Appendix 1

ABOUT THE AUTHORS

THOMAS SACHER
Ashurst LLP

Thomas Sacher is a partner at Ashurst LLP since 1 July 2015. From 1986 through June 2015 Thomas Sacher was a member and, from 1992 through June 2015, partner of another German law firm. He studied law at the universities of Munich and Regensburg and received admission to the Bar in 1986. In 1990 he received a PhD (Dr jur) from the University of Regensburg.

Dr Sacher specialises in the areas of M&A, private equity and venture capital. He advises his national and international clients in a variety of corporate law matters related to domestic and cross-border transactions and provides legal advice on transformations, mergers, formation of joint ventures, stock option plans and other corporate transactions.

ASHURST LLP
Ludwigstraße 8
80539 Munich
Germany
Tel: +49 89 24 44 21 100
Fax: +49 89 24 44 21 101
thomas.sacher@ashurst.com
www.ashurst.com
THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW
ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AABØ-EVENSEN & CO ADVOKATFIRMA

ÆLEX

AGUILAR CASTILLO LOVE

AKD NV

ALLEN & GLEDHILL LLP

ANDERSON MÔRI & TOMOTSUNE

ARIAS, FÁBREGA & FÁBREGA

ASHURST LLP

AZMI & ASSOCIATES

BHARUCHA & PARTNERS

BOWMAN GILFILLAN

BREDIN PRAT

BRIGARD & URRUTIA

CLEFTY GOTTLIEB STEEN & HAMILTON

CORRS CHAMBERS WESTGARTH

COULSON HARNEY

CRAVATH, SWAINE & MOORE LLP
Acknowledgements

DELFINO E ASSOCIATI WILLKIE FARR & GALLAGHER LLP
DITTMAR & INDRENIUS
DRYLLERAKIS & ASSOCIATES
ELLEX
FENXUN PARTNERS
HARNEYS
HENGELER MUELLER
HEUKING KÜHN LÜER WOJTEK
ISOLAS
KBH KAANUUN
KEMPFOOGSTAD, S.R.O.
KIM & CHANG
KINSTELLAR, S.R.O., ADVOKÁTNÍ KANCELÁŘ
KLART SZABÓ LEGAL LAW FIRM
LEGAL ATTORNEYS & COUNSELORS
LETT LAW FIRM P/S
MAKES & PARTNERS LAW FIRM
MATTOS FILHO, VEIGA FILHO, MARREY JR E QUIROGA ADVOGADOS
MNKS
MORAVČEVIĆ VOJNOVIĆ I PARTNERI IN COOPERATION WITH SCHÖNHERR
MOTIEKA & AUDZEVIČIUS
NISHIMURA & ASAHI
OSLER, HOSKIN & HARCOURT LLP
Acknowledgements

PÉREZ BUSTAMANTE & PONCE
POPOVICI NIȚU & ASOCIAȚII
ROJS, PELJHAN, PRELESNIK & PARTNERS
RUBIO LEGUÍA NORMAND
RUSSIN, VECCHI & HEREDIA BONETTI
S HOROWITZ & CO
SCHELLENBERG WITTMER LTD
SCHINDLER RECHTSANWÄLTE GMBH
SELVAM & PARTNERS
SEYFARTH SHAW LLP
SLAUGHTER AND MAY
STRELLA
SYCIP SALAZAR HERNANDEZ & GATMAITAN
TORRES, PLAZ & ARAUJO
URÍA MENÉNDEZ
UTEEM CHAMBERS
VON WOBESER Y SIERRA, SC
WEERAWONG, CHINNAVAT & PEANGPANOR LTD
WH PARTNERS
WILSON SONSINI GOODRICH & ROSATI
CONTENTS

Editor’s Preface ............................................................................................................................................ xiii
Mark Zerdin

Chapter 1 EU OVERVIEW ............................................................................................................................... 1
Mark Zerdin

Chapter 2 EU COMPETITION OVERVIEW ................................................................................................. 11
Götz Drauz and Michael Rosenthal

Chapter 3 EUROPEAN PRIVATE EQUITY ................................................................................................. 19
Thomas Sacher

Chapter 4 US ANTITRUST ......................................................................................................................... 32
Scott A Sher, Christopher A Williams and Bradley T Tennis

Chapter 5 CROSS-BORDER EMPLOYMENT ASPECTS OF INTERNATIONAL M&A ........................................... 53
Marjorie Culver, Darren Gardner, Ming Henderson, Dominic Hodson and Peter Talibart

Chapter 6 M&A LITIGATION ..................................................................................................................... 67
Mitchell A Lowenthal, Roger A Cooper and Matthew Gurgel

Chapter 7 AUSTRALIA ............................................................................................................................... 74
Braddon Jolley, Sandy Mak and Jaclyn Riley-Smith

