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The International Comparative Legal Guide to:

Mergers and Acquisitions 2015

9th Edition

A practical cross-border insight into mergers and acquisitions

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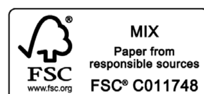

General Chapters:

1	**2014 – The Market Strikes Back** – Michael Hatchard & Scott Hopkins, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	1
2	**M&A Trends and Outlook for 2015** – Scott V. Simpson & Lorenzo Corte, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	5
3	**M&A in Africa** – Gavin Davies & Hubert Segain, Herbert Smith Freehills LLP	8
4	**Activist-Strategic Buyer Tag-Teams: A New Hostile Takeover Template?** – Adam O. Emmerich & Trevor S. Norwitz, Wachtell, Lipton, Rosen & Katz	14

Country Question and Answer Chapters:

5	**Albania**	Gjika & Associates Attorneys at Law: Gjergji Gjika & Evis Jani	20
6	**Argentina**	Severgnini, Robiola, Grinberg & Tombeur: Carlos María Tombeur & Matías Grinberg	27
7	**Austria**	Schoenherr: Christian Herbst & Sascha Hödl	33
8	**Belarus**	Sysouev, Bondar, Khrapoutski: Alexander Bondar & Elena Selivanova	43
9	**Belgium**	Astrea: Steven De Schrijver & Jeroen Mues	50
10	**Bermuda**	MJM Limited: Peter Martin & Brian Holdipp	59
11	**Bolivia**	Guevara & Gutierrez – Servicios Legales: Jorge Luis Inchauste	66
12	**Brazil**	Demarest Advogados: Gabriel Ricardo Kuznietz & Thiago Giantomassi	71
13	**BVI**	Maples and Calder: Richard May and Matthew Gilbert	80
14	**Bulgaria**	Schoenherr: Ilko Stoyanov & Tsvetan Krumov	86
15	**Canada**	Bennett Jones LLP: Jeffrey Kerbel & David Spencer	94
16	**Cayman Islands**	Maples and Calder: Nick Evans and Suzanne Correy	100
17	**China**	Grandall Law Firm: Will Fung & Yu Xie	106
18	**Colombia**	Peña Mancero Abogados: Gabriela Mancero	111
19	**Croatia**	Bardek, Lisac, Mušec, Skoko in cooperation with CMS Reich-Rohrwig Hainz: Hrvoje Bardek	118
20	**Cyprus**	A.G. EROTOCRITOU LLC: Alexis Erotocritou	125
21	**Czech Republic**	Schoenherr: Martin Kubánek & Vladimír Čížek	132
22	**Denmark**	Bech-Bruun: Steen Jensen & Regina M. Andersen	142
23	**Egypt**	El-Borai & Partners: Dr. Ahmed El Borai & Dr. Ramy El Borai	148
24	**Finland**	Dittmar & Indrenius: Anders Carlberg & Jan Ollila	153
25	**France**	Scemla Loizon Veverka & de Fontmichel (SLVF): Fabrice Veverka & Alexandre Piette	160
26	**Germany**	SZA Schilling, Zutt & Anschütz: Dr. Marc Löbbe & Dr. Stephan Harbarth	166
27	**Ghana**	Bentsi-Enchill, Letsa & Ankomah: Seth Asante & Frank Nimako Akowuah	173
28	**Hong Kong**	King & Wood Mallesons: Joshua Cole	181
29	**Hungary**	Lendvai Partners: András Lendvai & Dr. Gergely Horváth	187
30	**Iceland**	BBA: Baldvin Björn Haraldsson & Höskuldur Eiríksson	193
31	**Indonesia**	Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Herry N. Kurniawan	199
32	**Ireland**	Dillon Eustace: Lorcan Tiernan & Adrian Benson	206
33	**Japan**	Nishimura & Asahi: Masakazu Iwakura & Tomohiro Takagi	213
34	**Kazakhstan**	SIGNUM Law Firm: Liza Zhumakhmetova & Gaukhar Kudaibergenova	222
35	**Lithuania**	Dominas & Partners: Šarūnas Basijokas & Karolis Racevičius	227
36	**Luxembourg**	Collin Maréchal (CM Law): Raphael Collin & Flavien Carbone	233
37	**Macedonia**	Debarliev, Dameski and Kelesoska Attorneys at Law: Emilija Kelesoska Sholjakovska & Elena Nikodinovska	241
38	**Mexico**	Nader, Hayaux & Goebel: Yves Hayaux-du-Tilly Laborde & Eduardo Villanueva Ortíz	248
39	**Montenegro**	Moravčević Vojnović i Partneri in cooperation with Schoenherr: Slaven Moravčević & Miloš Laković	254
40	**Morocco**	Hajji & Associés: Amin Hajji & Houda Boudlali	261

