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Merger Control at a European Union level

Anastasios Antoniou LLC

Legal Framework

The Treaty on the Functioning of the European Union (the '**TFEU**') makes no express provision for the regulation of mergers, although some residual authority lies in Articles 101 and 102 of the TFEU.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('**EUMR**' or '**the Merger Regulation**') provides a one-stop shop, subject to certain limited exceptions, for the regulation of concentrations within the European Economic Area ('**EEA**'), which encompasses all European Union ('**EU**'), Member States, Norway, Iceland and Liechtenstein.

EU Member States comprise of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden, The Netherlands and the United Kingdom.

Broadly put, a merger or acquisition, whether it takes place within or outside the EU, will be assessed as a "concentration" with a Community dimension under the Merger Regulation where:

- two or more undertakings merge, or one or more undertakings acquire direct or indirect control of the whole or part of one or more other undertakings;
- the transaction has a Community dimension, namely the relevant turnover thresholds are met. Transactions taking place outside the EU can fall within the scope of the Merger Regulation.

The acquisition of control in the above context entails the possibility of exercising a decisive influence over another company, whether individually (sole control) or by two or more persons or undertakings (joint control).

A concentration will have a Community dimension for the purposes of the Merger Regulation where either:

(i) the combined total worldwide turnover of all the undertakings involved is at least EUR5 billion; and at least two of the undertakings involved have total EU-wide turnover of at least EUR250 million; or

(ii) the combined total worldwide turnover of all the undertakings involved is at least EUR2.5 billion; and at least two of the undertakings concerned have total EU-wide turnover of EUR100 million; and the combined total turnover of all the undertakings involved in three individual member states is at least EUR100 million; and in each of the three member states above, at least two of the undertakings involved have total turnover of at least EUR25 million.

The exception to the above test would be the case where each of the parties to the transaction achieve two-thirds of their EU-wide turnover in a single member state.

Turnover Calculation

For the purposes of the 'Community dimension' test, turnover is defined in the EUMR as the amounts (post sales rebates, VAT and any other taxes directly related to turnover) derived from the

ordinary activities of the undertaking concerned in the previous financial year. Separate rules govern the calculation of turnover of credit for financial institutions and insurance companies.

The first step in applying the thresholds is to identify the undertakings concerned for the purposes of the calculation. The undertakings concerned in relation to which turnovers are taken into account, are the target and each of the entities acquiring control of the target (either solely or jointly with other undertakings concerned). In calculating the turnover of an undertaking concerned, it is necessary to aggregate together the entire turnover achieved by the group of companies to which it belongs. Transactions between the same parties within a rolling two-year period will be aggregated.

Sector-specific rules

Maritime transport

In September 2009, the Commission adopted Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia). Through adoption of Commission Regulation (EC) No 697/2014 of 24 June 2014, the Commission has extended the exemption provided under Regulation (EC) No 906/2009 up to April 2020.

Insurance

On 24 March 2010, the Commission adopted a new block exemption regulation for the insurance sector (Regulation 267/2010). This entered into force on 1 April 2010. As a result, the insurance block exemption no longer covers the establishment of non-binding standard policy conditions or agreements on security devices. However, it still covers arrangements for the exchange of statistical information (calculations, tables and studies) and for the creation and operation of insurance pools, with some amendments. The block exemption is due to expire on 31 March 2017.

Air transport

The Commission currently has power to apply Articles 101 and 102 of the TFEU to air transport between EU airports (Regulation 3975/87, as amended in 1991, 1992 and 2003). This has been extended to cover air transport between EU and non-EU airports.

Under a Council enabling regulation, the Commission has powers in respect of intra-EEA routes to adopt block exemptions for agreements on joint consultation on fares, joint operations of scheduled air services on certain routes and slot allocation at airports (Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector).

Under Regulation 487/2009, the Commission retains the power to make block exemption regulations in relation to air transport agreements should it consider that this becomes necessary in the future.

Notification of the Concentration

If the EUMR applies, the transaction must be notified to the Directorate-General for Competition (DG Comp) of the European Commission ('the Commission').

Implementation of the transaction cannot take place until the Commission has given its approval. As discussed below, the Commission may also grant a derogation from this suspension in certain limited circumstances. There is also a restricted exception in the case of public bids and creeping takeovers.

The Commission will investigate whether the acquisition will significantly impede effective competition within the common market (or a substantial part of it), in particular as a result of the creation or strengthening of dominance. If the Commission finds that there is the possibility of

anti-competitive effects of that nature, it has the power to block the acquisition, impose conditions on the transaction or order divestiture.

Procedural Steps in the Assessment of the Concentration

The Commission's review procedure under the Merger Regulation could extend to a two-stage process, depending on whether an in-depth investigation is decided, consisting of:

(a) Phase I

The Commission has 25 working days (or 35 working days if the parties have submitted undertakings for consideration, or if the Commission receives a request from a member state for the referral back of the transaction to its national competition authority) from the formal notification of a transaction in which to make its initial assessment of the proposed transaction.

Within this period, the Commission must either decide that it does not have jurisdiction, clear the concentration (either unconditionally or subject to undertakings or commitments) or open an in-depth (Phase II) investigation.

(b) Phase II

Where the Commission decides to proceed to an in-depth investigation it has 90 working days in which to complete its investigation and come to its conclusion on the merger. This 90-day period can be extended.

At the end of the Phase II investigation period it may:

(i) clear the merger; or

(ii) prohibit it.

A simplified procedure has been introduced for the handling of routine concentrations that do not involve significant competition issues. Concentrations that satisfy the criteria for clearance under the simplified procedure will be declared compatible with the common market at the end of the 25 working day review applicable to Phase I. Clearance may involve the subjection of the transaction subject to commitments, such as structural changes or behavioral obligations.

Substantive Assessment of the Concentration

In assessing a concentration, the Commission must determine whether it is compatible with the EU's Single Market. A concentration that significantly impedes effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position must be declared incompatible with the common market (that is, prohibited).

Where the EUMR applies, the transaction cannot be implemented until the Commission has investigated whether or not it is "compatible with the common market" (Article 7 of the EUMR). An express derogation to the suspension provision under Article 7(3) may be granted, which is nevertheless a rare occasion and would require showing the following:

- detrimental harm to one of the parties (or potentially a third party) as a result of the suspension (cf. e.g., *ING/Barings Case No. IV/M.573*);
- that the transaction poses little or no threat to competition and would therefore qualify for the simplified procedure (discussed above).

The suspension does not apply in the case of a public bid or creeping bid provided that the transaction is notified to the Commission without delay and the acquirer does not exercise voting rights attached to the securities or does so only to maintain the full value of the investment based on a derogation granted by the Commission.

The Commission has published Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between

undertakings (Official Journal C 31, 05.02.2004, p. 5-18) as well as Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Official Journal C 265 of 18/10/2008).

Moreover, parties and their counsel are further assisted by the Commission Notice on the definition of the Relevant Market for the purposes of Community competition law (Official Journal C 372, 09.12.1997, p. 5) and the Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Official Journal C 267, 22.10.2008, p. 1-27).

The starting point for the Commission's analysis is usually the market share of the merged entity. A market share of less than 30%, although constituting an "affected" market if in excess of 20% on a horizontal basis, is unlikely to be considered as impeding competition. As a rule of thumb, if the combined market share of the parties is in excess of 50% this will, in itself, be seen as evidence of single-firm dominance.

The Commission will also look at other factors such as:

- the specific market structure for the relevant products or services and the likelihood of new entrants into that market;
- the market position of the undertakings concerned and their economic and financial strength;
- whether or not there are alternative products or services available.

The Commission will first identify the relevant product and geographical markets affected by the concentration, and will then consider the degree of market power within those markets created or enhanced by the concentration.

Defining the relevant product market would entail identifying the goods or services that are the subject of the concentration under assessment. To this should be added those goods or services that a significant number of consumers would accept as interchangeable or substitutable if the price of the original products was increased (demand side substitution). These substitutes will be included if the substitution would constrain prices from rising above competitive levels.

The geographic market is the area over which substitution can effectively take place because the trading conditions are very similar if not identical. The starting point is the geographical area in which the products or services supplied by the target compete closely with others. But if substitute goods or services are likely to be obtained from outside that area in the event of a price increase, this will increase the potential size of the geographic market. Regard is also had to a range of demand characteristics such as the importance of national or local preferences and current patterns of customer purchases and product differentiation. The market for some products will be EU-wide, while other products or services have a national or even local market.