Chapter 8 AUSTRIA ........................................................................................................................................ 87
Clemens Philipp Schindler

Chapter 9 BAHRAIN ..................................................................................................................................... 97
Haifa Khunji and Natalia Kumar
Contents

Chapter 10  BELGIUM ................................................................. 110

Olivier Clevenbergh, Gisèle Rosselle and Carl-Philip de Villegas

Chapter 11  BRAZIL ................................................................. 122

Moacir Zilbovicius and Rodrigo Ferreira Figueiredo

Chapter 12  BRITISH VIRGIN ISLANDS ............................. 132

Jacqueline Daley-Aspinall and Sarah Lou Rockhead

Chapter 13  CANADA ............................................................... 143

Robert Yalden, Emmanuel Pressman and Jeremy Fraiberg

Chapter 14  CAYMAN ISLANDS ......................................... 158

Marco Martins

Chapter 15  CHINA ................................................................. 173

Lu Yurui and Ling Qian

Chapter 16  COLOMBIA ......................................................... 187

Sergio Michelsen Jaramillo

Chapter 17  COSTA RICA ....................................................... 203

John Aguilar Jr and Alvaro Quesada

Chapter 18  CYPRUS ............................................................... 211

Nancy Ch Erotocritou

Chapter 19  CZECH REPUBLIC ........................................... 218

Lukáš Ševčík, Jitka Logesová and Bohdana Pražská

Chapter 20  DENMARK ............................................................. 225

Sebastian Ingversen and Nicholas Lerche-Gredal

Chapter 21  DOMINICAN REPUBLIC .................................... 236

Maria Esther Fernández A de Pou, Mónica Villafaña Aquino and Laura Fernández-Peix Perez
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>ECUADOR</td>
<td>246</td>
<td>Diego Pérez-Ordóñez</td>
</tr>
<tr>
<td>23</td>
<td>ESTONIA</td>
<td>257</td>
<td>Sven Papp and Sven Böttcher</td>
</tr>
<tr>
<td>24</td>
<td>FINLAND</td>
<td>269</td>
<td>Jan Ollila, Wilhelm Eklund and Jasper Kuhlefelt</td>
</tr>
<tr>
<td>25</td>
<td>FRANCE</td>
<td>281</td>
<td>Didier Martin and Hubert Zhang</td>
</tr>
<tr>
<td>26</td>
<td>GERMANY</td>
<td>296</td>
<td>Heinrich Knepper</td>
</tr>
<tr>
<td>27</td>
<td>GIBRALTAR</td>
<td>309</td>
<td>Steven Caetano</td>
</tr>
<tr>
<td>28</td>
<td>GREECE</td>
<td>321</td>
<td>Cleomenis G Yannikas, Sophia K Grigoriadou and Vassilis S Constantinidis</td>
</tr>
<tr>
<td>29</td>
<td>HONG KONG</td>
<td>334</td>
<td>Jason Webber</td>
</tr>
<tr>
<td>30</td>
<td>HUNGARY</td>
<td>344</td>
<td>Levente Szabó and Klaudia Ruppl</td>
</tr>
<tr>
<td>31</td>
<td>ICELAND</td>
<td>360</td>
<td>Hans Henning Hoff</td>
</tr>
<tr>
<td>32</td>
<td>INDIA</td>
<td>368</td>
<td>Justin Bharucha</td>
</tr>
<tr>
<td>33</td>
<td>INDONESIA</td>
<td>386</td>
<td>Yozua Makes</td>
</tr>
</tbody>
</table>
Chapter 34  ISRAEL .................................................................400
            Clifford Davis and Keith Shaw

Chapter 35  ITALY ...............................................................410
            Maurizio Delfino

Chapter 36  JAPAN ...............................................................422
            Hiroki Kodate and Masami Murano

Chapter 37  KENYA ...............................................................431
            Joyce Karanja-Ng’ang’a, Wاثimingira Muthang’atо and Felicia
            Solomon Nyale

Chapter 38  KOREA ..............................................................442
            Jong Koo Park, Bo Yong Ahn, Sung Uk Park and Young Min Lee

Chapter 39  LITHUANIA ........................................................457
            Giedrius Kolesnikovas and Michail Parchimovič

Chapter 40  LUXEMBOURG ....................................................465
            Marie-Béatrice Noble, Raquel Guevara, Stéphanie Antoine

Chapter 41  MALAYSIA ........................................................479
            Rosinah Mohd Salleh and Norhisham Abd Bahrain

Chapter 42  MALTA ...............................................................491
            James Scicluna

Chapter 43  MAURITIUS ........................................................503
            Muhammad Reza Cassam Uteem and Basheema Farreedun

Chapter 44  MEXICO .............................................................513
            Luis Burgueño and Andrés Nieto

