

THE MERGERS &
ACQUISITIONS
REVIEW

FOURTEENTH EDITION

Editor
Mark Zerdin

THE LAWREVIEWS

THE
MERGERS &
ACQUISITIONS
REVIEW

FOURTEENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in January 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Mark Zerdin

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGER

Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITORS

Anne Borthwick, Katrina McKenzie, Martin Roach

SUBEDITOR

Robbie Kelly

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2020 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at December 2020, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-480-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

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

AABØ-EVENSEN & CO ADVOKATFIRMA

ACCORD CHAMBERS

ÆLEX

AFRIDI & ANGELL

AGUILAR CASTILLO LOVE

BAE, KIM & LEE LLC

BAKER MCKENZIE

BIRD & BIRD ATMD LLP

BREDIN PRAT

CLEARY GOTTlieb STEEN & HAMILTON LLP

CMS ROMANIA

CRAVATH, SWAINE & MOORE LLP

DEBEVOISE & PLIMPTON LLP

DRYLLERAKIS & ASSOCIATES

EBL REDSKY

HAMMAD & AL-MEHDAR

HENGELER MUELLER PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

HEUKING KÜHN LÜER WOJTEK

HOGAN LOVELLS

KENNEDY VAN DER LAAN

MCCARTHY TÉTRAULT LLP

MAKES & PARTNERS LAW FIRM

MAPLES GROUP

MARTÍNEZ DE HOZ & RUEDA
MATOUK BASSIOUNY & HENNAWY
NCTM
NIEDERER KRAFT FREY LTD
NISHIMURA & ASAHI
OPPENHEIM LAW FIRM
PINHEIRO NETO ADVOGADOS
SCHINDLER RECHTSANWÄLTE GMBH
SLAUGHTER AND MAY
TMI ASSOCIATES
TORRES, PLAZ & ARAUJO
URÍA MENÉNDEZ
WHITE & CASE LLP
WINSTON & STRAWN LLP

CONTENTS

PREFACE.....	vii
<i>Mark Zerdin</i>	
Chapter 1 EU OVERVIEW.....	1
<i>Mark Zerdin</i>	
Chapter 2 M&A LITIGATION IN THE UNITED STATES.....	11
<i>Roger A Cooper, Mark E McDonald and Pascale Bibi</i>	
Chapter 3 REGULATION OF FINANCIAL INSTITUTIONS M&A IN THE UNITED STATES.....	21
<i>Gregory Lyons, David Portilla and Nicholas Potter</i>	
Chapter 4 UNITED STATES ANTITRUST OVERVIEW.....	28
<i>Richie Falek, Neely Agin, Conor Reidy and Johanna Rae Hudgens</i>	
Chapter 5 ARGENTINA.....	34
<i>Fernando S Zoppi</i>	
Chapter 6 AUSTRIA.....	42
<i>Clemens Philipp Schindler and Martin Abram</i>	
Chapter 7 BANGLADESH.....	53
<i>Suban Khan, Syeda Faiza Hossain and Ahmed Farzad</i>	
Chapter 8 BELGIUM.....	65
<i>Adrien Hanoteau and Thomas Sion</i>	
Chapter 9 BRAZIL.....	76
<i>Fernando Alves Meira and João Vitor de Araujo Crepaldi</i>	

Contents

Chapter 10	CANADA.....	88
	<i>Cameron Belsher, Robert Hansen, Robert Richardson, Debbie Salzberger and Mark McEwan</i>	
Chapter 11	CAYMAN ISLANDS	102
	<i>Suzanne Correy, Daniel Lee and Maximilian Chung</i>	
Chapter 12	CHINA.....	112
	<i>Lu Zhou</i>	
Chapter 13	COLOMBIA.....	127
	<i>Alexandra Montealegre Osorio</i>	
Chapter 14	COSTA RICA.....	140
	<i>John Aguilar Quesada and Marco Solano</i>	
Chapter 15	EGYPT	146
	<i>Omar S Bassiouny and Maha El-Meiby</i>	
Chapter 16	FRANCE.....	157
	<i>Didier Martin</i>	
Chapter 17	GERMANY.....	179
	<i>Heinrich Knepper</i>	
Chapter 18	GREECE.....	196
	<i>Cleomenis G Yannikas, Vassilis S Constantinidis and John M Papadakis</i>	
Chapter 19	HONG KONG	208
	<i>Jason Webber</i>	
Chapter 20	HUNGARY.....	218
	<i>József Bulcsú Fenyvesi and Mihály Barcza</i>	
Chapter 21	ICELAND.....	228
	<i>Hans Henning Hoff</i>	
Chapter 22	INDONESIA.....	235
	<i>Yozua Makes</i>	

