ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2016

10th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co Advokatfirma
Abenry & Company, Advocates
Ali Budiardjo, Nugroho, Reksodiputro
Allens
Astrea
Bär & Karrer AG
BBA
Bech-Bruun
Concern Dialog Law Firm
CMS Reich-Rohrwig Hainz
Cravath, Swaine & Moore LLP
Debarliev, Dameski & Kelesoska Attorneys at Law
Demarest Advogados
Dillon Eustace
Dittmar & Indrenius
E & G Economides LLC
ENGORU, MUTEBI ADVOCATES
Ferraiuoli LLC
Gjika & Associates
Guevara & Gutiérrez S.C. – Servicios Legales
Guzmán Ariza
Herbert Smith Freehills LLP
Houthoff Buruma
Kosta Legal
Lendvai Partners
Macchi di Cellere Gangemi
Maples and Calder
Matouk Bassiouny
MJM Limited
Moravčević Vojnović i Partneri in cooperation with Schoenherr
Nader, Hayaux & Goebel
Nishimura & Asahi
Pachiu & Associates
Pen & Paper
Peña Mancero Abogados
Roca Junyent SLP
Rutsaert Legal
Schoenherr
Severgnini, Robiola, Grinberg & Tombeur
SIGNUM Law Firm
Skadden, Arps, Slate, Meagher & Flom LLP
Slaughter and May
Sysouev, Bondar, Khrapoutski
SZA Schilling, Zutt & Anschütz
Türkoğlu & Çelepçi in cooperation with Schoenherr
Udo Udoma & Belo-Osagie
Villey Girard Grolleaud
Wachtell, Lipton, Rosen & Katz
WBW Weremczuk Bobeł & Partners Attorneys at Law
WH Partners
Zhong Lun Law Firm

glg
global legal group

global legal group

Contributing Editor
Michael Hatchard, Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Head of Business Development
Dror Levy

Sales Director
Florjan Osmani

Account Directors
Oliver Smith, Rory Smith

Senior Account Manager
Maria Lopez

Sales Support Manager
Toni Hayward

Sub Editor
Hannah Yip

Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
February 2016

ISBN 978-1-910083-83-3
ISSN 1752-3362

Strategic Partners

ECLA – European Company Lawyers Association

MIX Paper from responsible sources FSC® C011748

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

glg
global legal group

Country Question and Answer Chapters:

EDITORIAL

Welcome to the tenth 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:

Five general chapters. These chapters 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 54 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.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Divergence / A Game of Two Halves?

Michael Hatchard

Scott Hopkins

Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Divergence / A Game of Two Halves?

2015 has been a year dominated by the mega-deal. In the UK, AB InBev's £71.24 billion offer for SAB Miller and Royal Dutch Shell's £47 billion offer for BG Group lead the tables, with other sizeable deals including Ball Corporation's £4.3 billion offer for Rexam and Mitsui Sumitomo's £3.47 billion offer for Amlin. These represent some of the largest UK deals announced in a record year for global deal values. The total global value of announced deals in 2015 has eclipsed the peak reached prior to the banking crisis, primed by huge deals that include Pfizer's offer for Allergan. But very large transactions bring with them a host of complexities and dynamics that impact on how the deals are conceived and how they are executed. Detailed antitrust procedure drives longer offer periods, which in turn compel targets to seek reverse break fees as protection against the risk of exposure to a process that fails. Competition authorities may require divestitures to clear a deal which may themselves amount to very significant M&A transactions. At the same time, the UK Takeover Code, by restricting the use of financing pre-conditions and severely constraining the bidder's ability to extract commitments from the target and invoke closing conditions, exposes a bidder to significant costs and the prospect that it may be unable to extricate itself from a deal that morphs into a different strategic and economic shape due to the requirements of regulators or market movements.