Chapter 45  MONTENEGRO ....................................................523
            Slaven Moravčevič and Dijana Grujić
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Country</th>
<th>Authors</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>46</td>
<td>Myanmar</td>
<td>Krishna Ramachandra and Benjamin Kheng</td>
<td>533</td>
</tr>
<tr>
<td>47</td>
<td>Netherlands</td>
<td>Carlos Pita Cao and François Koppenol</td>
<td>544</td>
</tr>
<tr>
<td>48</td>
<td>Nigeria</td>
<td>Lawrence Fubara Anga</td>
<td>557</td>
</tr>
<tr>
<td>49</td>
<td>Norway</td>
<td>Ole K Aabø-Evensen</td>
<td>562</td>
</tr>
<tr>
<td>50</td>
<td>Panama</td>
<td>Andrés N Rubinoff</td>
<td>600</td>
</tr>
<tr>
<td>51</td>
<td>Peru</td>
<td>Emil Ruppert</td>
<td>611</td>
</tr>
<tr>
<td>52</td>
<td>Philippines</td>
<td>Rafael A Morales, Philbert E Varona, Hiyasmin H Lapitan and Patricia A Madarang</td>
<td>621</td>
</tr>
<tr>
<td>53</td>
<td>Portugal</td>
<td>Francisco Brito e Abreu and Joana Torres Ereio</td>
<td>630</td>
</tr>
<tr>
<td>54</td>
<td>Romania</td>
<td>Andreea Hulub, Ana-Maria Mihai and Vlad Ambrozie</td>
<td>643</td>
</tr>
<tr>
<td>55</td>
<td>Russia</td>
<td>Scott Senecal, Yulia Solomakhina, Polina Tulupova, Yury Babichev and Alexander Mandzhiev</td>
<td>657</td>
</tr>
<tr>
<td>56</td>
<td>Serbia</td>
<td>Matija Vojnović and Luka Lopići</td>
<td>675</td>
</tr>
<tr>
<td>57</td>
<td>Singapore</td>
<td>Lim Mei and Lee Kee Yeng</td>
<td>685</td>
</tr>
</tbody>
</table>
Chapter 58  SLOVENIA.................................................................694
             David Premelč, Bojan Šporar and Mateja Ščuka

Chapter 59  SOUTH AFRICA.......................................................705
             Ezra Davids and Ashleigh Hale

Chapter 60  SPAIN .................................................................716
             Christian Hoedl and Javier Ruiz-Cámara

Chapter 61  SWITZERLAND.....................................................732
             Lorenzo Olgiati, Martin Weber, Jean Jacques Ah Choon,
             Harun Can and David Mamane

Chapter 62  THAILAND ...........................................................745
             Pakdee Paknara and Pattraporn Poovasathien

Chapter 63  TURKEY.............................................................753
             Emre Akin Sait

Chapter 64  UNITED ARAB EMIRATES.................................762
             DK Singh and Stincy Mary Joseph

Chapter 65  UNITED KINGDOM................................................774
             Mark Zerdin

Chapter 66  UNITED STATES....................................................793
             Richard Hall and Mark Greene

Chapter 67  VENEZUELA.........................................................834
             Guillermo de la Rosa, Juan D Alfonzo, Nelson Borjas E,
             Pedro Durán A and Maritza Quintero M

Chapter 68  VIETNAM............................................................847
             Hikaru Oguchi, Taro Hirosawa, Ha Hoang Loc
Appendix 1  ABOUT THE AUTHORS ....................................................857

Appendix 2  CONTRIBUTING LAW FIRMS’ CONTACT DETAILS.....905
By a number of measures, it could be argued that it has been some time since the outlook for the M&A market looked healthier. The past year has seen a boom in deal making, with many markets seeing post-crisis peaks and some recording all-time highs. Looking behind the headline figures, however, a number of factors suggest deal making may not continue to grow as rapidly as it has done recently.

One key driver affecting global figures is the widely expected rise of US interest rates. Cheap debt has played a significant part in the surge of US deal making in the first few months of 2015, and the prospects of a rate rise may have some dampening effects. However, the most recent indications from the Federal Reserve have suggested that any rise will be gradual and some market participants have pushed back predictions for the first rate rise to December 2015. Meanwhile, eurozone and UK interest rates look likely to remain low for some time further.

The eurozone returned to the headlines in June as the prospect of a Greek exit looked increasingly real. Even assuming Greece remains in the euro (as now seems likely), the crisis has severely damaged the relationship between Greece and its creditors. The brinksmanship exhibited by all parties means that meaningful progress cannot occur except at the conclusion of a crisis: the idea that reform will benefit Greece has been lost and each measure extracted by creditors is couched as a concession. However, while the political debate has become ever more fractious, the market’s response to the crisis has been relatively sanguine. This is largely a result of the fact that the volume of Greek debt is no longer in the market, but in the hands of institutions. But it is also a sign of the general market recovery and expectations that major economies will continue to grow.