Contents

Chapter 23	ITALY	245
	<i>Pietro Zanoni and Eleonora Parrocchetti</i>	
Chapter 24	JAPAN	258
	<i>Masakazu Iwakura, Gyo Toda, Makiko Yamamoto and Junya Horiki</i>	
Chapter 25	MEXICO	269
	<i>Juan Francisco Torres Landa Ruffo, José Antonio Noguera Watty and Pablo Corcuera Bain</i>	
Chapter 26	NETHERLANDS	277
	<i>Fenna van Dijk</i>	
Chapter 27	NIGERIA	287
	<i>Lawrence Fubara Anga and Maranatha Abraham</i>	
Chapter 28	NORWAY	292
	<i>Ole K Aabø-Evensen</i>	
Chapter 29	PORTUGAL	326
	<i>Francisco Brito e Abreu and Joana Torres Ereio</i>	
Chapter 30	QATAR	339
	<i>Michiel Visser and Charbel Abou Charaf</i>	
Chapter 31	ROMANIA	351
	<i>Horea Popescu and Claudia Nagy</i>	
Chapter 32	SAUDI ARABIA	362
	<i>Abdulrahman Hammad and Samy Elsheikh</i>	
Chapter 33	SINGAPORE	370
	<i>Sandra Seah, Marcus Chow and Seow Hui Goh</i>	
Chapter 34	SOUTH KOREA	384
	<i>Ho Kyung Chang, Robert Dooley and Min Sun Kim</i>	
Chapter 35	SPAIN	395
	<i>Christian Hoedl and Miguel Bolivar Tejedo</i>	

Chapter 36	SWITZERLAND	407
	<i>Manuel Werder, Till Spillmann, Thomas Brönnimann, Philippe Weber, Ulysses von Salis, Nicolas Birkhäuser and Elga Reana Tozzi</i>	
Chapter 37	UKRAINE.....	415
	<i>Viacheslav Yakymchuk and Olha Demianiuk</i>	
Chapter 38	UNITED ARAB EMIRATES	432
	<i>Danielle Lobo and Abdus Samad</i>	
Chapter 39	UNITED KINGDOM.....	443
	<i>Mark Zerdin</i>	
Chapter 40	UNITED STATES.....	460
	<i>Richard Hall and Mark I Greene</i>	
Chapter 41	VENEZUELA.....	484
	<i>Guillermo de la Rosa Stolk, Juan Domingo Alfonzo Paradisi, Valmy Diaz Ibarra and Domingo Piscitelli Nevola</i>	
Chapter 42	VIETNAM.....	497
	<i>Taro Hirosawa and Ha Hoang Loc</i>	
Appendix 1	ABOUT THE AUTHORS.....	515
Appendix 2	CONTRIBUTORS' CONTACT DETAILS	545

PREFACE

While the previous edition of *The Mergers & Acquisitions Review* highlighted some causes for optimism for growth in the M&A market, the resilience of companies has been severely tested in 2020 in light of the covid-19 pandemic. Political uncertainty and economic shifts have taken a back seat to the wide-reaching global effects of the pandemic, which are leaving many jurisdictions and sectors in dire straits.

The figures for the first half of 2020 reflect this, as global deal value fell by 53 per cent and deal volume by 32 per cent (compared with the first half of 2019), while megadeals (over US\$10 billion) were down by 48 per cent.¹ The global deal value figure is the lowest half-yearly total since the first half of 2010. The priority for many businesses in the wake of the crisis has been to conserve cash and protect their revenue streams rather than seeking to invest in M&A.

The Americas saw the largest fall in share of global M&A, as its value fell to 33.4 per cent from 52.8 per cent in 2019.² The US is facing not only political uncertainty with the upcoming presidential election and protests across the country, but also a sharp decline in economic productivity due to the lockdown enforced by the covid-19 crisis. M&A deal activity in the US fell to lower levels than the 2008 global financial crisis, with higher value deals particularly affected. Despite the bleak figures for the first half of 2020, though, there are signs that some sectors, notably the technology sector, are rebounding. This is perhaps unsurprising as the future of many industries will depend on technology services.

European M&A saw its lowest quarterly value since 2009 in the second quarter of 2020 of just US\$83.6 billion. There was also a drop of 30.6 per cent in the value of European M&A in the first half of 2020 when compared with the figures in the first half of 2019. With economies beginning to open up towards the end of the first half of 2020, there are early signs as to where the focus of M&A activity will likely be in the aftermath of the crisis. Private equity buyouts have accounted for almost 20 per cent of deals targeting Europe, up from 18.9 per cent in 2019.³ In Europe, as in the Americas, the tech sector is continuing to attract interest and reached a total of US\$27.8 billion across 477 deals in the first half of 2020. By contrast, the consumer sector has been severely impacted and has fallen to its lowest value since 2009.

Looking forward to the remainder of 2020 and beyond, there are some reasons to be optimistic that the global M&A market will show some signs of recovery. There has already

1 Mergermarket, 'Global & Regional M&A Report 1H20'.

2 *ibid.*

3 *ibid.*

been a resurgence since the first half of 2020, with the third quarter seeing 36 deals worth US\$5 billion-plus, making it the busiest third quarter on record.⁴ The challenges caused by restricted international travel, less physical diligence and almost no face-to-face meetings are, for the most part, being surmounted. It is also anticipated that private equity funds will begin to put their dry powder to use as further clarity emerges on the duration and effects of the pandemic.

I would like to thank the contributors for their support in producing the 14th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 42 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin

Slaughter and May

London

December 2020

⁴ *Financial Times*, 'Dealmaking rebound drives busiest summer for M&A on record'.

CAYMAN ISLANDS

Suzanne Correy, Daniel Lee and Maximilian Chung¹

I OVERVIEW OF M&A ACTIVITY

The Cayman Islands is recognised as one of the world's leading global financial services centres. M&A activity is therefore largely driven by global rather than regional or national trends. The aggregate value of global M&A decreased in 2019 both in volume and value compared to 2018. The Bureau van Dijk M&A Review Global, Full Year 2019 Report (2019 Bureau van Dijk M&A Review Global Report) records deals worth US\$4.6 trillion announced during the course of 2019.² Cayman Islands M&A-related activity also decreased by value compared to the previous year. According to the 2019 Bureau van Dijk M&A Review Global Report, announced M&A deals in the Cayman Islands in 2019 had an aggregate value of US\$77.7 billion, below the US\$100 billion announced in 2018 but a little ahead of the US\$76 billion announced in 2017.

The three main types of entity used in the Cayman Islands are the exempted company, the exempted limited partnership and the limited liability company (LLC). New formation activity in the Cayman Islands decreased in 2019 as compared to 2018: 10,444 exempted companies (2018: 13,812), 4,218 exempted limited partnerships (2018: 4,917) and 856 LLCs (2018: 928) were incorporated or registered in the Cayman Islands, with 91,833 exempted companies (2018: 90,268), 28,469 exempted limited partnerships (2018: 26,011) and 2,390 LLCs (2018: 1,710) being active as at 31 December 2019.³

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The key sources of regulation of M&A in the Cayman Islands are the Companies Law (2020 Revision) (Companies Law), the Limited Liability Companies Law (2020 Revision) (LLC Law) and common law.

Part XVI of the Companies Law provides the framework for a more simple and quicker merger process without the need for court approval for companies limited by shares (but not segregated portfolio companies). Under this framework, the Companies Law includes provisions permitting mergers and consolidations between one or more companies, provided that at least one constituent company is incorporated under the Companies Law. The LLC Law also provides for a similar framework for Cayman Islands LLCs.

1 Suzanne Correy and Daniel Lee are partners and Maximilian Chung is an associate at the Maples Group.

2 Total announced deal value, The Bureau van Dijk M&A Review Global, Full Year 2019.

3 Cayman Islands Registrar of Companies, Registrar of Exempted Limited Partnerships and Registrar of Limited Liability Companies annual statistics.

Mergers, amalgamations and reconstructions by way of a scheme of arrangement approved by the requisite majorities of shareholders and creditors, and by an order of the Cayman Islands court under Section 86 or 87 of the Companies Law, are still available for complex mergers (and are mirrored in the LLC Law). The Companies Law provides a limited minority squeeze-out procedure (which, again, is mirrored in the LLC Law).

The Cayman Islands does not have a prescriptive set of legal principles specifically relevant to going private and other acquisition transactions (unlike other jurisdictions such as, for example, Delaware). Instead, broad common law and fiduciary principles will apply.

While there are no specific statutes or government regulations concerning the conduct of M&A transactions, where a target company's securities are listed on the Cayman Islands Stock Exchange (CSX), the CSX Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares (which exists principally to ensure fair and equal treatment of all shareholders) may apply.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Economic substance requirements

The Cayman Islands has recently introduced the International Tax Co-operation (Economic Substance) Law (2020 Revision) (Economic Substance Law) and related regulations and guidance notes. The Economic Substance Law is responsive to the global Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) standards regarding geographically mobile activities.

The Economic Substance Law contains certain reporting and economic substance requirements for relevant entities conducting relevant activities. Such entities are required to report certain information on their relevant activities on an annual basis to the Cayman Islands Tax Information Authority, each such annual report being due no later than 12 months after the last day of the relevant entity's financial year.

All entities having a separate legal personality and registered in the Cayman Islands (including where registered as a foreign entity) are required to make a determination as to whether they are a relevant entity and whether they conduct a relevant activity as each term is defined in the Economic Substance Law, and make notification of their classification and status under the Economic Substance Law with the filing of their annual return to the Cayman Islands Registrar of Companies.

A relevant entity is an entity that is not an entity that is an investment fund, an entity that is a domestic company or an entity that is tax-resident outside of the Cayman Islands.

The terms investment fund and domestic company are defined in the Schedule to the Economic Substance Law, and guidance notes provide some practical guidance as to the meaning of tax-resident.

Entities without separate legal personality (such as certain forms of partnership or trust) are not within the classification of a relevant entity.

The Economic Substance Law applies economic substance requirements to the following categories of geographically mobile relevant activities previously identified by the OECD (and adopted by the European Union):

- a* banking;
- b* insurance;
- c* shipping;

- d* fund management;
- e* financing and leasing;
- f* headquarters;
- g* distribution and service centres;
- h* holding companies; and
- i* intellectual property.

Where a relevant entity conducts a relevant activity, the economic substance test will apply. Where a relevant entity conducts more than one relevant activity, the economic substance test will need to be satisfied in respect of each relevant activity conducted. A relevant entity conducting a relevant activity may satisfy portions of the economic substance test by outsourcing certain activities to another person in the Cayman Islands. A relevant entity that outsources in this manner must be able to monitor and control the carrying out of the outsourced activities.

ii Merger regime and dissenting rights

The statutory merger regime contained in Part XVI of the Companies Law remains a popular tool for facilitating mergers involving Cayman Islands companies. Under this regime, two or more companies may merge, with their property and liabilities vesting in one of them as the surviving company.

Similar to other jurisdictions with equivalent regimes, the Companies Law provides for a right of dissenting shareholders to object to a merger and be paid a payment of the fair value of their shares upon their dissenting to the merger if they follow a statutory procedure. If the dissenting shareholders and the relevant company are unable to agree the price to be paid, the Grand Court of the Cayman Islands is required to determine the fair value of the shares, and a fair rate of interest, if any, to be paid by the company to the dissenter.

The legislation provides that the rights of a dissenting shareholder are not available in certain circumstances; for example:

- a* to dissenters holding shares of any class in respect of which an open market exists on a recognised stock exchange or recognised inter-dealer quotation system at the relevant date; and
- b* where the consideration for such shares to be contributed are shares of the surviving or consolidated company (or depositary receipts in respect thereof), are shares of any other company (or depositary receipts in respect thereof) that is listed on a national securities exchange or designated as a national market system security on a recognised inter-dealer quotation system, or are held of record by more than 2,000 holders.

Although the number of dissent actions in the Cayman Islands has fallen since the peak of 2017, those that have been filed show a marked upward trend both in the number of the dissenters and the value of the dissent. This appears to be driven, at least in part, by arbitrage investors purchasing positions in companies particularly with a view to exercising dissent rights. In certain notable deals, a company's trading price between the announcement of a merger and closing rose sharply as arbitrage investors increased their positions. It remains to be seen what effect this level of dissenter activity will have on deal structures: in some circumstances it has prompted parties to consider alternative structures including schemes of arrangement, being the way in which most takeovers and take-privates were structured

in the Cayman Islands prior to the introduction of the merger regime. Although schemes of arrangement involve court supervision, higher requisite majorities and generally higher deal costs, they do not involve dissenter rights or any other cash out or fair value option.

To the end of the third quarter of 2020, the Grand Court has ruled on only five merger fair value appraisal actions in the Cayman Islands, while there has been one appeal to the Privy Council, in *Shanda Games*. These decisions set out important guidance as to how, if a shareholder has dissented from a statutory merger, the fair value of the dissenter's shares will be determined. The following guidance can be taken from these decisions:

- a The Court is required to value the actual shareholding that a shareholder has to sell. This means that where a shareholder holds a minority interest, the shares should be valued as such.
- b The valuation method or methods to be applied in any given case is a fact-sensitive issue. Typically, the Court will hear expert evidence on the values evidenced by the traded share price (for listed companies), the merger consideration itself, a discounted cash flow (DCF) calculation and market comparables. Where more than one methodology is adopted, the Court will give particular weightings to the different methodologies, as appropriate, in the circumstances. The fair value amount must not be impacted by the limitations and flaws of particular valuation methodologies, rather 'fairly balancing, where appropriate, the competing, reasonably reliable alternative approaches to valuation relied on by the parties' (in *Trina Solar Limited*).
- c If a company's shares are listed on a major stock exchange, this does not mean that a valuation methodology based upon its publicly traded prices will be followed automatically. To determine fair value, the Court must assess the true monetary worth of the dissenters' shares taking into consideration all relevant circumstances and facts, including information that may not have been available to the market.
- d The Court will also look closely at the transaction process that resulted in the merger consideration being agreed, including the role played by the special committee (if any), the preparation of the management projections and whether other parties were given the opportunity to make a competing bid (and if not, whether this matters).
- e Despite dissenters typically pushing hard for sole reliance on a DCF calculation, in most cases, the Court has recognised the benefits of a market approach to valuation and has tended to use a DCF valuation as a cross check only.
- f The date for determining fair value is the date on which shareholders approved the transaction: this is the date on which the offer could be accepted. Importantly, the Court concluded that dissenting shareholders could not take advantage of the cost savings going forward as a result of the merger. The Court's view was that dissenting shareholders should not benefit from any enhancement in the value of their shareholding attributable directly to the transaction from which they have dissented.

The merger legislation in the Cayman Islands is very similar to that in Delaware, and the legislative drafters have borrowed from the Delaware statute. As such, the Court will often look to Delaware appraisal precedents as a guide. However, in *Shanda*, the Privy Council confirmed that the similarities between the Delaware appraisal remedy and Section 238 of the Companies Law do not mean that the Delaware jurisprudence on appraisal actions has been adopted wholesale into the Cayman Islands. In that case (and in an earlier case, *Integra*), the Grand Court had followed the Delaware and Canadian authority on minority discount, holding that in a fair value appraisal dissenters' shares were to be valued as their pro rata share

of the value of the whole company, not as a block of shares offered for sale, such that there was no applicable 'minority discount'. The Court of Appeal took a different view, and followed what it considered to be the public policy reflected in English case law, to the effect that 'it was not unfair to offer a minority shareholder the value of what he possesses, i.e., a minority shareholding. The element of control is not one which ought to have been taken into account as an additional item of value in the offer of these shares.'

The Privy Council upheld the Court of Appeal's decision and specifically noted that while the jurisprudence of Delaware is of great value in this field, the Cayman Islands legislature can only have intended that Cayman Islands courts should interpret this phrase against the backdrop of its own jurisprudence. In other forced sale legislation in England and the Cayman Islands, a minority discount would be applied. There was nothing in the Cayman Islands merger legislation that suggested that a different regime had been adopted for mergers.

Whether a minority discount will be applied in any given case is, of course, fact-sensitive and depends on the valuation methodology adopted. For example, in *Re Qunar Cayman Islands Limited* the Grand Court, while following the approach of the Court of Appeal in *Shanda*, considered that the applicable majority discount was nil given that Qunar's securities were highly liquid and there was no risk of minority disadvantage regarding management control or payment of dividends.