In addition to the assessment of the possible creation or strengthening of single firm dominance, parties should be aware that the Commission will also consider the extent to which the concentration may create or strengthen an oligopolistic market structure (referred to by the Commission as "collective" or "oligopolistic" dominance).

In other words, even though a merger may not create or strengthen the position of a market leader, it may still be considered problematic if it eliminates competitive constraints or makes collusive behaviour easier for participants in a market with a limited number of sizeable firms. The horizontal mergers Notice of the Commission mentioned above, distinguishes between mergers

involving homogeneous and heterogeneous products. Where a merger involves homogeneous products (being products which customers consider are highly substitutable irrespective of the producer) the Commission has indicated that it may consider that a merger gives rise to "serious doubts" where it results in the reduction of six to five major market participants. In the context of heterogeneous products, the Commission is unlikely to intervene where the parties combined market share is less than 25%.

The Horizontal Mergers Notice states that in addition to the ability to establish the terms of co-ordination with reasonable ease, three additional basic conditions must be fulfilled for there to be an increased risk of collusive or co-ordinated behaviour as a result of a merger:

- the affected markets must be sufficiently transparent to allow co-ordinating firms to monitor to a sufficient degree whether the terms of co-ordination are being observed;
- there must be credible deterrent mechanisms that can be activated in case deviation is detected;
- the actions of outsiders such as current and future competitors, as well as customers, should not be able to jeopardise the results expected from the co-ordination.

The Commission has also increased its focus on the ability of a merger to harm consumers. It has stated that mergers will be challenged only if they enhance the market power of companies in a manner which is likely to have adverse consequences for consumers.

The horizontal mergers Notice of the Commission provides guidance on four areas that may constitute a countervailing force or defence to an increase in economic power resulting from a merger, namely:

- buyer power;
- the likelihood of entry by new firms;
- the likelihood that efficiencies will result from the merger;
- the conditions for a failing firm defence.

To qualify as a countervailing force, efficiencies must be:

- of direct benefit to consumers;
- substantial;
- merger-specific;
- timely;
- verifiable;
- likely;
- quantifiable.

Sanctions and Appeals

The Commission has wide powers to impose penalties to undertakings under the EUMR. Indicatively:

- any concentration implemented in breach of the EUMR can be separated back into its individual parts and a fine imposed;
- fines of up to 1% of the aggregate turnover of "undertakings concerned" can be imposed for failing to notify a concentration, giving misleading or false information, or failing to comply with Commission requests for information.
- fines of up to 10% of the worldwide turnover of offending parties can be imposed where a concentration is implemented in breach of the EUMR or for a failure to comply with undertakings given.

We will also discuss certain key factors to be considered for the successful completion of M&A transactions. Although this article is written from a Swiss seller's perspective, it discusses challenges that Western and Chinese companies commonly encounter in cross-border M&A transactions.

Identification of Active Chinese Buyers in M&A Transactions

There are mainly four different types of active Chinese buyers in M&A transactions. The first type is the State Owned Enterprise ("SOE"), which plays an important role due to its relatively large size. Among the well-known Chinese SOEs we find, for example, PetroChina, Bank of China, and China Mobile. The second type is the Privately Owned Enterprise ("POE"), which is becoming increasingly active in cross-border M&A deals. Gaining access to new technology and increasing market shares are the most common driving forces. Examples of POEs are Lenovo, Hainan Airlines, and Huawei. The third type is the small but growing China-based Private Equity Firm. It recently started to increase its focus on international opportunities. Finally, the Sovereign State-Owned Wealth Funds also use M&A transactions to diversify China's foreign currency reserves. They tend to focus on smaller but high value stakes in large companies. An example of such a Sovereign Wealth Fund is the China Investment Corporation.

Most Active Chinese Investors in 2012—2014YTD

Bidder Company	Type	Target Company	Sector	Country	Stake	Deal Value (US$mn)
SANY	Private	Putzmeister	Industrials	Germany	100%	468
		Palfinger	Industrials	Austria	10%	147
招商局国际有限公司	SOE	Colombo International Container Terminals	Services	Sri Lanka	30%	6
		Port de Djibouti	Services	Djibouti	24%	185
		Terminal Link SA	Services	France	49%	539
武汉钢铁(集团)公司	SOE	ThyssenKrupp Tailored Blanks	Industrials	Germany	100%	334
		WISCO International Resources	Resources	Canada	100%	737
中国投资有限责任公司	SOE	Eutelsat Communications	Services	France	7%	484
		Heathrow Airport Holdings	Services	UK	10%	726
		Shanduka Group Pty Ltd	Services	South Africa	25%	241
		Thames Water Utilities	Services	UK	9%	779
SINOPEC	SOE	Devon Energy Corporation (five US oil and gas projects)	Resources	US	33%	2,500
		Petrogal Brasil, Ltd.	Resources	Brazil	30%	4,700
		Talisman Energy (UK) Ltd.	Resources	UK	49%	1,500
Alibaba Group	SOE	ChinaVision Media Group Ltd	Services	Hong Kong	60%	804
		Singapore Post Ltd	Services	Singapore	10%	249
		Kabam Inc	Services	US	NA	120
		CCE	Services	Brazil	100%	148
lenovo	Private	Iomega Corporation (Certa in Assets)	Services	US	>50%	5
		Motorola	Mobility	US	100%	2910

Sources: Handout of Citibank in the Conference hosted by Citi & NKF on Nov. 3, 2014 on 'Completing M&A Transactions Successfully with Chinese Companies'

Other Noteworthy Outbound China M&A 2014YTD

Bidder Company	Type	Target Company	Sector	Country	Stake	Deal Value (US$mn)
东风汽车公司	SOE	PSA Peugeot Citroen SA	Industrials	France	NA	720
FOSUN 复星	Private	Caixa Insurance Businesses	Services	Portugal	80%	1,412
ICBC 中国工商银行	SOE	Standard Bank PLC	Services	UK	NA	770
SUNGY MOBILE 众邦数码	Private	Alcatel Lucent Enterprise SAS	Services	France	85%	255
Tencent 腾讯	Public	China South City Holdings Ltd.	Services	Hong Kong	9.9	193
德尚集团	Private	Fisker Automotive Inc	Industrials	US	100%	150
	Private	Transpacific Industries Group	Industrials	New Zealand	100%	795
Alibaba Group	Public	ChinaVision Media Group Ltd	Services	Hong Kong	60%	804
中粮 COFCO	SOE	Noble Agri Ltd	Services	Hong Kong	51%	4,000
中国石油天然气集团公司	SOE	Phoenix Energy-Dover Project	Resources	Canada	100%	1,076

Sources: Handout of Citibank in the Conference hosted by Citi & NKF on Nov. 3, 2014 on 'Completing M&A Transactions Successfully with Chinese Companies'

Why Swiss Companies are Targets of Chinese Buyers

The following factors motivate Chinese companies to undertake M&A transactions with Swiss companies:

- Switzerland offers economic and political stability and security;
- the Swiss legal and regulatory framework is favorable for M&A transactions with Chinese buyers (there is a favorable Double Taxation Treaty between China and Switzerland and, so far, the Free Trade Agreement between China and Switzerland is the only such agreement that China has concluded with a continental European country);
- Switzerland is rich in human capital and offers reliable and well educated employees;
- M&A transactions with Swiss companies allow for an efficient inroad to advanced technical know-how;
- the acquisition of companies in Switzerland offers Chinese groups relatively quick and easy access to the Swiss market;
- it is a good way to acquire recognized brands, which may provide legitimacy in the Swiss, European, and even global markets (as Chinese companies sometimes struggle with reputational issues);
- Swiss luxury goods are very popular in the Chinese market; the Chinese are fascinated by Swiss technology and, particularly, by Swiss luxury goods;
- Chinese buyers have the potential to increase the value of the acquired Swiss companies and brands by their ability to facilitate a better and more direct access to the Chinese market. For example, in 2013 Asia accounted for more than half of Switzerland's watch exports by value (52.7%). China is, after Hong Kong, the second largest Asian market and, notably, third at world level.

