of the shares tendered if the actual number of shares

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Update and trends

For the past few years, we have seen many Taiwanese companies seeking M&A opportunities outside of Taiwan in order to expand growth, gain entry to new markets or diversify. This outbound trend has carried on into the year of 2016 and was further fuelled and supported by Taiwan government's new southbound policy. On the other hand, foreign investors are looking to acquire Taiwanese companies for their manufacturing capabilities, advanced technology, and established track record of successfully penetrating other key Asian markets.

Whether it is inbound or outbound, however, these cross-border deals present to corporate buyer challenges including regulatory, political and integration issues. It was against this backdrop that there have been initiatives in Taiwan for corporate buyers to team up with PE firms that work on cross-border deals all year round and can effortlessly tackle the cross-border issues with their wide international networks of contacts and connections.

tendered falls below the minimum number set by the offeror at the outset. During the tender offer process, the offeror may withdraw its offer under the certain circumstances such as material adverse change or insolvency of the target company and subject to the approval of the FSC.

As to other forms of business combinations, conditions may be agreed by the parties and typically include only shareholder approval, regulatory approvals and third-party consents.

In an all-cash tender offer, financing may be conditional upon successful completion of the tender offer, but, as explained above, financing may not be the condition to a tender offer.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

If a buyer needs debt financing to complete a transaction, the seller may require the buyer to provide and attach the relevant financing or commitment documents as an exhibit to the transaction agreement, and require the buyer to take all actions necessary to obtain that financing.

While sellers in Taiwan are inclined to cooperate with the buyer toward obtaining financing for the transaction, sellers typically do not have, and would be reluctant to accept, any contractual obligation to support or assist in the buyer's financing.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Minority shareholders may be squeezed out through cash-out mergers. First of all, prior shareholders' approval for such cash merger must be obtained during a general meeting of shareholders and such meeting for a public company requires at least a couple of weeks' advance notice. Further, immediately after the shareholders approval on the merger, the companies to the merger shall notify their respective creditors and specify a period of not less than 30 days to allow objection being filed by the creditor.

The squeezed-out shareholders are entitled to appraisal rights where they may request the company to buy back their shares at the prevailing fair price. The request shall be made to the company in writing within 20 days after the shareholder meeting. After receiving the request, the company shall decide the fair price of shares with the dissenting minority shareholders. If a mutual agreement on the price of the shares is reached (between the minority shareholders and the company), the company shall buy back the shares within 90 days from the shareholders meeting. In the contrary, if there is no mutual agreement reached within 60 days of the shareholders meeting, the shareholders may file for court determination on the price of the shares.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

In structuring cross-border transactions, attention should be given to Taiwan's foreign investment regulatory scheme. Under Taiwan's foreign investment regulations, Taiwan's industries are categorised into three groups: permissible, restricted and prohibited industries.

Foreign investments are prohibited in companies operating in industries such as national security, postal service, defence and military, etc. Restricted industries such as civil aviation business require that foreign investment of a certain company be limited to a certain cap. Industries that are neither prohibited nor restricted fall into the 'permissible' group. For restricted and permissible industries, foreign investment approvals are required before the completion of the transactions.

Furthermore, investments from the People's Republic of China (China) are subject to a more stringent set of approval process and criteria than typical foreign investments. Industries open to investment from China are more limited and the regulator has broader discretion to decide whether to approve such investment.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

As mentioned previously in question 5, merger transactions trigger a creditor protection procedure under which the company should wait for a period of at least 30 days after the approval of the merger by the shareholders at a shareholders' meeting before it could consummate the transaction. During such 30-day period, the creditors may demand repayment or additional collateral for their debt.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Business combinations involving a financial holding company or regulated financial institutions, such as banks, insurance companies or securities firms, are governed by the Financial Holding Company Act, the Financial Institutions Merger Law, the Banking Act, the Insurance Act, and the Securities and Exchange Act and rules promulgated thereunder. These laws and their enforcing rules prescribe, among others, approval procedures, terms and conditions that are permissible or restricted of the transactions, and qualifications for the acquirer and the target.

Acquisitions of media network operators, such as the cable, radio, television system operators or satellite broadcasting service operators (collectively the system operators) are also governed by the Cable Radio and Television Act or the Satellite Broadcasting Act, which requires the approval from the competent authority, the National Communications Commission. Furthermore, a cap is placed on the number of shares, whether directly or indirectly, that foreign investors may hold in such system operators. Further, the acquisition shall also comply with subscriber density tests by district and on a nationwide basis.

18 Tax issues

What are the basic tax issues involved in business combinations?

Under the Business Mergers and Acquisitions Act, business combination transactions meeting certain continuity of ownership criteria may be qualified for certain tax preferential treatments, such as the following:

- tax exemption (eg, stamp tax, deed tax, securities exchange tax);
- deferral of land value increment tax;
- deduction of the business loss; and
- amortisation of goodwill and expenses.

These above preferential treatments may apply to certain combination transaction between Taiwanese and foreign companies.

In addition, similar and more favourable tax treatments may be applicable to acquisitions involving financial institutions or financial holding companies under the Financial Institutions Merger Act and the Financial Holding Company Act.

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19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

In most business combination transactions, the acquirer may decide whether to retain all or just part of the employees of the target company by serving them a written notice expressly setting forth the new labour terms and conditions.

For employees that the acquirer chooses to retain after closing, they have the right to notify their decisions, in writing, to the acquirer. If they do accept, their preceding employment terms at the target company shall be recognised by the acquirer or its affiliated acquiring entity after the closing.

On the other hand, if they do refuse, such refusing employees along with other non-retained employees would be entitled to receive labour pension (if qualifying for retirement) or severance pay from the target company in accordance with the Labour Standard Law and the Labour Pension Act.

In addition, if massive unemployment (meeting the quantitative conditions set in the relevant rules) will take place in connection with the business combination transaction, the company shall comply with certain advance reporting obligations with the labour authorities pursuant to the Act for Worker Protection from Mass Redundancy.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Under Taiwan's Bankruptcy Act and Company Act, business combination transactions involving a target company in bankruptcy or a court-supervised restructuring procedure will be closely scrutinised and supervised by the court or its approved representative, and accordingly will require the approval from the court. Besides, consents from the creditor group and other interested stakeholders are generally required for acquisition of an insolvent target company. The ability of the acquirer to obtain deal protections and flexible payment terms as may be commonly seen in acquisitions of solvent companies is substantially limited.

If the target company is a financial institution under government receivership, approvals by the relevant receivership authority and the FSC (ie, the financial regulatory agency) are required for the acquisition. Normally, acquisitions of a financial institution under government receivership are initiated by the receivership authority in a bidding process, and the terms and structure will be predetermined from the inception of the bidding process with limited room to negotiate.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

In Taiwan, bribery of a Taiwan government official in return for his or her breach of official duty or preferential treatment relating to their duty is a criminal offense punishable under the Anti-Corruption Act, and the extent of punishment varies depending whether such a government official (the bribee) was requested to breach his official duties or not. If it is the former, the briber is punishable by imprisonment for up to one to seven years, and also a fine of not exceeding the amount NT$3 million. As to the latter, the imprisonment or detention would be no less than three years, with a fine of no less than NT$500,000. There are no laws prohibiting or governing bribery to officials of a foreign government.

There are a couple of features notable about Taiwan's anti-corruption regulation. First, only natural persons, not corporate entities, can be held liable for committing bribery under the Anti-Corruption Act. Furthermore, such offence is punishable only with criminal liabilities, and no other civil liabilities are imposed by the law.

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Tanzania

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1 Types of transaction

How may businesses combine?

The main way in which businesses combine in Tanzania is through mergers and acquisitions. A merger is defined as an acquisition of shares, a business or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania.

Mergers and acquisitions are regulated by the Fair Competition Commission (the FCC) alongside the Fair Competition Tribunal under the Fair Competitions Act 2003 and its Regulations.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The main laws that regulate business combinations include the Fair Competition Act 2003, Companies Act 2002, Capital Markets and Securities Act 1994, Law of Contract Act 2002 and the Transfer of Business (Protection of Creditors) Act 1976.

There are also sector-specific laws that regulate business acquisitions such as the Banking and Financial Institution Act 2006, Tanzania Communications Regulatory Authority Act 2003, the Mining Act 2010 and the Shipping Agencies Act 2002.

Section 11(2) of the Fair Competition Act 2003 states that a merger will be notified to the Fair Competition Commission before it is consummated if it involves a turnover or assets above the threshold of 800 million Tanzanian shillings.

3 Governing law

What law typically governs the transaction agreements?

There is no specific governing transaction agreement apart from the Law of Contract Act 2002, which gives parties to transaction agreements a choice to decide on a law of any jurisdiction to apply. However, some sector-specific laws may impose some conditions on how the subject matter may be transferred, for instance, the land.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

All agreements for business combinations require a Stamp Duty. The law requires all mergers to be notified to the Fair Competition Commission before their consummations. The notification fee is payable to the Commission, which is calculated on the basis of the combined total annual turnover of the last audited accounts or assets of the merging firms. For instance, if a firm's annual turnover is between 800 million and 25,000 billion Tanzanian shillings, the fee is 25 million Tanzanian shillings.

Income tax is also payable to the business combination.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Regulation 9(6) of the Capital Markets and Securities (Substantial Acquisitions, Takeovers and Mergers) Regulations 2006 require any public announcement of an offer to contain at minimum the following information:

- the identity of the acquirer and if the acquirer is a company or companies including name, incorporation or registration number, the identity of the promoters and, or the persons having control over such companies and the group, if any, to which the companies belong;
- the total number and percentage of shares proposed to be acquired from the public ,subject to a minimum number of shares to be acquired pursuant to the Regulations;
- the minimum offer price for each fully paid-up or partly paid-up share;
- the mode of payment of the consideration;
- the paid-up share capital of the target company, the number of fully paid up and partly paid-up share;
- the existing holdings of the acquirer in the shares of the target company, including holdings of persons acting in concert with him or her (if any);
- salient features of the agreement, such as the date, the name of the seller, the price at which the shares are being acquired, the manner of payment of the consideration and the number and percentage of shares in respect of which the acquirer has entered into the agreement to acquire the shares or the consideration, monetary or otherwise, for the acquisition of control over the target company as the case may be;
- the highest and the average price paid by the acquirer or persons acting in concert with him or her for the acquisition, if any, of shares of the target company made by him or her during the 12-month period prior to the date of public announcement; and
- object and purpose of the acquisition of the shares and future plans if any of the acquirer for the target company, including disclosure whether the acquirer proposes to dispose of or otherwise encumber any assets of the target company in the succeeding two years, except in the ordinary course of business of the target company.

If future plans are set out, the public announcement must also set out how the acquirer proposes to implement such future plans, including:

- the date of determining names of shareholders whom letters of offer would be sent;
- the date by which individual letters of offer would be posted to each of the shareholders;
- the date of opening and closure of the offer and the manner in which and the date by which, the acceptance or rejection of the offer would be communicated to the shareholders;
- the date by which payment of consideration would be made for the shares in respect of which the offer has been accepted;
- disclosure to the effect that the firm arrangement of the financial resources required to implement the offer is already in place, including details regarding the sources of the funds whether

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domestic (ie, from banks, financial institutions, or otherwise or foreign);
- provisions for acceptance of the offer by persons who own the shares but are not the registered holders of the shares;
- statutory approvals, if any, to be obtained for the purpose of acquiring the shares; and
- any other relevant information as is essential for the shareholder to make an informed decision with regard to the offer.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Regulation 6(1) of the Capital Markets and Securities (Substantial, Acquisitions, Takeovers and Mergers) Regulation 2006 states that 'any person, who holds more than 5 per cent of shares or voting rights in any company shall, within two months of the coming into operation of these regulations, disclose to the company his aggregate shareholding in that company.'

Regulation 7(1) of the Regulations states 'an acquirer, who acquires shares or voting rights which, when taken together with shares or voting rights, if any, held by him, would entitle him to more than five percent of shares or voting rights in a company shall, disclose the aggregate of his shareholding or voting rights in that company, to the company, in the manner specified in the Second Schedule.'

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

There is a general duty for a director to always exercise his or her duty and power honestly and in good faith and in what he or she believes to be the best interest of the company. The Companies Act 2002 under section 182 provides that a director owes the company a duty to exercise the care, skill and diligence that would be exercised in the circumstances by a reasonable person having both the knowledge and experience that may reasonably be expected of a person in the same position as the director, and any special knowledge and experience which the director has.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

According to the Capital Markets and Securities (Substantial Acquisitions, Takeovers and Mergers) Regulations 2006 all offers made to the board of a listed companies, for acquisition on shares or voting rights, such offer must be approved by a general meeting of the company's shareholders.

The approval rights of shareholders of the private company depend on the terms of the company's constitution.

The Companies Act 2002 requires approval by majority in number representing three-quarters in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting agree to any compromise or arrangement.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

There are no special considerations for hostile transactions. However, any person who intends to make an offer pursuant to a substantial acquisition and merger shall first put forward a proposal to the board of the offeree company or to its adviser before announcing the offer to the public. Where an offer or an approach with a view to make an offer is made by the ultimate offeror or potential offeror, the identity of that offeror or the ultimate controlling shareholder shall be disclosed at the outset to the board of the offeree company. The board may require an offeror to furnish it with information regarding the offeror's ability to implement the offer in full.

The law in Tanzania does not prohibit hostile takeovers. However, for the transaction to be successful, consent of the board or shareholders of the target company needs to be obtained.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break fees are not prohibited in Tanzania. A bidder can seek any type of deal security measures, including break-up fees. However, directors of the bidder will need to consider their fiduciary duties and should also ensure that any such arrangement is in the best interest of the company.

The company cannot limit deals from third-party bidders. For public companies, this will be seen by the regulator as prohibited arrangement. However, a company is permitted to maintain confidentiality of information and not to solicit the bidder's employees, customers or suppliers.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

No. There is no national security review of acquisitions in Tanzania.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

An offer shall not be made subject to the conditions that depend on judgement by the offeror or the fulfilment that is in his control.

All offers other than partial offers, whether voluntary or mandatory, shall be conditional up on the offeror having received acceptance in respect of shares that, together with the shares acquired or agreed to be acquired before or during the offer, will result in the offeror and person acting in concert with him or her holding more than 50 per cent of the voting right of the offeree company.

A voluntary offer may be made conditional on an acceptance level of shares carrying a higher percentage of the voting rights. A mandatory offer shall be subject to no other conditions, relating to minimum or maximum levels of acceptances required to be received or otherwise and shall be unconditional as to acceptances where the offeror and person acting in concert with him or her hold more than 90 per cent of the voting rights before such offer is made.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

For a listed company an acquirer shall before public announcement, by way of security for performance of this obligation deposit in an escrow amount 10 per cent of the consideration payable into the escrow account. The escrow account shall be informed of cash deposited with commercial bank, bank guarantee in favour of offeree or deposit of acceptance securities with appropriate margin with the commercial banker.

The target company is prohibited to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person for any shares in the company, or, where the company is a subsidiary company, in its holding company.

Financing obtained for the acquisition of shares in the non-listed company is dealt with based on the term of the contract.

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14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Any person or group of concert persons who acquires 90 per cent of the shares or voting right in the listed company shall, within a period of three months from the date of closure of the offer, extend the offer to other holders of each class of equity share capital of the company, whether or not the class holds the voting right.

It should be noted that once person or group of concert persons who acquires 90 per cent of the shares or voting right in the listed company such listed company will have to be delisted from the stock exchange and the acquirer shall be required to pass a resolution to remove such shares to the official list of the stock exchange. In this regard the acquirer shall be deemed to take over the company and shall forthwith apply for the procedure to delist the company.

When the acquirer is buying out the rest of the shares, he or she should bear in mind that the Company Act 2002 requires the non-listed company to have no fewer than two shareholders.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions in Tanzania do not have a specific structure. The applicable law in mergers and acquisitions is the Fair Competition Act 2003 and its Regulations, there are no other specific laws and regulations applicable to cross-border transactions. However, for cross-border transactions that involve partner states of the East African Community to which Tanzania is a partner state, the East Africa Competition Act 2006 applies.

The provisions of the Fair Competition Act 2003 together with its Regulations apply to Tanzania Mainland, state bodies and local government bodies in so far as they engage in trade. The law also applies to conduct outside mainland Tanzania:

- by a citizen of Tanzania or a person ordinarily resident in Tanzania;
- by a body corporate incorporated in Tanzania or carrying on business within Tanzania;
- by any person in relation to the supply or acquisition of goods or services by that person into or within Tanzania; or
- by any person in relation to the acquisition of shares or other assets outside Tanzania resulting in the change of control of a business, part of a business or an assets of a business, in Tanzania.

The Fair Competition Act requires that when a transaction falls within either of the above categories it should be notifiable to the Fair Competition Commission if it involves a turnover or assets above the threshold specified by the Commission. Currently the threshold is 800 million shillings calculated based on the combined market value of assets of the merging firms.

After notifying the Commission of the intended merger or acquisition, the Commission is required by law to issue a notice of either complete filing (Form FCC 11) or incomplete filing (Form FCC 12) depending on completeness of the information as requested under Form FCC 8. In the event that the notice of complete filing is used the Commission will proceed with the merger review. In case of incomplete filing, the applicant will be required to fulfil the requirement as requested under the Form FCC 12 issued. It is only after a notice of complete filing is issued that the Commission will proceed with the merger review.

The law requires that within 14 working days the Commission completes the review and communicate in writing to the applicant. However, the Commission may within the 14 working days determine that the merger has to be further reviewed. In this case the Commission will inform the applicant in writing that the merger will be reviewed within 90 working days.

Pursuant to the competition law, a merger is prohibited if it creates or strengthens a position of dominance in a market. Therefore, the test is whether the post-merger firm will result in either the creation of a dominant position or strengthening of the existing dominant position. A merger will be considered to have a dominant position if:

- the post-merger firm's share of the relevant market exceeds 35 per cent; and
- acting alone, the post-merger firm can profitably and materially restrain or reduce competition in the market for a significant period of time.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Other than the relevant waiting periods set forth in the competition laws, as detailed above, there are no other relevant waiting or notification periods for completing business combinations apart from those applicable in sector-specific industries as detailed in question 17.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

The merger control regime in Tanzania is as described in question 15. However, there are some additional sector-specific rules that are applicable to business combinations in certain specific industries. For telecommunications companies, the Electronic and Postal Communications Act 2010 requires that any shareholder or licensee who wishes to transfer, alienate, sub-contract or assign any interest in his shares under a telecom licence must obtain an approval of the Tanzania Communications Regulatory Authority (TCRA). This law also expressly prohibits anti-competitive practices and conduct by the telecoms licensees. Where it appears to the TCRA that a dominant licensee telecommunications systems provider is taking or intends taking any action that has or is likely to have the effect of giving an undue preference or undue discrimination against any persons, the TCRA will give the dominant licensee an opportunity to be heard. After the licensee is given a chance to be heard, the TCRA directs the licensee by a written notice to refrain or cease from taking such action. Contravening this particular provision on anticompetitive practice amounts to an offence liable on conviction to a fine not exceeding US$20,000 or its equivalent in Tanzania shillings. Under this law, the TCRA is empowered to determine the dominant position of electronic communications licensee in the relevant market.

The Capital Markets and Securities (Substantial Acquisitions, Takeovers and Mergers) Regulations, 2006 are applicable to all offers for substantial acquisitions, takeover or merger, concerning or affecting public and listed companies. Under these regulations, an application for a substantial acquisition, takeover or merger in a public or listed company is required to be made to the chief executive officer (CEO), who shall review it for completeness in all material respects. If the application is complete, the CEO shall within 14 days of receipt, submit it to the committee of the Capital Markets and Securities Authority (CMSA). Once the committee receives the application it will make a recommendation to the CMSA on the application within seven days of receipt of the application. The CMSA shall approve or disapprove the application within seven days of receipt of the committee's recommendations. Where the CMSA rejects an application it shall give reasons for the disapproval. It may also require a stock exchange or the applicant to furnish it with the information with regards to the disclosures required by this law.

Another sector specific statute that sets conditions for mergers and acquisitions in Tanzania is the Banking and Financial Institutions Act, 2006. Under this law, no bank of financial institution can effect any voluntary merger, consolidation or other reorganisation of its business or affairs with another bank or financial institution without prior written authorisation of the Central Bank of Tanzania (Bank of Tanzania). The law further prohibits banks and financial institutions from transferring whole or any of its assets or liabilities in Tanzania without a prior written authorisation from the Central Bank.

18 Tax issues

What are the basic tax issues involved in business combinations?

There are two types of taxes involved in business combinations in Tanzania. One is the capital gains tax, which is provided under the Income Tax Act 2008. The capital gains tax is calculated at the rate

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of 10 per cent of the gain for residents and 20 per cent of the gain for non-residents applies to sellers when they realise an asset during business combinations.

Another type of tax applicable during business combinations is the stamp duty tax, which is provided for under the Stamp Duty Act 2006. During a transfer of an asset such as shares or any other property, whether with or without consideration, the stamp duty tax of 1 per cent of the value or amount in question shall be charged to the buyer of such an asset.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

During a merger or an acquisition of shares in a company, the employees of the target company remains unaffected by the transfer of stock. The terms of the employment contracts of the employees shall remain in existence and effective as they were before acquisition of the shares, be it in a private-owned company or a public listed company.

However, when a business combination involves an acquisition of the business itself, for instance, acquisition of a plant or mine and not the shares of the target company, the provisions of the Employment and Labour Relations Act 2004 (ELRA) shall be applicable. At this instance, the employee's rights will be affected since the acquirer may choose to reduce the number of the employees depending on requirements, or hire new employees as it deems fit for the nature of the acquired business. In this case, the ELRA requires that the existing employees are notified of the change as soon as it is contemplated and that the employer engages in negotiations with the employees in an effort to fairly retrench the employees it does not need for operation of the business. Under the ELRA there are steps to be followed in order to lawfully retrench such employees, including the methods of employee selection for retrenching and the timing of the retrenchments. This also includes the necessary entitlements for redundant or retrenched employees, such as severance pay, any accrued unpaid salaries and pensions. All these arrangements are to be made by the target company before it is acquired by the buyer since the business will change after the acquisition is complete.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

It is prudent for the buyer to make sure that all the necessary legal steps for the appointment of the receiver, administrator or liquidator have been complied with and that the receiver, liquidator or administrator has been validly appointed. It will also be important for the buyer to do a thorough investigation on the target to ensure that the target company has disclosed all its liabilities. It will also be important for the buyer to retain a part of the purchase price to be set off against any unexpected liabilities that may arise in a certain period of time. The transaction may also be structured in such a way that the buyer will only inherit liabilities that it has agreed to assume to reduce risk of loss on the part of the buyer.

The buyer in such a transaction will also need to conduct searches on the ownership titles to the assets under acquisition to make sure that he or she has received good title to the assets, free from any encumbrances.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

During business combinations, the potential buyers should be cautious when transacting to make sure that they are not engaged in any corruption, bribery or economic crimes. There are various sanctions imposed by the government for various economic crimes, corruption and bribery offences as provided for under the enabling local laws.

Sanctions for the offence of money-laundering under the Anti-Money Laundering Act 2006 includes; if the offender is an individual, a fine not exceeding 500 million shillings and not less than 100 million shillings or to a term of imprisonment not exceeding 10 years and not less than five years; and if the offender is a body corporate, a fine not exceeding one billion shillings and not less than 500 million shillings or be ordered to pay the amount equivalent to three times the market value of the property, whichever amount is higher. In addition to these sanctions, where an offence of money laundering is committed by a body corporate or an association of persons, every person who at the time of the commission of the offence was a director, manager, controller or partner or was somewhat involved in the management of the company's affairs may be convicted of the offence and liable to the penalties as detailed above.

Sanctions for the offence of money-laundering under the Anti-Money Laundering Act 2006 includes; if the offender is an individual, a fine not exceeding 500 million shillings and not less than 100 million shillings, or an amount equivalent to three times the market value of the property, whichever amount is greater, or to a term of imprisonment not exceeding 10 years and not less than five years; and if the offender is a body corporate, a fine not exceeding 1 billion shillings and not less than 500 million shillings or be ordered to pay the amount equivalent to three times the market value of the property, whichever amount is higher. In addition to these sanctions, where an offence of money laundering is committed by a body corporate or an association of persons, every person who at the time of the commission of the offence was a director, manager, controller or partner or was somewhat involved in the management of the company's affairs may be convicted of the offence and liable to the penalties as detailed above.

Sanctions for economic crimes under the Economic and Organized Crimes Control Act 1984 includes imprisonment for a term not less than 20 years but not exceeding 30 years, or to both that imprisonment and any other penal measures provided for under the law; provided that

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where the law imposes penal measures greater than those provided by this Act, then the court shall impose such sentence. The law also provides for power of the court to order the forfeiture and confiscationto the government of all instrumentalies and proceeds derived from the offence committed under this law.

The Prevention and Combating of Crimes Act 2007 provides sanctions for the offence of corruption. Such sanctions include imprisonment, fines as well as recovery of proceeds of corruption through confiscation to the government by the Corruption Bureau, as well as forfeiture orders against any property obtained through corruption.

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Turkey

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1 Types of transaction

How may businesses combine?

Businesses may combine via mergers, demergers, acquisitions and joint ventures. Mergers are regulated under the Turkish Commercial Code No. 6102 in two types (article 136 onwards, TCC): establishment of a new company after merger of two or more companies; or takeover of one or more companies by another company.

Regading demergers, it is possible to split a business-line from one company and merge it with another company by undertaking a demerger (article 134, TCC).

Acquisitions can be realised through share transfers, capital increases, asset transfers or business transfers.

Joint ventures (JV) occur through execution of a joint venture agreement, which may include contractual business operation principles, or include provisions requiring incorporation of a special purpose vehicle company (SPV) to carry out business operations.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The primary legal framework includes:
- Turkish Commercial Code No. 6102 (TCC). Enforced by the Ministry of Customs and Trade, it outlines general corporate law provisions for company incorporations, acquisitions, mergers and takeovers.
- Capital Market Law No. 6362 (CML). Enforced by the Capital Markets Board, it outlines general rules applicable to business combinations for public companies.
- Capital Market Communiqués and Stock Exchange Regulations:
  - Communiqué on Mergers and Demergers (Serial II, No. 23.2). Regulates procedures and principles for mergers and demergers where at least one party is a public company;
  - Communiqué on Takeover Bids (Serial II, No. 26.1). Outlines general rules for mandatory and voluntary public bids;
  - Communiqué on the Principles Regarding Significant Transactions and Squeeze Out Right, Serial II, No: 23.1 (Communiqué on Significant Transactions); and
  - İstanbul Stock Exchange Stock Market Regulation;
  - Turkish Code of Obligations No. 6098 (TCO);
  - the Corporate Tax Law No. 5520 (Corporate Tax Law);
  - the Labour Law No. 4857 (Labour Law);
  - the Law on Protection of Competition No. 4054 (Competition Law); and
  - Communiqué Concerning Mergers and Acquisitions Calling for the Authorisation of the Competition Board No. 2010/4 (Communiqué No. 2010/4).

3 Governing law

What law typically governs the transaction agreements?

Acquisitions

Parties to an agreement which includes a foreign element can determine the agreement's governing law. However, Turkish law must be directly applied in certain circumstances stipulated by the International Private and Civil Procedure Law No. 5718. Accordingly, Turkish laws will still apply regarding (but not limited to) following, even if a non-Turkish law is chosen as the applicable law:
- competition and unfair competition;
- title to shares or assets and their transfer procedures;
- notices under the agreement; and
- arbitration clause.

Furthermore, share transfers in Turkish companies shall be made in accordance with the TCC regardless of the governing law. For instance, for share transfers in joint stock companies, the board of directors must approve the share transfer and the transfer must be recorded in the company's share ledger and share certificates must be endorsed to show the transfer and physically delivered to the transferee. To execute a share transfer in a limited liability company, a share transfer agreement must be executed before a notary public, a shareholders' resolution must be adopted and the transaction must be registered with the Trade Registry and publicly announced.

Mergers and demergers

If a non-Turkish law is chosen as the applicable law for a merger or demerger agreement, certain provisions of Turkish Law will still apply. Parties can agree to provisions different to the statutory minimums, provided these remain in line with the mandatory rules.

Initiation of merger and demerger transactions must be made by a resolution from the managing bodies of companies which are party to the transactions. The parties must then follow the TCC's steps and quorum requirements for such transactions.

Joint ventures

JVs can be formed as a commercial company under TCC (usually joint stock or limited companies) or an ordinary partnership under the TCO. Either way, JVs must comply with Turkish legislation and corporate regulations.

Parties execute a JV agreement to regulate the:
- intended corporate structure;
- relationship between the parties; and
- details on the JV.

Parties can include protection mechanisms in the JV agreement as contractual obligations, but the agreement must comply with TCC and TCO requirements.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Filing and fee requirements depend on the parties, type of entities (real person, company, cooperative, branch office, liaison office, etc) and type of business combination.

Mergers, acquisitions and joint ventures that result in a permanent change of control are subject to the Competition Board's approval, provided that they exceed the applicable turnover thresholds. Communiqué No. 2010/4 provides a definition of control (article

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5). Control may be acquired through rights, agreements or any other instruments which, separately or jointly, allow de facto or de jure exercise of decisive influence over an undertaking, and consist of ownership right or operating right over all or part of the assets of an undertaking, and those rights or agreements granting decisive influence over the structure or decisions of the bodies of an undertaking. Control may be acquired by persons or undertakings that are the holders of the rights, or entitled to the rights under the agreements concerned, or while lacking such rights and powers, have de facto power to exercise such rights.

Turnover thresholds must be evaluated if a permanent change in control occurs. The thresholds a transaction must exceed to trigger the filing requirement under the Turkish merger control regime are (article 7, Communiqué No. 2010/4):

- aggregate turnovers of the transacting parties in Turkey exceeding 100 million lira, and turnovers of at least two of the transacting parties in Turkey each exceeding 30 million lira;
- the Turkish turnover of the asset or businesses subject to acquisition in acquisition transactions exceeding 30 million lira, and the worldwide turnover of at least one of the other transacting parties exceeding 500 million lira; and
- at least one of the merger transaction parties having a Turkish turnover exceeding 30 million lira in merger transactions, and a global turnover of the other party exceeding 500 million lira.