As a separate point, and another example of where the Cayman Islands jurisprudence is different from Delaware's, a series of decisions culminating in a Court of Appeal ruling in *Qunar* affirmed that the Court has jurisdiction to make an interim payment order after a dissent petition is filed but before trial, meaning that a dissenting shareholder may be entitled to receive an interim payment effectively at the outset of the proceedings. In many cases the amount of the interim payment has equalled the merger consideration on the basis that a company has admitted that this reflects fair value (albeit this does not necessarily follow). However, *eHi Car Services Limited* confirmed that where a company has not conceded that the merger consideration represents fair value in making an interim payment order, the Court must identify the irreducible minimum amount that could safely be assumed the dissenters would receive in any event without venturing into disputed issues of fact or valuation: this may well be less than the merger price depending on the circumstances of a case.

iii Global transparency

Already recognised by the OECD, the International Monetary Fund (IMF) and other international bodies for its transparency and standards being consistent with those of other major developed countries, the Cayman Islands is acknowledged as a first-class jurisdiction for conducting international business. The government has also now implemented a number of legislative developments, including:

- a* the introduction of an economic substance regime responsive to global OECD BEPS standards regarding geographically mobile activities in line with rapidly implemented regimes on a level playing field basis by all OECD-compliant 'no or only nominal tax' jurisdictions;
- b* the introduction of a beneficial ownership register regime, discussed further below;
- c* the repeal of the Confidential Relationships (Preservation) Law and its replacement by the Confidential Information Disclosure Law, which offers more understanding and definition with regard to the mechanisms in place for sharing confidential information with the appropriate authorities;

- d* the introduction of data protection legislation in September 2019;
- e* the abolishment of bearer shares;
- f* the implementation in the Cayman Islands of the model legislation published pursuant to the OECD's BEPS Action 13 Report (Transfer Pricing Documentation and Country-by-Country Reporting); and
- g* the introduction of legislation relating to the regulation of collective investment vehicles and limited investor mutual funds.

The government has also indicated a willingness to commence discussions with those jurisdictions that are participating in the G5 initiative (for the exchange of beneficial ownership information with law enforcement agencies) on entering into bilateral agreements with the Cayman Islands, similar to the beneficial ownership regime now in place with the United Kingdom.

These measures demonstrate the Cayman Islands' continued efforts to comply with and promote transparency through close collaboration and compliance with the relevant global regulatory bodies, tax authorities and law enforcement agencies in line with international standards, while simultaneously respecting the legitimate right to privacy of law-abiding clients.

The Cayman Islands has agreements to share tax information with authorities in more than 100 other countries, including the United States under the Foreign Account Tax Compliance Act, and is in the early adopter group for the Common Reporting Standard, the OECD's global tax information exchange standard.

The Cayman Islands beneficial ownership register regime (BOR regime) has been in place since mid-2017. Exemptions mean that certain Cayman Islands companies and LLCs are not in scope for the purposes of the BOR regime, although if not in scope they must make a filing to that effect with their corporate services provider in the Cayman Islands. If a company or LLC is in scope, it must take reasonable steps to identify its beneficial owners and certain intermediate holding companies, and to maintain a beneficial ownership register at its registered office in the Cayman Islands with a licensed and regulated corporate service provider.

This register must generally record details of the individuals who ultimately own or control more than 25 per cent of the equity interests, voting rights or rights to appoint or remove a majority of a company's directors, or LLC's managers, together with details of certain intermediate holding companies through which such interests are held.

Corporate service providers must facilitate access to information extracted from the register through a centralised IT platform operated by a competent authority designated by the government. The information is not publicly accessible or searchable. Only Cayman Islands and UK authorities will have rights to request information, and then only as individual (and not automatic) requests. The information on the beneficial ownership register can already be requested by UK authorities under existing information exchange gateways, so in essence the new regime merely seeks to streamline the process to provide for quicker and more discrete search accessibility.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The vast majority of M&A activity involving Cayman Islands entities concerns foreign businesses and investors as a result of the offshore nature of the jurisdiction. These businesses and investors are based in a broad range of international jurisdictions.

A large number of M&A deals are still originating from the United States, while European deals continue to feature and Asian-related transactions continue to grow.

As at the end of 2016 (the last year that information is available), according to statistics published by the United States Securities Exchange Commission, there were 700 foreign companies (i.e., non-United States issuers) listed on the New York Stock Exchange and NASDAQ, of which 103 were Cayman Islands issuers, far ahead of any other traditional offshore jurisdiction. Only Canada had more companies traded on the main US public markets than the Cayman Islands.