Challenges Due to Different Cultural Backgrounds: Observations from a Western Party's Perspective

a) Mutual relationship of trust and respect

Generally, the Chinese prefer to deal with people whom they know well and whom they trust. They certainly rely more on personal relationships than their Western counterparts. Western companies are therefore well advised to make themselves known to, and respected by, the Chinese. The relationship needs to be built not only between companies but also between individuals at a very personal level; building such a relationship is an ongoing process.

In meetings, a lot of small talk seems to take place from the Western party's perspective. They may be surprised that the really important part of a meeting is often postponed until the very end of the meeting and that a considerable amount of time is spent on finding common ground and understanding on minor topics. However, this approach is important to develop the relationship of trust that is necessary to do business with the Chinese.

Chinese parties put a lot of emphasis on respectful behavior. They are very careful not to expose anybody to what is commonly known as "losing face". Especially in confronting business situations, aggressive behavior from either party might damage the "face" of the other party. The level of acceptance of aggressive behavior is much lower if the counterparty is Chinese.

b) Procedural Structure

While Western parties are generally used to working based on a commonly established timeline, which describes the steps to be taken on each working group level until the signing or the closing of the transaction, Chinese parties often pursue a more flexible and less foreseeable approach. One reason is that transactions involving Chinese parties often require internal or external regulatory approval or other procedures. The timing of such approval or procedures is often difficult to predict. Consequently, clearly set timelines are less common in the approach that Chinese companies pursue. Western parties should therefore be prepared for the fact that set timelines may often not be followed.

Also, Chinese parties tend to involve advisors quite late in the process, which can result in delays. A Western party, if time is of the essence, may therefore want to insist (vis-à-vis its Chinese counterparty) on the timely involvement of its advisors.

c) Indirect approach

Problematic issues are often not directly addressed by Chinese buyers but rather in a cautious and discreet way. The same approach may be advisable on the part of Western counterparties in order to preserve the relationship of trust and respect. Furthermore, it is essential to be aware not only of what is said in meetings but also of what is not said and which, in fact, should be.

d) Conclusion of negotiation topics

While Western parties often assume that agreed points can be considered as definitively closed, Chinese parties often reopen negotiations on these topics. This occurs throughout the negotiation process until signing — and sometimes even after signing (eg, in the context of conditions precedent, pre-closing covenants, purchase price adjustments, earn-outs or other deferred payments). Western parties should therefore be prepared for this and remain flexible. With respect to deal items that allow a discussion after signing or even closing, such as earn-outs and other deferred payments, a Western seller should therefore consider seeking adequate security. Also, one should be aware that issues that seem to be "minor" to a Westerner may not be as "minor" to the Chinese counterparty.

e) Negotiation attitude

Chinese parties are typically very firm on their position and expect the same from their counterparts. For that reason, the taking of a firm, clear position and posture from the beginning of the negotiations is essential.

Irrespective of the above, when negotiating a deal with a Chinese party, it is often advisable to keep room for concessions, so that the Chinese counterparty can report to its superiors some "points won" that allow it to keep its "face" while making some concessions on other points.

f) Risk Perception

Based on experience from transactions made in China, Chinese buyers sometimes tend to require additional security on the profitability of the target companies and the existence of the assets on their balance sheets, such as by additional due diligence requests (such as site visits that may go beyond the standards Western parties may be used to), or by requesting guarantees in the transaction documents that go beyond the mere confirmation of compliance with the applicable accounting standards. Western parties should therefore be prepared to spend additional time on satisfying due diligence requests and, sometimes, lengthy negotiations about the level of contractual guarantees.

g) Escalation to principals

With respect to a great variety of issues, a settlement between the highest level of the principals is necessary and an agreement concluded on the level of the advisors is often not possible. Complex and extended final negotiation rounds that use time and resources of the business principals are often required. Western parties should therefore be prepared to escalate critical issues to the principal level for final conclusion (sometimes involving a key group of senior Chinese advisors).

h) Increased professionalism

Even though Chinese buyers are generally, at least at this point in time, still lacking some experience and, hence, speed in M&A transactions (also due to language barriers, visa requirements, procedural aspects and so on) they tend to get rapidly accustomed to Western processes. Western parties should therefore be prepared for fast processing of multiple work streams with respect to different aspects of the transaction. Chinese buyers, more and more, engage highly professional and internationally experienced advisors early on in the process and keep them involved in all key stages of the transaction.

i) Dimensions of transactions

Deals with Chinese parties often have three different dimensions: business, political and administrative. It is often expected that the complete transaction team is present to make rapid deal progress and to build relationships at all levels. Also, Chinese parties often involve senior political figures as a way to enhance their image. Politicians are often present at the signing ceremony of significant transactions.

j) Post-acquisition phase

Differences in managerial styles and in corporate culture are regarded as the main reasons for past failures of Chinese outbound foreign direct investment. The post-acquisition phase is of great importance in cross-border M&A transactions involving Chinese parties. A fundamental challenge that affects the ultimate success of the integration process of an acquisition is to find the right balance between obtaining the necessary level of organizational integration and minimizing the interferences within the acquired firm's resources and competences. The chosen integration model should consider the cultural effects.

The involvement of professional advisors in cross-border M&A transactions is therefore also advisable after the transactions are closed. Their understanding of local laws and regulations, as well as their professional experience, help Chinese companies to better integrate into the new institutional environment. Moreover, assessment of local risks by professional firms can help the Chinese companies in making informed business decisions.

Selected Legal Aspects in M&A Transactions with Chinese Buyers

a) Approval procedures

For a Western party, the involvement of numerous different national and provincial Chinese bodies in a transaction may be rather unusual. Issues, seemingly to be of a pure administrative nature, may become tripwires. Approvals of Chinese national and provincial bodies require substantial coordination efforts, may be extremely time-consuming and can potentially have a significant impact on the closing timeline of a transaction. Experienced professional local advisors should be involved, because they best handle approval proceedings before Chinese bodies.

b) Structures of SOEs

There is a significant difference between a Chinese party that is a SOE and other Chinese buyers. SOEs often have:

- a complex organizational structure and sophisticated corporate governance mechanisms;
- a top-down approach;
- little transparency between senior managers and middle managers.

Often only the head of the SOE team is allowed to speak in negotiations, albeit he often may have no English language skills; this can lead to communication difficulties that can make the negotiations even more strenuous.

This complex structure, which in many instances is unfamiliar to Western target companies, often diminishes the motivation of the management of the acquired company to cooperate in not only the transaction process but also in the post-acquisition integration phase. By contrast, privately owned Chinese enterprises are generally more transparent; they show a fast decision-making process and a stronger willingness to learn.

c) Arbitration

China is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. By contrast, China has not yet entered into many agreements concerning the enforcement of court judgments with other countries (not even with Switzerland). It is therefore advisable to subject the transaction documentation for M&A transactions with Chinese companies to arbitration proceedings in order to best facilitate enforcement.

d) Chops, or corporate seals

In China generally, a chop (corporate seal) is required for a contract to be valid. While it may be unusual for Western parties that the Chinese parties will sign with the company's seal, this is an important aspect for the formal validation of the contract and, ultimately, for potential future enforcement of rights under the contract.

Issues to Note

Issue	Chinese Party	Western Party
Relationship	Very important not only between companies but also between individuals	Less important; focus is on achieving business interests
Problematic Points	Not addressed directly	Addressed directly
Transaction Details	Discussed on highest level	Discussed at a lower level
Respectful Behavior	Highly important (not exposing someone to "lose face")	Important (but level of tolerance of aggressive behavior is much higher)
Agreed & Closed Topics	Subject to new discussions until signing and, sometimes, even after closing	Understood to be concluded in a final way
Firm Clear Position from Beginning	Highly important	More flexible
Role of Legal Advisors	Delegation of resolution of adverse positions to advisors not customary; normally, agreements are only concluded between principals	Advisors may play a more central role
Administrative Approvals of Government Bodies	Procedure usually more difficult and less predictable, not transparent, time consuming, and outcome unpredictable	Procedure normally transparent and usually of pure administrative nature
Involvement of Political Figures	Common to enhance image	Not common
Different Legal Structures of Companies Influencing Transactions	Very different legal structures (SOEs, POEs etc.) that have an influence on the transaction	Differences in legal structures less important and without significant influence on the transaction
Post-Acquisition Phase	Challenging due to different cultural backgrounds	Important but often better manageable
Arbitration Clause	Recommended since China is party to the New York Convention and has not yet entered into many agreements concerning the enforcement of court judgments with other countries	Choice between State courts and arbitration proceedings less fundamental
Corporate Seal	Necessary to make legal documents valid	Not frequently used

(i) Sections 198 to 201 of Cap. 113, which govern domestic mergers of two or more companies or the restructuring of any company or companies following a scheme of arrangement between such company and its creditors (or a class thereof) or its shareholders (or a class thereof);

(ii) Sections 201A-H of Cap. 113, which govern mergers and divisions of public companies;

(iii) Sections 201Θ-ΚΔ of Cap. 113, which govern cross-border mergers and acquisitions. The particular provisions transpose Directive 2005/56/EC on cross-border mergers of limited liability companies into the national legal order.