Additional requirements to obtain governmental and regulatory authorisations may apply for each type of business combination (questions 11 and 17).

Acquisitions

Typically, acquisitions via share transfers in joint stock companies are not subject to any registration requirements, although depending on the characteristics of a share transfer in joint stock companies, these transactions may require registration, filing, or approval.

Share transfers in limited liability companies are subject to notarisation and registration with the Trade Registry.

Notification to Trade Registry may be required for share transfers over a certain shareholding percentage in group companies (questions 5 and 6). If the target becomes the sole shareholder company due to an acquisition, this must be registered to the Trade Registry.

Capital gains on a share sale must be included in a company's taxable profits; subject to corporate tax at a rate of 20 per cent (Corporate Tax Law). Further discussion in question 18.

Profits made by real persons from share transfers are subject to income tax. Sellers of target company shares are only required to pay income tax if they are Turkish tax residents. Otherwise, tax liability is addressed by laws in their own country.

A transaction (ie, capital increase) may require amendment of the target company's articles of incorporation (AoI). Incorporation and AoI amendment is subject to approval of the Ministry of Customs and Trade for certain types of companies (question 11).

During incorporations and capital increases, an additional payment to the Competition Authority is required as a contribution fee (0.04 per cent of company capital).

For publicly held companies, if a change in management control occurs owing to an acquisition, a mandatory offer to acquire all remaining shares must be made. Such offer must be approved by the Capital Markets Board (article 13, Communiqué on Takeover Bids Serial II, No. 26).

Mergers

The necessary filings and fees depend on the transaction type. The requirements and implications of the TCC, Capital Markets legislation, COB, Labour Law, and tax legislation must be considered during the merger process, as well as requirements in special legislation which may apply to the merger parties.

The main TCC procedural requirements are the merger agreement, including all details regarding transaction, must be approved by shareholders of all merger parties and must be registered with the Trade Registry Office and publicly announced in the Trade Registry Gazette.

For publicly held companies, an announcement must be submitted for the Capital Markets Board's approval. Depending on the company type, additional governmental filings and approvals may be required (question 11).

Before registering a merger, if the capital of the acquired company (surviving entity) will be increased as a result of the merger, 0.04 per cent of the increased capital must be paid to the Competition Authority (contribution fee).

The value contributed to the surviving entity from the dissolving entity (the merger profit) is subject to corporate tax. However, merger transactions which fulfil certain conditions under the Corporate Tax Law are considered tax-exempt for corporate tax. If the transaction meets these conditions, it will also be exempt from stamp tax, legal fees and VAT (question 18).

Demergers

The TCC basically contemplates two demerger types (article 159):

- pure demerger – All assets of a company are split into units and transferred to an existing or new company; or
- partial demerger – Part of a company's assets are transferred to an existing or new company.

Different procedures and requirements under the TCC shall be followed depending on the type of demerger and transaction structure. If the parent company's shareholders acquire shares in the acquiring company as a result of a demerger, further procedures to decrease the parent company's capital may be required.

Filings and fees for merger transactions must also be completed for demergers, where applicable. These may include Capital Markets Board approval, registration and announcement to the Trade Registry, as well as governmental approvals (see question 11).

Demerger transactions may be realised on a tax-free basis if conditions in the Corporate Tax Law are fulfilled; no taxes would apply to demerger profits. Tax-free demergers also receive exemption from VAT, legal fees and stamp duty obligations (question 18).

Joint ventures

In general, JV agreements do not require any filings, except for obtaining approval from the Competition Authority (if required) and paying stamp tax for the agreement. However, JV transactions usually include establishment of an SPV under Turkish law (TCC). Establishing an SPV requires notarisation of its AoI, registration of the AoI with the relevant Trade Registry Office, and announcement in the Trade Registry Gazette. The SPV must also be registered with the tax office and acquire a tax number in order to start operations.

Governmental filings and approvals may be needed, depending on the SPV's type. Incorporation and amendment of AoI is subject to approval of the Ministry of Customs and Trade for some company types (question 11).

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Information which must be publicly disclosed will generally depend on the type of business combination, as well as the company types involved (publicly held or private). Disclosure requirements mainly apply to publicly held companies. Details in relation to a transaction may need to be submitted to regulatory authorities (for example, during a competition filing).

Certain regulations require all companies to register and announce transactions, regardless of the company type. For example, under the TCC, merger and demerger transactions, capital increases in joint stock and limited liability companies, and share transfers for limited liability companies must all be registered with the Trade Registry, as well as announced in the Trade Registry Gazette.

All merchants (including real persons and legal entities) must register their commercial enterprise and trade name with a Trade Registry Office (TCC; Trade Registry Regulation). Records must be registered and publicly announced in the Trade Registry Gazette if they include a resolution on certain matters. These include change of address, trade name, field of activity, or capital increase.

Joint stock companies must register and publicly announce the following information in the Trade Registry Gazette: corporate structure, articles of association, persons who are entitled to bind and represent the company, termination of the company, becoming a sole shareholder

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company, and liquidation status. Annual company accounts and reports are not normally registered with the Trade Registry Gazette.

Disclosure requirements for publicly held companies are primarily regulated by the Communiqué on Material Events (Serial II, No. 15.1). Accordingly, publicly held companies must disclose the following information on the Public Disclosure Platform and on the company's website:

- inside information – material information which has not been publicly disclosed but which may influence the value of a capital market instrument or investor decision; and
- ongoing information – all other information which must be publicly disclosed and is not inside information.

The Capital Markets Board issued a Guideline on Material Events which outlines the circumstances which must be disclosed to the public as inside information. Merger and takeover bids are both noted as inside information which must be publicly disclosed if the bid is likely to have any effect on a capital market instrument's value or investor decisions (article 5.5, Guideline on Material Events).

Mergers and demergers

Publicly held companies must disclose certain information and documentation in relation to merger or demerger transaction on the public disclosure platform and the websites of the companies (article 8, Communiqué on Mergers and Demergers). These may include:

- announcement text approved by the Capital Markets Board;
- merger agreement or demerger agreement or plan;
- merger or demerger report;
- financial reports and information; and
- independent audit reports of the past three years (if any).

Additional disclosure requirements may arise depending on the structure of the merger, demerger, or any additional transactions planned within it.

Acquisitions via takeover bids

As per the Communiqué on Takeover Bids, bidders must publicly announce a takeover bid immediately after deciding to make the bid. The bidder's disclosure requirement may include – alongside others – the following:

- number and amount of the listed and unlisted shares at the end of each trading day during the offer period, and the number of shareholders responding to the offer;
- total number and amount of shares acquired, as well as the total number of shareholders responding to the offer at the end of the offer period;
- the target company's detailed shareholding and management structure; and
- renouncement of obtaining shares through a voluntary bid.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Group companies are subject to a specific disclosure requirement (article 198, TCC) whereby they must notify, register and announce their participation in another company, or a decrease of shares in companies already participated in. The notification obligation has two elements:

If the enterprise (parent company) holds 5, 10, 20, 25, 33, 50, 67, or 100 per cent of the shares of another company (affiliate), or the share ratio of the parent company decreases below one of those thresholds, the company is required to notify the affiliate and relevant authorities within 10 days of completing the transactions.

Acquisition or transfer of shares in this way must be disclosed in the company's annual activity and audit reports under a separate heading and disclosed on the company's website.

Board members and managers of the enterprise (parent company) and the company (affiliate) must notify of shareholdings of 20 per cent or more which are held by themselves, their spouses or their dependent children.

Notifications must be made in writing, as well as registered with the Trade Registry and announced in the Trade Registry Gazette. Failure to register and announce will cause rights associated with those shares to freeze, including voting rights. Even if these rights are exercised somehow, the votes will be deemed null and void.

Changes in the shareholding structure and management control in publicly held companies are deemed ongoing information, which must be publicly disclosed (Communiqué on Material Events).

A natural person or legal entity must disclose, if:

- his or her direct or indirect shareholding in a public company, acting alone or with others, exceeds or falls below 5, 10, 15, 20, 25, 33, 50, 67 or 95 per cent of the issued share capital or voting rights; or
- Voting rights relating to shares traded on a stock exchange that can be acquired by direct or indirect ownership of a capital market instrument reach, exceed or fall below these thresholds.

Once the company is informed as to the change in its shareholding structure by related person, it is must disclose this situation to the Public Disclosure Platform.

Private companies with shares traded on a stock exchange through a public offer must disclose a person's direct or indirect shareholding in the target which exceeds or falls below 25, 50 and 67 per cent of the issued share capital or voting rights.

The Communiqué on Material Events regulates the general information to be disclosed. The Communiqué states that real persons and legal entities directly having 5 per cent or more of capital shares or voting rights in the publicly traded issuers (and any changes) must be immediately updated on the Central Registry Agency and published in the Public Disclosure Platform (article 16, Communiqué on Material Events).

Publicly held companies which are party to a business combination have additional disclosure requirements relating to inside information depending on the transaction's structure (question 5).

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

For joint-stock companies, members of the board of directors and all other third parties responsible for management of a company must perform their duties diligently, protecting the company's interests and they are prohibited from competing or dealing with the company for their own benefit (articles 395 and 396, TCC). Directors are prohibited from participating in discussion of matters concerning their own interests (or their relatives' interests) which conflict with the company's interests (article 393, TCC).

For limited companies, managers and other persons responsible for management of the company must perform their duties with utmost diligence, protecting the company's interests (article 626, TCC).

Additional diligent management obligations are determined for publicly held companies. A board of directors must balance the corporation's risk at the most appropriate level through strategic decisions, as well as manage and represent the corporation by primarily protecting the long-term benefits through prudent risk management (Communiqué on Corporate Governance Principles). A publicly held company's board of directors is also obliged to keep inside information confidential and not disclose or use the information until it is publicly disclosed.

Accordingly, management of the companies shall put the company's interests before the personal interests of themselves, the shareholders, their relatives, other members of the board of directors, or any third parties when making decisions, if a conflict of interest exists.

Further, certain restrictions might apply if a controlling shareholder is also the parent company of a corporate group (article 195 onwards, TCC). A parent company must not exercise its control in a way which would cause the affiliate to incur loss (article 202(1), TCC).

If the parent company abuses its dominance over an affiliate, minority shareholders of this affiliate are entitled to request the purchase of their shares from the controlling shareholder (article 202(2), TCC; see question 14).

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8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Acquisitions

As a general rule, shares in joint-stock companies can be freely transferred, except as otherwise provided under a company's AoI. Therefore, such transfers are not subject to approval by the management body or other shareholders.

For limited liability companies, a share transfer requires execution of the share transfer agreement before a notary public, adoption of a shareholders resolution, and registration of the transaction with the Trade Registry. The majority of shareholders must approve a share transfer in limited companies, unless otherwise stipulated in the company's AoI (article 620, TCC).

Management of joint stock and limited liability companies can be granted a refusal right in certain circumstances (see question 10). If any shareholder is also represented in the management, they can reject share transfers by exercising these rights.

If the transaction requires financing via a share capital increase of the target company, shareholders' approval is required. Sale of company assets in significant amounts is also subject to general assembly approval (article 408, TCC).

For publicly held companies, transfer of the whole or an important part of the company's assets is defined as a 'significant transaction' (Communiqué on Significant Transactions, CML) and shareholders' approval is required. Accordingly, affirmative votes of at least two-thirds of shares with voting rights participating in the corporation's general assembly are required for the approval of significant transactions (article 29, CML).

Mergers and demergers

Mergers and demergers are subject to the approval of the general assembly of shareholders. To resolve on merger of a joint stock company, approval of the shareholders representing at least three-quarters of the shares present in the general assembly is required (provided the quorum represents the majority of share capital). For limited companies, three-quarters of the shares present at the general assembly meeting is required (provided the quorum represents at least three-quarters of the share capital).

For publicly held companies, merger and demerger transactions are determined to be significant transactions and specific quorum requirements must be met (CML; Communiqué on Significant Transactions). As a rule, affirmative votes of at least two-thirds of shares with voting rights participating in the corporation's general assembly are required for approval of significant transactions (article 29, CML).

Qualified quorums are regulated for squeeze-out mergers under the TCC, including 90 per cent of shareholders being required to approve a merger. Affirmative votes of minority shareholders are likely to be required to reach the TCC's qualified quorum.

Joint ventures

If the JV agreement requires incorporation of a new SPV in Turkey, all shareholders must sign and approve the SPV's AoI.

JV agreements can include matters requiring shareholder approval for share transfers, such as right of first refusal, tag-along or drag-along. However, as a general rule, such clauses are only binding among the shareholders and cannot be imposed on third parties as per TCC's 'sole obligation' principle, which stipulates that shareholder obligations should be limited to the amount of capital subscribed by them. Consequently, shareholders may only claim compensation for contractual breaches, rather than breaches of legislative or regulatory rights.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

There are no specific regulations under Turkish law addressing acquisition of control in a company via a hostile transaction. Hostile bids are not common in Turkey because most public and private companies are controlled by a single shareholder or a small group of shareholders.

That being said, the regulations applicable to public companies may allow acquisition of a company's shares without collaboration with its management in certain circumstances. A voluntary bid or a competing bid may be used to purchase company shares without its management's collaboration. In such case, company's management must prepare a report stating its opinion on the bid and reasons for the opinion, including its opinion on the voluntary bidder's strategic plans for the target and their likely effects on the target's activity and employees.

Since a hostile bid is presented against the will of the target company's management, the management board may choose not to cooperate with the bidder. As the management body is obliged to protect the best interests of stakeholders and the company, it must take all necessary measures to prevent a hostile takeover if such takeover is against stakeholder interests.

If the management body refuses to cooperate, the bidder cannot carry out full due diligence of the target, nor obtain comprehensive and sufficient information on the target's financial situation. The market price may not reflect the real share value and the bidder is prevented from determining a fair and accurate bid price. The bidder is vulnerable to hidden risks and must rely on other sources, such as publicly available information.

A limited or joint stock company's management body can reject share transfers made contrary to the company's AoI (TCC). The management body can include an approval requirement for transfer of registered shares by setting out explicit clauses in the company's AoI. For publicly held companies, the management body may only reject registration of transfer of registered shares, if the AoI sets forth a limit for the registered shares that can be acquired (article 495, TCC; see question 10).

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break fees

Break fees are not addressed under takeover regulations in Turkey. However, parties may agree on penalties for breach of contractual obligations or other contractual arrangements, which would serve as a break fee. The claiming party is not required to prove damages in order to claim compensation under such a clause; proving a breach of the agreement's terms is sufficient.

Limitations on protecting deals from third-party bidders

Generally, share transfers in joint stock companies are not subject to approval by the target company's management. Certain limitations apply:

Registered shares which have not been totally paid-in may only be transferred with the target company's approval (article 491, TCC).

The target company can refuse to approve a share transfer if the transferee's financial ability raises doubts and if the transferee fails to provide any security requested by the target company. Certain exceptions apply to share transfers realised by inheritance, marital property regime between spouses, or enforcement procedures.

The AoI may require registered shares to be transferred with the company's approval (article 491, TCC). However, the target company may only refuse the share transfer (article 493, TCC):

- on the basis of an important reason related to the company's economic independence or shareholder composition. The grounds for refusal must be explicitly included in the company's AoI; or
- by offering to purchase the shares from the transferring shareholder for their actual value at the time of the purchase request, on behalf of the company, its shareholders or third parties.

Transfer of registered shares in a publicly held company can only be restricted in specific circumstances (detailed by article 495, TCC). The management board can only decline approval of a share transfer if the company's AoI impose a limit on the acquisition of registered shares and this limit has been exceeded.

The restrictions outlined above can be incorporated into a company's AoI to give management an ability to protect the company from third-party bidders.

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Share transfers in limited liability companies are subject to approval by the shareholder general assembly, provided the company's AoI does not stipulate otherwise. Share transfers can be banned or restricted by the company's AoI (article 595, TCC).

For publicly held companies, another method to prevent a hostile tender offer is by presenting a preferable offer to shareholders as a competing bid. Following a hostile tender offer, the management body could arrange for a third party to make a competing offer at a higher rate than the hostile tender offer.

Financial assistance restrictions

Granting shares in a target company as an advance, loan, or security to finance the acquisition of its own shares is prohibited (article 380, TCC), thus preventing leveraged buy outs to a great extent. Any transaction including purchase of shares in a target by presenting the target company shares as security to third parties (ie, financial institutions) will be deemed invalid. Transactions involving provisions contrary to the financial assistance restrictions will not be deemed invalid as a whole but any loan transactions involving advance payment, loan or security contrary to article 380 will be deemed invalid. However, this should be evaluated on a case-by-case basis.

The restriction does not apply where the transaction:

- is a regulated transaction conducted by credit and finance institutions; or
- enables the company's employees (and employees of the company's affiliates) to purchase the company's shares, by transactions between the company and the employees in order to grant an advance, loan or security.

These two exemptions are invalid if they reduce or adversely affect the company's capital reserves as defined under articles 519 and 520 of the TCC.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Certain sectors are regulated with specific legislation and subject to oversight by separate governmental institutions, including IT, energy, banking, financial services and insurance (question 17). Unless a restriction is specifically provided by law, direct foreign investment is unrestricted in Turkey; foreign investors and investments are treated equally (article 3(a), Direct Foreign Investment Code). However, foreign investments are subject to restrictions to prevent foreign capital majorities in strategic sectors:

Foreign shareholding of media service providers cannot exceed 50 per cent of the registered capital. Further, foreign persons cannot be shareholders of more than two media service providers, nor be granted privileged shares (article 19-f, Establishment of Radio and Television and Broadcasting Services Code).

Majority shareholders of civil commercial aviation operators with authority to carry passengers and cargo on scheduled or unscheduled flights must be Turkish (article 9, Regulation on Commercial Air Transportation).

Restrictions apply if the nature of the business association includes the transfer of a real estate. Foreign real persons can acquire real estate or limited real rights (rights in rem) subject to certain restrictions (Land Registry Law, article 35).

Incorporation and amendment of AoI for the following companies are subject to Ministry of Customs and Trade approval:

- banks;
- financial leasing companies;
- asset management companies;
- companies providing consumer financing and credit card services;
- insurance companies;
- holding companies; and
- independent auditing companies.

An official Ministry of Customs and Trade representative must attend all general assembly meetings for companies listed above. For other companies, a representative must attend meetings where the agenda includes AoI amendments regarding increasing or decreasing capital, adopting or leaving the registered capital system, increasing the registered capital ceiling, changing the company's field of activity, merger, split or change of company type.

Further requirements apply to purchasing real estate in military forbidden zones, military security zones or strategic zones (Land Registry Law).

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Generally, no specific regulations address conditional offers in the context of business combinations. Nevertheless, transaction documents can include different condition types which could lead to cancellation of a transaction if some event is not completed (freedom of contract principle). Such conditions could be included in letters of intent, memoranda of understanding, or as conditions precedent in actual transaction documents.

In cash acquisitions, transaction documents may include financing as a precondition. Financial assistance restrictions should be considered while structuring financing preconditions (article 380, TCC; question 10).

Article 463 of the TCC provides a conditional capital increase system in cash acquisitions under which the company's AoI must explicitly regulate the following issues (article 465, TCC):

- nominal value of the contingent capital increase;
- share numbers, nominal values and types;
- classes which benefit from right of exchange or purchase;
- that pre-emptive rights of existing shareholders have been abolished, and the respective amount;
- privileges granted to certain stock groups; and
- limitations for transfer of new registered shares.

Conditional mandatory offers are prohibited for publicly held companies (Communiqué on Takeover Bids). However, a voluntary bid can be made for all (or part) of the target's shares. In a partial offer, if the number of shares the shareholders wishes to sell is more than the bidder's offer, the number of shares to be sold must be determined on a pro rata basis, ensuring equal treatment of the target's shareholders. Otherwise, no explicit provisions exist that allow, require or prohibit pre-conditions in voluntary takeover bids. Any condition of this type would require clearance from the Capital Markets Board before announcement of the bid document.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Conditions and representations regarding future financing or refinancing of the transaction are usually incorporated into transaction documents. Transaction documents usually state which valuation (EBITDA multiplier) the capital increase will use, the upper limit for the capital increase or the valuation, and financing method. Financing risk may be borne by the buyer by stipulating representations and warranties that the buyer is capable of providing financing by itself.

Buyers may receive loans from financial institutions to raise funds for an acquisition. In such case, the financer (usually a bank) may also attend the due diligence phase, or ask the buyer for additional securities in exchange for the loan.

Sellers do not have any obligations to assist the buyer's financing other than to generally act in good faith. Financial assistance restrictions of TCC should be considered while structuring financing of the transaction (article 380, TCC; see question 10).

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14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Squeeze-out in public takeovers

If shares acquired through a bid or some other way (including with others) reach or surpass a specified ratio of voting rights in a public company, the persons holding these shares gain the right to squeeze out shareholders who have become a minority (article 27, Capital Markets Law). The ratio is determined by the Capital Markets Board.

Within a certain period, these persons can request cancellation of the minority shareholders' shares and force sale of new shares to themselves, which are issued corresponding to the cancelled shares. The sale price is determined based on the average stock exchange price in the previous 30 days before public announcement of the squeeze-out (article 24, Capital Markets Law).

Squeeze-out in mergers

The TCC includes a squeeze-out fee in mergers, allowing compulsory purchase of minority shares in certain cases. Merger parties can determine a squeeze-out fee on a pro rata basis against the shareholding of squeezed-out shareholders. A provision can be included in the merger agreement which requires the approval of 90 per cent of the transferor entity's shareholders (article 141, TCC). The squeeze-out fee corresponds to the actual value of the acquired shares.

Specific provisions are made for the squeeze-out right for shareholders who have attended the general meeting on the merger, voted against it, and had their dissent recorded in the minutes (article 12, Communiqué on Significant Transactions). Shareholders can exercise their squeeze-out right by selling their shares in the public held company. On the shareholder's request, the company must purchase these shares at the average stock exchange price in the 30 days before the merger was publicly disclosed. The squeeze-out fee under the TCC has no impact on the squeeze-out right under the Communiqué on Significant Transactions.

Squeeze-out in corporate groups

The TCC stipulates specific rights for shareholders of an affiliate against certain significant transactions (ie, merger, demerger, important change in the AoI), which are realised through an unlawful exercise of control. If a parent company abuses its dominance over an affiliate, minority shareholders of this affiliate can request the controlling shareholder purchases their shares (article 202(2), TCC). If the parent company conducts certain identified transactions without a valid reason and by exercising its majority rights in a way which causes damage to the affiliated company's shareholder, the shareholder is entitled to either claim compensation for damages, or demand the shares be purchased (squeeze-out).

Losses incurred by affiliates in such circumstances can be remedied by a counter balance payment or a claim of equivalent value for the remedy of its losses within the same financial year. A specific explanation must be provided of how and when this loss will be recovered.

If the parent company directly or indirectly holds at least 90 per cent of shares in its affiliate, the parent company can purchase the minority shareholders' shares and squeeze them out if the minority shareholders do any of the following (article 208, TCC):

- prevent the company from performing its functions;
- contradict the principle of good faith;
- cause noticeable problems; and
- act carelessly.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

No specific laws or regulations apply to cross-border transactions. Establishment of a SPV is the most commonly used method since it enables access to special legislative provisions in relation to the incorporation of a company (provided the SPV will operate in Turkey).

Before beginning negotiations in Turkey, the rights or obligations granted or prohibited by Turkish laws should be considered. Turkish companies must comply with TCC. Therefore, incorporations, share transfers, mergers and demergers must be in compliance with the TCC (question 4).

Tax risk should be carefully structured in a cross-border transaction (question 18).

In principle, foreign direct investments are unrestricted in Turkey and treated equally to local investments (article 3(a), Foreign Direct Investment Code). Turkish commercial companies can be 100 per cent owned by foreign investors. After a foreign investment occurs, the target must notify the Undersecreteriat of Foreign Investment for statistical purposes.

Some sectors are considered strategic and are subject to restrictions on foreign parties holding controlling stakes (question 11).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Depending on the type of transaction, business combinations require notification or waiting periods to protect stakeholder rights.

Acquisitions

A business or asset transfer must be announced to creditors by an announcement published in the Trade Registry Gazette for commercial enterprises (article 202, Code of Obligations). Otherwise, an acquisition must be announced in any newspaper with national circulation. Transfers of commercial enterprises are subject to an announcement and registration requirement (article 11, TCC).

Bids for public companies must have Capital Markets Board approval. Applications for approval must be made within six working days after the date shares are acquired that provide control of a public company (article 13, Communiqué on Takeover Bids).

Merger and demerger

Companies participating in mergers must provide certain merger documents for stakeholder inspection (at their business centre) 30 days prior to the general assembly meeting at which the merger will be approved (article 149, TCC).

Shareholders have a legislative inspection right during demerger transactions (article 171, TCC). Companies subject to the demerger must provide certain documents (ie, demerger agreement, financial statements) for shareholder inspection (at their business centre) two months before the general assembly meeting at which the demerger will be approved.

Companies participating in a merger or demerger must publish an announcement in the Trade Registry Gazette and on their websites stating the documents are available for shareholder inspection.

Publicly traded companies must also make publications and announcements as required by Capital Markets regulations. Certain documents (ie, merger or demerger agreement, merger or demerger report, financial statements) must be disclosed on the Public Disclosure Platform and the companies' websites 30 days prior to the general assembly meeting.

The TCC envisages notification periods for securing creditors. Following registration of the merger transaction, companies participating in the merger must notify creditors of their rights through an announcement published in Trade Registry Gazette and on their websites (article 157, TCC). Creditors must make a claim for payment or securing credits within three months of the merger transaction being registered.

For demerger transactions, creditors must be invited to declare their receivables and demand security for the respective receivables (article 174, TCC). The invitation must be published as an announcement in the Trade Registry Gazette and on their websites. Creditors must make claims within three months of the date of the last announcement. If the parent company's shareholders acquire shares in the acquiring company as a result of a demerger, further procedures may apply in order to decrease the parent company's capital.

Additional requirements of announcement and notification to stakeholders may also be required for acquisition, merger or demerger of a financially distressed target. If these aren't complied with, creditors might ask for annulment of the transaction (question 20).

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17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies in specific industries are often subject to additional regulations and statutes. Regulatory approvals are required for IT, energy, banking, and financial services. Approval may be required for takeovers or mergers either before or after the transaction (industry dependent). Authorities that regulate specific industries include:
- the Capital Markets Board;
- the Energy Markets Regulatory Authority;
- the Banking Regulation and Supervision Agency;
- the Information and Communication Technologies Authority;
- the Mining Affairs General Authority; and
- the Incorporation and amendment of AoI is subject to approval of the Ministry of Customs and Trade for certain types of companies (question 11).

Publicly held companies must comply with Capital Markets Board regulations. For example, a bid for a public company must be approved by the Capital Markets Board and merger transactions where at least one of the parties is a publicly held are subject to Capital Markets Board review and approval.

18 Tax issues

What are the basic tax issues involved in business combinations?

Acquisitions

Stamp tax must be paid on all agreements that include a price. The stamp tax rate for 2017 is 0.948 per cent, calculated on the highest amount in the agreement. In 2016, the Stamp Tax Code was amended to exclude application of stamp tax on:
- contractual penalties contained within an agreement;
- share transfers of joint stock, limited and commandite companies; and
- documents regulating financing of small and mid-cap businesses and technology developing companies by venture funds through means of capital markets vehicles.

Furthermore, application of stamp tax on each copy of an agreement has been ceased. From August 2016 onwards, the parties of an agreement (if not otherwise within the scope of a stamp tax exemption) can only be required to pay stamp tax for one copy of an agreement.

Capital gains on share sales must be included in a company's taxable profits and are subject to tax at the corporate tax rate of 20 per cent (Corporate Tax Law).

Seventy-five per cent of the capital gains from the sale of shares held by a tax-resident entity are exempt from corporate tax for a period of at least two years before the sale.

Non-tax residents should consider whether a double taxation treaty applies to their particular circumstances.

Tax advantages (introduced as of 9 August 2016)
- Stamp duty exemption: (i) documents issued due to share transfers; and (ii) documents issued due to acquisition of companies based abroad which have advanced technology and will entail technology transfer, as well as the documents issued due to financial and legal consultancy services relating to such acquisitions are exempt from stamp duty (article 9, Stamp Duty Code).
- legal fee exemption: (i) transactions made as a result of share transfers; and (ii) transactions made as a result of acquisition of companies based abroad which have advanced technology and will entail technology transfer, as well as the documents issued due to financial and legal consultancy services relating to such acquisitions are exempt from the legal fees (article 123, Law on Legal Fees).

Mergers

Corporate tax exemption

The value contributed to the surviving entity by the dissolving entity (merger profit) is subject to corporate tax. Merger transactions which meet certain conditions in Corporate Tax Law are defined as 'takeover' transactions and are considered tax-free for corporate tax. The following are required for a tax-free merger:
- The legal or business centres of the merger companies are located in Turkey.
- The assets and liabilities of the dissolving entity must be transferred to the surviving entity, over their balance sheet values as of the date of merger (the date the surviving entity's merger resolution and authorised organs are registered with the competent Trade Registry Office).
- The dissolving entity's corporate income tax return must be submitted to the competent tax authority within 30 days of the merger announcement in the Trade Registry Gazette.
- The surviving entity must undertake payment of the dissolving entity's tax obligations which have and will accrue, as well as duly perform the dissolving entity's other fiscal and tax obligations.

If these preconditions are fulfilled, only the profits derived by the dissolved company before the acquisition date will be subject to taxation; merger profits will not be subject to corporate tax.

Deduction of carried-forward losses of dissolving entity by the surviving entity

In a tax-free merger, the dissolving entity's losses which do not exceed its equity capital on the merger date may be deducted from the surviving entity's taxable base. If the merger does not meet the conditions under the Corporate Tax Law, the dissolving entity's carried-forward losses will be lost.