Perhaps one of the more interesting emerging trends in the last year is the interplay between growth and productivity. Some commentators have suggested that the recent rise in deal making is a symptom of a climate in which businesses remain reluctant to invest in capital and productivity. Pessimistic about the opportunities for organic growth, companies instead seek to grow profits through cost savings on mergers. It is difficult to generalise about such matters: inevitably, deal drivers will vary from industry to industry, from market to market. However, if synergies have been the principal motivation in
much of the year’s deal making (it certainly has been in a number of large-cap deals) then it may be that the market is a little farther from sustainable growth than some would like to think.

I would like to thank the contributors for their support in producing the ninth edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
August 2015
Chapter 1

EU OVERVIEW

Mark Zerdin

I OVERVIEW OF M&A ACTIVITY

Following a sluggish 2013, Europe experienced a resurgence in M&A activity in 2014. There was a 39 per cent increase in the value of European M&A activity compared with 2014. This increase, which saw total deal value rise to a post-crisis high of €671.5 billion, occurred despite a far less pronounced increase in deal volume. The 6,286 deals completed in 2014 represent an increase of 8 per cent on volume in 2013 and this indicates a disproportionate increase in deals at the high end of the market. The number of deals valued at €2 billion or more increased dramatically and there were 10 mega-deals valued at above US$10 billion in 2014, compared to six in 2013. The average size of such mega-deals also increased to US$20.7 billion from US$13.9 billion in 2013. Perhaps surprisingly, these positive figures do not reflect dramatic improvements in economic conditions in Europe. The Eurozone did experience growth, estimated at 0.8 per cent, however, this figure was expected to be higher. There was also continued political instability in Europe with tensions in Ukraine being of particular prominence. However, despite these factors, there seemed to be renewed confidence in boardrooms globally, which was reflected in Europe.

The improvement in European M&A can be, at least in part, explained by improved access to financing. There was a tightening of credit standards across Europe and in response, interest rates and deposit rates were cut by the European Central Bank in order to encourage lending. These cuts, combined with access to comparatively cheap

1 Mark Zerdin is a partner at Slaughter and May. The author would like to thank Iain McCann for his assistance in preparing this chapter.
3 Mergermarket, M&A Insider: January 2015.
finance in capital markets, meant that financing conditions became suited to increased M&A activity, a stark contrast to 2013. Another driver for a strong 2014 was the high level of inbound M&A activity. Inbound deals were valued at US$320.6 billion, a figure which represents a record high since 2001. A large proportion of this inbound activity came from the United States with 60.7 per cent of inbound activity coming from US-based companies. Following the financial crisis, many European companies took the decision to reorganise structurally or to focus on their core businesses. As a result there are now a large number of European companies with a high asset quality that are attractive to buyers worldwide.

Certain sectors experienced a particularly strong 2014. Technology, media and telecoms (TMT) continued on from a strong 2013 and accounted for the largest share of European activity with total deal value of US$168.2 billion. This was driven partly by plans to establish a single market for telecoms and partly by growing demand for bundled packages of services such as mobile phones and internet. The latter was a factor in the stand-out transaction in this sector in 2014; Altice’s €17 billion acquisition of the French phone company SFR from Vivendi. The deal (which completed in November 2014) results in SFR, which provides mobile and fixed-line telecommunication server merging with Numericable Group, a subsidiary of Altice that provides cable broadband and fibre optics services and in which Altice had acquired a 34.6 per cent stake earlier in 2014 in a deal worth €3.8 billion. Liberty Global continued to have a strong presence in 2014 and its €8 billion acquisition of the 71.5 per cent stake it did not already own in Ziggo was another stand-out deal, demonstrating the trend for consolidation in European TMT. The sector’s strong 2014 looks likely to carry over into a successful 2015. For example, in March Hutchinson Whampoa agreed to buy Telefonica UK (02UK) for €14 billion following an agreement in February that BT Group would acquire EE for €16.7 billion.

The Pharma, Medical and Biotech (PMB) sector also enjoyed a very strong year and was the second most active sector with total deal value of US$114.9 billion, an increase of over 160 per cent from 2013. Actavis’ €50.5 billion acquisition of Allergan took the title as largest PMB deal. Early in 2014, one driver of activity was US firms attempting to benefit from favourable tax regimes in Europe (see, for example, Medtronic’s €33.9 billion acquisition of Covidien, a company based in Ireland). The US has since tightened rules aimed at preventing such tax-inversion deals, which may depress future deal making in this area.