(b) The Public Takeover Bids Law 41(I) of 2007 (**'Law 41(I)/2007'**), which transposes into the Cypriot legal order Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids. Law 41(I)/2007 regulates public takeover bids and is complemented by directives issued by the Cyprus Securities and Exchange Commission (the **'CySEC'**), the latter being the competent authority in these matters. Other statutes that should be considered in the course of performing any transaction within the discussed context are the Cyprus Stock Exchange Law and the Inside Information and Manipulation of Market Law.

(c) The Control of Concentrations Between Undertakings Law 83(I) of 2014 (**'Law 83(I)/2014'**), which regulates the concentrations between undertakings, which under certain requirements (discussed supra) require notification to and clearance by the national competition authority.

(d) The Preservation and Safeguarding of Employee's Rights at the Transfer of Business, Facilities or Parts of Business or Facilities Law 104(I) of 2000 (**'Law 104(I)/2000'**), which provides for the protection of the rights of employees in the event of a merger or an acquisition.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

With respect to filings of corporate changes, mergers, acquisitions and other shareholding or management alterations in relation to any corporate entity in Cyprus, the competent authority is the Registrar of Companies (the **'RoC'**), which is a department under the Ministry of Energy, Trade, Industry and Tourism. The involvement of the District Courts of Law may be required in relation to any mergers or acquisitions and prior to any filings with the RoC, where so provided under Cap. 113. The judicial proceedings involved are of an expedient nature and a relevant order can usually be issued within a matter of days.

The CySEC is the authority responsible for the supervision of public takeover bids falling within its scope of competence pursuant to s. 4 of Law 41(I)/2007.

The Commission for the Protection of Competition (the **'CPC'**) is the national competition authority for the assessment and control of concentrations between undertakings under Law 83(I)/2014. The powers and competence both the CySEC and the CPC are discussed below.

3. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

Public Bids subject to CySEC approval

Pursuant to the provisions of s. 4 of Law 41(I)/2007, the following categories of public bids are subject to the supervision and regulation of the CySEC:

(a) in cases where the target has its registered office in Cyprus and its securities are admitted to trading on a regulated market in Cyprus;

(b) in cases where the target's securities are not admitted to trading on a regulated market at the EU Member State in which the target has its registered office provided that:

(i) the target's securities are admitted to trading on a regulated market in Cyprus only;

(ii) the target's securities had initially been admitted to trading on a regulated market in Cyprus but were subsequently admitted to trading on a regulated market of another member state, other than the one where the target's registered office is;

(iii) the target's securities are admitted to trading on a regulated market in Cyprus and in another Member State, other than the one where the registered office of the target is, and the target has specified the CySEC as the competent authority in relation to the public bid, has announced same to the CySEC on the first transaction day and had its decision immediately published pursuant to Section 7 of Law 41(I)/2007.

The CySEC must ensure that the procedures for public bids prescribed under Law 41(I)/2007 as well as the subsidiary legislation (in the form of directives) issued by the CySEC pursuant to the provisions of the said Law, are duly observed by the parties involved. The CySEC has the authority, amongst others, to approve partial bids, to provide exemptions to the obligatory public bids, and also to impose administrative fines, to the extent permitted under Law 41(I)/2007, for failure to comply with Law 41(I)/2007.

Merger Control catching Foreign-to-Foreign Mergers

Restrictions or certain conditions may be imposed by the Commission for Protection of Competition, following an assessment of a concentration of undertakings resulting from a takeover bid, pursuant to the Control of Concentrations Between Undertakings Law 83(I)/2014. The substantive test for compatibility of a concentration with competition in the market is for such concentration not to substantially obstruct competition in the Republic or in a part thereof, particularly as a result of the creation or strengthening of a dominant position.

The Law applies to concentrations of major importance, which are those transactions meeting the jurisdictional thresholds. A concentration is defined under the Law as taking place through the permanent change of control as a result of:

(a) the merger of two previously independent undertakings or parts thereof; or

(b) the acquisition of control of whole or parts of an undertaking, directly or indirectly, by purchase of securities or assets, by agreement or otherwise, by one or more undertakings already controlling at least one undertaking or one or more undertakings; or

(c) an establishment of a joint venture which permanently carries out all the functions of an autonomous economic entity.

However, pursuant to section 6(4)(a) of the Law, a concentration between undertakings is not deemed to arise where:

- a credit or financial institution or an insurance company, the normal activities of which include transactions and dealing in securities on its own account or for the account of third

parties, holds securities on a temporary basis that it has acquired in an undertaking with a view to reselling them, provided that the institution does not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking, or provided that it exercises such voting rights only with a view to facilitating the disposal of all or part of that undertaking or of its assets or the disposal of those securities, and that any such disposal takes place within one year of the date of acquisition – a period which can be extended with the leave of the CPC;

- control is exercised by a person authorised under the legislation relating to liquidation, bankruptcy or any other similar procedure;
- the concentration of undertakings between one or more persons already controlling at least one or more undertakings is carried out by investment companies;
- property is transferred due to death by a will or by intestate devolution; or
- it is a concentration between two or more undertakings, each of which is a subsidiary undertaking of the same entity.

Pursuant to section 6(2) of the Law, 'control' is defined as control stemming from any rights, agreements or other means, which, either severally or jointly, confer the possibility of exercising decisive influence over an undertaking through:

- ownership or enjoyment rights over the whole or part of the assets of the undertaking; or
- rights or contracts that confer the possibility of decisive influence on the composition, meetings or decisions of the bodies of an undertaking.

For a local or foreign merger, acquisition or joint venture to fall within the scope of the Law and hence be subject to notification to and investigation by the CPC, the said transactions need be transactions of major importance. For the purposes of the Law, a concentration of undertakings is deemed to be of major importance if it meets the following jurisdictional thresholds:

(a) the aggregate turnover achieved by at least two of the undertakings concerned exceeds, in relation to each one of them, the amount of €3.5million;

(b) at least two of the undertakings concerned achieve a turnover in the Republic of Cyprus; and

(c) at least €3.5million of the aggregate turnover of all undertakings concerned is achieved in the Republic of Cyprus.

If, following an assessment of a concentration of major importance, the CPC finds that the competition in the market is likely to be obstructed by such concentration, it may impose such restrictions or conditions subject to which the relevant transactions will be permitted.

As can be deducted from the above mentioned thresholds, the local effects dimension triggering a filing obligation is met by the achievement of a turnover by at least two undertakings concerned in Cyprus, while the Cyprus turnover of all undertakings concerned need only be €3.5 million.

4. What documentation is required to implement these transactions?

Public Takeover Bids

As regards the process of a public takeover bid, the following are required:

(a) The announcement in relation to the intention of the offeror to make a public offer and/or the announcement confirming his decision to make a public offer, which announcement is made in accordance with Section 7 of Law 41(I)/2004 and the CySEC Directive DI41-2007-01 of 2012,

(b) The public offer document which is prepared in accordance with the CySEC Directive DI41-2007-03 of 2012;

(c) Where the offer made is for cash, the offer document must include confirmation by a credit institution or other organisation that resources are available to the offeror to satisfy full acceptance of the offer;

(d) An acceptance and transfer form, issued by the offeror and which is sent to all of the target's shareholders;

(e) The reasoned opinion by the Board of Directors of the target, which is announced and sent to the security holders forming the object of the offer, and which is accompanied by an independent expert report;

(f) Any revised offer document, if applicable; and

(g) The final result of the offer announced in accordance with s. 7 of Law 41(I)/2007 and published in two daily national newspapers.

Merger Control

With respect to merger control, any concentration of major importance must be notified to the CPC in writing by the undertaking falling within the notion of the notifying party in accordance with applicable legislation, unless such transaction falls under the exceptions of section 6(4) of Law 83(I)/2014.