To deduct such losses, the following conditions must be met:
- losses carried forward for up to five years should be separately indicated in the corporate income tax return on an annual basis;
- both the dissolving entity's and surviving entity's corporate tax returns pertaining to the past five years must have been filed within the required legal periods; and
- the surviving entity must continue the dissolving entity's business activities for at least five years from the accounting period during which the merger is realised.

Additional corporate tax benefits for small and medium-sized enterprises (applicable as of 18 January 2017)

An additional corporate tax benefit for mergers of small and medium-sized companies engaged in production activities and having an industrial registry certificate has been introduced under Corporate Tax Code. Accordingly, manufacturing profits of the target company (merging company) realised until the date of merger and the manufacturing profits of the acquiring company realised for a three-years period beginning from the year of acquisition are subject to the decreased corporate tax rate. The Council of Ministers is authorised to settle the reduced corporate income tax rate (article 32/5, Corporate Tax Law).

If these conditions are not fulfilled, deduction of losses from the surviving entity's taxable base would be considered tax loss. Administrative taxation and additional tax fines would apply to the surviving entity.

Other tax advantages
- VAT exemption: Tax-free mergers under the Corporate Tax Law are considered exempt from VAT (Value Added Tax Code);
- stamp duty exemption: Documents issued due to the merger transaction are exempt from stamp duty (article 9, Stamp Duty Code); and
- legal fee exemptions: Transactions made as a result of a merger are exempt from the legal fees (article 123, Law on Legal Fees).

Pure demergers

Demerges that meet Corporate Tax Law conditions are deemed to be pure demergers and receive the related tax exemptions. Pure demergers involve transfers of all assets, receivables, and undertakings of a fully responsible tax payer equity company to two or more existing (or to be established) fully responsible taxpayer companies by dissolution, without liquidation process over the book value of the subject assets, receivables, and undertakings. To be deemed a pure demerger such transfers must be made in consideration for acquisition of the transferee company's shares by the existing shareholders of such transferor company. Further conditions for being considered a tax-free demerger

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Update and trends

Some 248 mergers and acquisitions occurred in Turkey during 2016. Out of 248 deals, 108 had disclosed deal values adding up to a combined total of around US$$5.1 billion. The estimated value of all deals (including undisclosed deals) was around US$7.7 billion in 2016, representing a 53 per cent decrease compared to 2015. Small and mid-cap transactions constituted the largest portion of 2016 transaction in terms of numbers. Internet and mobile services, technology, energy as well as manufacturing and financial services were among the most active M&A sectors during 2016. Internet and mobile services (40 transactions) and technology (38 transactions) were the leaders as to the number of deals respectively during 2016. The energy sector contributed 31 per cent to the deal volume alone, with a deal value of US$2.4 billion, including undisclosed estimated values. Compared with previous years, 2016 saw a significant reduction in the number of deals and deal values.

Legislative amendments were adopted during 2016 with an aim to improve Turkey's investment environment, mainly by reducing transaction costs, introducing tax advantages, as well as eliminating certain bureaucratic steps for company establishments. There are no fundamental legislative changes currently planned for the regulatory and statutory framework applicable to business combinations.

are the same conditions as noted above for tax-free mergers. Tax-free pure demergers also benefit from all tax exemptions applicable to tax-free mergers.

The Corporate Tax Law outlines three types of partial demergers transactions:

- transfer of real estate existing in the balance sheet of a fully responsible taxpayer company or permanent representative of a foreign institution qualified as a company;
- transfer of participation shares that have been held for at least two years; and
- transfer of one or more production or service enterprises as capital in kind over their book values to an existing (or to be incorporated) fully responsible taxpayer company.

Income arising from partial demergers is tax-free, as well as exempt from VAT, legal fee and stamp duty obligations.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Business acquisitions

If a workplace is wholly or partially transferred to a third party based on a legal transaction, all employment agreements in force with respect to the workplace will be transferred, including all rights and obligations which exist on the transfer date (article 6, Labour Law).

If a transfer occurs, the transferor and the transferee are jointly liable for obligations that arose prior to the transfer date and that exist as of the transfer date. The transferor employer's liability for these obligations is limited to two years after the transfer date. However, the provisions regarding joint liability will not apply if a company ceases to have legal status owing to a merger, takeover or conversion.

The transfer will not constitute a just cause for terminating employment agreements, either by the employer or by the employee. Severance and notice payments must be paid to employees if the employer terminates the employment contract solely on the basis of the transfer, without any just cause. In these circumstances, the transferor and transferee employers' rights are reserved to terminate employment agreements based on economic and technical grounds, changes in business organisation or immediate termination on just grounds.

Mergers and demergers

If an acquisition occurs by way of a merger or demerger, the TCC allows employees (including key employees) to object to the transfer of their employment agreements to a new employer. If an employee does not raise any objections during a merger or demerger process, the employment agreement will be deemed to be transferred, including all rights and liabilities (article 178, TCC). If an employee raises objections to the transfer of their employment agreement, the employment agreement will be deemed to have ceased at the end of the legislative notice period.

Therefore, although employee's prior consent is not legally required in merger or demerger transactions, obtaining this is common practice in Turkey.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The TCC allows companies in liquidation and financial distress to be a party of a merger transaction under certain conditions:

- company in liquidation (article 138, TCC): A company in liquidation may take part in a merger transaction, if:
  - distribution of its assets has not begun; and
  - the company in liquidation will be the acquired company (transferee) in the merger; and
- capital loss or insolvency (article 139, TCC): A company that has lost half of its total capital and statutory reserves, or is insolvent, may take part in a merger if:
  - the acquiring company has freely disposable equity capital sufficient to meet the lost capital or the insolvency situation;
  - it is the acquired company in the merger; and
  - companies in bankruptcy cannot become involved in mergers or demergers because during bankruptcy, the right to dispose the company's assets is vested in the bankrupt estate, not the company itself. Additionally, if the target company is in concordatum, the court may rule on specific precautionary measures for sale of the company's shares (article 285, Enforcement and Bankruptcy Law).

If an acquisition is made in bad faith to prevent creditors from claiming their debts, an annulment claim could be made under (article 277 and following articles, Enforcement and Bankruptcy Law). An annulment claim allows the creditor to annul creditor disposals made in bad faith, preventing assets being liquidated and negatively impacting the claimant creditor.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The primary legal instrument in Turkey against corruption is the Turkish Penal Code numbered 5237 (TPC). The TPC identifies and criminalises certain offences, including embezzlement, malversation, bribery, money laundering and influence peddling, among others.

Bribery is defined as securing an undue advantage from a public official or from another person indicated by the public official, to perform or not to perform a task with regard to his duty (article 252, TPC). Both bribe giving and taking are criminal offences and attract identical sentences, including imprisonment for between four and 12 years. Bribery as a criminal offence also includes bribery actions.

Criminal behaviour exists where representatives of the following are involved in bribery:

- companies with public entity status;
- companies established with the partnership of the public entities or professional organisations which have public entity status;
- foundations operating within public entities or professional organisations which have public entity status;
- public benefit associations;
- cooperatives; and
- publicly traded joint-stock companies.

Enterprises that benefit from a bribe will also be punished with security measures, such as invalidation of licences granted by public authorities or seizure of pecuniary benefits related to the bribery. If an entity has secured an undue advantage from bribery and is involved in money laundering, it could have its licence cancelled.

If an offence is subject to six months' imprisonment or more and involves either of the following, this would constitute money laundering (article 282, TPC):

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- transferring assets to a foreign country which were acquired from an offence; or
- carrying assets to a foreign country where they will be subject to transactions intended to hide an illegal source of these assets (giving the impression of a lawful source).

If convicted of money laundering, offenders are liable for imprisonment of between three and seven years, and will also be liable to a punitive fine daily rate of up to 20,000 days.

The liability of legal persons and civil legal persons in Turkey for bribery and money laundering is regulated by the Code of Misdemeanours numbered 5326 (article 43(A)). The Code outlines administrative fines of between 10,000 lira and 2 million lira for bribery undertaken by a legal person or its representative.

Legal persons can only be held administratively liable under Turkish law (no criminal liability exists). However, other sanctions may be applied to legal persons for foreign bribery, such as:

- confiscation of the bribe (property used for committing an intentional offence) (article 54, TPC);
- confiscation of the proceeds of bribery (material gain obtained through the commission of an offence) (article 55, TPC);
- banning and prohibition from receiving public subsidies (article 11, Public Procurement Law numbered 4734); or
- dissolution by revoking the legal entity's operating licence as a special security measure (article 60, TPC).

Corruption has severe consequences for regulated sectors such as capital markets, energy, and banking.

Turkey is a party to several international treaties addressing anti-corruption matters, including:

- the United Nations Convention Against Corruption;
- the Council of Europe Criminal Law Convention on Corruption;
- the Council of Europe Civil Law Convention on Corruption; and
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

By signing these international treaties, Turkey undertakes to harmonise local laws with the international treaties. Accordingly, Turkey has introduced various judicial reform packages in relation to bribery. Turkey is continuing to synchronise certain laws with international treaties.

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Ukraine

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Nobles

1 Types of transaction

How may businesses combine?

Basically, there are three common ways of business combinations in Ukraine. The respective legal schemes may be classified as follows:

- statutory mergers,
- share purchases; and
- asset acquisitions (which also includes a specific for Ukraine – purchase of an integrated property complex).

Mergers

Ukrainian laws envisage two main forms of mergers: amalgamation and absorption. Amalgamation is a merger of two or more companies into a new company. Under amalgamation, the merging legal entities cease to legally exist, whereas all their property and liabilities are transferred to a newly established company. Merger by absorption occurs when the undertaking, property and liabilities of one or more companies are transferred to another existing company that is the only one surviving the merger.

Share purchases

Given the complexities and long-lasting procedures associated with statutory mergers in Ukraine, the most common scheme for business combinations are takeovers though share purchases. Such share purchases may take a form of direct purchase of shares in the Ukrainian target company or, as is quite often the case, through a purchase of shares in the offshore companies holding control over such Ukrainian target company.

Asset acquisitions

Under Ukrainian law, it is also quite common for business combinations to be structured through acquisition of the target's particular assets. In addition, Ukrainian law envisages a specific possibility to acquire the target company integrated property complex – a specific form of real estate common in post-Soviet jurisdictions that usually includes buildings, facilities, equipment and related liabilities.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

There is no separate takeover statue in Ukraine. The main laws and regulations that govern various aspects of business combinations, including takeovers, in Ukraine are as follows:

- the Commercial Code of Ukraine of 16 January 2003;
- the Civil Code of Ukraine of 16 January 2003;
- the Law of Ukraine 'On Companies' of 19 September 1991;
- the Law of Ukraine 'On Joint-Stock Companies' of 17 September 2008;
- the Law of Ukraine 'On Protection of Economic Competition' of 11 January 2001;
- the Law of Ukraine 'On State Registration of Legal Entities, Private Entrepreneurs and Non-governmental Organisations' of 15 May 2003;
- the Law of Ukraine 'On Securities and Stock Market' of 23 February 2006;
- the Law of Ukraine 'On Regime of Foreign Investments' of 19 March 1996;
- the Law of Ukraine 'On Re-establishment of Debtor's Solvency or Declaring it Bankrupt' of 14 May 1992; and
- the Labour Code of Ukraine of 10 December 1975.

3 Governing law

What law typically governs the transaction agreements?

The transactions agreements for business combinations are typically governed by Ukrainian law. However, with some exceptions, Ukrainian rules for conflict of laws allow the parties to choose other applicable law when one of such parties is qualified as a foreign person. Foreign investors and the biggest local business groups tend to choose other laws, in particular, English, German or Swiss laws, in combination with submission of the agreement to the jurisdiction of international arbitration tribunal, which provides more flexibility and comfort to such investors in terms of enforcement of the agreed contract mechanisms.

In any case, it is mandatory to apply Ukrainian law, among other things, to the provisions on legal capacity of the Ukrainian contract party, transfer of securities, internal corporate matters of the Ukrainian target company, merger essential conditions, transfer of real estate located on the territory of Ukraine.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Competition clearance with the Antimonopoly Committee of Ukraine (the AMCU)

If a business combination (treated broadly as catching almost all possible types of change-in-control transactions) reaches the financial thresholds below, then notification and formal approval of such a business combination by the AMCU is required. The thresholds mentioned are set forth in Law of Ukraine 'On Protection of Economic Competition' as follows:

- worldwide sales or assets of all parties exceed €30 million and sales or assets in Ukraine of at least two parties exceed €4 million; or
- sales or assets in Ukraine of the target exceed €8 million and sales of either party exceed €150 million worldwide.

The official filing fee for merger notification is approximately €680.

Notifying a stock exchange and the National Securities and Stock Market Commission

If the target is a joint-stock company (JSC), an acquirer is obliged to notify in writing the National Securities and Stock Market Commission and each stock exchange where the target underwent the listing as well as publish a respective announcement notice in the official press (eg, the daily Bulletin *Securities of Ukraine*). All these notifications shall be properly made at least 30 days prior to acquisition of shares.

The notice shall include the following information:

- name of the target company and its registration code;

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- if applicable, the number, type or class of the target's shares already belonging to the potential buyer (each buyer) and each of its affiliates; and
- the number of shares potential acquirer (acquirers) intends to acquire.

Companies Register

Information on merger (amalgamation, absorption), change in charter capital or, for limited liability companies (LLCs), participant structure must be filed with the Ukrainian Companies Register. In this case, the fees depend on the type of filing, whether it is registration of changes or a newly established legal entity. However, the registration fees are insignificant and usually are around €20.

Other filings

There could be other additional filings or mandatory submissions depending on the peculiarities and industry where the business combination takes place (as discussed in question 17). As a side note, in practice, getting certain approvals can be a highly bureaucratic and formalistic process.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

There are special disclosure requirements that are applicable only to companies that have issued securities (the issuer).

In accordance with respective by-laws, the target company must disclose certain details of the following events relevant to business combinations:

- change in shareholders who own 10 per cent or more of voting shares (including as a result of takeover) upon obtaining a respective notification from depositary;
- a decision of the competent body of the issuer or the court on termination (including through a merger) upon such decision being approved; or
- change in officers (directors) of the issuer (including as a result of a takeover) upon such a decision being approved by the competent corporate body.

In addition, the company must also disclose information on the following events that may be relevant to particular structures of business combinations:

- a decision on issue of securities for an amount exceeding 25 per cent of the share capital;
- a decision to repurchase its own shares;
- facts of listing or delisting of securities on the stock exchange;
- obtaining a loan or credit for an amount exceeding 25 per cent of the assets of the issuer;
- a decision of the issuer to reduce the share capital; and
- initiation of bankruptcy proceedings against the issuer, ruling on its reorganisation.

The company management must make a disclosure of information by way of publication on a special publicly available web database administered by the Commission (http://stockmarket.gov.ua), publishing of a statement in the official printed edition, publication on the company's own web page and by submission of a respective form to the Commission.

The disclosure must be made in the following terms:

- at http://stockmarket.gov.ua – within one business day after the date of a respective event, but not later than 10am on next business day following the date of such event;
- printed publication – within five business days from the date of a respective event;
- page on the internet – within five business days from the date of a respective event; and
- submission to the Commission – within seven business days from the date of a respective event.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Disclosure of ultimate beneficiaries

All companies are obliged to disclose their ultimate beneficial owners. To this end, an ultimate beneficial owner is an undertaking that owns directly or indirectly 25 per cent or more of the registered capital or that can exercise significant influence or control over the company. However, this requirement is not extended to NGOs, religious organisations, state-owned companies, government bodies, registered law societies, chambers of commerce and industry, etc.

Disclosure of substantial shareholders

As indicated above (see question 5), JSCs are obliged to make public certain information on shareholders with substantial shareholding (10 per cent or more).

Additionally, if an undertaking whether jointly or individually intends to acquire a shareholding that will result in holding directly or indirectly more than 10 per cent of company's shares shall not later than 30 days before the date of acquisition submit the written notice of its intention to the company, to the National Securities and Stock Market Commission and to each stock exchange where the company's shares are listed (if applicable).

Disclosure of all participants

LLCs disclose their participants upon registration and any further membership. Information regarding participants in LLCs is contained in the company's charter and can be found in the online Unified State Register of Legal Entities, Individual Entrepreneurs and NGOs in free access (https://usr.minjust.gov.ua/ua/freesearch) (in Ukrainian). It is possible to obtain information regarding identification data of the participant (name, address, identification code) and the amount of the equity share.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The directors and managers in both JSCs and LLCs must act in the best interests of the company. The controlling shareholders are generally free to act in their best interests.

In JSCs, the directors and managers and controlling shareholders (holding 25 per cent or more shares) have a duty to disclose any conflict of interest (personally or through the members of their respective families) that they may have in a business combination (if any) within three business days after such conflict arises.

In addition, shareholders holding 10 per cent or more shares can file a lawsuit on behalf of the company against directors and managers who caused damages to the company due their unlawful actions (exceeding of power, etc).

Under general prohibition, during takeovers of a JSC, the directors and managers are not allowed to take any measures to preclude the takeover bids.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Approval rights

Acquisition of shares requires neither approval of shareholders in JSC nor of participants in LLC. However, with respect to LLCs Ukrainian laws foresee the mandatory disclosure of all participants in the company's charter, and accordingly the amendments to the LLC charter (including those introducing new participants as a result of any sale and purchase agreements) requires approval of the general meeting of participants (shall be approved by the participants having more than 50 per cent of all votes in the LLC).

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Statutory mergers require approval of both the general meeting shareholders in a JSC and the general meeting of participants in an LLC.

Appraisal rights
Shareholders in JSCs who have registered at the general shareholders meeting and voted 'against' a decision on:

- a merger or (going private);
- acquisition of another company (if such acquisition constitutes a substantial transaction under the law – with a value of more than 25 per cent of the company's assets – or according to the charter of such company);
- sale or acquisition of assets (if, also, such acquisition constitutes an interested-party transaction or a substantial transaction under the law – with a value of more than 25 per cent of the company's assets – or according to the charter of such company); or
- change (decrease or increase) of the share capital,
  shall have the right to claim from the company to buy out their shares at the market value. Such shareholders can excise this right within 30 days of the relevant general shareholders meeting took place, and the company shall buyout the shares within 30 days of the receipt of the respective shareholder's request.

Moreover, in JSCs in the case of a purchase of the controlling shareholding (ie, more than 50 per cent of the shares), the new majority shareholder (acting alone or with its affiliates) is obliged to offer to remaining minority shareholders to buy out their shares at the market value. The offer shall be made within 20 days following the acquisition, and the minor shareholders may exercise the right to sell their shares within a specified period (not less than 30 days).

The law provides no statutory appraisal rights to participants of LLCs. However, participants of LLCs have a general right to exit the company upon a notice with the demand to pay the proportional amount of assets, as envisaged by law and the charter.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Ukrainian law does provide some limited regulation on unsolicited takeover bids. However, given that there are very few companies that are truly public (with a disseminated ownership) and most of companies are privately held, such type of transactions are extremely rare.

Generally, as in some other post-Soviet jurisdictions, hostile transactions in Ukraine have rather been associated with some illegal corporate raiding schemes. Lately, however, Ukrainian laws have been updated to counteract these type of illegal transactions more effectively.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There is no specific regulations with regard to break-up and reverse break-up fees. Therefore, general commercial and civil law principles apply to this provision. Generally, limitations on a company's ability to protect deals from third-party bidders. However, it is advisable for the parties to have a genuine intention to conclude a fair deal and act reasonably and in good faith, otherwise such deal can be declared null and void by a court.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

Except for competition and industry regulations (banks, etc), government agencies are generally not empowered to restrict a business combination. To some extent, business combinations that involve Russian companies, citizens (or companies controlled by them, or both) as buyers are restrained. For example, Russian companies and citizens as well as companies controlled by them cannot participate in state company privatisation tenders, be founders or participants of a local broadcasting organisation, or if a Ukrainian company performs a licensed activity and its ultimate beneficial owner is changed to another with a Russian registration, the licence will be revoked.

The only limitations that can influence the completion of business combination are currency restrictions introduced by the National Bank of Ukraine (NBU) in 2014. Mainly they can influence payment arrangements between the parties if the payments are made in hard currency and involve cross-border transfers. The principal restrictions that affect foreign investors are the restriction on transferring currency received from dividend distribution (partly abolished in 2016 regarding the dividends accrued in 2014–15), selling the shares or participatory interest, decreasing the charter capital and withdrawal from the company.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Ukrainian laws provide for restricted regulation on tender offers or exchange offers. In particular, conditions to a tender offer are statutorily limited to the following: in JSCs (whether public or private) the shareholder who acquired more than 50 per cent of the shares (directly or indirectly) is obliged to make a public offer to the remaining minority shareholders to buy out their shares at a price of no less than the market value. Such public offer shall be made within 20 calendar days from the date of acquiring the controlling shareholding, and the minority shareholders may exercise their right to sell the shares within the period from 30 to 120 calendar days. The public offer is irrevocable and binding, and the majority shareholder is obliged within the specified period to buy out the shares of minority shareholders who accepted the offer. In such a case, financing may not be conditional. In other cases, financing in a cash acquisition may be made conditional; eg, the availability of financing may be a condition precedent a share-purchase agreement.

Other forms of business combination in relation to unlisted companies, save for the exception with the private JSC as mentioned above, may be contingent on any condition the parties may agree apart from cases when such agreements contradict the principles of good faith according to the Civil Code of Ukraine. The most common conditions are obtaining corporate approvals or merger clearance from the national competition authority or clearance from the authorised state bodies in regulated areas (financial, insurance, etc).

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In a public offer, as mentioned above, the buyer (ie, majority shareholder) is obliged to buy out the shares of minority shareholders who accepted the offer within 30 days after expiration of the term for acceptance of the offer. In such a case, Ukraine's Law on Joint Stock Companies does not contemplate any options to make financing conditional.

In all other cases, Ukrainian laws do not explicitly govern the issue of financing in mergers and acquisitions transactions, except for some restrictions set forth by the law of Ukraine 'On Joint-Stock Companies for newly issued shares, ie:

- shares shall be paid for with money or if the parties agree so, with property or moral rights, having monetary value, or with some securities or other property;
- the investor is not allowed to pay for shares by undertaking obligations to provide some services; and
- JSCs are not allowed to grant a loan for investors to buy their shares.

Formally, there is also no obligation on the seller to assist the buyer in this process. As a rule, the buyer either finances the transaction from his or her own capital or uses borrowed funds for this purpose. The method of deal financing should be indicated in the transaction documents (eg, as a condition precedent). Although the seller is not obliged to assist in the buyer's financing, the parties, while structuring the deal, may agree that the seller provide financial support or that the buyer pay the purchase price in instalments over certain periods. Such deal

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structure usually provides for additional guarantees (security) on the part of the buyer.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Ukrainian law does not provide for a possibility to squeeze out minority shareholders at this point.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions are usually subject to strict Ukrainian currency control and financial monitoring regulations. Ukrainian law in force has imposed severe restrictions with respect to currency transactions and cross-border payments. Pursuant to these restrictions, certain payments in hard currency made by Ukrainian residents to non-residents are temporarily prohibited (including payment for the shares), whereas the rest are subject to special scrutiny, monitoring, limitations and approvals by the NBU. It is, however, possible for foreign investors to perform a wide range of investment activities in Ukrainian currency (without or with only partial repatriation of profits abroad at this point) through special investment accounts opened with Ukrainian banks.

Due regard must be paid to the cross-boarder taxation issues, as Ukrainian withholding tax is applicable to Ukraine-source income of non-resident companies from cross-border M&A transactions (as discussed below).

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Each transaction is specific and may imply different structures and combinations which in turn affect relevant waiting and notification periods; however, the basic ones can be limited to those listed below.

Period for exercise of certain shareholders' rights

A shareholder of a private JSC shall notify other shareholders having the pre-emptive right to purchase shares on his or her intention to sell its shares. The company charter may set a notification period. The waiting period for exercising the said pre-emptive right may last from 20 calendar days to two months. A similar rule is applicable for LLCs, and the participants are generally entitled with their pre-emptive rights in proportion to each participant's share.

If shares are to be purchased through an additional issue, the company has to make a notification thereon at least 30 days prior to its start. The waiting period for the existing shareholders to exercise their pre-emptive purchase right is set forth by the charter.

A person intending to buy shares in a JSC, which together with its other shares, including those held by affiliated persons, will make up 10 per cent and more of the JSC's authorised capital, shall notify the company, the National Securities Commission and each stock exchange on which it is listed of its intention at least 30 calendar days prior to purchase, as well as make an announcement in an official print medium.

The notification period on the upcoming general shareholders' (in a JSC) or participants' (in an LLC) meeting may not be less than 30 calendar days.

Period for exercise of certain creditors' rights, in case of reorganisation of a local entity

In a merger procedure, the JSCs participating therein and ceasing to exist as the result of the merger, shall notify their creditors and the stock exchange on which they are listed within 30 calendar days after the respective decision is taken by the general shareholders' meeting of the last participating company. Such creditors may, within 20 calendar days thereafter, request the early fulfilment of the company's obligations or granting a security. The merger may not be accomplished until all the creditors' raised claims are satisfied. In accordance with the Civil Code of Ukraine, similar rules are applicable for other types of companies including LLCs. Generally, the creditors shall have at least two months after the publication of merger notification to file their demands.

Approval of relevant state authorities

The shareholders (participants) of a company shall notify the competent state registrar within three business days after the decision on merger is taken. In addition, if a business combination implies an increase of the charter capital, change of shareholders and other actions that may entail registration of a document with the state register; additional waiting periods have to be considered.

In case of purchase of a Ukrainian bank, the notification period of the NBU about the intention to purchase a substantial shareholding (10, 25, 50, or 75 per cent) is three months. Within this period, the NBU shall issue its approval or disapproval of the intended purchase.

As regards purchase of shareholding in other financial institutions, the respective period is one month (the competent authority is the Financial Markets Commission).

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Strategic industries

There are specific industries where only Ukrainian state enterprises can operate. Those include railways, security services to strategic state-owned objects, forensic activities and the manufacture and launching of spacecraft.

TV, radio and media

In TV and radio broadcasting, non-resident companies may not be direct founders of local broadcasting companies. Nevertheless, they can either set up another local company, which, in its turn, would be a founder of a new broadcasting company, or acquire shares and become shareholders (participants) in already existing companies. Non-residents registered in offshore jurisdictions in Russia and those controlled by Russian residents cannot be participants (shareholders) in Ukrainian TV and radio broadcasting companies. In the news media, non-resident companies may not hold more than 35 per cent in the authorised capital of a Ukrainian information agency.

Banking and finance

Ukrainian law sets specific rules for M&A in the banking and financial sectors.

As regards banks, any reorganisation process (including merger) within a bank in Ukraine shall be approved by the NBU. The latter also approves the plan of such business reorganisation. If someone intends to acquire or increase a substantial shareholding in a Ukrainian bank (10 and more per cent of the charter capital or voting rights), this person must obtain consent from the NBU.

It is also required to obtain the relevant approval for acquiring or increasing a substantial shareholding (10, 25, 50 and 75 per cent of the charter capital or voting rights) in other financial institutions that provide certain financial services, eg, insurance companies, leasing companies, investments funds, etc. A potential investor is obliged to obtain a written consent from the National Commission for the Regulation of Financial Services Markets.

18 Tax issues

What are the basic tax issues involved in business combinations?

VAT

The sale of shares (or the purchase of those during an emission) is not subject to Ukrainian VAT. However, if an investor makes an in-kind contribution to the capital of a company (as opposed to a cash contribution) in exchange for its shares, it will trigger Ukrainian VAT payable by the target company (subject to VAT credit and refund). The same applies to an acquisition structured as an assets deal (as opposed to a share deal), in which case the purchase transaction is subject to (refundable) VAT.

Mergers of companies do not trigger any additional VAT obligations, either to the shareholders or to the companies themselves that consolidate their assets.

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Update and trends

Return of notarisation requirement
In October 2016, the Ukrainian parliament re-introduced a requirement to notarise the statutory documents of legal entities, any amendments thereto, in particular, pertaining to the change of shareholders, as well as respective shareholders' meetings resolutions submitted to state registrars. In the previous period, when this notarisation requirement was abolished, statutory documents were often forged and this was misused for numerous raider attacks (illegal takeovers) on Ukrainian companies. Currently, state registrars accept only documents properly certified by notaries, a measure set to reduce unlawful corporate raiding activities.

Tax changes
Another relevant change concerns the sphere of taxation, in particular, the ongoing reform of the tax office into a servicing rather than controlling agency and transformation in 2017 of tax reporting, and communication with the tax office into an electronic instead of paper form service.

In addition, the rules on the transfer of an accrued VAT credit in case of a business combination have been clarified. Such transfer of the VAT credit to a taxpayer's successor(s) shall occur in a reporting period immediately following the execution of a handover report (for merger, accession, transformation) or a division balance sheet (for division), provided that the indicated tax credit amount is confirmed by a tax audit.

Draft law on limited liability companies
During 2016, the competent government agencies and legal professionals community actively discussed the highly anticipated draft Law on Limited Liability Companies. Among the most crucial and long expected changes for the statutory framework governing business combinations of limited liability companies are the introduction of discretional participant agreements, enabling the establishment of a supervisory board with independent members, the introduction of a debt to equity conversion mechanism and a concept of significant and interested-party transactions.

M&A activity and regulatory regime in Ukraine
The simmering military conflict in Eastern Ukraine coupled with the deteriorated economic relations with Russia, internal political instability, still somehow high-level of corruption and lack of progress in reform have stood in the way of swift economic recovery, gaining of trust from potential foreign investors and, therefore, rise in the M&A area in Ukraine. Nevertheless, since there have been some signs of macroeconomic recovery in 2016, the local and international business community is expecting a further loosening of the tough regulatory framework, in particular, the currency control restrictions regarding repatriation of dividends and investments. There have also been proposals to open or expand certain state-owned industries to privatisation, such as the railroads and energy. And, of course, further deregulation, the pending judicial reform and elimination of corruption in the government could give a positive boost to M&As and business combinations in the years to come.

Improvement of corporate governance is on the way
In the end of March 2017, the Ukrainian parliament adopted two draft laws that introduced a possibility for shareholders of joint stock and limited liability companies to conclude shareholders agreements. Moreover, lawmakers added provisions to Ukrainian legislation that allow parties to conclude option agreements and use escrow settlement. Another significant change is the introduction of the squeeze-out right for a shareholder of a joint stock company owning 95 per cent or more shares. All these amendments will come into force after the President's signature and official publication which is due to take place in April 2017.

Repatriation taxes
Profit derived by a foreign investor from the sale of shares in a Ukrainian company is considered its Ukrainian-source income. Therefore, such profit (calculated as a positive difference between the investor's income from the sale and its expenses for the initial purchase of the shares) is subject to Ukrainian withholding tax (15 per cent) if the seller is a legal entity, or personal income tax (18 per cent plus 1.5 per cent of temporary war tax) if the seller is an individual. The existing double taxation treaties may provide for lower applicable tax rates.

Pre-merger tax audit
Any merger procedure in Ukraine (fusion, amalgamation) is placed under special scrutiny and merging companies are subject to an extraordinary audit by Ukrainian tax authorities. Although the company established as the result of merger generally takes over all the tax liabilities, profits and losses of the merged companies, it should be noted that outstanding tax liabilities of the latter might potentially impede the transaction in certain cases, since prior approval of the tax authorities may be required.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Under Ukrainian law, employees generally do not enjoy any formal approval rights as regards a business combination. Theoretically, a collective bargaining agreement may stipulate some duties of the target company's management to consult a local trade union. In practice, this is rather uncommon and unusual.

The change of control in the target company during a takeover does not per se affect the existing labour relationships, unless it is accompanied with or followed by justified organisational and structural changes in the company.

If two companies merge into a new company or one company merges with another (surviving) company, employees of the merging companies automatically become employees of the new or surviving company, unless they are made redundant due to reorganisation. Their consent to such 'transfer' is generally not required. In an assets deal, that is, when a manufacturing facility is entirely sold to another entity that also intends to take over the employees working there, it has to procure their consent to the transfer.

If during organisational or structural changes in the company, the latter laysoff employees or makes alterations of essential labour conditions, such as remuneration, social benefits and working time, such company must respect the statutory procedures and collective bargaining agreement. In particular, the management must observe the respective notification periods with regard to employees and public authorities (which is at least two months prior to the effective date), negotiate with the local trade union and, in certain instances (such as layoffs), procure its consent; and it must ensure statutory guarantees, such as severance payments, to redundant employees.

Lastly, the change of control causes the existing collective bargaining agreement to expire within one year after the change occurs. Meanwhile, the parties shall negotiate the terms of a new agreement.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The general rule of Ukrainian insolvency law provides that as soon as a competent commercial court opens a bankruptcy procedure, the affected target entity-debtor may no longer enter into a business combination without prior consent of an appointed administrator or creditors' committee (meeting) or both. Certain peculiarities exist for banks and other financial institutions, where the insolvency procedure is largely administered and directly run by the Individual Deposits Guarantee Fund, the NBU and administrators appointed by these bodies.

The first stage of a bankruptcy proceeding opened by a competent commercial court is receivership, which entails a moratorium with respect to creditors' claims; the receiver appointed by the court is authorised to administer the debtor's assets, give consent to all major transactions, including M&A and additional emissions of shares. Interested investors may submit to the receiver their proposals as to the rehabilitation of the debtor, including a rehabilitation plan, which is subject to approval by the creditors' meeting and the court.

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As soon as the court approves the rehabilitation plan, the next stage – rehabilitation – commences. The court appoints an administrator (with the functions similar to those of the receiver) who runs the company in accordance with the plan. Interested foreign investors can also be invited to take part in rehabilitation according to the plan, to which they must consent. Their functions are quite limited, though. Possible measures to restore debtor's solvency, include its reorganisation, as an investor may buy shares or assets of the debtor in return for the repayment of its debts, or capital increase and additional contributions to the authorised capital by the existing shareholders or new investors or both.

If receivership or rehabilitation fail, a liquidation procedure of the debtor is started and no further business combinations are possible.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The general rule provides that any transaction or legal act, including business combinations, entered into or issued in violation of the anti-corruption legislation, may be declared null and void, with the total restitution and compensation of caused damages being legal consequences thereof. Due to this, special attention should be paid to business combinations in which senior Ukrainian public officials and politicians (who generally may not combine their official capacity with any business function and are therefore under scrutiny of anti-corruption agencies) or companies or assets under their control participate.

All Ukrainian legal entities shall conduct regular assessment of corruption risks in their business and take necessary anti-corruption measures. Each employee of a legal entity is obliged to inform the CEO and respective corporate officers within the legal entity of any breach (or its attempt) of anti-corruption laws as well as of any conflict of interests. Business combinations involving the public sector (ie, legal entities in which the state or a local community has a controlling share or those participating in public procurement) shall also adopt these anti-corruption programmes and employ compliance officers.

It should be noted that relatively recently Ukraine has adopted a concept of criminal liability of legal entities. Such liability may be applied additionally to criminal liability of corporate officers of a company for certain white-collar crimes committed in the interests or for the benefit of that company, including commercial bribery. The sanctions that may be imposed on the company include fines, the confiscation of assets and forced liquidation.

Recently, some sanctions have been imposed by the government against a number of Russian individuals and companies, as well as their Ukrainian subsidiaries, in the context of the annexation of Crimea, Russian support of separatist movements in Eastern Ukraine, and persecution of Ukrainian political prisoners in Russia. The sanctions include, in particular, an entrance ban, the suspension of financial transactions, freezing of assets and cancellation of licences.

In addition to this, Ukrainian law has set some specific restrictions for companies owned (wholly or partly) or controlled by Russian investors. Such companies may not hold licences to conduct certain trading activities (banking, insurance, stock exchange, etc) and shall forfeit the existing licences; neither can they act as buyers in the course of a privatisation of state property.

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United States

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1 Types of transaction

How may businesses combine?

In the United States, businesses may be combined in a number of different ways. Stock purchases, asset purchases, legal mergers (essentially an amalgamation of two companies) which use stock or cash as consideration, tender offers for cash, exchange offers for securities and part-cash, part-stock tender offers are all available and widely used business combination structures. In many instances more than one technique is used, such as a first-step cash tender offer followed by a second-step cash or stock merger with the purpose of acquiring those shares not purchased in the tender offer.

Owing to practical considerations, business combinations of public companies almost always take the form of a merger completed in one step or a tender offer followed by a merger to eliminate any remaining minority interests. The most common in stock-for-stock transactions are mergers of the target directly into the acquiring company or with a subsidiary of the acquiring company. In 'mergers of equals' transactions, the parties to the merger may also form a new company and effect the transaction by merging each existing company into separate subsidiaries of the new company. In this case, stockholders of both companies are issued shares of the new company.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations are governed by the federal laws of the US and the laws of the state or states where the parties to a business combination are incorporated. The two primary relevant federal laws are the Securities Act of 1933 (the Securities Act) and the Securities Exchange Act of 1934 (the Exchange Act), including the rules and regulations promulgated by the Securities and Exchange Commission (SEC) under both the Securities Act and the Exchange Act.

The Securities Act deals primarily with the sale and purchase of securities and applies to all transactions where securities are being offered or sold. The Exchange Act, among other things, contains the federal law provisions relevant to tender offers, proxy statements, shareholder disclosure obligations and going-private transactions.

Whereas US federal corporate law addresses mainly disclosure and other investor protection issues in the context of transactions, state corporation law concerns itself with all other matters, including the duties of boards of directors, mergers, sales of assets, voting requirements, formation and dissolution of corporations, charters, by-laws, etc. Each of the 50 states has its own corporation code, and although there is some commonality, there are also many differences. This potential complexity is eased somewhat by the pre-eminence of the state of Delaware, where a disproportionate number of companies are incorporated. According to the State of Delaware's Division of Corporations, 66 per cent of the 500 largest US companies by revenue are incorporated in Delaware. Finally, although the corporate laws of the federal government and the states do overlap in the area of business combinations, as a US constitutional matter state laws are not permitted to conflict with federal laws.

3 Governing law

What law typically governs the transaction agreements?

At a minimum, the parties to a business combination enter into a central operative transaction document (eg, merger agreement, stock purchase agreement, asset purchase agreement, etc). Depending on the facts and circumstances of the transaction, numerous other related documents may be entered into as well. Examples include: voting agreements (typically entered into to ensure that a large stockholder votes in favour of the transaction), registration rights agreements (where securities not registered with the SEC are being issued as consideration), stockholders' agreements (governing the relationships of the stockholders going forward), transitional services agreements (most common where a subsidiary or division of a larger company is being sold) and employment agreements.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

For transactions over US$80.8 million, a filing will generally need to be made under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act) to comply with the US competition laws when they meet the other requirements of the HSR Act. The waiting period required under the HSR Act must expire prior to completion of a transaction subject to its jurisdiction.

Also, in merger transactions, a certificate of merger or a similar document will need to be filed in the state or states where the constituent companies are incorporated. Certain states also have nominal stock transfer taxes that need to be paid, but which are not comparable to the stamp taxes in the United Kingdom and elsewhere. In addition, in transactions raising national security concerns, filings with the US government are required.

In business combination transactions involving a public offering of securities, a listing application needs to be made with the relevant stock exchange and, under the Securities Act, a registration statement is required to be filed and cleared with the SEC. A fee is payable in connection with the filing of such a registration statement. In addition, in all public company business combination transactions, a proxy or information statement is required to be filed with the SEC before it is sent to security holders and in some instances requires an additional fee.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

Whereas the disclosure requirements vary depending on the type of transaction, under the Securities Act and the Exchange Act, public companies are required to inform stockholders of all material information related to the transaction, including the background of the transaction, the principal terms of the material transaction documents, the historical financial information of each company that is a party to the

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business combination, and the pro forma combined financial information of the combined entity.

In addition, SEC Regulation FD (fair disclosure) exists to address selective disclosure of material non-public information. The regulation requires that whenever an issuer, or a person acting on an issuer's behalf, discloses material non-public information to securities market professionals and holders of the issuer's securities who may trade on the basis of the information, the issuer must make simultaneous public disclosure of that information. If the issuer unintentionally discloses material information, it must 'promptly' make public disclosure of such information. The SEC adopted the regulation to address its concerns over selective disclosure. Selective disclosure occurs when an issuer releases material non-public information on a limited basis, such as to a group of analysts or institutional investors, prior to releasing the information to the public as a whole.

The regulation applies only to communications to certain securities market professionals, such as:

- broker-dealers or persons associated with broker-dealers;
- investment advisers or persons associated with an investment adviser;
- institutional investment managers or persons associated with an institutional investment manager; or
- investment companies.

The Regulation also applies to communications to holders of the issuer's securities, if in the circumstances it is reasonably foreseeable that such person will trade on the basis of the information. The public disclosure requirement would not be triggered by issuer disclosure to:

- persons who owe a duty of trust or confidence to the issuer such as attorneys, investment bankers or accountants; or
- persons who have expressly agreed to keep the information confidential.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Persons or groups of persons acting together who own 5 per cent or more of a public company are required to make a public disclosure filing pursuant to regulation 13D-G of the Exchange Act. Whether such stockholder is required to make such disclosure in a schedule 13G (which requires only basic information about the stockholder and the amount of its holdings) or a schedule 13D (which requires more extensive information, including information related to the purpose for acquiring the shares, any relationship such stockholder has to the issuer, and any plans or proposals that the stockholder may have for the issuer which would result in a material event for the issuer) depends on several factors, including whether such person has acquired the securities with any purpose or intent to change or influence the control of the issuer.

Schedule 13D filers are required to file an amendment whenever there is a material change in facts. In addition, 13G filers who become 13D filers due to a change in circumstances are required to file a schedule 13D within 10 days of the event giving rise to such filing obligation. Otherwise, 13G filers are required to update their filing annually. The disclosure obligations of large stockholders under regulation 13D-G are not affected if the company is party to a business combination unless such shareholder is a party to such business combination. Special rules apply in some instances to large shareholders in 'going-private' transactions, which will be discussed below.

Finally, in certain circumstances the HSR Act requires disclosure in connection with the acquisition of substantial shareholdings even where there is no change in control.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

In nearly all cases, the business and affairs of companies in the US are managed by or under its board of directors. In carrying out their managerial roles, including engaging in business combinations, directors are charged with a fiduciary duty to the company and all of its stockholders. This fiduciary duty includes two elements, the duty of care and the duty of loyalty. The duty of care includes a duty of the board to inform itself, prior to making a business decision, of all material information reasonably available to it. The duty also includes a requirement that the board reasonably inform itself of alternatives. The more significant the subject matter of the decision, such as a business combination transaction, the greater the requirement to probe and consider alternatives. A board is also required to act with requisite care in the discharge of its duties. The duty of loyalty requires that any decision by the board must be made on a 'disinterested' basis and not with a view to obtaining any personal benefit from the business combination. This duty mandates that the best interests of the company and its stockholders takes precedence over any interest possessed by any members of the board or any particular group of the company's stockholders and not shared by stockholders generally. In certain situations involving business combinations, the directors' duties may be subject to a higher level of scrutiny.

In Delaware and many other states, this is sometimes referred to as a *Revlon* duty, after the *Revlon* case in Delaware, which states that where a company is engaging in a sale of control, the company's directors have a duty to obtain the best transaction reasonably available for stockholders. It should be noted that this *Revlon* duty is not applicable to corporations in several US states that by statute or case law have provided that there be no enhanced level of scrutiny for directors' business judgements.

With respect to controlling stockholders, the majority view in the US (including Delaware) is that controlling stockholders do not owe a duty to the minority stockholders in the context of a business combination.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Under the various state laws, shareholder approval is generally required whenever a company is party to a merger or sells all or substantially all of its assets. Shareholder approval is not required in the context of tender offers or so-called 'squeeze-out' mergers where one person or company owns a large majority of the target company (typically 90 per cent, though the requirements vary in each state). Under the rules of the New York Stock Exchange and Nasdaq, shareholder approval is generally required before a company can issue shares of stock equal to or in excess of 20 per cent of the number of currently outstanding shares.

Shareholders do have appraisal rights in certain circumstances to demand the payment of 'fair value' for their shares, as decided by an independent party. This right is generally available when the consideration that would otherwise be received is different from the shares being purchased from the shareholder (eg, cash for stock transactions). In addition, Delaware law generally provides the right of appraisal only in the case of mergers, though many other states permit the exercise of such rights in other matters (such as the sale of all of a company's assets) that require the vote of shareholders. In all states, there are a number of other procedural requirements and limitations on a person's ability to exercise appraisal rights.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Hostile transactions in the US generally consist of one or both of the following elements: an attempt to purchase all or a majority of the voting stock of a target by way of a tender or exchange offer; and an attempt to replace the directors of the target's board with individuals nominated by the acquirer. In attempting to consummate a hostile transaction, an acquirer is faced with numerous obstacles. First, many states have enacted takeover statutes which impose super-majority voting and other requirements, making it difficult to consummate a takeover without the consent of the target's board.

Second, the availability of stockholder rights plans and, to a lesser extent, the existence of staggered boards (and the willingness of courts to explicitly uphold the use of these devices by boards of directors) means that it can take up to two years for a potential acquirer to consummate a pure hostile transaction. With respect to special

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Update and trends

The US M&A market remained strong in 2016 by historical standards. Although the value of US targeted deals announced in 2016 decreased by about 17 per cent as compared with 2015, the number of US targeted deals increased by about 7 per cent. In total, 11,027 deals with US targets were announced in 2016 with a total value of US$1.7 trillion. These trends reflect the strength of the middle market in the US in 2016, but the era of the megadeal is not yet over in the US (although it is more tempered than 2015). Ten of the 15 largest deals announced in 2016 involved US targets, and five of the top 10 deals involving US targets were above US$35 billion in value. By comparison, in 2015, all 10 of the top 10 deals involving US targets were above US$35 billion, and, in 2014, five of the top 10 deals involving US targets were above US$35 billion.

One developing trend for US, and in particular Delaware, mergers is the increasing exercise of appraisal rights and the concomitant rise in the use of appraisal conditions in merger agreements. In certain transactions, shareholders may demand appraisal (and payment) of 'fair value' for their shares. Over the past several years, the exercise of appraisal rights has substantially increased, both in terms of the value of shares seeking appraisal and the percentage of deals that are challenged by appraisal actions. Major players in appraisal litigation are hedge funds that buy a company's stock after a transaction is announced to seek arbitrage gains from either the statutorily prescribed interest that accrues on appraisal claims or the judicially determined 'fair value' of the shares. Although the Delaware legislature recently amended the Delaware appraisal statute (by prohibiting de minimis appraisal claims and allowing for the 'prepayment' of appraisal demands in order to cut off the accrual of interest), at present, there is no indication that the prevalence of appraisal challenges will abate. In particular, certain recent decisions by the Delaware judiciary (including the decision in the appraisal challenge of the Dell management buy-out) have signaled a reluctance to accept the deal price as 'fair value', particularly where a financial sponsor is the acquirer. In this regard, transactions where the buyer is a financial sponsor are particularly vulnerable to appraisal arbitrage, and in fact, approximately three-quarters of deals involving a financial sponsor in 2016 were challenged by appraisal claims. Accordingly, it is unsurprising that buyers are increasingly including a closing condition in merger agreements that impose a limit on the percentage of shares that can seek appraisal (ie, if the limit is exceeded, the closing condition is not satisfied and the buyer is not obligated to close the transaction). In 2016, approximately 13 per cent of transactions announced involving a US public company target included an appraisal closing condition, representing an approximately 35 per cent increase over 2015.

considerations for targets, many states (including Delaware) impose a requirement on the board of directors that their actions taken in the face of an attempted hostile takeover be reasonable in relation to the threat posed by the hostile takeover. This imposes a greater duty on the board than the general fiduciary duty discussed above.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Reasonable break-up or termination fees are allowed. Although there are no absolute statutory or judicially determined limits as to the amount of break-up fees, they must be reasonable and typically represent 1 to 4.5 per cent of the transaction's value (with 2.5 to 4 per cent being the most common range). The reasonableness of any particular break-up fee is highly dependent on the facts and circumstances of the transaction.

In addition, many other forms of deal protection are also available in US transactions, including no-shop provisions, 'poison pills' and limited termination rights. In overly broad terms, the standard applied to deal protection techniques is that they must be reasonable and they must not be preclusive with respect to a potential third-party bidder. It is also important to note that because these and other deal protection techniques are frequently the subject of comment by both judges and practitioners (and are typically heavily negotiated by parties engaged in business combinations), their form and use are constantly evolving.

For example, it has become customary in private equity transactions to include a reverse break-up fee where financing is not available. The amounts of these fees are typically no longer reciprocal with the amount of the standard break-up fee, but instead are higher (5 to 10 per cent is typical).

There are no restrictions on financial assistance in the US.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The SEC has broad powers to prohibit the issuance of securities if the Securities Act is not complied with. In addition, as noted below, transactions that have national security implications can, regardless of the industry, require special notification to and approval by the US government. In general, however, other governmental agencies do not influence or restrict the completion of business combinations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In general, tender offers, exchange offers, mergers and all other forms of business combinations can be conditioned on any event occurring, including obtaining financing.

In the tender offer and exchange offer contexts, however, the conditions cannot be drafted in such a manner so that the offer is illusory. For example, a typical condition in a tender offer or exchange offer specifies the minimum number of shares that must be tendered before any shares are accepted for payment. If the condition is drafted so that this objective fact is determined in the 'sole discretion' of the offeror, it may be argued to be an option, rather than an offer. In addition, binding financing commitments are included in tender offers that are conditioned on financing.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Typically, if a buyer requires debt financing to complete a transaction, the seller will require that the buyer attach the financing or commitment papers as an exhibit to the purchase or merger agreement, and require the buyer to take all actions necessary to obtain that financing or substitute financing. As part of entering into the overall transaction, a seller will generally seek to ensure that such financing documents do not contain any conditions different from those negotiated in the main transaction document.

In leveraged buyout transactions, where the selling company is also the borrower, buyers need to ensure the selling company's cooperation in obtaining such financing, such as preparing any necessary financial information, participating in road shows, and facilitating entering into the financing transactions at the closing of the deal.

In circumstances where the overall transaction is not conditioned on the financing being available, but is required by the buyer, parties often negotiate a 'reverse break-up fee' payable by the buyer to the seller to compensate the seller in the event the transaction does not close.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Yes. State statutes provide that, if a party owns or acquires more than a certain percentage of another party's stock (typically 90 per cent), the

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board of directors of the acquiring party may, by resolution, merge the target into the acquiring party. This procedure does not require a vote on the part of either company's stockholders, nor even a resolution of the target's board. The State of Delaware permits such a resolution to merge the target into the acquiring party when the acquirer obtains 50.1 per cent of the target's shares.

It is intended that the minority stockholders be protected by their appraisal rights, which allow stockholders who do not consent to certain transactions to seek judicially determined consideration for their shares. In the public context, certain squeeze-out transactions are referred to as 'going-private' transactions and in most cases are subject to rule 13e-3 of the Exchange Act.

Rule 13e-3 requires that a Schedule 13E-3 form, which provides detailed disclosure as to the fairness of the transaction, be publicly filed in connection with any such going-private transaction. Because rule 13e-3 supplements, rather than replaces, the other filing and disclosure requirements which may be applicable to a going-private transaction, the disclosures required by the rule will ordinarily be included in tender offer documents or proxy statements required by other applicable statutes or regulations. As a result, the going-private nature of a transaction will generally not affect the timing of the transaction. As above, appraisal rights statutes exist as a protection for minority shareholders in such going-private transactions.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Although there is no additional legal or regulatory framework in the US governing cross-border transactions, companies must typically comply with the laws of both the US and the other relevant jurisdiction. In response to the growing trend of US investors in foreign private issuers being excluded from certain offerings and transactions owing to the unwillingness of the foreign issuer to comply with US requirements, the SEC adopted regulations which provide foreign parties with certain limited exemptions from US regulations, provided that such parties comply with the legal and disclosure requirements of the country in which they are incorporated.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

Both federal and state proxy rules require various waiting periods to allow the dissemination of information before a business combination may be voted upon by stockholders. The length of these waiting periods is typically one month or less. Similarly, the federal tender offer rules require tender and exchange offers to be open for at least 20 business days, with mandatory extensions if there is a material change in the terms of the offer.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Many regulated industries (eg, telecommunications, energy, banking, transport) must comply with special business combination legislation particular to those industries. Typically, approval of the relevant federal or state governing agency is required before transactions in these industries may be completed. Also, transactions that have national security implications require special notification to, and approval by, the US government.

18 Tax issues

What are the basic tax issues involved in business combinations?

The most basic tax issue is whether the transaction is taxable or tax-free to the acquirer, target and their respective stockholders. Although acquisitions for cash are generally taxable, when stock is being issued as consideration, the structure of the transaction is very important in determining whether the transaction will be tax-free. In many cases, the structure of a transaction is dictated by the reduction or elimination of tax that such structure may provide. Another basic tax issue is the determination of basis; that is, whether the acquirer purchases the target and retains the historical basis of the target's assets (such as in a stock purchase transaction) or receives a step-up in basis (such as in an asset purchase transaction). In certain circumstances, US tax rules allow acquirers to make an election to treat stock purchases as asset transactions and receive a step-up in basis. Finally, an issue in many transactions concerns who is to be liable for the target's past and future tax liabilities. Where indemnification is available from a seller, the seller typically retains all pre-closing tax liabilities, with the buyer being responsible for all post-closing tax liabilities.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

There are a large number of federal statutes and regulations which govern labour and employee benefits matters in a business combination. These statutes (including ERISA, the Employee Retirement Income Security Act) provide protection to employees in connection with business combinations, including continuation of benefits following termination, advance notification prior to mass layoffs or plant closings, and full funding of benefit plan liabilities. In addition, federal tax and securities laws are often relevant and must be considered in the context of employee benefits matters in any business combination.

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20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Companies going through a reorganisation under US bankruptcy laws are subject to the jurisdiction of a US bankruptcy court that is charged with managing the assets of such company for the benefit of its creditors. As a result, all M&A transactions need to be approved by such bankruptcy court and generally by the creditors of the target company. Generally, a purchaser of a company (or, as is more typically the case, the assets of such company) that has been 'cleansed' by the US bankruptcy process does not inherit any of the pre-existing liabilities or debts of the company prior to its bankruptcy or reorganisation. Because of the complexity and procedural requirements of the federal bankruptcy laws, transactions involving a company going through bankruptcy or restructuring can often take significantly longer to complete. The ability to obtain a break-up fee or other significant deal protections is also substantially limited in this context.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The primary US law governing overseas bribery is the Foreign Corrupt Practices Act (FCPA). In basic terms, the FCPA is a federal statutory scheme, enacted in 1977, which is designed to prohibit bribery of a broadly defined group of foreign officials. The FCPA contains the Anti-bribery Provisions, which render it unlawful to take any action in furtherance of an offer, payment, promise to pay, or authorisation of the payment of money or anything else of value to any foreign official when such action is taken with a corrupt purpose, such as to obtain or retain business or to gain an improper business advantage.

The group of foreign officials that are covered by the FCPA is broadly defined. The FCPA defines a foreign official as 'any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization'. In addition to foreign officials as defined above, the FCPA also applies to 'any foreign political party or official thereof or any candidate for foreign political office'. In many countries, especially those with mixed economies in which many business enterprises are at least partially state-owned, many members of a business management team may also be considered foreign officials for FCPA purposes.

By their terms, the Anti-bribery Provisions generally govern three classes of entities:

- 'issuers', which includes companies with a class of securities registered with the SEC, regardless of where that company may be based;
- any 'domestic concern', a term defined to include any citizen, national, or resident of the US, or any business entity organised under the laws of a US state or having its principal place of business in the US, regardless of whether such company has any securities listed with the SEC; and
- any entity taking any action prohibited by the FCPA within the territorial jurisdiction of the United States.

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Venezuela

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1 Types of transaction

How may businesses combine?

Under Venezuelan Law, businesses combine mainly through:
- mergers with other businesses;
- purchase of capital stock or shares of private companies or, in the case of publicly traded companies, through tender offers (public offers for acquisition as regulated in the Securities Market Law); and
- acquisition of assets or going concerns.

Businesses may also combine through joint ventures whereby two or more businesses put up capital stock to incorporate a new business entity for a specific purpose.

Establishing consortia also serves as a mean for the temporary combination of business enterprises for specific purposes.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The Commercial Code, the Civil Code, the Securities Market Law and the Antitrust Law are the main laws governing business combinations.

3 Governing law

What law typically governs the transaction agreements?

Generally, Venezuelan Law governs the transaction agreements in local business combinations. According to the Venezuelan Private International Law Act, obligations (contracts) are subject to the law chosen by the parties; therefore, choice-of-law clauses may specify that the law of another jurisdiction applies. Choice-of-law clauses are not enforceable in matters subject to public order or public policy legal provisions.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Government or stock exchange filings will be necessary depending on the structure used for the business combination. Merger agreements also need to be filed before the Commercial Registry Office where both of the combining businesses are registered, along with the necessary corporate and shareholder approvals of the transaction.

If businesses combine through the acquisition of shares of privately held corporations, the Commercial Code establishes that no filings are required as stock transactions are made through transfer entries in the shareholder registry book kept by the target company.

If businesses combine through a tender offer made to the shareholders of a publicly traded company, the purchaser is required to file advance notices and a prospectus with the National Securities Superintendency prior to publicising the tender offer.

The purchase and sale of a going concern (asset sale) requires filings before the Commercial Registry Office. It also requires that parties to this transaction inform the public by way of notices published in newspapers before the closing of the transaction. In the case of a sale of a going concern, stamp duties are applicable.

Any filings before the Commercial Registry Office are subject to registration fees and may be subject to stamp tax depending on the specific transaction. No filing fees apply to filings before the National Securities Superintendency.

Competition filings are not mandatory. However, if a transaction is deemed to have detrimental impact on competition by the regulator, it can impose conditions on the transaction or even annul it.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information that needs to be made public during a business combination will depend on the type of structure used.

In cases of mergers, once the merger is filed and completed before the Commercial Registry Office, the official corporate decisions to go through with the merger have to be published.

No disclosure is required in cases of acquisitions of stock of privately held corporations.

For a business combination conducted through the purchase of shares of a publicly traded company, the purchasers need to present a report (prospectus) of the tender offer to the National Securities Superintendency and to the target's shareholders. This report has to provide the following:
- complete and detailed information of the purchaser;
- the purpose of the offer;
- the purchaser's current shareholding in the target business;
- the relationship between the purchaser and the target business;
- conditions of the offer;
- conditions of payment; and
- the offer and its legal basis.

In cases of sales of going concerns where the seller will exit the business, the Commercial Code requires that the parties inform the public through previous postings in the newspapers of their intent to carry out the transfer of the going concern.

In any case, the tax authority (SENIAT) should be notified of the merger and the new management of the company.

The merged company's articles of incorporation and by-laws will also need to be adapted accordingly and published in a local newspaper.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

There are no disclosure requirements for shareholders in privately held companies.

The Securities Market Law requires that any person or company that plans to acquire a 'relevant percentage' of the stock of a public company must inform the National Securities Superintendency of such intention.

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7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

There are no special or additional duties imposed on directors or controlling shareholders in connection with business combinations.

In general, directors or managers of a company owe fiduciary duties to the company shareholders, including the duty to act in their best interest. Controlling shareholders also have a general fiduciary duty to minority shareholders acknowledged as a principle of law.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

The Commercial Code establishes that the decision to merge with another company requires the presence of shareholders that represent 75 per cent of the stock of the company and that the decision requires the favourable vote of at least 50 per cent of the capital stock, unless the by-laws provide different quorum and majorities. The same rule applies for approval of the sale of a significant portion of the company's assets.

The by-laws may also provide for additional approvals from the board or corporate bodies to carry out these transactions.

Shareholders do not have appraisal rights as such, they are known in other jurisdictions in cases of business combinations.

Shareholders have the right to present allegations to the company's statutory auditor of any suspected wrongdoing by the company's management or a group of shareholders. If these allegations are backed by at least 10 per cent of the shareholders, the statutory auditor must present his or her findings at a shareholders' meeting to determine if any actions may be filed. It is up to the shareholders to determine together if any actions are required.