The PMB sector also exhibited a trend in 2014 for creative deal structuring beyond simple acquisitions. For example, in a deal worth €10.5 billion, GSK acquired the global vaccine business of Novartis; divested its oncology business to Novartis; and entered into a consumer health-care joint venture with Novartis. As with TMT, the momentum of

---

5 Mergermarket, ibid.
6 Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates, The Newfound Attractiveness of European M&A.
7 Mergermarket, M&A Insider: January 2015.
2014 seems to have carried into the beginning of 2015 with Mylon’s €32.6 billion offer for Perrigo being of particular note.\textsuperscript{10}

Beyond the TMT and PMB sectors, 2015 has started in the same positive manner as 2014. Total deal value in the first quarter of 2015 was on a par with 2014, which, given the fact 2014 was a record post-crisis year, bodes well for the remainder of 2015. While many of the stand-out deals so far this year have been in the TMT and PMB sectors, the largest deal of 2015 (at the time of writing) was Royal Dutch Shell’s agreement to buy BG Group for €74.5 billion.

Private equity also enjoyed a healthy 2014. Both buyouts and exits increased from 2013 values by 46 per cent to €100.7 billion and by 94.5 per cent to US$165.5 billion respectively.\textsuperscript{11} As in the broader market, there was a marked increase in deal valuations with the average EBITDA multiple jumping to 75 times earnings from 14.4 times earnings in 2013. This can be explained to some extent by the high level of ‘dry powder’ money that private equity houses have available but have not yet spent, which, as of August 2014, stood at US$1.19 trillion; a level above the pre-crisis high. The effect is that there is more cash available to pursue investments, pushing prices up.\textsuperscript{12} While exits have remained high during the start of 2015, buyouts have declined to the lowest level since the third quarter of 2013.\textsuperscript{13}

II RECENT EUROPEAN LAW MEASURES RELATING TO CORPORATE LAW

In 2011, the European Commission opened up for consultation the Green Paper ‘The EU Corporate Governance Framework’. Following the consultation period, the Commission unveiled an action plan for European Company law and corporate governance initiatives, which included the following proposals:

\begin{itemize}
  \item a enhancing transparency by increased disclosure of company board diversity policies and non-financial risks, and improved corporate governance reports;
  \item b engaging shareholders, possibly by the amendment of the Shareholder Rights Directive;
  \item c improving the framework for cross-border operations of EU companies;
  \item d providing guidance on shareholder cooperation in light of concert party concerns; and
  \item e codifying EU company law.
\end{itemize}

As discussed in the 8th Edition of \textit{The Merger and Acquisitions Review}, several of these proposals started to make slow but steady progress into law. In 2014, the Commission made further proposals as part of its company law and Corporate Governance Package.

\textsuperscript{10} Mergermarket, Deal Drivers EMEA: 2014
\textsuperscript{11} Ibid.
\textsuperscript{12} \textit{Financial Times}, Private equity’s goose is ‘overcooked’, 24 August 2014.
\textsuperscript{13} Mergermarket, Quarterly Report: April 2014.
There were also updates to the progress of earlier proposals, which were set out in the 8th Edition of *The Merger and Acquisitions Review*.

i **Common European sales law**

In 2011 the European Commission published a draft Regulation on a Common European Sales Law (CESL) which was relatively limited in scope. It was proposed to apply to cross-border contracts between a business and a consumer that applied to the sale of moveable tangible goods or digital content and related services. In addition, both parties would have to voluntarily agree to the CESL.\(^\text{14}\)

The Commission published its Work Programme for 2015 on 16 December 2014.\(^\text{15}\) In that Work Programme, the Commission stated that it proposes to either withdraw or amend the proposal for CESL. The Commission explained that its reasons for doing so are ‘in order to unleash the potential of e-commerce in the Digital Single Market’. At this stage, therefore, it is very difficult to predict whether the proposal will be adopted largely in the form adopted by the European Parliament as its first-reading position, be amended significantly but retained in some form; or be withdrawn and abandoned.

ii **Shareholder Rights Directive**

The Shareholder Rights Directive (2007/36/EC) was adopted in July 2007 and had a deadline for transposition into national law of 3 August 2009. It was intended to improve and harmonise corporate governance in EU companies traded on regulated markets by enabling shareholders to exercise their voting and information rights across borders.\(^\text{16}\)


iii **Single-Member Companies Directive**

The European Commission proposed a directive relating to single-member private limited liability companies on 9 April 2014. The proposal is that all member states will be required to provide for the existence of a single-member limited liability company under their respective national laws. A societas unius personae (SUP), the proposed name for such a company, will have common features across all member states such as a uniform template for the articles of association.\(^\text{17}\) The European Parliament is scheduled to adopt its first-reading position on the proposal on 15 December 2015.