The Asian growth can be evidenced by the popularity of the Cayman Islands exempted company as a listing vehicle in Asia: as at the end of 2019, 1,084 of the 2,071 companies listed on the Main Board of the Hong Kong Stock Exchange were Cayman Islands exempted companies.⁴

The Cayman Islands continues to be an attractive jurisdiction for the structuring of offshore transactions for a number of reasons, including:

- a* the speed with which vehicles can be established (usually within one business day), and without the need for any prior governmental approvals;
- b* the laws of the Cayman Islands are substantially based upon English common law and a number of key English statutes. This gives Cayman Islands law and the legal system a common origin with those of many of the jurisdictions of its users, including the United States;
- c* the Cayman Islands has a modern and flexible statutory regime for companies, limited partnerships and LLCs;
- d* as described further below, the Cayman Islands has no direct taxes of any kind;
- e* the lack of exchange control restrictions or regulations; and
- f* there is no requirement that a Cayman Islands entity should have any local directors or officers. Nor is there any requirement for local service providers (except that for funds regulated under the Mutual Funds Law (2020 Revision), where there is a requirement for their audited accounts to be signed off by a local firm of auditors). The appointment of local service providers, however, may assist entities with obligations under the Economic Substance Law to discharge those obligations.

As discussed above, the Cayman Islands is recognised by the OECD, the IMF and other international bodies for its transparency and standards consistent with those of other major developed countries.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

As discussed above, the merger regime of Part XVI of the Companies Law continues to be a popular tool for facilitating mergers involving Cayman Islands companies, and we continue to see listed companies being the subject of take-private transactions led by private equity and

⁴ HKEx Fact Book 2018.

management in addition to traditional strategic corporate acquisitions. The merger regime has also proven to be a popular mechanism for business combinations for special purchase acquisition vehicles.

Examples of deals of note announced or closed during 2019 that involved Cayman Islands vehicles include:

- a* the US\$2.7 billion acquisition of Cision Ltd, a leading global provider of software and services to public relations and marketing communications professionals, by funds managed by Platinum Equity;
- b* the US\$6.7 billion acquisition of a majority ownership of insurance claims and technology services firm Sedgwick by funds managed by The Carlyle Group Global; and
- c* the acquisition of Virgin Galactic, a vertically integrated aerospace company, by special purpose acquisition company Social Capital Hedosophia, resulting in a market capitalisation of US\$2.3 billion.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

As a leading jurisdiction for the establishment of private equity funds, it is perhaps unsurprising that a significant number of Cayman Islands M&A deals are also financed by private equity. Traditional sources also continue to be a key provider of finance for M&A involving Cayman Island entities, including in respect of a number of the deals listed above.

To an extent during 2019, but particularly during 2020, the formation of special purpose acquisition companies (SPACs), generally listed on either the New York Stock Exchange or NASDAQ, have re-emerged as a popular fundraising tool, with many traditional private equity managers establishing SPACs for the first time. After Delaware, the Cayman Islands is the most popular choice of domicile for SPACs, and we anticipate a significant number of these vehicles to drive additional Cayman Islands-related M&A in the coming years.

VII EMPLOYMENT LAW

A range of legislation and licensing requirements apply to companies seeking to carry on local business in the Cayman Islands and employ local personnel. In view of the nature of offshore business, the vast majority of Cayman Islands entities do not have employees in the Cayman Islands, and these requirements are therefore often not relevant to Cayman Islands M&A deals.

Employment standards in the Cayman Islands are currently governed by the Labour Law (2011 Revision) (Labour Law), the Health Insurance Law (2018 Revision) and ancillary regulations (Health Law), the National Pensions Law (2012 Revision) and ancillary regulations (Pensions Law), and the Workmen's Compensation Law (1996 Revision) and ancillary regulations. These laws establish minimum employment standards, but do not preclude an employer from setting conditions that are above the minimum.

The Labour Law includes provisions dealing with probation periods, employment termination, vacation leave, public holiday pay, sick leave, compassionate leave, maternity leave, severance pay, unfair dismissal and health, safety and welfare at work.

The Health Law requires that health insurance cover is provided to employees, and to their uninsured spouses and children. The Pensions Law requires an employer to provide a pension plan or to make a contribution to a pension plan through an approved pension

provider for every employee who is between 18 and 60 years old (an employer is not required to provide a pension plan for non-Caymanian employees who have been working for a continuous period of nine months or less).

VIII TAX LAW

i Cayman Islands taxation

The Cayman Islands has no direct taxes of any kind: no income, corporation, capital gains, dividends, royalties, payroll, withholding taxes or death duties. Under the terms of the relevant legislation, it is possible for all types of Cayman Islands vehicles – companies, unit trusts, limited partnerships and LLCs – to register with and apply to the government for a written undertaking that they will not be subject to various descriptions of direct taxation, for a minimum period, which in the case of a company is usually 20 years, and in the case of a unit trust, limited partnership and an LLC, 50 years.