Shareholders are also entitled to request a valuation of the company from the statutory auditor, but that valuation is not binding.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Venezuelan legislation does not provide special considerations for unsolicited (hostile) transactions. The Tender Offer Rules apply to any type of stock acquisition structure, whether for a significant participation or for a majority control of the target company. These rules do not differentiate between a hostile or amicable takeover.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Venezuelan legislation does not regulate break-up or reverse break-up fees.

Under the Tender Offer Rules, once a tender offer process starts with the publication of the offer, the offeror may withdraw its tender offer at any time prior to the start date of the offer. After the offer becomes effective and until three working days prior to its expiration, the law and regulations allow offer withdrawal in limited cases and always subject to the authorisation of the National Securities Superintendency.

After a tender offer has been delivered under the Tender Offer Rules of the National Securities Superintendency, management of the target company may not purchase self-controlling participation in the company, such as the company's own shares, unless otherwise authorised by law, and as long as it is in the best interests of the shareholders.

Both shareholders and managers are banned from taking any action to avoid a takeover that is not in the best interests of the shareholders. The National Securities Superintendency has the power to oversee the transaction and limit the shareholders' and managers' ability to present obstacles.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

No. Other than competition regulators or specific industry regulators, government agencies in general cannot influence or restrict the completion of business combinations. National security could be a reason to interfere with a transaction or prevent it only if the government were to suspend constitutional rights via a decree for emergency reasons.

The National Securities Superintendency can regulate tender offers made by potential purchasers to protect the interests of shareholders and avoid market manipulation.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In general, tender offers can be made in exchange for payment in cash or delivery of other stock to the shareholders of the target entity interested in selling their stock. The tender offer must be firm. If the offer is accepted by a number of shareholders that represent less than 75 per cent of the target ownership, the offeror may withdraw the offer. If the offer is accepted by shareholders representing a percentage of ownership greater than the target, then the offeror may only refuse to buy the excess stock if it made explicit reservation of that right in the offer.

Other mandatory conditions

Tender offers payable in cash must be guaranteed by the offeror with any manner of guarantee mechanism, including bonds, trusts and letters of credit to the satisfaction of the National Securities Superintendency.

If payment is to be made via exchange of stock, the stock to be delivered in payment must be fully paid and its public offer must have been already authorised by the National Securities Superintendency.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Financing details can be either included in the main transaction agreement or can be dealt with by separate agreements including cross-references to the main transaction agreement. If the financing involves a security interest located in Venezuela, it is important to comply with the applicable legal formalities in order for the security interest to be perfected.

Not all security interests require the same formalities to be perfected. Ordinary pledges need to be signed before a notary public, and all security interests over real estate, chattel mortgages, pledges without delivery and pledges over intellectual property rights need to be registered before the relevant Registry Office in order to be valid.

Agreements drafted in a foreign language are valid and binding between the parties; however, if the agreement is to be enforced before Venezuelan courts, it needs to be translated into Spanish by a certified public translator.

There are no legal obligations for the seller to assist in the buyer's financing. However, the relevant documents may create contractual obligations agreed upon by the parties to meet commercial or financial conditions.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Minority stockholders may be squeezed out. There is no explicit regulation concerning use of schemes to squeeze out minority shareholders. There are only general principles regarding majority shareholders' fiduciary duties toward minority shareholders.

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While minority shareholders are entitled to separation when in disagreement with certain shareholders' meeting decisions – with the company having to reimburse the separating shareholder's shares in proportion to the ownership of the company – said separation right is limited to instances of shareholders' meeting decisions changing the company's corporate purpose, ordering capital increases and capital reintegration, but such separation rights are not contemplated in cases of merger decisions.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions can be structured rather flexibly and there are many schemes used on a case-by-case basis. However, ownership of stock of Venezuelan corporations and its transfer is ruled by Venezuelan Law under the choice-of-law legislation, and the laws in Venezuela will apply to property located in Venezuela. Personal obligations and contracts are subject to the law chosen by the parties.

Cross-border transactions involving transfer of property located in Venezuela must meet the formalities required in each case by Venezuelan Law.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The merger will not have an effect on third parties until three months after the merger has been notified to the public through publication in a local newspaper.

The sale of a going concern will have an effect on third parties after three notices have been published in the newspapers at 10-day intervals. If no notices are published, the purchaser will be jointly liable with the seller before the latter's creditors.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

In the downstream, midstream and upstream sectors of petrochemical activities and in the oil sector, private participation is permitted only in association with state-owned companies that hold more than 50 per cent. In other areas, such as gas, such restriction is not legally present. However, in practice, the government has imposed the same restriction.

According to the Gold Law, private participation is permitted only in association with state-owned companies holding more than 55 per cent. All the gold has to be sold to Banco Central de Venezuela.

The Regulations to the Insurance Activity require that any transfer of shares of an insurance company shall be notified to the Superintendency of Insurance within 15 days following the execution of the transfer entries in the company's shareholder registry book.

The Banking Sector Law provides that all acquisitions of the capital stock of a bank or financial institution shall be authorised by the Banking Superintendency. This is an obligation of the target entity rather than an obligation of the purchaser.

18 Tax issues

What are the basic tax issues involved in business combinations?

The basic tax liabilities are as follows:
- the sale of stock (capital gains) is subject to income tax;
- mergers are subject to registration fees and stamp duties;
- mergers may be subject to income tax withholding;
- capital contributions are subject to 1 per cent stamp duty. The applicable rate varies depending on the State of Legal Jurisdiction of the Commercial Registry Office (from 1 to 2 per cent);
- the price for the sale of a going concern is subject to 5 per cent income tax withholding;
- the sale of a going concern is also subject to 2 per cent stamp duty. The applicable rate varies depending on the State of Legal Jurisdiction of the Commercial Registry Office (from 2 to 20 per cent); and
- the sale of tangible assets is subject to 12 per cent value added tax.

Update and trends

Mergers and Acquisitions in Venezuela have not undergone major changes lately. The most important factor to keep in mind when it comes to business combinations processes relates to the highly controlling character of our legislation, a situation that significantly affects the basic economic freedom of corporations participating in commercial activities. In this regard, we do not foresee any change in the government policy regarding private enterprises or in the ways they combine.

The credit crisis has not been an issue for mergers and acquisitions in Venezuela. The real problem for such activities has been the domestic and political crisis caused by the confiscatory and anti-private corporation policies imposed by the national government.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The basic regulatory framework governing labour and employee benefits in a business combination is found in the Venezuelan Labour Law. This law establishes that the employees must be notified prior to an employer substitution in the event of a business combination. Employees may choose between accepting substitution, which conveys to the successor entity the accrued labour liabilities, or rejecting the substitution, which terminates the existing labour relationship and entitles the employee to indemnification equivalent to that corresponding to termination without cause.

If a business combination occurs by merging two existing businesses into one existing business, the business that did not merge does not need to notify its employees, only the one that merged into the existing business.

Employees do not need to be notified of a share or stock purchase. Generally, employer substitution occurs in Venezuela after an asset sale.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

A business combination involving a target company in bankruptcy or receivership would require approval from the individual appointed by the court to oversee the bankruptcy or restructuring process.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Venezuelan legal framework with regard to anti-corruption includes the Inter-American Convention against Corruption, the United Nations Convention against Transnational Organised Crime, the Law against Corruption, and the Organic Law against Organised Crime. In addition, Venezuela is signatory to the United Nations Convention against Corruption, which is pending ratification. According to the Law against Corruption, corruption-related crimes include bribery of public officials, unjustified enrichment and collusion. Note that private commercial bribery is not considered a crime.

The Law against Corruption penalises bribery of Venezuelan public officials with imprisonment from one to four years and a fine of up to 50 per cent of the amount received or promised. The same penalty shall apply to the individual who gives or promises the money, compensation or other undue profit.

When the bribe is for delaying or omitting some action within the functions of the public official, the penalty is imprisonment from three to seven years and a fine of up to 50 per cent of the received or promised

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benefit. The same penalty shall be applied to the intermediary through which the public official received or had money or another undue profit promised, and to the person that gave or promised such money or undue profit. Actions to persuade or induce a public official to commit any of these corruption crimes shall be punished with imprisonment from six months to two years.

In addition, the Antitrust Law prohibits commercial bribery as a specific form of disloyal competition. Breach of this prohibition is regarded by the law as an administrative violation and exposes the perpetrator to a fine of up to 10 per cent of the value of the perpetrator's annual gross income, an amount that may be increased up to 20 per cent of the value of the annual gross income. In the event of recidivism, the fine shall be increased to 40 per cent. The value of gross income shall be that of the fiscal year immediately preceding the imposition of the fine.

According to the Law against Organised Crime and Terrorism Financing, business entities can be liable and punished for crimes committed on their behalf or benefit by their representatives. Penalties include the permanent shutdown of the business entity, prohibition on undertaking commercial or industrial activities, confiscation of assets related to the crime, publication of the criminal court decision in a national newspaper and fines up to the amount of the assets involved.

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Vietnam

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1 Types of transaction

How may businesses combine?

The most common forms of business combinations in Vietnam are acquisitions, joint ventures, mergers and consolidations.

Generally, an acquisition includes share deals and asset deals. In terms of legal definitions, 'acquisition' does not have one common legal definition. It is defined across various laws of Vietnam, as follows:

- the Law on Investment provides for a partial share transfer or subscription as one form of investment. It is distinctive from an 'acquisition', which is a complete share transfer;
- according to the Law on Competition, the acquisition of an enterprise means the purchase by one enterprise of all or part of the assets of another enterprise sufficient to control or govern all business lines or one business line of the acquired enterprise; and
- acquisition of a credit institution is, however, differently regulated, being the purchase of all of the assets, rights and obligations of the target credit institution. After the acquisition, the target becomes a subordinate entity of the acquiring entity.

An asset transfer, as opposite to a share transfer in the M&A context, is nevertheless not regulated. Asset transfers, including business transfers, are usually structured as share transfers whereby the target business is intentionally separated and transferred to a special-purpose vehicle, the shares of which would then be acquired by the investor. An asset transfer could also be straightforward between the seller and the buyer, which includes one or numerous sale and purchase transactions. An asset transfer is also mentioned in the Law on Investment through the term 'project transfer'. The Law on Investment passed on 26 November 2014 also mentions 'partly or wholly project transfer'. The project transfer may be followed by the liquidation of the transferring entity.

A joint venture is interpreted as a form of enterprise which foreign investors may enter into with domestic investors to establish limited liability companies with two or more members, joint-stock companies or partnerships under the provisions of the Enterprise Law and relevant laws. Under the Law on Investment and Law on Enterprises, the term 'joint venture company' no longer exists. Nevertheless, the form of enterprise to which foreign investors and domestic investors jointly contribute capital (or called as a foreign invested enterprise (FIE)) still exists under the form of investment by establishing a new entity (with partial foreign investment capital) or investment by partial share transfer or subscription of new shares. An FIE shall have legal person status under Vietnamese law, be established and operate from the date of grant of the enterprise registration certificate.

A merger means a situation where one or more companies (merging companies) may be merged into another company (merged company) by way of transfer of all lawful assets, rights, obligations and interests to the merged company and, at the same time, termination of the existence of the merging companies.

Consolidation means a situation where two or more companies (consolidating companies) may be consolidated with each other to form a new company (consolidated company) by way of transferring all lawful assets, rights, obligations and interests to the consolidated company and, at the same time, terminating the existence of the consolidating companies.

The National Assembly of Vietnam passed the new Law on Enterprises and new Law on Investment on 26 November 2014. The Law on Enterprises (effective from 1 July 2015) allows companies of different types to be merged or consolidated without a change of company type before the merger or consolidation.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

In addition to any sector-specific legislation, business combinations are mainly governed by the Law on Enterprises, the Law on Investment, the Law on Securities and the Law on Competition. Particularly, the Law on Enterprises and the Law on Investment are the two main laws generally governing business combinations and applicable to all companies incorporated in Vietnam. The government recently promulgated decrees and circulars to guide these laws (ie, Decree No. 78/2015/ND-CP and Decree No. 118/2015/ND-CP). Specific regulations addressing private equity transactions are Decree No. 96/2015/ND-CP, Decree No. 58/2012/ND-CP (as amended by Decree No. 60/2015/ND-CP), Decision No. 88/2009/QD-TTg and Circular No. 131/2010/TT-BTC. If the transaction involves a transfer of shares of a public company, the Law on Securities, Decree No. 60/2015/ND-CP, Circular No. 123/2015/TT-BTC and related rules and regulations will apply. If the deal involves credit institutions, Circular No. 04/2010/TT-NHNN (as amended by Circular No. 36/2015/TT-NHNN) shall apply. Cross-border transactions will be subject to the Law on Investment, the Ordinance on Foreign Exchange (and its guiding Circulars 05/2014/TT-NHNN and No. 19/2014/TT-NHNN), and the Vietnam's World Trade Organization (WTO) commitments. Where an M&A transaction triggers a competition concern, the Law on Competition must be observed.

3 Governing law

What law typically governs the transaction agreements?

Generally, the law of the jurisdiction in which the target company is established or where the assets for sale are located is selected as the governing law of the agreements. The specific law and regulations will vary depending on the particulars of the transaction. The choice of foreign law rather than Vietnamese law is accepted to the extent that it is not contrary to the basic principles of Vietnamese law.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

M&A transactions involving companies that are active in certain industries such as banking and finance, aviation or insurance may require the approval of their industry regulator. When state-owned assets or equity are involved, the approval of the relevant state bodies is required. In addition, the transaction may have to be conducted through a competitive method such as tender or bidding if it involves in a project funded by 30 per cent or more or 500 billion dong or more state capital.

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For acquisitions of public companies, except for the exceptional cases listed in question 9, the Law on Securities requires an acquirer who wishes to acquire from 25 per cent of the shares of the target company, or a shareholder and related parties holding 25 per cent or more of the voting shares continue the purchase of 10 per cent or more of the voting shares, or a shareholder and related parties holding 25 per cent or more of voting shares continue the purchase of 5 per cent to less than 10 per cent of the voting shares in less than one year after the completion of a previous general tender offer, to file a tender offer application with the State Securities Commission (SSC). The process for conducting a tender offer includes three major steps as follows: (i) registering the tender offer application to the SSC; (ii) making a public announcement regarding the tender offer and conducting the tender offer; and (iii) reporting to the SSC. The application comprises the registration application, the shareholders' or board's resolutions of the purchaser regarding the tender offer and the shareholders' resolutions of the target in the event it redeems its shares to reduce its charter capital (if any). Upon completion of the tender, the offeror must report to the SSC about the tender results within five days. For the listing of companies after merger and consolidation, there are several conditions with regard to operation duration, number of profitable fiscal years, number of accrued loss fiscal years, overdue debts and so on.

In certain circumstances, a business combination involving a Vietnamese company may be subject to the reporting requirements of the Vietnam Competition Authority (VCA). Under the Law on Competition, if the parties to a business combination have a combined market share of between 30 per cent and 50 per cent of the relevant market they must notify the VCA before the proposed combination. The proposed combination can only be carried out after written confirmation has been received from the VCA that the combination is not prohibited, which will be issued within 45 days from the registration. The combination shall be prohibited if the combined market share is above 50 per cent in the relevant market.

There are two exemptions to this rule, such as where one or more of the parties participating in the economic concentration is or are at risk of being dissolved or of becoming bankrupt; or where the concentration has the effect of extension of export or contribution to socio-economic development or to technical and technological progress. These exemptions, however, are not automatically granted. The relevant parties must file with the VCA a request for an exemption for economic concentration.

In the case of a merger or consolidation, the investor must comply with the procedures under the Law on Enterprises regarding the liquidation of a company and the formation of a new company. Such events must be registered with the business registration authority and the relevant authorities.

If the acquisition results in a shareholder directly or indirectly owning upwards of 5 per cent of a public company, then information about such shareholder shall be reported to the SSC, the stock exchange where the shares are listed within seven days.

A business combination may require a change to be made to the investment certificate or investment registration certificate or business registration certificate or enterprise registration certificate of the target company, or both. A government fee of about US$10 may be paid to register such change. Under the Law on Investment, an acquisition of 51 per cent shares or more in a local company or acquisition of shares of a local company engaging in conditional business sector shall subject a foreign investor to a registration formality with the Department of Planning and Investment before proceeding. In addition, the transaction will be subject to various Vietnamese taxes depending on the structure of the transaction, as further specified in question 18.

In addition, the fee for registering supplemental stock is about US$250, and in case the listed stock, which is required by law to exchange via the central stock exchange, is occasionally allowed to be transferred via an off-exchange transaction between parties, a fee of 0.1 per cent of the transaction value shall be charged when the buyer returns to the Vietnam Securities Deposit to register its ownership.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

The information that needs to be made public in a business combination will depend on the type of structure used. As mentioned above, the offeror must file a registration application with the SSC that contains various information such as the name, address and historical business performance of the offeror and its market share in the relevant business; the name and address of the target; the relationship between the offeror and the target; the current shareholdings of the offeror in the target; the number of shares to be acquired; the intention of the acquirer post-acquisition with respect to the target's operation and employees; the sources of capital to fund the acquisition, etc. Upon receiving the approval of the SSC, the offeror must make public disclosure of the offer in three consecutive issues of an electronic newspaper or printed newspaper. Furthermore, if the target is a listed company, the offeror is also required to make an announcement on the portal of the stock exchange in which the target company's shares are listed in accordance with the recent regulations on disclosure of information of the Ministry of Finance – Circular No. 155/2015/TT-BTC, effective from 1 January 2016 and replacing Circular No. 52/2012/TT-BTC.

Any 5 per cent shareholder of a public company must make a report to the SSC if there is any change of 1 per cent or more in the shareholding or if he or she is no longer regarded as a major shareholder of the public company within seven days from the date of change. Information to be disclosed includes:

- the name, address and business lines of corporate shareholders;
- the full name, age, nationality, place of residence and occupation of individual shareholders;
- the number and percentage of shares owned by such shareholders; and
- the reason and date of change.

Besides, a listed company and a large-scale public company must publicise information relating to capital contribution valued at 10 per cent or more of total assets of the company into other organisation; capital contribution valued at 50 per cent or more of charter capital of receiving companies receiving capital contribution; as well as purchasing, selling assets valued at more than 15 per cent of the company's total assets according to the latest audited financial statement or the latest reviewed semi-annual financial statement.

In case there is a merger or consolidation of companies, the companies must notify their creditors and employees of the merger or consolidation within 15 days from of the merger or consolidation resolution.

Furthermore, if the merger or consolidation triggers competition concerns then the companies must notify the VCA or the Competition Council thereof. Information to be disclosed includes financial statements of the past two years; a report on the market share in the relevant market of the parties in the past two years, list of subsidiaries, list of goods and services supplied, etc.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

A shareholder owning 5 per cent or more of a public company must report to the public company, the SSC, the stock exchange where the shares are listed within seven days from the date of acquiring such large shareholdings. Where there is any material change with respect to the previously reported information or a change in the shareholdings that exceeds 1 per cent of the outstanding shares, such shareholder must also submit the amended report to the public company, SSC and the stock exchange where the shares are listed within seven days of the changes being made.

A shareholder owning from 5 per cent of the voting shares of a public company must also report to the public company, the SSC, the stock exchange where the shares are listed within seven days from the date of his or her no longer being a major shareholder of the public company.

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7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Under Vietnamese law, a director manages the day-to-day business operations of the company; shall be supervised by the board of management and shall be responsible to the board of management and before the law for the exercise of his or her delegated powers and the performance of his or her delegated duties.

Besides the fiduciary duties that the directors of a company will assume under the Law on Enterprises, they also have the following duties.

Directors, senior management and large shareholders with knowledge of information about a takeover situation shall not abuse such information to trade shares for their personal benefit or supply such information, encourage or solicit others to trade shares before the official public disclosure of the tender offer. In addition, the board of the target must notify the SSC and its shareholders of its opinion about the offer to acquire.

Depending on the type of structure applied and the value of transaction, a business combination of a shareholding company may fall within the authority of the shareholders or the board of management. Normally, a business combination in the form of acquisition or joint venture with value of less than 35 per cent of total asset value of such company (or a smaller percentage stipulated in the company charter) is under the authority of the board of management. The board of management is required to exercise their powers and duties honestly and diligently to the best of their abilities in furtherance of the best lawful interests of the company. A merger or consolidation or business combination through acquisition or joint venture with substantial value is a matter under the shareholders' authority, thus a decision to make such business combination must be passed by the shareholders in a convened meeting. The chairman of the board is responsible for convening such meeting pursuant to the procedures stipulated by law in order to obtain the shareholders' approval. Specifically, the chairman shall send notice of the meeting, the agenda and documents to the shareholders well in advance of the scheduled meeting at least 10 working days.

The law provides that the contract for a business combination in the form of merger and consolidation must be sent to creditors within 15 days from its being approved. It does not specify the responsible persons but usually it is the legal representative of the companies. Besides, the business combination shall be announced to the employees within the above-specified time limit.

Directors and managers must also declare the details of companies in which they own shares and companies in which their related parties own more than 35 per cent of the equity interest. Such declaration must be conducted within seven working days from the date of arising of the relevant interest. A business combination involving either of these companies must be approved by the shareholders or the board, as the case may be. A party who has an interest in such transactions cannot vote.

A director (general director) of a shareholding company is now allowed to concurrently hold the position of director or general director of other companies.

With respect to controlling shareholders, except the reporting obligation mentioned in question 6, basically, they do not owe any duty to the company or the minority shareholders in the context of a business combination.

Generally, the Law on Securities prohibits the following conduct:

- directly or indirectly acting fraudulently or cheating, creating false information or omitting essential information that causes a serious misunderstanding and adversely affects a public offering, listing and trading securities, conducting business and investing in securities, securities services and the securities market;
- disclosing false information with the aim of persuading or provoking the purchase and sale of securities, or disclosing incomplete or out-of-date information about events that have a major effect on the price of securities on the market;
- using inside information to purchase or sell securities for oneself or for a third party; disclosing or supplying inside information or advising another person to purchase or sell securities on the basis of inside information;
- colluding in the purchase and sale of securities aimed at creating a false supply and demand; trading securities in the form of colluding with or persuading others to continuously purchase and sell in order to manipulate the price of securities; combining the aforementioned methods or using other trading methods in order to manipulate the price of securities; and
- implementing the securities trading activities without the SSC's approval.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Under the Law on Enterprises, any proposals for the issuance of new shares or disposing of assets of material amounts of the company, or a merger or consolidation shall require the approval of shareholders present and voting in person or by proxy representing at least 65 per cent of the voting rights. From the effective date of the Law on Enterprise 2014 (1 July 2015), the percentage for the adoption of the above business combination as a

In addition, a shareholder is entitled to demand for cancellation of resolutions of the shareholders in the following cases:

- the order and procedures for convening the shareholders meeting did not comply with the Law on Enterprise and the charter of the company; or
- the order and procedures for issuing a resolution and the content of the resolution breach the law or the charter of the company.

Within 90 days from the date of receipt of the minutes of the shareholders meetings, a shareholder or a group of shareholders holding more than 10 per cent of the total ordinary shares for a consecutive period of six months or more shall have the right to request a court or an arbitrator to consider and cancel such resolution of the shareholders.

There is no regulatory appraisal right of shareholders towards a business combination.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

The Securities Law establishes three situations where the investor acquiring voting shares, fund certificates of the public company or closed-end fund must tender a general offer to acquire:

- if the proposed acquisition results in the investor owning 25 per cent or more of voting shares, fund certificates that are issued and outstanding;
- organisations or individuals and related persons holding 25 per cent or more of voting shares, fund certificates to purchase 10 per cent or more of voting shares or fund certificates, which are issued and outstanding; and
- organisations or individuals and related persons holding 25 per cent or more of voting shares, fund certificates of closed-end fund to continue the purchase of 5 per cent to less than 10 per cent of the voting shares, fund certificates in less than one year after the completion of a previous general tender offer.

In addition, the law provides for seven exempted situations that are not subject to public offering:

- if the proposed acquisition results in the investor owning more than 25 per cent or more of the newly issued voting shares, fund certificates according to the issuance plan already passed by the shareholders of the public company or fund representative board of the closed-end fund;
- if the proposed acquisition results in the investor owning 25 per cent or more of the voting shares, fund certificates that are already approved by the shareholders of the public company or fund representative board of the closed-end fund;
- internal transfer of shares between holding company and subsidiaries;
- gift, inheritance or share certificates;

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- when participating in a public auction of securities for sale is not required to implement the provisions on public offers to acquire if such entity intends to purchase shares with share ownership ratios at or exceeding the threshold subject to a tender offer;
- transfer under the court's decision; and
- other transactions as provided by the Ministry of Finance.

Generally, the investor must follow the following process in a takeover:
- submit a tender offer to the SSC and send a copy to the target;
- the target makes an announcement of the offer within three days;
- the SSC gives its opinions within 15 days;
- the board must send its opinions regarding the offer to the SSC and shareholders of the target within 10 days. The board's opinions must be in writing and signed by majority of the board members;
- the investor must make an announcement in three consecutive issues of a printed or online newspaper and the website of the stock exchange where the shares are listed, within seven days from its receipt of the SSC's opinion;
- the investor must report the results of the offer to the SSC within five days from completion of the offer and at the same time make a public announcement on the result of the offer;
- the investor must appoint a securities company as an agent conducting the offer; and
- the offer period must be no shorter than 30 days and no longer than 60 days. It is noted foreign ownership of shares of a public company is now removed from the overall 49 per cent cap. Particularly, on 26 June 2015, the government issued Decree No. 60/2015/ND-CP and among the changes, the most welcomed point is the relaxation of the overall 49 per cent cap on foreign ownership in Vietnamese public companies. From 1 September 2016, in general, foreign ownership of public companies will not be limited. Decree 60, however, lists certain cases where foreign ownership will still be restricted, such as certain sectors under Vietnam's international treaties (eg, Vietnam's WTO commitments); and sectors restricted to foreign investors under the Law on Investment. If specific foreign ownership limitations for such conditional sectors have not yet been set, the foreign ownership in such cases will be capped at 49 per cent. In addition, where an investor acquires newly issued shares of a company in a private share placement the investor is restricted from selling the shares within one year.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Vietnamese law does not prohibit or otherwise regulate break-up fees and reverse break-up fees. Generally, breaches to the break-up fee agreements may lead to contractual penalties whereby the breaching party has to pay a pre-determined amount to the other parties. It is critical to note that a liquidated damages clause is not specifically provided under Vietnamese law. As a general understanding, the amount of the liquidated damages is determined by reference to an estimate of the likely loss suffered by the non-defaulting party as a result of the breach. In other words, the amount of damages is pre-agreed and does not depend on the non-defaulting party demonstrating the amount of loss actually suffered. On the other hand, Vietnamese law provides for two types of monetary remedies for breach of contract, namely penalty for breach and compensation for damages. In term of penalty for breach, the parties may agree on the penalty amount, but the amounts may not be more than 8 per cent of the value of the contractual obligation which is the subject of the breach if they are considered as a penalty. Furthermore, the aggrieved party can request for damages for loss. The value of damages for loss shall comprise the value of the actual and direct loss that the aggrieved party has suffered owing to the breach, as well as the direct profits the aggrieved party would have earned had such breach not been committed. Additionally, although not specifically regulated, the fees should be fully disclosed in the offer document that is registered with the SSC and the offer announcement. The break-up fees would also be approved by the shareholders of the target. Where the transaction is between affiliated companies, issues such as transfer pricing and related-party transactions should be considered. If the fees are to be paid to a foreign party it will also raise a foreign exchange issue.

We are not aware of any provisions that prohibit or restrict financial assistance in business combinations.

Vietnamese law does not place limitations on a company's ability to protect deals from third-party bidders. As mentioned above, the board of the target must send its opinions regarding a takeover offer to the SSC and shareholders within 10 days. The board's opinions must be in writing and signed by majority of the members of the board. If the board objects to the offer, it is unclear whether the deal can proceed or be aborted. We note that except for some special circumstances, shareholders are not restricted from selling their shares.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The Vietnamese government may restrict or bar certain cross-border transactions for reasons of national security or public policies of Vietnam.

Cross-border M&A transactions shall comply with the commitments of Vietnam upon accession to WTO. Transactions involving a Vietnam-incorporated company active in multiple businesses usually require appraisals of various line ministries and satisfaction of numerous industry specific conditions. Business lines that are not required to be to open to foreign investment under the WTO framework are subject to the sole discretion of the Vietnamese authorities. Owing to the workload in some big cities, a lack of inter-agency coordination and a lack of implementing regulations in several sectors, these reasons may break deals or delay business combinations in some situations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

A tender offer must ensure that:
- all conditions specified in a tender offer must apply equally to all shareholders in the target company;
- the relevant parties can fully access the tender offer information;
- the self-determination right of the shareholders of the target company is fully respected;
- the law on securities and securities market and other relevant laws are observed; and
- the party making tender offer must appoint a securities company as an offering agent.

A tender offer must be between 30 and 60 days. A tender offer may be supplemented or revised with terms no less favourable than those of the previous offers.

During a tender offer process, the offeror shall not:
- directly or indirectly purchase or undertake to purchase the subject shares of the offer outside the offer tranche;
- sell or undertake to sell the subject shares of the offer;
- treat shareholders holding the subject shares unfairly;
- supply separate information to a sub-group of shareholders or provide a different level of information to different groups of shareholders or at different times;
- refuse to purchase the subject shares of target company or fund certificates of investors from target investing fund; or
- purchase target company's shares or fund certificates of target investing fund which is contrary to the terms disclosed in the registration of tender offer.

After making a public announcement, the offeror may only withdraw the offer in the following circumstances:
- the total number of shares registered to sell is less than that intended to be purchased by the offeror as announced;
- the target company increases or reduces the number of its voting shares via a share split, share consolidation, or conversion of preference shares;
- the target company reduces its shareholding capital;

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- the target company issues additional securities to increase charter capital; or
- the target company sells all or a part of its business or assets.