---

iv Corporate governance reporting

The European Commission has made recommendations in relation to corporate governance reporting. The recommendations aim to improve the quality of corporate governance reporting by companies. In particular the recommendations focus on the requirement to give an explanation for a departure from a provision of the relevant corporate governance code. The recommendations state that a company should:

a explain the manner of and the reasons for a departure;
b provide details for the decision-making process within the company in relation to that departure;
c state when (if the departure is only temporary) the company believes it will comply with the relevant provision; and
d where the company has implemented some other measure, explain that measure and how it achieves good corporate governance.¹⁸

The final text of these recommendations was adopted on 12 April 2014.

III RECENT COMPETITION LAW DEVELOPMENTS

i Treatment of mergers by the European Commission

Between January 2014 and the end of April 2015, the European Commission received 399 merger notifications under the European Merger Regulation (EUMR). In 358 cases, the merger was cleared unconditionally at Phase I. In 17 cases, Phase I clearance was conditional on certain remedies being implemented. Thirteen cases were referred to Phase II for in-depth consideration. Of the nine Phase II decisions made during the period, two were cleared unconditionally and seven were given clearance conditional upon remedies being implemented.

In terms of emerging trends, 91.8 per cent of the 390 Phase I decisions issued in this period were unconditional clearances, just up from the 90.7 per cent in 2013. A further 4.4 per cent were conditional clearances (compared with 4.1 per cent in 2013), and 3.3 per cent were to open Phase II investigations (up from 2.2 per cent in 2013). There have been no prohibitions under the tenure of current Commissioner for Competition, Margrethe Vestager, who took over from Joaquin Almunia in November last year. There were a total of four prohibitions under Mr Almunia’s almost five-year tenure.

ii Simplification of EUMR procedures

On 5 December 2013 the European Commission adopted a legislation package to simplify its merger review procedures. The main changes were to increase the market share thresholds for cases to qualify for the ‘simplified procedure’, and to reduce the

amount of information required for notifying transactions in all cases. The changes took effect from 1 January 2014.

The new legislation package included a revised ‘Notice on a simplified procedure for treatment of certain mergers’. Under this notice, companies can use a shorter notification form for certain categories of mergers that are generally unlikely to raise competition problems. Generally speaking, where the combined market shares of the two merging companies are below a certain threshold, the merger should be treated under the simplified procedure. The Commission raised the market share threshold for mergers between firms competing in the same market from 15 per cent to 20 per cent. For mergers between firms active in upstream and downstream markets, the threshold raised from 25 per cent to 30 per cent. The Commission also created a new category of cases for the simplified treatment where the combined market share of two firms active in the same market is below 50 per cent and the increase in market share resulting from the merger is very small. A new ‘super-simplified notification’ has also been introduced for joint ventures that have no or negligible activity in the EEA. As a result of these changes, the percentage of cases treated under the simplified procedure has increased to approximately 69 per cent (compared to 60 per cent in 2013).

iii Commission consultation on proposed reforms of the EUMR relating to minority shareholdings and the referral regime

On 9 July 2014, the Commission published for consultation a White Paper, ‘Towards more effective EU merger control’, proposing certain reforms of the EU Merger Regulation. The proposed reforms include a mechanism to extend the current merger control regime so as to enable the Commission to review acquisitions of non-controlling minority shareholdings (otherwise known as ‘structural links’), and simplifying the EUMR’s existing pre-notification and post-notification referral regime under which cases can be reallocated between the Commission and the NCAs.

Acquisitions of non-controlling minority shareholdings are not currently subject to review by the European Commission. The Commission may be able to intervene in some cases under Articles 101 and 102 TFEU, but this is rare. Some national merger control regimes in Europe (including the UK and Germany) and elsewhere (including the USA) do extend to non-controlling minority stakes.

The White Paper proposed to enable the Commission to review acquisitions of minority shareholdings that give rise to a ‘competitively significant link’ – minority shareholdings that allow the acquirer to materially influence the commercial behaviour of a competitor (whether through voting rights or the ability to appoint a director), or that grant the acquirer access to commercially sensitive information. The proposals envisaged the voluntary submission of an information notice by the parties to relevant transactions, which would result in the application of suspensory waiting periods pending review. While the submission of an information notice would not be mandatory, the White Paper proposed to empower the Commission to call in non-notified transactions for investigation within a limited period of time following their implementation.

However, in a recent speech, Commissioner Vestager said that, after reviewing responses to the consultation, she concluded that ‘the balance between the concerns that this issue raises and the procedural burden of the proposal in the White Paper may not
be the right one and that the issues need to be examined further’. Commissioner Vestager also noted that it will take time to design an appropriate system and that there ‘is no need to rush’. 19

IV RECENT TAX LAW DEVELOPMENTS

i Base erosion and profit shifting (BEPS)

The hottest topic in international tax at the moment continues to be the BEPS project. Led by the Organisation for Economic Co-operation and Development (OECD), with the support of the G20, this ambitious project aims to reform the rules of international taxation to make them fit for purpose in today’s globalised, digitised, economy. The OECD is ploughing through a comprehensive 15-point action plan to address double non-taxation and profit shifting. By the end of 2015 the OECD intends to have reported on all of the actions and set out recommendations for the participating countries to adopt.

International consensus and cooperation is key to the success of the project. One reason for the compressed timetable is to forestall unilateral action by individual jurisdictions, as the result could well be the reintroduction of double taxation or indeed the creation of new opportunities for profit shifting. Unfortunately, such unilateral steps have already been taken by various impatient jurisdictions.

In the UK we have seen the introduction of the diverted profits tax (DPT), a controversial new tax that is designed to protect the UK tax base and took effect from 1 April 2015.

France and Spain have both implemented new anti-hybrid rules (denying deductibility for interest on related party debt where the interest income is subject to low or no tax) and Germany is expected to introduce further rules in this area shortly. Even the EU has been pre-empting the outcome of BEPS: the European Council has already adopted amendments to the Parent-Subsidiary Directive to prevent its application to hybrid arrangements and to introduce an anti-abuse rule for dividends relying on the Directive.

The latest unilateral announcement is from the US Treasury, which has proposed significant changes to the US model tax treaty intended to deal with ‘double non-taxation’ and ‘stateless income’; they would also allow the US to deny treaty benefits to US groups that redomicile through ‘inversions’ (see below). Unlike the multilateral instrument being developed under BEPS Action 15, the changes to the US model treaty will not automatically amend existing treaties. But the model treaty is the starting point (from the US perspective) for negotiation of any new US tax treaties and it may be that the US will seek to agree equivalent changes to existing US treaties.

ii Tax competition – inversions

Some international tax planning is driven by tax competition between jurisdictions. And in the context of cross-border M&A, the location for the parent company of the

19 Thoughts on merger reform and market definition (Keynote address at Studienvereinigung Kartellrecht Brussels), 12 March 2015.
group that results from the transaction can be an important issue; indeed, switching tax residence can itself be one motivating factor behind a bid.

The competitiveness of the UK tax system has been demonstrated over the past few years by the UK’s being the residence of choice for many US ‘inversions’; that is, transactions under which US groups (many of them in the pharmaceutical sector, which is active for other reasons) acquire non-US businesses and at the same time establish a new parent company resident outside the US. The US Treasury has sought to reduce the attractions of inversions and, as noted above, is now proposing an amendment to the US model tax treaty with the same object in mind. It remains to be seen what impact this will have.

iii Tax competition – incentives
Countries can also provide tax incentives to attract or retain specific kinds of activity. One good example is the ‘patent box’ regime offered in some form by a number of European jurisdictions; the basic idea is that profits from relevant IP should qualify for a lower rate of tax.

Germany has been persistently critical of the ‘transfer pricing approach’ in the UK’s patent box regime, which was introduced in 2013. The regime allows an arm’s length IP return in the UK to qualify for a low tax rate (of effectively 10 per cent by 2017) even if all the associated R&D was undertaken outside the UK. In the OECD’s September 2014 progress report on BEPS Action 5 (countering harmful tax practices), the UK’s approach was criticised and an alternative ‘nexus’ approach was proposed in which a company would benefit from the patent box only to the extent it carries out the R&D activities itself or buys in R&D from outside its group.

In an unusual joint announcement in November 2014 the German and UK governments confirmed that the UK would cut back its patent box regime, to placate German concerns that it encourages patent profits to be shifted to the UK (notably, of course, from Germany). The joint proposal has been endorsed by the OECD and the G20 and work on its implementation is ongoing. The proposed new UK patent box will continue to give some benefit to income from patents which are brought into the UK or that are generated from R&D carried on by an affiliate: broadly, this will qualify for 30 per cent of the normal patent box benefits.

IP can still be put into the UK’s existing patent box regime until June 2016 and any IP which is then in the patent box will continue to be taxed under the old rules for a further five years.

iv State aid
The European Commission is currently investigating several tax rulings (in the light of the ‘Lux leaks’) to determine whether they comply with state aid rules; it has asked all Member States to submit a full list of the rulings they have given. And this exercise is itself subject to scrutiny: a special committee was set up in February 2015 to investigate the tax rulings issue and how the Commission is dealing with state aid investigations and the committee has a wide remit, allowing it to consider tax rulings as far back as 1 January 1991.
In certain cases it may be appropriate to seek specific or additional contractual protection against the risk that a target company or group could be forced to make payment to a tax authority following the conclusion of a state aid enquiry.

v  Financial transactions tax (FTT)

When it became clear that there was no unanimous support for an EU-wide FTT, a Council Decision of 22 January 2013 permitted the use of the enhanced cooperation procedure by the 11 Member States that wished to participate. These Member States set a deadline of 18 June 2015 to approve and adopt the FTT in order for it to take effect from 1 January 2016, but it is still unclear what the FTT will cover and what will be excluded – assuming a consensus can be reached at all.

If the result is a tax that is capable of having extraterritorial effect, thus affecting non-participating Member States too, the UK is likely to bring a further action before the CJEU on the legality of the tax. (The UK’s previous legal action was dismissed as premature because the substance of the FTT had not been agreed at that time.)

V  RECENT PENSION AND EMPLOYMENT LAW DEVELOPMENTS

i  Collective Redundancies Directive: trigger for consultation

The Collective Redundancies Directive (CRD) requires employers who are contemplating collective redundancies to undertake consultation with affected employees. Article 1(1) (a) of the CRD provides for two alternative triggers for the consultation obligations, depending on the number of potential redundancies. These may be calculated as:

'(i) either, over a period of 30 days:
• at least 10 in establishments normally employing more than 20 and less than 100 workers,
• at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers,
• at least 30 in establishments normally employing 300 workers or more,
(ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question.'

The UK has chosen to implement part (ii) in section 188(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992), which applies ‘where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less’. This makes the meaning of ‘establishment’ crucial; if it is defined narrowly, the employer is less likely to trigger the obligation to collectively consult on proposed redundancies.

This issue has recently been considered by the ECJ in USDAW and Wilson v. WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd and Secretary of State for Business,
Innovation and Skills (commonly known as the Woolworths case). The facts involved the insolvency of retail chains Woolworths and Ethel Austin, resulting in the closure of hundreds of stores across the UK. The trade union USDAW lodged claims that there had been a failure to comply with the consultation obligations under Section 188(1) TULR(C)A 1992. The Tribunal treated each store as a separate ‘establishment’, meaning that the obligation to consult collectively about the closure of the stores (and the consequent redundancies) had not been triggered in respect of the smaller stores with fewer than 20 employees. The employees of those stores were therefore not entitled to receive a protective award, even though the Tribunal found that there had been a failure to comply with the collective consultation obligations. The result was that over 3,000 employees of smaller stores did not receive a protective award.

A dispute then ensued about the proper meaning of ‘establishment’ for these purposes, and whether Section 188(1) TULR(C)A 1992 was compliant with the CRD. The EAT controversially determined that the words ‘at one establishment’ should be read as deleted from Section 188(1), in order to comply with the CRD. This meant that the trigger should be applied across the employer’s whole business, and it significantly increased the scope of the collective redundancy consultation regime.

The ECJ has now confirmed that this was not the correct approach. It upheld the concept of considering redundancies at each ‘establishment’ separately, rather than across the employer’s whole undertaking. The ECJ was clear that the aim of the CRD is not solely to protect employees (and ensure as many of them as possible benefit from the right to collective consultation on redundancies). It is also to ensure comparable protection for workers’ rights in the different Member States, and to harmonise the costs that such protective rules entail for EU undertakings. The ECJ also pointed out that the CRD is concerned with the socio-economic effects that collective redundancies may have in a local context, rather than across all an employer’s locations.

The case will now return to the Court of Appeal to determine whether each store was in fact a separate ‘establishment’. The ECJ expressly left this issue open, although it suggested that classing each store as a separate establishment was a permissible approach to take. That said, the Advocate General’s Opinion was that several stores located within one shopping centre could potentially be regarded as forming a single establishment.

The ECJ’s decision is good news for UK employers (for further details of the UK implications of the decision, see Part VII of Chapter 67). Most other EU Member States have chosen to adopt Part (i) of the trigger in Article 1(1)(a) of the CRD, and for employers in those Member States, the decision will have less immediate significance. However, more broadly, the ECJ’s judgment represents a continued shift in approach, which started with its judgment in a TUPE context in Alemo-Herron and ors v. Parkwood Leisure Ltd. It shows that the ECJ is more willing to weigh the interests of employers in the balance, rather than solely seeking to protect the interests of employees. This is an encouraging sign for employers across Europe.

22 [2013] EUECJ C-426/11.
MARK ZERDIN
Slaughter and May
Mark Zerdin has been a partner at Slaughter and May since 2007. He advises on a wide range of corporate and commercial transactions for both corporate and private equity clients. His principal areas of work are public takeovers, private acquisitions and disposals, private equity investment, initial and secondary public equity offerings and joint ventures.

SLAUGHTER AND MAY
One Bunhill Row
London
EC1Y 8YY
United Kingdom
Tel: +44 20 7600 1200
Fax: +44 20 7090 5000
mark.zerdin@slaughterandmay.com
www.slaughterandmay.com