Although there is no prescribed format for the notification to be filed, Law 83(I)/2014 requires that the notification include the information prescribed in Appendix III to the same. The notification must be made in Greek and must be accompanied by various supporting documents and other information which can also be in English, including but not limited to the following:

- a copy of all final or most recent documents that brought about the concentration either by agreement or following a public bid;
- in the case of a public bid, a copy of the public bid document;
- copies of the most recent annual reports and audited financial statements of all the undertakings participating in the concentration;
- copies of reports or analyses prepared for the purposes of the concentration;
- a list and short description of the contents of all analyses, reports, studies and surveys that were prepared by or for any of persons responsible for notification for the purpose of evaluating or analysing the proposed concentration in relation to the market and competition conditions;
- details of the concentration (including the nature and scope of the concentration, the financial and structural details of the concentration, and details regarding the turnover in Cyprus and global turnover of each undertaking);
- details of relationships of ownership and control as between each participant in the concentration and the undertakings connected with it;
- personal and economic ties as between each group of undertakings and any other undertaking operating within the affected market in which such group holds, inter alia, at least 10% of the voting rights or shares; and
- a description and analysis of the affected relevant markets.

Q&A JURISDICTIONAL CHAPTERS

5. What government charges or fees apply to these transactions?

The CySEC's fees regarding takeover bids are determined by the CySEC Directive DI41-2007-02 and DI41-2007-02(A) of 2012-2014. The fee for examination of the offer document is set, in relation to a cash consideration, at the amount of €3,417 plus 0.01% of the value of the public offer. Where the consideration includes securities, the examination fee is set at €6.385 plus 0.01% of the value of the takeover bid. An additional €1,700 is payable towards examination of a revised offer document. Finally, a charge of €855 is made for an application for approval to make a partial takeover, while an application to exercise the squeeze-out right pursuant to Section 36 of Law 41(I)/2007 is charged at €600.

Law 83(I)/2014 sets filing fees over a concentration of major importance with the CPC at €1,000. When a concentration becomes subject to full investigation by the CPC (Phase II), an additional fee of €6,000 applies.

6. Do shareholders have consent or approval rights in connection with a deal?

It is a general principle of takeover bids pursuant to the provisions of s. 5(στ)(ii) Law 41(I)/2007, that where securities are to be offered, the offeror must obtain approval of the general meeting of its shareholders.

The target's shareholders' general meeting has the right to further approve or reject any action proposed by the Board of Directors, once the latter becomes aware of a potential public bid, and which action may obstruct or cancel any such public bid.

Approval of the target's shareholder's meeting is further required for (a) issue of securities of the target, provided that such issue aims at preventing the offeror from acquiring control of the target; (b) the conclusion of transactions involving significant differentiation of the assets or obligations of the company or the conclusion of gratuitous transactions- unless the CySEC approves the said transactions; and (c) the repurchase of own shares, except where the CySEC approves of the said repurchase. (Section 34 of Law 41(I)/2007)

Finally, the shareholders of the target can pass resolutions with the purpose of neutralising defensive measures in accordance with the provisions of Section 35 of Law 41(I)/2007.

In relation to non-listed companies, shareholder approval is required in relation to the following:

(a) the merger or division of a public limited company (Section 201Γ(5) of Cap. 113)

(b) the cross-border merger plan (Section 201ΣΤ of Cap.113)

7. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Section 201Z(1) of Cap. 113 provides that in the case of a merger or division of a public limited company, the directors of a company who sign a restructuring plan and the proposal in relation thereto, are liable for all damages resulting from negligent conduct, which they may cause during preparation of the merger or division, to the shareholders of the company being acquired or divided. It is further provided that in accordance with Section 201Z(3), if a restructuring plan or proposal signed by the directors includes false facts, each person signing the said documents is guilty of a criminal offense, unless such person can prove that until the time of submission of the above documents the relevant statements were true.

Similarly, pursuant to Section 21 of Law 41(I)/2007, the Board of Directors of the offeror is responsible for the accuracy, completeness and appropriateness of the offer document and shall exercise all due diligence to ensure that the information included in the offer document is true and complete, and contain no omissions which may alter the content of the offer document or mislead its recipients. Directors shall be liable towards the recipients of the public documents for any damage suffered by fault of the directors in relation to the accuracy, wholeness and appropriateness of the offer document.

Moreover, the provision of false or misleading information in relation to the substance of the offer document or concealment of a material fact from the offer document constitutes, in addition to an administrative violation of the Law, a criminal offense punishable with up to five years imprisonment or a fine of up to €200,000 or both penalties.

In addition to the above, Section 33 of Law 41(I)/2007 which concerns the obligation by the Board of Directors of the target to prepare a reasoned opinion in relation to the public bid, provides under subsection (5) that an omission by the directors to prepare the said opinion gives rise to liability of the directors for any damage which the holders of securities may suffer as a result of the director's omission.

Further to the above, in accordance with the rules of equity, the directors of a company owe a fiduciary duty to the company to act bona fide in the interests of the company. Finally, directors are under the duty of reasonable care and skill imposed under Common Law in relation to their capacity as directors and having regard to whether they have been appointed as directors by virtue of their knowledge and expertise (*Re City Equitable Fire Insurance*[1]; *Re Brazilian Rubber Plantations & Estates Ltd*[2]

8. In what circumstances are break-up fees payable by the target company?

None of the above mentioned legal instruments address the issue of break-up fees.

9. Can conditions be attached to an offer in connection with a deal?

In relation to a public offer, conditions may be attached on both the announcement of the intention or decision to make an offer as well as on the offer document itself.

As far as merger control is concerned, if the CPC ascertains that the notified concentration falls within the scope of the Law and raises doubts as to its compatibility with the competitive market, it will inform the Service of the need to conduct a full investigation. In such an event, the Service will request further information from the participants for the purpose of completing its investigation. If, following its review of the additional information provided to it, the CPC's doubts as to compatibility have not been removed, the Service will consider which of the circumstances giving rise to its concerns may be removed and will make suggestions and subsequently undertake negotiations with the parties to resolve the issues.

In the course of remedying competition issues, the CPC may order the dissolution or partial dissolution of the concentration concerned to secure the restoration of the competitive market, through the deprivation of any participation, shares, assets or rights acquired by any person participating in the concentration, or by the cancellation of any contracts that created the concentration or that arose from it, or by a combination of the two, or any other way the CPC deems necessary.

The CPC has, at any given time, the power to revoke decisions related to the compatibility of any concentration and to amend any of the terms of its decision if it determines that:

- its initial decision was based on false or misleading information or that necessary

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Malaysia

Shearn Delamore & Co.

1. What has been the general level of M&A activity over the last 12 months in your jurisdiction? What were the most notable mergers and acquisitions during that period?

It was reported in the Securities Commission's Annual Report 2012 that in 2012, the Securities Commission received a total of 35 applications for clearance of offer documents involving a total offer value of 14.54 billion ringgit, as compared to 23 applications in 2011 involving a total offer value of 14.06 billion ringgit. There were also many international cross-border M&A transactions involving assets and companies in Malaysia, which were not included in the latter statistics, as they did not require the approval of the Securities Commission.

Amongst the notable mergers and acquisitions deals over the last 12 months are:

- Property – The offer by Permodalan Nasional Bhd and Tan Sri Dato' Sri Liew Kee Sin for the remaining shares in SP Setia Bhd valued at 5.7 billion ringgit. This is the largest Malaysian takeover offer of a Malaysian company in terms of offer value in 2012.
- Insurance – The acquisition of ING Management Holdings (Malaysia) Sdn Bhd by AIA Group Ltd for 5.29 billion ringgit, which was completed in December 2012. With the acquisition, AIA has emerged as the largest life insurer in Malaysia in terms of total premium revenue of US$2.05 billion post acquisition.[1]
- Oil and gas – The RM11.85 billion merger between Kencana Petroleum Bhd and Sapura Crest Bhd in May 2012 formed the largest integrated oil and gas service provider by assets in Malaysia, known as Sapura-Kencana Petroleum Berhad. Under a cash and share swap deal, a special purpose vehicle, Intergral Key Sdn Bhd made the offer to acquire all the as sets and liabilities of SapuraCrest for 5.87 bil lion ringgit and Kencana for 5.98 billion ringgit.[2]
- Solar – Hanwha Chemical Corporation's (listed on the Korean stock exchange) successfully bid for and acquired Q-Cells SE's headquarters in Germany, its production facilities in Germany and Malaysia and its sales offices in the US, Australia and Japan positioning it as the third largest solar manufacturer in the world.[3]
- Retail – AEON Co Ltd's (Japan) acquisition of Carrefour's Malaysian operations through a new entity, AEON BIG (M) Sdn Bhd. The deal was to acquire Carrefour's Malaysian hypermarket operating subsidiary Magnificient Diagraph Sdn Bhd and Carrefour Malaysia Sdn Bhd for the purchase price of 147 million euros. The acquisition was completed in October 2012 and with the acquisition of the Carrefour's Malaysian operations, AEON becomes the 2nd largest retailer group in Malaysia.[4]

2. What are the most common methods for acquiring or merging with a public company in your jurisdiction?

The most common methods of acquiring a public company in Malaysia are:

1. Acquisition of shares of the company through sale and purchase agreement;
2. Acquisition of assets and liabilities of the company;
3. Takeover of the company by way of voluntary offer or mandatory offer in accordance with the Malaysian Code on Take-overs and Mergers 2010 (hereinafter known as 'the Code'); and
4. Scheme of arrangement under s 176 of the Companies Act 1965, which is regarded as a takeover offer regulated under the Code.

3. What are the key laws and regulation that govern mergers and acquisitions in your jurisdiction?

The key laws and regulations that govern mergers and acquisitions in Malaysia are:

1. The Code, Practice Notes and Guidelines on Contents of Applications relating to Take-overs and Mergers issued by the Securities Commission, which governs the conduct of all persons involved in takeover offers, mergers and acquisitions in Malaysia, and is administered by the Securities Commission;
2. Capital Markets and Services Act 2007 (CMSA 2007), which contains, *inter alia*, provisions that regulate the activities of markets and intermediaries in Malaysian capital markets and substantial shareholding reporting requirement. Part VI Division 2 of CMSA 2007 contains provisions to govern takeovers, mergers and acquisitions of companies;
3. Companies Act 1965 (CA 1965), which contains, *inter alia*, provisions that govern the conduct and affairs of companies, the director's duties, disclosure requirements on substantial shareholding and schemes of arrangements; and
4. Bursa Malaysia Listing Requirements 2010 (Listing Requirements), which apply to a company listed on the Bursa Malaysia Stock Exchange and contains rules that govern the conduct of a public listed company, including disclosure requirements, public spread requirements and other requirements during the M&A process.

4. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The main regulators for M&A activity in Malaysia are:

1. Securities Commission (SC) – SC has regulatory power to regulate the takeover, merger and acquisition of companies and to ensure compliance with the provisions of securities laws;
2. Companies Commission of Malaysia (CCM) – CCM is empowered, amongst others, to administer and enforce the Companies Act 1965;
3. Bursa Malaysia Securities Berhad (Bursa) – Bursa which operates Malaysia's stock exchange is the front line regulator with the primary responsibility to oversee compliance by listed companies with the Listing Requirements;
4. Bank Negara Malaysia (Malaysian Central Bank) – the Malaysian Central Bank administers the regulation of the financial sector and its power includes the consideration of applications for approval for the acquisition of interests in financial institutions ; and
5. Other Regulatory/Licensing authorities – Government agencies, regulators (including industry regulators) and/or local authorities may impose specific conditions or other requirements. Such conditions depend on the industry in which the target company operates.

5. Are hostile bids permitted?

There is no prohibition under the Code on hostile bids. In fact, there are a number of provisions under the Code which relate to competing takeovers. Hostile bids are uncommon in practice and one of the reasons may be due to the lack of opportunity for potential bidders to conduct due diligence on the target company. The only information available in respect of the target company in hostile bid situations is normally limited to those available in the public domain (see Question 10 for information in public domain).

6. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

The main anti-monopoly legislation in Malaysia is the Competition Act 2010 (CA 2010), which came into effect on 1 January 2012. There are no merger control provisions under the CA 2010 but there are provisions that prohibit anti-competitive practices and abuse of dominant market position. The CA 2010 is aimed at regulating agreements between enterprises which have the object or effect of significantly preventing, restricting or distorting competition in any market for goods and services in Malaysia and conduct which amounts to abuse of dominance in the relevant market. In the past, the Guidelines on the Acquisition of Interests, Mergers and Takeovers by Local and Foreign Interests in 2009 (hereinafter known as 'Foreign Investment Guidelines') restricted foreigners in the percentage of shares they may own in a Malaysian company. This restriction worked in parallel with similar prescriptions by other government ministries such as the Ministry of International Trade and Industry, which is the licensing authority for manufacturing companies. Since the abolishment of the Foreign Investment Guidelines, there is no longer a general restriction on the foreign ownership of shares in Malaysian companies. However, such limitation is now industry specific and is regulated and administered by the relevant government ministry or body such as Malaysian Central Bank.

7. What documentation is required to implement these transactions?

Other than the usual sale and purchase documentation, in the case of a general offer under the Code, the following documentation is required:

1. **Announcement for notice of a takeover offer**, which must be immediately made by the offeror of his firm intention to make a takeover to the public by press notice, ie at least three main national newspapers (one in the national language and one in English), and by written notice to the target's board of directors, the SC and Bursa if the target is listed. The announcement of the takeover must contain, *inter alia*, the following information:
   a. The identity of the offeror and all person acting in concert (hereinafter known as 'Pac');
   b. The basis of the offer price;
   c. The basis of consideration, if other than by cash;

d. The type and total number of voting shares or voting rights of the target company which have been acquired by the offeror;

e. The details of the agreements relating to the acquisition; and

f. The terms and conditions of the takeover offer.

2. **Announcement of the receipt of the takeover notice**, which must be made by the target's board of directors to the public by press notice or to Bursa if the target is listed. This announcement must contain all information disclosed to the target's board of directors and a statement as to whether they are seeking an alternative offer.

3. **Offer document**, which must be submitted to the SC for its consent. The offeror is required to disclose in the offer document, all information that the target's shareholders and their advisors would reasonably require and expect to find for the purpose of making an informed assessment as to the merits of accepting or rejecting the takeover offer and the extent of the risks involved. The offer document shall contain all information and statements as required under the 'First Schedule' of the Code, including:

a. The identity of the ultimate offeror;

b. The terms and conditions of the takeover offer;

c. The offeror's intentions with regard to the continuation of the target's business and the major changes to be introduced in the target's business;

d. The offer price and the confirmation that the offeror has sufficient financial resources where the takeover is by cash; and

e. Whether the offeror intends to invoke the right of compulsory acquisition.

4. **Target board's circular**, which must be issued by the target's board of directors to every shareholder. The circular will contain the board of director's comments, opinion and information on the takeover offer and must contain all information that the target's shareholders and their advisors would reasonably require and expect to find for the purpose of making an informed assessment as to the merits of accepting or rejecting the takeover offer and the extent of the risks involved.

5. **Independent advisor's circular**, which is to be issued by an independent advisor containing its comments, opinions, information and recommendation on the takeover offer to the target's board of directors, shareholders and holders of convertible securities. The independent advisor's circular must include the information set out in the 'Second Schedule' of the Code.

8. What government charges or fees apply to these transactions?

The fees payable to the SC in respect of takeovers, mergers and compulsory acquisitions are prescribed under the Capital Markets and Services (Fees) Regulations 2012. The amount payable varies depending on the type of application to the SC. For example, in respect of an application to the SC for its clearance of offer document, under the current regulations, the fees payable are calculated as follows:

1. For an offer value from 1.00 ringgit to 2.98 billion ringgit, the fee payable is 10,000.00 ringgit + 0.05% of offer value (up to 2.98 billion ringgit); and

2. Any remaining sum above the offer value of 2.98 billion ringgit, the additional fee payable is 0.025 per cent of the remaining offer value.

In the case of a circular to shareholders requiring Bursa's review (either limited review or full review), a fee may be charged by Bursa and the amount payable is to be determined by Bursa from time to time.

Apart from the above, stamp duty is payable in relation to the transfer of shares and property.