In a cash acquisition, the purchaser must specify in its disclosure report to the SSC the sources of funds it uses for the acquisition.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Generally speaking, the buyer should provide in the transaction documents the requisite approval of the financing entity, this being a condition precedent upon closing of the transaction. The payment schedule must be commensurate with that of the financing arrangement between the buyer and the financing entity. In addition, foreign exchange regulations must be observed depending on whether the investment is regarded as indirect or direct, which shall determine the flow of cash to be directed to an indirect investment capital Vietnamese dong account opened by the buyer with a licensed bank in Vietnam, from which the purchase price will be paid to the seller's designated account, or directly to the investment capital account of the company or target from the buyer's offshore account.

The Vietnamese authorities usually require evidence of payment before an approval is granted. The approval, however, is usually one of the conditions required by the financing entity before the disbursement. This conflict maybe solved in practice in a number of ways, such as escrow arrangements, payment guarantees or the buyer granting security over the equity in the target to the seller from the date of issuance of the approval until the payment of the purchase price.

It appears that a Vietnamese-incorporated company is not prohibited from giving financial assistance (directly or indirectly) to the purchaser in a M&A transaction, such as giving security to the bank loan obtained by the purchaser to finance the acquisition of shares in itself or its holding company. Note that a loan or a guarantee granted by a public company to the members of the board of directors, the control board, the executive director (general director), other managers, and persons related to these members is not allowed, unless otherwise decided by the general meeting of shareholders.

Vietnamese law is silent on the seller's obligations to assist the buyer's financing in an M&A deal. In practice, the seller may, upon mutually agreement by the parties, assist the buyer in its financing by recommending some sound financing entities to the buyer or signing necessary documents relating to the buyer's financing purposes. The seller may also give security to the bank loan obtained by the buyer in case the buyer wishes to use the acquired shares or assets as secured assets for the bank loan.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Vietnamese law does not specifically regulate situations where minority shareholders are squeezed out. Since the law does not require the consent of all shareholders, a business combination may still occur against the will of the minority shareholders. In the case of a merger where it is approved by a supermajority in number representing 65 per cent of the voting rights of the shareholders present or by proxy, the merger plan will be binding on all the shareholders. If the merger plan calls for the transfer of all of the company's shares, then the entire share capital of the company will be transferred to the acquirer (including the shares of any dissenting shareholder). There are no regulations specifying the steps to be taken and time frame for the process in this particular minority squeeze-out.

The minority shareholders of a public company are nevertheless protected in a takeover situation where they can refuse to sell the shares to the offeror or are even entitled to withdraw the subject shares at any time during the offer process. They also have the put option to compel the acquirer to buy their shares at the announced transaction price if, as a result of the acquisition, the acquirer owns more than 80 per cent of the outstanding shares of the target.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border transactions may be structured as an asset or equity deal.

Asset acquisitions usually involve the establishment of a wholly owned entity specifically for the purpose of acquiring the business and undertaking of the target. Asset deals used to be the preferred choice due to the complexity and legal loophole of the equity deal.

From 1 July 2015, acquisitions upwards of 51 per cent in a Vietnamese domestic company or a foreign investor contributes capital, purchases shares or equity interests in an economic organisation operating in conditional industries and trades applicable to foreign investors will need to undergo the procedure for registration of capital contribution, purchase of shares or equity interests.

Equity acquisitions may be onshore transactions whereby the equity of a shareholder in a Vietnamese domestic company or FIE is acquired directly. An onshore equity deal is subject to the approval of the relevant Vietnamese authorities and governed by the Law on Investments, Decision No. 88/2009/QD-TTg of the Prime Minister and its guiding Circular No. 131/2010/TT-BTC of the Ministry of Finance. These regulations may be changed upon effectiveness of the new Law on Investment and the new Law on Enterprise.

Equity transactions may be conducted offshore at the investor level, which would involve the sale of the equity of the foreign shareholder in an offshore company. They will usually need to register the change in the investor with the Vietnamese authorities. Where a Vietnamese resident invests in an offshore entity that has been established to make round-trip investments back into Vietnam, the investor needs to conduct the offshore investment procedures with respect to the establishment of such offshore entity and periodically report the offshore investment activities to the competent authorities of Vietnam, including subsequent disposal of any equity in it.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

For a normal merger:

- notify the shareholders of the scheduled meeting regarding a merger at least seven days in advance;
- notify creditors of the merger resolution and make a public announcement; and
- the authorities decide on whether to approve a domestic merger within five working days after receipt of all the required documents.

For a merger with a foreign element, the prescribed approval period is between 15 and 45 working days.

For a takeover deal:

- the target makes an announcement of the offer within three days from the receipt of the tender documents;
- the SSC reviews the tender documents within seven days;
- the board must send its opinions regarding the offer to the SSC and the shareholders of the target within 10 days from receipt of the tender documents;
- the acquirer makes an announcement on three consecutive issues of a newspaper and the website of the stock exchange where the shares are listed, within seven days from its receipt of the SSC's opinions;
- the length of the offer period is between 30 and 60 days; and
- the acquirer reports the results of the tender to the SSC within five days of completion.

Companies in specific industries are subject to industry-specific regulations that stipulate different waiting and notification periods for completing business combinations. Specific legal advice should be sought regarding such mergers.

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Update and trends

There was a significant increase in M&A activity in Vietnam during the past year. A number of large M&A deals have been announced in 2016, with retail and real estate continuing to dominate the market. Most notably, in April 2016, Thai company Central Group overcame numerous large-scale groups to officially become the new owner of Big C Vietnam. In mid-December 2016, F&N Beverages Manufacturing Sdn, Bhd and F&N Dairy Investments Pte, Ltd, spent 11.3 trillion dong on buying a total of 5.4 per cent stake in Vietnam Dairy Products Joint Stock Company (Vinamilk). The effect of the free trade agreements (especially the Trans-Pacific Partnership (TPP) treaty) and the positive changes from Vietnam's legal framework governing business combinations (Law on Enterprises and Law on Investment) will further enhance the opportunities for successful M&A transactions in 2017.

The government is also speeding up the restructure and equitisation of state-owned enterprises to improve performance and offer a higher rate of selling their stakes to investors. The Governor of the State Bank of Vietnam also issued Directive No. 04/CT-NHNN dated 27 May 2016 to instruct the credit institutions to continue implementing the restructuring plan.

Besides, based on the 2017 Law-Making Programme of the National Assembly of Vietnam, there are the proposals to change the regulatory framework that could affect business combination, for example, the amended Law on Competition and the new Law on Securities will be adopted in 2017.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

M&A transactions involving companies in specific industries are subject to additional and specific regulations and statutes. In principle, approval is usually required before a business combination may proceed. Foreign equity in certain industries is capped (for example, at 30 per cent for banking) or subject to industry-specific approvals (namely, distribution services), or both.

Transactions between credit institutions established and operating in Vietnam are currently governed by Circular 04/2010/TT-NHNN (as amended by Circular No. 36/2015/ TT-NHNN), which allows various forms of credit institutions to be merged or consolidated with one bank. There is one form of acquisition that is defined as the purchase of the entire legal assets, rights, obligations and interests of the target credit institution. After the acquisition, the target credit institution becomes a subsidiary company of the acquiring institution. The acquisition requires the consent of the State Bank. The recently issued regulations (ie, Circular 36 focuses only on mergers and consolidations). Partial and full acquisitions are left out of its scope and may be guided in a separate regulation. Circular 36 also introduces a new requirement that a copy of the merger or consolidation agreement be sent to the merging or consolidating credit institutions' creditors and notified to the employees within 15 days following the in-principle approval of the merger or consolidation by the SBV.

Specifically with regard to distribution services, there has been concern that the requirement of economic need test, which is only required for any retail sales outlet outside the first one, might be applied retroactively to an existing chain of retail sales outlets of domestic enterprises in the case of capital assignment to foreign investors.

Business combination in certain investment sectors requires approval of the relevant authorities at ministerial level. Opinions of those central ministries have considerable impact and can determine whether the business combination can be approved.

18 Tax issues

What are the basic tax issues involved in business combinations?

The tax treatment will depend on the structure of the transaction and legal status of the seller. If the seller is a legal person, corporate income tax (CIT) at 20 per cent will be levied on the capital gains generated from the transfer of assets. The tax base would be the actual sales price less the cost of acquiring the assets and direct expenses of transferring such assets. In addition, an asset transaction (except for special assets such as land use right, intellectual property, etc) will be subject to VAT ranging from zero per cent up to 10 per cent. In the case of transfer of certain property transactions such as real estate will be subject to a property registration fee at 0.5 per cent or those of vehicles will be charged at 2 per cent. The CIT rate of 20 per cent will also apply in the case of a share transfer. Noted that a share transfer will not be subject to VAT.

Where the seller is a natural person, personal income tax is usually levied on profit derived from the transfer of shares. For the capital contribution of liability limited company, the tax rate is 20 per cent of the income. For the shares of joint stock company, including listed and unlisted company, the tax rate of 0.1 per cent of the transaction value shall be applied.

Furthermore, special adjustment rules that govern transfer pricing may apply if the transaction involves affiliated parties. The parties may also take advantage of various double-taxation agreements that Vietnam has entered into with other countries in cross-border transactions involving Vietnam-incorporated companies.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Under the Labour Code, where an enterprise undergoes restructuring the succeeding employer is responsible for continuing the performance of the labour contracts with the employees. Where the succeeding employer cannot employ all of the existing employees, the employment plan must be worked out with the participation of the trade union representatives.

An employee who has been serving for 12 months or more must be paid allowance for loss of work based on their seniority, which is equivalent to an aggregate amount of one month's wages for each year of employment, but no less than two months' wages. The length of period for calculating the allowance means the total working time that the employee has actually worked for the employer minus the period for which the employee participated in the unemployment insurance regime in accordance with the Law on social insurance and the working period for which the employer already paid the allowance.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Bankrupt companies are subject to the Bankruptcy Law, which took effect on 1 January 2015. The Bankruptcy Law applies to all entities in Vietnam that have legal person status. There are special provisions applicable to companies in the financial sector such as banking, securities or insurance. In these circumstances, the State Bank, the Ministry of Finance or the State Securities Commission, as the case may be, shall have the right to apply available methods to restore the payment ability of the bankrupt companies.

Where there is a decision to start the bankruptcy procedures, the Bankruptcy Law does not allow a bankrupt company to sell or exchange its shares or transfer its property without the prior written consent of the presiding receivers.

Certain transactions entered into by a bankrupt company within six months or 18 months in case of internal transaction prior to the court accepting a bankruptcy application may be invalid, such as where the bankrupt company has donated its property, paid undue debts, mortgaged or pledged property for debts or carried out other transactions aiming to disperse its property. In addition, within five days upon the court accepting a bankruptcy application, if it is deemed that a suspension of the performance of valid contracts that are being performed or have not yet been performed will be more beneficial for the bankrupt company, the performance of such contracts shall be suspended. Therefore, investors dealing with such entities should take care to ensure that their dealings are conducted in a manner that will not expose them to the risk of a transaction being suspended or terminated.

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21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Law on Anti-corruption of Vietnam does not refer to business combinations.

A fine up to 10 per cent of the total revenue in the financial year prior to the year in which a breach of the provisions of business combinations was committed shall be imposed on each enterprises participating in carrying out a prohibited merger, consolidation, acquisition or joint venture, as stipulated in the Law on Competition.

A fine up to 10 per cent of the total revenue in the financial year prior to the year of each enterprise in which the breach was committed shall be imposed on each enterprise participating in given economic concentration that was not notified as required by law.

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Zambia

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1 Types of transaction

How may businesses combine?

Businesses may combine by:

- acquiring a majority shareholding in a target business, which gives effective control of the target business;
- acquiring a minority shareholding;
- the acquisition of the assets of a target business, which is then wound up;
- the establishment of a joint venture by two or more firms with products that overlap; or
- the appointment of interlocking directors to the boards of two businesses that were previously independent of one another.

The transactions described above may, if the thresholds prescribed in the Competition and Consumer Protection Act, No. 24 of 2010 (the Competition Act) are satisfied, require the prior approval of the Competition and Consumer Protection Commission (the CCPC).

In terms of the Competition Act, a merger occurs where an enterprise, directly or indirectly, acquires or establishes direct or indirect control over the whole or part of the business of another enterprise. In addition, a transaction will also be deemed to be a merger when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses. Essentially, there are no restrictions on the type of mergers that may occur. However, conglomerate and non-conglomerate mergers may be prohibited if they have the effect of preventing, distorting or restricting competition in the market. The CCPC generally intervenes in the marketplace in all matters that can be characterised as anticompetitive trade practices, abuse of market power by monopolies and dominant firms, and any business conduct that has a negative net effect on the welfare of consumers.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

The principal legislation governing business combinations in Zambia is the Competition Act and the regulations made pursuant to this legislation.

Under the Competition and Consumer Protection (General) Regulations 2011 (the Regulations), a merger transaction will require authorisation by the CCPC where the combined turnover or assets (whichever is higher) in Zambia of the merging parties exceeds an amount of approximately US$1.33 million. The CCPC has the power to review and authorise mergers and acquisitions that are captured under this threshold.

Whether a particular merger will require authorisation from the CCPC will depend on whether it meets the prescribed threshold. It is only those mergers that are captured by the threshold that are reviewable by the CCPC.

However, the CCPC may review a merger transaction that does not meet the prescribed threshold if it has reasonable grounds to believe that:

- it will create a position of dominance in a localised product or geographical market;
- it will contribute to the creation of a dominant position through a series of acquisitions that are not individually subject to prior notification;
- it will substantially prevent or lessen competition;
- it is concluded outside Zambia and has consequences in Zambia that require further consideration; or
- there are, or are likely to be, competition and public interest factors that require consideration as a result of the merger.

Any party to a merger or takeover that requires clarification as to whether such proposed merger requires CCPC authorisation or review may alternatively apply for negative clearance. Negative clearance is not absolute and can be revoked by the CCPC on the discovery of new information indicating that the transaction does amount to a merger.

Small enterprises, whose turnover is US€55,000 or less, are exempt from merger control as their turnover and investment threshold (which is currently prescribed at approximately US$55,000) falls outside the threshold to which merger controls apply.

Other relevant statutes regulating mergers include the Securities (Takeovers and Mergers) Rules (the Rules), which are issued pursuant to the now repealed Securities Act that govern mergers and takeovers relating to public companies. The Companies Act, Chapter 388 of the Laws of Zambia (the Companies Act), does not have express provisions with regard to the merger or acquisition of a company, but does have provisions that outline the power to acquire the shares of a minority shareholder and the rights of a minority shareholder in a takeover. Additionally, the Companies Act contains provisions which parties can use to reorganise a company's share capital through what is termed an 'arrangement'. Under these provisions, arrangements could be between a company and its creditors or its members. It is permissible for an arrangement to result in the amalgamation of any two or more companies or the reconstruction of any company or companies once the court makes the appropriate orders. In practice and to our knowledge, these provisions of the Companies Act have never been used to effect a merger because it is a court-driven process.

Other sector-specific legislation that applies to mergers and acquisitions in Zambia includes the Banking and Financial Services Act, Chapter 387 of the Laws of Zambia (the BFSA), the Energy Regulation Act, Chapter 436 of the Laws of Zambia, the Insurance Act, No. 27 of 1997, the Information and Communications Technologies Act, No. 15 of 2009 and the Mines and Minerals Development Act, No. 11 of 2015 (the Mines Act).

English common law is also a source of law in Zambia and due regard is given to the common law position when structuring mergers and acquisitions.

3 Governing law

What law typically governs the transaction agreements?

Parties are at liberty to choose the governing law of their agreements and there is no legal restriction pertaining to the choice of law by contracting parties. In practice, non-Zambian citizens tend to choose foreign law and the most common choice of law is English law and submission to the jurisdiction of English courts owing to the development and predictability of the English legal system.

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4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

Parties to a merger or takeover are required to complete the prescribed form (Form 1), which outlines the following:

- ownership;
- type of business;
- the purpose of the transaction;
- an understanding of the market structure of the relevant market; and
- the type of sector or the industry that would be affected by the transaction.

The form is lodged with the CCPC and must be accompanied by the payment of statutory filing fees of 0.1 per cent of the turnover of the target company, or the combined turnover of the merged entities if both are located in Zambia, with a cap of approximately 5 million Zambian kwacha (approximately US$500,000). A party seeking negative clearance of a merger transaction is also required to complete Form 1 and pay a fee of approximately 21,000 Zambian kwacha (approximately US$2,100). In both cases, the CCPC is required under the law to complete its assessment of the proposed merger and issue its determination within a period of 90 days from the date of application. However, where a party to the proposed merger fails to provide the CCPC with adequate information required for the completion of the assessment, the CCPC may make an assessment out of time. Where all the information required for an assessment has been supplied and the CCPC does not issue a notification of its decision regarding a proposed merger within 90 days, the proposed merger is deemed to have been approved.

Mergers and takeovers involving banks and financial institutions (ie, those that amount to corporate restructuring transactions as defined under the BFSA) can only be implemented with the prior written consent of the Bank of Zambia (BoZ). An application to the BoZ for consent to a corporate restructuring transaction must include a statement of the nature of the transaction proposed to be entered into, the text of all material documents intended to evidence or implement the transaction and such other information. This information must be contained in such form as the BoZ may reasonably require for the purposes of an informed consent or as may be prescribed by regulation.

Where shares, land and mining rights are transferred in the course of a business combination, Property Transfer Tax (PTT) is charged at a rate of 10 per cent (in relation to mining rights) and 5 per cent (in relation to land and shares) of the realised value of the property. The realised value of shares is determined by looking at the price at which the shares could, at the time of their transfer, reasonably have been sold on the open market as determined by the Commissioner-General of the Zambia Revenue Authority (ZRA) or the nominal value of the shares, whichever is the greater, while the realised value of a mining right or interest is the actual price of the mining right or interest at the time of transfer of that mining right as determined by the Commissioner-General, whichever is higher. However, where the transfer of property is by a shareholder of a company incorporated under the Companies Act and the transfer is that shareholder's contribution towards the equity of the company, such transfer will not be subject to PTT.

Mergers or takeovers involving companies that have their shares registered with the Securities and Exchange Commission (SEC) and are quoted or listed on the Lusaka Stock Exchange (LuSE) must be approved by the SEC. The requirement for approval extends to merger or takeover transactions outside the Zambian jurisdiction that involve the acquisition of control or direction over a Zambian public company. An application for approval must be made in prescribed form and accompanied by the prescribed fee of 0.25 per cent of the value of the transaction. The Securities (Takeovers and Mergers) Rules require a mandatory offer to be extended to the Minority Shareholders where the acquisition is in respect of 35 per cent or more of the voting rights of the public company. A fee of 0.25 per cent of the value of the transaction, and 150,000 Zambian kwacha is payable in respect of the waiver application pertaining to the mandatory offer requirements.

Where a company forming part of the merger is listed on the LuSE, Listing Rules require that an announcement of any proposed merger or takeover be submitted to the secretariat of the LuSE for approval. A copy of the announcement must also be sent to the SEC for approval.

As regards business combinations in the insurance industry, the Insurance Act requires that the amalgamation or transfer of an insurance business to another insurer must be approved by the Registrar of Pensions and Insurance (the Registrar).

Where parties propose to amalgamate two or more insurers, or otherwise to transfer the insurance business from one insurer to another, the insurers concerned must lodge with the Registrar (with the proposed agreement under which the amalgamation or transfer will take place), an application for approval of the amalgamation or transfer that will either be:

- an application for a new licence, where an amalgamation will result in the formation of a new company; or
- an application for an amendment of an existing licence, where the transfer of any insurance business will require an amendment of the licence of the transferee insurer to authorise it to conduct the insurance business being transferred.

Where an insurer that is a party to the amalgamation is a life insurer or the business to be transferred includes life insurance, a report must be made by the actuary or the insurer concerned on the state of each statutory fund affected by the amalgamation or transfer and, if only part of the life insurance business of an insurer is to be transferred, on the state of each such fund that would result from the division. Further, the Insurance Act requires that an abstract of any such report also be lodged with the registrar. It appears that there is no prescribed application form and the Insurance Act does not state whether any filing fees are levied.

Under the Information and Communication Technologies Act (the ICT Act), a licensee is required to notify the Zambia Information and Communication Technology Authority (ZICTA) of any direct or indirect changes to its shareholding. The ICT Act does not state whether any filing fees are levied. The licensee must obtain ZICTA's prior written consent for any transfer of shares that would result in the direct or indirect ownership of more than 25 per cent of the issued voting share capital of the licensee or any change in the ownership of the licensee's issued voting share capital that results in a change in the composition of one quarter of the licensee's board of directors.

Under the Mines Act, unless the prior written approval of the Minister of Mines has been obtained, a holder of a mining right or mineral processing licence is prohibited from registering the transfer of any share or shares in the company to any person or that person's nominee if the effect of doing so would give that person control of the company or enter into an agreement with any person, if the effect of doing so would be to give that person control of the company. In respect of these requirements, a person is deemed to have control of a company:

- if the person or that person's nominee holds, or the person and that person's nominee together hold, a total of 50 per cent or more of the equity shares of the company; or
- if the person is entitled to appoint, or to prevent the appointment of, half or more than half of the number of directors of the company.

Once an application for approval is lodged with the Mines Minister, the applicant may be requested to provide further information as required. The Mines Minister is required not to withhold approval unreasonably and to approve or reject an application for within 60 days of receipt of the application.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

With regard to listed companies, the Securities (Takeovers and Merger) Rules require that an announcement be made to the public when a firm intention to make an offer for a merger or takeover is notified to the directors of the offeree company. Further, where there has been a substantial acquisition or disposal of shares carrying voting rights in a listed company (ie, an acquisition of 15 per cent or more of the voting rights of the company) or rights over such shares, a person must disclose such an acquisition or disposal and his or her total holding to the company not later than 9am on the dealing day following the date of the acquisition or disposal.

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All persons concerned with takeovers and mergers are required to make full and prompt disclosure of all relevant information and take every precaution to avoid the creation or continuance of an uninformed market. Parties involved in offers must ensure that statements issued do not mislead shareholders or the stock market. The Securities (Takeovers and Merger) Rules require that when a firm intention to make an offer is announced, the announcement must contain the following information:

- the terms of the offer;
- the identity of the ultimate offeror or the ultimate controlling shareholder;
- details of any existing holding of voting rights in the offeree company;
- all conditions (including normal conditions relating to acceptance, listing and increase of capital) to which the offer or the posting of it is subject; and
- details of any arrangement (whether by way of option, indemnity or otherwise) in relation to shares of the offeror or the offeree and that might be material to the offer.

Combinations involving private companies do not need to be disclosed to the public. However, regulatory bodies such as the SEC and the CCPC may request information to assist in determining whether such transactions are subject to merger control provisions. Additionally, the Companies Act makes provision for court-sanctioned schemes of arrangement where it is shown to the court that a compromise has been proposed for the reconstruction of a company or the amalgamation of two or more companies and that the scheme provides that the whole or any part of the undertaking of a company is being transferred to another company. This method is rarely, if ever, used.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

In the case of quoted or listed companies, the Securities (Takeover and Mergers) Rules require that disclosures be made to the company in respect of any acquisition of the voting rights of the company representing 15 per cent or more but less than 35 per cent of the voting rights. Where two or more parties act in agreement to acquire voting rights commensurate with the stipulated threshold, the Securities (Takeover and Mergers) Rules treat such an acquisition as an aggregate in which case the disclosure obligation would apply. However, there is no requirement for the disclosure of the ultimate beneficiary of such shares.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The English common law duties apply to directors of both public and private companies. As fiduciaries of companies, the directors must not put themselves in a position where their interests and duties conflict with those they owe to the company. Further, directors have a common law duty to exercise their powers for a proper purpose. In this regard, directors must act bona fide and honestly.

Some of the common law duties of directors have been codified under the Companies Act and the BFSA, which governs banks and financial institutions.

The Securities (Takeover and Merger) Rules, which apply to public companies, further impose an obligation on the directors who receive an offer to seek competent independent advice in the interests of its shareholders. Directors are obliged to have regard to the interests of the shareholders as a whole and not their own interests, or those derived from personal and family relationships.

The directors' rights of control must be exercised in good faith and the oppression of minority or non-controlling shareholders is unacceptable.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

The Companies Act, which governs both private and public companies, sets out certain transactions in respect of which shareholder approval must be sought. The following transactions (which may affect business combinations depending on how the transaction is structured) cannot be conducted without the approval of the shareholders:

- the sale, lease or otherwise disposal of the whole or substantial part of the undertaking or of the assets of the company;
- the issuance of any new or unissued shares in the company; or
- the creation or granting of any rights or options entitling the holders thereof to acquire shares of any class in the company.

In addition to the above transactions, LuSE Listing Requirements require the directors of public listed companies to obtain the prior approval of the shareholders before entering into a transaction where the consideration to market capitalisation ratio is at least 25 per cent or the transaction is with a related party.

With regard to private companies, requirements for shareholder approval may also be provided for in the articles of association and the shareholder agreements. Further, under Zambian jurisprudence, the shareholders hold an overriding power over the decisions of directors and therefore have the power to reverse decisions that did not initially require shareholder approval.

With regard to appraisal rights, Zambian legislation does not specifically provide for them. However, this does not entail a lack of protection for the minority shareholders as the Companies Act does provide for the protection of minority shareholders from oppression where they suffer unfair prejudice.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

There are no specific considerations for hostile takeovers or mergers.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

There are no laws or regulations that provide break-up fees in Zambia. This effectively means that the matter is subject to agreement between the parties.

With respect to the limitations on a company's ability to protect deals from third-party bidders, a company is restrained from providing financial assistance to anyone for the purpose of purchasing shares in said company.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

The legal system in Zambia allows parties to enter into any type of agreement as long as the nature of that agreement is not contrary to the laws of Zambia or public policy principles and therefore the government's influence is limited unless the government or another parastatal organisation is a party to the transaction. As long as these principles are upheld, mergers and acquisitions may be expected to be completed without influence or restrictions from government agencies.

The government may, however, still intervene in the merger through its power of eminent domain by exercising compulsory acquisition over any of the shares in the proposed merger. The Constitution of the Republic of Zambia (the Constitution) provides protection of any owner by limiting the powers of compulsory acquisition. The Constitution states that property of any description shall not be compulsorily taken possession of, and interest in or rights over property

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of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired. The Constitution as amended now expressly prohibits the government from compulsorily acquiring an 'investment' (which is not defined), except under customary international law or subject to article 16. Article 16 is found under Part III of the Constitution (containing the Bill of Rights), which has not yet been amended. In respect of major state assets, the Constitution requires such assets to be sold, transferred or otherwise disposed of only if the National Assembly, by a vote of at least two-thirds of the members of Parliament, approves such sale, transfer or disposition. A major state asset is defined to include a parastatal and equity held by the Zambian government.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

In the case of a private company business combination, there are no statutory restrictions on the conditions that may be imposed. However, in the case of specific industries such as mining, energy, banking and telecommunications, where there are requirements to obtain regulatory approvals prior to the consummation of the transactions, it is prudent and common practice for parties to require that a sale be conditional upon the issuance of such approvals.

In a public acquisition, the Securities (Takeover and Merger) Rules prohibit the imposition of subjective conditions that depend on the judgments of the offeror or whose fulfilment depends on the offeror. All offers are generally conditional upon the offeror having received acceptances that meet a specific threshold.

The Rules require that the offeror must satisfy the board of the target company that the offeror will be able to implement the offer in full. This does not necessarily have to be conditional.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

This is normally a contractual issue between the parties as there is no legislation regarding how it should be treated. In most contracts, if the transaction is contingent on the buyer obtaining financing for the transaction in question, then completion will be conditional on the buyer obtaining such financing. The aspect of the buyer obtaining financing for the transaction is normally treated as a condition precedent to the transaction and the transaction documents will reflect this position.

It must be stressed however, that a target company is generally prohibited from providing financial assistance to a person for purposes of purchasing the company's shares. A private company may give financial assistance to purchase its own shares as an exception to the general rule and subject to compliance with the whitewash procedure set out in the Companies Act. Some of the guidelines that must be complied with include a declaration by the directors of the company to the effect that the company will be able to meet its debts as they fall due.

The obligations of the seller to assist in the buyer's financing are matters of contract to be agreed between the parties. Typically, the seller's involvement will be limited to providing a best endeavours undertaking to assist a potential financier in any due diligence process with respect to the financing.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

A majority shareholder may compulsorily acquire the shares of the minority shareholders by making an offer to all the shareholders on the same terms and upon the fulfilment of certain statutory conditions. The right to compulsorily acquire the shares of any dissenting shareholders is triggered if the offeror acquires at least 90 per cent of the shares of the target company within four months of making an offer to all the shareholders. Where all the statutory conditions have been satisfied, the offeror must, within two months, issue a notice to the dissenting shareholders that the offeror will compulsorily acquire the shares.

The dissenting shareholders have the right to challenge the compulsory acquisition as soon as the offer is made but before the expiration of three months following the satisfaction of the statutory conditions. If there are no objections to the compulsory acquisition pending before the court and there are dissenting shareholders who have not accepted the offer within a period of three months following the satisfaction of the statutory conditions, the offeror can proceed to compulsorily acquire the shares of the dissenting shareholders.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

The Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) administers the COMESA Competition Regulations (the Regulations). The Regulations require notification to the CCC, at a fee, of all mergers and acquisition transactions that may have an impact within the COMESA region.

The Regulations apply to all economic activity whether conducted by public or private persons, within or having effect within COMESA and require companies from the 20 member states of COMESA (of which Zambia is a member) to notify the CCC of any proposed mergers and acquisition transactions that may have a regional impact.

According to the COMESA Merger Assessment Guidelines, an enterprise is only considered to operate in a member state if its annual turnover or value of assets in that member state exceeds US$5 million. Therefore notification will only be required where:

- the target has annual turnover or value of assets exceeding US$5 million in at least one COMESA member state; and
- one of the merging parties (which could be the target) has an annual turnover or value of assets exceeding US$5 million in at least two COMESA member states.

However, the CCC is unlikely to exert jurisdiction where the market share of the merged entity is below 15 per cent (in horizontal mergers) or below 30 per cent (in non-horizontal mergers) and, in either case where that of the top three firms combined is less than 70 per cent.

Zambian law requires an international instrument to be ratified and domesticated by the Zambian parliament in order for it to have the force of law. The Regulations have not been domesticated and the Competition Act is yet to be amended to incorporate the Regulations, but it is understood that the process for domestication of the Regulations has commenced. Legally, the approved process under the Regulations exists in parallel to that under the Competition Act and does not have an overriding effect.

This entails that if a transaction is notifiable in Zambia, separate notifications must be filed to the CCPC and the CCC. This notwithstanding, the CCC and the CCPC have in place an administrative understanding whereby, dual notification will not be required where regulation by both entities is triggered. Therefore if a notification is made to the CCC alone, a letter is issued by the CCPC confirming that notification should not be made to the CCPC once the CCC is notified. It is worth noting that this arrangement is merely administrative and is not recognised under the law.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The Securities (Takeover and Merger) Rules set out detailed notification periods and time frames to be followed in takeovers and mergers that relate to public companies. The offer document must be posted within 21 days of announcing the terms of the offer and such offer must be kept open for 21 days. Where a conditional offer becomes unconditional, however, it must remain open for no less than 14 days thereafter.

Under the COMESA Regulations, parties to a merger must notify the CCC 'as soon as it is practicable but in no event later than 30 days of the parties' decision to merge'.

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Update and trends

Zambia has seen a lot of activity in the insurance sector in the last year with a number of European multi-national entities showing interest in investing in already established entities. This is more so because there is little insurance penetration in the Zambian market and future prospects appear positive. It is expected that there will be new legislation in the insurance and pensions spheres within the year.

Zambia has also seen a lot of investment in the energy sector although most of these investments have been Greenfield investments. This activity has been necessitated by the current power deficit that is affecting the country. The credit crisis generally affected business in Zambia; however, there is no documentation or statistics of its direct effect on M&As and we are not aware of any direct changes it has had on the regulatory regime in Zambia.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Other industry-specific legislation, such as in the mining, banking, insurance, energy and telecommunications sectors, prescribes certain regulatory approvals that must be obtained prior to the consummation of a transaction. The legislation does not, however, specify the time frame within which such regulatory approval will be granted. An exception to this is the transfer of a licence issued under the ICT Act where ZICTA may approve an application within 30 days.

18 Tax issues

What are the basic tax issues involved in business combinations?

If the business combination involves the sale of shares, transfer of land and mining rights, property transfer tax is payable by the shareholder selling its property in the target company. The rate of the tax is 10 per cent in respect to mining rights and 5 per cent in respect of land and shares of the realised value of the property.

This means that the Zambia Revenue Authority has the legal mandate and may be called upon to determine the value of the shares, land or mining rights for the purposes of calculating the property transfer tax payable.

If the business combination is structured as an asset sale between the companies, value added tax may be charged on such transfers, unless the assets are being transferred as a going concern in which case, the Commissioner-General of the ZRA must be notified within 30 days after the transfer takes effect.

A business combination that involves the transfer of shares through the declaration of a dividend in specie will attract withholding tax at the rate of 15 per cent. Zambia at present has no capital gains tax regime in place.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

The basic regulatory framework will depend upon, first, whether the respective employment contracts are in writing or are oral; and secondly, whether there is a collective agreement in place between the employer and employees. Generally, the applicable statutes are the Employment Act, Chapter 268 of the Laws of Zambia (as amended), the Industrial and Labour Relations Act, Chapter 269, and the Minimum Wages and Conditions of Employment Act, Chapter 276.

Where the business combination only involves a share transfer, the employer technically remains the same and no transfer or redundancy provisions under the law will be triggered. On the other hand, where the business itself is transferred, there is a risk of triggering the redundancy provisions under the Employment Act if the employment contracts are oral, and any appropriate redundancy term (if any) if the contracts are in writing or a collective agreement is in place.

Where the employees are under oral contracts, the company will need to notify the labour commissioner of any intended redundancy at least two months before the redundancy exercise is given effect. Conversely, where the employees are employed under written contracts or collective agreements, notification to the labour commissioner will only be necessary if expressly required by the terms of employment. Notwithstanding that the contract of employment is oral, in writing or a collective agreement, the affected employees must be notified at least one month before any redundancies take place.

It is common for agreements of business combinations to include the transfer of employees from one party to the agreement to the other. In such cases, if there is no agreement failure with the concerned employees on whether accrued benefits (including retirement benefits) will also be transferred to the new employer entails that the benefits must be paid by the transferring employer.

Additionally, transfer of written contracts requires the labour commissioner to endorse the terms of the transfer on the contracts prior to the transfer being given effect. The labour commissioner is also required to ascertain that the concerned employees have given their free and informed consent to the transfer. Transfer of employees using oral contracts of employment, on the other hand, does not require involvement of the labour commissioner. Notwithstanding the fact that the contract is oral, in writing or a collective agreement, the affected employees must consent to the transfer before it is given effect.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

There are no specific issues to be taken into consideration where the target company is in bankruptcy or receivership. However, there are certain issues that must be taken into account as a matter of business prudence. In the case of a company under receivership, regard

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must be had to whether the debt of the target company will have to be adopted. Further, when dealing with a company undergoing winding-up proceedings, regard must be had to the type of winding-up, that is, whether it is a voluntary or compulsory winding-up.

In the case of a compulsory winding-up, it is important to ascertain at whose instance the winding-up was commenced. A winding-up commenced by a creditor of the company might entail the need to engage such creditor for purposes of stalling the winding-up process. It must also be noted that once winding-up has been commenced, the shares of such target company cannot be transferred or disposed of unless with the sanction of a court order.

The current insolvency law is likely to be overhauled as there is a proposed Bankruptcy, Insolvency and Receivership Bill before Parliament.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

The Anti Corruption Act, No. 3 of 2012, makes it an offence for any person who, by himself, or by or in conjunction with any other person, corruptly gives solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person for oneself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything in relation to any matter or transaction actual or proposed, with which any private body is or may be concerned, shall be guilty of an offence.

The Act provides for various penalties for different corruption offences. A first offender under the Act may be liable upon conviction to imprisonment for a term not exceeding 14 years and, upon a second or subsequent conviction, to imprisonment for a term of no less than five years but not exceeding 14 years. In addition to any other penalty imposed under the Act, an offender will be required to forfeit to the state any pecuniary resource, property, advantage, profit or gratification received in the commission of the offence. It is worth noting that in addition to these penalties, a court may require the convicted person to pay to the rightful owner the amount or value as determined by it of any gratification received by the offender, such order to be deemed to form part of the sentence. If the rightful owner cannot be traced or ascertained, such monies are to be paid to the state.

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International Merger Control

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Over 85 jurisdictions now have merger control statutes. As a result, transactions between multinational corporations frequently trigger merger control notifications in multiple jurisdictions, particularly in those countries where merging parties have substantial operations, subsidiaries or registered offices, or where their sales or market shares exceed statutory thresholds. Significantly, most jurisdictions that mandate pre-merger notification prohibit the parties from closing the transaction until a clearance decision has been granted or waiting periods have elapsed.

As more jurisdictions introduce merger control requirements or amend existing procedures, the impact of compliance with this complex array of regulatory regimes on the timing and cost of transactions continues to increase, and, in certain cases, compliance may even affect the outcome of the transaction itself as parties choose to resolve even the most theoretical of objections through divestitures early in merger proceedings rather than suffering through an extended review process. Additionally, parties and regulators increasingly rely on complex econometric studies when a transaction goes through an in-depth review. The use of such econometric studies, however, needs to respect due process rights. For instance, in the *UPS* case, the General Court overturned the EU's Phase II prohibition decision because the EU relied on an econometric analysis that differed from the analysis that it had provided to the parties during the course of its investigation. The General Court held that the EU's action breached the parties' rights to defence.

Recent efforts by some regulators to simplify procedures for certain transactions seem to be bearing fruit. For example, the EU introduced amended procedures in 2014 to increase the number of transactions qualifying for a simplified review, and the number of reviews qualifying for the simplified procedure has increased by 15 per cent since 2013. In addition, China introduced a short filing form and process in 2014 for matters that qualify as simple cases and has reformed the structure of the Anti-Monopoly Bureau so that the same case team handles both the prenotification process and the review of the filing once initiated. The revised procedures in the EU and China do seem to have accelerated the merger review of those transactions that qualify.

Despite efforts by regulators to reduce costs and shorten clearance timelines for simple transactions, for transactions falling outside of these 'simplified' procedures, regulators are frequently imposing even greater burdens and longer timelines on notifying parties than existed in the past. For example, the EU has recently increased the number and scope of document requests during its investigations, often causing the EU to impose suspensions of the waiting period as parties struggle to respond to such requests in the time frame insisted on by the EU. Regulators around the world are also increasing the practice of requesting waivers from the parties to communicate with one another, often slowing down their review to remain aligned with other regulators' timing. As a result, the timeline for obtaining merger clearances for major international transactions, particularly for strategic deals, is growing longer and more complicated.

Not surprisingly, given this environment, successfully navigating the merger review process in multiple jurisdictions is an integral part of many transactions and is frequently the key gating item before parties can close.

Summary of filing requirements by jurisdiction

The following tables provide a brief summary of the most important merger control provisions in a number of jurisdictions. The tables are not intended to be a comprehensive analysis of all merger control regulations or to provide legal advice. Statutory sources are often ambiguous and local practice may affect the application of statutory provisions in important respects in the context of a specific transaction. In addition, several jurisdictions have foreign investment laws that require foreign parties to notify the relevant authorities of investments in local companies. Counsel should be consulted for advice concerning specific transactions.

Notes to the tables

a Notification thresholds (tables A, B and C)

The thresholds indicated in these charts reflect only the basic jurisdictional tests. In many jurisdictions, statutory or course of practice exemptions may apply. In addition, special rules may apply to regulated sectors such as energy, telecommunications, media and banking.

b Suspension effects (table B)

Suspension effects imposed in some jurisdictions may prohibit the parties from closing the transaction until they obtain clearance from the appropriate authority in the jurisdictions. Some jurisdictions may permit the parties to close the transaction prior to clearance if the parties hold separate their assets and businesses within that jurisdiction. Other jurisdictions may permit the parties to file a written petition requesting permission to close the transaction prior to clearance. Other jurisdiction-specific exceptions or exemptions may apply.

c India (table A)

The United States has entered into a memorandum of understanding with India.

d Brazil (table B)

The United States has entered into a bilateral cooperation agreement with Brazil.

e Canada (table B)

The United States has entered into a bilateral cooperation agreement with Canada.

f Chile (table B)

The United States has entered into a bilateral cooperation agreement with Chile.

g China (table B)

The United States has entered into a memorandum of understanding with China.

h Colombia (table B)

The United States has entered into a bilateral cooperation agreement with Colombia.

i EU (table B)

If the EU thresholds are met, no merger filing needs to be made in the EU member states or in EFTA states (exempting Switzerland).

j EU (table B)

The United States has entered into a bilateral cooperation agreement with the European Union.

k Germany (table B)

The United States has entered into a bilateral cooperation agreement with Germany.

l Israel (table B)

The United States has entered into a bilateral cooperation agreement with Israel.

m Japan (table B)

The United States has entered into a bilateral cooperation agreement with Japan.

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n Mexico (table B)
The United States has entered into a bilateral cooperation agreement with Mexico.
o Peru (table B)
The United States has entered into a bilateral cooperation agreement with Peru.
p Russia (table B)
The United States has entered into a bilateral cooperation agreement with Russia.
q South Korea (table B)
The United States has entered into a memorandum of understanding with South Korea.
r Australia (table C)
The United States has entered into a bilateral cooperation agreement with Australia.

A. Jurisdictions with mandatory merger control filings and fixed filing deadlines

Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Albania	Albanian Competition Authority (ACA)	Within 30 days of the conclusion of the agreement, announcement of the public bid, or acquisition of control.	Albanian turnover of at least one party exceeds 200 million leks and either the parties' combined worldwide turnover exceeds 7 billion leks or the parties' combined Albanian turnover exceeds 400 million leks.	Phase 1: two months (may be extended by two weeks if the parties offer undertakings). Phase 2: three months (may be extended by one month if the parties offer undertakings).	Yes.
Argentina	National Commission for the Defence of Competition (CNDC)	Within one week of the date of closing of the transaction, announcement of a public bid, or acquisition of control.	Parties' combined Argentine turnover exceeds 200 million Argentine pesos.	45 business days (but in practice is extended by requests for information). The waiting period may be suspended if the CNDC requests the filing of an additional form or missing information or the Secretariat so decides for a justifiable reason.	Yes (but the parties are authorised to close the transaction, subject to its subsequent approval).
Bosnia-Herzegovina	Competition Council	Within 15 days of the conclusion of the agreement, announcement of the public bid, or acquisition of control.	Parties' combined worldwide turnover exceeds 100 million marks or the parties have their seat in Bosnia-Herzegovina; and each of at least two of the parties have Bosnia-Herzegovinian turnover of 8 million marks or the parties' combined market share is at least 40 per cent.	Phase 1: 30 days from issuing the certificate of completeness. Phase 2: three months (can be extended by another three months).	Yes.
COMESA	The COMESA Competition Commission (CCC)	Within 30 days from the decision to merge.	A transaction must be notified if both the acquirer and the target, or either the acquirer or the target, operate in two or more member states, and: (a) the combined annual turnover or combined value of assets, whichever is higher of all parties, in the Common Market of all parties equals or exceeds COM$ 50 million; and (b) the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties equals or exceeds COM$ 10 million; unless each of the parties achieves or holds at least two-thirds of its aggregate turnover or assets in the Common Market within one and the same member state. Please note: although a COMESA filing should supersede the necessity to file in any COMESA member state, certain COMESA member states including Egypt and Kenya have in practice claimed jurisdiction even where a COMESA filing was made.	120 days (may be extended by 30 days).	No (for so long as the filing has been submitted to the CCC).
Costa Rica	Commission to Promote Competition (COPROCOM)	Within five days of closing.	At least two parties have operations in Costa Rica and: parties' combined assets exceed 30,000 times the minimum wage, including transactions executed within a period of two years that, in total, exceed this amount; or parties' combined Costa Rican turnover exceeds 30,000 times the minimum wage.	30 days (may be extended by 60 days).	No.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Ecuador	Superintendent for the Control of Market Power	Within eight days of closing.	The total amount of business in Ecuador of all parties exceeds the amount of basic unified remunerations set forth by the regulating board; or the transaction involves economic operators with a combined market share of 30 per cent or above in the relevant market of products or services.	60 business days (may be extended by 60 business days).	No.
Egypt (COMESA)	Egyptian Competition Authority (ECA)	30 days from the effectiveness of the concentration.	Notification required when annual turnover of the acquirer exceeds 100 million Egyptian pounds and shares in an Egyptian entity are directly acquired.	None.	No.
Faroe Islands	Faroese Competition Authority	Within one week of the conclusion of the merger agreement, the merger being publicly notified, or the acquisition of control.	Parties' combined Faroese turnover is at least 75 million Danish kroner and the Faroese turnover of each of at least two of the parties is at least 15 million Danish kroner; or at least one party has Faroese turnover of 75 million kroner and at least one other party has worldwide turnover of 75 million kroner.	Phase 1: 30 business days from the receipt of a complete filing. Phase 2: 90 business days from notification of Phase 2 (may be extended by 20 days when parties offer commitments and by 20 days with parties' consent).	Yes.
Greece (EU)	Hellenic Competition Commission (HCC)	Within 30 days of the conclusion of the agreement, announcement of the public bid, or acquisition of control.	Parties' combined worldwide turnover exceeds €150 million and the Greek turnover of each of at least two of the parties exceeds €15 million. In the media sector the turnover thresholds are decreased to €50 million and €5 million respectively.	Phase 1: one month. Phase 2: 90 days from initiation of the full investigation. (A hearing must be set within 45 days from initiation of a full investigation.) The time limits may be tolled until the parties provide any required information.	Yes.
India (See note c)	Competition Commission of India (CCI)	Thirty days from the date of execution of the agreement or a public announcement made under the Indian takeover code.	Parties' combined thresholds: (i) the parties' combined assets in India exceed 20 billion rupees; or (ii) the parties' combined turnover in India exceeds 60 billion rupees; or (iii) the parties' combined worldwide assets exceed US$1 billion, including combined assets in India of at least 10 billion rupees; or (iv) the parties' combined worldwide turnover exceeds US$3 billion, including combined turnover in India of at least 30 billion rupees. Or: Group thresholds: (i) The group's assets in India exceed 80 billion rupees; or (ii) the group's turnover in India exceeds 240 billion rupees; or (iii) the group's worldwide assets exceed US$4 billion, including assets in India of at least 10 billion rupees; or (iv) the group's worldwide turnover exceeds US$12 billion, including turnover in India of at least 30 billion rupees. Exceptions: The target's turnover in India does not exceed 10 billion rupees; or the target's asset value in India does not exceed 3.5 billion rupees. This exception will apply for a period of five years until 27 March 2022.	Phase 1: 30 days to issue prima facie opinion on the merger which would allow parties to close if positive. Phase 2: 210 days (from receipt of second notification if one is required). The central government and any persons have 60 days to convey an objection to the merger.	Yes.
Indonesia	Commission for Supervision of Business Competition (KPPU)	30 business days from closing. Pre-merger notifications are voluntary.	The parties' combined assets in Indonesia exceed 2.5 trillion rupiah for a non-financial company; or the parties' combined turnover in Indonesia exceeds 5 trillion rupiah. If two or more of the parties to the transaction are banks, only the asset test applies, and the parties' combined assets must exceed 20 trillion rupiah. If only one undertaking is a bank, an asset value threshold of 2.5 trillion rupiah applies.	Post-merger notification: Phase 1: 90 business days. Pre-merger notification: Phase 1: 30 business days. Phase 2: 60 business days.	No.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Jordan	The Competition Directorate	Within 30 days from having reached an agreement.	Parties' combined market share exceeds 40 per cent.	Phase 1: 100 days.	Yes.
Malta (EU)	Malta Competition and Consumer Affairs Authority	Within 15 working days of the conclusion of the agreement, announcement of the public bid, or acquisition of control.	Parties' combined Maltese turnover exceeds €2.3 million and each of the parties has Maltese turnover equivalent to at least 10 per cent of the parties' combined turnover in Malta.	Phase 1: six weeks (may be extended to two months if the parties offer undertakings). Phase 2: four months (may be suspended up to one month, for a total of five months, if the parties offer undertakings). A simplified procedure, with clearance within four weeks, is available where the transaction raises no serious concerns.	Yes.
Montenegro	Agency for Protection of Competition	Within 15 days of the conclusion of the agreement, announcement of the public bid, or acquisition of control.	Combined turnover in Montenegro of at least two parties exceeds €5 million; or the parties' combined worldwide turnover exceeds €20 million provided at least one of the parties achieved turnover of €1 million within Montenegro.	105 working days if clearance is unconditional. 125 working days if clearance is subject to conditions. 130 working days if the Agency prohibits the concentration.	Yes (Law allows implementation of a public bid that has been notified, provided that acquirer does not exercise voting rights).
Mozambique	Competition Regulatory Authority	Within five days of closing.	The combined turnover of all parties in Mozambique is equal to or exceeds 900 million meticais; or the transaction results in the acquisition or strengthening of a 50 per cent or more of the national market of a given product or service; or the transaction results in the acquisition or strengthening of a 30 per cent share of the national market of a given product or service, and each of at least two parties achieved at least 100 million meticais in Mozambique.	45 to 75 days.	No.
Saudi Arabia	The Council of Competition Protection	No later than 60 days prior to effective date of the agreement.	Parties' combined market share exceeds 40 per cent parties could have an ability to influence; or prevailing market price.	Phase 1: 60 days. Phase 2: 30 additional days.	Yes.
Serbia	Commission for the Protection of Competition (CPC)	Within 15 days of the conclusion of the agreement or contract, announcement of public offering, the announcement of the start or end date of a public takeover bid, or acquisition of control.	Parties' combined Serbian turnover exceeds €20 million provided the Serbian turnover of each of at least two undertakings exceeds €1 million; or the parties' combined worldwide turnover exceeds €100 million provided the Serbian turnover of at least one undertaking exceeds €10 million. Certain public takeover bids may require notification even where the thresholds are not met. The CPC may ex officio review any merger where the parties' combined market share is at least 40 per cent.	Phase 1: one month. Phase 2: three months.	Yes.
Slovenia (EU)	Slovenian Competition Protection Agency (CPA)	Within 30 days of the conclusion of the agreement, announcement of the public bid, or acquisition of control.	Parties' combined Slovenian turnover exceeds €35 million and either (i) the target's Slovenian turnover exceeds €1 million; or (ii) in cases of joint ventures, the Slovenian turnover of each of at least two of the parties exceeds €1 million. Where the target alone or the parties together have more than a 60 per cent market share in the Slovenian market, even if the thresholds are not met, the parties are obliged to inform the CPA which may then request a notification of the concentration.	Phase 1: 25 working days (may be extended). Phase 2: 60 business days (may be extended).	Yes.
Tunisia	Ministry of Trade and the Competition Council	Within 15 days of signing an agreement, decision to merge, publication of the purchase or exchange offer; or acquisition of control.	Parties' combined market share exceeds 30 per cent; or the aggregate Tunisian turnover of the parties exceeds 20 million Tunisian dinar. There must be an effect on local markets in Tunisia.	Phase 1: three months.	Yes.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Uruguay	Commission of Promotion and Defence of Competition	No later than 10 days prior to closing.	Parties' combined market share is at least 50 per cent; or the combined Uruguayan turnover of the parties in any of the three previous fiscal years exceeds 750 million indexed units.	Phase 1: 90 days (where the transaction will create a 'de facto monopoly' meaning a 100 per cent combined monopoly).	No (unless clearance is required).
Vietnam	Vietnam Competition Authority	No later than 30 days prior to closing.	Parties' combined market share is between 30 per cent and 50 per cent, unless the concentration results in a small or medium-sized enterprise (SME). Concentrations in excess of 50 per cent are prohibited unless it results in an SME or an exemption is granted.	Phase 1: 45 days (may be extended up to two times, by 30 days at a time).	Yes.

B. Jurisdictions with mandatory merger control filings but no fixed filing deadlines

Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Algeria	Competition Council	Pre-closing.	Parties' combined market share exceeds 40 per cent and/or concentration liable to have an impact on competition in the local market.	Three months.	Yes.
Armenia	State Commission for the Protection of Economic Competition of the Republic of Armenia	Pre-closing.	Value of the parties' combined assets is at least 3 billion dram; or the parties operate in the same product market and the combined value of their assets is at least 1 billion dram; or the value of the assets of one of the parties is at least 3 billion dram; or the parties operate in the same product market and the value of the assets of one of the parties is at least 1 billion dram.	Two months.	Yes.
Austria (EU)	Federal Competition Authority and Federal Cartel Prosecutor	Pre-closing.	Parties' combined worldwide turnover exceeds €300 million, and parties' combined Austrian turnover exceeds €30 million, and the worldwide turnover of each of at least two of the parties exceeds €5 million, unless the Austrian turnover of only one of the parties exceeds €5 million and the combined worldwide turnover of the other parties does not exceed €30 million.	Phase 1: four weeks (may be extended to six weeks). Phase 2: six months.	Yes.
Azerbaijan	Ministry of Economic Development of the Azerbaijan Republic (AMSAR)	Pre-closing.	Parties' combined assets exceed approximately 75,000 times the minimum salary; or parties' combined market share exceeds 35 per cent.	15 days (may be extended).	Yes.
Barbados	Fair Trading Commission	Pre-closing.	There is an effect on the local market and (i) either party's market share is at least 40 per cent; or (ii) parties' combined market share is at least 40 per cent.	Three months (may be extended).	Yes.
Belarus	Ministry of Antimonopoly Regulation and Trade (MART)	Pre-closing.	One party has more than 30 per cent market share and acquires any other assets or business engaged in a similar market; or acquires more than 25 per cent ownership or control of an entity with a dominant market position; or acquires more than 20 per cent of a company whose turnover exceeds 200,000 basic units or whose assets exceed 100,000 basic units.	30 days (may be extended).	Yes.
Belgium (EU)	Competition Authority	Pre-closing.	Parties' combined Belgian turnover exceeds €100 million and each of at least two of the parties' Belgian turnover exceeds €40 million.	Phase 1: 40 working days (may be extended by 15 working days if the parties offer undertakings). Phase 2: 60 working days (may be extended by 20 working days if the parties offer undertakings). Simplified procedure: 15 working days.	Yes.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Bolivia	Authority dependent on sector	Pre-closing.	Only regulated sectors (oil, gas, electricity, telecommunications and financial institutions) are caught by merger control policies and are reportable. In the electricity sector, a transaction must be notified if it results in a market share of 36% or more. Other regulated sectors do not have clearly defined thresholds.	30 days.	Yes.
Botswana	Competition Authority	Pre-closing.	The turnover of the parties or the target exceeds 10 million pula; or the assets in Botswana of the target exceeds 10 million pula; or the enterprises would supply or acquire 20% of goods or services in Botswana.	30 days (may be extended).	Yes.
Brazil (See note d)	Administrative Council of Economic Defence (CADE)	After execution of a binding formal document and before the consummation of any act relating to the transaction.	The Brazilian turnover of one party equals or exceeds 750 million reais and Brazilian turnover of the other party equals or exceeds 75 million reais. There are specific rules for calculation of turnover for investment funds.	240 days total (may be extended by 60 days at the request of the parties or 90 days at the request of CADE). There is no specific deadline under the fast-track procedure, but likely review period is an average of 30 days (plus 15 waiting days during which clearance can be challenged at CADE).	Yes.
Bulgaria (EU)	Commission on Protection of Competition (CPC)	Pre-closing.	Parties' combined Bulgarian turnover exceeds 25 million levs; and each of at least two of the parties or the target alone has a turnover in Bulgaria in excess of 3 million levs.	Phase 1: 25 working days (may be extended by 10 working days where the parties propose changes to the concentration). Phase 2: four months (may be extended by 25 working days in complex cases and by 15 working days where approval is subject to commitments or remedies).	Yes.
Canada (See note e)	Competition Bureau	Pre-closing.	Parties' combined assets or turnover in, into, and from Canada exceed C$400 million, and either the target's Canadian assets or turnover in and from Canada exceed C$88 million.	Formal process: 30-day waiting period. The Bureau may issue a supplementary information request, in which case a new 30-day waiting period will commence following compliance with the supplementary information request. Pursuant to the Bureau's service standards, the Bureau undertakes to complete its review within 14 days for non-complex transactions and 45 days for complex transactions (or until the end of the waiting period where a supplementary information request (SIR) is issued).	Yes.
Chile (see note f)	National Economic Prosecutor (FNE) and the Antitrust Court	Pre-closing.	The parties' combined turnover is US$70 million and the turnover in Chile of at least two parties is approximately US$11 million.	Phase 1: 30 days from date on which notification is deemed complete. Phase 2: 90 days from date on which notification is deemed complete.	Yes (if the Antitrust Court orders suspension while clearance is pending. Note: the consultation procedure, by its very nature, implies suspension until clearance is obtained).