Continued Overleaf

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Country Question and Answer Chapters:

41	**Netherlands**	Houthoff Buruma: Alexander J. Kaarls & Peter B.J. Werdmuller	266
42	**Nigeria**	Udo Udoma & Belo-Osagie: Yinka Edu & Ekundayo Onajobi	274
43	**Norway**	Aabø-Evensen & Co Advokatfirma: Ole Kristian Aabø-Evensen & Harald Blaauw	281
44	**Poland**	WBW Weremczuk Bobel & Partners Attorneys at Law: Lukasz Bobel & Nastazja Lisek	296
45	**Portugal**	Albuquerque & Associados: António Mendonça Raimundo	303
46	**Puerto Rico**	Ferraiuoli LLC: Fernando J. Rovira-Rullán & Yarot T. Lafontaine-Torres	309
47	**Romania**	Pachiu & Associates: Ioana Iovanesc & Alexandru Lefter	315
48	**Russia**	Pen & Paper: Stanislav Danilov	323
49	**Serbia**	Moravčević Vojnović i Partneri in cooperation with Schoenherr: Matija Vojnović & Luka Lopičić	329
50	**Slovakia**	Schoenherr: Stanislav Kovár & Monika Kormošová	336
51	**Slovenia**	Schoenherr: Vid Kobe & Marko Prušnik	343
52	**Spain**	Roca Junyent: Natàlia Martí Picó & Xavier Costa Arnau	352
53	**Sweden**	Advokatfirman Vinge KB: Erik Sjöman & Christian Lindhé	362
54	**Switzerland**	Bär & Karrer: Dr. Mariel Hoch & Dr. Dieter Dubs	368
55	**Turkey**	Türkoğlu & Çelepçi in cooperation with Schoenherr: Levent Çelepçi & Burcu Özdamar	376
56	**Ukraine**	CMS Reich-Rohrwig Hainz: Maria Orlyk & Kateryna Soroka	382
57	**United Kingdom**	Slaughter and May: William Underhill	387
58	**USA**	Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Thomas H. Kennedy	394
59	**Vietnam**	Gide Loyrette Nouel A.A.R.P.I.: Nasir PKM Abdul & Long Huynh	411

EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 55 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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2014 – The Market Strikes Back

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Global Cycle

2014 was a year in which the M&A recovery began to solidify and gather pace, with global deal values approaching 2006 levels. According to Dealogic and Thomson Reuters, global M&A deal value was up 24 per cent on a year-on-year basis. Whilst globally a cyclical pattern was becoming apparent [see Appendix 1], regionally the picture was more mixed.

The uptick in deal activity globally exposed varying rates of regional recovery and highlighted different local issues and themes. In the U.S., domestic M&A was strong as was outbound deal activity, which fuelled debate about the competitiveness of the U.S. corporate tax system and the need for reform. The Asia Pacific region (excluding Japan) had its highest ever year for M&A, with deals worth nearly US$600 billion, up 43 per cent on 2013. Low borrowing rates and an uptick in private equity disposals helped enliven activity. There were no surprises that China was the most active player in the region, particularly its state-owned enterprises, accounting for around 40 per cent of the deals in the region in terms of both volume and value. In contrast, Japan-related M&A activity saw the second lowest annual total since Thomson Reuters' records began in the mid-1980s. The 379 announced deals amounted to just $29.3 billion, 33.5 per cent down on 2013. The average deal size was also a historic low, at only $134.4 million.

Within Europe transactions generally remained depressed, but in the UK both the volume and value of deals were up substantially. According to Mergermarket, in 2014 UK bidder or target M&As rose to 2,021 deals, from 1,686 deals in 2013: a growth of 20 per cent. The total value of UK transactions also rose, from £144 billion in 2013 to £250 billion in 2014: a rise of 74 per cent. Here, the major theme of the year – the return of the blockbuster deal – was apparent, with attempted bids by Pfizer for AstraZeneca and Abbvie for Shire. Either deal, had it been completed, would have been the largest European acquisition by a US company. That the figures were so strong in spite of the fact that so many of these large transactions did not complete only underscores the level of activity.