Stamp duty may be payable in connection with the documentation executed in or thereafter brought within the jurisdiction of the Cayman Islands (perhaps for the purposes of enforcement). In most cases, this duty is of a relatively *de minimis* fixed amount except in limited circumstances, such as when security is being granted over property in the Cayman Islands.

ii Automatic exchange of information legislation

The Cayman Islands has signed an intergovernmental agreement to improve international tax compliance and the exchange of information with the United States (US IGA). The Cayman Islands has also signed, with more than 100 other countries, a multilateral competent authority agreement to implement the OECD Standard for Automatic Exchange of Financial Account Information – Common Reporting Standard (CRS).

Cayman Islands regulations have been issued to give effect to the US IGA and CRS. All Cayman Islands financial institutions are required to comply with the registration, due diligence and reporting requirements of these regulations, except to the extent that they are able to rely on certain limited exemptions, in which case, only the registration requirement would apply under CRS.

iii Country-by-country reporting

As part of the Cayman Islands' ongoing commitment to international tax transparency, the Cayman Islands has adopted country-by-country reporting rules pursuant to the OECD's BEPS Action 13 Report. Pursuant to this initiative, qualifying multinational enterprises (MNEs) are required to report annually to the Cayman Islands Tax Information Authority certain information as set out in the model legislation for each tax jurisdiction in which an MNE operates.

IX COMPETITION LAW

There is no specific anticompetition legislation that is relevant to Cayman Islands M&A. Given the offshore nature of Cayman Islands M&A, competition law issues are usually a question of the relevant onshore jurisdictions where the underlying businesses that are the subject of the M&A are based.

X OUTLOOK

In this chapter, we have focused on a review of 2019 M&A. Market conditions have, of course, changed rapidly and unexpectedly in 2020. However, in a recent Deloitte survey,⁵ 61 per cent of corporate executives and private equity investors expected M&A activity to return to pre-covid-19 levels within the next 12 months. That confidence, together with the dry powder held by a number of Cayman Islands-based special purpose acquisition companies being established during 2020, leads us to conclude that the coming year is likely to be a busy period for Cayman Islands M&A.

The existing legal framework of the Cayman Islands, together with the continued focus on being at the forefront of global compliance developments, and the proven ability of public and private stakeholders to work together to enhance local legal and regulatory regimes when required, will continue to ensure that the Cayman Islands remains the offshore jurisdiction of choice for global M&A transactions in future years.

5 Deloitte M&A Trends Survey 2020.

ABOUT THE AUTHORS

SUZANNE CORREY

Maples Group

Suzanne Correy is a partner in the Cayman Islands corporate and Latin American teams at Maples and Calders, the Maples Group's law firm. She has extensive experience in all aspects of corporate work, including joint ventures, IPOs and M&A, and also advises on a wide variety of structured finance, capital markets and investment fund transactions. Suzanne maintains a strong focus on public company work, advising clients through all stages of their growth from startup to IPO and beyond.

Through her Latin American practice, Suzanne advises clients both originating from and investing into the region. She has also advised telecommunications clients and hardware companies on Cayman Islands licensing and regulatory issues.

DANIEL LEE

Maples Group

Daniel Lee is a partner in the Cayman Islands corporate team at Maples and Calders, the Maples Group's law firm. His experience includes advising on a broad range of corporate and commercial work, including private equity, IPOs, M&A and joint ventures. He also advises on all types of investment funds, and has extensive experience in finance and capital markets.

MAXIMILIAN CHUNG

Maples Group

Maximilian Chung is an associate in the Cayman Islands corporate team at Maples and Calder, the Maples Group's law firm. He advises a wide range of clients, from startups to publicly listed companies, at all stages of their business cycle. Max's experience involves all aspects of corporate and commercial work, including advising on cross-border mergers and acquisitions, primary and secondary capital market raisings, corporate restructures, corporate governance and regulatory matters.

MAPLES GROUP

Ugland House

South Church Street

PO Box 309

Grand Cayman KY1-1104

Cayman Islands

Tel: +1 345 949 8066

Fax: +1 345 949 8080

suzanne.correy@maples.com

daniel.lee@maples.com

maximilian.chung@maples.com

www.maples.com

an LBR business

ISBN 978-1-83862-480-4