Although the dollar value of deals has climbed, 2015 has not been a record year for deal volumes. The complexity, cost and risk involved in bidding for a major UK-based target appears to have deterred many potential buyers who might otherwise have deployed growing cash reserves in pursuit of suitable acquisitions. Notably, few UK PLCs (or indeed European public companies generally) have found themselves the target of a serious offer from a private equity buyer this year – some of the potential reasons for this negative trend (and ways to navigate the perceived issues for private equity buyers) are discussed below. Major cash inflows have come instead from established corporates making strategic bids. The high cost and risks of a major UK transaction are reflected in the depressed volume of deals announced this year, and indicators of the general health of the market are skewed by the sheer scale of the year's largest deals.

The Takeover Code provides that a bidder should only launch an offer when it has every reason to believe that it can and will continue to be able to implement the offer. This general proposition drives the requirement that the offer be fully financed at the outset, and it transfers the decision of whether a closing condition can be relied upon away from the bidder and the target and places it in the hands of the regulator, the Takeover Panel.

The inability of the bidder and the target to control their own destiny when it comes to invoking conditions creates emphases on certain issues when it comes to navigating antitrust challenges. Competition regulators across the globe have shown an appetite for engaging deeply on the shirt-tails of the bid process, and are unlikely to flinch when requiring divestitures of assets deemed necessary for the health of the particular market. The level of disposals potentially required in major deals gives potential bidders pause for thought; the impact on strategic rationale, including the risk that anticipated synergies may be undermined by divestitures, must be weighed carefully.

A second challenging consequence of the complex antitrust process is the corresponding extension of the offer period (i.e. the period between the offer being announced, only after which the antitrust clearance can be processed, and the transaction finally closing). A bidder faced with a long offer period is likely to incur substantial costs simply from financing the deal. The Takeover Code requires bidders to establish certainty of funding from an offer announcement, which often results in a ring-fencing of the amount required to pay target shareholders for the duration of the offer period, leaving bidders liable for sizeable commitment and ticking fees just to maintain the acquisition facility over that period. A bidder in this situation may seek to convince the Takeover Panel that a financing pre-condition would be appropriate, meaning that acquisition financing would be required to be put in place only once the relevant regulatory pre-conditions have been met. However, the Takeover Panel has proved reluctant to agree on financing pre-conditions, and the target board may nonetheless insist that an offer is fully financed to reduce conditionality – arguably transferring value away from target shareholders, since fees paid to lender banks could have been rolled into the bidder's offer price.

Many bidders faced with high financing costs turn to the capital markets to replace high facility costs with cheaper public debt, although this carries its own costs and strategic considerations. This has been one of the key factors driving record levels of corporate debt issuance this year, with the total exceeding $2 trillion.

A longer offer period also has commercial implications for the bid parties and their competitors. A competitor may benefit from divestitures by snapping up a plant or other assets or access to information about the bid parties made available either through the offer process itself or in related divestiture procedures. Meanwhile, the bid parties inhabit an uneasy state during the offer period, unable to share sensitive commercial information due to competition law, Takeover Code rules and self-interest, but logically committed at some stage to undertake integration planning to ease the transition to a combined group and give the merger the maximum chances of delivering shareholder value. Bid parties will also be exposed to market risks while bound in this unusual relationship, and management teams are understandably stretched in numerous directions and pensive about their individual positions, as the offer period continues.

Reverse break fees (payments by the bidder to the target in specified circumstances, where the deal does not proceed) have also become larger and more prevalent in major deals. This reflects the target's concern that it will disclose significant information, expend significant management time and other resources in working with a bidder to satisfy the regulatory conditions to the offer and also leave itself vulnerable given the inevitable uncertainties, distraction and competitor opportunism that come with prospective change of control. This creates a particularly irksome asymmetry (from the bidder's perspective) because, in contrast to many jurisdictions, except in limited circumstances UK targets are prohibited by the Takeover Code from giving a break fee undertaking to the bidder: in economic terms, the risk of deal failure may be borne entirely by the bidder. In addition, targets may also seek to impose a 'best efforts' or even 'hell or high water' undertakings on the bidder to satisfy certain conditions, further increasing the stress on the bidder.