Importantly, deal activity in the UK generated much-anticipated market tests of structural changes which had been largely driven for regulatory or political reasons since the financial crisis. The political drive toward improved shareholder engagement converged with shareholder activism. Statements made by Pfizer during the course of its possible offer for AstraZeneca compelled the Takeover Panel to re-examine changes it had made to the Takeover Code regarding statements of intent following Kraft's bid for Cadbury. These, and various other developments, are a natural consequence of increased market activity and demonstrate how the UK market remains dynamic and responsive to broader themes.

Shareholder Activism

The significance of activist shareholders globally cannot be denied. The Financial Times reported last year that $100 billion was invested by hedge funds that identified themselves as activists. Such funds continue to attract high inflows from investors attracted by their record of outsized returns, and there was a marked uptick in their activity in the UK in 2014.

Essar Energy, WM Morrison, Bwin. Party and Burberry are just a few of the examples of campaigns on the UK side of the Atlantic in 2014. But it is not the nominal level of activity that is the real story here – it is the congruence of activism and existing drivers in the UK towards greater shareholder engagement with listed companies. The UK Corporate Governance Code, Stewardship Code and the Kay Review of UK Equity Markets and Long-Term Decision Making (the Kay Review) have created a friendly climate for shareholder engagement. Though traditionally UK shareholders have preferred to approach boards privately to voice their concerns, activists targeting UK companies have now adopted more public and aggressive tactics, mirroring the experience of their American counterparts. These activists are able to launch their campaigns using the tools provided by a supportive UK legislative and regulatory framework.

The Kay Review, spawned by Kraft's bid for Cadbury, sought to assess the effect of the UK equity markets' mechanisms of control and accountability on company performance, and ensure that the regulatory climate works for the benefit of companies and their shareholders. Professor Kay's recommendations (published in July 2012) advocate an industry-led reform of the culture of short-termism that pervaded UK equity investment. His report has resulted in changes to the UK Stewardship Code (in September 2012) and renewed government commitment to regulatory reforms that facilitate relations between companies and their shareholders. Key to that industry-led reform is the Collective Engagement Working Group Established in April 2013. This aims to encourage collaboration between investors in their interaction with companies, through the establishment of an Investor Forum and the issuance of practical recommendations informed by dialogue with key actors. The establishment and operation of the Investor Forum is one to watch in 2015.

Changes made to the UK Takeover Code, again as a result of the Cadbury acquisition, are also driving greater shareholder activism in the context of M&A activity. Historically the Code has reflected a position that shareholders should determine whether a company should be sold and not its directors. For this reason, target directors are prohibited from taking action that would frustrate an offer

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without shareholder approval. Following Kraft's bid for Cadbury, the Code was changed to set a 28-day bid deadline following the public identification of a potential bidder (except where the company is undergoing a formal sales process). Targets are now therefore more able to 'just say no' and refuse to engage, knowing that once the 28-day period ends, the bidder will have to either announce a hostile offer or walk away and stay away for six months. This means that bidders are increasingly reliant on target shareholders to engage with their board to force them to engage. The general tendency of institutions to support target management and avoid public statements may begin to break down if boards do 'just say no' and shareholders are thereby deprived of the opportunity to consider bids they might have accepted.

The impact of activism on M&A in the U.S. has been significant. Activism is now viewed as an integral part of the corporate landscape. Boards of public companies are attuned to the desire of institutional shareholders and other investors for corporate focus on building shareholder value often taking proactive steps to achieve increased value even before or without the public appearance of an activist shareholder. Moreover, the dismantling of corporate defences as a result of institutional shareholder pressure and the positive attitudes of such investors to favourable bids has helped propel such activity. Last year we saw an activist shareholder team up with a corporate acquirer in an unsolicited bid. Pershing Square joined with Valeant in its unsolicited takeover attempt of Allergan which was subsequently sold to a white knight. Whether this new type of collaboration will become more commonplace in the U.S., or elsewhere, remains to be seen.

UK Commitments and Statement of Intent

The relationship between the UK Takeover Code, the market and EU takeover regulation is well reflected in the issue over statements of intention. The EU Takeovers Directive was adopted in 2006. After 14 years of discussions, the UK Takeover Code was exported, through the Directive, to Europe, which at the time had little or no takeover regulation in all but three of its Member States. One of the significant 'flowbacks' from Europe into the UK Takeover Code was Rule 24.2, which requires a bidder to set out, among other things, its intentions with respect to the future business of the target, the continued employment of employees and management, as well as the likely repercussions on employment and locations of the target company's business. This rule reflects continental European perspective on the importance of other stakeholder groups (primarily, employees, customers and suppliers), as opposed to the UK perspective in the primacy of target shareholders, as owners of the company, in determining whether the company should be sold.