9. When conducting due diligence, what information is required to be publicly disclosed?

The overriding principle under the Listing Requirements in respect of information that has to be disclosed is that a listed company has to immediately disclose all material information. Information is considered material if it is reasonably expected to have a material effect on the price, value or market activity of any listed company's securities or the decision of the shareholder or investor in determining his choice of action. Material information includes information which concerns the listed issuer's assets and liabilities, business, financial condition or prospects.

In the situation where there is a potential takeover of a listed company, which may involve the conduct of due diligence by potential bidder/purchaser, there are a number of circumstances where the target company may be under an obligation to make an announcement for, eg:

- Where there is unusual movement in the price of the potential target company's voting shares or voting rights
- Where the potential target company becomes the subject of rumours or speculations about a possible takeover offer

Consistent with the thorough public dissemination policy which forms part of the disclosure policies, the Listing Requirements provide that no disclosure of material information should be made on an individual basis or selective basis unless such information has been previously disclosed and disseminated to the public. Further, in the circumstances where selective disclosure of material information is necessary, for example, where the listed company is undertaking a corporate exercise or to facilitate a due diligence exercise, the listed company must still ensure that disclosure is restricted to only relevant persons and the strictest confidentiality is maintained. In practice, this may necessitate any material information that has not been previously announced if disclosed to a potential bidder in the course of due diligence to be immediately announced.

10. What sources of information are available in the public domain?

Information that is available in the public domain is that, which is by law required to be lodged with the relevant authorities, such as:

1. Information/documents which are statutorily required to be lodged with or maintained by the CCM under the CA 1965, including:

a. Memorandum and articles of association of the target company;

b. Form 8 (certificate of incorporation of public company) or Form 9 (certificate of incorporation of private company);

c. Form 24 (return of allotment of shares);

d. Form 34 (statement of particulars to be lodged with charge);

e. Form 49 (return giving particulars in register of directors, managers and secretaries and changes of particulars); and

provisions in this regard include diverse guidelines for corporate governance. These companies are designed to serve as an intermediate stage between a limited liability stock corporation or limited liability partnership and a stock exchange company with respect to the legal system applicable to the protection of minorities, disclosure of information and good corporate governance requirements.

Investment promotion companies are regulated in such a way as to give them certain exemptions from the provisions of the GCL, and to provide greater protection for minority shareholders and establish standards for good corporate governance practices. These exceptions permit the company to carry out transactions that are important for it to receive private equity capital.

The investment promotion company, identified in Mexico as "SAPI" (IPC), may be adopted by a new company to be incorporated or by an existing company. Regarding the latter scenario, in order for an existing company to become an investment promotion company, an extraordinary shareholders' meeting must approve such modification.

This kind of company is the ideal vehicle to receive investment from private equity funds since, unlike stock corporations where the guiding principle to establish the rights of majorities and minorities is almost exclusively the percentage of participation in the capital stock of the Company, the IPC establishes a different criteria in order to protect such rights.

The following are some of the relevant aspects and criteria that pose certain of the main benefits of the Investment Promotion Companies:

a) They provide a more flexible and modern corporate regime than a normal stock corporation among other matters.

b) They allow minority shareholders to exercise control over the corporate governance of the company, regardless of their percentage in the capital stock of the same.

c) They allow more efficient mechanisms in order to implement outflow strategies of private capital stock.

d) The percentages for the appointment of directors or statutory auditors are lower than those established for stock corporations.

Therefore, the IPC can adopt flexible measures in terms of its operation which cannot be adopted by the stock corporation, and even freely agree on provisions restricted or prohibited under the GLC.

13. What is the waiting or notification period that must be observed before completing a business combination?

Other than those provided for in the Antitrust Law, there are no waiting periods for completing business combinations; however, the FIL provides that an authorisation from the National Commission of Foreign Investment is required in those cases in which a foreign entity intends to participate in a Mexican company whose assets exceed about US$245.83 million dollars. According to the FIL, the period for this approval is 45 working days from the submission of the request; however, in practice this can take additional time depending on the commission's workload.

14. Are there any industry-specific rules that apply to the company being acquired?

There are no additional restrictions other than Federal Antitrust Law (Antitrust Law) and the Foreign Investment Law (FIL), the latter being applicable to certain industries. The restrictions provided by the FIL apply to the following:

- Activities solely carried out by the state (i.e., no private parties may be involved), such as petroleum and other hydrocarbons, basic petrochemicals, electricity, generation of nuclear energy, radioactive minerals, telegraphs, radiotelegraphy, mail services, issuance of paper currency, production of coins, control supervision and surveillance of seaports, airports and helipads, among others;
- Activities reserved exclusively to Mexicans or to Mexican companies with a clause excluding foreign nationals, such as domestic land transportation of passengers, tourism and freight (not including messenger or courier services), gasoline retail sales and distribution of liquefied petroleum gas, and radio broadcasting services, development bank institutions, among others; and
- Activities and acquisition subject to specific regulation such as up to 10 per cent in cooperative companies for production, up to 25 per cent in domestic air transportation, air taxi transportation, and specialized air transportation, and up to 49 per cent in manufacture and sale of explosives, firearms, cartridges, ammunitions and fireworks, not including the purchase and use of explosives for industrial and mining activities, and the development of explosive mixtures for its consumption in such activities, printing and publishing of newspapers for circulation in national territory, freshwater, coastal water and exclusive economic zone fishing, excluding aquaculture, integral port administration, port pilot services for inland navigation under the terms of the law governing the matter, shipping companies engaged in commercial exploitation of ships for inland and coastal navigation (excluding tourism cruises and exploitation of marine dredges) and devices for port construction, conservation and operation, supply of fuel and lubricants for ships, airplanes and railway equipment, concessionaire companies in terms of Articles 11 and 12 of the Federal Telecommunications Law, among others.

Due to the foregoing, those industries having specific rules are oil exploration, transport, telecommunications, and the industries that are subject to special regulations when there are foreign nationals involved.

15. Are cross-border transactions subject to certain special legal requirements?

Cross-border transactions are structured taking into consideration the most suitable investment vehicle allowed under Mexican Law. For instance, it may be structured through a Mexican entity, with the limited liability stock corporations and limited liability partnerships being the most accepted structures in the business field, through a branch or through a trust.

The most applicable pieces of legislation regarding cross-border transactions are the Antitrust Law and the Foreign Investment Law (FIL).

Regarding antitrust, what is commonly known in the antitrust legislation of some countries as 'mergers and acquisitions' is, under Mexican antitrust law, known as 'concentration.' Article 16 of the Federal Antitrust Law (the Law) defines a 'concentration' as 'the merger, acquisition of control, or any other action between or among competitors, suppliers, customers or other economic agents to consolidate corporations, associations, stock holdings, partnership interests, trusts, or assets in general.' The Law further mentions that the Federal Antitrust Commission shall oppose and penalise any concentration having the purpose or effect of restraining, injuring or preventing the free and open competition in the market of equal, similar or substantially comparable products and services. In order to be in a position to analyse which

transactions may have these effects, article 20 of the Law establishes the economic thresholds, which, if exceeded, require a transaction to be notified.

The legal basis of the obligations of Mexican companies with foreign investment is the FIL and its regulations. Article 8 of the FIL requires that the National Foreign Investment Commission approve any foreign investment of more than 49 per cent in a number of specific sectors (see question 14).

16. How will the labor regulations in your jurisdiction affect the new employment relationships?

The basic regulatory framework governing labor and employee benefits are the Federal Labor Law, the Social Security Law and the Housing Law.

Regarding labor regulations, on November 2013, and after 40 years of not having made any reform, the legislative power approved an amendment to the Federal Labor Law, which includes the following:

- New hiring modalities in probationary periods for new employees, initial training, and seasonal employments.
- To regulate "outsourcing" scheme or subcontracting of personnel in order to ensure the employer's compliance with social security and health obligations.
- To regulate hourly payments.
- The payment of three months' compensation and back wages to workers who have been fired and whose employer does not prove the rescission causes in court.
- Obligation to publish the bylaws of the unions in the website of the Labor Ministry.
- The reform also strengthens the rights of women to expressly prohibit discrimination and harassment, and punish with the termination of labor relationship to such people who promote such practices.
- To regulate work for domestic workers, expressly to establish rest periods for them.

In case of a business combination, the acquisition vehicles should be structured considering the labor structure of the target companies and the best manner for the transfer of the employees considering the most beneficial employment terms that are available in light of the Mexican Federal Labor Law, such as regarding the Christmas bonus, vacation and vacation premium, and any other additional provisions granted to employees for their work.

One of the key factors for a business combination is to analyze and determine the structure to be adopted for the transfer of the employees. For instance, regarding asset acquisitions, a common manner to honor the labor terms of the target employees is to carry out a labor substitution, whereby a new employer continues with the labor relationship and honors the terms and conditions granted in favor of the employees prior to the acquisition.

This means that when an acquisition or merger is taking place between companies, employees are protected by law with the most favorable employment benefits of the companies involved.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Insurance and Surety Companies Law

On April 4, 2013 the Federal Official Gazette published an executive order issuing the Insurance and Surety Companies Law. The Insurance and Surety Companies Law will come into full force and effect in two years, calculated from the date of the publication, and repeals the Mutual Insurance and Insurance Companies Law and the Federal Surety Companies Law in their entirety. The purpose of this Law is to govern the incorporation and operation of insurance, surety, and mutual insurance companies, as well as the activities and transactions that they are allowed to carry out.

Telecommunications and antitrust

The Reform in Telecommunications, Radio Broadcasting and Antitrust matters was proposed on March 12, 2013 by the Federal Government and the coordinators of several political parties. It is intended to strengthen the rights related to freedom of expression and information; to adopt measures in order to encourage competition in open and pay television, radio, mobile and fixed telephony, data and telecommunications services in general; to ensure effective competition in all sectors; and to create conditions to increase substantially the telecommunication infrastructure and the obligation to make its use more efficient, which has a direct impact on the lowering of prices and increase of service quality.

On June 11, 2013, the Federal Official Gazette published the Executive Order Amending Articles 6, 7, 27, 28, 73, 78, 94, and 105 of the Mexican Federal Constitution in the Area of Telecommunications, which amends various constitutional provisions.

Moreover, this reform includes the State's obligation to ensure access to information and communication technologies, as well as broadcasting and telecommunications services, including broadband and internet. It also creates the Federal Telecommunications Institute (IFETEL) as an independent constitutional body, for the efficient development of broadcasting and telecommunications, whose duties shall be the regulation, promotion and supervision of the use, development and exploitation of radio spectrum, networks and the provision of broadcasting and telecommunication services, as well as access to active and passive infrastructure, and other essential inputs, entitling this institute to grant, revoke and authorize concessions and granting it authority in antitrust matters regarding broadcasting and telecommunications sectors.

Federal Act to Prevent and Identify Illegally-Funded Transactions and its regulations

On August 16, 2013, the Federal Official Gazette published the Regulations to the Federal Act to Prevent and Identify Illegally-Funded Transactions.

The purpose of this Law is to protect the financial system and the economy of the country by providing means and procedures to detect and prevent activities or transactions involving illegally-obtained funds. The financial structures of criminal organizations are also targeted in order to avoid their being operated with illegal resources.

The act also imposes several obligations on corporations and particulars. One of these obligations is the registration and filing of operation notices for carrying out activities considered as vulnerable in terms of the law, carried out since September 2013. A great number of commercial activities such as gaming and sweepstakes, draws, issuing of credit and prepaid cards, traveller's checks, construction services, buying and selling of precious metals and jewelry, art, vehicles, donations received by not-for-profit organizations, transport of values, professional services, foreign commerce services, leases and other activities are now subject to new restrictions and limitations that must be fulfilled so as to avoid a possible sanction.

On July 24, 2014, the agreement which amends the general rules that refer to the **Federal Act to Prevent and Identify Illegally-Funded Transactions** was published on the Federal Official Gazette.

This agreement increases some of the definitions, establishes a procedure by virtue of which notifications will be considered to be effective, empowers the Tax Administration Service to require information and documents regarding registration and notices of those who carry out vulnerable activities and simplify the identification of clients for some vulnerable activities.

This agreement incorporates Article 27 BIS, which establishes various exceptions with respect to the obligation to give notice for certain vulnerable activities.

Tax reform

After obtaining the opinion of the Commission of Finance and Public Credit, in October, 2013, Congress approved the economic package proposed by President Enrique Peña Nieto on September 8. This package includes substantial amendments to various tax laws including the repeal of the tax deposits in cash and the single rate business tax, as well as new provisions regarding value-added tax, special tax on production and services, federal fee law, income tax, etc.

Constitutional reform to the energy and electric sectors

On December 12, 2013, the Mexican Congress approved amendments to Articles 25, 27 and 28 of the Mexican Constitution to allow private investment in the oil and hydrocarbon industry, as well as activities related to the electricity industry.

On December 20, 2013, an executive order was published in the Federal Official Gazette amending and supplementing Articles 25, 27 and 28 of the Mexico's Federal Constitution in this regard, as well as Electricity matters. The Executive Order became effective the date following its publication; thus, as of December 21, 2013, the Federal Congress will have several terms to adapt the legal framework on oil, hydrocarbon and electricity matters, as well as issue supplemental laws and create public entities.

Due to the foregoing, in the future years it is envisioned that the foreign investment will increase in this sector allowing international companies to incorporate subsidiaries in Mexico.

Financial reform

On January 10, 2014, the Federal Official Gazette published the Financial Reform. Several Statutes were amended and a new act to regulate financial institutions was issued. The most relevant aspects of 2014 Financial Reform are as follows:

- Promulgation of a new act to regulate financial institutions, which purpose is to strengthen the corporate governance of holding companies.
- Strengthening of the National Financial Services Users Protection Commission ("Condusef").
- Multiple-purpose financial institutions ("SOFOMES") and general deposit warehouses.
- Development Banking System: the financial reform has as another objective, to make the legal framework governing the Development Bank more flexible.
- Several provisions of the Community Savings and Loan Act and Cooperative Savings and Loan Associations Act are amended or repealed.
- The Financial Reform removes limits to foreign investment in financial institutions.

New Federal Antitrust Law

A new Federal Antitrust Law was published on May 23, 2014 in the Federal Official Gazette, to enter into force on July 7, 2014.

The new law arises from the June 2013 amendments to Article 28 of the Mexican Constitution that had, as their, specific purpose, to create both the Federal Antitrust Commission ("COFECE"- Comisión Federal de Competencia Económica) and the Federal Telecommunications Institute ("IFT"- Instituto Federal de Telecomunicaciones) as constitutionally autonomous agencies independent from the executive branch, and to set their basic organization and operating principles.

As a result of the foregoing, most of the changes in the new Law specifically deal with the organization, powers and composition of the COFECE. As regards its substantive or underlying aspects, the new Law essentially continues the framework of the repealed law concerning the analysis and management of monopolistic practices, with the addition of new concepts such as barriers to competition and access to essential raw materials.

The new Law also incorporates innovative procedures, including procedures to analyze and regulate barriers to competition and access to essential raw materials, and amends the rules to process the issuing of opinions and investigations. In this latter case, this is with the specific intention of conforming to the principle of impartiality in decision-making as set forth in Article 28 of the Mexican Constitution. Finally, several aspects formerly in effect at the regulatory level are now raised to the statutory level.

New Federal Law on Telecommunications and Broadcasting

On July 14, 2014m the Federal Official Gazette published the Federal Law of Telecommunications and Broadcasting, after the passage last Thursday, July 10, of the new law by the Federal Congress.

The purpose of the new law is to regulate the use of radio spectrum, public telecommunications networks, orbital resources, satellite communication, the provision of public telecommunications service, the broadcasting rights of users, and the process of free competition in these sectors.

The most important points to highlight in this new legislation are:

- Federal Institute of Telecommunications ("FIT"). It will be the regulator of the entire sector, grant concessions, issue declarations of dominance and have the authority to oversee audiovisual content.
- Dominance. The FIT may declare that a company by sector and not for the services it provides.
- Interconnection Fees. The FIT will determine whether a company is dominant in some sectors, and may impose measures to restrict its market control.
- New Television Networks. The state will invite tenders for two new television networks concessions.
- Digital Television. December 31, 2015 was established as the deadline to complete the transition from analog to digital television.
- Failure to Comply and Penalties. The legislation establishes the types of non-compliance by concessionaire, and who has the jurisdiction to impose the appropriate sanctions. Among them are the Consumer Protection Agency, Mexico´s Department of the Interior and the Federal Institute of Telecommunications.
- Intervention and Geolocation. It established that private communications may be intercepted for public security and investigations by the authorities and the application of similar security measures.