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
China (See note g)	Ministry of Commerce (MOFCOM)	Pre-closing.	Parties' combined worldwide turnover exceeds 10 billion yuan and each of at least two parties have Chinese turnover in excess of 400 million yuan; or the parties' combined Chinese turnover exceeds 2 billion yuan and each of at least two parties have Chinese turnover in excess of 400 million yuan. Additionally, MOFCOM can investigate any transaction if it believes the transaction may have the effect of restraining or harming competition in China. Revenue from Hong Kong, Taiwan and Macao should be excluded.	Phase 1: 30 days. Phase 2: 90 additional days (may be extended by 60 days).	Yes.
Colombia (See note h)	Superintendency of Industry and Commerce (SIC)	Pre-closing.	Parties' combined or individual Colombian turnover or assets exceed 60,000 times the monthly minimum legal wages and the parties are active in the same market or in upstream, downstream or neighbouring markets. Market share equal to or greater than 20 per cent requires approval. If the market share of the parties is below 20 per cent, only notification is required and clearance does not need to be obtained before closing.	Phase 1: 30 working days. Phase 2: three months (may be extended if SIC requests additional information).	Yes (if market share of the parties is at least 20 per cent).
Croatia (EU)	Croatian Competition Agency (CCA)	Pre-closing.	Parties' combined worldwide turnover at least 1 billion kunas; and each of at least two of the parties have Croatian turnover of at least 100 million kunas; and at least one of the parties has its seat or subsidiary in Croatia.	Phase 1: 30 days. Phase 2: three months (may be extended by three months).	Yes.
Cyprus (EU)	Commission for the Protection of Competition (CPC)	Following the conclusion of an agreement, announcement of a public bid, or acquisition of control.	Worldwide turnover of each of at least two of the parties exceeds €3.5 million; and at least two parties achieve revenues in Cyprus; and parties' combined turnover in Cyprus is at least €3.5 million.	Phase 1: one month (may be extended by 14 days). Phase 2: four months from notification or the date all necessary information submitted.	Yes.
Czech Republic (EU)	Office for the Protection of Competition	Pre-closing.	Parties' combined aggregate Czech turnover exceeds 1.5 billion koruna and the Czech turnover of each of at least two of the parties exceeds 250 million koruna; or the Czech turnover of one party to a merger (target or at least one partner in a joint venture) exceeds 1.5 billion koruna and the worldwide turnover of another party exceeds 1.5 billion koruna.	Phase 1: 20 days for simplified notification and 30 days for standard notification. Phase 2: five months from original notification (may be extended up to 15 days).	Yes.
Denmark (EU)	Competition and Consumer Authority	Pre-closing.	Parties' combined Danish turnover is at least 900 million kroner and the Danish turnover of each of at least two of the parties is at least 100 million kroner; or the Danish turnover of one of the parties is at least 3.8 billion kroner and the worldwide turnover of one of the other parties is at least 3.8 billion kroner.	Phase 1: 25 working days (may be extended by 10 working days). Phase 2: 90 working days (may be extended by 20 working days).	Yes.
El Salvador	Superintendency of Competition	Pre-closing.	Parties' combined assets in El Salvador exceeds 50,000 times the minimum urban annual wage in the industrial sector; or the parties' combined turnover in El Salvador exceeds 60,000 times the minimum urban annual wage in the industrial sector.	90 days.	Yes.
Estonia (EU)	Estonian Competition Authority	Pre-closing.	Parties' combined Estonian turnover exceeds €6 million and the Estonian turnover of each of at least two of the parties exceeds €2 million.	Phase 1: 30 days. Phase 2: four months.	Yes.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
EU (See notes i and j)	DG Competition of the European Commission	Pre-closing.	Parties' combined worldwide turnover exceeds €5 billion and EU-wide turnover of at least two of the parties exceeds €250 million, unless each of the parties achieves more than two-thirds of the EU turnover in one and the same member state; or combined worldwide turnover of all parties exceeds €2.5 billion, EU-wide turnover of at least two of the parties exceeds €100 million each, the parties' combined turnover in each of at least three member states exceeds €100 million, and turnover in each of those three member states by each of at least two of the parties exceeds €25 million, unless each of the parties achieves more than two-thirds of the EU turnover in one and the same member state. Furthermore, concentrations may, subject to certain conditions, be referred to and from the European Commission by the request of the parties or a national competition authority.	Phase 1: 25 business days (may be extended by 10 business days if undertakings offered). Phase 2: 90 business days (may be extended by 15 business days if commitments are offered on or after the 55th business day of Phase 2 but before the 65th business day; a one-off extension of 20 business days may be granted if the request is made no later than 15 business days after Phase 2 has commenced or if agreed with the European Commission).	Yes.
Finland (EU)	Finnish Competition and Consumer Authority (FCCA)	Pre-closing.	Parties' combined worldwide turnover exceeds €350 million and the Finnish turnover of each of at least two of the parties exceeds €20 million.	Phase 1: one month. Phase 2: three months (may be extended by two months). The time periods may be extended where the parties fail to provide requested information within the deadline or provide inaccurate or incomplete information. If the FCCA opposes a transaction, the Market Court must issue its decision within three months of receipt of the application from the FCCA.	Yes.
France (EU)	French Competition Authority	Pre-closing.	Parties' combined turnover exceeds €150 million and each of at least two of the parties have French turnover exceeding €50 million. Please note: lower thresholds apply to the retail trade and to the French overseas departments and communities.	Phase 1: 25 business days (may be extended by 15 business days if commitments offered. Parties may request an additional 15 days where there is specific necessity). Phase 2: 65 business days (may be extended by up to 65 business days).	Yes.
Georgia	Georgia Competition Authority	Pre-closing.	Parties' combined turnover in Georgia exceeds 20 million laris and the annual Georgian turnover of at least two parties exceeds 5 million laris); or the joint value of the parties' operating assets in Georgia exceeds 10 million laris and the value of at least two parties' operating assets in Georgia exceeds 4 million laris.	30 days.	Yes.
Germany (EU) (See note k)	Federal Cartel Office (BKartA)	Pre-closing.	Parties' combined worldwide turnover exceeds €500 million; and at least one party has German turnover exceeding €25 million; and another party's German turnover exceeds €5 million; unless the following de minimis exemption applies: one of the parties has worldwide turnover of less than €10 million.	Phase 1: one month. Phase 2: four months from notification.	Yes.
Greenland	Consumer and Competition Authority	After the conclusion of the agreement, the announcement of the public bid, or acquisition of control and, in any event, before implementation.	Parties' combined aggregate turnover in Greenland exceeds 100 million kroner and the aggregate turnover in Greenland of each of at least two of the parties exceeds 50 million kroner.	Phase 1: 40 business days. Phase 2: 90 business days after expiration of original 40 business days. Both time limits can be extended up to 20 days with the parties' consent or if the undertakings propose new or revised commitments.	Yes.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Guernsey	Guernsey Competition and Regulatory Authority	Pre-closing.	The parties' combined turnover in the Channel Islands (ie, Guernsey and Jersey) exceeds £5 million and the Guernsey-wide turnover of each of at least two parties exceeds £2 million.	Phase 1: 25 working days from the date of registration of the application (may be extended). Phase 2: 6 months from the date of first registration of the application (may be extended). A simplified procedure is available for credit or financial institutions. In such case, the review period is 14 days.	Yes.
Honduras	Honduran Commission for the Defence and Promotion of Competition (CDPC)	Pre-closing.	Parties' combined assets in Honduras exceed 10,000 times the annual average minimum wage; or parties combined turnover in Honduras exceeds 15,000 minimum wage; or the parties' combined market share in Honduras exceeds 25 per cent.	45 days.	Yes.
Hungary (EU)	Hungarian Competition Authority (GVH)	After the conclusion of the agreement, announcement of the public bid, or acquisition of control.	Parties' combined turnover exceeds 15 billion forints and the turnover of each of at least two of the parties exceeds 1 billion forints. For foreign parties, only the turnover in Hungary is relevant for the above notification thresholds.	Phase 1: 30 days (may be extended by 20 days). Phase 2: four months from notification (may be extended by two months). The waiting periods may be extended by further requests for information. A simplified procedure is available where the parties' combined market share is less than 15 per cent for horizontal transactions and 25 per cent for vertical transactions.	Yes.
Iceland (EFTA)	Competition Authority (CA)	Pre-closing.	Parties' combined Icelandic turnover exceeds 2 billion kronur and the Icelandic turnover of each of at least two of the parties exceeds 200 million kronur. The CA may ex officio review a concentration if the merger substantially reduces effective competition and the aggregate Icelandic turnover is over 1 billion kronur.	Phase 1: 25 business days. Phase 2: 70 business days (may be extended by 20 business days).	Yes.
Ireland (EU)	Competition and Consumer Protection Commission (CCPC)	The transaction must be submitted prior to its implementation and may be notified on the basis of a good faith intention to conclude the agreement (or on signing the agreement). In the case of a public bid, a notification may be made where there is a publicly announced intention to make the bid.	Aggregate turnover in the Republic of Ireland of all of the parties exceeds €50 million; and turnover in the Republic of Ireland of each of at least two parties exceed €3 million. Specific rules apply in the media sector.	Phase 1: 30 working days (45 working days if the parties offer undertakings). Phase 2: 120 working days from notification (135 working days if the parties offer undertakings). The 120 working day period can be extended where the CCPC issues a formal request for information within the first 30 working days of Phase 2 (the time period is suspended until a complete response is received). Where proposed remedies are submitted in Phase 2, the CCPC has 135 working days rather than 120 to make its decision.	Yes.
Israel (See note l)	Israeli Antitrust Authority (IAA) Israeli Antitrust Tribunal	Pre-closing.	Each of the merging parties maintains a business presence in Israel and (i) the parties' combined Israeli turnover exceeds 150 million shekels; and each of at least two of the parties has Israeli turnover of at least 10 million shekels; or (ii) the parties' combined market share exceeds 50 per cent; or (iii) one of the parties has a monopolistic position prior to the merger.	30 days (may be extended).	Yes.
Italy (EU)	Italian Antitrust Authority (IAA)	Pre-closing.	Parties' combined Italian turnover exceeds €495 million and the target's Italian turnover exceeds €50 million.	Phase 1: 30 days from notification (15 days if a public takeover bid, 60 days if concentrations affect insurance, banking or media sectors). Phase 2: 45 additional days (may be extended by 30 days).	No (but may be ordered).

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Japan (see note m)	Japan Fair Trade Commission (JFTC)	Pre-closing.	Notification of share acquisitions may be required where the acquirer as a group has Japanese turnover of more than ¥20 billion, the target as a group has Japanese turnover of more than ¥5 billion and the ratio of voting rights of the acquiring company's corporate group in the target company exceeds 20 per cent or 50 per cent, respectively, through the contemplated stock acquisition. Notification of statutory mergers may be required if one party as a group has turnover exceeding ¥20 billion and the other party as a group has a Japanese turnover exceeding ¥5 billion. Notification of business asset transfers may be required if the acquirer as agroup has Japanese turnover exceeding ¥20 billion and the target business or business-related assets has a Japanese turnover of over ¥3 billion.	Phase 1: 30 days. Phase 2: 90 days from receipt of additional information or 120 days from date of notification, whichever is longer.	Yes (for 30 days).
Jersey	Jersey Competition Regulatory Authority	Pre-closing.	The parties' combined share of purchase or supply of any good or service in Jersey exceeds 25 per cent post-merger (horizontal overlap); or one party to the proposed merger has an existing 25 per cent or greater share of purchase or supply, and another party to the proposed merger has an existing 25 per cent or greater share of purchase or supply or in an upstream or downstream market (vertical overlap); or one or more parties to the merger has an existing 40 per cent share of purchase or supply in Jersey.	Phase 1: one month. Phase 2: six months from date of first registration.	Yes.
Kazakhstan	Agency of the Republic of Kazakhstan for Competition Protection	Pre-closing.	Parties' combined worldwide assets or turnover exceeds 2 million times the monthly calculation index or one of the parties has a dominant or a monopolistic position (at least 35 per cent). A foreign-to-foreign transaction is subject to the notification requirement if the transaction may affect competition within Kazakhstan.	30 days.	Yes.
Kenya (COMESA)	The Competition Authority of Kenya	Pre-closing.	The merging parties have a minimum combined turnover or assets of one billion Kenya shillings and the turnover of the target within Kenya is above 100 million Kenya shillings. If the merging parties have combined turnover in Kenya between 100 million Kenya shillings and one billion Kenya shillings, the transaction is subject to the Exclusion guidelines and an Exclusion Application must be made. The threshold is different in certain sectors.	Phase 1: 60 days (from receipt of all information or within 90 days where oral representations take place). Phase 2: 120 days from the date of notification. Exclusion application: 14 days.	Yes.
Kosovo	Competition Authority	Pre-closing.	At least one party is located in Kosovo and turnover of at least two parties exceeds €3 million and the worldwide turnover of all parties exceeds €20 million.	Phase 1: 30 days. Phase 2: additional 90 days.	Yes.
Kyrgyzstan	State Commission for Antimonopoly Policy	Pre-closing.	The target has a market share of 35 per cent or more in Kyrgyzstan.	10 days.	Yes.
Latvia (EU)	Competition Council	Pre-closing.	Parties' combined Latvian turnover exceeds €30 million and the Latvian turnover of at least two parties is at least €1.5 million. Even where thresholds are not met, Competition Council can request a notification once deal has closed where the parties' combined share exceeds 40 per cent and the transaction may impact on competition in Latvia.	Phase 1: one month. Phase 2: four months from notification; three months from notification in case of short-form notification.	No.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Lithuania (EU)	Competition Council	Pre-closing.	Parties' combined turnover exceeds €14.5 million and at least two of the parties have a turnover in excess of €1.45 million. For foreign parties, only the turnover in Lithuania is relevant for the above notification thresholds.	Phase 1: one month. Phase 2: three additional months (may be extended by one month if the parties offer undertakings).	Yes.
Macedonia	Commission for Protection of Competition	Pre-closing.	Parties' combined worldwide turnover exceeds €10 million and one of the parties is registered in Macedonia; or the combined Macedonian turnover of the parties exceeds €2.5 million; or one of the parties' market share exceeds 40 per cent; or the parties' combined market share exceeds 60 per cent.	Phase 1: 25 working days (may be extended by 10 working days if parties offer commitments). Phase 2: 90 additional working days (may be extended by 20 working days). All above deadlines may be extended by 20 working days by the Commission in agreement with the parties.	Yes.
Mexico (See note n)	Federal Commission on Economic Competition (COFECE)	Pre-closing.	Price of the Mexican part of target exceeds 18 million times the minimum daily wage in Mexico City; or an acquisition of 35 per cent or more of a firm with Mexican assets or Mexican turnover of more than 18 million times the minimum daily wage in Mexico City; or the parties have combined worldwide assets or turnover of more than 48 million times the minimum daily wage in Mexico City and the transaction results in an accumulation of assets or shares of stock in Mexico in excess of 8.4 million times the minimum daily wage in Mexico City.	15 business days to request additional information, 15 business days to respond (extendable by 40 business days). Once the notification is complete, COFECE has 60 days to issue its resolution (extendable by 40 days). A fast-track procedure, with clearance within 15 days, may be available if the transaction raises no serious concerns.	Yes.
Moldova	National Agency for Protection of Competition (NAPC)	Pre-closing.	Parties' combined turnover exceeds 25 million leu and each of at least two parties has a turnover in excess of 10 million leu in Moldova.	Phase 1: 30 days (may be extended). Phase 2: 90 working days (may be extended).	Yes.
Morocco	Competition Council	Pre-closing.	Parties' combined market share is at least 40 per cent; or the Moroccan turnover of at least two parties is at least 250 million dirhams; or the combined worldwide turnover is at least 750 million dirhams.	Phase 1: 60 days (may be extended by 20 days if undertakings are offered). Phase 2: 90 days (may be extended).	Yes.
Namibia	Namibian Competition Commission	Pre-closing.	Parties' combined Namibian turnover or assets exceed N$30 million; or Namibian turnover of acquirer plus the Namibian assets of target exceed N$30 million; or Namibian turnover of target plus the Namibian assets of acquirer exceed N$30 million; or Namibian turnover of target exceeds N$15 million; or asset value of target exceeds N$15 million; and (ii) the parties have economic activities in Namibia or economic activities that have an effect in Namibia.	Minimum 30 days and maximum 180 days.	Yes.
Netherlands (EU)	Dutch Authority for Consumers and Markets (ACM)	Pre-closing.	Parties' combined worldwide turnover exceeds €150 million and each of at least two of the parties have turnover in the Netherlands in excess of €30 million in the previous calendar year.	Phase 1: four weeks. Phase 2: 13 weeks. A simplified procedure may be available where the transaction does not raise serious concerns and there are no objections from third parties.	Yes.
Nicaragua	National Institute for the Promotion of Competition (PRO-COMPETENCIA)	Pre-closing.	Parties' combined market share is at least 25 per cent; or the parties' combined revenue exceeds 642,857 times the minimum annual wage. For a listed company, when a party acquires 20 per cent of the shares of a company.	Phase 1: 35 business days. Phase 2: 180 additional days.	Yes.
Norway (EFTA)	The Competition Authority (NCA)	Pre-closing.	Parties' combined Norwegian turnover exceeds 1 billion kroner and turnover of at least two parties exceeds 100 million kroner.	Phase 1: 25 working days (may be extended by 10 working days if parties offer undertakings). Phase 2: 70 working days from the submission of a complete notification (may be extended up to 30 working days).	Yes.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Oman	Public Authority for Consumer Protection (PACP)	Pre-closing.	Parties' combined market share exceeds 35 per cent in the relevant market.	90 days.	Yes.
Pakistan	Competition Commission of Pakistan (CCP)	Pre-closing.	A transaction must be notified if (i) the value of gross assets in Pakistan of the acquirer, excluding value of goodwill, is not less than 300 million rupees; or the combined value of gross assets in Pakistan of the parties to an acquisition or merger is not less than 1 billion rupees; or (ii) the annual turnover in Pakistan of the acquirer is not less than 500 million rupees, or the combined turnover in Pakistan of the parties to an acquisition or merger is not less than 1 billion (rupees); and (2)(i) the transaction relates to the acquisition of shares or assets in Pakistan exceeding of 100 million rupees; or (ii) in case of acquisition of shares, if an acquirer acquires voting shares such that post-acquisition the acquirer is entitled to more than 10 per cent of the voting shares of the target; or (iii) in the case of an asset management company carrying out asset management services, its collective exposure for itself and in all of its collective investment schemes is more than 25 per cent of total voting rights of the target; or (iv) the value of total assets under management of an asset management company in Pakistan is 1 billion rupees or more.	Phase 1: 30 business days. Phase 2: 90 business days.	Yes.
Paraguay	National Commission for the Defense of Competition (CONACOM)	Pre-closing.	Parties' market is at least 45 per cent in the relevant market share; or the Parties' aggregate turnover in Paraguay exceeds 100,000 times the minimum monthly salary.	Phase 1: 30 days. Phase 2: 60 days.	Yes.
Peru (see note o)	National Institute for the Defence of Competition	Pre-closing.	Mandatory only in the electricity sector when the transaction would result in a market share of 15 per cent or more for horizontal overlaps or five per cent or more for any vertical relationships.	30 days.	Yes.
Philippines	Philippine Competition Commission	Pre-closing.	The aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities, exceeds 1 billion Philippine pesos, and the value of the transaction exceeds 1 billion Philippine pesos. For the acquisition of shares, also take into account whether the acquirer will have more than 35 per cent of the target's outstanding voting shares or profits, or more than 50 per cent of such voting shares or profits if the acquirer already has more than a 35 per cent interest in the target.	Phase 1: 30 days. Phase 2: 60 days.	Yes.
Poland (EU)	Office of Competition and Consumer Protection (OCCP)	Pre-closing.	Parties' combined worldwide turnover exceeds €1 billion; or the parties' combined Polish turnover exceeds €50 million, unless the target's turnover in Poland did not exceed €10 million in each of the two financial years preceding notification. The same exemption applies in case of a merger or a joint venture (the domestic turnover of each of the merging parties or the joint venture parents did not exceed €10 million).	Phase 1: one month from notification. Phase 2: five months from notification.	Yes.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Portugal (EU)	Competition Authority	After the conclusion of an agreement but pre-closing. If the parties can demonstrate serious intent to conclude an agreement notification can take place earlier.	Turnover threshold: both the aggregate Portuguese turnover of the parties exceeds €100 million and Portuguese turnover of each of at least two parties exceeds €5 million. Market share threshold: the parties strengthen or create a combined market share that exceeds 50 per cent of the national market. De minimis market share threshold: the parties strengthen or create a combined market share that is 30 per cent or more (but less than 50 per cent) of the national market and Portuguese turnover of each of at least two parties exceeds €5 million the previous year.	Phase 1: 30 working days (may be suspended for 20 business days if parties offer commitments). Phase 2: 90 working days from the date of filing (may be suspended by 20 working days).	Yes (but subject to derogation in exceptional circumstances).
Romania (EU)	Romanian Competition Council (RCC)	Pre-closing.	Parties' combined worldwide turnover exceeds €10 million and Romanian turnover of each of at least two of the parties exceeds €4 million.	Phase 1: 45 days from effective date of notification. Phase 2: five months from effective date of notification.	Yes.
Russia (see note p)	Federal Antimonopoly Service (FAS)	Pre-closing for pre-completion notification.	An acquisition must be notified if: (i) the aggregate worldwide book value of assets of the parties to the transaction and the companies of their respective groups exceeds 7 billion roubles and the aggregate worldwide book value of the assets of the target's group exceeds 250 million roubles; or (ii) the aggregate worldwide turnover of the acquirer's group and target's group exceeds 10 billion roubles; and the aggregate worldwide book value of the assets of the target's group exceeds 250 million roubles. A joint venture between two competitors in relation to their operations in Russia, a merger at the Russian level, and a formation of a Russian company with share contribution must be notified if (i) the aggregate value of the assets of the parties exceeds 7 billion roubles; or (ii) the aggregate turnover of the parties exceeds 10 billion roubles. For foreign-to-foreign transactions: if the target has a Russian subsidiary, the local presence test is satisfied (whichever is the turnover of the Russian subsidiary). When the target has no Russian subsidiaries, notification is only required where the target generates Russian sales exceeding 1 billion roubles.	Phase 1: 30 days. Phase 2: two months in addition to the original 30 days (may be extended by up to nine months until the parties perform certain actions).	Yes (in case of pre-merger notification).
Slovakia (EU)	Antimonopoly Office of the Slovak Republic (AMO)	Pre-closing.	Parties' combined worldwide turnover is at least €46 million and the Slovak turnover of each of at least two of the parties is at least €14 million; or one party's worldwide turnover is at least €46 million and another party's Slovak turnover is at least €14 million.	25 business days (may be extended by 90 business days).	Yes.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
South Africa	Competition Commission, Competition Tribunal, and the Competition Appeal Court (CAC)	Pre-closing.	Intermediate merger: the parties' combined South African turnover is between 560 million rand and 6.6 billion rand; or the parties' combined South African assets are valued between 560 million rand and 6.6 billion rand; or the acquirer's South African turnover combined with the value of the target's South African assets is between 560 million rand and 6.6 billion rand; or the target's South African turnover combined with the value of the acquirer's South African assets is between 560 million rand and 6.6 billion rand; and the target's South African turnover or South African asset value exceeds 80 million rand. Large merger: the parties' combined South African turnover exceeds 6.6 billion rand; or the parties' combined South African assets equals or exceeds 6.6 billion rand; or the acquirer's South African turnover combined with the value of the target's South African assets equals or exceeds 6.6 billion rand; or the target's South African turnover combined with the value of the acquirer's South African assets equals or exceeds 6.6 billion rand; and the target's South African turnover or South African asset value exceeds 190 million rand.	Intermediate merger: Within 20 business days of certifying that an application is complete, the Competition Commission must approve or prohibit the merger (may be extended by up to 40 business days). Large merger: The Competition Commission has 40 business days to refer the case to the Tribunal; a date for hearing must be set within 10 business days of the matter being referred. A decision must be issued within 10 days of the end of the hearing and reasons for the decision must be published within 20 days of the decision (may be extended).	Yes.
South Korea (See note q)	Korean Fair Trade Commission (KFTC)	Pre-closing. In some cases, the parties may be able to make a post-merger filing.	One party to the transaction has worldwide assets or turnover of 200 billion won or more; and the other party has total assets or annual turnover of 20 billion won or more. For foreign-to-foreign transactions (ie, where the target is a non-Korean entity), each of the foreign parties must have a Korean turnover of 20 billion won or more.	30 days (may be extended to 120 days).	Yes.
Spain (EU)	National Markets and Competition Commission (CNMC)	Pre-closing.	Parties' combined Spanish turnover exceeds €240 million and Spanish turnover of each of at least two of the parties exceeds €60 million; or parties have a combined market share of at least 30 per cent and the target has a Spanish turnover or Spanish assets in excess of €10 million; or parties have a combined market share of at least 50 per cent.	Phase 1: one month (may be extended by 10 working days if the parties offer undertakings). Phase 2: two months (may be extended by 15 working days if the parties offer undertakings). The Minister for Economy has 15 days from the date of the decision to make a referral to the Council of Ministers (Phase 3). Phase 3: one month from the referral to the Council of Ministers.	Yes.
Swaziland	Swaziland Competition Commission (SCC)	Pre-closing.	Target derives any revenues in Swaziland, and a company is acquiring control over the target.	90 days.	Yes.
Sweden (EU)	Swedish Competition Authority	Pre-closing.	Parties' combined Swedish turnover exceeds 1 billion kronor and Swedish turnover of each of at least two of the parties exceeds 200 million kronor.	Phase 1: 25 working days from notification (may be extended by 10 working days if the parties offer commitments). Phase 2: three months (may be extended by a maximum of one month at a time by agreement with the parties or for compelling reasons). Phase 3: six months after the filing of a summons (may be extended to a maximum of two years from notification).	Yes.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Switzerland	Federal Competition Commission (ComCo)	Pre-closing.	Parties' combined turnover at least 2 billion Swiss francs worldwide or 500 million Swiss francs in Switzerland and the Swiss turnover of each of at least two of the parties at least 100 million Swiss francs; or the ComCo has previously found a party to hold a dominant position because every merger involving that undertaking in the market in which it holds a dominant position is then notifiable.	Phase 1: one month. Phase 2: four months.	Yes.
Taiwan	The Taiwan Fair Trade Commission (TFTC)	No later than 30 days before closing.	Parties' combined market share is at least 33 per cent; or one party has a market share of at least 25 per cent; or the combined worldwide turnover exceeds 40 billion Taiwanese dollars and at least two parties had Taiwanese turnover of 2 billion dollars; or for non-financial companies, one enterprise generated turnover of at least 15 billion Taiwanese dollars and the other generated turnover of at least 2 billion Taiwanese dollars; or for non-financial enterprises, one of the enterprises generated at least 15 billion Taiwanese dollars and the other enterprise generated turnover of at least 2 billion Taiwanese dollars. In foreign-to-foreign transactions, the turnover threshold applies to Taiwan only, but includes turnover in, into, and from Taiwan.	Phase 1: 30 days (may be shortened, or extended by a maximum of 60 days).	Yes.
Tanzania	Fair Competition Commission	No later than 14 days prior to closing.	Acquisition of shares, a business, or other assets, whether inside or outside Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in Tanzania and parties' assets or turnover exceed 800 million Tanzanian shillings.	Phase 1: 14 days. Phase 2: 90 days (may be extended by 30 days).	Yes.
Thailand	Trade Competition Commission (TCC)	Pre-closing.	Jurisdictional thresholds are to be set by regulation, but as no regulations have been adopted, notification is not presently required.	90 days (may be extended by 15 days).	Yes.
Turkey	Turkish Competition Authority (TCA)	Pre-closing.	Parties' combined Turkish turnover exceeds 100 million Turkish lira and at least two of the parties each have Turkish turnover exceeding 30 million Turkish lira; or the worldwide turnover of one acquirer (or one of the merging parties in case of a merger) exceeds 500 million Turkish lira and the Turkish turnover of the target (or one of the merging parties in case of a merger) exceeds 30 million Turkish lira.	Phase 1: 30 days. Phase 2: six months (may be extended up to six months).	Yes.
Ukraine	Antimonopoly Committee of Ukraine (AMC)	Pre-closing.	Parties' combined worldwide assets or worldwide turnover exceeds €30 million where each of at least two of the parties have worldwide turnover or assets exceeding €4 million and one party has Ukrainian turnover or assets exceeding €1 million; or the parties' combined worldwide assets or worldwide turnover exceeds 8 million and the worldwide turnover of at least one party exceeds 100 million. Note: include the seller's turnover/assets in the target's turnover/assets.	Phase 1: 45 days (a 15-day preview period followed by a 30-day review period). Phase 2: three months from the date of receipt of all requested information (may be extended).	Yes.

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
United States	US Department of Justice Federal Trade Commission	Pre-closing.	Notification is required where (i) one party has net sales or total assets of US$161.50 million or more and the other party has annual net sales or total assets of US$16.20 million or more and, as a result of the transaction, the acquiring person acquires voting securities or assets of the acquired person having a value of more than US$80.80 million but less than US$323.00 million; or (ii) the acquiring person acquires voting securities or assets of the acquired person having a value of more than US$323.00 million.	Phase 1: 30 days from filing (15 days in the case of cash tender offers and bankruptcy matters). Early termination of the waiting period may be granted. Phase 2: 30 days from substantial compliance with second request (10 days in the case of cash tender offers and bankruptcy matters).	Yes.
Uzbekistan	State Committee of the Republic of Uzbekistan on Privatisation, De-Monopolisation and Development of Competition	Pre-closing.	A transaction must be notified if the aggregate balance sheet value of the assets of both parties to the transaction or the aggregate amount of sales of goods for the last calendar year of both parties exceeds 100,000 times the minimum monthly wage. Notification is also required if the purchaser or target holds a dominant position in the market (market share of 50 per cent or more; or between 35 per cent and 50 per cent if a party had a stable market share for at least one year and there are possibilities to enter the market for new entrants and competitors). Foreign-to-foreign transactions are not notifiable if the target does not have a local presence and there is no effect on the local market.	Phase 1: 10 days (possible to extend up to 30 days).	Yes.
Zambia (COMESA)	Competition and Consumer Protection Commission	Pre-closing.	Parties' combined Zambian turnover or assets, whichever is higher, is at least 50 million fee units and the parties produce or distribute substantially similar goods or services.	Phase 1: 35 days from the date of the notification (may be extended up to 45 days). Phase 2: 90 days from the date of the notification (may be extended by up to 30 days).	Yes.

C. Voluntary filing jurisdictions

Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Australia (See note r)	Australian Competition and Consumer Commission (ACCC)	None.	No formal thresholds. The ACCC-published guidance indicates it will generally investigate a transaction where both of the following apply: the products of the merger parties are either substitutes or complements; and the transaction would result in the acquirer having a market share in Australia of 20 per cent or more. The ACCC may also investigate transactions where the acquirer's market share is less than 20 per cent if the market is concentrated, the transaction gives rise to conglomerate effects, there are high barriers to entry to the market, or the acquirer would have the ability to set high prices.	Informal clearance: No deadline but generally, two to four weeks, but can extend to six to 12 weeks for more complex cases. Formal clearance: 40 business days, 60 days in complex matters. Authorisation: three months (may be extended to six months in complex cases).	No (unless formal clearance is sought).
New Zealand	Commerce Commission (NZCC)	Pre-closing (but notification is voluntary).	No formal thresholds. The published guidance indicates the NZCC will generally only investigate a transaction that will either result in a post-merger market share of the three (or fewer) largest firms of greater than 70 per cent, with the merged firm supplying at least 20 per cent of the market, or result in the merged firm supplying 40 per cent or more of the market.	Clearance process: 10 working days (may be extended). Authorisation process: 60 working days.	No (but clearance cannot be granted post-closing).

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Jurisdiction	Antitrust agency	Filing deadline	Notification thresholds	Clearance deadline	Suspension effects
Panama	Authority for Consumer Protection and Defence	None.	None.	Phase 1: 20 days from notification. Phase 2: 60 days from the date on which the notification is received or, if additional information is required, from the date this additional information is received.	No.
Singapore	Competition Commission of Singapore	None.	No formal thresholds. The published guidance indicates notification is recommended if the transaction will substantially lessen competition in a market in Singapore. The Competition Commission will generally only investigate a transaction that will either: result in a post-merger market share of the three (or fewer) largest firms of greater than 70 per cent, with the merged firm supplying at least 20 per cent of the market; or result in the merged firm supplying 40 per cent or more of the market.	Phase 1: 30 working days. Phase 2: 120 working days.	No.
United Kingdom (EU)	Competition and Markets Authority (CMA)	None.	Target's UK turnover exceeds £70 million; or the merger would result in the creation or enhancement of at least a 25 per cent share of purchase or supply in the UK.	Phase 1: 40 working days (may be extended to 50 working days). Phase 2: 24 weeks (may be extended to 32 weeks).	No.
Venezuela	Superintendent for the Promotion and Protection of Free Competition	None.	Parties' combined turnover exceeds the equivalent of 120,000 tax units. Specific rules apply to the calculation of turnover in the cases of partial acquisitions, companies with joint subsidiaries and mergers of insurance companies.	Four months (may be extended by two months).	No.

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