Then came Kraft's bid for Cadbury and Kraft's ill-fated statement that it thought it would be able to keep open a factory that Cadbury had slated for closure. The Panel determined that the statement should not have been made as it did not meet the Code standard for statements of intention, which involves a two-part test. First, there must be an objective basis for the intention. Kraft did not have one as it was hostile when it made the statement, so could not know whether it could keep the factory open. Second, there must be a subjective basis. Kraft had to actually believe at the time that it could keep the plant open.

Politicians and the public were outraged when it emerged the intention would not be fulfilled. After the deal closed, Kraft executives attended Select Committee hearings in Parliament to explain. Politicians demanded changes to the Takeover Code and they got what they wanted. Major changes ensued, and among these, statements on the intention made in compliance with Rule 24.2 of the Code were made 'binding' in that the bidder would be required to adhere to such statements for a period of 12 months or another stated time frame. In addition, bidders would be required to confirm the absence of any intentions affecting employees in target locations if none were stated. This represented a paradigm-shift in the role of the Takeover Panel. For over 40 years it had regulated deals, to ensure that an orderly framework for takeovers operated. Now it would regulate the conduct for every bidder in the period following completion to ensure compliance with its statements of intention.

Then, in 2014, Pfizer announced it was interested in acquiring AstraZeneca. Pfizer made public statements of its intentions regarding employment levels of the combined business in the UK on the basis that they would be binding under the Code. Executives from both Pfizer and AstraZeneca were requested to appear before Select Committees in Parliament, this time before an offer had even been made. Notwithstanding the changes that had been made to the Code following Kraft/Cadbury, politicians appeared unwilling to accept that the statements made by Pfizer were binding under the Code.

All of this led to the Panel proposing, and then adopting in January 2015, changes to the Code which have the effect of distinguishing statements of intention made in compliance with Rule 24.2 and other, voluntary 'post-offer undertakings', which commit a party to a particular course of action for a specified period of time after an offer closes. Under the new regime, if a post-offer undertaking is given, then: (i) non-compliance will only be excused if a qualification or condition set out in the undertaking applies; (ii) regular reports must be submitted to the Panel to demonstrate compliance with the undertaking; and (iii) the Panel may require appointment of a supervisor to monitor compliance with the undertaking. Contrastingly, if a statement of intention is made and not adhered to, the Panel will wish to know whether the statement was made on the appropriate objective and subjective bases, and normally will require a public statement describing the course of action taken or not taken, explaining the reasons for the change of course.

So what began life as a European input into the Takeover Code found resonance with the UK public, but when tested in an active market, the rules were found wanting. They were adjusted to make them operate effectively but then had to be dialled back to provide the balance of protection and practicality necessary for an orderly framework. No doubt future transactions will pressure test the current accommodation; time will tell whether the current set-up achieves the appropriate balance.

Pools of Investment Capital

Companies remain flush with cash while stock price appreciation has reinforced the appetite to deploy stock as transaction consideration. The phenomenon of stock price increases on the back of transaction announcements, magnified where significant financial and other synergies are identified, has increased interest in stock as a component of consideration and the ability to structure funding based on equity issuance. According to Thomson Reuters data for the first half of 2014, nearly 70 per cent of announcements of US acquisitions worth $1 billion or more were followed by gains in the stock prices of the buyers. That is an above-average outcome on an historic review.

Resistance to foreign issuer stock as deal consideration has diminished, in part as natural market mechanisms have developed that help in managing flow back. We have not seen much by way of cash underpinning to provide an alternative to stock consideration for over two decades. The emergence of pools of investment capital, managed outside the traditional financial services community, that are able to make long term commitments to subscribe stock at prices