Downturn in public to private transactions (P2Ps)

One of the most noticeable absentees from the public takeover market in 2015 has been private equity. In 2015, there were only three announced "pure" P2Ps with a deal value over £100 million (and a small number under £100 million) – Lone Star's acquisition of Quintain Estates and Development (£745 million), Terra Firma's acquisition of Infinis Energy (£555 million) and Carlyle's acquisition of The Innovation Group (£499 million).

At the time that the Takeover Code was substantively amended in 2011, there was concern that certain amendments were not conducive to P2Ps. Against the backdrop of very low P2P volume in 2015 and with private equity facing increasing valuation pressure internally whilst at the same time competing against strategics prepared to pay synergy premiums, the British Venture Capital Association is in the process of surveying its members on whether aspects of the Takeover Code are impacting private equity houses' appetite for P2Ps; this is an important exercise as private equity houses actively consider P2P options as a means of acquiring reasonably-priced assets but face significant execution risk.

Some of the traditional areas of concern of private equity players on P2Ps are flagged below, including possible ways to navigate them during a potential rebound of P2Ps in 2016:

- *Prohibition on offer-related arrangements / deal protection*

  Private equity houses will generally only pursue P2Ps on a recommended basis to avoid aborted deal costs and the publicity of a blown deal – bidder exposure is accentuated by the current restrictions on offer-related arrangements (including break fees) to which a target can commit. As private equity houses seek to limit the risk of significant aborted deal costs, we expect them to actively consider taking advantage of the new innovative M&A insurance solution – 'topping insurance' – designed by Aon with Skadden's assistance in 2015, which provides a recommended bidder with cost reimbursement in the event its offer is topped by a competing interloper.

  In 2015, bidders (including private equity bidders) have been pushing for more protection in shareholder irrevocable commitments – for example, we are increasingly seeing provisions regarding management of competing bidders and matching rights (departures from the historic presumption that institutional shareholders are only prepared to give flexible irrevocables or letters of intent).

- *Naming private equity bidders following a leak / "PUSU" regime*

  Given the natural aversion of private equity houses to be used as stalking-horses or associated with a failed bid, it was thought that the addition of a Takeover Code requirement in 2011 to name bidders in a leak announcement would impact the desire of private equity houses to (i) commence P2Ps, or (ii) continue P2P transactions following a leak. In order to counter the latter, private equity houses may seek to agree up-front with targets and the Panel that they can walk away if otherwise named. Stronger measures to combat leak risk is another feature, leading to selectivity and delays in approaches to funding sources to mitigate the risk.

  The impact of a leak announcement that names a bidder in triggering the 28 days "PUSU" deadline creates severe pressure for private equity bidders given the usual expectations around the scope of their due diligence and their financing arrangements. However, given that P2Ps inevitably proceed on a recommended basis, targets are free to agree to extend the PUSU deadline, and the clear trend of 2015 has been for targets to extend the PUSU deadline (often on multiple occasions) where friendly discussions are ongoing.

- *Statements of intention and undertakings*

  Like all bidders, private equity bidders are required to make certain statements regarding their intentions *vis-à-vis* future business (including strategic plans), management and employees – this has been an area of continuous focus for the Takeover Panel in 2015 following amendments to the Takeover Code earlier in the year. This requires an important decision for private equity houses to either: (i) formulate these plans upfront (and therefore disclose them); or (ii) postpone strategic reviews (and therefore bear the risk of not being able to extract fully the assumed savings / value).