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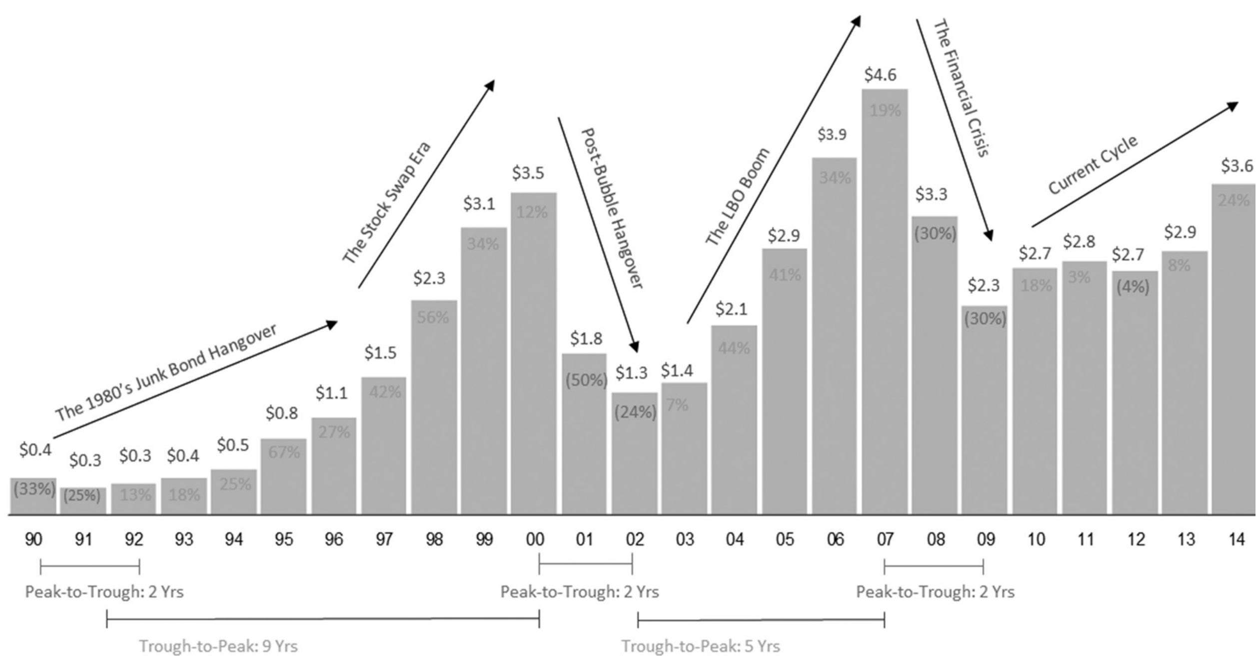
reflecting anticipated synergy and performance benefits, offers the capability to structure cash alternative elections, further encouraging the use of stock as consideration, with an election for shareholders who are not able or willing to hold the stock to receive cash.

Credit Where Credit is Due

It isn't possible to disconnect the performance of the equity markets and the level of activity in the M&A market – historically they have risen and fallen together. Highly valued stock makes good acquisition currency and conversely the possibility of acquisitions supports equity prices. The extent to which the annual compound growth rate and the equity and the M&A markets will correlate in the future is open to debate (currently M&A is lagging, on the basis of historic correlations) – in particular, externalities such as quantitative easing and political and monetary risk (e.g. Russia and Greece) may distort the trend – but it does seem that the trend in M&A activity will continue in an upward, if bumpy, trajectory.

Although debt remains cheap, the market (and not only activist shareholders) is more critical when assessing whether spending on an acquisition is an efficient deployment of capital. Conversely, the equity market has shown itself willing to give credit for strategic and synergistic combinations. Whereas typically the trader's strategy has been to go long target and short bidder, thus depressing the bidder's stock price and supporting that of the target, 2014 was notable by the number of deals in which the bidder's stock price reacted positively to the announcement of a transaction. Apparently some deals do make sense.

Appendix 1



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Michael Hatchard is practice leader of the English law facility at Skadden. The UK practice areas mirror those of Skadden's international practice generally, focusing on cross-border mergers and acquisitions, acquisition finance, corporate finance, project development, taxation, arbitration and litigation. Mr. Hatchard has extensive experience in mergers, strategic investments and divestments including transactions governed by the UK or other European takeover regimes. His practice has also included corporate governance, financial restructurings, refinancings and reorganisations. Mr. Hatchard has been identified as a leading rainmaker in European M&A and is ranked in the top performing levels of European M&A league tables. Matters in which he has been involved include representing: the financial advisors to the management buy-in team of The AA in the US$2.4 billion acquisition of The AA via an accelerated initial public offering on the London Stock Exchange; Pfizer in its proposed US$115 billion acquisition of Astra-Zeneca; Colfax Corporation in its approximately US$2.4 billion offer for Charter International plc; News Corporation in its US$11.5 billion proposed acquisition of the remaining stake it did not already own in British Sky Broadcasting Group plc; NDS Group Ltd. and its owners, News Corporation and Permira, in its approximately US$5 billion sale to Cisco Systems, Inc.; and News Corporation in partnership with Permira Advisers Ltd in their US$3.7 billion going-private acquisition of NDS Group plc.

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