- *Management incentivisation*

  Management, and appropriately incentivising management, is key for private equity houses. An obvious tension exists for private equity trying to reconcile their usual deal model of agreeing management equity and incentive arrangements up-front with the Takeover Code requirement to treat all shareholders equally and not enter into special deals with any shareholders without independent shareholder approval. Some private equity houses have preferred to defer incentivisation discussions to the post-completion phase (and having to positively state this – even if the market treats such responses with some scepticism) rather than seek independent shareholder approval for management deals with associated disclosure of the key terms.

If cheap money continues to be available in 2016, a key question will be whether private equity bidders are able to identify targets that can deliver their hurdle rates and whether they are sufficiently incentivised by the prospects to navigate these challenges. If this can be done, both trade buyers and private equity may contribute to increased deal volumes, and 2016 will become the year of competing bids for targets both big and small.

Acknowledgment

The authors would like to acknowledge the assistance of their colleagues Simon Rootsey, European Counsel, and Jake Foster, Associate, in the preparation of this chapter.

Michael Hatchard

Skadden, Arps, Slate,
Meagher & Flom (UK) LLP
40 Bank Street
Canary Wharf
London, E14 5DS
United Kingdom

Tel: +44 20 7519 7020
Email: Michael.Hatchard@skadden.com
URL: www.skadden.com

Michael Hatchard is practice leader of the English law facility at Skadden, with extensive experience in acquisitions, mergers, strategic investments and divestments including transactions governed by the United Kingdom or other European takeover regimes. His practice also includes 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: Fidelity on its take-private Colt Group S.A.; Ball Corporation in its proposed US$8.4 billion acquisition of Rexam plc; 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. In 2015, Mr. Hatchard was shortlisted for the *Financial Times*' 'Most Innovative Individual' award in the *European FT Innovative Lawyers Report*.

Scott Hopkins

Skadden, Arps, Slate,
Meagher & Flom (UK) LLP
40 Bank Street
Canary Wharf
London, E14 5DS
United Kingdom

Tel: +44 20 7519 7187
Email: Scott.Hopkins@skadden.com
URL: www.skadden.com

Scott Hopkins is a partner based in the London office of Skadden, and works principally in mergers and acquisitions and corporate finance. In 2010, Mr. Hopkins returned to Skadden from secondment to the UK Takeover Panel. During his two years at the Panel, Mr. Hopkins regulated more than 200 transactions governed by the UK Takeover Code. Mr. Hopkins is also a member of the firm's Japan practice. His M&A experience includes representing: Mitsui Sumitomo Insurance Co., Ltd. in its proposed US$5.3 billion acquisition of Amlin plc; Nikkei Inc. in its US$1.3 billion acquisition of Financial Times Group Ltd. from Pearson plc; Ball Corporation in its US$8.4 billion acquisition of Rexam plc; XL Group plc in its US$4.2 billion acquisition of Catlin Group Limited; Abbvie in its proposed £32 billion acquisition of Shire; Destination Maternity in its proposed £266 million acquisition of Mothercare; 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 approximately US$11.5 billion proposed acquisition of the remaining stake it did not already own in British Sky Broadcasting Group plc; Bear Stearns & Co., Inc., as financial adviser to The Thomson Corporation, in its US$17.2 billion business combination transaction with Reuters Group PLC through a dual-listed company structure; and Toshiba Corporation in its US$5.4 billion acquisition of Westinghouse Electric Company from British Nuclear Fuels plc.

Skadden
Skadden, Arps, Slate, Meagher & Flom LLP
& Affiliates

Skadden is one of the world's leading law firms, serving clients in every major financial centre with over 1,700 lawyers in 23 locations. Our strategically positioned offices across Europe, the US and Asia allow us proximity to our clients and their operations. For almost 60 years, Skadden has provided a wide array of legal services to the corporate, industrial, financial and governmental communities around the world. We have represented numerous governments, many of the largest banks, including virtually all of the leading investment banks, and the major insurance and financial services companies.

Skadden has one of the leading M&A practices in the world and has developed a first-rank mergers and acquisitions capability in Europe over 20 years with a focus on complex, cross-border transactions.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk