



# Global M&A Handbook

THE LEADING CROSS-BORDER FIRM

# Global M&A Handbook

2015

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## Editor's Note

We are pleased to present the first edition of Baker & McKenzie's Global M&A Handbook. Drawing on our unparalleled experience in all aspects of cross-border M&A, the handbook is intended primarily to provide decision makers with an overview of some of the key legal considerations associated with private M&A transactions in 42 jurisdictions across the globe.

This handbook is a product of numerous contributions from various practitioners and associated firm practitioners around the world, to all of whom we extend our profound thanks for their time, care and expertise.

Stuart Hopper, General Editor  
Jennifer Ferguson, Gillian Haggart, Editors  
March 2015

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Baker & McKenzie defined the global law firm in the 20th century, and we are redefining it to meet the challenges of the global economy in the 21st. We are the No. 1 cross-border M&A firm. Over the last 10 years we have completed more cross-border M&A transactions than any other law firm. In addition, it is the tenth year in a row the firm has been ranked No. 1 for deals involving emerging markets. With nearly 1,300 M&A lawyers in 77 offices globally, we have one of the largest and most active M&A practices in the world.

# Argentina

## 1.1 Overview

The federal government of Argentina is divided into provinces. All powers not delegated to the federal government by the National Constitution remain in the provinces. The capital of Argentina (the Autonomous City of Buenos Aires) and each province has its own public registry of commerce. The registries are headed by administrative authorities who gather all information relating to entities incorporated locally as well dealing with foreign entity registrations and formalities.

## 1.2 General Legal Framework

The Commercial Companies Law No. 19,550, as amended (CCL), regulates relevant issues for foreign entities in Argentina. It also governs which corporate vehicle can be used for a company to register in the jurisdiction, as well as requirements for the transfer of shares or quotas, etc. The local public registries of commerce in each local jurisdiction complement the process.

The legal framework differs significantly depending on whether the acquisition transaction is structured as a merger, purchase of assets or purchase of shares/quotas.

## 1.3 Corporate Entities

Argentine law provides for several types of legal entity (i.e. general partnership, limited partnership, etc.). The most common forms used to set up a branch or a subsidiary are the stock corporation or limited liability company, which are subject to different corporate requirements.

### 1.3.1 Stock corporations

A stock corporation must have at least two shareholders (although later this year, from 1 August 2015, the Public Registry of Commerce (PRC) will enable stock corporations to be incorporated with one sole shareholder). Those entities are referred to here as *Sociedad Anónima Unipersonal* (SAU). The sole shareholder of an SAU cannot itself be an SAU.

Shareholders may be either individuals and/or legal entities, whether Argentine or foreign. Should the shareholders be foreign companies, those foreign companies would have to be previously registered with the PRC to be able to act as foreign shareholders of a local stock corporation. Shareholders are, in principle, not liable for corporate debts and obligations beyond the amount of their capital subscription, unless certain specific circumstances related to fraud arise.

The PRC requires corporations to have a corporate capital in accordance with their corporate purpose, but the minimum corporate capital is ARS100,000. The criteria used to determine the amount of corporate capital depends on each case. Generally, the corporate capital will be divided into nominative and non-endorsable shares, all of which must have the same 'face' value and (depending on the provisions of the by-laws) can grant their owners between one and five votes per share. Shares may be ordinary or preferred. All shares must be duly subscribed for upon incorporation or on any increase of corporate capital. Upon incorporation, shareholders must pay-in all contributions in kind and at least 25% of their contributions in cash. The remaining cash contributions (i.e. 75%) must be paid within two years of the incorporation date, unless the by-laws provide for a shorter term.

Currently, the PRC requests corporations to define their corporate purpose as narrowly as possible: so, a corporate purpose with broad scope may be challenged by the PRC.

It is mandatory for the board of directors to meet at least every three months to discuss the ordinary course of the business of the corporation. The quorum needed to validly adopt resolutions may not be lower than the absolute majority of the members of the board. The board of directors may be composed of one or more directors who may or may not be shareholders. Directors may be either Argentine or foreign nationals, but the absolute majority of the members of the board of directors must

be actual Argentine residents<sup>1</sup> and all of them, whether or not domiciled in Argentina, must establish a special domicile in Argentina for the purposes of receiving legal notifications relating to the company.

Additionally, all regular directors must lodge an insurance bond with an Argentine insurance company in the amount of ARS10,000 as a guarantee to third parties in case of unlawful performance.

### 1.3.2 Limited liability companies

A limited liability company must have at least two quotaholders and a maximum of 50. Quotaholders are not, in principle, liable for corporate debts and obligations beyond the amount of their capital subscription, unless certain circumstances related to fraud are met.

The managers of limited liability companies have the same rights and obligations as those of the directors of stock corporations and may or may not be quotaholders.

Unlike stock corporations, it is not mandatory for a limited liability company to have a minimum corporate capital but the level of capital must be deemed reasonable to conduct the company's business activities. Capital is represented by quotas, all of which must have the same face value and must grant their quotaholders one vote per quota. All quotas must be subscribed upon incorporation and the quotaholders must pay-in all contributions in kind and at least 25% of their cash contributions. The remaining 75% of the cash contributions must be paid-in within two years of the date of incorporation.

The main difference between quotas and shares is that quotas are not represented in certificates. All quotas must be subscribed for upon incorporation. Quotas are freely transferred by assignment unless the by-laws provide otherwise and such transfers must be registered with the PRC in order to be enforceable against third parties.

## 2. Acquisition Methods

The legal framework differs significantly depending on whether the transaction is structured as a merger, a purchase of assets or a purchase of shares/quotas.

### 2.1 Acquisition of Shares

If a foreign company is willing to acquire shares or quotas in Argentine commercial companies, Argentine regulations state that the foreign legal entity must be registered with the PRC.

### 2.2 Acquisition of Assets

The purchase of all or a substantial part of the assets of a company should be regarded as a transfer of a going concern (*transferencia de fondo de comercio*) or 'bulk transfer'. Transfers of going concerns are specifically governed by Law No. 11,867. The application of the provisions of this law is not mandatory, but can be voluntarily opted into, where the buyer wants to be assured that the liabilities of the seller transferred to the buyer does not exceed those declared to the buyer by the seller. The main purpose of this legal procedure is to protect the buyer from the seller's hidden and contingent liabilities and to protect the seller's creditors in cases where the seller is transferring a substantial part of its assets. Nevertheless, labour and some tax liabilities and contingencies will pass to the buyer, which will be jointly and severally liable with the seller for these obligations. The purchase price may not be lower than those reported liabilities (Law No. 11,867).

### 2.3 Mergers

Under Argentine law, two or more companies can merge either by consolidation or absorption.

In both cases, the company surviving the merger acquires, as universal successor, all the assets and liabilities of the companies and the companies are dissolved without being wound up. As a result, the

<sup>1</sup> The majority of the regular members of the board must mandatorily be Argentine residents. e.g. in a board of three members, two must be Argentine residents.



shareholders of the companies become shareholders of the surviving company in accordance with the share exchange mechanism agreed upon between the merging companies.

The main difference between the two merger procedures lies in the nature of the surviving company. While under the merger–consolidation, the merging companies are succeeded by a newly formed company, in the merger–absorption, an existing company is absorbed by the surviving company.

### 3. Negotiation, Signing and Closing

#### 3.1 Pre-Contractual Obligations

In Argentina the abusive exercise of rights is unlawful, being contrary to the purpose of the law and/or in excess of limits imposed by good faith, customs or morals. In principle, interrupting ongoing negotiations prior to execution of the transaction agreements will not normally give rise to such pre-contractual liability under that principle, as long as the interruption is not arbitrary or abrupt. But the sudden or abrupt interruption of ongoing negotiations could fall foul of this rule, if it could be considered as abusive and in violation of the good faith negotiations and confidence of the other party. In such a case, the party which ceased negotiations could be exposed to liability to recompense the other party for loss time and for the costs of any preparatory work undertaken in preparation for the (abandoned) deal.

#### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Argentinian purchase agreements. Baker & McKenzie's fully interactive comparison of these provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

##### Purchase Price

1.	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. All types seen, including working capital adjustment, cash-free debt-free and NAV adjustments.
2.	Is there a collar on the adjustment?	Collars not common.
3.	Who prepares completion balance sheet?	Usually prepared by target company.
4.	Is the balance sheet audited?	Not necessarily.
5.	Is an earn-out common?	Yes.
6.	Is a deposit common?	Uncommon.
7.	Is an escrow common?	Common.
8.	Is a break fee common?	Uncommon.

##### Conditions Precedent

9.	Express Material Adverse Event (MAE) completion condition?	Common.
10.	Is the MAE general or specific?	Both seen.
11.	Quantification of MAE?	Common.

**Covenants, Access**

- |     |   |  |
|-----|---|--|
| 12. | Is a non-compete common? Do you use waterfall/blue pencil provisions?                             | Common. Waterfall/blue pencil provisions uncommon. |
| 13. | Non-solicit (of employees)?   | Common.  |
| 14. | Non-solicit (of customers)?   | Common.  |
| 15. | Broad access to books, records, management between sign and close?                                | Common.  |
| 16. | Is it common to update warranty disclosure or notify of possible breach? What is the consequence? | Uncommon.  |
| 17. | Is a separate tax covenant/indemnity or tax deed common?  | Uncommon.  |

**Representations and Warranties**

- |     |   |   |
|-----|---|---|
| 18. | Materiality in representations – how is it quantified (e.g. by a \$ amount)?      | Materiality generally quantified by a specific amount.  |
| 19. | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers increasingly common. Often limited to the actual knowledge and due enquiry of a specified list of senior management personnel. |
| 20. | Is a warranty that there is no materially misleading/omitted information common?  | Common.   |
| 21. | Is disclosure of data room common?  | Uncommon.   |

**Repetition of Representations and Warranties**

- |     |   |  |
|-----|---|--|
| 22. | Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?  | Repetition at completion is common. Bring-down certificates not very common. |
| 23. | What is the applicable standard? True in all material respects? Material Adverse Effect standard?   | True and correct.  |
| 24. | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon.  |

**Limitations on Liability**

- |     |  |                          |
|-----|--|--------------------------|
| 25. | What is the common cap amount (as a percentage of purchase price)? | Commonly less than 100%. |
|-----|--|--------------------------|

26.	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Entire agreement.
27.	What are the common exceptions to the cap?	Key warranties often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.
28.	Is a deductible or basket common?	Both common.
29.	Is a <i>de minimis</i> common?	Common.
30.	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–36 months common. Tax, labour and environmental liabilities usually tied to expiry of statute of limitations time-period.
31.	Is warranty insurance common?	Uncommon.

### Reliance

32.	Do financiers seek to rely on purchaser's due diligence reports?	Uncommon.
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### Set-offs against Claims

33.	Is a set off against claims for tax benefits common?	Uncommon.
34.	Insurance proceeds?	Uncommon.
35.	Third party recoveries?	Uncommon.

### Damages, Knowledge

36.	Obligation to mitigate damages?	Uncommon.
37.	Exclusion of consequential damages?	Common.
38.	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Uncommon.

### Dispute Resolution

39.	Does local law allow for a choice of governing law? What is the common governing law?	Yes. New York law.
40.	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. ICC.

### Stamp Duty

41.	If stamp duty is payable, is it normally shared?	Yes. Stamp tax is between 1% and 2% of the economic value of the transaction depending on the local jurisdiction.
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### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares

Shares can be freely transferred. While a company's by-laws may limit share transfers, they cannot prohibit transfer altogether.

#### 3.3.2 Transfers of assets

Assets can be freely transferred, although certain assets which need to be registered may be the subject of special conditions of transfer or registration (e.g. vehicles, real estate, trade marks, etc.). To transfer assets in a going concern, seller and buyer may choose whether or not to follow the procedures established by the 'bulk transfer law' (No. 11,867).

### 3.4 Formalities for Transferring Title to Shares or Assets

#### 3.4.1 Transfers of title to shares

The transfer of shares must be notified by the seller to the board of directors of the target company, which must register it in the target company's share registry book (and stock certificates cancelled and new certificates issued). The transfer of shares of a stock corporation does not need to be registered with the PRC. On the contrary, the transfer of quotas of a limited liability company must be registered with the PRC. In some cases, the transfer of quotas of a limited liability company will also imply an amendment to the by-laws and such amendment will need to be registered with the PRC.

#### 3.4.2 Transfers of title to assets

A transfer of a going concern must be evidenced through a written agreement between the buyer and the seller, which must then be registered with the PRC. The seller should deliver to the buyer a signed statement declaring:

- any debts (including loans)
- the name and domicile of each creditor
- the value of each debt, and
- the maturity date of each debt, if applicable.

A notice of the transfer of a going concern must be published in the *Official Gazette* and in a local newspaper in each jurisdiction where the seller operates. For 10 days after publication of this public notice, creditors may oppose the transfer, requesting that an amount equivalent to their credits be withheld from the purchase price. The opposition of a creditor requires the buyer to deposit the amount of the creditor's claim in a bank account at an official bank for 20 days, during which term the opposing creditors have the right to pursue a court garnishment order of the amounts deposited. Once the 20 day period has elapsed, if the deposited amount is not attached, it can be withdrawn and the parties may execute the final purchase document and close the transaction.

Under the procedure for the transfer of a going concern, tax management considerations arise: i.e. certain tax obligations must be complied with regarding the information to be disclosed to the local tax authorities (within a specific period of time), in order to limit the tax liability of the buyer.

### 3.5 Formalities for Mergers

The steps involved in a merger procedure (whether by consolidation or by absorption) may be summarised as follows:

- execution of a preliminary merger commitment by the directors of the companies involved, which must include the following information:
  - grounds and purposes of the merger

- merger balance sheet, prepared as from a date not more than 3 months prior to the preliminary merger commitment
- exchange rate agreed upon by the merging companies
- proposed by-laws of the new company or proposed amendments to the by-law provisions of the surviving company, and
- any restrictions on the management of the business of the merging companies and warranties to enable the continuance of business activities until the merger is registered with the PRC.
- approval of the preliminary merger commitment and the merger balance sheet by the shareholders of the companies involved
- publication of relevant information regarding the merger in the *Official Gazette* and in a newspaper of a relatively wide circulation for the purposes of providing third parties (i.e. creditors) the opportunity to oppose the merger until their credits are secured or satisfied
- after the 15-day term to receive creditors' objections and within the term of 20 additional days (to levy attachments – i.e. via an embargo ordered by a judge – if an objection has been filed within the 15-day period for objections), the final merger agreement must be executed providing for:
  - the corporate resolutions approving the merger
  - a list of shareholders and creditors who have objected to the merger
  - the special balance sheets and the consolidation balance sheets of the merging companies, and
  - any other agreements specified in the preliminary merger agreement, and
- registration of the merger with the PRC, at which point the merger becomes enforceable *vis-à-vis* third parties.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

A merger control regime was established for the first time by the Defence of Competition Law No. 25,156 in 1999 (DCL), and following an amendment to that Law by Law 26,993 in 2014, the Secretary of Commerce, advised by the Competition Defence Commission, is the enforcement regulator for the merger control regime. ('Commission' here for these purposes means both administrative agencies (i.e. the Secretary of Commerce and the Competition Defence Commission)).

The DCL was amended in 2001 by Executive Order 396/01 (EO 396), introducing major changes to the merger control system. The main purpose of the changes was to substantially reduce the number of transactions needing Competition Commission approval.

### 4.2 Merger Control Overview

Any merger that may have as its purpose or effect the limitation or distortion of competition in a manner that is detrimental to national economic interest is unlawful (s. 7, DCL).

#### 4.2.1 Thresholds

Any merger that meets the definitions of 'merger' taking into account the size of transaction and its territorial reach must be notified to the Commission.

The following transactions are within the scope of the DCL (and therefore must be notified):

- mergers of previously independent entities
- transfers of going concerns
- the acquisition of ownership rights in shares or equity interests, debts, or of any other rights in shares or equity interests that may entitle the holder to
  - convert them into shares or equity participation, or
  - have the control, or a significant influence, over the internal decision-making process of the entity issuing them, and
- any other agreement or transaction that may:
  - legally or as a matter of fact, transfer to any entity or economic group the assets of another entity, or
  - grant to that entity or economic group the control of, or a significant influence on, the adoption of ordinary or extraordinary business decisions of the entity.

Any of the above transactions must be reported to the authorities when the cumulative annual turnover in Argentina of the parties involved exceeds ARS200 million (s. 8 of the DCL, as amended by EO 396). For the purposes of this calculation, annual turnover means annual turnover in Argentina of the acquiring group plus the acquired company/ies.

‘Cumulative business volume’ means the total gross ordinary sales of goods and services of the newly combined entity during its last fiscal year, less any discount on sales, VAT and any other taxes directly related to business volume.

Cumulative business volume is calculated taking into consideration sales directly of the acquired entity itself, plus sales of any entity in which the acquiring group has significant interests.

One issue relates to turnover: for the purposes of calculating cumulative business volume, the turnover of the acquiring group of companies plus the turnover of the target company/ies must be taken into account, explicitly excluding the seller’s turnover, and some detailed rules apply on how to determine whether a transaction must be notified or is exempt from the notification requirement.

In general, an exemption from notification applies if:

- the buyer has more than 50% of the equity in the target (generally with some exceptions)
- the value of the deal (transaction itself or assets involved) is not greater than ARS20 million
- as long as the acquiring group has not entered into any other transaction in the previous 12 or 36 months, in the same market exceeding the total amount of ARS20 million or ARS60 million respectively (i.e. the tribunal has to look at both periods: if acquisitions in the past 12 months do not add up to ARS20 million but acquisitions in the past 36 months exceed ARS60 million, then the transaction must be filed).

This is a vexed and highly technical area which the Commission has tried to clarify, with mixed success. If trying to decide whether to notify the Commission of a proposed merger or not the facts must be analysed (and referred to the Commission) on a case-by-case basis.

#### 4.2.2 Penalties for non-compliance with notification requirements

Fines of up to ARS1 million apply per day until a required notification is made.

### 4.2.3 Time-limits for notification

Notification to the Commission must be filed:

- before the merger is executed
- within one week of the date the agreement is executed
- within one week of the date of publication of the purchase offer, or
- within one week of the date of acquisition of a controlling participation, whichever occurs first.

Regulators have clarified when the one-week filing period starts running. In the case of the acquisition of shares in a company, one week starts to run as of the date when the acquisition of the ownership rights over the shares becomes effective, according to the share purchase agreement (i.e. when the transfer of the shares is notified to the target company under Art. 215, CCL). This means in practice, that notification may take place up to one week from closing the transaction.

In a consultative opinion, the Commission has established that in some circumstances transactions which are subject to mandatory filing may be closed before approval but that they will not have any effect between the parties or *vis-à-vis* third parties until approval is granted. From a practical point of view, it is difficult to determine the effects of this interpretation in the case of a transaction which has already been closed and authorisation for which is later denied. However, in controversial cases, it is advisable not to close before approval is obtained to avoid these uncertainties.

It takes one year or more to obtain clearance of a transaction from the Commission due to the many questions made by the Commission that interrupt the 45-day approval period set out in the DCL.

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Argentinian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation	
Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
Timetable	
In practice, what is the timetable for clearance (in Phase I and Phase II review)?	Approximately 2 years in simple transactions with no anti-competitive effects (i.e. transactions that do not go beyond the F1 Form). Complex transactions may take several years.

## 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

There are no specific provisions on gun-jumping in Argentine law. This is regulated by the general principles of the Competition Law on exchange of information between competitors as applicable to the specific situation.

## 4.4 Anti-Bribery, Corruption and Money Laundering

The Argentine Criminal Code penalises any government official, member of the judiciary, prosecutor, etc. whether temporarily or permanently in the public function and any individual who engages in corrupt practices with government officials. The Argentine Criminal Code does not contain corporate liability provisions for acts of corruption (although it does provide for corporate liability for other crimes, e.g. money laundering).

Argentine federal anti-corruption laws are also contained in:

- the Public Employment Law (Law No. 25,164)
- the Ethics on Public Office Law (Law No. 25,188), and
- the Code of Ethics of Public Office (Decree No. 41/99).

These laws apply only to public officials.

The enactment of anti-corruption legislation is in general reserved to the National Congress. However, some provinces have passed Provincial Codes or Laws on Ethics which apply to provincial public employees.

Argentina has not passed an FCPA-type law as in other countries (e.g. Brazil).

#### 4.4.1 Argentine Criminal Code: Key Provisions

The Argentine Criminal Code provisions regarding anti-bribery and corruption punish the giving and accepting of benefits regardless of whether the public officers involved actually perform or abstain from performing their duties as a result of the benefit. Facilitation payments are prohibited. Further:

- *Bribery*: The Criminal Code prohibits government officials from receiving or accepting money or other benefits/gifts in order to do or not to do something related to their duties
- *Influence peddling*: The Code further penalises any person who requests or receives money or benefits/gifts, or accepts a promise of such, in order to make unlawful use of his or her influence before a government official
- *Transnational bribery involving a foreign official*: Any person who offers or gives a foreign public official anything of value, promises or advantages, in order to carry out, delay, or not to do something related to their duties will be criminally liable
- *Unlawful gifts*: Any government official, who, while in public office, accepts any benefit/gift given by reason of that position will be criminally liable. The person (individual) who presents or offers the gift is also subject to criminal prosecution. This crime does not require something being received in return from the government official
- *Financial bribery (financial sector-specific)*: The Criminal Code also penalises employees and officers of financial institutions and those operating in stock markets who allege false events or document false transactions in the accounts with the intent to obtain a benefit or cause losses.

#### 4.4.2 Corporate Liability

The Argentine Criminal Code does not contain corporate liability provisions for acts of corruption. Therefore, in the case of crimes relating to the activity of a company, criminal liability will be attributed to directors, managers or, in general, to those individuals directly involved in the crime.

However, there are some specific laws (i.e. Law No. 26,683 on Money Laundering; Law No. 26,733 on Stock-Market Crimes; and Law No. 26,735 which amends the Tax Criminal Regulation) which establish specific crimes for which companies can be held criminally liable (e.g. tax, exchange controls, money laundering matters).

#### 4.4.3 Money Laundering

Federal Law No. 26,683 on Money Laundering provides for sanctions including: fines, suspension of activities, bans on participation in public bids and state procurement of works, cancellation of legal registration, and loss or suspension of state benefits, when specific criminal acts are committed in the name of, or with the intervention of, or for the benefit of a legal entity.



## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Argentine law does not restrict or prohibit foreign investment. No prior governmental approval is necessary other than the authorisations needed for any domestic or foreign investor in a particular business activity (e.g. banking, insurance, etc.).

The main foreign investment provisions are set out in the *Ley de Inversiones Extranjeras* (Foreign Investment Law – i.e. No. 21,382/FIL) enacted in 1976 and amended to liberalise and deregulate foreign investment by Law No. 23,697 and the regulatory provisions of the Executive Order No. 1,853 (also enacted in 1993).

Investments may be made in various forms, including:

- foreign currency
- capital assets
- the proceeds of other investments
- proceeds that are subject to repatriation resulting from other investments made in the country
- capitalisation of certain foreign credits
- certain intangible assets.

Exchange control regulations designed to prevent speculative capital inflows have established the obligation to make a 30% mandatory deposit for the term of one year (with the Argentine financial entity that receives the funds) denominated in US Dollars. This deposit is non-interest bearing and cannot be used as collateral for any transaction.

If a foreign company is willing to acquire shares or quotas of Argentine commercial companies, Argentine regulations state that the foreign legal entity must be registered with the PRC.

### 4.5.1 Exchange Controls

Certain restrictions apply to gaining access to the local foreign exchange market and to transferring funds abroad. Certain foreign exchange and cross-border payment transactions are restricted or contingent upon Central Bank's prior approval. That said, the transfer of dividends based on an audited balance sheet does not require such prior approval, although certain 'de facto' restrictions could apply.

In general, foreign finance is subject to a minimum term of 365 days' for the cancellation of the loan. Although there are some exceptions, as a general rule foreign finance may be subject to a 30% one-year term, non-interest bearing deposit denominated in US Dollars with a local financial entity. That deposit cannot be used as collateral for any transaction.

Among the exemptions to the obligation to make this deposit, exchange control regulations include inflows of capital from equity holders holding at least 10% of the capital stock of the local company to be applied to capital contributions. The regulations also include additional formal requirements such as the simultaneous filing of the capital increase with the PRC and evidence to the local bank of completion of the capital increase registration process with the PRC within 540 calendar days.

### 4.5.2 Foreign Investment Approvals and Notifications

Argentine law requires that each foreign company be registered with the PRC in order to become a shareholder of a local corporation or a quotaholder of a local limited liability company. The foreign company must file certain corporate and accounting documents with the PRC (including articles of incorporation and by-laws; a board of directors' resolution stating the foreign company's decision to act as a foreign equity holder of an Argentine company; a power of attorney appointing a legal representatives in Argentina; financial statements; and a certificate of good standing issued by the

appropriate government authority—for the purposes of evidencing its existence and good standing under the laws of the country of its incorporation).

## 4.6 Industry-Specific Regulation

To operate in certain particular business sectors, special authorisation or licences may be needed (e.g. broadcasting, telecoms, oil and gas, etc.).

### 4.6.1 Broadcasting

In Argentina, broadcasting services are regulated by the Audiovisual Service Law No. 26,522, regulatory Decree No. 1558/2010 and resolutions issued by the Federal Audiovisual Service Authority, known as the 'AFSCA' (jointly, the audiovisual services laws—ASL).

The ASL requires broadcasting licencees, among other things, to seek governmental authorisation prior to any M&A operation, and applies certain investment restrictions on those companies.

#### ***Investment restrictions***

Under the ASL, and in absence of any reciprocity treaty Argentina has entered into with another country recognising mutual broadcasting benefits, broadcasting licencees are prohibited from:

- having any legal or corporate relation with foreign broadcasting entities and/or being directly or indirectly affiliated to any of such entities, and
- being subsidiaries or branches of foreign legal entities and/or conducting any activity or executing any agreement that would result in a foreign capital dominance over the performance of the local entity.

The ASL also imposes on broadcasting entities a minimum local corporate capital quota requirement—based on which broadcasting entities are prohibited from having in excess of 30% of both corporate capital and shareholder voting shares from or attributed to foreign sources. That percentage can be increased if there is a reciprocity treaty in place between Argentina and the country from which the foreign corporate capital originates.

Other restrictions, with exceptions, also apply to broadcasting licencees. One exception applies to situations where an acquisition was completed prior to the bringing into force of the ASL.

#### ***Transfers of shares***

As a general rule, the ASL prohibits broadcasting licencees from transferring their shares or quotas.

Exceptionally, AFSCA is entitled to authorise the transfer of shares or quotas for broadcasting licencees if their licences are five years old (at least) and where the transfer would be necessary to ensure continuity of the service. In any event, broadcasting licencees are required to maintain the control of the original shareholders or quotaholders in the company, who must retain at least 50% of the company's votes and shares/quotas.

For the purpose of obtaining authorisation to transfer shares or quotas, broadcasting licencees must file a letter of request and supplementary documents with the AFSCA, which will verify that the proposed shareholders and quotaholders comply with the regulatory requirements set out in the ASL.

Failure to comply with applicable regulations may trigger sanctions.

#### ***Transfers of assets***

Under the ASL, assets necessary for the provision of the service in a regular manner are restricted from being transferred, embargoed or pledged. Only under special circumstances will AFSCA authorise the alienation of the assets, and then only if the purpose of the transfer is to improve the service.

#### 4.6.2 Telecommunications

The Argentinian telecommunications industry is regulated by two principle laws:

- Telecommunications Law No. 19,798, and
- Argentine Digital Law No. 27,078.

While the former dates back to 1972, the latter was enacted recently, in December 2014 and its regulatory decree has not yet been issued. As a result, many of the obligations applicable to the telecom industry, including obligations that could potentially affect the transferability of shares or assets, are yet to be determined.

#### 4.6.3 Oil and gas

The hydrocarbons industry in Argentina has witnessed many changes since the date of the first oil discovery in 1907. The first decades were characterised by a state monopoly over hydrocarbons.

Argentina's first state-owned national oil company, *YPF Sociedad del Estado* (YPF) was established in 1922. YPF had the monopoly of oil and gas in the country and international and local private oil and gas (O&G) companies had access to the industry mainly as service providers to YPF. At this stage, the federal government retained jurisdictional and regulatory control over Argentina's hydrocarbons, and the exploration, exploitation, manufacture, transportation and commercialisation of oil and gas were regulated by the Hydrocarbons Law No. 17,319 of 1967. The Hydrocarbons Law provided for the granting of concession-based rights opening up the possibility for privately held oil companies to enter into agreement to explore and exploit hydrocarbons.

Deregulation followed in the 1990s; and recently, acts of nationalisation and major modifications to the National Hydrocarbons Law which, as amended by Law No. 27,007, continues to be the most important Act now regulating the industry.

##### ***Deregulation***

During the 1990s phase of deregulation, service agreements between YPF and oil and gas companies were converted into exploitation concessions, with the privatisation of YPF by National Law No. 24,145 in 1992, whereby YPF became a private company and its shares gradually sold to private parties.

In 1994, the National Constitution was amended transferring eminent domain over natural resources to the provinces but with no specific reference to jurisdiction over those resources. This introduced an element of doubt which created conflict between the provinces and federal government.

Following (and in some cases even before) the enactment of the Short Law, the provinces enacted legislation or executed agreements regarding hydrocarbons, which at times could have seemed to conflict with or circumvent the provisions of the Hydrocarbons Law. This period also witnessed the creation by hydrocarbons-producing provinces of their own provincially owned companies (POCs).

Many (but not all) of such conflicts were overcome in 2007 when National Law No. 26,197 (the Short Law) was enacted transferring licensing control over hydrocarbons to the provinces. This led the grant of many new sites to oil and gas companies in association with POCs.

In May 2012 the federal government enacted Law No. 26,741 (Nationalisation Law) declaring that 51% of the shares of YPF and Repsol YPF Gas SA (YPF Gas) would be expropriated. However, in the end only those shares held by a Spanish company, Repsol (and related parties) were expropriated. Under the Nationalisation Law, YPF and YPF Gas were to operate as private companies and YPF was entitled to seek internal and external financing, and sign joint ventures or other associative agreements with private, public, local, or foreign companies.

Recently, Argentina has been identified as having great potential for the exploitation of unconventional oil and gas specifically, having one of the world's most important reserves of shale gas in the so-called '*Vaca Muerta*' (literally 'dead cow') Formation,<sup>2</sup> generating positive expectations in the industry.

As recently as 2014, Law No. 27,007 was published in the *Official Gazette* on 31 October, introducing major changes to the regulatory framework, designed to promote the development of Argentina's unconventional oil and gas potential (the New Regime). Some of the changes include:

- fewer relinquishment obligations
- the possibility of holding areas for longer periods by extending exploitation concessions for unlimited terms
- rights to current concession-holders to access non-conventional concessions without having to compete in open public tendering
- caps on royalties paid to the provinces
- end of the provinces' and national government's powers to reserve vacant areas for national oil companies or POCs
- elimination of the 'carry' provisions<sup>3</sup> included mostly in agreements between POCs and oil and gas companies during 'development' stage.

### ***Acquiring exploration and production (E&P) rights***

#### ***Licensing rounds***

The Hydrocarbons Law establishes public bidding procedures as the system for the award of E&P rights. In this sense, the New Regime that amended the Hydrocarbons Law establishes that vacant areas must be offered to private parties via public bids, based on uniform bidding terms which the provincial and national authorities were required to draft within the first six months of the effective date of the New Regime (i.e. 31 October 2014; i.e. deadline 30 April 2015). Such uniform bidding terms have not yet been issued.

No nationality restrictions apply to holders of E&P rights, although applicants must register a domicile in Argentina, must have the required technical and financial capabilities, and must fulfil any other condition set out in the individual bidding process.

#### ***Concession-based E&P rights***

Either the relevant province or federal government (depending on the location of the site) can grant E&P rights through a bidding process to any individual or entity. The awardee/s will be the company or group of companies that offers the highest investment bid and then will be considered as title holder of the corresponding E&P right.

The E&P rights under the Hydrocarbons Law are:

- exploration permits (varies depending on whether a conventional, non-conventional or offshore target)
- exploitation concession (varies depending on whether is for conventional, non conventional or offshore target)

<sup>2</sup> The reserves are located in the central west part of Argentina in the Neuquina Basin, which includes the provinces of Neuquén, La Pampa, Río Negro and Mendoza.

<sup>3</sup> The 'carry' provision basically indicated that oil and gas companies had to finance POCs' participation for the full term of the exploration permit or exploitation concession, and only if the oil and gas discovered were commercially viable could the oil and gas companies recover the financing with a portion of the revenues generated by the POCs participating interests in the area.

- transportation concession (granted and extended for a time-period matching that of the associated exploitation concession).

### *Private transactions*

Private transactions to acquire E&P rights such as sales of shares or assets are valid in Argentina. In the case of asset sales, the acquiring/assignee party will most likely need to be approved by the corresponding provincial or federal enforcement authority.

Argentina's unconventional oil and gas potential, especially in the Province of Neuquén, has generated the execution of transactions of 'farm-in'/'farm-out' whereby private companies holding exploitation concessions have associated with other oil companies with expertise in various exploitation techniques.

### ***Restrictions on operations***

Certain restrictions and sanctions apply to entities performing oil and gas activities in the Argentine offshore continental Platform if they do not have authorisation from the Argentine government for those activities—those sanctions being hefty fines, cancellation of hydrocarbons' rights or imprisonment of company managers involved in the breach (Law No. 26,659, as amended by Law No. 26,915, and Resolution 407/07 of the National Secretary of Energy). Although the sanctions are severe, it is debatable their application and enforceability and shall be analysed in a case by case basis.

In practice, the only offshore area where companies may operate without an Argentine government permit is the Malvinas (known outside Argentina as the 'Falkland Islands') area. Argentina currently has a sovereignty dispute with the United Kingdom which currently has control over the islands. In this context, the United Kingdom has granted permits to companies to explore and exploit oil and gas in the Falkland Islands. At the same time, the Argentine government has established the restrictions and sanctions to try to discourage companies from operating in a territory claimed as Argentine but, in fact, under UK jurisdiction.

## **4.7 Import/Export Controls**

Individuals or corporations wishing to import or export goods into or from Argentina must generally be registered in the Importers and Exporters' Registry of the Customs Service.

Exceptions to the general registration requirement apply. The most important one is where an entity is only occasionally involved in foreign trade (in which case it may seek authorisation for each operation as it happens, without a general registration with Customs).

In general, in order to be registered with the Importer's Registry, the individual or corporation must be registered as a taxpayer with the Federal Revenue Service. In addition, any corporation wishing to register must evidence its creditworthiness or financial standing either by means of evidence of gross sales carried out during the immediately preceding year for an amount of ARS300,000; or be able to show a net shareholders' equity/net worth of an equal amount.

If such evidence cannot be provided, the corporation must post a performance bond instead to Customs for the sum of ARS30,000.

## **5. Transfer Taxes**

### **5.1 Acquisition of Shares**

The purchase of stock agreements with effects within the jurisdiction of the City of Buenos Aires are subject to stamp tax at the rate of 1% on the 'economic value' of the transaction. Purchase of stock agreements with effect in other Provinces would be subject to an approximately 1.5% stamp tax (rate varies depending on each jurisdiction).

## 5.2 Acquisition of Assets

The City of Buenos Aires levies a stamp tax on real estate transfers of 3.6%. In other provinces, rates may differ. The stamp tax is a local tax that is normally triggered when land registration documentation is created or amended during a transfer of land or where rights or obligations relating to land are amended or extinguished. Notary fees and costs are also payable on transfers of real estate, at variable, negotiable rates, but capped at approximately 2.3% of the value of the land.

## 5.3 Mergers

If a merger meets certain requirements, it can be treated as a tax-free reorganisation. Under that scenario tax losses and tax credits of the absorbed entity or entities can also be transferred (again if certain requirements are met).

If a merger does not qualify as a tax-free reorganisation, it will be deemed a taxable merger. The tax consequences of such a transaction would very much depend on the nature of the assets being transferred to the continuing entity.

## 5.4 Value Added Tax

The purchase of stock is not subject to VAT, and in general, real property transfers are not subject to VAT. However, VAT is applicable on construction activities carried out on real estate property (so transfer of such construction activities/developer's work goes with the property, and is subject to VAT at the rate of 21%. Exemptions may apply depending on the purpose and duration of the construction works.

# 6. Employee Issues

## 6.1 Method of Transfer under Local Law

### 6.1.1 Acquisition of shares

Should the buyer come to possess the company through an acquisition of shares, and the target continues as the same legal entity, the buyer's liabilities or duties will be the same as those of the target's. In addition, the Employment Contract Law (ECL) establishes that the seller and buyer are jointly and severally liable for all labour obligations existing on the date of the transfer of any establishment to another company.

The ECL does not require giving any kind of notice to employees or unions.

### 6.1.2 Acquisition of assets

The ECL does not refer specifically to the acquisition of assets. The transfer of a business as a transfer of a going concern is similar to the transfer of employees under an acquisition of assets.

### 6.1.3 Transfer of business

The Labour law refers to the transfer of an establishment, a notion that also comprises the transfer of a going concern. Case law of the Labour Appellate Court of the City of Buenos Aires has established that the buyer of an establishment is also liable for the seller's labour obligations arising from labour relationships terminated before the buyer's acquisition of the company: i.e. the buyer also liable for the debts to former employees terminated before the acquisition (e.g. back-pay, payments due as a result of litigation, unfair dismissal, lack of duly registered employment relationship, etc.).

The transfer of a going concern does not eliminate labour debts and/or claims of former employees. Creditors may enforce their claims against the buyer without urging them to register their claims in the transfer of a going concern proceeding for the remaining term. The statute of limitations limits labour actions to two years calculated from the date on which the claim arises (i.e. when the 'wrong' first occurred, e.g. when an unfair termination occurred).

The parties need not notify employees about closing of an M&A transaction or request their consent to go ahead with a deal. However, it is advisable to notify employees.

With transfers of a going concern, the transferee undertakes all employment contract obligations, and employees may not consider themselves dismissed as a consequence of the transfer, unless there is an abatement of the new employer's liability (e.g. if the buyer is not financially stable or a different sections, department or branches of the target have been separated in a manner which reduces the employer's liabilities).

Section 12 of the ECL prohibits employers from suppressing acquired rights. Changes to the core aspects of the relationship need the employee's express consent and consideration.

#### 6.1.4 Mergers

When a merger occurs the transferred employees must not have their duties changed due to the merger and the absorbing entity must fully continue operations by transferring the entire technical and operational unit in order to achieve this. Where the transfer is of a going concern, the transferee company must acknowledge employees' rank and seniority and all rights related to their position. Both the transferor and transferee companies are jointly and severally liable for all labour-related obligations as of the transfer date. Obligations after that date generally attach solely to the transferee company, and last for two years after the date of closing (under the statute of limitations).

Employees can only oppose the transfer of their job when some type of damage has been suffered as a result of the transfer. The employees' consent to the transfer of their employment contracts to the transferee company is not required. They may claim constructive dismissal and demand payment of severance only if they allege and prove that the transfer caused them damage or harm due to the undue alteration of their employment terms and conditions; if the transfer was fraudulent (a sham transfer) executed as an avoidance measure (to frustrate their rights); and/or, if the transferee company is not financially stable (i.e. insolvency of the transferee is a tangible possibility, based on the transferee's assets, credit and/or financial background).

On the other hand, if the transfer includes the personnel only, and does not include the going concern as a whole (called an 'assignment of personnel') the express acceptance in writing of all assigned employees will be required. Even where such acceptance has been obtained, assignor and assignee companies will be jointly and severally responsible for all liabilities stemming from the assigned employment relationship.

## 6.2 Approval or Consultation Requirements

There are no approval or consultation requirements.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

Employees may also be terminated without cause (and thus entitled to statutory severance) by the seller or by the buyer. If termination takes place after the transfer of the establishment the buyer must pay the severance based on the employee's accrued seniority/length of service.

Mass layoffs (redundancies) must be undertaken in compliance with a special procedure before the labour authorities (Local Ministry of Labour and/or Federal Ministry of Labour), with trade union involvement and the employer must give evidence as to why the mass layoff is necessary. In such cases, the parties (employer and trade union) may agree a reasonable severance pay package which must be ultimately approved by the Ministry of Labour. Employees may challenge a settlement offer by an employee (and indeed the labour courts do usually uphold such employee claims).

In all cases, employers are free to make additional payments (over and above the minimum and mandatory severance payments) to terminated or resigning employees. These additional payments are bonuses subject to income tax withheld by the employer at source for remittance to the tax authorities, but are exempt from social security contributions because they are considered extraordinary and exceptional bonuses (i.e. paid only on termination of the employment contract).

### 6.3.2 Penalties

If the transfer of employees is an 'assignment of personnel' (as opposed to a transfer of a going concern) but the company does not properly comply with procedural formalities (say, e.g. not requiring acceptance by the employees of their written notice/offer) fines can be imposed on the buyer by the Federal Ministry of Labour. The fines will be in the range of 30%–200% of the monthly national minimum subsistence wage, per affected employee. In practice it would always be best to have the employee and employer each sign a hard copy of the offer/acceptance document.



# Australia

## 1.1 Overview

Australia has a healthy and vigorous mergers and acquisitions market. Asian investors in particular continue to enter the Australian market. There is also strong foreign and domestic interest in the food, agribusiness, life science, bioscience and clean energy sectors. Australia is regularly featured in the world's Top 10 for national merger and acquisition activity.

## 1.2 General Legal Framework

Australian law applicable to Australian incorporated companies is derived from two sources: Australian common law (case law) and Australian federal and state statutes, the principal one being the Corporations Act 2001. The Corporations Act is administered by a federal government organisation, the Australian Securities and Investments Commission (ASIC). Listed companies must also comply with the ASX Limited (ASX) Listing Rules. Foreign investment in Australia is governed by the Foreign Acquisitions and Takeovers Act 1975.

## 1.3 Corporate Entities

Several types of companies are available. The two most common company types are:

- public companies, and
- proprietary (or private) companies, which are further divided into large and small proprietary companies.

A proprietary company will usually be more appropriate if the entity is to be a wholly-owned subsidiary of a foreign company and if a public offering of shares or debentures is not intended. A proprietary company may be converted into a public company at any time.

### 1.3.1 Proprietary (or private) companies

Shares in a private company may not be offered to the public. Private companies must be either limited by shares or established as unlimited companies with share capital. In the case of limited companies, the liability of shareholders is usually limited to the amount of their capital contribution in the company; in the case of an unlimited company, the personal liability of the members for the debts and obligations of the company is unlimited. A proprietary company cannot have more than 50 non-employee shareholders and must have at least one director who is ordinarily resident in Australia.

A small proprietary company is defined as a company which has, on a consolidated basis (judged at financial year end), at least two of the following features:

- gross operating revenue of less than AUD25 million
- gross assets of less than AUD12.5 million, and
- fewer than 50 employees.

If the proprietary company does not meet at least two of these requirements, it is a large proprietary company.

### 1.3.2 Public companies

In contrast to private companies, public companies are able to raise finance from the general public at large through offers to subscribe for securities (subject to compliance with detailed regulatory requirements). A public company may be limited by shares, limited by guarantee (e.g. charities), unlimited with share capital or be a no liability company (only for mining companies). In the case of a limited company, the liability of shareholders is usually limited to the amount of their capital contribution in the company; in the case of an unlimited company, the personal liability of the members for the debts and obligations of the company is unlimited. A public company may have an

unlimited number of shareholders. A public company must have at least three directors, two of whom must be ordinarily resident in Australia.

## 2. Acquisition Methods

Business acquisition in Australia usually takes the form of either an asset acquisition, when the assets of a business are purchased, or a share acquisition. A procedure known as a 'Scheme of Arrangement' is available in Australia under which two companies may merge, subject to the approval of a state Supreme Court or federal court and the target's shareholders in a general meeting. Schemes of Arrangement are also popular in private-equity funded 'public-to-private' transactions where they offer greater flexibility than public company takeovers. For example, different kinds of shareholders can be offered different kinds of consideration.

### 2.1 Acquisition of Shares

The sale of the shares of the target company involves the sale of the target company, together with all assets and liabilities. A share acquisition may proceed by way of:

- purchase of shares in an Australian company (direct share acquisition), or
- purchase of shares in a non-Australian corporation which holds the shares of the Australian company (indirect share acquisition).

The legal consequences may differ, depending upon whether the share acquisition is direct or indirect.

Generally, all that is required to transfer legal title to the shares in an Australian private company is for a Share Transfer Form to be executed by the seller, stamped (if required by the law in the state in which the company is incorporated) and then registered in the register of members of the relevant company. Prior to registration, a share certificate in relation to the shares that have been transferred will need to be provided (or if no share certificate is available, an appropriate indemnity for the lost share certificate) by the existing shareholder. A share purchase agreement is usually prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction.

### 2.2 Acquisition of Assets

On an asset transfer, only those assets specifically identified by the seller and purchaser in the asset purchase agreement (APA) will be transferred, and the purchaser will only assume those liabilities which it expressly agrees to assume. The seller retains all liabilities not specifically assumed by the buyer. When a business is being transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer that applies to that type of asset. In respect of some assets, this will simply be a case of delivering the asset to the purchaser, but in other cases, the formalities are more prescriptive, as in the case of real property or intellectual property.

A sale of assets is often more logistically complex than a sale of shares as it is necessary to separately deal with each category of asset and assumed liability. For example, existing third-party contracts (e.g. leases, contracts with suppliers and customers, licences and permits, intellectual property and employees) can be transferred by mutual agreement but may need the consent of third parties to the transfer. It is necessary to include a provision, either in the purchase agreement governing the purchase of the business and its assets or in separate agreements, for the relevant formalities to be complied with.

## 2.3 Mergers/Other Acquisition Methods

A Scheme of Arrangement is available in Australia under which two companies may merge, subject to the approval of a state Supreme Court or federal court and the target's shareholders in a general meeting. The shareholder approval thresholds are:

- a special resolution of shareholders, which requires at least 75% of the number of votes cast on the resolution to be in favour of the scheme, and
- approval from at least 50% of the number of shareholders who vote on the resolution, regardless of how many shares they hold.

Although this procedure is becoming more common in the listed company arena, it is generally used less frequently than a direct share or asset acquisition. However, it may have particular advantages depending on the characteristics of the target entity and whether special corporate actions need to be undertaken in connection with the transaction, such as amending the target's constitution or approving a share buy-back.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

It is customary to include restrictions on the seller in relation to the conduct of the target's business in the period between signing of the purchase agreement and completion so that there are no amendments to the constitution and no entry into transactions with a value above a specified amount without the consent of the purchaser.

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Australian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. Cash-free, debt-free and working capital adjustments are typical. NAV adjustments are also common. Some use of locked-box mechanisms to reduce or eliminate complexity of adjustments process recently.
2	Is there a collar on the adjustment?	Collars are not common. Sometimes a <i>de minimis</i> is agreed.
3	Who prepares completion balance sheet?	Usually prepared by the target company. (i.e. buyer-controlled).
4	Is the balance sheet audited?	Not common.
5	Is an earn-out common?	Not very common. We are seeing more earn-outs to bridge the gap between forecast earnings views/valuations of seller and buyer. If used, earn-outs commonly capped.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Becoming more common.
8	Is a break fee common?	Uncommon, although we are seeing some in private deals. 1% (similar to public companies rules).

### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Increasingly common, but typically only available where there is a long period between execution and completion. Also more common where a foreign seller or buyer is involved.
10	Is the MAE general or specific?	Both are seen. Often combined.
11	Quantification of MAE?	Not uncommon. Tend to encourage clients to be more specific. Often combined with a general MAE.

### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall/blue pencil provisions are common, as sometimes courts will read down the period.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Generally used in private deals.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating disclosure rarely permitted after execution. Notification of possible breach is common. In case of material breach, sometimes right to terminate but more commonly only indemnification/damages claim.
17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax indemnity, usually included in purchase agreement.

### Representations & Warranties

18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but are often not quantified (other than specific warranties e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are growing. Often limited to the actual knowledge and due enquiry of a specified list of senior management.
20	Is a warranty that there is no materially misleading/omitted information common?	Always requested by buyers, but typically one of the most contested warranties.
21	Is disclosure of data room common?	Standard practice.

### Repetition of Representations & Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates are not very common.
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23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and correct and (if acting for buyer) not misleading.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.

### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Cap often split between title, tax and other material warranties (100%) and other more general warranties (lower % cap, anywhere between 10% (auction deal) to 50%). Big deals will tend to have a lower aggregate cap.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Both seen regularly.
27	What are the common exceptions to the cap?	Key warranties are often exempted from the lower cap, but still subject to a 100% cap (e.g. title, capitalisation, authority, tax and sometimes some specific areas of concern). Usually a carve-out from all limitations (including cap) for fraud and deliberate non-disclosure.
28	Is a deductible or basket common?	Common.
29	Is a <i>de minimis</i> common?	Common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	Common to have 18 months for general warranties. Generally longer (about 4 years) for title, capitalisation, authority and tax warranties.
31	Is warranty insurance common?	Increasingly common.

### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Becoming more common.
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### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Sometimes seen.
34	Insurance proceeds?	Common for actually received.
35	Third party recoveries?	Common for actually received.

## Damages, Knowledge

36	Obligation to mitigate damages?	Required by law for contractual claim for damages, but failure to mitigate is still usually an express limitation on liability to the extent that loss increased as a result.
37	Exclusion of consequential damages?	Quite common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Sellers and buyers will negotiate for these respective positions.

## Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. Usually an Australian state law is chosen.
40	Is litigation or arbitration more common? If arbitration, where?	Litigation is more common, but arbitration becoming more common where parties from different jurisdictions.

## Stamp Duty

41	If stamp duty is payable, is it normally shared?	Borne by buyer by law and very unusual to agree otherwise. The rate varies between asset sales and share sales and from state to state. Ranges from 0%–5.75%.
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## 3.3 Formalities for Execution of Documents

### 3.3.1 Transfers of shares

There is no legal requirement for an agreement for the sale of the legal and beneficial title to shares to be made in writing. Market practice in the majority of cases is for a share transfer to be documented between the seller and the buyer by way of a written share sale/share purchase agreement (SPA). It is usual for the seller's lawyers to prepare the first draft of the SPA. Where an acquisition occurs by way of subscription for new shares (for tax, capital increases or other reasons), a subscription agreement will usually be drafted by the target company's lawyers.

### 3.3.2 Transfers of assets

It is usual for the seller's lawyers to prepare the first draft of the asset purchase agreement. The agreement should clearly identify the assets to be acquired and exclude those to be retained by the seller.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

Although a contract for the sale of shares does not need to be in writing, where shares are held in certificated form, the constitutional documents of most companies require a written transfer to be signed by or on behalf of the transferor and transferee, stamped (if necessary) and lodged with the company before the new shareholder is registered as the owner of the legal title to the shares.

Accordingly, transfer of title to the legal and beneficial interest in shares usually involves the following three stages:

- entry into a written SPA for the sale and transfer of the shares
- delivery by the seller to the buyer of an instrument of transfer (Transfer Form) in respect of the shares, and
- approval and registration of the transfer by the issuing company.

#### 3.4.2 Transfers of title to assets

An asset purchase agreement will frequently only require signature by or on behalf of the parties. However, it may also be necessary for the agreement or any ancillary documents to be executed as a deed due to a particular formality or the absence of consideration. Each individual asset needs to be transferred in accordance with the formalities for a transfer that applies to that type of asset. In respect of some assets, this will simply be a case of delivering the asset to the purchaser, but in other cases, the formalities are more prescriptive, such as in the case of real property or intellectual property.

## 4. Regulatory Framework

### 4.1 Competition Law Consideration

See **4.2.**

### 4.2 Merger Control

Acquisitions which have the effect or likely effect of substantially lessening competition are prohibited (s. 50, Competition and Consumer Act 2010 (CCA)). Remedies available for contravention of this prohibition may include divestiture of the shares or assets that were the subject of the proposed acquisition and penalties for corporations of up to AUD10 million. There are four processes available to merger parties to address possible risks arising under s. 50:

- formal merger clearance
- merger authorisation, and
- informal merger clearance.

The formal merger clearance process was introduced in 2007 and provides immunity for merger parties from Australian Competition and Consumer Commission (ACCC) or third party challenge under s. 50 of the CCA. The process involves an applicant submitting all information relevant to the competition analysis to the ACCC at the time the application is made. This material is then made public by the ACCC for the purpose of conducting its review. Given the practical difficulties in anticipating all potential issues, the level of detail required to address them and confidentiality issues, the formal clearance process is yet to be used by merger parties.

Similarly, merger authorisation is only likely to be an attractive option in a limited number of circumstances. Applications for merger authorisation are made to the Australian competition tribunal. A grant of authorisation can provide an immunity for a contravention of s. 50 of the CCA where the tribunal is satisfied that the detriment to the public arising from any lessening of competition is outweighed by identifiable public benefits.

Informal merger clearance is the most commonly used process for managing risks under s. 50. The process has no statutory basis, is not compulsory and does not provide an explicit immunity from liability. It is simply a series of ACCC protocols which set out the manner in which merger reviews will be conducted if the merger parties provide the ACCC with sufficient information or time to conduct a review. In this way, the informal merger clearance process imposes obligations on both the merger parties and the ACCC which provide a level of certainty around the manner and timing of merger reviews.

#### 4.2.1 Notification

There is no legal requirement to notify the ACCC of a potential acquisition. Merger parties simply face the risk that upon becoming aware of a completed acquisition, the ACCC may conduct an investigation and where appropriate, commence court proceedings for penalties and divestiture orders.

The ACCC's preference is to review acquisitions before completion so that if necessary, it is in a position to obtain a court order to restrain completion. The ACCC provides guidance on the types of acquisitions that it expects will be notified. This threshold is relatively low and involves acquisitions where the products of the merger parties are substitutes or complements<sup>1</sup> and the merged firm will have a post-merger market share greater than 20% in the relevant markets.

#### 4.2.2 Information required

The ACCC will not commence an informal merger clearance process until the merger parties have provided a submission addressing the impact of the acquisition on competition. As a result, the timing of notification and for providing a submission to the ACCC have a direct impact on the timing of clearance being obtained.

The information the ACCC requires includes details of:

- the operations of the merger parties with particular reference to any areas of overlap
- the proposed acquisition including the structure, timing, rationale and conditions of the deal
- the relevant markets based on tests of substitutability across product, geographic and functional dimensions
- background information on the relevant markets sufficient to enable the acquisition to be considered in context
- alternative suppliers in the relevant markets including details of their products and services
- market shares in the relevant markets based on the most appropriate metric (i.e. revenue, transactions, customers)
- the extent to which there are barriers to entry to the relevant markets, e.g. licensing, as well as any examples of entry
- the extent of any vertical integration in the industry before and after the acquisition, and
- the dynamic characteristics of the relevant markets such as the impact of technological developments on competition.

The ACCC will use this information to identify the relevant competition issues and prepare a 'market inquiries letter' to be sent to interested parties at the commencement of the market inquiries process.

#### ***Informal clearance process and timing***

Merger parties may apply to the ACCC for informal merger clearance on a confidential or public basis. Confidential merger reviews involve the ACCC forming a preliminary view about the potential impact of an acquisition on competition without the benefit of public market inquiries. Any letter of comfort provided by the ACCC as part of a confidential informal merger clearance is expressed as 'subject to market inquiries'. Accordingly, the confidential process is a preamble to the public informal merger clearance process rather than a substitute.

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<sup>1</sup> i.e. forming part of a bundle of products. The term 'complements' is used by the ACCC in its merger guidelines without definition. It relates to products that are purchased together such that a merger involving two complementary products could impact competition in the supply of either the product and/or the combined bundle.



Confidential clearance can be attractive where merger parties are unable to publicly disclose the details of an acquisition but would still like to engage with the ACCC and obtain some sense of any potential opposition. As the market inquiries process is the heart of the informal merger clearance process, confidential clearances can provide only limited clarity as to the likely risks. The timeframe for confidential informal merger clearance is 2 to 4 weeks with 4 weeks being a realistic estimate for an acquisition with any material competition issues.

Upon receiving an application for information clearance the ACCC will make an initial assessment of whether there are sufficient competition issues to require a public review. Where it considered there are not, the ACCC will 'pre-assess' the application and provide confirmation that, based on the information provided by the parties, the ACCC does not consider that a public review is required. This pre-assessment process usually takes 2 to 3 weeks.

The public informal merger clearance process involves ACCC conducting a market inquiries process in which interested parties are contacted and asked to provide input on issues relevant to the competition analysis. Market inquiries usually commence in the first week of the ACCC's review and take between 2 and 4 weeks.

If market inquiries identify competition concerns the ACCC will engage with the merger parties in relation to those concerns. If these concerns are capable of being resolved through supplementary submissions by the merger parties, the ACCC will go on to formally consider the proposed acquisition and provide a letter of comfort indicating that it is not opposed. The usual time frame for the first phase of an informal merger clearance process is 6 to 12 weeks.

Where material competition issues are identified through market inquiries and they are not capable of being resolved through supplementary submissions by the merger parties, the ACCC will publically release a Statement of Issues (SoI) and proceed to a second phase review. An SOI will identify the relevant outstanding issues and call for further information from interested parties. The SoI also provides the merger parties with an opportunity to provide submissions based on a narrower set of issues that have been identified by the ACCC as most relevant.

The second phase review process usually adds a further 6 to 12 weeks to the ACCC's informal review timeframe. Although this brings the total timeframe for a complex acquisition to around 26 weeks this should be taken as a minimum timeframe and the ACCC has the ability to 'stop the clock' in its review where it is waiting on further information from merger parties.

The output of the process is a letter of comfort and public announcement from the ACCC stating that it either intends, or does not intend, to oppose an acquisition.

## 4.3 Anti-Bribery, Corruption and Money Laundering

### 4.3.1 Anti-bribery and corruption

#### ***Prohibition***

Australia has implemented the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>2</sup> Pursuant to Australia's foreign anti-bribery and corruptions laws, it is an offence to dishonestly provide or offer to provide a benefit or cause a benefit to be provided with the intention of influencing a foreign public official in the exercise of the official's duties to obtain or retain business or a business advantage that is not legitimately due. A 'benefit' is broadly defined to include any advantage and is not limited to property.<sup>3</sup> Like the FCPA, Australia's laws apply to foreign public officials, including employees of state-owned or operated entities, as well as public authorities and public international organisations.

<sup>2</sup> Division 70 of the Criminal Code Act 1995 (Cth); see Appendix D for further explanation concerning the Convention and corresponding US and UK foreign anti-bribery laws.

<sup>3</sup> This is likely to be as broad as 'anything of value' described in Appendix D, s. 2, US FCPA.

### ***Jurisdiction and extra-territorial application***

Australia's laws capture prohibited conduct which occurs:

- wholly outside Australia at a time when the offender was an Australian citizen, or body corporate incorporated under the laws of Australia, or
- wholly or partly in Australia including on board an Australian aircraft or ship and is committed by any person.

### ***Liability***

Individuals and bodies corporate may be liable for engaging in Australia's foreign bribery and corruption offences.

Where the prohibited conduct is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of their employment or authority, a body corporate may be held criminally responsible. The fault based element of the prohibition will be imposed on a body corporate if it can be proven that:

- the board of directors or a senior managerial agent intentionally, knowingly or recklessly carried out or expressly, tacitly or impliedly authorised or permitted the commission of the offence
- a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the above provisions, or
- the organisation failed to create and maintain a corporate culture that required compliance with the above provisions.

A 'corporate culture' is defined to include an attitude, policy, rule, course of conduct or practice existing within the whole or part of the body corporate.

Successor liability, where the purchasing entity inherits liabilities of the acquired company by bringing the target into its group, applies in Australia. Accordingly, because the internal governance practices of a target may be relevant to establishing corporate liability, in appropriate circumstances pre-acquisition due diligence can be essential to assist in mitigating that risk to ensure potentially value eroding acquisitions are avoided.

### ***Limited defences***

Two limited defences are available for conduct which is otherwise prohibited. First, where the conduct is lawful pursuant to the written laws of the foreign country in which the conduct took place. Second, Australia provides a facilitation payments defence where a benefit was conveyed to expedite or secure the performance of a routine government action of a minor nature, the value of the benefit was relatively minor, and the provider makes a record of the relevant conduct as soon as practicable.

### ***Enforcement history***

Unlike the other jurisdictions, enforcement of Australia's foreign bribery and corruption laws has been limited. A number of high-profile prosecutions of companies have concluded, however, these remain subject to broad non-publication orders until the prosecutions of individuals have concluded. Accordingly, limited guidance is available on whether these prosecutions have been successful, let alone whether any penalties have been imposed.

#### **4.3.2 Anti-Money Laundering and Counter-Terrorism Financing Act 2006**

The Australian government enacted the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML/CTF Act) in December 2006. The AML/CTF Act sets out a risk-based legislative regime aiming to align Australia's anti-money laundering and terrorist financing regulatory framework with international best practice. The AML/CTF Act is administered by AUSTRAC (Australia's anti-

money laundering and counter-terrorism financing regulator and specialist financial intelligence unit). AUSTRAC has set out both AML Rules and guidance notes to assist the regulated 'reporting entities' to comply with their obligations.

'Reporting entities' are captured by the Act if they provide certain 'designated services' (as set out in the AML/CTF Act). Most of the designated services relate to banking, financial services and the gambling industry, but the AML/CTF Act extends the class of persons regulated significantly beyond 'cash dealers' under the Financial Transaction Reports Act 1988 (Cth) to include bullion trading. Reporting entities must comply with the prescriptive requirements in the AML/CTF Act and must design a 'risk-based' AML/CTF programme with the goal of identifying, mitigating and managing the risks of money laundering and terrorist financing.

Some of the key obligations for reporting entities under the AML/CTF Act are as follows. Reporting entities must:

- report transactions of AUD10,000 or more (threshold transactions) in Australian currency or the equivalent of AUD10,000 or more in foreign currency or e-currency
- report international funds transfer instructions
- report suspicious transactions including any transaction which the reporting entity has reasonable grounds to suspect may be relevant to investigation of criminal activity, such as tax evasion, terrorism financing, or money laundering or where the reporting entity has reasonable grounds to suspect that the counterparty in the transaction is not who it says it is
- engage in ongoing customer and employee identification and due diligence procedures
- maintain a record-keeping system of the provision of designated service(s) to customers
- develop and maintain an AML/CTF compliance programme, since they may be required to provide reports to AUSTRAC.

#### 4.4 Exchange Control, Foreign Investment Restrictions and Trade Regulation

The Foreign Acquisitions and Takeovers Act 1975 (Cth) (Foreign Acquisitions Act) and its regulations, together with the Federal Government's Foreign Investment Policy regulate the direct and indirect acquisition of Australian corporations and businesses by foreign interests. Under the Foreign Acquisitions Act, 'foreign persons' (which includes foreign corporations) may be required to notify and obtain the consent of the Commonwealth Treasurer of Australia (Treasurer) to acquire an interest in an Australian corporation or business or in an offshore company that has Australian subsidiaries. The body that administers the Foreign Acquisitions Act is the Foreign Investment Review Board (FIRB). Where a proposed acquisition falls within the scope of the Foreign Acquisitions Act or policy, a foreign national will need to consider whether they must, or should, provide prior notification of the acquisition and seek a statement of no objections (FIRB approval).

For certain industries (e.g. banking and broadcasting), additional legislation restricts foreign investment. Furthermore, the constitutions (or by-laws) of certain companies (including companies recently privatised) may restrict foreign investment.

Except as noted below, Australia has no exchange controls relevant to M&A transactions and no longer requires tax clearance certificates.

##### 4.4.1 Exchange controls

Exchange controls were effectively abolished in Australia for most transactions. Notwithstanding this change, there is a requirement that exports and imports of Australian and foreign cash in the amount of AUD10,000 or above must be reported to the Australian Transaction Reports and Analysis Centre (AUSTRAC). AUSTRAC does not have any power to restrict a person from transferring currency to or from Australia; rather, its role is limited to collecting data and forwarding it to various governmental authorities (e.g. security, social justice and revenue agencies).

The Australian government has implemented resolutions of the United Nations Security Council in imposing sanctions against certain nations and entities, including the Taliban, Al-Qaida and officials of the previous government of Iraq. Accordingly, exchange controls have been imposed in relation to certain transactions with these groups.

#### 4.4.2 Foreign investment approvals and notifications

Under the Foreign Acquisitions Act, 'foreign persons' (including foreign corporations) may be required to notify and obtain the consent of the Commonwealth Treasurer of Australia (Treasurer) to, either alone or together with associates:

- acquire a 'substantial interest' in an Australian company or business that is valued above AUD248 million (indexed annually), or
- implement a takeover for an offshore company that has Australian subsidiaries or assets valued above AUD248 million (indexed annually).

A substantial interest occurs when a single person (and any associates) acquires 15% or more of an Australian company or when two or more persons (and any associates) acquire 40% of an Australian company.

In the majority of industry sectors (excluding the sensitive industry sectors discussed below) smaller proposals are exempt from notification and larger proposals are approved unless certain valuation thresholds are exceeded and the transaction is judged to be contrary to the national interest. Special rules apply to the direct or indirect acquisition of different types of Australian real estate.

The Policy provides that prior FIRB approval must be sought for:

- investments of 5% or more in the media sector regardless of size, and
- investments by foreign government investors.

In summary, if the value of the gross assets of the target is greater than AUD248 million, consent must be obtained from the Treasurer. This valuation threshold is raised to AUD1,078 million where the investment is to be made by certain individuals or entities from the United States and New Zealand by virtue of the Free Trade Agreement between Australia and the United States and the Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement.

Broadly speaking, if a financial threshold is exceeded, the Treasurer will determine if the proposed transaction is contrary to the 'national interest' by having regard to community concerns, and will generally consider if (among other things):

- the foreign investment proposal would lead directly or indirectly to net economic benefits for Australia, and
- subsequent to the acquisition, the business will continue to follow practices consistent with Australia's interests.

An application generally contains background information on the target, buyer and seller (including details of the major business activities, business locations, group ownership structures and the most recent financial statements), nature of the proposed acquisition, a statement of the buyer's intentions and, where the acquisition is in an area deemed to be sensitive in terms of the national interest, an outline of the benefits of the proposed acquisition for Australia.

The Treasurer will usually, in accordance with the requirements of the Foreign Acquisitions Act, make a decision within 30 days of receiving an application, and notify the applicant of that decision within 10 days thereafter. Generally, if the Treasurer has not responded within 40 days of being notified of a proposed foreign investment, consent is deemed to have been given. It would only be in exceptional circumstances that consent would be denied or that an interim order would be made by the Treasurer to extend the period of time for considering an application by 90 days. However, consent may be given subject to any conditions which the Treasurer considers necessary. There is no time limit for

applications made under the Policy only. However, the Government also aims to consider these proposals within 30 days, where possible.

Failure to obtain consent for a prescribed investment is an offence under the Foreign Acquisitions Act and may lead to the Treasurer making a divestiture order. Such an order requires the buyer to dispose of the assets acquired within a stipulated period of time.

Less onerous investment restraints apply for the United States and New Zealand investors and investors from certain other countries, pursuant to free trade agreements.

## 4.5 Industry-Specific Regulation

Specific restrictions apply to foreign investment in sensitive industries, which include banking, shipping, civil aviation, airports and media and telecommunications. The Treasurer has published guidelines for investment in these industries that should be carefully considered when planning an investment.

## 4.6 Import/Export Controls

Australia is a member of the World Trade Organization (WTO) which shapes many aspects of Australia's trade laws. Within the general framework of the WTO, the Australian government is seeking to expose Australian industry to increased competition from imports. At the same time, the WTO is being used as a forum for voicing Australian complaints on the restrictive trade policies of other countries.

The WTO prohibits discrimination between Member States insofar as rates of duty are concerned, although preferences which were in existence at the time the WTO was formulated are permitted to continue. Australia maintains some preferential policies, particularly in relation to products that are manufactured in nominated developing countries.

### 4.6.1 Tariff concession system

The main purpose of tariff barriers is to foster the development and expansion of domestic industries, rather than to raise revenue. It follows that where there is no domestic industry, the need to impose trade barriers in the form of customs duties disappears. Australia's Tariff Concession System (TCS) permits duty-free entry of certain imports in cases where there is no competitive domestic industry. Importers of goods can apply for a Tariff Concession Order (TCO) under this system for concessional rates of duty to be applied. Once a TCO has been granted, it will apply to all importers of the goods.

In order to obtain a TCO, it is necessary to establish that, on the day the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business. Substitutable goods are Australian-produced goods that are put to a use that corresponds with a use to which the imported goods can be put. Should this criterion be satisfied, it will be possible to obtain a TCO and to import otherwise dutiable goods into Australia free of duty.

Certain goods are precluded from eligibility for TCOs, including foodstuffs, clothing and passenger motor vehicles.

### 4.6.2 Import controls

In addition to complying with usual customs clearance procedures, there may be other regulatory obligations imposed on an importer wishing to bring an item into Australia for Australian use. Some examples are below.

- Importers will need a permit to import certain commodities into Australia such as particular plant and animal products, weapons and other sensitive items
- Importers must apply trade descriptions to imported goods in accordance with the prescribed requirements. There is also specific consumer law regulation of country of origin representations.

Specific labelling requirements apply to certain items, such as customer telecommunications equipment and particular radio communications equipment. The label displays that the equipment complies with the relevant standards. There are also product labelling and packaging standards which must be complied with in relation to therapeutic goods.

#### 4.6.3 Export controls

A permit is required to export from Australia controlled goods and technology. The list of controlled items (the Defence Strategic Goods List) reflects the list set by member countries to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies.

In November 2012, Australia passed legislation for a permit system for intangible transfers from within Australia to outside Australia of controlled subject-matter (e.g. by email or allowing remote access). A pilot period is being conducted for introducing the new system. The pilot is due to end in May 2015. No penalties apply for an intangible transfer without a permit during the pilot period.

The rules for the permit system are under review as part of the pilot period and changes are expected.

Exports of some goods and other transactions connected with certain nations or designated entities or individuals may be subject to United Nations Security Council Sanctions or Australia's autonomous sanctions regime.

There are also export permit and licensing requirements for other sensitive subject-matter such as hazardous waste.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Share transfer duty is imposed on an acquisition of shares in a private company located or taken to be located in New South Wales or South Australia. The remaining Australian states and territory have abolished this duty, although a transfer of shares may still result in landholder duty being payable (see below). The current rate of duty is 0.6% calculated on the higher of the consideration payable and the unencumbered market value of the shares being transferred. The location of shares in a company is determined by reference to the state or territory of registration of that company.

Dealings in quoted shares in listed companies are generally exempt from duty (with the exception of takeovers of listed landholder companies which may be taxed in a number of jurisdictions). Similar rules apply to stapled securities that are quoted in a recognised stock exchange for the purposes of the relevant stamp duty legislation.

Additional duty may be payable in instances where a significant acquisition is made in a private company that is a landholder or land-rich. A private company is a landholder if it directly (or indirectly) owns an interest in land with a value in excess of a particular threshold in the jurisdiction in which the land is located. A company can be a landholder in more than one jurisdiction. Landholder duty is paid at transfer duty rates on the value of the land (and moveable goods in some jurisdictions) as if the land had been purchased directly at its unencumbered market value. This type of duty is also payable in some transactions involving listed companies.

Relief from duty is available for a qualifying corporate reconstruction in most states and territories (with the exception of Tasmania). The rules for obtaining such relief vary from jurisdiction to jurisdiction and there are certain conditions that are attached to the grant of such relief from duty. Among other things, it generally requires the parties seeking relief to have been 'associated' companies both prior to the transfer and after the transfer for between one year and three years.

Similar rules to those described above for companies also apply to dealings in units trusts.

## 5.2 Acquisition of Assets

An acquisition of assets may be subject to stamp duty depending on the Australian state or territory where the relevant assets are located or taken to be located. The stamp duty rates and forms of dutiable property vary from jurisdiction to jurisdiction and range between 4.5% and 5.75%. Where stamp duty is payable in respect of an asset acquired, the duty is calculated on the higher of the consideration payable and the unencumbered market value of the dutiable property being transferred.

All states and territories impose duty on the acquisition of land interests. Duty is levied in certain states and territories on the acquisition of most business assets, including plant and equipment, trade receivables and also intangible property (e.g. goodwill and intellectual property). Each Australian state and territory has its own stamp duty legislation and stamp duty is levied and administered by different state revenue authorities.

Similar to above, corporate reconstruction relief from duty may be available where the relevant statutory conditions are met.

## 5.3 Mergers

The stamp duty implications arising on a merger are dependent on how the merger is legally effected. As mergers generally result from the transfer of shares in a target company, the same issues identified at 5.1 are relevant in mergers. A corporate reconstruction exemption from duty may be available where the merger is occurring between companies of a corporate group.

## 5.4 Goods and Services Tax

GST is sometimes payable with respect to a sale of assets.

GST is currently imposed at a rate of 10% on taxable supplies. The tax is paid by the supplier but would generally be recovered under contract from a recipient of that supply. The tax applies to residents and non-residents alike if the following threshold requirements are satisfied:

- there is a supply for consideration
- that supply is made in the course or furtherance of an enterprise carried on by the supplier
- the supply is connected with Australia, and
- the supplier is registered or required to be registered.

To recoup GST charged in addition to the purchase price on an acquisition of assets and third-party services (e.g. GST on professional fees), the recipient must, among other requirements, be registered for GST purposes. If registered, the recipient should be entitled to claim back the GST paid to the supplier as input tax credits from the ATO.

GST may not apply in certain circumstances. For example, the supply of a business by way of a sale of assets may be a supply of a 'going concern'; i.e. GST-free; provided certain requirements are met. In broad terms, a going concern is an operating enterprise that the vendor carries on until the date of sale when the buyer is provided with all things necessary for its continued operation. The purpose of the going concern exemption is to provide cash flow relief since the buyer does not need to pay the GST to the supplier and subsequently claim an input tax credit. In addition, the supplier can recover any GST it has paid on acquisitions it has made in order to make the supply of the going concern (such as legal costs).

GST may also not apply to transactions which are 'input taxed', such as the supply of shares. In those supplies, no GST is payable on the supply. However, both the supplier and recipient may not be able to recover GST paid on third-party services relating to the input taxed supply. For example, where there is a share acquisition, GST costs (e.g. included in advisor's fees) may be unrecoverable. However, reduced input tax credits may be available for the cost of some things, which will minimise the impact of the lost GST.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In a share acquisition, the buyer becomes the owner of shares in the entity that owns the assets and employs the employees in the business. The employees' employer does not change and the existing employment contracts therefore remain in force. The buyer will assume ultimate liability for all existing employment arrangements. Employees who do not wish to remain with the employer after the share ownership has changed (and whose employment terms and conditions will not change as a result of the share purchase) must resign by giving notice in accordance with their employment contract or any applicable industrial instrument. If there is any change in the employment which is detrimental to the employee (including career progression opportunities and reporting lines), the employee may assert there has been a technical redundancy and their employment has ceased, instigated by the employer (and may claim termination entitlements).

#### 6.1.2 Acquisition of assets

Under Australian law, the employment of an employee cannot be transferred from one employer to another without the employee's consent. Therefore, an asset acquisition will not give rise to an automatic transfer of employment. Rather, for the transferring employees to commence employment with the buyer, the employees' employment with the seller must be terminated and the employees must then accept an offer of employment from the buyer. As the termination of employment with the seller is at the seller's instigation, it is typical for the seller to provide notice of termination of employment to each transferring employee. It is also possible for the seller to seek the employees' consent to terminate their employment by mutual agreement, or otherwise request that the employees resign their employment (including having the buyer make resignation a condition of the buyer's offer of employment). These two methods of bringing the employees' employment with the seller to an end are designed to avoid liabilities arising on termination of employment at the initiative of the seller (e.g. liabilities in relation to notice of termination or payment in lieu of notice, redundancy and accrued leave entitlements). However, the lawfulness and efficacy of such methods have not been fully tested and may expose the seller to liability if challenged.

To take advantage of an exemption to statutory redundancy pay provisions in the Fair Work Act 2009 (Cth) (FW Act), a seller will usually require that a buyer make offers of employment to employees on terms and conditions which are no less favourable (considered on an overall basis) than the employees' current terms and conditions of employment with the seller and which recognise the employees' period of service with the seller. This is because when offers are made to this standard, the FW Act provides that employees who have received such offers are not entitled to redundancy payments under the FW Act (which would ordinarily be the liability of the seller) even if the employee rejects the offer.

Pursuant to the FW Act, a 'transfer of business' takes place if the following occur:

- the employment of an employee of the seller has terminated
- within three months after the termination, the employee becomes employed by the buyer
- the work the employee performs for the buyer (the 'transferring work') is the same or substantially the same as the work they performed for the seller
- a 'connection' exists between the two employers.

There will be a 'connection' between the seller and the buyer if, in accordance with an arrangement between:

- the seller or an associated entity of the seller, and
- the buyer or an associated entity of the buyer



where:

- the buyer, or the associated entity of the buyer, owns or has the beneficial use of some or all of the assets (whether tangible or intangible)
- the seller, or the associated entity of the seller, owned or had the beneficial use of
- that relate to, or are used in connection with, the transferring work.

In the ordinary course, a transfer of assets which relates to the work performed by the transferring employees will result in a 'transfer of business for the purposes of the FW Act. In these circumstances, the buyer must generally recognise the transferring employee's prior service with the seller and assume liability for certain accrued employee entitlements, such as leave entitlements except where permitted not to pursuant to the FW Act (e.g. annual leave and/or redundancy pay). If the buyer elects not to recognise service for one or more purposes, it must comply with the FW Act (note the provisions operate differently where the buyer and seller are related bodies corporate) and it may result in the buyer's offer of employment being 'less favourable' and the seller having to pay out the relevant entitlement upon transfer.

An employee who is not offered employment with the buyer or who does not accept an offer of employment with the buyer (regardless of whether or not it is on less favourable terms) will generally have their employment terminated by the seller, unless the seller is able to redeploy the employee into another acceptable position. Upon termination of employment, the seller will be required to pay any accrued annual leave and accrued long service leave (if long service leave is payable under state/territory long service leave legislation). The seller must also consider the period of notice of termination that is required to lawfully terminate the employees' employment. The period of notice of termination that is required is determined by referring to the employees' contracts of employment with the seller, any applicable industrial instruments (e.g. awards and/or enterprise agreements) and the FW Act. If the termination of employment due to the seller no longer requiring the employee's role to be performed by anyone following the sale, the employee may be entitled to statutory redundancy pay pursuant to the FW Act, depending on the employee's length of service. Redundancy pay entitlements may also arise pursuant to an industrial instrument, individual employment contract and/or a custom or practice of the seller (see **6.3.1**).

### 6.1.3 Transfer of Business

Where there is a 'transfer of business' (as defined in the FW Act: see **6.1.2**), any enterprise agreement which applied to the transferring employees and the seller immediately before the time of transfer (a 'transferable industrial instrument') will transfer to, and become binding upon, the buyer. The transferable industrial instrument will remain binding on the buyer in respect of the transferring employees, until terminated or replaced. Further, a transferable industrial instrument will apply to the exclusion of any other enterprise agreement or named employer award which would otherwise have covered the transferring employee on transfer.

The FW Act also provides that in certain circumstances a transferable industrial instrument may cover new employees of the buyer—if the new employees have been engaged to perform the same work as the transferring employees and the new employees are not covered by an industrial instrument (i.e. an enterprise agreement or modern award)<sup>4</sup> when their employment commences.

In limited circumstances, an application can be made to the Fair Work Commission for an order that a transferable industrial instrument (of part of that instrument) does not apply to transferring employees in their employment with the buyer.

## 6.2 Approval or Consultation Requirements

Where the seller decides to terminate the employment of 15 or more employees for structural reasons (this would include an asset sale), it is obliged to notify and consult with each union of which any of the affected employees is a member.

<sup>4</sup> A modern award is an industrial instrument which sets out minimum terms and conditions of employment for qualifying employees.

The seller will also and otherwise have consultation obligations in relation to those in-scope employees whose employment is covered by a modern award. These obligations will be triggered once a definite decision has been made to implement a major change which is likely to have a 'significant effect' on employees. Significant effect includes termination of employment, but can also include diminution of conditions etc. As such, while consultation will be required in each asset sale scenario, it may also be required in a share sale scenario where change in the ownership of the employing entity may effect conditions of employment (e.g. participation in group incentive plans).

The consultation obligations require the seller to discuss the changes with the employees affected and their representatives, and provide relevant information about the changes (though this does not require the disclosure of the seller's confidential information).

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

Employers must pay redundancy benefits to employees who are terminated on the grounds of redundancy in accordance with a scale which varies depending on the employee's years period of service with the employer (FW Act).

Under Australian law an employee's position is considered to be redundant where:

- an employer has made a definite decision that the employer no longer wishes the job the employee has been doing to be done by anyone
- the decision is not due to the ordinary turnover of labour
- the decision leads to the termination of the employee's employment, and
- the termination of the employee is not on account of any personal act or default on the part of the employee.

Redundancy benefits are usually calculated by reference to an employee's length of service, up to a capped amount. Genuine redundancy payments obtain favourable tax treatment.

Some industrial instruments set out procedural requirements before a termination on redundancy grounds can take effect.

It will be a defence to any unfair dismissal claim if the employer can establish the termination was a 'genuine redundancy'. This requires that: the employee's position is not be required to be performed by anyone; the employer has complied with any consultation requirements in an applicable industrial instrument; and it not being reasonable in the circumstances to redeploy the employee within the employer's business or that of the employer's related bodies corporate.

### 6.3.2 Penalties

Failure to comply with obligations pursuant to an industrial instrument (e.g. consultation obligations) and/or the FW Act (e.g. provision of adequate notice of termination) will expose the employer to potential penalties pursuant to the FW Act.

# Austria

## 1.1 Overview

Austria is a federal state comprised of nine provinces: Burgenland, Carinthia, Lower Austria, Salzburg, Styria, Tyrol, Upper Austria, Vienna and Vorarlberg. After joining the European Union in 1995, the Austrian government has passed several new regulations to harmonise its economic, legal and tax structures with those of the European Union. This has led to a liberalisation of Austrian commercial laws making Austria a more attractive market for investors as a consequence.

## 1.2 General Legal Framework

The legal framework applicable to a transaction will differ, depending on the type of company involved and whether the transaction is structured as a purchase of shares or a purchase of assets.

Austrian company law provides for three types of companies.

- Limited liability companies: governed by the Limited Liability Companies Act (*Gesetz über Gesellschaften mit beschränkter Haftung/GmbHG*)
- Stock corporations (regulated by the Stock Corporation Act (*Aktiengesetz/AktG*), and
- the European Company (*Societas Europaea/SE*).

While the relevant tax provisions for mergers and acquisitions are largely concentrated in the Reorganisation Tax Act (*Umgründungssteuergesetz/UmgrStG*), corporate law provisions can be found in various laws, including the:

- GmbHG
- AktG
- Law on Divisions (*Spaltungsgesetz/SpaltG*)
- Corporate Transformation Act (*Umwandlungsgesetz/UmwG*)
- Takeover Act (*ÜbernahmeGesetz/ÜbG*), and the
- Squeeze-out Act (*Gesellschafter-AusschlussGesetz/GesAusG*).

## 1.3 Corporate Entities

The predominant forms of legal entity used for doing business in Austria are the limited liability company (*Gesellschaft mit beschränkter Haftung/GmbH*) and the stock corporation (*Aktiengesellschaft/AG*). The number of GmbHs has recently exceeded 100,000, with AGs at around 2,000. Another legal form for doing business in Austria is the European Company (*Societas Europaea/SE*). As currently only a few European Companies exist in Austria, we will concentrate on GmbHs and AGs. In addition, a few hundred limited liability companies which have been established under the laws of the United Kingdom have their main, or even their exclusive, place of business in Austria.

Austria has the strictest capital requirements in Europe, with the minimum share capital of an AG amounting to EUR70,000 and the minimum share capital of a GmbH amounting to EUR35,000 (although only EUR10,000 may be required in the initial phase following foundation – see below). However, in practice, only half of that amount needs to be paid in the course of establishing the company.

The Austrian Ministry of Justice has taken further steps to increase the appeal of the Austrian GmbH by affording them special privileges. For example, newly founded GmbHs need only have a preliminary minimum share capital of EUR10,000 for the first 10 years after registration with the companies register (EUR5,000 of that having been paid-in prior to registration (s. 10b, GmbHG)).

This privilege ends 10 years after registration at which time the normal provisions on capital requirements apply, i.e. the minimum share capital of the GmbH must be at least EUR35,000, with half of this amount paid-in in cash. In other words, an obligation to increase the share capital by at least EUR25,000 and pay-in an additional amount of EUR12,500 (EUR17,500 minimum minus EUR5,000 already paid in prior to registration of the company with the companies register) arises on the tenth anniversary of registration of the GmbH with the companies register.

### 1.3.1 Limited liability companies (GmbH)

The GmbH is the most frequently used business organisation in Austria, and it is governed by the GmbHG.

In principle, the shareholders of a GmbH cannot be held liable by creditors of the GmbH. Exceptions apply under certain circumstances, for example where:

- there is no clear distinction between the assets and liabilities of the company as opposed to those of its shareholder(s)
- where the registered share capital of the GmbH is far too low for the requirements of the type of business the company engages in, or
- where the legal form of GmbH is misused to the detriment of the company's creditors.

The minimum share capital of a GmbH is generally speaking EUR35,000 though:

- see above for details on privileged treatment for GmbHs, and
- only half is payable in the course of establishing the company.

GmbHs are required to have at least one director, which may not be a legal entity.

A GmbH may be established and owned by a single shareholder, including multiple layer structures of sole shareholding. There are no requirements for the shareholders to be Austrian nationals.

Mechanisms exist in Austria to 'immobilise' the movement of shares, so that shares in a GmbH are not evidenced by share certificates and a notarial deed is required to effect their transfer. Shares in a GmbH may not be publicly traded. Shareholders must be registered with the companies register, but registration is declaratory in nature, so not a required prerequisite to a share transfer.

The GmbH's general assembly is deemed to be the supreme body of the company, in particular enjoying an extensive instruction right *vis-à-vis* the company's management.

### 1.3.2 Stock corporations (AGs)

Another form of company with limited liability is the AG. The underlying rules can be found in the Austrian Stock Corporation Act (*Aktiengesetz/AktG*). As with the GmbH, in principle the shareholders of an AG may not be held liable for liabilities of the company. One main difference to the GmbH relates to the focus of the AG: whereas a GmbH is designed as a legal entity for a few individuals (usually involved in the company's management), an AG is designed to attract a large number of investors who are not personally involved in the management of the company. Accordingly, shares in an AG may be publicly traded. However, in practice, only about 100 out of approximately 2,000 AGs are listed on a stock exchange. In recent years, the legislator has also begun to differentiate between listed and non-listed AGs in various legal reforms.

AGs must have a management board and supervisory board, which are independent from and not subject to shareholders' instructions.

## 2. Acquisition Methods

Austrian businesses are mostly acquired by means of a share deal. For the acquisition of smaller businesses and in distressed situations in particular, buyers also choose to undertake asset deals. In general, asset deals have only recently become more attractive in Austria due to the fact that in 2007 the Commercial Code has eased the transfer of legal relationships connected with the business to be transferred. Most significantly, by providing that third parties will be presumed to agree to the transfer of their legal relationship associated with the business to the transferee unless they object to the transfer within three months of receipt of notification about the transfer. The choice of transfer method will depend substantially on tax implications. As with other jurisdictions, mergers are mainly used for internal reorganisations within groups rather than for acquisitions of an unrelated business. The use of own shares as consideration, however, seems to be becoming more popular.

### 2.1 Acquisition of Shares

The acquisition of a corporation by means of a share deal may be effected by purchasing all or part of the shares of a company or by increasing its share capital and subscribing to new shares. In share deals, the legal entity of the target company remains unchanged and thus, in principle, agreements entered into by that company and the respective parties also remain unchanged. The buyer of a share is usually not liable for debts of the target company; but if the share capital is not fully paid-up or has been repaid, the buyer may be liable for paying up the remainder (for buyers of shares in a GmbH, this would even include liability for the remainder of other shareholders).

### 2.2 Acquisition of Assets

In an asset deal, all or part of the assets of a going concern are acquired. There is no comprehensive code in Austrian corporate and civil law relating to acquisitions of a business as a going concern, but in principle, each single asset must be transferred in compliance with the respective transfer and form requirements for that particular asset. Asset deals, despite the need to transfer each asset separately (with some exemptions), can be attractive to buyers for tax reasons and also because of the opportunities to limit a buyer's risks pertaining to a legal entity to a certain extent (see below).

#### 2.2.1 Liability of buyers under the Civil Code and Commercial Code

Austrian civil law and commercial law provide for separate and independent regimes on acquirer's liability and these apply in parallel.

Under Austrian commercial law, a buyer of business assets will be jointly and severally liable with the seller for liabilities or debts owed to the creditors of the business or the asset, by virtue of the theory of cumulative assumption of debts (s. 38ff, Commercial Code/*Unternehmensgesetzbuch*/UGB). The seller's liability, however, is limited to five years after the sale of the business assets. In addition, the liability of the buyer under s. 38ff UGB can be reduced by a special entry in the companies register indicating deviation from the general legal concept (i.e. joint and several liability due to cumulative assumption of debts) as long as the liability of the seller remains unlimited.

Under Austrian civil law, mandatory liability still applies with respect to all debts of the transferred business which were or should have been known to the buyer: the acquirer of a business or the acquirer of assets will be jointly and severally liable with the seller *vis-à-vis* the business's or asset's creditors for any pre-existing debts of the acquired business or assets (s. 1409, General Civil Law Code (*Allgemeines Bürgerliches Gesetzbuch*/ABGB)). What this means in practice is that, where a buyer acquires a business/assets, the buyer becomes directly liable for debts connected with that business/those assets, which she/he knew about or should have known about at the time of the acquisition (without prejudice to the creditors' rights against the seller). However, the buyer's liability is limited to the value of the business/assets actually acquired. Further, the buyer's liability is reduced to the extent the purchase price is used to pay such pre-existing debts (either by the seller or by the buyer on behalf of the seller). Liability is also limited to such debts that factually and economically relate to the acquired business or assets.

In addition to the liability provisions provided in the Civil Code and the Business Code, particular liability provisions are set out in the General Social Security Act (s. 67, *Allgemeines Sozialversicherungsgesetz/ASVG*) and in s. 14 of the Federal Fiscal Code (*Bundesabgabenordnung/BAO*), providing for the buyer's liability for pre-existing social security contributions and for certain known taxes and charges arising from the operation of the company.

## 2.3 Mergers/Other Acquisition Methods

### 2.3.1 Mergers

Two basic structures can be distinguished. Either the target company is merged into an existing company, with the shareholders of the target company receiving shares in the surviving company as compensation (absorption); or a new company (NewCo) is formed to which all the assets and liabilities of two or more companies are transferred, with the shareholders of both/all companies receiving shares in NewCo (consolidation).

In both cases, the target companies are dissolved by operation of law. Austrian corporate law allows mergers between two or more GmbHs and two or more AGs. Mergers of GmbHs with AGs are also possible. The statutory provisions for mergers of AGs are set out in ss. 220–233 AktG. Special rules for mergers involving GmbHs are found at ss. 91–101 GmbHG, reflecting the more personal relationship of shareholders in a GmbH and with less formality than the rules for AGs.

### 2.3.2 Divisions

Since 1 July 1993, GmbHs and AGs have been allowed to split their assets under the rules of the SpaltG. The law provides for the following types of divisions involving GmbHs and AGs:

- Split: whereby the transferring company is dissolved (without liquidation), and transfers all its assets and liabilities to existing corporations and/or newly formed companies. The shareholders of the transferring company surrender their shares and receive new shares in the existing and/or newly formed companies. In certain situations an asymmetric allocation of shares (i.e. allocation of shares not in proportion to the shareholdings in the transferring company) is possible.
- Spin-off: One or more assets of a company are transferred to existing (receiving) companies or newly formed companies with the company that transfers the assets continuing operations.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

In general, Austrian law provides that the parties are free to abstain from concluding a contract at any point until they have reached full consensus on all outstanding issues, i.e. until one party fully accepts the other party's offer. Until full consensus has been reached, neither party may assume the contract will be concluded, and therefore acts at its own risk if acting upon it in any way.

That principle is, however, modified to some extent by the general duty to act in good faith. Legal academics and Austrian courts provide that as soon as the parties enter into contractual negotiations, there is a pre-contractual duty to safeguard the other party's interests. Neither party may mislead the other concerning its own willingness and honesty to conclude the contract, especially if one party is aware that the other party is incurring expense in leading to conclusion of the contract, but knows it is not itself willing to close the deal (for whatever reason).

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Austrian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

## Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Yes. Purchase price adjustments usually based on a cash-free/debt-free mechanism (usually combined with (minimum) working capital adjustments or equity adjustments).
2	Is there a collar on the adjustment?	Usually not.
3	Who prepares completion balance sheet?	Usually buyer, whereas measures protecting seller's interests (e.g. inspection and objection rights/consultation obligations) are implemented.
4	Is the balance sheet audited?	Usually not, however, a review by auditors is common.
5	Is an earn-out common?	Not too common, although IP/IT related acquisitions tend to include earn-out provisions more frequently.
6	Is a deposit common?	No.
7	Is an escrow common?	Yes.
8	Is a break fee common?	No.

## Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Common, in particular in connection with transactions in the financial sector.
10	Is the MAE general or specific?	Depending on the negotiations.
11	Quantification of MAE?	Common.

## Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Non-compete very common.  Waterfall provisions not common.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Generally yes (to the extent permissible under applicable anti-trust laws).
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Common to update only such schedules that were not available at signing (e.g. contracts). Notification of possible breach seen. Breach might lead to right to terminate (usually depending on seriousness of infringement).
17	Is a separate tax covenant/indemnity or tax deed common?	Yes, seen in almost every transaction.

## Representations and Warranties

18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Often not quantified but defined in an abstract manner.
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Often limited to actual knowledge and due and careful inquiry of key persons (e.g. managing directors).
20	Is a warranty that there is no materially misleading/omitted information common?	Yes.
21	Is disclosure of data room common?	Yes, although certain limitations may apply (e.g. only such facts are deemed disclosed as can be derived (i) using the efforts and having the knowledge of a common buyer, or (ii) from an individual document included in the data room, i.e. without having to read various documents and combine the information contained therein).

## Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Both repetition at completion and at all times between signing and completion seen.  Bring-down certificates very uncommon.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	The general standard is true and accurate, whereas qualification (true and accurate in all material aspects) may apply.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation?	No.

## Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Usually 100% as to title (and potentially tax) and between 5% and 35% in respect of other liabilities.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually warranties only.
27	What are the common exceptions to the cap?	Title and tax (in which case 100% cap applies) and certain covenants (e.g. non-compete).
28	Is a deductible or basket common?	Yes; basket is more common.
29	Is a <i>de minimis</i> common?	Yes, basically seen in every transaction (however, potentially not applicable to tax warranties).



30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	Usually between one and three years.  Exceptions for fraud, tax, environmental and title warranties common.
31	Is warranty insurance common?	Not yet common in Austria, but increasingly seen.

#### Reliance

32	Do financiers seek to rely on buyers' due diligence reports?	Yes, but not uncommon to disclose the report on a non-reliance basis only.
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#### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Very common.
34	Insurance proceeds?	Common for amounts actually received (or amounts that could have been received).
35	Third party recoveries?	Common for amounts actually received (or amounts that could have been received).

#### Damages, Knowledge

36	Obligation to mitigate damages?	Obligation to mitigate damages required by law (and contractually specified).
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Common (exclusions relating to tax may apply).

#### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes.  Austrian law.
40	Is litigation or arbitration more common? If arbitration, where?	International investors tend to prefer arbitration. Common places of arbitration include Vienna, Zurich, Paris and London.

#### Stamp Duty

41	If stamp duty is payable, is it normally shared?	Usually paid by buyer.
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### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares

Any agreement regarding the transfer of shares in a GmbH must be drawn up in the form of an Austrian notarial deed. No specific formal requirements apply with regard to the transfer document regarding shares in an AG.

### 3.3.2 Transfers of assets

Whether or not (and which) formal requirements must be complied with depends on the transferred assets (e.g. transfer of IP rights may require notarised deeds).

Acquisition, transfer, limitation and suspension of rights registered in the land register can only be effected by registering a change. As long as a legal transaction involving real estate is not registered, a party to a contract only has a contractual claim for performance against the other contracting party, as registration with the land register is required to pass title to the new owner. Legal uncertainties are usually avoided by using escrow agents.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

A notarial deed is required for the transfer of shares in a GmbH (s. 76(2), GmbHG). The articles of association may subject the transfer to additional conditions (which would also have effect *vis-à-vis* third party acquirers), such as prior consent requirements or pre-emptive rights of other shareholders. The GmbH must be notified of the transfer to allow the new shareholders to exercise their rights against the company.

For AGs, in principle, no specific form requirements apply with respect of the transfer of shares. Shares in non-listed companies must be issued in the form of registered shares. Registered shares are transferred by means of written endorsement by the seller. The company must be notified of the transfer of registered shares. The articles of association of the company may impose additional shareholder consent requirements for registered shares, but due to the principle of free disposal of shares, the AktG does not allow pre-emptive rights for other shareholders or third parties in the articles of association (which may, however, be provided for in shareholders' agreements).

### 3.4.2 Transfers of title to assets

Austrian corporate and civil law does not contain any comprehensive set of provisions relating to the acquisition of a business as a going concern. In principle, each single asset must be transferred in compliance with the respective transfer and form requirements for each asset (for exemptions see below). As such:

- property rights must be transferred according to applicable property law provisions (e.g. transfer of real estate requires registration with the land register)
- claims need to be transferred by means of an assignment, and
- intangible property rights must be entered into the respective public registers according to applicable intellectual property laws.

Generally speaking, the rights of a contractual party can be transferred only by assumption of contractual rights with the approval of all other contractual parties. However, the Business Code (*Unternehmensgesetzbuch*/UGB) facilitates the operation of this requirement by adopting a legal presumption of approval by the contractual parties (s. 38ff, UGB).

Some contracts/rights will transfer automatically by operation of law to the new owner (e.g. employment contracts, some insurance contracts, and certain tenancy rights).

A shareholders' resolution is required to approve the transfer by a GmbH or an AG of all its assets. The resolution in these two cases will require approval by a majority of at least three-quarters of the nominal capital represented or by a greater quorum if required by the articles of association; that approval requirement also applies where a substantial part of the company's business is to be transferred (according to legal academics).

### 3.5 Formalities for Mergers

A merger agreement must generally be approved by the shareholder meetings of all companies participating in the merger, by a three-quarters majority vote of the shareholders present at the meeting. Exemptions apply for mergers of group companies. However, the articles of association may stipulate a higher quorum or additional requirements. Also, additional statutory consent requirements may arise if shareholders with special rights exist in either of the companies. These provisions apply to both 'absorption' and 'consolidation'.

In the case of a consolidation:

- all merging companies will cease to exist and the newly established company will be the receiving company
- the merger agreement must include the Articles of Association of the NewCo
- the appointment of the first supervisory board and of the auditor of the first annual balance sheet requires the consent of the shareholders of all companies participating in the merger in their respective meetings.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Merger control in Austria is governed by the Austrian Cartel Act 2005, as amended, which entered into force on 1 January 2006.

The Federal Competition Authority (*Bundeswettbewerbsbehörde/BWB*) is the regulator. Its main function is to investigate and detect activities which could potentially have the effect of restricting competition. Merger applications (4 copies) must be filed with the BWB. The cartel court and the Cartel Court of Appeals are the decision-making courts, which can order remedies to diminish anti-competitive effects.

For further details on EU competition law see Appendix A.

### 4.2 Merger Control Overview

A merger or acquisition must be notified to the BWB (mandatory notification) if:

- the parties' combined worldwide turnover exceeds EUR300 million
- the combined Austrian turnover of the parties exceeds EUR30 million, and
- the worldwide turnover of at least two of the parties exceeds EUR5 million each.

Each and all of these requirements must be met in the last business year prior to the concentration.

However, concentrations that exceed the turnover thresholds are exempt from the notification obligation if:

- only one of the undertakings concerned achieved Austrian turnover of more than EUR5 million, and
- the other undertaking(s) concerned achieved an aggregate turnover not exceeding EUR30 million worldwide.

For the purpose of calculating turnover, the aggregate net turnover, excluding intra-group turnover, of all undertakings linked to each other must be included. In the case of media concentrations, the turnover of media businesses and media services must be multiplied by 200, and the turnover of media support businesses, by 20, for the purpose of the calculation. However, the worldwide

EUR5 million threshold should not be multiplied. The calculation of turnover in the banking and insurance sector is also subject to special rules.

Each undertaking involved in the concentration may file the notification and/or is entitled to send information about the transaction. In practice, however, the buyer usually files the application with the sellers' consent.

The filing and approval of the transaction must occur before the merger is consummated.

Failure to file – e.g. implementation of a concentration without prior clearance – may lead to fines of up to 10% of worldwide group turnover achieved in the preceding financial year by each of the enterprises involved in the violation. Agreements violating the filing provisions are legally void.

A concentration will be prohibited if it is expected that the concentration will create or strengthen a dominant market position. An undertaking is deemed to hold a market-dominating position if it has only insignificant competition in a market, or if it has a superior market position in relation to its competitors, customers or suppliers. In addition, an undertaking will be deemed to be dominant if, in a relevant market, it either:

- holds a market share of at least 30%
- holds a market share of more than 5% and is competing in that market with only one or two other undertakings, or
- holds a market share of more than 5% and is one of the four largest undertakings in the market, which together hold a market share of at least 80%.

A media concentration may also be prohibited if it is expected that it will impair media diversity.

Within four weeks of receipt of the notification, the official parties – i.e. the BWB and the Federal Cartel Attorney – may apply for in-depth investigation of the concentration (Phase II). If no such application is filed within four weeks, the concentration is automatically presumed cleared.

During a Phase II investigation, the cartel court may prohibit the concentration (or clear it, with conditions) within five months of the date of commencement of the second phase investigation. If the cartel court fails to issue a decision within a five-month period, the concentration will be deemed cleared without restrictions.

Decisions issued by the cartel court can be appealed to the Cartel Court of Appeals within four weeks of receipt of the decision, and the Court of Appeals has two months to decide the appeal.

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Austrian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory (if thresholds are met or exceeded).
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## Timetable

2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p>Phase I: The large majority of concentrations is cleared at the expiry of the 4-week Phase I period without an application for in-depth examination by the authorities (BWB and Federal Cartel Attorney). Under certain conditions, the Phase I procedure may be shortened by means of a 'waiver' by the authorities of their right to initiate a Phase II procedure. A waiver may be issued not earlier than 14 days after submission of the notification by the parties and is only issued if it can be shown that the clearance is particularly urgent. Neither the law nor the authorities provide clear guidance as to what kind of circumstances amount to a 'particular urgency' justifying a waiver. More recently, the authorities have been rather reluctant to grant a waiver.</p> <p>Phase II proceedings are rare and can last the maximum statutory period (i.e. five months). In a number of cases, the authorities have withdrawn Phase II requests because its concerns were addressed by the notifying party.</p>
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### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Austrian merger control rules prohibit the completion of a notifiable transaction prior to the transaction being cleared by the authorities (BWB and Federal Cartel Attorney). In respect of the exchange of competition sensitive information and 'gun-jumping' Austrian provisions mirror EU rules: i.e. the aim is that competitors should remain competitors and must act as such until the date of closing the transaction. The laws prohibiting restrictive agreements are applicable throughout the pre-closing process, even after merger control clearance has been obtained or any merger control waiting periods have expired. For further details see Appendix B.

If the parties are found to have implemented the transaction before it has been cleared by the authorities, it would risk substantial fines (up to 10% of revenues of the year preceding the year in which the fine is imposed).

### 4.4 Anti-Bribery, Corruption and Money Laundering

In Austria, rules against money laundering follow EU Directives. Anti-Money laundering rules are in particular found in the Penal Code and in the Banking Act (*Bankwesengesetz/BWG*).

Duties of diligence apply to banks which are obliged to take due consideration when conducting their business, particularly with respect to any transactions that may lead themselves to money laundering (s. 39, BWG).

Banks must identify customers (applying 'know-your-customer' principles):

- when entering into a permanent business relationship
- in cases of transactions outside of a permanent business relationship involving, in aggregate, one or more interrelated transactions amounting to at least a EUR15,000 or its equivalent in foreign currencies, or
- if there is a substantiated reason to suspect that the customer (even unknowingly) is a member of a terrorist organisation, or is involved in money laundering transactions for the financing of terrorism (s. 40, BWG).

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

No currency exchange control approvals of general application apply in Austria. Accordingly, in principle, there are no restrictions on the acquisition of shares in a GmbH or an AG. However, exceptions apply for certain specific types of business. Approvals will, for example, be required for the acquisition of a controlling shareholding in an Austrian credit institution.

In addition, acquisitions of 25% or more or a controlling interest by non-EU, non-EEA and non-Swiss person in an Austrian enterprise engaged in a particular – protected – industry sector defined under the Foreign Trade Act (*Außenwirtschaftsgesetz/AußWG*) must seek the advance approval of the Austrian Ministry of Economic Affairs. Protected sectors include the defence equipment industry, security services, energy supply, water supply, telecommunication, traffic and infrastructure in the healthcare and educational sector.

### 4.5.1 Exchange controls

All capital transfers between residents and non-residents, as defined by the Foreign Exchange Act (*Devisengesetz/DevG*), are subject to Austrian National Bank controls. Under the DevG, the Austrian National Bank is generally vested with the power to issue restrictions on foreign exchange as well as on domestic currency and certain transactions must be reported to the National Bank. However, the National Bank has not made wide use of its power. At this time, payments for all business transactions (with very few exceptions) are generally permitted by general regulation of the National Bank.

### 4.5.2 Foreign investment approvals and notifications

As noted above, under the AußWG the list of protected sectors is extensive and includes *inter alia* not only the defence equipment industry but telecoms, energy and water supply.

The application for approval by the Ministry will have to be submitted before entering into a legally binding agreement to acquire the relevant interest or before announcing the launch of a public offer in an enterprise of the protected sector. Additionally, the AußWG provides for an ex officio review procedure. The waiting time for the approval is between 1 to max 3 months from the notification.

Any prohibition will have to be reasoned and is subject to appeal. The sanctions for violation of the approval requirement include the invalidity of the acquisition agreement. Additionally, even negligent violations of the approval requirements are subject to fines amounting to up to 360 days income or up to one year imprisonment.

### 4.5.3 Industry-specific regulation

#### ***Banking***

Any acquisition of a target bank must be conducted in compliance with merger control regulations as well as the ÜbG if the target bank is listed on the stock exchange. In certain cases, a special permit must be obtained from the FMA, e.g.:

- for any merger and acquisition
- for any change in legal form when a branch office is established in a non-EU country, or
- wherever the thresholds of 10%, 20%, 33% and 50% of the voting rights or capital are reached, exceeded or undercut if another credit institution directly or indirectly holds, acquires or relinquishes these voting rights or capital.

#### ***Insurance companies***

The regulatory provisions set out at *Banking* above also apply to the acquisition of insurance companies listed on the stock exchange.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Austria imposes a capital transfer tax of 1% (*Gesellschaftssteuer*) on equity contributions of a direct shareholder in its Austrian subsidiary. In most cases, this levy may be avoided by contributing the funds via a grandparent company.

### 5.2 Acquisition of Assets

The transfer of real estate generally triggers real estate transfer tax in the amount of 3.5% of the purchase price of the property located in Austria. Registration fees add on at least an additional 1%. Real Estate Transfer Tax may also apply to a share deal if 100% of the shares in a domestic entity owning real estate is acquired by one buyer. In this event, real estate transfer tax may be avoided by transferring a minor share in the Austrian subsidiary to a second shareholder. This minority stake may be as little as 0.1%.

Austria also imposes stamp duty on various legal transactions, such as assignments (0.8%) or leases (1%). In practice, these fees can be avoided by appropriate structuring.

### 5.3 Mergers

Under certain conditions, a merger is exempt from capital transfer tax and VAT, and the rate of real estate transfer tax can be lowered.

### 5.4 Value Added Tax

There is no exemption from VAT for the transfer of going concern, so asset acquisitions are subject to VAT at statutory rates (i.e. 10% or 20%, depending on the relevant good or service), unless assets are transferred that are exempt from VAT (i.e. receivables). Austria levies VAT on domestic supplies and services at a rate of 20%. Reduced rates of 10% or 12% may apply to certain supplies, specially enumerated services and supplies (such as hospital services rendered by public corporations) are exempt from tax. Export of goods is zero-rated and intra-community supplies exempt from Austrian VAT, but intra-community acquisitions trigger VAT at the statutory rates. Intragroup services supplied within a domestic group are disregarded for VAT purposes.

Share sales are usually exempt from VAT.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In share acquisitions, the employment conditions of the employees of the target company remain unchanged since the employer remains the same entity.

#### 6.1.2 Acquisition of assets

An asset acquisition will likely qualify as a transfer of business under the Austrian law implementing the EC Business Transfer Directive. Where a transfer of business takes place, the affected employees are transferred by operation of law to the buyer which becomes the new employer. Generally, the employees transfer with all existing rights and obligations.

#### 6.1.3 Transfer of business

#### **Notification**

Employers must inform the works council (where there is one) of any proposed transfer of business.

If no works council exists, the transferor or transferee must inform affected employees in writing before the transfer. That information must include the date of transfer, the reasons for the transfer,

legal, economic and social consequences of the transfer for the employees, and any measures which may be taken as a result of the transfer.

### **Mergers**

Mergers also qualify as a transfer of business triggering notification and/or consultation requirements.

## **6.2 Approval or Consultation Requirements**

Employers must inform the works council (where there is one), of any proposed change to the business. The following are examples of a change of business (s. 109(1), Labour Constitution Act (*Arbeitsverfassungsgesetz/ArbVG*)):

- downsizing or closure of a business or parts of the business
- collective redundancies
- relocation of a business or of parts of it
- merger with other companies
- change to business purpose, plant, or organisation
- introduction of new working methods
- introduction of substantial rationalisation measures or automation, or
- change to the company's legal form or ownership.

Although no strict time-limit applies, the employer is obliged to inform the works council in the planning stage and to notify the works council as soon as possible – at least soon enough for the proposed change to be thoroughly discussed. Details of how much information is to be given to the works council, and its scope, are not governed by law, but the information must be detailed enough to allow for a consultation with the works council.

Employers must also consult with the works council about the structure of the change of business if the works council requests this, although the works council can generally neither block nor make specific suggestions about how the transfer should be executed, as employers are entitled to determine any change to the business unilaterally. The works council can request a representative of a trade union to join the consultations.

In enterprises employing at least 20 employees the works council is entitled to request the employer to enter into a social plan mitigating any negative consequences of the operational change (i.e. the business transfer within the meaning of s. 109(1), ArbVG), if any, that may affect a substantial part of the workforce. The social plan usually grants employees additional severance pay where the change necessitates termination, and reimbursement of training costs and other benefits.

## **6.3 Protection against Dismissal**

### **6.3.1 Redundancies**

No written contract of employment is required in Austria. Employment contracts may be concluded for a definite (short-term contracts) or indefinite (permanent) period. Notice of the termination of permanent employment contracts can be made freely, although rules on giving sufficient notice (in terms of time) do apply. For example, the statutory notice period for salaried employees (on permanent contracts) ranges from six weeks to five months, counting from the end of a month or a calendar quarter. If a works council is established, the employer is obliged to inform the works council of any proposed notice of termination at least five working days in advance of giving notice to the employee.



The ArbVG and Equal Treatment Act provide the opportunity for the works council or, if the works council does not comply with an employee's request to challenge the termination, employees themselves to challenge a notice of termination (e.g. on social and/or discriminatory grounds) if certain criteria are met. If business conditions require the redundancy of an employee (and provided the works council has raised an objection to the redundancy), a social compromise must be reached. This means that the termination cannot be justified if notice of termination of that particular employee would involve considerably greater hardship for him or her compared with the impact it would have on other employees of the same company. Thus, when selecting employees for termination, the employer needs to look at all comparable employees, considering issues relating to their age, seniority and number of dependents when selecting those whose jobs will be terminated. There is no rule as to how much relevant weight any of these criteria should be given. A successful challenge to a termination would lead to the reinstatement of the respective employee.

The employment of specially protected employees (e.g. disabled or pregnant employees, etc.) can only be terminated with the prior approval of the labour court or disabled employees committee established at the Federal Social Office.

Immediate dismissal can be effected only on solid grounds, which must be asserted immediately. Mass redundancies may have to be notified to the local employment office (AMS) if they meet specific criteria (i.e. in relation to number of employees and number of terminations involved).

### 6.3.2 Penalties

Any redundancy made without notifying the works council or effected within the five-day notice period will be void. Redundancies (and mutual agreements) made without notifying the local employment office or prior to expiry of a 30-day period after notification are also null and void.

## Bahrain

### 1.1 Overview

The Kingdom of Bahrain has a national constitution and its laws are codified. There is no federal system in Bahrain. The legal system of Bahrain is a hybrid system deriving from a number of jurisprudential traditions, including the Islamic Shari'ah, Egyptian civil, criminal and commercial law (the Egyptian system itself deriving from the French Napoleonic Code, local tradition and custom), and English common law. The first Penal Code of Bahrain was promulgated in 1955 and amended by Decree Law 15/1976.

### 1.2 General Legal Framework

In general, the Ministry of Industry and Commerce (MOIC), through its Directorate of Company Affairs, handles the registration of all types of companies and branches of foreign companies as well as commercial agencies. It also regulates and supervises companies in accordance with the Commercial Companies Law as amended (CCL) and the provisions of the companies' respective articles of association.

The CCL gives administrative and judicial authority to MOIC which supervises, regulates and enforces legal measures against any companies violating the law.

The Bahrain Bourse and listed companies and activities carried out by financial institutions are subject to the supervision and regulation of the Central Bank of Bahrain (CBB). CBB has issued a regulation specifying the financial activities which fall under its authority, including all investment companies, consultancy and brokerage companies. The CBB has issued a Rulebook, comprising of several volumes, for the licensing, organisation, and management of financial institutions and their different activities to ensure the proper implementation of the CBB Law and CCL, as well as other relevant laws including the Anti-Money Laundering Law and Bahrain Stock Exchange Law. Each volume of the Rulebook deals with specific activities and institutions.

The role of the CBB is not confined to the supervision and regulation of financial institutions but it also regulates Bahrain's licensed exchanges and clearing houses and acts as the Listing Authority for companies and financial instruments listed on the exchanges. It is also responsible for regulating conduct in Bahrain's capital markets.

In addition to supervision by CBB and MOIC, companies carrying out business activities may be subject to the supervision and control of other authorities. For example, industrial-related activities are subject to the Directorate of Industrial Projects at the Ministry of Industry and Commerce; tourism is subject to the Directorate of Tourism Affairs at the Ministry of Information; and food-related activities are subject to the Department of Public Health at Ministry of Health. The laws relevant to those authorities also empower them with judicial authority enabling them to enforce relevant laws and take appropriate measures in cases of violation of the laws.

Other laws applicable to mergers and acquisitions in Bahrain include the Consumer Protection Law 2012; the Commercial Agencies Law of 1992 (as amended); the Labour Law 2012; the Penal Code; the Civil and Commercial Procedures Act 1972 (as amended); the Civil Code 2001; and the Rules and Regulations of the CBB.

### 1.3 Corporate Entities

Most businesses in Bahrain take the form of limited liability or closed joint stock companies. Foreign entities may own up to a 100% of the business for many activities and services. Citizens of Gulf Cooperation Council (GCC) countries and the United States (under the USA-Bahrain Free Trade Agreement (FTA): see 4.5) are treated in the same way as domestic Bahraini companies, with only a few exceptions. Whether restrictions apply to a particular company will be determined by the proposed share ownership and type of business involved.

Private companies in Bahrain can take eight different forms, but for present purposes the main features of three of those are examined:

- with limited liability companies (WLLs)
- joint stock companies (BSC), and
- single person company (SPC).

#### 1.3.1 Single person companies

An SPC has one shareholder who is liable for its obligations to the extent only of its investment in the shares in the company. The minimum capital requirement to establish an SPC is BHD50,000 or equivalent amount in any other approved currency. There is no concept of 'directors' but a manager must be appointed. The SPC is a favourable option because it can be 100% foreign-owned and administratively straightforward to run, as there is no requirement to hold annual or extraordinary general meetings and audited financials can simply be filed with MOIC without the need for annual general meeting approval.

#### 1.3.2 With limited liability companies

A WLL can be incorporated with a minimum of two shareholders and two directors. The liability of each shareholder is limited to the extent of its shareholding. The minimum share capital required to establish an WLL is BHD20,000. As with an SPC, a WLL can have 100% foreign ownership unless the business activity determines a local sponsorship requirement; if so, this is usually 51% of the issued share capital.

#### 1.3.3 Joint stock companies

A joint stock company can be either private and closed or public.

A closed joint stock company can be incorporated with a minimum of two shareholders and five directors. The liability of each shareholder is limited to the extent of its shareholding. The minimum share capital required to establish a closed BSC is BHD50,000. This structure can also have 100% foreign ownership unless the business activity determines a local sponsorship requirement (usually of 51% of the issued share capital).

A public BSC can be incorporated with a minimum of two shareholders whose liability is limited to the extent of their shareholding. Unless the Minister of MOIC approves otherwise, shareholders need to be nationals of the Kingdom of Bahrain or a GCC member state. The Minister also has power to determine the share capital or expertise of foreign participation in certain sectors or activities. Shares may be offered to the public subject to the approval of the public BSC, CBB and MOIC.

## 2. Acquisition Methods

In Bahrain, a business can be purchased either by way of a share purchase or asset purchase.

### 2.1 Acquisition of Shares

Generally, all that is required to transfer legal title to the shares in a Bahraini private company is a Stock Transfer Notice which is executed by the seller before a notary and then registered with MOIC. Prior to registration, the incoming shareholder will be required to provide the relevant corporate resolutions approving the acquisition; most recent audited accounts; a power of attorney for a representative in Bahrain; buyer's constitutional documents; the certificate of incorporation; and most recent audited accounts. The existing seller and the company will be required to provide the relevant corporate authorities with a resolution approving the sale.

## 2.2 Acquisition of Assets

When a business is being transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer that applies to that type of asset. In respect of some assets, this will simply be a case of delivering the asset to the purchaser, but in other cases, the formalities are more prescriptive, such as in the case of real property. It is therefore necessary to include a provision, either in the purchase agreement governing the purchase of the business and its assets, or in separate agreements, for the relevant formalities to be complied with. As with a share acquisition, an asset purchase agreement is usually drawn up to record the respective rights, obligations and liabilities of the parties.

## 2.3 Mergers

The CCL prescribes the circumstances in which a Bahraini company can merge with another by acquisition where the acquired company is wound up and its assets transferred to an existing company or a new company set up for the purpose of the merger. The CCL sets out the procedure for such merger in terms of the resolutions that need to be passed and the valuation of the respective companies involved in the merger.

It should also be noted that where the entity is licensed or regulated by a governing body (e.g. CBB or the Telecommunications Regulatory Authority (TRA)) the merger cannot be initiated without prior discussions and approval of those regulators, who may impose additional requirements before the merger can take place.

The Takeovers, Mergers and Acquisitions Module (TMA Module) in volume 6 of the Rulebook issued by CBB, applies to takeovers, mergers and acquisitions affecting Bahrain domiciled publicly listed companies and overseas companies whose ordinary voting equity securities are listed on a licensed exchange in Bahrain. These include partial offers, offers by a parent company for shares in its subsidiary, and certain other transactions where control of a company is to be obtained or consolidated. 'Takeovers' and offers include share repurchases by mandatory offer.

Generally, the TMA Module is triggered when 30% or more of company's voting rights are acquired.

## 2.4 'Hive-down'

A 'hive-down' is a process by which the selling company transfers some of its assets and liabilities to a newly incorporated company, usually a wholly owned subsidiary of the selling company. The purchaser then acquires all the shares in the newly formed subsidiary. This mechanism is not common in Bahrain and is more common in intra-group restructurings, or as a precursor to a new joint venture.

## 3. Negotiation, Signing and Closing

### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Bahraini purchase agreements. Baker & McKenzie's fully interactive comparison of these provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

- |   |  |           |
|---|--|-----------|
| 1 | Is a purchase price adjustment common? | Uncommon. |
|---|--|-----------|

What type is common (e.g. debt-free, cash-free)?

- |   |                                      |     |
|---|--------------------------------------|-----|
| 2 | Is there a collar on the adjustment? | No. |
|---|--------------------------------------|-----|

3	Who prepares completion balance sheet?	Usually buyer.
4	Is the balance sheet audited?	Yes.
5	Is an earn-out common?	No.
6	Is a deposit common?	Very rare.
7	Is an escrow common?	Very rare.
8	Is a break fee common?	No.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	No.
10	Is the MAE general or specific?	Not used.
11	Quantification of MAE?	Not used.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Yes but waterfall or blue pencil provisions uncommon.
13	Non-solicit (of employees)?	Yes, common in conjunction with non-compete.
14	Non-solicit (of customers)?	Yes, common in conjunction with non-compete.
15	Broad access to books, records, management between sign and close?	Yes, common.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Yes. Consequence is the ability to rectify and/or terminate.
17	Is a separate tax covenant indemnity or tax deed common?	No tax jurisdiction.
<b>Representations and Warranties</b>		
18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but not quantified other than for specific contract or transaction value.
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Both actual and constructive and while not common, specific persons can be specified.
20	Is a warranty that there is no materially misleading/omitted information common?	Very uncommon.
21	Is disclosure of data room common?	Very common.

### Repetition of Representations and Warranties

- |    |   |   |
|----|---|---|
| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?  | Repetition at completion common. Bring-down certificates not very common. |
| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard?   | True and accurate in all material respects common.                        |
| 24 | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon.   |

### Limitations on Liability

- |    |  |   |
|----|--|---|
| 25 | What is the common cap amount (as a percentage of purchase price)?   | No common cap. Deal-specific, usually capped at transaction value.            |
| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Usually warranties only.  |
| 27 | What are the common exceptions to the cap?   | Key warranties such as title, authority, capacity, key assets, contracts etc. |
| 28 | Is a deductible or basket common?  | Uncommon.   |
| 29 | Is a <i>de minimis</i> common?   | Common.   |
| 30 | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | 1 to 2 years but no common carve-outs.  |
| 31 | Is warranty insurance common?  | Uncommon.   |

### Reliance

- |    |  |                       |
|----|--|-----------------------|
| 32 | Do financiers seek to rely on purchaser's due diligence reports? | Becoming more common. |
|----|--|-----------------------|

### Set-offs against Claims

- |    |  |                               |
|----|--|-------------------------------|
| 33 | Is a set off against claims for tax benefits common? | Not seen.                     |
| 34 | Insurance proceeds?                                  | Common for actually received. |
| 35 | Third party recoveries?                              | Common for actually received. |

### Damages, Knowledge

- |    |                                 |         |
|----|---------------------------------|---------|
| 36 | Obligation to mitigate damages? | Common. |
|----|---------------------------------|---------|

37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge has no effect on warranty/indemnity?	Common if acting for seller not buyer.

### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes and Bahraini clients usually opt for Bahraini law.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration becoming increasingly common. Bahrain entities will prefer the Bahrain courts for dispute resolution. If there is an offshore party to the transaction then as a compromise, parties likely to opt for arbitration at the Dubai LCIA Arbitration Centre (DIFC).

### Stamp Duty

41	If stamp duty is payable, is it normally shared?	None.
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## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

There is no legal requirement for an agreement for the sale of the legal and beneficial title to shares to be made in writing. All that is required is a standard prescribed stock transfer form signed by the seller or under its power of attorney before a notary public in Bahrain.

Any offshore incoming or outgoing shareholders on a transfer of shares will be required to notarise and/or apostille and/or legalise documents required to support the transfer depending on the jurisdictional origin of the outgoing and incoming shareholder.

### 3.2.2 Transfers of assets

In a transfer of assets, written contracts may be required by law or to fulfil an applicable registration requirement. Some examples of contracts that must be in writing are:

- contracts for the sale of land
- assignments of the benefit of a contract
- transfers of the legal title to shares, and
- guarantees.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

The process of transfer of shares broadly consists of three stages:

- making an online application to MOIC
- lodging the documents below (which may need to be notarised, apostilled and/or legalised depending on the nationality of the transferor and transferee), and

- registering the transfer with MOIC.

#### ***Transferor***

- appropriate resolutions approving the transfer if the transferor is a corporate entity
- power of attorney if the transferor not appearing before the notary, and
- share transfer notice.

#### ***Transferee***

- appropriate resolutions approving the transfer if the transferee is a corporate entity
- power of attorney if the transferee is not personally appearing before the notary
- amended memorandum and articles of association of the company
- most recent audited accounts
- constitutional documents, and
- certificate of incorporation.

#### ***Company in which shares are being transferred***

- resolutions approving the transfer, and
- power of attorney if the company is not appearing before the notary.

### 3.3.2 Transfers of title to assets

Each individual asset must be transferred in accordance with the formalities for a transfer that applies to that type of asset. An asset purchase agreement will frequently only require signature by or on behalf of the parties.

Other documents for transferring title would include:

- sale deeds of land or any interest in land
- assignment of leases
- documentation of mortgages and charges
- documentation pertaining to sales by mortgagees
- the appointment of trustees, and/or
- powers of attorney.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Currently, there is no competition law in force in Bahrain. However, Legislative Decree No. 7 (Law of Commerce) addresses unfair competition and prohibits certain acts. The Law of Commerce provides for a broad prohibition of activities that would have damaging effects on competition, and companies are forbidden from undertaking practices detrimental to their competitors or attracting the customers of their competitors. Provisions are also found in CCL to ban any merger that will result in monopolising an economic activity, commodity or product; TRA has competition guidelines which



protect the interests of subscribers and users, and promotes effective and fair competition among established and newly licensed operators. The Consumer Protection Law also ensures that the law with respect to determining prices and control is implemented and violators are punished.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Bahrain purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix A for further details).

### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	<p>Filing is mandatory only for regulated financial service providers. Bahraini merger control law is confined to acquisitions involving the banking sector and companies that are either:</p> <ul style="list-style-type: none"> <li>• Bahrain-domiciled companies whose ordinary equity securities are listed on the Bahrain Stock Exchange; or</li> <li>• overseas companies whose primary listing of ordinary equity securities is on the Bahrain Stock Exchange.</li> </ul>
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### Timetable

2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p>The CBB Rulebook does not differentiate between deadlines for a first phase and a second phase. Generally, CBB will make its decision once it receives all information during the notice period. CBB also has the discretion to request further documentation for the sake of clarification. Once satisfied, it will issue its consent in writing.</p>
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## 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

'Insider Information' and 'Market Information' are defined in Part 5, Chapter 1 of the CBB Law. Article 100 of the CBB Law lists the 'offences' which a person who is in possession of inside information, as an insider shall not do - i.e. such a person must not:

- deal in any security to which that information relates
- encourage any person to deal in any securities to which that information relates
- disclose inside information to any other person, otherwise than in the proper performance of the functions of his employment, office or profession, or
- violate the rules governing the publishing of market information.

## 4.4 Anti-Bribery, Corruption and Money Laundering

On 5 October 2010, the Kingdom of Bahrain ratified the United Nations Convention Against Corruption (the UNCAC) pursuant to Decree no. 7/2010. UNCAC aims at preventing corruption, criminalising certain conducts, strengthening international law enforcement and judicial cooperation and measures to prevent money laundry activities.

The Bahraini Penal Code contains provisions relating to bribery in the private sector in addition to existing public sector provisions. The law applies to accepting bribes, offering bribes and embezzlement, all of which now carry penalties such as imprisonment and substantial fines.

The CBB Rulebook also includes a module on Anti-Money Laundering and Combating of Financial Crime (AML) which offers clear guidelines on the requirements for any financial institution, person or agent involved in providing any of the activities specified under Article 80 of the CBB Law or any other activity approved by the CBB. Furthermore, Decree Law 4/2001 on the Prevention and Prohibition of Money Laundry provides the sanctions applicable to entities or individuals who carry out money laundering activities in the Kingdom of Bahrain.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Bahrain has a free economy, with no restrictions on capital movements, foreign exchange, foreign trade or foreign investment. It has bilateral trade and economic agreements with over 40 countries, including China, France, India, Singapore, the United Kingdom and the United States of America.

The FTA signed with the United States became effective in 2005, liberalising certain restrictions on trade and investment between Bahrain and the United States. The agreement was drafted to promote increased trade between the two countries. Bahrain's overall aim for the FTA included facilitating trade flows, stimulating inward investment, expanding key manufacturing and service sectors, encouraging the exchange of expertise to create employment opportunities, and stimulating economic growth in Bahrain. Under the FTA, US nationals are given GCC recognition for investment purposes, allowing them to invest in business activities that might otherwise be restricted to foreign nationals. In addition, up to 96% of Bahrain's industrial and agricultural exports have free access to US markets.

### 4.5.1 Exchange controls

Bahrain has no exchange control restrictions on repatriation of capital, profits and dividends, enabling full financial transferability of capital, profits and dividends.

### 4.5.2 Foreign investment approvals and notifications

There are a few restrictions on foreign ownership in the Kingdom of Bahrain. The main restriction that a foreign company may face is the requirement to have a minimum of (51%) Bahraini investment. Sectors that cannot have 100% foreign ownership are:

- construction
- press, publishing and distribution
- automobile and motorbike rental
- fishing
- foreign manpower supply
- land transportation of goods and passengers
- trading including sale and purchase, import and export
- small businesses
- commercial agency, franchise or distributor
- any real estate services such as leasing and property management, and
- gas bottling and gas cylinder distribution.

The Minister of Industry and Commerce reserves the right to waive this requirement and allow foreign investment in these sectors if the Minister believes that such investment will provide positive economic development.

Some sectors do allow (100%) foreign investment, including among others: technology, tourism, healthcare, education, manufacturing and business services. However, other restrictions may apply to those sectors.

#### 4.5.3 Industry-specific regulation

##### ***Central Bank of Bahrain***

CBB's objectives include:

- setting and implementing monetary, credit and other financial sector policies for the Kingdom of Bahrain
- providing effective central banking services to the government and the financial sector of Bahrain
- developing the financial sector, and
- protecting the interests of depositors and customers of financial institutions.

The only corporate entities permitted to provide banking and insurance services in Bahrain are both closed and public BSC and foreign branch companies. These companies are also subject to the laws and regulations of the CBB.

##### ***Telecommunications Regulatory Authority (TRA)***

The TRA governs the way in which telecommunication companies compete in the local market by promoting fair competition and monitoring any anti-competitive conduct.

##### ***National Oil and Gas Authority (NOGA)***

NOGA regulates the oil and gas industry in the Kingdom of Bahrain. NOGA provides a strategic link with the government of Bahrain, as it has a political role proposing and implementing government policy, and setting standards for the industry in Bahrain.

##### ***Committee for Organising Engineering Professional Practice (COEPP)***

COEPP licenses all engineering offices in the Kingdom of Bahrain. The engineering licence granted will permit the applicant to practice engineering in the specific licensed field only. The founder of the engineering office must be a Bahraini licensed engineer. The company will also need a dedicated manager who is a qualified engineer but does not need to be a Bahraini citizen.

#### 4.6 Import/Export Controls

The GCC Unified Customs Law provides the framework for GCC countries' import regulations as well as setting the penalties for breaching any of the provisions of the law. However each GCC member state has its own list of exempted and prohibited products. The Bahrain Customs Law provides rules and regulations on import and export controls.

Companies wishing to export goods to Bahrain for consumption or sale must obtain a general licence from the Custom Affairs Directorate of the Ministry of Interior. The Department of Customs Affairs publishes lists of items, equipment and products that may not be imported in Bahrain. These include narcotic drugs, used and reconditioned tyres, cultured pearls, cigarette advertising, seditious or treasonable material and raw ivory. Any petro products and certain consumables such as flour, rice and poultry cannot be exported from Bahrain.

## 5. Employee Issues

### 5.1 Method of Transfer under Local Law

#### 5.1.1 Acquisition of shares

In share purchases, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the purchaser inherits all those rights, duties and liabilities by virtue of being the new owner of the target company.

#### 5.1.2 Acquisition of assets and/or business, and mergers

Under Bahraini law there are no provisions that transfer employees automatically when a substantial part of a business or assets of a company are transferred to another company, unlike in European jurisdictions.

If employees are required to move over (as an asset) to a new company, the employment contracts must be terminated by the outgoing employer, and that employer must pay the employees affected all end-of-service benefits payable under their contracts of employment and under the Labour Law. The employees then enter into new contracts with the new company.

### 5.2 Approval or Consultation Requirements

An employer cannot terminate a contract of employment due to full or partial closure of its business establishment, reduction in scale of its activities, replacement or upgrading its production system, without first giving notice to the Ministry of Labour setting out the reason for termination 30 days before giving notice to the employee.

### 5.3 Protection against Dismissal

#### 5.3.1 Redundancies

Employees are entitled to specific compensation for loss of job due to a business restructuring reason. From the day they receive notice of termination of their job, they will be entitled to receive financial compensation in the form of end-of-service benefits under their employment contract, and compensation equivalent to one day's wages for each month of service worked. The minimum payment is one month and the maximum is 12 months.

#### 5.3.2 Penalties

In addition to the awards referred to in **5.3.1**, if an employer, terminating a contract of employment for reasons which relate to the full or partial closure of the business establishment, reduction in the scale of its activities, or the replacement of a production system, fails to give the Ministry of Labour the notice referred to in **5.2** then it may be liable to pay the Ministry of Labour fines of between BHD500–1000. This amount can be multiplied by the number of workers it applies to and doubled if the offence reoccurs.

# Belgium

## 1.1 Overview

Belgium is a state formed as a constitutional monarchy in 1830, with its first written Constitution having been adopted in 1831. Over time, Belgium has evolved into a federal state with national legislative and executive branches as well as communities and regions that have their own legislative and executive bodies with jurisdiction over particular matters. In general, legislation applicable to M&A transactions will be federal national statutes such as the Company Code.

## 1.2 General Legal Framework

There is no specific legislation governing M&A in Belgium. The Company Code provides for merger and demerger procedures and optional corporate procedures for the transfer (by sale or by contribution) of a business division or the entire business of a Belgian company and there is separate legislation governing public offers. Other legislation outside the strict companies law area also touches on M&A issues, such as the merger control rules and provisions governing the transfer of and liabilities towards employees (both covered below).

## 1.3 Corporate Entities

The most commonly used forms of corporate vehicle in Belgium are the limited liability company and, more specifically, the *naamloze vennootschap/société anonyme* (NV/SA) and *besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée* (BVBA/SPRL). Both the NV/SA and the BVBA/SPRL are limited liability companies, i.e. companies whereby the shareholders are in general (save for certain limited exceptions) not liable for the company's obligations beyond their share in the equity share capital, and the shareholders are thus generally shielded by the 'corporate veil'.

### 1.3.1 NV/SA

NV/SAs must be incorporated by two or more shareholders. If, following its incorporation, an NV/SA has only one shareholder and no second shareholder joins the company within the year following the date on which the sole shareholder acquired all shares, the sole shareholder will be jointly liable for the liabilities of the NV/SA incurred since that date. This joint liability ends when at least one share is transferred to a second shareholder.

The minimum share capital of an NV/SA is EUR61,500. Shares can be issued with or without a nominal value. Upon incorporation, the share capital of an NV/SA must be fully underwritten and a minimum of EUR61,500 in aggregate must be paid up. All shares must be registered shares or dematerialised shares. Bearer shares can no longer be issued.

In principle, the shares in an NV/SA are freely transferable. The articles of association or any agreement among shareholders may limit the transferability of the shares (and other securities entitling the holders to acquire shares). Restrictions on the transferability of such shares (and securities) can only be applicable for a limited period of time and should be justified taking into account the company's best interests. Any restriction on transfers which results from any pre-emptive rights/clauses providing for a right of first refusal or requiring prior consent, may not prevent transfers for longer than six months.

NV/SAs are managed by a board of directors (*raad van bestuur/conseil d'administration*). The Board is authorised to perform all actions which are not reserved to the general shareholders' meeting (either by the Belgian Company Code or the articles of association of the NV/SA). The board must have at least three directors, except where the company has only two shareholders, in which case both shareholders will constitute the board. The board of directors can delegate specific powers to proxyholders or the daily management of the company (*dagelijks bestuur/gestion journalière*) to a managing director or general manager. It can also delegate in more general terms the conduct of the business of the company to an executive committee (*directiecomité/comité de direction*).

### 1.3.2 BVBA/SPRL

Unlike NV/SAs, BVBA/SPRLs can only be private and not public, and can even be incorporated by only one shareholder. However, if a BVBA/SPRL has only one shareholder who is a legal person, and no second shareholder joins the company within the year following the date on which the sole shareholder acquired all shares, the sole shareholder is jointly liable with the BVBA/SPRL for the liabilities of the BVBA/SPRL incurred since the date of such sole shareholder acquiring all shares in the BVBA/SPRL. That joint liability applies immediately (i.e. without the one year waiting period) when the BVBA/SPRL is incorporated by only one shareholder who is a legal person. In both cases, the joint liability ends when at least one share is transferred to a second shareholder.

The minimum share capital of a BVBA/SPRL is EUR18,550. If only one shareholder incorporates the company, the minimum share capital is EUR12,400. Shares can be issued with or without a nominal value. Upon incorporation, the share capital of an BVBA/SPRL must be fully underwritten. If there is more than one shareholder, a minimum of EUR6,200 in aggregate must be paid up. If there is only one shareholder, a minimum of EUR12,400 must be paid up.

Unless the articles of association provide for stricter rules, share transfers always require the approval of at least 50% of the shareholders, owning at least 75% of the company's share capital (not taking into account the shares to be transferred). That approval is not required where the transfer is to another shareholder, a relative of the transferor, or to any other person as specified in the articles of association.

A BVBA/SPRL must have at least one director (*zaakvoerder/gérant*). Each of the directors is authorised to perform all actions not reserved to the general shareholders' meeting.

## 2. Acquisition Methods

### 2.1 Acquisition of Shares, Assets or a Business

The acquisition of a Belgian business is most often structured either through an acquisition of the shares in a company or via an acquisition of assets or a business division of a company. Mergers and demergers are less often used as acquisition methods in M&A deals (probably mainly because those transactions result in the shareholders of the 'selling' company becoming shareholders of the 'acquiring' company) but are frequently implemented in intra-group re-organisations (and also as preparatory acts leading to a subsequent third-party sale).

Regardless of whether an acquisition is structured through an acquisition of shares or through an acquisition of assets or a business, the agreement, if governed by Belgian law, will be construed as a contract for sale and purchase and will be subject to the provisions of the Belgian Civil Code applicable to sale and purchase contracts.

### 2.2 Mergers and Demergers

Mergers and demergers are not often used as acquisition methods in M&A deals but are often used in intragroup re-organisations. Demergers are often used in the preparation for a third-party sale.

The merger procedure results in the dissolution of the 'absorbed' company, the automatic transfer to the 'absorbing' company of all assets and liabilities of the absorbed company by operation of law, and (unless the absorbed company is a wholly-owned subsidiary of the absorbing company), the issuance of shares in the absorbing company to the shareholders of the absorbed company.

The demerger procedure results in the automatic transfer of the demerged assets and liabilities to the transferee company by operation of law. The consideration for that transfer consists of new shares issued by the transferee company to the shareholders of the transferring company.

### 3. Negotiation, Signing and Closing

#### 3.1 Pre-Contractual Obligations

Under Belgian law, parties negotiating a transaction, including a sale and purchase of shares, assets or a business are under a general obligation to conduct the negotiations in good faith. This entails, among other things, that negotiations which are at a reasonably advanced stage, can in principle not be terminated unilaterally without due and reasonable justification. Where there is a breach of pre-contractual obligations, the party in breach can be held liable for damages.

#### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Belgian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

##### Purchase Price

1	Is a purchase price adjustment common? What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. We commonly see adjustments for net (financial) debt and/or working capital. Adjustments for NAV are less common, except in certain specific industries (financial institutions). Fixed prices (locked box) are common.
2	Is there a collar on the adjustment?	Collars are not common, but not unheard of either.
3	Who prepares completion balance sheet?	This is usually prepared by the buyer.
4	Is the balance sheet audited?	Usually.
5	Is an earn-out common?	Not common, except in buyer-friendly circumstances and smaller transactions.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Common.
8	Is a break fee common?	Uncommon.

##### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Uncommon (often heavily resisted by sellers).
10	Is the MAE general or specific?	If there is a MAE, it is usually target-specific but general in scope.
11	Quantification of MAE	Not uncommon.

##### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, but not from private equity sellers. Waterfall provisions uncommon.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).

15	Broad access to books, records, management between sign and close?	Not common, but not unseen either. NB: competition law issues around potential 'gun-jumping'.
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16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating the warranty disclosure and notification of possible breach between signing and closing common. It is however often agreed that the update must not prevent or limit purchaser's right to indemnification. Purchaser's right to walk away where material update/breach between signing and closing may be negotiated (in the absence of a MAE).
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17	Is a separate tax covenant/indemnity or tax deed common?	Uncommon to have a separate tax deed or tax covenants. Tax warranties and specific tax indemnities are common.
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### Representations and Warranties

18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but are sometimes not quantified.
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19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are common. Often limited to the actual knowledge, after due enquiry, of a specified list of senior management.
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20	Is a warranty that there is no materially misleading/omitted information common?	Common.
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21	Is disclosure of data room common?	Common.
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### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates not common (and any other kind of closing certificate not common).
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23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and correct.  Material Adverse Effect or 'in all material respects' qualifications applied at times, but not routinely.
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24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Uncommon.
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### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Commonly 20%–35% for warranties (other than key warranties (e.g. title, capitalisation, authority)). Also not uncommon is a cap of 100% of the purchase price for the seller's liability under the purchase agreement (subject to certain carve-outs).
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually warranties only.
27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g. title, capitalisation, authority) from the warranty cap. Where there is fraud by the seller, the limitations (including cap) are not applicable.
28	Is a deductible or basket common?	Deductible is more often resisted and tipping basket more common.
29	Is a <i>de minimis</i> common?	Common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–24 months common. Common to carve out fraud. Tax, social security and key warranties commonly longer than general warranties (statute of limitations). Also environmental warranties can survive longer.
31	Is warranty insurance common?	Uncommon.

#### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Not uncommon.
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#### Set-offs against Claims

33	Is a set off against claims for tax benefits common?	Common.
34	Insurance proceeds?	Common for actually received.
35	Third party recoveries?	Common for actually received.

#### Damages, Knowledge

36	Obligation to Mitigate Damages?	Required by law.
37	Exclusion of consequential damages?	Increasingly common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Common to provide for a warranty from buyer that, except for the disclosures, it is not actually aware of any breach of the seller's warranties (at signing).

#### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. Belgian law.
40	Is litigation or arbitration more common? If arbitration, where?	Both are common. Arbitration location often in Belgium under local arbitration rules.

## Stamp Duty

- 41 If stamp duty is payable, is it normally shared? No stamp duty.

### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares

There is generally no legal requirement to the effect that an agreement for the sale and purchase of shares must be in writing. However, agreements do almost always tend to be in writing, as the parties will wish to have written evidence of their agreement. The agreement should ideally be signed in as many originals as there are parties to the agreement (i.e. all parties should sign an original); and most often, in practice, each page of the agreement will be initialled by or on behalf of each of the parties for purposes of identifying the agreed pages.

#### 3.3.2 Transfers of assets

Special rules may apply to the sale and transfer of specific assets (e.g. real estate, which requires a notary deed; trade marks, which require specific registration formalities, etc.).

Transfers by operation of law of the business of a Belgian company (via merger, demerger, or sale or contribution of a business) require the advance filing of special forms with the clerk of the relevant Commercial Court as well as, in certain cases, the execution of notary deeds to complete the transfer.

### 3.4 Formalities for Transferring Title to Shares or Assets

#### 3.4.1 Transfers of title to shares

The transfer of title to dematerialised shares is effected by moving the registration from one securities account to another. The transfer of title to registered shares must be recorded in the target company's share register to ensure the enforceability of the rights arising from the transfer against third parties and the company itself. The register must be signed by seller and purchaser or their attorneys-in-fact.

#### 3.4.2 Transfers of title to assets

Unless the parties opt to apply the specific procedure provided for in the Belgian Company Code for the transfer of a business division or the entire business of a Belgian company, no specific procedure is generally required to transfer title to the assets of a business as a going concern. Parties merely enter into a sale and purchase agreement, which will make the sale and purchase binding between them. Depending on the assets being transferred, however, certain formalities must be complied with to perfect the transfer of the relevant assets (see **3.3.2**).

Unless the contract provides otherwise, the obligations under a contract are not transferable by a party to such contract to a third party without the consent of the other party or parties to the contract. Transfer of the benefits under a contract must be notified to the relevant other party or parties to the contract unless the benefits constitute a business division or the entire business of a company (see next paragraph, **3.4.3**).

#### 3.4.3 Transfer of a business division

If the assets to be transferred qualify as a business division or constitute the entire business of a Belgian company, the procedure provided for in the Company Code must be followed.

The Company Code procedure involves the creation and filing with the clerk of the relevant Commercial Court of a transfer proposal, giving six weeks' notice of the transaction. If this procedure is followed, the transfer of all assets and liabilities of the business is automatically effected in favour of the purchaser, and will be binding on third parties as of the date of publication of the transfer in the Belgian *Official Gazette*, subject to certain limited exceptions.

### 3.5 Formalities for Mergers and Demergers

The merger procedure is established by the Company Code. The regulations vary slightly depending on whether non-affiliated companies, sister companies or parent–subsidiary companies are merging. Generally, the merger procedure involves the preparation of board and statutory auditor reports, the establishment and filing of a merger proposal and a waiting period of six weeks between the date of filing of the merger proposal and the date on which the merger will be effected by the execution of notary deeds containing the minutes of an extraordinary shareholders' meeting of all merging companies resolving upon the merger. The demerger procedure is very similar.

### 3.6 Avoiding Tax and Social Security Liabilities: 'Clean Certificates'

Some special formalities should be observed by buyers to avoid joint liability with the seller for outstanding tax and social security liabilities.

Where an asset deal qualifying as a transfer of 'an entirety of goods composed of, among other things, elements which enable keeping the clientele', a copy of the transfer agreement must be filed with the relevant tax and social security authorities. The transfer will only be binding upon these authorities at the end of the month following the month of this notification. The purchaser of the business may also incur joint liability for the tax (income tax and VAT) and social security liabilities of the seller up to the amount of the purchase price paid (or deemed paid) to the seller during the transitional period during which the transfer is not yet binding upon the relevant tax and social security authorities.

As an exception to this rule, a transfer will be immediately binding upon the relevant tax and social security authorities and there is no joint liability of the purchaser for any outstanding liabilities of the seller if the seller obtains a 'clean certificate' from the relevant tax and social security authorities (i.e. a document certifying that the seller does not have any outstanding liabilities *vis-à-vis* that particular authority) and the 'clean certificate' is notified to the respective authorities at the same time as a copy of the transfer agreement. The date on which the clean certificate was issued may only precede the date on which it is notified to the relevant authorities by a maximum of 30 days. i.e. the clean certificate cannot date back more than 30 days prior to the day it is notified to the authorities; if this would be the case, a new clean certificate would have to be obtained).

To avoid last-minute complications, it is important to obtain any necessary clean certificate early in the process.

In certain circumstances, none of the above applies, i.e. where transfers are made in compliance with the procedures set out in the Company Code, no risk of the assumption of joint liability for tax and social security will apply.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Belgian merger control laws are set out in Book IV of the Economic Law Code (the Competition Act).<sup>1</sup>

Enforcement of the provisions of the Competition Act generally is the responsibility of the Competition College, an ad hoc body consisting of three members (President (or Vice President) and two assessors). The College of Competition Prosecutors, headed by the Competition Prosecutor General receives notifications and has authority to decide on mergers notified under the simplified procedure (available for unproblematic mergers, where the parties' combined market shares are sufficiently low).

<sup>1</sup> Act of 3 April 2013 inserting Book IV (Protection of Competition) and Book V (Competition and price evolution) into the Code of Economic Law and inserting definitions specific to Books IV and V and enforcement provisions specific to Books IV and V into Book I of the Economic Law Code). The Competition Law entered into force on 6 September 2013.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Belgian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	<p>Mandatory.</p> <p>Filing is mandatory for concentrations that meet the turnover thresholds. Concentrations cannot be implemented before clearance.</p>
Timetable		
2	In practice, what is the timetable for clearance (in first phase and second phase review)?	<p>Simplified procedure: accelerating this procedure is very unlikely given that the 2013 Competition Act has already reduced the duration of the procedure from 20 to 15 working days.</p> <p><i>Phase I</i> (40 working days from the day after notification): the Competition College will be prepared to clear a transaction earlier if the deal does not raise competition issues and in particular where the parties have engaged in extensive pre-notification discussions. In practice, the clearance decision may be obtained a few working days prior to the deadline (i.e. the 40 working days deadline mentioned in the Phase I).</p> <p><i>Phase II</i> (60 working days from the decision to initiate Phase II proceedings): In most cases the Competition College will make use of the full review period and in difficult cases the deadline can even be extended (with the consent of the notifying parties).</p>

The substantive provisions of the Competition Act (with the exception of the thresholds) mirror the provisions of the EC Merger Control Regulation (see Appendix A). If a merger is subject to EC merger control, it will fall outside the remit of Belgian merger control.

The Competition Act will apply where there is a concentration (Art. IV.6, Competition Act), i.e. where:

- two or more previously independent undertakings merge
- one or more persons already controlling at least one or more undertakings acquire, directly or indirectly (whether by purchasing shares or assets, by contract or by any other means), the control of the whole or part of one or more other undertakings
- a joint venture is created which performs (on a lasting basis), all the functions of an independent economic entity.

Pre-completion notification is compulsory when the relevant thresholds are met, namely:

- if the combined aggregate turnover in Belgium of the undertakings concerned exceeds EUR100 million, and

- if each of at least two of the undertakings concerned generates an aggregate turnover in Belgium of at least EUR40 million).

The decision-making process is subject to strict deadlines. A Phase I decision must be taken within 40 working days of receipt of notification, which may be extended by a further 15 working days if the parties offer commitments. If the Competition College concludes that a Phase II investigation is required, the review period will be extended by a further 60 working days, which can be extended even further by a maximum of 20 working days if commitments are offered. Mergers notified under the simplified procedure (available for unproblematic mergers, where the parties' combined market shares are sufficiently low) will be cleared within a shortened period of 15 working days by individual competition prosecutors who will confirm in a simple letter to the parties that the concentration does not raise any substantive concerns. The notification process is free of charge.

The Competition College evaluates mergers which fall within the Competition Act. It must prohibit any concentration if it finds that the merger would significantly impede effective competition in the Belgian market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, unless it finds that the concentration produces economic benefits which outweigh the distortion of competition. In balancing these factors, the Competition College must take into account the overall economic interests; the competitiveness of the relevant industrial sector when compared with levels of competition internationally; and the interests of consumers.

Administrative fines apply to:

- failure to notify a concentration (of up to 1% of aggregate turnover), or
- completing a concentration prior to clearance (of up to 10% of aggregate turnover).

The Competition College may order divestiture if no pre-completion approval has been obtained.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

No specific local legislation relates to these issues. See Appendix B.

### 4.4 Anti-Bribery, Corruption and Money Laundering

#### 4.4.1 Anti-Bribery and corruption

Belgian public and private anti-bribery and corruption laws are set out under different parts of the Criminal Code, namely:

- Arts 246–252 (Public Bribery Statute), and
- Arts 504*bis* and 504*ter* (the Private Bribery Statute).

#### ***Public bribery***

The Public Bribery Statute makes a distinction between passive bribery and active bribery:

- Passive bribery is the act of a public official, requesting or accepting (directly or indirectly) an offer, promise or benefit for himself or for a third party, in exchange for the performance of (or refraining from performing), any act that falls within the scope of his responsibilities
- Active bribery is the act of offering, promising or giving a benefit to (directly or indirectly), a public official, for his own benefit or that of a third party, to induce the public official to perform or refrain from performing any act falling within the scope of his responsibilities.

Both active and passive bribery are prohibited when designed to induce a public official to:

- perform a lawful act, which is within the scope of his public duties, but for which he should not receive payment from a third party

- perform an unfair act in the exercise of his office or refrain from performing an act which he should perform as part of his office
- commit a crime or misdemeanour in the exercise of his office
- use the actual or pretended influence which he has as a result of his function, to procure a public authority or administration to act, or to omit to act ('influence peddling').

### ***'Public service mission'***

The provisions of the Public Bribery Act apply to 'any person who holds a public office', i.e. a person employed by the Belgian federal or regional governments or any governmental agency, department or subdivision, any local or regional body, or public undertakings, as well as persons elected in public elections and certain private persons entrusted with a 'public service mission'. According to the definition applied by Belgian courts, 'public service mission' is to be broadly considered and understood as 'an activity of general interest'. A case-by-case analysis would have to be made to determine whether any particular company is entrusted with a 'public service mission'.

In addition, the Public Bribery Statute also covers:

- any public official of a foreign state (the status of the person determined by reference to the legislation of the foreign state)
- any official working for a public international organisation (e.g. the European Commission, European Parliament, etc.), except for non-governmental and sports organisations (e.g. the International Olympic Committee or FIFA (*Federation Internationale de Football Association*))
- anyone who is a candidate for a public office
- anyone who, through false pretenses, leads someone to believe that he will hold or that he holds a public office.

Persons committing active or passive bribery are subject to sanctions under Belgian law (see Table.) A prison sentence and/or a fine will be awarded against an offender. Note that merely requesting or merely offering a bribe can give rise to the sanctions (i.e. the bribe does not need to be actually delivered or received):

Sanctions: public bribery	prison sentence	fine (EUR)
Acts of public bribery	5–10 years	2,500–500,000
Influence peddling	6 months–3 years	500–250,000

Additional sanctions (e.g. the exclusion of companies involved in public bribery from participation in any public procurement procedure) may be applicable, including a prohibition on performing any public function and/or any other functions listed in Art. 31 of the Criminal Code for 5 to 10 years.

Entering into a corrupt pact (i.e. an agreement between a donor and public official) whether in writing or orally is an aggravating circumstance. If the bribery involves a law enforcement agent, a member of the public prosecutor's office, an arbitrator, an associate magistrate, a juror or a magistrate, the penalties will also be higher.

### ***Private bribery***

The Private Bribery Statute applies to all persons not covered by the public bribery provisions, i.e. private persons (legal entities and individuals).

The Private Bribery Statute defines 'private bribery' as occurring when any person who, in his capacity of director, manager, proxyholder, or employee of a legal entity, or proxyholder or employee of a

natural person, requests or accepts an offer, promise, or benefit, for himself or for a third party, to perform an act or to abstain from performing an act within the scope of his responsibilities, or facilitated the act by using his office without the knowledge and authorisation of the board of directors, shareholders, principal or employer.

The Private Bribery Statute makes the same distinction as the Public Bribery Statute between passive bribery and active bribery.

- Passive bribery is the act of requesting or accepting an offer, promise or benefit (directly or indirectly) for oneself or for a third party, to perform or refrain from performing an act falling within the scope of that person's responsibilities (or facilitated by that office/role), without informing and without the authorisation of the board of directors, general shareholders meeting, principal or employer. Under Belgian law, the acceptance of a bribe (or the request for a gratuity) is punishable as passive bribery even if it is not followed by a proposal to pay by the person asked or offering the bribe, and even if that person does not pay or offer a bribe; the offence is in the hands of the receiver or potential receiver of the gratuity
- Active bribery is the act (including through an intermediary) of proposing to a person who is a director or manager of a legal entity, proxyholder of or mandated by a legal entity or a natural person, an offer, promise or any benefit whatsoever for that person him or herself or for a third party with a view to induce that person to perform or to refrain from performing an act falling within the scope of their responsibilities (or facilitated by their office/role), without the authorisation of and/or without informing the board of directors, general shareholders' meeting, principal or employer.

Sanctions: private bribery	prison sentence	fine (EUR)
	6 months–3 years	500–250,000

Additional sanctions (e.g. the exclusion of exercising certain functions, profession or activities in the commercial sector) may be applicable.

Entering into a corrupt pact (i.e. agreement between the donor and the private person) whether in writing or orally is an aggravating circumstance.

#### 4.4.2 Money laundering

Belgian anti-money laundering legislation is divided into two broad areas:

- criminal legislation—the incrimination of money laundering, and
- administrative legislation—the prevention of the use of the financial system for money laundering or financing of terrorism.

The criminal legislation is provided for in Art. 505 of the Belgian Criminal Code, which defines three money laundering offences, consisting of:

- purchasing, trading, guarding or managing goods mentioned in Art. 42, 3° of the Criminal Code, despite having known the origin of the goods when commencing those actions (or where the person should have known)
- converting or transferring goods mentioned in Art. 42, 3° of the Criminal Code to hide their illegal origin or conceal them, or to help a person that is involved in the crime from which the goods originated to escape the legal consequences of his deeds
- restraining or concealing the nature of, the origin of, the discovery place of, the transfer of, the displacement of or the property title to the goods mentioned in Art. 42, 3° of the Criminal Code, although they knew or should have known the origin of the goods upon commencement of their activities.

'Goods' for these purposes means the material proceeds obtained as the direct result of a criminal offence, any goods or money's-worth replacing those proceeds and the income from interest received on proceeds of crime which are invested. It should be noted that this is a very broad definition of the 'proceeds of a criminal offence'.

More generally, the money laundering offence covers the laundering of the proceeds of any unlawful act whatsoever. Consequently, it suffices that the 'laundered' capital gains originate from any underlying criminal offence.

These three money laundering offences are sanctioned with imprisonment of up to 5 years and/or a fine of up to EUR1.2 million. An attempt to commit one of these offences is sanctioned with imprisonment up to 3 years and/or a fine of up to EUR600,000.

The material proceeds that are obtained directly from the criminal offence, the goods and the money's-worth that replaces these proceeds, as well as the income from invested proceeds, can be confiscated if ordered by the public prosecutor. If the proceeds are no longer part of the assets of the offender, the judge will estimate the monetary value of the proceeds and will order confiscation of a corresponding monetary amount (Art. 43*bis*, Criminal Code).

As to the administrative legislation, the Anti-Money Laundering Act (AML)<sup>2</sup> supplements the criminal legislation with a series of preventative measures which impose on specified institutions and individuals a duty to co-operate in order to detect suspicious transactions and facts and report them to the Belgian Financial Intelligence Processing Unit (CTIF-CFI).

For the purpose of the AML Act 'money laundering' is defined in Art. 5, paragraph 1 of the AML Act as:

- the conversion or transfer of money or assets for the purpose of concealing or disguising their illicit origin or assisting any person who is involved in the offence from which this money or these assets derive, to evade the legal consequences of their actions
- the concealment or disguise of the nature, source, location, disposal, movement or ownership of money or assets known to be of illicit origin
- the acquisition, possession or use of money or assets known to be of illicit origin
- participation in, complicity to commit, attempt to commit and aiding, abetting, facilitating and advising the commission of any of the acts referred to in the foregoing three items.

The persons and entities subject to the AML Act have several legal obligations, for example:

- to identify their clients and their clients' agents, owners/principals and/or final beneficiaries of the operation and verify their identities by means of supporting documents of which a hard copy or electronic copy must be made; where the client or its owners/principals and/or final beneficiaries of the operation cannot be identified or their identity cannot be verified, it is not permitted to establish or maintain a business relationship with the client concerned, or to carry out operations on its behalf; the same applies when the client does not provide the required information or when the information does not seem credible and sufficient; they are also required to verify whether the received information is credible and relevant and to conduct regularly a new identification and verification process as set out in the AML Act to update the data of their regular clients, their agents and their owners/principals and/or final beneficiaries of the operation
- to collect information concerning the purpose and the intended nature of the business relationship

<sup>2</sup> Full title, Act of 11 January 1993 On the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorism Financing.



- to apply enhanced client due diligence measures on risk-sensitive clients in situations that, by their nature, may represent a higher risk of money laundering or terrorism financing
- to follow with special care each transaction that, because of its nature or unusual character in view of the activities of the client or the circumstances or characteristics of the person involved, is considered particularly likely to be linked to money laundering
- to report to the CTIF-CFI whenever there is a suspicion or certainty of money laundering or terrorism financing
- to keep all identification data of clients, clients' agents, owners/principals and/or final beneficiaries of the operation, as well as duplicates of the evidence used for the identification of these persons at any data carrier, for a period of at least 5 years after the relationship with that client comes to an end; to also keep a copy of all documents relating to the identity verification process for a period of at least 5 years from the time the transactions are executed and record transactions in a manner that enables the entity to respond to information requests by the CTIF-CFI
- to train employees and agents to familiarise them with the provisions of the AML Act
- to appoint a person responsible for anti-money laundering, who is responsible for that entity's implementation of the AML Act (Art. 18, AML Act).

The AML Act also contains two provisions concerning restrictions on cash payments, i.e. the price of the sale of real estate may only be paid by means of bank transfer or cheque; and the sale by a trader of one or more goods or of one or more services with a value equal to or greater than EUR3,000 may not be paid in cash, unless the cash amount does not exceed 10% of the total sale price, and in any event, as long as the cash amount does not exceed EUR3,000.

The preventative legislation is only applicable to the exhaustive list of natural persons and legal entities specified in the AML Act.

The supervisory, regulatory and disciplinary authorities have significant powers to deal with non-compliance with the obligations laid down in the AML Act by persons caught by its terms.<sup>3</sup> Those authorities may impose administrative fines up to EUR1.25 million, and can publish their decisions and publicise any measures adopted by them; and they must always inform the CTIF-CFI of the final sanctions imposed by them.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Belgium has no exchange controls which have any substantial impact on mergers and acquisitions.

There are also no foreign investment approvals of general application, although any proposal to transfer shares representing more than one-third of the capital of a company carrying on a business in Belgium and having a net worth of at least EUR2,478,935 must be notified, prior to completion, to the Minister of Economic Affairs, the Minister of Finance and the Minister within the relevant regional government with responsibility for economic policy. There are no sanctions for non-compliance and the authorities do not have the right to veto or suspend the transaction.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

The transfer of shares will not trigger any stamp duty in Belgium.

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<sup>3</sup> Art. 40, AML Act.

## 5.2 Acquisition of Assets

Depending on the nature of the assets transferred, certain transfer taxes could become due. The sale of real estate (including heavy machinery that is immovable property by incorporation) will as a rule be subject to transfer tax of 10% or 12.5% (depending on the region where the assets are located) on the sales price or the fair market value, whichever is higher. The transfer tax is normally payable by the purchaser, unless otherwise agreed upon between the parties. If a lease agreement is transferred, the transfer will also be subject to a transfer tax of 0.2% of the amount of the lease payments and charges which are still due under the remaining term of the contract (2% in the case of the transfer of a leasehold right).

## 5.3 Mergers

A merger will not normally trigger any stamp duty.

## 5.4 Value Added Tax

While the sale of shares is normally exempt from Belgian VAT, the sale of assets is, as a general rule, subject to VAT at the standard rate of 21%. The transfer of certain assets (e.g. receivables) and the transfer of liabilities are, however, VAT-exempt. The sale of buildings is subject to VAT only if the buildings are still new for VAT purposes, i.e. if they are transferred within a period of two years following the year of their first use. If input VAT has been deducted by the seller on the construction or renovation of the buildings, the transfer of those buildings without VAT within a period of 15 or respectively 5 years (calculated as of 1 January of the year during which the right to deduct the input VAT arose) will normally trigger a pro rata recapture at the level of the seller of (part of) the VAT initially deducted.

The VAT due at the occasion of the transfer is normally paid by the purchaser to the seller, who is to remit that VAT to the authorities. If the purchaser is entitled to fully deduct input VAT, the payment of that VAT sum to the seller merely entails a pre-financing cost. However, if the purchaser is not entitled to fully deduct the input VAT, the non-deductible portion of the VAT due at the occasion of the transfer constitutes an actual cost for the purchaser.

As an exception to the above rules, the transfer of assets and liabilities under an asset deal is exempt from VAT if it relates to an 'entire business' or a 'branch of activity' (so-called transfer of going concern or TOGC exemption). Transferred items constitute an entire 'business' or a 'branch of activity' if, for the purchaser, they constitute a combination of elements allowing the purchaser to carry on an independent economic activity. If all elements relating to an existing business are transferred, the TOGC exemption normally applies. If certain elements of the business are excluded from the transfer, it may be advisable to seek confirmation through a (formal or informal) ruling from the tax authority as to whether the TOGC exemption will be applied.

The TOGC exemption generally also applies in case of a merger.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of a share purchase, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the purchaser therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the target company.

If there is an integration of the target company's business with the purchaser's business post-acquisition, this is likely to constitute an acquisition of assets or a business transfer, and the considerations set out below will be relevant.

### 6.1.2 Acquisition of assets

If the assets transfer qualifies as a transfer of an undertaking or part of an undertaking within the meaning of the Belgian transfer of undertaking legislation (National Collective Bargaining Agreement 32*bis*—CBA 32), the employees of the seller's business will automatically transfer to the purchaser with all rights and obligations (with the exception in principle of the extra-legal pension rights). Those employees do not have the right to refuse to transfer to the purchaser as they would in other jurisdictions (i.e. if they refuse to transfer they will legally be considered to have resigned from the transferee, i.e. from the 'new' employer. If so, they are in principle liable for payment of an indemnity in lieu of notice to the transferee.).

If the assets transfer does not qualify as a transfer of undertaking with the meaning of CBA 32, then the employees will only transfer if they consent (i.e. if the employee does not agree he/she will in principle simply remain employed by the 'old' employer. If, due to the transaction, the 'old' employer is no longer able to employ the employee, the old employer will have to terminate the employment contract).

### 6.1.3 Mergers

A merger would in principle qualify as a transfer of undertaking within the meaning of CBA 32. In that case, the considerations set above (acquisition of assets) will be relevant.

### 6.1.4 Transfer of business

If the transfer of a business qualifies as a transfer of an undertaking within the meaning of CBA 32, as stated above, employees attached to the business being transferred will automatically transfer to the purchaser with all rights and obligations. As noted in **6.1.2**, employees have no right to refuse that transfer (in the manner that they may have in other jurisdictions).

If the assets transfer does not qualify as a transfer of undertaking with the meaning of CBA 32, then the employees will only transfer subject to their consent (see **6.1.2**).

## 6.2 Approval or Information/Consultation Requirements

### 6.2.1 Acquisition of shares

The works council must in principle be informed upon the occurrence of events that are likely to have important consequences for the company. The fact that as a result of a share deal, the company belongs to another group is often considered as triggering this obligation to inform the works council (if one exists). The works council should in any event be informed of any development before the news about the transaction is disclosed to the public. Consultation with the works council is not required.

### 6.2.2 Acquisition of assets/transfer of business

Whether or not the acquisition of assets/transfer of business qualifies as a transfer of undertaking within the meaning of CBA 32, the works council, if any (or in the absence of a works council, the internal trade union delegation; or in the absence of an internal trade union delegation, the committee for the protection and prevention at work (CPPT) of the target company, if there is one)—must be informed and consulted with when that information and consultation is still meaningful. It is usually considered that that information/consultation must take place prior to the (final) decision's being taken to transfer the assets/business.

As long as the sale of the assets or of a business qualifies as a transfer of an undertaking within the meaning of CBA 32, in the absence of a works council/trade union delegation/CPPT, the employees must be informed prior to the effective transfer. They must be informed about the contemplated date of the transfer, the reasons for the transfer and what impact such change of employer will have on the employees.

### 6.2.3 Penalties

Violation of the information/consultation requirements is in theory sanctioned by criminal penalties against the company and/or the management members involved (i.e. those managers who had the possibility to cause the company to act in compliance).

## 6.3 Protection against Dismissal

Where the CBA 32 applies, the employees cannot be dismissed by reason of the transfer (be it by the purchaser or the seller). Where this prohibition is violated, the dismissed employees may claim damages (in addition to their severance indemnity entitlement) which could amount to between 3-17 weeks' salary.

# Brazil

## 1.1 Overview

Brazil is a federal presidential republic composed of 26 states, one federal district and more than 5,000 cities. The federate states and cities have powers to approve their own laws on certain matters (e.g. state and municipal taxes or licences), and so laws may differ slightly from state-to-state/city-to-city.

## 1.2 General Legal Framework

As a general rule, the acquisition of a company or business in Brazil does not require government consent, except for merger control approval if the parties' gross annual turnover is above antitrust thresholds (see 4.2), or where transactions involve regulated activities controlled by the government. However, the transaction may still trigger the application of various Brazilian laws and rules designed to protect the rights of the parties.

The primary sources of company law in Brazil are the:

- Civil Code (Law No. 10,406/2002), and
- Corporations Law (Law No. 6,404/76).

The CVM (Brazilian Securities and Exchange Commission) has powers to supervise and sanction the activities of all market participants, and sets the rules for securities trading on the stock exchanges.

## 1.3 Corporate Entities

Most non-resident investors choose to organise a business by setting up one two types of company:

- *Sociedade Anônima* (SA), a limited liability corporation, or
- *Sociedade Limitada* (*limitada*), a more flexible form of a limited liability company.

### 1.3.1 Corporations (*Sociedades Anônimas*)

In an SA, shareholders' liability is limited to the amount of capital invested by each shareholder.

An SA must have at least two shareholders which may be entities or individuals. There are no residency or nationality requirements; however, a shareholder that is not a Brazilian resident must appoint an attorney-in-fact resident in Brazil vested with powers to receive court summons on its behalf.

At least 10% of the stated capital must be paid-up in cash at the time of the SA's incorporation. No minimum capital is required, except to carry out certain regulated activities, e.g. for banking, insurance and trading companies.<sup>1</sup> The capital of the SA is divided into shares. According to the rights attributed to their holders, the shares may also be qualified as ordinary or preferred.

The holders of preferred shares can have full voting rights, no voting rights or restricted voting rights. The number of preferred shares without the right to vote or with restrictions on the exercise of a right cannot exceed 50% of the total number of shares issued by the SA. The holders of preferred shares with no voting rights or with restricted voting rights must be entitled to certain financial rights, such as the priority:

- to receive dividends, fixed or minimum
- to receive the reimbursement of capital, with or without a bonus, or

<sup>1</sup> These are companies organised for the purpose of exporting products—on their own account or through third parties—which benefit from certain tax incentives.

- both of these benefits.

The SA must be managed by a board of officers (*diretores*) with at least two members, all of which must be resident in Brazil (or if they are foreign nationals, they must hold permanent visas). A board of directors (*conselho de administração*) is not compulsory, unless the SA:

- trades its shares on the stock exchange or in 'over-the-counter markets'
- issues debentures, or
- has authorised capital.

Brazilian residency is not a requirement for members of the board of directors, provided that an attorney-in-fact resident in Brazil is appointed and vested with powers to execute corporate documents and receive court summons on behalf of the non-resident director. The board of directors must have at least three members.

For a publicly held SA (*Sociedade Anônima de Capital Aberto*), Brazilian corporate legislation is more protective of the minority shareholders of preferred shares. Additionally any publicly held SA must be enrolled with and comply with the rules and requirements of the CVM, and must as a result submit their balance sheets to independent auditors before their publication.

### 1.3.2 Limited liability companies (*Sociedades Limitadas*)

A *limitada* is a more flexible form of limited liability company. For this reason the *limitada*'s structure is often used to incorporate wholly-owned subsidiaries (including purchase vehicles for local acquisitions) in Brazil. The liability of quotaholders is also limited to the amount of the capital invested by each quotaholder, but if the capital is not fully paid-in, liability is for the full amount of the company's capital.

A *limitada* must have at least two quotaholders who can be entities or individuals. There are no residency or nationality requirements, but quotaholders who are not Brazilian residents must appoint an attorney-in-fact resident in Brazil vested with powers to execute corporate documents and receive court summons on its behalf.

No minimum capital is required either upon incorporation or to carry out the business, except for specific activities, so for example, the *limitada* cannot be used to carry out certain regulated activities such as banking and insurance. The capital is divided into quotas whose title is evidenced in the language of the articles of organisation of the *limitada* that are registered with the State Commercial Board (along with any subsequent amendments). The capital may be increased only after the existing capital sum has been totally paid-in.

The *limitada* may be managed by one or more Brazilian resident individuals (officers), who may or may not be quotaholders. The appointment of non-quotaholder officers is subject to the approval of:

- all quotaholders, if the corporate capital is not fully paid in, or
- quotaholders representing two-thirds of the corporate capital if the capital is fully paid in.

If an officer is a quotaholder his or her appointment (in a separate document) will require the approval of quotaholders representing more than half of the company's capital. The officer's appointment (whether quotaholder or not) is subject to the approval of quotaholders representing at least three-quarters of the company's capital.

Although not mandatory, the *limitada* may have an audit committee (*conselho fiscal*) composed of at least three members.

## 2. Acquisition Methods

The acquisition of a business may be achieved by purchasing either the shares in the company that operates the business, or the assets and liabilities pertaining to the business. Share acquisitions are more common than asset acquisitions in Brazil, as they are less burdensome from a bureaucratic point of view and, depending on the circumstances, can be more tax-efficient. Each type of acquisition has its own advantages and disadvantages, however, and the choice of the structure will largely depend on the circumstances of the transaction and, in particular, the parties' tax considerations.

### 2.1 Acquisition of Shares

From a transactional point of view, a share (or quota) transaction is much simpler and involves less documentation than an asset transaction. No individual transfers of title to the company's assets and inventory is required and no cumbersome formalities need be observed. Normally, public licences and permits are not affected by a change in the control of the target company. As a general rule, unless a contract or agreement expressly requires prior consent before the transfer of control (common in contracts with the public sector, but not necessarily an obstacle), the company's rights and obligations under its contracts and agreements are not affected. A share acquisition also offers more flexibility in terms of tax planning.

### 2.2 Acquisition of Assets

Asset acquisitions tend to be much more complicated than share acquisitions as each asset and liability to be included in the sale has to be identified and transferred, either individually or by legal category (e.g. each equipment and inventory item must be described valued and quantified in the transfer invoices to be delivered by seller to buyer). In some cases the issuance of these transfer invoices may trigger transfer taxes. The title to real properties is transferred through the registration of deeds that trigger the payment of tax and notarial fees.

The parties do not need to transfer the whole business and are, generally, free to select the assets and liabilities they wish to transfer. In general, the buyer is liable only for obligations acquired, which the buyer assumes expressly in the purchase agreement. There are, however, certain exceptions where the buyer assumes certain liabilities of the seller by the operation of law: e.g. tax, labour and environmental liabilities. This risk of inheriting hidden liabilities, as well as the time-consuming procedural requirements tend to dissuade some buyers from electing asset deals as an acquisition vehicle in Brazil.

Some public licences and governmental permits may not be transferred along with the business, but must be applied for anew by the buyer. Buyers should therefore obtain all necessary governmental licences before completion of an asset deal, to avoid any interruption to business and the risk of incurring penalties.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

Parties in a negotiation typically start a letter of intent. Although in many cases buyers may proceed in negotiations with sellers using such letters of intent (stipulating only a few provisions which are intended to be legally binding like confidentiality and exclusivity), under Brazilian law, these pre-contractual letters will not necessarily have legal effect because whether or not a letter will create legal obligations depends on the substance of what is said and not its format.

### 3.2 Customary Issues in Negotiating Acquisition Agreements

Brazilian parties to an M&A transaction may be very sophisticated or relatively inexperienced; the terms and conditions to be negotiated may vary a lot depending on the profile of the parties involved and their advisors (i.e. it is not uncommon to find Brazilian parties or counsels who are not fluent in English and have never been involved in any M&A transaction). The following is a brief overview of certain key provisions in typical Brazilian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

## Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common and may even be negotiated when signing and closing are simultaneous, in view of the length of time that may elapse from the date of the base balance-sheet for valuation purpose and the actual closing. Different types of price adjustments are seen, including cash-free debt-free, working capital and NAV adjustments.
2	Is there a collar on the adjustment?	Collars are not common, but not unheard of either.
3	Who prepares the completion balance sheet?	This is usually prepared shortly after the transaction closing by the buyer or an independent appraiser appointed by the buyer.
4	Is the balance sheet audited?	Except for listed companies, multi-national subsidiaries or entities involved in activities regulated by the government, most Brazilian companies are not audited.
5	Is an earn-out common?	Yes, especially in transactions where the sellers continue managing the target company after closing and in private equity transactions.
6	Is a deposit common?	Uncommon.
7	Is an escrow common?	The escrow account is the most common guarantee in private M&A transactions involving a Brazilian target business. A holdback is uncommon, even if in Brazil an escrow account can only be maintained with financial institutions which charge fees for their services. In Brazil it is common to have escrow funds applied in interest-bearing financial applications.
8	Is a break fee common?	Uncommon.

## Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Common. But it is common to have transactions where signing and closing are simultaneous without condition.
10	Is the MAE general or specific?	Both are seen. Sellers usually demand it to be specific.
11	Quantification of MAE?	Uncommon.

## Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common for a maximum term of 5 years with a clear definition of the applicable territory. Non-competes are also foreseen by law. Waterfall and blue pencil provisions are not common. For enforceability, it is expressly provided that the party bound by the non-compete receives compensation.
13	Non-solicit (of employees)?	Common.



14	Non-solicit (of customers)?	Common, combined with non-compete.
15	Broad access to books, records, management between sign and close?	Common.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules is common, as is the insertion of a clause requesting seller to notify buyer of possible breach. May trigger termination or price adjustment.
17	Is a separate tax covenant/indemnity or tax deed common?	Common to have specific tax indemnity included in the purchase agreement.

### Representations and Warranties

18	Materiality in representations—how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers are common, but are often not quantified (other than specific warranties e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers increasingly common. Usually including actual knowledge or matters that should have been known upon due inquiry. Listing individuals is not common.
20	Is a warranty that there is no materially misleading/omitted information common?	Common.
21	Is disclosure of data room common?	Usually disclosure of the data room is not accepted as a liability limitation.

### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Both are common. In some cases the parties execute a closing memorandum or similar document addressing any amendments in the warranties and confirming those which have not suffered any changes.
23	What is the applicable standard? True in all material respects? Material Adverse Effect?	Both are seen separately, but usually true and accurate in all material aspects.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.

### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Buyer often starts negotiations asking a cap of 100% of the purchase price. Some obligations, such as non-compete, may have a higher cap, depending on the size of the deal. Lower caps may be negotiated.
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually the cap applies to all obligations of the agreement, except for certain obligations which, depending on the amount of the deal, may be excluded from the cap, e.g. non-compete or confidentiality obligations.
27	What are the common exceptions to the cap?	Depending on the size of the deal, non-compete/non-disclosure provisions.
28	Is a deductible or basket common?	Both are common. Varies case-to-case.
29	Is a <i>de minimis</i> common?	It varies case by case but not uncommon.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	Usually 5 years, in line with the statute of limitation for tax and labour liabilities. However, a reduced period is sometimes seen.
31	Is warranty insurance common?	Uncommon as it is still an expensive tool only recently introduced in the Brazilian market.

### Reliance

32	Do financiers seek to rely on purchasers' due diligence reports?	Financiers will read the purchaser's due diligence reports, but they may not rely only on these materials. It is not uncommon to have financiers conducting a limited review and relying on their own analysis of balance sheet and financials.
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### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Uncommon.
34	Insurance proceeds?	Uncommon.
35	Third party recoveries?	Uncommon.

### Damages, Knowledge

36	Obligation to mitigate damages?	Uncommon, except that generally sellers will ask buyers to commit to refrain from self-denouncing certain unmaterialised pre-closing liabilities identified during the due diligence to the authorities after the closing.
37	Exclusion of consequential damages?	Common. By operation of law, consequential damages are excluded.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Usually claimed by seller, but often successfully resisted by buyers.

## Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Brazilian law only allows for a choice of governing law where arbitration is the conflict resolution option in the contract. If litigation is chosen, it is not possible to make a choice of governing law. Where parties choose litigation, the jurisdiction of the proponent of the deal determines governing law.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. Location varies case-to-case.

## Stamp Duty

41	If stamp duty is payable, is it normally shared?	None.
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## 3.3 Formalities for Execution of Documents

### 3.3.1 Transfers of shares

There is no legal requirement for a written agreement for the sale of the legal and beneficial title to shares to be made in writing. No cumbersome formalities need be observed in connection with the purchase of shares, except for the execution of simple corporate documentation. Nevertheless, market practice in the majority of cases is for a share transfer to be documented between the seller and the buyer by way of a written share purchase agreement.

### 3.3.2 Transfers of assets

As a general rule, a transfer of assets under Brazilian law does not need to be governed by a written agreement. However, written contracts may be required by law or in order to fulfil registration requirements, where applicable. For example, transfers of real property and intellectual property are normally required to be in writing as they are subject to registration. The title transfer of most assets and inventory is formalised through the issuance by the seller and delivery to the buyer of transfer invoices printed in accordance with Brazilian accounting rules and tax law.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

Registered shares of an SA can be transferred by means of an entry in the nominative shares transfer book (*livro de registro de ações nominativas*), dated and signed by both the assignor and the assignee, or their legal representatives (Art. 31, Corporations Law No. 6,404/76). Where the shares are maintained in a deposit account with a financial institution in the name of the holders, the transfer of book entry shares requires a written order by the assignor, and is effected by an entry made by the financial institution in its books, debiting the share account of the assignor and crediting the share account of the assignee.

In the case of a *limitada*, the transfer of quotas is formalised by the registration with the competent State Commercial Board of an amendment to the articles of association providing expressly for the quota transfer executed by representatives (i.e. resident individuals) of both buyer and seller.

### 3.4.2 Transfers of title to assets

Asset acquisitions tend to be much more complicated than share acquisitions since each category of assets and inventory has to be transferred separately, in accordance with applicable legal requirements. For real property in Brazil, the transfer must be notarised and registered to be effective, *vis-à-vis* third parties resulting in significant notarial fees and transfer tax, depending on the value of the property.

The seller will not be automatically released from its liabilities by transferring them to the buyer; but the consent of each individual creditor may be required for the seller to be effectively replaced by the buyer. The same is true with respect to any kind of contracts or agreements to be transferred to the buyer. The transfer of contracts with government agencies requires special attention, as in many situations the transfer of the agreement may trigger regulatory issues in view of the fact that the seller won a public tender to be contracted - and as a rule cannot be simply replaced.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

The Brazilian antitrust landscape changed significantly in 2012, in particular in relation to thresholds for filing, the structure of the antitrust regulators, and rules governing merger filings, with the coming into force of the New Competition Act (New Act).

The New Act established a pre-merger notification regime, which requires the parties to wait for the approval of the Brazilian antitrust authority Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Economica (CADE)*), approval before proceeding with a transaction. There is no filing deadline, but transactions cannot be implemented before clearance by CADE, subject to heavy fines. The New Act provides an objective list of the transactions that need to be submitted for approval, namely:

- typical merger and acquisition transactions (acquisition of companies or part of companies, shares; even acquisition of minority shares; stock and assets)
- associative agreements (see 4.2)
- consortia and joint ventures, except where formed in participating in a public bid.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Brazilian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

#### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	<p>Filing is mandatory for certain transactions (see thresholds at item 2, below). Mandatory notifiable transactions must be submitted for review before closing and parties involved in a transaction must keep their respective operations totally separate until CADE's final approval has been given. Parties that do not meet such requirements will be subject to gun-jumping fines (see 4.3).</p> <p>On the other hand, transactions involving public takeover bids, and transactions carried out in the over-the-counter or the stock exchange markets which are subject to mandatory notification, can be submitted for review after their announcement and can be consummated before CADE's clearance. However, decision-making rights attaching to the equity interest acquired via such transactions cannot be exercised before CADE's clearance. On the parties' request, CADE may grant authorisation to the parties to exercise such rights.</p>
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## Timetable

2	In practice, what is the timetable for clearance (in first phase and second phase review)?	<p>Depends on whether CADE reviews the transaction under the fast-track procedure or the ordinary procedure.</p> <p>The average approval time for a fast-track transaction is 20 calendar days from submission. CADE has an internal deadline of 30 calendar days to approve fast-tracks cases, which is usually met, but it is not legally bound to meet that deadline. After clearance, parties must wait an additional 15 days for a possible appeal before closing. Thus, closing schedules should allow for between 35–45 days for clearance in fast-track cases.</p> <p>The average time for an approval in the ordinary procedure is 70 calendar days as of the publication of the transaction in the <i>Official Gazette</i> (when the transaction is deemed complete).</p>
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### 4.2.1 Thresholds

Under the New Act, the thresholds for mandatory filings are as follows:

- one of the parties to the transaction must have revenue in Brazil, in the year prior to the transaction, in excess of BRL750 million, and
- at least another party involved must have revenues in Brazil in excess of BRL28.8 million.

The revenues to be considered are those of the parties' economic group (not just revenues of buyer and target). For the purposes of defining 'economic group', according to the Brazilian regulations, one has to consider:

- all companies controlled directly or indirectly by the same parent company or individual, and
- all companies in which any of the companies identified in the first bullet holds a participation of at least 20% (directly or indirectly) in the corporate or voting capital.

Furthermore, in the case of investment funds for filing thresholds purposes, the 'economic group' should comprise the following:

- the economic group of each quotaholder that holds (directly or indirectly), at least 50% of the quotas of the fund directly involved, either by individual participation or by shareholder agreement, or
- the companies controlled by the fund involved in the transaction and the companies in which such fund holds (directly or indirectly), at least 20% of the corporate or voting capital.

In addition to mergers, transactions subject to review include joint ventures, 'associative agreements' and consortia. CADE's resolution defines 'associative agreements' as those effective for more than two years and involving a horizontal relation (above 20%) or vertical integration (above 30%), or a sharing of risks, which results in interdependence between the contracting parties.

Subscription or acquisition of bonds, debentures and other securities convertible into shares must be notified to CADE if, upon conversion, the transaction falls within one of the mandatory notification events set out in the Brazilian antitrust legislation.

CADE can request the notification of any transaction that does not meet these thresholds up to one year after closing, with powers to order divestitures.

The maximum review period is 330 (calendar) days: 240 days for the 'regular analysis' with a possible 60 days extension (at the request of the parties) or 90 days (due to a decision of CADE). If CADE does not issue a final decision within the 330-day period, the transaction is automatically approved (although this is not expressly provided in the New Act, it has been the position of CADE in practice so far). The regulation also provides a fast-track procedure for the review of simple cases which have no or very little possibility of causing competitive harm, e.g.:

- classic or co-operative joint ventures
- substitution of an economic agent
- low market share (less than 20% of horizontal overlap or less than 30% of market share in vertically integrated markets), and
- absence of a causal connection (less than 50% of horizontal overlap and HHI variation below 200).

The fast-track procedure is applied at CADE's discretion, and, although there is no formal deadline, CADE has fixed an internal and informal 30-calendar day period for review of these cases, which has been observed so far. Moreover, the regulation provides that acquisition of shares by the sole controlling shareholder will be exempt from notification. Finally, joint ventures, 'associative agreements' and consortia formed to participate in public bidding processes are exempt from notification.

#### 4.2.2 Non-compete

Ancillary non-compete clauses in merger transactions are subject to certain conditions under Brazilian law. Generally, these clauses must be limited to a certain geographic areas and have an expiry date, as follows:

- acquisitions: non-compete clause generally allowed up to 5 years
- joint ventures: CADE usually allows non-compete clauses for the duration of the joint venture provided that they are restricted to the relevant market where the company is active.

In specific cases, CADE may approve transactions conditioned upon the deletion or modification of a non-compete clause, in order to ensure that competition will not be harmed. (This still applies under the new regime).

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Parties must not act in any way to implement the deal (e.g. change corporate structure or implement the buyer's management) until final clearance by CADE. Any transfer of assets or any influence of one party over the other, or any exchange of competitive-relevant information is prohibited, unless strictly necessary for the execution of the transaction agreements. Failure to comply will lead to the transaction being annulled and might subject the parties to fines ranging from BRL60,000–BRL60 million, and may even provoke a cartel investigation by CADE.

Exceptions to this prohibition do exist however for cases where:

- the transaction does not pose any immediate threat to competition
- the measures to implement the transaction are entirely reversible, and
- the parties are able to prove that if the measures were not taken, the acquired company might suffer immediate and irreparable financial harm.

CADE has 30 days to review such pre-clearance requests.

## 4.4 Anti-Bribery, Corruption and Money Laundering

### 4.4.1 Anti-bribery laws

Brazilian authorities are closing ranks against corruption. The Brazilian Federal Police has carried out several special operations to combat corruption, money laundering and related crimes, resulting in the arrest of hundreds of individuals, and a number of foreign multinationals implicated—including US companies and other companies subject to the FCPA or other similar foreign legislation. Often, information obtained by the Brazilian authorities is shared with foreign authorities.

In addition to anticorruption provisions established by the Criminal Code, Brazil enacted a new Anti-Bribery Law (Law No. 12,846/2013), which came into force on 29 January 2014.

The main features of the law are as follows.

#### ***Liable parties***

The following entities (legally or de facto organised, even if temporarily) will be strictly liable for the prohibited acts committed in their interest or benefit, exclusive or not under the Anti-Bribery Law:

- business organisations and sole proprietorships, incorporated or not, regardless of type of organisation or corporate model adopted
- any foundations or associations of entities or persons (including voluntary organisations/charities), and
- foreign companies with offices, branches or other representation on Brazilian territory.

#### ***Prohibited acts***

The Anti-Bribery law applies more widely than to corruption. It also applies to other illegal conducts committed against local and foreign public administration. The following conduct (if proven), is prohibited:

- to promise, offer or give, directly or indirectly, any undue advantage to a public agent, or to a third party related to that agent
- to finance, fund, sponsor or in any way subsidise the performance of wrongful acts provided for in the new law
- to make use of an individual or legal entity to conceal real interests or use deception to hide the identity of beneficiaries of acts performed
- in relation to public tenders and contracts, to:
  - thwart or defraud the competitive nature of a public tender procedure
  - prevent or adversely affect the performance of any act of a public tender procedure
  - remove or try to remove a tenderer by fraudulent means or by the offering of any type of inducement
  - defraud a public tender or a contract arising from it
  - to create, fraudulently or illegally, a legal entity to participate in a public tender or enter into an administrative contract
  - to gain an undue advantage or benefit, fraudulently, from amendments or extensions of contracts entered into with public administration, without the authorisation of law or in the public tender invitation or contractual instruments, or

- to manipulate or disrupt the economic and financial balance between the parties in contracts entered into with public administration, or
- to hinder investigation or auditing activities of public entities or agencies, or interfere with their work.

### ***Sanctions***

The sanctions set out in the Anti-Bribery Law are harsh and include:

- Administrative sanctions:
  - fines of 0.1%–20% of the gross revenue of the legal entity that fiscal year (which in Brazil is the calendar year) previous to the initiation of administrative proceedings, excluding taxes; and never below the value of the advantage obtained (based on estimates), and
  - publication of the adverse decision.

If it is not possible to use the criteria above, the fine will range from BRL6,000 to BRL60 million.
- Judicial sanctions:
  - seizure of assets, rights or valuables representing, directly or indirectly, the amount of the advantage or benefit gained from the infringement
  - partial suspension or prohibition of the continuity of its activities
  - compulsory dissolution of the legal entity, and
  - prohibition from receiving funds, subsidies, grants, donations or loans from public agencies and from public financial institutions controlled by the government, for a period of 1–5 years.

The application of these sanctions will not exclude additional sanctions being applied (e.g. under the Improbity Law (No. 8,429/92) or Public Procurement Law (Law No. 8,666/93)).

All administrative and judicial sanctions relating to loss of assets, rights or valuables will be applied under the theory of strict liability. This means that CADE need only show the illegal acts were committed to the benefit of or in the interests of the legal entity. The application of the remaining sanctions (e.g. fines, prohibitions on doing business, prohibitions from receiving lent public funds) requires a finding of fault or intent on the part of the entities involved.

Factors that will be taken into consideration in applying the sanctions include:

- the seriousness of the offence
- the advantage gained or sought
- whether the offence was fully or partially completed
- the level of damages indemnified
- the negative effects produced by the offence.

Anti-corruption due diligence is imperative to avoid successor liability for such acts of an acquired company pre-acquisition (since the Anti-Bribery Law establishes successor liability in the event of amendments to the articles of association, transformation, merger, acquisition or spin-off of the



company. For mergers and incorporations, successor liability will be limited to payment of fines and full restitution of the damages, up to the limit of the assets transferred).

In line with anti-corruption legislation adopted in other countries (in particular the United States and the United Kingdom), Brazilian law now expressly recognises that companies which have effective compliance programs in place and which cooperate with authorities for the investigation of the offences will be more favourably treated.

### ***Leniency agreements***

The Anti-Bribery law allows the public administration to enter into leniency agreements with the legal entities responsible for prohibited acts, provided they effectively collaborate with any investigation, with the administrative proceeding, and that such collaboration results in:

- the identification of those responsible for the violation, where applicable, and
- rapid collection of information and documents proving the illegal acts under investigation.

Leniency agreements may only be executed when the following requirements are each fulfilled; the legal entity:

- is first to come forward and demonstrate its willingness to cooperate with the investigation of the illegal act
- completely ceases its involvement in the investigated infringement from the date of the proposal of the agreement
- admits its participation in the offence and fully and permanently cooperates with investigations and administrative proceedings until their end.

Leniency agreements will not exempt a legal entity from its obligation to provide restitution for the damages caused. However, they will reduce the fine by up to two-thirds, and will exempt the legal entity of all administrative and judicial sanctions under the Anti-Bribery Law. The Anti-Bribery Law also allows the public administration to enter into a leniency agreement with a legal entity responsible for committing illicit acts as described in Articles 86–88 of the Public Procurement Law (Law No. 8,666/93).

#### **4.4.2 Money laundering rules**

The concept of ‘money laundering’ in Brazil encompasses any criminal offence or misdemeanour or tax evasion crime.

The AML Act is designed to prevent misuse of the financial system for the illicit acts it describes. It makes legal entities responsible for identifying customers and for maintaining records of transactions, and reporting suspicious transactions. Failure to do any of this will render the entity liable to administrative penalties for noncompliance.

The Act also created the Council for the Control of Financial Activities (*conselho de controle atividades financeiras*; CCFA), an agency under the Ministry of Finance responsible for the regulation and investigation of suspicious transactions that potentially involve money laundering. The CCFA has powers to impose administrative penalties.

The 1998 amendments to the law increased the number of individuals and legal entities that are obliged to inform suspicious activities to CCFA, capturing entities also, which have reporting duties (e.g. stock exchanges, commodities exchanges, derivative exchanges, banks, securities brokers and dealers, insurance companies, and factoring companies). Any transaction conducted with those entities involving assets that can be converted into currency exceeding BRL10,000 must be reported to the CCFA.

The Central Bank (BACEN) has published specific rules on money laundering prevention and on 24 July 2009 issued rulings and an administrative act on 11 February 2010 to enhance the anti-money laundering and terrorist finance system in Brazil.<sup>2</sup>

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

### 4.5.1 Foreign investments

In general, Brazilian law does not prohibit or restrict the participation of foreign investment in business activities. With certain exceptions, foreign investors are free to establish any business in Brazil. Those few areas in which foreign investment is either totally prohibited or limited to minority interests include some telecoms and media segments. In these restricted areas, foreign investors may need to use different kinds of structures including joint ventures and consortia depending on their requirements.

Foreign investments must be registered with the Brazilian Central Bank's electronic system (SISBACEN) to enable the remittance of profits and/or interest on equity (*juros sobre capital próprio*) to foreign investors, as well as the repatriation of foreign capital invested in Brazil and the reinvestment of profits and/or interest on equity. There are also general rules governing the payment of royalties and technical assistance fees.

Foreign investment under the law include:

- items imported by entities with headquarters in Brazil as capital contributions (e.g. machinery, equipment)
- capitalisation of credits against Brazilian companies held by foreign lenders, and
- the inflow of foreign funds to Brazil as capital contributions.

#### ***Registration of foreign direct equity investments***

Foreign direct equity investment registration is carried out through SISBACEN by means of electronic registration (*registro declaratório eletrônico de investimentos externos diretos – RDE-IED*). After the foreign currency funds are exchanged into local currency or machinery is imported, the Brazilian beneficiary company or representative must electronically register the investment with SISBACEN (both in foreign currency and in the corresponding amount in local currency) within 30 days of the date of receipt of the funds. Registration allows payment of dividends and interest on equity to foreign investors and repatriation of foreign capital invested in Brazil.

#### ***Reinvestments***

Once taxed, and if not remitted abroad to the foreign investor, profits may be reinvested in the same company that generates the profits or in any other Brazilian company chosen by the foreign investor. The reinvestment must also be registered with SISBACEN. The amount of foreign currency registered as reinvestment is determined by the average exchange rate at the date of the relevant reinvestment and published by BACEN.

#### ***Repatriation of capital***

When the foreign investor sells shares or quotas in the Brazilian venture or when the Brazilian company reduces its capital or is liquidated, the foreign investment can be repatriated in the relevant foreign currency free of taxes up to the proportional amount of foreign currency registered with SISBACEN.

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<sup>2</sup> Those rules were enacted in line with recommendations of the Financial Action Task Force (FATF), the inter-governmental body created to promote the development of international policies to combat money laundering and terrorist finance. Brazil has been a member of FATF since 2000.

For a capital reduction, the amount to be repatriated exceeding the value registered in foreign currency with SISBACEN represents a capital gain and is therefore taxed by withholding income tax income tax deducted at source at the rate of 15%, or 25% if the beneficiary is located in a low-tax jurisdiction (i.e. tax haven country).

If a foreign investor withdraws from its Brazilian subsidiary by assigning its quotas/shares in an amount exceeding that registered with SISBACEN, the exceeding amount will be considered a capital gain and subject to withholding income tax.

### **Financial tax**

Any cross-border remittance of funds from or to Brazil is subject to taxation: the so-called IOF (*imposto sobre operações financeiras*); i.e. tax on financial transactions) is levied at the rate of 0.38% on the amount transferred as purchase price to the seller or as capital contribution to the purchase vehicle, at the time of the funds transfer. Other rates may apply to different kinds of transaction facilitating the funds transfer (e.g. certain cross-border loans).

## **4.6 Industry-Specific Regulation**

Generally, foreign investors can establish a subsidiary in Brazil to carry out any kind of business, with some specific exceptions, e.g.:

- exploitation and use of deposits, mines and other mineral resources and of sources of hydraulic power
- ship transportation of certain products
- ownership and administration of media companies, limited to 30% of the voting capital. The participation of foreigners in such companies can be indirect by the bank, via a company incorporated under Brazilian law with headquarters in Brazil
- investment in cable TV, limited to 49% of the voting capital
- activities relating to defence and national security, and the practice of certain activities at border areas
- the acquisition of rural real estate; a Brazilian company could be prohibited from purchasing rural property if foreign nationals or foreign companies control the majority of its capital. In addition, restrictions apply if the rural real estate is located in areas reserved for national security reasons or nature preservation reserves
- national airline companies: only Brazilian entities, headquartered in Brazil, can own a Brazilian airline, but one-fifth of its voting capital can be held by foreign nationals
- health insurance, and
- the incorporation or acquisition of financial institutions in Brazil.

### **4.6.1 Banking and financial services**

Foreign financial institutions are prohibited from opening new branches in Brazil and from increasing their equity interest in Brazilian financial institutions, unless authorised by an international treaty (providing for reciprocity), or the Brazilian government considers foreign participation to be in Brazil's best interests (Art. 52, Transitory Constitutional Provisions Act (*ato das disposições constitucionais transitórias*) of the Brazilian Federal Constitution of 1988).

That said, the federal government does tend to treat most acquisitions of Brazilian financial institutions by foreign investors as being in the best interests of the country and in view of that, will investigate the controlling group. The procedure for institutions interested in participating in equity interests of Brazilian financial companies should present a formal request to the Central Bank, which

reviews it before submitting it for CMN approval, which in turn will forward it to the President of Brazil for final authorisation by Decree.

The Central Bank will want to see information on the controlling group, including financial statements, corporate documents, and any other information that it may deem appropriate. It will also want to know why and how the project will benefit the Brazilian economy.

The formalities and timing of Central Bank's approval depend on the structure of the transaction, but it is usually a very lengthy and bureaucratic procedure. (For example, if the foreign interest is obtained via the issue of new shares rather than the purchase of existing ones, the new subscription amount must be deposited with the Central Bank prior to obtaining final approval for the change in control).

#### 4.6.2 Telecommunications

The General Telecommunications Law establishes that as a pre-condition of becoming a telecommunications service provider, a company should be located, established and managed in Brazil under Brazilian laws. Indirect foreign investment is allowed, via a holding company established in Brazil.

### 4.7 Import/Export Controls

#### 4.7.1 Import of products

Import transactions and financial and equipment leases for longer than a 360-day term must be registered with SISBACEN through the ROF system.

#### 4.7.2 Exports of products and services

As a general rule, exports must be carried out with the payment in respect of the exported products to the Brazilian exporter being made in Brazilian Reais or foreign currency. There are a very few exceptions where exports may be carried out without the exporter's payment, such as capital contribution through assets and temporary export.

Brazilian exporters can maintain abroad foreign funds received as payments for products and services exported by them. Those funds are to be used by the Brazilian exporter only for investments, financial investments, or payments of its own obligations abroad. The exporter is expressly prevented from lending such funds. The value of the funds which can be maintained abroad in this way may be up to the equivalent of the exporter's export income, although this cap may be modified at any time by the CMN.

The location of the funds held abroad by Brazilian exporters must be notified to the Federal Revenue Department (SRF) by means of a statement filed in accordance with Ruling (*instrução normativa*) No. 726/2007. Exporters failing to comply with that Ruling or with applicable legislation, and those who fail to inform the SRF about the existence of such funds abroad, will face SRF fines.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

In a direct share acquisition, none of the Brazilian transactional taxes apply (ICMS, IPI, PIS/COFINS). The acquisition of shares generally triggers capital gains tax as there is no stamp duty in Brazil. The combined Corporate Income Tax (IRPJ) and Social Contribution (CSLL) rate generally applicable to capital gains of Brazilian entities is currently 34%. If the capital gain is recorded by an individual resident in Brazil, the tax rate will be 15%. It is common to see sellers reorganising the corporate structure of the target company pre-closing to ensure individuals are the entities selling the shares rather than a holding company.

In a share acquisition, even if both buyer and seller are non-Brazilian (i.e. taxpayers of jurisdictions other than Brazil), the capital gain recorded in the transfer of shares or quotas of Brazilian companies is subject to Brazilian taxes. In those cases, the buyer's local representative may be held personally liable if the seller's capital gain is not paid on closing. The rate of the capital gain tax will be 15% unless the foreign taxpayer is based in a blacklisted jurisdiction when the rate will be 25%.

If all legal requirements are met, Brazilian legislation allows the buyer to benefit from the tax amortisation of the goodwill paid in a direct share acquisition. To proceed with this amortisation structure, the buyer generally justifies the goodwill payment based on the future profitability of the acquired company. The goodwill amortisation is not free of risk as tax authorities may challenge it. To be implemented the goodwill amortisation requires the use of a Brazilian purchase vehicle to record the goodwill locally and afterwards to merge with the target company.

## 5.2 Acquisition of Assets

Asset acquisitions are less common in Brazil because transactional taxes are incurred in addition to capital gains taxes. Although those taxes are often recoverable, they imply an upfront disbursement of cash. However depending on the facts of the transfer, those taxes may not be recoverable, which generates an additional tax burden on the transaction.

The transactional taxes that may be payable are:

- taxes on gross revenues, PIS and COFINS on a non-cumulative basis at the combined rate of 9.25% on the total amount of the revenues derived from the sale of assets other than permanent assets<sup>3</sup>
- value-added taxes, ICMS and IPI, which apply mostly to inventory (18%<sup>4</sup> and variable rates, respectively, depending on the tariff classification of the products in question), and
- municipal tax on transfers of real estate, ITBI (generally 2%–5%, depending on the municipality).

## 5.3 Value Added Taxes

Value-added taxes, ICMS and IPI, are computed by those plants, facilities or branches of a company that engage in taxable transactions. These units are considered separate taxpayers for the purpose of the monthly tax computation. For both taxes, the amount due is calculated based on the difference between credits for goods entering the facility and debits for the goods sold or leaving the facility under other taxable circumstances. These value-added taxes may be avoided in an asset acquisition if the buyer acquires the business activity of an individual branch as a going concern (called the acquisition of an *estabelecimento comercial*). In this case, the transaction is considered as a change in the ownership of the establishment and does not trigger ICMS and IPI taxation.

Value-added taxes are generally not payable on the purchase of shares.

# 6. Employee Issues

## 6.1 Method of Transfer under Local Law

### 6.1.1 Acquisition of shares

In share acquisitions, there is no change in the employer/employee relationship. Change of ownership of the target company does not affect the rights of the company's employees, nor the employment agreements between the company and its employees.

### 6.1.2 Acquisition of assets

The buyer's liability in the labour sphere will always be the same, regardless of the fact that it has acquired shares, assets or merged part of its assets with seller. The transfer of the company's ownership as a whole is not needed to trigger liability succession. The buyer will inherit all liabilities and obligations to employees that the seller had, even if the transfer involved just one establishment

<sup>3</sup> With some exceptions, e.g. financial institutions and companies taxed by the 'presumed income method' which are subject to PIS/COFINS at 3.65%.

<sup>4</sup> Sale of inventory within the State of São Paulo. Interstate transactions are usually subject to a 12% rate.

or one line of business of the seller. Case law suggests certain prerequisites for the buyer to inherit the seller's employee liabilities, namely, that:

- the establishment (as a production unit) is transferred from one holder to another, and
- the employees' employment is not interrupted.

That said, in more recent court decisions, the second requirement has been found to be necessary, and the first requirement by itself has been sufficient to characterise successor liability.

Two articles of the Brazilian Labour Code (CLT) provide for the assumption of labour liabilities:

- *Article 10*: 'modification in the corporate structure of the company shall not affect the rights of the company's employees', and
- *Article 448*: 'modification in the ownership or corporate structure of the company shall not affect the employment agreements entered into between the company and its employees.'

These legal provisions also apply to the transfer of assets, resulting in the transfer of employees together with the business.

Thus, the purchaser of the business will always be entirely responsible for labour-related debts and obligations arising from the acquired business, and conversely, the seller may not be held responsible after closing for the payment of these labour-related debts and obligations. An exception to this rule occurs when the sale was made to avoid payment of labour rights and other creditors of the seller, in which case both seller and buyer will be considered jointly liable for the payment of outstanding obligations.

Any contractual clauses that purport to exclude a buyer's liability will be null and void before the labour courts, since the assumption of agreements by the new holder arises by operation of law. But any clauses agreed upon between seller and buyer in relation to the seller's responsibility for pre-closing liabilities will be effective in relation to the parties to the agreement only (so that in the event of labour claims, the buyer would have to take legal action against the seller to recover the sums involved)—but not in relation to third parties.

### 6.1.3 Transfer of business

In the case of asset acquisitions involving the transfer of a business as a going concern (i.e. the acquisition of a *estabelecimento comercial*), Brazilian labour law allows either the continuation or the termination of the employment relationship.

In those cases, the transfer of employees does not necessarily require the termination of the employment agreements (which triggers certain labour rights and severance payments). Instead labour law allows the transfer of such agreements to the acquiring company. The concept is that the employees are transferred together with the assets, as a part of the economic activity. The transfer proceeding is very simple and is formalised by amending the employee's labour ID (*carteira de trabalho*: a form of booklet listing all employee's jobs) and the company's files on each employee. The new employer is the legal successor of the employees' labour liabilities.

The parties of an asset acquisition could alternatively agree that the seller will terminate its employees who will be immediately rehired by the buyer. Although this procedure is very expensive for the seller (who will generally be reluctant to accept this alternative) and does not completely exclude potential succession labour liabilities for the buyer, it will give the buyer some comfort by reducing the amounts that may be claimed by the seller's former employees in future.

If the parties agree to terminate and rehire the employees, the termination procedure requires an advance notice of a period from 30 to 90 days, depending on the length of service of the employee with the seller. Alternatively it requires the payment of compensation in lieu of that notice period, together with other severance payments (e.g. Christmas bonus, annual vacation pay). Also, since the termination is not instigated by the employee, the seller will be required to pay a fine equivalent to 50% of the Severance Fund account balance (*fundo de garantia por tempo de service/FGTS*). This is

a blocked bank account in the name of the employee administered by a governmental bank where the employer deposits monthly 8% of the employee's remuneration. This blocked account can only be released to the employee in rare circumstances provided by applicable law.

Generally the above rules apply to all employees, including senior or management employees, especially if they have very limited powers. In any event, either in the termination and re-hire scenario or in the straight transfer of employees, the employees' current employment conditions cannot be modified in a way that adversely affects the employees. Although it is possible to change a few conditions of the employment relationship, no changes can negatively affect the employee (e.g. except in exceptional cases, salaries cannot be decreased). Because of Article 448 of the CLT (see 6.1.2), any change in the compensation of the employee or in his/her employment conditions:

- requires the employee's express consent in writing, and
- must not cause any loss (financial or otherwise) to the employee.

## 6.2 Protection against Dismissal

The concept of 'at-will' employment is recognised in Brazil. Both employee and employer-company may terminate the employment relationship at any time for any reason, with or without cause.

Termination with cause is only possible if the fault committed by the employee is one of those listed in the CLT (which sets out an exhaustive list of possibilities).

Brazilian employees are always entitled to some severance pay on termination. The amounts of the severance and labour rights will depend on whether the employee has been terminated for cause or not, and whether the termination is effected by the employer or the employee.

The basic and routine severance payments on termination without cause are:

- compensation (i.e. salaries and fringe benefits) due until the day of termination
- accrued vacation leave credits based on one month's remuneration per year of employment; when termination occurs before a full year is completed, calculated on a pro rata basis
- vacation bonus, equal to 1/3 of one month's remuneration; when termination occurs before a full year is completed, calculated on a pro rata basis
- pro rata Christmas bonus or '13th month salary' equal to 1/12 of the employee's monthly remuneration; when termination occurs before a full year is completed, calculated on a pro rata basis from 1 January until the day of termination, equivalent to at least 15 days' remuneration, and
- 50% of the balance of the employee's Severance Fund bank account (FGTS).

The employer will also need to pay a number of payroll taxes calculated on some of the above benefits.

The prior notice for employees' termination must be proportional to the length of time the worker served the employer, capped at 90 days. Employees who have up to one year's service with the same company are entitled to 30 day's notice. However, for those employees with more than one year of service with the same company, the notice period is three days for each year of employment up to a maximum of 60 additional days.

# Canada

## 1.1 Overview

Canada is organised on the principle of 'federalism', with governmental powers divided between the federal and provincial governments. Absolute jurisdiction rests with either the federal or provincial governments with respect to some matters, with jurisdiction shared between the two for others.

## 1.2 General Legal Framework

Canada's legal system is also bifurcated with a civil law regime governing those in Québec and a 'common law' system in all other provinces and territories. The common law is a system of rules based on precedent. The civil law system in Québec uses court decisions to interpret the intentions and allowable authority of law-makers, but also relies on a written Civil Code that sets out standards of acceptable behaviour or conduct in private legal relationships. Unlike common law courts, courts in a civil law system first look to the Civil Code and then refer to previous decisions for consistency.

The main federal corporate statute in Canada is the Canada Business Corporations Act (CBCA). While many provincial corporate statutes contain substantially similar provisions to the CBCA, other corporate statutes may also be of interest to investors. For example, in contrast to the CBCA, some provincial corporate statutes do not impose Canadian residency requirements on directors.

## 1.3 Corporate Entities

A corporation may be formed under the laws of any province or territory or under the federal law. If formed under the CBCA, it will be empowered to carry on business throughout Canada, although still subject to provincial laws of general application, including the requirement to register or obtain an extra provincial licence.

A corporation need not actually carry on its business in its jurisdiction of incorporation, but where a corporation is formed in one province, it must usually register or obtain an extra-provincial licence in any other province or territory where it carries on business.

### 1.3.1 Limited companies

Limited companies may be private or closely held non-offering corporations or corporations offering securities to the public (offering corporations). The articles of a non-offering corporation may prohibit the offering of securities to the public or to more than 50 shareholders, however, those restrictions can be removed with the approval of the shareholders. This generally only happens where a company is undertaking an initial public offering or other transaction that results in its securities being publicly traded.

It is typical for the articles of a private company to provide that the authorised capital consists of an unlimited number of shares. The CBCA confers all powers of a natural person on a corporation. There is no requirement under the laws of any jurisdiction in Canada for a minimum paid-in capital.

The board of directors of a corporation has the responsibility to manage the corporation's affairs. Corporations may have one or more directors, and may provide in their articles for a minimum and maximum number of directors, with the precise number to be determined by the shareholders (or if so empowered, by the directors). Corporations governed by the CBCA must have a board of directors composed of at least 25% resident Canadians, and if there are fewer than four directors, at least one must be a resident Canadian. British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, Québec, Yukon and Northwest Territories and Nunavut do not have Canadian residency requirements for directors. Offering corporations require a minimum of three directors and generally require a majority of directors to be independent of management.

### 1.3.2 Unlimited companies

The provinces of Alberta, British Columbia and Nova Scotia permit the incorporation of an unlimited liability company (ULC). A ULC is treated, for Canadian tax purposes, as an ordinary corporation but may have special tax status in the United States.



There are differences in the treatment of ULCs in each of Alberta, British Columbia and Nova Scotia. For example, British Columbia and Nova Scotia do not impose Canadian residency requirements on directors whereas Alberta requires a minimum of 25% of the directors of an Alberta ULC be Canadian residents.

## 2. Acquisition Methods

In Canada, a business can be purchased either by way of a share purchase, an asset purchase or a merger.

### 2.1 Acquisition of Shares

Generally, all that is required to transfer legal title to the shares in a Canadian non-offering corporation is for a stock transfer form to be executed by the seller and then registered in the register of shareholders of the relevant corporation. Depending on the restrictions contained in the company's articles, prior approval by the company's board of directors may also be required. A share purchase agreement (SPA) is usually prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction.

Takeover bids are the norm to acquire all (or a controlling interest) of the shares of an offering corporation when the consideration offered is cash or securities in another Canadian offering corporation and for hostile acquisitions. The target's management need not be involved to commence a takeover bid, as the acquirer makes its offer directly to the target's shareholders. However, in the context of a friendly transaction, a support agreement is usually prepared to record the agreement between buyer and target on their respective rights, obligations and liabilities in connection with the transaction.

### 2.2 Acquisition of Assets

When a business is being transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer that applies to that type of asset. For some assets, this will simply be a case of delivering the asset to the buyer, but in other cases, the formalities are more prescriptive, such as in the case of real property or intellectual property. It is, therefore, necessary to include a provision, either in the purchase agreement governing the purchase of the business and its assets or in separate agreements, for the relevant formalities to be complied with. As with a share acquisition, there is usually an asset purchase agreement (APA) to record the respective rights, obligations and liabilities of the parties.

### 2.3 Mergers/Other Acquisition Methods

In Canada, amalgamations and plans of arrangement are the primary merger structures. Both require a target shareholders' meeting and supermajority approval of the transaction (66<sup>2</sup>/<sub>3</sub>% of the votes cast). Plans of arrangement also require court supervision.

#### 2.3.1 Amalgamations

Amalgamations are statutory mergers effected by filing articles of amalgamation. In general, amalgamations under Canadian corporate law result in each of the amalgamating corporations continuing in the amalgamated corporation. The amalgamating corporations cease to exist (as entities separate from the amalgamated corporation) and the amalgamated corporation possesses all the property and is subject to all the liabilities of each amalgamating corporation.

There is usually an amalgamation agreement to record the respective rights, obligations and liabilities of the parties involved in an amalgamation transaction. A notice of meeting containing disclosure sufficient to allow shareholders to make an informed decision must be delivered to shareholders entitled to vote on the amalgamation. If the amalgamation involves an offering corporation (i.e. a corporation offering its securities to the public), the notice of meeting will be accompanied by an information circular that will contain very detailed information regarding the transaction and the amalgamating entities, including financial statement disclosure.

### 2.3.2 Plans of arrangement

Plans of arrangement are statutory mergers effected by filing articles of arrangement. A plan of arrangement is a very flexible way to structure an acquisition and can be used to deal with complex tax issues, to amend the terms of outstanding securities (e.g. convertibles, options, warrants or debentures) and to assign different rights to different holders of securities. Plans of arrangement are also often used when a non-Canadian acquirer wants to use its own securities as consideration. Plans of arrangement have the additional benefit of being eligible for an exemption from the SEC's registration and disclosure requirements for securities that the acquirer offers as consideration.

Plans of arrangement are court-supervised, requiring interim court approval and, following approval by the target's shareholders, final court approval. The parties will enter into an arrangement agreement to record the respective rights, obligations and liabilities of the parties and information similar to that required for an amalgamation must also be delivered to shareholders entitled to vote on an arrangement.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

In the context of a takeover bid or merger transaction, before making an offer, an acquirer is free to seek undertakings or lock-up agreements from shareholders who agree to accept the bid or vote in favour of the merger. Those undertakings may take many forms, from irrevocable commitments to 'soft' commitments that permit a shareholder to terminate its obligation if a superior offer is made by another potential acquirer.

In proposed acquisitions of offering corporations, toehold acquisitions of up to 19.9% (together with securities beneficially owned by any joint actor) are permitted. Acquisitions of 20% or more are deemed takeover bids under Canadian law and require offers to all holders of the same class of shares unless an exemption is available. In Canada, public disclosure of a toehold acquisition is triggered once an acquirer acquires 10% or more.

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Canadian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1.	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. Working capital adjustments most prevalent. Other adjustment metrics, including assets, cash and debt fairly common. Purchase price adjustments may be based on more than one metric.
2.	Is there a collar on the adjustment?	Collars not common.
3.	Who prepares completion balance sheet?	Usually prepared by buyer; however, becoming increasingly common for seller to prepare.
4.	Is the balance sheet audited?	Not necessarily.
5.	Is an earn-out common?	Earn-outs not uncommon, although the majority of transactions do not include earn-outs.
6.	Is a deposit common?	Uncommon.
7.	Is an escrow common?	Relatively common.

8.	Is a break fee common?	Uncommon. Break fees prominent in public transactions.
<b>Conditions Precedent</b>		
9.	Express Material Adverse Event (MAE) completion condition?	Common.
10.	Is the MAE general or specific?	The MAE definition is typically general and tends to be forward-looking, but will often contain carve-outs.
11.	Quantification of MAE?	Not common.
<b>Covenants, Access</b>		
12.	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Blue pencil severance only available where portion being removed is trivial and not central to the provision; rarely used.
13.	Non-solicit (of employees)?	Common.
14.	Non-solicit (of customers)?	Common.
15.	Broad access to books, records, management between sign and close?	Common.
16.	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Common. Accuracy of representations at closing a common condition precedent. Obligation of target to notify buyer of breaches also common. A covenant requiring target to update disclosure schedules less common but not unusual. Consequences of breach specific to the transaction and any indemnity provisions.
17.	Is a separate tax covenant/indemnity or tax deed common?	Uncommon to include a separate tax covenant, but inclusion not unusual. A specific tax indemnity is commonly included in the purchase agreement.
<b>Representations and Warranties</b>		
18.	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers common and different materiality thresholds may be used for different representations. Materiality not typically quantified.
19.	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge commonly qualified as constructive knowledge (imposing obligations to conduct an express investigation, reasonable or due inquiry). Specific individuals usually identified.
20.	Is a warranty that there is no materially misleading/omitted information common?	Full disclosure representations (no untrue statements and no omissions) and/or US-style '10b-5' representations were included in 45% of deals in 2014 according to ABA's 2014 study.
21.	Is disclosure of data room common?	Uncommon.

## Repetition of Representations and Warranties

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|-----|---|---|
| 22. | Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?  | Common to repeat warranties at completion. Bring-down certificate from seller at completion common and may be a condition of closing.   |
| 23. | What is the applicable standard? True in all material respects? Material Adverse Effect standard?   | Both accurate 'in all material respects' and material adverse effect common. A combination of materiality standards, where different representations are subject to different materiality qualifications also common. |
| 24. | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon.   |

## Limitations on Liability

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| 25. | What is the common cap amount (as a percentage of purchase price)?   | Cap amounts range from less than 10%–100% of purchase price. According to the ABA's 2014 study, 25% of deals in 2014 included a 100% cap. The median cap, however, is 40%.  |
| 26. | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Caps commonly apply to indemnification obligations in the entire agreement. Other limitations on liabilities (including baskets) can also be imposed for breach of representations and warranties, breach of seller covenants and other items.  |
| 27. | What are the common exceptions to the cap?   | Common carve-outs for caps include (in descending order of frequency): fraud, taxes, due authorisation, intentional breach of representations, due organisation, title to assets, ownership of shares sold, capitalisation and breach of covenants.   |
| 28. | Is a deductible or basket common?  | Inclusion of a basket very common. According to ABA's 2014 study, 92% of deals in 2014 included a basket. 'First Dollar' baskets are most prominent, followed by deductible basket and then a combination of the two.   |
| 29. | Is a <i>de minimis</i> common?   | An eligible claim threshold establishing a <i>de minimis</i> amount for any individual claim was included in 27% of deals in 2014 according to ABA's 2014 study.  |
| 30. | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | Survival of liability typically 24 months. A range between 12– 24 months also common. Carve-outs will often be made for taxes, fraud, title to assets, ownership of shares, due organisation, breach of covenants, intentional or wilful breach, capitalisation, environmental and no conflict. |
| 31. | Is warranty insurance common?  | Uncommon, but use of representation and warranty insurance increasing.  |

**Reliance**

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| 32. | Do financiers seek to rely on buyer's due diligence reports? | Uncommon but occasionally requested. |
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**Set-offs against Claims**

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| 33. | Is a set off against claims for tax benefits common? | Common. |
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| 34. | Insurance proceeds? | Common. |
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| 35. | Third party recoveries? | Common. |
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**Damages, Knowledge**

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| 36. | Obligation to mitigate damages? | Uncommon to incorporate express requirement to mitigate losses in acquisition agreement. Duty to mitigate exists at common law for contractual breaches. |
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| 37. | Exclusion of consequential damages? | Not unusual. According to ABA's 2014 study, 44% of deals in 2014 excluded consequential damages while 11% included them. |
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| 38. | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? | 'Anti-sandbagging' provisions (no party is liable if the party seeking indemnification had knowledge) – not common. |
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**Dispute Resolution**

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| 39. | Does local law allow for a choice of governing law? What is the common governing law? | Yes. Jurisdiction is usually related to location of the parties. Where silent, governing law is the jurisdiction in which the agreement was signed. |
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| 40. | Is litigation or arbitration more common? If arbitration, where? | Litigation is generally more common, however, alternative dispute resolution provisions were included in 30% of deals in 2014 according to ABA's 2014 study. Where those provisions were included, binding arbitration is predominant. |
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**Stamp Duty**

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| 41. | If stamp duty is payable, is it normally shared? | No stamp duty in Canada. |
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**3.3 Formalities for Execution of Documents****3.3.1 Transfers of shares**

There is no general legal requirement for an agreement for the transfer of shares to be made in writing. Market practice is for a share transfer to be documented between the seller and the buyer by way of a written share purchase agreement (SPA). This can be effected with only signatures by or on behalf of the parties. Corporate seals are not required.

### 3.3.2 Transfers of assets

Like transfers of shares, there is no overarching requirement that a transfer of assets be made in writing. However, in certain transfers of assets, written contracts may be required by law or to fulfil an applicable registration requirement. Some examples of contracts that must be in writing are:

- contracts for the sale of land
- leases for a term in excess of 3 years
- guarantees
- declarations of trust over land (or any interest in it), and
- grants of an equitable interest or trust.

Market practice in the majority of cases is for an asset transfer to be documented between seller and buyer by way of a written asset purchase agreement. As with share transfers, this agreement will generally only require signatures by or on behalf of the parties.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

Private companies will often include restrictions on shares transfers in the corporation's articles of incorporation, by-laws or in the SPA to prevent shares from being sold to the general public. If that is the case, share transfers may not be effective until approved by the board of directors and/or the shareholders, who must sign a resolution to give effect to the transfer. Typically, the seller will sign a stock transfer power of attorney or endorse the back of the share certificate.

### 3.4.2 Transfers of title to assets

Depending on the content of the asset sale, a range of obligations may be triggered. If the sale involves real property, it must be in writing and the transfer of ownership will need to be registered with the appropriate government land registration office. Similarly, where the assets being sold include automobiles, ownership records will need to be changed in accordance with applicable provincial legislation.

#### ***Shareholder approval***

Depending on the content of the transaction, shareholder approval may be required. There are two main instances in which shareholder approval must be obtained to complete an asset purchase transaction. These occur where:

- the assets constitute 'all or substantially all' of the property of the selling corporation, or
- an SPA of the purchasing company requires shareholder approval for the purchase price of the acquired assets to be satisfied by the issue of a substantial number of shares of the purchasing company's own stock.

#### ***Bulk Sales Act (Ontario)***

In Ontario, an asset sale may also trigger the provisions of the Bulk Sales Act. The purpose of this legislation is to protect creditors of a business by preventing the business from selling its assets out of the ordinary course of business without regard to the creditors' interests.

Where the Bulk Sales Act applies, the parties may waive compliance with that legislation with the seller, providing an indemnity to the buyer, or the seller may apply to the court for an exemption order. The order may be granted where the court is satisfied, 'that the sale is advantageous to the seller and will not impair the seller's ability to pay creditors in full'.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Canadian 'anti-trust' law is contained primarily in the federal Competition Act, which includes both criminal and non-criminal provisions.

Criminal offences include conspiracy, bid-rigging, and certain misleading advertising or deceptive marketing practices. Prosecutions are brought before criminal courts where strict rules of evidence apply. Penalties include fines or imprisonment, or both. Individuals as well as companies may be charged. The Commissioner of Competition may apply to the court for prohibition orders (i.e. court orders forbidding certain activities) or interim injunctions (i.e. temporary court orders forbidding certain activities until a hearing is held) against infringing parties.

Non-criminal reviewable matters include:

- mergers
- price maintenance
- misleading advertising
- collaborative behaviour
- abuse of dominant position
- refusal to deal
- consignment selling
- exclusive dealing
- tied selling
- market restriction, and
- delivered pricing.

These matters are reviewed by the Competition Tribunal (generally having been referred by the Commissioner) under non-criminal law standards and may be resolved by issuance of an order by the tribunal terminating the restrictive practice and ordering remedial actions. In some instances the tribunal may impose an administrative fine.

A private right of civil action is also available where there is a violation of the criminal provisions of the Competition Act or failure to comply with an order of the Competition Tribunal or court. The private party must be able to prove 'loss' or damage as a result of the violation.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Canadian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe.

The Competition Act contains provisions regulating acquisitions of control of Canadian businesses. Part IX of the Act requires mandatory pre-notification of an acquisition of more than 20% of the voting shares of a public corporation (that directly or indirectly carries on a business), or more than 35% of

the voting shares of a private corporation that directly or indirectly carries on an operating business, where the following two thresholds are met:

- the buyer and its affiliates and the target corporation and its affiliates (which would include the target corporation's parent and its affiliates) have assets in Canada whose book value exceeds CAD400 million, or annual revenues from sales in, from or into Canada exceed CAD400 million, and
- the book value of the assets in Canada of the target corporation exceeds CAD86 million or those assets generate annual revenues from sales in or from Canada in excess of that amount.

Similar provisions exist with respect to transactions that involve the acquisition of assets, amalgamations or combinations.

The merger review process in Canada is two-stage, similar to that in the United States.

A proposed transaction cannot be completed during the 30 days following receipt of the initial filing by the Commissioner unless early clearance is obtained. The Commissioner may, within the first 30 days following receipt of the initial filing, send a Supplementary Information Request (SIR) to the party that supplied the information requiring it to provide additional information. A SIR triggers a second 30-day waiting period, which commences when all information requested in the SIR has been received.

The Competition Act contemplates a procedure whereby the parties to a proposed transaction may, in lieu of or in addition to filing a merger pre-notification, request an Advance Ruling Certificate (ARC). The Commissioner may be prepared to issue an ARC if in his view the proposed merger will not substantially lessen competition. The Commissioner is obliged to consider those requests as expeditiously as possible. It is difficult to estimate the amount of time it takes to obtain an ARC, since much depends on the extent of the information required by the Commissioner.

The Competition Bureau has adopted non-binding service standards for the review of transactions which depend on the complexity of the transaction. The service standard for non-complex mergers is 14 calendar days, commencing on the day a complete pre-merger notification or ARC request is received, assuming sufficient information is provided. The service standard for the review of complex mergers in Phase I is 45 calendar days, 15 days longer than the 30-day statutory waiting period after which a transaction may legally close (unless a SIR is issued). If a SIR is issued during the initial 30-day period, triggering a Phase II review, the Phase II service standard is the same as the Phase II statutory waiting period (i.e. 30 calendar days from receipt of a complete response to the SIR). The service standards are not binding, however, and substantive review may continue after the statutory waiting periods have expired. While parties can legally close a transaction after expiry of the statutory waiting periods, the Competition Bureau is not obliged to complete its review or issue a clearance decision within that time.

A filing fee of CAD50,000 is payable in respect of a merger pre-notification or an ARC request unless both relate to the same transaction, in which case the fee is payable only once.

The Merger Enforcement Guidelines issued by the Competition Bureau outline the evaluative criteria used to determine the likelihood that a merger may result in a substantial lessening or prevention of competition. The market share of the merged firm and post-merger industry concentration are only two of many factors considered. While these alone are not definitive, the higher the market share, and the greater the concentration will be after a merger, the more likely the Commissioner will be concerned about the transaction.

The Competition Bureau is not deemed to approve a transaction merely because it fails to initiate an inquiry within the established waiting periods or because the financial thresholds set out above for pre-notification have not been met. The Competition Tribunal may, on application by the Commissioner, review any proposed merger, or any completed merger within one year of its completion. The power to review transactions that have closed applies regardless of whether a transaction exceeds the financial pre-merger notification thresholds. The Competition Bureau has



been aggressive in identifying non-notifiable transactions that they believe may raise substantive competition issues.

### 4.3 Anti-Bribery and Corruption

Canada's foreign corrupt practices legislation is the Corruption of Foreign Public Officials Act (CFPOA), which implements Canada's international obligations under the Anti-Bribery Convention of the Organisation for Economic Co-operation and Development (OECD). The CFPOA reflects the language of the OECD Convention, the US Foreign Corrupt Practices Act (FCPA) and existing domestic anti-bribery provisions in the Canadian Criminal Code that apply to Canadian public officials.

The CFPOA applies to Canadian citizens, permanent residents of Canada, companies and other organisations incorporated or formed in Canada, and to persons anywhere in the world whose acts or omissions have a 'real and substantial connection' to Canada. While the CFPOA applies to corrupt practices in relation to foreign public officials, the Criminal Code includes Canada's domestic anti-corruption provisions. The Criminal Code creates a number of bribery, corruption and 'influence peddling' offences that capture the payment of bribes, benefits and advantages to domestic public officials in Canada. The Criminal Code also establishes the offence of corruptly giving 'secret commissions' in the context of agency relationships.

#### 4.3.1 Corruption of Foreign Public Officials Act

It is an offence 'to obtain or retain an advantage in the course of business,' to 'directly or indirectly [give, offer or agree to give or offer] a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official: (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions.'

The CFPOA contains an exemption for reasonable promotional expenses. To be exempt the payment or benefit made to cover reasonable expenses must be made in good faith and be directly related to the promotion, demonstration or explanation of the products or services of the business, and not in furtherance of any personal interest. Although the CFPOA originally included an exception for facilitation payments (e.g. payments made for acts of a routine nature such as the issuance of a permit or the processing of official documents), the statute was amended to eliminate the exception for facilitation payments at some future date (yet to be determined).

All transactions and expenditure must be adequately and accurately identified in books and records. In contrast to the United States, there is no parallel civil enforcement mechanism relating to proper books and records.

#### 4.3.2 Criminal Code

Canada's anti-bribery laws generally apply to public officials and not to private sector transactions. However, there is a prohibition in the Criminal Code against secret commissions in the agency context and the general law of fraud applies more broadly to any business relationship. For example, it is illegal for an agent to be paid commission for referring business to a company where this is not disclosed to the agent's principal.

#### 4.3.3 Penalties

Under both the CFPOA and the anti-bribery provisions of the Criminal Code, penalties may include imprisonment for up to 14 years. Potential fines are unlimited. Corporate officials and employees can be convicted of CFPOA and Criminal Code offences personally, and the actions of middle managers are sufficient to make a company criminally liable. A corporation can also be liable as a party to an offence committed by a 'senior officer.' There is no limitation period for prosecution.

## 4.4 Foreign Investment Restrictions and Trade Regulation

### 4.4.1 Foreign investment approvals and notifications

Foreign investment in Canada is regulated by the Investment Canada Act (ICA). Generally speaking, the ICA monitors the establishment of new businesses and the acquisition of control of existing Canadian businesses by non-Canadians. Whether an entity is a non-Canadian for purposes of the ICA is determined by the nationality of the individual who ultimately beneficially owns or controls the entity. Every non-Canadian who is a citizen or resident of a country that is a member of the World Trade Organization (a WTO Investor) is given special status under the ICA for most transactions. The rules to determine whether an entity or individual is a WTO Investor can be complicated and should be analysed on a case-by-case basis.

#### ***Notifiable acquisitions***

A non-Canadian establishing a new business in Canada must file a notification with the Investment Review Division of Industry Canada (IRD) prior to, or within 30 days of the commencement of the business. This filing is unnecessary if the new business is related to a Canadian business already being carried on by the foreign investor.

A notification must also be filed with respect to each direct acquisition of a Canadian business if the book value of its assets is less than CAD369 million (for 2015), unless neither the seller nor buyer of the Canadian business is a WTO Investor.

A transaction will be reviewable if the book value of the assets is CAD5 million or more and if the Canadian business relates to Canada's cultural heritage or national identity, or if neither the seller nor the buyer is a WTO Investor. Furthermore, if the new business or the business of the target is related to Canada's 'cultural heritage or national identity', the Minister of Canadian Heritage may exercise discretion to review it, regardless of its size. The applicable regulations define 'cultural heritage or national identity' to include the publication and distribution of books, magazines, periodicals, newspapers, films, videos, music recordings and sheet music, and radio, television and cable television broadcasting and related activities. The Department of Canadian Heritage conducts the review process for such transactions.

#### ***Reviewable acquisitions***

Acquisitions that are subject to review cannot generally be completed until approval is received. Direct acquisitions of control of a Canadian business whose gross assets exceed CAD369 million (for 2015) would require approval. Such approval is given upon application if the Minister is satisfied that the acquisition will result in a 'net benefit' to Canada. The approval process may take as long as six weeks.

As a condition of approving a reviewable transaction, the IRD on behalf of the Minister of Industry (or Minister of Canadian Heritage, as the case may be) will often require undertakings from the non-Canadian to ensure that the transaction is of net benefit to Canada. Compliance with these undertakings is monitored after closing the transaction and will be renegotiated if they have not been substantially performed.

#### ***Investment by state-owned enterprises***

The Canadian Minister of Industry has issued guidelines specifically relating to investments involving foreign state-owned enterprises (SOEs) which will normally be subject to scrutiny and post-transaction obligations with respect to governance and commercial focus. However, these apply only to investments which are subject to pre-closing review.

#### ***National security***

The Minister of Industry has very broad powers to examine any investment in Canada (whether or not subject to review or notification under the above requirements) made by a non-Canadian if the Minister reasonably believes that the investment could be injurious to national security. A transaction cannot be closed without approval if the Minister has given notice to the non-Canadian prior to

implementation that he has concerns relating to the investment's impact on Canadian national security. If the transaction has already closed, the federal cabinet may order divestiture. The term 'national security' is not defined and to date virtually no guidance has been provided as to how this provision will be interpreted or implemented.

### ***Real property***

In most provinces and for most property interests, there is no restriction on the ownership of real property in Canada by non-resident persons or corporations, with a few exceptions:

- in Prince Edward Island, a non resident may not own land in excess of five acres or having a shore frontage in excess of 165 feet (unless he/she first receives permission to do so from the Lieutenant Governor in Council)
- Alberta restricts non-resident ownership of controlled land (land outside the boundaries of a city, town, new town, village or summer village)
- Saskatchewan restricts the sale of agricultural land to non-residents to 10 acres, and
- Manitoba restricts non-residents from owning more than 40 acres of farmland and requires that they move to the province within two years of purchasing the land.

Non-residents may apply for an exemption from the Alberta, Saskatchewan and Manitoba restrictions, and Canadian citizens and permanent residents (and corporations controlled by same) are not subject to the Alberta, Saskatchewan and Manitoba restrictions. Québec does not permit non-residents to purchase agricultural land without permission from the *Commission de protection du territoire agricole du Québec*. A non-resident is anyone who has lived in Québec for less than 366 days within the 24 months preceding a real estate transaction. Québec also restricts ownership by non-residents of certain classified cultural properties.

#### **4.4.2 Industry-specific regulation**

Other federal statutes regulate and restrict foreign investment in industry sectors, such as telecommunications, broadcasting and banking.

#### **4.4.3 Import/export controls**

The Canadian government restricts the import of certain goods (e.g. dairy, meat and poultry products) to promote domestic policy objectives as well as to implement intergovernmental arrangements or commitments. Goods that are subject to import controls are contained in an Import Control List established under the Export and Import Permits Act (EIPA). Persons who wish to import goods on the list must first obtain an import permit from the Trade Controls Bureau of the Department of Foreign Affairs, Trade and Development Canada (DFATD).

The EIPA not only controls the import of certain goods into Canada, but also controls the export of certain goods and technologies from Canada.

The EIPA also authorises the federal cabinet to establish an Export Control List (ECL) and an Area Control List (ACL). Goods and technologies listed on the ECL include military goods and technologies, dual-purpose industrial goods and technologies which have both civilian and military application, nuclear-related goods and technologies, and other non-strategic goods. Exporters of goods or technologies on the ECL must obtain an export permit to export the goods to all destinations with one general exception: it is not necessary to obtain an export permit if the country of final destination is the United States, unless the goods are nuclear-related (and certain other items).

The ACL is a list of countries to which all exports are controlled and for which an export permit must be obtained, whether or not the goods are on the ECL.

Except in specific circumstances where General Export Permits (GEPs) are available, exporters must apply to the Trade Controls Bureau of DFATD for a specific export permit. GEPs authorise the export of certain goods to eligible countries without requiring the exporter to apply for a specific export permit, if certain conditions are met.

## 5. Transfer Taxes

### 5.1 Income Tax: Acquisition of Shares

A selling shareholder will generally be liable to tax on the sale of shares. The amount of tax is generally based on the difference (i.e. the 'gain') between the sale proceeds (or fair market value for dispositions to related parties) and the seller's cost basis in the subject share (generally, the cost to the taxpayer of the property). The gain is generally taxed as a capital gain; i.e. one-half of the gain is included in the seller's income and taxed at the seller's combined (i.e. federal and provincial), marginal income tax rates.

If the share is a 'qualified small business corporation share' (as defined in the Income Tax Act (ITA)), and the seller is an individual (but not a trust), the seller may qualify for an exemption on capital gains for the first CAD800,000 of the sale proceeds.

No stamp duty is payable by buyers on the acquisition of shares in Canada.

If the shares constitute 'taxable Canadian property' (as defined in the ITA) and the shares are being purchased from a non-resident of Canada, the buyer may have to withhold 25% of the purchase price (unless it obtains a certificate of compliance from the Minister of National Revenue).

### 5.2 Income Tax: Acquisition of Assets

A seller will generally be liable to tax on the sale of assets. The amount of tax is generally based on the difference between the proceeds of disposition (or fair market value for dispositions to related parties and the seller's tax cost in the assets (generally, the cost to the taxpayer of the property). The gain is generally taxed as a capital gain (see **5.1**). However, the gain on some items (e.g. inventory) will be taxed as ordinary income.

For sales of depreciable property, the sale may give rise to either recapture of previously-claimed capital cost allowance (CCA) (taxed at full income tax rates up to the amount of CCA previously claimed) or may result in a 'terminal loss' (if all of the depreciable property in a class of depreciable property (prescribed by ITA regulations) is disposed and an undepreciated capital cost remains).

### 5.3 Goods and Services Tax/Harmonised Sales Tax (GST/HST)

Most supplies of property and services in Canada are subject to GST at a rate of 5% in British Columbia, Alberta, Saskatchewan, Manitoba, Québec and the territories; or HST that applies at a rate of 13% in Ontario, Newfoundland and New Brunswick; 14% in Prince Edward Island; and 15% in Nova Scotia.

#### 5.3.1 Acquisition of shares

In general, the transfer of shares is an exempt supply under the Excise Tax Act and therefore not subject to GST/HST.

#### 5.3.2 Acquisition of assets

The acquisition of assets generally results in the application of GST/HST, at a rate depending on the province in which the supply of assets is made. In the context of an asset sale, the seller must examine each asset individually to determine the GST/HST consequences. Assets may fall into one of three categories:

- taxable
- exempt, or

- zero-rated.

In general, if the buyer is acquiring the assets for consumption, use or supply exclusively in the course of commercial activities, it may recover GST/HST paid by way of input tax credit.

Where there is sale of all or substantially all of the assets of a business or part of a business, the seller and buyer can jointly elect to allow for the GST/HST-free transfer of the business (if the conditions of s. 167(1), ETA are met). Alternatively, under s. 156 of the ETA, eligible members of a 'closely related' group of corporations and partnerships may enter into an election that generally relieves intercompany supplies between them from GST/HST.

## 5.4 Provincial Sales Taxes

The province of Québec has a provincial value added tax called the Québec Sales Tax (QST), which applies at a rate of 9.975% to taxable supplies of property and services made in Québec. The QST operates in generally the same manner as GST/HST.

The provinces of British Columbia, Saskatchewan and Manitoba impose provincial retail sales tax (PST) that applies to most types of tangible personal property, computer software and certain taxable services. However, inventory and other goods purchased for resale are generally exempt from PST. The PST rates are 7% in British Columbia, 8% in Manitoba, and 5% in Saskatchewan. Sellers of goods via bulk sales in a PST province are generally required to obtain a PST clearance certificate from the provincial tax authority.

## 5.5 Land Transfer Tax

The acquisition of real property generally gives rise to provincial land transfer tax in most provinces of Canada. Land transfer tax rates vary by province and in certain cases (such as Ontario) are also applicable to the conveyance of unregistered (beneficial) ownership and to long-term leases in excess of 50 years (Ontario). In addition, the cities of Toronto and Montreal impose a municipal land transfer tax.

# 6. Employee Issues

## 6.1 Method of Transfer under Local Law

Prior to undertaking negotiations or due diligence, parties to a transaction should consider the governing labour, employment, and privacy rules. In doing so, parties must keep in mind that the federal government and each of the provinces have distinct labour and employment laws, which may impact the structure and associated costs of a corporate transaction. The details set out below specifically address the legislation applicable to the Province of Ontario; however, other provinces will have similar, although not identical, laws in place.

### 6.1.1 Acquisition of shares

Share acquisitions involve a change to the identity of the employer's shareholders, rather than the identity of the employer itself. At common law and under employment standards legislation, the employment relationship between the employee and employer continues post-closing because the employing business entity does not change. As a result, share acquisitions minimally impact labour and employment relationships.

In addition to protection against redundancies, which is set out in **6.3.1**, employees are also protected against constructive dismissal. If the buyer makes material changes to fundamental terms and conditions of employment post-closing, employees may treat such action as constructive dismissal, view the employment relationship as having been wrongfully terminated, and sue for damages. In order to protect against either scenario, the purchase and seller may seek to allocate liability for such costs through the use of indemnity clauses in the share purchase agreement.

In much the same way that the employment relationship remains unchanged by a share acquisition, the relationship between the employer and any existing union also remains unchanged. The buyer inherits all aspects of the seller's labour relations, including obligations regarding bargaining, collective agreements, and outstanding grievances and settlements.

Finally, where the seller sponsored an employee pension plans, the buyer will continue to sponsor the plan following the closing date. No regulatory approval is required for this change, as the plan's asset and liabilities remain unaltered. The buyer should therefore seek detailed representations and warranties from the seller regarding pension plans, in order to minimise any potential liability and possibly negotiate a price adjustment clause based on an eventual determination of the financial position of the pension plan. Special considerations would apply in cases where the entity being purchased participates in an 'umbrella' pension plan, in which case various scenarios will have to be weighed in order to determine how the parties wish to address the matter.

#### 6.1.2 Acquisition of assets

Under the common law, an asset purchase is viewed as a termination of employment by the seller, coupled with a simultaneous hiring by the buyer, leading to the formation of a new employment contract between the employees and the buyer. Employees who do not go on to work for the buyer are seen as having been terminated without cause by the seller and are consequently entitled to reasonable notice, subject to the employee's duty to mitigate its damages, which can include accepting a reasonable offer of employment from the buyer. The common law infers that, absent express contractual language to the contrary, the buyer recognises an employee's prior service with the seller.

Even where an employee has failed to mitigate his or her damages for common law notice by accepting an offer of employment with the buyer, the employee will be entitled to statutory minimum notice, or pay in lieu of it and severance pay, where applicable, under the Ontario's Employment Standards Act (ESA). Details regarding these statutory requirements are detailed in **6.3.1**.

The ESA expressly provides for continuity of employment in the context of corporate transactions. If a buyer hires the seller's employees within 13 weeks of the sale or the employees' last day of employment with the seller, the employee's full service carries over for the purpose of all service-driven provisions of the ESA, including the calculation of vacation pay and entitlements to pregnancy or parental leave.

The Ontario Labour Relations Act (OLRA) provides that a buyer inherits the existing collective agreement upon the sale, in whole or in part, of a business. This survival of representation by the union applies to all aspects of labour relations, including collective bargaining, ongoing certification drives, outstanding grievances, arbitrations, and settlements. Although a collective agreement may not be terminated without the approval of the Ontario Labour Relations Board (OLRB), the buyer may negotiate with the bargaining agent to modify the collective agreement by consent. Additionally, if the buyer is already a unionised workplace, the OLRB has the power to define and modify the composition of bargaining units to properly reflect workforce representation.

Buyers may decide to offer or not offer a pension plan to transferring employees. However, if participation in the seller's pension plan is a term of the collective agreement applicable to transferring employees, the buyer will be required to assume the plan. If the buyer decides not to establish a pension plan, the Ontario Pension Benefits Act provides that the seller's plan may be wound up. If the buyer offers a pension plan, it may:

- accept assignment of the seller's plan
- maintain a new plan for employees, with benefits accruing on future service
- create a new plan that recognises the employees' service with the seller but does not pay out benefits under the seller's plan, or
- accept the transfer of assets and liabilities associated with transferring employees from the seller.

### 6.1.3 Common considerations in share or asset acquisitions

In addition to the above considerations, other legislation exists that may impact the parties to either a share or asset acquisition. For instance, the Ontario Human Rights Code, which sets out a number of grounds upon which employers may not discriminate and sets out a duty to accommodate employees, does not contain a successor employer provision. However, outstanding human rights complaints may indicate ongoing problems, about which the buyer should be aware. Similarly, the employment-related provisions of the Accessibility for Ontarians with Disabilities Act require organisations to provide accessibility for persons with disabilities throughout the employment cycle and are harmonised with the Human Rights Code. Buyers should factor potential accommodation arrangements into its transaction costs and determine how offers of employment to employees on leave will be handled in order to mitigate risks under both these pieces of legislation.

Buyers should also be aware of the requirements relating to workplace health and safety. Although buyers are unlikely to be liable for prosecutions initiated under the Ontario Occupational Health and Safety Act prior to the sale, work orders may be directed towards a particular asset, which may give rise to obligations post-closing. Under the Ontario Workplace Safety and Insurance Act, a buyer is liable to pay all premiums owing by the seller immediately before the sale, whether the sale proceeds by way of shares or assets.

Where a seller has a pay equity plan under the Ontario Pay Equity Act, which is designed to equalise wages such that male and female employees are provided equal pay for work of equal value, the buyer may be required to make any compensation adjustments set out in the plan for positions that it maintains. Similarly, if the seller has adopted a voluntary equal employment or affirmative action program under the federal Employment Equity Act, the program's policies should be reviewed by the buyer.

Finally, the Employment Insurance Act and the Canada Pension Plan allow transacting parties to agree that the buyer will succeed the seller, such that the regulator will consider any amounts deducted, remitted, and paid by the seller during the transaction year to have been deducted, remitted, and paid by the buyer.

## 6.2 Approval or Consultation Requirements

During negotiations, transacting parties inevitably disclose and use personal employee information. The privacy rules related to such information differ across the provinces. British Columbia, Alberta and Québec are the only provinces that have enacted privacy legislation applicable to the private sector (Manitoba has passed private sector privacy legislation but it was not yet in force at the time of printing).

For those provinces without private sector privacy legislation, the federal Personal Information Protection and Electronic Documents Act (PIPEDA) applies to personal information collected, used or disclosed by private and federally-regulated organisations in the course of commercial activities. Although PIPEDA does not apply to provincially-governed employment relationships, some commentators have argued that PIPEDA may apply to personal employee information in the context of commercial transactions.

In general, privacy legislation prohibits the collection, use and disclosure of personal information about an individual without the individual's consent. However, some privacy statutes may provide for exemptions to this general rule, notably business transaction exemptions. To minimise litigation risk, transacting parties should sign a data protection, confidentiality, or non-disclosure agreement and may wish to obtain consent from all affected employees to the collection, use and disclosure of personal employee information in the context of the transaction.

In Canada, all employment relationships are personal in nature. The employer contracts, in writing or orally, with the employee for the latter's personal service. Absent the employee's consent, or as provided for by the written employment agreement, the employer cannot assign or transfer the employment relationship to another person. In general, where an employee begins to work for another employer, the employment relationship with the former employer terminates. However, in many cases, parties will simply treat the relationship as though it has been transferred. Over time, employees will likely be found to have implicitly accepted employment with the new employer.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

The termination of employer-employee relationships is governed by the common law, statutory law, and/or contractual undertakings. Termination of employment owing to a business transaction constitutes dismissal without cause. Where the buyer decides to terminate an employee's contract post-closing, the buyer is responsible for providing notice of termination (statutory or based on the common law), or pay in lieu of it, to employees, based on the employee's years of service with the seller. In certain jurisdictions, including Ontario, the employer will also have to provide severance to employees who have had their contracts terminated. These general employment principles apply to corporate transactions, regardless of the nature of the transaction.

Under the common law, the reasonable notice period for individual employees is based on a multitude of factors, in particular the age of the employee, his or her years of service, the nature of the employee's position, and the availability of alternate employment. The reasonable notice period can range anywhere from 3 to 6 weeks per year of service to a notional maximum period of upwards of 24 months.

Statutory notice of termination is calculated on an individual basis using a sliding scale based upon the affected employee's length of service. Under the ESA, notice of termination (or pay in lieu of such notice) is owed to any discharged employee with at least three months of service, and increases with total years of service. Where a transaction contemplates the termination of 50 or more employees within any rolling four-week period, the ESA provides for minimum 'mass termination' notice requirements and requires that notification be sent to the Director of Employment Services. In certain jurisdictions, employment benefits provided by the employer must be maintained during the applicable statutory notice period, even if pay in lieu of notice is provided.

Under the ESA, severance pay is a lump-sum payment that is equivalent to one week of salary per year of service, pro-rated for partial years, to a maximum of 26 weeks. Employers cannot satisfy their severance pay obligations by providing working notice. Severance pay is only owed to employees in certain circumstances, including:

- when 50 or more employees have their employment terminated by an employer in a period of six months or less, and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment, or
- when one or more employees have their employment terminated by an employer with a 'payroll' of CAD2.5 million or more.

### 6.3.2 Penalties

As discussed above, employees have certain termination entitlements where their employment is not transferred post-closing. Where these obligations are not met, or where the buyer undertakes a material change to the employment contract that is not accepted by the employee (i.e. constructive dismissal), affected employees may bring a wrongful dismissal claim under the common law, a grievance under a collective agreement (where applicable), or lodge a complaint with the regulator under the ESA or other regulator under relevant employment legislation.

Employees who are terminated following a return from a statutory leave of absence may also lodge a complaint against the buyer for having breached the provisions of the ESA relating to reinstatement after leave and protection from reprisal.

Where an employee alleges that he or she was terminated in a discriminatory manner post-closing, the employee may file a claim against the buyer and/or the seller under the Ontario Human Rights Code. If either the buyer or the seller is found to have discriminated against the employee on the basis of any of the enumerated grounds set out in the Human Rights Code, it may be required to pay compensation to the employee, including lost wages, damages for injury to feelings, dignity, and self-respect. The Human Rights Tribunal of Ontario may also order non-monetary remedies, such as requiring the employer to reinstate the employee, undergo human rights training, design a human rights policy or make a copy of the Human Rights Code available at the workplace.



Finally, if an employer fails to reinstate worker who was previously on leave for a workplace-related injury, the Workplace Safety and Insurance Board can award the employee one year's worth of compensation benefits and fine the employer an equivalent amount.

# Chile

## 1.1 Overview

As Chile continues to demonstrate economic and political stability and to integrate with international markets, its treatment of foreign investment and the impact of its laws and legal system on investment decisions are likely to be of increasing interest to overseas investors. Chilean laws are structured to encourage foreign investment by providing a stable and certain regulatory framework, which will allow foreign investors to compete on equal terms with local businesses. With the exception of certain industries, which are deemed to be in Chile's national interest, 100% foreign ownership of investments is possible.

## 1.2 General Legal Framework

The main bodies of legislation relating to companies in Chile are the Commerce Code, Law No. 3,918 (on limited liability companies), Law No. 18,046 (on stock corporations) and its regulations, all of which provide for the basic legal framework and most important provisions governing Chilean corporate entities and M&A activity.

## 1.3 Corporate Entities

The main types of corporate entities available in Chile are:

- limited liability companies/partnerships (*Sociedades de Responsabilidad Limitada*/SRL)
- stock corporations (*Sociedades Anónimas*/SAs), and
- limited liability stock companies (*Sociedades por Acciones*/SpA), the newest legal vehicle used in Chile. SpAs were only introduced into Chilean legislation in 2007, but have soon become one of the most common vehicles to structure a business in Chile given the flexibility it affords its shareholders in structuring the company's management and the fact that it is the only legal entity in Chile which permits only one shareholder.

This handbook focuses on privately-held companies M&A, and while some of the issues may also be faced by publicly-traded companies, it should be noted that there are substantial differences in the laws and regulations that apply to publicly-traded and privately-held companies.

### 1.3.1 Limited liability companies/partnerships

The *Sociedad de Responsabilidad Limitada* (SRL) is the most commonly used business entity in Chile. Like SAs, the liability of members is limited and, unlike many foreign partnerships, the entity is legally distinct from the partners. Accordingly, partnership losses may not be set off against partners' other income. The liability of partners is limited to the amount of their capital contributions to the partnership or a greater amount if agreed in the partnership deed.

A minimum of two partners is required and a maximum of 50 partners is permitted. A partnership is automatically dissolved if there is only one partner or one partner is deemed to have total control through ownership of related entities or control of a nominee partner. Foreign legal entities may be partners.

The partnership deed will set out how the partnership is to be managed. Management powers may be exercised by one or more of the partners, a board of directors or by a third party. Any amendment or modification to the partnership deed, including change of partners, modification of the corporate purpose, or to the powers of management, must be agreed to by unanimous consent of all the partners.

### 1.3.2 Stock corporations

A *Sociedad Anónima* (SA) may be either public/open or private/closed. An SA is public if its shares are registered (either voluntarily or as mandated by law) with the Superintendency of Securities and Insurance (SVS), and an SA will be required to register its shares if has at least 500 shareholders or

greater than 10% of its issued capital is held by more than 100 shareholders. Shareholders who hold more than 10% of the share capital are excluded for the purpose of this final calculation. All other SAs are private, with the exception of insurance and reinsurance companies, pension fund administrators and other regulated entities, which are known as 'special SAs' and which, even if private/closed in their own structure, are subject to the same rules applicable to public/open SAs.

Public/open and special SAs are subject to the surveillance of the SVS. In the case of public/open SAs, as issuers that publicly offer their shares, both the company itself (issuer) and its securities (shares) must be registered with the SVS.

Public SAs must also prepare annual reports and audited annual financial statements and distribute at least 30% of net profits (unless all shareholders agree otherwise). These requirements do not apply to private SAs.

A minimum of two shareholders is required in an SA. An SA is automatically dissolved if all its shares are held by one sole entity or person for an uninterrupted period of 10 days. As with partnerships, total control is deemed to occur when ownership is held through related or nominee entities. Management is in the hands of a board of directors, formed by a minimum of three directors in the case of private/closed SAs and by a minimum of five for public/open SAs. Directors may be of any nationality.

An SA's capital is set out in its by-laws and may consist of contributions of cash or property. Shares may not be issued as payment for personal services or for formation of the SA. Capital must be subscribed and paid within three years. The board of directors cannot restrict share transfers and the by-laws of public SAs cannot limit the free transfer of shares. However, shareholder agreements restricting transfer (and other) rights are permitted and must be registered with the SA and made available to other shareholders and interested third parties.

### 1.3.3 Limited liability stock companies

The *Sociedad por Acciones* (or SpA) is a newly created legal entity. It is a hybrid vehicle that has the basic structure of an SA but some of the flexibility of an SRL. In this sense, SpAs have fewer restrictions than SAs (e.g. in connection with restrictions to protect minority interests). For these reasons, they are especially useful for capital venture or seed capital enterprises. As they have been recently created, there is still limited relevant case law or practical experience in connection with SpAs. Generally, they receive the same tax treatment as SAs. Like SAs, the liability of shareholders is limited. Accordingly, company losses may not be set-off against shareholder's other income.

SpAs are the only type of legal entity in Chile where 100% direct ownership can be achieved because they do not need to have a minimum of two shareholders to exist. Foreign individuals or foreign entities may be shareholders of a Chilean SpA.

Importantly, the formation documents may restrict the transfer of shares and may establish the minimum or maximum amount or percentage ownership that a single shareholder may have, either directly or indirectly through one or more affiliates or other related parties. Likewise, the formation documents may include mandatory put or call option rights in favour of another shareholder, the company or even a third party, if certain conditions are met. For these purposes any buyer of shares in an SpA is required to expressly state in the purchase agreement that it accepts the by-laws of the company at the time of the transfer.

SpAs may be transformed into SAs or SRLs at any time by resolution of the shareholder(s).

## 2. Acquisition Methods

In Chile, a business can be acquired either by way of a share (or 'interests', in the case of an SRL) purchase or an asset purchase. Mergers and spin-offs are permitted under Chilean law.

## 2.1 Acquisition of Shares

Generally, all that is required to transfer the shares in an SA or an SpA is a private share transfer form or a public deed executed by both seller and buyer (in compliance with certain mandatory formalities as set out in the regulations to the Stock Corporations Law), followed by registration in the shareholders' registry of the company. A share certificate may or may not be issued, at the option of the new shareholder. A share purchase agreement is usually prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction.

In the case of an SRL, each partner owns a 'pro rata' participation or interest in the capital of the company which is not evidenced in 'shares' (nor in 'quotas' or any other 'unit'). Generally reference is made in the by-laws of the SRL to the amount of capital that has been actually subscribed and/or paid by each partner and it is also possible to state such partner's ownership percentage in the company, by dividing the amount subscribed by the partner by the total authorised capital of the company. Therefore, the transfer of ownership (participation or interests) in an SRL implies an amendment of the company's by-laws, which requires the unanimous consent of all partners. The transfer and by-laws amendment must also be carried out by means of a public deed, an excerpt of which will be then registered in the commerce registry and published in the *Official Gazette*.

## 2.2 Acquisition of Assets

When a business is being transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer that applies to that type of asset. For some assets, this will simply be a case of delivering the asset to the buyer, but in other cases, the formalities are more prescriptive, as is the case of assets subject to registration (e.g. real property, intellectual property or mining concessions). It will therefore be necessary to include a provision, either in the purchase agreement governing the purchase of the business and its assets or in separate agreements, for the relevant formalities to be complied with. As with a share acquisition, there is usually an asset purchase agreement to record the respective rights, obligations and liabilities of the parties.

## 2.3 Mergers/Other Acquisition Methods

Alternative corporate structures are available to merge or consolidate companies in Chile, with different rules applying to SRLs on the one hand, and to SAs and SpAs on the other; and mergers between different types of company are allowed.

There are two main types of mergers in Chile – statutory and non-statutory mergers.

Statutory mergers are only regulated with respect to SAs (although the same rules apply also to SpA). In a statutory merger, a resolution approving the merger (as well as some other materials supporting the merger) must be adopted at a special shareholders' meeting and must carry a majority vote of at least two-thirds of the shares entitled to vote (for each of the entities involved in the merger). Where SpAs are involved, the applicable quorum will be as established in its by-laws or, if the by-laws are silent on the issue, the same rule as that applicable to SAs will apply. Dissenting shareholders will have the right to request the corporation to buy their shares (withdrawal right), at net book value in the case of private/closed SAs and market value in the case of public/open SAs.

A non-statutory merger is achieved when 100% of the shares/interests in an SA or SRL, respectively, is held by one sole shareholder/partner. The same rule may also apply to an SpA as long as its by-laws expressly contemplate this possibility.

Although not expressly regulated, Chilean law also allows for a merger of an SRL. As with any other amendment to its by-laws, a merger requires the unanimous consent of all partners.

As a general rule, mergers proceed by cancelling the shares/interests of the 'absorbed' company, transferring the absorbed company's assets and liabilities to the 'absorbing' one, and issuing shares/increasing the capital in the absorbing company and giving that shares/interests to the shareholders/partners of the absorbed company.

Normally tax benefits such as accrued losses cannot be transferred from the absorbed corporation to the absorbing corporation, but tax effects must be determined on a case-by-case basis.

### 3. Negotiation, Signing and Closing

#### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Chilean purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. All types seen, including working capital adjustment, cash-free debt-free, NAV adjustments, earn-out adjustments and others.
2	Is there a collar on the adjustment?	Collars not common.
3	Who prepares completion balance sheet?	Usually buyer; sometimes target company.
4	Is the balance sheet audited?	Not necessarily, although generally seen in practice.
5	Is an earn-out common?	More common in private equity transactions where sellers continue to manage target company after closing, but also in M&A transactions. Less common where seller completely exiting.
6	Is a deposit common?	Both deposit and escrow are reasonably common.
7	Is an escrow common?	Reasonably common.
8	Is a break fee common?	Uncommon.

#### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Common.
10	Is the MAE general or specific?	Both seen.
11	Quantification of MAE?	Although seen, fairly uncommon.

#### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall provisions uncommon.
13	Non-solicit (of employees)?	Common.
14	Non-solicit (of customers)?	Common.
15	Broad access to books, records, management between sign and close?	Common.

16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Common to update disclosure schedules, but normally limited to things like lists of contracts. Notification of possible breach common. In cases of material breach, right to adjust purchase price or to terminate the agreement.
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17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax indemnity, usually included in purchase agreement.
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### Representations and Warranties

18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen although not usually quantified (except by certain sophisticated sellers).
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19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	All alternatives can be seen, although usually limited to actual knowledge and due enquiry of a specified list of senior management.
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20	Is a warranty that there is no materially misleading/omitted information common?	Common, but sophisticated sellers try to avoid it.
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21	Is disclosure of data room common?	Common, but generally resisted, except in auctions.
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### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition at completion common. Bring-down certificate is also common.
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23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects common but often carve-out for some fundamental representations which must be absolutely clean and true.
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24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.
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### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Depends on type of deal. In general buyer will ask for 100% but possible to negotiate down. Ranges from 15%–100% (mostly less than 100%).
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Both seen regularly, but depends on sophistication of the parties (most commonly applies to the whole agreement but for certain specific carve-outs).
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27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax, labour, environmental and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated. Normally gross negligence and wilful misconduct also excluded.
28	Is a deductible or basket common?	Both common.
29	Is a <i>de minimis</i> common?	Common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–24 months common. Common to carve-out labour, tax, environmental and some specific areas of concern. Fraud covered by law.
31	Is warranty insurance common?	Uncommon. No insurance policies in Chile can be automatically redeemed after breach.

### Reliance

32	Do financiers seek to rely on buyer's due diligence reports?	Uncommon.
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### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Uncommon.
34	Insurance proceeds?	Increasingly common for actually received.
35	Third party recoveries?	Increasingly common for actually received.

### Damages, Knowledge

36	Obligation to mitigate damages?	Common.
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Normally silent in this regard.

### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, but subject to Chilean public policy rules. Common governing law is Chilean and also New York law.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration more common. Santiago Chamber of Commerce normally appointed, or alternatively ICC or AAA in New York, Miami.

### Stamp Duty

41	If stamp duty is payable, is it normally shared?	No stamp duty payable.
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## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

Share transfers must be granted in writing by means of either a public deed (signed before and authorised by a notary public) or a private instrument signed before two witnesses of legal age, a notary public or a stock broker. All parties involved must be properly identified by their respective ID numbers. Market practice in the majority of cases is for a share transfer to be additionally documented between seller and buyer by way of a written share purchase agreement (SPA).

The transfer of interests in an SRL imply an amendment of its by-laws and must be performed via a public deed signed before and authorised by a notary public. An excerpt is then registered in the commerce registry and published in the *Official Gazette*.

### 3.2.2 Transfers of assets

In a transfer of assets, written contracts or public instruments may be required by law or to fulfil a registration requirement. Each individual asset needs to be transferred in accordance with the formalities that apply to the transfer of that type of asset. In the case of certain types of assets, the formalities are more prescriptive (e.g. for real property, intellectual property or mining concessions). It is, therefore, necessary to include a provision, either in the purchase agreement governing the purchase of the business and its assets or in separate agreements, for the relevant formalities to be complied with. As with a share acquisition, there is usually an asset purchase agreement to record the respective rights, obligations and liabilities of the parties.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

Share transfers must be granted in writing by means of either a public deed or a private instrument signed before two witnesses of legal age, a notary public or a stockbroker. On execution of the transfer agreement, the transfer will be valid between the parties. However, the transfer will not be effective against the company and third parties until notified to the company and registered in the shareholders' registry.

The company cannot refuse to register a transfer of shares and is obliged to register it without further formalities (unless the transfer is not in compliance with the basic formalities prescribed by the law).

### 3.3.2 Transfers of title to assets

An asset purchase agreement will frequently only require signature by or on behalf of the parties. However, it may also be necessary for the agreement – or an ancillary document – to be executed as a public deed or to be authorised by a notary public, and then registered with the competent registrar due to formalities applicable to that particular kind of asset (e.g. real property, intellectual property rights, mining concessions, motor vehicles).

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Chilean antitrust law is embodied in Decree Law No. 211 on the Protection of Free Competition of 1973, as amended (the Competition Law). The Competition Law applies to all 'economic agents or groups of economic agents', including all categories of people and entities, public or private, local or foreign. Although the Competition Law mainly applies to acts within Chile, it extends to foreign activities that have anti-competitive effects in Chile.

The Competition Law is intended to cover all anti-competitive conduct and is designed to promote and defend the free competition in markets. Article 1 provides that '[i]nfringements against free competition in economic activities must be corrected, prohibited, and punished ...'. Article 3 prohibits 'acts, agreements, or conventions that hinder, restrict or impede free competition, or which tend to produce said effects'.



Among the conduct that will be considered to hinder, restrict or impede free competition, the Competition Law lists the following actions:

- express or tacit agreements between economic agents, or concerted practices between them, which confer to them market power and which consist of fixing sale price, purchase price, restrictions on output, allocation of territories or market quotas, excluding competitors or bid-ridding processes
- abusive exploitation by a company or a group of companies under a single controller of a dominant position in the market by price-fixing; imposing tying arrangements; allocating territories or market quotas; or other similar abuses
- predatory practices, or unfair competition, with the intention of increasing or maintaining a dominant position.

The *Fiscalía Nacional Económica* (FNE) is the governmental agency in charge of investigating and challenging breaches to competition and enforcing the Competition Law. The FNE also leads in advocating and promoting fair competition, as well as providing technical support to the competition tribunal (TDLC). The TDLC is the judicial body, subject to the authority of the Supreme Court of Justice, which will hear and resolve adversarial and non-adversarial competition cases. The TDLC also resolves consultations that the FNE or any private or public entity may submit for its review. The TDLC can issue punitive, restrictive or corrective measures.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control process (including timetables for clearance) in a typical Chilean purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

With regards to mergers and acquisitions a significant feature of the Chilean system is that it does not require pre-merger filing. If in doubt, parties may request a voluntary consultation with the TDLC.

### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	<p>Voluntary.</p> <p>However, if the filing is not performed, there is a risk that the transaction may be subject to a challenge by the FNE or an affected party afterwards, if that transaction is considered harmful to competition.</p> <p>The FNE has published internal guidelines to inform the market of its position on merger control processes, and in which cases it will consider a transaction might be harmful to competition. This includes variables such as the market share of the merging parties, the market conditions, barriers to entry, etc.</p>
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### Timetable

2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p>FNE filings: 3 months, approximately.</p> <p>TDLC filings: average time for clearance approximately 8 months. If that decision is challenged before the Supreme Court, extended by an additional 6–8 months.</p>
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### 4.3 Exchange of Competition-Sensitive Information and ‘Gun-Jumping’ Issues

No specific rules apply in Chile to the exchange of competition-sensitive information and ‘gun-jumping’ in pre-acquisition negotiations between companies. However principles of common sense and reasonable behaviour should apply. So, while no conduct will be illegal *per se*, conduct that actually harms competition, or has the potential to do so, could be considered to be unlawful. Thus, if in an exchange of competition-sensitive information in preliminary negotiations the exchange can be justified on legitimate business grounds, it should generally not be considered a cause for concern by the anti-trust authorities.

### 4.4 Anti-Bribery, Corruption and Money Laundering

Chile has adapted local laws to meet international standards on anti-money laundering. The main legal instrument is Act No. 19,913. The Act defines the offence of money- and asset-laundering as the concealment or disguise (in any way), of the illegal origin of goods, knowing that they stem, either directly or indirectly, from criminal activities (as described in a closed list of criminal offences). The list of criminal offences are as provided for in various Acts, including:

- Illegal Trafficking of Narcotic and Psychotropic Drugs (Act No. 19,366)
- Terrorist Conduct and Penalties (Act No. 18,314)
- Weapons Control (Art. 10, Act No. 17,798)
- Securities Market Law (Title XI)
- Decree No. 3 of 1997, issued by Ministry of Finance, containing General Banking Act (Title XVII)
- Criminal Code (Title V, Book II, para 4, 5, 6 and 9), and
- Criminal Code (ss 141–2, 366*quáter*, 367 and 367*bis*).

The Anti-Money Laundering Act makes it unlawful for any person to acquire, possess, hold or use goods with the intention of profiting from them while being aware when they received them of their illegal origin. The Act also established a new Financial Analysis Unit (FIU) (*Unidad de Análisis Financiero*) within the Finance Ministry, to which suspicious transactions must be reported. Mandatory FIU reporting applies to businesses including the following:

- banks and financial institutions
- brokerage firms
- financial lease companies
- ‘securitisation’ companies
- general fund-managing companies, and
- investment fund-managing companies.

The SVS has issued regulations under the Act to flesh out some of the detail relating to the prevention of money laundering and financing of terrorism (Ruling No. 1809, 10 August 2007, as amended by Ruling No. 1853 of 2 October 2007 and by Ruling No. 2070, 19 April 2012), which are applicable only to those entities under the SVS’ surveillance (i.e. public/open and special SAs).

In addition Law 20,393 establishes 'The criminal liability of legal entities regarding money laundering, terrorism financing and bribery crimes'. Those criminal offences, which capture the actions of any legal entity (local or foreign) include:

- money laundering crimes (s. 27, Law No. 19,913)
- the financing of terrorist crimes (s. 8, Law No. 18,314), and
- bribery crimes including bribery of foreign public officials (ss. 250–51*bis*, Criminal Code).

Businesses can be exempted from liability for those criminal offences incurred by its officials or employees, if they can prove that they have adopted adequate methods of supervision and control in accordance with those prescribed in Law 20,393, including, among other actions, the appointment of a compliance officer.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Chilean laws are structured to encourage foreign investment by providing a stable and certain regulatory framework to allow foreign investors to compete on equal terms with local businesses. With the exception of certain industries, which must have Chilean national ownership (in the national interests), 100% foreign ownership of investments is possible.

### 4.5.1 Exchange controls

Chilean foreign exchange legislation consists of the Central Bank Act No. 18,840, and is supplemented by the Compendium of International Exchange Regulations enacted by the Central Bank of Chile (the 'Exchange Regulations').

The Central Bank Act (CBA) sets out certain types of international exchange operation (IEO) which may be limited or restricted by the Central Bank. The Exchange Regulations detail those limits and restrictions that are currently in place (and which can be varied from time-to-time by the Central Bank). The concept is that the CBA empowers the Central Bank to decide on whether to apply or not certain foreign exchange restrictions from a list of restrictions provided for in the CBA. The CBA expressly establishes that the effects of IEOs conducted abroad, and to be complied with in Chile (e.g. a capital contribution to a Chilean company, with disposition of funds abroad), shall be subject to Chilean laws.

At present, only three types of restrictions mentioned in the CBA have been implemented by the Central Bank (see below), but there is always the possibility that the Central Bank will decide to also apply some of the other restrictions. The current principle, therefore, is total freedom for foreign exchange transactions: i.e. complete freedom to acquire and make payments abroad using foreign currency, from Chile and vice versa. Entities and individuals are free to purchase, sell, keep, remit abroad, and bring into Chile foreign currency (with a few reporting duties which may apply).

According to the Exchange Regulations currently in force (since March 2002), only three type of restrictions/limitations apply:

- foreign exchange transactions which must be conducted through the Formal Exchange Market (e.g. a commercial bank) and reported to the Central Bank of Chile: e.g.:
  - foreign exchange transactions performed by insurance and reinsurance companies formed in Chile (Chapter VII, Exchange Regulations)
  - investments, deposits and loans made abroad by Chilean resident individuals in excess of USD10,000, (Chapter XII, Exchange Regulations), or
  - capital contributions, investments, deposits and loans made from abroad and into Chile in excess of USD10,000 (Chapter XIV, Exchange Regulations).

- foreign exchange transactions which must be conducted through the Formal Exchange Market, but not reported to the Central Bank (e.g. licence and royalty payments abroad regardless of the sums involved (Chapter VIII, Exchange Regulations), and
- other foreign exchange transactions which must be reported to the Central Bank (e.g. payments relating to imports and exports (Chapters IV and V, Exchange Regulations)).

As noted above, the Central Bank has the authority (under Article 49 of the CBA) to regulate and impose stricter restrictions on foreign exchange operations (i.e. mandatory repatriation of funds, mandatory conversion of foreign currency into Chilean Pesos, a reserve requirement). The Central Bank of Chile may at any time re-establish these restrictions.

Funds invested in Chile through the foreign exchange rules may be repatriated abroad at any time as well as profits arising from those investments. If an investment was conducted via Decree Law 600 (the Foreign Investments Statute), the capital effectively invested in Chile may only be repatriated after one year from entrance, but no time limitation applies regarding repatriation of profits (which may be repatriated at any time).

#### 4.5.2 Foreign investment approvals and notifications

As a general rule, Chilean law does not require investors to obtain any foreign investment permits or licences, other than for specific industry sectors (e.g. insurance, banking, telecoms).

#### ***Foreign Investment Statute (FIS)***

Although not mandatory and provided that certain requirements are met, foreign investment can be registered under the Foreign Investment Statute (Decree Law No. 600/1974) (FIS), which affords foreign investors with some benefits as described below. Under the FIS, foreign investment can be made in foreign currency, tangible assets (e.g. goods or equipment), intangible assets (e.g. technology) and capitalised profits. For investments in foreign currency, the minimum amount to qualify for registration under the FIS is USD5 million. This minimum does not apply to investments made in physical assets and technology, where a minimum of USD2.5 million applies. Normally, approval of foreign investment is granted within 25 days, however, authorisation for the immediate liquidation of capital may be granted at the moment of the filing of a foreign investment application.

The investor will execute a simple contract with the Chilean government setting out their rights and obligations upon approval. The contract will include terms providing for the time within which capital must be brought into the country, the form of the capital contribution, guarantees that the foreign investor will not be subject to discriminatory conduct and will have access to the Formal Exchange Market to purchase foreign currency and to repatriate the capital and any profit arising from the investment. The contract may also fix the rate of certain direct and indirect taxes applicable to the investment.

Following a recent tax reform late in 2014, the FIS is due to be repealed as of 1 January 2016, and accordingly only those applications filed on or before 31 December 2015 will be considered for approval. Foreign investment contracts already executed with the State of Chile will remain in force.

#### ***Foreign Exchange Regulations (Chapter XIV)***

If an investment application under the FIS is not approved (which is unusual), or in other cases, e.g. required information being unavailable to secure clearance by the Foreign Investment Committee, the investment can nevertheless be effected under Chapter XIV of the Foreign Exchange Regulations, which is administered by the Central Bank. Investments under the Foreign Exchange Regulations may only consist in foreign currency. The minimum investment is USD10,000. No foreign investment contract is executed and other guarantees and investor protection measures (e.g. access to the Formal Exchange Market) contained in the FIS will not be available to investors who register their investment in accordance with Chapter XIV of the Foreign Exchange Regulations but who do not obtain approval under the FIS.

Even when approval is granted under the FIS, investors must also report foreign investment transactions to the Central Bank and perform them in the formal currency market, in accordance with the Foreign Exchange Regulations.

Neither the Statute nor the Regulations impose any domestic ownership requirements (i.e. 100% foreign ownership is possible). In addition, there is no maximum period of time for foreign investments to remain in Chile if registered only under the Foreign Exchange Regulations.

#### 4.5.3 Import/export controls

All types of goods and services may be imported by any individual or entity except a limited number of specifically prohibited items (e.g. used cars). Imports must be registered with the customs service prior to shipment and comply with all applicable laws and regulations. Import licences are generally provided if import prices are consistent with market levels (to combat transfer pricing, customs may not approve imports at undervalued prices). Normally, imports must be shipped within 120 days after the licence is granted.

All types of goods and services may be exported by any individual or entity (provided the exports comply with applicable laws and regulations), except a limited number of specifically prohibited items. For example, some agricultural products may be subject to seasonal restrictions. Customs must be notified in advance of exports with the exception - among others - of transactions of up to USD2,000 'free on board' or authorised by certain government bodies, when particularly sensitive products are at issue (e.g. copper, which requires authorisation by the Copper Commission). Foreign currency proceeds of export sales (net of related overseas expenses) do not have to be returned to Chile, and if returned, do not need to be converted into local currency. If not returned to Chile, the exporter is obliged to inform the Central Bank of the foreign exchange transaction involved in such export operation.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

No stamp or registration or any other similar taxes or charges are payable under the laws of Chile in connection with the execution, delivery, performance or enforcement of a share acquisition.

### 5.2 Acquisition of Assets

According to Chilean law, the acquisition of assets is not subject to transfer taxes or any other similar taxes.

The sale of used vehicles is subject to a municipal tax of 1.5% of the purchase price or the fiscal valuation of the vehicle, whichever is higher. This municipal tax must be borne by the buyer.

### 5.3 Mergers

No stamp or registration or any other similar taxes or charges are payable under the laws of Chile in connection with the execution of a merger.

### 5.4 Value Added Tax

The sale of inventory of a Chilean company will be subject to VAT at a rate of 19%. The sale of fixed assets, including vehicles is subject to VAT at 19%, only if acquired by the seller within four years of the date of the sale (unless the normal tax depreciation period has elapsed before that date). Fixed assets and vehicles must also be detailed in the corresponding Chilean invoices. VAT assessed on sales must be declared and paid by the seller within the first 12 days of the month, following the month of the sale. Taxpayers authorised to electronically issue invoices must declare and pay VAT within the first 20 days of the month, following the month of the sale. Accounts receivables and intangible assets are not subject to VAT.

As a general rule the sale of used vehicles is exempt of VAT, unless:

- it corresponds to the inventory of new cars or to the fixed assets of the company
- the sale takes place within four years as of the date of its first acquisition (unless the normal tax depreciation term has elapsed by that date), and
- its acquisition generated a fiscal VAT tax credit for the seller.

As a general rule, the acquisition of vehicles will not generate a fiscal VAT credit for the buyer unless the line of business of the buyer is the trade and/or rent of vehicles, or if the Regional director of the IRS allows the expense as a deductible item (Art. 23 No. 4, VAT Law).

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

Regarding labour and social security issues, any amendment - in whole or in part - to the ownership, possession or tenancy of a company, must not affect the rights and liabilities of employees (as provided in both their individual and collective employment agreements) and must remain in effect with the new employer (Art. 4, Labour Code).

#### 6.1.2 Acquisition of assets

If the sale involves the sale of specific assets, but not of the entire business of the seller or an operative line or division of that business, any labour contingency will continue to be borne by the seller. However, if the proportion of the assets sold implies a '*de facto*' acquisition of the entire business or a part of the business operations, a transfer of the entity will be deemed to have occurred for labour law purposes. In this case, the individual labour contracts between employees and employer, and any collective employment agreements between employer and any labour union, will remain unaffected but with the new employer-buyer becoming liable for all labour and social security contingencies (Art. 4, Labour Code). Therefore, employees are transferred to the buyer with the same seniority as they held at the time of the acquisition, and will still be entitled to the same rights and benefits as pre-transfer.

#### 6.1.3 Transfer of business

If the buyer acquires a considerable part of the assets or an operative division or line of business of a company, it will be deemed as the new employer of the employees associated to said assets, division or line of business, and will thus be liable for all employment and social security obligations related to those employees. Thus, and given that this transfer of employees is effected automatically, by the sole operation of the law, no new employment agreements need to be executed.

#### 6.1.4 Mergers

A merger of two or more companies implies a change of the employer's ownership, making Article 4 of the Labour Code applicable. Thus, the merger will not alter the rights and obligations of the employees under their individual or collective employment agreements, which remain in full force and effect under the new employer entity.

### 6.2 Approval or Consultation Requirements

According to Chilean Labour Law, there is no obligation of approval or consultation. Labour authorities, employees, unions, or other employee representatives have no right whatsoever at law to be informed and consulted merely because the employer company is going to change hands, whether it is a transfer of business, a merger, an acquisition of assets or any other figure.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

If the buyer intends to make any employees of the target business/company redundant, it should carefully consider their rights to statutory compensation and to protection against dismissal.

Employees who enjoy special protection against dismissal (and cannot have their employment contracts terminated on the grounds of business necessity or 'at will') are:

- union representatives (during the term of their position and for 6 months after the end of it)
- non-union employees' representatives (during the term of their position and for 6 months after the end of it, except if they have a fixed-term employment contract)
- employees who participate in the formation of a union (as of 10 days prior to the formation and for 30 days after it, up to a total maximum of 40 days)
- employees' representatives on safety committees (*Comites Paritarios*) for the term of their position
- pregnant women (during pregnancy and for one year after the expiry of the maternity leave period)
- employees taking family leave (for births and deaths)
- parents on parental leave
- employees involved in collective bargaining (from 10 days before the presentation of the proposal to 30 days after the execution of the collective contract; members of the Bargaining Unit who are not Union directors may not be dismissed within 10 days of the presentation of the proposal and until 60 days after the execution of the collective contract), and
- employees on sick leave (*licencia médica*).

In these cases, the employer may not terminate the employment contract without the prior approval of the Labour Court, but such permission will not ever be granted in cases of termination on the grounds of business necessity or 'at will'.

The employment contracts of union representatives, non-union employees' representatives and employees' representatives on safety committees may be terminated without the Labour Court's prior approval only when closure of a business involves the dissolution of the entire company.

### 6.3.2 Penalties

The failure to consult or to obtain employee approval carries no penalties, as there is no obligation to consult or to obtain approval under Chilean law.

Penalties for breaching legal protections against dismissal include obliging employers to reinstate wrongfully terminated employees and to pay remuneration from the date of termination and until the date of reinstating the employee (where appropriate), including all social security contributions accrued within that period. Additional penalties may be applied if the dismissal is considered unlawful, an infringement of fundamental rights, or an unlawful union practice.

# Colombia

## 1.1 Overview

Colombia is the third largest country in Latin America in terms of population after Brazil and Mexico, and it has the fourth largest economy. It has a largely urban population, with over 70% living in cities, the largest being the capital city of Bogotá DC, followed by Medellín, Cali and Barranquilla. Colombia has a highly skilled and competitive workforce, with well-qualified and experienced executives.

## 1.2 General Legal Framework

The Colombian Commercial Code is the principal legal framework which sets out the legal vehicles that are available to investors interested in undertaking commercial business in Colombia. These structures include the incorporation of closed entities whereby the liability of the owners or shareholders is unlimited, and other entities whereby liability is, as a general rule, limited to the amount of the contribution of the investor.

## 1.3 Corporate Entities

Unless there are specific or particular reasons on a case-by-case basis for a foreign entity to assume unlimited liability, the most suitable way to carry out business in Colombia is to set up a subsidiary, either a simplified corporation, a corporation or a limited liability company. These entities limit, as a general rule, the liability of the investor to the amount of its contribution (with exceptions for each kind of company). Another way to carry out business in Colombia is via a branch of a foreign company, which is deemed a commercial establishment of the foreign entity in Colombia.

### 1.3.1 Simplified stock corporations (*Sociedad por Acciones Simplificada*)

These companies were introduced into Colombian law in December 2008 to facilitate the setting up of formal corporate structures, inspired by the Delaware LLC, the French SAS and single ownership models previously provided for under Colombian law. These entities are appropriate for business groups, smaller single-owner operations and joint ventures, as the rules governing their operations and management are very flexible. However, they cannot be used to set up the corporate structure of banks, insurance companies or publicly traded companies. These companies can have an unlimited term and do not need to list in their by-laws the specific corporate activities they will be engaged in and, therefore, are entitled to undertake any permitted commercial activity. Given their flexible and streamlined structure, these simplified stock corporations have been very popular since their introduction. The incorporation of a simplified corporation usually takes around two to three weeks counting from the date all documents required for the purpose are received in order to proceed with the registration process at the Chamber of Commerce.

A simplified stock corporation may have a single shareholder. The liability of the shareholders is limited, in principle, to the amount of their capital contributions. The capital structure is very similar to the traditional form of corporation and consists of authorised, subscribed and paid-in capital. In addition, a two-year window is permitted to pay subscribed capital and no minimum percentage of capital need be paid on subscription (as applies with traditional corporations). In a simplified stock corporation a board of directors can be appointed (but is not mandatory), and the company may appoint a single manager (legal representative), so the number of officers can be kept to a minimum.

### 1.3.2 Corporation (*Sociedad Anónima*)

This is the most appropriate entity in Colombia for public trading and for entities that are normally regulated, such as banks and insurance companies. A minimum of five shareholders (either individuals or entities) is required to incorporate a corporation. No shareholder may hold 95% or more of the shares of a corporation at any time. As a general rule, the liability of each shareholder is limited to the amount of its capital contribution. The capital of the corporation is divided into shares of equal value. On incorporation, at least 50% of the authorised capital must be subscribed for, and at least one third of the value of the issued shares must be paid. The remainder must be paid within one year of incorporation.



A corporation must have a board of directors of at least three principal members and three alternates who do not need to be shareholders and who are appointed by shareholders. A corporation must also have a legal representative, usually the general manager, who must have at least one alternate. The day-to-day operations of the corporation are entrusted to the manager, who must always act within the powers granted in the by-laws.

### 1.3.3 Limited liability companies (*Sociedad de Responsabilidad Limitada*)

A minimum of two partners (either individuals or entities) contributing capital is required to form a limited liability company. The maximum number of partners permitted is 25.

As a general rule, the liability of the partners is limited to the amount of their capital contribution, however:

- the by-laws may provide for a greater responsibility of some or all of the partners
- a Supreme Court decision has ruled that the partners of a limited liability company are jointly and severally liable for the labour obligations of the company's employees, and
- tax law provides that partners of a limited liability company are jointly and severally liable for all income tax obligations of the company.

The capital of the company is divided into quotas of equal value. The capital of the company must be entirely paid-in on its incorporation. Each quota grants each partner one vote. Partners are entitled to transfer their quotas which must be formalised by means of an amendment of its by-laws. However, all other partners have a statutory right of first refusal in the amount of their existing participation unless the by-laws provide otherwise.

Companies may choose to have a board of directors, but this is not mandatory; therefore all decisions may be adopted directly by the partners and the general manager, if they have been granted such authority. A limited liability company may be managed directly by the partners or they may decide to appoint a legal representative, usually the general manager, who must then have at least one alternate. As in the case of corporations, the manager must always act within the powers granted to him or her in the by-laws.

## 2. Acquisition Methods

Acquiring a business in Colombia may take several forms. What follows summarises the main legal issues in acquiring an ongoing business by way of the three most common transactions seen in Colombia:

- the purchase of shares
- the purchase of assets, and
- mergers.

### 2.1 Acquisition of Shares

As a general rule, shares are freely negotiable unless a right of first refusal in favour of the current shareholders is agreed, or in the case of simplified corporations—unless a prohibition on the transfer of shares is incorporated in the by-laws. Partners (in a limited liability company) have a statutory right of first refusal in the amount of their existing participation unless the by-laws provide otherwise.

Title to shares in a corporation or a simplified corporation is transferred to the buyer from the seller by the agreement of the parties. For the transfer to be effective *vis-à-vis* third parties and to be formalised, however, the transfer must be registered by the company in its stock registry (which it will be required to do once it has received duly endorsed share certificates or a letter from the seller requesting that the operation be recorded).

On the other hand, the transfer of quotas in a limited liability company needs to be formalised by means of an amendment to its by-laws duly registered with the Chamber of Commerce.

## 2.2 Acquisition of Assets

In Colombia, there are two principal ways to undertake a transfer of assets:

- by the transfer of a commercial unit or ongoing concern (commercial establishment), which consists of a group of assets that are destined by an entity to form a separate commercial unit, registered as such before the Chamber of Commerce; certain special procedures and rules will apply to this kind of transfer (including rules regarding liability between the transferee and transferor)
- by transfer of the individual assets not organised nor registered as a commercial unit before the Chamber of Commerce.

Unless otherwise stipulated, the sale of commercial establishments will be deemed to take place over the commercial establishment as an economic unit without requiring the parties to specify each of the elements being transferred. No special voting majorities are required by law to dispose of a major part of an establishment's assets (although the by-laws do usually establish rules regarding such asset transfers).

In the case of the transfer of individual assets, no special procedure needs to be followed for the transfer of assets and the legal relationship would be governed by the asset purchase agreement entered into between the parties. However, note that the formalisation of the transfer of assets will need to be undertaken following the rules to transfer that specific asset (e.g. real estate needs to be transferred by means of a public deed and its appropriately registered).

The following considerations should be taken into account in connection with the transfer of assets:

- Labour liabilities: the entity transferring the assets and the entity receiving such assets will be jointly and several liable for the obligations incurred prior to the transfer of the employees
- Tax liability: as a general rule, tax liabilities will not be transferred to the entity to which the assets are transferred; only real estate taxes and vehicle taxes would be carried over. For Bogota, some liability may arise to the transferee in local revenue tax (ICA) if the asset deal transaction is structured as a sale of a commercial unit.

## 2.3 Mergers

In a merger, the surviving company assumes all assets, obligations and liabilities of the absorbed company or companies. When any company holds more than 90% of the outstanding shares of a simplified corporation, the controlling company may absorb the controlled simplified corporation through an expedited process. This process will not be applicable whenever the merger needs to be approved by the Superintendency of Companies.

# 3. Negotiation, Signing and Closing

## 3.1 Pre-Contractual Obligations

According to the Colombian Commercial Code, in the pre-contractual phase the parties must act in good faith and must pay for any damages caused where they do not comply with this provision. This phase includes several steps which will be taken before the contract is executed, including commercial offers, counter-offers, negotiations and bidding processes. Precedents in Colombia have established several issues which will be taken into account to determine if the parties have acted in good faith. The parties:

- must provide accurate and sufficient information—a key factor influencing the decision to execute a contract

- must not create false expectations about execution of a contract if they know that the contract will not be executed, and
- will be bound by confidentiality obligations regarding the information obtained in a negotiation phase even if a contract is not executed as a result of that process.

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Colombian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. All types are seen, including working capital adjustment, cash-free debt-free. Locked box accounts are uncommon in less complex deals.
2	Is there a collar on the adjustment?	Collars are not common, but not unheard of either.
3	Who prepares completion balance sheet?	This is usually prepared by the target company.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	Not yet common. More common in acquisitions of assets.
6	Is a deposit common?	Uncommon.
7	Is an escrow common?	Increasingly common.
8	Is a break fee common?	Uncommon.

#### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Increasingly common, especially where there is a long period between signing and closing.
10	Is the MAE general or specific?	The MAE definition is usually general and forward-looking, but sometimes includes specific carve-outs.
11	Quantification of MAE?	Increasingly common.

#### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Increasingly common due to relaxation of the competition authority's policy on the subject.
13	Non-solicit (of employees)?	Common.
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).

15	Broad access to books, records, management between sign and close?	Common, except in concentrated markets (in which case full access is granted only after competition authority has cleared the transaction or to the 'clean team' which is an impartial third party bound by strict confidentiality protocols regarding the critical sensitive information submitted by the seller).
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules and notification of possible breach is becoming increasingly common.
17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax indemnity, usually included in purchase agreement.

### Representations and Warranties

18	Materiality in representations—how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but are often not quantified (other than specific warranties e.g. contract value). Preferable to have a quantified materiality threshold.
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers not uncommon, but usually applicable to specific representations. Usually limited to actual knowledge after due inquiry of specific individuals.
20	Is a warranty that there is no materially misleading/omitted information common?	Sophisticated sellers try to avoid—and if pressured will accept if limited to fraud or intention to mislead.
21	Is disclosure of data room common?	Generally resisted. Not common.

### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Yes, by way of a bring-down certificate.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.

### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Ranges typically around 15%–30% of purchase price.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually just to misrepresentations and sometimes to special indemnities.

27	What are the common exceptions to the cap?	Fraud, fundamental representations (e.g. title, capitalisation, authority) and specific areas of concern. Increasingly common to leave FCPA or anti-bribery representations uncapped
28	Is a deductible or basket common?	Baskets are becoming widely accepted; deductibles less so.
29	Is a <i>de minimis</i> common?	Increasingly common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–36 months common. Tax, labour and environmental are liabilities usually tied to expiration of statute of limitations.
31	Is warranty insurance common?	Uncommon.

### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Becoming more common.
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### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Becoming more common.
34	Insurance proceeds?	Becoming more common.
35	Third party recoveries?	Becoming more common.

### Damages, Knowledge

36	Obligation to mitigate damages?	Becoming more common.
37	Exclusion of consequential damages?	Common (although probably unnecessary in most cases as under Colombian law only direct, foreseeable damages are indemnifiable).
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Agreement usually silent on this point.

### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, if disputes under the agreement are validly referred to international arbitration (which requires a significant connection with a jurisdiction other than Colombia, e.g. a party incorporated abroad). Aside from Colombian law, New York law is a popular choice.
40	Is litigation or arbitration more common? If arbitration, where?	Domestic arbitration under Bogotá Chamber of Commerce Rules is more common. In larger deals arbitration under ICC rules, in a venue that is considered neutral.

## Stamp Duty

- 41 If stamp duty is payable, is it normally shared? No stamp duty applies.

### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares

It is increasingly common for purchases of stock to be documented in US or English style share purchase agreements which include stipulations that international investors are accustomed to, such as representations and warranties from the sellers regarding the shares and the target company, covenants and the relevant indemnification obligations.

The disposal of quotas of a limited liability company will require other partners to waive their right of first refusal, as well as to approve the transfer of quotas to a third party by means of a by-laws amendment, which requires at least the affirmative vote of 70% of the company quotas. On the other hand, the sale of shares of a traditional or simplified corporation to a third party may require other shareholders to waive their right of first refusal if the company's by-laws have a provision in this regard, but a by-laws amendment will not be required.

#### 3.3.2 Transfers of assets

The sale of assets must be in writing and if the sale involves real estate it must be incorporated into a public deed, which must be registered before the real estate registry. If the sale does not involve real estate, it may be carried out by a public deed or private document.

### 3.4 Formalities for Transferring Title to Shares or Assets

#### 3.4.1 Transfers of title to shares

Title to shares in a corporation is transferred among buyer and seller by mere agreement of the parties. For the transfer to be effective *vis-à-vis* third parties, however, the transfer must be registered by the company in its stock registry which it will be required to do once it has received duly endorsed share certificates or a letter from the seller requesting that the operation be recorded.

#### 3.4.2 Transfers of title to assets

If the transfer of asset is undertaken by means of the transfer of a commercial establishment, the seller must deliver a financial statement of the establishment, properly identifying the liabilities, duly certified by a public accountant. The document evidencing the sale of the establishment must be registered before the corresponding Chamber of Commerce. Notice of sale must be given to all creditors of the establishment through publication in newspapers. Creditors have a term of two months to oppose the sale of the assets (by registration before the commercial registry) and to demand guarantees or securities for the payment of their credits.

### 3.5 Formalities for Mergers

The company's shareholders (or partners) must approve the proposed merger agreement. Unless otherwise provided for in the by-laws, the decision must be approved with a simple majority of the shareholders/partners represented at the meeting. The proposal for a merger must be available to the shareholders for at least 15 business days prior to the meeting where the decision is made. Absent or dissenting shareholders/partners may withdraw from the company within eight days following the meeting where the merger agreement is approved, if their rights are adversely affected.

Once the merger has been approved, the legal representatives of each of the participating companies must: (a) publish basic information about the merger (i.e. identification of participating companies, amount of assets and liabilities, and a summary explanation of the valuation mechanism used) in a newspaper; and (b) notify all creditors of the merger. Within a 30 business-day period, the company's creditors will be entitled to demand sufficient and satisfactory guarantees for the payment of their

credits and the merger process may be suspended until sufficient guarantees are presented or until payment of the credits, if necessary, has been made.

Administrative authorisations may be required, if any of the merging companies are subject to government surveillance (i.e. by the Financial Superintendency or the Superintendency of Companies) or meet certain conditions, such as having pension liabilities on the balance sheet or having registered goodwill pending amortisation.

Upon authorisation from the government, if required, the companies must incorporate the agreed merger into a public deed (or into a private document if the absorbing entity is a simplified stock corporation and there is no transfer of real estate property), together with the financial statements and other documents related to the merger, and amend the surviving company's by-laws. This must be registered with the Chamber of Commerce and all pertinent notifications must be made.

When any company holds more than 90% of the outstanding shares of a simplified stock corporation, the controlling company may absorb through an expedite process the controlled simplified stock corporation. This expedite process will not be applicable whenever the merger has to be approved by the Superintendency of Companies.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Any transaction resulting in an economic concentration in at least one market in Colombia, in the form of a merger, acquisition, joint venture, spin-off, agreement, or any sort of business which results in the economic merger of two or more entities, which are engaged in the same economic activity or are in the same line of production or distribution with respect to a final product or service that is sold in Colombia, will be subject to Colombian merger control regulations.

An economic concentration of a local company or enterprise by a foreign company will be subject to antitrust clearance if the transaction has effects directly or indirectly (through distributors or imports) in the Colombian market. Likewise, economic concentrations taking place outside of Colombia, but having effects in the Colombian market (directly or indirectly) may also be subject to prior antitrust report and clearance by the Superintendence of Industry and Commerce (SIC).

The parties involved (not just the buyer) must inform the SIC and require its prior consent on a transaction when an economic concentration fulfils the following criteria (according to Law 1340/09 and Rule 12193/13 of the SIC):

- Subjective criterion: triggered if the transaction has the effect of concentrating one or more markets in Colombia—i.e. when two or more undertakings to the transaction are involved in the same activity (horizontal effects) or when the transaction has the potential to create vertical links in one or more markets in Colombia—i.e. when the parties to it are part of different links in a production chain (vertical effects), regardless of the legal structure used, and
- Objective criterion: triggered when the parties involved in the transaction (not just the Colombian entities) reported a combined value which exceeds legal thresholds on operational turnover or total assets as established annually by SIC (during the fiscal year prior to closing; the legal threshold is described below).

This control is exercised by the SIC regardless of the legal structure of the transaction through which the parties achieve the consolidation, merger or integration. The SIC may either authorise (fully), authorise subject to commitments or remedies, or reject the transaction.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Colombian purchase agreement.

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	<p>Mandatory.</p> <p>Fines are imposed for implementing transaction without clearance. The SIC may also order the reversal of the operation if it considers that if the transaction had been notified, it would not have obtained clearance on the grounds of being restrictive of free competition.</p>
Timetable		
2	In practice, what is the timetable for clearance (in first phase and second phase review)?	<p>The SIC is entitled to issue a decision in Phase I, if it considers that it has all the evidence to conclude that the transaction does not affect free competition in the relevant markets in Colombia. Phase I lasts for 30 business days, counted from the date on which the SIC receives the required information.</p> <p>If the SIC considers that the operation requires an in-depth analysis, it enters into a Phase II evaluation in which the parties would have to submit additional information. In Phase II, the SIC would have an additional 3 months to review the information, counted as of the moment the additional information is filed by the parties.</p> <p>In practice, this second stage can be extended for several months when the SIC identifies potential competition issues or when the information submitted by the parties is not complete to allow the SIC to undertake its review. If it turns out that the transaction can be unconditionally cleared in the second phase, the SIC may also grant clearance earlier than the average timing for the review period.</p>

An economic concentration carried out between two or more businesses in the same relevant market or in complementary markets in Colombia, will require express and prior clearance from the SIC, when either of the two following conditions are met:

- When the turnover of the parties (including their corporate group and foreign companies) jointly considered is equal to or higher than the equivalent to 100,000 national monthly minimum legal wages as reflected in their balance sheet and financial statements for the prior fiscal year to the submission of the filing document to the SIC, or
- When the total assets of the parties (including their corporate group and foreign companies) jointly considered is equal to or higher than the equivalent to 100,000 national monthly minimum legal wages as reflected in their balance sheet and financial statements for the prior fiscal year to the submission of the filing document to the SIC.

So, for transactions to be reported in 2015, the relevant threshold (for both turnover and total assets) would be calculated by using the national monthly minimum legal wage in effect during 2015 (COP644,350 per month) multiplied by 100,000 or COP64,435 million.



Even though the merger control regime does not establish a territorial approach of the turnover and assets for the merger analysis, according to Resolution 12193 of 2013 issued by the SIC, this analysis should include the income and assets of the parties and of the companies related to the parties by virtue of a control situation, on a worldwide basis (including foreign companies).

#### 4.2.1 Simplified notice procedure—Fast-track

When the combined share of the parties to the transaction is below 20% in all of the markets and segments potentially affected, a simplified notification procedure and a fast-track (implied) approval is available. In this cases, the transaction will be deemed to be approved upon filing of a notice.

#### 4.2.2 Timetable

As an average, antitrust clearance can take between two and eight months, unless the transaction triggers a possible undue restriction of free competition, in which case the procedures could take longer.

The SIC has a period of five years, counted from the date of the notice being given by the parties, to review any implied approval and challenge it, should the SIC considers that the conditions for the implied approval were not satisfied by the parties upon submission.

#### 4.2.3 Penalties

If an economic transaction is closed or implemented in Colombia without or prior to obtaining the mandatory clearance by the SIC, the closing will be deemed a breach of Colombian antitrust provisions and the SIC could impose administrative fines on the following levels:

- up to 100,000 times the national minimum monthly legal wage against the parties involved. For the FY 2015 this value is equivalent to approximately USD32.2 million
- up to 2,000 national minimum monthly legal wages against the managers, directors, legal representatives and any other individuals authorising, executing, or simply allowing the antitrust violation. For the FY 2015 this value is equivalent to approximately USD644,000.

If the SIC determines that the parties committed a violation of the antitrust regulation by engaging in the transaction without its approval; affected third parties who can prove a link between the transaction and the damages caused as a result of it, may initiate an action before the ordinary courts requesting compensation for the damage that the party is able to quantify. If the damages are caused to 20 people or more, they could initiate a class action.

Further, the SIC is entitled to order the reversal of the economic transaction if it considers that if the transaction had been notified, it would not have obtained clearance on the grounds that it could restrict free competition.

### 4.3 Exchange of Competition-Sensitive Information and ‘Gun-Jumping’ Issues

If the parties engage in conduct which would mean an economic concentration before obtaining clearance from the SIC, (e.g. hiring personal from the other party, etc.), such conduct would be deemed ‘gun-jumping’ and will be subject to the penalties and sanctions described above.

Further, the exchange of sensitive information between the parties (e.g. price information, commercial conditions, clients, etc.) could trigger the violation of antitrust provisions and could be sanctioned by fines as described above. It is therefore advisable for parties to not exchange information between them but with their counsel or with the counsel to the other party.

### 4.4 Exchange Control, Foreign Investment Restrictions and Trade Regulation

The *Banco de la República* (the Central Bank) is the authority on monetary and exchange matters.

Under the Constitution and foreign investment regulations, foreign investment in Colombia shall receive the same treatment as an investment made by Colombian nationals. The conditions for reimbursement of foreign investment and remittance of profits in effect at the time the investment is

registered may not be changed so as to affect foreign investment adversely, except on a temporary basis when the international reserves are lower than the value of three months' worth of imports. Any investment made by a person that does not qualify as a resident of Colombia for foreign exchange purposes will qualify as foreign investment, provided it meets the requirements below.

#### 4.4.1 Exchange controls

##### ***'Compensation' accounts***

Unless the law specifically permits otherwise, the general rule is that payments between Colombian companies or individuals must be made in Colombian Pesos, or between overseas foreign currency accounts duly registered with the Central Bank, known as 'compensation' accounts.

In general, Colombian banks do not offer foreign currency accounts. However, Colombian residents are allowed to maintain accounts in foreign currency abroad for the performance of all types of operations. If the account is used to perform controlled operations, the foreign currency account must be registered with the Central Bank as a 'compensation' account and the movements of these accounts must be reported to the Central Bank and to the tax authorities on a monthly or quarterly basis. Failure to do so within the legal term will trigger fines against the account holders.

##### ***Controlled operations***

All foreign currency for the operations listed below must be acquired or handled through the so-called 'exchange intermediaries' (i.e. Colombian banks, some financial institutions and foreign exchange intermediation companies, formerly known as exchange houses) or by using registered offshore accounts:

- import and export of goods
- foreign loans and related earnings
- foreign investments in Colombia and related earnings
- Colombian investments abroad and related earnings
- financial investments in securities issued or assets located abroad and earnings related to them, except when investment is made with currency originating from 'free market' operations (i.e. operations that the law does not require to be made through the exchange market)
- guarantees in foreign currency, and
- derivatives.

All other foreign currency operations may be made through the exchange market or the so-called 'free market'. In general, Colombia regulations do not allow for the set-off of the payment obligations resulting from these transactions.

##### ***Exchange declaration***

Colombian and foreign residents who perform an exchange operation through the Colombian exchange market must complete and file an exchange declaration.

The exchange declaration must be submitted to a commercial bank or an authorised financial institution, which will then forward it to the Central Bank. In some cases, the law will require filing of the exchange declaration directly with the Central Bank.

##### ***Foreign loans***

Colombian residents may obtain loans in foreign currency from Colombian banks or from any overseas entity, and may use such currency for any legal purpose. The parties are free to agree on the terms and conditions of the loan. All foreign lenders must register with the Central Bank, either

simultaneously with, or prior to, disbursement. The debtor must register the foreign debt with the Central Bank.

Direct intercompany loans granted by non-Colombian parent companies to their Colombian subsidiaries are permitted. Colombian subsidiaries may also loan funds to their foreign parent companies or affiliates.

#### 4.4.2 Foreign investment approvals and notifications

Under Colombian exchange control provisions, any investment made by a non-resident foreigner in Colombia will qualify as foreign investment. Foreign investments in Colombia do not require prior government approval. However, transactions that involve investment from abroad must be channelled through the exchange market on the date of the transaction and will be automatically registered or must be reported to the Central Bank within a specified term. Registration of the foreign investment enables the foreign investor to have access to the foreign exchange market in order to purchase convertible currency to remit dividends and to repatriate the investment. Failure to report or register will cause the imposition of exchange control fines. Registry of foreign investment must be annually updated with the Central Bank.

If a purchase of shares is carried out between two non-resident foreigners, the transaction will qualify as foreign investment and, thus, it must be registered in the Central Bank as a foreign investment substitution.

#### 4.4.3 Industry specific regulation

A special regime is available to domestic and foreign companies operating in: the exploration and production of oil and natural gas; the mining of coal, nickel and uranium; or the rendering of technical services with regard to oil exploration and production. Under this regime, these companies are allowed to denominate their transactions and receive payments in foreign currency in Colombia. Conversely, they do not have access to the exchange market to acquire foreign currency, except to remit the proceeds from the sale of oil, gas and services inherent to the sector and paid in Pesos to them. Branches of foreign companies in this sector cannot directly incur foreign debt.

Companies domiciled outside Colombia that want to enter into oil contracts must establish a Colombian branch that complies with the formalities of the Colombian Commercial Code.

#### 4.4.4 Import/export controls

Payment of imports must be made through the exchange market. Imports may be financed by the supplier of the product, by foreign financial institutions, and by Colombian banks and other authorised financial institutions.

Income from exports must be received through the exchange market. Advance payments and pre-financing of exports are permitted.

## 5. Income Tax and other Transfer Taxes

### 5.1 Income Tax and Capital Gains

The transfer of shares and other assets deemed as fixed assets that have been held for two years or more by the taxpayer (whether local or foreign) is subject to capital gains tax at a 10% rate. If the holding period of this type of assets is under two years, income derived from them is subject to income tax, CREE (Income Tax on Fairness) and the CREE surcharge. Income tax, CREE and CREE surcharge add up to 39% (2015), 40% (2016), 42% (2017), and 43% (2018).

If the assets (shares included) are transferred by a foreign entity and the purchaser is a Colombian withholding agent, a 14% withholding applies and the seller must file an income tax return in Colombia. The seller can credit the income tax withheld at source against final income tax liability.

## 5.2 Other Transfer Taxes

The current rate of stamp tax is 0%. No transfer taxes are payable on the acquisition of shares in Colombia.

The transfer of real estate entails the payment of:

- registration tax at a rate of 1%
- registration rights of 0.5%, and
- notary fees of 0.3% in respect of assets that must be transferred through a public deed (mainly, real estate), plus VAT on the notary fees.

A tax withholding of 2.5% will be made on the value of an asset transfer when the transaction is between Colombian entities.

Registration tax applies to any document or contract that is required by law to be registered in the Real Estate Registry Office.

This tax is departmental (departments in Colombia are territorial subdivisions roughly equivalent to the states), and will be collected by the Real Estate Registry Office, on behalf of the relevant department.

The various departments have discretion to set the rates for the registration tax, within parameters determined by law. For documents or contracts registered with the Real Estate Registry Office, rates can range from 0.5%–1% of the value stated in such documents or contracts.

## 5.3 Mergers and Splits

For tax purposes, mergers and splits may qualify as acquisitions or reorganisational mergers and splits.

### 5.3.1 Acquisition mergers and splits

Acquisition mergers and splits will be income tax neutral as long as they meet the following conditions:

- acquisition mergers and splits take place between non-related companies
- the effects for the companies involved are as follows:
  - there is no taxable income and the law considers that no transfer has taken place for tax purposes
  - the tax cost and the nature of the transferred assets are the same both for recipient and transferor
  - if the recipient transfers the assets within the two years following the contribution, it will not be able to compensate accumulated tax losses or presumptive income surpluses in the period when the merger or split takes place.
- for the shareholders no transfer takes place for tax purposes as long as:
  - the owners of at least 75% of the shares of the original company continue as owners of the resulting entity
  - the shareholders' consideration must be at least 90% in shares of the resulting entity

- if the shareholders transfer the shares at any time before the second taxable period following the period in which the merger or split was finalised, they must pay income tax on the transfer or assignment plus an additional 30%. In any case, the income tax can never be lower than 10% of the value of the shares.

### 5.3.2 Reorganisational mergers and spinoffs

Reorganisational mergers and splits will be income tax neutral as long as they meet the following conditions:

- reorganisational mergers and spinoffs take place between related companies
- the tax effects for the companies involved are as follows:
  - there is no taxable income and the law considers that no transfer has taken place for tax purposes
  - the tax cost and the nature of the transferred assets are the same both for transferee and transferor.
- for the shareholders no transfer takes place for tax purposes as long as:
  - the owners of at least 85% of the shares in the original company continue as owners of the resulting entity
  - the shareholders' consideration must be at least 99% in shares
  - if the shareholders transfer the shares at any time before the second taxable period following the period in which the merger or split was finalised, they must pay income tax for the transfer or assignment plus an additional 30%. In any case, the income tax can never be lower than 10% of the value assigned to the shares.

These conditions are applicable to international mergers and spinoffs if the resulting entities are national entities.

### 5.3.3 Taxable mergers and splits

Mergers and spinoffs that are not in compliance with the above requirements will constitute a transfer for tax purposes and will be taxed according to the rules on transfer of assets contemplated in the Tax Code.

### 5.3.4 Mergers and spinoffs between non-resident foreign entities

The transfer of assets in Colombia as a result of a merger or split abroad will be taxed in Colombia unless the Colombian assets represent 20% or less of the total value of the assets of the group to which the intervening parties in the reorganisation operation belong.

## 5.4 Value Added Tax

VAT is not payable on the purchase of shares. The transfer of fixed assets will not trigger VAT.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

When a business is transferred by means of a stock purchase such a transaction will not involve a change of employer. Therefore, employees and their conditions, benefits and entitlements are unaffected.

### 6.1.2 Acquisition of assets

If the transaction is structured as an asset purchase which entails the transfer of personnel, it would be considered an employer substitution if the parties have not previously assigned or terminated the employment agreements. This would operate automatically, by virtue of law, upon execution of an asset purchase agreement and the transfer of personnel.

The main effects of the employer substitution would be the following:

- the employment agreements of employees are not modified, suspended or terminated, and all risks, duties and liabilities will transfer to the purchaser
- the purchaser must therefore match the salaries and benefits the employees were receiving
- if the incoming employees have enjoyed different employment benefits compared with those of the purchaser's existing employees in comparable job roles (in terms of rank/seniority, skills, qualifications, among others), the purchaser could be forced to harmonise these by offering all employees the most favourable conditions (unless otherwise agreed with all employees, 'old' and 'new')
- All employees' seniority must be maintained for all legal purposes
- the pension liability of the seller will be transferred to the purchaser
- former and new employer would be considered jointly and severally liable for all labour obligations relating to the existing employment agreements (for both target and purchaser) at the time the employer substitution takes place, and the new employer will be responsible for the obligations that come into effect after the substitution occurs. If the new employer assumes payments regarding labour obligations that the old employer was forced to recognise, then the new employer can recover them from the old employer, unless agreed otherwise.

The transferred employees will not be legally entitled to refuse the change of employer or to demand payment of any social benefit or redundancy or severance pay due as a result of the employer substitution. If they do not wish to work for the new employer they can resign, as any employee is legally entitled to do.

### 6.1.3 Assignment of employment agreements

By virtue of the principle of the 'autonomy of the parties private will' it is viable for a contracting party (old employer) in an employment relationship to be substituted by a third party (new employer) in every labour obligation by the assignment of the employment agreement. Such assignment implies that all obligations, rights and legal benefits inherent in the nature and conditions of the employment agreement are transferred to the new employer unless agreed otherwise. This means that, before an employer substitution occurs, the current employer will be able to assign the employment agreements to the purchaser and regulate the terms and conditions of that assignment in that private document.

In order for the assignment to be fully effective legally, the employees' consent to any such change of employer must be obtained. Assuming consent is granted by the employees, such an assignment will have the same effects as an employer substitution, namely:

- the labour relationship continues uninterrupted
- the old employer and the purchaser are jointly and severally liable for any labour obligations and employer liabilities up until the date of assignment, and
- the employees' length of service is maintained for all legal effects.

The advantage of an assignment is that the new employer can agree in advance any change or modification it wishes to perform to the employment agreements by means of an assignment agreement signed by the old employer, the new employer and the transferred employee. This means that the new employer might for example be able to reduce employees' wage or agree new benefits.

## 6.2 Approval or Consultation Requirements

In case of transfers via employer substitution, the seller is not legally required to give notice of the closing of the transaction to the employees or request their consent to it. Nonetheless, it is advisable to notify affected employees that their employment agreements have been or will be transferred to a new employer by indicating the date on which it occurred or will happen, as the case may be. It is not unlawful to inform employees after the employment agreements have been transferred to the new employer.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

Under Colombian legislation, an employer may not dismiss without just cause, in the same semester, a certain percentage of employees (depending on the size of the total workforce) except with prior authorisation from the Ministry of Labour. The closing of operations, totally or partially, is prohibited for employers without having prior authorisation from the Ministry of Labour.

There is no obligation to consult with works councils unless this has been agreed under individual employment agreements or in the collective bargaining agreement.

### 6.3.2 Penalties

Mass layoff of employees without authorisation will be ineffective, the legal consequence being that the employees must be reinstated with back-payment of salaries and social benefits accrued but not paid during the time unemployed.

Finally, note that Colombian legislation affords special privileges to protect certain employees from being dismissed, in which cases termination of employment can be carried out only with just cause and with prior authorisation from the Labour Court or the Ministry of Work.

This could apply, for example, to employees:

- who by 1 January 1991 had more than 10 years of service under the same labour contract
- pregnant women or women on maternity leave
- with medical problems or physical limitations
- with union privileges (i.e. founders or directors of unions members of the claims committee and employees who have filed a claim of petitions by means of which a collective negotiation begins aiming to reach a collective bargaining agreement), or
- who have filed a labour harassment complaint during the 6 months prior to the termination.

## Czech Republic

### 1.1 Overview

Prior to the global financial crisis, the Czech M&A market experienced significant growth, peaking during the first half of 2008. This was caused mainly by:

- EU membership (as of May 2004)
- related EU law harmonisation
- a significant number of foreign investments.

But with the global financial crisis, the number of larger deals significantly decreased. To date Czech economic activity and the Czech M&A market have still not fully recovered, although for some investors, the global financial crisis presented interesting opportunities. Some foreign investors disposed of their investments in the Czech Republic and private equity investors took the opportunity to acquire those businesses. Czech strategic investors, on the other hand, looked abroad for international growth.

Recently there have been some indicators meriting additional optimism. Since the turn of the 2013–2014 year, there has been slight GDP growth. Public finance management is recovering; while public deficit has slightly decreased. Levels of unemployment and inflation remain among the lowest in Europe.

Generally, all forms of acquisitions and exits are commonly used in the Czech Republic, including share deals and various forms of asset deals (e.g. sale of an enterprise, sale of part of an enterprise, and individual asset deal). Various merger structures are used. In practice, tenders organised by sellers are the most common. Nevertheless, one-to-one transactions are also still regularly seen in the Czech Republic.

### 1.2 General Legal Framework

Since 1 January 2014, the new Civil Code and new Act on Business Corporations became effective in the Czech Republic. The adoption of this new legislation marks the most significant change to the legal regulation of both civil and commercial relationships within the last 25 years. The new law affects all Czech companies. Aligned with the Act on Business Corporations and new Civil Code, other important regulations have also been adopted (including new regulation on registration on the Czech commercial register).

The new Act on business corporations applies to companies established after 1 January 2014. Companies existing before this date had to amend their constitutional documents in compliance with the new legislation, and file the amended documents with the Collection of Deeds of the relevant commercial register by 30 June 2014.

Companies which existed prior to 1 January 2014 need to decide (1 January 2016), whether to submit to the regime set out by the Act on Business Corporations as a whole and register new constitutional documents in the commercial register. If they choose to do so, the companies will be regulated solely by the Act on Business Corporations. If they choose not to do this the provisions of the previous law relating to the rights and obligations of the participants will still apply, as long as the provisions of their constitutional documents do not contravene the mandatory provisions of the new Act on Business Corporations.

### 1.3 Corporate Entities

The most commonly used types of company are limited liability companies (*společnost s ručením omezeným*, commonly referred to as 'sro' or 'spol sro') and joint stock companies (*akciová společnost*, commonly referred to as 'as' or an 'akc spol').



### 1.3.1 Limited liability companies

A limited liability company may be established by one or more individual(s) or by one or more corporate entity/entities (there is no maximum limit on the number of participants). Liability of the participants is limited (up to the total unpaid value of the participation interests as registered in the commercial register).

Shares in a Czech limited liability company are represented by participation interest. If the constitutional document provides for it, the company can issue a participation certificate representing and incorporating the participation interest. The incorporation of the participation interest into the participation certificate will enable the participation interest to be easily transferred (see below).

The minimum capital contribution of each participant is one Czech Crown (CZK). The company founders may decide on a higher registered capital. Before filing a petition for registration of the limited liability company into the commercial register, the whole contribution premium and 30% of each participant's capital contribution must be paid (the remainder of the initial capital must be paid within five years of registration of the company). Subject to certain conditions, in-kind contributions may be made to the company's registered capital.

A limited liability company has no board of directors; instead, the company is represented by one or more executives. The executives can, however, form a board if the constitutional document of the limited liability company provides for this. A limited liability company may establish a supervisory board as a controlling body; but the establishment of a supervisory board is not mandatory.

### 1.3.2 Joint stock companies

A joint stock company may be established by one or more individual(s), or by one or more corporate entity(ies) (there is no maximum limit to the number of shareholders). The shareholders of a joint stock company are not liable for the company's obligations.

The capital stock of a joint stock company is divided into shares, which may be issued in the form of bearer or registered shares. Registered shares can be issued as certified shares or can be maintained in the form of book-entry (computer entry) securities in a special account at the Central Securities Depository, which is maintained by *Centrální depozitář cenných papírů*, or which can be deposited with a bank or another financial institution. In order to increase the transparency of the ownership structure of the joint stock companies, bearer shares can be issued only as book-entry securities, or as securities deposited with a bank or another financial institution. Certified bearer shares which have not been deposited with a bank or another financial institution prior to 1 January 2014 are transformed automatically to certified registered shares (with effect since 1 January 2014) under the Act on Certain Measures to Increase the Transparency of Joint Stock Companies. A joint stock company can either issue shares with a nominal value, or shares without a nominal value. Those shares do not have a nominal value and each of them represent an identical share in the registered capital of the company. Where shares without a nominal value are issued, the company may not issue any other shares with a nominal value.

The minimum registered capital of a joint stock company is CZK2 million. If a joint stock company keeps books in Euros the minimum registered capital of a joint stock company is EUR80,000.

The joint stock company can have either a monistic or dualistic structure of corporate management. A dualistic structure anticipates that the company's bodies will include (in addition to the general meeting) the board of directors and supervisory board. The monistic structure means that, in addition to the general meeting, the company's bodies will include one statutory director and a board of trustees.

A joint stock company must maintain webpages in which it will publish certain statutory information (e.g. information that must be stated on the business documents, etc.).

## 2. Acquisition Methods

In general, there are five key methods of structuring an acquisition:

- acquisition of shares (participation interests)
- acquisition of assets
- acquisition of an enterprise
- merger (i.e. amalgamation or consolidation) and demerger (demerger or spin-off), and
- transfer of assets to a participant or shareholder/squeeze-out.

### 2.1 Acquisition of Shares (Participation Interests)

From a transactional point of view, a share transaction is much simpler and usually involves less documentation than an asset transaction. Generally, public licences and permits are not affected.

### 2.2 Acquisition of Assets and Acquisition of Enterprise

In an asset sale, the parties are generally free to select the assets and liabilities they wish to transfer. The buyer will generally be liable only for those obligations of the acquired company which it expressly assumes. However, an asset acquisition is generally more complicated and involves more documentation than a share acquisition. As a general rule, public licences and permits cannot be transferred but must be reapplied for by the buyer.

Czech law governs the sale of an 'enterprise' separately. The same rules also apply to sales of a part of an enterprise as long as that part represents a 'golden egg' (i.e. it is a material part of the enterprise, the sale of which would represent a material change of business/activities of the seller). The parties are free to exclude an individual asset or a liability as long as the entire unit still represents an 'enterprise'.

In a sale of an 'enterprise', the selling entity transfers title to the enterprise (as a whole) to a buyer. Transactional documentation is generally more complicated and involves more documentation than in share acquisitions. Assets, contracts and liabilities of the seller pertaining to the enterprise pass to the buyer without the consent of creditors. The buyer, however, takes over only those liabilities which were known to it, or which the buyer must have reasonably expected. As a general rule, public licences and permits cannot be transferred, but must be reapplied for by the buyer.

### 2.3 Mergers and Demergers

A merger can be structured as:

- an amalgamation, or
- a consolidation.

A de-merger can be structured as:

- a demerger, or
- a spin-off.

An amalgamation is the combination of two or more existing legal entities by way of transfer of all assets and liabilities of one or more of those entities to another existing entity. The transferor entity is dissolved by operation of law upon the amalgamation taking effect, with the transferee entity becoming the legal successor. An amalgamation takes effect upon registration in the commercial register.

A consolidation is the combination of two or more existing legal entities by way of transfer of all assets and liabilities of those entities to a newly-formed entity. The transferor entities are dissolved by operation of law upon the consolidation taking effect, with the transferee entity becoming the legal successor. The consolidation takes effect upon registration in the commercial register.

A demerger is the division of an existing legal entity by way of transfer of all assets and liabilities of that entity to:

- a newly-formed entity(ies), or
- an already existing entity(ies).

The transferring entity is dissolved by operation of law upon the demerger taking effect. A demerger takes effect upon registration in the commercial register.

A spin-off is the division of an existing legal entity by way of transfer of some assets and liabilities of that entity to:

- a newly-formed entity(ies), or
- an already existing entity(ies).

The transferring entity is not dissolved as a result of a spin-off. A spin-off takes effect upon registration in the commercial register.

Both mergers and demergers may be structured as cross-border transactions under Czech law.

## 2.4 Transfer of Assets to a Participant or Shareholder and Squeeze-Out

Subject to approval at a general meeting, the majority participant/shareholder (holding shares representing more than 90% of the companies registered capital and at least 90% of voting rights) takes over all assets and liabilities of the entity, which is dissolved by operation of law. The majority participant must provide fair monetary compensation to all minority shareholders of the entity. The transfer of assets takes effect upon registration in the commercial register. The transfer of assets may be structured as a cross-border transaction.

The majority shareholder holding shares representing at least 90% of voting rights and at least 90% of the company registered capital may request that all minority shareholders transfer their shares to that majority shareholder (squeeze-out). A squeeze-out is subject to approval of the general meeting (90% majority required).

The majority shareholder must provide fair monetary compensation to all minority shareholders of that entity. If the shares in the company are publically traded, the squeeze-out needs to be approved by the Czech National Bank.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

The New Civil Code represents a material change in the legal regulation of pre-contractual obligations in the Czech Republic. Prior to its effective date (1 January 2014), any pre-contractual negotiations were subject to general rules on damage liability. In practice, it has not been common to claim pre-contractual liabilities, and virtually no court decisions allowing such claims exist.

The New Civil Code provides more detailed regulation. The key purpose of the new regulation is to provide a certain level of protection to a contracting party where the other party withdraws from negotiations without justified grounds. In general, each negotiating party shall only be liable for failure to enter into a contract if such party started (or commenced) the contractual negotiations without an honest intention to enter into such contract. The New Civil Code also provides that the contracting parties should notify each other of any significant actual and legal circumstances which could be important to the contract to be concluded. If the contractual negotiations reach a certain stage (i.e. the

contract is nearly finalised) no contracting party can withdraw from the execution of the agreement without justified grounds.

The effect of these changes in practice to pre-contractual obligations on the parties and on M&A in general remains to be seen.

## 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Czech purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. Various methods applicable, cash-free debt-free adjustments and NAV adjustment most frequent.
2	Is there a collar on the adjustment?	Collars not common.
3	Who prepares completion balance sheet?	Usually target or buyer.
4	Is the balance sheet audited?	Usually.
5	Is an earn-out common?	Limited to transactions where sellers are continuing in the management of target after closing.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Common.
8	Is a break fee common?	Uncommon.

### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Uncommon.
10	Is the MAE general or specific?	Both seen.
11	Quantification of MAE?	Uncommon.

### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, but difficult to get from private equity sellers or in some sector segments. Waterfall/blue pencil provisions not common.
13	Non-solicit (of employees)?	Common (in conjunction with non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with non-compete).
15	Broad access to books, records, management between sign and close?	Not uncommon. Depends on sophistication of parties. Common for private deals but frequent resistance from sellers. NB: competition law issues around potential 'gun-jumping'.

16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules is common but limited to things like lists of contracts. Notification of possible breach is common. Where material breach, right to terminate.
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17	Is a separate tax covenant/indemnity or tax deed common?	Common.
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### Representations and Warranties

18	Materiality in representations - how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but often not quantified (other than specific warranties, e.g. contract value).
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19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are growing. Often limited to actual knowledge and due enquiry of a specified list of senior management.
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20	Is a warranty that there is no materially misleading/omitted information common?	Still commonly requested by buyers, but often resisted by sellers.
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21	Is disclosure of data room common?	Common.
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### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates not very common.
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23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects common but often carve-out for fundamental representations which must be absolutely true and accurate.
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24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Uncommon.
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### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Commonly less than 100%. Mid-cap and larger deals see lower caps, e.g. 20%–50%.
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually warranties only.
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27	What are the common exceptions to the cap?	Key warranties (e.g. title) typical, often tax and environmental indemnities and other specific indemnities. Separate caps common.
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28	Is a deductible or basket common?	Both common (to exclude small claims).
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29	Is a <i>de minimis</i> common?	Common.
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30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 12–24 months common. Common to carve-out fraud. Tax commonly longer than general warranties, usually matches statutory limitation of 3 years.
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31	Is warranty insurance common?	Uncommon.
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#### Reliance

32	Do financiers seek to rely on buyer's due diligence reports?	Uncommon.
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#### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Common.
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34	Insurance proceeds?	Common for actually received.
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35	Third party recoveries?	Common for actually received.
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#### Damages, Knowledge

36	Obligation to mitigate damages?	Common.
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37	Exclusion of consequential damages?	Common.
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38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Often silent.
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#### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. Czech law.
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40	Is litigation or arbitration more common? If arbitration, where?	Arbitration more common. Prague Arbitration Court (Arbitration Court allocated to Czech Economic and Czech Agricultural Chambers) or ICC.
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#### Stamp Duty

41	If stamp duty is payable, is it normally shared?	No stamp duty payable.
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### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares

The formalities for transfer documentation differ subject to the type of entity (whose shares are being transferred).

For a limited liability company, the ownership interest is transferred upon written contract; the signatures of the contracting parties need to be verified by a notary. The agreement on the transfer of ownership interest needs to contain certain mandatory provisions (e.g. declaration of the buyer that it accepts the memorandum of association of the company, purchase price, precise specification of ownership interest in compliance with Czech mandatory law, and other related provisions). In addition,

the transfer of ownership interest may be subject to various transfer restrictions or pre-emption rights subject to the company's memorandum of association.

If the limited liability company issued a participation certificate, the respective participation interest may be transferred upon verbal or written agreement, written endorsement and actual handover of the participation certificate. In other words, instead of having to conclude a written agreement on the transfer of the participation interest with notarised signatures – a verbal agreement, endorsement (with simple signatures, i.e. not witnessed) and handover protocol (with simple signatures, i.e. not witnessed) may be sufficient.

For a joint stock company, the certified shares (materialised securities) are transferred upon verbal or written contract, execution of endorsement and actual handover of the shares. Book-entry shares are transferred upon registration of the transfer in the central securities depository (maintained by *Centrální depozitář cenných papírů*). The registration of the transfer is realised upon formal instruction issued by the contracting parties in person at the central securities depository; the contracting parties may also be represented by a third party on the basis of power of attorney with notarised signatures. The registration of the transfer of dematerialised shares may also be realised by a securities broker.

### 3.3.2 Transfers of Assets

Documentation formalities differ depending on the type of asset transferred.

As a general rule, contractual documentation should be in writing. However, writing is not always required by law. For the transfer of certain types of asset (e.g. real estate property and a participation interests not represented by a participation certificate) signatures of the contracting parties must be officially verified. The asset purchase agreement must always precisely specify the transferred assets and their purchase price.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

The formalities of transfer documentation differ subject to the type of entity (the shares in which are transferred).

For limited liability companies, the transfer of participation interests is effective as of the date of execution of a written agreement for the transfer of the participation interest with notarised signatures (with respect to the contracting parties). With respect to a company, the transfer of participation interests is effective as of the date of delivery of the written agreement for transfer of the participation interest to the respective company. The transfers of participation interests also need to be registered with the Czech commercial register. Third parties may, to a certain extent, rely on the information listed in the Czech commercial register.

For joint stock companies, the certified shares (materialised securities) are transferred as of the moment of execution of endorsement and actual handover of the shares. Dematerialised shares (book-entry securities) are transferred as of the moment of registration of the transfer in the central securities depository.

### 3.4.2 Transfers of title to assets

The formalities for transferring title differ according to the type of asset being transferred.

The moment of transfer of title to real estate property differs depending on whether the real estate is subject to registration. The transfer of real estate property which is subject to registration becomes effective on the date of registration of the new owner in the Cadastral Register. However, the transfer is also effective retroactively as of the date of filing of the application for registration with the respective Cadastral Office. A transfer of real property which is not subject to registration becomes effective on the effective date of the relevant transfer agreement.

Any intellectual property transfers need to be registered with the Intellectual Property Office. Each agreement giving rise to a right or obligation would have to be reviewed and the relevant authorisation, approval, consent, waiver, or novation obligations indicated in those agreements would need to be considered.

The sale of an enterprise is subject to the approval of the sellers and buyers at their general meeting. If the buyer is a company registered in the Czech commercial register, the buyer must file evidence of the transfer of the enterprise with the Collection of Documents of the commercial register and arrange publication of information about the fact of that filing with the *Commercial Gazette*. The buyer acquires title to the enterprise upon publication in the *Commercial Gazette* (that moment usually triggers the effective date of the Agreement on Sale of the enterprise). The passing of an obligation (debt) from seller to buyer does not require the consent of creditors (although the seller is liable for the buyer's performance of the assigned obligations). The buyer is required to promptly notify creditors of the assumption of the obligations (debts) and the seller must promptly notify debtors of the assignment of those receivables of the seller to the buyer.

### 3.5 Formalities for Mergers

A Merger Project must be concluded between all entities involved. In certain structures, a Merger Project proposal must be reviewed by an independent (court-appointed) expert. In certain structures, the expert(s) must prepare an Expert Report on Merger (ERM). The ERM must be sent to the board of directors and supervisory board (if any) of the entities involved and must be made available to general meeting attendees. In some cases, an independent expert(s) appointed by the court must also evaluate the assets of the entities involved. These experts may be, but do not need to be, the same experts preparing the ERM.

The Merger Project must be approved by the shareholders (participants) of the relevant companies at a general meeting by a three-quarter majority of shareholders (participants) present at the general meeting. Under certain circumstances (typically, if a controlled entity merges into a controlling entity) approval of the board of directors of both companies may be sufficient. The general meeting approval must be in the form of a notarial deed.

The board of directors of each entity involved must prepare a report on merger (RM). The RM can be prepared separately for each of the entities involved, or one common RM can be prepared for all (or a group of) entities. The RM must also be reviewed by the supervisory board.

The following documents must be made available for the shareholders in the registered offices of all the entities involved not later than one month prior to the scheduled general meeting:

- proposals of the Merger Project
- RM
- ERM
- accounting statements for the past three years of all entities involved
- accounting statements up to the day of the merger
- opening balance sheet as of the day of the merger

—all reviewed by an auditor (subject to certain exceptions).

The proposal of the Merger Project must also be filed at the Collection of Documents at the commercial register. Each shareholder must be provided with a copy of all documentation upon request. After the general meeting has approved the merger, the application for registration of merger in the commercial register can be filed.

Depending on the structure of the merger, the shareholders of the merging companies may waive various formal requirements and conduct the merger in a simplified manner.



A merger takes effect upon registration in the commercial register.

The same key principles apply also to demergers.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

The purpose of Czech competition legislation is to protect economic competition from any party preventing, restricting or otherwise distorting the markets. Competition laws apply to any activity or conduct which has, or may have, an effect on the Czech market, including transactions that take place outside of the Czech Republic, if that activity could materially affect the domestic Czech market.

The Act on the Protection of Economic Competition further applies to investigation and proceedings of the Czech authorities under Articles 101 and 102 of the Treaty of Functioning of European Union (TFEU) and to some aspects of co-operation with the European Commission and other EU authorities.

Competition laws apply both to individuals and legal entities (or associations of entities, e.g. Czech Banking Association) as long as they, whether or not entrepreneurs, take part in competition by engaging in an economic activity, or could influence competition by their activities.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Czech purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Approval of the Office for Economic Competition (OEC) is required for any merger, consolidation or acquisition where:

- aggregate domestic turnover in the last accounting period of the concerned undertakings in the Czech Republic exceeds CZK1.5 billion and at least two of the undertakings reached an individual domestic turnover in the Czech Republic exceeding CZK250 million, or
- domestic turnover reached by:
  - at least one of the merged undertakings
  - the acquired undertaking or part of it
  - the acquired business, or
  - at least one entity forming a joint venture in the last accounting period in Czech Republic—exceeds CZK1.5 billion and worldwide turnover reached by one of the other relevant undertakings exceeds CZK1.5 billion.

In this regard, the OEC has authority to approve a concentration if the applicants are able to prove that the transaction will not create a significant impediment to effective competition (especially by creating or strengthening the dominant position of one of the undertakings involved). The transaction may not be acted upon prior to OEC approval. In share acquisition transactions, for example, unless specifically approved by the OEC, the acquirer may not exercise control over the acquired entity.

The OEC may impose fines on competitors of up to 10% of the worldwide turnover in the preceding calendar year where the Competition Act has been breached. If no mandatory notification was made, the OEC will also impose remedial measures, such as return of the acquired shares or business to the original owner.

Mergers, acquisitions and joint ventures between economic entities with a EU dimension, are subject to investigation by the European Commission. For details, see the EU Merger Control regime (Appendix A).

### Filing Obligation

- |   |  |            |
|---|--|------------|
| 1 | Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)? | Mandatory. |
|---|--|------------|

### Timetable

- |   |  |  |
|---|--|--|
| 2 | In practice, what is the timetable for clearance (in Phase I and Phase II review)? | OEC usually adheres to its deadlines, i.e. 20 calendar days, 30 calendar days and 5 months. Simplified proceedings: it would be rare to be granted permission to adopt accelerated, simplified proceedings. Phase I: OEC will be prepared to clear a transaction earlier if the deal does not raise competition issues, in particular where the parties have engaged in a pre-notification process. In practice, the decision may be obtained a few calendar days prior to the deadline. Phase 2: in most cases the OEC will use the full review period. The actual timetable will also depend on the cooperation of the parties when providing OEC with the necessary data. |
|---|--|--|

## 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Czech competition law does not provide any meaningful guidance in connection with the exchange of sensitive information in the course of pre-merger negotiations or meetings. No precedent exists in the form of court rulings or decisions of the OEC with respect to the exchange of competition-sensitive information or so called 'gun-jumping' issues. However, in considering a transaction, the OEC will often implement EU guidelines and processes over documentary evidence and proofs, so it is highly recommended that EU level standards are strictly met in implementing transactions in the Czech Republic. For more details see Appendix B.

## 4.4 Anti-Bribery, Corruption and Money Laundering

In the Czech Republic, anti-money laundering is governed primarily by the Anti-Money Laundering Act. The Act incorporated into Czech law the provisions of Directive 2005/60/EC on the prevention of use of the financial system for the purpose of money laundering and terrorist financing. The purpose of the Act is to prevent any possible legalisation of revenues from illegal conduct, to prevent the financing of terrorism, and establish a mechanism for uncovering suspect conduct.

The Czech Anti-Money Laundering Act imposes a wide range of duties on so-called 'qualified persons'. Those duties include obligations to identify customers, carry out customer due diligence, report suspicious transactions, implement internal control procedures and rules, train designated employees, pass information to the Ministry of Finance on request, and keep certain information confidential. 'Qualified persons' include banks, savings and credit unions, casinos, gambling and lottery companies, auditors, external accountants and tax advisors, entities depositing client funds (e.g. notaries and advocates) and other related persons.

Non-compliance with the Act may attract fines of up to CZK10 million. Where there is material, gross or repeated violation of obligations specified by the Anti-Money Laundering Act, the business licence of the offender may be cancelled. In addition, in certain circumstances, the property of the offender may be forfeited or expropriated.

Anti-money laundering may also have criminal consequences. Money laundering is a crime under the Czech Criminal Code. The Czech Criminal Code defines the crime of money laundering as that of a person concealing or negligently enabling another person to conceal the origin of or discovery of the origin of an asset obtained through criminal activity or an asset obtained in exchange for an asset obtained through criminal activity.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

In general, no foreign investment approvals apply in the context of mergers and acquisitions in the Czech Republic. Certain restrictions or approvals may be applicable to certain specific types of business (involving financial institutions, lottery companies and energy industry, etc.).

To assist in the preparation of international statistics on balance of payments, investment position and debt service of the Czech Republic, the Czech National Bank may request certain information from companies and individuals.

There are no foreign exchange restrictions limiting payments among residents and non-residents in the Czech Republic.

### 4.5.1 Exchange controls

No foreign exchange restrictions limit payments made among residents and non-residents in the Czech Republic. Any payments among residents and non-residents of the Czech Republic may be conducted in local or foreign currency at the choice of the parties. All residents and non-residents may freely buy, sell and exchange local currency and foreign currencies in the Czech Republic.

### 4.5.2 Foreign investment approvals and notifications

In general, no investment approvals apply in the context of mergers and acquisitions in the Czech Republic. Certain restrictions or approvals may be applicable to certain specific types of business (involving financial institutions, lottery companies and energy industry, etc.).

For the purposes of preparation of international statistics pertaining to balance of payments, investment position and debt service of the Czech Republic, certain information duties with respect to the Czech National Bank apply. A domestic company receiving direct investment from a foreign investor must report the direct investment to the Czech National Bank if the foreign investor's share in the domestic company's business (or the amount of loans provided or accepted within the direct investment in the Czech Republic) amounts to at least CZK25 million at the end of the calendar year.

Certain legal entities must submit statements and other specific information to the Czech National Bank (e.g. banks, branches of foreign banks and legal entities classed as statistically significant). The Czech National Bank and the Ministry of Finance are also authorised to request from residents and non-residents certain information (e.g. financial claims against and liabilities to residents abroad and non-residents; direct investments by non-residents, and other related information). Residents are also obliged to provide information concerning their foreign trade-related transactions. Non-residents are obliged to provide only information that relates to their business activities in the Czech Republic.

### 4.5.3 Industry-specific regulation

As a general rule, no investment approvals apply in the context of mergers and acquisitions in the Czech Republic, although certain restrictions or approvals may be applicable to certain specific types of business, for example:

- the establishment of a branch of a foreign bank or the provision of investment, brokerage or insurance services by a foreign entity in the Czech Republic is subject to the approval of the Czech National Bank
- a foreign entity may only perform business activities in the Czech energy industry (e.g. energy production, transfer and distribution, gas production, transport and distribution, heat energy production and distribution) via its Czech branch

- lotteries can only be offered by Czech entities.

#### 4.5.4 Import/export controls

As a general rule, no special import/export controls generally apply in the Czech Republic (over and above the general European Union regulations which do apply to cross-border transit).

However, special restrictions or necessary approvals may be required to import or export certain types of goods, for example to:

- military products, e.g. weapons, ammunition and explosives
- habit-forming substances, preparations, precursors and auxiliary substances of drugs
- objects of cultural value
- human medicines and products and veterinary goods
- dual-use items
- financial funds in Czech or foreign currency, travellers' cheques, money orders exchangeable for cash, bearer securities or any other investment instruments valued at least EUR10,000.

In addition, certain restrictions apply to some goods because of international sanctions (e.g. restrictions on goods originating from the Republic of Crimea, Sevastopol and the Russian Federation; and imports of textile goods from Belarus and Northern Korea).

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

No stamp taxes or other types of transfer tax apply to the transfer of shares in the Czech Republic.

### 5.2 Acquisition of Assets

To the extent that real estate is being transferred (whether in an asset sale or as part of the sale of an enterprise), real estate transfer tax at the rate of 4% would be applied to the higher of the transfer price and the price set under specific administrative rules. That transfer tax would generally be payable by the seller, unless the parties agree that the buyer will pay. If a seller fails to pay the tax, the buyer becomes liable for it by default as guarantor.

### 5.3 Mergers

No stamp taxes or other types of transfer tax apply to mergers in the Czech Republic.

### 5.4 Value Added Tax

Transfers of shares will generally not attract VAT in the Czech Republic. And if the transaction is structured as a sale of enterprise or a part of an enterprise, no Czech VAT will be chargeable either.

However, for transactions structured as sales of individual assets provided that:

- the seller is a registered VAT payer, and
- the assets do not leave the territory of the Czech Republic.

—the seller would generally have to charge VAT (at the rate of 21%) on all assets being transferred (with certain minor exceptions, e.g. for the transfer of land or securities). A sale of an enterprise (or its part) will usually be a VAT-exempt.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

Share sales do not create any particular employment law issues since the legal identity of the target company as employer is not affected. However, there is a general duty to inform the employees/their representatives of any substantial change in the employer's shareholder structure or business activities (see below).

#### 6.1.2 Acquisition of assets

If the activities and tasks (or part of them) of the seller are transferred to the buyer, the seller's employees participating in the transferred tasks and activities (or part) automatically transfer to the buyer and certain information and consultation duties apply. The buyer is not required to conclude new employment contracts with these employees. The consent of the transferred employees to the transfer is not required; however certain information and consultation duties apply. If no activities and tasks (or their part) of the seller are transferred to the buyer, employees of the seller are not transferred.

#### 6.1.3 Transfer of enterprise

On an acquisition of an enterprise (or part of one), employment contracts are, as a matter of law, transferred to the buyer. As a result, the rights and duties of employees of the enterprise sold will pass from seller to buyer by operation of law. The buyer is not required to conclude new employment contracts with these employees. The consent of the transferred employees is not required; however, certain information and consultation duties apply (see **6.2**).

#### 6.1.4 Mergers

Employment contracts of all employees of merged entities are, as a matter of law, transferred to the successor entity. The consent of the transferred employees is not required; however certain information and consultation duties apply (see **6.2**).

### 6.2 Approval or Consultation Requirements

The transferring and acquiring employer must inform employee representatives about the automatic transfer and consult with them at least 30 days prior to the transfer. If there are no employee representatives, all transferred employees must be informed individually.

### 6.3 Protection against Dismissal

Employees do not enjoy any special protection against dismissal following on an automatic transfer.

However, generally employers may not serve a termination notice during the following 'protected periods':

- when the employee is designated as temporarily incapable of work (if the employee did not bring about this incapability intentionally or if such incapability did not arise as an immediate result of a state of intoxication or addictive drug abuse) and during the period from a date referring that employee for inpatient treatment is submitted, or from the date of commencement of therapeutic spa, to the day when the treatment is completed (the period is extended for six months after discharge from inpatient treatment in cases of tuberculosis)
- where an employee is engaged on military service or emergency military service, from the date when the draft order was delivered to the employee until two weeks after the employee's release from service
- where the employee is on long-term leave of absence to serve in a public office

- where employees are pregnant or on maternity or parental leave (the latter including male employees)
- where an employee is declared temporarily unfit for night work (by a doctor).

Exemptions from the above prohibition of termination notice under the Labour Code may apply in case of certain termination reasons.

### 6.3.1 Redundancies

Severance payment is applicable where terminating an employment relationship due to redundancy, relocation or closure of the employer or its part, equal to at least:

#### Severance payments due on redundancy

Length of service	number of units (one unit = one month's average pay)
<1 year	1x
1–2 years	2x
2 years+	3x

The figures in the Table apply unless a higher severance payment has been agreed upon in the collective agreement, or in the employer's policy of employment, or as otherwise agreed between the parties.

### 6.3.2 Penalties

The Labour Inspectorate can fine employer-companies (both the transferor and transferee) up to CZK200,000 if the obligation to inform and consult employee representatives about the automatic transfer of employees has been breached.

# Egypt

## 1.1 Overview

Egypt's governing system is quasi-presidential with three independent constitutional authorities: the executive arm led by the President; legislative authority represented in the Parliament; and a judicial authority which is an independent branch of the government.

Government administration was historically centralised until, in 1960, a local government administration system was established to promote decentralisation and greater citizen participation in local government. The Local Administration Law No. 124 of 1960 (which was repealed and replaced by Law No. 43 of 1979), provides for three tiers of local administration: governorates (*muhafazat*), districts or counties (*marakaz*) and the villages (*qariya*). There are two councils at each administrative level: a mostly elected council and an appointed executive council. The councils exercise certain legislative powers but are controlled by the central government.

Egypt is divided into 27 governorates. These governorates' local councils perform a wide variety of functions in education, health, public utilities, housing, agriculture and communications. The local councils are funded out of national revenues, taxes on buildings and lands within the governorates, miscellaneous local taxes and fees, profits from public utilities and commercial enterprises, and national subsidies, grants and loans.

## 1.2 General Legal Framework

Egypt's legal system is based on Islamic law (Shari'ah) and the Napoleonic Codes, including the French Code Civil, upon which the Egyptian civil code is largely based. Under President Mubarak's successive governments, the courts have demonstrated increasing independence, with principles of due process and judicial review gaining greater respect. Marriage and family law are primarily based on the religious law of the individual concerned, which for most Egyptians is Islamic law. Non-Muslims have their own laws to settle marriage and family matters. Generally speaking, Islamic law is not forced upon non-Muslims and are subject to their own laws with respect to family matters. Traditional Shari'ah principles influence the family law arena to a much greater extent than commercial law.

The Companies Law No. 159 of 1981 and regulations made under it regulates the most common corporate structure and the types of company that can be established in Egypt by foreign investors, setting mandatory requirements for their establishment, corporate governance and dissolution.

## 1.3 Corporate Entities

The main types of entities that can be established or acquired by foreign investors in Egypt are joint stock companies and limited liability companies.

At least 10% of the annual net profits of an Egyptian company must be distributed to employees up to a maximum of the annual payroll. However, that excludes limited liability companies established under the Companies Law with capital less than EGP250,000 (which are not required to distribute such a percentage of profits to employees).

At least another 5% of the net profits must be placed in a legal reserve. Shareholders are entitled to cease placing profits into such legal reserve when it reaches 50% of the company's capital). Such reserve may be used to cover losses or to increase capital by issuing bonus shares.

### 1.3.1 Joint stock companies

The most commonly used business vehicle in Egypt is the joint stock company, which is governed by the Companies Law.

The joint stock company's capital must be divided into nominal shares of equal value. The nominal value of shares must not be less than EGP0.1 and not more than EGP1,000. The minimum share capital for a joint stock company formed under the Companies Law is EGP250,000. Joint stock companies are permitted to offer shares in the company to the public. In the event that the joint stock companies offer their shares to the public, the minimum share capital is EGP500,000.

If the company's capital is paid-in in cash, then at least 10% of the share capital must be paid at incorporation, to be increased to 25% within three months, with the balance to be paid-in within five years. If the capital is paid in the form of an in-kind contribution, then 100% of the capital must be contributed upon incorporation.

There must be a minimum of three founding shareholders. Founding shareholders may be natural persons or judicial persons. There is no maximum limit on the number of founders. If the number of founding shareholders is less than three founding shareholders even if there are more than three non-founding shareholders, the company will be deemed to be dissolved by the force of law.

A joint stock company is managed by a board of directors with members of which there may be no fewer than three at all times. Members of the board need not be Egyptian nationals or shareholders in the company.

### 1.3.2 Limited liability companies

Limited Liability Company (LLC) capital must be divided into shares of equal value. The shareholders are entitled to determine the par value of shares. Shares must be of equal rights. The minimum issued share capital for a LLC formed under the Companies Law shall be decided by the shareholders. The issued share capital must be fully paid at incorporation and placed in a blocked bank account until the company is recorded in the Commercial Registry. The LLC is not permitted to offer shares to the public.

There must be a minimum of two founding partners and maximum of 50. Founding partners may be natural persons or judicial persons.

An LLC must be managed by one or more managers, at least one of whom is an Egyptian national, and by a supervisory council if the number of shareholders exceeds ten.

## 2. Acquisition Methods

Egyptian law permits different means of obtaining control of a business in Egypt: through the acquisition of shares, acquisition of assets, swap of shares, or mergers. Acquisitions of shares and mergers are most common.

### 2.1 Acquisition of Shares

Transfer of title to shares in joint stock companies must be executed by a brokerage company licensed by the Egyptian Financial Supervisory Authority (EFSA), even for unlisted shares. The mechanics of processing the transaction vary depending on whether the shares are listed or not, but in both cases it is effected through the Egyptian Stock Exchange. The time required for execution of such transactions is approximately one to three business days. However, deals above a threshold of EGP20 million require the approval of the Trading Committee and hence usually take approximately five business days.

Transfer of title to shares in limited liability companies must be embodied in a share purchase agreement. The articles of association of the target company will define whether or not such agreement must be notarised. A shareholders resolution must be issued to amend the shareholding structure of the company.

### 2.2 Acquisition of Assets

Civil law applies to acquisitions of assets, regulating the relationship between sellers and purchasers. Sale and purchase agreements should be agreed between buyer and seller incorporating provisions determining the price of the goods, place and time of delivery of the goods, and the sellers' and buyers' obligations.



## 2.3 Mergers and Share Swaps

The Companies Law and Capital Markets Law regulates shares swaps between companies. The shareholders of the target company will assign its shares to the buyer in return for shares in one or more other company via a swap of shares.

The Companies Law regulates mergers of companies. One or more companies may merge into an existing company or may merge with each other to form a new company (with the pre-existing companies dissolving). The merger may take place even if the merged company is in liquidation, provided that a prior approval of the competent authorities is obtained to cancel the liquidation.

The merger must be approved by EGM resolutions of each of the companies in question. This approval will be subject to the voting requirements prescribed by the articles of each of the companies. The Companies Law prescribes a voting threshold of 75% for merger decisions. That said, unanimous shareholder approval is required in the event of merger, which results in the increase of the shareholders' liability.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

Documents such as memoranda of understanding, heads of terms, letters of intent, expressions of interest and term sheets will set out the commercial agreement in principle. Such documents are usually non-binding, with a few exceptions, such as those relating to exclusivity, confidentiality, governing law, and dispute resolution. Egyptian law places great emphasis on the intent of the parties, so any such documents must make clear that they are not intended to create binding obligations. These documents must have a longstop date to enable the parties to pursue a different transaction after a certain period of time has elapsed.

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Egyptian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. Market practice sees different types (including working capital adjustment, cash-free, debt-free and EBITDA).
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	The buyer is usually responsible for ensuring the target company prepares this and has it audited by a third party auditor.
4	Is the balance sheet audited?	Usually.
5	Is an earn-out common?	Quite common in private equity transactions when the sellers continue to manage the target company after closing. Not common where the seller is completely exiting, though market practice has seen a few cases of earn-out in such scenarios more recently.
6	Is a deposit common?	Not common.

7 Is an escrow common? Common.

8 Is a break fee common? Not common.

### Conditions Precedent

9 Express Material Adverse Event (MAE) completion condition? Common.

10 Is the MAE general or specific? Usually general, though market practice is beginning to see specific.

11 Quantification of MAE? Uncommon.

### Covenants, Access

12 Is a non-compete common? Do you use waterfall/blue pencil provisions? Blue pencil common. Waterfall uncommon.

13 Non-solicit (of employees)? Common (in conjunction with non-compete).

14 Non-solicit (of customers)? Common (in conjunction with non-compete).

15 Broad access to books, records, management between sign and close? Access is common, 'broad access' varies deal-to-deal.

16 Is it common to update warranty disclosure or notify of possible breach? What is the consequence? Not common to update warranty disclosure. Notification of possible breach also uncommon. In cases of material breach, right to terminate.

17 Is a separate tax covenant/indemnity or tax deed common? Common to have tax warranties, usually included in the purchase agreement.

### Representations and Warranties

18 Materiality in representations—how is it quantified (e.g. by a \$ amount)? Materiality qualifiers commonly seen, but often not quantified (other than specific warranties e.g. contract value).

19 How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? Knowledge qualification uncommon for private deals. Common for private equity deals (generally not with respect to a specific group of people, but with regard to constructive knowledge and due enquiry).

20 Is a warranty that there is no materially misleading/omitted information common? Still commonly requested by buyers, but often resisted by sellers.

21 Is disclosure of data room common? Uncommon.

### Repetition of Representations and Warranties

22 Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common? Repetition at completion and at all times between signing and completion common. Bring-down certificates at completion uncommon.

23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True, correct and accurate in all material respects is common, but often carve-out for key representations and warranties (which must be true, correct and accurate without any qualification).
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Uncommon.

### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Ranges from 10%–40% of purchase price. Key warranties, such as on tax, employment and environmental, generally unlimited or limited to 100% of purchase price.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually warranties only.
27	What are the common exceptions to the cap?	Key warranties are generally excepted (e.g. title, capacity, authority). Fraud and gross negligence are also excepted. Often specific areas of concern, such as tax, employment and environmental, sometimes with specific higher caps.
28	Is a deductible or basket common?	A basket is common.
29	Is a <i>de minimis</i> common?	Common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–24 months common. Common to carve out key warranties (e.g. title, capacity, authority, tax, employment and environmental) as well as fraud and gross negligence.
31	Is warranty insurance common?	Uncommon.

### Reliance

32	Do financiers seek to rely on purchasers' due diligence reports?	Uncommon.
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### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Common.
34	Insurance proceeds?	Common (net of any cost, including legal fees, for recovery of insurance proceeds).
35	Third party recoveries?	Common (net of any cost, including legal fees, for third party recoveries).

**Damages, Knowledge**

36	Obligation to mitigate damages?	Required by law. Not common to reiterate the obligation in the purchase agreement.
37	Exclusion of consequential damages?	Required by law. Not common to reiterate such obligation in the purchase agreement.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	It is common to include provisions that there is no liability if the buyer had knowledge and such knowledge is established by the disclosures made in the disclosure letter.

**Dispute Resolution**

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, if not contrary to public policy. Egyptian law often chosen.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. National or international arbitration (usually ICC or LCIA), depending on the nationality of the parties.

**Stamp Duty**

41	If stamp duty is payable, is it normally shared?	The sale of shares is subject to a stamp duty tax at the rate of one per thousand paid by the buyer and one per thousand paid by the seller.
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**3.3 Formalities for Execution of Documents****3.3.1 Transfers of shares**

There is no legal requirement for an agreement for the sale of the title to shares to be made in writing. Market practice in the majority of cases is for a share transfer to be documented between the seller and buyer by way of a written share sale/share purchase agreement (SPA).

**3.3.2 Transfers of assets**

In a transfer of assets, written contracts may be required by law or in order to fulfil an applicable registration requirement, including:

- contracts for the sale of land, and
- assignments.

**3.4 Formalities for Transferring Title to Shares or Assets****3.4.1 Transfers of title to shares**

Transfer of title to shares usually involves the following three stages:

- entry into a written SPA for the sale and transfer of the shares
- procuring a certificate issued by the Egyptian Stock Exchange regarding the execution of the transaction, and
- recording the transaction in the shareholders' ledger of the company. If shares are deposited with the central custodian (i.e. Misr for Central Clearing, Depository and Registry) no updates need be made within the shareholders' ledger of the company. However, the Misr for Central Clearing, Depository and Registry will automatically update its records.

### 3.4.2 Transfers of title to assets

An asset purchase agreement will frequently only require signature by or on behalf of the parties. However, it may also be necessary for the agreement or any ancillary documents to be executed.

Other documents which must be executed include:

- real estate sale agreements, and
- powers of attorney.

## 3.5 Merger Formalities

To conclude a merger, certain procedures must be followed and documentation completed and filed with the regulatory authorities.

A draft merger agreement should be prepared, approved and then negotiated among the board of directors of both entities. The agreement must contain, among other things: reasons for the merger; preliminary valuations of the assets and liabilities of the merged companies; the manner by which the shareholders rights will be assessed; and the date chosen on which to base these assessments of assets and liabilities of both merged entities. The merger agreement must also be reviewed by the company's auditors, who will report their findings. The preliminary figures as stated in the merger agreement will be converted into definite figures after being confirmed by the General Authority for Investment and Free Zones.

The board of directors of each entity must call for an EGM to issue its preliminary approval of the merger following the procedure prescribed in the merger agreement, and to authorise the board of directors as well as all relevant external tax and legal advisors to commence preparing the necessary documents and for the requisite procedures.

Following issuance of the EGM preliminary approvals by both entities, all merger documents along with the following documents must be filed with the General Authority for Investment and Free Zones (GAFI):

- financial statements of both entities covering the three previous years, if relevant
- the financial status of both entities as of the date of the merger
- a report on the tax and social insurance status of both entities as of the date of the merger, and
- the fixed assets ledger of both entities.

All relevant documentation, along with the valuations of the assets and liabilities are then inspected in detail by a committee at GAFI. During this phase, meetings and discussions between the external consultants of both entities and GAFI will be necessary to assist GAFI in reaching its conclusions.

The GAFI report expressing its views and/or comments on the merger is then provided to both entities to enable them to act on GAFI's findings and guidelines. GAFI then issues a preliminary approval of the merger.

The final merger agreement is then entered into and the board of directors of each entity will call another EGM to issue a final approval of the merger in line with the final reports and assessments issued by the auditors. The EGM of the surviving entity will also approve the amendment of its articles of association to reflect any changes in share capital and redistribution of shares. The board of directors of the surviving entity will also need to call for an OGM to change or reappoint its board of directors.

The minutes of those EGMs and OGM must then be filed with GAFI for certification along with any merger documents GAFI may require.

The certified EGM minutes and all other documents are filed with the office of the Chairman of GAFI for issuance of a Decree authorising the merger. The Decree is then published in the *Investment Gazette*.

The merger is then annotated on the Commercial Registry of the surviving entity. The merged entity must then be deregistered from the Commercial Registration Office and will consequently cease to exist.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

In early 2005, the Egyptian Parliament approved Law No. 3 of 2005, known as the Protection of Competition and Anti-Monopoly Law. The Law prohibits economic activities that prevent, restrict or damage free competition in Egypt.

A new regulatory authority has very recently been established under the name of the Protection of Competition and Anti-Monopoly Authority (Art. 11, Law No. 3). Law No. 3 does not grant the authority merger control powers, but merely provides for a post-merger, or post-acquisition, notification that must be submitted to the authority within 30 days of the date of completion of the transaction.

Law No. 3 requires both parties to a transaction with an annual turnover exceeding EGP100 million (based on their latest financial statements), to notify the authority upon their acquisition of assets, property rights, usufructs, stocks, or the setting up of unions, mergers, or the joint management of two persons or more. The notification should be submitted on a form provided by the authority along with supporting documents, which include, *inter alia*, documents evidencing completion of the transaction (e.g. transfer of title agreement) and financial statements evidencing that the purchaser's or seller's annual turnover exceeds EGP100 million, as well as an updated extract of the commercial register of the target company. The authority may request additional documentation. Failure to submit a notification is punished by a fine ranging from EGP20,000 to EGP500,000.

### 4.2 Merger Control Overview

Not applicable in Egypt.

### 4.3 Exchange of Competition: Sensitive Information and 'Gun-Jumping' Issues

Not applicable in Egypt.

### 4.4 Anti-Bribery, Corruption and Money Laundering

The Egyptian anti-bribery law is contained in Penal Code No. 58 of 1937. The Penal Code uses sweeping language to encompass any questionable activity or payment or promise of payment or benefit to a public official, and the penalties are relatively severe. The Penal Code punishes persons offering bribes, and also recipients and any intermediaries—with the same sanction. Articles 103—106 of the Penal Code prohibit public officials (the term here includes governmental employees and private sector employees in certain cases); from requesting, accepting or taking for themselves or for another person a promise, a gift or a benefit, from performing or refraining from performing a function of their position, even if they incorrectly believe that the act falls within their official duties; or for violating or abusing the duties of their position with the intent of being rewarded for such an action. In all such cases, this would constitute a crime subject to imprisonment and fines up to the amount equal to the value of the bribe EGP. The Penal Code applies extraterritorially to 'any person who commits outside the country an act which makes him a principal or an accessory in a crime committed wholly or partially in Egypt' (Art. 2(1)). Offerors or intermediaries will be exempted from the sanction if they report the bribery to the public prosecutor or admit payment of the bribe before the court.

In most cases, in practice, the general practice of the public prosecutor is to 'shelf' any investigation and not prosecute where the sums involved are not significant. This is however discretionary to the prosecutor and there is no provision in the Penal Code to expressly support the practice.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

### 4.5.1 Exchange control

The price of foreign currency against the EGP is determined by the forces of supply and demand.

### 4.5.2 Foreign investment approvals and notifications

As a general rule, no restrictions apply to investment by foreigners in Egypt, except in specific sectors (e.g. commercial agencies and commercial importation, and ownership of land in designated areas in Egypt).

### 4.5.3 Industry-specific regulation

There are certain other regulated activities which require regulatory approval, irrespective of the nationality of the investor, such as banking and insurance.

### 4.5.4 Import/export controls

A company with foreign shareholder/management may not carry out commercial importation of finished products for resale purposes. Also, a company with foregoing ownership or with Egyptian ownership but the majority of the indirect shareholders is foreigners may not carry out commercial agency activities.

### 4.5.5 Restrictions on foreign ownership of real estate

Foreign nationals and entities acquiring ownership of vacant land are obliged to commence construction within five years from notarisation of the land purchase agreement (Law No. 230 of 1996 Regulating the Ownership of Built Real Estate and Vacant Land by Non-Egyptians). Should the five-year period lapse without construction works commencing, the prohibition to dispose of the vacant land is extended by the same period as the length of the delay.

Foreigner nationals and entities acquiring ownership of a building in accordance with that Law may also not dispose of the building within five years of the date of the acquisition, but permission to transfer ownership of a building before the lapse of this time-period may be granted by way of a Prime Ministerial decree.

Foreigner nationals and entities are also not permitted to own more than two real estate units in Egypt for residential purposes (for personal use or use by immediate family), and each unit may not be larger than 4,000 square meters. However, the Prime Minister may at his own discretion exempt non-Egyptians from both requirements.

Foreigner nationals and entities may not own agricultural land either (Foreigners' Ownership of Agricultural Land Law No. 15 of 1963).

In addition, under the Sinai Development Law No. 14 of 2014, only Egyptian nationals born to Egyptian parents or Egyptian companies whose capital is wholly owned by Egyptian nationals have the right to own land in certain areas of the Sinai Peninsula, but companies with foreign participation are permitted to invest in certain areas of the Sinai Peninsula, provided that 55% of the share capital is owned by Egyptians.

## 5. Transfer Taxes

The capital gains derived from the disposal of shares in Egyptian companies by Egyptian shareholders are subject to income tax at the normal tax rates (25% on the net annual taxable income up to EGP1 million and 30% on any amount exceeding the EGP1 million). Oil and gas exploration and production companies are subject to a rate of 40.55%. The capital gains derived from the disposal of the shares of shares in Egyptian companies by a non-Egyptian shareholder are subject to 10% tax rate with no deductions.

## 5.1 Acquisition of Assets

No capital gains tax applies to asset acquisitions. However, revenue generated from such transactions become part of taxable income and subject to tax at rates as above.

## 5.2 Mergers

The capital gains derived from a merger are subject to income tax at the normal tax rates (25% on the net annual taxable income up to EGP1 million and 30% on any amount exceeding that figure). Oil and gas exploration and production companies are subject to the rate of 40.55%.

## 5.3 Value Added Tax

All local and imported good are subject to sales tax (VAT) under the Sales Tax Law No. 11 of 1991. A standard VAT rate of 10% applies to all goods. However, certain products are subject to higher rate which can rise to as much as 200%. Exported goods are zero-rated and thus exempt from VAT.

# 6. Employee Issues

## 6.1 Method of Transfer under Local Law

### 6.1.1 Acquisition of shares

On the acquisition of share, employees of a target company remain unaffected and are transferred automatically to the purchaser, as are all terms and benefits of their employment.

### 6.1.2 Acquisition of assets

The acquirer will assume the obligations of the target in relation to the employees. In addition, Egyptian law encompasses the doctrine of 'acquired rights', whereby if a right or benefit has been habitually enjoyed by employees over a number of years, those employees may acquire the right to treat that benefit as part of their employment package. Thus, if bonuses or other benefits are habitually paid, the employer runs the risk that those will be construed as part of the employees' remuneration. Employees will continue to benefit from acquired rights post-closing and the acquirer is not entitled to change, alter or terminate such rights.

### 6.1.3 Mergers

Employees of the merged entity will be transferred to the surviving entity.

## 6.2 Protection against Dismissal

There are three types of employment contracts as follows:

- definite (fixed-term)
- indefinite (permanent), and
- assignment-based (temporary contracts)

The Labour Law No. 12 of 2003 provides that a definite term contract may be renewed, in express written mutually-agreed, terms, for consecutive definite terms without being construed as an indefinite term contract. Nevertheless, if the parties omit to expressly renew (in writing) the definite term contract and continue to perform the same, it will be construed as an indefinite term contract.

In indefinite employment contracts, note that termination will be more difficult and complicated as it will only be considered justifiable termination if the employee is found to be grossly negligent as per the provisions of Article 69 of the Labour Law. If an employer terminates the employee without cause (i.e. not in accordance with Art. 69), this will be deemed an unjustifiable termination and the employee will be entitled to a minimum of two months' salary for each year of service in compensation for the termination.



There are three types of employment contract:

- definite (fixed-term)
- indefinite(permanent), and
- assignment-based contract related to a specific assignment (usually called temporary contracts).

A definite term contract may be renewed by the express mutual written agreement of the parties for consecutive definite terms without being construed as an indefinite term contract. Nevertheless, if the parties omit to expressly renew (in writing) the definite term contract and continue to perform it, it will be construed as an indefinite term contract.

The termination of indefinite employment contracts is more difficult and complicated as it will only be considered justifiable termination if the employee is found to be grossly negligent (Art. 69, Labour Law). If the employer terminates the employee without cause (i.e. not in accordance with Art. 69), this will be considered an unjustifiable termination and the employee will be entitled to a compensatory payment equivalent to at least two months' salary for each year of service.

## France

### 1.1 Overview

Foreign individuals or entities intending to expand their business activities in France must decide on the most appropriate business form. That decision should be based on the key considerations summarised below.

### 1.2 General Legal Framework

The main body of legislation relating to companies in France is the French Commercial Code (Decree 67-236/1967 on commercial companies, as recently incorporated in the Commercial Code by Decree 431/2007). French corporate law is also contained in statutes including the Monetary and Financial Code (*Code Monétaire et Financier*) and Civil Code (*Code Civil*).

### 1.3 Corporate Entities

Companies setting up operations in France can choose from a range of corporate vehicles, including:

- corporations (*sociétés anonymes/SA*)
- simplified corporations (*sociétés par actions simplifiées/SAS*)
- limited liability companies (*sociétés à responsabilité limitée/SARL*)
- limited liability partnerships (*sociétés en commandite simple*), and
- mixed liability companies (*sociétés en commandite par actions*).

This summary is limited to the more common of those forms: corporations, simplified corporations and limited liability companies.

#### 1.3.1 Corporations (SA)

The SA is commonly used for large businesses and listed companies.

The share capital of an SA is divided into shares (*actions*). An SA must have at least seven shareholders (French or foreign individuals and/or legal entities). If the number of shareholders falls below seven, any interested party may request that the Commercial Court (CC) dissolve the company at the expiry of a one-year period counting from the date on which the number of shareholders fell below seven. However:

- it is possible to request the CC to grant a 6-month extension to allow the company to fix the number of shareholders, and
- the company's dissolution cannot be governed by the CC if the situation materialises on the day the court makes its ruling.

The share capital must be at least EUR37,000 (or for listed SAs, EUR225,000). Shareholders' liability for the debts and obligations of the SA is limited to the amount of their capital contributions (i.e. they are generally not liable beyond their shareholding).

SAs are managed either by a general manager (*directeur général*) and a board of directors (*conseil d'administration*); or by a management board (*directoire*) and supervisory board (*conseil de surveillance*). The former is more common. An SA with a board of directors must have between three to 18 directors (the authorised maximum may be higher for mergers).

### 1.3.2 Simplified corporations (SAS)

The simplified corporation (*société par actions simplifiée/SAS*) is the corporate structure most commonly used by foreign investors in France in particular because it can be wholly-owned and is very flexible in terms of organisation of its management structure and shareholder relationships.

The share capital of an SAS is split up into shares (actions) and the shareholders may be French or foreign individuals or legal entities. No minimum share capital is required for an SAS. The shareholders' liability for the debts and obligations of the SAS is limited to the amount of their capital contributions. An SAS cannot be publicly listed.

The only required body is the chairman (president) who can be either a legal entity or an individual. The chairman need not be a shareholder. The by-laws may provide for the appointment of one or several general managers, who may be entrusted with the same authority and powers as that of the chairman to act in the name and on behalf of the company *vis-à-vis* third parties.

### 1.3.3 Limited liability companies (SARL)

The limited liability company (*société à responsabilité limitée/SARL*) is a closed form of company commonly used for small structures or 'family' businesses. The share capital of a SARL is split up into partnership shares (*parts sociales*). A SARL must have at least one and no more than 100 shareholders (French or foreign citizens or legal entities). It may not be listed on a stock exchange. No minimum share capital is required to incorporate a SARL (i.e. the share capital of a SARL may be as low as EUR1 and shareholders' contributions may be made in cash or in kind). The shareholders' liability for the debts and obligations of the SARL is limited to the amount of their capital contributions. Shares are freely transferable between the shareholders, but approval of a majority of the shareholders holding at least half of the shares is required in the event of transfer of shares to a third party (unless the by-laws require a larger majority).

A SARL is run by one or several managers, the number of which is set out in the by-laws. A manager may be a French or foreign national, and must be a natural person not an entity.

## 2. Acquisition Methods

The purchase of a business can take a number of different forms. There are basically three techniques to take control of a business in France, i.e. through a sale of shares, a sale of assets, or through a merger/contribution of assets or shares. The legal and tax framework, however, differs significantly depending on whether the transaction is structured as a purchase of assets, a purchase of shares, a contribution of assets, a contribution of shares, or a merger.

The most common form of acquisition, especially for larger businesses, is the purchase of shares. Transfers of assets are generally preferred for the sale of small businesses. Mergers and contributions are more frequently used for internal reorganisation purposes or in the case of joint ventures. Spin-offs are rarely used due to the French tax regime.

### 2.1 Acquisition of Shares

In a purchase of shares, the purchaser steps into the shoes of the seller and acquires the company with all of its assets and liabilities. It is therefore critical that appropriate representations, warranties and indemnities be included in any sale agreement.

### 2.2 Acquisition of Assets

In the sale of a business as a going concern (known as a *fonds de commerce*), certain assets and contracts are deemed part of the transferred business (which essentially involves clientele, other intangible assets, tangible assets, employment contracts, insurance contracts and commercial leases). Any other assets or contracts to be transferred (e.g. real estate and other contracts) must be specifically identified, or else will be deemed assets to remain with the seller. All liabilities will be deemed to remain with the seller except:

- certain liabilities which are the subject of specific regulation (e.g. in relation to employees, social contributions or the environment), and
- as otherwise provided in the business transfer agreement.

The sale of a business as a going concern will be subject to transfer tax (see **5.1**).

## 2.3 Mergers

A merger consists of the universal transfer of all the assets and liabilities of the absorbed company to the absorbing company. The liabilities are assumed under the terms and conditions specified in the merger contract. For a transaction to be characterised as a merger, the shareholders of the entity which contributes the assets must receive shares from the entity receiving the assets but a limited cash payment is permitted in certain circumstances.

Although not specifically dealt with under French law, in practice there have been mergers between French and non-French companies where foreign assets have been exchanged for shares owned by a French company, where this is lawful under the laws of the foreign jurisdiction. Conversely, i.e. where a French company is absorbed by a non-French company, mergers can be carried out as long as the consent of all French shareholders is obtained, and the foreign country's laws allow such a merger.

That said, most combinations with foreign groups take the form of a share purchase or exchange or, occasionally, a contribution of French assets in exchange for shares in a foreign company. As to EU companies, the Cross-Border Merger Directive,<sup>1</sup> as implemented by French law,<sup>2</sup> provides for specific rules and procedures to facilitate mergers between French and other EU member state companies.

## 3. Negotiation, Signing and Closing

### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical French purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1.	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. Choice of adjustment method generally depends on the calculation methods of the purchase price and the type of business operated by the target. Net debt (or net cash) and working capital adjustments are common. Net assets value adjustments are less common.
2.	Is there a collar on the adjustment?	Collars are not common.
3.	Who prepares completion balance sheet?	Buyer usually has responsibility to ensure target company prepares this, but seller also taking responsibility also seen especially where the seller is continuing e.g. in owner-managed companies with earn-out arrangements.
4.	Is the balance sheet audited?	Not necessarily. Third-party experts used, as designated by the parties, to review closing balance sheet if there is a dispute between the parties regarding calculation of the purchase price adjustment (art. 1592, French Civil Code).

<sup>1</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005.

<sup>2</sup> By the law dated 3 July 2008 and incorporated into the French Commercial Code as Arts L. 236-25–L.236-32.

5.	Is an earn-out common?	Yes, when the sellers continue managing the target company after closing; otherwise fairly uncommon.
6.	Is a deposit common?	Not common.
7.	Is an escrow common?	Yes for the purpose of securing both the purchase price adjustment and the indemnification obligations of the seller under the representations and warranties, specific indemnification cases and breach of covenants.
8.	Is a break fee common?	Uncommon.
<b>Conditions Precedent</b>		
9.	Express Material Adverse Event (MAE) completion condition?	Common. Scope/definition of the MAE is often an issue and subject to negotiation.
10.	Is the MAE general or specific?	Both are seen. Depending on the negotiations, the scope and definition of the MAE are key and often subject to negotiation.
11.	Quantification of MAE?	Uncommon (even if seen sometimes in certain transactions).
<b>Covenants, Access</b>		
12.	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common.
13.	Non-solicit (of employees)?	Common.
14.	Non-solicit (of customers)?	Common. Duration is generally similar to non-compete.
15.	Broad access to books, records, management between sign and close?	Not common. Risk of <i>de facto</i> management by the buyer under French law.
16.	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating disclosure schedules and notification of possible breach between signing and closing common. However it is usually agreed that disclosure must not prevent or limit buyer's right to indemnification. Purchaser's right to walk away where material update/breach between signing and closing may be negotiated (issues linked to MAE).
17.	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax representations and warranties and specific indemnification included in the general representations and warranties. However, also common to have specific tax indemnity when a specific tax risk has been identified in the due diligence and specific indemnification period aligned on applicable statute of limitations for tax matters.

## Representations and Warranties

- |     |   |   |
|-----|---|---|
| 18. | Materiality in representations – how is it quantified (e.g. by a \$ amount)?      | Materiality qualifiers commonly used but often not quantified (other than specific warranties e.g. contract value or representations regarding actions or events in the interim period).  |
| 19. | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers are common and usually negotiated. Often limited to the actual knowledge of a limited group of persons including the management and individuals who handled the due diligence process on seller/target side. |
| 20. | Is a warranty that there is no materially misleading/omitted information common?  | Common.   |
| 21. | Is disclosure of data room common?  | Uncommon.   |

## Repetition of Representations and Warranties

- |     |   |  |
|-----|---|--|
| 22. | Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?  | Repetition of the representations and warranties at completion is common. Bring-down certificates at completion common.                |
| 23. | What is the applicable standard? True in all material respects? Material Adverse Effect standard?   | True and accurate in all material respects is common but for fundamental representations it must be absolutely true. Often negotiated. |
| 24. | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon.  |

## Limitations on Liability

- |     |  |   |
|-----|--|---|
| 25. | What is the common cap amount (as a percentage of purchase price)?   | 10%–30% for general cap. Key warranties and/or specific indemnities are usually not capped or capped at 100%.   |
| 26. | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Usually warranties only.  |
| 27. | What are the common exceptions to the cap?   | Key representations and warranties often excepted (e.g. title, ownership, authority, good standing, etc.) Often tax and specific areas of concern (treated as specific indemnities) depending on key findings in due diligence also expected with specific, separated caps or no cap. |
| 28. | Is a deductible or basket common?  | Both common (50/50).  |
| 29. | Is a <i>de minimis</i> common?   | Common.   |

30.	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	From 12–36 months for general representations and warranties except for tax, social security and environmental matters or key representations and warranties/specific indemnities for which statute of limitations usually applies (+x months). Exception for breach of competition laws/compliance matters to be considered.
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31.	Is warranty insurance common?	Uncommon.
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#### Reliance

32.	Do financiers seek to rely on purchaser's due diligence reports?	Becoming common.
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#### Set-offs against Claims

33.	Is a set off against claims for tax benefits common?	Common
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34.	Insurance proceeds?	Common.
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35.	Third party recoveries?	Common.
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#### Damages, Knowledge

36.	Obligation to mitigate damages?	Common.
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37.	Exclusion of consequential damages?	Common.
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38.	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Common to provide for a representation from buyer that, except as disclosed in the purchase agreement, it is not aware of any breach of representations at time of closing.
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#### Dispute Resolution

39.	Does local law allow for a choice of governing law? What is the common governing law?	Yes, choice of governing law allowed but generally accepted market practice that French law applies for French target companies.
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40.	Is litigation or arbitration more common? If arbitration, where?	Both are common (50/50). Arbitration common with foreign buyers/sellers and local courts are common with local buyers/sellers.
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#### Stamp Duty

41.	If stamp duty is payable, is it normally shared?	Stamp duty applies. Usually borne and paid by buyer but shared payment can be negotiated (yet both parties remain liable for payment towards the French tax authorities). Stamp duties are equal to 0.1% of portion of purchase price paid to each seller for the transfer of shares in French corporations (SA) or French simplified corporations (SAS) and 3% of the portion of purchase price paid to each seller exceeding EUR23,000 for the transfer of shares in French limited liability companies (SARL).
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## 3.2 Formalities for Exchange of Documentation

### 3.2.1 Transfers of shares

See **3.3.1**.

### 3.2.2 Transfers of assets

See **3.3.2**.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

The formalities relating to the sale of shares vary depending on the corporate form of the company. For SAs and SASs, share transfers are evidenced by a transfer form and the registration of the transfer in that entity's share transfer register and on the shareholders' individual accounts. Shares in certain other types of company (e.g. SARL), partnerships and limited liability partnerships are transferred by means of a share transfer agreement which must be served on the company and filed with the relevant commercial court.

### 3.3.2 Transfers of title to assets

The sale of a business as a going concern in France is subject to cumbersome formalities: the transfer agreement needs to be in writing and in French, and filed with the French tax administration; two successive public notices must be made announcing the sale to the public:

- one in a local newspaper within 15 days of the date of the sale, and
- the second, in the *BODACC* (which is the national official bulletin for civil and commercial announcements) within 15 days of the publication in the local newspaper.

Creditors have a window of 10 days from the second notice to object to the transfer. The whole process can take up to five-and-a-half months if the tax authorities have any objections.

The purchase price is generally placed into escrow until the deadline for objections passes (if the purchaser does not ring-fence the funds in this way, it risks exposure to liability to pay the purchase price twice: once to the seller and again to opposing creditors). Specific formalities are also required to make the transfer of certain assets enforceable against third parties.

Additional formalities for sales of businesses as going concerns (and potentially for contributions in kind) apply to businesses located in areas designated as subject to special laws designed to protect and conserve local traditional skills and craftsmanship, (in a *périmètre de sauvegarde du commerce et de l'artisanat de proximité*). For those exceptional/specially regulated areas, notice of the contemplated sale must be given in advance by the seller to the local town council which will have a pre-emption right (for a period of two months from the notification), by which it can acquire the business. If the town administration does not exercise its pre-emption right within that two-month window, approval of the transaction is deemed granted and the purchaser will be entitled to proceed with the transfer to the chosen buyer. If the town administration exercises its pre-emption rights and acquires the business, it must re-sell the business within one year to a purchaser selected on the grounds of its ability to preserve the local commercial activity. If the sale is not notified in a timely manner to the relevant town administration, it may be challenged by any interested third party and declared invalid by a court. The applicable statute of limitations is five years as of the transfer for those specialised cases.

## 3.4 Formalities for Mergers

Although most types of company in France may merge, specific provisions have been enacted only for SAs, SASs and SARLs.

The merger must be authorised by a vote of the shareholders of both companies achieving the statutory majority required to change the by-laws. The following voting majorities will be required.



Company type	Proportion of majority vote of shareholders (present or represented) required
Corporations (SAs)	at least 2/3 of the shares
Limited liability companies (with either one or several shareholders) (SARLs)	3/4 of the share capital
Simplified corporations (with one or several shareholders) (SASs)	as set out in the by-laws

If the absorbed company is a wholly-owned subsidiary of the absorbing company, the merger can be decided only by the sole shareholder of the absorbing company (see simplified merger procedure described below).

If the absorbed company is partially owned by the absorbing company, the latter may not receive its own shares in exchange for the assets it receives (except under very limited conditions). In those cases, it can issue shares only to other shareholders in the absorbed company.

A wholly-owned subsidiary may be merged into its parent company under a simplified procedure prescribed by French law.

The unanimous vote of the shareholders is required if their obligations as shareholders will become more onerous as a result of the merger. The approval of the majority of bondholders, if any, of the absorbed company must also be obtained, except where the bonds are to be repaid.

A draft merger agreement must be approved by the companies participating in the merger, filed with the Registry of Commerce and published to give advance notice of the proposed merger to creditors.

One or more appraisers (*commissaires à la fusion or commissaires aux apports*) must be designated by the commercial court on the request of the merging companies to prepare a report on the merger terms and certify that the valuations of the companies or the assets contributed under the merger, are proper. However, the shareholders may decide to waive such designation by a unanimous vote.

Where a simplified merger (absorption by a parent company of its wholly-owned subsidiary) appointment of appraisers is not mandatory.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

French merger control is governed by Articles L.430-1 to L.430-10 of the Commercial Code and Decree 2002-689 of 30 April 2002.

The merger control regime has been substantially modified as a consequence of the adoption on 4 August 2008 of the Law on Modernisation of the Economy (LME). Under this law, the regulator for merger control review became the competition authority (*autorité de la concurrence*), replacing the Minister of Economy who had jurisdiction over the whole process before that date. Instead, reviewable mergers are now notified to the competition authority (CA) which is responsible for assessing a merger's competitive effects on the relevant market, while the Minister is empowered to be involved, at his discretion, after a Phase II (indepth investigation of the transaction) looking at issues from more of a general interest perspective: e.g. the state of the relevant industry at the time; the competitiveness of companies in that market internationally; and/or any effects the merger might have in terms of the creation or preservation of jobs in France. If any of those areas are affected, the Minister has the final say as to whether the merger should be cleared or prohibited.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including timetables for clearance) in a typical French merger proceeding, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
Timetable		
2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p><i>Phase I</i>: 25 working days (if commitments are offered, extended by a further 15 working days and additional 15 working days at the request of the parties).</p> <p><i>Phase II</i>: additional 65 working days (if commitments submitted less than 20 days before the deadline for a decision, the review period is extended by 20 working days, a further extension of 20 working days if requested by the parties).</p> <p>Government intervention: the Ministry of Economy may within 25 working days of issuance of the Phase II decision, decide to review the case from a general interest perspective going beyond the mere competitive assessment made by the competition authority.</p>

### 4.2.1 Scope of merger control

Jurisdiction will be assumed by the French authorities in international mergers where the following thresholds are met, irrespective of the nationality of the parties and/or 'centre of gravity' of the transaction (i.e. the authority will not look at the location of the business headquarters or the corporate documents etc. If the turnover thresholds are met, a notification will be required: e.g. establishing a joint venture in Zimbabwe will be notifiable if the turnover of the two parent companies meet the thresholds). The French authorities may block a merger or impose conditions if they find that the proposed merger is likely to significantly restrict competition particularly by creating or strengthening a dominant position in the French market.

Transactions that have all three of the following characteristics will be subject to review by the CA:

- the parties to the merger have a combined annual worldwide turnover, exclusive of taxes, in excess of EUR150 million
- the French annual turnover, exclusive of taxes, achieved individually by each of at least two parties to the merger exceeds EUR50 million
- the European merger control thresholds are not met.

In addition, there are specific filing thresholds in connection with concentrations within the retail sector or in overseas territories.

#### 4.2.2 Retail

Concentrations in the retail sector are subject to French merger control rules when at least two of the parties operate one or several retail shops and:

- combined annual worldwide turnover, exclusive of taxes, of all the parties to the transaction exceeds EUR75 million, and
- annual turnover, exclusive of taxes, achieved individually in France in the retail sector, by at least two of the parties, exceeds EUR15 million.

Concentrations in overseas territories are subject to French merger control rules when at least one of the parties carries out all or part of its activity in one or several overseas territories (*Départements d'Outre-Mer*, DOM) or in the territory of Mayotte, Saint-Pierre-et-Miquelon, Saint-Martin and Saint-Barthélemy and:

- combined annual worldwide turnover, exclusive of taxes, of all the parties to the transaction exceeds EUR75 million, and
- the annual turnover, exclusive of taxes, achieved individually in at least one of the DOMs or overseas territories concerned, by at least two of the parties, exceeds EUR15 million (EUR5 million for the retail sector).

In measuring these turnover thresholds, it is necessary to also include the turnover of undertakings linked to the undertakings participating in the transaction – whether because of a parent–subsidiary relationship, or because of controlling interests, interlocking directors, close financial ties with veto rights, or other similar relationships. On the seller's side, however, only turnover of the undertaking or branch of activity that is sold (the target) is taken into consideration. With joint ventures, the turnover of both parties to the joint venture must be taken into account.

#### 4.2.3 Procedure

Notification of mergers meeting the above thresholds is mandatory. The transaction must therefore not be consummated prior to clearance by the CA and should therefore be filed promptly with the CA – as soon as they are able to present a sufficiently final agreement enabling the assessment of the matter (upon signing a letter of intent, a memorandum of understanding, or if a public offer has been announced). There is no specific deadline for the notifying party to file a notification but the CA must respond with its decision within the timescales noted below.

Notifications are filed by the individuals or undertakings wishing to acquire control of an independent undertaking. For joint ventures, the parent companies must jointly notify the transaction. In addition, a total or partial referral of a merger to the French authorities by the European Commission constitutes a notification.

The CA notification must contain detailed corporate and market share information as well as financial documents.

The review period by the CA is as follows:

- *Phase I investigation*: the regulator must rule within 25 working days of receipt of a complete notification. If commitments are offered by the parties, this period is extended by another 15 working days
- *Phase II investigation*: where concentrations raise serious competition concerns, the regulator may open a Phase II investigation and proceed to an in-depth review. It will have 65 working days to issue its decision from the opening of Phase II. If commitments are offered by the parties leaving 20 days or fewer before this period is due to end, the timeline extended by another 20 working days.

In addition, the notifying parties may request a suspension of the review (stop the clock) for up to 15 working days in Phase I and 20 working days in Phase II.

#### 4.2.4 Remedies – orders and commitments

At the end of the Phase I investigation, the CA has the power either to authorise the merger unconditionally or subject to commitments by the parties. The Minister of Economy may step in within five days after the issuance of a Phase I decision to request a Phase II investigation to be opened.

In the Phase II investigation, the CA makes the final decision as to whether the merger should take place or not from a competition perspective. The CA has power to prohibit a merger outright or to authorise the transaction subject to conditions, and may require the parties to submit reports at certain times post-completion to monitor adherence to any conditions imposed. The regulator may also require the parties to modify the transaction, and take every measure necessary to re-establish a sufficient level of competition in the market, in which case, commitments from the parties as to their future conduct will sometimes be required. Within 25 working days of the Phase II decision of the CA, the Minister of Economy may intervene and reverse the decision of the CA based on general interest considerations (other than competition considerations).

The competition authority has the power to fine parties where the parties:

- fail to notify the transaction to the CA
- fail to provide the CA with key information
- provide inaccurate information
- fail to abide by an order, commitment or injunction, or
- implement the transaction prior to obtaining the required authorisation.

Fines will amount to 5% of the notifying parties' turnover in France, plus 5% of the target's turnover in France if the CA considers that it is appropriate. In the event of lack of notification, the CA may order the parties to file the notification, and if they do not, order a demerger.

#### 4.2.5 Fees

No specific fees need to be paid with respect to filing with the French competition authorities.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

The exchange of competitively sensitive information would qualify as an anticompetitive agreement under French law if the parties to the transaction are competitors. In such cases, the parties may be exposed to a fine of up to 10% of their worldwide turnover. Gun-jumping may give rise to a fine of up to 5% of the turnover of the notifying parties (see **4.2.4**).

The broad principles contained in Appendix B on Information Exchange/Gun-Jumping are therefore relevant under French law.

### 4.4 Anti-Bribery, Corruption and Money Laundering

In France, as in many other countries, it has become standard to include Anti-Bribery, Corruption and Money laundering issues into the M&A process. Depending on the specific risk (e.g. country risk or industry risk) associated with the target further due diligence may be performed and specific compliance clauses (indemnifications and warranties) negotiated. Following the acquisition existing compliance processes can be integrated. The increasing importance of compliance issues is largely driven by the Anti-Bribery law, which is as far-reaching and heavily enforced as, for example, the FCPA.

See Appendix D in relation to FCPA and UK Bribery Act which may apply to activities in France.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

In principle, foreign investments can be made freely in France, with the exception of operations taking place in any sector of activity in which state-control remains effective (Art. L. 151-1, Monetary and Financial Code). Those sectors are specified in a Decree dated 30 December 2005, as amended by a more recent Decree dated 14 May 2014 and are detailed in **4.5.2**.

### 4.5.1 Exchange control

Not relevant in France; see above.

### 4.5.2 Foreign investment approvals and notifications

#### ***Prior authorisation***

The prior authorisation of the Treasury Department of the Ministry of Economy (*Direction Générale du Trésor et de la Politique Economique*) must be obtained for investments in any activity in France, which (even if only occasionally) participate in the exercise of state authority or is an activity which:

- is likely to jeopardise public order, public safety or national defence interests, or
- is related to research, manufacture or the sale of arms or weapons, munitions or explosives.

In addition to those defence sector activities, activities in relation to private security, cryptology products and services and double-use products or technologies must also be pre-notified to the Treasury Department of the Ministry of Economy (under the 2005 amendments).

A third category of activities requiring special treatment by pre-notification, covers activities considered necessary to protect French strategic interests as a matter of French public policy, or activities related to matters of public security or national defence (added in 2014). Such strategic interests include:

- provision of electricity, gas, hydrocarbons or energy sources
- provision of water
- operation of transportation networks and services
- operation of electronic communications networks and services
- operation of an establishment that is strategic to French national defence, and
- protection of public health.

The Ministry of Economy has two months from the date of notification of a complete application to grant or deny its approval. If it makes no decision by that deadline, authorisation will be deemed granted.

Authorisation is also deemed granted if the investment is between companies belonging to the same group (i.e. companies in which more than 50% of the share capital or voting rights are held directly or indirectly by the same shareholder), unless the objective of the investment is to transfer all or part of a line of business out of France (as listed in the Decree of 30 December 2005).

The Ministry of Economy may grant its authorisation subject to conditions (to ensure the investment will not negatively impact national interests). These conditions generally cover:

- requesting a guarantee from the investor that it will ensure the proposed activities are pursued in such a way as to preserve industrial capacity and the research and development potential and know-how of the shareholders of the French target company guarantying the adequacy of supply, and/or

- ensuring the French target company will still be able to fulfil its contractual obligations, either as party or sub-contractor to a government contract, or, more generally, any contract related to security, national defence, research, manufacture or sale of weapons, munitions, powder or other explosives.

If this activity is merely ancillary to the other activities of the French company, the Ministry of Economy may make authorisation conditional upon the transfer of the ancillary activity to an independent third party.

The Ministry of Economy may refuse to grant authorisation (as long as the refusal is motivated), where:

- there is a significant risk that the investor will commit an offence, or
- the implementation of the conditions mentioned above would not be sufficient to preserve France's national interests because it would appear that:
  - the continuation of the activities, industrial capacities, and research and development of the industrial entities or of the shareholders' know-how would not be preserved
  - the adequacy of supply would not be guaranteed, or
  - the performance of contractual obligations would be compromised.

If the investor fails to request prior authorisation from the Ministry of Economy, or consummates its investment despite a refusal from the Ministry, or fails to comply with the conditions set out by the Ministry, the latter may issue an injunctive order ordering that the investor:

- reinstate the *status quo*
- discontinue the investment, or
- modify certain details of the conditions of the investment.

If an investor fails to comply with such an injunction, it may face a fine in the amount of twice the sum of the illegal investment, and the validity of the investment and of all ancillary actions or agreements may be challenged.

Right at the very beginning of the process, it may be advisable for investors to directly request the Ministry of Economy whether the investment falls within the scope of activities subject to prior authorisation. The Ministry will have two months to respond to any such preliminary inquiry (but if it makes no response in that period, the investor is not permitted to assume it needs no prior authorisation; the investor should assume that prior notification is needed).

### ***Declaration***

Certain transactions need only a 'declaration' to the Treasury Department of the Ministry of Economy (rather than an application for prior authorisation). The following transactions are in this category:

- incorporation of a French company by a foreign company or a non-resident individual
- acquisition of all or part of a line of business of a French company by a foreign company or a non-resident individual, or
- real estate acquisitions executed by foreign investors in France if the amount of the operation exceeds EUR1.5 million.

The declaration must be addressed to the Ministry of Economy on the date of completion of the investment. This is usually the date of execution of a binding agreement; of publication of the bid or exchange offer; or when an asset is actually acquired. The date of the first of those will determine the date on which the declaration should be sent.

Failure to comply with this obligation will be fined (EUR750).

Generally, foreign investors divesting their French investments must also file a reporting declaration with the Ministry of Economy.

#### 4.5.3 Industry-specific regulation

See 4.5.2.

#### 4.5.4 Import/export controls

This is not applicable in France as foreign investments can be made freely in France, with the exception of operations taking place in any sector of activity in which state-control remains effective – see 4.5.2.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

The registration taxes applicable to the acquisition of shares are as follows:

- transfers of shares in an SA or SAS are subject to 0.1% transfer tax (unless the company is a real estate company in France)
- the sale of shares in a SARL, *société civile* or *société en nom collectif* is subject to 3% transfer tax (with the same exception for real estate), reduced proportionately by an amount corresponding to the ratio existing between EUR23,000 and the total number of shares (e.g. the sale of 100% of the shares will qualify for a global tax rebate of EUR23,000)
- transfers of shares (except in relation to real estate) may be exempt when the buyer belongs to the same group as the seller within the meaning of Art. L. 233-3, Commercial Code
- the sale of unquoted shares in a company qualifying as a real estate company in France, i.e. the assets of which mainly (more than 50%) consist of real estate located in France, is subject to 5% transfer tax with no cap transfer tax is assessed on the sale price or fair market value of the shares, whichever is higher. The transfer tax is usually borne by the buyer but both parties are jointly and severally liable for its payment.

### 5.2 Acquisition of Assets

The sale of a going concern is subject to registration tax as follows:

#### Registration tax thresholds for sales of going concerns

Sale price (or fair market value) (EUR)	tax rate
Portion of price below 23,000	0%
Portion of price between 23,000–200,000	3%

Portion of price between above 200,000 5%

The registration tax is assessed on all the elements which make up a going concern under French law, including intangible assets such as goodwill and trade marks and tangible assets such as equipment. The threshold applies on the aggregate amount of the fixed assets transferred.

Inventory also forms part of the assets of a going concern but its sale as part of a going concern is treated differently and is only subject to VAT (at the rate of 20%), which is recoverable by the purchaser. Under certain conditions, the transfer of inventory as a part of a going concern can benefit from a VAT exemption regime (see below).

The sale of goodwill alone is subject to the same registration taxes as the sale of a going concern.

The sale of a patent is subject to a flat registration tax of EUR125, regardless of how it is sold (as part of a going concern or separately), provided the transfer does not involve a transfer of goodwill.

The sale of business assets (equipment) may be subject to the same transfer tax if the agreement allows the purchaser to take over the same activity as that previously carried out by the seller.

Registration tax is assessed on either the sale price or the fair market value of the assets transferred, whichever is higher. The tax is usually borne by the purchaser but both parties are jointly and severally liable for its payment. Registration tax is a deductible expense for corporate tax purposes.

The sale of assets which do not involve a going concern, such as real estate and shares, is subject to registration tax, at a rate dependent on the nature of the assets, as follows.

#### Registration tax rates for real estate assets sold as part of a going concern

##### Tax rate

5.09% or 5.81%	for buildings >5 years	excluding notary fees; tax % varies depending on the municipality where the real estate is located
0.71498%	on building plots and new buildings (< 5 years)	
flat rate of EUR125	where buyer intends to build/rebuild the land/property within 4 years of the deal	

## 5.3 Mergers

In mergers or spin-offs, registration tax at a rate of EUR375 (if the share capital of the beneficiary entity does not exceed EUR225,000 after the merger or spin-off) or EUR500 (if the EUR225,000 amount is exceeded) is due at the time of registration, which must be within one month of the dissolution, merger or spin-off.

The portion of the contribution which is compensated by assumption of liabilities is treated as an outright sale and is therefore subject to registration tax applicable to the fixed assets so contributed (see 5.1). The parties may freely set-off the assumption of liabilities against assets the assignment of which is not subject to registration taxes.

Mergers and contributions may, under certain conditions, qualify for a special tax regime in France with respect to both registration tax and corporate income tax. This regime is voluntary and can be beneficial but requires analysis on a case-by-case basis.

This can also apply in circumstances where a company has been dissolved (without having gone into liquidation) – e.g. where a sole shareholder has decided to dissolve its subsidiary.

To benefit from the favourable regime the companies must be subject to corporate income tax.

A favourable transfer tax regime also applies to spin-offs and partial contributions of assets where the assets contributed constitute a complete line of business. A registration tax of EUR375 or EUR500 is payable even if liabilities are also contributed. The same tax registration duty applies to dissolution without liquidation, except that the tax rate applied is 0.7% in real estate transfers.



## 5.4 Value Added Tax

Transfers of inventory included in the assignment or contribution of a group of assets and liabilities will not trigger any VAT under certain conditions:

- where the purchaser continues conducting the same activity, and
- where the assignment is between two parties liable to pay VAT.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

Employment contracts automatically transfer with the transfer of a business (Art. 1224-1, Labour Code). However, the French Supreme Court has ruled that the acquisition of shares alone, is not a 'business transfer' for these purposes, and employees therefore remain with their current employer under the same terms and conditions (and do not transfer i.e. they remain, unaffected, with the target company which is being acquired by the buyer).

#### 6.1.2 Acquisition of assets

If in an acquisition of assets:

- the transferring business is an autonomous entity with its own activities, equipment, goodwill and inventory, and
- it continues as such after the transfer

that business's employment contracts will automatically transfer to the new employer (Art. L. 1224-1, Labour Code).

#### 6.1.3 Mergers

If companies merge, employment contracts effective at the time of the transfer automatically transfer to the new entity (Article L. 1224-1, Labour Code).

#### 6.1.4 Transfer of business

Labour Code Art. L.1224-1 provides that 'Whenever a change in the legal situation of the employer occurs, such as a successor in interest, sale, merger, transformation of the going business, or incorporation of the business, all employment contracts in effect on the day of the change remain in effect'.

Case law of both the European Court and the French Supreme Court has evolved considerably over the last few years on the interpretation of this provision. Under current case law, for the transfer of employment contracts to operate with immediate effect, no legal connection is required between the successive employers. The automatic transfer of the employment contracts will apply wherever the transferred business is:

- an autonomous entity with its own activities, equipment, goodwill and inventory, and
- continues as such after the transfer.

However, the transfer applies only to those employees primarily dedicated to the transferred activity and whose employment contracts are in effect at the time of the transfer.

As a result, the consent of employees who are not primarily dedicated to the business should be obtained prior to their transfer. For those employees, tripartite agreements (between the two companies and employee) can be entered into, under which the first employment contract is terminated and the conditions of employment with the new employer are agreed upon.

How Article L.1224-1 of the Labour Code is to be applied when the transfer concerns service activities (e.g. where a company sub-contracts cleaning, restaurant, freight handling or other services to an independent specialised company), is more difficult to determine. Indeed, the execution and/or termination of such service agreements (e.g. when outsourcing the service to another service provider) need not necessarily entail the automatic transfer of the employees of the service company to the new service provider where there is no simultaneous transfer of tangible or intangible assets and no provision to the contrary in the collective bargaining agreements.

That said, according to recent French case law, a transfer of assets is not always necessary to entail the automatic transfer of employees.

## 6.2 Approval or Consultation Requirements

The legal representative of the company must inform and consult with the company's works council prior to any modification in the economic or legal structure of the company (e.g. merger, sale or acquisition of assets or shares, or an important modification in production structures). The works council must also be consulted whenever the company contemplates purchasing at least 10% of the capital of another company and whenever another company purchases at least 10% of the company's capital, if this triggers a change of control of the company.

A company legal representative must inform the works council as soon as he or she becomes aware of the fact that a public offer is being filed to purchase or exchange the company's shares. He or she must also inform and consult with the company's Health and Safety and Working Conditions Committee (CHSCT) in any project entailing an important modification of the employees' working conditions. The CHSCT's opinion must be given before the works council's vote on the project.

Although this requirement may seem awkward for a foreign purchaser who wishes to keep the acquisition or merger confidential, the timing of the consultation is important. The works council must be informed and consulted before any final decision is taken by the management of the company. For example, in the case of a merger between two SAs, the consultation must take place before the adoption of the draft merger agreement by the boards of directors of the two. From a practical standpoint, the consultation must take place before any binding agreement or letter of intent is signed, even at the level of the parent company, if that agreement involves France and French management is aware of it.

The prescribed consultation process involves supplying the works council with detailed written information (an 'information note') on the contemplated transaction and its consequences for the employees. That information must be sufficiently detailed to enable the works council to give its opinion (which will not be binding on the company) on the proposed transaction. From a practical point of view, all relevant information regarding the contemplated transaction should be provided, including:

- reasons for the proposed transaction
- the intended date for completion of the transaction
- information on the employees affected by the transaction (number, status, etc.), and
- the legal, social, economic and financial consequences of the transaction for the employees affected.

The CHSCT should be provided only with information regarding the contemplated modification of the employees' working conditions, the potential effects on employee's health and safety, and measures the management is contemplating to reduce negative impacts on employees.

Although the works council cannot prevent the transaction (except if the purpose of the transaction is to purposely deny the employees their rights, e.g. their right to an employment protection plan – in other words, except if the transaction is a fraudulent 'sham'); it can apply for a court order to have the transaction suspended until the information and consultation obligations are fulfilled, and a daily penalty may be incurred by the company throughout this period.

Works councils can appoint experts (e.g. a chartered accountant) to evaluate the information provided by the company. In theory the works council will shoulder the expert's fees; but in practice the works council may insist that company's management covers those fees.

Failure to consult with the works council (or improper consultation with it) could expose the head of the company to criminal penalties (fine of up to EUR3,750 and/or imprisonment of up to one year for a first offence). The company itself can be liable for a fine of EUR18,750 for a first offence. In addition, the works council may claim damages. The same criminal sanctions apply to the legal representative of the company and the legal entity itself in the absence of the provision of information to the existing works council, the group works council, or the European works council.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

The transfer of business is not in itself a valid reason for termination of employees. However, it is possible to terminate employment contracts prior to or after the transfer on separate personal or economic grounds.

Where the purchaser intends to reorganise the business and terminate the employment of employees, the costs of terminating those jobs should be taken into account. Those costs will depend on the employees' seniority in the company; their age; on any collective bargaining agreement applicable to the company; as well as the terms of individual employment contracts.

In redundancies, specific but different procedures must be complied with depending on whether the company has more or less than 50 employees and whether the number of employees affected by redundancy is more or less than 10. Collective lay-offs (involving at least two employees) in particular require the involvement of the works council and, in many cases, the local labour authorities. The redundancy of employee representatives requires the prior authorisation of the Labour Inspector. When a company contemplates dismissing at least 10 employees in any 30-day period, it must implement an employment protection plan (formally known as a 'social plan') granting additional benefits to those employees whose dismissal is under consideration.

### 6.3.2 Penalties

Terminations with the intent to avoid the automatic transfer of an employee will be considered as ineffective and the employment contract therefore would continue to exist. The employee can either ask for either:

- reinstatement with the new entity, or
- damages for abusive termination by their former employer.

Both the former and the new employer can be liable where there is proof of collusion or if both caused a prejudice to the employee due to their successive actions.

# Germany

## 1.1 Overview

Germany's commercial appeal is manifold: it is the world's fourth largest economy and Europe's central economic driver. Germany was also the world's leading exporter between 2003 and 2008. With an industry focus on production, industrial goods and services, the country has an excellent logistical and technological infrastructure, a highly skilled workforce and a stable economy.

Germany is a federal republic with a parliamentary democracy and a bicameral legislative system, which means there are effectively two levels of government: Federal (*Bund*) and State (*Länder*), there being 16 largely autonomous states which together make up the 'Federal Republic of Germany'.

## 1.2 General Legal Framework

The acquisition of companies and businesses in Germany is predominantly governed by the Civil Code (BGB) and the Commercial Code (HGB). The acquisition of shares in corporations, such as the limited liability company (GmbH) or the stock corporation (AG), is further regulated by the Limited Liability Company Act (GmbHG) and the Stock Corporation Act (AktG). The acquisition of securities that are admitted to trading in organised markets is furthermore subject to the rules of the Securities Acquisition and Takeover Act (WpÜG) and the Securities Trading Act (WpHG).

German law makes a clear distinction between the contractual obligation to transfer the ownership in shares or assets (e.g. sales contract) on the one hand; and, on the other hand, the actual *in rem* transfer of ownership (e.g. assignment or other act of disposal). The latter requires a further 'agreement' between the transferor and the transferee to effect the transfer of legal ownership. In practice, however, the sale and the transfer of shares in a company or the assets making up a business often occur on the basis of one sale and transfer agreement, pursuant to which the sale agreement (i.e. the obligation to transfer the company or the business) becomes effective on signing and the actual transfer of ownership becomes effective later on the fulfilment of certain conditions precedent (typically payment of the purchase price or the closing and in the case of limited partnership interest the registration of the transfer in the commercial register).

## 1.3 Corporate Entities

The vast majority of German companies exist in the form of a limited liability company (GmbH). However, German law also offers a number of other legal forms, including stock corporations (AG) and partnerships (*Personengesellschaften*).

### 1.3.1 Limited liability Companies (GmbH)

German limited liability companies (*Gesellschaft mit beschränkter Haftung*/GmbH) are regulated by the GmbHG. They may be formed by one or more shareholders. The minimum share capital of a GmbH is EUR25,000. Beyond the duty to pay-in the share capital subscribed for, the shareholders are in principle neither liable for obligations of the GmbH nor required to pay-in any additional capital.

The corporate governance of the GmbH is structured as a two-tier system, consisting of one or more managing directors on the one hand and the shareholders' meeting on the other hand. Such a two-tier structure, however, is not mandatory. The articles of association may provide for the existence of a third tier, such as a supervisory board or an advisory board. Sometimes, the existence of a supervisory board is mandatory, e.g. if the GmbH has more than 500 employees.

The managing directors are responsible for the management of the company and its representation *vis-à-vis* third parties. Their signatory power is unlimited *vis-à-vis* third parties and can only be restricted by granting a joint signature power to be exercised together with another managing director or a registered representative (*Prokurist*). In addition it is possible to implement internal restrictions, such as approval requirements regarding certain transactions. However, such restrictions generally do not apply *vis-à-vis* third parties, who may rely on the managing director's unrestricted signatory power unless they are aware of the internal restrictions.

In spite of the rather far-reaching powers of managing directors, the ultimate authority in a GmbH remains with the shareholders who are not only entitled to collectively decide on the appointment and removal of the managing directors but also to instruct them on all issues relative to the management of the company. Further, the shareholders' meeting has competence to make decisions for the company with regard to certain fundamental issues provided for by law or the articles of association, such as the amendment of the articles of association, increase or decrease of stated capital, the use of profits, liquidation or transformation of the company, etc. Nevertheless, the shareholders do not have authority to represent the GmbH *vis-à-vis* third parties.

### 1.3.2 Stock corporations (AG)

German stock corporations (*Aktiengesellschaft/AG*) are regulated by the Stock Corporation Act (AktG). They may be formed by one or more shareholders and the minimum share capital is EUR50,000.

Beyond the duty to pay-in the share capital subscribed for, the shareholders are in principle neither liable for obligations of the AG nor required to pay-in any additional share capital. Shares of an AG can be issued either as par value shares or as non-par value shares. In each case the minimum nominal amount or pro rata amount is EUR1. Furthermore, the shares can be issued either as bearer shares or as registered shares with different consequences for the transfer of the shares depending on which route is chosen.

The governance of the AG is structured as a mandatory three-tier system, consisting of the management board, the supervisory board and the shareholders' meeting.

The management board is responsible for the management of the AG and its representation *vis-à-vis* third parties. It consists of one or more members. Depending on the number of employees, it may be required to have a board member responsible for employment affairs. Unless otherwise provided for by the articles of association, all members of the management board represent the company jointly. Similar to a GmbH the signatory power of the management board is unlimited *vis-à-vis* third parties. However, a significant difference between a GmbH and an AG is the greater level of independence of the management board, which generally cannot be restricted by the supervisory board or the shareholders' meeting.

The management board is supervised by the supervisory board. The supervisory board consists of at least three members. Depending on the number of employees, it may be necessary for a certain number of members of the supervisory board to be elected by the employees. The supervisory board is responsible, among other things, for the appointment and removal of the members of the management board and the representation of the AG *vis-à-vis* the members of the management board. Furthermore, the articles of association or the supervisory board must implement an approval catalogue. This is a document setting forth the types of transactions for which the management board requires the prior approval of the supervisory board.

The shareholders' meeting appoints and removes the members of the supervisory board (unless they are to be elected by the employees) and is competent for decision-making of the company with regard to certain matters provided for by law or the articles of association, including the appropriation of profits (dividend distributions, retention of earnings) as well as fundamental decisions regarding the constitution (e.g. amendment of the articles of association) and the existence of the company (dissolution of the company). Even though management decisions, in principle, are made by the management board and only subject to possible approval requirements by the supervisory board, there may be cases where approval by the shareholders' meeting is also required. According to German case law this will generally apply where management acts result in structural changes to the company (e.g. a sale of all or nearly all the company's assets). In such cases the consent of the shareholders' meeting with a majority of at least three-quarters of the nominal capital represented is required.

## 2. Acquisition Methods

The acquisition of a German company or business is typically structured as a purchase of shares or a purchase of assets. In addition the Transformation Act and general corporate law provide for alternative structuring possibilities for acquisitions (e.g. mergers). The most common acquisition method in Germany is the purchase of shares. A purchase of assets is in most cases more complex and time-consuming and therefore less frequent. Another reason for sellers preferring a share deal is the fact that it is generally more tax-favourable for the seller.

### 2.1 Acquisition of Shares

By way of acquiring all shares or partnership interests in a legal entity, a purchaser acquires any and all rights associated with the ownership of the shares or partnership interests. In particular this includes the right to control the legal entity and to receive profits generated by it. At the same time, the purchaser indirectly (as new owner of the legal entity) acquires all liabilities and risks associated with the legal entity. Since the change in ownership of the shares or partnership interests occurs only on shareholder level, the legal entity as such and its business will not change as a result of the acquisition.

### 2.2 Acquisition of Assets

German law does not provide for specific regulations regarding the sale and transfer of a business as a going concern. Instead, each single asset must be sold and transferred individually. In particular with respect to the transfer of ownership it is important to observe the statutory requirements regarding the different types of assets that make up the business being sold.

Although liabilities and risks of a acquired business generally do not transfer to the purchaser unless specifically provided for in the asset purchase agreement, there are circumstances under which a purchaser may become liable for obligations of the previous owner of the business. This will be the case for example where an acquired business is carried on under the previous company or trading name of the seller (s. 25, HGB). Such assumption of liabilities by operation of law can be avoided by an agreement between seller and purchaser, which becomes effective *vis-à-vis* third parties when published in the *Federal Gazette* and registered in the commercial register.

### 2.3 Mergers and Divisions

The German Transformation Act (the Act) governs mergers and divisions of legal entities. A merger is the combination of at least two legal entities by way of transferring all assets and liabilities of the transferring entity, the transferor, to the receiving company, the transferee. The Act distinguishes between two basic types of merger: merger by acquisition and merger by the formation of a new company. In the first case, the transferee already exists while in the second case the transferee will be established by the merging transferors. The interest holders of each transferor receive shares or memberships in the transferee in return for shares or memberships in the transferor being dissolved by the merger.

A division is the split of a legal entity by transferring certain parts of its business (i.e. assets and liabilities, contracts, employees, etc.) to a receiving company. The Act distinguishes between three basic types of division:

- the split
- the spin-off, and
- the hive-down.

Each of these types of division can be effected by acquisition or the formation of a new company.

### 2.3.1 Split

In the case of a split, the transferor splits and transfers its entire business (i.e. assets and liabilities, contract, employees, etc.) to at least two other legal entities. The transferor is dissolved by the split and ceases to exist. The interest holders of the transferor become the interest holders of each transferee.

### 2.3.2 Spin-off

In a spin-off, the transferor spins-off and transfers its business or a part of it (i.e. certain assets and liabilities, contracts, employees, etc.) to at least one other legal entity. The interest holders of the transferor receive shares or memberships in the transferee in return for the spun-off and transferred assets. Different from the split, the transferor is not dissolved, but continues to exist.

### 2.3.3 Hive-down

In a hive-down, the transferor hives-down and transfers its business or a part of it (i.e. certain assets and liabilities, contracts, employees, etc.) to at least one other legal entity. In the case of a hive-down it is the transferor (and not the interest holders of the transferor) who receives shares or memberships in the transferee in return for the hived-down and transferred assets.

Under German law, the transfer of contracts and liabilities usually requires the consent of the contracting parties. One of the biggest advantages of structuring an acquisition under the Act is that contracts and liabilities are transferred by operation of law, which can be a decisive advantage. The contracting parties affected by such a statutory transfer of their contracts and claims are to a certain extent protected by the Act. In particular the Act provides for a joint and several liability of the transferor and the transferee regarding the liabilities that existed at the time of the spin-off or hive-down.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

Under German law there is a general pre-contractual duty to negotiate in good faith. Accordingly, each party may become liable *vis-à-vis* the other party for damages caused by a breach their pre-contractual duties.

Such pre-contractual duties include quite far-reaching information and disclosure duties on the part of the seller. In M&A transactions, a seller is generally obliged to inform purchasers of all material issues and circumstances that the seller is aware of if those issues/circumstances can generally (and from an objective perspective) be regarded as relevant for a buyer's purchase decision. A disclosure duty certainly applies if a purchaser asks the seller specific questions. If that duty is breached intentionally during the negotiations, the purchaser may be entitled to claim damages from the seller over-and-above any damages provided for in the purchase agreement. This is because it is generally not possible to limit or cap a party's liability for intentional behaviour. Further, if the non-disclosure constitutes fraud on the part of the seller, the buyer may be entitled to rescind the purchase agreement.

Pre-contractual obligations may also become relevant in the case of breaches of exclusivity or the abandonment of negotiations. A seller that pretends to have an interest in selling to a buyer or breaches its exclusivity undertaking may become liable for that buyer's expenses incurred up until that point (e.g. due diligence, etc.) if the sale to the buyer ultimately does not take place. This may apply even if the parties have signed a non-binding letter of intent, term sheet, memorandum of understanding or similar 'pre'-agreement. However, it is usually difficult for a purchaser to prove that the seller breached its pre-contractual obligations to negotiate in good faith. Therefore, buyers have an interest in requesting a break-up fee or liquidated damages in the letter of intent to forestall such an eventuality.

## 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical German purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. Cash-free debt-free adjustments are normal. Working capital and NAV adjustments are also common. Sellers often try to push for locked-box structure with no post closing adjustment.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	In a sellers' market, this is usually prepared by the seller; in a buyers' market, usually prepared by the buyer.
4	Is the balance sheet audited?	Usually.
5	Is an earn-out common?	Uncommon for larger deals, sometimes seen in mid-cap deals with private individuals as sellers.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Not uncommon.
8	Is a break fee common?	Uncommon.

### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Uncommon
10	Is the MAE general or specific?	Both are seen.
11	Quantification of MAE?	Not uncommon. Sometimes seen as a reference to sales or EBITDA effect.

### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common.
13	Non-solicit (of employees)?	Common in international transactions (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Not common in national transactions.
15	Broad access to books, records, management between sign and close?	Generally yes in private transactions, but avoiding a set-up which could be interpreted as taking over control of the target.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Uncommon.



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| 17 | Is a separate tax covenant/indemnity or tax deed common? | Almost universal. |
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### Representations & Warranties

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| 18 | Materiality in representations – how is it quantified (e.g. by a \$ amount)? | Materiality qualifiers commonly seen but are often not quantified (other than specific warranties, e.g. contract value). |
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| 19 | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers are growing. Often limited to the actual knowledge and due enquiry of a specified list of senior management/deal team. |
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| 20 | Is a warranty that there is no materially misleading/omitted information common? | Uncommon. |
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| 21 | Is disclosure of data room common? | Common. |
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### Repetition of Representations & Warranties

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| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common? | Repetition at completion for some warranties (e.g. title, capacity) is standard. Repetition of operational warranties at completion is common, but not standard. Bring-down certificate is not common. |
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| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard? | True and accurate in all material respects is common but often carve out for fundamental representations which must be absolutely true. |
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| 24 | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon. |
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### Limitations on Liability

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| 25 | What is the common cap amount (as a percentage of purchase price)? | Common cap amount typically between 10%–25%. Title to shares often capped at amount of purchase price. |
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| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Generally to operational warranties and damage claims, more rarely whole agreement. |
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| 27 | What are the common exceptions to the cap? | Key warranties (e.g. title), typically, tax and environmental indemnities and other specific indemnities are excluded. Staggered caps are common. |
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| 28 | Is a deductible or basket common? | Both are common. |
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| 29 | Is a <i>de minimis</i> common? | Common. |
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30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of one full accounting cycle after completion, i.e. 12–24 months common. Typically longer periods for title. Fraud and intentional behaviour is carved out. Tax is commonly longer than general warranties, as well as environmental indemnities.
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31	Is warranty insurance common?	Uncommon.
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#### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Not uncommon.
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#### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Common.
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34	Insurance proceeds?	Common for actually received.
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35	Third party recoveries?	Common for actually received.
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#### Damages, Knowledge

36	Obligation to mitigate damages?	Required by law.
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37	Exclusion of consequential damages?	Common.
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38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Common.
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#### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. German law.
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40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. Germany or sometimes Switzerland.
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#### Stamp Duty

If stamp duty is payable, is it normally shared?	No stamp duty payable. Notarisation fees for transfer of shares in a limited liability company paid by buyer.
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### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares

German law differentiates between the contractual obligation (i.e. the sale) to transfer shares and the actual transfer of the shares. With the exception of shares in a GmbH, there are generally no formal requirements regarding the contractual obligation to sell and/or transfer shares in a German legal entity, (in particular AGs or partnerships). Nevertheless, it is common for sale and purchase agreements regarding such shares to be in writing. For the sale and transfer of shares in a GmbH, statutory law requires a written agreement recorded by a notary public. Further restrictions and/or formalities affecting the validity of the sale and transfer of the shares may be provided for in the

articles of association of the legal entity or a shareholders agreement (e.g. consent requirements, pre-emptive rights etc.).

### 3.3.2 Transfers of assets

German law does not provide for specific regulations relating to the sale and purchase of a business as a going concern. Accordingly, there are generally no statutory form requirements for the sale of a business. However, since the business to be sold and transferred typically consists of various different assets (real property, (in)angible assets), liabilities, contractual relationships, employees, etc. there is a need to identify and describe the business. This is usually done in a rather lengthy asset purchase agreement with detailed exhibits listing all assets, contracts, employees, etc. Furthermore, formal requirements may apply depending on the types of assets that make up the business. For example, the transaction must be notarially recorded if the assets sold make up the entire estate of the seller or any real property located in Germany forms part of the assets transferred.

According to German case law, the sale of an important part of or all assets of a German company requires a shareholders' resolution with a three-quarters majority of the selling company's shareholders.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

#### **GmbH**

In order to be valid, the transfer of title to shares in a GmbH (i.e. the assignment of the shares) must be recorded by a notary public. Usually, both the sale as well as the transfer of the shares in a GmbH are notarially recorded in one agreement. The transfer of the shares is then, in the agreement, made subject to certain conditions precedent (e.g. payment of the purchase price, closing). Instead of having both the sale and transfer in one agreement, it is also possible for the parties to notarise a separate share transfer agreement at the closing.

The transfer of shares may also be subject to other requirements. Typically, the articles of association provide that the transfer of shares requires certain consents (e.g. shareholders meeting, managing directors or all shareholders) in order to be valid. It is important to observe these requirements to ensure the validity of the share transfer.

In order for the buyer to be able to exercise its shareholder rights *vis-à-vis* the acquired GmbH, the buyer must be registered in the shareholder list of the GmbH which is kept at the commercial register. The notary public who recorded the share transfer is obliged to submit an updated shareholders' list to the commercial register immediately after the transfer becomes effective. In relation to other changes relating to shareholders, the managing director of the GmbH has an obligation to update the shareholder list.

#### **AG**

The stipulations applicable to an acquisition of shares in an AG differ slightly depending on whether the shares are issued as bearer shares or as registered shares and whether share certificates have been issued or not. Shares which are not represented by share certificates are generally transferred by way of assignment of the shares. If share certificates have been issued, the transfer of such shares may also require the transfer of ownership of the share certificate and/or endorsing the shares certificates.

In the case of shares in an AG, the articles of association may also provide for consent requirements, which must be observed in order to effectively transfer the shares. In the case of registered shares, it will further be necessary to update the share register which is maintained by the AG, before the buyer can exercise its shareholder rights.

### 3.4.2 Transfers of title to assets

In asset transactions, it is necessary to transfer each of the sold business' assets, liabilities, contracts, employees, etc. individually. This means that for each type of asset as well as the transfer of liabilities, contracts and employees, the respective legal transfer requirements must be observed.

The sale and transfer of tangible assets requires that the respective assets are described precisely so they can be easily identified by any third party reading the agreement (or relevant exhibit to it). Typically this is done by identifying and listing each asset (e.g. in an inventory list) and/or by specifying exactly where the assets are located (i.e. address and location within a specific building). Further, the transfer of ownership of tangible assets requires that the buyer obtains direct or indirect possession of those assets or is able to claim possession from a third party possessor. The transfer of real property located in Germany also requires notarial recording and registration in the land register.

The transfer of intangible assets (e.g. patents, trade marks) is in principle not subject to any formal requirements and need not be recorded in any public register in order to become effective. However, the intangible asset does have to be described in a determinable manner. Where a register of the intangible asset in question exists, a transfer of the relevant intangible asset should be recorded in that register for the sake of transparency and protection of intellectual property rights.

The transfer of claims against third parties is made by way of assignment, which generally does not require the third party's consent. For liabilities *vis-à-vis* third parties, the consent of the third party is required before the buyer will assume the liability. The transfer of agreements and contractual relationships requires the consent of the respective other contracting party or parties unless the agreement or contract specifically permits the transfer to a third party (as may be the case in transfers within the same group).

### 3.4.3 Formalities for mergers

With respect to mergers and divisions under the Transformation Act, certain formalities have to be observed. In general, those transactions require a notarised agreement as well as notarised shareholder approvals and registration in the commercial register in order to become effective. Depending on the circumstances, there may also be other formal requirements, such as information reports and audits. There are also time constraints, in particular with respect to filing with the commercial register, which needs to occur within eight months of the relevant balance sheet date for the merger. If the company has a works council, it will be necessary to submit the merger/division agreement to the works council at least one month prior to notarisation and filing with the commercial register.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

EC merger control laws must be taken into account in considering any merger or acquisition in Germany. Where the EC Merger Control Regulation does not apply, German merger control rules may become relevant. The Federal Cartel Office (FCO) must be notified of concentrations (see 'Definition of a concentration' below) within the scope of the Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*/GWB). The GWB prohibits the implementation of such concentrations prior to their clearance by the FCO or the expiry of the review period (see Timing below).

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical German purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is filing voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Filing is mandatory. There are penalties for failure to notify or for implementing a transaction without notification or approval. Additionally, all actions to implement a notifiable transaction without notification or approval will be considered void.
Timetable		
2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p><i>Phase I:</i> The FCO is prepared to clear a transaction earlier if the deal does not raise competition issues and the parties contact the authority early; in very straightforward cases 1 to 2 weeks are possible (subject to staff resources).</p> <p><i>Phase II:</i> In most cases the FCO uses the full 3-month review period and in difficult cases the deadline is often extended (with the consent of the notifying parties). However, if it turns out that the transaction can be unconditionally cleared in Phase II, the FCO may also grant clearance earlier than at the end of the 3-month period.</p>

#### 4.2.1 Definition of a 'concentration'

For the purposes of the GWB, each of the following will represent a concentration:

- the acquisition of:
  - all or a substantial part of the assets of another undertaking. A part of the assets of another undertaking is substantial if it is the basis of that undertaking's position in the market and if it will be transferred to the acquirer so that it is capable of changing the acquirer's position in the market
  - direct or indirect control by one or several undertakings of the whole or parts of one or more other undertakings. ('Control' is defined as the possibility of exercising decisive control of the strategic business decisions of the target company, alone or together with another undertaking)
  - shares in another undertaking if the shares, either separately or together with other shares already held by the undertaking, reach or exceed 25% or 50%<sup>1</sup> of the capital or the voting rights of the other undertaking.

—and any other combination of undertakings that enables one or several undertakings to directly or indirectly exert a competitively significant influence on another undertaking.

#### 4.2.2 Pre-merger notification

Calculated for each company on the basis of the figures for the business year immediately preceding the transaction, the FCO's prior approval is required if:

- the combined aggregate worldwide turnover of all participating undertakings (i.e. the purchaser's group of companies, and the target company) amounts to more than EUR500 million, and

<sup>1</sup> Both thresholds apply in each case. German merger control laws regard reaching/exceeding a participation percentage of 25% as well as reaching/exceeding a participation percentage of 50% as incidents that require filing.

- the domestic turnover of at least one participating undertaking amounts to more than EUR25 million, and
- the domestic turnover of another participating undertaking amounts to more than EUR5 million.

If the turnover thresholds set out above are met, and the transaction meets the definition of a 'concentration' as above, the FCO must be pre-notified of this.

There are special provisions for the calculation of turnover in a number of special business sectors such as banking, press/media and insurance. For example, for the Press (newspapers and magazines) sector, the achieved turnover is to be multiplied by eight.

The merger must not be executed or consummated<sup>2</sup> (in whole or in part, legally or *de facto*) until it has been cleared by the FCO. It is possible, however, for the parties to sign a purchase agreement placing an obligation on the seller to transfer the assets or shares to the acquirer, provided closing is conditional upon the transaction being cleared by the FCO.

#### 4.2.3 Timing

A pre-notification can be filed any time prior to the transaction, provided the proposed merger is sufficiently clear and specific. It is therefore not necessary to wait until a purchase agreement has been signed to file a pre-merger notification.

Upon receipt of a complete notification, the FCO has one month to examine the concentration. This one-month period may be shortened depending on the goodwill and caseload of the case handler. If the FCO believes that an in-depth review of the transaction given notice of is required, it may extend the initial period by three months (i.e. extending the total period to 4 months).

If the review period is extended, the FCO must inform the parties within one month of receipt of the complete notification that it has initiated an in depth examination of the concentration (the so-called 'Phase II examination'). If this notice is not sent or a decision is not issued to the notifying parties by the end of the four-month period, the concentration will be deemed to have been cleared.

#### 4.2.4 Post-merger notification

Post-merger notification is an administrative requirement in addition to the pre-merger notification of the concentration. It can readily be satisfied by advising the FCO that the concentration previously notified and subsequently approved has been consummated accordingly.

#### 4.2.5 Exemptions from notification requirements

If the turnover thresholds set out above are met, a proposed concentration will not be subject to review and does not require notification if:

- there will be no effects on domestic markets; however, this is rarely the case if the relevant turnover thresholds that usually trigger the notification requirement (see above) are met (e.g. this would only cover instances that include joint ventures located abroad where the parent groups are not sufficiently active in Germany. The exemptions are based on the September 2014 *Merkblatt für Inlandsauswirkungen* published by the FCO which is fairly ambiguous, and case law does not provide a clear understanding as to its interpretation),
- the target company or the purchaser recorded a worldwide turnover in the last business year of less than EUR10 million ('*de minimis* clause'). However, if the target company or the purchaser belongs to a group of companies, this clause applies only if the worldwide turnover of the respective group is below EUR10 million.

<sup>2</sup> The parties are prohibited from any actions that are designed to bring about the legal effects of the transaction prior to clearance by the FCO. Whether such actions would have any legal effect is another matter.

#### 4.2.6 Substantive test

If the proposed transaction will<sup>3</sup> lead to a significant impediment to effective competition (SIEC-test), the FCO will prohibit the concentration, unless the parties are able to provide evidence that the pro-competitive benefits resulting from the proposed transaction will outweigh its disadvantages.

If the market concerned is one in which goods or commercial services have been offered for at least five years, and in the last calendar year the total turnover by all participants in the market in Germany was less than EUR15 million, the FCO will not prohibit the transaction (the mini-market clause). However, application of the mini-market clause does not affect the requirement to notify the transaction.

#### 4.2.7 No confidentiality

Within a few days of receipt of a pre-merger notification, the FCO will publish on its website ([www.bundeskartellamt.de](http://www.bundeskartellamt.de)) notice of the receipt of the merger filing. The information published will include the names of the parties to the transaction and a short statement regarding the relevant market. This information will also be published in the *Official Gazette*.

#### 4.2.8 Powers of the FCO

The FCO has wide powers to investigate whether a concentration creates or strengthens a dominant market position. In this context, the FCO may request additional information from the parties to the concentration and from any third parties (competitors, customers, suppliers, etc.).

#### 4.2.9 Fees

The FCO merger control procedure is subject to an administrative fee. The amount of the fee depends on the matters reviewed (as regards the significance of the transaction for the market and the amount of work involved for the FCO). In practice, fees are to a large extent subject to the discretion of the FCO, and will not generally exceed EUR50,000. However, in exceptional cases, the fee can be up to twice as high.

#### 4.2.10 Permission of the federal ministry of economy and technology

Where a transaction is prohibited by the FCO, the parties may apply with the Federal Ministry of Economy and Technology to grant its approval to the transaction. Such approval is granted only in exceptional cases, where there is an overriding public interest to justify the merger.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

#### 4.3.1 Legal consequence of putting a transaction into effect prior to clearance by the FCO

If a concentration falling within the scope of the German merger control rules is consummated by the parties prior to having obtained clearance from the FCO (or the Federal Department of Economy), the FCO may punish such actions by imposing fines of up to EUR1 million. For undertakings or associations of undertakings however, the fines can be higher, up to 10% of the respective undertaking's or association's group turnover in the last financial year.

This applies to all acts that (in part) pre-empt the effects of the transaction prior to its clearance, not just the final consummation of the transaction. For further information, see Appendix B (Broad Principles on Information Exchange and 'Gun-Jumping')

#### 4.3.2 Non-competition covenants

The purchaser is usually keen to ensure that following an acquisition, the seller does not engage in business activities competing with the business acquired by the purchaser. Consequently, a non-competition covenant is frequently included in the purchase agreement, especially if the seller is an

<sup>3</sup> Note that the mere possibility of significant impediment to effective competition is not enough. The German regulations require a certain likelihood that the transaction will lead to significant impediment to effective competition.

individual who has been personally involved in the activities of the business and has had access to (or could still have access to)<sup>4</sup>: commercially sensitive information.

Non-competition covenants are generally permissible if they are of a reasonable duration (up to 2 years, and in exceptional cases 3 years) and limited to the geographical area in which the acquired business was active. They should not extend to activities that were not carried out by the target undertaking at the time of the acquisition. Non-competition covenants that disregard these principles are invalid under German law.

#### 4.4 Anti-Bribery, Corruption and Money Laundering

In Germany, as in many other countries it has become standard to also include Anti-Bribery, Corruption, Money Laundering issues into the M&A process. Depending on the specific risk (e.g. country risk or industry risk) associated with the target further due diligence may be performed and specific compliance clauses (indemnifications and warranties) negotiated. Following the acquisition existing compliance processes can be integrated. The increasing importance of compliance issues is largely driven by German Anti-Bribery law, which is as far-reaching and heavily enforced as for example the FCPA.

#### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

In principle, foreign investors are subject to the same conditions as German investors (e.g. licensing and notification requirements etc.). However, investors from non-EU countries may be subject to additional scrutiny by German authorities for reasons of national security. In addition, investments in certain specific sectors (e.g. defence) by any foreign investor, including investors from other EU Member States, are subject to restrictions.

##### 4.5.1 Exchange controls

Not relevant in Germany: the Euro is freely convertible into other currencies and the import and export of capital is free, subject only to reporting requirements.

##### 4.5.2 Foreign investment approvals and notifications

If a non-EU investor acquires at least 25% of the voting rights in a German company, the Federal Ministry of Economics (*Bundesministerium für Wirtschaft und Energie/BMWi*) may carry out an in-depth review of such investment if it has concerns that the investment may constitute a danger to German national security. Based on relevant case law, it is generally understood that such a review will only take place if the German target company is active in a sector that is relevant in times of crisis, e.g. telecommunications or energy.

If BMWi finds that the transaction may endanger German national security, BMWi will enter into a second-stage review to assess whether that danger is indeed present and whether any measures need to be adopted to remove or reduce it. BMWi is entitled to adopt any measure appropriate to remedying the situation, e.g. it could restrict the voting rights of a foreign investor. In extreme cases, BMWi may even prohibit a transaction or appoint a trustee to unwind an investment that has already been consummated.

BMWi must carry out the first-stage review within a period of two months of the transaction's being signed. If it intends to carry out a the second-stage review, BMWi must inform the parties of that intention within this two-month period. If it does not act within this initial two-month period, BMWi will be barred from taking any further action. This applies even if BMWi has not learned of the investment before expiry of the two-month period. The second-stage review must be completed within a three-month period.

If investors wish to obtain certainty at an early stage of the transaction as to whether BMWi may have any concerns, they can contact BMWi and apply for a so-called 'Certificate of No Objections'. If BMWi does not initiate an in-depth review within 30 days of the receipt of that application, the Certificate will

<sup>4</sup> Albeit that the seller usually does not retain access to commercially sensitive information unless he remains involved e.g. as the parent company of a JV of which he has sold a few (but not all) shares.



be deemed to have been granted. Thus, in cases where there is doubt about whether a transaction may be relevant for German national security, it is advisable to contact BMWi as early as feasible in order to be able to alleviate any concerns which BMWi may have regarding a transaction. If BMWi does have concerns, it is usually also possible to negotiate with BMWi on any appropriate measure and, if necessary, to take these measures into account in the investment agreement.

## 4.6 Industry-Specific Regulation

Investments by any foreign investor in companies from certain industry sectors are subject to mandatory notification and review in Germany. The notification requirement applies if a non-German investor, including investors from other EU member states, acquire at least 25% of the voting rights in a company which engages in any of the following business operations:

- manufacturing or development of war weapons (generally, weapons for attacking another country)
- manufacturing or development of specially designed engines or gears for main battle tanks or other armoured tracked military vehicles
- manufacturing of IT security products which have been approved for handling classified government matters or key components of such IT security products
- operation of a satellite-based remote sensing system for high quality data.

Notifications must be submitted to BMWi, which will carry out an initial review to assess whether the investment may affect material interests of German national security. If BMWi finds that it could, it will initiate a second-stage, in-depth review to decide whether material interests of German national security would indeed be affected and which measures must be adopted to remedy that risk. As in the general review procedure described at 4.5.2, BMWi may adopt any measure that is appropriate to remedy dangers to German national security, including a prohibition of the transaction.

BMWi must carry out the initial, first-stage review within a period of one month after receiving the notification. If it does not initiate the in-depth second -stage review within this period, BMWi is deemed to have approved of the transaction. The second-stage review, including the decision on any measures to restrict or prohibit the transaction, must also be concluded within a period of one month.

As with the general review procedure discussed at 4.5.2, it is advisable to contact BMWi as early as feasible in order to be able to alleviate any concerns which BMWi may have regarding an investment. If BMWi does have concerns, it is usually also possible to negotiate with BMWi on the measures that should be adopted and, if necessary, take these measures into account in the investment agreement.

## 4.7 Import/Export Controls

The general approach of German policy is that imports and exports should be encouraged rather than impaired. The import of items into Germany does not generally require a licence. An exemption applies for weapons of war (generally, weapons that could be used to attack another country) which require a licence. In addition, the import of certain items may be controlled or restricted on the basis of regulations adopted at EU level.

Germany has in place a comprehensive system of export controls. The main rules are laid out in the European Dual Use Regulation (Regulation 428/2009), the Act on Foreign Trade (*Außenwirtschaftsgesetz*) and the Statute on Foreign Trade (*Außenwirtschaftsverordnung*). Administratively export control is divided between the Federal Office for Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle/BAFA*) and Customs.

While BAFA is responsible for deciding whether a certain export requires a licence and, if so, whether a licence will be granted, it does not exercise any policing powers, which is the job of Customs.

There are two types of exports, both of which are subject to German export control regulations: tangible exports, i.e. where items physically depart Germany, and intangible exports, i.e. the transmission of software or technology using telecommunications services.

#### 4.7.1 Export of military items

The export of military items to any country requires an export licence. The designation of items as 'military' depends on their technical features and on whether they have been designed or modified for military use. Items will not be classified as military items merely because they are sold to a military customer, such as the police or armed forces. Items sold to a civil customer are deemed to be military items, if they conform to the specifications of the military list as set out in the Statute on Foreign Trade.

#### 4.7.2 Export of dual-use items

The export of dual-use items to non-EU countries also requires an export licence. Whether items are subject to export controls as dual-use items must be determined in accordance with the European Dual-Use List, which is part of the European Dual-Use Regulation, and German law which adds a few additional categories of dual-use items. When determining whether particular items conform to one of the categories of controlled items, a careful analysis of the technical features of the item is required.

In addition, export licences may also be required for exports of unlisted items, if one of the following applies:

- the exporter knows or has been informed by BAFA that the items to be exported are intended to be used in connection with weapons of mass destruction or missiles capable of delivering weapons of mass destruction
- the export is destined for a country against which an arms embargo is in place, and the exporter knows or has been informed by BAFA that the items to be exported are intended for a military end-use, or
- the export is destined for a country which the German government considers to be a thriving market for nuclear weapons or where the German government believes there is a special risk for proliferation of nuclear weapons and the exporter knows or has been informed by BAFA that the items to be exported are intended for use in or in connection with a nuclear plant or installation (including nuclear power plants).

#### 4.7.3 Technical assistance

Under certain conditions, providing 'technical assistance' also requires a formal export licence, covering any technical support or technical service, in the form of instruction, training, transfer of practical knowledge or abilities, or consultation, including assistance by telephone or electronic media or the provision of technology (e.g. documents or files) to non-German nationals.

Providing technical assistance requires an export licence if:

- the company providing the support knows or has been informed by BAFA that the support will be used in connection with weapons of mass destruction or with missiles capable of delivering weapons of mass destruction and the support is provided to a non-German national who is not resident in Australia, Canada, Japan, New Zealand, Norway, Switzerland or the United States or the support is provided outside the EU, or
- the company providing the support knows or has been informed by BAFA that the support is related to a military end-use and the support is provided in a country under an arms embargo or to persons resident in these, or
- the company providing the support knows or has been informed by BAFA that the support is related to a nuclear plant or installation in a country which the German government considers to be a thriving market for nuclear weapons or where the German government believes there is a special risk of proliferation of nuclear weapons.

#### 4.7.4 Embargoes and sanctions

The European Union has adopted a number of embargoes and sanctions against countries considered to be aggressors or to be engaged in massive violations of human rights. For a number of

years, it has been following a 'Smart Sanctions' approach, targeting individual persons, corporations, or single industries within the embargoed country. In addition, the European Union has adopted financial sanctions against a number of individuals, corporations and groups (so-called 'designated parties'). Financial sanctions have been adopted in anti-terrorism sanctions, but also in connection with embargos adopted against specific countries.

Germany has implemented the embargoes and sanctions adopted by the European Union and while it has marginally broadened the scope of some embargoes, it has not adopted embargoes of its own. Current information on embargoes and sanctions implemented by Germany may be obtained from the BAFA website ([www.ausfuhrkontrolle.info/ausfuhrkontrolle/de](http://www.ausfuhrkontrolle.info/ausfuhrkontrolle/de)).

As the European Union considers the effect of certain US legislation implementing embargoes against Cuba and Iran to be extra-territorial, it has adopted a set of sanctions to block such US legislation. These so-called 'US Blocking Sanctions' make it illegal for EU companies to comply with certain US laws.

#### 4.7.5 Early-warning lists

Germany has not adopted its own lists of designated parties, although the German authorities have compiled early-warning lists. These lists include persons and entities which Germany suspects to be involved in the proliferation of nuclear weapons or in international terrorism. If an export is destined to a person or an entity included in an early-warning list, Customs will hold the shipment and will not process the export until an export licence has been presented. The early-warning lists are not in the public domain. Information as to whether a particular entity is listed may be requested from BAFA or the local Chamber of Industry and Commerce.

#### 4.7.6 Export licences

There are two types of export licence available in Germany: individual licences and general licences.

Individual licences can be granted as a single license (*Einzelgenehmigung*) covering one export to one particular consignee, or as a maximum value license (*Höchstbetragsgenehmigung*) covering several shipments of items to one particular consignee up to the total value set out in the license. A maximum value licence can, for example, cover expected annual turnover in relation to a single consignee. Exporters who have been granted a large number of export licences within a short timeframe can obtain an accumulative licence (*Sammelgenehmigung*), which covers the shipment of a range of items to several consignees.

To facilitate export licensing procedures, the European Union and BAFA have issued several General Export Licences. For exports which are within the scope of these general licences, no application is required. Instead, only certain basic formalities need to be complied with. General export licences are of immense practical value, as they allow immediate exports of otherwise restricted items, and provide for planning reliability. General licences can be used for exports of those items to those countries listed in the licence. They have been issued for both military and dual-use items. The following general licences are of most practical value:

- Union General Export Authorisations (UGEA001): applicable to exports destined for Australia, Canada, Japan, Liechtenstein, New Zealand, Norway, Switzerland and the United States; covers most dual-use items included in the European Dual-Use List
- General Licence 16 (GA-16): applies to exports of telecommunications items and most basic cryptography items to most countries in the world
- General Licence 12 (GA-12): covers shipments of dual-use items whose value does not exceed EUR5,000 to most countries in the world.

## 5. Transfer Taxes

### 5.1 Stamp Duty

No stamp duty applies in Germany.

## 5.2 Value Added Tax

### 5.2.1 Acquisition of shares

The transfer of shares in a M&A-transaction is typically exempt from VAT. In many cases the seller may, however, waive the exemption and have VAT levied on the purchase price under certain conditions. Only with such waiver can the seller be entitled to an input VAT recovery on the related costs for the share deal. The purchaser may, in turn, pay the VAT by assigning its input VAT refund claim. The transfer of shares can also be non-taxable. If the purchaser is a holding company, it should be determined whether the company is to be treated as an “entrepreneur” for VAT purposes (e.g. if it renders management services or provides IP- licences to its subsidiaries or pursues other operational business activities). If the holding company does not qualify as an entrepreneur, it will not qualify for any input VAT recovery. In such a case, the seller will not be entitled to waive the tax exemption mentioned above.

### 5.2.2 Acquisition of assets

The sale of assets generally triggers VAT (at the ordinary rate of 19%). The sale of an entire business (*Unternehmen*) or of all of the assets of an (independently operated) business unit (*gesondert geführter Betrieb*) are not subject to VAT under certain conditions. In particular the purchaser must intend to continue the business or at least a comparable business with the acquired assets. The parties are well advised to use proper contract clauses to reduce VAT risks, as the details of the tax relief are very controversial and subject to a continued reinterpretation of the German financial courts.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In share purchases, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the purchaser therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the target company. If there is a post-acquisition integration of the target company's business with the purchaser's business, this is likely to constitute an acquisition of assets or a business transfer, and the considerations set out below will be relevant.

#### 6.1.2 Acquisition of assets

If a business (or a part of it) is transferred to another entity, as is the case in most asset deals, the latter is bound to enter into the same rights and obligations provided under an employment relationship existing at the time of the transfer, assume all existing liabilities towards transferring employees, and recognise seniority.

#### 6.1.3 Transfer of business

#### ***Notification requirements and employee's right to refuse the transfer***

Very strict notification requirements apply to employers in relation to all employees affected by a transfer of business (s. 613a, Civil Code). Accordingly, either the transferor or the transferee of the business in Germany (or frequently both parties in a joint information) must inform each employee affected by the transfer of all of the following:

- the date or purported date of the transfer
- the reasons for the transfer
- the legal, economic, and ‘social’ consequences of the transfer for the employee, and
- any measures envisioned which affect the employee.

A mere oral notification is not sufficient. Notification must be in writing in order to be valid (although it need not necessarily bear a wet-ink signature). Notification by way of fax or e-mail can suffice for these purposes if the employee has generally consented (usually in their employment contract or, implicitly, by having accepted a company's practice) to be notified about legally relevant issues in this form.

All affected employees have the right to object to the transfer of their employment. However, objections can be raised only in writing within a period of one month after the employees have been notified of the transfer of the business. An exception applies if the transferor or transferee of the business fails to comply with the existing requirements as to the form and the contents of the notification. In this event, the notification will be deemed to be invalid and, thus, the employees affected have in principle an unlimited right to object to their employment being transferred to the transferee.

If the employees do object to the transfer of their employment, the employment relationship with the transferor will remain in existence even if the whole enterprise is transferred. However, as a consequence, employees who object to the transfer of business are substantially at risk of being lawfully made redundant by the transferor following the effective transfer of business.

Any dismissal based only on the grounds of the business transfer will be deemed to be invalid (s. 613a(4), Civil Code). However, this does not affect an employer's right to dismiss the employee for other valid reasons (e.g. redundancy—see below).

### ***Applicability of s. 613a, Civil Code***

These provisions apply only to transfers of businesses or parts of businesses, not to share deals. A transfer of business within the scope of s. 613a of the Civil Code exists if a legal entity transfers to another legal entity all relevant assets necessary for the transferred business to function as before. A transfer of a part of a business will occur if the relevant assets of a separate unit of the company necessary to keep this unit functioning are transferred from one legal entity to another.

In its *Ayşe Süzen* ruling, the European Court of Justice stipulated that for a transfer to qualify as a business transfer, at least an 'economic unit' of the business would need to be transferred. Therefore the simple outsourcing of a function could trigger the rights and obligations following a business transfer pursuant to s. 613a.

Following the European Court of Justice, the German Federal Labour Court has now held that in case of the transfer of a service-rendering business, the mere transfer of employees can also qualify as a business transfer in the sense of s. 613a if both the knowhow and experience of the transferred employees constitute the substantial assets for the purchaser to keep the business functioning.

## **6.2 Approval or Consultation Requirements**

In general, the transfer of a business will not involve co-determination rights of the works council. However, exceptions may apply, for example, if parts of the business are transferred and therefore the business is split, or if the transfer is accompanied by substantial reorganisation measures or substantial redundancies. In such cases, an equalisation of interest agreement and a social plan must be negotiated with the works council prior to the transfer.

In transactions involving larger businesses, the seller must inform the economic committee, an intra-company body consisting mostly of works council members, of the proposed asset sale. In a share sale scenario, the management of a target company also has to inform the economic committee or, absent such committee, the works council, prior to the sale.

## **6.3 Protection against Dismissal**

### **6.3.1 Redundancies**

Termination of employment often becomes necessary to meet business needs: for example, the introduction of new technology, changes in production methods, the shutting down of a plant, reduced sales, etc. will generally make dismissals inevitable. An employer is free to make economic plans and

decisions, and the labour courts allow employers a certain degree of flexibility. However, in businesses with consistently more than 10 employees (or 5 employees if their employment started prior to 1 January 2004), employers will be required by the courts to explain and prove the facts on which the business decision is based and prove that the workload has actually been reduced.

### ***Selection of employees for redundancy***

If business considerations require the dismissal of an employee from a certain group, the termination may still be invalid if, among several employees whose contracts could also have been terminated, the employer did not make an appropriate choice from a social perspective. The employer will have to select for redundancy employees who, from a group of comparable employees, will be least severely affected by the termination. The following 'social' criteria can be relevant: length of service, age, maintenance obligations toward dependents, and disability.

On an exceptions only basis, the employer may exclude from social selection those employees whose continued employment is in the legitimate interests of the company, due to their extraordinary knowledge, skills, and performance or for the maintenance of a balanced personnel structure in the company.

### ***Mass dismissals***

Before an employer can give notice to numerous employees at the same time, the intention to do so must be discussed with the works council. In addition, the employer must inform the local employment office.

Terminations are considered to be a mass dismissal if they are effected within a 30-day period and involve:

- more than 5 employees in a business unit with more than 20 and fewer than 60 employees
- 10% of the workforce, or more than 25 employees in a business unit with at least 60 and fewer than 500 employees, or
- 30 or more employees in a business unit with at least 500 employees.

#### **6.3.2 Penalties**

Violations of consultation or information requirements under the Works Constitution Act can trigger administrative fines of up to EUR10,000 per case, levied against managing directors, board members or other statutory representatives of the company.

# Hong Kong

## 1.1 Overview

While being part of the sovereign territory of the People's Republic of China (PRC), the Hong Kong Special Administrative Region maintains a different legal system to the PRC and has its own laws. This important principle of 'One Country, Two Systems' is enshrined in the Basic Law of Hong Kong which serves as the constitutional document for Hong Kong. The Basic Law ensures that the laws in force in Hong Kong prior to the handover of sovereignty on 1 July 1997 (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) must be maintained.

Mergers and acquisitions are extremely common in Hong Kong and continue to represent a significant means by which corporations pursue the objectives of economic growth, expansion, diversification and realisation of wealth.

## 1.2 General Legal Framework

The main sources of legal principles and regulations governing M&A in Hong Kong are:

- the common law of contract (which is heavily based on the English common law of contract) as interpreted by the courts of Hong Kong
- specific Hong Kong legislation or regulations that apply depending on the nature of the transaction and the relevant industry sector, including, for corporate entities, the Companies Ordinance (cap. 622 of the Laws of Hong Kong), and
- for publicly listed companies, the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited, the Hong Kong Code on Takeovers and Mergers and decisions of the Securities and Futures Commission.

## 1.3 Corporate Entities

A company formed under Hong Kong law may be either limited by shares or by guarantee, or unlimited. The usual form of a subsidiary company is a company limited by shares. If a company is limited by shares, the liability of whose members (i.e. 'shareholders') is limited to the amount, if any, unpaid on their shares. The focus is on only companies limited by shares.

### 1.3.1 Private companies

Certain restrictions are imposed on private companies. Their articles of association must contain a restriction on the right of members to transfer their shares, limiting the number of members to 50 (exclusive of employee members) and prohibiting invitations to the public to subscribe for the shares or debentures of the company. However, a private company may be converted to a public company at any time by removing these restrictions from the articles of association.

Hong Kong companies no longer have authorised capital which limits the capital of the company (although companies can in their articles of association specifically limit the number of shares to be issued), and shares no longer have a par value. A company may not have bearer shares. The capital of a company may be denominated in any currency.<sup>1</sup>

A company must have at least one director and at least one director must be an individual. There is no requirement that the directors be Hong Kong residents or incorporated companies. Private companies may not have any corporate directors if that private company is part of a group where there is also a listed company in the group. A listed company is one whose shares are listed on The Stock Exchange of Hong Kong Limited.

In addition, it is mandatory to appoint as the company's secretary a Hong Kong resident individual or a company with its registered office or a place of business in Hong Kong. The secretary may be chosen from among the directors but a private company with only one director cannot have its sole

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<sup>1</sup> With effect since the commencement of the Companies Ordinance on 3 March 2014.

director (or a body corporate the sole director of which is the sole director of the company) act as the secretary. In addition, where any corporate action must be effected by a director and the secretary, this cannot be carried out by a single person (if that person is both a director and the secretary).

### 1.3.2 Public companies

In contrast to the situation for private companies, the shares in a Hong Kong public limited company (HK Public Co) may be offered to the public (subject to compliance with detailed regulatory requirements). As with private companies limited by shares, the liability of the members of a HK Public Co is limited to the amount unpaid (if any) on the shares each member holds. HK Public Cos need not be listed, but if they are listed in Hong Kong, they will be subject to additional regulations applicable to listed companies.

A HK Public Co must have at least two directors and all directors must be individuals. As for Hong Kong private companies, a HK Public Co must also appoint a secretary that is a Hong Kong resident individual or a company with its registered office or a place of business in Hong Kong.

## 2. Acquisition Methods

As in other jurisdictions, the acquisition of a business in Hong Kong may be structured either as a sale of shares or as a sale of assets (or a combination of the two). More particularly, the buyer may purchase the shares in the company operating the business from its shareholders or purchase the assets of the business directly from that company.

### 2.1 Acquisition of Shares

A share acquisition is generally more simple to implement from both the seller's and the buyer's point of view. A share acquisition involves the transfer of ownership of only the shares in the target company and, as a matter of Hong Kong law, is a relatively straightforward process. It also provides continuity for the business for the buyer and a clean break for the seller.

### 2.2 Acquisition of Assets

An asset sale involves the identification and transfer of title to specific assets or categories of assets, and as such is generally more complicated. The target's assets will commonly include land and premises, inventory and work-in-progress, book debts, intellectual property rights, goodwill, insurance, leases, hire purchase and other contracts, and plant and machinery. It will, therefore, be necessary to transfer each asset or category of assets from the target to the buyer by way of different conveyances, assignments and transfers that, in some instances, will also require consents from third parties not directly involved in the transaction. New permits or authorisations may also be needed to carry on the business. The transfer of assets also raises additional concerns in relation to the employees of the business (see Employee Issues below).

One of the main advantages of an asset acquisition is that the buyer may pick and choose specific assets or liabilities to be purchased or assumed, leaving behind those assets and liabilities that it does not require. The buyer of assets will not generally inherit the target's liabilities although in this respect the provisions of the Transfer of Businesses (Protection of Creditors) Ordinance must be noted. Under the Transfer of Business Ordinance, the buyer of a business, or part of a business, is deemed to be liable for all the debts and obligations arising out of the carrying on of the business by the seller. Debts and obligations for which a buyer could potentially be liable include sums of money owed by a seller to its creditors; other obligations arising out of contract or tort, such as for breach of contract or product liability; liabilities to employees; or liabilities for unpaid taxes. It is possible to avoid this by publishing certain notices, containing specified particulars that have the effect of barring any claim against the buyer that comes later than one month of the notice. If this notice procedure is not followed, proceedings may be issued against the buyer at any time up to one year after the transfer. The seller's liability to creditors is not affected by the procedure, so the obligation of the buyer created by this Ordinance is additional to existing obligations of the seller. The effect and requirements of this legislation do not affect indemnities and warranties between the seller and buyer as set out in the acquisition agreement.



## 2.3 Mergers/Other Acquisition Methods

Broadly defined, a merger involves the absorption of one company (that ceases to exist) into another that retains its own identity and acquires the assets and liabilities of the former. With effect since 3 March 2014, Hong Kong provides for a simple, court-free amalgamation procedure for effecting the merger of Hong Kong companies as long as the companies are sister companies or parents–subsidiaries. Complex amalgamations may be effected through a court-sanctioned scheme of arrangement, though this is rarely used in practice. The new amalgamation procedure is largely untested and it is uncertain how some aspects of an amalgamation will be effected in practice (e.g. whether employees transfer automatically). The economic results of a merger can also be achieved through:

- transfer of one company's business assets to another company, followed by liquidation or disposal of the transferor company
- establishment of a new company that acquires the assets of two or more entities which, following the transfer of assets, are liquidated or disposed of, or
- transfer of one company's (Company A) shares to another company (Company B), followed by liquidation of Company A and distribution of its assets in their present form to Company B.

## 3. Negotiation, Signing and Closing

### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Hong Kong purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

Purchase Price		
1	Is a purchase price adjustment common? What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. All types seen, including working capital adjustment, cash-free, debt-free, NAV adjustments.
2	Is there a collar on the adjustment?	Collars are not common. May be required where public company.
3	Who prepares completion balance sheet?	Usually prepared by target company.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	More common in private equity transactions when sellers continue to manage the target company after closing. Less common where seller is completely exiting. Earn-outs commonly capped.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Commonly used by private equity investors and strategic buyers.
8	Is a break fee common?	Uncommon.

**Conditions Precedent**

- |    |  |   |
|----|--|---|
| 9  | Express Material Adverse Event (MAE) completion condition? | Uncommon, typically only available where there is a long period before execution and completion, or a foreign seller. |
| 10 | Is the MAE general or specific?                            | Both seen.  |
| 11 | Quantification of MAE?                                     | Uncommon.   |

**Covenants, Access**

- |    |   |   |
|----|---|---|
| 12 | Is a non-compete common? Do you use waterfall/blue pencil provisions?                             | Common, but not from private equity sellers. Waterfall provisions uncommon.   |
| 13 | Non-solicit (of employees)?   | Common (in conjunction with non-compete).   |
| 14 | Non-solicit (of customers)?   | Common (in conjunction with non-compete).   |
| 15 | Broad access to books, records, management between sign and close?                                | Generally get this for private deals.   |
| 16 | Is it common to update warranty disclosure or notify of possible breach? What is the consequence? | Updating schedules is common but limited to things like lists of contracts. Notification of possible breach is common. Where material breach, right to terminate. |
| 17 | Is a separate tax covenant/indemnity or tax deed common?  | Becoming increasingly common.   |

**Representations & Warranties**

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|----|---|---|
| 18 | Materiality in representations – how is it quantified (e.g. by a \$ amount)?      | Materiality qualifiers commonly seen but often not quantified (other than specific warranties e.g. contract value).               |
| 19 | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers are growing. Often limited to the actual knowledge and due enquiry of a specified list of senior management. |
| 20 | Is a warranty that there is no materially misleading/omitted information common?  | Common.   |
| 21 | Is disclosure of data room common?  | Becoming more common.   |

**Repetition of Representations & Warranties**

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|----|--|---|
| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common? | Repetition at completion common. Bring-down certificate not very common.  |
| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard?  | True and accurate in all material respects is common but often carve-out for fundamental representations which must be absolutely true. |

- |    |   |                                     |
|----|---|-------------------------------------|
| 24 | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Double materiality usually avoided. |
|----|---|-------------------------------------|

### Limitations on Liability

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| 25 | What is the common cap amount (as a percentage of purchase price)?   | Buyer will ask for 100% but possible to negotiate down. Ranges from 10%–100%.   |
| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Both seen regularly.  |
| 27 | What are the common exceptions to the cap?   | Key warranties often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated. |
| 28 | Is a deductible or basket common?  | Becoming more accepted in market.   |
| 29 | Is a <i>de minimis</i> common?   | Becoming more common.   |
| 30 | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | General survival of 18–24 months common. Common to carve out fraud. Tax is commonly longer than general warranties.   |
| 31 | Is warranty insurance common?  | Uncommon but has been used in private equity exits.   |

### Reliance

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| 32 | Do financiers seek to rely on purchaser's due diligence reports? | Becoming more common. |
|----|--|-----------------------|

### Set-offs against Claims

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|----|--|-------------------------------|
| 33 | Is a set off against claims for tax benefits common? | Not commonly seen.            |
| 34 | Insurance proceeds?                                  | Common for actually received. |
| 35 | Third party recoveries?                              | Common for actually received. |

### Damages, Knowledge

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|----|--|---------------------------------------|
| 36 | Obligation to mitigate damages?  | Not usually express. Required by law. |
| 37 | Exclusion of consequential damages?  | Quite common.                         |
| 38 | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? | Often silent.                         |

## Dispute Resolution

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|----|---|---|
| 39 | Does local law allow for a choice of governing law? What is the common governing law? | HK is the most common law, but other common law jurisdictions, e.g. English law, sometimes used.  |
| 40 | Is litigation or arbitration more common? If arbitration, where?                      | Arbitration is more common. Hong Kong predominately chosen but will typically carve out court or administrative action (e.g. injunction). |

## Stamp Duty

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| 41 | If stamp duty is payable, is it normally shared? | Common to share stamp duty payable in Hong Kong. 0.2% of the greater of the purchase price and value (usually determined as NAV). |
|----|--|---|

## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

There is no legal requirement for an agreement for the sale of the legal and beneficial title to shares to be made in writing. However, to effect a share transfer it will be necessary to execute an instrument of transfer and bought and sold notes (a specific legal document used in Hong Kong). Market practice in the majority of cases is for a share transfer to be documented between the seller and the buyer by way of a written share sale/share purchase agreement (SPA).

### 3.2.2 Transfers of assets

In a transfer of assets, written contracts may be required by law or to fulfil an applicable registration requirement, for example for the sale of real property. Market practice in the majority of cases is for an asset transfer to be documented between the seller and buyer by way of a written asset sale/share purchase agreement (APA).

Where the Transfer of Businesses (Protection of Creditors) Ordinance applies, it is common in an arm's length transaction for the requisite notices to be published upon the signing of the relevant acquisition agreement relating to the transfer of the business. Completion then takes place after the expiry of the one-month period, subject to there having been no proceedings issued during that period or, if proceedings have been issued, to their having been dealt with to the buyer's satisfaction. It is also possible to publish the notices after completion and rely upon contractual indemnities if any claims arise.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

Transfer of title to the shares takes place by the delivery of a properly executed instrument of transfer and bought and sold notes and the original share certificate, which is *prima facie* evidence of title, followed by the stamping and registration of the transfer in the company books of the target (which normally will require the passing of a board resolution of the target where the target is a private limited company). Equitable title will normally be considered to pass when the instrument of transfer and bought and sold notes are executed (although this may occur earlier if an SPA is signed earlier). Legal title will be transferred when the transfer is registered in the company books of the target.

### 3.3.2 Transfers of title to assets

An APA will frequently only require signature by or on behalf of the parties to effect the transfer of title. However, certain types of assets (e.g. real property) require certain particulars to be transferred, such as being executed as a deed. Similarly, assets that are registered (e.g. domain names) may only be transferred by application to the relevant registrar.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

On 14 June 2014, the Legislative Council of Hong Kong adopted the long-awaited Hong Kong Competition Ordinance. The law is expected to come in force in the second half of 2015. Companies must comply with the Competition Ordinance from the date it comes into effect and any continuing conduct at that point in time will be subject to the law and 'at risk' (i.e. no grandfathering provisions apply).

The Competition Ordinance has two key prohibitions:

- the First Conduct Rule, which prohibits anticompetitive agreements, arrangements and concerted practices (applying to both horizontal and vertical arrangements), and
- the Second Conduct Rule, which prohibits abuse of a substantial degree of market power.

The Ordinance does not include any general merger control provisions, except for merger rules which already apply to the telecoms industry (see **4.2**). The rules under the Ordinance are substantially similar to those already in force, though they clarify that indirect or overseas transactions involving telecommunication or broadcasting licensees and minority acquisitions fall within the scope of the Hong Kong regime. Under the Ordinance, merger activities are specifically excluded from the application of the First Conduct Rule and the Second Conduct Rule.

The text of the Ordinance is drawn from a number of sources, including EU and other competition laws. At the time of writing (March 2015), draft guidelines are out for public consultation, so there is still uncertainty as to how the law will be applied. However, the draft guidelines and various comments made by Commission give some sense of how the law will be interpreted and enforced when the prohibitions are brought into force. The Ordinance includes provisions for:

- far-reaching investigative powers
- imposition of potentially high fines
- a leniency regime for breaches, and
- a mechanism for allowing victims of anti-competitive conduct to bring actions for compensation.

A Competition Commission has been established to investigate and bring proceedings in relation to alleged breaches of the Ordinance. The Communications Authority (CA) is conferred concurrent jurisdiction with the Commission to enforce the Ordinance in respect of the conduct of telecommunications and broadcasting licensees. A specialist division has been established within the Hong Kong High Court called the Competition Tribunal, which has primary responsibility to hear competition cases and issue decisions on breach, penalties and other relief. There are no stand-alone rights of action. However, anyone who suffers loss or damage as a result of anti-competitive conduct may bring follow-on claims in the tribunal to claim damages and other relief.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position prior to the Competition Ordinance coming into force (including thresholds and timetables for clearance) in a typical HK purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

## Filing Obligation

- |   |  |  |
|---|--|--|
| 1 | Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)? | Voluntary and only applies to the telecoms industry. An undertaking to a proposed transaction can apply in writing to the CA for consent to the transaction. The merger provisions only apply to transactions involving changes in relation to Hong Kong telecommunications carrier licensees. |
|---|--|--|

## Timetable

- |   |  |  |
|---|--|--|
| 2 | In practice, what is the timetable for clearance (in first phase and second phase review)? | The Telecommunications Authority's Guidelines for Mergers and Acquisitions in Hong Kong Telecommunications Markets (the M&A Guidelines) provide that in cases which do not raise serious competition issues, the CA will give consent to the application within one month of receipt of the application. When a detailed investigation is necessary, the CA will give a final decision within 3 months of receipt of the application. Note that these are not statutory deadlines and the CA has the discretion to take more time before making a decision. In practice, clearance can take significantly longer than the stated timeframes in the M&A Guidelines, depending on the nature of the transaction. |
|---|--|--|

The merger provisions only apply to transactions involving changes in relation to Hong Kong telecommunications carrier licensees (including local and external fixed network operators and mobile network operators). There is no approval requirement since the filing obligation is voluntary.

The merger provisions under the Telecommunications Ordinance (TO) come into operation when there is a 'change' in a carrier licensee which crosses one of the three tiers of control thresholds set out below:

## Rules on telecoms mergers upon change in carrier licensee

### Acquisitions of (percent of voting shares in carrier licensee)

### Conditions (as long as the acquirer)

15%–30%

either:

- already holds, or simultaneously acquires, >5% of the voting shares in any other carrier licensee, or
- has or simultaneously acquires the power to ensure that the affairs of any other carrier licensee are conducted in accordance with its wishes

30%–50%

is not already owner or controller of more than 30% of the voting shares

more than 50%, or

power to ensure that the affairs of the carrier licensee are conducted in accordance with the wishes of the acquirer.

does not already own or control more than 50% of the voting shares or does not already have the power to determine the affairs of the carrier licensee.

In all cases, the acquisition of shares will be assessed by taking account of the shares held by the acquirer and any 'associated person' (as defined in the M&A Guidelines).

The CA is empowered to investigate a transaction in relation to a carrier licensee. If, on carrying out an investigation, the CA forms an opinion that a transaction has or is likely to have the effect of substantially lessening competition, the CA can, by notice, direct the licensee to take any action it considers necessary, including requiring the parties to modify the transaction via structural and/or behavioural remedies.

The CA also has power to direct carrier licensees to modify any changes in ownership or control that may be of concern. Failure to take any directed action would constitute a contravention of the Telecommunications Ordinance. The CA may impose administrative sanctions (including directions, financial penalties, and cancellation, withdrawal or suspension of licences) upon carrier licensees.

The substantive test of the CA is whether the transaction has or is likely to have:

- the effect of substantially lessening competition in a telecoms market, and
- a benefit to the public, such that the benefit outweighs any detriment.

The CA has identified two 'safe harbour' thresholds, whereby if a transaction falls within one of the two thresholds, it is unlikely to substantially lessen competition. In these cases, the CA will take the view that it is unlikely that a detailed investigation or intervention will be needed (though the CA retains the discretion to carry out an intervention).

#### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Gun-jumping arises where parties to a proposed transaction integrate their business activities prematurely (prior to obtaining approval from the competition authorities). The parties should not take steps prematurely to:

- acquire or influence the commercial behaviour of the other company
- exchange competitively sensitive information, or
- integrate the acquiring target into their business activities.

Any such action may violate the First Conduct Rule when the Competition Ordinance comes into force. The draft guidelines state that the Commission will consider information exchange on future pricing (or element of pricing) or sales volume information as detrimental to competition. This includes information exchange via a third party supplier or distributor as a 'conduit'. Other forms of information exchange may also be considered to be detrimental to competition.

See Appendix B for more information on the broad principles of information exchange and 'gun-jumping'.

#### 4.4 Anti-Bribery, Corruption and Money Laundering

Anti-bribery, corruption and money laundering are broadly regulated in Hong Kong through the Organised and Serious Crimes Ordinance and the Prevention of Bribery Ordinance. These Ordinances include general prohibitions on and establish offences of official and commercial bribery and money laundering.

See also Appendix D in relation to FCPA and UK Bribery Act which may apply to activities in Hong Kong.

#### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Hong Kong remains one of the least regulated jurisdictions in Asia. At present no investment approval requirements are directed specifically towards foreign investors (other than industry-specific regulations).

#### 4.5.1 Exchange controls

Hong Kong applies no controls on the movement of foreign exchange. Similarly, there are no restrictions on investment or repatriation of capital or remittance of profits or dividends to or from a Hong Kong company and its shareholders. In certain circumstances, withholding tax may be payable on royalty payments. There are no limits on the amount of profits which may be remitted to foreign investors, subject to restrictions in the Companies Ordinance concerning maintenance of company capital.

#### 4.5.2 Foreign investment approvals and notifications

As a general rule, there are no restrictions on permitted ratios of foreign ownership of Hong Kong companies. However, regulatory controls apply in certain industries. For example:

- approval is required under the Broadcasting Ordinance (BO) if foreign ownership of a domestic free television programme service licensee is to exceed any of the following shareholding thresholds 2%, 6% and 10%
- foreign ownership of a radio broadcasting company must not exceed 49% as regulated under the TO, and
- certain telecommunications licences may only be issued to Hong Kong companies (although there are no restrictions on foreign ownership of those companies).

#### 4.5.3 Industry-specific regulation

In certain industries, the consent of the relevant regulatory body is required for a change of ownership, the acquisition of even a minority interest, or the disposal or amalgamation of the regulated business. Those businesses include:

- banking, restricted licensed banking or deposit-taking (BO)
- insurance companies (Insurance Companies Ordinance)
- securities dealers and securities investment advisers (Securities and Futures Ordinance), and
- radio and television broadcasting (TO and the BO).

These merger approvals apply equally to foreign and local investor entities with only a few exceptions.

#### 4.5.4 Import/export controls

Hong Kong operates a free port, with minimal tariff and non-tariff barriers. Imported merchandise must be declared within 14 days of arrival in Hong Kong, and is generally the only requirement applicable to most imported merchandise. Notable exceptions to this include import duties imposed on a few dutiable commodities: liquor, tobacco, hydrocarbon oil and methyl alcohol; and a handful of non-tariff barriers.

Furthermore, in accordance with the United Nations (UN) Security Council Resolution 1540, Hong Kong has implemented export controls to stem the proliferation of weapons of mass destruction, by regulating the export of strategic commodities (i.e. weapons and dual-use items, which have both a military and civilian application). Although it is not a member of the Wassenaar Arrangement (WA), Hong Kong maintains a dual-use items blacklist similar to that of the WA.

In fulfilment of its UN obligations, Hong Kong also implements UN sanctions against countries and parties that range from trade restrictions of arms or dual-use materials, to restrictions on the financing (directly or indirectly) of sanctioned activities.

Hong Kong is also a member country to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and in accordance with its treaty obligations, implements import and export restrictions relating to endangered animals and plants, as well as their derivative products (e.g. crocodile leather goods).



## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Stamp duty at the rate of 0.1% is generally payable on any transfer of shares by each of the transferor and the transferee, with the amount being calculated by reference to the stated consideration or underlying value of the shares being transferred – whichever is higher. Where the amount of stamp duty payable on a company acquisition is likely to be significant, certain techniques (e.g. a fresh allotment of shares or reclassification of existing shares) may be adopted to minimise the duty. If those techniques involve steps that have no commercial or business purpose, the Collector of Stamp Revenue may seek to apply anti-avoidance principles in order to disregard the non-commercial steps. An exemption applies for shares transferred between companies with a common shareholding of 90% or more (among other conditions). An application must be made to the Collector of Stamp Revenue to take advantage of the exemption.

Stamp duty must be paid before the transfer of shares can be registered in the books of the target company and within the time-periods specified in the Stamp Duty Ordinance.

### 5.2 Acquisition of Assets

The transfer of assets in Hong Kong is not generally subject to tax, although tax is payable on the transfer of certain specific assets such as real property.

### 5.3 Value Added Tax

Hong Kong does not impose VAT or goods and services tax.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

Where a transaction takes the form of an acquisition of shares in a company with employees, there are unlikely to be significant employment law issues as the underlying employment contract (and employee benefits generally) between the target company and its employees will usually be unaffected by the change in control of the employer. In this context, it is really a matter for the buyer to identify the liabilities associated with the labour force and possibly also to make appropriate arrangements for the transfer of benefits or the establishment of an appropriate pension or retirement scheme. The contracts of key senior personnel should be checked for any change of control provisions. Due diligence should be undertaken to ensure that potential liability for past acts and omissions is known.

#### 6.1.2 Acquisition of assets

The position is a little more complex in the case of a transfer of the assets comprising a business. In this situation, Hong Kong law provides that the contracts of the employees who are employed by that business do not automatically transfer to the buyer. Existing contracts of employment must therefore be terminated and new contracts entered into with the buyer. Technically, the employees will be made redundant by the transfer and it is important to take steps, to the extent possible, to minimise the employer's potential liability to make payments to employees in this situation.

To avoid liability to pay severance to employees on the transfer of a business, the offer of new employment must be given by the buyer not less than seven days before the date of the employees' transfer. The new terms of employment must either be identical to those under the employees' existing employment, or constitute an offer of suitable employment on terms no less favourable to the employees than those under which they were previously employed. The new employer must agree to recognise the employees' previous period of service. It is common practice for the termination and offer of new employment to be combined in a joint letter sent by both seller and buyer, or to be made in separate letters from the seller and buyer, but given to employees at the same time. Typically, a

clause requesting the employee's consent to shorter contractual notice to the transfer will also be contained in the transfer letter. The notice period cannot, however, be shorter than seven days.

If, on a transfer of assets or business, the employees are provided with due notice and all the mandatory details they should receive, as above – but the employees decide not to accept the offer from the buyer and their employment is terminated by the seller, the legal exposure of the seller will, in normal circumstances, be limited to just a long-service payment, if applicable, plus accrued wages and untaken annual leave. If the employees are entitled to a contractual bonus, a pro rata portion will also be payable.

## 6.2 Protection against Dismissal

### 6.2.1 Redundancies

Generally, employees have no rights to security of continuing employment. Under current legislation, employers are entitled to terminate employment either by giving contractual notice or making payment in lieu of notice. Exceptions to the right to terminate may exist in cases involving union membership, sick leave, maternity leave, pregnancy or industrial accidents. Employers' freedom to terminate is also slightly restricted by anti-discrimination legislation and restrictions on unfair dismissal.

Employees must be given the length of notice of termination required under their contracts or, where relevant, any longer period as provided for in the Employment Ordinance which provides for a minimum notice period of seven days; continuous contracts of employment are, in the absence of express agreement to the contrary, treated as requiring one month's notice. Wages must be paid up to the date of termination and payment for accrued annual leave may also be needed. These payments are based on average wages calculated by reference to the 12 full calendar months immediately preceding the transfer date. 'Wages' include salary and most allowances and commissions. In addition, a pro rata bonus may also be payable, depending on the nature of any bonus plan.

### 6.2.2 Penalties

If the notice requirements are not followed, 'wages' (as defined in the Employment Ordinance) in lieu of notice will be payable by the employer.

# Hungary

## 1.1 Overview

Hungary has had a new legislative framework affecting M&A since 2014.

Act V of 2013 of the (new) Civil Code has been in force since 15 March 2014, replacing the previous regime. The Civil Code consolidates some of the rules affecting business organisations which were contained in previous company laws, while also introducing new rules to increase creditor protection and help create legal certainty about the operation of business organisations.

## 1.2 General Legal Framework

The Civil Code and Act V of 2006 on Public Company Information, Company Registration and Winding-up Proceedings, as amended, are the two basic laws governing corporate matters.

## 1.3 Corporate Entities

Businesses wishing to establish a company in Hungary must adopt one of four possible corporate structures, as set out in the Civil Code:

- limited liability companies (*korlátolt felelősségű társaság/Kft*)
- private companies limited by shares (*zártkörűen működő részvénytársaság/Zrt*)
- public companies limited by shares (*nyilvánosan működő részvénytársaság/Nyrt*), and
- various types of partnerships with unlimited liability of some or all partners (*közkereseti társaság/Kkt* and *betéti társaság/Bt*).

The latter forms (Kkt/Bt) tend not to be used for foreign investment purposes.

### 1.3.1 Limited liability companies

A Kft is a business organisation established with a predetermined amount of initial capital provided by one or more quotaholders. A Kft may not issue shares or securities; the equity contribution of each Kft quotaholder is represented by the so-called 'business quota'. Members of a limited liability company are called quotaholders (rather than shareholders). In general, the liability of a quotaholder in this type of company extends only to their providing capital contributions and any other contributions as dictated by the articles of association; they are not usually responsible for the liabilities of the Kft. The minimum capital required to establish a limited liability company is HUF3 million.

Most quotas are freely transferrable among the quotaholders of the company, excluding the company's own quotas. The quotaholders of the company, the company or a person designated at the quotaholders' meeting have, in this order of priority, pre-emptive rights to purchase quotas which are to be transferred by means of a quota sale and purchase agreement, as long as this is not precluded or restricted by the articles of association.<sup>1</sup>

### 1.3.2 Companies limited by shares

A company limited by shares will have a pre-determined amount of share capital represented by shares of a predetermined number and nominal value. The liability of the shareholders of a company limited by shares is limited to their contribution to the share capital of the company limited by shares, i.e. to the nominal or subscription value of their share(s).

<sup>1</sup> The law establishes the priority order for the exercise of the pre-emptive purchase right. If the other quotaholder does not want to buy the quota from the quotaholder who proposes to sell it to a third party, the company may exercise its pre-emptive right to purchase that quota (subject to the rules on the maximum amount of 'treasury quota' which the company may own). If the company does not exercise that pre-emptive right, then a person designated at or by the quotaholder's meeting to exercise such pre-emptive right may do so.

A company limited by shares must take one of these two forms:

- private company limited by shares
  - if its shares are not listed on a stock exchange, and
  - its registered capital is not less than HUF5 million.
- public company limited by shares
  - if its shares are listed on a stock exchange, and
  - it has been established by share subscription via a public procedure regulated in the capital markets and other applicable laws, and it has registered capital of at least HUF20 million.

## 2. Acquisition Methods

A business may be purchased either by way of a share (quota) purchase or the purchase of individual assets comprising the business. While mergers are regulated by the Civil Code and the Hungarian legislation implementing the EU Directive on Cross-Border Mergers, to date mergers have been utilised in the context of pre- or post-transaction restructurings or corporate group consolidations rather than as acquisition vehicles.

### 2.1 Acquisition of Shares (Quotas)

Besides concluding a written share purchase agreement, the parties must comply with several administrative formalities to transfer the legal title over the quotas in a Kft or shares in a Zrt or Nyrt. In share (or quota) transfers, the buyer acquires the company with all of its assets and liabilities. The company can usually retain most of its operating licences and may continue operating without interruption. In some cases the change of the ownership of the company would trigger a reporting obligation or the need to amend company licences.

### 2.2 Acquisition of Assets

Hungarian civil law does not recognise the concept of transfer of business. Instead, each individual asset (and liability) comprising the relevant business must be transferred in accordance with the terms and conditions applicable to that particular type of asset. As a result of legal developments based on relevant EU legislation, the concept of the sale of a line of business has gained recognition in the last few years not only from a labour law but also from a tax liability (e.g. VAT, CIT) perspective.

### 2.3 Mergers/Other Acquisition Methods

The Civil Code and the Act (CLXXVI of 2013) on the Transformation, Merger and Demerger of Business Associations lists and regulates the methods of merger which may be used among different Hungarian companies or other business associations, as well as the general rights and obligations of the various entities involved in the process and of their shareholders (quotaholders). Further rules are applicable to the cross-border mergers between Hungarian companies and other EU resident companies based on the local implementation of the EU Directive on Cross-Border Mergers. Due to the heavy administrative burden and specific payment and share (quota) exchange rules, mergers and demergers are rarely used in acquisitions, and tend instead to be used in the context of pre- or post transaction restructurings. The merger process usually takes about 4 to 8 months and requires an audit of the financial documentation prepared for the purpose of the merger by an independent auditor (who must not have served as statutory auditor of any of the companies involved in the past two financial years).

### 3. Negotiation, Signing and Closing

#### 3.1 Pre-Contractual Obligations

Hungarian law does not require any special formalities or obligations to be completed prior to signing of the transaction documents, except for a general co-operation obligation. Nevertheless, in local practice, it is common for the buyer to conduct at least legal and financial due diligence before finalising and signing the share (quota) or asset purchase agreement.

#### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Hungarian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

##### Purchase Price

1.	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. Cash-free, debt-free adjustments usual, and working capital adjustments also common.
2.	Is there a collar on the adjustment?	Collars not common.
3.	Who prepares completion balance sheet?	Usually prepared by buyer.
4.	Is the balance sheet audited?	Usually. Audited by target's auditor or buyer's financial advisor.
5.	Is an earn-out common?	Not common if seller completely exits. However, sometimes used if the sellers continue to manage the target after closing and in private equity transactions.
6.	Is a deposit common?	Not common.
7.	Is an escrow common?	Common to cover breach of the warranties and any other of the seller's contractual obligations.
8.	Is a break fee common?	Not common at all.

##### Conditions Precedent

9.	Express Material Adverse Event (MAE) completion condition?	Common.
10.	Is the MAE general or specific?	Specific more common.
11.	Quantification of MAE?	Increasingly seen.

##### Covenants, Access

12.	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, but not from private equity sellers. Waterfall/blue pencil provisions uncommon.
13.	Non-solicit (of employees)?	Common (in conjunction with non-compete).
14.	Non-solicit (of customers)?	Common (in conjunction with non-compete).

15.	Broad access to books, records, management between sign and close?	Common for private deals, but avoid structures which could be interpreted as taking over control of the target if merger control approval for the deal is required.
16.	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Common. But usually any update or disclosure made after signing does not limit the liability of seller or restrict buyer's rights, unless otherwise specifically agreed.
17.	Is a separate tax covenant/indemnity or tax deed common?	Very common to have tax representations and warranties relevant indemnity, usually included in purchase agreement.

### Representations and Warranties

18.	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality is usually defined on case-by-case (i.e. per rep) basis, and usually quantified by an amount.
19.	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers growing. Often limited to the actual knowledge of a specified list of senior management of target and of specific representatives of seller.
20.	Is a warranty that there is no materially misleading/omitted information common?	Still commonly requested by buyers, but often resisted by sellers.
21.	Is disclosure of data room common?	Becoming more common.

### Repetition of Representations and Warranties

22.	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition at completion common. Bring-down certificate is not very common.
23.	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects common but often carve-out for fundamental representations which must be absolutely true.
24.	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Uncommon.

### Limitations on Liability

25.	What is the common cap amount (as percentage of purchase price)?	The typical range is between 10-30% of the purchase price. As regards ownership, usually capped at 100% of purchase price. Local law has mandatory restrictions on the limitation of liability (e.g. liability for fraud or wilful actions may not be limited).
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26.	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually warranties only.
27.	What are the common exceptions to the cap?	Key warranties often excepted (e.g. title, authority). Often tax, specific areas of concern or identified liabilities uncapped or with higher caps.
28.	Is a deductible or basket common?	Tipping basket more common than deductible.
29.	Is a <i>de minimis</i> common?	Common.
30.	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–24 months, with the exception of basic warranties (e.g. title, ownership, authority) which are unlimited, and tax and sometimes environmental warranties, which usually survive for the period of the applicable statute of limitations.
31.	Is warranty insurance common?	Uncommon.

#### Reliance

32.	Do financiers seek to rely on buyer's due diligence reports?	Uncommon.
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#### Set-offs against Claims

33.	Is a set-off against claims for tax benefits common?	Common.
34.	Insurance proceeds?	Common for actually received.
35.	Third party recoveries?	Common for actually received.

#### Damages, Knowledge

36.	Obligation to mitigate damages?	Required by law.
37.	Exclusion of consequential damages?	Common.
38.	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Often silent.

#### Dispute Resolution

39.	Does local law allow for a choice of governing law? What is the common governing law?	Yes. Hungarian law commonly chosen if the target is Hungarian or if seller is a Hungarian private person/s.
40.	Is litigation or arbitration more common? If arbitration, where?	Arbitration is much more common. For Hungarian law-governed agreements, typically the Permanent Arbitration Court of the Hungarian Chamber of Commerce and Industry.

## Stamp Duty

41. If stamp duty is payable, is it normally shared? No. Each party pays its own costs and taxes.

### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares (quotas)

A written agreement on the sale and purchase of shares or quotas of a Hungarian company must be concluded. In addition, the parties must comply with several administrative formalities to transfer the legal title over the quotas in a Kft or the shares in a Zrt or Nyrt.

#### 3.3.2 Transfers of assets

Hungarian civil law requires that a written agreement on the sale and purchase of certain types of assets be concluded. In local practice, a written agreement is usually concluded to regulate the rights and obligations of the parties and to enable accounting and taxation of the transaction.

### 3.4 Formalities for Transferring Title to Shares or Assets

#### 3.4.1 Transfers of title to shares (quotas)

In addition to the requirement for a written share (quota) purchase agreement, the following reporting and registration steps must be followed to transfer title over shares (quotas).

#### ***Limited liability companies***

Any change in the ownership of the quota must be recorded by the managing directors of the Kft, in the so-called 'membership list' of the Kft, which contains data relating to each quotaholder and information on their quota and capital contributions. The ownership change also must be reported to the Hungarian trade registry for registration purposes. That registration is not constitutive of the title transfer; the quota transfer will be recorded in the trade registry as having occurred on the date stated in the written quota purchase agreement.

#### ***Companies limited by shares***

Private companies limited by shares may issue either printed or dematerialised (electronic) shares. Public companies limited by shares must issue dematerialised shares.

Endorsement is required to transfer the title to printed shares. The buyer's name may be either included in the text of the endorsement (full endorsement) or left out of the endorsement (blank endorsement). In the latter case, it is possible for the buyer, as owner of the shares, to further transfer the shares without having been registered on the printed shares themselves.

Title to dematerialised shares must be transferred from the securities account of the seller to the securities account of the buyer.

In addition, if the new shareholder intends to exercise its shareholder's rights (e.g. right to dividend, right to participate and vote in shareholder's meetings, etc.), it must inform the board of directors of the company limited by shares to update the shareholder's register with details of the new shareholder.

Further reporting and registration obligations may apply if the shareholding of the buyer reaches or exceeds certain levels (usually 75% of the shares) or if industry-specific laws impose specific obligations (e.g. banking, energy sector, etc.).



### 3.4.2 Transfers of title to assets

Usually an asset transfer agreement combined with the handing over of the sold assets are adequate for the transfer of the legal title to most assets belonging to a business. In addition to a mandatory written purchase agreement, specific reporting and registration rules may apply to the transfer of title to specific assets such as real estate, vehicles, and intellectual property. Further, if the assets are encumbered by pledge, mortgage or are the subject of a government subsidy, their transfer may be subject to the prior written approval of the relevant financing institution or government agency.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

The main rules of Hungarian competition law are set out in Act LVII of 1996 on the Prohibition of Unfair Market Practices and Unfair Competition. This Competition Act has been amended many times since it entered into force in 1997. The substantive provisions of the Act correspond to the EU anti-trust rules (Arts 101 and 102, TFEU).

The Competition Act contains provisions on the prohibition of unfair competition, consumer protection, merger control, the abuse of dominant position and the prohibition of restrictive agreements and practices.

Infringement of anti-trust rules may trigger administrative, criminal and civil liability.

Administrative enforcement is the task of the competition office, which has the discretion to issue an injunction and to impose administrative fines on infringing companies. Criminal liability of individuals may arise only in cases related to concession tenders and public procurement procedures. In those cases criminal courts may impose criminal sanctions both on individuals and companies found to be in violation of the anti-trust rules. In addition to administrative and criminal sanctions, the infringement of anti-trust rules may also lead to private lawsuits before civil courts, in which private plaintiffs can seek the termination of the infringing act and/or raise damage claims.

All restrictions of competition that have, or are likely to have, effects within the territory of Hungary are subject to the Competition Act. Accordingly, foreign undertakings are subject to these prohibitions even if they do not have a corporate or other type of presence in Hungary. Similarly, the jurisdiction of the competition office can be established even if the conduct is carried out (solely) abroad, but it results in (at least potential) restrictive effects in Hungarian markets.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Hungarian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Where there is a concentration of companies, authorisation from the Competition Office must be obtained if

- the aggregate net turnover of all groups of companies involved, and the net turnover of the companies controlled jointly by members of the groups of companies involved together with other companies in the previous financial year exceeded HUF15 billion, and
- among the groups of companies involved there are at least two groups with net sales revenues of HUF500 million or more in the previous year, including in each case the net sales revenues of companies controlled by members of the same group jointly with other undertakings.

Filing must be made before implementation of the concentration which may not be implemented prior to approval.

If the thresholds of the EC Merger Regulation are met, the concentration must be approved by the European Commission, and not the Hungarian Competition Office (see Appendix A, 1.4).

### Filing Obligation

Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
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### Timetable

In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p>The Competition Office usually orders the submission of supplementary information, in which case the deadline only starts when all information (including any supplementary information) has been filed. As a result of this, and as a result of possible information requests later on in the procedure which may ‘stop-the-clock’, a standard Phase I (simplified) procedure usually lasts for 6–10 weeks and rarely ends earlier than 3 weeks from the date of the initial filing, except if filing is provisionally accepted in pre-notification discussions.</p> <p>In more straightforward Phase II procedures, the process takes around 4 months; in more difficult cases, 6–8 months.</p>
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## 4.3 Exchange of Competition-Sensitive Information and ‘Gun-Jumping’ Issues

Notifiable transactions may not be implemented before the approval of the Competition Office has been granted. The same rules apply to exchange of competitively sensitive information as under EU competition law. Sharing competitively sensitive information may qualify as an information cartel and may trigger anti-trust liability.

## 4.4 Anti-Bribery, Corruption and Money Laundering

The Hungarian Criminal Code (Act C of 2012) effective since 1 July 2013 defines ‘bribery’ as including any cases where anything of value is offered or promised directly or through a third person to seek to improperly influence the conduct of a public official. This includes prohibitions on:

- attempting to bribe a public official by giving or promising unlawful advantage to that person or to another person for the account of a public official
- giving or promising an advantage to public officials to induce them to breach their official duties, exceed their competence or otherwise abuse their positions of authority
- the request, acceptance or receipt of an unlawful advantage by a person who claims to influence a public official in connection with that advantage, or agreeing with such person.

The Criminal Code includes an exhaustive definition of persons who are public officials.

Commercial bribery is also prohibited by the Criminal Code and includes all cases where anything of value is offered or promised directly or through a third person to improperly influence an individual working for or on behalf of a company or other economic entity (i.e. to induce that person to breach their duties).

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Hungary has no exchange controls or mandatory foreign investment approvals of general application. Various approvals or notifications may be required in the case of acquisitions in certain fields, such as, e.g. financial services, utilities, and media sectors. However, those requirements exist principally because of the nature of the business concerned rather than as mechanisms to control foreign investment. Generally, Act XXIV of 1988 on the Investments of Foreigners in Hungary permits foreigners to engage in or conduct business activities in Hungary or to engage in business via a presence for business purposes in Hungary (e.g. a company, a branch, etc.).

Hungary has signed the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention) which aims to remove major impediments to the free international flow of private investment posed by non-commercial risks and the absence of specialised international methods for investment dispute settlement.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Generally share (quota) acquisitions are exempt from VAT and transfer tax. However, the disposal of shares of a company holding real estate is subject to transfer tax under certain conditions. Transfer tax is payable if the acquirer of the shares owns, directly or indirectly, 75% of the total of the shares of the company holding real estate. The total number of shares includes shares held by related parties and close relatives of the acquirer as well as close relatives of those related parties. The tax base is the proportional part of the market value of Hungarian real estate held by the company holding real estate. The tax rate is 4% (up to a market value of HUF1 billion, plus 2% (on any excess over this value), with tax payable capped at HUF200 million per real estate.

### 5.2 Acquisition of Assets

Transfer tax may apply on some transferred assets, especially on real estate, pecuniary rights attached to real estate (e.g. the right to use the real estate) and the transfer of motor vehicles.

The transfer of real estate and rights related to it is subject to transfer tax on the basis of the market value of the real estate. The general rate of transfer duty is 4% (up to a market value of HUF1 billion) and 2% (on the excess above this value), with tax payable capped at HUF200 million per real estate property. A special 2% regime is applicable if a piece of real estate is acquired by a real estate agent or a financial leasing company. In the case of pecuniary rights attached to real estate, the basis of transfer tax is one-20th of the market value (not reduced by any encumbrances on the real estate) multiplied by the number of years of the right (e.g. usufruct rights).

The transfer tax payable on the transfer of motor vehicles depends on the age and the performance (i.e. kW power) of the motor vehicle. The transfer tax rate is HUF300–HUF850 per kW.

If certain conditions are met, a so-called ‘preferential’ transfer of assets is exempted from transfer tax. A preferential transfer of assets is a transaction whereby a company (the transferor) transfers one or more independent branches (or lines) of its activity to another company (the transferee) in exchange for quotas or shares representing the capital of the transferee (and the transferor is not dissolved).

### 5.3 Mergers

Generally the transfer tax rules described above also apply to mergers. However, in a preferential transformation or a preferential exchange of shares, the acquisition of assets is exempt from transfer tax.

A preferential transformation is the formation of a new company (including via a merger or demerger), where both the predecessor and successor entities are companies and:

- the shareholders of the predecessor company receive shares in the successor company and a cash payment of up to 10% of

- the total nominal value of the shares acquired in connection with the transformation, merger, demerger, or
- if the shares have no nominal value, the percentage which they represent in the registered capital, or
- in a demerger, the shareholders of the predecessor company receive a proportionate (compared to the other shareholders) share in the capital of the successor companies, or
- a wholly-owned company merges with/into its sole shareholder.

A preferential exchange of shares in a restructuring transaction occurs when a company:

- acquires a stake in the share capital of another, obtaining the majority of the voting rights in that company, or
- holding a majority in the share capital of another, acquires a further holding in it and the shareholder of the acquired company receives shares or financial assets valued at a sum not exceeding 10% of the nominal value of the shares in the acquirer company.

## 5.4 Value Added Tax

Share acquisitions are VAT and transfer tax exempt. However, it is anticipated that this may change in the near future.

The sale of assets is generally subject to VAT at a standard rate of 27%. The following real estate transactions are subject to VAT:

- building sites and sites with ongoing construction
- developed areas (including buildings and apartments), if the sale occurs prior to issuance of the occupancy permit (which, in practice, is generally issued shortly after the completion of construction), or where the occupancy permit is already binding, but is not older than two years at the time of the sale.

The transfer of certain assets (e.g. receivables) and the transfer of liabilities are VAT-exempt. Under certain conditions, the transfer of a going concern (TOGC) will be VAT-exempt.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares (quotas)

Except for certain specific cases (e.g. privatisation transactions) no employee consultation is necessary for the acquisition of shares (quotas) of a Hungarian company. The target company will continue to be the employer of the employees and will continue to exercise and fulfil its employment-related rights and obligations.

#### 6.1.2 Acquisition of assets

Each asset purchase transaction must be examined to determine whether the group of assets (and any liabilities and contractual relationships) being transferred will or will not qualify as an organised group of material and other resources (comprising a separate and individual line of business). If an organised group of material and other resources is being transferred, then the transaction is deemed to be a transfer of business for labour law purposes. In that case, the employees belonging to the affected business unit, together with all employment-related rights and obligations relating to them and their employment, are transferred automatically from seller to buyer by virtue of law. That transfer occurs on the employment terms and conditions existing on the effective date of the transfer. Accordingly, the buyer is not entitled unilaterally to modify the employment agreements of the transferred employees nor to decide which employees are to transfer and which will not.

The procedure requires a pre- and a post-transaction consultation with the employee representative body (works council or trade union) or, in the absence of such an body, with notification to the affected employees themselves. The consultation will look at the implications of the transfer and its legal, economic or social consequences, if any, to employees.

### 6.1.3 Mergers

A merger qualifies as transfer of business for labour law purposes; accordingly, the rules detailed in **6.1.2** also apply to mergers.

## 6.2 Approval or Consultation Requirements

The employer must request the opinion of the works council on the employer's contemplated measures affecting a group of employees: in particular, plans for reorganisation; change of employer, conversion of an organisational unit into an independent organisation; or modernisation or updating of production technologies. The works council must deliver its opinion concerning the employer's planned actions within 15 days of the employer having notified the works council of the change. Failure by the works council to react in that timeframe will be interpreted as granting consent to the proposed action. If no works council is in place at the employer company, the employer will be obliged to inform the trade union of any matters which would be deemed relevant to a works council.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

As the purchase of the shares (quotas) of a Hungarian company does not affect the employment relationship between the target company and its employees, no special rules apply to that purchase. Any dismissal of the employees of the target company must be made by the target company in accordance with the general rules of Act I of 2012, the Hungarian Labour Code.

Where asset purchase transactions result in the automatic transfer of employees by virtue of law, the buyer may not decide whether to accept or refuse the transfer to it of certain employees. Also, the occurrence of the transaction itself may not serve as a valid legal basis for employee dismissal. The buyer, as the new employer, may reorganise the operation after closing the transaction and in that process decide if any position has become redundant.

Specific rules apply to mass redundancy. The employer must follow the special procedure governing mass redundancy if it decides to terminate the number of employees set out below within a 30-day period.

Total number of employees	Number/percentage of employees to be terminated
21–99	10
100–299	10%
300+	30

In the case of a mass redundancy the employer must provide certain information to the employees prior to commencing the procedure and must also consult with the works council (if the employer has one) at least 15 days prior to the employer's decision to implement a mass redundancy. The employer must also provide information to the local Labour Centre during the process. The Labour Centre and the employees who may be dismissed must be given notice of termination, in writing, at least 30 days in advance.

### 6.3.2 Penalties

Failure to comply with the consultation requirements may invalidate the process – which will mean that the employee terminations may also be deemed invalid if challenged before a court. If the court rules in favour of the employee asserting that their employment was terminated unlawfully, the employer must pay the employee's lost salary (but which may not exceed the equivalent of 12 months, absentee-fee remuneration). The employer must also pay all additional damages incurred by the employee. However, the employee cannot be reimbursed for sums which the employee could have recovered from other sources (e.g. from their new employment or from unemployment benefits). Employees are also obliged to mitigate losses, which might decrease the employer's exposure. The employee may ask the court to order their reinstatement to their prior position in exceptional cases only e.g. where:

- the termination by the employer constituted a violation of
  - the requirement of equal treatment, or
  - a restriction of the termination rights of the employer, or
- the employer terminated the employment of an employee who was also a trade union officer (without the trade union's prior approval).

## Indonesia

### 1.1 Overview

Indonesia's jurisprudence is based on the European civil law system. This difference from many other jurisdictions in the Asia Pacific region, together with ongoing regulatory changes, means careful consideration of the issues that arise in mergers and acquisitions (M&A) is required.

Indonesian law is constantly changing and with the absence of implementing regulations, is not always clear. It is likely that there will be further amendments to existing laws, or new laws in the near future.

### 1.2 General Legal Framework

The current Company Law was enacted in July 2007 and sets out a statutory framework for the combination of businesses conducted through limited liability companies. The Company Law emphasises protection of minority shareholders in particular, and of the interests of the company, its employees, the interests of society in general, and fair competition.

The practice, procedure and policy of relevant Indonesian government agencies, including the Ministry of Law and Human Rights (MOLHR), Bank Indonesia, the Financial Services Authority (OJK) and the Capital Investment Coordination Board (BKPM) will be as important in consummating a transaction as the underlying laws governing M&A.

### 1.3 Corporate Entities

There are two main types of company that can be established in Indonesia—private companies and public companies.

The focus here is on private company M&A. While some of the issues may also be faced by public companies, it should be noted that there are substantial differences in the laws and regulations as they apply to public versus private companies.

## 2. Acquisition Methods

Five types of M&A transactions are contemplated by the Company Law: mergers, consolidations, share acquisitions, spin-offs and asset acquisitions. The law succinctly defines and differentiates between the concepts of merger, consolidation, spin-off and acquisition.

### 2.1 Acquisition of Shares

Under the Company Law, an acquisition is a lawful act executed by a legal entity in the form of a company or other entity, or by an individual, to take over all or a majority of a company's shares, whether existing or newly issued, which may cause a change in the control of the company. The Company Law does not state the meaning of 'control' but it is reasonable to assume that the term refers to the capacity to determine, directly or indirectly, in any way, the management or policies of the company concerned.

Acquisitions instigated by the management of a company are treated differently, and have more complex requirements than an acquisition between an existing shareholder and a proposed new shareholder.

Generally, all that is required to transfer legal title in the shares in an Indonesian private company, after receipt of regulatory approval and completing regulatory procedures, is for a share transfer deed to be executed by the seller and purchaser (under hand by way of an agreement or in notarial deed form) and then registered in the company's shareholders register. The transfer is effective on the date of the share transfer deed. However there are subsequent requirements to notify or make registrations with the MOLHR and other government agencies (including in some circumstances changes in licensing).

## 2.2 Acquisition of Assets

When a business is being transferred by way of an asset purchase, each individual asset must be transferred in accordance with the formalities applicable to that type of asset. For some assets, this will simply be a case of delivering the asset to the purchaser, but in other cases, the formalities are more prescriptive, as is the case in real property or intellectual property transfers. It is therefore necessary to include a provision, either in the purchase agreement governing the purchase of the business and its assets or in separate agreements, for the relevant formalities to be complied with.

In conducting an asset purchase in Indonesia, acquirers should not underestimate the time that will be involved in concluding the transaction. In particular, acquirers need to be aware of:

- the multitude of government agencies that may be involved in effecting the transfer of registrable assets
- procedures for acquiring good title to land
- the often time-consuming efforts needed to:
  - obtain consents and approvals (including those from banks, third parties and government agencies)
  - establish the new investment company as the purchaser
  - obtain all general and industry-specific licences for the business being acquired
  - apply for expatriate work plans and permits
  - transfer over employees and deal with statutory benefits they may be entitled to on the transfer.

While these matters are not insurmountable, they do make closing an asset acquisition much more difficult and time-consuming than a transaction involving shares. In many respects the business on an asset sale either needs to cease operating until all licences are obtained or otherwise operate without licences (this is a consequence of licences not being transferable in Indonesia).

In contrast, share acquisitions generally require far fewer consents and approvals and are less problematic.

## 2.3 Mergers/Other Acquisition Methods

### 2.3.1 Mergers/Consolidations

A merger is a lawful act executed by one or more companies to merge with existing companies, which causes the dissolution of the merging companies but the continuing existence of the surviving company.

A consolidation is a lawful act executed by two or more companies to fuse together, forming a new company, followed by the dissolution of both (or all) of the consolidating companies.

### 2.3.2 Spin-offs

A spin-off is a lawful act whereby either:

- all of the assets and liabilities of a company are transferred by law to two or more companies and the transferring company is dissolved by law, or
- part of the assets and liabilities of a company are transferred by law to one or more companies and the transferring company still maintains its existence.



Unfortunately the Company Law does not regulate spin-offs in detail and the anticipated government regulations dealing with spin-offs have not been issued to date.

### 3. Negotiation, Signing and Closing

#### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Indonesian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

##### Purchase Price

1	Is a purchase price adjustment common? What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. For more sophisticated deals cash-free debt-free adjustments are normal. Working capital and NAV adjustments are also common. On deals with less sophisticated parties adjustments are not common.
2	Is there a collar on the adjustment?	Collars not common. Sometimes a <i>de minimis</i> is agreed where the parties are more sophisticated.
3	Who prepares completion balance sheet?	The buyer usually has the responsibility to ensure the target company prepares the balance sheet.
4	Is the balance sheet audited?	Typically reviewed but not fully audited.
5	Is an earn-out common?	Not common at all.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Not common unless using an escrow arrangement where a deposit is payable in an auction process.
8	Is a break fee common?	Uncommon.

##### Conditions Precedent

9	Express MAE completion condition?	Uncommon, typically resisted. Much depends on the sophistication of the seller's lawyers as to whether this might be slipped in. Arguably from a buyer's perspective this is prudent to have in Indonesia (given the long period for closing and unknowns).
10	Is the MAE general or specific?	Uncommon, typically resisted.
11	Quantification of MAE?	Uncommon. Usually very general (no examples of use or objection to use is known).

##### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall provisions, etc. uncommon.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).

15	Broad access to books, records, management between sign and close?	Not uncommon. Depends on the sophistication of the parties. Some sellers resist and limit for transitional purposes only.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Uncommon to update warranty disclosure. Notification of breach is common – usually by default. Where material breach, right to terminate.
17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax indemnity, usually included in purchase agreement. Usually short-form.
<b>Representations &amp; Warranties</b>		
18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen and often not quantified (other than specific warranties e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are common. Generally limited to a group of persons. Arguments still prevail over actual knowledge or knowledge after due enquiry (prior to signing of the agreement).
20	Is a warranty that there is no materially misleading/omitted information common?	Sophisticated sellers try to omit this representation and if pressured limited to fraud or intention to mislead.
21	Is disclosure of data room common?	Becoming more common and generally in auctions, etc. (especially where there is a virtual data room).
<b>Repetition of Representations &amp; Warranties</b>		
22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates very common.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.
<b>Limitations on Liability</b>		
25	What is the common cap amount (as a percentage of purchase price)?	Buyer will ask for 100%. If an offshore firm (or an Indonesian firm affiliated with an offshore firm) is advising, usually a lesser percentage for business warranties, e.g. 50%.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Both seen regularly, depending on sophistication of parties.

27	What are the common exceptions to the cap?	Key warranties often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated. Sometimes fraud excluded.
28	Is a deductible or basket common?	A basket is common
29	Is a <i>de minimis</i> common?	Individual <i>de minimis</i> is common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–24 months common. Common to carve out fraud. Tax commonly longer than general warranties (5–7 years).
31	Is warranty insurance common?	Uncommon.

### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Not yet but most deals financed on balance sheet. Likely to become increasingly common.
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### Set-offs against Claims

33	Is a set off against claims for tax benefits common?	Not commonly seen.
34	Insurance proceeds?	Common.
35	Third party recoveries?	Common.

### Damages, Knowledge

36	Obligation to mitigate damages?	Common to request. Not required by law.
37	Exclusion of consequential damages?	Quite common. If Indonesian law usually only direct damages (foreseen) recoverable.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Not uncommon.

### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. Governing law varies, depends on parties. Singapore law can be used and if UK firms involved they will try to argue for English law.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. Usually SIAC in Singapore. Some Indonesian parties refuse offshore arbitration and some insist on Indonesian courts.

### Stamp Duty

41	If stamp duty is payable, is it normally shared?	Stamp duty is only IDR6,000 per document, and the parties can agree who pays (whether orally or in the transaction agreements).
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## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

Under the Company Law, where there is a change in control of a company, notifications to creditors and employees must occur at least 30 days prior to calling the general meeting of shareholders to approve the transaction.

The documentation, whether all or some of the shares in the target company are purchased, will normally include a written share purchase agreement, although this is not strictly required by law and a simple share transfer deed can (and must) be executed.

Preemptive rights on the transfer of shares between shareholders are commonplace and must be specifically provided for in the articles of association.

### 3.2.2 Transfers of assets

In an asset acquisition there is typically an asset purchase agreement selling the assets/business purchased. Depending on the assets, specific instruments/agreements may also be required. The following items will require specific ancillary documentation:

- land transfer deeds for the sale of land
- assignments of the benefit of a contract (novation of agreements generally)
- assignment deeds for the transfer of most intellectual property rights.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

All share transfers and issuances to foreigners need foreign investment approval from BKPM.

The Company Law requires a simple deed of transfer for the transfer of shares in a company. All share transfers must be in the form of a deed and may be reduced to an Indonesian notarial deed if not executed in that form.

Usually the articles of association of a company have specific processes that must be followed.

A transfer of shares will not be recognised unless the transfer is recorded in the company's shareholders register.

The MOLHR will need to be notified of changes in the shareholding structure of any company (and must approve the issue of new shares). Notaries are generally involved in closing as they normally deal with reporting requirements to various government agencies and, where necessary, prepare relevant documentation in notarial form.

The local Land Office needs to register land for there to be an effective transfer of land. Certain titles (e.g. plantation land titles) in a share acquisition require approval from the local Land Office.

### 3.3.2 Share acquisitions under the company law (vertical mergers)

In general, the procedures for acquiring the shares in another company are very similar to the requirements for a merger or consolidation where the acquisition is instigated by the management of the relevant companies. The directors of each of the companies involved must prepare a proposal (acquisition proposal) that must be approved by the respective boards of commissioners. Acquisition proposals must be reduced to plans which are then adopted by the directors of the companies involved (acquisition plans) and laid before a general meeting of shareholders of each company.

The acquisition plan must include:

- the names of the companies

- the reasons for, and an explanation of, the terms and procedures for the acquisition of the shares
- the latest financial statements of the acquiring company
- the pro forma consolidated balance sheet and profit and loss statement post-acquisition prepared by independent advisers.

Similarly, the general meeting of shareholders of both companies that are party to an acquisition must approve the acquisition plan by a three-quarters vote (where a quorum is present of three-quarters of the shares with voting rights).

In addition, the acquisition plan must be published and notifications provided in the same manner as for a merger or consolidation (see below).

The deed of acquisition, as approved by shareholders, must be executed in notarial form.

### 3.3.3 Transfers of title to assets

Legal documentation for an asset acquisition tends to be more complicated than documentation for a share acquisition since the former involves the transfer of different categories of property. Different categories of property will often require different transfer documentation.

In an asset acquisition there is typically an asset purchase agreement assigning the assets purchased in broad terms. However, there are also various deeds of assignments for specific property such as shares, intellectual property, real property and motor vehicles.

Key personnel of the target company may also execute employment agreements, if the assets or business is bought as a going concern. The local land office needs to register land to effectively transfer land.

In an acquisition of assets transaction that involves the transfer of the entire or a substantial part of the assets of the target company, the directors of the company must obtain approval at a general meeting of shareholders under Article 102 of the Company Law.

A 75% vote of shareholder and public publication in a national newspaper is required.

## 3.4 Formalities for Mergers/Consolidations

Consolidations are rare in Indonesia as a new company must be formed. However, the formalities are very similar to those for a merger.

In a proposed merger or consolidation, the board of directors of all of the companies intending to consolidate or merge must prepare a proposal of merger or consolidation that must be approved by the respective boards of commissioners. Once approved, the directors of the respective companies intending to merge or consolidate must prepare a plan for the consolidation or merger that should be based on the proposals. At a minimum, the proposals and plan must include:

- the names of the companies intending to consolidate or merge
- the reasons for, and an explanation of, the proposed consolidation or merger by the respective directors of the companies intending to consolidate or merge, and the actual terms of the merger or consolidation (meaning the business reasons that justify the transaction from the perspective of shareholder value)
- the mechanical procedures for the conversion of the shares in the respective companies into shares in the surviving company resulting from the merger or consolidation; this requirement applies where the essential economic transaction between the respective companies must be described

- any amendment to the articles of association of the surviving company in the case of merger, or a draft of the deed of establishment of the new company resulting from a consolidation; in most cases, a merger will require amendments to the surviving company's articles of association (e.g. to increase its authorised share capital). This is because the Ministry of Law and Human Rights maintains a policy, stemming from the interpretation of Article 26 of the Company Law, that the authorised capital of a company cannot be greater than four times its paid-up capital. A new deed of establishment will clearly be required in every consolidation and such a deed will necessarily require the approval of the Ministry of Law and Human Rights
- balance sheets and profit and loss statements for the last three fiscal years from all the companies intending to consolidate or merge; it is implicit in this requirement that companies that have not been established long enough to be able to produce such financial results cannot consolidate or merge (although this view may be changing)
- pro forma balance sheets and profit and loss statements of the company post-merger or post-consolidation prepared by an independent adviser
- details settling the employees' status
- arrangements for any dissenting shareholders and creditors
- management analysis of the financial and operational issues relating to all relevant companies.

A merger or consolidation may only be completed if the plan (containing the prescribed elements) together with the draft deed of merger or draft deed of consolidation, is approved by a general meeting of shareholders of each of the companies involved. A three-quarters vote is required at a general meeting of shareholders where a quorum of three-quarters of the shares with valid voting rights is present. Before the transaction is submitted for approval to the general meeting of shareholders, the directors must publish a summary of the plan in one national newspaper and make an announcement in writing to the employees at least 30 days prior to 'calling' the general meeting of shareholders. Creditors have the right to object to the conclusion of a consolidation or merger within 14 days of the newspaper announcement (such objections need to be settled prior to or at the general meeting of shareholders in order for the merger or consolidation to proceed).

The purpose of the publication requirement is to give the parties concerned an opportunity to be informed so that if they believe their interests may be harmed, they may take certain steps to defend those interests. This refers to a separate requirement in the Company Law, discussed below, that a merger, acquisition, spin-off or consolidation plan must take into account the interests of the company, minority shareholders, employees and other affected parties (e.g. creditors). In particular, the rights of minority shareholders and employees would need to be guaranteed by the implementation of a merger, consolidation or acquisition plan. In addition, the implementation of the plan would also need to guarantee public interest and maintenance of healthy business competition, introducing antitrust concepts into the procedures.

The deed of merger or deed of consolidation, as approved by shareholders, must be executed in notarial form.

A consolidation (and the dissolution of consolidating companies) becomes effective upon the date that the deed of establishment of the new fused company is approved by the MOLHR. In any event, the submission of the deed of consolidation to the MOLHR must be made within 14 days of the general meeting of shareholders.

The time when a merger becomes effective depends on whether amendments are required to the articles of association of the company resulting from the merger. Where such amendments require approval by the MOLHR (which, as noted above, will usually be the case) the merger becomes effective on the date the Minister of Law and Human Rights issues his approval to the amendments. If the merger does not require any amendments to the articles of association, then the merger becomes effective on the execution of (or at a later date as agreed under) the deed of merger.

The merging company is also considered dissolved on the date that the merger becomes effective. The dissolution can be effected with or without prior liquidation of the consolidating or merging company.

As in the case of mergers, share acquisitions made under the Company Law become effective on the approval of the Minister of Law and Human Rights or on the execution of (or at a later date as agreed under) the deed of acquisition.

The general process and timing is as follows, in addition to foreign investment approvals (and applications and supporting documents). Documents required for a merger or consolidation include:

- merger/consolidation plans (prepared by the directors and approved by the commissioners)
- notices to the public (newspaper announcements with an abridged form of the plan) and notices to employees
- notice calling a GMS, and
- shareholder resolutions (amendments to articles etc.).

General Timetable for Merger/Consolidation/Acquisition (Vertical Merger)	
Day	Action
Execution	38 days (minimum) – assumes prior preparation of documents
Days 1–3	newspaper announcement in national newspaper to creditors and announcement to employees in writing (BKPM/foreign investment application could also be lodged at this time)
Days 4–18	waiting period for creditor objections (which must be notified to the company within 14 days of announcement, otherwise deemed approved) (BKPM approval would issue during this period)
Day 19–33/48*	settle creditor claims (must be done prior to general meeting of shareholders, otherwise resolutions cannot be passed)
Day 34	calling a GMS (Indonesian Company Law and usually articles of association require 14 clear days, but period might be shorten by shareholders agreeing to short notice (namely using Art. 82(5) of the Indonesian Company Law) or, least preferable, signing circular resolutions
Day 35/51*	the GMS passes resolutions approving the merger/consolidation
Day 37/53*	notary issues notarial deeds

\* = number of days if notice of a GMS is given 16 clear days prior to the GMS.

Thereafter filings with the MOLHR and other government agencies should be made.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

The Indonesian Competition Supervisory Commission (the Commission) has authority to examine and approve mergers, acquisitions and consolidations that 'have the potential to violate the Anti-Monopoly Law'. Unlike in other jurisdictions, the Anti-Monopoly Law only provides for post-transaction notifications and one sanction – cancellation of a transaction if the Commission believes that there will be monopolistic or unfair business competition if the transaction were to continue. This is unique to

Indonesia and makes it critical to assess the impact of a transaction on the market before advancing too far.

A post-completion mandatory filing will be required where there is an acquisition which exceeds certain thresholds.

An acquisition is where there is a change in control whether in the:

- ownership or control of shares or voting rights above 50% in a business entity, or
- ownership or control of shares or voting rights equal to or less than 50%, but having the ability to influence or determine management policies or the management of a business entity (e.g. shareholder agreements).

The thresholds are

- where the value of the assets of the combined businesses in Indonesia exceeds:
  - IDR2.5 trillion
  - IDR20 trillion for banks, or
- the sales turnover of the combined businesses in Indonesia exceeds IDR5 trillion.

The Commission has issued regulations:

- on merger/antitrust post-transaction notifications (including thresholds, requirements and procedure), and
- for prior non-binding consultations, which the Commission has stated it will abide by, provided there has been no material change in circumstances since the non-binding consultation occurred.

Asset sales and transactions between affiliates fall outside the merger control rules.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Indonesian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory for post-completion and voluntary for pre-completion.
Timetable		
2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	The Commission usually uses all allotted time or extends the review period by asking for additional information to complete a notification and, as a result, commence the running of time.



### 4.3 Exchange of Competition-Sensitive Information and ‘Gun-Jumping’ Issues

Parties who are competitors are required to act as competitors until any transaction between them is closed. The permissible scope of coordinated activities between the parties is therefore limited during the pre-closing period. See Appendix B for further information.

### 4.4 Anti-Bribery, Corruption and Money Laundering

#### 4.4.1 Anti-bribery law

The official explanatory notes (formally known as elucidations) to the Anti-Bribery Law explain that the law was promulgated to prohibit acts of bribery of government employees and other state administrative officials which affect the public interest. (This law is not intended to apply to cases where the Anti-Corruption Law, the Amendment to the Anti-Corruption Law or the Indonesian Criminal Code apply). In practice, current prosecutions of bribery in Indonesia generally invoke the more recent Anti-Corruption Law and the Amendment to the Anti-Corruption Law.

Given its focus on bribery involving the ‘public interest’, the law could also be interpreted to apply to ‘gifts’ given to officers of private entities, to the extent that the business involved touches on matters of public interest.

The basic elements of the crime of bribery are:

- ‘anyone’
- ‘giving or promising something’
- ‘with the intention to persuade the recipient to do or not to do something related to his duties’
- ‘which is contrary to his authority or obligations’
- ‘which is contrary to the public interest’.

Further, anyone who receives something or a promise of something, who knows or should have known that that thing or promise was given with the intention that he should do or refrain from doing something in the scope of his duty which is contrary to his authority or obligations involving the public interest, may be sanctioned.

In summary, any act of giving or receiving a bribe, whether in the form of tangible or intangible objects, is a crime if the act was done with the intention of persuading the recipient to do or refrain from doing something within the scope of his duty and which is contrary to his authority or obligations (including those stipulated under the internal policy or code of conduct of the organisation involved), contrary to the public interest.

#### 4.4.2 Anti-corruption law

The subjects of the Anti-Corruption Law and the Amendment to the Anti-Corruption Law include government employees, corporations, individuals and state administrative officials.

The Anti-Corruption Law covers a wide range of prohibitions, formulating many acts defined as corruption, e.g. actions that may cause loss to state finances; bribery; embezzlement by abuse of power; extortion; acts of cheating (*perbuatan curang*); conflicts of interest in a procurement process; and gratification (see below).

The Anti-Corruption Law does not regulate private-to-private acts of corruption.

The principal elements of the crime cover anyone:

- who gives or promises something to a government employee or state administrative official with the intention that that person do something (or refrain from doing something) in his position or capacity which is contrary to his obligations/duty, or

- who gives something to a government employee or state administrative official because of or in connection with something which is contrary to his obligation or duty (whether or not performed in that position/capacity, i.e. the offence could cover acts by public officials when acting 'off-duty').

In addition, anyone who gives a gift or makes a promise to do so to a government employee because of the power or authority vesting in that official position (or which the offeror assumes are attached to that office) may be sanctioned.

The Amended Anti-Corruption Law introduced a number of new concepts relating to the monetary value of gifts and the definition of 'gratuities'. There are no safe harbours for gifts for routine governmental actions or the like. Rather, every gratuity given to a government employee or state administrative official is potentially a bribe, but to be an actionable crime it must be given with some connection to the government employee's position and involve some *quid pro quo* by the recipient to do or not do something in contravention of his obligations or duties. In summary, some 'corrupt intent' must be involved, i.e. intent to cause a misuse of office for a prohibited purpose.

#### 4.4.3 Money laundering law

Under The Money Laundering Law, 'money laundering' is defined as any placing, transfer, forwarding, spending, paying, granting, depositing, or taking abroad, changing of form/currency or securities or other deeds pertaining to assets which are recognised to have resulted (or are suspected of having resulted) from a criminal act, in order to hide or disguise the origin of the assets. Persons found guilty of the offence can be sentenced to imprisonment for up to 20 years and fined not more than IDR10 billion.

If a corporation commits money laundering the company's personnel may be subject to their sanction, depending on their involvement.

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Foreign exchange controls as such were abolished in 1971. Consequently, there are no restrictions or approval procedures on remittances of money or capital in Indonesia. While the Investment Law guarantees the repatriation of dividends and capital etc. repatriation may be circumscribed in certain circumstances.

#### 4.5.1 Exchange controls

Bank Indonesia also has authority to require information and data in respect of any flow of foreign exchange and has introduced regulations requiring the reporting of transactions over a certain value, and limiting remittance of foreign currency, unless an underlying transaction exists to justify the remittance of the foreign currency abroad.

Bank Indonesia can also determine a foreign exchange conversion mechanism.

All domestic transactions should be in Indonesian Rupiah, unless in specific business sectors and for specific purposes and/or areas as stipulated by Bank Indonesia (or according to an agreement between the parties, if there is one).

Rupiah is not readily obtained offshore and usually transactions in Rupiah either require the buyer to obtain expensive swaps or alternatively the transaction documents must include/provide for an exchange rate mechanism with payment in foreign currency.

#### 4.5.2 Foreign investment approvals and notifications

Most private foreign investments in Indonesia (and domestic investments enjoying the same facilities) are administered and supervised by BKPM. Consequently, most matters relevant to M&A transactions must be reported to or approved by BKPM.

A negative list of investments determines which business sectors are open to foreign investment. Additional material on the negative list is available on request.

In addition, government regulations dating to 1994 require foreign investors in a wholly foreign owned Indonesian company to divest to local companies or Indonesian citizens an unspecified percentage of their shares 15 years after commercial production. This requirement is contained in the foreign investment approval. Any prior approval requiring divestment must comply with the regulations (even if the divestment is nominal). New approvals since around 2010 do not have divestment obligations (given the Government has finally accepted the argument that there was no divestment obligation in the 2007 Investment Law).

BKPM issues policies regularly and these must be taken into account in structuring a deal.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Stamp duty is nominal at IDR6,000 and is affixed by way of a duty stamp at the time of signing.

Generally, unlisted shares sold by non-resident taxpayers are subject to a final withholding tax (approximately 5% of the sale price). Non-resident taxpayers may be exempted from tax by the provisions of any applicable tax treaties.

Listed shares sold on the exchange by both non-resident and resident taxpayers are subject to a withholding tax of 0.1% of the transaction amount (and 0.5% for founder shares in the share value at prescribed times if the tax for the founder shares has not already been paid).

### 5.2 Acquisition of Assets

Sellers must pay income tax of 5% on transfers of land and/or buildings, which is a final tax. Buyers are required to pay a 5% duty on the transfer of land and buildings.

### 5.3 Value Added Tax

VAT is generally not payable on the purchase of shares. VAT at a rate of 10% is chargeable on assets sold to an entity and is incurred by the purchaser.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares, merger or consolidation

Employers (both buyer and seller) have the right to terminate or maintain the employment in the event of the change of a company's status, merger or consolidation (but not on a change of ownership).

A change to a company's status, a merger, a consolidation or a change of ownership will be deemed an event triggering employees' rights to refuse or accept their new indirect employer.

The Labour Law does not specifically spell out the percentage of ownership that would trigger the entitlements but simply refers to a 'change of ownership.' However, the practice under the previous regulations that also carried this formulation of change of ownership (based on past practice and policies of the Ministry of Manpower) was that a change of less than 50%, not accompanied by any changes in human resources and management policies, was unlikely (but not guaranteed) to trigger the rights of employees. Unfortunately the Labour Law does not specifically refer to an indirect or direct change in ownership, and the labour courts have extended in some cases the provision to cover an indirect change in ownership as well as stating that less than a 50% change in shareholding can trigger employee rights.

Consequently, it will not be sufficient to just consider the percentage shareholding being acquired; changes in management and employee policies to be adopted also need to be considered (e.g. rights and entitlements of the employees to be changed, to the extent permitted by Indonesian laws and regulations, which are quite strict).

In summary while a 'change of ownership' is frequently associated with the change of the controlling shareholder, given the concept of change in ownership (rather than control) under the Labour Law this is not necessarily always the case. Any substantial changes in management and employment policies after a transaction can also trigger an employee's right to demand to be terminated (e.g. in an indirect acquisition).

In any event, cooperation of the employees is required to ensure a smooth transaction, as is a discussion with the target company's human resources department on how employees may be dealt with. Typically in a transaction, the following will happen:

- employees will be asked to elect before closing whether they will exercise their rights to be terminated post-closing, so that the manpower position is known
- key employees might be required to continue working, or
- a certain percentage of staff at certain levels within the target company must elect not to be terminated.

This issue is usually not a valuation issue (as there should be provisions in the target company for retirement benefits which are higher) but more of a cashflow and talent management issue.

#### 6.1.2 Transfer of business/acquisition of assets

There is no automatic transfer of employment provisions under Indonesian law, and employees need to agree to be terminated by the seller (and paid out their statutory entitlements) and the employees are rehired by the purchaser.

Alternatively employees can also resign from the seller (with no payment of benefits) and all the employees' accrued entitlements would be taken over by the purchaser. An immediate accounting provision will be required in the accounts of the purchaser (which may affect the immediate retained earnings of the purchaser).

In either case, employees' cooperation is required to ensure a smooth transaction.

### 6.2 Approval or Consultation Requirements

Even in a share acquisition, an industrial relations plan must be drawn up and discussions held with unions to ensure that employees will accept the continuing accrual of entitlements rather than having the entitlements paid out after closing (if this approach is taken). In practice, some employees have taken advantage of the regulations to seek the payment of entitlements and then also asking for a 're-commencement of employment' so that the employee cost is reflected in completion accounts and employees start again with zero entitlements.

Investors should not underestimate the importance of considering employee issues early in their negotiations and of allocating between the parties the responsibility for paying termination amounts (whether by providing for an adjustment in the completion accounts or otherwise).

In addition, there may be not only cashflow issues for the target company if employees choose to resign (on a merger or share acquisition), but there may also be employee relations issues in ensuring that a workforce remains in place to continue running the business.

### 6.3 Protection against Dismissal

Employers only have the right to terminate employees in statutory acquisitions, mergers and consolidations.

Termination payments consist of the following, depending on the terms of employment (including benefits) and the period of employment:

- severance pay (the basic payment due to the termination)

- long-service payment (recognising the employee's service)
- compensation (e.g. for untaken annual leave, housing allowances, if provided for in the company's regulations).

Termination payments are calculated based on a formula set out in the Labour Law.

# Italy

## 1.1 Overview

Although a unified sovereign state, Italy comprises 20 administrative regions, five of which (Sardinia, Sicily, Trentino-Alto Adige/Südtirol, Aosta Valley and Friuli-Venezia Giulia) are considered autonomous regions with autonomous powers in relation to legislation, administration and finance. Company law is primarily set out in the national Italian Civil Code, which is consistent throughout Italy, (the Italian Civil Code) albeit that there are differences in the laws of autonomous regions in some areas (e.g. on land and tax law).

## 1.2 General Legal Framework

Both share and asset acquisitions, as well as mergers and consolidations are regulated in Italy by the Italian Civil Code, as amended by the corporate law reform provided for in Legislative Decree Nos 5 and 6 of 17 January 2003 which came into force on 1 January 2004.

For certain kinds of businesses (financial, stock-brokerage, factoring, banking, insurance, maritime companies and companies listed on the stock exchange or incorporated for privatisation purposes, etc.), the Italian Civil Code and/or other statutes contain additional and/or specific rules.

## 1.3 Corporate Entities

In Italy there are two forms of corporation assuring limited liability to all the shareholders, namely the joint stock company (*Società per Azioni/SpA*) and the limited liability company (*Società a responsabilità limitata/Srl*).

However, should an SpA or an Srl be incorporated by a sole stockholder (called, in the case of Srls, 'quotaholder'), then in order to claim the limited liability protection in the event of insolvency of the relevant company, the sole stockholder/quotaholder must meet the following requirements:

- payment in full of the capital contributions, and
- compliance with information and disclosure obligations (about the fact of being controlled by a sole stockholder) *vis-à-vis* the Register of Companies.

Failure to meet those requirements will cause the sole stockholder/quotaholder to be liable, to an unlimited extent, for all the company's obligations arising during the period of sole stock ownership.

### 1.3.1 Joint stock companies (SpA)

The *Società per Azioni* is the corporate vehicle generally used for large businesses—where the equity (corporate capital in Italian legal parlance) is equal to or exceeds EUR50,000—and the mandatory company type in the case of listed companies. The corporate capital of SpA companies is divided into shares (that are negotiable instruments) and normally represented by share certificates.

### 1.3.2 Limited liability companies (Srl)

*Società a responsabilità limitata* are normally used for closely held companies with limited equity. The minimum capital is EUR10,000 divided into 'quota' (rather than shares) which are not represented by certificates. The governance of this type of company is more flexible than that of SpAs and is well suited not only for smaller scale operations, but also as a fully-owned subsidiary vehicle in Italy of a multi-national parent corporation or, in certain circumstances, as a joint venture company.

(Srls may also be incorporated with a capital lower than EUR10,000, but in such cases the Srls must allocate at least 20% of the yearly profits into the mandatory reserve until the aggregate value of the corporate capital and of the mandatory reserve jointly hit the threshold of EUR10,000).

## 2. Acquisition Methods

Under Italian law, a concentration of two or more businesses into one company may be achieved by merger, consolidation, purchase of assets or purchase of shares. Generally speaking, Italian sellers tend to prefer share transactions.

### 2.1 Acquisition of Shares

In an acquisition of shares, the purchaser steps into the position of the seller in respect of the acquired company. The acquired company will be transferred subject to all existing liabilities, although these can be addressed by means of warranties and indemnities (between the parties).

The shares in an SpA and participation in an Srl are freely transferable, unless otherwise provided for by the company's articles of association/by-laws. The by-laws of an SpA may provide for absolute non-transferability of the shares for a maximum period of five years from the date of incorporation of the company or from the date of the special shareholders' meeting which resolved to include such restriction in the by-laws of the company. The by-laws may subject the transfer of the shares in the SpA to the discretionary approval of the company's corporate bodies or the shareholders. If they state that (and if such approval is not granted) then either:

- the company or the other shareholders must purchase the shares, or
- the selling shareholder can exercise its right of withdrawal from the company.

If the by-laws of an Srl provide for the absolute non-transferability of the quota, or require that the transfer be subject to the prior approval of the company's corporate bodies, quotaholders or third parties, without conditions or limitations, or else provide for conditions and/or limitations which, in practical terms, do not allow the transfer, then the quotaholder may exercise the right of withdrawal from the company. The by-laws of an Srl may provide for a term, not exceeding two years from the incorporation of the company or subscription of the quota, before which the right of withdrawal may not be exercised.

The by-laws of SpA and Srl companies may also provide for pre-emption or first refusal rights, whereby any shareholder who intends to transfer, for any reason, its shares, shall first offer them pro rata to the other shareholders.

### 2.2 Acquisition of Assets

The acquisition of the assets of a target Italian business may be achieved through a sale or contribution of the target's business as a 'going concern' or of a branch thereof. A purchase of assets provides a higher degree of isolation of the purchaser from the overall liabilities of the seller. Although the purchaser and the seller remain jointly liable *vis-à-vis* the seller's creditors for the seller's liabilities, this is limited to liabilities specifically reflected in the seller's accounting books (which the purchaser should thoroughly inspect prior to entering into the sale agreement). As regards the purchaser and the seller, the former may further limit its liabilities through ad-hoc provisions to be inserted into the sale transaction documentation.

### 2.3 Mergers and Consolidations

#### 2.3.1 Mergers

A merger occurs where the assets and liabilities of one or more companies, including its or their corporate name and identity become part of the assets and liabilities of another. The latter will be treated as the successor of the former. At the end of the process, only the surviving company will remain.

#### 2.3.2 Consolidations

A consolidation is a variant of a merger and occurs when two or more companies pool their assets and liabilities by forming a new company. At the end of the process, only the new company will be in existence and will be treated as the successor of the consolidated companies.

### 3. Negotiation, Signing and Closing

#### 3.1 Pre-Contractual Obligations

The Italian Civil Code mandates all parties to act in good faith during the negotiation and drafting of the acquisition agreements. Failure to do so will expose the defaulting party to pre-contractual liability.

#### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Italian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

##### Purchase Price

1	Is a purchase price adjustment common? What type is common (e.g. debt-free, cash-free)?	Yes, common. Market practice sees different types (including working capital adjustment, cash-free debt-free and, less frequently nowadays, NAV adjustments). Currently, a combination of working capital and cash-free debt-free adjustments appears to be one of the most common structures.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	The buyer usually has the responsibility to ensure the target company prepares this.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	Quite common in private equity transactions when seller keeps managing the target company after closing. Not common where seller is completely exiting, though market practice has begun to see a few cases of earn-out in such scenarios.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Common.
8	Is a break fee common?	Not common.

##### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Common, although enforceability may be problematic especially in the case of general clauses.
10	Is the MAE general or specific?	Usually general, though market practice is beginning to see specific MAE clauses also due to possible enforceability issues.
11	Quantification of MAE?	Uncommon.

##### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall provisions common.
13	Non-solicit (of employees)?	Common (in conjunction with non-compete).



14	Non-solicit (of customers)?	Common (in conjunction with non-compete).
15	Broad access to books, records, management between sign and close?	Depends on the sophistication of the parties. Usually, private equity sellers resist and limit for transitional purposes only. NB: competition law issues around potential 'gun-jumping'.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Not common to update warranty disclosure. Also notification of possible breach is uncommon. In cases of material breach, right to terminate.
17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax representations and warranties/relevant indemnity, usually included in the purchase agreement.

### Representations & Warranties

18	Materiality in representations—how is it quantified (e.g. by \$ amount)?	Materiality qualifiers commonly seen, but often not quantified (other than specific warranties e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualification uncommon for private deals. Common for private equity deals (generally not with respect to a specific group of people, but having regard to constructive knowledge and due enquiry).
20	Is a warranty that there is no materially misleading/omitted information common?	Still commonly requested by buyers, but often resisted by sellers.
21	Is disclosure of data room common?	Uncommon.

### Repetition of Representations & Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	It is common to contractually provide that warranties are true, correct and accurate at all times between signing and completion. Bring-down certificate at completion uncommon.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True, correct and accurate in all material respects is common, but often carve-out for key representations and warranties (which must be true, correct and accurate without any qualification).
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Uncommon.

### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Typically it ranges from 10%–40% of purchase price, subject to exceptions for key warranties.
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually warranties only.
27	What are the common exceptions to the cap?	Key warranties are generally excepted (e.g. title, capitalisation, authority). Fraud and gross negligence also excepted. Often other specific warranties, e.g. on tax, employment and environmental are excepted, capped at 100% of purchase price or, sometimes, subject to specific higher caps.
28	Is a deductible or basket common?	A basket is common.
29	Is a <i>de minimis</i> common?	Common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–24 months common. Common to carve out key warranties (e.g. title, capitalisation, authority, tax, employment and environmental) as well as fraud and gross negligence.
31	Is warranty insurance common?	Uncommon. Starting to see it in private equity deals.

#### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Uncommon.
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#### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Common in more sophisticated deals.
34	Insurance proceeds?	Common (net of any cost, including legal fees, for recovery of insurance proceeds).
35	Third party recoveries?	Common (net of any cost, including legal fees, for third party recoveries).

#### Damages, Knowledge

36	Obligation to mitigate damages?	Required by law. Not common to reiterate such obligation in the purchase agreement.
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Uncommon.

#### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, if not contrary to public policy. Italian law often chosen.
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40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. National or international arbitration (usually ICC), depending on nationality of parties.
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### Stamp Duty

41	If stamp duty is payable, is it normally shared?	In the sale of business, stamp duties are generally borne by buyer. In the share sales, the so-called 'Tobin Tax' is statutorily borne by buyer.
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## 3.3 Formalities for Execution of Documents

### 3.3.1 Transfers of shares

No specific formalities are required by Italian law for the execution of relevant preliminary share (or quota) sale and purchase agreements—either in the case of SpA or Srl companies.

However, for SpAs, specific formalities must be complied with in connection with the endorsement of the share certificates (if issued, see below), which is the most common way to transfer title to shares.

In addition, for Srls, the sale of quota must be perfected by means of a final quota transfer agreement, which must be signed before a notary public—either as a public deed or as a private agreement with notarised signatures—and registered by the notary public with the local Registry of Enterprises within 30 days of execution.

### 3.3.2 Transfers of assets

In general terms, each individual asset needs to be transferred in accordance with the transfer formalities that apply to that type of asset. The transfer of a business as a going concern must be perfected by means of a business transfer agreement to be signed before a notary public—either as a public deed or as a private agreement with notarised signatures—and then filed with the local Registry of Enterprises as well as with any other relevant local register, depending on the nature of the specific assets transferred as part of the business (e.g. if the business as a going concern included real estate, then the change of ownership of that real estate must also be recorded in the local Real Estate/Land Registry).

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

In the case of SpA companies, the endorsement consists of a specific annotation on the back of the certificates with a 'date certain' and with all of the purchaser's details, which must be signed by the seller before a notary public. If the shares which are being transferred are not fully paid-in, then the endorsement must also be signed by the purchaser. In order to be enforceable *vis-à-vis* the company, the share transfer must then be recorded in the company's stockholders' ledger. However, a purchaser able to prove itself as a rightful owner of shares based on a continuous chain of endorsements is entitled to exercise the rights conferred by those shares even in absence of any such annotation in the stockholders' ledger. If no share certificates were issued, the share transfer becomes enforceable *vis-à-vis* the company on its being recorded in the stockholders' ledger. Special rules apply to transfers of listed company shares, since those securities are mandatorily subject to dematerialisation<sup>1</sup>.

In the case of Srl companies, the new quotaholder acquires the status of quotaholder *vis-à-vis* third parties and the company upon registration of the quota transfer agreement and the new quotaholder details in the Register of Enterprises unless otherwise provided for in the company's by-laws.

<sup>1</sup> Dematerialisation in this context refers to the substitution of paper-form securities by book-entry securities.

### 3.4.2 Transfers of title to assets

In cases of sale or contribution of a business, all agreements pertaining to the business as a going concern (and which are not of a personal nature) are automatically assigned to the purchaser/beneficiary company, unless otherwise agreed between the parties and as set out in the agreement. However, the (assigned) contractual party may object to the assignment within three months from the date on which it received notice of the sale/contribution of the business. Such objections are allowed only if a just cause exists, e.g. where the purchaser is not as economically sound as the seller of the business.

Receivables pertaining to the transferred business are automatically assigned to the purchaser on registration of the deed of transfer with the local Register of Enterprises, with no need for debtors' consent. However, the (assigned) debtor is discharged if it paid the seller in good faith.

As to debts owed by the seller pertaining to the transferred business, sellers will remain liable to pay these if the creditors did not consent to the release. The purchaser is jointly liable with the seller for the payment of such payables if these are recorded in the seller's mandatory accounting records.

In practice, payables and receivables pass on to the purchaser of the business as a consequence of the automatic assignment of the contracts from which they stem.

## 3.5 Formalities for Mergers

Broadly, the process for implementing a merger or consolidation is as follows:

- Each of the boards of directors of the merging companies prepares and approves a merger plan containing detailed information
- The merger plan must be filed with the respective Register of Enterprises of the districts where the companies involved have their registered offices or, alternatively, may be published on the corporate websites of the merging companies, provided that those websites meet certain security standards required by the law
- Each merger plan must then be approved by the holders of a majority of the shares entitled to vote at a special shareholders' meeting of each of the companies concerned (a different quorum is required for second calls of shareholders' meetings of SpA companies), unless the by-laws of the companies provide for a higher quorum. For meetings to be validly held, specific documents must be made available for inspection at each company's registered office/company website during the 30-day period preceding the meeting. The length of that period is reduced from 30 to 15 days if the merger involves only Srls
- The shareholders' resolutions of each of the companies concerned are subject to review by the notary public acting in his/her capacity as a government official and must be filed with the relevant Register of Enterprises
- A merger deed must be executed before a notary public by the companies concerned and filed with the relevant Register of Enterprises.

The notarial merger deed can be entered into after 60 days have elapsed from the registration of the shareholders' meetings resolutions with the Register of Enterprises (or 30 days if the merger involves only Srls):

- provided that the creditors of the merging companies have not raised objections within the 60/30-day period, or
- in case of objections by the creditors, where the court authorises the merger ascertaining that:
  - there is no incumbent danger of prejudice for the creditors that have raised the objections, or
  - the merging company has provided adequate guarantees.

The merging companies may enter into the notarial merger deed prior to the aforesaid 60/30-day term in the following cases:

- consent of the creditors of the merging companies
- payment of the creditors that do not give the consent
- deposit with a bank of sums sufficient to cover all receivables of those creditors, or
- the auditing firm preparing the report on the exchange ratio states that the financial and net-worth situation of the merging companies does not require guarantees to protect the rights of creditors and bondholders.

For the purposes of the above, the merging company's debts to be considered are those which already exist as of the time of the registration of the merger plan with the Register of Enterprises.

The whole procedure usually takes between four and five months to complete, but it can be shortened under certain circumstances, for instance, by posting a bond equalling the amount of the company's debts.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

In addition to EU merger control, prospective purchasers and merging companies should consider Italian antitrust legislation. In this respect, it should be mentioned that transactions having a community dimension, i.e. falling within the European Commission's jurisdiction, need not be filed with the Italian Antitrust Authority (the Authority) - or with any other EU national competition authority - due to the 'one-stop shop' principle, whereas transactions that do not fall within the European Commission's jurisdiction and meet the turnover thresholds triggering an obligation to notify in Italy—must be filed with the Authority.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Italian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

#### Filing Obligation

- |   |  |            |
|---|--|------------|
| 1 | Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)? | Mandatory. |
|---|--|------------|

#### Timetable

- |   |  |  |
|---|--|--|
| 2 | In practice, what is the timetable for clearance (in first phase and second phase review)? | <i>Phase I:</i> In most cases clearance decision by the Authority—which should be taken within 30 calendar days of filing—is adopted prior to deadline, and approximately 3 weeks after notification. However, the communication informing the parties of the clearance is normally received 30–35 calendar days after the notification. |
|---|--|--|

*Phase II:* When, after the first phase review, the Authority decides to open an in-depth investigation on the transaction, it has 45 calendar days from the date of that decision to then issue its final decision. Most cases authority uses full investigation period. However, if it turns out that the transaction can be unconditionally cleared in the second phase, the Authority may also grant clearance earlier than at end of review period.

Concentrations between unrelated undertakings, whether achieved through merger or via the purchase of assets or shares or by contract or any other means which modify the control structure of the undertaking concerned, must be notified in advance to the Authority (Law No. 287 of 10 October 1990, as amended, the Italian Competition Act) when the combined aggregate national turnover of the undertakings concerned exceeds EUR489 million and the target company's national turnover exceeds EUR49 million. These thresholds are adjusted annually to take inflation into account. In determining whether the thresholds are met and, therefore, whether the concentration must be notified, the following rules apply:

- 'Combined aggregate national turnover' means the aggregate turnover from sales of goods or services generated in the last fiscal year in Italy by the undertakings concerned. In determining turnover, only sales made in the Italian market (i.e. to clients located in Italy) are taken into account. Turnover is calculated net of indirect taxes (e.g. VAT) and discounts, if applicable. Export sales by Italian companies in the acquiring group (or by Italian companies within the target) are not included for the purpose of calculating the thresholds. On the other hand, sales made in the Italian market by other non-Italian companies of the acquiring group (or by non-Italian companies within the target) will be taken into account, and
- 'Undertakings concerned' means the companies involved in the concentration (i.e. in the case of an acquisition, the acquiring group and the target company).

The concentration must be notified to the Authority by the undertaking(s) acquiring control before it is implemented. However, the notification does not have suspensory effect i.e. the parties are not automatically obliged to suspend the transaction while waiting for clearance; they are free to implement the transaction if content to accept the risk that the transaction may be unwound. The Authority may impose administrative fines on undertakings which fail to comply with the prior notification requirements of up to 1% of their global turnover.

Within 30 calendar days of receiving a complete notification (Phase I) the authority must decide whether the transaction creates or strengthens a dominant position in the national market with the effect of eliminating or substantially reducing competition on a lasting basis. If not, the authority will clear the transaction. On the contrary, if the transaction does generate such anti-competitive concerns, the authority can veto the transaction or (if the concentration has already been implemented) order that it be partially or wholly reversed.

The Authority can also initiate a fact-finding procedure (Phase II) and deliver its final decision within 45 calendar days of the date of its decision to initiate the investigation. This period may be extended in the course of the investigation for a further period (of not more than 30 days) whenever the undertakings fail to provide the information and the data in their possession upon request. The Authority can also initiate a Phase II investigation after the expiry of the Phase I 30-day term, but only where the information supplied by the parties is found to be grossly inaccurate, incomplete or false.

Where concentrations are implemented but are subsequently prohibited by the Authority, or where the parties fail to comply with conditions imposed by the Authority to restore competition for a concentration already implemented, the responsible undertakings are subject to fines ranging from 1%–10% of the global turnover of the parties to the relevant transaction in the business forming the object of the concentration (e.g. in the market/s where the target is active).

Special provisions are applicable to mergers in the banking industry, where notifications of the concentration must be submitted to both the Authority (the only authority competent for antitrust assessments) and to the Bank of Italy (which will analyse the operation for the assessments of sound and prudent management). The relevant decisions must be adopted within 60 days of the date of complete submission of the notification. For insurance, broadcasting and publishing industries, the Authority will adopt its decision upon receipt of the non-binding opinion of the authority of the relevant industry, which must be issued within 30 days of receiving the relevant documentation from the Authority. If the opinion is not issued within 30 days, the Authority may proceed to adopt its decision without waiting for issuance of the opinion.

### 4.3 Exchange of Competition-Sensitive Information and ‘Gun-Jumping’ Issues

Since, in dealing with the exchange of sensitive information, the Authority follows the same approach as the European Commission, see paragraph 3 of Appendix B.

### 4.4 Criminal Conduct, Corruption and Money laundering

#### 4.4.1 Basic Principles

Companies may incur administrative sanctions whenever a crime is committed by individuals within their organisations (including, among others, directors, managers, employees, statutory auditors, consultants and agents) if those persons have acted in the interests of or to the benefit of the company (Decree 231/200—the Decree). It follows that the company will not be liable if the crime was committed in the exclusive interests of the perpetrator, or of third parties. Recent court decisions have ruled that the Decree applies not only to Italian legal entities but also to foreign companies operating in Italy, whether directly or through local branches.

Not all criminal offences are capable of triggering the application of these administrative sanctions against the company: the Decree specifically identifies an exhaustive list of offences which could bring about this result; but other offences, not named on the list will not be captured by the law and will not trigger the above company’s liability. That said, the Decree has been amended several times and could well be amended to include other offences in future. To date, the following crimes are covered and will trigger corporate liability:

- crimes against administrative authorities or against ‘public trust’ (including corruption)
- corporate offences (including accounting crimes and corruption between private parties (including persons that have a decisional power or hold an office within the companies involved))
- market abuse offences
- manslaughter and serious injury as a consequence of violation of health and safety laws and regulations
- receiving stolen goods, money laundering and self-laundering (money laundering by the same person that committed the offence from which the concerned money or goods come), and use of money or goods of unlawful origin
- terrorist and subversive activities
- crimes relating to child pornography and prostitution and trafficking of human beings
- computer crimes
- transnational organised crime
- counterfeiting
- offences against industry and commerce (including fraud in the carrying out of commercial activities, sale of non-genuine food products as genuine)

- infringement of copyright and other IP rights
- incitement to not testify/commit perjury in court
- environmental offences.

It is possible that the list could soon be expanded to include criminal offences relating to the violation of legislation in other areas, such as tax legislation.

The administrative sanctions companies might face fall into two broad categories: pecuniary sanctions (fines) and restraining measures.

The maximum potential exposure of companies to fines is approximately EUR1.5 million (except in connection with market abuse offences, for which the pecuniary sanction may be up to 10 times the profit generated by the criminal behaviour).

The implications of restraining measures should not be underestimated either. Included in the list of potentially disruptive measures that a company might face are the following:

- being prohibited from performing the company's business
- being suspended or facing the revocation of authorisations, licences or permits
- being prohibited from negotiating and entering into contracts with administrative authorities
- exclusion from subsidies and contributions, or revocation of any subsidies and contributions already granted to the company, and
- being prohibited from advertising the company's goods and/or services.

As a rule, restraining measures are temporary, and can last between three months and two years. Such measures could, however, become permanent if the company:

- made considerable profits from the criminal conduct, and
- had been the subject of restraining measures three times in the past seven years.

#### 4.4.2 Actions to helping companies avoid these sanctions

The Decree offers companies the opportunity to avoid the application of sanctions if they can prove that the perpetrator of the crime committed it by fraudulently violating (properly formalised and effective) corporate policies designed to prevent such acts (the Decree calls such policies 'organisational and management models'—here, 'Organisational Model').

The Decree describes the characteristics which Organisational Models should have in order to protect the company from sanctions as follows. The Organisational Model should:

- identify the activities 'at risk' within the company's business
- set out specific procedures which should be followed for the purpose of forming and implementing the decisions of the company with respect to the activities that are identified as risky (i.e. those that can possibly lead to commission of crimes)
- set out specific procedures for the management of financial resources, to prevent the commission of offences
- impose on all employees a specific obligation to inform the ad hoc supervisory body (see below) of any illegal conduct within the company



- provide for specific disciplinary sanctions applicable to managers and employees of the company where the rules in this Organisational Model are violated.

By adopting such Organisational Model, a company will be minimising the risks of exposure to sanctions under the Decree; but adopting it is not mandatory.

Likewise, adopting such an Organisational Model will not per se be sufficient to avoid the application of a sanction. To this end, the following three additional conditions must also be met:

- The management of the company must assign the responsibility for enforcing the provisions of the Organisational Model to a specific person or 'supervisory body' within the organisation, who should keep it constantly updated. That supervisory body must be independent
- The individual who committed the crime was able to do so only by fraudulently violating the Organisational Model
- The supervisory body was not negligent in performing its duties.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

In general, profits from Italian subsidiaries may be freely repatriated, subject to any applicable withholding tax. However, all fund transfers to and from abroad are monitored for statistical purposes.

### 4.5.1 Exchange control and foreign investment restrictions

Subject to the powers and approvals discussed below, EU parties wishing to acquire Italian companies or assets are subject to the same rules as those applicable to Italian nationals, while non-EU parties are generally subject to the reciprocity principles embodied or supplemented by international bilateral or multilateral treaties between Italy and the non-EU party's home country.

### 4.5.2 Industry-specific regulation

#### ***Defence and Homeland Security***

The Italian Prime Minister may exercise certain powers (special powers) in relation to transactions involving a 'threat of a serious harm to the essential interests of the national defence and homeland security' (Law Decree No. 21, 15 March 2012). These special powers consist of:

- ex ante veto right of shareholders or board resolutions approving mergers, spin-offs, transfers of assets, transfers of corporate seats outside Italy, winding-up, changes in the articles of association, transfers of ownership or utilisation rights concerning tangible or intangible asset
- ex post imposition of specific conditions for the security in the procurement and export of goods, safety of information and data, the transfer of technology, or the purchase of participations (shares/quota) in certain entities
- ex post blocking of the purchases of participations by any entity other than the Italian government if the purchaser ends up holding a participation that could jeopardise the 'essential interests of national defence and homeland security'.

Those special powers do not apply to intra-group transactions, if there are 'no elements pointing to a threat of a serious harm to Defence and Homeland Security's essential interests'.

#### ***Energy, transportation and communications***

With some procedural differences, the Italian Prime Minister may also exercise these special powers in relation to strategic assets in the energy, transportation and communications sectors (Presidential Decree No. 85, 25 March 2014).

### ***Other sector-specific approvals***

The prior authorisation of regulators is required in certain sectors, including:

- Insurance: the acquisition of direct or indirect control, significant influence or certain equity percentages of Italian insurance or reinsurance companies requires pre-approval of IVASS. For non-EU entities based in a country where reciprocity is not recognised, the authorisation process must also involve the Ministry of Economic Development and the Italian Prime Minister, who are entitled to block a proposed transaction
- Banking: the Bank of Italy must authorise the acquisition of direct or indirect control, significant influence or certain equity percentages of Italian banks. Again, for non-EU entities based in a country where reciprocity is not recognised, authorisation process must also involve the Ministry of Economy and Finance and the Italian Prime Minister, who are entitled to block a proposed transaction
- Aviation: operating in Italy's air transport sector is reserved to companies located in Italy and controlled, directly or indirectly, by a EU member State or EU parties whose main activity consists of air transportation, unless an international convention to which the EU is a party states otherwise.

## **5. Transfer Taxes**

### **5.1 Acquisition of Shares**

The transfer of title to shares (in SpA companies) by way of endorsement of the share certificates is subject to the so-called 'Tobin tax'. The Tobin tax is levied on any transfer of title to shares in SpA as well as in joint-stock companies with registered offices in Italy, even if such a transaction is executed between individuals/entities that are not resident in Italy. Purchasers of shares pay the tax on the sum paid for shares. For shares of listed companies, the Tobin tax applies at a tax rate of 0.1% (with an exemption for companies whose average market capitalisation on November of the year prior to the year when the transaction was entered into is lower than EUR500 million); for non-listed companies, the rate is 0.2%.

The final quota transfer agreement (in Srl companies) is subject to a fixed registration tax equal to EUR200 unless a third party (e.g. the parent company of a party) is acting as guarantor to the agreement in which case guarantees are subject to tax at 0.5%, applicable to the total guaranteed amount. The seller and the purchaser are jointly liable for the payment of registration tax.

### **5.2 Acquisition of Assets**

The transfer of a business as a going concern is subject to a 3% registration tax levied on the net value of the business transferred, i.e. the value of the assets, including goodwill at its fair market value, less the amount of any liabilities. If there is real property among the assets transferred, the net value of such real property is taxed at 9% (12% for agricultural lands; and to both transfers of real property and of agricultural land a EUR100 mortgage/cadastral tax applies as well). If there are receivables among the assets transferred, these will be subject to a 0.5% registration tax rate as opposed to the ordinary 3% rate, if the value/consideration paid in lieu of receivables is clearly identified in the agreement. The seller and the purchaser are jointly liable for the payment of registration tax applicable to transfer of a business as a going concern. Cars and other registered movable goods are subject to minor fixed transfer taxes.

### **5.3 Mergers**

Mergers are subject to a fixed registration tax equal to EUR200.

### **5.4 Value Added Tax**

No VAT is due with respect to either an acquisition of shares or an acquisition of a business as a going concern.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of share transactions, there is no change in the employer/employee relationship. However, some national labour collective agreements provide that directors or managers are allowed to resign and receive certain payments in the case of a change of control of an employer.

#### 6.1.2 Acquisition of assets

In the case of an asset transaction, i.e. a transfer of an undertaking, business or part of a business according to the European Acquired Rights Directive (and relevant Italian implementing legislation), Italian law applies the TUPE principle of continuation of the employment relationship and the safeguarding of employees' acquired rights. Guarantees apply in the following cases:

... For the purposes and the consequences of this Article, a transfer of a business is any transaction that, as a result of a contractual transfer or merger, implies a modification in the ownership of an economic activity, whether or not operating for gain, existing prior to the transfer and which, in the transfer, retains its identity, regardless of the nature of the transaction or the instrument on the basis of which the transfer is effected, including usufruct or renting of a business.

The provisions of this Article apply also to the transfer of part of a business, intended as a functionally autonomous branch of an organised economic activity, identified as such by the transferor and the transferee, at the time of the transfer. (Art. 2112, par. 5, Italian Civil Code).

Under the terms of these provisions:

- a transfer of undertaking is not, in itself, a valid ground for dismissal and all contracts of employment will transfer to the purchaser automatically by operation of law. However, the law expressly provides that the ordinary provisions on dismissal remain generally applicable. Moreover, the law provides that employees, whose terms and conditions are materially affected during the three months following the transfer, may resign for just cause, thus claiming payment of the indemnity in lieu of notice and, possibly, also damages, and
- the seller and the purchaser will be liable for all the entitlements of the employees at the time of the transfer. However, the employee may release the seller from its obligations by signing a release or a waiver before a competent labour office or before unions.

Given the sensitivity of employment relations in Italy, treatment of employees on a transfer must be approached with particular care.

#### 6.1.3 Mergers

A merger will fall within the scope of Article 2112 of the Italian Civil Code and is treated in the same way as an acquisition of assets (see **6.1.2**).

### 6.2 Approval or Consultation Requirements

Prior to a transfer of a business, the seller and the purchaser must inform their respective works councils, in writing, of their intention to carry out such a transfer. Those information duties apply when the transferor has more than 15 employees (regardless of the number of employees that are being transferred).

Sellers and purchasers must notify, in writing, their intention to carry out a transfer of a business, to their respective works councils, as well as to the unions that concluded the collective agreements applied by the employers affected by the transfer. Absent works councils, seller and purchasers must in any case notify the larger representative unions in the relevant business fields.

The notice must include, among others, the following information:

- date or proposed date of the transfer
- reasons for the planned transfer
- legal, economic and social implications for the employees, and
- any measures envisaged in relation to the employees.

The notice must be given at least 25 days prior to the execution of the instrument effecting the transfer, or the signature of any binding document.

The works councils and the unions may request a joint review of the matter from the prospective parties to the transfer. Such a request must be made within seven days of receipt of notice by the employer. Within seven days of receipt of such a request, sellers and purchasers must organise a meeting with the unions to jointly review the planned transaction.

If no agreement is reached within 10 days of the date of the start of this joint review procedure, the consultation will come to an end, but the planned merger can be accomplished. This implies, though, that labour issues may likely arise after or during the merger process.

Courts have clarified that the notice to unions and the relevant consultation apply also to mergers and consolidations. This requirement does not apply instead to a transfer of shares, for the reasons mentioned above.

Unions may react against the breach of sellers' and purchasers' duties to notify and/or to carry out a joint review of the planned transaction, by filing a judicial petition for 'anti-union behaviour'. Upon receipt of such a petition, a court may issue an injunction obliging the parties in breach to stop their behaviour and remove the consequences of same (e.g. by suspending the effects of the transfer until the communication and information procedures have been complied with). The court's injunction is subject to appeal. Failure to comply with such an injunction (or failure to comply with the court's decision of any appeal filed against the injunction) is characterised as a misdemeanour and is punishable by fine or imprisonment (of up to 3 months) of the legal representative of the undertaking in breach of the court's injunction/decision.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

If the purchaser intends to make any employees of the target business/company redundant, the purchaser must be aware of the statutory provisions that apply to redundancies.

In particular, a transfer of a going concern is not, in itself, a valid ground of dismissal. If transferring employees are dismissed before or after the transfer as a consequence of the transaction, they will automatically be treated as having been unfairly dismissed (Art. 2112, Italian Civil Code).

In Italy, an employer is required to consult with the unions if the business:

- employs more than 15 employees
- intends to dismiss, over a 120-day period and within each single unit (or more if in the same province), at least 5 employees
- all dismissals which are a consequence of:
  - reduction of personnel
  - change of the business activity or of the working process, and
  - closure of the business.

The company must consult with the works council (RSA or RSU) and unions at local or national level, depending on the geographical location of workforce to be dismissed.

The process of selecting which workers are to be dismissed is strictly regulated by statute—and an employer may not deviate from set criteria, namely that the selection must be based on the technical, production and organisational needs of the company and must take place within the framework of any applicable collective agreement, or where none exists in accordance with certain criteria set out by statute as follows:

- family dependents: employees with fewer family dependents should be prioritised for dismissal, taking into account the other two criteria also
- seniority of service: the employer should select the employee with fewer years of service, taking into account the other two criteria also
- technical, production and organisational needs: this criterion relates to business reasons.

These criteria must be used together in making the selection.

The procedure for collective dismissals implies a specific series of steps, which must be carried out within the timeframe provided by the law and from which the employer cannot deviate.

The first step is to prepare and send a written notice to the unions, which should include detailed information about, among other things:

- reasons for considering redundancy of personnel
- technical, organisational and production related reasons why it is not possible to avoid the dismissal
- number, job title and professional profiles of employees being considered for redundancy as well as of the other employees (reference may only be made to job titles/positions and not to specific named individuals: individuals may only be identified at the end of the procedure).

Within seven days from receipt of the written notice and upon request of the unions, the employer should begin a consultation process with the unions covering all relevant aspects of the redundancy. This consultation may last up to 45 days from receipt of the notice sent by the employer.

At the end of the joint consultation with the unions the employer must send a notice to the Labour Office, indicating the outcome of the consultation exercise with the unions and, if no agreement was reached, reasons why it could not be reached. Where no agreement is reached, the Labour Office will convene the parties for a further phase of discussions at in front of the Regional Authorities, which may take up to 30 days from receipt by the Regional Authorities of the employer's notice.

If a planned redundancy involves 10 employees or more, the consultation period should last no longer than 75 days of the receipt of the notice by the unions. Where 10 employees or fewer are involved, that period is halved.

When an agreement with the unions is reached or once the steps above have been completed, the employer may dismiss the employees by giving them a written notice of the termination of the contractual relationships (abiding by statutory notice periods the employees may be individually entitled to, or offering payment of an indemnity in lieu of notice). Within seven days of the notification of the dismissals, the employer must send to the Regional Authorities and to the unions a list detailing the dismissed workers, including names, addresses, job titles, category, level, age, family dependents and a detailed specification of the way in which the selection criteria have been implemented.

### 6.3.2 Penalties

If dismissal are effected disregarding the above requirements each dismissed employee can individually challenge dismissal within 60 days of receipt of the notice of termination.

If the court states that the termination was ineffectual or null and void, it may alternatively order the employer to:

- in cases of lack of written notice to the unions: reinstate the dismissed worker with backpay plus social security contributions due since the dismissal and up to the effective reinstatement date (in any case, a sum not lower than 5 monthly salaries), or
- in cases of violation of the consultancy procedure or selection criteria: pay an indemnity calculated at a rate of the equivalent to 2 months' salary for each year of employment; in any case, that figure may not be lower than the equivalent of 4 months' salary and not more than 24 months' salary.

Employees entitled to reinstatement, may opt for the payment of a lump sum amount equal to their overall compensation for 15 months' employment. Employers do not have the alternate option to pay the mentioned 15 month overall compensation as a means to avoid reinstatement. Payment of salaries due for the unlawful period of redundancy and related social security contributions are also payable to employees unlawfully made redundant in these circumstances.

Unions may also instigate court proceedings against employers for so-called 'anti-union behaviour' if they believe that an employer has acted in a way that hinders or limits union rights and activities. If a court upholds such a claim it may issue an injunction forcing the employer to comply with the consultation exercise provided for by statute. Failure to comply with such an order could result in a criminal charge, punishable with imprisonment of the legal representative of the employing entity up to three months or the payment of a fine up to EUR206. Employer found liable for 'anti-union behaviour' will also lose any tax concessions it may have received to encourage the creation of new jobs.

# Japan

## 1.1 Overview

Japan is the world's third largest economy. In the past, specific sectors that have experienced significant M&A and investment activity include financial services, including insurance and securities brokerage; telecommunications; automotive; retail; and information technology. Historically, the volume of mergers and acquisitions has been relatively low in Japan compared to other major industrialised markets. However, there have been significant developments in the Japanese M&A market over the last several years.

First, the volume of M&A transactions increased enormously in the early part of the decade, peaking at over 2,500 transactions in 2006—a five-times increase on volumes seen ten years earlier. In 2013, 2,048 M&A deals involving Japanese companies were completed. The biggest driver of this expansion has been domestic growth, i.e. transactions between Japanese corporations. The volume of inbound transactions also rose during the period but fell sharply following the global financial crisis (GFC). The GFC did, however, trigger a wave of outbound transactions as Japanese corporations took advantage of comparatively robust balance sheets, lower prices and less competition for offshore assets to expand in overseas markets. There is strong optimism that this trend will continue in the foreseeable future.

Second, Japan witnessed increasing numbers of private equity funds, both domestic and foreign, entering the M&A market, driving growth in buy-outs and acquisition finance in Japan and ushering in more volumes of public-to-private transactions.

Third, the decade saw a series of major corporate law reforms introduced in 2006 which made it possible to implement a range of new M&A vehicles, such as triangular mergers, and prompted several high-profile corporate takeover attempts and a wave of 'poison pill' plans. Further changes are expected to come with the first major amendment to the Companies Act (the Amendment), due to come into force in May 2015. The Amendment sets out a number of new rules and regulations including a new mechanism for majority shareholders to utilise in 'squeezing-out' small minority shareholders. The Amendment expressly provides for a new squeeze-out option under which a majority shareholder holding a 90% or greater stake in any company (whether public or private) will be entitled (with the approval of the board of directors) to compel all other shareholders and option-holders to sell their shares and options in the company to the majority shareholder. It is hoped that this new scheme will enable a squeeze-out to be completed quickly and efficiently without adverse tax consequences.

## 1.2 General Legal Framework

The Japanese legal system is a civil law system modelled principally on German and French law. Some specialised legislation, such as the Financial Instruments and Exchange Act (FIEA), is modelled on US law.

The primary sources of Japanese law are codes and statutes. Key codes and statutes applicable to M&A include the Companies Act, the FIEA and the Anti-Monopoly Act. Foreign investment is subject to certain mandatory reporting requirements and, in limited instances, approval procedures under the Foreign Exchange and Foreign Trade Act (FEFTA).

As in many civil law jurisdictions, in most cases the primary codes and statutes set out only the broad legal principles. These are supplemented, to some extent, by case law and subordinate legislation.

However, for cultural and other reasons, litigation in the commercial sphere is relatively rare in Japan, and on many issues no extensive body of case law exists.

Subordinate legislation may take the form of cabinet orders, enforcement orders, ministerial orders and other rules formulated by government agencies. Although these regulations help articulate the law, considerable discretion is often vested in the agency charged with administering them.

## 1.3 Corporate Entities

Two main types of company available in Japan are:

- a corporation, known in Japan as a '*Kabushiki Kaisha*' (sometimes translated as 'joint stock company') or 'KK', and
- a limited liability company, known in Japan as a '*Gōdō Kaisha*' or 'GK'.

### 1.3.1 Corporations

The most common form used by foreign companies setting up operations in Japan is the KK corporation. A KK is similar to a US close corporation or, when listed on a stock exchange, akin to a US public corporation. It is also similar to the German AG corporate form. A shareholder's liability is limited to the initial capital contribution made for the shares to which it subscribes.

The Companies Act allows a KK to be incorporated using a range of different corporate governance models.

The minimum governance requirement depends on the size and type of a KK. The simplest corporate governance model for a private KK (i.e. one that restricts the transfer of shares in its articles of incorporation) involves the appointment of just one director.<sup>1</sup> If a KK has only one director, the sole director automatically becomes the representative director. A KK must have at least one representative director who must be a resident of Japan (but need not be a Japanese national).<sup>2</sup> For KKs that have only one director, major actions are approved either by the representative director or the shareholders.

A private KK can further choose whether or not to organise its directors as a board. A KK that chooses to organise its directors as a board, fittingly referred to as a 'Corporation with a Board of Directors' (*torishimariyakukai secchi kaisha*) in Japanese corporate law terms, must appoint at least three directors, of which at least one must be appointed as a 'representative director'. A Corporation with a Board of Directors must also have at least one company auditor (or a board of at least three company auditors, if a listed company), unless the KK has adopted a committee system of governance.

A KK that has adopted the three-committee system of governance, a corporation with committees (*iinkai secchi kaisha*) has the following board level committees: audit committee, nomination committee and compensation committee. Each committee must have at least three directors, the majority of whom must qualify as outside directors under the Companies Act. Unlike the traditional corporation with a board of directors, in a corporation with committees, the board of directors has a primarily oversight function, while the day-to-day business is executed by the executive officers appointed by the board of directors. The Amendment will add the corporation with an audit and supervisory committee (*kansa-to-iinkai secchi kaisha*) as a further option among the range of governance models. This model will feature one board level committee, the audit and supervisory committee<sup>3</sup> which must be comprised at least three directors, a majority of which must qualify as outside directors under the Companies Act.

The Companies Act abolished the previous requirement of a minimum share capital of JPY10 million for the incorporation of a KK. It is now possible for a KK to incorporate with capital of only one Yen. However, a KK must have net assets of at least JPY3 million before it may distribute profits to shareholders.

<sup>1</sup> Note however, that a private KK that has stated capital of JPY500 million or more, or total liabilities of JPY20 billion or more, falls within the definition of a 'Large KK' and becomes the subject of additional duties, including being required to appoint at least one company auditor and an accounting auditor.

<sup>2</sup> Note however, that discussions are ongoing within the Japanese government to abolish this residency requirement.

<sup>3</sup> To more clearly distinguish between this model and the Corporation with Committees model, both of which embody a committee system, the name of the Corporation with Committees model will be changed to *shimei-iinkai-to secchi kaisha* (loosely translated as 'corporation with nomination and other committees', however, the official English translation of the new form has yet to be confirmed).



### 1.3.2 Limited liability companies

The Companies Act also introduced a new 'hybrid' entity that is a combination of a company and a partnership. This is the GK which is modelled along the lines of the US LLC. A GK functions internally like a partnership but the members' liability is limited.

It is possible to incorporate a GK with just one investor, described as a 'partner'. Each partner has the right to manage the GK, but 'executive partners' may be appointed to operate and manage the GK if this option is provided for in the articles of incorporation. An executive partner owes fiduciary duties to the GK, similar to those that directors owe to a KK. There is no stated minimum number of executive partners under the Companies Act. It is possible for a legal entity (i.e. a corporation, including a foreign company) to become an executive partner, as long as the legal entity appoints an individual, referred to as the 'executive manager', to represent it. Although not specifically stipulated in the Companies Act, it is possible for a foreign company to be the sole partner of a GK. In that scenario, it is necessary for the foreign company to appoint an individual as the executive manager to represent it. The executive manager representing the foreign company must be a resident of Japan but need not be a Japanese national. However, where there is more than one executive manager, only one executive manager is required to be a resident of Japan. The executive manager owes fiduciary duties to the GK similar to those that a director would owe a KK.

There is no minimum capital requirement upon the incorporation of a GK. Accordingly, it is possible to establish a GK with just one Yen. A GK may distribute profits periodically to members to the extent it has any distributable surplus.

## 2. Acquisition Methods

In Japan, a private acquisition usually takes the form of either a share acquisition, which involves purchasing the shares in the company that owns the business, or a business transfer, which involves purchasing the assets and liabilities of the business being acquired. However, mergers and company splits are also widely used for business acquisition purposes.

### 2.1 Acquisition of Shares

An acquisition of shares in a Japanese private company may be implemented by way of private agreement, whereas an acquisition of shares in a company listed on a Japanese stock exchange may trigger certain tender offer requirements under the FIEA if an acquirer seeks to acquire more than one-third of the company's voting shares in an off-market transaction. A share purchase agreement (SPA) is usually prepared to record the agreement of the parties over their respective rights, obligations and liabilities in connection with the transaction.

### 2.2 Business Transfer

The Companies Act recognises two types of business transfer: one that involves the transfer of 'all or a substantial part' of a Japanese company's business which requires approval by a special resolution of the shareholders (see **3.2.2**), and one that does not. The distinction between the two different types of transfer is not always clear. For example, a sale by a company of a single manufacturing facility, or a single operating division or branch office may be regarded as a transfer of a 'substantial part' of its business. However, the question is usually determined on the basis of an objective assessment of the relative importance of the business sold compared with the company's overall business (e.g. as a proportion of the company's total amount of sales, earnings and workforce). The Companies Act indicates that a transaction would not be deemed a transfer of a 'substantial part' of a company's business if the book value of the assets being transferred is not more one-fifth of the total assets of the seller, and the transaction will therefore be exempted from the special shareholders' resolution requirement if that is the case.

## 2.3 Mergers/Other Acquisition Methods

### 2.3.1 Mergers

There are two types of merger available under the Companies Act:

- merger by absorption, where the acquirer takes over all of the assets and liabilities of the target company and the target company is dissolved, and
- merger by incorporation, where the assets and liabilities of both parties are acquired by a newly incorporated third party and both parties are dissolved.

Merger by absorption is by far the most common method used in Japan.

A merger will usually proceed by way of an issue of shares in the surviving company to the shareholders of the target company. A merger is often used to rationalise the operations of subsidiary entities. 'Cash-out' mergers, involving mergers by absorption, are also allowed under the Companies Act.

The Companies Act does not currently permit mergers directly between foreign corporations and Japanese corporations. However, there are provisions under the Companies Act that permit acquisitions of Japanese corporations using shares in foreign companies (so-called 'triangular mergers'). Subject to certain Japanese tax law requirements, triangular mergers can take place by way of an allocation of the foreign company's shares owned by its Japanese subsidiary (the surviving company) to the shareholders of the target company (the dissolving company).

### 2.3.2 Company splits

The Companies Act provides for two types of company split:

- an incorporation-type company split (*shinsetsu bunkatsu*) in which a new company is incorporated by operation of law and acquires the assets and liabilities divested by the company undergoing the split, and
- an absorption-type company split (*kyūshū bunkatsu*) in which an existing company acquires or 'absorbs' the assets and liabilities divested by the company undergoing the split.

In the context of a company split transaction, the legal term for the divesting company (the company undergoing the split) is the 'splitting company' and the legal term for the company taking over the assets/liabilities from the splitting company is the 'succeeding company'.

Company splits are often used as an alternative structure to business transfers because they are more efficient from a procedural perspective (no need to obtain third-party or employee consents – see Employee Issues) and also from a tax perspective (see Transfer Taxes).

## 3. Negotiation, Signing and Closing

### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Japanese purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?	Purchase price adjustments common. All types seen, including working capital adjustment, cash-free debt-free, NAV adjustments.
	What type is common (e.g. debt-free, cash-free)?	

2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	Usually prepared by seller or target company.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	Not common.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Not very common, but occasionally requested. Few local escrow service providers. Buyers may also rely on holdback.
8	Is a break fee common?	Uncommon.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	Often seen where there is a long period before execution and completion. More common where a Japanese buyer is involved.
10	Is the MAE general or specific?	Both are seen.
11	Quantification of MAE?	Not sufficiently widespread to qualify as common.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, but not from private equity sellers. Waterfall provisions uncommon.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Generally get this for private deals.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Both are seen but more common to notify of possible breach (though notification usually not deemed to constitute exception to applicable warranty). Consequence of breach negotiable: right to terminate or claim damages.
17	Is a separate tax covenant/indemnity or tax deed common?	Not sufficiently widespread to qualify as common.
<b>Representations and Warranties</b>		
18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but are often not quantified (other than specific warranties e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers depend on risk-sharing in the deal. Often limited to the actual knowledge and due enquiry of a specified list of senior management.

20	Is a warranty that there is no materially misleading/omitted information common?	Not very common but can be negotiable depending on buyer's bargaining power and extent of disclosed information during the course due diligence.
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21	Is disclosure of data room common?	Becoming more common where a UK/Australian seller is involved.
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### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates not very common.
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23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	Both seen in Japan.
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24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.
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### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Buyer will ask for 100% but usually negotiated down. Range from 10%–100%.
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Both are seen regularly.
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27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.
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28	Is a deductible or basket common?	Becoming more accepted in market. Deductible very much case-by-case.
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29	Is a <i>de minimis</i> common?	Becoming more common.
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30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	If tax indemnity included, tax matters usually survive until a short period after SOL, i.e. the period in which tax authorities can audit the target.
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31	Is warranty insurance common?	Not so common generally, but has been used (e.g. in private equity exits).
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### Reliance

32	Do financiers seek to rely on buyer's due diligence reports?	Becoming more common (but many law firms reluctant to agree).
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**Set-offs against Claims**

33	Is a set-off against claims for tax benefits common?	Not very common but seen.
34	Insurance proceeds?	Common for actually received.
35	Third party recoveries?	Common for actually received.

**Damages, Knowledge**

36	Obligation to mitigate damages?	Civil law system, so not required by law, but sometimes express.
37	Exclusion of consequential damages?	Common but often expressed differently as there is no defined concept of 'consequential damages' in Japan.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Often silent.

**Dispute Resolution**

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, if not contrary to public policy. Japanese law often chosen in any event.
40	Is litigation or arbitration more common? If arbitration, where?	Litigation is more common. Forum usually Tokyo district court.

**Stamp Duty**

41	If stamp duty is payable, is it normally shared?	Stamp duty not levied on share transfers.
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**3.2 Formalities for Execution of Documents****3.2.1 Transfers of shares**

Board approval by the target company's board of directors may be required where a transfer of shares is restricted under the target company's articles of incorporation and the target company has a board of directors. Such restrictions are fairly common in closely held Japanese companies. If the target company's articles of incorporation include a restriction on share transfer and the target company does not hold a board meeting, then the transfer of shares will require a shareholders' resolution of the target company.

The approval of the seller's board and the buyer's board will also be required if the sale/purchase of the target's shares constitutes the disposition/acquisition of 'important property'. Further, after the Amendment, a special resolution of the seller's shareholders is also required if:

- the target company is a subsidiary of the seller
- the seller ceases to hold the majority of shares in the target after the sale, and
- the book value of the transferred shares in the target constitutes more than one-fifth of the total asset value of the seller.

### 3.2.2 Business transfers

#### ***Disposition/acquisition of 'important property' vs 'all or a substantial part' of a business***

Whether or not the sale is of 'all or a substantial part' of the seller's target business, if the transaction involves the disposition or acquisition of 'important property,' board approval is required from the seller. Whether or not a transaction involves important property will be determined by considering the price of the assets, the proportion of assets transferring from the target relative to the target's total assets, the purpose of the transaction, the terms and conditions of the transaction, and past practice. Depending on the significance of the acquisition from the buyer's perspective, board approval may also be required from the buyer.

In addition, a business transfer involving 'all or a substantial part' of a Japanese company's business will be subject to a special resolution of the seller's shareholders. A special resolution is adopted by a two-thirds majority vote of the shareholders present at a general meeting of shareholders attended by shareholders holding more than one-half of the total voting rights of shareholders who are eligible to exercise voting rights at a general meeting of shareholders. If the business transfer involves the transfer of all of the Japanese company's business, a special resolution of the buyer's shareholders will also be required.

The distinction between the two different types of business transfer is not always clear. In practice, many buyers tend to proceed cautiously when an asset acquisition is involved. It is common for buyers to interpret the scope of the business transfer provisions widely and to insist on a special shareholders' resolution by the seller's shareholders (i.e. interpreting the transaction as involving a transfer of 'a substantial part' of the seller's business) to avoid violating the Companies Act when the book value of the assets is more than one-fifth of the total assets of the seller.

#### ***Asset acquisition by newly incorporated Japanese subsidiary***

Foreign investors wishing to acquire Japanese assets via a recently established Japanese subsidiary should note that if the acquisition occurs less than two years after the subsidiary's incorporation, it may be subject to the post-incorporation asset purchase rules of the Companies Act.

The general rule is that if a subsidiary that is less than two years old agrees to acquire property:

- existing before its incorporation
- intended to be used on a continuing basis for purposes of the company's business, and
- at a price equal to more than one-fifth of the company's net asset value (this threshold may be lowered in the articles of incorporation).

then a shareholders' resolution is required to approve the asset acquisition in addition to a board resolution.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

In a share acquisition involving a private company which issues share certificates, transfer of title of the shares takes place by the delivery of share certificates to the buyer. If the target company does not issue share certificates (private companies have the option not to issue share certificates under the Companies Act), transfer of title of shares takes place by agreement between the transferor and the transferee. The transfer must be registered in the target company's shareholders' register in order for the transferee to be able to assert its rights as a shareholder against the company.

### 3.3.2 Transfers of title to assets

In an asset sale, it is necessary to separately deal with each category of asset and liability. Contracts must be individually assigned to the buyer and, where necessary, third-party consents obtained. Much will depend on the type of asset being acquired and what is required to effect a transfer. The seller will

be obliged to obtain the consent of any employees to be transferred to the buyer. In many cases, the seller and employees will expect the buyer to provide the same employment conditions that existed prior to the sale.

### 3.4 Formalities for Mergers

A merger requires the approval of the board of directors and shareholders of both the acquirer and the target.

However, if:

- the total value of the total number of shares issued by the acquiring company upon the merger, multiplied by the net asset value per share of the acquiring company and the total book value of bonds or any other assets<sup>4</sup> issued by the acquiring company upon the merger does not exceed one-fifth<sup>5</sup> of the net asset value of the acquiring company, and
- there is no objection by any shareholder(s) of the acquiring company holding more than one-sixth of the total voting shares in the acquiring company<sup>6</sup>.

then the approval of the acquiring company's shareholders is not required (known as a 'simplified merger' (*kan i gappei*)).

That said, even if the above conditions are met, the approval of the acquiring company's shareholders will be required if:

- the acquiring company has assumed a net loss as a result of the merger, or
- the acquiring company's articles of incorporation include a restriction on share transfer and shares are issued by such company upon the merger<sup>7</sup>.

If a party owns 90% or more of the shares in the party to be the surviving party of the merger (described as a 'special controlling relationship'), the approval of the surviving party's shareholders will not be required (known as a 'short-form merger' (*ryaku shiki gappei*)) unless the surviving company issues shares upon the merger and any of such shares are subject to share transfer restrictions pursuant to the articles of incorporation of the surviving company. Also, if a party owns 90% or more of the shares in the disappearing party, the approval of the disappearing company's shareholders will not be required.

Both the acquirer and the target must publish public notices regarding the merger to allow creditors the opportunity to object to the proposed merger.

### 3.5 Formalities for Company Splits

A company split (assuming it is an absorption-type company split in the context of private M&A) requires the approval of the board of directors and shareholders of both the seller and the buyer.

However, if the book value of the split assets is not more one-fifth of the total assets of the seller, then the approval of the seller's shareholders is not required (known as a 'simplified company split' (*kan i kaisha bunkatsu*) of the seller).

On the other hand, if:

- the sum of the total number of shares issued by the buyer upon the company split, multiplied by the net asset value per share of the buyer and the total book value of bonds or any other

<sup>4</sup> This includes cash.

<sup>5</sup> The 1/5 threshold may be lowered by the articles of incorporation of the acquiring company.

<sup>6</sup> The 1/6 threshold may be varied by the articles of incorporation of the acquiring company.

<sup>7</sup> The Companies Act requires the approval of the acquiring company's shareholders for share issuances if such company's articles of incorporation restrict the transfer of shares. Note that this applies throughout this chapter.

assets<sup>8</sup> issued by the buyer upon the company split does not exceed one-fifth<sup>9</sup> of the net asset value of the buyer, and

- there is no objection by any shareholder of the buyer holding more than one-sixth of the total voting shares in the buyer<sup>10</sup>.

then the approval of the buyer's shareholders is not required (known as a simplified company split of the buyer).

Nonetheless, even if these conditions are met, the approval of the buyer's shareholders will be required if:

- the buyer assumes a net loss after the company split, or
- the buyer's articles of incorporation include a restriction on share transfer and shares are issued by such company upon the company split.

If a party owns 90% or more of the shares in the other party ('special controlling relationship'), approval of the controlled company's shareholders will not be required unless the controlled company, being the buyer, issues shares upon the company split and its articles of incorporation restrict the transfer of shares.

The buyer must publish a public notice regarding the company split to allow its creditors the opportunity to object to the proposed company split. The seller must also publish a public notice regarding the company split except where the seller will be held jointly and severally liable for the liabilities transferred to the buyer.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

The Anti-Monopoly Act prohibits mergers and acquisitions if they will substantially restrain competition in any particular market, or if the merger or acquisition involves unfair trade practices. To give this prohibition teeth, the Anti-Monopoly Act imposes certain reporting and approval requirements in relation to certain M&A transactions.

Broadly speaking, transactions involving share acquisitions, business transfers, asset acquisitions, mergers and company splits that meet thresholds set out in the Anti-Monopoly Act are subject to prior notification to the Fair Trade Commission (FTC).

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Japanese purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

#### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
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<sup>8</sup> This includes cash.

<sup>9</sup> The 1/5 threshold may be lowered by the articles of incorporation of the acquiring company.

<sup>10</sup> The 1/6 threshold may be varied by the articles of incorporation of the acquiring company.



## Timetable

2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	The FTC is prepared to clear a transaction within Phase I (i.e. 30 calendar days) if the transaction does not raise competition issues and in particular where the parties have engaged in an extensive pre-notification process. If, however, the transaction gives rise to serious competition issues, it can be difficult to predict the exact timetable, but previous cases have taken between 6 and 7 months from filing date to achieve clearance.
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### 4.2.1 FTC review

The FTC may review a direct or indirect acquisition of a Japanese company or business, and has power to order the parties to a transaction deemed as substantially restraining competition in a particular market to take a range of remedial steps to restore competition, including the divestiture or transfer of a business.

FTC guidance<sup>11</sup> outlines the circumstances in which a proposed merger or acquisition may or may not be regarded as substantially restraining competition in a particular market. This refers to the 'Herfindahl-Hirschmann Index' (HHI) which is calculated as the sum of the squared market share of each company in a particular market. If the business combination only involves two parties, the HHI increment can be calculated by doubling the sum of the squared market share of each company group.

The guidelines specifically state that a share acquisition, asset acquisition (including a business transfer) or merger is unlikely to be deemed to have an anti-competitive effect where the following occurs in the HHI after the business combination:

HHI after business combination	HHI increment
<1,500	not relevant
>1,500 but <2,500	<250
>2,500	<150

Amendments to the guideline which came into force in July 2011 abolished the system of prior informal consultation under which the FTC granted informal clearance to difficult transactions before the parties formally filed a notification.

Under the amended guidelines, the FTC reviews proposed business combinations within the framework of the formal notification system under the Anti-Monopoly Act and no longer grants informal clearance in response to a voluntary consultation prior to a filing.

### 4.2.2 Restrictions on financial institutions

The Anti-Monopoly Act prohibits banks from owning more than 5%, and insurance companies from acquiring more than 10%, of the issued voting shares in any Japanese company. The prohibition applies whether the acquirer bank or insurance company is incorporated in Japan or overseas. However, this prohibition does not apply where prior permission is obtained from the FTC or where the acquisition falls within the scope of certain exemptions (e.g. under the exercise of security rights) provided under the Anti-Monopoly Act.

<sup>11</sup> Guidelines on the Application of the Anti-Monopoly Act to Reviewing Business Combinations.

#### 4.2.3 Reporting and approval requirements under the Anti-Monopoly Act

Under the Anti-Monopoly Act, a prior notification must be filed with the FTC in relation to mergers, asset acquisitions, share acquisitions and certain company splits which meet certain thresholds set out in the Act.

The parties to a transaction that requires a prior notification filing are prohibited from effecting the transaction for a period of 30 days after the filing. However, the FTC can shorten the waiting period. The FTC also has power to ask the parties to submit additional information regarding the transaction.

If the FTC does ask for additional information during the 30-day waiting period, it may still take action in relation to the transaction even after the 30-day waiting period (and until either 120 days from the date of acceptance of the initial notification, or 90 days from the date of acceptance of the additional information, whichever is later).

##### ***Share acquisitions***

The acquiring company must file prior notification with the FTC no later than 30 days before completion of the share acquisition, where:

- the total amount of domestic sales<sup>12</sup> of the acquiring company (whether a domestic or foreign company) and the other companies in the combined group of companies<sup>13</sup> exceeds JPY20 billion
- the total amount of domestic sales of the target company and its subsidiaries exceeds JPY5 billion, and
- as a result of the acquisition, the aggregate percentage of the total voting shares in the target company held by the acquiring company and the other companies in the combined group of companies exceeds 20% or 50%.

An acquisition of shares on the incorporation of a wholly-owned subsidiary is not subject to this reporting requirement.

##### ***Business and asset acquisitions***

The acquiring company must file prior notification with the FTC at least 30 days before completion of the acquisition where:

- the total amount of domestic sales of the acquiring company (whether domestic or foreign) and the other companies in the combined group of companies exceeds JPY20 billion
- if the acquisition involves the company's entire business, the company's total amount of domestic sales exceeds JPY3 billion, and
- if the acquisition involves a material part of the company's business or all or a material part of the fixed assets used in the company's business, the total amount of domestic sales related to the target business or fixed assets exceeds JPY3 billion.

<sup>12</sup> The phrase 'total amount of domestic sales' means the sum of the domestic sales of all of the companies that belong to the combined group of companies.

<sup>13</sup> The phrase 'combined group of companies' means a group that consists of a company and its subsidiaries and the ultimate parent company of the company, if any, and the subsidiaries of the ultimate parent company (excluding that company and its subsidiaries).

## ***Mergers***

Both parties to a merger must file a prior notification with the FTC at least 30 days before the completion of the merger where:

- the total amount of the domestic sales of the combined group of companies to which one company belongs exceeds JPY20 billion, and
- the total amount of domestic sales of the combined group of companies to which the other company belongs exceeds JPY5 billion.

A merger between a parent company and a subsidiary or between two or more subsidiaries of the same parent is not subject to this prior notification requirement.

## ***Company splits***

In company splits involving multiple transferors, all parties (i.e. including the transferee entity), must file a prior notification with the FTC at least 30 days before the completion of the company splits where certain thresholds are met.

## ***Timetable***

The FTC is prepared to clear transactions within Phase I (i.e. 30 calendar days) as long as they do not raise competition concerns and in particular where the parties have engaged in an extensive pre-notification process. However in cases where the FTC requests the submission by the parties of any reports, information or materials during the period, the deadline for the FTC's action may be extended up to either 120 calendar days from the date of acceptance of the notification, or 90 calendar days from the date of acceptance of the reports, information or materials that the parties are requested to submit, whichever is later. If the transaction gives rise to serious competition issues, it can be difficult to predict the exact timetable, but past cases have taken between 6 to 7 months from the filing date to achieve clearance.

## **4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues**

Although the Anti-Monopoly Act does not expressly provide any rules in relation to the exchange of competition-sensitive information, such information exchange should be restricted in accordance with the Broad Principles of Information Exchange and 'Gun-Jumping' set out at Appendix A when taking into consideration the general prohibition of unreasonable restraints of trade in Japan. There have, however, been no cases of enforcement in relation to gun-jumping in Japan.

## **4.4 Anti-Bribery, Corruption and Money Laundering**

### **4.4.1 Anti-bribery in the public sector**

#### ***Penal Code (Act No 45 of 1907)***

Bribery of Japanese public officials is criminalised under the Penal Code. Specifically, under the Penal Code, a person who gives, offers, or promises to give a bribe (in the form of any benefit, including food and drink) to a Public Officer in connection with the official's duty is guilty of bribery, unless such offers or promises are considered necessary as a common courtesy. Under Article 198 of the Penal Code, an offender can be imprisoned for a term of up to three years or be subject to a fine of up to JPY2.5 million.

Under Article 7 of the Penal Code, a 'Public Officer' means, a national or local government official of Japan, a member of an assembly or committee of Japan, or other employees engaged in the performance of public duties for the government of Japan in accordance with laws and regulations.

Special laws governing certain publicly funded organisations (e.g. public universities and incorporated administrative agencies), further expand the application of the anti-bribery provisions of the Penal Code to directors and employees of such organisations as 'quasi-public officials' (*minashi koumuin*).

### ***Unfair Competition Prevention Act (Act No 47 of 1993; UCPA)***

Japan has ratified and implemented the OECD Anti-Bribery Convention - see Appendix D. The implementing legislation is the UCPA. Article 18(1) of UCPA provides that:

'No person shall give, or offer or promise to give, any money or other benefits to a Foreign Public Officer for the purpose of having the Foreign Public Officer act or refrain from acting in a particular way in relation to his/her duties, or having the Foreign Public Officer use his/her position to influence another Foreign Public Officer to act or refrain from acting in a particular way in relation to that officer's duties, in order to obtain illicit gains in business with regard to international commercial transactions.'

Violations are punishable by:

- imprisonment for a term of up to five years, and/or
- fine of up to JPY5 million.

The term 'foreign public officer' is defined in Article 18(2) as a person who engages in:

- public services for a foreign, state, or local government
- services for an entity established under a special foreign law to carry out specific affairs in the public interest
- the affairs of an enterprise of which the number of voting shares or the amount of capital subscription directly owned by one or more of the foreign, state, or local governments exceeds 50 percent of that enterprise's total issued voting shares or total amount of subscribed capital, or of which the number of officers (which means directors, auditors, secretaries, and liquidators and other persons engaged in management of the business) appointed or designated by one or more of the foreign, state, or local foreign governments exceeds half of that enterprise's total number of officers, and to which special rights and interests are granted by the foreign state or local governments for performance of its business, or a person specified by a Cabinet Order as an equivalent person
- public services for an international organisation (which means an international organisation constituted by governments or intergovernmental international organisations), or
- the affairs under the authority of a foreign, state, or local government or an international organisation, and which have been delegated by such organisation.

#### **4.4.2 Anti-bribery in the private sector**

In certain limited cases such as those involving former government owned monopolies or fiduciary relationships, special laws specifically governing those entities or relationships, may also subject private sector individuals to penal sanctions prescribed under those laws for certain acts of bribery.

#### **4.4.3 Money laundering**

The Act on Prevention of Transfer of Criminal Proceeds (Act No. 22, 2007) applies to a broad scope of 'specified business operators' including lawyers and accountants, banks and other lending institutions, and insurance companies, in connection with benefits or money received from drug related crimes or organised crime. Such entities have duties to perform 'know-your-client' checks to confirm the identity of customers when conducting certain specified dealings.

### **4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation**

Foreign investment in Japanese companies and businesses is regulated by the FEFTA.

Certain reporting or approval requirements may apply to direct inward investments depending on:

- the jurisdiction in which the investor is located (i.e. whether it is an approved country or not)
- the industry in which the target company or business operates (i.e. whether it is a regulated or a non-regulated industry), or
- the nature of the particular asset involved (for asset acquisitions).

#### 4.5.1 Exchange controls

One of the stated aims of the FEFTA is to liberalise foreign exchange and foreign trade – i.e. subject foreign investment to as little regulation and compliance duties as possible. Capital flows relevant to mergers and acquisitions in Japan are therefore largely free of government controls.

However, cash remittances of more than JPY30 million into or out of Japan must be reported to the Minister of Finance (MoF). This reporting obligation is directed at and applicable to residents only. In practice, however, the Japanese bank involved in such remittance usually prepares and files such report on behalf of its customer as a service for its customer.

The repatriation of profits and dividends by branches and subsidiary forms is unrestricted in Japan. Bond issues, whether overseas by Japanese residents or by foreign residents in Japan, do not require government approval. However, issues involving sums of JPY100 million or more may be subject to an after-the-fact reporting requirement.

#### 4.5.2 Foreign investment approvals and notifications

##### ***Share acquisitions***

###### *General case filing obligation*

Foreign investors (usually foreign corporations) must file an ‘after-the-fact’ report with the MoF and other relevant ministers through the Bank of Japan (BoJ) by the 15th day of the month following the month in which the investor acquires shares in a Japanese company. This filing is generally regarded as a mere formality and does not require extensive disclosure of information.

However, no after-the-fact report is required if, as a result of the acquisition, the investor and any related companies do not in the aggregate hold 10% or more of the issued shares in a company.

###### *Exceptional case filing obligation*

However, foreign investors purchasing any number of shares in a company<sup>14</sup> in Japan must file:

- at any time during the six months prior to the acquisition, a notification, and
- within 30 days after the acquisition, an execution report, with the MoF and any other relevant ministers through the BoJ.

if either:

- the investor is located in a jurisdiction that is not included in the MoF list of designated jurisdictions
- the target company is engaged in business in a regulated industry, or

<sup>14</sup> For the exceptional case filing obligation, the 10% threshold of aggregate holdings does not apply, except in case of acquisitions of the shares of a listed company (in which case the Exceptional Case Filing Obligation will be required only if, as a result of the acquisition, the investor and any related companies in the aggregate hold 10% or more of the issued shares in the listed company).

- the investor is Iranian and acquires shares in a company which operates a business in which Iranian investment is prohibited.

Regulated industries include:

- telecoms (i.e. including telecoms carriers which must be registered under Art. 9, Telecommunications Business Act)
- electricity
- agriculture and fisheries
- marine and air transportation
- petroleum
- leather goods
- aerospace
- nuclear power, and
- gunpowder and armaments.

#### *Offshore share acquisitions*

Foreign investors who acquire shares in a non-listed company from another foreign investor need not file a prior notification or after-the-fact report regarding the acquisition.

If the foreign investor disposing of the shares previously filed a prior notification under the FEFTA, that foreign investor will be required to file an after-the-fact report with the MoF.

#### ***Asset acquisitions***

If a foreign investor acquires assets directly from a Japanese seller, the acquisition will be subject to certain reporting requirements under the FEFTA. The reporting requirements differ depending on the asset involved. For example, non-residents must report acquisitions of real property located within Japan to the MoF (through the BoJ) within 20 days of an acquisition of real estate. Personal property is generally exempt from these requirements.

#### ***Mergers***

The Companies Act does not currently provide for mergers between foreign corporations and Japanese companies. A foreign investor can only participate in a merger, as the acquiring party, through a wholly-owned or controlled Japanese subsidiary. If a foreign investor proposes to establish a new company in Japan with a view to acquiring the assets of a Japanese company through a merger, the acquisition of shares in the new company will be subject to the reporting requirements and restrictions that apply under the FEFTA to share acquisitions (see above). However, the Companies Act does permit some acquisitions of Japanese corporations using shares in foreign companies (so-called 'triangular mergers').

#### ***Changes of business purposes***

A change of a foreign-held company's business purposes will also trigger a FEFTA prior notification requirement if that change relates to a regulated industry. A change not relating to a regulated industry is not subject to any prior notification or reporting requirement.

## 4.6 Industry-Specific Regulation

Thresholds have been established with respect to foreign ownership in certain industries. The rules vary for individual companies within these industries and should be checked at the time an acquisition is being contemplated. Foreign individuals and companies may still invest in these companies beyond the set caps. However, they cannot be registered as shareholders and will therefore not enjoy the usual shareholder rights (e.g. voting rights and dividend rights).

The major industries to which these rules apply include the following.

- **Telecommunications:** Foreign investors are permitted to acquire 100% of the shares in all Japanese telecoms companies, except for Nippon Telegraph and Telephone East Corporation (NTT-East); Nippon Telegraph and Telephone West Corporation (NTT-West); and Nippon Telegraph and Telephone Corporation (NTT, being the holding company of NTT-East and NTT-West). Less than one-third of all of the voting rights of NTT may be foreign-owned, and NTT-East and NTT-West must be owned by NTT
- **Airlines:** Foreign investors are permitted to acquire 33.3% of all voting rights in Japanese airline companies
- **Broadcasting:** Foreign investors are permitted to acquire less than 20% of all voting rights in general broadcasting and communications companies and other similar companies. The regulations relating to broadcasting such as cable, satellite and similar companies are technical; and the restrictions should be confirmed prior to any substantial acquisition in this sector.

In certain industries, the relevant regulator may have to be notified and in some instances its consent or approval sought in relation to an acquisition or merger. For example:

- **Telecommunications:** where the whole of a telecoms business is transferred or there is a merger or a company split of a telecoms carrier, an after-the-fact notice must be provided without delay to the Minister of Internal Affairs and Communications
- **Stock company-type financial instruments exchange:** where 5% or more of the voting rights in a stock company-type financial instruments exchange is acquired, an after-the-fact notice must be made without delay to the Prime Minister through the competent Local Finance Bureau. Where the percentage is 20% or more, the approval of the Prime Minister is also required
- **Banks:** M&A involving banks must be approved by the Commissioner of the Financial Services Agency. If more than 5% of the voting rights in a bank are acquired, an after-the-fact notice must be made within 5 business days of the acquisition to the competent local finance bureau; and for 20% or more of the voting rights, approval of the Commissioner of the Financial Services Agency is also necessary.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Share purchase agreements are not subject to stamp duty in Japan.

## 5.2 Acquisition of Assets

Acquisition of assets is subject to the following taxes:

Tax Type	Transaction	Tax Rate
<b>Real property acquisition tax</b>	Acquisitions of buildings	3% (residential buildings) or 4% (other buildings) of the appraisal value based on a fixed assets tax
	Acquisitions of land	3% of appraisal value based on a fixed assets tax (or half of the appraisal value based on a fixed assets tax in the case of residential land)
<b>Registration and licence tax</b>	Acquisitions of real property, except land	2% of appraisal value based on a fixed assets tax
	Acquisitions of land	1.5% of appraisal value based on a fixed assets tax until 31 March 2015 (to be extended to 31 March 2017 under 2015 tax legislation proposals)
	Transfer of ownership of any other registrable assets acquired from the transferor, such as registrable intellectual property	Registration tax of JPY15,000 per patent and JPY30,000 per trademark, etc.
<b>Stamp duty</b>	Agreements for the acquisition of business assets, including real property, intellectual property rights, etc., that are prepared and executed in Japan.	<p>Progressive and are assessed on amount of purchase price stated in the agreement.</p> <p>Maximum amount of stamp duty payable is JPY600,000 on an agreement involving a purchase price of more than JPY5 billion.</p>

## 5.3 Mergers and Splits

Mergers and company splits are subject to the following taxes:

### Mergers

Tax Type	Transaction	Tax Rate
<b>Stamp duty</b>	Merger agreement	Flat rate of JPY40,000 per original agreement
<b>Registration and licence tax</b>	Acquisitions of real property	0.4% of appraisal value based on a fixed assets tax
	Transfer of statutory intangibles, such as patent registrations and trade marks	Registration tax of JPY3,000 per patent and JPY3,000 per trade mark, etc.



### Company Splits

Tax Type	Transaction	Tax Rate
<b>Stamp duty</b>	Company split agreement/ plan	Flat rate of JPY40,000 per original agreement
<b>Real property acquisition tax</b>	Acquisitions of buildings	3% (residential buildings) or 4% (other buildings) of appraisal value based on a fixed assets tax
	Acquisitions of land	3% of appraisal value based on a fixed assets tax (or half of the appraisal value based on a fixed assets tax in the case of residential land). If certain conditions are met, the company split is not subject to real estate acquisition tax.
<b>Registration and licence tax</b>	Acquisitions of real property, except land	2% of appraisal value based on a fixed assets tax
	Acquisitions of land	1.8% until 31 March 2015; 2% of appraisal value based on a fixed asset tax (on or after 1 April 2015)
	Transfer of statutory intangibles, such as patent registrations and trade marks	Registration tax of JPY15,000 per patent and JPY30,000 per trademark, etc.

## 5.4 Value Added Tax

Consumption tax (similar to VAT) will be imposed at a rate of 8% on the transfer of taxable assets (e.g. inventory and fixed assets, both tangible and intangible). The rate will rise to 10% from 1 April 2017. Acquisitions of shares, mergers and splits are not subject to Japanese consumption tax.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

An acquisition of the shares in a corporate employer will not affect its obligations to its employees because the employing entity will remain the same. In practice, however, the buyer may need to change the working conditions of the employees if the target is moved from one company group to another and the buyer wishes to integrate the target's working conditions with the working conditions of the other group companies.

To change working conditions that have been individually agreed with each employee, the consent of each employee will generally be required. If those working conditions are provided for under the work rules or their ancillary rules, such terms can be changed for the workplace by following the procedures set by the Labour Standards Act. However, even if those procedures are followed, certain changes may still be challenged on an individual basis by employees who are detrimentally affected by the change. Any detrimental change in the working conditions provided under the work rules will be valid only when:

- the employees consent to the change (detrimental changes will not be effective against non-consenting employees), or
- the change is reasonable considering the circumstances as a whole taking into account various factors including economic factors or business needs (Arts 9 and 10, Labour Contract Act and relevant case precedents).

#### 6.1.2 Acquisition of assets/businesses

When a business is sold, the seller must obtain the consent of any employee that the buyer proposes to employ (Civil Code). Any employee whom the buyer proposes not to employ will remain an employee of the seller. If the seller finds it necessary to dismiss any employees who choose to remain with it, such dismissal must meet both procedural and substantive requirements, failing which the dismissal may be invalidated. (See **6.4** for the substantive requirements.)

A transfer of an employee to the buyer can be effected by either:

- a resignation by the employee from the seller and re-hire by the buyer, or
- a transfer of the employment contract from the seller to the buyer.

In general, the resignation and re-hire process is used more frequently where the employees are transferred to a company outside the seller's current group of companies; whereas the transfer of contract process is more frequently used where the employees are transferred within group companies.

Both methods require the consent and co-operation of the transferring employees. The action plan for either method should include a comparison of the original working conditions of the employees with those which the buyer is in a position to offer – this will necessarily require the cooperation of both the buyer and the seller. The goal of this exercise is to identify the potential impact of the transfer on each employee and the appropriate measures to be taken to address those impacts and develop an approach for the consent process. To obtain consent from all of the target employees as smoothly as possible, it is recommended that the new working conditions offered to the employees are no less favourable than their existing conditions.

#### ***Termination and re-hire***

If an employee resigns from the seller and then is re-hired by the acquirer/employer, that transferring employee is entitled to be paid retirement benefits accrued with the seller, upon the transfer. However, employees can choose to have accrued retirement benefits and other entitlements (e.g. pension benefits) transferred to the buyer rather than have them paid out on the transfer (and usually prefer this latter course). The feasibility and procedures for the transfer of such accrued entitlements should be carefully assessed at an early stage. Such practical issues may include portability of the accrued benefits as well as any requirements/consents of third party benefit providers that might apply. See **6.3**.

#### ***Transfer of employment contract***

Employment contracts will transfer from the seller to the buyer. As a general rule, the conditions of employment of the employee remain unchanged after the transfer, and accrued retirement benefits and other entitlements will also be transferred to the buyer. In practice, however, this may result in the transferred employees and existing employees having different working conditions, which would not be viable for the buyer-employer. It may not even be possible to maintain the same benefit schemes for the transferred employees after the transfer due to limitations faced by the buyer. For example, where the buyer acquires the business through a newly established special purpose vehicle, such entity may not be able to meet a third-party benefit provider's requirements for corporate enrolment (e.g. number of years since incorporation). Replicating the same benefits can also be difficult where the buyer's benefit programs are so structurally different from those provided by the seller to its employees that the costs and effort required to do so may be prohibitive. See **6.3**.

The conditions of employment of the incoming/transferred employees may therefore need to be adjusted after the transfer, which requires very careful handling, and must follow the set procedures for changing working conditions as discussed in **6.1.1**. In practice, the consent to such changes in conditions of employment should be obtained from each employee at the same time as they consent to the business transfer.

### 6.1.3 Mergers and splits

#### ***Mergers***

In a merger situation, the employees of the target company become employees of the merged entity as of the merger date by operation of law. There is no requirement for either the acquirer or target to obtain the consent of their respective employees to the merger itself.

However, where there are differences in the employment conditions of the acquirer and the target company, harmonisation of the working conditions may become necessary. Working conditions may also need to be adjusted after the merger if the same benefit schemes cannot be maintained (see **6.1.2**). The procedures for changing the working conditions as set out in **6.1.1** must be followed in these circumstances.

#### ***Company splits***

Under the company split process, as a general rule, all assets, liabilities and contracts are transferred with the transferring business by operation of law. The employment contracts, as with other types of contracts, will automatically transfer from the splitting company to the succeeding company, without the need to obtain the consent of each employee, under the same terms and conditions. In order to protect employees in a company split scenario, the Act on the Succession to Labour Contracts upon Company Splits (ASLCCS) sets out certain requirements concerning consultations, notices and objection rights as described below.

To transfer employees in a company split, the splitting company must complete two types of consultation process:

- consultation with the labour union/employee representative (under Art. 7, ASLCCS), and
- consultation with the employees engaged in the transferring business (under Art. 5, Supplementary Provisions of Act Revising a Portion of the Commercial Code etc.).

The Supreme Court has held that failure to consult with the target employees may invalidate the transfer of the employees in a company split if:

- no consultation takes place at all, or
- the seller's consultations or communications are insufficient and clearly do not satisfy the underlying purpose behind the consultation requirement.

Once the consultations are undertaken in accordance with the correct procedure and completed, the splitting company must send notice to:

- employees primarily engaged in the business to be succeeded to by the succeeding company (core employees), and
- the employees covered under the split agreement/plan as those who will be succeeded to by the succeeding company (transferring employees).

Further, the splitting company must send notice to the labour unions with which it has concluded collective bargaining agreement(s), if there are any.

The notice requirement is framed in these two distinct ways because it is not only the Transferring Employees who have a right to notice. That is, all Core Employees are also entitled to notice even if some may not be among the Transferring Employees agreed between the buyer and the seller. This is significant for the purposes of the objection rights discussed below.

After receipt of the above notices, the following groups of employees have a right to object either to being transferred, or not being transferred.

- Non-Core Employees who are included among the Transferring Employees can object to being transferred, and
- Core Employees who have not been included among the Transferring Employees and are not being transferred can object to not being transferred.

These employees must exercise this right of objection during the period from the date of the notice until one day before the date of the shareholder's resolution relating to the corporate split.

## 6.2 Approval or Consultation Requirements

Where a target company's employees are unionised and a collective bargaining agreement has been concluded between the union and the seller, those agreements might require the seller to:

- notify the union
- engage in advance consultations with the union, and/or
- obtain the union's consent to the proposed acquisition.

Even where no collective bargaining agreement exists or one exists but does not require such notification, consultation and consent, it is probably advisable to properly communicate with the unions. The individual consent of each employee must be obtained in certain circumstances, so from a practical perspective, having the unions on-side can facilitate matters.

Sufficient time for such union consultations should be factored in.

## 6.3 Transfer of Benefit Schemes

Because various types of benefit can be offered, and employees will receive different packages from company-to-company, it may not always be possible to directly transfer a benefit scheme in any kind of company re-organisation. Parties should therefore ascertain the feasibility of, and processes required for the transfer of each and every benefit scheme made to employees of the seller at an early stage.

For example, take a scenario involving the transfer of pensions. Pension schemes (or retirement benefit plans) vary from company to company and their transfer might need the approval/involvement of the lead trust bank and/or government.

Another example would be health insurance. Some companies enrol in a health insurance association (HIA) scheme. HIA is a private association authorised by the government to provide health insurance in the place of government health insurance. In general, HIA policies usually offer better benefits to employees (health coverage) than government health insurance. Parties should be aware of the fact that transfer of such schemes needs government authorisation.

## 6.4 Protection against Dismissal

Dismissal of an employee will be invalid if it is found to have been conducted in a manner which is an 'abuse of the employer's right of dismissal'. A dismissal will be considered an 'abuse' and therefore null and void if it is not based on objectively reasonable grounds or is 'not considered to be appropriate in general societal terms'. The courts determine whether these standards are met based on the circumstances of each case.

With respect to the substantive requirements for unilateral dismissal for business reasons (referred to as 'adjustment dismissal' by practitioners), a 4-factor test has evolved in the case precedents, requiring all four of the following in order to justify dismissal:

- the economic grounds for reducing the number of employees must be significant
- fair and non-discriminatory criteria must have been used in selecting the employees to be dismissed
- the employer can show that it exhausted other, less drastic methods before resorting to unilateral termination (e.g. implementing other cost-cutting measures, transferring employees to other departments, putting a moratorium on the hire of new employees, offering early retirement or voluntary resignation, etc.), and
- the proper procedural protocols were followed in dismissing the employees.

This is a strict test holding employers to a very high standard of justification.

Nevertheless, it is possible that a case for justification could be made in an acquisitions context - e.g. if an employee refused an offer of employment with the buyer offering working conditions which would be no less favourable than they enjoyed in their previous employment, and chose nevertheless to remain with the seller, even though there would be no job position or work available with the seller, the seller would have a relatively strong argument to justify termination following the 4-factor test.

Notwithstanding the above, it would always be open to an employee to challenge the validity of any termination. Therefore, the safest, least risky approach would be to offer a severance payment or benefits, and ask the employee to voluntarily agree to resign.

## Luxembourg

### 1.1 Overview

The Grand-Duchy of Luxembourg is considered a prime location for holding companies and investment funds. The country benefits from a flexible legal framework, especially in relation to the structuring of companies, and corporate migrations towards and out of Luxembourg and cross-border mergers and acquisitions are key drivers in this buoyant economy.

### 1.2 General Legal Framework

In addition to relevant provisions of the Civil Code, companies in Luxembourg are governed by the Law on Commercial Companies dated 10 August 1915, as amended (CC Law).

All companies must have a registered office located in the Grand-Duchy of Luxembourg, a corporate name and a specific business purpose. In addition, all companies whose central administration (head office) is located in Luxembourg are subject to the laws of the Grand-Duchy of Luxembourg even if their incorporation deed has been enacted in a foreign state (Art. 159, CC Law).

The flexibility of the CC Law and the neutrality of the Luxembourg jurisdiction allows the implementation of a diversity of international restructuring possibilities for multinationals and mergers and acquisitions projects.

### 1.3 Corporate Entities

The following corporate forms are commonly found in Luxembourg.

#### 1.3.1 Private limited liability companies

The most widely used corporate form in Luxembourg is the private limited liability company (*société à responsabilité limitée*/S.à r.l.), used by around two-thirds of companies in Luxembourg.

A private limited liability company is not entitled to issue shares or bonds to the public. The number of shareholders is limited to 40. The company may have a sole shareholder. The liability of the shareholder(s) is limited to the amount of its/their contributions. Shareholders control transfers of shares to third parties. The company is managed by at least one manager, who need not be a shareholder. Private limited liability companies can pursue any object (except insurance, capitalisation and savings activities). One or more statutory auditors (*commissaires*), who need not be shareholders, must be appointed where the number of shareholders exceeds 25. Minimum share capital is EUR12,500 or its equivalent in a foreign currency (fully paid-up at incorporation). Only registered shares are issued.

#### 1.3.2 Public limited liability companies

The public limited liability company (*société anonyme*/SA) is also a common legal form. A public limited liability company may offer its shares or bonds to the public. The company may have a sole shareholder, and there is no maximum number of shareholders. The liability of the shareholders is limited to the amount of their contributions. Shares are negotiable and transferable. The company is managed by at least one director (where there is only one shareholder) or at least three directors, who hold that position for a maximum term of six years, and the directors do not need to be shareholders. Minimum share capital is EUR31,000 or the equivalent in a foreign currency (of which at least 25% must be paid-up on incorporation). It is possible to issue bearer shares. Contributions in kind may need to be audited by a qualified auditor (*réviseur d'entreprises agréé*).

## 2. Acquisition Methods

In Luxembourg, a business can be acquired either by way of a share deal, under which part or all of the target's shares are transferred; or an asset deal, consisting of the purchase of some or all of the target's assets. To enhance its favourable legal environment, Luxembourg has also implemented the various European Union merger directives. Besides purely domestic mergers, Luxembourg provides

for a regulatory framework for cross-border mergers in line with its characteristically open-market approach.

## 2.1 Acquisition of Shares

Shares in an SA are freely transferable, unless any transfer restrictions provisions are included in the articles of association or in a shareholders' agreement. To be valid the transfer of legal title to the shares in an SA must be recorded in the shareholders register. The transfer of shares in a Sàrl to a non-existing shareholder requires prior approval of the current shareholders representing 75% of the company's share capital. A share purchase agreement is prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction. No specific form of agreement is prescribed under Luxembourg law.

## 2.2 Acquisition of Assets

When a business is transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer applicable to that type of asset. For some assets, this will simply be a case of delivering the asset to the buyer, but in other cases the formalities are more cumbersome (e.g. requiring filing the transfer in respect of trade marks and patents; or for real estate the additional step of executing the purchase agreement before a notary public in Luxembourg, update of the land registry (*cadastre*) and filing of the notarial deed with the mortgage registry (*conservation des hypothèques*)). The assignment of contracts under an asset purchase could also raise issues of third party consent, while in a share deal, third party consent is needed only for agreements which have a change of control clause. It is therefore necessary to include a provision, either in the purchase agreement or in separate agreements, requiring those formalities to be complied with. There will usually be an asset purchase agreement to record the respective rights, obligations and liabilities of the parties.

## 2.3 Mergers/Other Acquisition Methods

Cross-border mergers are possible for any merger of a Luxembourg and foreign company, and is not restricted to European Union companies, as long as the foreign jurisdiction does not prohibit the merger and the foreign company complies with the requirements and formalities of its domestic law. A merger will entail the universal transfer of all assets and liabilities of the absorbed company to the absorbing company, except in certain cases (see 3.5).

# 3. Negotiation, Signing and Closing

## 3.1 Pre-Contractual Obligations

Luxembourg law does not provide for pre-contractual obligations in the context of mergers and acquisitions transactions.

## 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Luxembourg purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. Cash-free debt-free or NAV adjustments are common. Frequently, appointment of an expert where there is disagreement between the parties.
2	Is there a collar on the adjustment?	Collars are not common.

3	Who prepares completion balance sheet?	Often prepared by the seller. Responsibility to be agreed by both seller and buyer.
4	Is the balance sheet audited?	Not usually.
5	Is an earn-out common?	Not common though possible. However, earn-outs are used in transactions where the seller continues to manage the target company after closing.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Not uncommon. Escrow is frequently used to secure purchase price adjustment or indemnification obligations. Escrow also used to secure post-closing obligations of the seller.
8	Is a break fee common?	Not common.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	Common but only in cases where signing and closing are separated by a long period of time (i.e. several months).
10	Is the MAE general or specific?	Both seen but specific more common.
11	Quantification of MAE?	Common.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall/ blue pencil provisions not common but sometimes seen.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Not common. Usually access granted only until signing.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating warranty disclosure is common until signing. After signing, the party in breach must normally notify the other party. Remedies are possible depending on the materiality of the breach: either indemnification solely or termination plus indemnification are seen.
17	Is a separate tax covenant/indemnity or tax deed common?	Very common. Usually covers the fact that target is up-to-date in terms of tax declarations, that declarations are certified true, correct and complete.
<b>Representations and Warranties</b>		
18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers often used but often not quantified.



19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers common. Generally not limited to specified persons.
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20	Is a warranty that there is no materially misleading/omitted information common?	Common.
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21	Is disclosure of data room common?	Common.
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### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition of the representations and warranties at completion common. A bring-down certificate at completion not uncommon.
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23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects is common but fundamental representations must be absolutely true.
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24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Uncommon.
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### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	20%–30% for general cap (may differ subject to negotiations).
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually warranties only.
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27	What are the common exceptions to the cap?	Indemnification related to fraud/environment usually not capped.
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28	Is a deductible or basket common?	Both common.
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29	Is a <i>de minimis</i> common?	Common.
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30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	From 12–36 months for general representations and warranties except for tax and social security matters for which legal limitations usually apply. Unlimited for fraud.
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31	Is warranty insurance common?	Uncommon.
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### Reliance

32	Do financiers seek to rely on buyer's due diligence reports?	Not uncommon.
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### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Common, often as regards VAT.
34	Insurance proceeds?	Common.
35	Third party recoveries?	Common.

### Damages, Knowledge

36	Obligation to mitigate damages?	Common.
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Common.

### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, if not contrary to public policy. In general Luxembourg law chosen for Luxembourg targets.
40	Is litigation or arbitration more common? If arbitration, where?	Litigation more common, arbitration rare.

### Stamp Duty

41	If stamp duty is payable, is it normally shared?	No stamp duty. However, Luxembourg courts may require prior registration of a purchase agreement with the tax administration ( <i>Administration de l'Enregistrement et des Domaines</i> ) in Luxembourg, in which case a fix registration fee of EUR12 is payable.
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## 3.3 Formalities for Execution of Documents

### 3.3.1 Transfers of shares

Transfers of shares are subject to statutory legal requirements and specific provisions of the articles of association. The legal restrictions on share transfers are as follows.

#### ***Private limited liability companies (S.à r.l.)***

Shares are freely transferable among the shareholders. Shares may not be transferred during a shareholder's lifetime to non-shareholders unless shareholders representing at least three-quarters of the share capital have agreed to this in an ordinary general meeting. In addition, the articles of association may include specific clauses relating to pre-emption rights and rights of first refusal for the benefit of the remaining shareholders.

#### ***Public limited liability companies (S.A.)***

According to the CC Law, shares are freely transferable. Contractually (i.e. in articles of association, shareholders' agreement), clauses relating notably to restrictions on transfer, pre-emption and first refusal are allowed, subject to certain restrictions.

### 3.3.2 Transfers of assets

No specific form of agreement is required under Luxembourg law for the transfer of assets, except in certain particular cases. Usually, transfer agreements or sale and purchase agreements are used to document the terms and conditions of the transfers.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

Transfers of title to shares requires the following steps:

- a notarial deed or agreement executed under private seal to be entered into by transferor and transferee setting out the terms and conditions of the share transfer (Art. 40, CC Law, where a public limited liability company; or Art. 190, CC Law, where a private limited liability company)
- recording of the transfer in the share register of the Luxembourg company to which shares are being transferred (the Luxco)
- notification to the Luxco of the transfer of its shares (Art. 1690, Civil Code). The notification must be made either by:
  - the Luxco entering into the transfer agreement (i.e. through the signature by the Luxco of that agreement) in order to acknowledge and consent to the transfer, or
  - by a notice of transfer of shares to be sent by the transferor to the Luxco, countersigned by the Luxco.
- for S.à r.l.: registration of the transfer of shares with the Luxembourg Trade and Companies Register (R.C.S. Luxembourg) within one month of the effective date of the transfer
- publicising the transfer of shares by publishing a notice in the *Luxembourg National State Gazette (Mémorial C, Recueil des Sociétés et Associations)* for Sàrl, within two months of the transfer.

### 3.4.2 Transfers of title to assets

See **3.3.2**. Specific formalities will have to be performed depending on the assets to be transferred (e.g. special formalities for the transfer of a real estate assets).

## 3.5 Formalities for Mergers

No formalities need to be completed. However, the transfer of industrial and intellectual property rights and ownership or other rights in assets other than collateral established in movable and immovable property will be valid *vis-à-vis* third parties on the conditions provided for in the laws governing those operations. Specific attention should be paid to change of control provisions in contracts and where the identity of the party to the contract is instrumental in obtaining the contract.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

No prior notification to Luxembourg competition authorities is required as a prerequisite to concentrations between companies in the Luxembourg market: the Luxembourg competition authority has no powers to validate or deny mergers between companies or acquisitions a companies. The Law on Competition of 23 October 2011 does not contain any specific provision on mergers, only reflecting Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) prohibiting concerted practices and abuses of dominant position in the European Union.

If a concentration does have a European dimension, control is implemented at the level of the European Commission under the EU Merger Control regime.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Luxembourg purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	<p>No, for a merger with a Luxembourg dimension, i.e. affecting only the national Luxembourg market.</p> <p>For mergers with a EU dimension as per EU Regulation 139/2004, see Appendix A.</p>
Timetable		
2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p>N/A for a merger affecting the national Luxembourg market.</p> <p>For merger with EU dimension as per EU Regulation 139/2004, see Appendix A.</p>

## 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

This is not applicable to Luxembourg, as no review of the concentration will be performed by a Luxembourg antitrust or competition authority.

## 4.4 Anti-Bribery, Corruption and Money Laundering

Luxembourg has no specific laws regulating anti-bribery, corruption or money laundering that may occur during mergers between companies. However, there is a legal obligation to verify the identity of the ultimate beneficial owners of 25%+ holdings in any corporate entity or structure.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions applies (see Appendix D).

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

### 4.5.1 Exchange controls

This is not applicable to Luxembourg, as no specific laws to control currency exchange have been enacted.

### 4.5.2 Foreign investment approvals and notifications

This is not applicable to Luxembourg, as no specific laws regarding prior notification of foreign investment exist.

### 4.5.3 Industry-specific regulation

Companies performing commercial, craft or industrial activities need a business licence, granted by the Ministry of Economy. Any change in the company's name, legal form or object, any change of the company director to whom the qualification and professional integrity allowing the granting of the business licence relates, as well as the opening of a branch office, must be notified to the Ministry of Economy which will then issue a new business licence.

Other companies may be subject to certain specific regulatory controls or approvals relating to their specific industries or activity (e.g. credit institutions, insurance companies, investment firms and companies operating in the telecommunication business may be subject to specific approvals and notifications in certain cases).

#### 4.5.4 Import/export controls

No specific law regarding control of imports or exports applies in Luxembourg.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

The acquisition of shares in a Luxembourg company is not subject to transfer taxes in Luxembourg.

### 5.2 Acquisition of Assets

The acquisition of Luxembourg real estate is subject to transfer tax.

#### Luxembourg real estate transfer tax

Taxable asset	Tax rate (total)	Elements of the tax
Property buildings and land inside the City of Luxembourg	10%	6% registration duty + 1% transcription tax + 3% municipal surcharge
Property buildings and land outwith the City of Luxembourg	7%	6% registration duty + 1% transcription tax

The tax base of the transfer tax is the market value or the consideration paid if the latter is higher than the market value.

### 5.3 Mergers

Not relevant to Luxembourg as no merger control regime applies.

### 5.4 Value Added Tax

As a general rule, all supplies of goods and services are subject to VAT. However, transactions relating to shares and participations in other companies (e.g. acquisitions, holding and sale of shares) fall, in principle, outside the scope of VAT. Those transactions might, however, fall within the scope of VAT where they are performed in the context of a trading activity. If that is the case, transactions relating to shares should be exempt from VAT.

In an asset deal, the transfer of the assets is in principle regarded as several distinct supplies of goods, each of which is in principle subject to VAT at the appropriate rate. However, the Luxembourg VAT law provides for a special regime for a transfer of the totality of assets/the business or a part of the total business as a going concern (TOGC). As a matter of law, TOGCs qualify neither as a supply of goods nor as a supply of services and therefore falls outside the scope of VAT. VAT is therefore not chargeable during the TOGC.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of a share purchase, all rights, duties and liabilities owed by, or to, the employees of the target company shall, by reason of such share purchase, be inherited and transferred to the buyer, as new owner of the target company. If the target company's business is integrated into the buyer's

business post-acquisition, this is likely to constitute an acquisition of assets or a business transfer, and the considerations set out in **6.1.2** should be referred to.

#### 6.1.2 Acquisition of assets

Where there is a transfer of an undertaking, establishment or a part of an undertaking or establishment, all the transferor's employees as well as all rights and obligations arising from an employment relationship existing on the date of the transfer automatically transfer to the buyer (transferee).

The transfer does not constitute in itself grounds for dismissal of employees by the transferor or the transferee.

If the transfer involves or would involve a substantial change in working conditions to the material detriment of the transferring employees, the employees may refuse the transfer. Such refusal will be regarded as a dismissal and may therefore give rise to claims for unfair dismissal. The transferor and the transferee will be jointly and severally liable regarding obligations which arose before the date of transfer from an employment contract or relationship existing on the date of transfer. The transferor must reimburse any sums paid by the transferee as a consequence of any joint or several liability unless otherwise agreed.

Assuming that the employees do not exercise their right to object to the transfer, the buyer stands in the place of the seller as regards the employees' contract of employment.

#### 6.1.3 Transfer of business

See **6.1.2** as Luxembourg law does not distinguish between the acquisition of assets and the transfer of business.

#### 6.1.4 Mergers

Rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which a cross-border merger takes effect are transferred to the acquiring company at the date on which the cross-border merger takes effect.

### 6.2 Approval or Consultation Requirements

In an asset sale, there is an obligation on the seller to give 'appropriate representatives' of affected employees prescribed information about the asset sale, sufficiently in advance of the asset sale to allow consultation (if required) to take place.

Consultation with the appropriate representatives should relate to any measures envisaged in relation to affected employees by either the seller or buyer—e.g. redundancies, changes in terms and conditions, or other operational matters. Consultation must be 'with a view to seeking agreement' to the measures envisaged.

There is no equivalent obligation in respect of share purchases, and employee representatives have no legal right to be informed and consulted of a change in ownership, except where a works council exists (for companies employing more than 150 employees for at least 3 years).

### 6.3 Protection against Dismissal

#### 6.3.1 Redundancies

When the transferor or the transferee are planning to implement measures affecting their employees, the legal employee representatives must be consulted in good time. If the buyer intends to make any employees of the target business redundant, the buyer should carefully consider their rights to statutory compensation. In particular, in an asset purchase, if transferring employees are dismissed before or after the transfer as a consequence of the transaction, they will be considered as having been unfairly dismissed as a transfer does not constitute legal grounds for dismissal. Economic dismissals due to reorganisation or for business reasons arising from the transfer remain feasible.

The dismissals are considered as being 'mass dismissals' if seven or more employees are to be dismissed for reasons not inherent to the employees within 30 days, or 15 within 90 days. In those cases, negotiations must be opened with the employee representatives and a redundancy plan signed no later than within 15 days of the announcement of the proposed change of employer, extendable with another 15 days under the National Conciliation Office's supervision upon request of the parties.

The dismissals can take effect no sooner than 75 days after the signing of the redundancy plan.

#### 6.3.2 Penalties

The transferor and the transferee will be jointly and severally liable regarding obligations which arose before the date of transfer from an employment contract or relationship existing on the date of transfer. Damages will be payable by the new employer to those employees who are dismissed unfairly and who seek compensation in the courts/tribunals.

# Malaysia

## 1.1 Overview

Malaysia is a federation comprising 13 states and three federal territories in both West (Peninsular) Malaysia and East Malaysia. The government encourages industry and foreign investment, particularly in high technology and resource-based export-oriented industries. Malaysia has attracted much interest from multinationals due to its rapid economic growth and future potential.

Although the legal framework for merger and acquisition activity in Malaysia is relatively straightforward, administrative processes complicate matters, both for prospective buyers and sellers. In particular, the regulatory approvals process can often be lengthy and involve several regulatory bodies. There are also relevant statutes to consider, depending on whether the target company holds an operating licence to carry out its business activities: e.g. a licensed telecommunication company will be regulated under the Communications and Multimedia Act 1998 and will be required to hold at least one of a number of licences.

## 1.2 General Legal Framework

For historical reasons, the Malaysian legal system is based on the laws of England. Many Malaysian statutes are modelled on their English counterparts. Unless there are provisions to the contrary in the written laws of Malaysia, there is continuing reception of current English mercantile law in the states of Malacca, Penang, Sabah and Sarawak; and for the rest of West Malaysia, as it stood on 7 April 1956. English law continues to be strongly persuasive in the practice of the Malaysian common law system.

The main sources of legal principles and regulations governing M&A in Malaysia are:

- the common law of contract (heavily based on the English common law of contract) as interpreted by the Malaysian courts
- specific Malaysian legislation or regulations including the Companies Act 1965
- for publicly listed companies, regulations such as the Listing Requirements of Bursa Malaysia, the Equity Guidelines issued by the Securities Commission (SC) and the Malaysian Code on Take-Overs and Mergers 2010, as well as specific legislation such as the Capital Market and Services Act 2007 (CMSA).

In practice, merger and acquisition laws are an intricate interplay of various laws and regulations. These laws and regulations are also subject to Malaysian government policy applicable to the particular area of industry where the target company is operating.

## 1.3 Corporate Entities

Under the Malaysian Companies Act 1965 (CA 1965), a company may be either limited by shares, limited by guarantee, limited both by shares and guarantee or unlimited company. The usual form of a subsidiary company is company limited by shares. If a company is limited by shares, the liability of whose members (shareholders) is limited to the amount, if any, unpaid on their shares. Here the focus is mainly on companies limited by shares.

### 1.3.1 Private companies

Certain restrictions are imposed on private companies. The articles of association must:

- contain a restriction on the rights of members to transfer their shares
- limit the number of members to 50 (exclusive of employee members), and
- prohibit invitations to the public to subscribe for the shares or debentures in the company.

However, a private company may be converted to a public company at any time by removing these restriction from the articles.



On 2 July 2013, the Companies Commission of Malaysia (CCM) published a draft of the new Companies Bill for public consultation. The CA 1965 prohibits a company from carrying on business with fewer than two shareholders for more than 6 months. The only exception is a company whose issued shares are wholly held by a holding company. A company must also have a minimum of two resident directors (i.e. individuals who have their only or principal place of residence in Malaysia). Under the Bill, companies will be able to be incorporated and operated with a single individual or corporate shareholder and need only have one resident director (who can also be the sole shareholder of the company). This move will reduce incorporation costs, as well as general management and operational costs.

Shares in Malaysian companies are currently issued with a par (nominal) value. The Bill introduces a no par value regime where all new shares issued by a company shall have no par/nominal value.

### 1.3.2 Public companies

By contrast to the situation for private companies, the shares in a Malaysian public limited companies (*Berhad* or *Bhd* with the company name) may be offered to the public, subject to compliance with detailed regulatory requirements. As with private companies limited by shares, the liability of the members of a public limited company is limited to the amount unpaid (if applicable) on the shares each member holds. Malaysian public limited companies need not be listed, but if they are listed in Malaysia, will be subject to additional regulation.

A Malaysian public limited company must have at least two directors and all directors must be natural persons (individuals).

### 1.3.3 Limited Liability Partnerships

It has been possible since 2012 to establish limited liability partnerships (LLP) to conduct business in Malaysia<sup>1</sup>. The key features of an LLP are that:

- it must be formed by no fewer than two persons, which may be individuals or bodies corporate
- all partners have limited liability in respect of:
  - claims against the LLP
  - personal liability from the wrongful conduct of other members of the LLP
- it is a body corporate/legal entity separate from its members.

## 2. Acquisition Methods

As in other jurisdictions, the acquisition of a business in Malaysia may be structured either as a sale of shares or a sale of assets (or a combination of the two). More particularly, the buyer may purchase the shares in the company operating the business from its shareholders or purchase the assets of the business directly from that company.

### 2.1 Acquisition of Shares

A share acquisition is generally simpler to implement from both the seller's and buyer's point of view. A share acquisition involves the transfer of ownership of only the shares in the target company which, as a matter of Malaysian law, is a relatively straightforward process. It also provides continuity of the business for the buyer and a clean break for the seller.

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<sup>1</sup> Since the coming into force of the Limited Liability Partnerships Act 2012 on 26 December 2012.

## 2.2 Acquisition of Assets

As asset sale involves the identification of and transfer of title to specific assets or categories of asset, and as such is generally more complicated. The target's assets will commonly include land and premises, inventory and work-in-progress, book debts, intellectual property rights, goodwill, insurance, leasing, hire purchase and other contracts, and plant and machinery. It is, therefore, necessary to transfer each asset or category of asset from the target to the buyer by way of different conveyances, assignments and transfers that, in some instances, will also require consents from third parties not directly involved in the transaction. New permits or authorisations may also be required to carry on the business. The transfer of assets also raises additional concerns in relation to the employees of the business (see 6).

One of the main advantages of an asset acquisition is that the buyer may pick and choose specific assets or liabilities to be purchased or assumed, leaving behind those assets and liabilities that it does not require. The asset buyer will not generally inherit the target company's liabilities unless those liabilities are specifically acquired.

## 2.3 Mergers/Other Acquisition Methods

Except for the provisions for facilitating reconstruction and amalgamation of companies in the CA 1965, whereby the Court is given powers to make ancillary orders to facilitate reconstruction and amalgamation of companies, there is no codified framework for amalgamations in Malaysia.

The economic results of a merger can also be achieved by:

- transfer of one company's business assets to another company, followed by the liquidation or disposal of the transferor company
- establishment of a new company that acquires the assets of two or more entities which, following the transfer of assets, are liquidated or disposed of, or
- transfer of the shares in one company (Company A) to another company (B), followed by the liquidation of Company A and a distribution of its assets in its present form (*in specie*) to Company B.

## 3. Negotiation, Signing and Closing

### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Malaysian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

Purchase Price		
1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. Cash-free, debt-free adjustments are normal. Working capital and NAV adjustments are also common.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	Usually prepared by target company (but buyer may be involved in process of preparing the accounts).
4	Is the balance sheet audited?	Not necessarily audited, but typically, parties will require for the balance sheet to be reviewed by an accountant (not a full audit).

5	Is an earn-out common?	More common in private equity transactions with continuing management. Less common where seller is completely exiting. Earn-outs commonly capped.
6	Is a deposit common?	Common.
7	Is an escrow common?	Not uncommon to have an escrow arrangement where a deposit is payable. Less common to have a deposit used as a break fee.
8	Is a break fee common?	Uncommon; but seen occasionally.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	Uncommon though increasingly used in the context of targets exposed to significant risks.
10	Is the MAE general or specific?	Both seen. Increasingly more specific.
11	Quantification of MAE?	Uncommon.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Not uncommon, but more common for sales of businesses. Enforceability issues potentially if used in share sales, as it may be in restraint of trade.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Generally get this for private deals.
16	Common to update warranty disclosure or notify of possible breach? What is the consequence?	Uncommon. Notification of possible breach common. Where material breach; right to rescind.
17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax indemnity, usually included in purchase agreement.
<b>Representations &amp; Warranties</b>		
18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but often not quantified (other than specific warranties e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers growing. Often limited to the actual knowledge and due enquiry of a specified list of senior management.
20	Is a warranty that there is no materially misleading/omitted information common?	Sellers increasingly resisting information warranty.
21	Is disclosure of data room common?	Becoming more common.

## Repetition of Representations & Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at completion common. Bring-down certificate not very common.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects common but often carve-out for fundamental representations which must be absolutely true.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.

## Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Title and capacity warranties usually uncapped or capped at 100%. Business and operational warranties often in the range of 50%–100%. Some sellers start at 20%.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Warranties only.
27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.
28	Is a deductible or basket common?	Yes. Case-by-case basis. Depends on industry and target in question.
29	Is a <i>de minimis</i> common?	Common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	Up to 12 months. General survival of 18–24 months common. Tied to 1–2 audit cycles. Tax is commonly 5 years which ties to the tax audit statutory limitation period. Common to carve out fraud.
31	Is warranty insurance common?	Generally uncommon but parties increasingly considering it, particularly in private equity deals.

## Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Uncommon.
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## Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Not commonly seen.
34	Insurance proceeds?	Common for actually received.

- 35 Third party recoveries? Common for actually received.

### Damages, Knowledge

- 36 Obligation to mitigate damages? Not usually express. Required by law.
- 37 Exclusion of consequential damages? Quite common.
- 38 Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? Knowledge may make a warranty claim difficult, as it makes it harder to prove loss (i.e. cannot exclude liability because of knowledge). Does not apply to indemnity clauses.

### Dispute Resolution

- 39 Does local law allow for a choice of governing law? What is the common governing law? Yes. Malaysian law.
- 40 Is litigation or arbitration more common? If arbitration, where? On balance, arbitration more common. Foreign parties try to elect arbitration outside Malaysia.

### Stamp Duty

- 41 If stamp duty is payable, is it normally shared? Buyer, by law and unusual to agree otherwise. Rate of 0.3%.

## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

There is no legal requirement for an agreement for the sale of the legal and beneficial title to shares to be made in writing. However, to effect a share transfer, it will be necessary to execute an instrument of transfer. Market practice in the majority of cases is for a share transfer to be documented between the seller and buyer by way of a written share sale agreement/share purchase agreement (SPA).

### 3.2.2 Transfers of assets

In a transfer of assets, written contracts may be required by law or to fulfil an applicable registration requirement, for example the sale of real property (which also requires the completion of Form 14A Memorandum of Transfer). Market practice in the majority of cases is for an asset transfer to be documented between seller and buyer by way of written asset sale/asset purchase agreement (APA).

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

Transfer of title to the shares takes place by the delivery of a properly executed instrument of transfer (Form 32A) executed by the transferor and transferee. On execution, the share transfer form will need to be submitted to the Inland Revenue Board of Malaysia, along with the latest audited financial statements of the company, for assessment of stamp duty payable on the transfer of shares. Equitable title will normally be considered to pass when the instrument of transfer (Form 32A) is duly executed and the consideration for the shares paid. Legal title will be transferred when the instrument of transfer is duly stamped and the transfer is registered in the company register of members.

### 3.3.2 Transfers of title to assets

An APA will frequently only require signature by or on behalf of the parties to effect the transfer of title. However, certain types of assets (e.g. real property) require certain particulars to be transferred, such as the execution of the Form 14A Memorandum of Transfer. Statutorily-imposed obligations such as payment of taxes continue to apply to certain assets, for example, 'quit rent and assessment' payable

on the property. An instrument for the transfer of real property in Malaysia will have to be executed, duly attested by the relevant witness and presented at the relevant land office or registry for registration.

Under the National Land Code, foreigners must obtain the prior approval of the relevant state authority before acquiring real property (save for industrial land) in West Malaysia. Industrial land is often held under leasehold title, and state authorities may impose conditions relating to foreign ownership in the title.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Until fairly recently, there were generally no anti-trust laws in Malaysia. Parties seeking to restrict anti-competitive conduct could only rely on sector-specific legislation and guidelines prohibiting anti-competitive behaviour, notably in the telecoms, media, energy and franchise<sup>2</sup> sectors.

Since 2010, however, Malaysia has had a general competition statute similar to the Singapore and UK models, in the Competition Act 2010 (CA) and the Competition Commission Act 2010 (CCA). The CCA came into force on 1 January 2011, and the CA came into force on 1 January 2012.

The main objective of the CA is to regulate:

- agreements between companies which have as their object or effect significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia, or
- conduct which amounts to abuse of dominance in the relevant market.

There is no merger control regime under the CA.

The CA is enforced by the Malaysian Competition Commission (MyCC), a government authority formed on 1 April 2011 under the CA. The MyCC has a broad range of powers and duties under the CA, from advising the Minister or any public or regulatory authority on competition matters, to educating and raising public awareness of the benefits of competition law.

Note that the CA does not supersede any sector-specific legislation which provides for anti-competitive regulations (the CA expressly carved-out commercial activities regulated under sector-specific legislation from its scope).

### 4.2 Merger Control Overview

At present, the CA does not contain any requirement or option for enterprises to seek advance clearance from the MyCC for an anticipated or completed merger, acquisition or joint venture.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Information-sharing can reduce the uncertainty that competitors will face and therefore reduces competition significantly. The MyCC has indicated that in general, frequent exchange of confidential information among all competitors in a market which has few competitors is more likely to have a significant effect on competition. In addition, the exchange of information between competitors that is not provided to consumers is also likely to have a significant adverse effect on competition.

Specifically, the exchange of price information could be considered as having the object of significantly preventing, restricting or distorting competition in the market. On the other hand, the impact of the exchange of non-pricing information on competition in the market will need to be assessed on a case-by-case basis.

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<sup>2</sup> The franchise sector is a regulated industry in Malaysia (Franchise Act 1998)

At present, there is no specific provision in the CA which addresses 'gun-jumping' issues, so issues of this nature are likely to be assessed under the general prohibition set out in the CA: i.e. whether the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia. See Appendix A on Broad Principles of Information Exchange and Gun-Jumping for further information.

#### 4.4 Anti-Bribery, Corruption and Money Laundering

The key anti-corruption legislation in Malaysia is the Anti-Corruption Commission Act 2009 (MACCA). The Act criminalises corrupt acts between private parties as well as those involving public officials, and sets out a broad definition of offences involving gratification with a corrupt intention.

Malaysian case law does not set out any fixed judicial test for determining liability. Persons offering, giving, soliciting, receiving, aiding and abetting bribes, as well as their agents, can be liable under the Act.

MACCA provides that upon the prosecution establishing the gratification, there is a presumption of corrupt intent on the part of the accused. The presumption is rebuttable by the accused. There is no prescribed monetary/value thresholds relevant to determining liability, and there are also no official guidelines concerning corruption which are capable of general application.

The Anti-Corruption Commission's current policy is to focus on prosecuting the individuals who are involved in corruption, rather than companies (e.g. the individuals' employers) – even if the individuals have committed the corrupt acts for the benefit of a company/employer. Amendments to the MACCA to hold corporate executives and companies liable for corruption activities involving their employees, are expected to be tabled shortly.

The primary legislation governing money laundering and terrorism financing in Malaysia is the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLA). The Act is designed to be in line with international agreements and treaties on money laundering. As such, it generally shares a common purpose in respect of anti-money laundering issues with other jurisdictions. It has extra-territorial reach and retrospective effect. The regulators for financial and non-financial institutions in relation to AMLA are the Financial Intelligence Unit and Supervision Departments of Bank Negara Malaysia i.e. the central bank of Malaysia (Bank Negara).

Bank Negara has published official guidelines to provide guidance on the requirements that reporting institutions must comply with under AMLA to combat money laundering and terrorism financing. The Securities Commission of Malaysia has also published compliance guidelines for reporting institutions licensed under the Capital Markets and Services Act 2007 (e.g. fund managers, futures brokers and futures fund managers) in complying with the provisions of AMLA.

#### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

##### 4.5.1 Exchange controls

Prior to 30 June 2013, the Exchange Control Act 1953 (ECA) governed exchange control in Malaysia. The ECA was supplemented by the Exchange Control of Malaysia Notices (ECM Notices) and circular letters issued under the ECA, which embodied the general permissions and directions of the Controller of Foreign Exchange. The ECA and other financial services Acts<sup>3</sup>, were repealed and consolidated into the Financial Services Act (FSA) and Islamic Financial Services Act (IFSA) with effect from 30 June 2013.

With the coming into force of the FSA and IFSA, the Controller of Foreign Exchange revoked all existing ECM Notices and related circular letters, and consolidated them into seven new Foreign Exchange Administration notices (FEA Notices) which were issued to supplement the foreign exchange administration rules under the FSA and IFSA. The FEA Notices set out the circumstances in which the specific approval of the Controller of Foreign Exchange within Bank Negara Malaysia,

<sup>3</sup> Banking and Financial Institutions Act 1989, Insurance Act 1996 and Payment Systems Act 2003.

i.e. the central bank of Malaysia (Bank Negara), must be obtained by 'residents' and 'non-residents' to remit funds to and from Malaysia. For these purposes:

- 'Resident' is defined as a citizen of Malaysia (excluding a person who has a permanent residence in a foreign country and resides outside Malaysia), a non-citizen of Malaysia who has obtained permanent resident status in Malaysia and is residing permanently in Malaysia, or a party (body corporate or unincorporated) incorporated or registered with or approved by any authority in Malaysia
- 'Non-resident' is defined as any person/party other than a resident, an overseas branch, an overseas subsidiary, a regional office, a sales office, a representative office of a resident company, embassies, consulates, high commissions, supranational or international organisations, or a Malaysian citizen who has obtained permanent resident status in a territory outside Malaysia and is residing outside Malaysia.

### ***FEA Notices***

The following are some of the provisions and restrictions of the FEA Notices applicable to residents and non-residents.

### ***Settlements between residents and non-residents***

Residents and non-residents are free to settle payments for import and export of goods and services in foreign currency. Settlement in Malaysian Ringgit is allowed as long as:

- the payment by a resident is made into the external account of the non-resident (i.e. an account in Ringgit maintained with financial institutions in Malaysia), or
- payment by a non-resident effected from an external account (of that non-resident or any other non-resident).

In relation to other settlements, residents are free to pay to non-residents in foreign currency, save that the payment for investment in foreign currency assets is subject to prevailing rules on investment in foreign currency assets. Resident future brokers may pay in foreign currency to a non-resident for foreign currency-denominated derivatives (other than exchange rate derivatives) transacted on overseas specified exchanges.

Residents may pay non-residents in Ringgit for:

- the purchase of Ringgit assets
- settlement of trade in goods
- settlement of services
- income earned or expenses incurred in Malaysia
- settlement of a commodity '*murabahah*'<sup>4</sup> transaction between the parties undertaking transactions via a resident commodity trading service provider
- settlement of reinsurance for domestic insurance business or *retakaful*<sup>5</sup> for domestic *takaful*<sup>6</sup> business

<sup>4</sup> A cost-plus-profit financing in which a buyer and seller enter into a sale of commodities agreement whereby the buyer purchases the commodities from the seller at a price covering the seller's purchase price plus profit margin agreed upon by both parties concerned and thereafter the buyer has the option to sell the commodities to a third party.

<sup>5</sup> An arrangement consistent with sound *takaful* principles for *retakaful* of liabilities in respect of risks incurred or to be incurred by the *takaful* operator in the course of his carrying on *takaful* business.



- settlement of a non-financial guarantee denominated in Ringgit issued by a person licensed to undertake banking business in Labuan (a federal territory off the coast of Borneo in East Malaysia), or
- for any other purposes as long as the non-resident is an immediate family member.

### ***Borrowing in Ringgit***

Resident companies may borrow:

- any amount from non-resident entities within its group and non-resident direct shareholders to finance activities in the real property sector in Malaysia
- up to MYR1 million in aggregate from any other non-residents, other than a non-resident non-bank company or individual, for use in Malaysia.

Non-residents may borrow from licensed onshore banks, as well as resident stockbroking companies and resident insurance companies for specified purposes.

### ***Borrowing in foreign currency***

A resident individual may borrow in foreign currencies up to an amount equivalent to MYR10 million from a licensed onshore bank or a non-resident.

Non-residents may borrow any amount of foreign currency from:

- licensed onshore banks
- another non-resident in Malaysia, or
- any immediate family member.

Non-residents are also permitted to borrow from resident non-bank companies or individuals, subject to certain limits depending on whether it has existing Ringgit loans/facilities.

### ***Lending in Ringgit***

Resident licensed onshore banks, resident non-bank companies and individuals, are free to lend any amount to non-resident non-bank companies or individuals for the purpose of financing activities in the real property sector in Malaysia. Resident stockbroking companies and resident insurance companies are also allowed to lend to non-residents for specified purposes.

Non-resident non-bank related companies may lend any amount to its resident related companies to finance real property sector activities in Malaysia. Other non-residents non-bank companies or individuals may lend up to MYR1 million in aggregate to resident companies or resident individuals for use in Malaysia.

### ***Lending in foreign currency***

Non-resident non-bank related companies may lend any amount to its related resident companies. Other non-residents may lend in foreign currency up to an amount equivalent to MYR10 million to a resident individual and up to MYR100 million equivalent to a resident company on a corporate group basis.

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<sup>6</sup> a scheme based on brotherhood, solidarity and mutual assistance which provides for mutual financial aid and assistance to the participants in case of need whereby the participants mutually agree to contribute for that purpose.

### ***Export and import of Ringgit and foreign currency by travellers***

Residents and non-residents may import and export any amount of foreign currency but only up to USD10,000 equivalent of Ringgit.

### ***Others***

The limit on the number of residential or commercial property loans allowed to non-residents has been abolished (since 1 April 2007).

Other exchange control rules apply to investments abroad, the issuance, transfer or substitution of securities or financial instruments, financial guarantees, export of goods, opening of foreign currency accounts, payments and hedging, as well as dealings with specified persons and companies.

#### **4.5.2 Foreign investment approvals and notifications**

While welcoming foreign investment, the Malaysian government is also keen to achieve balanced development within the Malaysian economy, and strives to achieve a balance between rapid growth and reasonable participation by Malaysians in economic development. One of its main objectives is to increase Malaysian and Bumiputera (the indigenous people of Malaysia) ownership of Malaysian incorporated companies and businesses. The Malaysian government has therefore adopted the National Vision Policy (NVP), which has the objective of ensuring that the ownership of all industries in the Malaysian economy (including property or assets as well as share capital in any Malaysian company) reflects at least 30% ownership by Bumiputeras. The remaining equity shareholding can be held by local non-Bumiputera interests or foreign interests or both.

### ***Acquisitions of shares***

The Foreign Investment Committee (FIC) was tasked with the implementation of the NVP. Until recently, the FIC monitored foreign equity participation in the economy through its guidelines (FIC Guidelines),<sup>7</sup> having previously required that a Malaysian company be at least 30%-owned by Bumiputeras (i.e. the indigenous people of Malaysia), although there were some exceptions to this rule in certain sectors.

There was however, a shift in foreign investment policy in 2009 when the 30% Bumiputera equity requirement was removed for 27 service sub-sectors.

In 2009, the Prime Minister announced further liberalisation measures including the abolishment of the FIC and repeal of the FIC Guidelines. The momentum of the drive towards deregulation was continued in 2011, with the further liberalisation of 17 more service sub-sectors, which has been implemented in stages since 2012.

Presently, the service sub-sectors which have been fully liberalised are telecommunication services (such as network service providers, network facilities providers and application service providers licences), healthcare services (such as private hospital, medical specialist and dental specialist services), professional services (such as accounting and taxation, architectural, engineering, legal and quantity surveying services), environmental services (such as incineration services), distributive trade services (such as departmental stores and specialty stores), education services (such as private higher education with university status, international schools, technical and vocation education services (special needs and non-special need) and skills training centre) and courier services.

Some restrictions on foreign investments in Malaysia remain, e.g. for banking, insurance, aviation, energy and infrastructure.

<sup>7</sup> There were two sets of FIC Guidelines: the Guideline on the Acquisition of Interests, Mergers and Takeovers by Local and Foreign Interests; and the Guideline on the Acquisition of Properties by Local and Foreign Interests. Under the FIC Guideline on the Acquisition of Interests, Mergers and Takeovers by Local and Foreign Interests, the acquisition of Malaysian companies by foreigners including the establishment of wholly owned subsidiaries, was subject to review by the FIC.

### ***Acquisitions of assets***

The current law is the new Guideline on the Acquisition of Properties (2014 EPU Property Guideline) effective 1 March 2014. It imposes a MYR1 million minimum threshold (i.e. the minimum amount a foreign investor can own) for acquisition of properties by foreign interests, in line with the 2014 Budget.

Under the 2014 EPU Property Guideline,<sup>8</sup> the following property acquisitions by foreign interest do not require the approval of the EPU but fall under the purview of the relevant Ministries and/or government departments:

- acquisition of commercial properties valued at MYR1 million and above
- acquisition of agricultural land valued at MYR1 million and above or at least 5 acres for the following purposes
- agricultural activities on a commercial scale using modern or high technology
- agro-tourism projects, or
- agricultural or agro-based industrial activities for the production of goods for export
- acquisition of industrial land valued at MYR1 million and above, and
- the transfer of property to a foreign national based on family ties is permitted only among immediate family members.

Acquisition of property (as in the first 3 bullet points above) are also subject to the condition that the property must be registered under a locally incorporated company.

Foreign interests are free to acquire residential properties valued at MYR1 million and above, on condition that the acquisitions do not result in the dilution of Bumiputera or interests in the ownership of those properties. However, foreign parties are not allowed to acquire properties:

- valued below MYR1 million per unit
- residential units in the category of low and low-medium cost (as determined by the state authority)
- properties built on Malay reserved land, and
- properties allocated to Bumiputera interests in any property development project (as determined by the state authority).

EPU approval is required for real property transactions resulting in the dilution of Bumiputera or government interests in real property, as follows:

- direct acquisition: where there is going to be a dilution of Bumiputera or government interests in real property and the property is valued above MYR20 million, and
- indirect acquisition: where there is indirect acquisition of real property by a foreign interest through acquisition of shares if:
  - the transaction results in a change in control of the company owned by Bumiputera interest and/or government agency
  - the real property makes up more than 50% of the company's assets, and

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<sup>8</sup> The 2014 EPU Property Guideline is not law but a reflection of governmental policy only.

- the real property is valued above MYR20 million.

Where EPU approval is required under the 2014 EPU Property Guideline, the EPU will impose equity and share capital conditions on the buyer of the property, as follows:

- equity condition: at least 30% Bumiputera equity in the shareholding of the property holding company must be maintained
- paid-up capital conditions: there must be issued and paid-up capital of at least MYR100,000 where the buyer is a local company owned by local interest; or issued and paid-up capital of at least MYR250,000 where the buyer is a local company owned by foreign interests.

### ***Implementation of FIC guidelines***

No legal sanctions apply for non-compliance with the Guidelines but they can be enforced administratively through government departments exercising a regulatory role in the granting of relevant licences, approvals, permits and in particular the land offices may not permit the transfer of properties unless compliance with the Bumiputera equity condition is met.

The EPU exempts the following transactions from the requirement to obtain EPU approval.

Acquisitions of:

- residential units under the 'Malaysia My Second Home' Programme (which is still subject to a minimum price determined by each state authority)
- residential units for accommodation by the following (only for the purchase of one residential unit valued at minimum MYR250,000 (except in Kuala Lumpur, Johor Bahru and Penang))
- foreign nationals with expatriate status serving the government
- foreign nationals with expatriate status serving a non-government organisation and receiving a minimum monthly salary of MYR8,000, or
- permanent residents holding a red identity card
- residential units to be occupied as a hostel of company's employees. However, local companies owned by a foreign interest are permitted to acquire only residential units valued at MYR100,000 and above
- property by companies with Multimedia Super Corridor (MSC) status in MSC areas as long as the property is only used for operational activities (which may include using the property as employee residences)
- property in approved areas in any regional development corridor by certain approved companies
- property by companies which have obtained endorsement from the Secretariat of the Malaysian International Islamic Financial Centre (MIFC)
- industrial property by manufacturing companies
- properties under privatisation projects (provided the buyer is the original signatory to the privatisation contract)
- properties by Ministries and Government Departments (Federal and State), Ministry of Finance Incorporated, Menteri Besar Incorporated or Chief Minister Incorporated, State Secretary Incorporated and listed Government Linked Companies

or the transfer of property to a foreign interest under a Will and court order.

## ***Legal control***

Legal control in respect of Bumiputera participation is enforced through administrative discretion conferred under statutes or 'subsidiary' legislation. Equity ownership is controlled via the issuance of licences, permits and employment passes or in the purchase of real property and acquisitions of any interest in real property. Where the intended operations of a company or business in Malaysia require certain operating licences, equity conditions or restrictions may be imposed through the approval and issuance of licences by government or statutory bodies. An example of a sectoral regulator vested with powers and legal control by way of conditions imposed through an operating licence is the Ministry of International Trade and Industry (MITI) which regulates the manufacturing industry in Malaysia. See *Manufacturing* below.

### **4.5.3 Industry-specific regulation**

Generally, it is government policy (rather than statute) that limits acquisitions in specific industries, although certain Malaysian legislation (such as that governing banking) sets caps on foreign equity participation in Malaysian companies operating in particular industries. Generally, the broad principles of the NVP are applied and the Malaysian government policy imposed on foreign participation varies between industries. Certain examples are listed below.

#### ***Investment in the share capital of Malaysian companies***

There is no legislation prohibiting foreign ownership of the share capital in Malaysian companies as a general rule. However, the relevant government department or statutory body for a specific industry sector may set equity conditions in the granting licences, permits or other governmental approvals, for examples in the following areas.

#### ***Manufacturing***

Manufacturing companies (except those with shareholders' funds of less than RM2.5 million or less than 75 full-time paid employees) are required to be licensed under the Industrial Coordination Act 1975 (ICA) which is regulated by the MITI. A foreign company wishing to establish a manufacturing operation must incorporate a Malaysian subsidiary in Malaysia.

The Malaysian government has, in the past few years, taken various steps to liberalise the restrictions on foreign participation in the manufacturing industry in Malaysia. The general policy is that 100% foreign equity participation will be allowed for all new investments, including investments for expansion and diversification by existing licensed manufacturers, save for certain sensitive industries/activities where evaluation and approval are still required for the issuance of the manufacturing licence.

Whilst equity and export conditions imposed on existing licensed manufacturing companies prior to the new policy will be maintained, a waiver of the equity conditions may be applied for by the licence holder to MITI, the approval of which is at the sole discretion of MITI.

#### ***Trading/retail***

Another example of sectoral regulator is the Ministry of Domestic Trade, Co-operatives and Consumerism (MDTCC). Under its Distributive Trade Guidelines 2010 (DTG),<sup>9</sup> all proposals for foreign involvement in 'distributive trade' in Malaysia are subject to the approval of the MDTCC. This covers hypermarkets, department stores, superstores, specialty stores, franchise systems and other types of distributive formats.

Currently, under the DTG, all distributive trade companies with foreign equity intending to undertake activities relating to mergers and acquisitions, opening or expanding branches, selling or purchasing properties for their core or ancillary business, should comply with the requirements of the DTG.

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<sup>9</sup> Effective since 6 January 2010.

Such retail companies with foreign equity must have Bumiputera directors and management personnel, should formulate and apply policies to facilitate the participation of Bumiputera and employees with disabilities, and maximise their use of domestic Malaysian services, such as airports, ports (rather than by e.g. road), legal and other professional services.

All distributive trade companies with foreign involvement should be incorporated locally under the Companies Act 1965.

The DTG is not law and represents the Malaysian government's policy. Although there are no legal sanctions against non-compliance, the DTG is enforced administratively via refusal to register branches of foreign companies, or through licensing restrictions and issuance of immigration passes.

### ***Petroleum: upstream activities***

Petronas, a wholly-owned Malaysian government entity vested with the entire ownership and control of petroleum resources in Malaysia, licences upstream activities and generally requires local and Bumiputera equity ownership in entities it deals with.

#### **4.5.4 Import/export controls**

Certain prohibitions and restrictions on the import and export of goods into and out of Malaysia are set out in the Customs (Prohibition of Imports) Order 2012 and Customs (Prohibition of Exports) Order 2012 respectively. The schedules to these orders list those goods which are absolutely prohibited and those which are restricted, subject to obtaining the required licence or approval from the relevant authority.

There are also product-specific minimum standard requirements for some goods imported into Malaysia, including for:

- building or construction materials
- steel
- toys
- telecoms equipment, and
- labelling requirements for some goods.

### ***Export controls of 'strategic items'***

With the introduction of the Strategic Trade Act 2010 (STA) and the subsidiary legislations<sup>10</sup>, Malaysia established export control laws which require exports, transits and trans-shipment of any strategic items to be accompanied by permits issued by the MITI. The Act was brought into force in phases, but the permit obligations for all 'strategic items' are now in force, covering:

- nuclear items
- military items, and
- other non-nuclear dual-use items and technology.

The 1st Schedule to the Order<sup>11</sup> lists end-users who will need a special permit issued by the MITI for the export, transit and trans-shipment of strategic items. These countries include Congo, Ivory Coast, Lebanon, Sudan and Libya, Afghanistan, Iraq, Liberia, Rwanda, Somalia and Eritrea. A full embargo

<sup>10</sup> Strategic Trade (United Nations Security Council Resolutions) Regulations 2010, Strategic Trade Regulations 2010, Strategic Trade (Restricted End-Users and Prohibited End-Users) Order 2010, Strategic Trade (Strategic Items) Order 2010, Strategic Trade (Delisting of Prohibited End-Users) Regulations 2014 and the Strategic Trade (Unfreezing of Property in Relation to Prohibited End-Users) Regulations 2014.

<sup>11</sup> Strategic Trade (Restricted End-Users and Prohibited End-Users) Order 2010.

applies to the export, trans-shipment or transit of strategic items, to persons and entities listed in the 2nd Schedule to the Order (locations primarily in the People's Republic of Korea and Iran).

In addition, the proliferation of weapons of mass destruction is totally banned under UN Regulations<sup>12</sup>, as applied in Malaysia.

The brokering provisions under the STA are drafted very widely to include the activity of any person who either on his own behalf or acting as an agent on behalf of another, negotiates, arranges or facilitates the purchasing, financing, conveying, sale or supply of strategic items or buys, sells or supplies those strategic items. Brokers of strategic items have annual registration obligations.

The STA also has extra-territorial effect and can catch any person regardless of nationality or citizenship, so any offences committed under the STA outside Malaysia will be treated as offences committed within Malaysia.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

In general, in a share acquisition the buyer pays stamp duty of 0.3% of the purchase price paid or of the market value, whichever is higher. However, mutual agreement between the parties to allow the cost to be borne by either or both of the parties is possible.

### 5.2 Acquisition of Assets

In an asset acquisition, depending on the type of assets in question, it may be possible to structure the acquisition so that legal title to the assets is transferred by physical delivery. This would preclude the agreement becoming an instrument of conveyance and the agreement would therefore be subject to nominal stamp duty. However, certain assets (e.g. land and shares) may only be transferred via prescribed instruments of transfer. These will incur stamp duty levied on an *ad valorem* (according to value) basis. Legal assignments of assets will similarly be subject to stamp duty on an *ad valorem* basis.

### 5.3 Value Added Tax

The current sales and service taxes are to be replaced with a broad-based consumption tax to be known as the Goods and Services Tax (GST). The GST will take effect on 1 April 2015 at the rate of 6%. GST will be administered by the Royal Customs of Malaysia, and when implemented, will replace the sales tax and service tax currently imposed and collected under the Sales Tax Act 1972 and the Service Tax 1973 respectively. All supplies of goods and services made in Malaysia by a taxable person will be subject to GST unless they are zero-rated supplies, exempt supplies or fall within a special scheme.

## 6. Employee Issues

The Employment Act 1955 (EA) governs matters relating to employment in West Malaysia, with the exception of public servants and those employed in statutory bodies. The EA applies to all employees whose monthly wages do not exceed MYR2,000 and those who are engaged in specified work such as manual labour regardless of their monthly wage (EA employees). In respect of other employees and those who do not come within the ambit of the Sabah or Sarawak Labour Ordinances, their benefits will be governed by their employment contracts and to a limited extent, the common law.

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

Where a transaction takes the form of an acquisition of shares in a company with employees, there are unlikely to be significant employment law issues as the underlying employment contract (and employee benefits generally) between the target company and its employees will usually be

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<sup>12</sup> Strategic Trade (United Nations Security Council Resolutions) Regulations 2010.

unaffected by the change in control of the employer. In this context, it is really a matter for the buyer to identify the liabilities associated with the labour force and possibly also to make appropriate arrangements for the transfer of benefits or establishment of an appropriate pension or retirement scheme. The contracts of key senior personnel should be checked for any change of control provisions. Due diligence should be undertaken to ensure that potential liability for past acts and omissions is known.

#### 6.1.2 Acquisition of assets

In Malaysia, no automatic transfer of employees applies on a transfer of business. An employer cannot unilaterally transfer an employee to another employer without the consent of the employee, regardless of whether the individual is an EA or a Non-EA employees.

For employees governed by the EA, if the new owner of the business does not immediately offer to continue the employment of the employees, on terms and conditions no less favourable than previously enjoyed by them before the acquisition, the employees' service contracts are deemed terminated, and the employer immediately preceding the change of ownership is liable to pay termination benefits by virtue of the Employment (Termination and Lay-off Benefits) Regulations.

For employees outside the scope of the EA or not subject to any collective agreement, an acquirer/buyer will not be legally obliged in law to make offers of employment to the employees of the seller. Even if the buyer elects to make employment offers to those employee, it is not obliged to offer terms and conditions of employment that match (are no less favourable than) the terms of employment the employee enjoyed with the seller.

The test as to what constitutes a change of ownership in business is 'whether the business is being transferred as a going concern' and what amounts to a business transfer is a question of fact to be decided by the industrial tribunals.

On the part of the seller, it would be prudent to issue letters to all affected employees with a view to informing them of the impending business sale. The Malaysian courts have generally held that the requirement to give notice of termination is mandatory even though the employees may have been offered fresh employment by the business buyer and that no actual loss of employment is occurring.

#### 6.1.3 Transfer of business

A seller of a business will be liable to pay termination benefits (i.e. severance) to EA employees unless the buyer, within seven days of the change of ownership of the business, offers to continue to employ the EA employees under no less favourable terms and conditions and the EA employees unreasonably refuse the offer. Arrangements relating to benefits payable on termination on grounds of redundancy can be addressed in the contract of service or collective agreement.

### 6.2 Approval or Consultation Requirements

See 6.1.

### 6.3 Protection against Dismissal

#### 6.3.1 Redundancies

There is no concept of 'at will' employment in Malaysia. All dismissals must be for 'just cause or excuse' and procedures and requirements which are specific to the grounds for termination must be followed. Termination and lay-off benefits in respect of EA employees are prescribed under the Employment (Termination and Lay-Off Benefits) Regulations 1980. With regard to other employees, arrangements relating to redundancy can be addressed in a contract of service or collective agreement. The employer is also required to notify the Director-General of Labour of the redundancy of any employees at least one month prior to the redundancy exercise.

Dismissal of any employee must be for a just cause or excuse. And even where there is just cause and excuse for dismissal, the dismissal must follow certain inquiry procedures, failing which, the employee may appeal to the Minister of Human Resources and through him to the industrial court for



reinstatement. The employer is also required to notify the Director-General of Labour of the redundancy of any employees at least one month prior to the redundancy exercise.

#### 6.3.2 Penalties

If the prescribed dismissal procedures are not followed, the employee may appeal to the Minister of Human Resources and through him to the industrial court for reinstatement. The former employer may eventually be found liable for unfair dismissal by the industrial court. The compensation awarded in a successful unfair dismissal claim can be substantial, but no orders as to legal costs are made regardless of the verdict. The conciliation and adjudication process will take several years. Any dismissal of employees, including non-Malaysian employees, must therefore be very carefully managed with the objective of managing unfair dismissal risk.

### 6.4 Employee Personal Data Protection

The Personal Data Protection Act 2010 (PDPA) which came into force on 15 November 2013 was enacted to regulate the collection and use of personal data. Briefly, the Act imposes new legal obligations on employers (as data users) who process the personal data of its employees (as data subjects). Employers are expected to obtain employees' consent prior to processing their personal data, inform employees that their personal data is being processed in written notice; specify the reasons for the collection of the personal data; be responsible for protecting all personal data; ensure accuracy of the personal data retained; and allow employees to access all personal data the employer has retained.

## Mexico

### 1.1 Overview

Mexico, whose official name is the 'United Mexican States', is a federal republic comprised of 31 states and a federal district. The federal government is comprised of three branches: executive, legislative and judicial. The head of the executive branch is the President who is elected by popular vote for a six-year term. Legislative power is vested in the Chamber of Deputies and the Senate, whose members are elected for three- and six-year terms respectively. The judicial branch consists of a Supreme Court of Justice, circuit courts and district courts. Each of the 31 states has its own constitution, civil code and other local laws and regulations, as well as its own executive, legislative and judicial authorities.

Mexico has a civil law system, based on the Continental European legal tradition stemming from Roman law and Napoleonic principles. Under this system, basic legal principles are largely codified in civil, commercial, criminal, judicial and procedural codes. Judicial precedents are not binding except for federal courts' decisions under certain circumstances.

### 1.2 General Legal Framework

General matters pertaining to M&A transactions are regulated at federal level by several laws, including the:

- Commerce Code
- General Law of Commercial Companies (GLCC)
- Securities Market Law
- Foreign Investment Law (FIL), and
- Competition Law.

Certain matters pertaining to the transfer of particular assets, such as real estate, are regulated by the civil codes of the state where the real estate is located, and by local environmental, zoning and other administrative laws. The parties to an M&A transaction in Mexico may also agree to be subject to non-Mexican law and thus the acquisition agreement may be subject to foreign laws.

### 1.3 Corporate Entities

Among the most commonly used forms of business organisation regulated by the GLCC, are:

- corporations
  - *Sociedad Anónima/SA*, or
  - *Sociedad Anónima de Capital Variable/SA de CV*), and
- limited liability companies:
  - *Sociedad de Responsabilidad Limitada/S de RL*, or
  - *Sociedad de Responsabilidad Limitada de Capital Variable/S de RL de CV*).

These entities offer limited liability which means that the shareholders or members are insulated from liability up to the amount of their contributions at the entity level.

The Securities Law contemplates several forms of business organisation, including:

- stock corporations for the promotion of investment (*Sociedades Anónimas Promotoras de Inversión de Capital Variable*/SAPIs)
- securities investment development corporations (*Sociedades Anónimas Promotoras de Inversión Bursátil*/SAPIBs), and
- publicly held corporations (*Sociedades Anónimas Bursátiles*/SABs).

Although the choice of business entity depends on many factors, in practice, if the entity is going to be a wholly-owned subsidiary, non-Mexican investors frequently form a SdeRLdeCV because that form of business organisation can be tax efficient (in the United States, e.g. that entity is considered a 'pass-through' entity for federal income tax purposes). In the context of a joint venture arrangement, SAPIs are increasingly used in Mexico since a SAPI offers more flexibility than an SAdeCV or an SdeRLdeCV with respect to corporate governance matters, including allowing the issue of different classes of shares, the establishment of voting restrictions and/or stock transfer restrictions.

### 1.3.1 SA de CV

The SA de CV is equivalent to a corporation in other jurisdictions. There must be at least two shareholders to incorporate a SA de CV. Unless otherwise limited by the FIL, the GLCC allows the shareholders of any given corporation to be Mexican and/or a foreign national (individual or legal entity).

Shares in stock, the certificates of which are considered negotiable instruments under Mexican law, represent the capital stock of corporations. The SA and SA de CV differ in at least one significant aspect. A certain amount of capital stock for an SA is fixed (the GLCC does not require a minimum amount) and specified in its charter and by-laws, so that any subsequent increase or decrease to that fixed capital requires amendment to the incorporation documents. On the other hand, the charter and by-laws of a SA de CV set the minimum fixed portion of its capital stock and the variable portion of that capital may remain open. In this scenario, the variable portion of its capital stock may be unlimited and may be increased or decreased without amending the incorporation documents. For this reason, foreign investors, particularly those with wholly owned subsidiaries that want flexibility to increase or decrease the corporation's capital stock without any other formalities, generally prefer to organise their business activities in Mexico under the form of a SA de CV rather than through a SA.

Upon incorporation, a corporation must have fully subscribed capital stock in an amount freely set by the shareholders in the corporation's charter and by-laws (minimum fixed capital) and at least 20% of their capital contribution paid in cash. Where contributions are made in kind, the same must be subscribed and paid in full on the incorporation date. The corporation may withhold shares paid by contributions in kind for 24 months as of the contribution's date as a guarantee that the value of the in-kind contributions will not be reduced by more than 25%.

The corporation's management may be vested in one (sole administrator) or more directors (board of directors). If the board of directors has three or more members, the individual shareholder or group of shareholders owning 25% or more of the corporation's capital stock have the right to appoint at least one member of the board. The corporation will be legally represented by its sole administrator or board of directors, and its authority will be contained in the corporation's by-laws or conferred by the shareholders.

The sole administrator or board of directors will be vested with the authority to appoint one or more general or special managers. By its nature, that appointment may be revoked at any time by the corporation's sole administrator, board of directors or by the shareholders.

To protect the shareholders of an SA or SA de CV, the GLCC provides for the existence of a statutory auditor (*comisario*) to be appointed directly by the shareholders. The main task and duty of the statutory auditor will be to oversee the corporation's management for the benefit of the shareholders. As in the case of managers, there are some statutory limitations contemplated by the GLCC to be appointed as statutory auditor of any given corporation, which seek to ensure their independence with respect to the corporation's management.

### 1.3.2 S de RL de CV

A S de RL de CV is equivalent to a limited liability company in other jurisdictions. There must be at least two members to organise a S de RL de CV and a limit of 50 members is set by the GLCC. The GLCC allows the members of any given limited liability company to be Mexican and/or foreign.

Upon organisation, a 'limited liability company' (LLC) must have fully subscribed capital with at least two equity quotas with a value of at least MXN1 each (minimum fixed capital), as established by the members in the company's charter and by-laws, and at least 50% of that capital contribution must be fully paid. The capital of LLCs is divided into equity quotas, which by law are not considered negotiable instruments. The assignment of equity quotas, as well as the admission of new members to participate in the LLC's social capital, requires a prior favourable resolution of the majority of its members, unless the company's by-laws establish a higher percentage. The treatment of the minimum fixed and variable portion of the capital in an S de RL and S de RL de CV is similar to the treatment of an SA de CV, as outlined at 1.3.1. Based on the above considerations, most foreign investors prefer to organise their business activities in Mexico under the form of an S de RL de CV rather than through an S de RL.

The LLC's management may be vested in one (sole manager) or more managers (board of managers), either of which can be freely removed by company members at any time. Where two or more managers are entrusted with the management of the LLC, they must act as a board of managers. The LLC is legally represented by its sole manager or board of managers, and its authority established in its by-laws or conferred by the members. The S de RL de CV need not have a statutory auditor (GLCC).

### 1.3.3 SAPI

A SAPI is a type of corporation regulated by the Securities Law. SAPIs are a relatively new form of corporate entity created by the Mexican Congress in 2006 to accommodate private equity investments and to act as a joint venture vehicle. By contrast to other forms of entities in Mexico, a SAPI places greater emphasis on capital contributions rather than the identity of the shareholders/members. SAPIs need not register their securities with the National Securities Registry.

### 1.3.4 SAPIB

A SAPIB is a type of SAPI that must register its securities in the National Security Register of the Mexican Stock Market for a transitional period. SAPIBs may operate for a maximum of three years before transforming to a SAB. The purpose of this three-year period or registration is to allow the SAPIB time to adopt the corporate governance and administration measures that are required for a SAB. SAPIB securities may be traded with or without a public offering and may be acquired by any party, including institutional or qualified investors.

### 1.3.5 SAB

A SAB is a type of corporation that adopts specific governance regulations provided for by Securities Law to offer capital and securities on the Mexican Stock Market. The entity must register its shares with the National Security Register, and add to its corporate name the word '*Bursátil*' or the abbreviation 'B'.

## 2. Acquisition Methods

In Mexico, a business can be purchased by way of:

- share purchase
- asset purchase
- a merger, or
- a combination of those transactions.

Either structure has specific issues that need to be considered by seller and buyer during the negotiation process. Certain key differences between a stock/share acquisition and an asset acquisition include the following.

The principal distinction between an asset and a share acquisition is that, for share acquisitions, the buyer will assume the entire liability from the target company. In contrast, in an asset acquisition, the buyer will generally only absorb liability on the assets acquired (subject to an exception with respect to the acquisition of a business as an going concern, as referred to in the last paragraph of **5.2**).

In an asset transaction, the seller might need to obtain consent from a contracting party to transfer certain contracts to the buyer. In a stock/share acquisition, contracts are generally unaffected by the transfer of shares, except if the contract contains a change of control provision. Similarly, the licences, permits and authorisations of the target company will remain unaltered in a share acquisition. In contrast, in an asset acquisition, certain permits and authorisations held by the target company could be difficult to transfer because of the need to obtain consents from the issuing government agencies. In some cases it will be necessary to obtain a new permit or authorisation.

Because in an asset acquisition the buyer can choose the assets it wishes to acquire and the liabilities it wishes to assume, due diligence in an asset acquisition is generally narrower, as it usually involves verifying title to the corresponding asset(s) and the seller's compliance with legal requirements applicable to the import, use or sale of the relevant assets. In contrast, due diligence in a stock acquisition context requires a complete and comprehensive review of the affairs of the target company to limit the risk that the buyer might assume liabilities that it does not wish to assume.

## 2.1 Acquisition of Shares

Under Mexican Laws, the acquisition of shares is one of the least complicated procedures for acquisition for non-Mexican buyers to transact with Mexican sellers. Generally, all that is required to transfer legal title to the shares in a stock corporation (SA de CV) is:

- execution of a stock/share transfer agreement
- endorsement and delivery to the buyer of the relevant stock certificate(s), and
- registration of the new shareholder in the company's stock registry book.

Similar requirements apply to the acquisition of membership interests in limited liability companies (S de RL de CV), except that:

- the members of the company issuing the equity quotas must approve the transfer of quotas to a third party at a members' meeting, and
- the endorsement of the stock certificate is not required since a S de RL de CV does not issue negotiable stock certificates.

## 2.2 Acquisition of Assets

Under Mexican Laws, the transfer of assets is generally documented in an asset purchase agreement (APA). The APA must follow the requirements applicable to the transfer of those particular assets. Generally speaking, for movable assets, their transfer requires of an invoice issued in accordance with Mexican tax laws. The transfer of ownership of real estate requires a notarial deed prepared by a notary public and the registration of the deed with the public registry of property for the location of the transferred real estate property.

## 2.3 Mergers

Under Mexican law, two or more entities can merge either by integration or by absorption. A merger by integration involves the formation of a new entity by one or more entities, which merge, integrate and consolidate with a new entity, resulting in the extinction of the integrated entities. In a merger by absorption, two or more entities merge into one, which will be the resulting entity. The merged entities

are extinguished and cease to exist upon transfer of their assets, liabilities and capital to the surviving or resulting entity.

### 3. Negotiation, Signing and Closing

#### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Mexican purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1.	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. Purchase price adjustment; working capital adjustment; NAV; earn-out adjustments; adjustments due to labour severance or liability or pension benefit obligations – all common.
2.	Is there a collar on the adjustment?	Neither collar nor materiality thresholds are common.
3.	Who prepares completion balance sheet?	Usually prepared by the target company or a third party (i.e. accounting firm or appointed independent appraiser).
4.	Is the balance sheet audited?	Not necessarily.
5.	Is an earn-out common?	Fairly common
6.	Is a deposit common?	Uncommon but could be agreed.
7.	Is an escrow common?	Common.
8.	Is a break fee common?	Uncommon.

#### Conditions Precedent

9.	Express Material Adverse Event (MAE) completion condition?	Common.
10.	Is the MAE general or specific?	Both seen.
11.	Quantification of MAE?	Possible.

#### Covenants, Access

12.	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common.
13.	Non-solicit (of employees)?	Common.
14.	Non-solicit (of customers)?	Common.
15.	Broad access to books, records, management between sign and close?	Common, subject to prior execution of confidentiality agreements.

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| 16. | Is it common to update warranty disclosure or notify of possible breach? What is the consequence? | Not common but could be agreed. |
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| 17. | Is a separate tax covenant/indemnity or tax deed common? | Not common to have separate tax covenant or indemnity. Specific tax indemnity commonly included in the purchase agreement. |
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### Representations and Warranties

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| 18. | Materiality in representations – how is it quantified (e.g. by a \$ amount)? | Materiality qualifiers commonly seen but not often quantified. Materiality could be difficult to define. |
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| 19. | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers more common now. Mostly limited to actual knowledge of top management or key personnel. |
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| 20. | Is a warranty that there is no materially misleading/omitted information common? | Common. |
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| 21. | Is disclosure of data room common? | Uncommon. |
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### Repetition of Representations and Warranties

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| 22. | Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common? | Repetition at completion common. Bring-down certificates not common. |
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| 23. | What is the applicable standard? True in all material respects? Material Adverse Effect standard? | True and accurate in all material aspects. |
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| 24. | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon. |
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### Limitations on Liability

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| 25. | What is the common cap amount (as a percentage of purchase price)? | 100% |
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| 26. | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Entire agreement. |
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|-----|--|--|
| 27. | What are the common exceptions to the cap? | Representations and specific areas of concern. |
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|-----|-----------------------------------|--------------|
| 28. | Is a deductible or basket common? | Both common. |
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| 29. | Is a <i>de minimis</i> common? | Common. |
|-----|--------------------------------|---------|

30.	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 12–36 months common. Tax, labour and environmental are usually tied to expiry of statute of limitations period (normally 5 years).
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31.	Is warranty insurance common?	Uncommon.
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#### Reliance

32.	Do financiers seek to rely on buyer's due diligence reports?	Uncommon.
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#### Set-offs against Claims

33.	Is a set off against claims for tax benefits common?	Uncommon.
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34.	Insurance proceeds?	Uncommon.
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35.	Third party recoveries?	Uncommon.
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#### Damages, Knowledge

36.	Obligation to mitigate damages?	Uncommon.
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37.	Exclusion of consequential damages?	Not common. Consequential damages not provided under Mexican law.
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38.	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Not common.
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#### Dispute Resolution

39.	Does local law allow for a choice of governing law? What is the common governing law?	Yes, parties may choose governing law. Normally where buyer selects.
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40.	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common when applicable law is not Mexican. Arbitration can take place in Mexico or outside Mexico.
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#### Stamp Duty

41.	If stamp duty is payable, is it normally shared?	No stamp duty applies.
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## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

The transfer of shares or quotas/membership interests of a Mexican company is documented in a stock/share transfer agreement (SPA). Subject to the restrictions set out in FIL and its regulations, the buyer of stock issued by a Mexican company may be a Mexican or non-Mexican individual or legal entity. As in other jurisdictions, the choice of acquisition vehicle (e.g. Mexican or non-Mexican entity, joint venture company, etc.) is typically influenced by tax considerations. Transfers of assets



The transfer of assets is generally documented in an asset purchase agreement (APA). The formalities for the transfer of assets are referred to at **3.3.2**. Given certain tax and labour-related formalities applicable in Mexico, a Mexican company is typically used as the acquisition vehicle for assets located in Mexico.

### 3.3 Formalities for Transferring Title to Shares or Assets

#### 3.3.1 Transfers of title to shares or quotas

Shares in a corporation type of entity (SAPI or SA de CV) are transferred by endorsement and delivery of the share certificate to the buyer. The name, nationality, domicile and tax identification number of each buyer–entity must then be included in the shareholders' registry book of the target company. It is also important that the buyer considers, prior to the acquisition of the shares, any formalities for the transfer of shares set out in the target company's by-laws. That procedure may include, for example, a notice to the board of directors, right of first refusal, or other formalities.

The membership or equity interests in a limited liability company (S de RL de CV) are transferred by means of a quota purchase agreement, with the prior consent of at least a majority of the members of the company. The name, nationality, domicile and tax identification number of each buyer must be included in the members' registry book of the target company.

#### 3.3.2 Transfers of title to assets

The APA must address the requirements applicable to the transfer of the relevant assets, including the following:

##### ***Movable assets***

An APA involving the transfer of movable assets should include:

- an assets/liabilities schedule, which must set out the assets that will be transferred from seller to buyer
- a purchase price allocation schedule identifying, individually, all of the assets to be transferred, and
- as a closing deliverable, invoices representing the transferred assets.

The invoices must list unit price, quantity, make, model, serial number and other necessary details to permit the proper identification of the item or asset. If the movable assets are subject to encumbrances, it may be necessary to execute releases before a Mexican notary public.

##### ***Immovable assets/real estate***

Where the transaction involves the acquisition of real property, certain legal formalities should be followed based on the civil code rules of the municipality where the property is located. The purchase should be formalised in the presence of a Mexican notary public, and a notarial deed evidencing that transaction issued. The notary public should include in the notarial deed a description of the property's boundaries, whether the property is subject to liens or other encumbrances, the purchase price, etc. The notarial deed must be registered with the public registry of commerce.

In addition, the seller and buyer should take into account and properly address in the APA any situations in which the seller might be subject to transfer restrictions that could serve as obstacles to the transaction, such as:

- where a seller has provided to the shareholders or members the right to refuse the transfer of assets
- where the approval of a creditor is needed for the transfer of the assets under a finance or credit agreement entered into by the seller.

### 3.4 Formalities for Mergers

Mergers, either by absorption or integration, must be approved at a shareholders/members meeting, and by the execution of a merger agreement. The minutes of the meeting and the merger agreement must be formalised in a notarial deed which must be registered with the Public Registry of Commerce. It will also be necessary to publish an extract of the merger agreement in the *Official Gazette* for the corporate domicile of the merging entities, along with the entities' balance sheets.

Mexican law provides for two possible methods to effect a merger:

- the adoption of the merger agreement by the shareholders or members of all the entities involved, then the consummation of the deal, which will occur immediately upon recording the merger agreement with the Public Registry of Commerce, as long as the consent or payment (or deposit for payment in a banking institution) of all creditors of the merging entities has been obtained, or a provision for payment is included in the merger agreement; or (alternatively)
- consummation of the merger after three months of the date of the merger agreement's registration with the Public Registry of Commerce, as long as no creditors objections have been made.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

The new Federal Law of Economic Competition (FLEC) became effective in July 2014. In accordance with the FLEC and the recent amendments to Article 28 of the Mexican Constitution (published 11 June 2013), the Telecommunications Federal Institute (IFETEL)<sup>1</sup> and the Federal Economic Competition Commission (FECC)<sup>2</sup>, are the government agencies which act as competition regulators in Mexico. The FECC and IFETEL (referred to together as the New Competition Authority (NCA) are both independent agencies with their own legal, administrative, technical and operative powers and autonomy.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Mexican purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

#### Filing Obligation

- |    |  |            |
|----|--|------------|
| 1. | Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)? | Mandatory. |
|----|--|------------|

<sup>1</sup> FLEC regulator for telecommunications, radio and TV industries sectors.

<sup>2</sup> FLEC regulator for any other sector or market not covered by IFETEL.

## Timetable

2. In practice, what is the timetable for clearance (in Phase I and Phase II review)?	The NCA may clear a transaction earlier if the deal does not raise competitive concerns and in particular where the parties have engaged in pre-notification discussions. In practice, the clearance decision may be obtained prior to the 60 working-day deadline (usually within 20–30 working days in straightforward cases with no antitrust concerns). Only in extremely rare cases will the NCA actually extend the term to resolve or investigate matters for an additional 40 working days.
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For the purposes of the sections which follow, (in general terms):

- a concentration is defined as any merger, acquisition or other action by which companies, associations, shares, equity quotas, trusts, or assets in general are accumulated
- a prohibited concentration is defined as a merger, acquisition or other action between any persons or entities, whether competitors or not, having the purpose or effect of diminishing, damaging or preventing competition in identical, similar or substantially related goods or services.

The Competition Law identifies certain issues that the NCA must consider in determining whether a concentration is prohibited, such as the possible market power or price-fixing capabilities resulting from the concentration. The NCA can condition the approval of a proposed concentration on the restructuring of the transaction to avoid anti-competitive consequences, or can order the partial or full unwinding of a prohibited concentration.

### 4.2.1 Procedure

The NCA must be given prior notice of a proposed concentration if the underlying transactions:

- have a value in the Mexican Republic exceeding 18 million times the nationally set daily minimum wage for the federal district (DMW),<sup>3</sup>
- involve the accumulation of more than 35% of the assets or shares in an entity whose assets or sales in Mexico exceed 18 million times the DMW, and/or
- imply an accumulation of assets or capital stock in the Mexican Republic in excess of 8.4 million times the DMW, and
- involve persons or entities whose combined assets or annual sales in Mexico exceed 48 million times the DMW.

Upon notification, the NCA has 60 business days to rule on the reported concentration. This 60-day term will restart if the NCA finds it has to request additional information. If the NCA does not respond within the 60 days, the transaction should be deemed approved.

As competition regulator, the NCA has broad investigatory and enforcement powers. It may initiate administrative procedures on its own or at the request of third parties, investigate and resolve those cases, and issue administrative penalties. It may also refer criminal cases to the District Attorney. The NCA can also issue binding opinions in antitrust matters.

<sup>3</sup> The current DMW is MXN70.10 as of 1 January 2015.

### 4.2.2 Penalties

In addition to the obligation to dismantle prohibited concentrations, parties found to be in violation of the competition laws may be subject to administrative penalties in the following amounts:

#### Fines for breaches of competition laws

Action	Fine	
Carrying out a prohibited concentration	≤ 8% annual income of offender	
Failure to notify a reportable concentration	≤ 5% annual income of offender	
Direct participation in a prohibited concentration in the capacity of 'representatives' of the offenders	≤ 5% of the annual income of the offender or up to 200,000 times the DMW (approx. USD1 million)	The Competition Law does not expressly define what kind of representation is required here, so this penalty may be applicable to any individuals involved directly or indirectly in the violation
Inducing, provoking or participating in a prohibited concentration	≤ 180,000 times the DMW (approx. USD870,000)	
Breach of NCA order to discontinue acts deemed as a prohibited concentration	≤ 8% of the annual income of the	

Note: recidivism or a relapse in complying with any of the above obligations may entitle the NCA to double the above fines

## 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

### 4.3.1 Exchange of competition-sensitive information

The FLEC regulates two main kinds of monopoly:

- absolute monopolistic practices (among competitors, e.g. price-fixing, market segmentation, restriction in the offering of goods, bid-rigging and/or any exchange of information with the aim of accomplishing any of those results), and
- relative monopolistic practices (among any undertaking with any of its suppliers, clients or distributors).

Absolute monopolistic practices are prohibited per se and any legal act or contract that attempts to implement them will be deemed as null and void. Thus, any exchange of sensitive information with competitors would in principle qualify as an absolute monopolistic practice and the undertaking involved may be subject to a sanction of up to 10% of its annual income generated in Mexico, in addition to any potential civil liability. Likewise, the personnel directly involved in an absolute monopolistic practice may be subject to fines of up to approximately USD1 million and may face criminal prosecution (personnel directly involved in this kind of monopolistic practice may be subject to a criminal penalty of up to 10 years imprisonment: Federal Criminal Code).

#### 4.3.2 'Gun-jumping' issues

Global merger control laws need to be taken seriously, as merger control authorities around the world have developed an appetite for investigating and punishing companies for failure to notify reportable transactions or for implementing a transaction in breach of standstill obligations. In this Mexico is no exception, with the NCA ready to penalise or block transactions pending investigation of anti-trust consequences.

Under the FLEC parties submitting merger control filings with the NCA should wait until the authority clears the reported transaction before proceeding to closing. If the parties do not report a notifiable transaction to the NCA or decide to proceed to closing without NCA approval, those undertakings could be subject to a fine of up to:

- 8% of annual income generated in Mexico if the relevant operation is ultimately considered as a prohibited concentration, and/or
- 5% of annual income for failure to notify a reportable transaction.

#### 4.4 Anti-Bribery, Corruption and Money Laundering

Mexico is a party to several international conventions regulating anti-bribery, including the Inter-American Convention against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention against Corruption. At national, federal level, Mexico has enacted several anti-corruption laws, including the following:

##### 4.4.1 Federal Criminal Code

The Federal Criminal Code has prohibited bribery since 1931. Both public servants and private parties may be guilty of the crime of bribery, which punishes:

- 'The public servant (PS) who, directly or indirectly, solicits or receives unduly for the PS or another person, money or any other gift, or accepts a promise, to do or refrain from doing any just or unjust act in relation to the PS's functions', and
- 'Whoever spontaneously gives or offers money or any other gift to any of the persons described in the foregoing paragraph, to cause any PS to do or refrain from doing any just or unjust act related to the PS's function'.

The crime is punishable by imprisonment of between 2 and 14 years, with a statute of limitation period of 8 years from the commission of the crime. The crime of bribery can only be committed by individuals, not companies. The crime is relatively rarely proven, however, with evidentiary requirements for proof of the crime difficult for the state to meet.

##### 4.4.2 Federal Anti-Corruption Law for Government Procurement (Anti-Corruption Law)

The Anti-Corruption Law came into force in June of 2012. It is an administrative law that applies both to individuals and companies, whether Mexican or foreign, that directly or indirectly (e.g. through a 'commission agent') participate in procurement proceedings with federal government entities. Under the Mexican Commercial Code, a commission agent acts according to specific instructions from its principal, who is liable for the agent's actions, from both a civil and administrative law perspective.

Among the most relevant prohibitions of the Anti-Corruption Law are the following, which cover both direct and indirect activities:

- Promising, offering or providing money or any other benefit to a public servant or a third party, in order to induce that public servant to perform or refrain from doing any action related to their duties or those of another public servant, for the purpose of obtaining or retaining any benefit or advantage, regardless of whether the money or benefit was actually accepted or received and regardless of the result. This specifically includes benefits to third parties who are in any way involved in the preparation of the government contracting process

- In collusion with one or more of the parties subject to the Anti-Corruption Law, taking any action that involves or is intended to obtain an unlawful benefit or advantage in any procurement process
- Performing any action intended to avoid complying with requirements or rules in a procurement process.

For any of the above cases, the agent engaging in the prohibited behaviour will be sanctioned along with its principal.

The sanctions are as follows:

- Individuals: maximum fine approx. USD375,000 or 35% of the value of the agreement; the individual may be disqualified from participating in federal government procurement processes for up to 8 years, and
- Companies: maximum fine approx. USD14.9 million or 35% of the value of the agreement; the company may be disqualified from participating in federal government procurement processes for up to 10 years.

#### 4.4.3 Administrative responsibility of public servants law

This 2002 law provides as follows:

Art. 8(XII)—Every public servant (PS) has the following obligations: To abstain, during the PS's exercise of his or her functions, from soliciting, accepting or receiving, directly or indirectly, money, real or personal goods by transfer at a price 'notoriously' inferior to its ordinary market price, or any donation, services, employment, position or commission for him/herself or for [related persons] from natural or corporate persons whose professional, commercial or industrial activities are directly governed, regulated or supervised by the relevant PS in the performance of the PS's employment, office or commission and that involve a conflict of interest ...

The obligation continues for one year after the PS has left office.

#### 4.4.4 Procurement law

Government entities are prohibited from receiving proposals or awarding contracts to any individual with whom, or any company in which, any of the public servants involved in the government procurement process has a personal family or business interest (Art. 50).

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

#### 4.5.1 Exchange controls

Mexican law does not impose any general restrictions or limitations on the remittance of dividends or repatriation of capital. No exchange controls exist in Mexico.

#### 4.5.2 Foreign investment approvals and notifications

In a share sale, where the target's by-laws do not include a clause allowing foreign (i.e. non-Mexican) participation, the existing shareholders or members should amend the by-laws to authorise foreign participation. However, there are limits on foreign investment participation set by Mexican law in relation to certain regulated businesses. Under the FIL, a foreign investor may acquire more than 49% of the equity of an existing company owned by Mexican investors, without the prior approval of the National Commission of Foreign Investments (NCFI), as long as the target company is not engaged in a restricted activity and the total value of the assets of that company does not exceed certain monetary thresholds established annually by the NCFI. Currently, this threshold is MXN3,601,905,682.86. See also **4.2.2**.

### ***Non-voting shares***

Mexican companies may issue non-voting shares, which are considered as a 'neutral investment'. Foreign investors may acquire those shares, with certain limits established by the FIL. The process of issuance of these shares begins with the approval of the Foreign Investment Commission of the release of ordinary participation certificates representing not more than 49% of the voting stock. The certificates represent economic rights.

### ***National registry of foreign investments***

The FIL and its regulations provide that companies with foreign investments (whether subject to approval or not) are required to file several notices regarding the operations of the companies' financial status and other relevant information with the National Registry of Foreign Investments (NRFI). Mexican companies with foreign investment are required to register with the NRFI within 40 business days of the date of their respective incorporation. That registration must be regularly renewed to maintain good standing. The requirement is to file a notice within 40 business days of any change with the NRFI, in the case of changes to the original information submitted to the NRFI. If a company does not comply with this requirement, it will be subject to administrative fines.

Mexican companies whose capital is held by foreign investors, in any amount, are required to file a corporate financial and statistical questionnaire before the NRFI for the corresponding latest fiscal year, once a year. In addition, any company with foreign investment in its capital must file, on an annual basis, a quarterly report within 20 business days of the end of each quarter.

In accordance with the FIL, a foreign company:

- that wishes to carry out commercial acts in Mexico on a regular basis, or
- that wishes to set up a presence in Mexico (and provided it is not subject to any specific sector regulations).

—must obtain approval from the Ministry of Economy to establish and register a branch in Mexico. An application must be submitted to the Ministry which must rule on the application within 15 business days of the day on which the application was submitted.

### ***Real estate***

Mexican law establishes certain restrictions on land ownership by foreign investors in Mexico.

- **Restricted zones:** Foreign individuals and entities may not hold direct title to real estate in Mexico located within 100 kilometres of the Border or 50 kilometres of the coastline (the restricted zone; under the Mexican Constitution). However, individuals and entities may hold the beneficial interest in real estate within the restricted zone via a Mexican trust. Real estate trusts in Mexico cannot last longer than 50 years and its trustee must be a Mexican bank.

Mexican companies with foreign equity participation may hold direct title to real estate located in the restricted zone if they engage in non-residential activities (FIL). If engaging in residential activities, they may hold the real estate in trust, i.e. they may not hold direct title to real estate in a restricted zone.

- **Non-rural land outside restricted zone:** Under Mexican law, foreign individuals and Mexican companies with foreign equity participation may hold direct title to non-rural land located outside the restricted zone.
- **Rural land outside the restricted zone:** Foreign individuals may hold direct title to rural land located outside the restricted zone. Mexican companies with foreign equity participation may hold direct title to rural land, provided ownership of that land is represented by special 'Series T' shares. Foreign investors may not own more than 49% of the 'Series T' shares issued by the respective company.

- Quantitative restriction of land ownership: The Mexican Constitution and regulatory agrarian legislation establish limits to the amount of rural land a person may own and protect against expropriation for communal use. For example, generally the maximum area of irrigated land that may be protected from expropriation is 100 hectares per person. For lands subject to seasonal use and un-irrigated pastures subject to agricultural harvest, the maximum area which can be protected is 200 hectares.

Under the Constitution, a Mexican corporation may own and protect up to 25 times the land area that one individual is permitted to protect.

Under certain circumstances and if certain requirements are met, a landowner may protect an area which exceeds the above limits, e.g. if he or she is improving the quality of the land by installing irrigation or drainage systems.

**IMMEX or Maquiladora Programme:** A Maquiladora or IMMEX company is a Mexican company authorised by the Ministry of Economy to operate under an IMMEX programme to manufacture finished products for further exportation and/or to render export services using raw materials, parts, components, machinery and equipment temporarily imported under the programme.

The Mexican maquiladora programme was introduced over 30 years ago by the Mexican government to promote employment in Mexico. The maquiladora industry in Mexico is governed by the Decree for the Promotion of the Manufacturing, Maquiladora and Export Services Industry (the Maquiladora Decree or the IMMEX Decree) and the Income Tax Law, as amended. Under the Maquiladora Decree, a foreign investor will qualify to operate under maquiladora status only if it has a corporate presence in Mexico. A Mexican corporation that qualifies for maquiladora status may have up to 100% foreign ownership. The great majority of maquiladoras (also known as IMMEX companies) are wholly-owned subsidiaries of foreign corporations.

## 4.6 Industry-Specific Regulation

The FIL lists certain economic activities that are:

- reserved to the Mexican State
- reserved to Mexican nationals or Mexican companies without foreign equity participation
- subject to quantitative foreign investment limitations, and
- subject to prior approval if the foreign investor wishes to own more than 49% of a company engaged in those activities.

### 4.6.1 Activities reserved to the Mexican State

In compliance with the Mexican Constitution and as a reflection of historical concerns regarding private investment, the FIL reserves certain strategic areas to the Mexican State. Neither Mexican nor foreign investors may engage in these areas of economic activity.

These include:

- transmission and distribution of electricity as a public service
- nuclear energy generation
- industries involving radioactive minerals
- industries involving telegraphs
- radio telegraphy
- mail services



- issuance of money
- control, supervision and security of ports, airports and heliports, and
- certain other areas expressly specifically legislated for.

#### 4.6.2 Activities reserved to Mexican investors

The FIL establishes certain economic activities that are open exclusively to Mexican investors (Mexican nationals or Mexican companies with a foreign exclusion clause (*cláusula calvo*)). These areas include:

- domestic and international transportation of passengers by land
- tourism
- freight/shipping cargo, excluding messenger and courier services
- development banks, and
- professional and technical services reserved to Mexicans under the corresponding legislation.

Foreign investors cannot participate in any of the above activities, directly or indirectly, through any agreement or corporate structure or scheme, except by owning specially approved 'neutral' shares (which have no voting rights and limited corporate rights), or as otherwise approved by the NCFI.

#### 4.6.3 Activities with foreign investment equity limitations

The FIL establishes foreign ownership limits in certain companies, activities and types of shares.

Foreign-ownership	Regulated activities
≤10%	<ul style="list-style-type: none"> <li>• production cooperatives</li> </ul>
≤ 25%	<ul style="list-style-type: none"> <li>• domestic and specialised air transport; air-taxi transport</li> </ul>
≤ 49%	<ul style="list-style-type: none"> <li>• production/sale of explosives, including firearms, cartridges, ammunition, fireworks (except purchase/use of explosives for industrial and extractive purposes, and preparation of explosive mixtures for related uses)</li> <li>• printing/publication of newspapers for exclusive distribution within Mexico</li> <li>• 'Series T' shares in companies owning agricultural, cattle-raising and forest lands</li> <li>• freshwater and coastal fishing; fishing in the exclusive economic zone, excluding aquaculture</li> <li>• comprehensive port management</li> <li>• piloting services to vessels in inland interior navigation</li> <li>• shipping companies operating commercial vessels for navigation in interior waterways and between domestic ports (excluding tourist ferries; use of dredging machines and devices for port construction, maintenance and operation)</li> <li>• supply of fuel and lubricants for ships, airplanes and railroad equipment, and</li> <li>• some specified telecommunication services.</li> </ul>

Foreign investors may not own more than the permitted percentage of equity in a Mexican company engaged in any of the activities at the Table at **4.6.3**. Those limits may not be surpassed either directly or through any type of agreement or corporate structure or scheme, except via ownership of 'neutral' shares (see **4.6.2**), and unless otherwise provided for by international treaty (e.g. North American Free Trade Agreement in the case of financial services).

#### 4.6.4 Activities subject to pre-approval of 49%+ foreign investment

Prior approval is required before a foreign investor can own more than 49% of a company engaged in any of the following activities:

- port services to vessels engaged in interior navigation (e.g. towing, mooring)
- overseas shipping
- companies authorised to operate public aerodromes
- private schools (pre-school, primary, secondary, preparatory and higher levels)
- legal services
- construction, operation and use of railways and public railroad transport services.

Those foreign investors required to obtain prior approval to own 49%+ of a new or existing Mexican company must file an application with the NCFI, which has 45 business days from the day the filing to issue its ruling. If the NCFI does not rule within 45 days, the application will be deemed approved.

## 4.7 Import/Export Controls

### 4.7.1 Import controls

Since the enactment of NAFTA in 1994, import controls have significantly eased in Mexico. Most products no longer require prior import permits, and import duties have been reduced. Duties are generally assessed on the transaction value of the products imported into Mexico and may be reduced and/or deferred under the import and export programmes enacted by the Mexican government (e.g. IMMEX Programme) or Free Trade Agreement (FTA).

Generally, under the Mexican Customs Law, importers must be registered in the general importers' registry and secure an import licence to start processing import and export transactions. To register in the importers' registry, the importer entity must:

- be registered in the federal taxpayers' registry
- have an advanced electronic signature (FIEL) and confidential electronic identification password, from the tax administration service
- be able to provide the name and licence number of the individuals that will act as Mexican customs brokers authorised by the importing company to carry out customs operations on behalf of the company.

### 4.7.2 Export controls

Mexican law currently imposes restrictions on the export of certain goods under the 2011 Export Control Regulation, which introduced export controls on military and 'dual-use' goods specified in the Wassenaar Arrangement List of Dual-Use Goods and Technologies and Munitions. As in other jurisdictions, 'dual-use' items are items that, whilst principally having a commercial application, are deemed sensitive because of their potential to be used in military or other sensitive applications.

To determine whether a specific product falls within the Export Control Regulation, a Mexican exporter must refer to the Export Control Regulation and to specific administrative regulations issued by different government entities. However, where an item is listed both in any of the above-mentioned

regulations and also in the Export Control Regulation, the obligation set out in the administrative regulations issued by the Ministries of Economy, Energy, Health and Defence (if any) should prevail.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

#### 5.1.1 Income tax

Generally, under domestic tax law the transfer of shares (or equity interests/quotas) of a Mexican company is subject to Mexican income tax, regardless of the country where the sale takes place. Additionally, the transfer of shares (regardless of the tax residency of the issuer) will be subject to income tax in Mexico if the book value of those shares is represented, directly or indirectly, in more than 50% of real estate property located within Mexico.

Non-Mexican residents who transfer shares in Mexican companies are subject to a 25% tax on the gross proceeds of the sale (or to 35% tax on the net gain derived from the sale, if the foreign resident opts for this tax and has a local representative in Mexico). Note that this is not an option for foreign sellers domiciled in a tax haven jurisdiction or a jurisdiction with a territorial taxation system.

Net gain is determined by subtracting from the gross sale proceeds, the seller's tax basis in the shares sold (adjusted for inflation and for other factors as determined by the Income Tax Law). If the transferor elects to be taxed at 35% on the net gain derived from the sale, the party transferring the shares or quotas must appoint a legal representative in Mexico and must file a tax return with respect to the sale, as well as a fiscal notice and certification (*dictamen fiscal*) signed by a Mexican certified public accountant to certify that the gain reported on the tax return has been correctly calculated.

Where transactions are made between related parties, the certified public accountant must certify in the *dictamen fiscal* that the adjusted tax cost of the shares has been calculated correctly and that the shares have been properly valued in accordance with the arm's-length principle set out in the Mexican tax law for the purposes of determining the shareholder's gain or loss on the exchange.

Under certain conditions, it may be possible to request permission from the tax authority to defer payment of taxes on transfers of shares in reorganisations between members of the same group of companies. That permission must, however, be requested (and granted) before the transfer of shares.

Mexico has entered into more than 50 tax treaties to avoid double taxation. Depending on the tax residence of the transferor, therefore, some treaties may provide a reduction on the tax rate applicable on transfers of Mexican shares.

#### 5.1.2 Value added tax

The purchase or sale of shares (or equity interests/quotas) of a Mexican company is not subject to VAT.

### 5.2 Acquisition of Assets

#### 5.2.1 Income tax

The transfer of assets is a taxable event in Mexico and can trigger income tax for the seller/transferor (assuming a gain is obtained). From the buyer's perspective, a purchase of assets is the route to fastest tax recovery (via deducting expenses, depreciation or amortisation). Inventory is deductible in the year it is sold; the principal depreciation rates are:

- computer equipment 30%
- automobiles 25%
- office equipment and machinery 10%
- building/construction works 5%.

Under applicable Mexican tax laws, goodwill is deemed as an intangible good, so in acquisitions involving intangible assets, it will be important to review the nature and type of intangibles that will be acquired. Caution must be exercised when goodwill is involved as part of the acquisition, since it cannot be amortised, even when acquired from third parties, and while it may be subject to VAT, VAT paid is not recoverable.

### 5.2.2 Value added tax

VAT is triggered on a cashflow basis and applies on the purchase of assets (tangible or intangible) – and can be recovered during the course of the Mexican transferee's operations. A few sales transactions qualify for exemption from VAT, and some others are zero-rated (as opposed to attracting the standard VAT rate of 16%). With respect to real estate, VAT is levied on the purchase price of properties.

### 5.2.3 Real estate-related taxes

The purchase and sale of real estate is subject to real estate transfer tax payable by the person or entity that acquires the real property. The applicable tax rate varies depending on the location of the property (rates range from 1.5%–4.9%). The real estate's tax base is calculated on the highest of the purchase price, the value registered with the land registry office, and the property's fair market value. In addition, as noted in **3.3.2**, the transfer of ownership of real estate requires a notarial deed prepared by a notary public and the registration of the deed with the public registry of property (PRP). The PRP will charge registration fees to record the notarial deed.

### 5.2.4 Acquisition of a business as a going concern

According to the Mexican Federal Tax Code, acquirers of going concerns or businesses could be deemed jointly and severally liable with the seller for past tax obligations of the seller and its business. Therefore, the acquisition should be structured to mitigate the acquirer's exposure to that risk of joint and several liability. For instance, in certain circumstances, it may be advisable to break down the various components of the going concern, such as inventory, fixed assets, accounts payable and receivables, employees, goodwill (or a covenant not to compete) – and have different entities in the buyer group purchase/acquire each of those components. Or else, only certain assets could be acquired, attracting joint and several liability for only those essential parts of the business.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of a share purchase, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the buyer therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the target company. Although not common, collective bargaining agreements (CBA) may include change of control provisions that could trigger notification, consultation or special rights in favour of employees of the target company involved in a share purchase transaction. Thus, it is advisable to review relevant CBA to determine if, in fact, it does contain any such rights.

#### 6.1.2 Acquisition of Assets

On a transfer of assets, the labour implications will vary depending on the case. Under certain binding court precedents, if the majority or all of the assets required for the employer's operation is transferred as a result of the deal, then an automatic employer substitution occurs. If only certain assets are transferred to the buyer, only the employees whose employment activities are related to those assets may be subject to an employer substitution. Therefore, in practice, two methods exist for the transfer of employees to an acquirer of assets:

- employer substitution, and
- termination and rehire.

### ***Employer substitution***

In the employer substitution situation, the 'substitute employer' (i.e. the buyer of the assets or its designee) will assume liability for salaries, benefits, length of service bonuses and all other employment conditions of the employees of the target company. Thus, the employees continue their employment contract unchanged. In addition, due to a recent court precedent in Mexico, the following conditions will apply for an employer substitution to be valid and enforceable:

- the substitute employer must acquire the assets related to the activities performed by the transferred employees, and
- the activities in which the employees are involved should be continued by the substituted employer.

When an employer substitution takes place, employees are, in principle not entitled to severance pay, as long as the new employer assumes and honours all of their former employment conditions and benefits. In the event that the substitute employer cannot match all the previous working conditions, the substitution of the employer will not be enforceable, and employees may therefore terminate the employment relationship 'for cause'. In that case, the employees will be entitled to receive the compulsory severance pay provided for in the FLL.

Although the consent of the employees is not technically required for an employer substitution, both former and new employers must inform transferring employees of the change, in writing. Note that under the FLL, the outgoing and new employers are jointly liable for labour obligations including unpaid social security contributions for a period of six months after the effective date of the employer substitution.

### ***Termination and re-hire***

If the employment substitution method does not apply to the corresponding asset and sale transaction, the following alternatives are available for the transfer of employees. These alternatives must be carefully evaluated and negotiated as they may have implications (e.g. costs of terminating the positions of some employees).

Termination and re-hiring without recognition of seniority:

If a seller terminates its employment relationship with employees and the buyer then rehires them, without acknowledging their length of service (seniority) with the former employer, the employees would be treated as new hires by the buyer, who would be free to establish new terms and conditions of employment (and in turn, the employees would be, of course, free to accept those conditions of employment, or not).

However, because under Mexican law an employer may not terminate the employment relationship with an employee absent a statutory 'just cause' of termination, the employees will be entitled to mandatory severance pay required under the FLL (see below) and the termination agreement must also be approved by the relevant Conciliation and Arbitration Board.

This alternative may seem on its face to entail less risk for and costs to the buyer, as the buyer will not be assuming the liabilities and termination costs of the transferred employees. However, it could turn out to be more costly for the seller, because of the requirement to pay mandatory severance. Thus in an asset deal, in practice, the determination as to which party will pay termination costs, or how the parties will split those costs will be significant, and should be carefully negotiated.

Termination and re-hiring with recognition of seniority.

If the seller terminates its employment relationship with employees and then the buyer rehires those employees acknowledging their length of service (seniority) with the transferor:

- the employees should receive all unpaid salaries, holidays, bonuses, etc. that accrued with the seller, but not, at the time of termination, the mandatory severance pay required under the FLL (see below), and

- the buyer may establish new rates of pay and conditions for the employees after rehiring.

After closing the transaction, if and when the buyer terminates the employment relationships with the relevant employees, the buyer will be required to pay mandatory severance calculated on the total length of service of each employee (including length of service of the employee with a former employer (i.e. pre-dating the seller)).

This alternative requires:

- the consent of the employees who must sign a resignation letter
- an acknowledgment by the employees of receipt of full payment of wages owed, and
- the execution of a termination agreement between seller and employees, ratified by the Labour and Conciliation Board.

Should the employees not consent, the termination of the employment relationship will be deemed to be a dismissal without 'just cause' and the employees will be entitled to the mandatory severance payment.

### ***Mandatory severance***

Mexican employers may not freely dismiss employees without cause (FLL). To dismiss an employee and avoid liability for payment of mandatory severance, a Mexican employer must:

- be able to prove, in a labour court if necessary, that the dismissal was for a statutorily-defined 'just cause', and
- give the employee, directly or through the Labour Board, prompt written notice of the dismissal and the 'just cause'.

'Just cause' for termination of the employment relationship includes the employee's:

- immoral conduct
- sexual harassment
- repeated absenteeism, or
- unauthorised disclosure of trade secrets (non-exhaustive list under the FLL).

In case of litigation, if the employer fails to prove the grounds for dismissal on a termination with cause, the employer must make the following severance payments:

- three months' 'aggregate' salary (including base salary, plus all other benefits paid to the employee whether in cash or in kind during the last year of services, such as bonuses, commissions, vehicle, stock options, etc.)
- a seniority premium, equal to 12 days per year of service (capped at twice the minimum wage)
- back pay from the date of dismissal back pay from the date of the alleged dismissal up until the final resolution issued by the Labour Board is fulfilled. Back wages have a cap of 12 months. In relation to that period, the defendant must pay a monthly interest rate of 2% over 15 months capitalised at the payment date. The cap to back wages applies only to labour suits started as of 1 December 2012 (effective date of the reform to the Mexican Federal Labour Law)
- accrued benefits.

Note that severance payment is an un-waivable employee's right and any agreement stating otherwise would be null and void. However, severance payment can be negotiated with the employee depending on the specific circumstances, even during the litigation process.

## 6.2 Approval or Consultation Requirements

### 6.2.1 Share purchases

The FLL does not grant any special rights to employees of a target company whose shares are sold to a buyer in a share purchase transaction. However, it is advisable to review the employment agreements of the employees and any collective bargaining agreement to ascertain if those documents include a change of control provision that would trigger any notification, consultation or other special rights. Depending on the case, as a practical matter, it is usually advisable to discuss any change of ownership with the head of the senior management department and/or union to maintain good working relationships.

### 6.2.2 Asset purchases

The employer substitution method does not require the approval of employees, as long as the substitute employer recognises their salaries, benefits, length of service and matches all of the conditions of the employment offered by the outgoing employer. The termination and re-hire method does require the employee's consent to formalise termination of the employment relationship with the seller, and thereafter, with the buyer or its designee, as new employer. In addition, the re-hired employees should execute a new employment agreement with the new employer.

## 6.3 Protection against Dismissal

If the buyer intends to make any employees of the target business redundant, the buyer should consider carefully the employees' rights to mandatory severance, since employer may not freely dismiss an employee without paying severance (under the FLL).

## The Netherlands

### 1.1 Overview

Dutch businesses have traditionally been very active in mergers and acquisitions. This, in part, explains why The Netherlands, in spite of its modest size, is home to some of the world's largest and fastest-growing companies such as DSM, Unilever, Philips, Tom-Tom, Ahold and AKZO-Nobel. For tax and other reasons, The Netherlands has also been a popular jurisdiction for the establishment of intermediate holding companies through which the acquisition of foreign companies is structured through non-Dutch entities.

### 1.2 General Legal Framework

The Netherlands is one of the founding members of the European Union and therefore, Dutch business law incorporates the European Company Law Directives. The acquisition of a Dutch company of any substance may warrant the application of a variety of laws and rules of regulatory bodies which are designed to protect the rights of affected parties or persons (e.g. employees and minority shareholders), and to maintain the financial integrity of the target.

### 1.3 Corporate Entities

Dutch law distinguishes between two types of limited liability company: public companies (*naamloze vennootschap/NV*) and private limited liability companies (*besloten vennootschap/BV*). The main differences between these two entities are as follows:

- BVs (as opposed to NVs) cannot issue bearer shares
- NVs with bearer shares can be listed on the Dutch Stock Exchange (BVs cannot)
- NVs must have a minimum issued and paid-in capital of EUR45,000. For BVs, no minimum issued and paid-in capital is required, as long as at least one share is issued to a person or legal entity other than the BV or its subsidiaries
- the nominal value of shares in BVs (as opposed to NVs) may be denominated in another currency other than the euro
- BVs can issue shares without voting or profit rights (but NVs cannot)
- BVs are subject to less strict capital and creditor protection rules than NVs. For example, BVs need not obtain an auditor's statement for contributions in kind
- holders of a certain class of BV shares may appoint, suspend or dismiss their 'own' managing director. Holders of a certain class of NV shares may only have nomination rights in relation to the appointment of managing directors (these nomination rights may be overruled at the general meeting of shareholders).

A Dutch subsidiary may be established and owned by one or more shareholders that may either be individuals or legal entities, regardless of their nationality. BVs and NVs may merge with limited liability companies incorporated under the laws of EU member states.

The mandatory corporate bodies within both BVs and NVs include the general meeting of shareholders and the board of managing directors. The articles of association may additionally (but need not) provide for a board of supervisory directors.

The management of the BV and the NV is vested in the board of managing directors, consisting of one or more managing directors. The articles of association may provide for a minimum number of managing directors. Dutch company law does not require the managing directors to be Dutch residents. Managing directors can be legal entities.



The articles of association of both BVs and NVs may provide that the company will have a board of supervisory directors consisting of one or more supervisory directors. Only individuals can be appointed as a supervisory director. An obligation to have a two-tier system exists if the BV or NV falls under the so-called 'large companies regime' (LCR).

The LCR will apply to a company if, for three consecutive years, it meets all of the following criteria.

- it has an issued share capital plus retained earnings and reserves of at least EUR16 million
- it has a works council (or an interest of 50%+ in a dependent company which has a works council), and
- the company, together with its subsidiaries, normally employs at least 100 employees in The Netherlands.

Dutch company law recognises total and partial exemptions from the LCR. Companies which are fully exempt include group holding and finance companies, as long as the majority of the employees of the group work outside The Netherlands. A partial exemption (called the 'mitigated large companies regime') applies to a large company in which one or more other companies have an interest of 50% or more, as long as the majority of the employees of the companies work outside The Netherlands.

The board of supervisory directors must supervise the policies of the board of managing directors and general affairs within the company and its business. It must give advice to the board of managing directors, but may not in principle participate in the management of the company other than by offering general policy guidance.

## 2. Acquisition Methods

On identifying a business opportunity, a decision will need to be taken about which of several possible acquisition structures should be adopted. The purchaser may purchase the shares in the target from its shareholders or purchase assets directly from the target, or the purchaser may contemplate a merger with the target or a demerger.

### 2.1 Acquisition of Shares

The transfer of shares in a BV or NV requires the execution of a notarial deed before a Dutch civil law notary in The Netherlands. This obligation does not apply to NVs whose shares or share certificates are in bearer form or are officially listed on a regulated stock exchange.

### 2.2 Acquisition of Assets

Asset transactions are normally used either for tax reasons (e.g. to minimise the risk of undisclosed or contingent liabilities of the target company) or to sell only a portion of a company's business.

Asset transactions tend to be much more complicated since each category of asset has to be transferred separately in accordance with applicable legal transfer requirements. In an asset sale, contracts with suppliers, customers and other contractual counterparties of the acquired business need to be transferred, so the co-operation or consent of those parties must be obtained (remembering that ultimately the parties can refuse to deal with a purchaser and instead terminate the agreement). This means that in asset sales, there is a risk that government or other approvals, licences and permits held by the business may be lost.

### 2.3 Mergers

#### 2.3.1 Legal merger

Dutch law permits legal mergers of companies, whereby all the assets and liabilities of one or more companies are acquired and assumed, respectively, by an existing company or by a new company formed for the purpose, while the company or companies whose assets and liabilities have thus been acquired or assumed cease to exist by operation of law. The shareholders of the disappearing company become shareholders of the acquiring company.

The merger procedure is used primarily for inter-group reorganisations. Only rarely is this procedure used as a means of acquiring the shares in an unrelated party. At present, legal mergers apply to Dutch companies and SEs and, under certain circumstances (as a consequence of recent (EU) case law (*Sevic Systems*: ECJ case C-411/03 (2003)) mergers involving a Dutch and a foreign company.

### 2.3.2 Demerger

A demerger is a legal act whereby either:

- all the assets and liabilities of a company (which ceases to exist) are acquired and assumed respectively by two or more companies, or
- all or part of the assets and liabilities of a company which remains in existence are acquired and assumed respectively by one or more other companies, of which at least one issues shares to the shareholders of the demerging company or of which at least one is incorporated by the demerging company.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

Special care must be given to the principles of pre-contractual good faith under Dutch law. These principles may, under certain circumstances, mean that a party may not terminate ongoing negotiations without being liable for damages to the other involved negotiating party or parties or even (in extreme cases only) lost profits. Whether such liability will arise in a particular case will depend on all relevant facts and circumstances of the matter at hand including but not limited to the actions of the relevant parties, their reasonable commercial expectations and their respective level of professionalism (including that of their advisers, if any).

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Dutch purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1.	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. All types seen, including working capital adjustment, cash-free debt-free, NAV, CAPEX adjustments.
2.	Is there a collar on the adjustment?	Collars are not common.
3.	Who prepares completion balance sheet?	In a sellers' market, usually prepared by the seller; in a buyers' market, usually prepared by the buyer.
4.	Is the balance sheet audited?	Usually.
5.	Is an earn-out common?	More common in transactions where the sellers continue to manage the target company after closing. Less common where seller is completely exiting. Used sometimes to bridge the valuation gap.
6.	Is a deposit common?	Not common.
7.	Is an escrow common?	Yes for the purpose of securing both purchase price adjustment and indemnification obligations of seller under representations and warranties.

8.	Is a break fee common?	Not common.
<b>Conditions Precedent</b>		
9.	Express Material Adverse Event (MAE) completion condition?	Uncommon.
10.	Is the MAE general or specific?	Both are seen.
11.	Quantification of MAE?	Not uncommon. Sometimes seen as a reference to sales or EBITDA.
<b>Covenants, Access</b>		
12.	Is a non-compete common? Do you use waterfall/blue pencil provisions?	More common in certain sectors and if sellers are individuals. Waterfall provisions uncommon.
13.	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14.	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15.	Broad access to books, records, management between sign and close?	Generally get this for private deals. NB: competition law issues around potential 'gun-jumping'.
16.	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Uncommon to update warranty disclosure. Notification of possible breach is seen. However, this has no effect on right to terminate agreement.
17.	Is a separate tax covenant/indemnity or tax deed common?	Almost universal.
<b>Representations and Warranties</b>		
18.	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but are often not quantified (other than specific warranties, e.g. contract, litigation value).
19.	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers growing. Often limited to actual knowledge and knowledge after due enquiry of a specified list of senior management.
20.	Is a warranty that there is no materially misleading/omitted information common?	Common.
21.	Is disclosure of data room common?	Common.
<b>Repetition of Representations and Warranties</b>		
22.	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition at completion common.
23.	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects common but often carve-out for fundamental representations which must be absolutely true.

24. Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. Uncommon.

### Limitations on Liability

25. What is the common cap amount (as a percentage of purchase price)? Common cap amount typically between 15%–30%. Title to shares almost always capped at amount of purchase price.
26. Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? Usually warranties only.
27. What are the common exceptions to the cap? Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.
28. Is a deductible or basket common? Deductible is usually resisted. A tipping basket is more common.
29. Is a *de minimis* common? Common.
30. How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)? General survival of 18–24 months common. Common to carve out key warranties (e.g. title, capitalisation, authority, tax, employment and environmental) as well as fraud.
31. Is warranty insurance common? Uncommon. Starting to see it in private equity deals.

### Reliance

32. Do financiers seek to rely on purchaser's due diligence reports? Not uncommon.

### Set-offs against Claims

33. Is a set-off against claims for tax benefits common? Common.
34. Insurance proceeds? Common for actually received.
35. Third party recoveries? Common for actually received.

### Damages, Knowledge

36. Obligation to mitigate damages? Required by law.
37. Exclusion of consequential damages? Common.
38. Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? Often silent.

## Dispute Resolution

39. Does local law allow for a choice of governing law? What is the common governing law? Yes. Common to have Dutch law if target is in The Netherlands.

40. Is litigation or arbitration more common? If arbitration, where? Litigation more common.

## Stamp Duty

41. If stamp duty is payable, is it normally shared? No stamp duty. Notarisation fees for transfer of shares in a limited liability company paid by buyer.

## 3.3 Formalities for Execution of Documents

### 3.3.1 Transfers of shares

See **3.4.1**.

### 3.3.2 Transfers of assets

See **3.4.2**.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

The transfer of registered shares and the transfer of a restricted right to the shares (e.g. a right of pledge) require the execution of a notarial deed before a Dutch civil law notary and must be evidenced by an entry in the company's shareholders' register. This obligation does not apply to NVs whose shares or share certificates are in bearer form or are officially listed on a regulated stock exchange.

### 3.4.2 Transfers of title to assets

Asset transactions, as long as no real estate is involved, generally do not require a separate notarial deed. However, particular care must be taken to ensure that all statutory transfer requirements for each individual category of assets are observed. Generally speaking, asset purchase- or business purchase agreements are more (technically) complex, due to the different transfer requirements.

## 3.5 Formalities for Mergers

A legal merger is effected by the execution of an instrument by the companies involved before a civil law notary. The Dutch Civil Code contains various conditions and requirements which must be satisfied, and which are designed to protect the rights of creditors and other third parties. The demerger procedure resembles, to a large extent, that of a legal merger. The most striking difference is that a demerger, unlike a legal merger, allows the acquisition of part of a business. None of the disadvantages of an asset transaction mentioned above apply to a demerger.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

When acquiring a business generating turnover in The Netherlands, Dutch and/or EU competition law may come into play, in particular the requirement to obtain prior merger control approval from the Dutch Authority for Consumers & Markets (ACM) or from the European Commission. In addition, the parties to a transaction should take account of the competition law risks of exchanging competitively sensitive information, as well the issue of 'gun-jumping', i.e. they should continue to act as competitors until the transaction is closed.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Dutch purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation	
1. Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory. Failure to notify, or implementing a transaction without prior approval, may lead to fines of up to 10% of worldwide turnover, to be imposed on the undertaking(s) acquiring control.
Notification Threshold and Timetable	
2. What is the notification threshold in The Netherlands?	1. Where all undertakings concerned generated an aggregate global turnover in the last calendar year of at least EUR150 million; and,
3. What is the timetable for clearance (in Phase I and Phase II review)?	2. At least two of the undertakings each generated a turnover in the last calendar year of at least EUR30 million in The Netherlands.
	Note that lower thresholds apply to certain providers of health care services.
	<i>Phase I:</i> 4 weeks. In practice, the ACM may clear a transaction before the end of the 4-week term if it is clear that the concentration does not raise any competition concerns. More complex transactions generally take longer because the ACM can 'stop the clock' by asking formal questions.
	<i>Phase II:</i> 13 weeks. In practice, the ACM's timetable often exceeds the 13-week term, because the ACM generally suspends this review period by asking formal questions.

Mergers, acquisitions and the creation of certain types of joint ventures that bring about a change of control (concentration) may be subject to merger control. Concentrations that meet Dutch notification thresholds are not allowed to be consummated until the intention to conduct the transaction has been notified and approved by the ACM. However, if the turnovers of the parties to a concentration meet the EU merger control thresholds, approval must be obtained from the European Commission rather than at national level under the 'one-stop shop' principle). Appendix A provides a summary of the EU merger control regime.

The ACM prohibits concentrations that significantly impede effective competition in the Dutch market (or part of it), in particular by creating or strengthening a dominant market position. If a transaction does not raise substantive competition concerns, the notification process with the ACM can formally be completed within four weeks of notification, but this can be longer in practice if the ACM requires more information for its assessment. If at the end of this first review period the ACM would conclude that a concentration might significantly impede competition, it will decide that an additional investigation phase is necessary. This means that a new (more detailed) notification would need to be submitted, for which the formal review period is another 13 weeks, but in practice this review typically takes longer.

Failure to notify a proposed concentration, or consummation of a notifiable concentration before the ACM has approved it, may lead to fines of up to 10% of a company's (group) turnover, to be imposed on the undertaking(s) that would acquire control if the transaction went ahead.

Non-competition covenants, which are directly related to, and necessary for, the realisation of a concentration, are regarded as ancillary to the concentration and fall outside the scope of the cartel prohibition. However, where non-competition covenants go beyond what is strictly necessary for the realisation of a concentration (e.g. duration, product scope and geographical scope), they may be caught by the cartel prohibition. The ACM follows the relevant notice of the European Commission to determine whether a non-competition covenant can be regarded as ancillary or not.<sup>1</sup> If both goodwill and knowhow are acquired, then non-competition clauses are generally justified for a period of up to three years; when goodwill but not knowhow is acquired, these will generally be justified for a period of up to two years. Non-competition covenants for a period of more than three years can be justified only under special circumstances.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

The exchange of competitively sensitive information between competitors may violate the cartel prohibition under Dutch and/or EU competition law. This will be assessed by the ACM in accordance with the guidelines of the European Commission on horizontal co-operation agreements. Parties to a concentration should also ensure that they continue to act as competitors until the transaction is closed, to avoid the risk of consummating a concentration before the ACM has approved it (gun-jumping). As a general rule, prior to closing, the parties should act as independent entities and not make any joint business decisions. Similarly, neither party should base its independent business decisions on competitively sensitive information of the other party. Appendix B provides an overview of the broad principles of information exchange and gun-jumping.

### 4.4 Anti-Bribery and Anti-Money Laundering

#### 4.4.1 Anti-bribery

##### ***Bribery involving public officials***

Under The Netherlands Criminal Code (CC), providing or offering a gift, a promise or a service, to a public official with the intent to make the official do or omit to do something in the course of his or her appointment is a criminal offence. Likewise, providing or offering a gift, a promise or a service, to a former government official as a reward for something the former public official did or omitted to do during his or her appointment is a criminal offence (Art. 177, CC).

The mirror image is also a criminal offence – accepting or demanding a gift, a promise or a service to do or omit something, whether against official duties or not by a public official. The same applies to the acceptance of or request/demand for a gift, a promise or a service by a former public official for something done or omitted in a previous position as public official (Art. 362, CC).

Generally, 'public official' is broad, covering anyone appointed by the public administration in a public appointment to carry out a government task. If a person is employed by an organisation which carries out government responsibilities under government control and oversight, he/she is a 'public official'. Whether the person is a 'public official' under employment law is not decisive.

The bribe (gift, promise or service) can be anything that represents value to the recipient. Examples from case law include providing a loan, a promise of certain favours, the provision of any tangible assets (cars, jewellery) or services (refurbishment of a personal home) etc.

<sup>1</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, *Official Journal*, C 11 of 14 January 2011.

***Bribery involving others (not public officials)***

It can also be a criminal offence to offer a gift, promise or service to a person other than a public official, in relation to any act or omission in the course of the discharge of his or her duties. This would be the case if the provider or offerer must reasonably understand that the other person will not disclose the gift, promise or service to his/her employer or principal.

Similarly, it is a criminal offence for someone to demand or accept a gift, promise or a service in relation to any act or omission in the discharge of his/her duties, if this is not disclosed - contrary to good faith - to his/her employer or principal.

Dutch case law confirms that it is not relevant in these situations whether the employee/agent has acted contrary to his or her official duties because of the bribe or whether the act/omission is irregular or not. It is equally irrelevant whether the employer/principal has suffered any adverse consequences. The key element is the failure to disclose the bribe to the employer/principal (contrary to good faith). Likewise, in the offering or giving of a bribe, the key element is the 'briber's' reasonable understanding that the recipient will not disclose the bribe.

**4.4.2 Anti-money laundering*****Criminal law***

The laundering of assets is a criminal offence. The offence consists in the concealing of the true nature of an asset, or its provenance, location, or the fact that it has been transferred or sold, or concealing its true ownership, as well as the acquisition, holding, transfer or use of an asset while knowing that that asset has been obtained through the commission of a criminal offence (Art. 420*bis*, CC).

With regard to 'knowing', accepting the reasonable chance that an asset has been acquired by a criminal offence without taking any measures to obtain more certainty about its provenance can constitute 'knowledge'.

There is a separate offence – the 'habitual laundering of assets' (Art. 420*ter*, CC).

In addition, it is a criminal offence to do the following whilst having reasonable cause to suspect that the asset has been obtained through a criminal act (Art. 420*quater*, CC).

- conceal the true nature of an asset (or its provenance or location; or the fact that it has been transferred or sold)
- conceal its true ownership, or
- acquire, hold, transfer or use the asset.

The concept of 'asset' here comprises tangible and intangible assets and property rights.

The criminal offence of asset laundering is independent of the criminal act through which the asset was obtained. This means that the offence of asset laundering can be committed by the mere holding of an asset with a reasonable suspicion that the asset was obtained through a criminal offence without knowledge of how, when and through what exact offence the asset was acquired.

***Anti-Money Laundering and Anti-Terrorist Financing Act***

The Anti-Money Laundering and Anti-Terrorist Financing Act 2008 (*Wet ter voorkoming van witwassen en financieren van terrorisme (Wwft)*) aims to limit opportunities to use apparently legitimate transactions for money laundering purposes, by imposing obligations on certain categories of businesses and professionals ('Wwft businesses'), including:

- financial institutions (including investment offices, exchange offices, insurers and insurance brokers, credit card companies etc.)



- casinos
- traders in assets of substantial value (cars, ships, jewellery, antiquities) and other traders
- professional service providers (lawyers, notaries, tax advisors, business consultants, accountants)
- real estate brokers
- trust service providers
- payment service providers.

### ***'Know-your-customer'***

In essence, the Wwft requires any of the above service providers to confirm the identity of their customer and (where the customer is a company) the natural person (s) who ultimately owns or controls the customer (ultimate beneficial owner). The extent to which service providers/companies must conduct know-your-customer (KYC) due diligence depends on the risk associated with the transaction. The Wwft has three levels of KYC due diligence:

- regular
- simplified, and
- 'enhanced'.

The simplified due diligence procedure applies in relation to transactions which carry a low risk of money laundering, such as where the customer is a Dutch government agency or a public company (or subsidiary), or where the nature and goal of the relationship with the client is immediately identifiable (e.g. in the case of life insurance, pensions etc.).

Regular KYC due diligence, on the other hand, aims to verify the identity of the customer, and to establish the nature and reasons for the business relationship with the customer. If companies are involved, the ultimate beneficial owner must be identified.

'Enhanced' KYC due diligence is required in transactions which carry a higher risk of money laundering: i.e. transactions where the customer is 'not present' or where customers are resident or established in any of the following countries:

Argentina, Aruba, Australia, Brazil, Canada, Curaçao, French Polynesia, Guernsey, Hong Kong, Japan, Jersey, the Isle of Man, Mayotte, Mexico, New Zealand, Russia, Singapore, Saint Martin, Saint Pierre and Miquelon, the United States, Wallis and Futuna, South Africa, and Switzerland.

Wwft businesses are required to have policies and procedures in place to undertake such KYC due diligence, as well as policies and procedures for recognising and reporting 'unusual transactions' (*ongebruikelijke transacties*), which must be reported to the Financial Intelligence Unit. The test for what constitutes an 'unusual transaction' hinges on so-called 'objective indicators' (e.g. cash payments in excess of EUR25,000 for traders in valuable assets) and 'subjective indicators' (whether the Wwft business has reasons to suspect money laundering or not).

For traders, the Wwft regulator is the Dutch Revenue Service.

## **4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation**

There are no exchange controls prohibiting or restricting payments to and from The Netherlands. Consequently, the transfer or repatriation of profits and capital gains to and from The Netherlands is entirely free. Acquisitions of Dutch companies or businesses are not subject to government approval or scrutiny, with the exception of acquisitions in several regulated sectors (banks, insurance companies and broadcasting corporations) which are subject to special rules for acquisitions.

#### 4.5.1 Import/export controls

Imports into and exports from The Netherlands (as with any other EU member state) are the subject of rules on the free movement of goods. Articles 34 to 37 of the EC Treaty provide that all measures that tend to restrict imports from or exports to other EU member states are prohibited. Such restrictions can be justified only in exceptional cases, e.g. for reasons of public security; the protection of the health and the lives of human beings, animals or plants; or the protection of industrial and commercial property.

The general rule is that any product that has been legally manufactured and marketed in another EU member state may be lawfully marketed in any other EU member state. Articles 34 to 37 of the Treaty have a direct effect in The Netherlands and can be invoked before the Dutch courts.

In terms of trade between the Netherlands and other EU member states, all customs duties have been abolished.

The common EU customs tariff rate applies to trade between The Netherlands and non-EU countries, and the European Commission's import and export regulations applicable to trade with non-EU countries must be observed. Depending on the country of origin or destination of a product or depending on the type of goods involved (e.g. military goods or 'dual use' goods that can be used both for civil and military purposes), import or export licences may be required. Additional controls exist for certain goods, such as livestock or chemicals.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

#### 5.1.1 Stamp duty

The Dutch tax system does not contain stamp duties or similar documentary taxes or charges. As such, the acquisition/transfer of shares in a Dutch company is not subject to stamp duties (or other similar taxes/charge relating to documents/registration of/formalities to do with documents)

#### 5.1.2 Corporate income tax

For corporate income tax purposes, acquired shares are generally carried in the tax books at cost price. If the shares qualify for the application of the Dutch participation exemption regime, all acquisition costs in relation to the acquired shareholding will not be tax-deductible and should be added to the fiscal cost price of the participation.

If a Dutch resident company acquires the full legal (including voting rights) and beneficial ownership of at least 95% of the nominal paid-up share capital of another Dutch resident company, both companies can, subject to certain conditions, form a fiscal unity and thus be treated as one taxpayer for Dutch corporate income tax purposes. Within a fiscal unity, the income and costs of the members are aggregated, so the mechanism can sometimes be used to achieve an efficient debt pushdown.

#### 5.1.3 Real estate transfer tax

The acquisition of a minimum of one-third of the outstanding shares (or a similar financial interest) in a company owning real estate may trigger the levy of Dutch real estate transfer tax (the statutory rate is 6%). This generally happens if the following two conditions are met at the level of the company in which the shares are transferred:

- the assets of the company consist (or have consisted in the preceding year):
  - of at least 50% real estate (including rights that qualify as real estate (e.g. economic ownership, financial lease), and
  - of at least 30% real estate within The Netherlands, and

- the purpose of the company is the exploitation of real estate owned by the company (i.e. at least 70% of the real estate owned should be destined for sale or rental).

Some specific transfer tax exemptions apply. For example, a transfer tax exemption could apply within the context of an internal reorganisation. An exemption may also apply if the acquisition or supply of immovable property is subject to VAT (see **5.1.4**).

#### 5.1.4 VAT

Transactions relating to shares or other participations in companies (e.g. acquisitions, the holding and sale of shares) only fall within the scope of VAT when they:

- are carried out as part of a commercial share-dealing activity
- involve direct or indirect involvement in the management of the company acquired, or
- constitute the direct, permanent and necessary extension of the taxable activity of the taxpayer concerned.

If an acquisition of shares (or a participation) falls within the scope of VAT, the costs attributable to the acquisition are regarded as general costs. The VAT incurred on those costs is deductible in accordance with the 'pro rata calculation method.'

## 5.2 Acquisition of Assets

### 5.2.1 Real estate transfer tax

The acquisition of Dutch immovable property, including the acquisition of the beneficial ownership in real estate, is subject to real estate transfer tax at a rate of 6%. The transfer tax is calculated on the purchase price or market value, whichever is higher. Legally, transfer tax is to be paid by the buyer, but it is customary for the parties to agree to who will bear the tax.

### 5.2.2 Corporate income tax

The basis for the amortisation or depreciation of acquired assets is the acquisition price. Acquired goodwill can be amortised for tax purposes at a maximum rate of 10% per annum. Other business assets can be depreciated at a maximum rate of 20% per annum.

Depreciation on buildings is allowed for tax purposes, but the tax book value of the building may not drop below:

- 100% of the WOZ-value<sup>2</sup> of the building if the building is used predominantly by a non-affiliated person or entity (e.g. buildings that are leased to third parties), or
- 50% of the WOZ-value of the building, in any other case (including when the building is intended for own use).

In an asset deal, any existing tax losses available for loss carry-forward remain with the transferring entity.

### 5.2.3 VAT

As a general rule, all supplies of goods and services are subject to VAT. Dutch VAT is due if transactions are (deemed to be) located in The Netherlands.

A transfer of assets will in principle be regarded as several distinct supplies of goods (and services), each of which is subject to VAT at the appropriate rate. However, if an asset deal qualifies as a

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<sup>2</sup> The WOZ-value of a building is an estimation of the fair market value and is determined by the Dutch municipal authorities.

transfer of a going concern (TOGC; or part of one), no VAT will be due upon the TOGC. An asset deal could qualify as a TOGC if:

- the assets constitute a whole or well-separated part of the business and are sold as a transfer of the business as a going concern
- only part of the business (assets) is sold, if it is capable of operating separately (e.g. a mere transfer of assets need not be sufficient to qualify as a TOGC; the assets transferred must be a distinct or well-separated part of the business).

Generally, if a Dutch business operation is transferred as part of an acquisition, the transfer will not be considered as a supply of services or goods and will therefore remain outside of the scope of Dutch VAT legislation. In that case, the acquiring company will inherit the VAT position of the transferring company in every respect.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of a share purchase, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the buyer therefore inherits all those rights, duties and liabilities by virtue of being the new owner–employer of former target company employees. If there is an integration of the target company's business with the buyer's business post-acquisition, this is likely to constitute an acquisition of assets or a business transfer, and the considerations below will be relevant.

#### 6.1.2 Acquisition of assets

The automatic transfer of employees on an asset sale takes effect under the EU Business Transfer Directive (Transfer of Undertakings Protection of Employment Directive/TUPE), as long as the asset sale comprises the sale of a business (or an identifiable part as described in TUPE). Employees of the seller's business have the right to refuse to transfer to the buyer, but their employment will then terminate by operation of law effective on the transfer date, and they will not be entitled to severance compensation if they exercise this right. Consequently, they will have no remedy against either the seller or buyer. An exception to this rule applies where the transfer involves or would involve a substantial change in working conditions which would be to the material detriment of the transferring employees.

Assuming employees do not exercise their right to object to the transfer, the buyer takes the place of the seller as employer and assumes liability for the transferring employees and their contractual rights provided that for debts and obligations accrued but unpaid before the transfer date, the seller and the buyer are jointly liable for the period of one year.

#### 6.1.3 Mergers

Mergers may generally qualify as acquisitions of assets, in which case the considerations at **6.1.2** apply.

#### 6.1.4 Transfer of business

When a company transfers all or a part of its business to another party, the contracts of all employees working in that business are transferred to the buyer by operation of law.

The Netherlands has implemented the EU Business Transfer Directive. This means that in the event of a transfer of a business (acquisition of assets) or a part of it, the employees involved will, by operation of law (automatically) transfer to the buyer. As a result, the employees become employees of the buyer and their conditions of employment remain unchanged. All rights and obligations concerning the transferring employees will transfer to the buyer. It is therefore not possible to exclude all or some employees in an asset transaction. During the year after the acquisition, the seller and the

buyer are jointly and severally liable for the fulfilment of those obligations under the employment contracts originating prior to the transfer.

## 6.2 Approval or Consultation Requirements

### 6.2.1 Merger code

The Merger Code (a code of conduct issued by the Dutch Socio-Economic Council) is designed to provide some employment protection to employees of both listed and unlisted companies and businesses of any legal form that are the subject of acquisition negotiations. The relevant provisions of the Merger Code are applicable if, as a result of the proposed acquisition, a third party will acquire control over the target company or business and one of the companies or businesses involved employs 50 or more employees in The Netherlands.

The Merger Code is broad in its application. It may, for instance, also apply to some joint ventures and transactions between a buyer and a seller who are both located outside The Netherlands, unless the proposed acquisition is part of a transaction in which the Dutch element is relatively insignificant.

The Merger Code may also be applicable to enterprises with fewer than 50 employees by virtue of a collective labour agreement governing the employment conditions in the industry in which either of the parties to the acquisition operate.

If the Merger Code is found to be applicable, the relevant trade unions and the Secretariat of the Socio-Economic Council must be notified of the proposed transaction, since at that point the views of the trade unions may (still) be substantially influential on whether or not the transaction will be implemented, and if it is to be implemented, on the manner in which it is implemented.

The parties to the transaction must provide the trade unions with background information on the transaction, which must include the buyer's intention and policy towards the employees to be pursued after the transaction, along with information on any anticipated social, economic or legal consequences of the transaction. The trade unions must be given an opportunity to express their opinions on the transaction to the management from the employees' perspective.

Note, however, that the Merger Code imposes on the respective seller only a duty to inform: any decisions taken by the restructured companies are not dependent on the trade unions' or the Social Economic Council's approval.

### 6.2.2 Works Councils

Any proposed acquisition of a company or business which employs 50 or more employees (an 'entrepreneur') must not only be communicated to and discussed with relevant trade unions, but must also be presented to the works councils of the buyer and/or seller to seek their advice on the proposed transaction.

The request for advice must be in writing and must be presented to the works council at a stage when any response from the Works Council could still have an impact on the decision to be taken. The request for advice must be accompanied by grounds for the contemplated transaction and any anticipated consequences that may affect the workforce.

If the advice of the works council is not followed, then the entrepreneur must suspend execution of the proposed transaction for one month. During this period, the works council may appeal the proposed decision with the Enterprise Chamber of the Amsterdam Court of Appeals (the Court). The Court will determine whether the entrepreneur could reasonably have reached its decision, had it assessed all interests involved. If the Court finds that the entrepreneur could not reasonably have come to its decision, it can issue an order requiring the entrepreneur to revoke the decision in whole or in part to prohibit further implementation of the transaction and to reverse any measures already taken.

Any entrepreneur must take great care to comply with the procedural rules set out in the Works Council Act. In general, it will be prudent to seek the works council's advice promptly where an obligation exists to involve it.

### 6.3 Protection against Dismissal

A business transfer in itself is not a valid reason for terminating the employment contract of the transferred employees. Dismissals in connection with the business transfer (both for the transferor if dismissals take place before the business transfer and for the acquirer if dismissals take place after the business transfer) are only allowed for an economic, technical or organisational reason requiring a reduction in workforce (ETO-reasons) or for a serious cause. Lacking that sufficient reason for justifying dismissals in connection with the business transfer, the employer faces potential employee's claims for abusive dismissal. In that case the employer must prove that the employees have been dismissed for ETO-reasons or for a serious cause.

Transferred employees who are employee representatives in the Works Council or health and safety committees (both elected (effective or substitute) member and non-elected candidates to that bodies), or trade union delegates, continue to enjoy the special protection against dismissal they benefited from before the business transfer.

# People's Republic of China

## 1.1 Overview

Since the People's Republic of China (PRC) joined the World Trade Organization (WTO) in 2001, the PRC foreign investment regime has evolved considerably. Developments in mergers and acquisitions by foreign investors are particularly prominent, including:

- further delegation by the Ministry of Commerce (MOFCOM) of its authority to approve foreign investment projects to its local counterparts
- the introduction of partnership as an investment vehicle for foreign investors, and
- tightened scrutiny of transactions, including indirect offshore transactions, from the PRC tax, exchange control, merger control and national security perspectives.

While China is currently widely regarded as one of the most promising jurisdictions in the world for foreign investment, there remain various legal hurdles and practical difficulties for international investors tapping into the potential of the Chinese market.

Lack of transparency and bureaucracy are continuing concerns, complicated by China's continuing reluctance to allow foreign control of, or even participation in, key industries or well-known brands.

The landscape for foreign investment is also likely to change significantly when the draft Foreign Investment Law is promulgated.

The topics covered here primarily take the foreign buyer's point of view (and therefore does not seek to cover issues in M&A initiated by domestic PRC companies; and touches only marginally on issues to be considered and resolved primarily by sellers).

For the purposes of this chapter, the terms 'PRC' or 'China' do not include Hong Kong, Macau or Taiwan.

## 1.2 General Legal Framework

### 1.2.1 Current legal framework

The existing legal framework governing foreign-invested enterprises (FIEs), including the:

- Sino-Foreign Equity Joint Venture Law
- Sino-Foreign Cooperative Joint Venture Law, and
- the Law on Wholly Foreign-Owned Enterprises.

—as well as their respective implementing regulations (collectively, the FIE Laws), has been in place since as early as 1979 and has governed the establishment and operation of FIEs since then. The Company Law of the People's Republic of China also includes certain provisions that apply to FIEs in the form of a company. The primary governing legislation under the Chinese regulatory framework for mergers and acquisitions involving foreign investors is the Regulations on the Merger and Acquisition of Domestic Enterprises by Foreign Investors (Foreign M&A Regulations), which was last revised in June 2009 and is supplemented by a myriad of departmental rules governing specific industries or target groups. In addition, the Several Provisions for Change of Investors' Equities in Foreign Investment Enterprises apply if the target company is an FIE.

The procedures for an acquisition of a PRC target company by a foreign investor may vary depending on the location and the ownership structure of the Chinese party. In general, the acquisition will have to be approved by MOFCOM or its local counterpart depending on the size and business of the target company and other factors. For project-based target companies such as manufacturing enterprises, verification by the National Development and Reform Commission (NDRC) or its local counterpart is additionally required before MOFCOM approval. After approval, the transaction must be registered

with the local bureau of the State Administration for Industry and Commerce (SAIC and its local bureau AIC) within one month.

The general approval authority rules described vary in particular cases. The central government has promulgated a number of individual regulations, notices and policies with special rules for determining and delegating the approval authority for projects and transactions in certain sectors or industries. For example, sector-specific authorities, such as the China Banking Regulatory Commission and the China Securities and Regulatory Commission are the primary regulator for their respective industries. Local authorities often publish individual rules to further refine delegation of approval powers within their localities. Accordingly the precise approval authority for any given project, company or transaction can only be determined after careful consultation of all of the relevant rules.

### 1.2.2 Draft foreign investment law

On 19 January 2015, MOFCOM released a draft of a new foreign investment law for public comment. The draft law is meant to replace the existing FIE Laws. When passed, this law would stand as a historic event in China's reform and liberalisation. The draft law aims to establish a framework for the regulation and monitoring of foreign investment in the areas of market entry and ongoing compliance, while leaving the corporate form and governance issues to other legislation such as the Company Law.

Compared to the FIE Laws, the draft law adopts a much broader definition of 'foreign investment' based on a 'substance over form' principle. The draft law proposes a complete overhaul of the current pre-establishment approval regime governing foreign investment by replacing it with a market entry review and an information-reporting regime. A Negative List replicating the current practice in China (Shanghai) Pilot Free Trade Zone would replace the decades-old case-by-case examination and approval system. An investor would only be required to obtain market-entry approval if the investment is in a sector on the Negative List. Otherwise, the investor could simply report the establishment of or investment in the FIE. Another notable development is the codification of national security review as formal law.

Many hurdles need to be cleared and a consensus built before the draft law can be presented to the Chinese legislature for its first formal legislative review. The whole process may take up to two years or more.

## 1.3 Corporate Entities

Traditionally, foreign investors usually establish a presence in the PRC via one or more of the following legal forms:

- representative office
- Sino-Foreign joint venture (JV)
- Wholly foreign-owned enterprise (WFOE), or
- Foreign-invested joint stock limited company (FISC).

The latest option, available only since 2010, is the foreign-invested partnership (FIP). The more flexible FIP form is now starting to replace the foreign-invested venture capital enterprise (a form of a PRC vehicle used by some international investors to acquire Chinese targets), particularly with PRC investment funds aimed at foreign investors.

A JV or a WFOE takes the form of a limited liability company (LLC) that does not issue shares but has 'registered capital' and 'total investment' (paid-in capital plus permitted borrowing), which are both approved by the PRC government. FISCs, currently less common in China, are share-issuing companies similar in legal form to Western-style corporations. An FIP may take the form of a limited liability partnership, which is akin to its Western-style counterparts.



### 1.3.1 Sino-Foreign joint ventures

A JV is typically a non-share-issuing, limited liability company formed between one or more non-PRC entities/individuals (including Hong Kong, Macau and Taiwan entities/individuals) and one or more Chinese entities. A JV can be either an Equity Joint Venture (EJV) or a Cooperative Joint Venture (CJV), which are typically structurally similar in most respects. However, JVs have fixed terms of operations which can be extended with approval from the relevant approval authority.

JVs are popular investment vehicles either for foreign investors less familiar with investment in China that would prefer a local partner with connections to help handle local issues, or for those investing in certain industries that require the participation (or even control) of a Chinese partner under the current PRC legal regime.

Most investors who establish JVs in China choose to set up EJVs. Investors typically would adopt a CJV structure if they specifically desire to adopt a non-legal person structure, need more freedom in configuring their profit distribution ratios, or prefer to be able to recover their investments early under certain circumstances. (These are the main benefits of a CJV structure not available to EJVs.)

### 1.3.2 Wholly foreign-owned enterprises

A WFOE is a limited liability company 100%-owned by one or more foreign entities/individuals (and thus would include a joint venture between two foreign investors), although most WFOEs only have one investor. Like JVs, WFOEs have equity in the form of registered capital not divided into shares, and no shares are issued, and have fixed terms of operations which can be extended with approval from the relevant approval authority.

WFOEs are the most popular Chinese investment vehicles, especially favoured by those foreign investors who are more familiar with investment in China. Because it is wholly-foreign owned, a WFOE usually enjoys greater flexibility in management and control, and avoids the complications of dealing with Chinese partners. On the other hand, a WFOE is more stringently restricted in the types of business it may engage in, especially in certain sensitive industries.

### 1.3.3 Foreign-invested joint stock limited companies

Unlike JVs or WFOEs, the shareholding of the investors in a FISC is in the form of issued shares, similar to Western-style corporations. A FISC is accordingly the only form of FIE that can be directly listed on PRC stock exchanges. Other forms of FIEs would have to be converted into FISCs before they could be listed in China. Unlike a JV or a WFOE, a FISC can continue to operate indefinitely.

The formation requirements for a FISC are much more stringent than those for JVs or WFOEs:

- the sponsors are subject to additional restrictions and qualifications; the foreign equity holding in a FISC must be at least 25%
- a FISC must have a minimum registered capital of RMB30 million, and
- approval procedures to establish FISCs are generally more burdensome.

### 1.3.4 Foreign-invested partnerships

FIPs combines the features of JVs and WFOEs, and can be partly or wholly owned by foreign investors, with the partners having limited and/or unlimited liability towards third parties.

One advantage of using a FIP is that, while a separate legal person, it is transparent for PRC tax purposes and so can offer more opportunities for tax planning. Additionally, establishing a FIP does not require an application to MOFCOM or its local counterpart: it can be established directly by submitting the requisite documents to the competent AIC.

## 2. Acquisition Methods

A foreign investor wishing to acquire or increase its equity in a PRC target company would commonly do so in one of the following ways:

- direct acquisition, where the foreign investor buys all or part of the equity of the PRC target company or subscribes for an increase in capital of the target directly
- offshore/indirect acquisition, where the foreign investor acquires or increases equity of the PRC target company via the offshore purchase of or subscription for an increase in equity in the target's foreign parent(s), or
- asset acquisition, where a foreign investor, using a new FIE or an existing FIE as the acquiring vehicle, directly buys some or all of the business and assets of the PRC target company.

### 2.1 Direct Acquisition of Shares

A direct acquisition will take place in the PRC and will therefore be subject to full PRC approval requirements, which may be time-consuming and involve government discretion, i.e. the PRC authorities may withhold approval if they perceive problems with the transaction.

The foreign buyer in a direct share acquisition generally assumes all existing or contingent obligations and liabilities of, and restrictions applicable to, the PRC target company in proportion to its equity in the target, unless explicitly carved out or excluded before or during the transaction.

### 2.2 Offshore/Indirect Acquisition of Shares

This option is available only if the PRC target companies have foreign investors. An offshore acquisition takes place in the offshore company's jurisdiction of incorporation and is generally not subject to PRC jurisdiction and review, except in certain circumstances under the PRC's antitrust and national security review regimes and PRC tax disclosures. This might change with the promulgation of the draft Foreign Investment Law which seeks to require the approval of MOFCOM or its local counterpart for certain types of offshore acquisition where the actual control of a domestic enterprise is transferred to a foreign investor. In addition, if the offshore company's ultimate shareholders are PRC nationals or entities, certain PRC filings should have been made with the PRC State Administration of Foreign Exchange (SAFE) which should be reviewed during due diligence.

The foreign buyer in an indirect share acquisition generally assumes all the existing or contingent obligations and liabilities of, and restrictions applicable to, the PRC target company via the target's parent company, unless explicitly carved out or excluded before or during the transaction.

### 2.3 Acquisition of Assets

Asset acquisitions are subject to PRC jurisdiction and relevant PRC approval requirements if the target is a non-FIE. Where the target is an FIE, although generally an asset acquisition is not subject to government approval, local practice may vary and in some localities the approval authority may insist that an asset acquisition be submitted for approval. In an asset transaction, any existing obligations and liabilities of the target, or restrictions on it, generally remain the target's sole responsibility.

### 2.4 State-Owned Interests and Special Types of Acquisition

The Law of the People's Republic of China on the State-owned Assets of Enterprises, passed in October 2008, was a reminder of how significant state-owned enterprises (SOEs) are in the Chinese national economy. It remains the Chinese government's objective to spin off SOEs in less sensitive sectors, particularly SOEs in poor financial shape. Since early 2003, foreign investors have been allowed to acquire domestic creditors' rights (debts) in the target SOE and thereby qualify for the opportunity to later convert such debts into equity in the company (similar to a convertible bond). The normal means of direct equity or asset acquisition applicable to regular companies outlined above will

also apply, with certain special rules and restrictions. Such acquisitions could also raise other issues, such as state-asset valuations and employee resettlement issues.

## 2.5 Mergers

Western-style mergers between two or more companies are possible but are rarely seen in the PRC. Current PRC statutory mechanisms recognise two means of mergers: a merger by absorption and a merger by new establishment. A merger by absorption involves one company absorbing another, after which the absorbed company is dissolved and its registered capital and assets are merged into the surviving entity. In a merger by new establishment, both pre-merger companies are dissolved and a new company is established, holding an aggregate of the pre-merger companies' assets and registered capital. Generally, the post-merger entity would be a complete successor to the pre-merger entities, that is, it would assume all rights and liabilities of those pre-merger entities. But creditors of the participating companies may opt to have their claims repaid in full before the completion of the merger.

Cross-border mergers are currently unavailable under PRC law, i.e. it is not possible to directly merge a foreign entity with a domestic company (including FIEs). For foreign investors, the only permissible forms of mergers in China are between FIEs and FIEs, or between FIEs and domestic companies. To effect these mergers, the FIE must be fully capitalised and must have started operations.

## 3. Negotiation, Signing and Closing

Although there is a concept of pre-contractual obligations under the PRC Contract Law, it is not commonly seen in practice, especially in the context of M&A transactions involving foreign investors. Usually a non-binding MOU/term sheet will be entered into first, with only certain provisions such as confidentiality and exclusivity binding on the parties. In any event, as long as the parties act in good faith, pre-contractual obligations would not arise.

### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Chinese purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. All types seen, including working capital adjustment, cash-free, debt-free, NAV adjustments. There are regulatory restrictions for PRC onshore deals, because MOFCOM and/or SAFE may not accept price adjustment in the purchase agreement which would make the mechanism not feasible in practice.
2	Is there a collar on the adjustment?	Collars are not common. May be required where public companies are involved.
3	Who prepares completion balance sheet?	Usually prepared by target company.
4	Is the balance sheet audited?	Not necessarily.

5	Is an earn-out common?	More common in private equity transactions where sellers continue to manage target company after closing. Less common where seller is completely exiting. Earn-outs commonly capped. Potential difficulties in implementing earn-out provisions in onshore acquisitions given the requirement for foreign investor to pay in full the purchase price within one year of issuance of the target's updated business licence.
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6	Is a deposit common?	Not common.
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7	Is an escrow common?	Commonly used by private equity investors and strategic buyers. If the Foreign M&A Regulations apply, purchase price (including the escrow amount) must be fully settled within one year after closing, unless otherwise approved.
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8	Is a break fee common?	Uncommon.
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#### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Uncommon, typically only available where there is a long period before execution and completion, or a foreign seller.
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10	Is the MAE general or specific?	Both seen.
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11	Quantification of MAE?	Uncommon.
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#### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, but not from private equity sellers. Waterfall provisions uncommon.
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13	Non-solicit (of employees)?	Common (in conjunction with non-compete).
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14	Non-solicit (of customers)?	Common (in conjunction with non-compete).
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15	Broad access to books, records, management between sign and close?	Generally get this for private deals.
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16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules is common but limited to things like list of contracts. Notification of possible breach is common. In case of material breach, right to terminate. After the purchase agreement is approved, any further updates of that agreement, if constituting material changes, will need to be approved again by the original approval authority before becoming effective in China.
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17	Is a separate tax covenant/indemnity or tax deed common?	Becoming increasingly common.
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## Representations and Warranties

18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but often not quantified (other than specific warranties e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are growing. Often limited to the actual knowledge and due enquiry of a specified list of senior management.
20	Is a warranty that there is no materially misleading/omitted information common?	Common.
21	Is disclosure of data room common?	Becoming more common.

## Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates not very common.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects is common but often carve-out for fundamental representations which must be absolutely true.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.

## Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Buyer will ask for 100% but possible to negotiate down. Ranges from 10%–100%.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Both seen regularly.
27	What are the common exceptions to the cap?	Key warranties often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.
28	Is a deductible or basket common?	Becoming more accepted in market.
29	Is a <i>de minimis</i> common?	Becoming more common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–24 months common. Common to carve out fraud. Tax is commonly longer than general warranties.
31	Is warranty insurance common?	Uncommon but has been used in private equity exits.

**Reliance**

- |    |  |                       |
|----|--|-----------------------|
| 32 | Do financiers seek to rely on purchaser's due diligence reports? | Becoming more common. |
|----|--|-----------------------|

**Set-offs against Claims**

- |    |  |                               |
|----|--|-------------------------------|
| 33 | Is a set off against claims for tax benefits common? | Not commonly seen.            |
| 34 | Insurance proceeds?                                  | Common for actually received. |
| 35 | Third party recoveries?                              | Common for actually received. |

**Damages, Knowledge**

- |    |  |                                       |
|----|--|---------------------------------------|
| 36 | Obligation to mitigate damages?  | Not usually express. Required by law. |
| 37 | Exclusion of consequential damages?  | Quite common.                         |
| 38 | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? | Often silent.                         |

**Dispute Resolution**

- |    |   |  |
|----|---|--|
| 39 | Does local law allow for a choice of governing law? What is the common governing law? | PRC law mandatory for certain types of agreements (e.g. purchase agreement for acquisition of pure domestic company). Otherwise HK or English law more common. |
| 40 | Is litigation or arbitration more common? If arbitration, where?                      | Arbitration is more common. Hong Kong predominately chosen but will typically carve-out court or administrative action (e.g. injunction).                      |

**Stamp Duty**

- |    |  |  |
|----|--|--|
| 41 | If stamp duty is payable, is it normally shared? | An equity/share/asset purchase agreement is subject to stamp duty in the amount of 0.05% of the purchase price (for each party). It is common for stamp duty to be equally shared. |
|----|--|--|

**3.2 Formalities for Execution of Documents****3.2.1 Transfers of shares**

The formalities for execution of documents in an indirect equity transfer are subject to the requirements under the laws of the place of incorporation of the offshore target company and the governing law of the purchase agreement.

Parties to a direct equity transfer transaction must enter into an agreement to transfer or subscribe for the target's registered capital. This equity transfer or subscription agreement must be governed by PRC law and will be reviewed by the approval authority (MOFCOM or its local counterpart).

The target's articles of association (and the JV contract or shareholders' agreement, for a JV or a WFOE with multiple investors) will have to be amended or restated to reflect the changes. Where the transaction converts the target into a JV or a WFOE with multiple investors, a new joint venture contract or shareholders' agreement is needed. The amendments or new corporate documents are also reviewed by the approval authority along with the equity transfer or subscription agreement.

Other documentation required generally includes a unanimous board resolution of the target, consent from existing co-investors in the target and waiver of their pre-emptive rights to buy the equity transferred, or a unanimous shareholders' resolution in case of acquisition of domestic LLCs. The approval authority may also require the parties to submit other documents for its review, such as bank letters evidencing the buyer's financial soundness, board resolutions of the parties approving the equity sale, constitutional documents of the parties or other contracts or documents referred to in the transaction documents.

Under applicable rules and prevailing practice, all documents submitted for review and approval need to be in Chinese (with translations of essential documents from other jurisdictions). Officials can refuse to review documents not available in Chinese, delaying the approval process. The Foreign M&A Regulations require copies of the foreign investor's constituent documents to be legalised or authenticated, and this may also be required for other documents in practice (e.g. appointments of directors). Local practice and individual reviewing officials often require certified translations to be provided, though this is not legally required.

### 3.2.2 Transfers of assets

The parties to an asset transfer should enter into an appropriate asset transfer agreement for the primary transaction. Depending on the nature of the transaction and the approval requirements, other documentation required could include a resolution of the seller of the assets approving the sale, notification to creditors and staffing plans.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

#### ***Indirect acquisitions***

As an indirect acquisition is conducted offshore by acquiring equity in an offshore entity, PRC authorities generally have no jurisdiction over the transaction and the transaction will, by and large, require no PRC approval, except for the antitrust review and national security review procedures summarised below. Consequent changes to the company name, legal representative, directors, etc. of the PRC target company shall be subject to approval of and/or registration with the PRC authorities.

#### ***Direct acquisitions***

Under PRC law, in a direct equity transfer transaction where the target is an LLC and has two or more shareholders, consents to the transaction are legally required from all co-investors of the target. These co-investors have pre-emptive rights to buy any equity offered for sale by the selling investor. These rights must be waived before the equity can be sold to a third party.

Transactions involving transfer of the registered capital of an existing FIE or conversion of a domestic invested company into an FIE via a direct equity transfer would require approval and registration. MOFCOM and/or its local counterparts are authorised to examine and approve transactions involving such foreign investments in domestic companies and FIEs (unless regulations otherwise specify, often where the target companies are in special industries). The SAIC and its local counterparts carry out registration procedures once the proposed transaction has been approved.

An application should be filed with the target FIE's original approval authority. If the target is currently not an FIE, then the application should be filed with MOFCOM or its counterpart, depending on the size of the total investment and industry involved.

In general, if the target is not an existing FIE, the parties must have the value of the equity appraised before the transfer. Prices manifestly lower than the appraisal result are forbidden.

Upon receipt of all necessary documents, the approval authority (MOFCOM or its local counterpart) will review the substance of their Chinese versions, and may ask for changes to terms it considers inappropriate. The parties may need to negotiate with the approval authority if they object to those changes.

A number of factors (e.g. transaction size, locality, approval level, industry, complexity and sensitivity) can significantly affect the time required for approval of a given transaction, which can range from just a few days or weeks to more than a year.

On approval of the acquisition by the approval authority, an official approval letter will be issued, followed by a new or updated certificate of approval of the target company. The purchase agreement shall become effective upon the approval of the approval authority.

### ***Special procedures for state-owned unlisted equity***

If a foreign investor is buying state-owned equity (other than in financial enterprises or listed companies) and the target is to be reorganised as an FIE, special procedures must be followed.

The seller will have to submit a reorganisation plan to the relevant government authorities for approval. The seller must also appoint a qualified institution to carry out an asset appraisal.

Subsequently, approval procedures for the FIE are then carried out on the strength of the approval documents for the reorganisation plan and the acquisition agreement.

The State-Owned Assets Supervision and Administration Commission (SASAC) and the Ministry of Finance require transfers of state-owned equity (other than in financial enterprises or listed companies) to be carried out at one of China's property rights exchanges, unless laws and regulations provide otherwise. The goal is to increase transparency and stem losses of state assets from sales by corrupt officials at well under actual value.

Under the rules, sellers must make a public announcement through a property rights exchange on the equity they propose to sell. If more than one prospective buyer emerges during the prescribed notice period, the equity must be sold by means of an auction or tendering process. The main problem with this system is, of course, that foreign investors who have put a lot of time and resources into negotiating an acquisition may find themselves competing with other bidders in an auction or tendering situation near the end of the process.

### ***Registration process***

Following approval of the transaction, the target company must file with the local AIC an amendment of any existing registration particulars affected by the transaction: e.g. company name, business scope, investor, amount of total investment/registered capital, and principal officers and directors. The local AIC will issue an updated business licence to the target company. The legal title of the foreign investor to the acquired equity interest shall be evidenced by the completion of the registration with the local AIC.

#### **3.3.2 Transfers of title to assets**

A foreign investor which wishes to acquire assets, rather than equity, must have a registered presence in the PRC. This could be an existing FIE in China or an FIE newly established for the purpose of acquiring and operating the purchased assets. The establishment of any new FIE must be approved.

A domestic company selling its assets to a buyer should notify its creditors and make a public announcement in a newspaper at the provincial level or above (with national circulation), at least 15 days before applying to the approval authority to approve the asset sale.

A seller of assets generally remains responsible for its debts and liabilities. But the seller may make an agreement with the buyer and other creditors on the disposal of debts, as long as the agreement will not harm third-party rights. That agreement should be submitted to the approval authority as part of the application documents.

Apart from approval for establishment of a new FIE, transfers of certain assets (such as those listed below) require additional approvals.



- When all of the assets, or the main assets, of a state-owned enterprise or a company with state-owned equity are sold to a foreign investor for the establishment of an FIE, the assets must be appraised and the appraisal results approved or registered. The approved or registered appraisal results form the basis for the transaction price. Also, a reorganisation plan and the acquisition agreement must be approved. In some circumstances, the acquisition agreement may be approved by the parent company rather than government authorities
- Other transfers of state-owned assets must also be appraised in accordance with the state-owned asset appraisal regulations
- If the transferred assets involve certain tax-exempt equipment still under customs supervision and control, the customs authorities must approve release of the customs supervision of the asset (normally involving retroactive payment of taxes and duties exempted or reduced)
- If the transferred assets involve certain types of intellectual property rights (e.g. patents and trade marks) or technology or know-how subject to the PRC technology import/export administrative regime, separate approvals/formalities may be required.

Particular care must be taken if the asset transfer involves certain special industries in which foreign participation is restricted. While the asset transfer as such may not need approval, licences needed to operate in those sectors cannot be transferred, so the buying FIE must apply for its own licences before it can make use of the assets.

For the transfer of certain categories of assets, such as real property, automobiles, etc., additional registration formalities need to be conducted for the completion of transfer of legal title. For the transfer of employees and contracts, consents of the transferring employees and consents of/notification to the relevant counterparties to the transferring contracts may also be required.

### 3.3.3 Formalities for mergers

Mergers of two or more FIEs should generally be approved by the original approval authority of those FIEs. Where the merger involves more than one approval authority, it should be approved by the approval authority with jurisdiction over the post-merger FIE. After approval of the merger, registration procedures should be carried out with the competent local AIC. Detailed formalities for mergers are similar to those applicable to direct equity acquisitions discussed above.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Pursuant to the 2008 Anti-Monopoly Law (the AML), the State Council, MOFCOM, the NDRC and the SAIC have promulgated various regulations clarifying how the AML will be applied and how various practices will be scrutinised.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical PRC purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

#### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
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## Timetable

2	In practice, what is the timetable for clearance (in first phase and second phase review)?	<p>Clearances within Phase 1 are rare. However, MOFCOM has recently introduced a simplified procedure (in February 2014) with reduced timelines. The MOFCOM has indicated that it aims to clear transactions which qualify for the simplified procedure within Phase 1, and to date all notified simplified transactions have been approved within Phase 1.</p> <p>MOFCOM officials have stated that the simplified procedure could see 60% of all notified transactions cleared within 30 days. However, there are no actual guarantees as to timing.</p>
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Any transaction resulting in a party acquiring control or decisive influence (a 'concentration') must be reported for clearance to MOFCOM's Anti-Monopoly Bureau if the following thresholds are met:

- all participating business operators' combined worldwide revenue in the previous accounting year is over RMB10 billion, and at least two business operators have PRC revenue over RMB400 million each, or
- all participating business operators' combined PRC revenue in the previous accounting year is over RMB2 billion, and at least two business operators have PRC revenue over RMB400 million each.

MOFCOM has discretion to investigate any transaction that fails to meet the thresholds, but has not yet exercised this discretion.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Gun-jumping arises where parties to a proposed transaction integrate their business activities prematurely (prior to obtaining approval from the competition authorities). The parties should not take steps prematurely to:

- acquire or influence the commercial behaviour of the other company
- exchange competitively sensitive information, or
- integrate the acquiring target into their business activities.

See Appendix B for more information on the broad principles of information exchange and 'gun-jumping'.

### 4.4 Anti-Bribery and Anti-Corruption

The PRC's anti-corruption laws, regulations, guidance, and policies generally:

- prohibit bribery, graft, embezzlement and other forms of corruption in political, governmental, and commercial contexts
- impose penalties on both bribe recipients and bribe givers (with the focus in a given enforcement action depending very much on the specific circumstances of the situation), and
- limit the circumstances under which gifts and/or benefits with nominal value may be provided to PRC officials and/or to market participants including their employees.

The penalties for givers and/or recipients of bribes or gifts/benefits include fines, confiscation of illegal gains, confiscation of property, being banned from government bidding, and in extreme cases, imprisonment or the death penalty.

'Official bribery' is a criminal offence in the PRC, and involves bribes to a PRC government agency or its personnel, which is defined broadly as anyone who is engaged in public service (e.g.: personnel working at state organs, state-owned enterprises, institutions, and people's organisations, and even persons appointed by those personnel in certain circumstances). In contrast, 'commercial bribery' can be either a criminal offence or an administrative violation, and involves the giving or receiving of bribes or improper benefits between and among market participants and their employees.

The primary pieces of legislation include the:

- Criminal Law of the PRC, effective from 1 July 1979 (as amended)
- Anti-Unfair Competition Law of the PRC (1994), and
- Interim Provisions on the Prohibition against Commercial Bribery Acts (1995).

The Criminal Law has been recently revised to include bribery of foreign public officials (i.e. the officials of a non-Chinese country or of an international organisation) in a commercial context.

The application of the PRC's criminal, civil, and administrative regulatory regimes depends upon the magnitude and underlying circumstances of a situation involving corruption and/or bribery. Generally speaking, investigation of a suspected commercial bribery situation will commence as a non-criminal action. However, if the magnitude of the situation is determined to be significant, the investigating authority has the power to turn the matter over for handling by those PRC government bureaus which are in charge of investigation and enforcement of criminal matters.

The SAIC and its local counterparts<sup>1</sup> across China are the authorities responsible for enforcing the AUCL. AIC focus their enforcement efforts on those areas which are likely to have a serious impact on people's livelihood or which would affect the market economy. These include construction, land transfers, assets transfers, sale/purchase of medical/pharmaceutical products and government procurement. Other industries which have received close scrutiny from the AIC include insurance, securities and futures, banking, publishing, sports, telecommunications, wine and spirits, power generation, quality inspection and environmental protection. It is worth noting that any commercial bribery administrative penalty imposed by AIC will become public information, as a result of a new regulation which became effective on 1 October 2014 (i.e. Interim Regulations on Enterprise Information Publicity), which requires both the penalty-imposing AIC as well as the company being punished to publicise the penalty information on specified online platforms within a specified period.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

### 4.5.1 Exchange controls

China's national currency, the RMB, is not freely convertible into other currencies. Nevertheless, China has introduced a form of current account convertibility, under which joint ventures may purchase foreign exchange for current account expenditures without the necessity of obtaining government approval. China also permits the conversion of RMB into foreign exchange for remittances of after-tax profits or dividends to foreign investors in equity joint ventures. Foreign exchange remittances and receipts must be cleared through authorised banks designated to handle foreign exchange transactions. Instead of government approval for foreign exchange remittances and receipts, the designated banks examine the documentation for the underlying transaction to ensure that the proposed payment or receipt qualifies as a current account item. Joint ventures also have access to the inter-bank market for the purchase and sale of foreign exchange through the designated banks.

Government approval is still required for the purchase and remittance of foreign exchange for certain capital account transactions (generally, items of a non-trade, nonrecurring nature, such as investment in China, real estate purchases, repayment of principal of foreign currency loans and contributions to

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<sup>1</sup> SAIC local counterparts are under reform at the moment, to be merged with the local food and drug administration, quality and technology supervision bureau and/or price bureau. The new local agency after the reform will be named the 'market supervision administration'. The reform has taken effect in a small number of places, e.g. district level AICs in Shanghai.

registered capital). The general trend is to reduce government approval and some capital account transactions can now be processed by authorised banks. More flexibility in the free trade zones is also seen.

#### 4.5.2 Approval of foreign exchange transactions

There are detailed rules specifying the approval authority which local banks and local branches of SAFE exercise over each type of foreign exchange transaction. These rules change periodically but the general trend is for SAFE to delegate more authority to approve foreign exchange transactions to local banks.

#### 4.5.3 Remittance issues

While PRC statutes allow multiple forms of payment for a merger and acquisition transaction, some foreign buyers may opt to pay the purchase price for the relevant interest or assets transferred, utilising foreign currency funds currently held outside of China. This means that, in M&A transactions involving foreign investors acquiring targets in China, generally, the 'inward remittance' and 'settlement' aspects of foreign exchange control are more relevant.

#### ***Payment to a foreign seller outside of the PRC***

Where the seller in either an indirect acquisition or a direct acquisition is a foreign company with a bank account outside of China, the foreign buyer typically pays the purchase price offshore to the foreign seller. Since such payments do not cross the PRC border, SAFE would not have jurisdiction over them.

#### ***Payment to a seller in the PRC***

- ***Equity acquisitions:*** If the transaction involves a seller who must be paid in China, the foreign investor will have to remit the purchase price into the PRC. The purchase price will typically be remitted in foreign exchange to a special account that the seller establishes for the specific purpose of receiving these funds. The PRC seller must then submit supporting documents to the bank to convert the foreign exchange in the special account into RMB, and remit the RMB out of the special account.

With the internationalisation of RMB promoted by the PRC government, a foreign buyer may pay the purchase price with lawfully obtained RMB, which is subject to less scrutiny in practice. Under the Foreign M&A Regulations, a foreign buyer may also pay the purchase price with listed shares or pre-IPO shares of an offshore company (upon MOFCOM approval), if the shares fulfil certain conditions and comply with required approval procedures.

- ***Asset acquisitions:*** In an asset purchase involving the formation of a new FIE as the acquisition vehicle, the new FIE will first need to be funded. A capital account will be established to receive the capital contribution funds. The PRC foreign exchange regime requires all transactions in China to be priced and settled in RMB, so the buying FIE must use RMB to purchase assets from a domestic company. Those RMB may come from conversion of part of its initial capital contributions or from its operational income. In any event, the payment to the seller, being in RMB, will typically not trigger specific foreign exchange issues.
- ***Round-trip investment:*** On 21 October 2005, SAFE issued the Notice on Foreign Exchange Control Issues Relating to Financing and Round Trip Investments by Domestic Residents through Offshore Special Purpose Vehicles, commonly known as 'Circular 75', which had been the main regulation governing foreign exchange administration of a Chinese investor's 'round-trip' investment. On 14 July 2014, SAFE replaced SAFE Circular 75 with the Notice on Foreign Exchange Administration of Overseas Investments and Financing and Round-Trip Investments by Domestic Residents through Special Purpose Vehicles (SAFE Circular 37). Under SAFE Circular 37, registration/change in registration rules apply to PRC individuals and entities making 'round-trip' investment, i.e. domestic investment made directly or indirectly through a special purpose vehicle, including through setting up FIEs by greenfield investment or merger and acquisition to obtain relevant ownership, right of control or right of management or administration, etc.

In an indirect offshore acquisition, if the foreign parent company of the PRC target is ultimately controlled by PRC individuals and/or entities, the foreign investor will need to consider regulatory requirements under SAFE Circular 37, although the obligations are largely on the PRC individuals and/or entities themselves.

## 4.6 Foreign Investment Approvals and Notifications

### 4.6.1 Foreign investment catalogue and industry restrictions

The PRC Regulations for Guiding the Direction of Foreign Investment and the Catalogue for Guiding Foreign Investment in Industries serve as general indicators of current policy governing foreign investment in various industries. The Foreign Investment Catalogue is revised every few years to embody changes in PRC foreign investment policy.

These documents provide certain policy incentives or disincentives depending on whether a project is deemed 'encouraged', 'permitted', 'restricted' or 'prohibited'. An enterprise in the 'encouraged' businesses category, for example, may qualify for local (and generally more lenient) approval processes. An enterprise conducting 'restricted' activities, on the other hand, may be subject to additional scrutiny by higher approval authorities during the establishment process and may in some cases be required to have its Chinese partner(s) control more than 50% of its equity. These documents are important guidelines that affect many aspects of merger and acquisition activities conducted by foreign investors.

The 2011 Foreign Investment Catalogue, effective since 30 January 2012, continues to restrict or prohibit foreign investment in many industries, but there are now more encouraged industries and fewer restricted and prohibited industries. Restrictions on foreign shareholdings in several industries have also been removed. The 2011 Catalogue seeks to encourage foreign investment in high-end manufacturing, new technologies, modern services, and new energy, energy-saving and environmentally friendly industries.

On 4 November 2014, the NDRC released a draft 2014 version of the Foreign Investment Catalogue which was open for public comment until 3 December 2014. The new draft promises to open up a significant number of currently restricted and prohibited sectors to foreign investors. Compared to the 2011 Catalogue, the draft 2014 Catalogue reduces the number of restricted sectors for foreign investment from 79 to 35, and removes shareholding limitations in a wide array of industries. As of the date of this publication, the final version of the new Foreign Investment Catalogue has not yet been released.

### 4.6.2 Closer economic partnership arrangement

China entered into the Closer Economic Partnership Arrangement (CEPA) with both Hong Kong and Macau in 2003, with Supplements signed each year since, further liberalising market access to China for qualified Hong Kong and Macau enterprises in specified sectors, on terms more favourable than those available generally through China's WTO accession protocol. The latest Supplement was CEPA Supplement X signed between Hong Kong and Macau with China on 29 and 30 August 2013 respectively.

Although the CEPAs are designed primarily to benefit Hong Kong and Macau companies, they may also indirectly benefit multinational investors with significant subsidiaries already established in Hong Kong or Macau who may, through such subsidiaries, have additional options to invest in certain restricted industries in China.

### 4.6.3 National security regime

The State Council and MOFCOM issued regulations in 2011 fleshing out a national security review procedure already referred to in general terms in the Foreign M&A Regulations and Anti-Monopoly Law.

A joint committee led by the NDRC and MOFCOM is responsible for carrying out a review to determine whether a transaction will have a major impact on national security. If that impact cannot be

mitigated, the transaction will not be permitted to go forward. To make that determination, the review considers impact on:

- national defence
- national economic stability
- social order, and
- R&D capabilities for key technologies affecting national security.

The onus is on the investor to file for a national security review before seeking approval if the transaction could raise national security concerns. The approval authority may also on its own discretion decide that a national security filing with MOFCOM is required, and suspend approval pending the results of that filing.

A filing is required if the acquisition would give a foreign investor actual control of a domestic defence enterprise, or a non-defence enterprise which:

- has a bearing on national security, and
- involves industries such as major agricultural products, major energy sources and resources, major infrastructure facilities, major transportation services, key technologies and the manufacture of major pieces of equipment.

The draft Foreign Investment Law also seeks to codify the national security review requirements. Under the current draft, the foreign investor may apply for a review. MOFCOM or its local counterpart may determine that a review is required. Third parties such as industry associations may also request a review.

## 4.7 Import/Export Controls

Since China's ascension to the WTO, imports and exports have increased dramatically. Nevertheless, China continues to maintain high import taxes and export duties.

In addition, China maintains a complex matrix of product regulatory requirements that apply to a broad spectrum of imported and exported merchandise.

Product quality and safety licensing and inspection requirements are administered centrally by the General Administration of Quality Supervision, Inspection and Quarantine. At the local port level, commodity inspections are carried out by local bureaus known as the China Entry-Exit Inspection and Quarantine Bureaus.

China's export controls include restrictions on the import and export of weapons and dual-use items (i.e. items with both a military and civilian application), administered by the Ministry of Commerce, as well as the regulation of the import, export and use of commercial encryption products, administered by the State Encryption Management Bureau under the Ministry of Public Security.

These non-trade barriers continue to pose obstacles and risks for companies doing business in and with China.

## 5. Taxes

### 5.1 Acquisition of Shares

The seller in a share acquisition will be subject to enterprise income tax (EIT) on capital gains at the applicable domestic rate, normally 25% if it is a resident enterprise, or 10% if it is a non-resident enterprise and the gain is not connected with a permanent establishment in China. Each party is also subject to stamp duty at 0.05% of the contract value of the acquisition agreement.

If a foreign investor acquires a Chinese company, real property situated in China or property owned by an establishment or place<sup>2</sup> situated in China (collectively, 'China taxable property') through an indirect share acquisition (i.e. by buying the shares of the target company's overseas holding company), the seller of the shares may be subject to EIT in China on capital gains based on China's indirect transfer rules<sup>3</sup>. These rules have been effective since 3 February 2015, but apply to indirect transfers that occurred before 3 February 2015 which have not yet been assessed for tax by the tax authorities. An indirect transfer generally will be 're-characterised' as a direct transfer if it lacks reasonable commercial purpose and does not fall within any safe harbours, and the buyer should be the withholding agent. If neither the withholding agent nor the offshore seller withholds or pays the taxes due, the PRC tax authorities may impose a penalty ranging from 50% to three times the amount of the unpaid tax on the withholding agent. Certain indirect transfers will be deemed to lack reasonable commercial purpose without any further analysis if:

- 75% or more of the value of the offshore target's equity is directly or indirectly derived from Chinese taxable property
- 90% or more of the total assets (excluding cash) of the offshore target, at any time during the one-year period preceding the indirect transfer of Chinese taxable property, comprise direct or indirect investments located in China, or 90% or more of the revenue earned by the offshore target, during the one-year period preceding the indirect transfer of Chinese taxable property, is directly or indirectly sourced from China
- the offshore target and its underlying affiliates that directly or indirectly hold Chinese taxable property have only completed the formality of registration in their counties (or regions) and fulfilled all legal organisational requirements, but the actual functions they performed and the risks they assumed are too limited to prove that they have economic substance, and
- the foreign income tax payable on the indirect transfer is lower than the possible Chinese tax payable on the direct transfer.

## 5.2 Acquisition of Assets

The taxation of an asset acquisition is more complicated. The foreign investor needs to establish a PRC company as the buyer of the assets from the Chinese seller (or use an existing PRC company). The seller is subject to EIT on capital gains at its applicable rate (normally 25%), and may be subject to various transfer taxes (e.g. VAT, business tax and/or land appreciation tax) depending on the nature of the assets to be transferred. The buyer is subject to deed tax at a rate of 3%–5% if it acquires real property. Both parties may also have to pay stamp duty at either 0.03% or 0.05% depending on the type of dutiable instruments. Below is a table summarising various PRC transfer taxes that potentially could be applicable to an asset acquisition.

Types of Taxes	Rate	Taxable Event	Taxpayer
Business tax	5%	Gain on transfer of land use rights and building ownership rights	Transferor
VAT	17%	Transfer of inventory	Transferor (collected from Transferee)
	6%	Transfer of trade marks, goodwill and copyright	
	0%	Transfer of technology (patent and know-how)	

<sup>2</sup> 'Establishment or place' is a domestic concept which is analogous to the treaty concept of permanent establishment.

<sup>3</sup> State Administration of Taxation's Bulletin on Several Issues of Enterprise Income Tax on Income Arising from Indirect Transfers of Property by Non-resident Enterprises, SAT Bulletin [2015] No. 7, dated 3 February 2015, effective as of the same date.

Types of Taxes	Rate	Taxable Event	Taxpayer
	2%	Transfer of used assets before 1 January 2009	
	17%	Transfer of used assets on or after 1 January 2009	
Custom duties and import VAT	to be determined by the Customs (17% for import VAT)	Disposal of tax/duty free imported equipment within the 5-year Customs supervision period	Transferor
Surcharges	7%–13%	Amount of the VAT and BT payable	Transferor
Deed tax	3–5%	Transfer of land-use rights or building ownership rights	Transferee
Land appreciation tax	30%–60%	Gain on sale of land use rights and building ownership	Transferor
Stamp duty	0.03%	Transfer of inventories	Transferor and Transferee
	0.05%	Transfer of other assets	

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

As a PRC legal matter, equity acquisitions do not trigger transfers of employees, as there are no changes to the target company's (the employer's) structure. But in practice, many acquisitions are followed by further corporate restructurings, which may lead to employee transfers or terminations.

An employer trying to terminate employment contracts in a restructuring should, if circumstances permit, cite a legitimate statutory ground for termination, such as a 'major change in the objective circumstances on which the employment contract was based' or one of the statutory grounds for collective dismissals. However, courts generally will not view a simple equity transfer as a change in objective circumstances sufficient to justify terminating the employment contract. Employers must generally do some other restructuring, such as shut down a business division or introduce a new production method or major new technology, before termination can be carried out on these grounds. Local rules and practice should be consulted as to the likelihood of a successful termination. Employment contract terminations may trigger a statutory and/or contractual requirement to make severance payments.

A special rule for foreign investors gaining a controlling interest in an SOE is discussed below.

#### 6.1.2 Acquisition of assets

Based on the current legal framework, a transfer of assets will not carry with it the obligation to transfer any employees (but see the discussion below of special rules applicable to SOE acquisitions).

If the parties to an asset acquisition do wish to transfer relevant employees to the buyer, then the current employment relationship must first be terminated (either by employee resignation or mutual agreement), then the employee must sign a new employment contract with the buyer. In other words, there is no automatic or direct transfer of employees between two separate entities, and employees may only be 'transferred' through termination and rehire.



In an asset acquisition, a transferred employee is entitled to severance pay as a result of the termination of his or her employment with the seller. In practice, most employees are willing to waive their right to severance if the buyer agrees to count the transferred employee's previous years of service with the seller when calculating severance pay for any subsequent termination.

### 6.1.3 SOE acquisitions

Special rules apply to state-owned enterprise (SOE) equity and asset acquisitions. When a foreign investor acquires a controlling interest in an SOE and the SOE is reorganised as an FIE, or the foreign investor acquires an SOE's main business assets and uses them to establish an FIE, an employee resettlement plan must be prepared and approved by the SOE's employee representative council. The plan must also be submitted to the approval authorities, and included in the transfer agreement.

The SOE must use its existing assets to pay outstanding wages, non-refunded pooled contributions and unpaid social insurance premiums.

The SOE must also pay severance payments to employees who are not retained, and must make lump-sum payments of the required social insurance premiums for employees who are transferred to the local social insurance authority to take care of. The funds for these payments are to be deducted from the net assets of the SOE or on a priority basis from the proceeds of the sale.

### 6.1.4 Mergers

In a merger, unless agreements between the pre-merger entities and their employees provide otherwise, all employees' employment contracts will automatically be transferred to the post-merger entity. So long as the employees continue to work for the post-merger entity, the merger does not trigger a severance payment liability.

In general, employee consent would be required to amend or renew employment contracts pursuant to a merger. But under certain circumstances, the post-merger entity may be able to unilaterally terminate certain redundant employees following a merger. In that case, the post-merger entity will have to make severance payments.

## 6.2 Approval or Consultation Requirements

The M&A Regulations require submission of a labour settlement plan to the approval authority for both asset acquisitions and direct equity acquisitions. The settlement plan should cover issues such as how many employees might be dismissed as a result of the acquisition and how unpaid salaries, benefits and severance pay will be paid.

If a transfer of state-owned equity implicates workers' rights and interests, the employee representative council must approve matters such as the resettlement of workers.

A company considering restructuring or other major operational matters should listen to the trade union's opinion, and to employees' opinions and suggestions (through an employee representative council or otherwise). In practice this is not often done.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

An employer may need to terminate some of its employees due to 'redundancy of roles' arising from a restructuring or a transaction. In the PRC employees can only be terminated based on statutory termination grounds and there is no statutory termination ground of 'redundancy of roles' under PRC law. However PRC law provides several similar termination grounds. There are specific conditions that must be fulfilled in order to rely on these termination grounds, which act to safeguard employees against dismissal. The relevant termination grounds and their applicable conditions are listed below.

***Major change in objective circumstances***

Where a major change in the objective circumstances relied upon at the time of conclusion of the employment contract renders it impossible to perform and, after consultation, the employer and employee are unable to reach agreement on how to amend the employment contract.

***Mass lay-offs***

'Mass lay-offs' occur where:

- where there are serious difficulties in production and/or business operations
- where there is restructuring pursuant to the Enterprise Bankruptcy Law
- where the enterprise switches production, introduces a major technological innovation or revises its business method and, after amendment of employment contracts, still needs to reduce its workforce, or
- a major change occurs affecting the objective economic circumstances relied upon at the time of conclusion of relevant employment contracts, rendering them impossible to perform.

An employer must complete a three-part procedure before collectively terminating employees (mass lay-off) based on one of the four grounds above. First the employer must explain the reasons for the dismissals to its labour union or to all employees 30 days' in advance of the dismissals; second, it should consider the opinions of the labour union or the employees; and finally it must report its plan for workforce reduction to the local labour bureau.

PRC law provides protection from unilateral termination on the grounds listed above for specified groups of protected employees, these include employees who:

- suffer from an occupational disease or injury, and are confirmed to have lost or partially lost the ability to work
- are in a statutory medical treatment period for a non-work-related illness or injury
- are pregnant, or for one year thereafter (constituting the nursing period)
- are engaged in operations exposing them to occupational disease hazards and have not undergone a pre-departure occupational health check-up, or are suspected of having contracted an occupational disease and are being diagnosed or under medical observation
- have worked for the employer continuously for at least 15 years and are less than 5 years away from their legal retirement age
- hold the post of union chairman, vice-chairman or union committee member (though the law is less clear on this category of employees)
- hold the post of collective bargaining representative during collective bargaining negotiations, or

—other circumstances stipulated in legislation.

It is possible to terminate a protected employee (or any other category of employee) through mutual termination.

**6.3.2 Penalties**

If an employer unilaterally terminates an employee relationship and is not able to justify the termination on one of the statutory grounds, or the employee is protected from termination, the employer would be deemed by the courts to have committed an unlawful termination.

If an employer is held to have unlawfully terminated an employee, the employee can request the court or labour arbitration tribunal to order the employer to reinstate the employee's employment. Under the reinstatement scenario, the employer is generally required to compensate the employee the full salary from the date of wrongful termination (or the date of case filing, in some cities) up to the date of reinstatement, and continue to employ the employee until the employer has other legal grounds to terminate the employee or until the employee's employment contract expires. If the company refuses to back-pay salary during the period the employee was terminated, and the employee can show that he/she has submitted a complaint to the labour authority and the employer still refuses to pay the salary as ordered by the labour authorities, in addition to the back payment of salary, employees may also successfully claim a penalty amount equal to 50–100% of the unpaid salary under the Employment Contract Law.

If the employee does not demand reinstatement or if reinstatement is 'not possible', then the employee should be awarded damages equal to double the amount of statutory severance to which the employee would be entitled if he/she had been lawfully terminated. The law provides no guidance on when reinstatement would be deemed as 'not possible' so this would be in the arbitrator's or judge's discretion.

## Peru

### 1.1 Overview

The Peruvian legal system follows civil law principles. Its constitutional and legal framework makes the economy open and friendly to private investment, which is carried out in the context of a social market economy. It also promotes competition and allows foreign investment in any type of company.

The Peruvian Constitution provides that the State's role in business activities should be subsidiary and authorised by law, for reasons of public interest. This means that the State will supervise and promote free competition, repressing any conduct that restricts this, including any kind of practice which could jeopardise free economic competition, such as the establishment of monopolies or abuse by investors of a dominant position in certain sectors of the economy.

Since the early Nineties, investment guarantees were introduced such as the right to hold foreign currency, the removal of restrictions on the remittance of foreign currency and dividends abroad, and on the repatriation of capital. The Peruvian Constitution also guarantees that there will be no discrimination or differential treatment of any kind as between local and foreign investors on matters including (but not limited to) currency exchange, pricing and export and import of goods rights.

### 1.2 General Legal Framework

The General Corporations Law contemplates the different types of corporate vehicles investors may use to carry out economic activities in Peru. Investors are free to choose from the various types of corporations set out in the General Corporations Law. The most common entities used by investors are:

- corporations (under their regular form or as closely held corporations)
- limited liability companies, and
- branches.

The first two options are usually used by investors wishing to incorporate a subsidiary company in Peru and provide limited liability on shareholders or partners. The branch is usually used as an extension of a parent company and the parent will ultimately answer for obligations incurred by the branch.

### 1.3 Corporate Entities

Corporations and limited liability companies are the two main legal vehicles chosen by investors to conduct their business in Peru. Note that in both cases:

- the law does not establish a minimum amount of capital, although, some industries (e.g. banking and insurance sectors) establish some minimum requirements, and
- the initial cash contribution for incorporation must be deposited in a local bank (contributions in kind are also permitted but are subject to particular rules).

#### 1.3.1 Corporations (*Sociedades Anónimas/SA*)

The corporation is the preferred form of legal structure for doing business in Peru. It provides limited liability and is structured to allow the separation of management from ownership. For its incorporation it requires a minimum of two shareholders (either local or foreign individuals or companies).

The capital of corporations is represented in shares, and there are no limitations on their transfer, except as otherwise agreed by shareholders in the by-laws or shareholders agreement.

The governing bodies of the corporation are the shareholders' meeting, the board of directors and the general manager. Summons of the shareholders' meetings must be made by publication in a local newspaper.

In addition, the General Corporations Law includes two special types of corporations:

- 'closely held' corporations, and
- publicly held corporations.

Closely held corporations have the following characteristics:

- a minimum of 2 and maximum of 20 shareholders
- certain rules apply to the transfer of shares, such as the shareholders' right of first refusal (although agreements in the company's by-laws or shareholders' agreements to the contrary are allowed), and in some cases, the consent of the company (this should be agreed in the company's by-laws)
- the shares in a closely held corporation cannot be listed on a stock exchange
- it is optional for this type of corporation to have a board of directors
- non-presence shareholder meetings are allowed (i.e. meetings can be carried by electronic or telephone conferences)
- the summons for a shareholder meeting are made by personal notifications (including emails but note that summons can not be made by newspaper announcement).

Publicly held corporations have the following characteristics:

- all shares must be registered in the Public Registry of the Securities Market
- no limitations apply to the transfer of shares, and any agreement purporting to restrict the transfer of shares will not enforceable against the company
- the company is subject to supervision by the securities market regulator (*Superintendencia del Mercado de Valores/SMV*)
- if a corporation meets any of the following conditions, it must be incorporated as, or be adapted to the form of, a publicly held corporation:
  - it has made an initial public offering of shares or convertible bonds into shares
  - it has more than 750 shareholders
  - over 35% of its capital belongs to 175 or more shareholders, excluding those shareholders whose individual holdings do not reach 0.2% of the capital or exceed 5% of the capital
  - all shareholders with voting rights unanimously approve the adoption of this regime.

Except for these special rules, closely held corporations and publicly held corporations are subject to the same rules applicable to ordinary corporations.

- Limited liability companies (*Sociedades Comerciales de Responsabilidad Limitada/SRL*). As its name states, the limited liability company gives limited liability to its partners. A limited liability company is incorporated with a minimum of 2 and a maximum of 20 partners.

Shares may not be issued in this type of corporate vehicle, as the capital is divided into participation quotas. Certain limitations apply to transfers of these participation quotas, such as a right of first refusal for the partners of the company. In addition, to be valid and effective, any transfer of participation quotas must be formalised in a public deed and registered in the Public Registry.

Its structure is similar to the closely held corporation, except that there is no board of directors.

- **Branches.** A branch is not an independent legal entity, but an extension of its parent company. The parent company holds the rights and is held accountable for the obligations of the branch. The parent company must appoint at least one legal permanent representative in Peru. However, for tax purposes, a branch is treated as an independent company separate from its parent.

## 2. Acquisition Methods

The acquisition of shares or assets is usually undertaken by a negotiated acquisition. The private share or asset purchase agreement is drafted setting out the terms and conditions of the acquisition, as well as the representations, covenants and liabilities of the parties.

It is common to see the acquisition carried out by means of an investment in the target company by the investor. As a consequence of the investment, the target company's capital stock will be increased, shares will be issued in favour of the investor and the percentage of participation in the target company of the other shareholders reduced.

The acquisition of shares in a company listed on the Lima Stock Exchange (*Bolsa de Valores de Lima/BVL*) may be undertaken by a negotiated acquisition with the controlling shareholder, subject to mandatory tender offer regulations, or by a tender offer regulated by the SMV and the BVL.

### 2.1 Acquisition of Shares

The acquisition of shares is mostly undertaken by privately negotiated acquisition. The most common transaction documents involved are listed in the following Table.

#### Documentation in private negotiated share acquisitions

##### *Corporate*

Share Purchase Agreement (SPA)

Shareholders' Agreement (SHA)	Required only in partial acquisitions
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Escrow Agreement

Others	Additionally, several ancillary transaction documents will be prepared depending on the nature of the deal, which may include non-compete agreements, management agreements, bring-down certificates, share ledger entries, officer resignation letters, among other documents.
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##### *Financing*

Loan Agreement	Most commonly a senior facility agreement
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Security Agreement	Over the shares or assets of the target company, including cashflows
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The most common provisions found in an SPA relate to representations and warranties, covenants and indemnification clauses.

It is quite common to also see buyer protection clauses, which usually take the form of a negotiated warranty and indemnity coverage from the seller. The terms of the protection will vary from transaction to transaction, but it is quite normal to expect that limits will be negotiated on any such terms

protecting the seller, including claim thresholds and caps, time-limits and adjustments for items disclosed or accounted for. Other types of guarantee (e.g. placing funds in escrow or guarantee trust, holding back part of the purchase price and security interests) are also common.

*Acquisitions of shares in a listed company or shares registered with the securities superintendence*

The acquisition of shares in a listed company or a company with at least a class of shares with voting rights registered with the SMV, can be undertaken either:

- by a negotiated acquisition with the controlling shareholder, subject to a subsequent mandatory tender offer (regulated by the SMV and BVL), or
- by a tender offer (regulated by SMV and BVL).

Where the acquisition is negotiated with the controlling shareholder, the documents to be prepared and clauses included in these are quite similar to those provided in a private acquisition. However, both in the case of a negotiated acquisition and where the acquisition is conducted by a tender offer, the Peruvian Securities Market Law provisions and the tender offer regulations must be followed.

The Peruvian Securities Market Law and tender offer regulations require any person who directly or indirectly acquires (in one or a series of transactions) a 'substantial interest' (defined below) in a company that has at least a class of shares with voting rights registered with the SMV, to submit a tender offer (*oferta pública de adquisición*) (a 'mandatory tender offer').

The person who directly or indirectly intends to acquire (in one or a series of transactions) a 'substantial interest' is required to submit a mandatory tender offer prior to acquiring the 'substantial interest', unless that person is acquiring the substantial interest:

- indirectly
- in a public secondary offering of securities
- in a single transaction, or
- in no more than a series of four consecutive transactions in a period of three years, where the tender offer must be made following the acquisition of the 'substantial interest' when the earlier of the following occur:
  - 4 months from the date on which the substantial interest is acquired, or
  - 5 calendar days from the date the valuer entity files the valuation report determining the minimum price for the shares that can be offered.

*'Substantial interest'*

A 'substantial interest' in a company is acquired when a person (either individuals or companies) acquires or intends to acquire a number of common shares that:

- will result in that person beneficially (directly or indirectly) owning 25%, 50% or 60% of the outstanding shares with voting rights of a company in one or a series of transactions, or
- allows that person to
  - appoint a majority of the directors of a company, or
  - amend the by-laws of a company.

## 2.2 Acquisition of Assets

An acquisition of assets is conducted by a private negotiated acquisition by means of an asset purchase agreement. According to the General Corporations Law, if the assets to be sold by the seller represent more than 50% of its capital, a shareholders' meeting approving the transfer of assets is required.

The following Table summarises the main differences between acquisitions of assets as opposed to acquisitions of shares under Peruvian regulation.

	Acquisition of shares	Acquisition of assets
<b>Risks</b>	Risk higher for buyer. Buyer acquires the assets, liabilities (existent and contingent), patrimony; contracts, employees, and all that comprises the business of the target company.	Risk is lower for buyer. Buyer 'cherry picks' the assets of the company to acquire. Liabilities of seller not assumed by buyer, except under certain specific cases (labour and tax liabilities and, in certain cases, environmental liabilities).
<b>Due diligence</b>	More complex due diligence (must include target company and its entire business).	Less complex due diligence (includes only the information on the assets to be acquired and in certain cases labour, tax and environmental liabilities).
<b>Representations and warranties</b>	Greater scope of the representations and warranties. This may result in price adjustments or in assignment of a percentage of the price in an escrow account.	Limited scope of the representations and warranties. It is less common to have price adjustments or the establishment of escrow accounts.
<b>Limitations to the transfer</b>	Approval of shareholders' meeting not required for transfer of shares; nonetheless, shares may be subject to a right of first refusal of shareholders or a 'tag-along' right (see 3.3.1)	If assets to be transferred represent more than 50% of target company's share capital, the approval of shareholders' meeting required for transfer of the assets.
<b>Implementation</b>	Shorter time-frame to implement the transfer (execution of SPA and record of the transfer in target company's share ledger is sufficient).	<p>Longer time-frame to implement the transfer, as it is necessary to:</p> <ul style="list-style-type: none"> <li>• transfer each asset</li> <li>• obtain any corresponding licences, permits or authorisations, and</li> <li>• assign the contractual position in the agreements related to that asset.</li> </ul> <p>Additionally, as applicable, the title over the asset acquired may have to be registered in the Public Registry.</p>



	Acquisition of shares	Acquisition of assets
<b>Tax treatment<sup>1</sup></b>	Income tax for seller is 5% to 28% or 30% (depending on seller's characteristics).  No VAT applies (and no property tax (' <i>Alcabala</i> ': see 4.2)).	Income tax for seller varies from 5% to 28% or 30% (depending on seller's characteristics).  VAT applies for movable assets and property tax ( <i>Alcabala</i> ) applies in the case of properties.

## 2.3 Mergers/Other Acquisition Methods

### 2.3.1 Mergers

A merger occurs where two or more companies consolidate as one single entity. A merger can be conducted in either of the following ways:

- merger of 2 or more companies to create a new independent and separately incorporated company (and where the 2 merging companies cease to exist), or
- one company takes over the entire business of the other company so that the target company ceases to exist.

In both cases, the new entity or the remaining company receives all the assets, liabilities, rights and debts of the companies<sup>2</sup> which cease to exist, and the shareholders of the companies ceasing to exist receive outstanding shares in the new or remaining company.

### 2.3.2 Spin-off

A spin-off is a type of corporate reorganisation that consists in the segregation of assets, debts and assets, and/or business lines by a company to transfer them to another company, which may be already incorporated or may be incorporated as a result of the contribution of that block of assets, debts and assets and/or business line. In either case, the shares to be issued by the company receiving the segregated block under that equity contribution must be issued to the shareholders of the company transferring the block.

### 2.3.3 Simple reorganisation

A simple reorganisation is the segregation of assets, debts and assets, and/or business lines, in order to transfer them to another company. The company which receives the debts and assets, and/or business lines must issue new shares (if applicable) for the contributing company.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

Negotiation usually includes, from the seller's side, the delivery of a process letter to potential buyers. This is followed up by the execution of a non-disclosure agreement. Commonly, the next steps, for the seller, are to deliver a 'teaser' to potential buyers and negotiate a non-binding term sheet (i.e. a list of relevant terms with their corresponding definitions and conditions) with them. In a second round of negotiations, and once the best offer has been identified, a binding memorandum of understanding or letter of intent will be executed with the chosen purchaser, including the most relevant conditions of the acquisition (i.e. price, price adjustments, object of the transaction, due diligence, means of payment, shareholder agreement provisions, among others.). A civil action may be pursued by an injured party if the negotiations break down in breach of good faith obligations by another party, but the alleged damage must be proven.

<sup>1</sup> See 4. 'Transfer Taxes' for more information.

<sup>2</sup> As a whole and by universal title.

## 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Peruvian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

Purchase Price		
1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. Cash-free debt-free and working capital are the most common adjustments.
2	Is there a collar on the adjustment?	Neither collar nor materiality thresholds are common.
3	Who prepares completion balance sheet?	Usually prepared at closing by target company or seller. After closing usually reviewed by seller or an audit company.
4	Is the balance sheet audited?	Not necessarily. Historical balance sheets for completed fiscal years are often audited. Interim balance sheets typically unaudited.
5	Is an earn-out common?	Uncommon, although occasionally agreed.
6	Is a deposit common?	Uncommon but could be agreed
7	Is an escrow common?	Relatively common.
8	Is a break fee common?	Uncommon.
Conditions Precedent		
9	Express Material Adverse Event (MAE) completion condition?	Common.
10	Is the MAE general or specific?	The MAE definition is usually general and forward-looking, but sometimes includes specific carve-outs.
11	Quantification of MAE?	Uncommon, although we have seen it in small deals.
Covenants, Access		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall provisions are uncommon. Blue pencil provisions are commonly included in severability clause of agreement.
13	Non-solicit (of employees)?	Common for a 2 to 3-year term (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common for a 2 to 3-year term (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Common, subject to prior execution of confidentiality agreements.

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| 16 | Is it common to update warranty disclosure or notify of possible breach? What is the consequence? | Updating schedules is common; notification of possible breach is not common. Accuracy of warranties at closing is a common condition precedent. |
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| 17 | Is a separate tax covenant/indemnity or tax deed common? | Common to have specific tax covenant/indemnity included in the purchase agreement. |
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### Representations & Warranties

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| 18 | Materiality in representations—how is it quantified (e.g. by a \$ amount)? | Materiality qualifiers commonly seen but are not often quantified (other than specific warranties e.g. contract value). |
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| 19 | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers usually based on constructive knowledge (after due inquiry), although actual knowledge standard also used. Commonly limited to list of specified persons or group of persons (selling shareholders and key managers and directors). |
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| 20 | Is a warranty that there is no materially misleading/omitted information common? | Not common, although seen when buyer has a strong bargaining position. |
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| 21 | Is disclosure of data room common? | Common if seller has a strong bargaining position. |
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### Repetition of Representations & Warranties

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| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common? | Repetition at signing date and closing date is common. Bring-down certificate at closing common. |
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| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard? | Both accurate 'in all material respects' standard and MAE standard are common. Often carve-outs for some fundamental representations which must be absolutely 'clean and true'. |
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| 24 | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Double materiality usually avoided. |
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### Limitations on Liability

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| 25 | What is the common cap amount (as a percentage of purchase price)? | Depends on the type of transaction. Usually ranges from 5%–30%. |
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| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Caps commonly apply to indemnification obligations in the whole agreement (although breach of seller's/target's covenants often carved out from the cap). Other limitations on liabilities (such as baskets) commonly apply only to the representations and warranties. Specific representations and warranties or other items in the agreement may have different cap amounts. |
|----|--|---|

27	What are the common exceptions to the cap?	Fraud is usually excepted from the cap. Certain fundamental representations and warranties (e.g. authority, capitalisation, due organisation and title) are also commonly excluded. Breaches of seller's/target company's covenants are also often carved out from the cap.
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28	Is a deductible or basket common?	Baskets are common.
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29	Is a <i>de minimis</i> common?	Common.
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30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	Typically 18–36 months. Common carve-outs include: taxes, capitalisation, due authorisation and organisation, ownership of shares and fraud—usually tied to the expiry of statute of limitations.
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31	Is warranty insurance common?	Uncommon.
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### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Uncommon but occasionally requested.
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### Set-offs against Claims

33	Is a set off against claims for tax benefits common?	Common.
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34	Insurance proceeds?	Common.
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35	Third party recoveries?	Common.
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### Damages, Knowledge

36	Obligation to mitigate damages?	Common.
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37	Exclusion of consequential damages?	Common.
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38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Common to include both 'sandbagging' and 'anti-sandbagging' provisions.
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### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, parties may choose the governing law. Peruvian law is agreed on most transactions, although New York law is sometimes seen in very large deals.
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40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. Usually Lima Chamber of Commerce or American Chamber of Commerce of Peru.
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### Stamp Duty

41	If stamp duty is payable, is it normally shared?	No stamp duty applies.
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### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares

In the case of the transfer of shares issued by a corporation, there is no particular formality to be complied in order for the transfer to be valid and effective. The transfer of the shares must be recorded in the target company's share ledger. If certificates have been issued, they should be endorsed to the purchaser or cancelled. Note that first refusal rights or other rights related to the transfer of shares (e.g. a 'tag-along' right) must be honoured if these have been set in the target company's by-laws or previously agreed by the shareholders.

For transfers of quotas issued by a limited liability company, the transfer of quotas must be documented in a public deed and registered with the Public Registry in order for it to be considered valid and effective.

#### 3.3.2 Transfers of assets

The transfer of assets is more complex than the transfer of shares (see Table in **2.2**). Depending on the type of asset, the transfer may be formalised either in a private document (e.g. transfer of intangibles such as trademarks) or in a public deed (e.g. transfer of real property). In the case of movable assets, the transfer is determined by physical delivery, or the contractually agreed delivery method, of the asset by the seller to the purchaser.

Additionally, in some cases, authorisations or permits must be obtained prior to the acquisition; and, in addition, after the acquisition, registration in the relevant registries or before the corresponding authorities.

### 3.4 Formalities for Transferring Title to Shares or Assets

#### 3.4.1 Transfers of title to shares

The transfer of title to shares is valid with only the agreement of the purchaser and seller. However, that transfer must be recorded in the target company's share ledger in order for the transfer to be effective before the issuing company. Also, if certificates have been issued, they should be endorsed to the purchaser or cancelled.

#### 3.4.2 Transfers of title to assets

The transfer of title to assets depends on the type of asset. In the case of movable assets, the transfer of title is determined by the physical delivery, or the contractually agreed delivery, of the asset by the seller to purchaser. The title over rights or other intangibles is transferred by the sole agreement of the parties (although, in some cases, authorisations or registrations must be obtained). For real estate, the transfer of title is valid and effective with the sole agreement of the purchaser and seller in respect to the transfer of the asset (unless otherwise agreed).

In order to become of public knowledge, the transfer of title over real property must be registered with the Public Registry of Real Estate, on the corresponding public file of the transferred property. Title over certain movable assets may also be registered with the Public Registry.

### 3.5 Formalities for Mergers

A merger, in either of its forms, must be approved by the board of directors and the shareholders' meeting of both companies involved in the merger (qualified quorum and qualified majority approval are required). In that meeting, the proposed merger plan (which must be prepared by the management of the companies involved and previously approved by the companies' boards of directors, if applicable) and an effective date for the merger must be approved.

Once approved, the merger agreement must be published three times, with an interval of five days between each notice, in the *Official Gazette* and in an additional local newspaper. According to the General Corporations Law, creditors of the companies involved will have the opportunity to oppose to the merger agreement within a 30-day window from the last publication date of the merger agreement (the opposition right period). Once the opposition right period has lapsed, and assuming no creditor of

any/either of the companies involved has exercised its opposition right, the management of each company must issue an statement confirming this situation, which will be enclosed to the corresponding Merger Public Deed.

Finally, a Merger Public Deed must be prepared and the corresponding documentation filed with the public registry. Registration of a merger usually takes 14 business days, but this term may be extended if the registrar comments on the documentation filed.

The Merger Public Deed must include the following documents:

- copies of the agreements resolved by the shareholders' meetings
- the new company's by-laws or amendments to the by-laws of the surviving company of the merger
- the effective date of the merger
- notices published, and
- management statement regarding the lapse of opposition right period, confirming that no creditor has exercised its opposition right (as appropriate). Note that if a creditor has exercised its opposition right, then the company must file a judicial resolution attesting that the company has paid the corresponding debt or has granted a corresponding guarantee to that creditor.

## 4. Transfer Taxes

### 4.1 Acquisition of Shares

The acquisition of shares is not subject to any specific Peruvian tax.

However, income tax does apply on capital gains obtained on transfers of shares by companies or individuals. According to the Peruvian Income Tax Law (ITL), a capital gain is obtained when income is generated as a consequence of the sale of capital goods (i.e. not goods that are acquired in the normal course of business).

The capital gains tax basis is calculated by subtracting, from the price agreed upon for the shares (which must not be lower than their fair market value), the cost incurred (and recognised by the ITL) in acquiring such shares. Once the tax basis is determined, the tax rate is applied.

Tax rate applicable will vary depending on the seller: see Table.

Seller	Tax rate	
Domiciled individual	5%	effective rate
Non-domiciled individual	30%	5% if the transfer of shares takes place through the BVL
Domiciled company	28% <sup>3</sup>	
Non-domiciled company	30%	5% if the transfer of shares is performed through the BVL

It is important to note that the transfer of shares by means of a corporate reorganisation (where all the parties involved are domiciled companies) is not subject to the ITL.

<sup>3</sup> The tax rate in force in 2015; it will be amended for 2016 and 2017.

## 4.2 Acquisition of Assets

The ITL does not tax the acquisition of assets. However, the '*Alcabala Tax*' (Transfer of Real Estate Tax) applies to the gratuitous or onerous transfer of real-estate property<sup>4</sup>. The tax is payable by the transferee. The tax rate of 3% is applied to the value of the property agreed by the parties or the self-appraisal value determined by the municipality of the district where the property is located, whichever is greater.

The income resulting from the transfer of those assets performed by companies or individuals will be taxed as a capital gain.

Assets transferred under a corporate reorganisation may be subject to the ITL depending on whether or not the parties involved in the reorganisation agree on the revaluation (to market value) of that asset (with or without tax consequences).

- Revaluation of assets (to market value) with tax consequences: If the parties agree to the revaluation of assets with tax consequences, the difference between the agreed revaluated value and the tax basis (determined according to the ITL) will be taxed under ITL as capital gain. In this case, when taxing the transferred assets, the transferee will take as its taxable basis, the revaluated value
- Revaluation of assets (to market value) without tax consequences: If the parties involved in the reorganisation agree on the revaluation of the assets without tax consequences, the difference between the revaluated value and the tax basis will not be taxed under the ITL, if this value is not distributed among their shareholders. The ITL establishes the cases when the revaluated value of the assets is considered to be distributed to the shareholders. In this case, the assets transferred will keep the same tax basis in the transferee recognised by its former owner
- Non-revaluation of assets: If the parties involved in the reorganisation agree not to revalue the assets subject to transfer, no income tax consequences will be triggered upon the reorganisation.

## 4.3 Value Added Tax

Peruvian VAT applies at a rate of 18% to the sale of goods within Peruvian territory and to first transfers of real estate property by construction companies. Note that, according to the Peruvian VAT Law, 'goods' includes most assets, except certain goods such as shares, quotas, securities and cash. The tax basis will differ depending on the operation performed: so for the sale of goods and first transfers of real estate property by the construction company or developer, the tax basis will be the consideration agreed upon by the parties.

Transfers of assets within a corporate reorganisation do not qualify as 'sales' according to the VAT Law so are not subject to VAT.

## 5. Employee Issues

### 5.1 Method of Transfer under Local Law

#### 5.1.1 Acquisition of shares

When purchasers acquire the shares in a target company, they also acquire (inherit) all of its employees, including any outstanding labour-related liabilities (i.e. salaries, length-of-service compensation (*compensación por tiempo de servicios*), compensation for arbitrary dismissal and other mandatory benefits employees that may be owed, including unpaid employee-contributions payable by the employer (seller) to the Private Pension System Fund and National Pension System, as applicable, and associated interest and costs).

<sup>4</sup> Gratuitous transfers are made without any profit or advantage received or promised as a consideration for it. Onerous transfers are those in which something is given or promised as consideration.

### 5.1.2 Acquisition of assets

In asset acquisitions, under Peruvian regulations, the buyer might be affected by rules enforcing the mandatory observance of labour 'credits' (liabilities). That is to say, an acquiring company may be held liable for payment of the full amount of any unpaid labour liabilities relating to the employees of the selling company, and creditors (employees) can enforce payment of these debts against buyer, as can be seen in the following examples:

- If the seller-employer has been declared insolvent resulting in the dissolution and liquidation of the company or its bankruptcy, the right of the employees over such labour credits reaches the assets transferred by the seller-company within 6 months preceding the declaration of insolvency of the seller-employer (i.e. employees will be able to file for the foreclosure of said assets in order to collect their credits)
- When termination of an employment relationship is the result of employers acting wilfully and intentionally against the company's interests or fraud (i.e. when the employer:
  - unreasonably obstructs/delays/disrupts/hinders/frustrates production, harming production/business to the point of enforcing the company's demise/closure
  - transfers/diverts key business assets to third parties or to different sites to start new business, or
  - when the employer disappears/abandons the workplace).

### 5.1.3 Transfer of business

#### ***Involving transfer of employment relationships***

In this scenario, since the employment relationships are not terminated, the acquiring company inherits all labour liabilities and must acknowledge all employee rights, including not only employees' rank and seniority but also any labour-related liability as between the transferor company and the transferred employee. By virtue of the acquisition, the acquiring company is liable for the previous employment liabilities (which it should pay off with its assets—previous, acquired and future assets, within the terms established by law for each particular case).

#### ***Not involving transfer of employment relationships***

Acquiring companies may be obliged to pay labour liabilities to the employees of the selling company those liabilities being granted priority ranking over other obligations of the acquiring company (e.g. severance payments).

The rules for the acquisition of assets (see **5.1.2**) also apply.

## 5.2 Approval or Consultation Requirements

No law or regulations apply in Peru.

## 5.3 Protection against Dismissal

### 5.3.1 Redundancies

Peruvian regulation permits the employment relationship to be terminated for 'objective causes' (among other reasons). Dismissal for objective causes is also known as 'collective dismissal' and it is permitted in the following scenarios:

- acts of God or *force majeure*
- economic, technological, structural (i.e. that job role no longer needed) or similar reasons
- dissolution, liquidation or bankruptcy of the company, or



- group restructuring.

An 'economic, technological, structural or similar' ground for collective termination, is not an allowable exception unless it affects at least 10% of the total number of employees of the entity. If it involves less than that percentage the mass termination must be conducted individually per employee and for certain proven reasons.

To make these terminations effective, the procedures established by law must be followed which may involve a notice to or the approval of the Labour Authority.

#### 5.3.2 Penalties

If a dismissal of an employee (or employees) is not justified (i.e. because it is not based on a legal cause or it is successfully challenged by the employee in court), the employees will be entitled to severance (unfair dismissal compensation) equal to 1.5 times their monthly salary for each year of service; plus pro rata part payments up to a maximum of 12 monthly salaries for employees under indefinite term relationships. For fixed-term employment contracts the severance payment will be 1.5 times the monthly salary for each month until the contract was due to expire, up to a maximum of 12 monthly salaries. The severance must be paid by the employer within 48 hours of the employee's termination.

Pursuant to decisions of the Constitutional Court, employees dismissed without cause may refuse severance payment and may instead demand reinstatement. This alternative does not apply in the case of personnel who were hired for management or trust positions at the beginning of their employment relationships, who may only make a demand for severance payment. However, employees who were promoted to such positions of management or trust and were dismissed without cause, may sue (as an alternative to the severance payment) for reinstatement to the position they held before their promotion (note that the employer must reinstate the employee at a wage equal or higher to the last wage the latter received as an employee of the company).

# Philippines

## 1.1 Overview

The Philippines is a constitutional democracy with three co-equal branches of government—the executive, the legislative and the judicial branches. The Philippines is also a civil law jurisdiction with codified bodies of law. Notable among these are the Corporation Code of the Philippines, that deals with corporations in general, and the Civil Code of the Philippines, that includes general laws relating to obligations and contracts. Decisions of the Supreme Court of the Philippines also have the force and effect of law.

## 1.2 General Legal Framework

The Philippines does not have specific M&A legislation. Generally, the provisions of the Corporation Code, the Securities Regulation Code (SRC) and Civil Code will govern M&A transactions.

## 1.3 Corporate Entities

Three forms of business vehicles are recognised in the Philippines:

- sole proprietorships
- partnerships, and
- corporations.

Of the three, the corporation is generally the most common.

Unlike a sole proprietor and a general partner (who have unlimited liability), the liability of shareholders of a corporation is generally limited to their investment in the corporation.

Foreign corporations may set up representative offices, branch offices, or regional headquarters and regional operating headquarters in the Philippines.

There are substantial differences in the laws and regulations that apply in M&A situations to public as opposed to private companies. Under the SRC, a public company is a corporation with a class of equity securities listed on the Philippine Stock Exchange or with assets in excess of PHP50 million and having 200 or more holders, at least 200 of which hold at least 100 shares of a class of its equity securities.

## 2. Acquisition Methods

Acquisitions are the most common form of M&A transaction. Acquisitions may be structured in one of two ways; the acquiring entity may:

- acquire shares from the shareholders of the target company (share acquisition), or
- acquire assets directly from the target company (asset acquisition).

The Philippines also recognises the concept of a merger or consolidation. In a merger, the surviving company absorbs a target company. In a consolidation, two or more companies consolidate to form a new corporation.

### 2.1 Acquisition of Shares

A share acquisition is procedurally simpler and tends to be more widely used than an asset acquisition. A share acquisition basically involves the transfer of shares in the target company from the shareholders of the target company to the purchaser. In such transactions, specifically where the purchaser acquires all the outstanding shares of the target company, the purchaser effectively acquires the target company with all its assets and liabilities (including contingent and undisclosed liabilities).

## 2.2 Acquisition of Assets

An asset acquisition tends to be more complex than a share acquisition because the former transaction involves the transfer of various categories of assets and liabilities to the purchaser. The transfer of each category of assets and liabilities may require different legal requirements and documentation.

Unlike a share acquisition, in an asset acquisition the vendor retains all assets and liabilities not otherwise acquired or assumed by the purchaser.

## 2.3 Mergers and Consolidations

Mergers and consolidations are procedurally more complicated to effect than a share acquisition or an asset acquisition, and require the approval of the Philippine Securities and Exchange Commission (SEC).

In a merger, the surviving corporation, which will be one of the constituent corporations to the merger, absorbs all assets and liabilities of the constituent corporations. In a consolidation, a new corporation—called the ‘consolidated corporation’—acquires and assumes all the assets, rights, franchises and liabilities of the constituent corporation, similar to the surviving corporation in a merger.

Effectively, a merger or consolidation is a combination of two transactions, namely:

- an asset or business sale by the absorbed corporation (as seller) in favour of the surviving corporation or consolidated corporation (as a purchaser), and
- the dissolution of the absorbed corporation by operation of law when the merger or consolidation becomes effective.

The absorbed corporation(s) may be viewed as the seller(s), but because it will dissolve by operation of law after the merger or consolidation becomes effective, it may not receive the consideration for the transfer of its assets to the surviving corporation or consolidated corporation. Instead, what normally happens in a merger or consolidation is that the surviving corporation or consolidated corporation, as the case may be, issues shares to the stockholders of the absorbed corporation(s), as consideration for the transfer of assets of the absorbed corporation(s).

## 3. Negotiation, Signing and Closing

### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Philippine purchase agreements. Baker & McKenzie’s fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. We have seen working capital, cash free, debt free and NAV adjustments.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	The buyer usually bears the responsibility of ensuring the target company prepares this.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	Not common.

6	Is a deposit common?	Not common.
7	Is an escrow common?	Not uncommon.
8	Is a break fee common?	Not common.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	Uncommon, typically only available where there is a long period before execution and completion.
10	Is the MAE general or specific?	Both are seen.
11	Quantification of MAE?	Uncommon.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Not uncommon; depends on industry. Waterfall provision uncommon.
13	Non-solicit (of employees)?	Not uncommon (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Not uncommon (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Generally get this for private deals.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Uncommon to update warranty disclosure. Notification of possible breach more common.  In case of material breach, right to terminate quite common.
17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax indemnity, usually included in purchase agreement.
<b>Representations &amp; Warranties</b>		
18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but are often not quantified (other than specific warranties e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are growing. Trend is towards limitation to actual knowledge of a specified list of senior management.
20	Is a warranty that there is no materially misleading/omitted information common?	Quite common.
21	Is disclosure of data room common?	Varies case-by-case.

## Repetition of Representations & Warranties

- |    |   |   |
|----|---|---|
| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?  | Repetition at completion quite common. Bring down certificate at completion quite common; but a new trend growing towards simultaneous signing and closing. |
| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard?   | True and accurate in all material respects quite common but with carve-out for fundamental representations which must be absolutely true.                   |
| 24 | Is double materiality common? (e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.) | Double materiality usually avoided.   |

## Limitations on Liability

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|----|--|---|
| 25 | What is the common cap amount (as a percentage of purchase price)?   | Commonly less than 100%. Bigger deals in terms of purchase price tend to have a lower aggregate cap.  |
| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Case-by-case, but a liability cap on warranties only is more common.  |
| 27 | What are the common exceptions to the cap?   | Waiver/limitation of liability for fraud and gross negligence void under Philippine law; carve-out of key or fundamental warranties (e.g. title, capitalisation, authority) from liability cap more common. |
| 28 | Is a deductible or basket common?  | Case-by-case.   |
| 29 | Is a <i>de minimis</i> common?   | Case-by-case.   |
| 30 | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | Cap on period of survival not uncommon; but period varies case-by-case.   |
| 31 | Is warranty insurance common?  | Uncommon.   |

## Reliance

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|----|--|-----------|
| 32 | Do financiers seek to rely on purchaser's due diligence reports? | Uncommon. |
|----|--|-----------|

## Set-offs against Claims

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|----|--|---|
| 33 | Is a set-off against claims for tax benefits common? | Uncommon.   |
| 34 | Insurance proceeds?                                  | Case-by-case, but on balance, set off of proceeds that are actually received are more common.   |
| 35 | Third party recoveries?                              | Case-by-case, but on balance, set-off of recoveries that are actually received are more common. |

**Damages, Knowledge**

36	Obligation to mitigate damages?	Not required. Not usually stipulated in the purchase agreement.
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Not common.

**Dispute Resolution**

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, subject to certain conditions; but Philippine law generally adopted.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common.

**Stamp Duty**

41	If stamp duty is payable, is it normally shared?	Stamp duty payable on share transfer (0.375% of par value of the shares of stock sold) and sale of real property (1.5% based on whichever is higher between the consideration and fair market value). Liable party depends on contract. More common to see buyer assuming liability.
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## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

While there is no legal document required for the validity of the transfer of shares of a corporation, in a share acquisition, there is typically a share purchase agreement and a deed of assignment or deed of absolute sale over the shares.

### 3.2.2 Transfers of assets

In an asset acquisition, there is typically an asset purchase agreement assigning the assets purchased in broad terms, and a deed of absolute sale to implement the sale and transfer of assets.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

No legal document is required to ensure the validity of a transfer of shares of a corporation. The vendor's delivery of a duly endorsed share certificates is legally sufficient to transfer ownership of the shares from seller to purchaser. However, the transfer of shares will not be recognised or valid in respect of the target company or third parties unless the transfer is recorded in the stock and transfer book of the target company, which necessitates certain documentation.<sup>1</sup>

This documentation, whether all or some of the shares of the target company are purchased, will normally include a share purchase agreement and a simple deed of assignment of the shares. The latter is made mainly for convenience and ease of presentation of the transfer document to the tax authorities but is not in fact essential legally for the transaction to complete.

<sup>1</sup> Note that the transfer is not valid in relation to (i) target company; or (ii) third parties, until recorded in the stock and transfer book.

### 3.3.2 Transfers of title to assets

Legal documentation for an asset acquisition tends to be more complicated than documentation for a share acquisition because the former usually involves the transfer of different categories of property.

Because different categories of property may require preparation of different transfer documents, aside from the asset purchase agreement assigning the assets purchased in broad terms, various deeds of assignment for specific property such as shares of stock, real property or motor vehicles may be needed. Key personnel of the target company may also execute employment agreements with the purchaser if the assets or business are bought as a going concern (i.e. personnel and their knowhow being 'assets' of the selling entity).

## 3.4 Formalities for Mergers and Consolidations

In merger or consolidation transactions, in addition to the legal documentation for the transfer or exchange of shares and property between or among the corporations, the constituent corporations must prepare and approve a plan of merger or consolidation. That plan will state the terms of the merger or consolidation, the mode of carrying it out, and any changes required to the articles of incorporation of the surviving corporation or the consolidated corporation. The plan of merger or consolidation, together with other supporting documents, must be submitted to the SEC for approval. In cases where the corporations involved are regulated by specific regulatory agencies, a favourable recommendation of the regulatory agency concerned must also be obtained.

Provided that the conditions of the Tax Code are met, a merger or consolidation may be classified as a 'tax-free' transfer under s. 40(C)(2) of the Tax Code. While transfers made pursuant to s. 40(C)(2) are commonly referred to as 'tax-free' transfers, they are in reality merely tax-deferred transfers. Section 40(C)(2) merely defers the recognition of the gain or loss on the transfer of property because in determining the gain or loss from a subsequent transaction, the original or historical cost of the properties in the exchange is taken into consideration.

To confirm that the merger or consolidation is a 'tax-free' transfer, a formal application must also be filed with the Bureau of Internal Revenue (BIR).

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

The Philippines currently does not have comprehensive, detailed legislation specifically dealing with competition and antitrust issues. Except for industries that are subject to special regulations, provisions on monopoly, unfair competition and restraint of trade are found in general laws and are couched in general terms. These general laws are the Philippine Constitution, the Revised Penal Code and the Civil Code.

The Philippine Constitution adopts a direct and encompassing policy that promotes competition and mandates that the Philippine government regulate monopolies and prohibit combinations in restraint of trade and unfair competition. The Philippine Constitution also expressly mandates that the Philippine government protect Philippine enterprises against unfair foreign competition and trade practices.

Certain provisions of the Revised Penal Code breathe life into the constitutional policy on free competition. The Revised Penal Code considers the following as criminal acts:

- combinations to prevent free competition in the market, by entering into any contract or agreement or taking part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce, to prevent by artificial means free competition in the market
- monopolies to restrain free competition in the market, by monopolising any merchandise or object of trade or commerce, or by combining with any other party to monopolise such merchandise or object of commerce in order to alter its price by spreading false rumours or making use of any other artifice to restrain free competition in the market

- agreements by manufacturers, producers, processors or importers of any merchandise or object of commerce, with any person to enter into transactions prejudicial to lawful commerce or to increase the market price of merchandise or objects of commerce manufactured, produced, processed, assembled or imported into the Philippines, and
- importation and distribution or sale of falsely marked articles or merchandise made of gold, silver or other precious metals or their alloys.

In addition to the Revised Penal Code, the Civil Code promotes the constitutional policy of free competition by allowing the recovery of damages in the case of unfair competition in agricultural, commercial or industrial enterprises. Under the Civil Code, unfair competition those areas or in labour through the use of force, intimidation, deceit, machination or any other unjust, oppressive or high-handed method gives rise to a right of action by the person who suffers damage as a result of such act.

The Office for Competition (OFC) was created under the Philippine Department of Justice (DOJ) and was vested with broad powers to investigate and prosecute cases involving violations of competition laws, as well as to enforce competition policies for the protection of consumers from abusive trade practices (Executive Order 45).

There are bills pending in Congress relating to antitrust and monopoly activities but, at time of writing, these bills have not been passed into law.

## 4.2 Merger Control Overview

On 23 July 2014, the DOJ and SEC entered into a Memorandum of Agreement (MOA) under which the SEC is obliged to notify the DOJ of applications for mergers and consolidations of corporations, and the DOJ is authorised to assess the impact on competition of the proposed merger or consolidation. The MOA took effect on 7 August 2014. The DOJ is still in the process of drafting guidelines to assess whether a proposed merger or consolidation will violate existing laws on competition, monopolies, or combinations in restraint of trade.

Bills are also pending before the Philippine Congress to also provide for merger control filings and requirements, but, at time of writing, these bills have not been passed into law.

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Philippine purchase agreement, taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP) GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

### Filing Obligation

- |   |  |  |
|---|--|--|
| 1 | Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)? | Mandatory for mergers and consolidations between domestic corporations in the Philippines. |
|---|--|--|

### Timetable

- |   |  |  |
|---|--|--|
| 2 | In practice, what is the timetable for clearance (in first phase and second phase review)? | The SEC must immediately notify the OFC of applications for mergers or consolidations of domestic corporations received by the SEC. The OFC will assess and/or evaluate whether the proposed merger or consolidation is consistent with existing laws on competition, monopolies, and combinations in restraint of trade. The OFC will report to the SEC on the proposed merger or consolidation stating whether the proposed merger or consolidation is inconsistent with any existing laws on competition, or could unreasonably restrict trade or lead to monopolisation. |
|---|--|--|



### 4.3 Anti-Bribery, Corruption and Money Laundering

There is no single, specific anti-bribery and corruption law in the Philippines. Legislation which affects those acts can be found scattered across various pieces of criminal and civil legislation.

Note however that, unlike in other jurisdictions, the Philippines does not penalise commercial or private acts of bribery, only acts of bribery or corruption by public officers/government officials.

The main bribery and corruption provisions are contained in the following laws:

- Revised Penal Code
- Anti-Graft and Corrupt Practices Act (RA 3019)
- Code of Conduct and Ethical Standards for Public Officials and Employees (RA 6713)
- Presidential Decree No. 46 (PD 46), governing the giving of gifts to public officers.

Criminal intent must be proven for purposes of prosecuting criminal offences under the Revised Penal Code, such as bribery and corruption, but not for RA 3019, RA 6713 and PD 46.

The Revised Penal Code penalises bribery which may either be direct or indirect. *Direct bribery* is committed by a public officer who accepts an offer/promise, or receives a gift/present, in consideration of:

- the performance of an act which may either constitute a crime or an unjust act short of a criminal act, and
- refraining from doing something which is the public officer's official duty to do. *Indirect bribery* is committed by a public officer who accepts a gift given solely by reason of his office.

The private person who gives the gift or promise may be held liable for the crime of 'corruption of public officials'. The penalty depends on the gravity of the offence or the value of the gift. The penalty of imprisonment ranges from 2 to 12 years. Other penalties applicable to the public officer include special temporary disqualification or public censure.

RA 3019 was passed to penalise certain offences which may not otherwise fall within the concept of bribery under the Revised Penal Code. This law, for example, penalises public officers, regardless of criminal intent, for taking advantage of their public positions for any personal benefit, whether directly or indirectly, or for taking actions which are prejudicial to the government (e.g. by entering on behalf of the government, into any transaction which is manifestly and grossly disadvantageous to the government). Excluded from this law are 'unsolicited gifts or presents of small or insignificant value offered or given as a mere ordinary token of gratitude or friendship according to local customs or usage.' Among the penalties for violations of RA 3019 are imprisonment of between 1 to 10 years for both the public officer and private individual, and fines of between PHP100–PHP1,000 for certain violations, perpetual disqualification from public office, forfeiture of prohibited interest and unexplained wealth of the public officer.

RA 6713 contains some overlapping provisions but further expands the scope of Philippine corruption laws to cover other acts like disclosure and/or misuse of confidential information, engaging in the private practice of profession by certain public officials. Penalties may either be a fine not exceeding 6 months' salary of the public official or suspension not exceeding 1 year, or a fine not exceeding PHP5,000 and/or imprisonment for a period not exceeding 5 years depending on the violation committed. 'Unsolicited gifts of nominal or insignificant value not given in anticipation of, or in exchange for, a favour from a public official or employee' are likewise excluded from the coverage of the law.

A much older law, PD 46, similarly punishes the act of giving, or offering to give, to a public official or employee, a gift or other valuable thing on any occasion, including at Christmas, when the same is given by reason of the public official/employee's position. However, unlike RA 3019 and RA 6713, it

does not provide for an exception even for low-value gifts. The penalty that may be imposed is imprisonment of between 1 to 5 years for the private individual and the public officer, and perpetual disqualification from public office, suspension and/or removal for the public officer.

Philippine anti-bribery and corruption laws do not allow facilitation payments, unlike the US Foreign Corrupt Practices Act (US FCPA).

### ***Money laundering***

The Anti-Money Laundering Act of 2001 (AMLA) defines 'money laundering' as a crime whereby the proceeds of an unlawful activity are transacted, thereby making them appear to have originated from legitimate sources. It is committed by 'any person knowing that any monetary instrument or property':

- represents, involves, or relates to, the proceeds of any unlawful activity, transacts or attempts to transact said monetary instrument or property
- involves the proceeds of any unlawful activity, performs or fails to perform any act as a result of which he facilitates the offence of money laundering referred to above
- is required under this the AMLA to be disclosed and filed with the Anti-Money Laundering Council, and fails to do so.

'Unlawful activity' refers to any act(s) or omission(s) involving or relating to specific criminal offences as listed in s. 7 of AMLA.

## **4.4 Exchange Control, Foreign Investment Restrictions and Trade Regulation**

As a general rule, foreign investors may own up to 100% of a domestic enterprise in the Philippines provided that the domestic enterprise is not engaged in any of the activities listed in the Negative Lists of the Foreign Investments Act, as amended.

There are two Negative Lists: List A and List B. List A contains areas of investment where foreign ownership is limited by mandate of the Philippine Constitution and/or by specific laws. List B contains areas of investment where foreign ownership is limited for reasons of security, defence, risk to health and morals, or protection of local small and medium-size enterprises. List B cannot be amended more than once every two years.

Under the Foreign Investments Act, as a general rule, a domestic market enterprise (i.e. which produces goods for sale, or renders services or otherwise engages in any business in the Philippines) that is more than 40% foreign-owned must have paid-in or assigned capital of the Philippine Peso equivalent of at least USD200,000. That minimum capitalisation requirement of USD200,000 may be reduced to USD100,000 if the activity involves advanced technology as certified by the Department of Science and Technology, or if it employs at least 50 direct employees as certified by the appropriate regional office of the Department of Labour and Employment (DOLE).

Export enterprises (i.e. manufacturers, processors or service entities exporting 60% or more of its output, or traders purchasing products domestically and exporting 60% or more of those purchases) need not comply with this minimum capitalisation requirement.

The Philippines has an Anti-Dummy Law that imposes criminal and civil penalties on those violating nationalisation laws. The Anti-Dummy Law prohibits foreign nationals from, among other things, intervening in the management, operation, administration or control of a company engaged in a nationalised or partially nationalised activity, whether as officer or employee (excluding technical personnel specifically authorised by the Secretary of Justice). However, foreign nationals may serve as members of the board or governing body of corporations engaged in partially nationalised activities in a number proportionate to their actual and allowable equity in the company.

#### 4.4.1 Exchange controls

Foreign exchange may generally be freely sold and purchased in the Philippines. An exception can be found in relation to the *Bangko Sentral ng Pilipinas* (BSP, the central monetary authority of the Philippines), which regulates the purchase and sale of foreign exchange by BSP regulated entities: i.e.

- authorised agent banks (AAB)
- their subsidiary/affiliate foreign exchange corporations (AAB-forex corps)
- non-bank BSP-supervised entities
- foreign exchange dealers
- money changers, and
- remittance agents.

The Monetary Board of the BSP also has emergency powers, for use in cases of an imminent and actual foreign exchange crisis or national emergency. In such an event, the Monetary Board, with the approval of the President of the Philippines, can impose restrictions on foreign exchange transactions (e.g. temporary suspension or restriction on the sale of foreign exchange by the BSP; subjecting all transactions in gold and foreign exchange to BSP licence; or requiring any foreign exchange obtained by a resident to be delivered to the BSP or any bank or agent designated by the BSP at the effective exchange rates).

#### 4.4.2 Foreign investment approvals and notifications

Foreign investments must be registered with the BSP or, in certain instances, with a custodian bank, so that foreign exchange may be sourced from AABs/AAB-forex corps to fund repatriation of investments and remittance of profits and dividends.

If a foreign investment is not registered with the BSP, AABs/AAB-forex corps would not be allowed to sell foreign exchange to fund the repatriation of that investment and the remittance of profits and dividends relating to such investment. However, in those cases foreign exchange to fund the repatriation and remittance could be sourced from non-BSP regulated entities.

Prior BSP approval for outward investments would be required if the foreign exchange needed to fund outward investments exceeding USD60 million (or the equivalent in foreign currency) per investor per year, such foreign exchange being sourced from AABs/AAB-forex corps. In certain cases, 'qualified investors' may apply to the BSP for a higher annual outward investment limit.

'Qualified investors' include insurance and pre-need companies, collective/pooled funds (e.g. mutual funds, unit investment trust funds, variable insurance), public or private pensions or retirement or provident funds, and other entities determined by the BSP to be 'qualified investors'.

#### 4.4.3 Industry-specific regulation

Most M&A transactions in the Philippines do not require special statutory or regulatory consent or approval. General laws, including the Corporation Code and the Civil Code, largely govern M&A activities. In most cases, the parties need only obtain corporate approvals to authorise a merger or acquisition and comply with rules and regulations to administratively and procedurally execute and implement the transaction. However, special regulations do apply in certain regulated industries such as banking, insurance and telecommunications.

## ***Banking***

Bank mergers and consolidations are subject to the approval of the BSP. Merging or consolidating banks should consult with the BSP prior to finalisation of any merger or consolidation agreement.

BSP policies tend to encourage and promote mergers and consolidations in the banking sector as a means to develop larger and stronger financial institutions, for example granting fiscal and non-fiscal incentives to merging or consolidating banks and other financial intermediaries. These incentives allow for the revaluation of bank premises improvements to premises and bank equipment, and the restructuring of past due debts to BSP to allow the new entity to re-pay these inherited liabilities over a 10-year period.

Subject to the approval of the BSP, the incentives may also be granted in share acquisition scenarios.

A foreign bank may now own up to 100% of the voting stock in one domestic bank through the purchase of the domestic bank's stock under the General Banking Law.

Since June 2007, a foreign bank has been able to operate in the Philippines by acquiring up to 60% of the voting stock of an existing domestic bank. The nationality of the corporation that owns shares in a bank will be the same as that of the controlling stockholders, irrespective of the place of the bank's incorporation.

## ***Insurance***

All insurance companies must obtain the prior approval of the Insurance Commission before effecting any change in ownership.

For mergers and consolidations, the Insurance Code provides that, on giving prior notice to the Insurance Commissioner, two or more domestic insurance companies may merge into a single corporation. This can be one of the constituent corporations or a single new corporation formed by the consolidation.

Upon receipt from the SEC of the certificate of merger or of consolidation, the constituent companies surrender to the Insurance Commissioner their respective certificates of authority to transact insurance business. The absorbing or surviving company in the case of mergers, or the newly formed company in consolidations, must then immediately file with the Insurance Commissioner the application for issuance of a new certificate of authority to transact insurance business, together with a certified copy of the certificate of merger or of consolidation issued by the SEC.

## ***Telecommunications***

In the telecoms sector, share acquisitions need the approval of the National Telecommunications Commission (NTC), where the transfer or sale of shares in a telecoms company will result in the purchaser owning more than 40% of subscribed capital stock (Public Service Law/PSL).

For mergers and asset acquisitions, the PSL requires the prior approval of the NTC<sup>2</sup> for any sale, transfer, mortgage, encumbrance or lease of property, any franchise, certificate, privilege or rights; or for merger or consolidation of property, franchises, privileges or rights of a telecommunications company.

### **4.4.4 Import/export controls**

Certain commodities are subject to import/export controls in the Philippines. In general, these fall into two categories: regulated commodities and prohibited commodities. Some of the more notable examples are set out in the table.

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<sup>2</sup> NTC issues certificates to public utilities (e.g. Certificates of Public Convenience).

Regulated Commodities	
Import	Export
Toys	Bamboo
Motor vehicles, trucks, motorcycles and parts	Coffee
Optical media manufacturing, replicating equipment, parts and accessories	Copper concentrates
Firearms and ammunition, and their parts and accessories	Gold
Communications, telecoms equipment and accessories	Tobacco products
Recyclable materials containing hazardous substances, e.g. electronic assemblies	

Prohibited Commodities	
Import	Export
Dynamite, gunpowder, ammunition and other explosives, firearms, weapons of war and parts except where authorised by law	Abaca and ramie seeds, seedling suckers and root stocks; <i>buri</i> seeds and seedlings (fibre plants)
Written or printed articles, negatives or cinematographic film, photographs, engravings, lithographs, objects, paintings, drawings or other representations of an obscene or immoral character	Milkfish
Any article manufactured wholly or partly of gold, silver or other precious metals or alloys, the stamps, brands or marks of which do not indicate the actual fineness of quality of the metals or alloys	Raw materials for cottage industries, monkey pod (acacia), rattan (including poles)
Marijuana, opium, poppies, cocoa leaves, heroin or any other narcotics or synthetic drugs, or any compound, manufactured salt, derivative, or preparation, except when imported by the Government of the Philippines or any other person duly authorised by the Dangerous Drugs Board, for medical purposes only.	Shells: trumpet shells (Triton); helmet shells (Cassis); live specimens, raw shells, meat and by-products of giant clams.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Under existing laws and regulations, the transfer of shares of stock in a Philippine corporation generally qualifies as a taxable event. In particular, the transfer of shares will attract capital gains tax (CGT), documentary stamp tax (DST), and in some cases, donor's tax.

### 5.1.1 Capital gains tax

For sales or transfers of shares in a Philippine corporation, the net capital gains derived therefrom by a non-resident foreign corporation are subject to capital gains tax at a rate of five percent of the net capital gains not exceeding PHP100,000 and 10% of net capital gains in excess of the first PHP100,000. Here 'net capital gains' means the excess of the amount realised over the basis or adjusted basis for determining gain where 'the amount realised' is the sum of money received plus the fair market value (FMV) of the property (other than money) received and the 'basis' is the cost in cases of property acquired by a purchase.

In determining the FMV of the shares, the Adjusted Net Asset Method is used, whereby all assets and liabilities are adjusted to FMV. Under that method, the FMV of the shares will be the value of adjusted assets less adjusted liabilities. If the corporation whose shares are being transferred, holds real property, the appraised value of real property at the time of sale must be the higher of the following; FMV as:

- determined by the Commissioner, or
- shown in the schedule of valued fixed by the Provincial and City Assessors, or
- determined by an independent appraiser.

This means that the difference between the appraised value of the real property over its recorded value (in the latest audited financial statement prior to the date of transfer) will be added to the recorded net asset value for the purposes of determining the FMV of the shares.

### 5.1.2 Tax Treaty relief

Provided the conditions of an applicable tax treaty are met, a non-resident foreign corporation which transfers shares in a Philippine corporation may be able to claim exemption from CGT. To confirm the exemption, the non-resident foreign corporation must file a tax treaty relief application (TTRA) with the Bureau of Internal Revenue and obtain an official ruling.

### 5.1.3 DST

The transfer of shares of stock in a Philippine corporation is also generally subject to DST at a rate of PHP0.75 for every PHP200 or fraction thereof (effectively 0.375%) of the total par value of the shares to be transferred. The DST is payable by either party to the transaction (depending on their agreement).

There is no exemption from the DST on the transfer of shares, even if the seller is a non-resident.

However, transfers of stock pursuant to a 'tax-free' merger or exchange are exempt from DST, provided the requirements of the Tax Code are met.

### 5.1.4 Donor's tax

If the FMV of the shares sold, assigned, or disposed of exceeds the amount of cash and/or the FMV of the property received by the seller or transferor, the excess shall be considered as a 'gift' subject to donor's tax. The donor's tax will be levied on the excess at a rate of 30% if the parties involved are juridical persons.<sup>3</sup>

## 5.2 Acquisition of Assets

Under existing laws and regulations, the transfer of assets between entities that have no incentives or special registrations, generally qualifies as a taxable event. In particular, the transfer of assets will attract income tax, withholding tax, VAT; and in some cases, DST, donor's tax and local transfer tax (LTT).

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<sup>3</sup> For example, if the FMV of shares sold are PHP100,000 and consideration for the sale is PHP50,000, the excess of PHP50,000 (FMV less consideration) will be subject to donor's tax at a rate of 30%.

### 5.2.1 Income tax

The transferor may be subject to corporate income tax of 30% on the gains received from the transfer of its assets.

### 5.2.2 Creditable withholding tax

If the assets transferred include 'real property used in the business', the sale of these assets will be subject to creditable and final withholding tax equal to 6% of the transfer price or FMV of the real property, whichever is higher.

### 5.2.3 VAT

VAT at the rate of 12% may be imposed on the 'gross selling price' of the assets used in the business of the transferor. Because VAT is an indirect tax, the cost of the tax may be shifted or charged by the transferor to the transferee. In turn, the transferee can recover and claim the VAT charged as an input tax credit to reduce its VAT liabilities, if any, arising from its own sales (i.e. output tax).

The transfer of property pursuant to a statutory merger will be exempt from VAT. Any unused input tax credits of the absorbed corporation as of the effective date of the merger shall be absorbed and can be utilised by the surviving corporation going forward

### 5.2.4 DST

If the assets to be transferred include real property, the transfer of such assets will be subject to DST of 1.5% based on whichever is higher between the actual selling price or consideration of the real property and its FMV, payable by either party.

As a general rule, DST is also payable on the assignment or transfer of any mortgage, pledge, lease or certificate of indebtedness, at the same rate as that imposed on the original instrument. However, if there is no change in the maturity date or remaining period of coverage from that of the original instrument, the assignment or transfer of the mortgage, pledge, lease or certificate of indebtedness is exempt from DST.

### 5.2.5 Donor's tax

Where property other than real property subject to CGT are transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the FMV of the property exceeded the value of the consideration shall be considered as a 'gift' subject to donor's tax. The donor's tax is levied on that excess at a rate of 30% if the parties involved are juridical persons.

### 5.2.6 Local transfer tax

In relation to asset acquisitions, provinces and cities may impose local transfer taxes and registration fees (for registration with the register of deeds) in cases involving the transfer of real property ownership. Provinces may levy a tax on the transfer of real property ownership at a rate not exceeding 0.5% based on the total consideration involved in the acquisition of the property or the FMV of the property, whichever is higher. The real property transfer tax rate that cities can levy may exceed the maximum rate allowed for provinces but by no more than 50%.

### 5.2.7 Entities with incentives or special registrations

Note that the tax implications of asset transfers involving entities with tax incentives or special registrations (whether transferor, transferee or both) (e.g. entities registered with the Philippine Economic Zone Authority) will vary depending on the incentives and special registration of the entities involved in the asset transfer.

## 5.3 Mergers

In mergers, the issuance of shares by the surviving corporation is subject to a DST of PHP1 on each PHP200 (or fraction) of the par value of the shares. However, transfers of stock or real property pursuant to the merger are exempt from DST, provided the requirements of the Tax Code are met.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of share acquisitions, all rights, duties and liabilities owed by or to the employees of the target company continue to be owed by or to the target company. The purchaser merely buys the shares of the target company and, therefore, indirectly inherits all the rights, duties and liabilities as new owner of the target company. If there is an integration of the target company's business with the purchaser's business post-acquisition, this may be through an acquisition of assets, and the considerations set out below will be relevant.

#### 6.1.2 Acquisition of assets

In an asset acquisition, the legal consequences under Philippine labour laws are more complex and uncertain. Although there are no defined statutes governing employment matters in asset acquisitions, case law provides certain guidance as to the likely treatment of any employment-related conflict that may arise out of an asset acquisition.

The general rule is that labour contracts are considered personal contracts, i.e. enforceable only against the parties to the contract. Because of this, labour contracts are generally not enforceable against a purchaser of assets, unless this is provided for in the transfer agreement. A good faith purchaser is not obliged to continue employing employees of the seller. However, this general rule is not absolute. In certain cases, the Philippine Supreme Court has been known to disregard the personal nature of labour contracts and hold the purchaser, vendor, or both, liable in transactions where it has been deemed that good faith was lacking.

#### 6.1.3 Mergers and consolidations

In cases of mergers and consolidations, the rules on transfer of general liabilities and obligations to the surviving corporation or the consolidated corporation are applied to employment-related obligations and liabilities. The surviving or consolidated corporation becomes responsible for all the liabilities and obligations of each of the constituent corporations in the same manner as if a surviving or consolidated corporation would itself incur such liabilities or obligations. Any claim, action or proceeding pending by or against any such constituent corporations may be prosecuted by or against the surviving or consolidated corporation.

### 6.2 Approval or Consultation Requirements

Whether the transaction is an acquisition of shares or assets, there are no approval or consultation requirements for carrying out the transaction, unless there are agreements in place, e.g. collective bargaining agreements.

### 6.3 Protection against Dismissal

#### 6.3.1 Redundancies

If the purchaser in a share acquisition wants to make any employees of the target company redundant, there must be a legitimate reason for the redundancy and the transaction itself cannot be that reason. Redundancy of employees of the target company may be justifiable if the services of those employees are not needed by the target company. The target company must also give written notice of employment termination to each employee affected and to the DOLE at least one month before the effective date of the termination. In addition, the target company should pay severance pay equivalent to one month's salary per year of service or one month's salary, whichever is higher (six months or more being considered a whole year: i.e. if an employee has worked for six years and seven months, she will be entitled to severance pay calculated on the basis of seven years' employment). If a contract, policy or practice exists providing a longer notice period or bigger separation pay, the contract, policy or practice would prevail. (This paragraph also applies to mergers and consolidations).



However, in asset acquisitions, there may be no need for the purchaser to implement any post-acquisition redundancy. A purchaser of assets (in good faith) has no obligation to absorb employees of the vendor or to continue employing them. The purchaser can select the employees it requires or wants, avoiding the need to implement any post-acquisition redundancy.

### 6.3.2 Penalties

If there is no basis for the redundancy (where decisions regarding continuance of employment for employees have not been made in good faith/the selection criteria are unfair), the dismissed employees will be generally entitled to reinstatement and back wages and benefits computed from the time of the dismissal until reinstatement. By contrast, if there are grounds for the dismissals, but the employer fails to observe the notice requirement, the employees will be entitled to nominal damages, the amount of which is subject to the discretion of the court. Currently, the court imposes nominal damages of PHP50,000.

# Poland

## 1.1 Overview

Poland, officially the Republic of Poland, is a unitary state made up of 16 *voivodeships* (provinces). Since the fall of the communist government, Poland has steadfastly pursued a policy of liberalising the economy and today stands out as a successful example of the transition from a centrally planned economy to a primarily market-based economy.

## 1.2 General Legal Framework

The general legal framework applicable to business structures as well as merger and acquisition transactions in Poland is contained in three principal acts. The Civil Code (enacted in 1964) establishes the general framework for the acquisition of shares and also assets. The Code of Commercial Partnerships and Companies (enacted in 2000; CCC) is the principal regulation applicable to the main types of legal entities operating in the Poland and governs matters relating to the formation, operation, dissolution, and changes in legal structure relating to those entities. The Act on Freedom of Business Activities (enacted in 2004) provides the general legal framework governing the commencement, conduct, and termination of business activities by domestic and foreign entrepreneurs.

## 1.3 Corporate Entities

The limited liability company (*spółka z ograniczoną odpowiedzialnością/sp. z o.o.*) and the joint stock company (*spółka akcyjna/S.A.*) are the two main corporate forms in Poland, and are substantially based on German models. Both have legal personality with the economic liability of shareholders limited to the amount of their equity contribution. Shares in these kinds of companies are freely transferable unless their statutory documents provide otherwise.

Of the principal legal differences between the two types of companies, two are fundamental.

First, the share capital in joint stock companies may be raised by public subscription, whereas limited liability companies may not engage in public share issues. Second, shares in joint stock companies are issued in the form of share certificates, while the issue of share certificates by limited liability companies is forbidden.

### 1.3.1 Limited liability companies

The limited liability company (*sp. z o.o.*) is well suited to carrying out business activities of all kinds. The shareholders' liability is limited to the amount of their contributions to capital. The minimum share capital of a limited liability company is PLN5,000. The shares are not represented by security instruments and, assuming no restriction is provided for in the articles of association, may be transferred in written form by the way of signed and notarised agreement.

A limited liability company is managed by a management board consisting of one or more members appointed by the shareholders (unless the articles of association provide otherwise). The management board must be composed of one or more members. Certain strategic decisions, in particular those relating to approval of annual reports, distribution of profits, claims for the reparation of damages, etc., are made at the shareholders' meeting.

As a rule, it is not necessary for a limited liability company to have a supervisory body in addition to the management board. Indeed, often limited liability companies with only one shareholder will not have a supervisory body, but the articles of association may provide for a supervisory board or audit commission, or both. In such cases, the articles may also prohibit individual supervision by shareholders.

In companies which have a share capital in excess of PLN500,000 and where the number of shareholders exceeds 25, the appointment of a supervisory board or an audit commission is mandatory. The supervisory board will consist of at least three members and is obliged to exercise supervision of the company's activities at all times. Its competencies include examination of financial

statements, reports and motions of the management board regarding the distribution of profits or how to account for losses, in a manner envisaged by the CCC.

### 1.3.2 Joint stock companies

The joint stock company (S.A.) is the corporate form usually used for large undertakings that require substantial capital. The minimum share capital is PLN100,000. Shares in a joint stock company are freely transferable unless the company's statutory documents, such as the company articles of association or statutes, provide otherwise. The statutes of an S.A. may provide for two categories of shares: bearer shares (the transfer of which may not be restricted); and registered shares (where transfer may be restricted).

A joint stock company must have a management board consisting of one or more members. The management board represents the company. Its members are usually appointed by the supervisory board. Certain key decisions concerning the joint stock company are made at the general (stockholders') meeting.

A joint stock company must also have a supervisory board consisting of at least three members (or at least five members in the case of publicly listed companies), who are appointed by the general meeting. The statutes, however, may provide for other methods of appointment. The supervisory board is required to exercise constant supervision over the company's activities in all areas of its business. The duties of the supervisory board include, in particular, examination of the financial statements and review of the management board reports and motions regarding the distribution of profits and accounting for losses, as well as the submission of annual written statements reporting its findings to the general meeting of shareholders. The supervisory board is competent to suspend all or individual members of the management board for 'important reasons' and to temporarily substitute one of its own members to perform the functions of a suspended, dismissed or otherwise unavailable management board member.

### 1.3.3 Partnerships limited by shares

Partnerships limited by shares (S.K.A.) share some of the features of registered partnerships and joint stock companies. Like other types of Polish partnerships, a partnership limited by shares does not have legal personality. It is the only partnership structure that is required to meet minimum share capital requirements (PLN50,000) and its capital may be raised by public subscription. Shares in a partnership limited by shares are issued in the form of share certificates. In partnerships limited by shares, there are two types of partners—at least one of them will have unlimited liability and at least one will be a shareholder. A partner with unlimited liability may be also a shareholder.

Partnerships limited by shares have no management board, therefore all partners with unlimited liability manage and represent it unless the statutes provide otherwise. Certain actions involving the partnership may require the consent of the partners and shareholders at a general meeting. In addition, a supervisory board may be established by the partners and shareholders at the general meeting that performs a non-executive role and may oversee the management of a partnership limited by shares, but the establishment of a supervisory board is generally optional (but mandatory where there are more than 25 shareholders).

## 2. Acquisition Methods

In Poland, a business can be purchased by way of a share purchase or an asset purchase. Merger and other forms of corporate reorganisation are also available.

### 2.1 Acquisition of Shares

The acquisition of a target company may be achieved by acquisition of its shares, which will result in the acquisition of the target company shareholder's rights and liabilities.

## 2.2 Acquisition of Assets

The acquisition of a target company may be achieved by the acquisition of assets of that company. If the assets acquired, in aggregate, form an independent business, subject to meeting conditions specified in Polish legislation, such a transaction may be qualified as an acquisition of a business. Whether a transaction involves a standard acquisition of assets or an acquisition of a business will depend on the nature of the assets being acquired. Similar but not identical concepts are used by civil, employment and tax regulations and it needs to be analysed on a case-by-case basis whether the assets acquired form a business from the civil law perspective; an employment establishment from the employment perspective; and/or a going concern from the tax perspective.

The acquisition of a business involves acquisition of all elements of the business, unless specifically excluded from the transfer by the acquisition contract or by provisions of law. The acquirer of a business will be liable jointly and severally with the transferor for the transferor's debts and obligations relating to running the business unless, at the time of acquisition, the acquirer was not aware of those obligations despite having investigated this with due care. The statutory liability of the acquirer is limited to

- the value of the acquired business as at the time of the acquisition, and
- the amount owing to the creditors of the business at the time of the acquisition.

The condition and composition of the acquired business as at the moment of acquisition is assumed for valuation purposes. This liability cannot be excluded or limited without the creditor's consent.

If assets to be acquired do not form a business pursuant to Polish regulations, all such assets should be listed in a detailed inventory to ascertain which elements are subject to the transfer. Both the acquisition of assets and the acquisition of the business require the consent of creditors before the seller's liabilities arising out of contractual obligations relating to the acquired assets will be validly transferred.

## 2.3 Mergers

Under the CCC, companies may merge either by transferring all the assets of the company being taken over to the company effecting the takeover in exchange for the issue of shares to the shareholders of the company being acquired, or through the creation of a new company to which the assets of the merging companies are contributed in exchange for the issue of shares. A merger may be carried out without increasing the share capital of the acquiring company if that company owns shares in the company whose assets are being acquired. A merger must be approved by and registered with the relevant registry court in order to become effective. An acquiring company or a newly-formed company assumes, at the date of the merger, all the rights and obligations of the acquired company or companies merging into the newly-formed company. The same applies to administrative permits, consents and reliefs; however, specific provisions of law (or the permits, consents or reliefs themselves), may contain provisions preventing such a transfer.

Merger is often used as a vehicle for post-acquisition integration, rather than for acquisition purposes directly.

In general, a merger requires fewer formalities (e.g. there is no need for a shareholders' resolution, verification of the merger plan by an expert auditor, or preparing reports on the legal and economic grounds for the merger by management boards of the merging companies) where the acquiring company already holds more than 90% of the shares of the company being acquired, or the acquiring company holds 100% of the shares of the company being acquired.

## 3. Negotiation, Signing and Closing

### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Polish purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

## Purchase Price

1	Is a purchase price adjustment common? What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. Various types are seen, while cash-free, debt-free and working capital adjustments are the most common. The 'locked box' mechanism is becoming increasingly popular for the most sought-after assets.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares the completion balance sheet?	Usually prepared by target company on instruction by buyer, and verified by seller.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	Common in private equity transactions when sellers continue to manage the target company after closing. Otherwise not common.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Quite common as a completion mechanism to ensure price payments. Increasingly less common as a collateral of seller's liability for representations and warranties (although it depends on bargaining position of the parties).
8	Is a break fee common?	Not common.

## Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Quite common.
10	Is the MAE general or specific?	Rather general.
11	Quantification of MAE?	Uncommon.

## Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Blue pencil provisions common. Waterfall provisions not so common.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records and management between sign and close?	Common. NB: competition law issues around potential 'gun-jumping'.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Common to update warranty disclosures. Usually no consequence as long as updates do not result in MAE.
17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax representations and warranties/relevant indemnity included in the purchase agreement.

## Representations & Warranties

18	Materiality in representations—how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen. Quantification by certain amount is often used (if applicable).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Entirely depends on relative bargaining positions (from imputed to actual knowledge).
20	Is a warranty that there is no materially misleading/omitted information common?	Still commonly requested by buyers, but often resisted by sellers.
21	Is disclosure of data room common?	It is increasingly common to include data room index or data room documents in annex to the agreement with a reverse representation of the buyer.

## Repetition of Representations & Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at completion common. Bring-down certificate at completion is not very common.
23	What is the applicable standard? True in all material respects? Material Adverse Effect?	True, accurate and not misleading in all material respects is very common. Often carve-out for the most important representations which must be absolutely true.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Uncommon.

## Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Commonly 100% for the title to the shares only. Mid-cap and larger deals see lower caps, e.g. 10%–30%. Key warranties and/or specific indemnities are usually not capped or capped at 100%.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually warranties and damage claims (with respect to the scope of damage and its kind).
27	What are the common exceptions to the cap?	Key warranties and tax warranties are often excepted or limited with higher cap. Specific indemnities are usually limited to 100% of the price or not capped at all.
28	Is a deductible or basket common?	Both are common. Deductible is more often resisted and a tipping basket is more common.
29	Is a <i>de minimis</i> common?	Common.

30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	Operational warranties: 12–24 months; key warranties: 24–48 months (e.g. title, authority, financial statements, etc.); tax: 6 years (statute of limitations period); title warranties: sometimes not limited in time. Liability for fraud (wilful misconduct) may not be limited by the parties due to statutory limitations.
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31	Is warranty insurance common?	Very uncommon.
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#### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Uncommon.
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#### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Common.
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34	Insurance proceeds?	Common for actually received.
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35	Third party recoveries?	Common for actually received.
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#### Damages, Knowledge

36	Obligation to mitigate damages?	Common. Additionally required by law.
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37	Exclusion of consequential damages?	Common.
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38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Common to provide for a representation from buyer that except as disclosed in the agreement, it is not aware of any breach of the representations at the time of closing.
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#### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. Polish law choice is most common (unless Polish target is part of a multi-jurisdictional transaction).
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40	Is litigation or arbitration more common? If arbitration, where?	Both common. If arbitration, usually either Polish Chamber of Commerce or arbitration ad hoc under UNCITRAL (Warsaw common as a venue). Sometimes ICC Stockholm or Vienna.
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#### Stamp Duty

41	If stamp duty is payable, is it normally shared?	No stamp duty applies. Transfer tax applies (unless broker is involved) borne by the buyer according to the statutory provisions. Notarial fees usually borne by the buyer.
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## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

Signatures on agreements for the transfer or encumbrance of shares in a Polish limited liability company (sp. z o.o.) must be notarised to validate the agreement. The transfer of shares in a joint-

stock company (SA) requires a written declaration. Company constitutional documents may provide for additional formalities concerning share transfers.

### 3.2.2 Transfers of assets

Signatures on agreements for the transfer of a business must be notarised. Moreover, acquisitions of real property, as well as agreements to transfer real property, require the form of a notarial deed.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

The form of transfer of shares depends on the type of the company and type of shares being transferred.

Transfer of registered shares in a joint stock company requires delivery of share certificates and endorsement by the transferor on the share certificate or in a separate document. The transfer of the registered shares is effective against the company when the purchaser of such shares is entered into the shareholders register maintained by the company. Transfer of bearer shares in a joint stock company requires delivery of share certificates to the purchaser. The transfer of bearer shares does not need to be registered with the company.

In a limited liability company, the purchaser should notify the company of the acquisition of shares and deliver evidence of the share transfer to the company (which is an additional argument for using a separate short-form share transfer agreement for company notification purposes). The share transfer agreement should be in a written form with the parties' signatures certified by a notary. Until such notification the transfer is deemed ineffective against the company.

If a company acquires shares of the target company and, as a result of such acquisition, it achieves a dominant position over the target company, the acquiring company has a duty to notify the target company of the acquisition within two weeks of the acquisition date. If this is not done, the acquiring company will only be allowed to exercise voting rights under the acquired shares representing up to 33% of the shares in the share capital of the target company (if the acquiring company holds more shares, those will be deprived of voting rights until the required notification occurs).

### 3.3.2 Transfers of title to assets and business

Assets must be listed in the sale agreement in order to be included in the asset sale. The acquisition of a business will include by default assets not specifically itemised in the sale agreement but belonging to the business; it is however customary to list all assets in business acquisition agreements expressly to avoid potential disputes about whether or not an asset is part of the acquired business. Real estate may only be effectively transferred by notarial deed and certain intellectual property rights must be separately transferred. Transfer of other assets may be effected, even by means of an oral agreement, but in practice any transfer of assets (except for minor day-to-day transactions concerning low value items) will be evidenced by a written agreement or invoice for tax reasons. The transfer of business requires a written agreement with notarised signatures. The transfer of the name of the business is often difficult and is generally only possible with the transfer of the business.

## 3.4 Formalities for Mergers

The merger procedure starts with the preparation of the draft terms of the merger agreed in writing by the merging companies (the merger plan). In cases where the acquiring company holds 100% of shares of the company being acquired, a simplified merger plan may be prepared.

### 3.4.1 The merger plan

The merger plan must stipulate at least the following details:

- basic information regarding the merging entities (type, business name, seat), the method of merging, and, in the case of a merger through the formation of a new company, basic information regarding that new company



- the ratio of exchange for the shares of the company being acquired or companies merging by the formation of a new company for the shares of the acquiring company or the newly-formed company, as well as the amount by which the share capital of the acquiring company will be increased as a result of the merger and the amount of additional payments, if any (not obligatory in cases where a simplified merger plan is used)
- the rules governing allocation of shares of the acquiring or the newly-formed company (not obligatory in cases where a simplified merger plan is used)
- the date from which the shares in the acquiring or newly-formed company give the right to a share in the profits (not obligatory in cases of simplified merger plan is used)
- rights granted by the acquiring company or the newly-formed company to the shareholders or persons enjoying special rights in the company being acquired or in companies merging by the formation of a new company, if any, and
- special benefits for members of the governing bodies of the merging companies and other persons involved in the merger, if any.

The following documents must be attached to the merger plan:

- drafts of the merger resolutions
- draft amendments to the articles of association or the statutes of the acquiring company or draft articles of association or statutes of the newly-formed company
- a valuation of the assets of the company being acquired or of companies merging through the formation of a new company as of a chosen date in the month preceding the filing of an application to announce the draft terms of merger, and
- an accounting statement drawn up for the purposes of the merger as of the date referred to above, prepared with the use of the same methods and layout as the most recent annual balance sheet.

At the same time as drawing up the merger plan, the management board of each of the merging companies must draw up a report justifying the legal and economic grounds for the merger and, in particular, the share exchange ratio (not obligatory in the case of the acquisition of a subsidiary by its parent company). Once the draft terms of the merger are agreed by each of the merging companies, they should be filed with the relevant registry courts for each of the merging companies. Following the submission of the draft terms of the merger, the merging companies should apply for the appointment by the court with jurisdiction over the seat of the acquiring company, of an expert auditor to examine the draft terms of the merger (not obligatory if all shareholders of the merging companies grant a waiver). The expert auditor is obliged to issue its opinion within a time-limit determined by the court, but in any event no later than two months of the date of the auditor's appointment. The management boards of the merging companies must submit additional explanations or documentation to the auditor if the auditor makes a written request for that information.

The merger plan must be publicly announced not later than one month prior to the date of the shareholders meeting on which the merger resolution is due to be adopted.

Once the merger plan is examined and approved by the expert auditor appointed by the court, management boards of the merging companies must, twice, notify the shareholders of their intention of merging with the other company. The first notification must be made no later than one month prior to the proposed date for adopting the resolution to merge, and the second must be made within a period not shorter than two weeks after the first notification.

The general meetings of each of the merging companies must then adopt the resolution on the merger. Such resolutions must be adopted by a majority of three-quarters of the votes, representing at least half of the share capital, unless the articles of association or company statutes set stricter requirements. Note that the resolution on the merger of a publicly traded company with another

company requires a two-thirds majority of the votes, unless the company articles of association or statutes provide for stricter requirements. The resolution should include consent to the merger plan and to any proposed amendments to the articles of association or the statutes of the acquiring or newly-formed company. The merger resolutions are then recorded in minutes drawn up by a notary.

Following the passing of the resolutions to merge, the management boards of each of the merging companies file the merger resolution with the registry court.

The merger date will be the date of registration of the merger by the relevant registry court for the seat of the acquiring or newly-formed company. On the same date, a company being acquired or companies merging by the formation of a new company will be automatically dissolved, without commencing the liquidation proceedings which normally need to be completed before companies are allowed to deregister.

In general, a merger requires fewer formalities (e.g. there is no need for a shareholders' resolution, verification of the merger plan by an expert auditor or reports of the merging companies) in cases where the acquiring company already holds more than 90% of shares of the company being acquired, or the acquiring company holds 100% of shares of the company being acquired.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Competition law in Poland is regulated by the Act on Protection of Competition and Consumers of 16 February 2007 (the Antimonopoly Act), the Act on Combating Unfair Competition of 16 April 1993 (the Unfair Competition Act) and the Act on Combating Unfair Commercial Practices (the Unfair Commercial Practices Act) of 23 August 2007.

The Antimonopoly Act is directed towards three types of market behaviour:

- agreements and practices restricting competition
- abuse of a dominant position, and
- excessive concentration in a market.

The President of the Office for Protection of Competition and Consumers (the Antimonopoly Office/AMO) has broad investigatory powers and may issue a decision ordering that illegal practices (i.e. agreements and practices restricting competition or abuse of a dominant position) be ceased. Any agreement concluded in violation of the Antimonopoly Act may then be declared void by a civil court in whole or in part. Decisions of the AMO President will give grounds for damages resulting from claims filed by other competitors and/or consumers.

The President of the AMO may impose fines on undertakings entering into agreements restricting competition or abusing a dominant position, of up to 10% of their annual turnover. In addition, the AMO President has powers to fine individuals who intentionally approve the conclusion of an anti-competitive agreement. The maximum cap of such a fine is PLN2 million.

Additionally, the Antimonopoly Act also prohibits the following practices violating consumer interests:

- using clauses in listed in the Register of Prohibited Clauses in agreements
- not complying with the obligation to provide consumers with reliable, truthful and complete information, and
- unfair commercial practices and acts of unfair competition.

The AMO President may impose fines on undertakings that violate consumer interests, of up to 10% of their annual turnover.

The Minister of the State Treasury should be notified of transactions exceeding EUR50,000 in value and involving state-owned companies or their assets. The Minister can submit an objection to such transactions.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Polish purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
Timetable		
2	In practice, what is the timetable for clearance (in first phase and second phase review)?	Generally, due to 'stop the clock', the process (see <b>4.2.3</b> ) can last up to 5 months (1 month in the first phase plus additional 4 months in the second phase), depending on the complexity of the case. Difficult cases can take up to 6–9 months.

### 4.2.1 Merger control

The AMO has jurisdiction over certain categories of transactions that have, or may have, effects on the Polish market. Notification to the AMO is mandatory in the following situations:

- merger of undertakings
- taking direct or indirect control of another undertaking or a part of it
- creation of joint ventures, and
- certain acquisitions of assets.

The above transactions may be subject to pre-closing review by the AMO if:

- the combined worldwide turnover of the undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR1 billion, or
- the combined turnover of the undertakings participating in the concentration in the territory of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR50 million.

Further, acquisition of a part of another undertaking's property (the entirety or part of the undertaking), shall be subject to AMO review if the turnover achieved by the to-be-acquired property in any of the two financial years preceding the year of notification has exceeded the equivalent of EUR10 million in the territory of Poland.

The notification to the AMO is a mandatory and pre-merger requirement imposed on the management body of the acquirer, i.e. in a share acquisition, on the purchaser of the shares, or in case of change of the control of the company, on the undertaking that acquires control. All parties to a transaction are required to make the filing only in transactions relating to the merger of undertakings and the creation of a joint venture.

#### 4.2.2 Statutory exemptions

The above transactions do not require any filing to the AMO, provided that:

- the combined turnover of the target company and its subsidiaries did not exceed in the territory of Poland in any of the two financial years preceding the notification, the equivalent of EUR10 million
- the turnover of at least one of the merging parties or at least one of a joint venture's parents and their capital groups did not exceed the equivalent of EUR10 million in the territory of Poland
- the combined turnover of the target company and its subsidiaries plus the turnover achieved by the to-be-acquired property (in case the target and the property belong to the same capital group) in any of the two financial years preceding the year of notification did not exceed together the equivalent of EUR10 million in the territory of Poland
- the undertakings concerned belong to the same capital group
- the disposal of the acquired securities takes place within a year of the acquisition by a financial institution and no voting rights (except the right to receive a dividend) are exercised or such rights are exercised solely with a view to the resale of the undertaking concerned, or its part, or its assets, or the securities acquired
- the shares are acquired on a temporary basis with a view to safeguard the creditors' interests and the creditor does not exercise any voting rights with it, except to the right to resell it, or
- the control is taken in the course of a liquidation process, except when the acquiring company is a competitor of the undertaking over which the control is to be taken or belongs to the same capital group to which the competitor belongs.

#### 4.2.3 Timetable

Currently (since 18 January 2015), there are two phases of review. The first phase lasts up to one month. If the case merits extensive markets analysis, a second phase will be initiated. That second phase will last no longer than an additional four months. During these phases the AMO has the right to request additional information. Such requests for information stop the clock until the AMO has received the requested information. In case of remedies (conditions), the statutory review period will be extended for additional 14 days.

#### 4.2.4 Powers of the AMO

The AMO may clear the concentration, impose remedies on the transaction, or prohibit it if the merger would result in the creation or strengthening of a dominant position leading to the significant limitation of competition. Until a final decision approving (conditionally or unconditionally), the transaction or the lapse of the statutory period for AMO's review of the notification, the transaction may not be consummated (closed).

A decision of the AMO may be appealed to the Anti-Monopoly Court within one month of the date of delivery of the decision.

#### 4.2.5 Penalties

Should the parties close the transaction without obtaining of the required clearance of the AMO or consummate it before clearance has been issued, the AMO may:

- impose on the undertaking a fine of up to 10% of the turnover it has generated in the previous financial year (in practice, to the end of 2014, such fines have not exceeded EUR100,000)

- impose on the person holding a managerial post or a member of a managing authority of the undertaking, a fine of up to 50 times the average salary in the business sector (currently approximately EUR41,000), or
- order:
  - that the merged entity be divided
  - disposal of the entirety or part of the undertaking's assets, or
  - disposal of stocks or shares ensuring the control over the undertaking or undertakings, or dissolution of the company over which the undertakings have joint control.

A decision ordering that the merged entity be divided or ordering disposal of assets/shares may be issued within five years of the closing of the transaction. Should such decision be issued and the undertaking does not comply with it, the AMO President may split up the merged entity, and may request the court to undertake actions to restore the previous state of affairs.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

#### ***Non-compete covenants***

Non-compete covenants are commonly included in Polish business sale agreements. Essentially, these are assessed according to the general principles of Polish anti-monopoly legislation and EU legislation. In principle, the legal effectiveness of non-compete covenants will be upheld as long as the term of the covenant is not more than two years (three years in some cases). In addition, under a recent ruling of the Supreme Court, a seller cannot purport to extend a non-compete obligation to cover family members, including a spouse (husband or wife).

#### ***Gun-jumping***

The general rule is that competitors should remain competitors and must act as such until the date of closing (completion) of the transaction. The laws prohibiting restrictive agreements are applicable throughout the pre-closing process, even after merger control clearance has been obtained or any merger control waiting periods have expired (see Appendix B).

It should be noted that a concept of gun-jumping relates not only to communication between competitors that takes place prior the completion of the transaction, but also to filings that are made too late, as well as in cases when the parties admit that they failed to notify 'an intention' to concentrate.

### 4.4 Anti-Bribery, Corruption and Money Laundering

The principal source of Polish law on business crime is the Criminal Code. The Criminal Code prohibits various corruption and business crime-related activities, and in particular: 'active' and 'passive' bribery in the public sector; active and passive bribery in the private sector; trading 'in influence'; money laundering; public procurement crimes; abuse of trust in management; and (illegal) acting to the detriment of creditors. Criminal provisions relating to business offences may also be found in other pieces of legislation, including the Act on the Liability of Collective Entities for Penalized Acts (2002) and the Act on Counteracting Money Laundering and Financing of Terrorism (2000). Authorities devoted to combatting bribery, corruption and money laundering crimes are mainly the Police, the Prosecution Service and the Central Anti-Corruption Bureau.

#### 4.4.1 Bribery in the public sector

The concept of bribery is broad and includes the acceptance of benefits (or the promise of a benefit), in connection with holding a public function. The benefit need not be actually received or granted for a criminal deed to be committed, since offers will suffice to commit the crime. The benefit to be granted need not be illegal in itself and may relate to an official function which is within the normal scope of the functions/acts of a person holding an official function (e.g. speeding up an administrative

procedure). The crime of bribery can be committed even when no particular action is expected of the person holding the public function, and the intention is only to gain the 'positive attention' of the beneficiary. There is no minimum threshold value of such a bribe, but the amount in question may have an impact on the resulting penalty.

'Active bribery' is the giving and offering of benefits under conditions as described above and may be committed by anyone. 'Passive bribery' is the accepting and receiving of benefits under conditions as described above and, consequently, concerns exclusively individuals holding a public function.

Individuals holding a public function include:

- public officials, e.g.:
  - the President of the Republic of Poland
  - members of the Sejm (lower house of the Polish parliament)
  - members of the Senate (upper house of the Polish parliament)
  - members of the European Parliament
  - councillors
  - judges, jurors, prosecutors
  - officers of financial authorities carrying out preparatory proceedings and officers of authorities superior to such authorities
  - notaries, court enforcement officers, court-appointed trustees, official receivers, court supervisors and court-appointed custodians
  - persons adjudicating in disciplinary bodies
  - employees of government administration or other public or local self-government bodies, unless carrying out only service activities, as well as other persons entitled to issue administrative decisions
  - employees of a state supervisory body or local government supervisory body, unless carrying out solely service activities
  - persons in managerial positions in other state institutions
  - officers of bodies responsible for ensuring public safety or officers of the Prison Service
  - persons on active military duty
  - international criminal tribunal employees excluding individuals performing service functions only
- persons employed by entities transferring public funds, unless they perform service functions only
- members of local self-government bodies
- certain other persons in public sector roles.

Passive bribery may also apply to persons in public sector jobs in foreign countries or within international organisations.

#### 4.4.2 Bribery in the private sector

Polish law also penalises certain bribery activities in business-to-business relations. Business bribery occurs when decision-makers (i.e. persons who fulfil a managerial function in an entity which carries out business, or have significant impact on decision-making) or other persons in employment relationship or in service or similar contract, demand or accept a material or personal benefit (or a promise of the same) in return for abusing the authority granted to him or her, or for failing an obligation which could:

- result in material damage being incurred by a business entity
- constitute an act of unfair competition
- constitute an act which inappropriately favours the purchaser or customer of goods, services, or other performances.

In addition to penalising the demanding and accepting of benefits under conditions as described above, Polish law also penalises the promising and granting of such benefits.

#### 4.4.3 'Trading in influence'

'Trading in influence' consists in claiming influence in a government, local government, international organisation and/or in a Polish or foreign entity transferring public funds, or convincing another person or confirming a conviction concerning the existence of such influence, and undertaking to intercede in the settling of a matter, in connection with the claimed influence, in exchange for some material or personal benefit or a promise of such a benefit. By way of an example, the claimed influence may consist in the claimant's good personal relationships with government decision-makers or other officials. As the criminal activity consists in the undertaking to intercede in the settling of a matter in connection with the claimed influence in exchange for a benefit, it is not necessary for the person to in fact have such influence, or for that person to actually intercede in the settling of a matter.

It is recognised as a criminal act under Polish law to grant a material or personal benefit or to promise to grant such a benefit in exchange for interceding in the settling of a matter by way of an illegal influence on the decision to be made, an/or on the action or the refrain from taking an action on the part of the person holding the public office.

#### 4.4.4 Company criminal liability

Under Polish law companies, partnerships and some other collective entities are liable for the illegal acts of individuals which have, or may have, resulted in the entity's benefit. Polish legislation provides for a broad description of individuals whose actions are covered by collective entities' liability. Prior to establishing the entity's liability, the illegal character of the individual's action should be confirmed by a final court verdict. Entities remain liable if the illegal action of an individual resulted in failing to ensure due care in the appointment of that person; failing to ensure that adequate controls were in place to monitor that person; or where failures in the organisational structure of the entity resulted in not preventing an illegal act being committed. Sanctions include fines and other measures, including restrictions on marketing; bans on public subsidies (including EU funding); prohibitions to take up support from international organisations; bans on competing for public procurement contracts; and public announcement of any adverse court rulings to that effect.

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Restrictions on foreign ownership have generally been lifted except for certain highly regulated sectors and companies holding real estate in Poland.

#### 4.5.1 Exchange controls

Foreign exchange transactions between Polish residents and non-residents who are residents of the EU, the EEA or OECD countries (Member Countries) are generally free from limitations on exchange control, subject to a few minor limitations, including the obligation to transfer funds via a bank account if the amount of the transfer exceeds the equivalent of EUR15,000; and a prohibition on payments in

currencies defined as non-convertible currencies; and restrictions on exports and imports of gold and platinum.

State controls still exist in relation to countries other than the Member Countries, defined as 'third countries'. Transactions with persons registered, resident or otherwise located in these countries often require obtaining a permit from the National Bank of Poland. However, pursuant to a general permit issued in 2009 by the Polish Minister of Finance, countries which have concluded either bilateral investment treaties with the Republic of Poland or treaties with the EU which require Poland to lift the restriction on capital transfers with such countries (BIT Countries), enjoy similar, restriction-free treatment to the Member Countries.

The Foreign Exchange Act provides a list of foreign exchange transactions which, when carried out with an entity from a third country other than the Member Countries or the BIT Countries, may be performed only with a foreign exchange permit. Non-residents from third countries must obtain a permit to sell and/or buy in Poland securities or debts, except for securities or debts primarily acquired in Poland.

Other types of transactions which fall within the scope of the Foreign Exchange Act include:

- transfers of funds by Polish residents to third countries for the development of business activity
- investments by Polish residents in third countries in real property, securities or purchase of debts, and
- the opening of bank accounts in third countries by Polish residents.

Certain Polish residents who carry out foreign-exchange transactions may also be required to file monthly, quarterly or annual reports to the National Bank of Poland on such transactions.

Foreign exchange values (foreign currency, gold and platinum, and securities denominated in foreign currency that constitute a means of payment) may be owned by Polish residents, whether in Poland or abroad, and by non-residents in Poland. Residents are no longer required to repatriate foreign exchange values or Polish currency held abroad, and may maintain foreign bank accounts with any bank in a member country. The opening of bank accounts with banks operating in countries other than Member Countries or BIT countries is, however, still subject to restrictions. There are no foreign exchange restrictions with regard to crossing the border between Poland and any other Schengen area member country.

The Polish Zloty (PLN) is a convertible currency. The list of convertible currencies comprises 127 currencies that comply with the requirements of Article VIII of the Statute of the International Monetary Fund. Any transaction may be concluded and settled in PLN or in any of those convertible currencies. Foreigners (non-residents) employed in Poland may receive remuneration in foreign currency, whether paid in Poland or deposited directly in their bank accounts abroad.

Although transfers of funds from Poland are legal, residents conducting foreign exchange transactions are required to use a bank as an intermediary if the amount of the transaction exceeds EUR15,000 or its equivalent. The banks have some supervisory obligations with respect to the transfer of funds involving foreign exchange transactions between residents and non-residents. There are no restrictions on the opening of bank accounts by non-residents.

#### 4.5.2 Foreign investment approvals and notifications

Technically, no foreign investment approvals are necessary to acquire interests in Polish companies. However, as a result of an amendment to the law on the acquisition of real estate by foreigners, where a foreign investor:

- acquires shares in a Polish controlled company which results in foreigners taking control of that company, or
- acquires shares in a foreign-controlled company of which it is not already a shareholder.



—and in either case, the company owns real estate, a permit from the Minister of the Interior to acquire those shares will be required. However, it should be noted that that restriction applies only to investors who are not members of the EEA.

The issuance of a permit to acquire shares may also be required in specifically regulated industries and business sectors.

#### 4.5.3 Industry-specific regulation

Under the Act on Broadcasting of 29 December 1992, a licence for broadcasting activities may only be granted to a company seated in Poland. Foreign investors cannot own more than 49% of the company's share capital and their voting rights cannot exceed 49%. The majority of management board and supervisory board members should be Polish citizens permanently domiciled in Poland. However these restrictions do not apply to a foreign business entity or its subsidiary whose registered headquarters is in an EEA country.

#### 4.5.4 Import/export controls

##### ***Licences and quotas***

As a member of the EU, Poland is subject to the EC internal market regulations. Any tariffs on trade between the EU member states are abolished, while trade relations with third states are governed by common rules. The basic principles of trading between the EU and other countries, as well as administrative procedures applicable in that respect, are governed by EC legislation, including the Community Customs Code and the Integrated Tariff of the European Communities (TARIC), as supplemented by the Polish Customs Law.

Both Poland and the EU are also parties to the World Trade Organization (WTO) Agreement, which contains provisions on international trade and administration.

##### ***Customs duties and VAT and other import taxes***

The EU constitutes one customs area and goods are charged with the relevant customs tariffs upon their importation into the EU customs territory. Tariffs are set at the EC level. Once the required customs procedures are complied with in one EU member state, the product can move freely within the whole territory, including Poland. In addition, goods are charged value added tax (VAT) on importation. The standard rate of VAT in Poland is 23%. However, certain goods are charged at other rates. Some goods are also subject to excise tax. The method of calculating this tax, as well as its amount, differs depending on the goods concerned.

##### ***Documentation***

In addition to a customs declaration, importers must present other documents to the customs authorities at the time of importation: an invoice; certificate of origin (if applicable); and declaration of customs value.

## 5. Taxes

### 5.1 Acquisition of Shares

#### 5.1.1 Corporate Income Tax (CIT)

Unlike the situation in asset deals, in Poland a purchaser of shares cannot benefit from an increase of the depreciation basis of assets owned by the acquired company. From the perspective of the Polish corporate or individual seller, the capital gains on the sale of the shares will be subject to 19% CIT or personal income tax (PIT). There is no universal scheme under which such capital gains could be exempt from taxation, so share deals are most attractive tax-wise if the seller is a Polish non-resident entity protected from Polish taxation under the relevant tax treaty.

Acquisition through a share deal also makes it difficult for the purchaser to have the financing costs (if any) offset against income from the acquired business.

Theoretically, tax grouping is available in Poland but in practice it is impossible to implement in leveraged acquisitions. Purchasers should therefore implement alternative debt pushdown strategies to achieve this goal.

#### 5.1.2 VAT and transfer tax

Share sales will normally be out of the scope of (or exempt from) Polish VAT.

In practice, significant difficulties surround the question of deductibility of input VAT incurred in the framework of a share deal (e.g. VAT on advisors' fees). The Polish tax authorities' position is that such input VAT (especially input VAT on advisors' services) cannot be recovered by the seller, as the sale of shares is out of the scope of VAT, but this may be in doubt following rulings of the ECJ suggesting that such VAT sums might be recoverable if the input VAT constitutes a general overhead cost borne by the seller conducting activities that are subject to VAT. If it is possible to prove a strong link between the acquisition and the VATable sale made to the target company (e.g. of services) it may therefore be possible to avoid this input VAT.

#### 5.1.3 Transfer tax

Sales of shares in a Polish company is subject to one percent transfer tax in Poland irrespective of the place of residence of the parties to the agreement and the place where the sale agreement was signed.

#### 5.1.4 Tax losses

The tax loss of a company that has been subject to a change of control (i.e. the target) will generally continue to be carried forward despite the change of control.

#### 5.1.5 Transfer of tax liabilities

In share deals, all (potentially hidden) tax arrears of the acquired company (i.e. the target) are inherited by the purchaser, and should hopefully be discovered during due diligence.

#### 5.1.6 Transaction costs

If the acquirer is a Polish company, transaction costs relating to the acquisition of shares will normally be deductible at the level of that company (from its taxable profits). It may be advisable to seek a private tax ruling from the tax authorities to confirm what types of cost that are not capitalised to the value of shares acquired will be treated as current tax-deductible costs.

### 5.2 Acquisition of Assets

#### 5.2.1 CIT

In asset deals, the tax depreciation basis of all fixed and intangible assets acquired by virtue of a sale agreement is established by reference to the purchase price paid by the acquirer. The tax base for assets that are not fixed/intangible assets (subject to depreciation) is also established by reference to the purchase price paid.

Specific rules apply if fixed and intangible assets are acquired under a transaction classified as a sale of enterprise or the so-called 'organised part of an enterprise' (separate business unit). In such a case, if goodwill arises on the transaction (goodwill being defined as the difference between the purchase price of the enterprise or organised part of enterprise and the fair market value of all assets making up the enterprise or organised part of enterprise), then the tax depreciation basis of all fixed and intangible assets is their fair market value. Also, goodwill itself may be depreciated by the acquirer over a minimum period of five years. On the other hand, if no (or in practice negative) goodwill is recognised, the tax depreciation basis of all fixed and intangible assets amounts to the difference between the purchase price and the value of assets not classified as fixed or intangible assets.

In asset deals, it is generally possible to offset financing costs (if any) against income from the acquired business.

As the transfer of assets will normally be subject to CIT in the hands of the seller and as a result will allow for a increase in the depreciation basis in the hands of the purchaser, one can expect that, compared to a share deal, the price due under an asset deal will be higher (as it will take into account the step-up achieved by the buyer compared with the deferred tax it would face in the case of a share deal).

### 5.2.2 VAT

The sale of assets is normally subject to VAT at a standard rate of 23%. The transfer of certain assets (e.g. in certain cases, receivables, shares and real estate) is either not subject to VAT or VAT-exempt, and the transfer of liabilities not subject to VAT.

In particular, the sale of buildings (and the land it is built upon) is generally VAT-exempt, except in situations where supplied within the framework of so-called 'first occupation' (generally new-builds or buildings up to two years old) (as defined in the VAT law). Where this exemption applies, the parties may opt for the sale to be subject to VAT (upon fulfilment of certain additional conditions) to be able to deduct input VAT and benefit from transfer tax exemption.

If the above exemption is not applicable, a sale of a building would be VAT-exempt if:

- the building was acquired by the seller without a right to deduct the input VAT on such an acquisition, and
- additionally, the seller did not incur expenses for the renovation of the building amounting to at least 30% or more of the initial value of the building (unless the building was used by the seller for the purposes of activities subject to VAT or within a period of at least five years since the renovation).

VAT due on the transfer is normally paid by the purchaser to the seller, who will remit the VAT to the tax authorities. If a purchaser is entitled to fully deduct input VAT, the payment of VAT on the transfer will be merely a pre-financing cost. However, if the purchaser is not entitled to fully deduct the input VAT, the non-deductible VAT due on the transfer will constitute an actual cost.

As an exception to the above rules, the transfer of assets and liabilities under an asset deal will be fully beyond the scope of VAT if it relates to an enterprise or an 'organised part of enterprise' (i.e. a transfer of going concern (TOGC) exemption). Whether the transferred items constitute an 'enterprise' or an 'organised part of enterprise' is to be determined pre-transfer. If all assets and liabilities relating to a business are transferred, the TOGC exemption will normally apply. If certain components of the business are not part of the transfer (e.g. certain intangible assets or liabilities), it may be advisable to seek confirmation on the application of the TOGC exemption through a formal tax ruling.

#### VAT on transfer of assets

<b>Rate</b>	23%
<b>Basis</b>	Agreed transfer price  Special rules could apply for transactions between certain related entities (if one party does not have a full right to deduct VAT).
<b>Date of payment</b>	Depends on the situation of the seller; generally on a monthly basis (within 25 days of the end of the month), but sometimes on a quarterly basis (within 25 days of the end of the quarter) for certain companies.
<b>Liable person</b>	VAT payable to the tax office by the seller.

<b>Recoverability</b>	Deductibility of VAT will depend on the scope of activity of the purchaser.  The deductible VAT is to be entered as a credit item in the periodic VAT return. If the deductible VAT for the period concerned exceeds the VAT due, a refund can be requested. Refunds are normally paid within 60 days.
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<b>Exemption</b>	Transfer of going concern—private tax ruling obtained from the tax authorities often advisable to confirm the application of the exemption.
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### 5.2.3 Transfer tax

Certain civil law transactions relating to assets located and property rights executable in Poland are subject to tax on civil law transactions (transfer tax). Also subject to transfer tax are transactions that concern assets located (or property rights executed) abroad if the acquirer is a Polish tax resident and the transaction is executed in Poland.

Transfer tax is applicable only to the civil law transactions listed in a closed list of taxable transactions including:

- sale agreements
- exchange agreements
- loan agreements
- irregular deposit agreements
- donations
- mortgages
- increasing the capital of companies, and
- partnerships.

Generally, a transaction will not be subject to transfer tax if at least one party to the transaction is a VAT taxpayer (i.e. is taxed with VAT or exempt from VAT on this transaction). Therefore, if at least one party of a transfer of assets transaction (usually the seller) is taxed with VAT or is exempt from VAT on this transfer, then the transaction is not subject to transfer tax. However, there are certain exceptions to this rule (e.g. VAT exempt sales/exchanges of real estate; or VAT exempt sales of shares which are still subject to transfer tax).

Moreover, as a transfer of assets and liabilities within the framework of an 'enterprise' or an 'organised part' of an enterprise is entirely out of the scope of VAT, such transfers will be subject to transfer tax in Poland.

### Transfer tax

<b>Rate</b>	2% on sales/exchanges of movable and real estate assets.  1% on sales/exchanges of property rights (including shares and arguably, goodwill).
<b>Basis</b>	Fair market value of the transferred asset.
<b>Date of payment</b>	Within 14 days of date of concluding the sale agreement.
<b>Liable person</b>	The purchaser (in the case of sale agreements concluded in the form of notarial deeds, a notary public acts as tax remitter of the due transfer tax).

<b>Tax deductibility for CIT</b>	As a general rule, the transfer tax paid on the transfer of assets may be recognised by the purchaser as a tax-deductible cost. In the case of acquisitions of assets subject to tax depreciation, the amount of the transfer tax increases the tax depreciation basis and does not result in one-off deduction.
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### Other acquisition costs

<b>Notary fees</b>	Generally only due on the transfer of real estate and certain other assets (e.g. an enterprise); the exact amount of notary fee depends on the purchase price of the assets subject to the transaction (sale).
<b>Mortgage registration duties</b>	Entering a mortgage on a land and mortgage register of a given real estate is subject to a court fee amounting to PLN200 and a transfer tax amounting to PLN19 or 0.1% of the debt guaranteed by the mortgage (depending on the type of a mortgage).
<b>Tax deductibility for CIT</b>	Generally, other costs relating to the acquisition of an asset may be tax-deductible either directly or through a tax depreciation write-off.

#### 5.2.4 Transfer of tax liabilities

The purchaser of assets (qualifying as an 'enterprise' or 'organised part of enterprise') can be held jointly liable for almost all tax arrears of the seller relating to the seller's business activity, up to the value of the acquired 'enterprise'/'organised part of enterprise'.

The joint liability can be avoided if a 'clean' certificate (i.e. a certificate confirming that the seller has not defaulted in its tax obligations and has no tax arrears) is obtained from the relevant authority. In order to enjoy full protection of a clean certificate, it is crucial to acquire 'enterprise'/'organised part of enterprise' within 30 days of the date of issuance of the certificate.

### 5.3 Financing the Investment

#### 5.3.1 Deductibility of financing expenses

Financing expenses must meet the general deductibility conditions that apply to any expenses, which basically require such expenses (and therefore the transaction) to have been actually 'incurred in order to generate taxable income or to secure or retain existing sources of income' (i.e. they must relate to the business activity of the purchaser).

The expenses must meet the arm's-length test (under transfer pricing requirements). There are also thin capitalisation rules in Poland in relation to certain kinds of related-party debt (see the Table below).

With respect to acquisition financing, financing expenses will, as a general rule, be fully tax-deductible in the hands of a Polish acquirer if the transaction is structured as an asset deal.

If the transaction is structured as a share deal, the issue might prove trickier, as the tax treatment of interest incurred on the financing drawn for the purpose of acquisition of shares could be subject to varying interpretations. The question arises whether:

- such interest should be linked to revenues from the potential sale of the shares (as expenses incurred in relation to the acquisition of such shares) and should be recognised for tax purposes only upon disposal of the shares, or
- the specific rules for recognition of interest on a cash basis (i.e. when paid) should apply.

The recognition of interest (in relation to the financing of acquisition of shares) on a cash basis is currently the predominant practical approach. This approach is supported by the Ministry of Finance which has expressed the view that such interest should not be treated as expenses 'for the acquisition of shares' but instead relate to general taxable revenues of the taxpayer and as a result may be recognised for tax purposes under general rules, i.e. when paid or compounded to the principal amount of loan. Case law also supports this position (although we are also aware of opposing judgments).

Currently, the Ministry of Finance tends to issue private rulings in which the treatment of interest (incurred in relation to the acquisition of shares) as tax-deductible upon payment is confirmed. However, this conclusion may in practice not be straightforward if such costs are incurred by an 'empty' holding company not generating taxable revenues. Therefore, in practice, parties would be strongly advised to seek a private tax ruling from the tax authorities confirming the deductibility of interest incurred in relation to the acquisition financing.

In the case of share deals, the acquirer must have sufficient taxable income to offset the interest charges (but debt 'pushdown' strategies might prove possible).

## Deductibility of financing expenses

### Thin capitalisation rules

Generally, thin capitalisation provisions apply to loans from:

- direct or indirect parents (holding directly or indirectly at least 25% of the shares in the capital of the Polish company), and
- direct or indirect sister companies (if a common parent company holds directly or indirectly at least 25% of the shares in both the Polish borrower and the lender company).

Interests are not deductible in the proportion in which the total restricted indebtedness exceeds the capital of the company (debt-to-equity ratio, 1:1).

The definition of loans subject to thin capitalisation restrictions is very broad, and covers:

- any agreement under which a lender transfers ownership of some amount of money to a borrower and the borrower is obliged to transfer back the same amount of money
- debt securities
- irregular deposits, and

cash deposits.

There is no exclusion from thin capitalisation restrictions for loans granted by banks (when parents/sisters of the Polish company).

There is exemption for back-to-back loans within the group.

Also, the tax law provides for alternative rules for deducting interest which are based on the relation of interest costs to value of assets and EBITDA.

### Arm's-length principle

To be deductible, the applicable interest rate on the related debt must be in compliance with the arm's-length principle, which is the fundamental requirement of transfer pricing regulations in Poland (taking into account, in particular, the specific circumstances of the case, and in particular the duration of the loan and financial condition of the borrower); transfer pricing rules apply if the lender is a related entity.

Under certain circumstances, an interest rate that would be considered too low (i.e. below market rates) could, regardless of whether the lender is a related party, lead to actual taxation at the level of the Polish borrower of the 'free-of-charge benefit' received—amounting to the difference between the market rate and the interest rate actually applied. The same applies in cases of funding through an interest-free loan.

### Other limitations to deductibility

In order for financing expenses to be deductible, those expenses (in particular interest) must be incurred in order to receive future income or to secure or retain the existing sources of income, and they must relate to the business activity of the purchaser.

Moreover, there is a usury law in Poland according to which an interest rate on the loan may not exceed four times the level of interest rate on Lombard loans provided by the National Bank of Poland.

#### 5.3.2 Withholding tax on interest

Under the CIT law, interest earned in the territory of Poland by tax non-residents is subject to a withholding tax of 20% unless a relevant treaty on the avoidance of double taxation provides otherwise. The application of the treaty benefits is conditional upon delivery to the Polish payer of a certificate of residence of the non-resident being an interest recipient. Several countries grant full exemption under the tax treaties from withholding tax on interest, including Sweden, France and Spain.

No withholding tax applies to interest paid to Polish corporate tax residents (which are generally taxed on interest received).

Poland has now fully implemented the Interest-Royalty Directive (2003/49/EC). As a result, interest and royalty payments made to qualified associated companies that are tax-resident in the EU (and their permanent establishments located in the EU) are fully tax-exempt.

The application of the exemption is conditional upon delivery to the Polish tax payer of a certificate of residence of the non-resident as a recipient of interest and a written statement that the interest recipient is not a tax exempt-entity under the tax laws of its country of residence.

#### 5.3.3 Debt pushdown

Under the Polish CIT law, Polish corporate taxpayers can establish fiscal unity where a group of companies is treated as one single taxpayer and the transfer pricing regulations do not apply—but only under certain very strict conditions, which make it not a workable solution for debt pushdown strategies with pure holding companies.

In Poland, the most common means of achieving debt pushdown is to have the target merged into a leveraged acquisition vehicle (or to have the acquisition vehicle merged into the target—so-called 'downstream merger'). As a rule, a merger is a tax-neutral transaction. However, if a merger is performed without any justified business/economic reason and the predominant reason for the merger is tax avoidance or evasion, the tax authorities may deny tax neutrality.

As an alternative to merger, the target (and potentially also the target's subsidiaries) may be transformed into a partnership(s). As the income of partnerships is consolidated at the level of the corporate partners (i.e. taxed at the level of partner), the interest costs would effectively decrease the tax base from the operations of the target.

In the past, debt pushdown structures involving leveraged capital reductions or share redemptions were also used. These structures were generally rejected by the tax authorities and by the courts, and are therefore no longer used. Debt-financed payment of dividends is also no longer a feasible debt pushdown structure, following a resolution by seven judges of the Supreme Administrative Court dated 12 December 2011 (II FPS 2/11).

## 5.4 Holding the Investment

### 5.4.1 Main tax costs

<b>Taxable income</b>	Taxable revenues less deductible expenses (i.e. interest expenses, depreciations, etc.) are subject to CIT at the standard rate of 19%.
<b>Depreciation</b>	<p>Depreciation is allowed in respect of certain tangible fixed assets (except land), as well as intangible fixed assets, on the basis of their normal useful life; the assets are depreciated over periods of time.</p> <p>However, taxpayers are generally allowed to extend, or shorten, the period of the depreciation with regard to tangible and intangible fixed assets (in the latter case, only with respect to certain kinds of tangible fixed assets and only to the extent provided by law).</p>
<b>Write-offs or capital losses on shares</b>	<p>Write-offs on shares are not deductible for Polish tax purposes.</p> <p>Capital losses on shares are deductible only if they are realised upon the alienation of those shares.</p>
<b>VAT</b>	<p>As a general rule, all supplies of goods and services are subject to VAT. The standard Polish VAT rate is 23%. Reduced rates (8%, 5%) and exemptions may apply.</p> <p>Input VAT incurred on supplies generally constitutes a cost for CIT purposes if it is not recoverable under the VAT rules.</p>
<b>Licence business tax</b>	N/A
<b>Other taxes</b>	<p>Real estate tax is calculated annually (at the rate determined by local authorities). It is imposed on the owner of a land, a building or any other building structure (e.g. a parking lot).</p> <p>The tax base is:</p> <ul style="list-style-type: none"> <li>• in case of lands and buildings, their usable area, and</li> <li>• in case of other building structures: <ul style="list-style-type: none"> <li>• the value of a building structure determined for purposes of tax depreciation as of 1 January of each year (gross value not decreased by depreciation write-offs), or</li> <li>• the fair market value of the structure if the building structure is not subject to tax depreciation.</li> </ul> </li> </ul> <p>The tax rate (determined by local authorities) is:</p> <ul style="list-style-type: none"> <li>• in case of lands and buildings, the amount in PLN per one square meter (with maximum rates set under the law separately for various types of land and buildings – in particular PLN0.89 and PLN23.03, respectively, for land and buildings used for business purposes), or</li> <li>• in case of other building structures, a certain percentage of the tax base (which may not exceed 2%).</li> </ul> <p>Any real estate tax paid constitutes a deductible expense for CIT purposes.</p>



## 5.4.2 Distribution of profits

**Withholding tax on dividends distributed by a Polish company**

As a general rule, withholding tax on dividends is levied at the rate of 19%, subject to a possible tax treaty reduction.

An exemption from withholding tax (based on the Parent-Subsidiary Directive) applies when the following conditions are met:

- the dividend is paid to a company being a tax-resident in Poland or other EU/EEA country or in Switzerland
- the dividend recipient does not enjoy full tax exemption in its country of residency
- the company receiving the dividend holds at least 10% of shares in the company distributing the dividend (a minimum holding requirement). (In the case of a Swiss company, there is a 25% minimum holding requirement.)
- the company receiving the dividend holds shares in the company distributing the dividend for an uninterrupted period of at least two years.

**Taxation of dividends received by a Polish company**

Both domestic and foreign dividends received by a Polish company are subject to 19% tax. For dividends received by a Polish company from another Polish company, the latter is obliged to withhold the tax from the gross amount of the dividend paid. For dividends received from non-Polish companies, no withholding tax mechanism applies and the dividends are accumulated by the Polish company with its other sources of income.

The gross amount of foreign dividend is subject to tax in Poland, but the Polish company (dividend recipient) may credit any amount of withholding tax applied by the subsidiary against the Polish corporate income tax due on that incoming dividend.

A Polish company receiving dividends from a subsidiary is also entitled in certain cases to an underlying tax credit (i.e. tax reduction related to tax paid by the subsidiary).

Moreover, dividends received by the Polish company from another Polish company or from a company being a tax resident in another EU/EEA country or in Switzerland may be tax-exempt if the following conditions are met:

- the Polish company receiving the dividend holds at least 10% of the shares in the company distributing the dividend (a minimum holding requirement). (For Swiss companies paying the dividend, there is a 25% minimum holding requirement)
- the Polish company receiving the dividend holds these shares in the company distributing the dividend for an uninterrupted period of at least two years.

Excluded from the exemption are dividends (or other dividend-type income) in case such dividends can be treated as tax deductible costs or otherwise decrease the tax base or tax liability of the non-Polish subsidiary.

## 5.5 Selling the Investment

### 5.5.1 Asset deals

**Capital gain taxation** Any gain realised on the transfer of assets will normally be subject to tax payable by the seller at the standard CIT rate of 19%.

If the net gain is to be distributed to the shareholder of the Polish company entering into an asset deal (instead of the shareholders entering into a share deal), one should also take into account the 19% withholding tax which is due upon liquidation of the Polish company on the amount of the net liquidation gain. An exemption, however, applies if the shareholders satisfy the conditions for the parent–subsidiary exemption of withholding tax (described above).

**Selling costs/transfer taxes** The transfer of assets will generally attract VAT, except if the TOGC exemption applies.

In case the transfer is out of the scope of VAT (e.g. TOGC), the transaction may be subject to transfer tax in Poland.

Generally, costs incurred by the seller in relation to the transfer are taken into account to calculate the net gain that will be subject to CIT.

**Sale by corporate non-residents** Any gain realised by a foreign corporate on disposal of assets forming part of a Polish Permanent Establishment is taxable in Poland at the normal CIT rate. The same applies in relation to any gain realised upon disposal of Polish real estate property (irrespective of whether the latter is part of, or constitutive of, a PE).

### 5.5.2 Share deal

**Capital gain taxation** Capital gains on shares realised by a Polish company will normally be subject to tax in the hands of a corporate seller at the standard CIT rate.

It is unclear under the Corporate Income Tax Act if capital gains realised upon disposal of shares in a Polish company may be seen as income derived from a Polish source and thus taxable in Poland irrespective of the place of tax residency of the parties to the share sale agreement. In our view, this is a risk which cannot be excluded and is particularly high where the Polish company derives value from real estate in Poland. However, in practice, such a capital gain may often be exempt on the basis of a tax treaty between Poland and the country of the investor.

**Selling costs/transfer taxes** Generally, a 1% transfer tax is due on the disposal of the shares of a Polish company.

Normally, costs incurred by the seller in relation to the transfer of the shares are taken into account to calculate the net gain that will be subject to CIT.

**Sale by corporate non-residents**

Capital gains on shares realised by corporate non-residents will normally be subject to tax in the hands of a seller at the CIT rate.

The capital gain is calculated as the difference between the price paid to the corporate non-resident seller for the shares and the acquisition costs of such shares previously paid by the seller upon acquisition.

In practice, such a capital gain may be often exempt on the basis of a tax treaty between Poland and the country of the investor.

## 5.6 Tax Regime for Restructuring Operations

A number of restructuring operations such as a merger, demerger or an in-kind contribution of an enterprise (or 'organised part' of an enterprise, see above) can take place in Poland under a tax neutrality regime.

Specific rules also apply with respect to the transfer of the tax losses carried forward by companies or businesses involved in a tax-neutral reorganisation. Generally, under these rules, in mergers, demergers and conversions of legal form, the transfer of tax loss carry forward of a disappearing company to a company that is legal successor to the first company is not permitted. An exception, however, applies to a conversion of a legal form of a limited liability company to a joint stock company and vice versa.

In Poland, it is impossible to transfer tax loss carry forward of companies where there is in-kind contribution of an enterprise (or organised part of enterprise); i.e. a transfer of business.

Most tax-neutral restructuring operations are also out of the scope of VAT (provided the conditions for the TOGC exemption are met).

**Merger or demerger**

Can be entirely tax-neutral (rollover regime); however, if a merger or a demerger is performed without any justified business/economic reason and the predominant reason for such merger is only tax avoidance or tax evasion, then the tax authorities may deny the tax neutrality.

Also, cross-border mergers or demergers with an EU company can be tax-neutral. Polish tax law does not contain any specific rules in this respect, so general tax neutrality rules apply.

The surviving entity is allowed to use its tax losses carried forward pursuant to general rules (but the tax losses of disappearing entities will be forfeited).

**Contribution of enterprise or organised part of enterprise (TOGC)**

The contribution of an enterprise or organised part of enterprise (TOGC) is also tax-neutral, i.e. no tax liability arises in the field of income tax, VAT and transfer tax.

There is no transfer of losses (incurred by the contributor) to the receiving company, while losses of the latter will be carried forward under general rules.

**Impact of foreign reorganisation transactions on Polish assets**

N/A. In particular, change of control does not impact the tax loss carried forward position of the Polish subsidiaries. An issue might potentially arise in case of an indirect disposal of shares of a Polish company holding real estate property.

**Setting up of a Polish subsidiary** In-kind contribution of a Polish establishment of a foreign company to a Polish company is a tax-neutral transaction (rollover regime), provided that the establishment is classified as an enterprise (or organised part of enterprise; TOGC). If such an establishment cannot be classified as such, any gain realised (or crystallised) on that occasion is taxable.

**Exchange of shares** If a Polish company (or natural person) realises a share-for-share exchange, the gain realised (or crystallised) on that occasion may be exempt, provided that the conditions for the exchange of shares exemption stipulated in the Polish Corporate Income Tax Act/Personal Income Tax Act are satisfied. (This exemption is based on the provisions of the Merger Directive).

If the conditions for that exemption are not met, any gain realised (or crystallised) by a Polish company (or natural person) involved in an exchange of shares transaction (i.e. contributing shares into another company) will be taxable.

## 5.7 Special Holding/Investment Regimes

**Polish 'close-end' investment fund** Tax-exempt regulated Polish investment funds (close-end investment funds) may in practice be used as 'private' holding vehicles with only one investor holding 100% of investment certificates in such a fund.

In particular, a structure may be used where the investment fund invests in shares of Polish partnerships limited by shares. The partnerships are the only vehicles involved in operational activities. Partnerships are also transparent for income tax purposes (which means profits are allocated to and taxed in the hands of partners/shareholders). Under such a structure, profits allocated to the investment fund (and profits from active business) are fully tax-exempt. The Ministry of Finance prepares changes to the Corporate Income Tax Act which will reduce the tax effectiveness of the investment fund structures (as partnerships limited by shares will become taxpayers paying 19% corporate income tax). Restructuring involving non-Polish vehicles to replace partnerships limited by shares can also be an option to preserve tax benefits.

In this scheme, VAT should normally not be an issue. A partnership will be entitled to recover any input VAT to the extent that this input VAT is related to its activities that are subject to VAT.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

Share sales do not have any employment law implications because the legal identity of the target company as employer is not affected. In specific cases the target company may be obliged to inform the employees (or their representatives) about the anticipated transaction.

#### 6.1.2 Acquisition of assets

The Polish Labour Code provides that where a business is acquired, all existing employment contracts relating to the acquired business or to any organised part of the business are transferred by operation of law to the purchaser. As a general rule, such an automatic transfer will not take place if the transaction merely involves selected assets of the target company which do not constitute a separate business.

The transferring and the acquiring employer are obliged to inform their employees of the date on which the transfer is scheduled to take place. Additionally, the notification must outline the reason behind the transfer and its legal, economic and social implications for employees, as well as the new employment terms and conditions envisaged for the employees, particularly with regard to work conditions, remuneration terms, and conditions for retraining.

This notification must be delivered not later than 30 days prior to the date on which the transfer of the business unit is scheduled to take place.

Under the Code, employees have the right to terminate their contracts of employment if they do not wish to work for the new employer. In this case, a notice must be served by the employee within two months of the transfer of the business. Once this notice is served within the designated timeline, the employment contract terminates after the lapse of 7 days from the date the employer receives it. The Code treats the termination of the contract of employment in these circumstances as a termination by the employer.

If there is an in-house trade union organisation within the company, the current employer is not obliged to notify the employees as described above (but may choose to do so for information purposes). Instead, both the current and the new employers must issue such notification, each with respect to their own in-house trade union organisation(s). The deadline for issuance of the notification is the same as in case of informing employees, i.e. not later than 30 days prior to the date on which the transfer of the business unit is scheduled to take place.

Where the current or new employer intends to take measures with respect to the employees' terms and conditions of employment, it must begin negotiations with the trade union organisations to reach an agreement in this respect. If an agreement is not reached due to the parties' inability to agree the contents of the agreement within a 30-day period of negotiations, the employer is allowed to independently take measures with respect to the employees' terms and conditions of employment, taking into account the points and issues agreed with the in-house trade union organisations during the negotiations concerning the agreement.

If the assets of the target company acquired by the purchaser do not form an organised business unit and the employees are not offered new employment by the purchaser, then the seller, if terminating the employees' contracts of employment and if employing in total at least 20 individuals, will be liable to pay severance pay. The amount of severance pay depends on the length of an employee's service, but will likely be in the range of from one to three months' salary. The employer has the right to cap the amount of severance in accordance with the statutory maximum (up to the equivalent of 15 minimum statutory remunerations). However, capping is not mandatory and the employers are free to pay more.).

## 6.2 Approval or Consultation Requirements

Employers must consult employee trade unions and advance-notify the unions on a wide range of issues, including information about the individual dismissal of trade union members or persons whose rights the trade union has agreed to protect; about collective redundancies; and/or about the automatic transfer of employees—prior to taking any decisions in relation to these matters.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

Mass lay-offs are regulated by the Act on Mass Redundancies dated 13 March 2003 (as amended), although the Act does not apply to employment establishments which employ fewer than 20 employees.

Mass redundancies are deemed to take place in circumstances where an employer employing at least 20 persons terminates the employment relationships by notice or by mutual agreement of the parties within a period of not longer than 30 days with a number of employees exceeding statutory threshold.

The threshold differs depending on the total number of employees employed by the given employer, i.e.:

- threshold of at least 10 employees applies if the employer employs at least 20 persons but less than 100 persons, or
- threshold of 10% of employees applies if the employer employs at least 100 but less than 300 persons, or
- threshold of 30 employees applies if the employer employs 300 or more persons.

### 6.3.2 Procedure

The procedure for mass lay-offs under the Mass Redundancy Act is as follows:

- employers must consult trade unions operating in the employer's company about their intent to conduct mass lay-offs. These consultations must look in particular into the possibility of avoiding or reducing the extent of mass lay-offs; and at the possibility of allowing employees to requalify or undertake professional training; as well as showing attempts have been made to find other employment for employees laid off
- the employer must notify the in-house trade union organisations in writing of the grounds for the intended mass lay-offs, the number of employees involved and professional groups (defined in accordance with the Polish Classification of Professions, Regulation of the Ministry of Labour and Social Policy dated 28 August 2014) to which they belong; the estimated length of the lay-off procedure; the proposed criteria for selecting employees for the lay-offs; the order in which employees are to be terminated (i.e. whether the employees are to be served termination notices on one day or in waves, e.g. the productions employees first, then the administration, etc.); and any proposals as to how to resolve related labour issues. Where the employees are to receive additional severance pay or any other non-statutory benefits connected with early termination, employers must indicate how these benefits are to be calculated. The notice should be delivered to the in-house trade union organisations in a timely manner giving them time to consult and consider all the issues (no specific statutory timeframe applicable)
- written notice should also be delivered to the local labour office with the same, excluding details of possible cash benefits proposed
- if agreement on the content of the proposals cannot be reached within 20 days, the employer must prepare regulations/policy defining the procedure for mass lay-offs with special regard to agreements agreed with the company trade unions in the course of negotiating the agreement
- further consequence of not reaching the agreement with the in-house trade union organisations is that the employer must inform the in-house trade union organisation representing the employee about the termination of each employment agreement. The in-house trade union organisation must register any protest within five days of receiving this information
- where there is no in-house trade union organisation employee representatives should be selected by the employees under a procedure commonly used at the given workplace to select employee representation
- the employer must notify their labour office in writing about any agreements reached with the company trade union/representatives, including details of the total number of employees and professional groups of the employees to be laid off; with reasons and a timescale for the lay-offs
- on completing this procedure, notice of the lay-offs can be given to employees

- the termination of employment relationships may occur no sooner than 30 days from the date of delivery of this notice to the local labour office
- termination notices should be delivered to individual employees in accordance with the regulations regarding the periods of termination notice, special protection of certain employees etc
- in respect to protected employees (e.g. persons close to retirement age, pregnant women, and those on maternity leave, etc.) it is only possible to change current terms and conditions of work and remuneration. If the procedure described above results in a reduction in remuneration, protected employees will be entitled to an equalising payment (to cover the difference between the reduced remuneration and the current one) to be paid by the employer up until the end of the period of their protection
- employment contracts concluded for a definite period of time may be terminated upon two weeks' notice. In the case of contracts of employment concluded for an indefinite period of time where the statutory notice period amounts to three months (i.e. where employee's seniority with given employer exceeds 3 years), the employer may shorten the notice period to a minimum of one month but the employee will be entitled to payment covering the amount of remuneration due for the remaining two months.

### 6.3.3 Severance payments

A severance payment should be made to dismissed employees in accordance with the rules applicable to the calculation of payments compensating for the unused holiday leave, as follows:

- the equivalent of one month's salary if the employee has worked for less than 2 years
- the equivalent of two months' salary, if the employee has worked for 2–8 years
- the equivalent of three months' salary, if the employee has worked for more than 8 years.

The amount of severance pay may not exceed 15 times the statutory minimum monthly salary as published by the government as of the date of the termination of employment.

### 6.3.4 Penalties

The National Labour Inspection has powers to undertake ad hoc inspections of workplaces, and to that end can fine companies found to be violating employees' rights. The fine may be imposed directly by the National Labour Inspection officers (up to PLN2,000) or by the court upon National Labour Inspection's motion (if the proposed fine exceeds PLN2,000). The maximum amount of the fine is PLN30,000.

Fines will be payable by members of the management board of the company or other persons representing it in employment matters.

Additionally, violation of any rules regarding trade union rights in the mass redundancies process may be considered as an offence sanctioned with fine up to PLN5,000 or limitation of freedom (sanction where the person remains free but cannot change place of residence and must carry out social works or deduct part of salary for social purposes as defined by the court).

Each individual employee also has the right to challenge the termination in court and can claim reinstatement in their previous position or (alternatively) compensation in an amount not higher (in principle) than remuneration due for the notice period (up to 3 months). The burden of proof lies with the employer who must show the redundancy was procedurally lawful and necessary for legitimate reasons.

# Qatar

## 1.1 Overview

The State of Qatar officially gained its independence from the United Kingdom to become an independent sovereign state in 1971. Qatar is a principality governed by the Al Thani monarchy.

Qatar is a civil law jurisdiction and as with most civil law jurisdictions, the legislative framework consists of statutory codes which regulate civil and commercial relationships between natural and legal persons. Civil transactions are mainly administered by Law No. 22 of 2004 (the Civil Code). As Qatar's legal system is based upon the codes of Shari'ah Law (i.e. Islamic Law), matters not addressed in either the Civil Code or the other main local laws are supplemented by the application of Shari'ah Law.

Worldwide foreign investment in Qatar has exponentially increased over the last few years and appears to be on track to keep growing for the next few years.

Continued strength in the energy sector is apparent. However, there is growing interest in the goods and services industry, as well as significant volume of public infrastructure works. The growth of the Qatar Financial Centre, which acts as an offshore jurisdiction has increased the development of financial services also.

While the opportunities for the mergers & acquisitions (M&A) market is strong and foreign investment is welcomed in Qatar, there are strong protectionist measures in place to protect Qatari nationals.

## 1.2 General Legal Framework

Foreign ownership onshore in Qatar is generally limited to 49% of a company. Further details of Qatar's foreign ownership restrictions are set out in **4.5.2**. The laws governing the formation and operation of companies in Qatar are Law No. 5 of 2002 (the Companies Law) and the Civil Code.

Qatar is seeing a steady flow of M&A activity but activity is not comparable with that of more developed economies due to some extent to Qatar's foreign ownership rules. Historically there was little competitive pressure in the relatively small Qatari market due to the presence of large, family-owned conglomerates with close relationships to each other and to the government, and significant levels of state ownership of key companies. This made traditional, adversarial M&A activity less likely as Qatari family-owned businesses were hesitant to risk family reputation, or the disapproval of government officials, by engaging in takeovers.

The legal system of Qatar is in its infancy and there are limited rules in Qatari law that apply specifically to M&A, particularly in relation to private companies. For public companies specific rules on M&A were only issued for the first time in 2014.

The Companies Law provisions in respect of M&A activity were limited, until 2010 when a new takeover chapter was added, making the merger process clearer with a precise list of requirements. Acquisitions were also covered by the new chapter. Although intended to govern acquisitions of majority stakes (whether in shares or voting rights), the Ministry of Economy & Commerce has been applying it in practice to acquisitions that fall below the 50.01% stake, without setting any clear threshold in terms of monetary sums/value of the deal/shares at stake.

The Middle East and North Africa region has seen increasing focus on financial institution mergers and acquisitions (driven by a variety of factors, including the refocus of foreign financial institutions on their core business activities and Gulf Cooperation Council (GCC) banks having spare cash) and the Qatar Financial Markets Authority (QFMA) has been playing a crucial role, enacting rules and regulations to guide M&A players in transactions involving Qatari public companies. The key piece of legislation is the M&A Regulations.



## 1.3 Corporate Entities

Several types of corporate entities may be formed in Qatar under either the Companies Law or the Civil Code. In the context of private M&A transactions, the most common forms of company incorporated in Qatar are the limited liability company (LLC) and the private joint stock company (PJSC) both formed under the Companies Law. Companies established under the Civil Code are not generally permitted to have corporate shareholders and so do not commonly feature in M&A transactions. PJSCs are subject to more onerous administrative obligations, so the LLC is the vehicle most commonly encountered.

### 1.3.1 Limited liability companies

The LLC structure offers limited liability to its shareholders and provides that the number of shareholders must be a minimum of 2, and not more than 50.

The Companies Law prescribes a minimum capitalisation of QAR200,000 for an LLC. The share capital must be made up of equal shares (meaning that different classes of shares are not permitted) and have to be fully paid-up and deposited with a Qatar bank. Government regulations mean higher minimum capital requirements can be imposed on a discretionary basis with respect to certain classes of company or types of activity. Qatar's foreign ownership restrictions (see **4.5.2**) mean that a foreign party can only ever hold 49% or less in an LLC. Despite this, the LLC structure is flexible so that appropriate safeguards for the minority party can be included in the registered constitutive documents of the LLC (variously referred to as a 'contract of establishment' or the 'memorandum' and 'articles of association').

Such minority protections can include:

- supermajority voting
- management control
- disproportionate allocation of profits between shareholders which does not need to reflect the shareholding percentage in the LLC. For example, a minority shareholder can receive up to 90% (or more in some cases) of the LLC's profits
- shareholding agreements and other contractual arrangements that supplement the memorandum and articles of association.

Additionally, Article 68 of the Companies Law allows for alternative joint venture arrangements, which are owned partly by the government or a public authority in partnership with foreign investors. The main advantage of an Article 68 company is that the Companies Law only applies to the extent that it does not conflict with the memorandum and articles of association, joint venture agreement or other contracts of establishment. The shareholders are therefore able to draft those documents free of all or any of the restrictions contained in the Companies Law. Also, due to a recent amendment in the law, the foreign investor's share ownership in the Article 68 company can be more than 49% with the approval of the Council of Ministers.

### 1.3.2 Joint stock companies

The Companies Law recognises two types of joint stock company (each a JSC): public and private. The Qatar foreign ownership restrictions apply equally to JSCs. Key features of a JSC are:

- the procedures for JSC formation are complicated, time-consuming and require a number of special approvals
- it is not possible to predict with any certainty the time-frame to establish a JSC (but it is likely to take a minimum of several months)
- the minimum capital requirements are high (AED10 million for a public JSC and AED2 million for a private JSC)

- a JSC must have at least 10 founders and a substantial percentage of the shares must be offered in a public offering
- stricter foreign ownership percentages apply (up to 75% of the shares must be owned by Qatari nationals)
- the chairman and a majority of the board of directors of the JSC must be Qatari nationals
- in contrast to an LLC, the structure does not permit flexibility with respect to minority protections
- the JSC is more heavily regulated than an LLC.

For these reasons, JSCs are not commonly used in the context of private M&A transactions, except where government regulatory or other policy requirements mandate the use of the JSC structure.

### 1.3.3 Branches of a foreign company

A foreign company can set up a branch (with no Qatari partners) in Qatar. However, that privilege is limited to projects deemed by the Ministry of Economy and Commerce to facilitate the performance of a public service or utility (e.g. key government projects) and branches are only entitled to perform the specific contract for which they are registered, with registration valid only for the duration of the contract. A branch does not have a separate legal personality and remains liable for all the liabilities of the parent company. This means that branches cannot be transferred from one party to another.

## 2. Acquisition Methods

In Qatar, transactions are usually concluded through either a share purchase or an asset purchase. Statutory mergers can also be concluded under Qatar law, however these are not commonly used.

### 2.1 Acquisition of Shares

A share purchase in Qatar will share many commonalities with share purchases in other jurisdictions. The key transactional document will be the share purchase agreement. Further details of the procedure for transferring shares is set out in 3.4.

### 2.2 Acquisition of Assets

An asset purchase in Qatar will share many commonalities with asset purchases in other jurisdictions. The key transactional document will be the asset purchase agreement. This document does not need to be submitted to any authorities and can therefore be drafted in the language preferred by the parties. Unless the assets to be transferred are of a type that are registered (e.g. registered trademarks, motor vehicles, real estate, etc.), there is no need to file any documentation with the relevant authorities. In the event that registered assets are to be transferred, the parties would typically execute a short-form document to that effect rather than filing the long-form asset purchase agreement which contains the full terms of the transaction with the authorities.

### 2.3 Mergers/Other Acquisition Methods

The Companies Law provides for the merger of Qatar companies by way of amalgamation (where two companies merge by disappearing into one newly formed company) and absorption (where one company merges into another and only the merged company survives). These provisions are complex, largely untested and are therefore not generally used in the context of private M&A transactions.

### 3. Negotiation, Signing and Closing

#### 3.1 Pre-Contractual Obligations

##### 3.1.1 Duty of disclosure

The Civil Code provides that a party may terminate a contract if the other party makes a misrepresentation to the other and the contract has been entered into by a 'gross cheat'. The Civil Code further provides that deliberate silence concerning a fact or circumstance must be treated as a misrepresentation if it is proved that the person misled the other and thereby would not have made the contract if aware of that fact or circumstance.

Although the courts are not bound to adhere to case precedents under Qatar law, Qatari courts have provided the following indications in previous cases of how liability would be determined:

- it is necessary to prove that there has been both a 'misrepresentation' and a 'gross cheat'
- the criterion for determining whether there has been a 'gross cheat' depends on the factual circumstances and the discretion of the court
- in determining whether there has been a 'gross cheat' there must be a serious discrepancy between the true value of the thing sold and the price for which the buyer is buying it, to the extent that the victim would not have entered into the contract if the 'gross cheat' had not occurred
- the burden of proving that there has been a 'gross cheat' lies with the party making that allegation.

Depending on the facts, it is possible that the provisions set out above could be used to imply an obligation to disclose material information even where the seller has not specifically been asked to disclose that information in the due diligence process. However, it is recommended that buyers do not rely solely on this provision, and try to make the due diligence questionnaire process as comprehensive as possible. Sellers should be wary of this provision and note the risk that there may be liability issues if any relevant facts are not disclosed which they might be obliged to disclose under this obligation of good faith.

#### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Qatari purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

##### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. We see all types, including working capital adjustment, cash-free debt-free, NAV adjustments. We also see locked box arrangements.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	Depends on the negotiating strength of the respective parties, but more commonly the buyer.
4	Is the balance sheet audited?	Not usually, although sometimes on medium size and large deals.
5	Is an earn-out common?	Not historically common, but more common in the past few years.

6	Is a deposit common?	Not unusual.
7	Is an escrow common?	Common as a completion mechanism to ensure that payment is made at completion.
8	Is a break fee common?	Uncommon.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	Uncommon, typically resisted by sellers, only available where there is a long period between signing and completion and limited to very specific events.
10	Is the MAE general or specific?	Both are seen.
11	Quantification of MAE?	Uncommon.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall/blue pencil provisions are quite common.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close	Common for private deals.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules is common. Notification of possible breach is common. Where material breach, right to terminate.
17	Is a separate tax covenant/indemnity or tax deed common?	Uncommon.
<b>Representations &amp; Warranties</b>		
18	Materiality in representations—how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but often not quantified (other than specific warranties, e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge is often qualified (frequently by reference to a specific group).
20	Is a warranty that there is no materially misleading/omitted information common?	Still commonly requested by buyers, but often resisted by sellers.
21	Is disclosure of data room common?	Common.

### Repetition of Representations & Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring down certificate at completion common?	Highly dependent on strength of respective parties' bargaining position but if permitted, common to only repeat at closing with no bring-down certificate.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects is common but often carve-out for fundamental representations which must be absolutely true.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Uncommon.

### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Commonly 20%–50%, sometimes higher if the situation permits.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually just warranties only.
27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.
28	Is a deductible or basket common?	Both are common.
29	Is a <i>de minimis</i> common?	Common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	From 12–36 months (usually at least one full audit cycle under buyer's ownership) for general representations and warranties except for tax (if applicable), fundamental warranties/specific indemnities.
31	Is warranty insurance common?	Uncommon. Very new and untested in Qatar market.

### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Uncommon.
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### Set-offs against Claims

33	Is a set off against claims for tax benefits common?	Uncommon due to lack of taxes levied in Qatar.
34	Insurance proceeds?	Common for actually received.
35	Third party recoveries?	Common for actually received.

**Damages, Knowledge**

36	Obligation to mitigate damages?	Usually specifically included in the purchase agreement.
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Often silent.

**Dispute Resolution**

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. Qatar law common (and will likely be implied) for purchase agreements between two Qatari parties. English law commonly used for all other transactions.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration in the Qatar International Center for Arbitration or overseas jurisdictions commonplace and recommended as awards can generally be enforced without a local court rehearing the case.

**Stamp Duty**

41	If stamp duty is payable, is it normally shared?	No stamp duty payable. Notarisation fees for transfer of shares in a limited liability company paid by each party.
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**3.3 Formalities for Execution of Documents**

See **3.4**.

**3.4 Formalities for Transferring Title to Shares or Assets****3.4.1 Transfers of shares**

A share purchase agreement (SPA) is typically signed by the relevant parties to the acquisition of shares. An SPA can be drafted in English, does not have to be notarised and the parties can sign the signature page without having to sign or initial each page of the SPA.

To transfer the shares in the LLC, a separate Arabic share transfer agreement is required. If the share transfer agreement is drafted in bilingual format (i.e. in Arabic and any other language, usually English) it must be attested by a sworn translator in Qatar before the existing and new shareholders of the company sign it before a notary public.

In addition to the transfer agreement, a schedule of amendment to the Arabic articles of association (or a bilingual version) must also be signed in front of a notary public. The attested, signed and notarised documents must then be submitted to the Ministry of Economy and Commerce which will update the commercial licence of the company and issue a new licence stating the names of the new shareholders with their shareholding percentages. The transfer agreement and the schedule of amendment of the articles of association can also be combined in one document if the parties wish.

If the purchaser of the shares is itself a corporate entity, the Ministry of Economy and Commerce and notary public will require the constitutional documents of the purchaser along with a shareholder or board resolution (purchaser resolution) resolving to acquire the shares and to appoint a signatory to sign the transfer documents before the notary public. The purchaser's constitutional documents and the purchaser resolution must be legalised by the Qatari embassy in the country of origin of the purchaser and attested at the Ministry of Foreign Affairs in Qatar. Following legalisation of the

documents, the documents must then be translated into Arabic and attested by a sworn translator in Qatar.

Shareholders in an LLC have statutory rights of pre-emption in all transfers of shares.

### 3.4.2 Transfers of assets

Sale contracts for assets in Qatar are subject to the Civil Code. Movable assets may be transferred between parties without concluding a sales contract. The transfer can instead be effected through a purchase order, as long as the name of the purchaser and seller are included, the movable assets and the purchase price are clearly defined, and the purchaser either signs the purchase order or approves it in writing in order to evidence its acceptance.

Certain registered assets may require a separate transfer agreement to be entered into or further procedures to be followed. Such assets include real estate, vehicles, employees or registered intellectual property.

## 3.5 Formalities for Mergers

### 3.5.1 Documents required for mergers of private companies

Under the Company Law, the share purchase contract related to the merger (the merger contract) will dictate the terms upon which the created company exists and will be the basis for the creation of a Memorandum of Understanding (MoU) and application to the commercial registration (i.e. 'trade licence').

A valid decision will need to be passed by each of the companies that are party to the merger contract with a resolution passed as per their respective MoUs. If necessary the MoU of the companies may need to be amended to enter into the merger contract or to facilitate the merger.

The Commercial Companies Law requires the following procedure to be followed in merger transactions:

- decision to dissolve issued by each of the merging companies
- net assets of the merging companies evaluated in accordance with the Commercial Companies Law
- parent companies, if any, issue a decision to increase their respective shareholding and the share capital of the newly formed company depending on the evaluation, to comply with the requirements of Qatari law and the merger contract
- the new shares must be distributed among the shareholders in the newly formed company in accordance with their shareholding.

Public company M&A transactions are also regulated by the QFMA M&A regulations. The main notification and document submission obligations are applicable where a company listed in Qatar makes an offer to acquire:

- a target that is a foreign company
- a local company (whether the target is listed or unlisted), or
- another company listed in Qatar.

The QFMA M&A regulations require listed Qatari companies intending to enter into M&A transactions involving another Qatari company to notify the authority even prior to any agreement being made (at the point where there is an intention to make an offer).

### 3.5.2 Documents required for M&A involving public companies

Although the process may differ slightly depending on which one of the categories set out above the transaction falls into (the first only requires post-foreign regulator approval action in Qatar), the offeror must generally submit a proposal to the QFMA for the purpose of establishing a timetable for the acquisition or merger within a period not exceeding two weeks of the date of disclosure of the intention to submit a potential offer (the disclosure must be made both to the QFMA and to the stock market). The timetable must include enough time for the following procedures:

- submission of final offer document to QFMA for approval
- sending and publishing approved offer document from QFMA to offeree company
- publication of opinion of offeree company's board
- offeror shareholders' approval (if applicable)
- first permitted closing date for offer
- final date when offeree company can announce its profits or dividend forecasts, asset evaluation or proposals for dividend payments
- publication of data of no-increase in the offer value
- final date on which an announcement may be made that offer is unconditional as to acceptances
- final date to meet all conditions
- final date to pay the amount or other consideration to be provided to the offeree company shareholders
- proposed date of trading suspension of offeree company securities if offeree company is listed.

In all cases the Labour Law provides some protection for employees of the subject companies that will be affected by the acquisition or merger and ensures continuance of QFMA contracts in the context of M&A transactions.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Any merger or acquisition which will create market dominance must be notified to the relevant governmental authority which is the competition committee established under the Anti-Competition Law (the Committee) which will decide whether the transaction can proceed or not (Arts 10 and 11, Law No. 19 of 2006 on Anticompetitive Practices in Qatar (Anti-Competition Law)).

'Control' or 'domination' is defined in the Anti-Competition Law as 'the ability of a person or group of persons working together to control product markets and have an effective impact on prices or on the volume of supply on it, without his competitors having the ability to limit that'. If a notification is required, the Anti-Competition Law stipulates that the Committee will consider the matter and make a decision within 90 days and no further action should be taken in respect of concluding the transaction unless the approval of the Committee has been obtained or the 90-day period has expired whichever is sooner.

An exception in the Anti-Competition Law allows the Committee to approve any merger creating a dominant position if it considers that, despite creating market dominance, the benefits to Qatar's economic development likely to result from the merger compensates for this. Essentially, the approval of a merger which creates a dominant position is at the discretion of the Committee.



Under Qatari law there is no distinction between anti-trust and anti-competition; they are viewed as synonymous and therefore regulated by the same law.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Qatari purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory when merger or acquisition will create market dominance (as defined above). Fines not less than QAR100,000 and not more than QAR5 million.
Timetable		
2	In practice, what is the timetable for clearance (in first phase and second phase review)?	The Anti-Competition Law has not been tested sufficiently due to the very few notifications made. However, the Ministry of Commerce and Economy committee is legally obliged by the Law to examine the notification within 90 days. If that period lapses with no decision having been made, this will be deemed an acceptance.

## 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Pending clearance from the Ministry of Commerce and Economy, applicant entities should not perform any action or procedure to consummate the economic concentration. The Anti-Competition Law prohibits unlawful pre-merger coordination between parties. Failure to comply with this prohibition will be subject the entities involved to fines of not less than QAR100,000 and not more than QAR5 million.

## 4.4 Anti-Bribery, Corruption and Money Laundering

### 4.4.1 Anti-Bribery and corruption

Qatar does not have a general anti-corruption law. Other Qatari laws, however, contain provisions on anti-corruption—primarily, the Qatari Penal Code. Law No. 8 of 2009 on Human Resources Management regulates the conduct of civil servants (HR Law). The HR Law places a clear duty on civil servants not to accept payments, grants or gifts in relation to their position which could only be provided as a result of, or relate to, the duties carried out by them through their position (Art. 123). The HR Law applies sanctions to the public official only. Note:

- there is no such thing as a 'safe benefit' which can be offered to either a public-sector or private person: i.e. the value of the benefit is not relevant
- in both the public and private sectors, there is in general no requirement for any particular behaviour or action in exchange (i.e. if the offeror receives nothing back in exchange for the benefit, this does not exempt the offeror from potential liability)
- in the public and in the private sectors attempted bribery is also punishable
- the inappropriate nature of a 'special benefit' (e.g. its value, or the circumstances in which it is given) could indicate intent to corrupt on the part of the giver and/or the recipient.

The Qatari Penal Code does not require proof of intent to influence in the case of bribery of public office holders (i.e. there is no need to prove the offeror's purpose) - it will be enough to show that a 'special benefit' has been received by a person in a public office post. In view of the foregoing, gifts and other similar benefits should not be provided to public office holders.

#### 4.4.2 Money laundering

Qatar has established a wide range of regulations to combat money laundering, with provisions included in the Penal Code (mainly Law No. 4/2010 on Combating Money Laundering and Terrorism Financing (the AML Law)) and various directives of the Qatar Central Bank.

The AML Law includes provisions relatively similar to those of the UK Proceeds of Crime Act 2002, covering concealment arrangements; acquisition, use and possession; failure to disclose; and 'tipping off'. Since its enactment, various ministries and governmental agencies have stepped up their efforts to combat money laundering.

In parallel, the Qatar Financial Center (QFC) Regulatory Authority, working very closely with the Qatar Central Bank, have issued their own set of regulations 'The QFC Anti-Money Laundering and Countering Terrorism Financing Rules' (AML and CTF) which provide the QFC compliance framework and detailed requirements in relation to anti-money laundering and countering the financing of terrorism. The QFC indeed can be seen as leading the way in combatting financial crimes.

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

#### 4.5.1 Exchange controls

Qatar has no foreign exchange controls. The Qatar Riyal is pegged to the US dollar at a rate of around QAR3.65 to USD1.

#### 4.5.2 Foreign investment approvals and notifications

Qatari nationals, or companies wholly-owned by Qatari nationals, must own at least 51% of the capital of any onshore company formed in Qatar. The normal maximum permitted foreign ownership in a company formed under the CCL is therefore 49% (Law 25/2005 (Commercial Registration Law); Companies Law, 13/2000 (Foreign Investment Code); and Law 25/2005 (Concealment Law).

Although amendments to the Foreign Investment Code have been made to allow greater foreign ownership percentages in certain industries (by creating exceptions to the general rules limiting foreign-ownership shares in Qatar companies), the exceptions have barely been tested and are ultimately subject to the discretion of the Minister of Economy, who may take the question to the Cabinet for further consideration.

Theoretically however, the following sectors may be allowed higher percentages of foreign ownership (i.e. higher than 49%):

- agriculture
- industry/manufacturing
- health
- education
- tourism
- development and exploitation of natural resources
- energy, and
- mining.

Investments which are in line with the Development Plan of the State of Qatar will receive preferential consideration, namely projects which would

- achieve optimal use of domestic raw materials
- create new export industries
- develop new products or incorporate new technologies
- help promote/export Qatar's leading industries or areas of professional expertise.

Note also the exception above in relation to Article 68 companies.

#### 4.5.3 Industry-specific regulation

Foreign investment in Qatar is not subject to any approval formalities in general, although for some sectors notification and approval of a proposed acquisition may be required: e.g. for defence, banking and insurance.

Additionally, certain business activities (e.g. manpower companies) are reserved to Qatari nationals or companies wholly-owned by Qatari nationals.

#### 4.5.4 Import/export controls

A company's right to import goods into Qatar will depend on its licensed activities, the nature of goods to be imported or the purpose of importing them. Where a product is the subject of a registered agency agreement (which provides the importer with the exclusive right to import the product) those products cannot be imported into Qatar by anyone else, except with the written permission of the registered commercial agent.

Qatar has adopted a sanctions regime against Israel. Under this regime, the import, exchange, possession or trade in goods, commodities or products of Israeli origin is prohibited. The boycott also applies to monetary instruments and other negotiable instruments of Israeli origin (which will not be recognised) in Qatar.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Prior to any acquisition of shares by any new shareholder from a non-Qatari shareholder, all outstanding tax liabilities must be paid by the exiting, non-Qatari shareholder.

### 5.2 Acquisition of Assets

No Qatar tax applies to the acquisition of assets by Qatari companies from foreign or local entities.

### 5.3 Mergers

Prior to any merger between a Qatari entity and a non-Qatari entity, all outstanding tax liabilities must be paid by the non-Qatari entity.

### 5.4 Value Added Tax

There is no sales tax or VAT in Qatar, although some taxes are imposed on some goods and services, including, for example, sales of alcoholic beverages, hotel and restaurant bills.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In share purchases, the employment relationship between the employee and the target remains unchanged.

#### 6.1.2 Acquisition of assets

No rule applies in Qatar which will result in the automatic transfer of employees on an asset sale. This means that employees need to go through a termination and rehire process, as they will need to be employed by (and be under the sponsorship of) the buyer entity. This is usually achieved by the seller, buyer and employee entering into a tri-partite agreement to transfer the employment to the buyer.

Employers in Qatar are liable to pay an end-of-service benefit or 'gratuity' to employees when their employment is terminated (unless it is terminated for specified reasons). The gratuity is payable under Law 14/2004 (Labour Law) and is calculated according to length of service. Upon a transfer of employment, the parties (including the employee) can mutually agree whether it is to be paid at the time of termination or rolled over to be paid at the time the employee's employment with the new entity ends.

### 6.2 Approval or Consultation Requirements

No approval or consultation requirements apply in Qatar and no works councils or trade unions or other collective employee bodies. Accordingly, the company should communicate and consult directly with each employee regarding any termination or transfer of employment, to remain in compliance with employee termination entitlements under the Labour Law, visa sponsorship issues and any terms agreed between the parties in individual employment contracts.

On termination of employment, an employer must ensure that the relevant authority is informed of the termination and that the residence visa (for expatriates) and work permit are cancelled. An employer is obligated to arrange for the cancellation of the visa within 30 days from the termination date.

### 6.3 Protection against Dismissal

Redundancies are not recognised under Qatar law. As such, there are no specific economic reasons an employer must prove to justify a termination. Instead, what equates to a redundancy process in other jurisdictions, in Qatar is dealt with by the ordinary termination procedures as regulated by the Labour Law.

An individual may have their employment terminated during a probationary period without notice or alternatively for the following reasons:

- fixed-term contracts: the termination will occur upon the expiration of the fixed term, or if the employee engages in the type of behaviour outlined in Article 61 of the Labour Law (which details various types of gross misconduct)
- contracts for an indefinite term (permanent contracts): there must be a 'legitimate reason' for termination, or the employee must have engaged in the type of behaviour outlined in Article 61 of the Labour Law.

A legitimate reason is usually connected with the employee's performance. If the termination is based on a 'legitimate reason', notice of at least two weeks must be given and a gratuity paid. The notice period should be:

- 2 weeks – if the employee has been employed for less than 5 years, or
- 1 month – if employed for more than 5 years

—unless the individual contract of employment provides for any longer notice period, in which case that contractual term must be respected.

The Labour Law requires the following procedure to be followed before any disciplinary sanction, including dismissal, is imposed:

1. notify the employee in writing of the charge
2. invite the employee to a meeting and listen to his or her representations
3. investigate the matter and provide the employee with written reasons for any penalty to be imposed (and record this in the employee's personnel file).

If an employee is not dismissed for a 'legitimate reason' or in accordance with Article 61, the termination may be considered 'arbitrary'. If an employee is dismissed arbitrarily, the Labour Dispute Department of the Ministry of Labour could grant compensation to the dismissed employee. 'Arbitrary dismissal' under the Labour Law includes situations where the dismissal has no connection to the employee's work performance, or is carried out as a retaliatory reaction against a filing by the employee of a complaint or his or her making a claim against the employer that proves to be justified.

## Russian Federation

### 1.1 Overview

The Russian Federation is a continental law jurisdiction. Its current legal system was formed in the early Nineties after the break-up of the Soviet Union. The Russian Civil Code was adopted in 1994, modelled on the Civil Codes of France, Germany and the Netherlands. It was amended in 2014 as part of the government's legal reforms to modernise it and further amendments are under discussion.

### 1.2 General Legal Framework

Mergers and acquisitions in the Russian Federation are regulated by several laws which impact on various aspects of M&A activity in the corporate, securities, antitrust, employment, tax and other areas. These laws include the Civil Code, the Tax Code, the Labour Code, the Law on Protection of Competition, the Law on Joint Stock Companies, the Law on Limited Liability Companies and the Law on the Securities Market.

### 1.3 Corporate Entities

The most common corporate structures for business operations in Russia are limited liability companies (LLCs) and joint stock companies (JSCs), which are regulated by the Civil Code, and the Law on Limited Liability Companies (LLC Law) and the Law on Joint Stock Companies (JSC Law), respectively. The LLC Law and the JSC Law are expected to be amended in 2015–2016 to modernise and bring the laws in line with recent amendments to the Civil Code.

#### 1.3.1 Limited liability companies

The charter capital of an LLC is divided into participatory interests held by participants in the LLC. The number of participants in an LLC may not exceed 50. A single founder, whether Russian or non-Russian, may establish an LLC but only if that founder is not itself a company owned by a single individual or entity. The participants in an LLC have pre-emptive rights in respect of the sale of participatory interests by a participant to any third party, although it is also possible to prohibit transfers to third parties altogether. LLCs are best suited for small businesses and wholly-owned companies, as well as certain joint ventures.

#### 1.3.2 Joint stock companies

There are two types of JSC in Russia: public and private. In a public JSC, shares and securities convertible into shares may be offered to the public and the total number of shareholders is unlimited. In a private JSC, shares may not be offered to the public. Shareholders in a private JSC have pre-emptive rights in respect of the sale of shares to third parties.

## 2. Acquisition Methods

The consolidation of two or more businesses in the Russian Federation is usually achieved through a purchase of shares or assets, or a merger. Mergers are rarely used as an acquisition method, particularly in cross-border acquisitions, since Russian law does not allow foreign entities to merge with local companies. In most cases, acquisitions generally occur through share or asset purchases.

### 2.1 Acquisition of Shares

Shares in a JSC exist in non-documentary form as entries on a shareholder's account in a shareholders' register maintained by a professional third-party registrar. There are two classes of shares: ordinary (voting) shares and preference shares which are normally non-voting but may become voting in certain circumstances. Shares in JSCs under Russian law are classified as securities and each share issue must be registered with the Central Bank of Russia.

Participatory interests in an LLC are not classified as securities and do not need to be registered. The LLC is obliged to maintain a list of its participants specifying their shareholdings. Participants in the LLC and their shareholdings are also recorded in the Russian companies register which is maintained by the tax authorities and is publicly available.

As with shares in the JSC, a participatory interest in an LLC may be transferred only after it has been fully-paid up by the founders.

## 2.2 Acquisition of Assets

Under the Civil Code, an asset transaction may be made in the form of either an ordinary asset sale (asset sale) or the sale of an enterprise (enterprise sale).

An ordinary asset sale enables the buyer to acquire specific assets without liabilities which generally stay with the previous owner.

An enterprise sale is a sale whereby the seller transfers an enterprise as a whole to the purchaser, which includes all types of property required for its commercial activities. This includes land, buildings, facilities, equipment, tools, raw materials, inventory, claims (receivables) and debts (payables), as well as the company's name, trademarks, service marks, and other exclusive rights, unless otherwise provided by statute or contract. The contract for an enterprise sale must generally be concluded in the form of a single document.

Under Russian law, an enterprise is treated as immovable property. Title to the property passes to the purchaser upon registration of the transfer with the Russian Ministry of Justice. However, due to a rather complicated procedure for ascertaining whether a property complex is an enterprise and for registering it, the sale of an enterprise is rarely used in M&A deals.

## 2.3 Mergers and Consolidations

Russian corporate legislation defines a merger as a form of corporate reorganisation, whereby one company survives and the other disappears. The surviving company retains its own name and legal status and assumes the assets and liabilities of the absorbed company, while the latter loses its legal status and ceases to exist as a separate legal entity.

In addition to mergers, Russian legislation allows companies to consolidate. In a consolidation, both companies cease to exist and their assets and liabilities are transferred, by operation of law, to a new legal entity formed as a result of that consolidation.

# 3. Negotiation, Signing and Closing

## 3.1 Customary Issues in Negotiating Acquisition Agreements

Russian laws are not yet sufficiently sophisticated for complex M&A transactions, particularly in relation to risk allocation. In cross-border M&A transactions parties often chose English law to govern important deals. Foreign law may be chosen when one of the parties is a foreign entity or individual. Deals between Russian parties without any cross-border element should be governed by Russian law. Although the Civil Code was recently amended and efforts to further modernise it are under way, concepts like representations and warranties and indemnities do not exist or are not sufficiently developed, and if used in the context of a Russian law-governed contract will likely not work as intended, not least because the Russian courts have no familiarity with these concepts.

The following is a brief overview of certain key provisions in typical English-law governed purchase agreements for Russian deals. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

### Purchase Price

1	Is a purchase price adjustment common?	Purchase price adjustments are common. All types are seen, including working capital adjustment, cash-free debt-free and NAV adjustments.
	What type is common (e.g. debt-free, cash-free)?	

2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	This is usually prepared by the buyer.
4	Is the balance sheet audited?	Usually.
5	Is an earn-out common?	Common in transactions when the sellers continue to manage the target company after closing.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Common as a completion vehicle to ensure payment is made at completion.
8	Is a break fee common?	Uncommon.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	Reasonably common.
10	Is the MAE general or specific?	Specific is more common.
11	Quantification of MAE?	Increasingly seen.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, similar to the United Kingdom, but under Russian law non-competes are viewed as non-enforceable.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Common for private deals.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules is common but limited to things like lists of contracts. Notification of possible breach is common. In cases of material breach, right to terminate.
17	Is a separate tax covenant/indemnity or tax deed common?	A separate tax deed is not very common. It is more usual to include an indemnity in the purchase agreement.
<b>Representations &amp; Warranties</b>		
18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but often not quantified (other than specific warranties, e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are growing. Often limited to the actual knowledge and due enquiry of a specified list of members of the senior management.



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| 20 | Is a warranty that there is no materially misleading/omitted information common? | Uncommon. |
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| 21 | Is disclosure of data room common? | Common. |
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### Repetition of Representations & Warranties

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| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring down certificate at completion common? | Repetition at completion common. Bring-down certificate not very common. |
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| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard? | True and accurate in all material respects is common but often carve-out for fundamental representations which must be absolutely true. |
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| 24 | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon. |
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### Limitations on Liability

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| 25 | What is the common cap amount (as a % of purchase price)? | Commonly at 100%. Mid-cap and larger deals see lower caps, e.g. 20%–50%. |
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| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Usually warranties only. |
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| 27 | What are the common exceptions to the cap? | Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated. |
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| 28 | Is a deductible or basket common? | Deductible is more often resisted and a tipping basket more common. |
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| 29 | Is a de minimis common? | Common. |
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| 30 | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)? | 12–36 months. Common to carve out fraud. |
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| 31 | Is warranty insurance common? | Uncommon. |
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### Reliance

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| 32 | Do financiers seek to rely on purchaser's due diligence reports? | Common. |
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### Set-offs against Claims

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| 33 | Is a set off against claims for tax benefits common? | Common. |
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34	Insurance proceeds?	Common for actually received.
35	Third party recoveries?	Common for actually received.
<b>Damages, Knowledge</b>		
36	Obligation to mitigate damages?	Common.
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Often silent.
<b>Dispute Resolution</b>		
39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. English law, or Russian law if the deal is between Russian companies.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is common for larger deals. Stockholm, ICC or LCIA. Currently, due to sanctions, Singapore and Hong Kong often considered as alternative venues.
<b>Stamp Duty</b>		
41	If stamp duty is payable, is it normally shared?	No stamp duty.

## 3.2 Formalities for Execution of Documents

See 3.3.

## 3.3 Formalities for Transfer Title to Shares or Assets

### 3.3.1 Transfers of shares

It is market practice to document the terms of a sale and purchase of shares in a JSC by way of a written share purchase agreement (SPA). In order to transfer title to shares in a JSC the buyer must open an account with the shareholders' register. This involves the filing of corporate documents which in the case of foreign buyers need to be notarised and apostilled (an apostille being a special form of certification required by the Hague convention) and translated into Russian. In turn, the seller must sign transfer instructions typically at the registrar's office to effect the transfer, which involves payment of a fee.

In order to transfer title to a participation interest in an LLC, the buyer and seller must sign a Russian-law governed transfer agreement before a Russian notary who checks passports and powers of attorney or other authorisations, as well as corporate documents which in cases of foreign companies should be notarised, apostilled and translated into Russian.

### 3.3.2 Transfers of assets

The sale of assets is normally documented in writing by signing an SPA. Assets should be sufficiently identified, normally by including a clear description and inventory number, if available, in an annex to the SPA. For accounting and tax purposes, it is common to include a price for each asset. Special rules apply to transfers of certain types of assets (e.g. vehicles, real estate or IP), and separate transfer agreements may need to be executed and registered with the traffic police, real estate registry or patent authorities.

The contract for the sale of an enterprise must generally be concluded in the form of a single document and should include: a statement of inventory, a balance sheet, an independent auditor's statement on the property included in the enterprise and a valuation of it; and a list of all debts (obligations) included in the enterprise, specifying the creditors, nature and size of the debts and their due dates.

### 3.4 Formalities for Mergers and Consolidations

The following steps need to be taken in connection with both mergers and consolidations:

- approval of a merger agreement and a transfer act by the boards of directors of each of the merging companies
- under certain circumstances, prior approval of the Federal Antimonopoly Service (FAS)
- approval of the merger at a general meeting of shareholders of each company involved
- notification to the creditors of the merging companies, and
- implementation of the merger, including issue and registration of new shares (or participatory interests) in exchange for the shares (or participatory interests) of the absorbed company.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Most sizeable M&A transactions require prior antitrust clearance. The principal law regulating antitrust issues in Russia is the Law on Protection of Competition (Competition Law) adopted 26 July 2006, effective 26 October 2006.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Russian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory, if thresholds are met.
Timetable		
2	In practice, what is the timetable for clearance (in first phase and second phase review)?	<p>Phase I usually takes about 27–30 calendar days from the date the filing is made.</p> <p>Phase II usually takes 2 months after Phase I is completed.</p>

#### 4.2.1 Share sale filing requirements

Prior approval by FAS is required for the acquisition of shares in a Russian company if as a result the acquirer will hold more than 25%, 50%, or 75% of the shares in the target JSC, or more than 1/3, 50%, or 2/3 of the participatory interests in the target LLC, as long as:

- the latest aggregate balance sheet value of the total assets of the acquirer and its 'group of persons' as well as the target company and its 'group of persons' exceeds RUB7 billion and at the same time the balance sheet value of the total assets of the target company and its 'group of persons' exceeds RUB250 million
- the aggregate revenue earned by the acquirer and its 'group of persons', together with the target company and its 'group of persons', from the sale of goods (services) during the past calendar year exceeded RUB10 billion and at the same time the balance sheet value of the total assets of the target company and its 'group of persons' exceeds RUB250 million, or
- either the acquirer, or a member of its 'group of persons', or the target company, or a member of its 'group of persons', is included in the FAS Register of Entities with a market share exceeding 35% in the relevant market.

When an individual, legal entity or 'group of persons' acquires more than 50% of the voting shares of, or any right of control over, a legal entity incorporated outside of Russia, or the right to perform the functions of its executive bodies, the acquirer must receive prior approval from FAS if:

- that target foreign legal entity controls a Russian subsidiary, or that target foreign legal entity supplied goods to the Russian Federation worth more than one billion Rubles during the year preceding the transaction, and
- the aggregate book value of the assets of the acquirer and its 'group of persons' plus the target and its 'group of persons' exceeds RUB7 billion and the balance sheet value of the total assets of the target and its group exceeds RUB250 million, or
- the aggregate revenue earned by the acquirer and its 'group of persons' plus the target and its 'group of persons' from the sale of goods over the past calendar year exceeds RUB10 billion and the balance sheet value of the total assets of the target and its group exceeds RUB250 million, or
- either the acquirer, or any of the entities belonging to its 'group of persons', or the target, or any of the entities belonging to its 'group of persons', is included in the FAS register of entities with a market share exceeding 35% in the relevant market.

In determining the threshold for asset and revenue values, FAS takes into consideration not only the acquirer and the target company, but also all persons (individuals or legal entities) in the acquirer's and target's 'group of persons.'

Where a merger or acquisition takes place between entities in the same 'group of persons' that are related to each other through other than a shareholding of over 50% (e.g. through management control, contractual control or other *de facto* control), the Competition Law permits a 45-day post-transaction notification of FAS, provided the group structure is submitted to FAS no later than one month before the transaction and the group structure does not change until after the transaction.

The Competition Law contains separate conditions and thresholds for the acquisition of an interest, asset or right in a financial organisation subject to pre-acquisition FAS notification; these acquisitions should be considered on a case-by-case basis.

#### 4.2.2 Asset sale filing requirements

Prior approval by FAS is required in an asset acquisition if the acquirer (or its 'group of persons') acquires assets (or the right to use assets) exceeding 20% of the balance sheet value of the fixed production and/or intangible assets of the target company (except for land plots and non-industrial-purpose buildings, constructions, premises and parts of premises, and unfinished construction projects), as long as:

- the latest aggregate balance sheet value of the total assets of the acquirer and its 'group of persons', as well as the target company and its 'group of persons', exceeds RUB7 billion and at the same time the balance sheet value of the total assets of the target company and its 'group of persons' exceeds RUB250 million, or
- the aggregate revenue earned by the acquirer and its 'group of persons', together with the target company and its 'group of persons', from the sale of goods (services) during the past calendar year exceeded RUB10 billion (approximately USD154 million) and at the same time the balance sheet value of the total assets of the target company and its 'group of persons' exceeds RUB250 million, or
- either the acquirer, or a member of its 'group of persons', or the target company, or a member of its 'group of persons', is included in the FAS Register of Entities with a market share exceeding 35% in the relevant market.

#### 4.2.3 Merger filing requirements

Prior approval by FAS is required for a merger of Russian commercial organisations, as long as the latest aggregate balance sheet value of their assets (or the assets of their 'group of persons') exceeds RUB7 billion or the aggregate revenue earned by these organisations (or their 'group of persons') from the sale of goods (services) during the past calendar year exceeded RUB10 billion, or any of the merging organisations is included in the FAS Register of Entities with a market share exceeding 35% in the relevant market.

The thresholds for consolidations or mergers involving financial organisations are set by the Russian government depending on the type of financial organisations involved.

Intra-group consolidations or mergers may be exempt from the requirement to obtain prior FAS approval, provided certain conditions are met, but a limited number of these transactions may require post-transaction notification to FAS, subject to certain additional requirements being applied.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

There are no specific restrictions for the exchange of competition-sensitive information and 'gun-jumping' in Russian law.

### 4.4 Anti-Bribery, Corruption and Money Laundering

On 1 January 2013 Russia's first comprehensive anti-corruption law, Federal Law No. 273 On Combatting Corruption, was amended to require companies to take enhanced measures to prevent corruption. Specifically the amended law requires all organisations to develop and implement measures to prevent bribery and specifically recommends the following:

- designating departments and structural units and officers who will be responsible for the prevention of bribery and related offences
- co-operating with law enforcement authorities
- developing and implementing standards and procedures designed to ensure ethical business conduct
- adopting a code of ethics and professional conduct for all employees, and

- preventing the creation and use of false and altered documents.

The enforcement practice at the moment includes an increasing number of prosecutors' actions and court cases in connection with inspections of Russian entities for non-compliance with the requirements of current anti-corruption laws.

A number of other developments in Russia's regulatory framework have prompted increased efforts by state authorities in combating corruption. Federal Law No. 230 On Control over the Correlation between the Expenses and Earnings of State Public Officials was passed on 3 December 2012 followed by Federal Law No. 79 of 7 May 2013 which effectively prohibits public officials (and their family members) from owning property and having funds in bank accounts outside of Russia. The government also issued a sequence of rulings in 2013 which envisage more stringent reporting procedures for profits and ownership of public officials. On 9 January 2014 detailed procedures were introduced by a ruling of the Russian government for the reporting of gifts received by public officials, rules for evaluating those gifts and for the possible repurchase of the gifts by the public officials receiving them.

#### 4.4.1 Active public and commercial bribery on behalf of a legal entity

The Code of Administrative Offences provides for administrative liability of a legal entity for unlawful provision, offer or promise of anything of pecuniary value to a Russian or foreign public official, an official of a public international organisation as well as officers in a commercial company for any actions or omissions to act in the interests of this legal entity.

Administrative liability is fault-based. Fault of a legal entity is defined as failure to take all measures within its power to comply with the Code's requirements. Therefore, a legal entity may raise as a defence the measures it has taken to prevent bribery on its behalf.

Administrative sanctions vary depending on the amount of the unlawful remuneration (bribe). The minimum sanction for a bribe up to RUB1 million is a fine of up to three times the amount of the bribe, but not less than RUB1 million. The maximum sanction for a bribe over RUB25 million is a fine of up to 100 times of the amount of the bribe, but not less than RUB100 million. In all cases, the bribe or its equivalent value may be confiscated.

A legal entity may be held liable under Article 19.28 of the Code of Administrative Offences irrespective of liability of a particular individual involved in the giving of a bribe.

Legal entities succeeding to the rights of other legal entities as a result of various corporate reorganisations, mergers, etc. are liable for the administrative offences committed by the legal predecessors regardless of whether the succeeding entities knew of those administrative offences.

#### 4.4.2 Active bribery of public officials

The Criminal Code punishes bribes offered to Russian public officials, foreign public officials and officials of public international organisations, including bribes offered through intermediaries.

A 'Russian public official' is defined as a person who permanently, temporarily or under a specific authorisation performs the function of a representative of state power as well as persons who perform organisational or administrative functions in state and municipal bodies or establishments, as well as in the Russian military and other armed forces.

A 'foreign public official' is defined as any person who is appointed or elected to an office in the legislative, executive or judicial body of a foreign state, including a public administration or enterprise. An official of a public international organisation is an international civil servant or any person authorised by that organisation to act on its behalf.

The minimum sanction for bribes not exceeding RUB25,000, is a fine from 15–30 times the amount of the bribe, or forced labour for the period of up to 3 years, or imprisonment for up to 2 years with a fine of 10 times the amount of the bribe.

The maximum sanction for a bribe exceeding RUB1 million, is a fine from 70–90 times the amount of the bribe or imprisonment for 7–12 years, and a fine 70 times the amount of the bribe.

Persons who have been found to have given a bribe may be relieved of criminal liability if they actively aid detection and prosecution of the crime or reported themselves after the commission of the crime to the criminal law enforcement authorities or were solicited by a public official to offer a bribe.

#### 4.4.3 Active commercial bribery

Russian law differentiates between a bribe to a public official (referred to as public bribery in this text) as compared to a bribe to a manager of a private company (referred to as commercial bribery).

The Criminal Code defines ‘commercial bribery’ as unlawful provision of anything which has pecuniary value (including property rights, services, etc.) to a person who performs managerial functions in a commercial or other organisation for an act or omission in connection with that person’s official position in the interests of the provider.

The requirement that a bribe must be given in the interests of its provider raises the question as to what extent that bribe may be imputed to an organisation (for the purposes of administrative liability) if this bribe was provided by an employee to obtain or retain business for the organisation. Lack of any immediate interest on the part of the employee will not necessarily exclude administrative liability of the organisation.

Criminal sanctions are determined by the court and vary depending on whether the person giving a bribe has acted alone or in conspiracy with others as well as on whether the bribe is given for the commission of a lawful or an unlawful act (omission). The minimum sanctions are:

- a fine from 10–50 times the amount of the bribe and a ban on holding certain positions or engaging in certain professional activities for a period of up to 2 years, or
- a limitation of freedom for a period of up to 2 years, or
- forced labour for a period of up to 3 years, or
- imprisonment for a period of up to 3 years.

The maximum sanctions are:

- a fine from 40-70 times the amount of the bribe and ban on holding certain positions or engaging in certain professional activities for a period of up to 3 years, or
- forced labour for a period of up to 4 years, or arrest for a period of 3–6 months, or
- imprisonment for a period of up to 6 years.

A person who has committed the offence, regardless of whether that person has provided or received a bribe, may be relieved of criminal liability if he actively aided in detecting or prosecuting this offence, or he was subject to bribe solicitation, or he voluntarily reported the bribe to criminal law enforcement authorities.

#### 4.4.4 Aiding and abetting public bribery

Aiding and abetting public bribery is a separate criminal offence (Art. 291.1, Criminal Code). ‘Aiding and abetting’ is defined as the physical giving of a bribe on the instructions of the person either giving or receiving a bribe as well as any other assistance to either of these persons in reaching or executing an agreement between them to give and take a bribe. This Article applies only to bribes with a value exceeding RUB25,000. This Article also applies to offers or promises of assistance in public bribery regardless of the value of the bribe. The sanctions are comparable to those for active public bribery.

#### 4.4.5 Countering money laundering

The Anti-Money Laundering Law imposes certain requirements on credit organisations, professional participants in the securities markets, insurance and leasing companies, and postal and other entities that deal with the transmission of money or other valuables. These entities must:

- identify clients and beneficiaries under a specific procedure
- require certain information on payers in payment orders (a payment order is a standard document which is completed when asking an institution to process payments)
- report to the Federal Financial Monitoring Service certain types of transactions of RUB600,000 or more (or the equivalent in foreign currency), and transactions involving real property of RUB3 million or more (or the equivalent in foreign currency) and all complex or unusual transaction schemes that have no apparent economic or lawful purpose irrespective of their amount
- identify foreign public officials and the sources of their money and other property, and
- pay increased attention to transfers of monetary funds and other property between foreign public officials and their close relatives.

Under Anti-Money Laundering Law, it is unlawful to create or maintain an anonymous account.

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Generally, there are no restrictions on foreign involvement in M&A transactions (except for a limited number of industries, e.g. banking, insurance services, mass media, defence, aviation and natural resources, where restrictions are imposed on the level of foreign shareholding and involvement in management).

In addition foreign investment in 'strategic' industries is restricted; regulated by the Federal Law on the Procedure for Foreign Investments in Companies of Strategic Significance for National Defence and Security (Strategic Companies Law). The law establishes certain limitations and requirements for foreign investment in companies with strategic significance for national defence and security.

There are also restrictions on acquisitions of stakes in Russian companies by foreign states and organisations controlled by foreign states.

#### 4.5.1 Exchange controls

The Ruble is the national currency of the Russian Federation. Although contracts may refer to the Ruble equivalent in foreign currency, all transactions between Russian entities within the Russian Federation must, as a general rule, be settled in Rubles.

Currently, there are only certain reporting requirements with respect to currency operations.

However, certain requirements still apply to Russian residents:

- Russian companies must remit all foreign currency export proceeds to their Russian bank account(s) (repatriation of currency proceeds), subject to certain exceptions
- 'transaction passports' are required for certain transactions (external trade, loans) at Russian banks
- the purchase and sale of foreign currency may only be performed at authorised Russian banks
- exports of cash are subject to restrictions



- the operation of an overseas bank account by a Russian resident is subject to certain restrictions, and
- when a Russian company or individual opens an overseas bank account in OECD/FATF member countries they must notify the tax authorities and present regular reports on the cashflow in that account.

'Russian residents' include: Russian citizens and other individuals whose permanent place of residence is the Russian Federation; legal entities established in accordance with Russian legislation; representative offices (branches) of Russian legal entities outside Russia; and the governments of the Russian Federation, constituent entities of the Russian Federation, and municipal units.

Violation of Russian currency control requirements may entail civil, administrative, or criminal liability. Administrative penalties for violation of Russia's currency control requirements include various fines, which may be imposed on individuals, legal entities and company executives. The amount of a fine may be as high as the entire value of a transaction performed in violation of the currency control requirements. Other sanctions include the revocation of licences (primarily applicable to banks) and imprisonment.

#### 4.5.2 Foreign investment approvals and notifications

The preliminary consent of a special governmental commission is required for foreign investment in companies doing business in certain sectors of the Russian economy (strategic companies), i.e.:

- the nuclear industry
- weapons and the military equipment industry
- aviation and aviation security
- space activities
- manufacture of special equipment (e.g. connected with encryption)
- geological surveys
- exploration and development of natural resources
- modification of hydro-meteorological and geophysical processes and phenomena, and
- mass media and certain types of telecommunications services rendered by business entities having a dominant position in the relevant markets.

Additional restrictions apply to foreign investment in strategic companies involved in the exploration, development and production of natural resources on subsoil plots of federal significance (see comment on Strategic Companies Law above).

The prior consent of a special governmental commission is required for transactions resulting in:

- acquisitions by foreign investors of control over a Russian strategic company by:
  - holding its voting shares
  - having the right to appoint a majority of its management and/or executive bodies
  - performing the functions of its management company, or
  - otherwise determining the decisions of that strategic company, or

- the acquisition by a foreign country, international organisation, and companies under their control, including Russian companies, of more than 25% of the voting shares or rights to block decisions of the management bodies of a strategic company.

Where a foreign investor obtains control over a strategic company as the result of a buy-back, distribution or conversion of shares in that strategic company, the investor must file for approval of this within three months of that event.

The law permits the above transactions to be effected without prior consent if (prior to the transactions in the bullet list above), the foreign investor directly or indirectly held more than 50% of the voting shares in the strategic company. However, this exemption is not applicable to strategic companies using federal subsoil plots.

Additionally with respect to strategic companies using federal subsoil plots of federal significance, the prior consent of a special governmental commission is required for transactions resulting in:

- the acquisition of control by a foreign investor (that is itself not controlled by a foreign state or international organisation) of:
  - 10% and more of the total number of voting shares, or
  - rights to appoint the CEO, or to elect 10% or more of the management and/or executive bodies of a strategic company using federal subsoil plots of federal significance,<sup>1</sup> or
- the acquisition by a foreign country, international organisation, and companies under their control, including Russian companies, of more than 5% of the voting shares in strategic companies using subsoil plots of federal significance.

No preliminary clearance for transactions with strategic companies operating subsoil plots of federal significance is required if the foreign investor owns more than 75% of the shares (participatory interests) in that company before the execution of the transactions.

It should be noted that foreign countries, international organisations, and companies under their control, including Russian companies, are prohibited from acquiring control over strategic companies, including acquiring 10% or more of voting shares in strategic companies using subsoil plots of federal significance and more than 50% in other strategic companies.

The Law also covers the acquisition by a foreign investor of the main production facilities of strategic companies with a value of 25% or more of the balance sheet value of the company's assets.

FAS must be informed about the completion of transactions and other actions for which preliminary consent was obtained.

Investments of foreign states, international organisations and organisations under their control into Russian companies (strategic and non-strategic) are subject to additional clearance requirements under the Law on Foreign Investments. Any transaction which gives a foreign state, an international organisation or an organisation under their control the right to dispose directly or indirectly of more than 25% of the total number of votes attached to voting shares in any Russian company, or otherwise block decisions of the governing bodies of a Russian company, requires preliminary clearance with the Russian Government and/or the FAS.

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<sup>1</sup> Except for those strategic companies where Russia holds more than 50% of the voting shares, or directly or indirectly holds more than 50% of the votes.

### 4.5.3 Industry-specific regulation

#### ***Banking***

The participation of foreign banks in the Russian market is subject to certain restrictions. In particular, non-residents need the Bank of Russia's prior approval if they acquire 10% or more of the shares in a Russian bank or non-banking credit organisation. When a non-resident acquires more than 1% but less than 10%, the Bank of Russia need only be notified. This is similar to the regulation that applies to Russian residents. Also, the Bank of Russia may not establish additional requirements for the subsidiaries of foreign banks related to mandatory ratios and minimal charter capital. However, additional requirements on reporting procedures, approval of management bodies and permitted operations of the representative offices and subsidiaries of foreign banks may still be introduced.

#### ***Insurance***

Russian law places restrictions on insurance companies that are subsidiaries of foreign investors or where more than 49% of their charter capital belongs to foreign investors (with one exception under Art. 6(5), Insurance Law: see below). Such insurers (which have part foreign-ownership) cannot conclude certain types of insurance policy (e.g. life insurance), and cannot conclude policies which relate to the performance or delivery of work under a public sector/state contract, and purporting to protect the property interests of state and municipal organisations (e.g. liability insurance of any civil liability; mandatory state insurance or property insurance).

A quota applies to the amount of foreign capital which can be invested in the insurance sector in Russia. This was amended on Russia's accession to the WTO in August 2012 and is now set at 50%. Should the amount of foreign capital invested in the sector exceed this quota (it is far from doing so at present), the regulator (the Central Bank of Russia) must stop issuing licences to insurance companies that are affiliates of foreign insurers or which are more than 49% foreign-owned.

An exemption from the above restrictions is provided in Article 6(5) of the Insurance Law which applies to subsidiaries of foreign companies and to companies with foreign capital exceeding the 49% cap, whose parent organisations are situated in member states of the European Communities.<sup>2</sup>

Russia has also undertaken obligations in insurance services under the Marrakesh Agreement in 2011.<sup>3</sup> In particular, foreign insurance companies will be allowed to directly establish branches in Russia from 2021. The incorporation and operation of those branches would be supervised by the Bank of Russia, and they would need to be permanent establishments for tax purposes.

#### ***Natural resources (oil and gas/mining)***

Russia differs from other countries where private ownership of minerals in the ground exists and where land owners have title to all mineral resources located below their land plots. All Russian subsoil resources in the ground, including oil, gas, gold and other minerals, unless extracted, are owned by the Russian state, irrespective of who holds title to the relevant land plot or who holds the relevant subsoil licence. Rights to extract subsoil resources can be granted under subsoil licences which, as a rule, provide that ownership rights to the extracted resources belong to the holder of the relevant licence.

Both Russian and foreign companies may hold subsoil licences in the Russian Federation, save for licences for strategic deposits, which may be developed by Russian companies only (Subsoil Law). Users of offshore fields may only be Russian companies which are at least 50%-owned by the Russian state with at least five years' experience of development of offshore fields. Although foreign companies are allowed to hold subsoil rights in respect of non-strategic deposits, in practice there are only a few cases where a foreign company directly holds subsoil rights in Russia. Foreign companies

<sup>2</sup> Established in the Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and their Member States, on the One Part, and the Russian Federation, on the Other Part dated 24 June 1994.

<sup>3</sup> Protocol on the Accession of the Russian Federation to the Marrakesh Agreement Establishing the World Trade Organization in Geneva on 16 December 2011.

therefore usually hold subsoil rights to Russian deposits indirectly through their Russian subsidiaries which are allowed subsoil rights in on-shore strategic deposits.

In 2008 Russia introduced restrictions on the ownership of strategic subsoil plots (subsoil plots of federal significance) by foreign investors. 'Strategic deposits' for these purposes include subsoil plots:

- containing deposits and showings of uranium, diamonds, high-purity quartz, the yttrium group of rare earths, nickel, cobalt, tantalum, niobium, beryllium, lithium or the platinum group of metals (irrespective of the size of the deposits)
- containing the following reserves, as evidenced by the State Register of Reserves:<sup>4</sup>
  - recoverable oil reserves equal to or exceeding 70 million tonnes
  - gas reserves equal to or exceeding 50 billion cubic meters
  - hard-rock gold reserves equal to or exceeding 50 tonnes, or
  - copper reserves equal to or exceeding 500,000 tonnes.
- located in the inland sea waters, territorial sea waters, or on the continental shelf of the Russian Federation
- that can only be developed using land used for defence and security.

The list of subsoil plots of federal significance is published by the Federal Agency for Subsoil Use and includes approximately 1,000 strategic deposits. The list is not exhaustive and any deposit that meets the above criteria will be deemed strategic irrespective of whether it is included into the list or not. The list is also regularly updated.

### ***Mass media***

Foreign companies operating in the mass media sector (e.g. newspapers, TV channels, radio and TV programs, internet publications and any other periodic publication), must comply with the following restrictions<sup>5</sup>:

#### ***Foreign shareholding restrictions***

##### **'1st tier' restrictions**

The following persons or entities may not act as founders (participants) or editorial board members of any mass media organisation:

- a foreign entity or individual
- a Russian entity with foreign participation (i.e. with at least one non-Russian shareholder)
- a Russian citizen who is also a citizen of another country, or
- a person without citizenship.

##### **'2nd tier' restrictions**

The following persons may not manage or control, directly or indirectly, (jointly or individually), more than 20% of the shares in the shareholder of a mass media organisation or editorial board:

- a foreign entity or individual or a Russian entity with more than 20% foreign participation

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<sup>4</sup> As of 1 January 2006.

<sup>5</sup> Effective as of 1 January 2016.

- a Russian citizen who is also a citizen of another country, or
- a person without citizenship.

#### *Foreign control restrictions*

The following persons or entities may not establish any other form of control over a mass media organisation or its founder or editorial board

- a foreign entity or individual or a Russian entity with foreign participation (i.e. having a non-Russian shareholder)
- a Russian citizen who is also a citizen of another country, or
- a person without citizenship

– where that control would result in the possibility of those persons or entities owning, managing, controlling, or decision-making for that mass media organisation (either directly or indirectly).

#### 4.5.4 Import/export controls

##### ***Customs Union***

Since the formation of the Customs Union, the territories of Russia, Belarus and Kazakhstan comprise a unified customs territory. The Customs Union has unified rules for foreign trade activity, including the import and export of goods. Once goods are imported and released in any member state of the Customs Union those goods may be freely moved within the Customs Union. No customs clearance or customs control applies at either the internal state border between Russia and Belarus or the Russia–Kazakhstan border.

The supreme authority of the Customs Union is the Eurasian Economic Supreme Council, a supranational regulatory and executive body of the Customs Union authorised to monitor the implementation of regulations of the Customs Union by its member states.

The Customs Union represents one step towards the formation of the Unified Economic Area (UEA), which is expected to lead to free movement of services, labour force and capital within the unified territory. The basic agreements on the formation of the UEA have been signed by Russia, Belarus and Kazakhstan (on unified macroeconomic policy, market access for various sectors, etc.). It is expected that the UEA will be gradually completed (by 2020 for most sectors): i.e. ensuring free trade in services, including market access to natural monopolies (e.g. railways, energy, etc.); access to financial services, including free movement of capital; a unified social policy and free movement of the labour force; unified competition laws; and a concerted macroeconomic policy.

##### ***Import and export licensing***

Import licensing in the Customs Union is based on legislation on non-tariff measures and is designed to monitor and control imports and exports of goods which are classified as sensitive by Customs Union member states or by the international community.

Import/export licences are required:

- in the event of temporary quantitative restrictions on imports of certain types of goods
- to regulate the import of certain goods for reasons of national security, health, safety or environmental protection
- to grant exclusive rights to import certain goods, or
- to carry out international obligations.

A list of goods to which import and export limitations and prohibitions are applied was established in the Customs Union. The list includes:

- fertilisers
- rare animals and plants
- goods with a high level of cryptographic protection
- hazardous waste
- drugs
- items of cultural value
- precious stones and metals.

The licences are issued by Russia's Ministry of Industry and Trade in accordance with the unified licensing rules of the Customs Union. Products containing any cryptographic devices or functions and not requiring an import licence (i.e. electronics; phones; computers; laptops; modems; software, etc.) are nevertheless still subject to mandatory notification with the Russian Federal Security Service. A Russian entity may import licenced goods into Russia only and has the right to move those goods through the territory of the other Customs Union member states.

The importation into Russia of certain categories of goods that are not subject to licensing at Customs Union level may still require a local Russian handling licence (e.g. aerosols containing ozone-destroying properties).

## 5. Transfer Taxes

### 5.1 Stamp Duty

There is no stamp duty in the Russian Federation.

### 5.2 Value Added Tax

The acquisition of shares or participatory interests is not subject to VAT.

Generally, the acquisition of assets is subject to VAT. Current legislation imposes a VAT rate of 18% on the sale of most goods, work and services. A reduced 10% rate applies to limited types of goods: i.e. pharmaceuticals, medical equipment and certain food products and periodicals. Certain types of goods and services are exempt from VAT (e.g. land, houses and apartments, leases of office space to accredited representative offices and branches of foreign legal entities, and certain medical goods and services).

The transfer of IP rights under a licence agreement has been exempt from VAT since 1 January 2008.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In a share acquisition, the employment conditions of the employees of the target company remain unchanged since the employer remains the same.

#### 6.1.2 Acquisition of assets

Russian law does not require employees of the target company to be automatically transferred with the acquired assets. Thus, in an asset acquisition, the purchaser may select which employees of the target company it is willing to employ.

The transfer of the employees to the purchaser may be completed within several days if the process is well organised. The transfer may involve either a so-called 'direct transfer' based on the agreement of all parties, or an 'indirect transfer' (resignation of the employees from the seller and their subsequent employment by the purchaser). In Russia a transfer to another employer legally involves termination of the previous employment and employment with the new employer. Russian law does not require that the terms of employment of the transferred employees with the purchaser mirror those with the seller.

However, the transfer of employees does require the employees' consent. In transfers involving foreign employees, any Russian immigration issues should be resolved before the transfer.

## 6.2 Approval or Consultation Requirements

Under Russian law mergers and acquisitions do not require specific consultations with trade unions or employees.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

An employment relationship may be terminated by the employer only on the specific grounds set out in the 2002 Labour Code of the Russian Federation (as amended), including staff redundancy. An employer is not permitted to terminate an employment relationship 'at will'. Specific procedures and documentary requirements set out in the Labour Code must be strictly complied with by the employer when terminating an employee's employment for any reason. In contrast, employees are entitled to terminate their employment at any time, without any reason and with only two weeks' written notice to the employer.

The employer must inform and consult 'in good time' and in any event, 90 days before the first dismissal takes effect (where 100 or more redundancies are proposed) or 30 days before the first dismissal takes effect in all other cases. The employer must consult not only in relation to proposed dismissals, but also in relation to the reasons for the decision giving rise to the proposed dismissals where the dismissals are an inevitable consequence of that decision, as well as the effect (if any) of dismissals on those who will continue to be employed. Certain prescribed information must be given to trade unions and/or employee representatives, in writing, with a view to reaching agreement on how best to avoid redundancies, to reduce the numbers of employees involved, and to mitigate the effects of the proposed dismissals. It is also worth noting that elected representatives enjoy various statutory protections.

### 6.3.2 Penalties

For violations of Russian labour legislation the employer may be fined up to RUB50,000 for each breach. Russian authorities may also:

- impose administrative fines on officers (such as the general director or others) in the amount of up to RUB5,000 for each violation, and
- in cases of a repeated violation, impose disqualification for a term of up to three years.

Importantly, as a consequence of the imposition of any administrative fines (regardless of the amount) officers who are foreign citizens may face difficulties in obtaining Russian visas and entry into Russia.

Employees who are wrongfully dismissed may be re-instated by court and, in which case, the employer will be ordered to pay the regular salary for the period of dismissal.

# Saudi Arabia

## 1.1 Overview

The Kingdom of Saudi Arabia is the largest country in the Arabian peninsula. Saudi Arabia's population is around 29 million and its capital city is Riyadh. The current ruler is King Salman bin Abdulaziz, Custodian of the Two Holy Mosques.

Saudi Arabia has a strong and dynamic mergers and acquisitions market. In recent years, Saudi Arabia has undertaken several reforms and implemented various programs to improve the business environment, provide comprehensive service to investors and foster investment opportunities in key sectors of its economy. Continued strength is apparent in the oil and gas sector. There is also strong foreign and domestic interest in the defence, retail, power, healthcare and clean energy sectors.

Saudi Arabia became the 149th member of the World Trade Organization (WTO) on 11 December 2005G.<sup>1</sup> Saudi Arabia welcomes foreign investment, which can take a number of forms, including setting up a new company, investing in an existing entity or establishing a joint venture.

## 1.2 General Legal Framework

Saudi law is based on Islamic Law, or Shari'ah. The Saudi government issues rules and regulations to supplement Islamic law when the need arises. In the event of a conflict between Islamic law and government rules and regulations, Islamic law will generally prevail. There is no concept of judicial precedent in Saudi Arabia, which means that the decisions of a court or a judicial committee have no binding authority with respect to another case. In general, there is also no system of court reporting in the Kingdom. Moreover, the relevant principals of Islamic law are often expressed in general terms and there are various views as to how they should be interpreted and applied. It can therefore be more difficult to predict how a Saudi court or judicial committee would view a particular case than it might be to predict the result of litigation in other jurisdictions.

Saudi law applicable to Saudi incorporated companies is mainly derived from the Companies Regulations issued by Royal Decree M/6 of 22nd Rabi Awal 1385H (corresponding to 20 July 1965G), as amended. The Companies Regulations cover a wide range of aspects relating to incorporation, regulation, liquidation, dissolution, mergers and acquisitions for private companies. The regulatory authority is the Ministry of Commerce and Industry (MoCI).

In addition to the procedures contained in the Companies Regulation, foreign shareholders have to obtain the appropriate licences from the relevant government bodies and comply with other restrictions (neither of which is contained in the Companies Regulation, see below).

## 1.3 Corporate Entities

The Companies Regulations governs eight types of corporate bodies: general partnerships; limited partnerships; unincorporated joint ventures; joint stock companies; partnerships limited by shares; limited liability companies; variable capital companies; and co-operative companies, although the last two types are rarely encountered in practice. The Companies Regulations do not necessarily apply, or do not apply fully, to certain companies incorporated by Royal Decree, which are usually government-owned entities such as Saudi Aramco. This handbook focuses on limited liability companies and closed joint stock companies, and while some of the same issues may also be faced by listed joint stock companies, it should be noted that there are substantial differences in the laws and regulations that apply to closed and listed joint stock companies.

### 1.3.1 Partnerships

The Companies Regulations recognise both general and limited partnerships as well as partnerships limited by shares. Foreign participation in partnerships is not generally allowed, apart from nationals of, and juristic persons wholly owned by nationals of, other member states of the Gulf Cooperation Council (GCC). The Companies Regulations stipulate that general partners in both general and limited partnerships must be individuals rather than juristic persons. As an exception to this, the

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<sup>1</sup> 'G' refers to the Gregorian calendar whereas 'H' refers to the Hijri calendar.



Professional Partnerships Regulations issued by Royal Decree No. M/4 of 18 Safar 1412H (28 August 1991G) allow for the formation of partnerships to practice professional activities (e.g. medical, legal, accounting and consulting engineering services) between licensed Saudi professionals (individuals) and foreign professional firms (juristic persons).

General partnerships under both the Companies Regulations and the Professional Partnerships Regulations afford no liability protection to their members, who are jointly and severally liable for the partnership's debts. The limited partnership entity is comprised of one or more general and one or more limited partners. The general partners are liable for partnership debts to the full extent of their personal assets while the limited partners are liable only to the extent of their capital contributions as long as they do not engage in management. The partnership limited by shares differs from the limited partnership in that the limited partners' interests are represented by negotiable shares. The requirement that general partners in limited partnerships and partnerships limited by shares be natural persons has tended to limit their utility as investment vehicles.

### 1.3.2 Limited liability companies

The locally incorporated limited liability company (LLC) is by far the most common form adopted by foreign companies doing business in Saudi Arabia. An LLC must have a minimum of 2 and a maximum of 50 shareholders. Individuals and corporate entities may be a shareholder in a limited liability company. A foreign company may be a shareholder in a Saudi limited liability company, subject to delivery by SAGIA (the Saudi Arabia General Investment Authority) of a foreign investment licence (see **4.4.3**). The shareholders are generally liable for the debts of the LLC only to the extent of their respective share capital contributions. Article 180 of the Companies Regulations provides that if an LLC incurs losses amounting to 50% or more of its share capital, the shareholders must resolve, within 30 days of those losses reaching the 50% threshold, either to continue the company on the basis that they will be responsible for its debts, or liquidate the company. If the shareholders fail to take such resolutions, the protection afforded by limited liability status no longer applies. Transfers of shares between the shareholders may be subject to conditions and restrictions as specified in the articles of association, but each shareholder is entitled by statute to a pre-emptive right. The company may be managed either by one or more individual managers or by a board of managers. 10% of the net profits of the company must be set aside as a statutory reserve until that reserve equals 50% of the original capital of the company.

The minimum capital is SAR25 million for agricultural projects and SAR1 million for industrial projects comprised of indivisible non-negotiable shares of equal value. Although there is no minimum capital requirement for other projects, in practice SAGIA has generally required a minimum amount of around SAR500,000. SAGIA may require greater capital as a prerequisite to granting an investment licence, although this is more common in the field of manufacturing than services. Companies formed to engage in distribution or trading activities (wholesale or retail) – activities historically reserved for wholly-Saudi-owned business – require a capital investment of at least SAR20 million for each foreign investor. The Saudi investors (who must hold at least 25% of the share capital) must contribute proportionately.

### 1.3.3 Branches

A branch is also a common way for foreign investors to set up a local presence. The Companies Regulations and the Foreign Investment Regulations permit a foreign company to establish a branch in Saudi Arabia, subject to approval by SAGIA (see **4.4.3**). To obtain a licence to form a branch, a foreign company must submit an application to SAGIA. The formation process is generally similar to that of an LLC except that there are no articles of association to be approved. However, MoCI, under the Companies Regulations, must issue a decision approving the formation of the branch. The capital requirements are the same as that of an LLC and dependent on what type of activity the proposed branch will be undertaking.

### 1.3.4 Joint stock companies

Joint stock companies are becoming an increasingly common form of joint venture vehicle, but their numbers are still quite small as compared with LLCs. The joint stock company (JSC) is the only corporate form allowed for companies wishing to list their shares on Tadawul (the Saudi stock exchange). Also, a JSC may be the required form for investors wishing to engage in certain activities

regulated by the CMA (as defined below). However, in general, joint stock companies are more heavily regulated than LLCs and do not provide the same flexibility as LLCs (e.g. at least 5 shareholders are required and a representative of MoCI must be convened and attend the general meetings of the company). Unlike an LLC, the financial statements of JSC must be published. Joint stock companies also take significantly longer to form. LLCs may convert to joint stock companies subject to certain restrictions which have recently been considerably eased.

## 2. Acquisition Methods

The typical forms of business acquisitions in Saudi Arabia are by way of a share purchase or an asset purchase. A company can merge with another company of the same or of a different kind. However, a cooperative company cannot merge with a company of a different kind. Although there is a statutory legal concept of a merger between two companies, mergers are not common in Saudi Arabia.

### 2.1 Acquisition of Shares

For a valid share purchase transaction, it is important that buyer and seller have the requisite authority to enter into the transaction. This is normally evidenced by properly issued powers of attorney and/or corporate resolutions approving the transaction, all duly authenticated, legalised and notarised for use in Saudi Arabia and then translated into Arabic by an accredited translator (where the buyer is a foreign investor).

For sales and transfers of shares in an LLC to a third party, the statutory pre-emption rights under the Companies Regulations must be waived by all the existing shareholders of the LLC. A shareholders' resolution of the target company approving the sale and stating that the shares were offered to the other shareholders is required. An approval of the shareholders' resolution is required by MoCI.

In the case of a listed JSC (a public listed company), acquisition of shares generally takes place via a restricted offer of shares or a takeover offer. These transactions are regulated by the Merger and Acquisition Regulations of the CMA pursuant to Resolution Number 1-50-2007 dated 21st Ramadan 1428H (corresponding to 31 October 2007G) and are governed by the Capital Markets Authority (CMA), the regulator of listed joint stock companies, and establishments involved in securities, asset management, investment banking and brokerage activities.

The Saudi Council of Ministers issued a draft resolution on 21 July 2014G authorising qualified foreign financial institutions to directly buy and sell stocks listed on Tadawul. The CMA plans to implement the final rules during the first half of 2015G.

### 2.2 Acquisition of Assets

In an asset purchase arrangement, the buyer may purchase all assets of a target entity or pick certain assets in order to exclude certain liabilities. The procedural aspects of the transfer of assets may need some form of third-party consent, particularly with respect to leased assets. Most industrial facilities, for example, tend to be located on government-owned land, administered either by the Royal Commission for Jubail and Yanbu, which operates large industrial parks in those two coastal cities, or by the Saudi Industrial Property Authority (MODON), which operates industrial estates near Jeddah, Riyadh and Dammam, both of which have standardised leasing contracts and policies regarding assignment and subleasing. The buyer may require an industrial or other licence. Written contracts may be required by law or to fulfil an applicable registration requirement. The agreement should clearly identify the assets to be acquired and exclude those to be retained by the seller or target company. The agreement should also describe the condition of the assets sold to avoid any potential dispute between the parties at a later stage. It may be necessary to draw up an inventory of the assets being sold in certain cases.

The transfer of employees also raises specific issues that should be addressed in asset purchase documentation (see 6.).

## 2.3 Mergers/Other Acquisition Methods

The Companies Regulation provides for mergers in which:

- the companies involved are liquidated and their assets and liabilities are contributed to a newly incorporated company. The shareholders of the liquidated companies receive shares in the new company in exchange for their shares in the liquidated companies, or
- one or more companies are absorbed by an existing company. The shareholders of the absorbed companies receive new shares in the absorbing company.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

#### 3.1.1 Due diligence

Before acquiring shares or assets, it is common for buyers to conduct pre-contractual investigations, generally known as 'due diligence'. The purpose of due diligence is to gather information and identify any risks or liabilities associated with an acquisition as well as any relevant issues that may arise in the sale process. Legal due diligence is generally undertaken in coordination with any commercial, financial or accounting review conducted by other professional advisers of the buyer. Based on the findings and outcome of the due diligence, the buyer may decide to complete the transaction, to add specific warranties in the acquisition documents, revise the purchase price, exclude certain assets from the acquisition or even stop the acquisition process.

Most acquisitions will require some form of due diligence to be conducted. The nature of the acquisition has an impact on the types of issues to be considered. For example, if the transaction takes the form of an asset acquisition, due diligence may focus around the transferability of those assets. Where the transaction involves a share acquisition, it will be necessary to consider in particular the impact of any change in shareholding or change of control clauses in third-party contracts.

In Saudi Arabia, public information on private companies is scarce. The buyer has to depend largely on meaningful disclosure of material information by the seller. The availability of documentation and information for review may depend on a number of factors, such as, the standard of corporate governance and corporate book-keeping of the target company.

Ideally, potential buyers and their advisers are given access for an agreed period of time to documents that are relevant to the contemplated acquisition (e.g. corporate registers, key business contracts, loan and facility agreements, leases, employment agreements and workplace policies, insurance policies, details of disputes, information technology agreements, privacy policies and other relevant information). Access to information can be provided via access to a physical data room or online where potential buyers and their advisers can access information from their desktops. As any information provided in the context of a sale is likely to be confidential or commercially sensitive, it is important to be aware of confidentiality issues and to establish appropriate protocols for the handling of confidential information.

In addition, the buyer may send a list of enquiries about the shares or assets to be acquired to the seller and request that the seller answer them. In answering, the seller should be careful to avoid any misrepresentation which may subsequently be relied upon by the buyer to rescind the sale agreement and claim for damages.

Vendor due diligence is fundamentally the same process as traditional buyer due diligence, except commissioned at the seller's request and cost. The end product is a report that addresses the concerns of any prospective buyer and may potentially be relied upon by the ultimate buyer and its financiers depending on the basis on which it has been prepared.

### 3.1.2 Letters of intent

Signing a letter of intent, or a memorandum of understanding, is relatively common in Saudi Arabia, depending on the intentions of the parties. It is a useful outline of the transaction and usually details the key commercial terms of the contemplated transaction. It also generally presents an overview of the parties' respective rights and obligations to be included in the transaction documents. It may define the buyer's inspection and due diligence rights, provide for the treatment of confidential and proprietary information, and establish a schedule for completing all matters necessary to close the transaction.

It may serve to prevent the seller from negotiating with other parties (if a binding 'no-shop' clause is included), allow the governmental approval process to begin, and facilitate fundraising for the transaction.

Depending on the intention of the parties, the letter of intent may be expressed to be binding or non-binding, in whole or in part.

## 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Saudi Arabian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

### Purchase Price

1.	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. We see all types, including working capital adjustment, cash-free debt-free, NAV adjustments. We also are starting to see 'locked box' arrangements.
2.	Is there a collar on the adjustment?	Collars are not common.
3.	Who prepares completion balance sheet?	Usually the buyer.
4.	Is the balance sheet audited?	Not usually.
5.	Is an earn-out common?	Not very common but certainly not unheard of.
6.	Is a deposit common?	Not common.
7.	Is an escrow common?	Common as a completion mechanism (in lieu of a certified check) to ensure payment is made at completion.
8.	Is a break fee common?	Uncommon.

### Conditions Precedent

9.	Express Material Adverse Event ('MAE') completion condition?	Not uncommon, but may be resisted by sellers.
10.	Is the MAE general or specific?	Both seen but general more common.
11.	Quantification of MAE?	Uncommon.

### Covenants, Access

- |     |   |  |
|-----|---|--|
| 12. | Is a non-compete common? Do you use waterfall/blue pencil provisions?                             | Common, but not from private equity sellers. Waterfall/blue pencil provisions not common.                  |
| 13. | Non-solicit (of employees)?   | Common.  |
| 14. | Non-solicit (of customers)?   | Common (in conjunction with non-compete).  |
| 15. | Broad access to books, records, management between sign and close?                                | Common for private deals.  |
| 16. | Is it common to update warranty disclosure or notify of possible breach? What is the consequence? | Not that common, but becoming more so. Consequences include right to walk away in case of material breach. |
| 17. | Is a separate tax covenant/indemnity or tax deed common?  | Common.  |

### Representations and Warranties

- |     |   |  |
|-----|---|--|
| 18. | Materiality in representations – how is it quantified (e.g. by a \$ amount)?      | Materiality qualifiers commonly seen but often not quantified (other than specific warranties, e.g. contract value).               |
| 19. | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers not uncommon. Typically limited to actual knowledge and due enquiry of a specified list of senior management. |
| 20. | Is a warranty that there is no materially misleading/omitted information common?  | Still commonly requested by buyers, but often resisted by sellers.   |
| 21. | Is disclosure of data room common?  | Not common. Generally successfully resisted by buyer.  |

### Repetition of Representations and Warranties

- |     |   |  |
|-----|---|--|
| 22. | Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?  | Repetition at completion common. At all times between signing and completion less common but will be sought by buyer. Bring-down certificates not very common. |
| 23. | What is the applicable standard? True in all material respects? Material Adverse Effect standard?   | True and accurate in all material respects common, but often carve-out for fundamental representations which must be absolutely true.                          |
| 24. | Is double materiality common? E.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon.  |

### Limitations on Liability

- |     |  |  |
|-----|--|--|
| 25. | What is the common cap amount (as a percentage of purchase price)?   | 100% is not unusual but negotiated caps range from 20%–100%. Enforceability of caps under Saudi law is questionable.   |
| 26. | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Usually warranties only.   |
| 27. | What are the common exceptions to the cap?   | Title, authority, tax, environmental, fraud, wilful misconduct.  |
| 28. | Is a deductible or basket common?  | A basket is common.  |
| 29. | Is a <i>de minimis</i> common?   | Common.  |
| 30. | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | Generally at least one or two audit cycles. Common to carve-out fraud, tax and environmental (statute of limitations). |
| 31. | Is warranty insurance common?  | Not yet common but becoming more so.   |

### Reliance

- |     |  |           |
|-----|--|-----------|
| 32. | Do financiers seek to rely on buyer's due diligence reports? | Uncommon. |
|-----|--|-----------|

### Set-offs against Claims

- |     |  |   |
|-----|--|---|
| 33. | Is a set-off against claims for tax benefits common? | Uncommon, but sometimes seen.                               |
| 34. | Insurance proceeds?                                  | Not that common but becoming more so for actually received. |
| 35. | Third party recoveries?                              | Common for actually received.                               |

### Damages, Knowledge

- |     |  |  |
|-----|--|--|
| 36. | Obligation to mitigate damages?  | Common.  |
| 37. | Exclusion of consequential damages?  | Not uncommon, but also not really necessary as damages are not ordinarily recoverable under Saudi law. |
| 38. | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? | Often silent but becoming more common.   |

## Dispute Resolution

- |     |   |   |
|-----|---|---|
| 39. | Does local law allow for a choice of governing law? What is the common governing law? | Yes, although there is little track record of enforcement of foreign judgments or awards. Saudi law is a typical choice. Most popular foreign law choice is English. If foreign law is chosen must choose foreign forum for resolution of dispute as Saudi courts will only apply Saudi law.                              |
| 40. | Is litigation or arbitration more common? If arbitration, where?                      | Both litigation (in Saudi) and arbitration (abroad) are common. London, Paris, Switzerland and Dubai are all common arbitration venues. Depending on implementation experience new Saudi arbitration law may make arbitration in Saudi more popular, but the historical experience of arbitration in Saudi has been poor. |

## Stamp Duty

- |     |  |                |
|-----|--|----------------|
| 41. | If stamp duty is payable, is it normally shared? | No stamp duty. |
|-----|--|----------------|

## 3.3 Formalities for Execution of Documents

### 3.3.1 Transfers of shares

A share acquisition of an LLC in Saudi would generally require:

- execution of a share purchase agreement
- a foreign investment licence from SAGIA (where a foreign buyer is involved) or amendment to an existing foreign investment licence (where the target entity has an existing foreign shareholder)
- submission of the target entity's shareholders' resolution amending its articles of association for MoCI approval
- execution of the shareholders' resolution before a notary public and its publication in the *Official Gazette*, and
- issuance of an amended commercial registration by MoCI.

A share acquisition of a JSC would also generally require the execution of a share purchase agreement and a SAGIA licence (where a foreign buyer is involved) or the amendment of an existing one. The by-laws of the JSC would not need to be amended as they do not contain the names of shareholders. A requirement for joint stock companies is to maintain a share register. Registered shares must be transferred by means of an entry in the shareholders register and an annotation made on the share warrant to the effect that the entry has been made (Art. 102, Companies Regulations). A transfer of title to any registered share is effective as far as the company or third parties are concerned only from the date of its entry in the shareholder register.

### 3.3.2 Transfers of assets

In a transfer of assets, the buyer may require special licensing (e.g. a new or amended foreign investment or industrial licence) to undertake the purchase. In addition, written contracts may be required by law or to fulfil an applicable registration requirement and may require specific approval. Some examples of contracts that must be in writing are:

- contracts for the sale of land

- transfers of the legal title to shares
- transfers of intellectual property rights
- guarantees, and
- employment contracts.

### 3.4 Formalities for Transferring Title to Shares or Assets

#### 3.4.1 Transfers of title to shares

##### ***Limited liability companies***

The main steps required to complete a transfer of shares in a Saudi LLC are as follows:

- if any of the buyer(s) or seller(s) is a foreign investor, the parties must submit to SAGIA:
  - a short-form share purchase agreement (SPA) containing limited information required by SAGIA. This agreement includes an acknowledgement by the parties that the purchase price was paid in full at the date of this short form purchase agreement (rarely the case in practice, as the transfer of title to the shares only occurs at a later stage (see below))
  - the amended provisions of the target company's articles of association (including provisions relating to the identity of the shareholders and allocation of the shares between them). However, if the parties decide that the target's articles of association should be re-stated, a copy of the revised draft articles of association must be provided to SAGIA.

In addition to the short form purchase agreement, the parties usually sign a negotiated SPA (including representations and warranties) that remains confidential and is not disclosed to SAGIA. This negotiated agreement generally provides that the payment of the purchase price will take place on the date the amended articles of association are signed before the notary public (see below).

The review by SAGIA of these documents takes approximately 1–3 months, although this varies from case-to-case. Once its review is completed, SAGIA issues a new temporary licence that remains subject to the completion of the following additional formalities:

- the parties submit the target company's shareholders resolutions to MoCI for its approval. This process generally takes about 2–3 weeks, but also varies from case-to-case. Once MoCI approves the draft resolutions, it refers the parties to a notary public at SAGIA
- a meeting is held at the public notary's office approximately within 2 weeks of MoCI's approval, to sign the amended articles of association reflecting the new shareholding structure of the target. All parties must be duly represented, including the existing non-selling shareholders in the target company, if any. It is at that date that the transfer of title to the shares is deemed completed. Generally, the parties hold a separate meeting where they sign the negotiated SPA (if signing and closing are simultaneous) and where the buyer pays the purchase price to the seller
- the amendment to the target's articles of association is published in the *Official Gazette (Umm Al Qura)* and the commercial registration of the target company is amended accordingly.

##### ***Joint stock companies***

The closing process for share transfers in a Saudi JSC is somewhat different from the process described above for LLCs. It is in many aspects similar to the common closing process found in several jurisdictions, except for the need for SAGIA approval where one or more of the parties is foreign.



No amendment of the by-laws is necessary for share transfers in a JSC, as the names of the shareholders are not disclosed in the by-laws. In this type of company, title to the shares is evidenced by share certificates and a share transfer register. At closing, new share certificates are issued to the buyer, who pays the purchase price. The share transfer register is updated accordingly to reflect the transfer of the shares sold.

### ***Public listed companies***

In relation to listed companies, the timetable commences when an announcement of an offer is required by the Merger and Acquisition Regulations issued by the CMA under Resolution 1-50-2007, dated 21<sup>st</sup> Ramadan 1428H (31 October 2007G) (M&A Regulations). If an announcement is made, the offeror must immediately approach the CMA for the purpose of establishing a timetable in relation to the takeover of a company.<sup>2</sup> The adopted timetable must include the following:

- delivery of the final offer documents to CMA
- publication of the offeror documents approved by CMA and their sending out to the board of the offeree company
- publication of a board circular by the offeree board
- shareholders' approval (if required)
- the earliest permitted first closing date of the offer
- the latest date on which the offeree company may announce profit or dividend forecasts, asset valuations or proposals for dividend payments
- the withdrawal of acceptance if the offer has not become unconditional as to acceptance, and
- publication of 'no increase' in the offer statement.

#### 3.4.2 Transfers of title to assets

See 3.3.2.

### 3.5 Formalities for Mergers

A merger is valid if it is authorised by a properly published resolution adopted by each of the constituent entities in the manner prescribed for the alteration of its articles of association or by-laws. The merger resolution takes effect 90 days after the date of its publication. The creditors of the merged companies may, during that period, object to the merger by registered letters addressed to the company. If that occurs, the merger will be suspended until the creditors have waived their objection; or until the Board of Grievances has ruled at the request of the company that the objection is unfounded; or until the company has offered sufficient security for the satisfaction of the debt.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

In July 2004, Saudi Arabia adopted a competition law (the Competition Law) enacted by Royal Decree No. (M/25) dated 4<sup>th</sup> Jumada Al-Awwal (22 June 2004G). The Competition Law established a Council for Competition Protection (CCP). The Competition Law was amended on 2 February 2014. On 16 December 2006, the Competition Council issued the Implementing Regulations under the Competition Law which were amended on 9 September 2008G and on 1 July 2014G. The main purpose of the Competition Law is to protect and promote fair competition, and to restrict practices undermining lawful competition. The Competition Law applies to all legal entities and companies doing business in Saudi Arabia, irrespective of their country of incorporation, but does not apply to

<sup>2</sup> Article 6(d) M&A Regulations.

entities or companies wholly-owned by the state. It also applies to any activities taking place outside Saudi Arabia if their effects are detrimental to lawful competition within Saudi Arabia.

The wording of the provisions of the Competition Law and its implementing regulations is broad and intended to catch a wide variety of anti-competitive practices and agreements. As with the competition laws of many other jurisdictions, certain agreements and behaviours are singled out for special attention and effectively presumed to be anti-competitive (e.g. price-fixing or collusion in the tendering process) without any further enquiry. In other cases, it is the effect of the conduct or agreement that needs to be considered. This leaves scope for the argument that a restriction which might be prohibited in certain situations may not be prohibited in others because it was required to establish a market for products or services.

Practices, alliances or agreements (whether written or verbal, express or implied) between existing or potential competing companies are prohibited, if the aim of those practices, alliances or agreements, or their effect, is to restrict or prevent lawful competition between businesses. This includes, without limitation, the following practices which are deemed to be anti-competitive:

- controlling prices of commodities and services meant for sale by increasing, decreasing, fixing their prices or in any other manner detrimental to lawful competition
- restricting freedom of flow of commodities and services to markets or removing them, wholly or partially, therefrom by hiding, unlawfully storing, or refraining from dealing in them
- contriving a sudden abundance of commodities and services, which results in an unrealistic price affecting other dealers in the market
- preventing any firm from exercising its right to enter or move out of the market at any time or hampering the same
- depriving, wholly or partially, certain firm or firms of commodities and services available in the market
- dividing or allocating markets for selling or purchasing commodities and services pursuant to any of the following criteria:
  - geographical regions
  - distribution centres
  - type of clients, or
  - seasons and time periods.
- influencing the normal price of sale, purchase, or supply quotations of commodities and services whether in government or non- government bids or auctions, and
- freezing or restricting manufacturing, development, distribution or marketing processes and all other aspects of investment, or restricting the same.

The anti-trust provisions of the Competition Law do not distinguish between vertical and horizontal relationships when determining if the relationship has an anti-competitive effect, and therefore apply to business relationships such as franchises and distribution agreements.

The CCP may at its discretion waive the prohibitions listed in Article 4 of the Competition Law for practices and agreements if their benefit to consumers outweigh their anti-competitive effect.

The existence of a dominant position in the Saudi market is not prohibited by itself (Art. 8, implementing regulations of the Competition Law); but abuse of that dominant position is prohibited. A company or a group of companies will be deemed to have a dominant position if:

- its sales represent at least 40% of total sales of the relevant product or service in the market for a period of 12 months, or
- it is in a position to influence the prevailing prices in the market.

A company will be deemed to be abusing its dominant position if it carries out any activities or actions listed above, or generally does anything which restricts competition on the Saudi market.

Any transactions resulting in a company or a group of companies acquiring a dominant position through merger, takeover, acquisition or combining their management into one joint management are referred to in the legislation as 'economic concentration' (Art. 6, Competition Law).

Companies in a dominant position or which are likely to have a dominant position as a result of an economic concentration are required to pre-notify the CCP in writing. Once notified, the CCP will review all relevant information before deciding whether to clear the transaction. The transaction may be completed:

- if the CCP notifies its approval in writing
- if the CCP has not sent any objection notice within 60 days of the date of notification (but note that the CCP may extend the 60-day review period if it considers the review of the transaction will take more than 60 days), or
- in the case of an economic concentration, if the CCP has not sent any objection notice within 90 days of the date of notification.

The CMA's M&A Regulations contain similar notification and approval requirements.

In addition, a party claiming to be affected by conduct which they believe breaches the Competition Law or Regulations may request the CCP to conduct an investigation to determine whether breaches of the Competition Law have occurred. The CCP may also initiate investigations of its own volition, without having received any complaint. The CCP's investigation must be completed within 180 days of the date of the request for the investigation. If following its investigation, the CCP concludes that any party has breached the Competition Law, it will notify the party concerned and afford it an opportunity to defend its interests at a hearing held 15 days after notification. The CCP will notify its decision to the parties within 10 days of the hearing.

The CCP may require the prohibited conduct to stop, dispose of assets or take any other action to remove the effects of the violation. Violators may also become subject to financial penalties. Each violation may attract a fine not exceeding 10% of total turnover or not exceeding SAR10 million. Where a violation is repeated, the fine may be doubled. If the violation continues after the issuance of a decision or judgment of the CCP the CCP may suspend the activity of the undertaking temporarily for a period not exceeding one month, or revoke the licence permanently.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Saudi Arabian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

### Filing Obligation

Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
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## Timetable

In practice, what is the timetable for clearance (in Phase I and Phase II review)?

The only available guidance at present are the statutory timelines (i.e. 60 calendar days starting from the first working day after the filing date of a complete application. This period can be extended by another 30 calendar days).

### 4.3 Anti-Bribery, Corruption and Money Laundering

Combating Bribery Law (CBL) issued by Royal Decree M/36, dated 29 Dhul-Hijjah 1412H (30 June 1992G) covers public-to-public and public-to-private bribery, but not private-to-private bribery. It criminalises various aspects of corruption, including abuse of authority and office for personal interest, as well as 'active' and 'passive' bribery. The prohibition on a public official receiving a 'gift' in the context of bribery includes gifts, travel expenses, meals or entertainment of any value, if the requisite elements of bribery are met. There is no special treatment of travel and entertainment in the CBL. In practice, modest levels are not objectionable if there is no specific intent to bribe. There would be equal treatment for providing and receiving such benefits. Violation of the CBL can result in prison sentences of up to 10 years and fines up to SAR1 million. A person who reoffends within 5 years of the imposition of a penalty may on a subsequent offence receive double the aforementioned penalties.

Enforcement of anti-corruption laws is limited in Saudi Arabia and occurs mostly behind closed doors. Similarly, punishments against individuals involved in corruption are selective and usually includes lower-level figures indicted for relatively minor offences. Public officials are not subject to financial disclosure laws and no laws provide public access to government information, including ministerial budgets. The country has signed but still not ratified the United Nations Convention against Corruption. In 2007, the Council of Ministers approved a National Strategy for Maintaining Integrity and Combating Corruption with the aim of enhancing and organising the Saudi fight against corruption through various initiatives. The National Anti-Corruption Commission (*Nazaha*) was created by Royal Order A/65 to promote transparency and fight against financial and administrative corruption.

The Anti-Money Laundering Law (AML) was promulgated by Royal Decree M/39 dated 25 Jumaada al-Thani 1424H (23 August 2003G) and applies to every person who undertakes, intervenes or participates in money laundering operations. The accompanying implementing regulations to the AML provide examples of which acts will fall under the ambit of criminal activities and what are 'illegal and illegitimate sources'. The AML provides that a perpetrator of an offence may be sentenced to imprisonment of up to 10 years and/or a fine up to SAR5 million, or an order confiscating the property and proceeds and instrumentalities<sup>3</sup> connected with the crime. Article 21 of the AML provides for immunity from the penalties and sanctions to all those who were acting in good faith. According to the AML's implementing regulations, good faith shall be determined based on objective conditions and circumstances by the General Prosecution and Investigation Authority.

### 4.4 Exchange Control, Foreign Investment Restrictions and Trade Regulation

#### 4.4.1 Exchange controls

There are no restrictions on foreign exchange and repatriation of capital and profits under the Saudi Foreign Investment Law. No approval is therefore required for any payment, remittance or capital transfer by a company incorporated in Saudi Arabia outside the Kingdom. A non-resident person or entity who is a shareholder in a company incorporated in Saudi Arabia, may freely repatriate dividends received and proceeds of the sale of their shares in that company.

That said, individuals are required under the AML to declare any cash or valuables that exceed SAR60,000 in their possession when exiting Saudi Arabia.

<sup>3</sup> 'Instrumentalities' is defined as anything that is used or was meant to be used in any way in committing a crime subject to sanction.

#### 4.4.2 Anti cover-up law

Foreign nationals may not conduct or invest in any business in Saudi Arabia without a foreign capital investment licence issued by SAGIA (under the Anti Cover-Up Law). The Anti-Cover Up Law also prohibits any Saudi person from assisting foreign nationals in any way to invest in or carry out any activity without an appropriate licence offences under the law are punishable by deportation, imprisonment of up to two years or fines up to SAR1 million. This law would, for example, prohibit 'trust' arrangements whereby a Saudi person or entity holds title to shares on behalf of a beneficial foreign owner.

#### 4.4.3 Foreign investment restrictions

Under the Foreign Investment Regulations issued by Royal Decree M/1 of 5 Muharram 1421H (10 April 2000G), SAGIA must approve the formation of any company in which a foreign party is to have an interest, or any share transfer in a Saudi entity if any of the sellers or buyers are foreign, by granting a licence authorising the foreign party's investment in the company, or authorising its exit.

The legal regime governing foreign investors from countries that are not members of the GCC is somewhat different from both the regime that applies to Saudi individuals and wholly Saudi-owned companies and the regime that applies to nationals of other GCC countries and/or GCC companies wholly-owned by GCC nationals. A non-GCC foreign investor wishing to engage in commercial activities in Saudi Arabia will ordinarily require a foreign investment licence issued by SAGIA to form, or participate in the formation of, a legal entity in Saudi Arabia. SAGIA will only grant a licence to legal entities pursuing commercial activities which are not on the so-called 'Negative List' published by the Supreme Economic Council, which prohibits various activities in which foreign investment is prohibited or restricted (e.g. oil exploration, manufacturing of military equipment, devices and uniforms, recruitment and employment services, printing and publishing with certain exceptions – full list available at [www.sagia.gov.sa](http://www.sagia.gov.sa)). In addition to the restrictions of the Negative List, companies having a foreign shareholder may not include in their objects certain 'consulting' activities such as legal services, accounting, medical or engineering consulting. These are considered professional activities that are not appropriate for 'commercial' companies licensed by SAGIA (even though they do not appear on the Negative List).

A separate regime applies to the formation of joint entities in the licensed professional fields (e.g. law, accounting, medicine, and consulting engineering) which involves the formation of partnerships between foreign professional firms and Saudi nationals who are licensed to practice the relevant profession. This regime has a number of restrictions as compared with the regime governing commercial entities. Although historically other types of consulting such as management and technical consulting, have been considered 'professional' activities subject to the professional partnership regime, recently SAGIA has started licensing those former activities, since they are treated as 'commercial activities' in the eyes of the WTO to which Saudi Arabia is a signatory. However, special qualifications and 'Saudization' requirements apply. The general rule is that foreign investment is allowed in all fields except where that kind of investment is specifically precluded by law. In some cases, such as telecommunications, foreign investment is allowed subject to special requirements (e.g. minimum Saudi participation).

SAGIA, by issuing the licence, will also specify the business activities the company will be authorised to pursue. The parties must submit a joint application to SAGIA for this purpose prior to submitting the application. It is customary to enter into a joint venture agreement (if the shareholders are unaffiliated with one another) and agree upon the company's articles of association.

Once SAGIA grants its licence, the articles of association must be submitted to MoCI for its approval. Then they must be formally signed before a notary (an official of the Ministry of Justice – see **3.4.1**).

#### 4.4.4 Import/export controls

Saudi Arabia is a member of the WTO and a party to a number of free trade agreements, in particular within the GCC. Saudi Arabia has enacted the GCC Customs Law, which unified customs procedures in all GCC member states. Although the GCC Customs Law has allowed for a large number of import duty exemptions, many imported goods and products remain subject to customs duties. No custom duties or tariffs apply on exported goods.

## 5. Transfer Taxes

Tax in Saudi Arabia consists primarily of corporate income tax, withholding tax and *zakat*. For local companies, corporate income tax is assessed on the share of the profit of the foreign partner in the local company. Generally, the maximum corporate income tax rate is 20%. *Zakat* is a religious levy on Saudi and GCC nationals and companies to the extent owned by Saudi or GCC nationals. The *zakat* rate is 2.5% of the higher of the Saudi/GCC share of *zakat* base and the Saudi/GCC share of profit.

According to Art. 3, Income Tax Regulation, issued by Royal Decree M/1 of 15 Muharram 1425H (7 March 2004G), a natural person (i.e. an individual) is considered a Saudi resident if he or she meets any of the following conditions:

- the natural person has a permanent place of residence in Saudi Arabia and resides in the country for a total period of not less than 30 days in the taxable year, or
- the natural person is physically present in Saudi Arabia for a period of not less than 183 days in a taxable year.

A company is considered resident in the Saudi Arabia during any given fiscal year if it meets any of the following conditions:

- it is formed in accordance with the Companies Regulations, or
- its central management is located in the Kingdom.

### 5.1 Acquisition of Shares

Saudi and GCC nationals are generally liable to pay *zakat* (religious wealth tax) at the rate of 2.5% of the portion of their taxable income attributable to their shareholding in a Saudi entity.

If the seller is not considered a Saudi resident under the Income Tax Regulation then the seller will be liable to pay capital gains tax at a rate of 20% of the tax base. The tax base of a non-resident is generally the consideration for the disposal of the shares (selling price, or market or book value of the shares, whichever is highest), less the initial and any subsequent costs incurred in acquiring the shares (i.e. the initial share capital and any contributions that may have been made over the years to increase the share capital in the target).

In certain circumstances, sellers may prefer to realise part of the value of their investment as income by means of a pre-sale dividend. That dividend may be subject to a 5% withholding tax but would reduce the proceeds of the sale (and consequently the gain on sale), which may be subject to 20% capital gains tax.

Goodwill paid on the acquisition of shares in a company is considered to be a cost of investment, and a deduction is allowed for this on disposal. The buyer may pay for the goodwill of a business as a going concern. The goodwill is tax-deductible and can be amortised over a maximum period of 20 years for accounting purposes at a rate of 10% for tax purposes.

Losses can be carried forward without any time-limit in the hands of the entity that has incurred the loss. However, the allowable deductible accumulated losses in any taxable year should not exceed 25% of the profit made in that year. The balance of accumulated losses would have to be carried forward to the following year, to be offset against any taxable income made in that year. An acquisition of shares in a company, therefore, would not result in the acquired company losing the potential benefit of carrying forward losses. However, where there is change of 50% or more in the underlying ownership or control of a company, no deduction for losses carried forward is allowed for the non-Saudi shareholder in the taxable years following the change.

### 5.2 Acquisition of Assets

A gain arising out of a disposal or transfer of assets is likely to be treated as normal business income and will be taxed at the normal corporate tax rate. The cost base of an asset purchased, produced, manufactured or constructed by the taxpayer is the amount paid or incurred by the taxpayer in cash or

in kind in respect of the acquisition of the asset. No gain or loss arises on the disposal of an asset (including goodwill) that is depreciable under Saudi tax law. The result of disposal of such assets is dealt with under the depreciation method stipulated by the law. For Saudi or GCC shareholders the value of fixed assets may be deducted from the company's *zakat* base.

### 5.3 Mergers

No specific rules apply under the Saudi taxation regime to specifically address mergers and acquisitions. Mergers in Saudi Arabia generally do not trigger any capital gains tax.

### 5.4 Value Added Tax

No transfer tax (such as stamp duty), VAT or any other indirect tax is imposed on M&A transactions.

## 6. Employee Issues

A large proportion of Saudi's workforce is comprised of expatriate labour, whether at managerial, professional, skilled, semi-skilled, unskilled or retail levels.

As a general rule, foreigners may not come to, or be brought to Saudi Arabia to work unless the prior approval of the Ministry of Labour has been obtained and a work permit and residence permit (*igama*) issued. In order for a permit to be issued, the following conditions must be met; the employee must:

1. have entered the country legally
2. possess vocational skills or educational qualifications or work experiences needed in the Kingdom that are either lacking or insufficiently available
3. must have a contract with a Saudi employer or a non-Saudi employer authorised to do business in the Kingdom, and
4. be under the sponsorship of his or her employer.

This part addresses certain Saudi employment law issues that may arise as a result of restructurings or reorganisations that may take place in the context of Saudi M&A transactions.

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

If the ownership of an entity is transferred to the buyer, or where there is a change in the structure of an entity as a result of a merger, restructuring or otherwise, the terms of employment contracts must continue to remain in force as the employee must be under the sponsorship of his employer – in this case, the target company.

#### 6.1.2 Acquisition of assets

A foreign employee may not leave his position with his employer unless he obtains the approval of his employer to transfer his sponsorship to his prospective new employer, as would be the case in an asset acquisition. The steps to transfer an employee's sponsorship are as follows:

- the original employer must agree to transfer the employment and sponsorship of the employees to the new employer, and the new employer must agree to employ, and accept the transfer of sponsorship and employment of the employees
- the original employer must terminate the employment of each employee and should deliver to the new employer the following documents:
  - a signed release letter from each of the employees

- a letter addressed to the new employer consenting to the transfer of sponsorship of each employee
- a letter addressed to the Passport Department consenting to the transfer of sponsorship of each employee, and
- a letter addressed to the Labour Office consenting to the transfer of sponsorship of each transferring employee.
- the original employer should also obtain all government approvals required (employees' residence and work permits) to effect the transfer to the new employer
- once all the governmental approvals for the transfer have been obtained, the new employer becomes responsible for the payment of wages and benefits
- the original employer is responsible to pay all government fees incurred in respect of the transfer of employment and sponsorship of each employee (in practice, the original and new employer usually agree to those fees being reimbursed by the new employer).

### 6.1.3 Transfer of business

Where a transfer of assets amounts to the transfer of business including its employees, the Labour Law (see **6.3.1**) views the employment relationship as continuous, so that the original employer (seller) and the new employer (buyer), are jointly responsible for paying employee entitlements, including in particular accrued end-of-service benefits due to each employee as of the date of transfer. This accrued sum will transfer to the buyer (although there are a variety of ways to do this, one way is under an indemnity clause contained in the transfer agreement), or will simply be paid to the employees by the seller. The end-of service award will ultimately be calculated as if the employees had been continuously employed from the date they were hired by the seller. It is of course important to document all of this carefully in both the purchase agreement and in employment contracts.

## 6.2 Approval or Consultation Requirements

There is no specific approval or consultation requirement other than those imposed by the Labour Law as described above.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

Saudi law does not recognise 'at-will' employment relationships (Labour Law issued under Royal Decree M/51 dated 23 Shaban 1426H (27 September 2005G)). The law recognises definite term (specified term) and indefinite term (unspecified term) contracts and the rules governing termination differ depending on which of those types of contract apply.

Under the Labour Law, all non-Saudi employees must have definite term contracts. If the relevant contract does not specify a definite term then the period of the employee's work permit is considered to be the term of the contract. Generally speaking, a definite term contract can be terminated only for 'cause' prior to the expiry of the defined term. 'Cause', in the case of a termination by the employer, is defined in Labour Law, which contains a list of the permissible bases to terminate an employment contract without notice or an end-of-service indemnity; these bases largely require the fault or misconduct of the employee in question, and include:

- acts of misconduct
- non-compliance with the employment contract
- non-compliance with legitimate employer orders
- fraud



- conduct intending to cause the employer a material loss, and
- divulging commercial or industrial secrets.

In addition, an employee on a definite term contract can also be terminated if on probation. An employee can be hired on probation for up to 90 days.

Indefinite term contracts can be terminated either 'for cause' or, with 30 days notice, for any 'legitimate reason'. The term 'legitimate reason' is not defined in the Labour Law. The issue of whether a 'legitimate reason' exists is therefore determined on a case-by-case basis. Since the Saudi labour courts have no system of binding precedent or case reporting it is often difficult to predict with certainty whether a 'legitimate reason' for termination may exist in any given case. However, it is clearly intended to be a less stringent standard than 'cause', and in the case of termination by the employer, could include reasons not involving any fault on the part of the employee, including economic reasons (e.g. the employer's loss of business or contracts, or redundancy due to a business combination). Employment contracts sometimes cite specific examples of 'legitimate reasons' for termination but these will not necessarily be considered binding by a labour court.

If an employment contract is terminated by the employer improperly, the dismissed employee is entitled, in addition to his wages and other compensation due under law (including end-of-service award), to compensation, generally in damages, as determined by a labour court for material and moral damages suffered by him. The court may also order that the employer reinstate the employee.

In Saudi there is no specific redundancy payment, although Article 84 of the Labour Law provides for end-of-service awards. Upon termination of a (specified or unspecified term) employment contract otherwise than for cause, an employee is ordinarily entitled to an end-of-service award equal to half a month's ordinary remuneration (wage) for each year of employment for the first five years, and a full month's remuneration for each subsequent year. 'Wage' is broadly defined to include not just base salary but also the value of every cash or in-kind allowance or benefit payable to employees on a regular basis pursuant to their contracts or as an 'acquired right'. The only elements of the 'wage' that it is permissible to exclude by contract from the end-of-service award calculation are commissions 'and similar elements of the wage that by their nature are subject to increase and decrease'. Housing allowances paid in cash or in-kind are ordinarily included as part of the 'wage' for these purposes. Air travel tickets granted to an employee would also be considered part of the employee's wage as well as the payment of bonuses made on a regular basis. Certain officials at the Ministry of Labour have taken the view that a transport allowance is considered to be in the nature of a reimbursement of an expense, rather than compensation and therefore should not be included in this figure of 'wage', but labour court decisions on this issue have been inconsistent. Upon the termination of a non-Saudi employee's post, the employer is generally required to repatriate him or her at the employer's expense; in addition, all dismissed employees should be paid all outstanding wages and entitlements.

### 6.3.2 Penalties

The Labour Law continues a long-established rule that the percentage of Saudi employees in any establishment should not be less than 75% of the total number of the workforce, and their wages should not be less than 51% of the total wages paid. However, the Law also provides that these levels may be waived if the requisite skills are not available among the Saudi workforce, and in fact have not been strictly enforced in practice. However, there is a strong policy to favour Saudis over foreign employees whenever possible.

Pursuant to a 1994G order issued by the Council of Ministers (Resolution No. 50), certain positions are reserved to Saudi nationals only (recruitment personnel, receptionists, security guards, etc.). Under the same order, all employers employing more than 20 employees are required to increase the percentage of Saudis among their workforce by 5% annually. This order has been enforced more aggressively than the Labour Law. However, the annual increases were suspended several years ago when the required percentage of Saudi nationals increased to 30% (under Resolution 4/3767). In practice, significantly lower percentages of Saudi employees are permitted in a number of industries.

In June of 2011G, the Ministry of Labour introduced a new and more sophisticated system – *Nitaqat* – which imposes varying Saudization requirements on companies by reference to the size of their workforce (five categories are recognised, from ‘very small’ to ‘giant’) and the type of business (41 categories are recognised). It is intended that the required Saudization percentages will be adjusted periodically (as often as every three months) to reflect the Ministry’s assessment of realistic Saudization levels in each field. Each company receives a rating (red, yellow, green and excellent) depending on the level of Saudization achieved. Those receiving either the red or yellow rating are subject to penalties, including not only the loss of the right to recruit additional foreign personnel but also the possible loss of the ability to renew existing visas and work permits or to prevent their employees from transferring their employment to employers in the green or ‘excellent’ categories.

Employers who employ more foreign nationals than Saudis, even if they are in compliance with *Nitaqat*, are subject to fine for each ‘excess’ foreigner, which accrues at a rate of SAR200 per month (order issued in November 2012G).

In addition, the Saudi Arabian General Investment Authority, which licences foreign investment in the Kingdom, has instituted a programme of special Saudization requirements (up to 75%) in certain fields (including contracting, trading and light manufacturing), separate from the *Nitaqat* requirement and implemented by requiring applicants for new foreign investments licences (and renewals of existing licences), to sign undertakings to comply with special nationality requirements (and therefore only relevant to entities with some degree of foreign ownership).

Labour disputes are subject to the jurisdiction of labour commissions (operating under the authority of the Ministry of Labour) – although as part of Saudi Arabia’s judicial reform programme a new labour court system is to be established with powers granted by the Ministry of Justice. Domestic arbitration of labour disputes is also theoretically permitted under the Labour Law, but is rarely resorted to in practice. The Labour Law applies in all cases.

# Singapore

## 1.1 Overview

Singapore, a Republic with a multi-racial population of over five million, is well known as an attractive place in which to do business. It has an enviable record of political stability and its government actively encourages investment by foreign business interests. All of these factors combine to make the country extremely attractive to multinational companies.

## 1.2 General Legal Framework

For historical reasons, the Singapore legal system is based on English law. Many of Singapore's Acts of Parliament are modelled on English Acts, and English common law applies in many areas. In mercantile matters, a number of statutes passed by the English Parliament have been incorporated into Singapore law.

## 1.3 Corporate Entities

Business in Singapore may be conducted through a variety of vehicles, including limited liability companies and partnerships. The choice of organisational form will be dictated partly by the activities which are intended to be carried on in Singapore and partly by tax considerations.

### 1.3.1 Limited liability companies

In Singapore, a limited liability company is a separate entity from its shareholder(s). Equity participation by Singaporeans is not a requirement. A foreign company can thus set up a wholly-owned subsidiary in Singapore. Joint ventures may also be established using a limited liability company and indeed this is the usual structure for joint ventures in Singapore.

There is no minimum capitalisation requirement. Pursuant to the Companies (Amendment) 2005 Act passed by the Parliament on 16 May 2005 and which came into effect on 30 January 2006, shares of a company no longer require par or nominal value. Bearer shares are however still not recognised. This applies to both shares issued before and after the date of commencement of the 2005 Amendment Act.

A Singapore company must have a minimum of one director resident in Singapore. An expatriate in Singapore on an employment pass will also meet this requirement. If the requirement is not satisfied, the Accounting and Corporate Regulatory Authority (ACRA) and the courts may compel members of a company to appoint one director that is resident in Singapore. Members of a company may also be made liable for the debts of the company if it continues operating for more than six months without a resident director. All directors must be natural persons. Where the company has only one director, that director must not also function as the company secretary.

### 1.3.2 Limited liability partnerships

Interested parties may choose to register a limited liability partnership (LLP) to carry out their business activities. A LLP is a body corporate with a legal personality separate from its partners. It gives its owners the flexibility of operating as a partnership whilst giving them limited liability, thereby combining the benefits of a partnership with those of a private limited company. However, there are safeguards in law to minimise abuse and provide protection to parties who deal with the LLP.

Every LLP must have at least one manager who is ordinarily resident in Singapore and that manager must be a natural person. Every LLP must have at least two partners. The partner may be an individual, a local company, a foreign company or another LLP.

## 2. Acquisition Methods

When a business opportunity has been identified, the acquirer and the target can structure the acquisition in several ways. The acquirer may either purchase the shares in the target from its shareholders or purchase assets directly from the target. It may also consider a long-form amalgamation as a means to merge the target and its own acquisition vehicle but this remains an

untested procedure so the share and asset acquisition route remain the usual forms of acquisition on an arm's length basis.

## 2.1 Acquisition of Shares

The sale and purchase of shares in a target company will take place between an existing shareholder and a third party potential shareholder. A share acquisition involves a transfer of ownership only of the shares in the target. The sale and purchase will not involve the creditors of the target company unless there are pre-existing covenants with them requiring their approval for a change of control of the company. A transfer of shares in the target also transfers all of the target's assets and liabilities to the acquirer. As a legal person, the target has the capacity to incur contractual, tortious and criminal liabilities, some of which may not have been properly disclosed to the acquirer.

## 2.2 Acquisition of Assets

Some investors may prefer to purchase specific assets in a target company as opposed to shares in the target. The purchase of assets enables them to avoid the liabilities of the company and to 'cherry-pick' only the viable parts of the business. Acquirers of assets will not generally inherit the target's liabilities.

An asset acquisition requires the passing of title to assets from the target to the acquirer. The target's assets may include land and premises, stock and work-in-progress, book debts, intellectual property rights, goodwill, insurance, leases, hire purchase and other contracts, employees, shares in other entities, and plant and machinery. It will therefore be necessary to transfer each asset, or category of asset, from the target to the acquirer by way of different conveyances, assignments and transfers. This can be rather cumbersome. In addition, a share acquisition may be necessary if the target's assets are not amenable to transfer, for example if the target has non-transferable government licences or has entered into licensing or distribution arrangements that are not assignable.

## 2.3 Mergers

The Companies Act (cap. 50) was amended on 30 January 2006 (CA), to introduce new procedures for a form of legal merger of companies in Singapore. Before the amendments were introduced, commercial transactions commonly referred to as a merger were, in fact, asset acquisitions. For example, Company B would acquire the assets of Company A through an issue of its own shares to Company A as consideration. Alternatively, Company A and Company B might each inject all or part of their respective assets into Company C which would then issue its own shares to both Company A and Company B. While there was a consolidation of assets into one company, the legal identities of Company A, Company B and (where appropriate) Company C remained separate.

Since these amendments came into effect, the CA has allowed for a more efficient statutory form of merger and amalgamation. It provides for the amalgamation of two or more Singapore incorporated companies into a single entity that may be either one of the amalgamating companies or a new company.

Despite the introduction of the statutory form of merger and amalgamation, the existing forms of asset transactions known as 'mergers' will still continue to be relevant. One reason for this is that where the merger is between companies that are not in the same group, directors of the new amalgamated company may have certain reservations about making forward-looking solvency statements for the combined entity. Another reason is that the amalgamation regime also creates some uncertainties that have yet to be dealt with conclusively - in particular, there are still certain accounting concerns as to how the cancellation of shares in the amalgamating companies will be accounted for, particularly if the horizontal form of amalgamation is used.

# 3. Negotiation, Signing and Closing

## 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Singaporean purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

## Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. All types are seen, including working capital adjustment, cash-free, debt-free, NAV adjustments. Also more sellers (particularly in auctions) are insisting on e.g. 'locked box' accounts to avoid post-completion adjustments.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	The buyer usually has the responsibility to ensure the target company prepares this, but the seller can also be responsible especially where the seller stays on e.g. in owner-managed companies with earn-out arrangements.
4	Is the balance sheet audited?	Typically reviewed but not fully audited.
5	Is an earn-out common?	More common in private equity transactions when the sellers continue to manage the target company after closing. Less common where the seller is completely exiting. Earn-outs commonly capped.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Commonly used by private equity investors and strategic buyers.
8	Is a break fee common?	Uncommon.

## Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Uncommon, typically only available where there is a long delay between execution and completion.
10	Is the MAE general or specific?	Both are seen.
11	Quantification of MAE?	Not uncommon. Tend to encourage clients to be more specific.

## Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Similar to HK/China (i.e. common, but not from private equity sellers). Waterfall still unusual but do occur.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Generally should be requested for private deals.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Uncommon unless significant gap between signing and closing. Notification of breach quite common. In the case of a material breach, there would usually be a right to terminate.

17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax indemnity, usually included in purchase agreement.
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### Representations and Warranties

18	Materiality in representations—how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but are often not quantified (other than specific warranties, e.g. contract value).
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19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are growing. Often limited to the actual knowledge and reasonable enquiry of a specified list of senior management.
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20	Is a warranty that there is no materially misleading/omitted information common?	Commonly requested, and can be contentious.
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21	Is disclosure of data room common?	Same as HK/China, i.e. becoming more common.
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### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates not very common.
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23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects is common but often carve-out for fundamental representations which must be absolutely true.
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24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.
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### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Starting to see 20%–50% as common for business warranties especially on auction sales. Fundamental warranties limited at 100%.
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Buyers resist whole agreement but this is becoming more common.
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27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.
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28	Is a deductible or basket common?	Basket is common
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29	Is a <i>de minimis</i> common?	Common.
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30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	Similar to HK/China. Tied to one full year audit. Tax is commonly 4–5 years, which ties to the statutory limitation period. Title/capacity warranties usually have a longer period or unlimited. Fraud is usually carved out.
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31	Is warranty insurance common?	Uncommon. Starting to see it in private equity exits.
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#### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Not uncommon.
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#### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Not commonly seen.
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34	Insurance proceeds?	Common for actually received.
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35	Third party recoveries?	Common for actually received.
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#### Damages, Knowledge

36	Obligation to mitigate damages?	Usually express. Required by law.
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37	Exclusion of consequential damages?	Common.
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38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Common to address the point as buyer's draft will often seek to exclude.
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#### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, but Singapore law generally adopted.
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40	Is litigation or arbitration more common? If arbitration, where?	Arbitration in Singapore very common but also Singapore courts especially if contracting parties are both in Singapore.
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#### Stamp Duty

41	If stamp duty is payable, is it normally shared?	0.2% of the greater of purchase price or market value. Default legal position is that stamp duty is borne by the buyer although this can be varied contractually (but such variation would be very rare).
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## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

There is no legal requirement for an agreement for the sale of the legal and beneficial title to shares to be made in writing. However, a transfer of an equitable interest in shares is required to be in writing and signed by the person disposing of the interest (see **3.2.2**). Market practice in the majority of cases is for a share transfer to be documented between the seller and the buyer by way of a written share sale/share purchase agreement (SPA).

### 3.2.2 Transfers of assets

In a transfer of assets, written contracts may be required by law or in order to fulfil an applicable registration requirement. Some non-exhaustive examples of contracts which must be in writing are:

- contracts for the sale of immovable property (s. 6(d) of the Civil Law Act (cap. 43))
- declarations of trust in respect of immovable property (s. 7(1), Civil Law Act)
- transfer of legal title to shares (s. 126(1), CA)
- transfers of most intellectual property rights
- guarantees (s. 6(b), Civil Law Act), and
- disposition of an equitable interest or trust (s. 7(2), Civil Law Act).

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

Although a contract for the sale of shares does not need to be in writing, s. 126(1) CA requires a proper instrument of transfer ('transfer form') to be delivered to the company before the transfer of shares may be registered by the company. Accordingly, the transfer of title to the legal and beneficial interest in shares usually involves the following three stages:

- entry into a written SPA for the sale and transfer of the shares
- delivery by the seller to the buyer of the transfer form in respect of the shares, and
- approval and registration of the transfer by the company.

The Companies (Amendment) Act 2014 was passed in Parliament on 8 October 2014 and is expected to come into force in the second quarter of 2015. Once it comes into force, private companies will not be required to keep a register of members. An electronic register maintained by ACRA will be the main and authoritative register of members. Pursuant to that Amendment Act, the transfer form will be required to be lodged with the company and thereafter, the company will need to notify ACRA of such transfers. The transfer of shares will not take effect until the ACRA electronic register of members is updated.

### 3.3.2 Transfers of title to assets

Certain requirements must be complied with to complete the transfers of certain assets. For example:

- transfers of interests in land, including mortgages and leases for any term exceeding 7 years, are effective only by way of registration of a duly executed prescribed instrument (s. 63, Land Titles Act (cap. 157))
- charges over certain types of company assets must be registered, failing which the charge is void as against the liquidator and other creditors of the company (s. 131, CA), and
- statutory assignments of choses in action must be in writing (by the assignor) and written notice of the assignment must be given to the debtor (s. 4(8), Civil Law Act).

## 3.4 Formalities for Mergers

Certain requirements must be complied with to complete a merger. In brief, these include the following:

- the terms of the amalgamation must be set out in an amalgamation proposal that must be approved by members of each amalgamating company by special resolution



- the proposal must be sent to every secured creditor of an amalgamating company, and
- the directors of the amalgamating and amalgamated companies must make certain solvency statements in connection with the merger.

It is possible, however, to adopt an abbreviated (short-form) amalgamation procedure in cases of internal group restructurings where one of the Singapore companies is wholly-owned by the other, or if they are both wholly-owned subsidiaries, directly or indirectly, of the same parent corporation (which can be non-Singaporean).

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Mergers that substantially lessen competition in any market in Singapore without any off-setting efficiency benefits are prohibited (by s. 54 of the Singapore Competition Act (cap. 50B): 'Section 54 Prohibition'). This applies to mergers that have been completed and to anticipated mergers.

In Singapore, it is not mandatory to notify a merger or anticipated merger. However, if on self-assessment (which the Competition Commission of Singapore (CCS) encourages) the merger parties believe that the merger may trigger the Section 54 Prohibition, they may file a notification to the CCS.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in Singapore. The timetable is taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

#### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Voluntary.
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#### Timetable

2	In practice, what is the timetable for clearance (in first phase and second phase review)?	<p>Phase I review</p> <p>In general, upon receipt of a complete application for clearance (Form M1), the CCS will carry out an assessment (Phase I review) which is normally completed within 30 working days. A Phase I review entails a quick assessment and allows CCS to give a favourable decision on merger situations that clearly do not raise any competition concerns under the Competition Act.</p> <p>Phase II review</p> <p>If CCS is unable during the Phase I review to conclude that the merger situation does not raise competition concerns, it will provide the applicant(s) with a summary of its key concerns. A further Form M2 will have to be filed. Upon the filing of a complete Form M2 and response to the Phase II information request, CCS will proceed to carry out a more detailed assessment (Phase II review). This Phase II</p>
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review is more complex and CCS has stated that it aims to complete Phase II reviews within 120 working days.

#### In practice

Generally the CCS will complete reviews within the timeframes above, subject to any instances of 'stopping the clock'.

During both Phase I and Phase II, CCS may ask the applicant to provide additional information. CCS will require the applicant to furnish the additional information by a deadline set by CCS. If the applicant is unable to provide the requested information by the deadline, it should submit a request for extension of time to CCS as soon as possible. Deadlines for requests of information are likely to be short and, depending on the nature of the information, may range from 3–5 working days.

Even if CCS extends the deadline, it may (depending on the nature of the additional information that is required) 'stop the clock' for the period between the date of the original deadline and the date on which the applicant reverts with the requested information. If the applicant fails to revert with the additional information within the deadline (and any extensions which may have been granted), CCS may determine the application by not giving a decision, but may then commence its own investigation into the merger using its statutory powers.

Based on experience, CCS would usually only stop the clock if the applicants do not respond to CCS's queries within the deadline. If CCS stops the clock, this would result in the 30 or 120 working day timeframe (for Phase I and Phase II respectively) being 'extended' due to the stoppage.

#### 4.2.1 Confidential advice

In Singapore, it is possible for merger parties to obtain confidential advice in respect of whether a merger is likely to raise competition concerns in Singapore. Certain conditions must be met in order to obtain confidential advice from the CCS for a merger. The information required to be provided to the CCS to obtain confidential advice is similar to that as required in the Form M1 (i.e. information similar to that required for notification applications). Confidential advice is, however, not binding on the CCS, since the CCS retains the right to investigate all merger situations as long as the relevant statutory requirements are met.

#### 4.2.2 Pre-notification discussions

The CCS is prepared to enter pre-notification discussions with a party or parties in respect of the merger or anticipated merger. Such a request must be submitted in writing and the CCS will not entertain discussions on speculative or hypothetical transactions. These discussions are not binding on the CCS and are meant to provide an opportunity for the CCS to indicate any potential competition concerns that might arise from the transaction.

#### 4.2.3 Conditional mergers

These are mergers that are allowed to proceed on the basis of binding commitments or specific undertakings, made or given by the merger parties to address any competition concerns identified.

#### 4.2.4 Extra-territorial application

The Competition Act applies to a party, agreement, abuse of dominant position or merger if such a party, agreement, abuse of dominant position or merger has infringed any of the prohibitions above and have affected a market in Singapore, even where:

- the agreement has been entered into outside Singapore
- any party to the agreement is outside Singapore
- any undertaking abusing the dominant position is located outside Singapore
- the merger has taken place outside Singapore
- any party to the merger is located outside Singapore, or
- any other matter, practice or action arising out of such agreement, dominant position or merger is outside Singapore.

#### 4.2.5 Guidelines on mergers issued by the CCS

The CCS has issued guidelines that provide clarification of the kinds of transactions that are considered mergers under the Competition Act.

Under the Competition Act, a merger occurs when:

- two or more undertakings, previously independent of one another, merge
- one or more persons or undertakings acquire direct or indirect control of the whole or part of one or more other undertakings, or
- an undertaking acquires the assets (or substantial part thereof) of another undertaking so that the first undertaking replaces the second in the latter's business (or part of it).

'Control' exists if the acquirer is able to exercise decisive influence over the target.

In this respect, the guidelines clarify that 'control' can be legal or de facto. Legal control arises where the acquirer has ownership of more than 50% of the voting rights of the undertaking. If the acquirer gains ownership of between 30%– 50% of the voting rights, this would give rise to a rebuttable presumption that there is decisive influence over the company. The CCS will also consider de facto control, which will be evaluated on a case-by-case basis. Situations where de facto control may arise include financial arrangements, additional agreements and/or rights to veto strategic and commercial decisions by the company.

Joint ventures can also be subject to the Competition Act if they are subject to joint control, perform the functions of an autonomous economic entity, and do so on a lasting basis. These definitions are further clarified in the guidelines.

The test used in relation to mergers is the 'substantial lessening of competition' test. This test takes into consideration the prospects of competition with and without the merger and is a prospective one, i.e. it attempts to assess future competition. The focus of the analysis is on competition and concerns that do not result from the merger are not taken into consideration.

The CCS will first define the relevant market and then review the changes to the market structure as a result of the merger. Market definition will focus on the areas of overlap in the merger parties' activities. The CCS will also examine the structure and level of concentration in the relevant market,

as well as the merged entity's market power. The general guideline is that there is no competition issue unless the merged entity will have a market share of:

- 40% or more, or
- 20%–40% and the combined market share of the three largest firms in the market is 70% or more.

The above thresholds are provided for guidance only and other relevant factors that are taken into consideration include: the immediate competitive effects of the merger (for horizontal mergers); whether the merger will affect the entry into and/or expansion of the market; and the possibility of market foreclosure (for non-horizontal mergers).

If there is an infringement of the Section 54 Prohibition (see 4.1), the guidelines provide that the CCS can exercise two broad forms of remedies—structural and behavioural. Structural remedies generally require the sale of one or more of the overlapping businesses that have led to the competition concern, with the buyer being approved by the CCS. A behavioural remedy is generally prescribed where a divestment is impractical or disproportionate to the competition concerns. These are meant to reduce the scope for a merged company to behave competitively.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Exchange of information is governed by s. 34 of the Competition Act. The section prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore (the Section 34 Prohibition). An exchange of information between parties pre-merger may therefore run the risk of infringing the Section 34 Prohibition. Parties should thus be careful to not infringe the Section 34 Prohibition in the course of a merger or acquisition, in particular, by exchanging or sharing any commercially sensitive information (e.g. prices and customer details).

Under the guidelines issued by CCS, an exchange of information may have an appreciable adverse effect on competition, where it serves to reduce or remove uncertainties inherent in the process of competition. The fact that the information could have been obtained from other sources is not necessarily relevant. Whether or not an exchange of information has an appreciable effect on competition will depend on the circumstances of each individual case: the market characteristics, the type of information, or the manner in which it is exchanged. As a general principle, it is more likely that there would be an appreciable adverse effect on competition:

- the smaller the number of undertakings operating in the market
- the more frequent the exchange
- the more sensitive and confidential the nature of the information which is exchanged, and
- where information exchanged is limited to certain participating undertakings to the exclusion of their competitors and buyers.

Singapore had its first ever case on information sharing in the *Ferry Operators Case* (CCS 500/006/09) in 2012. In that case, it was made clear that information sharing may potentially be anti-competitive and infringe the Competition Act. The CCS adopted a wide interpretation of 'concerted practice' which caught the flow of competitively sensitive information shared between the ferry companies even though there may have been no actual agreement between the companies to fix prices at a certain level. The CCS also characterised 'pure' information exchange as anti-competitive by 'object'—meaning that it is not necessary to show that the arrangement had actually produced an anti-competitive effect on the market or that any specific arrangement had even been implemented by the parties.

Merger parties should therefore bear in mind that any exchange of information must be properly managed to avoid the risk of being found to have infringed the Section 34 Prohibition. Merger parties should also keep in mind any applicable foreign competition laws applicable to the transaction.

## 4.4 Anti-Bribery, Corruption and Money Laundering

### 4.4.1 Anti-bribery and corruption

The primary anti-corruption legislation in Singapore is the Prevention of Corruption Act (cap. 241; PCA). The Penal Code (cap. 224) also contains some provisions directed at public servants and at persons taking 'gratification' (bribes) in order to influence public officials.

#### ***Prevention of Corruption Act***

The PCA covers the bribery of private individuals as well as public officials. Under s. 5 PCA, a person will be guilty of a corruption offence when he or she, by him or herself, or in conjunction with any other person:

- corruptly solicits or receives, or agrees to receive for himself, or for any other person, or
- corruptly gives, promises, or offers to any person whether for the benefit of that person or of another person

any gratification as an inducement to or reward for, or otherwise on account of any person to do or forbear to do anything in respect of any matter or transaction whatever, actual or proposed.

The definition of 'gratification' under the PCA is very wide and includes monies, gifts, loans, fees, rewards, commissions, valuable security and property. Further, 'gratification' is also extended to cover 'any other service, favour or advantage of any description whatsoever'.

The PCA also creates a presumption of corruption where any gratification is proved to have been given to or received by a person in the employment of the Government of Singapore or public body. In such cases, the burden of proof to rebut the presumption is on the accused.

The PCA does not provide any 'safe harbour' monetary guidelines for gifts, hospitality expenses or other entertainment, and there are no favourable presumptions under the statute simply because the gifts or hospitality involved are below a certain monetary value. Any form of gratification could potentially be a prohibited bribe if the requisite corrupt intent and other prerequisites/conditions of the PCA are present.

While there are no reported cases on the prosecution of any Singapore or foreign company under the PCA to date, the PCA is broad enough to capture individuals and corporate 'persons'. The provisions of PCA have effect outside as well as within Singapore in relation to citizens of Singapore. Where an offence under the PCA is committed by a citizen of Singapore in any place outside Singapore, that citizen may be dealt with in relation to that offence as if it had been committed within Singapore.

A person guilty of an offence under the key provisions of the PCA will be liable on conviction to a fine not exceeding SGD100,000 or to imprisonment for a term not exceeding five years, or both. The PCA also provides that where a person is convicted for acceptance of any gratification in contravention of the PCA, the court may order him or her to pay a penalty equivalent to the amount of any bribes received as a fine.

#### ***Penal Code***

The corruption offences under the Penal Code are contained in ss. 161–164. An offence of corruption would, for example, occur under the Penal Code when a public servant takes a benefit or gift, for the purpose of influencing his or her decision, action or inaction, in connection with his or her official functions. As the offences provided for under the Penal Code largely overlap with those in the PCA, and the sanctions under the Penal Code are less grave/serious than those prescribed by the PCA, it is very rare for a prosecution to be brought under the Penal Code in cases of receiving or taking of illegal gratification.

#### 4.4.2 Money laundering

In Singapore, the primary anti-money laundering legislation is the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (cap. 65A; CDTA). The CDTA criminalises (among other things) the laundering of proceeds from drug dealing offences and criminal conduct.

'Criminal conduct' is defined in the CDTA as doing or being concerned in (whether in Singapore or elsewhere), any act constituting a serious offence or a foreign serious offence. Such offences are expressly listed in the CDTA, and include bribery offences under the PCA and certain tax offences (including tax evasion under the Income Tax Act (cap. 134) and foreign serious tax offences).

Under the CDTA, it is an offence for a person to enter into or be concerned in an arrangement, knowing or having reasonable grounds to believe that by that arrangement:

- the retention or control of benefits from drug dealing or criminal conduct by or on behalf of another person (the other person) will be facilitated, or
- the other person's benefits from drug dealing or criminal conduct are used to secure funds that are placed at that other person's disposal, or to acquire property for that other person's benefit

and the person knows or has reasonable grounds to believe that the other person engages in or has engaged in drug dealing or criminal conduct, or has benefited from drug dealing or criminal conduct.

For individuals, each offence is punishable by a fine not exceeding SGD500,000 or imprisonment for a term not exceeding 10 years or to both. For corporations, each offence is punishable by a fine not exceeding SGD1 million.

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

#### 4.5.1 Exchange controls

No exchange controls are currently in place in Singapore.

#### 4.5.2 Foreign investment restrictions

Foreign investment restrictions are not common in Singapore but may be present in certain sectors. Consents from the relevant industry regulator may be necessary, depending on the nature of the target's business. This is common in industries such as banking, insurance and telecommunications. In some sectors, however, a change of control or transfer of assets may merely require notification to the relevant authorities rather than an obligation to obtain consent.

#### 4.5.3 Trade regulation

Historically, Singapore has been a free port. Only a few items are dutiable, the principal items being liquor, tobacco, petroleum products and motor vehicles.

Controls on imports and exports apply to certain types of goods (e.g. food, animals, telecommunication equipment). In addition, the Strategic Goods (Control) Act controls the export, transfer and brokering of strategic goods and strategic goods technology, as well as the any other goods and technology capable of being used to develop, produce, operate, stockpile or acquire weapons capable of causing mass destruction, and missiles capable of delivering such weapons.

The documentation required for imports and exports is relatively straightforward. For controlled goods, permits must be obtained in advance from the relevant controlling agencies for the purpose of such imports or exports.

Singapore is also a signatory to approximately 20 Free Trade Agreements (FTAs). The FTAs help reduce or eliminate trade barriers between the relevant member parties of the FTAs, helping Singapore to increase its trade competitiveness. Singapore Customs has also signed Mutual Recognition Arrangements (MRAs) with approximately six other customs administrations, thus

providing mutual recognition of Authorised Economic Operator (AEO) status to companies recognised as AEOs by their respective customs administrations.

## 5. Taxes

### 5.1 Acquisition of Assets

Stamp duty is payable on a conveyance, assignment or transfer of real property in Singapore that is effected by way of an instrument executed or received in Singapore. Buyer's stamp duty is payable at the rates of 1% on the first SGD180,000 of the purchase price or market value of the real property (whichever is higher); 2% on the next SGD180,000; and 3% thereafter.

An additional buyer's stamp duty of 15% also applies to the purchase price or the market value of the property (whichever is higher) where companies have acquired residential properties situated in Singapore on or after 12 January 2013.

A seller's stamp duty may also apply to sellers of residential and industrial properties situated in Singapore. For residential properties, a seller's stamp duty of 16%, 12%, 8% and 4%, respectively, applies to sellers who have acquired residential properties on or after 14 January 2011 and dispose of them in the first, second, third and fourth year after acquisition. For industrial properties, a seller's stamp duty of 15%, 10% and 5%, respectively, applies to sellers who have acquired industrial properties on or after 12 January 2013 and dispose of them in the first, second and third year after acquisition.

In addition, when chargeable assets (e.g. real property situated in Singapore or shares in Singapore-incorporated companies of a company in liquidation) are distributed in that form to its shareholders, it is mandatory that such shareholders pay stamp duty on the market value of the assets distributed.

### 5.2 Acquisition of Shares

In an acquisition of shares in a Singapore-incorporated company, the buyer generally pays stamp duty at 0.2% of the purchase price or the market value of the shares (whichever is higher) unless relief for stamp duty is applicable. Where the market value of the shares is not readily available, it is generally taken to be the net asset value of the shares. It is possible to agree to the cost to be borne by either or both of the parties by mutual agreement.

#### 5.2.1 M&A Scheme

The M&A scheme is a specific tax regime introduced by the Singapore government in 2010 to encourage taxpayers to expand their businesses through M&A transactions. A share acquisition may be more advantageous for an acquirer under the scheme if the transaction is a qualifying acquisition. A qualifying acquisition is one that results in:

- the acquirer owning at least 20% of the target's ordinary shares if it owned less than 20% before the acquisition date, or
- more than 50% of the target's ordinary shares if it owned 50% or less before the acquisition date.

Under the M&A scheme, subject to conditions:

- an acquirer acquiring the ordinary shares of a target under a qualifying acquisition during the period 1 April 2015–31 March 2020 (both dates inclusive) is granted an M&A allowance of 25% of an acquisition value of up to SGD20 million in the relevant year of assessment over 5 years
- a 200% allowance is granted on transaction costs (e.g. legal fees, accounting or tax advisor's fees and valuation fees) incurred on qualifying acquisitions completed during the period 1 April 2015–31 March 2020 (both dates inclusive), subject to an expenditure cap of SGD100,000 per year of assessment, and

- stamp duty relief of up to SGD40,000 per financial year is granted on an instrument of transfer on a sale of ordinary shares under qualifying acquisitions completed during the period 1 April 2015–31 March 2020 (both dates inclusive).

### 5.3 Goods and Services Tax (GST)

Singapore also has a GST of 7% payable on the supply of goods and services in Singapore and should be taken into consideration in the case of asset sales. However, asset sales that qualify as transfers of going concerns are excluded from GST, provided certain conditions are met. These conditions include the requirements that the assets are transferred in relation to a transfer of a business and intended for use by the transferee in the same kind of business as the transferor and that the business is a going concern at the time of the transfer. Share sales are generally exempt from GST.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of a share purchase, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the buyer therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the target company. If there is an integration of the target company's business with the buyer's business post-acquisition, the buyer should be mindful of the considerations set out below.

#### 6.1.2 Acquisition of assets

In the context of an asset sale where the business is transferred on a going-concern basis, employees who come under the ambit of the Employment Act (cap. 91) (EA employees) will automatically transfer on their existing terms and conditions to the buyer.

The Employment Act (cap. 91) (EA) applies generally to persons who have entered into, or work under, a contract of service. It does not apply to any person employed in a managerial or executive position, and who are in receipt of a monthly basic salary exceeding SGD4,500. Managers, professionals, and executives are employees with executive or supervisory functions. These functions include the authority to influence or make decisions on issues like recruitment, discipline, termination of employment, assessment of performance, or involvement in the formulation of strategies of the enterprise, or the management and running of the business. They also include professionals with tertiary education and specialised knowledge/skills and whose employment terms are comparable to those of managers and executives. Professionals such as lawyers, accountants, dentists and doctors whose nature and terms of employment are comparable to executives would generally be deemed as such, and hence they would not be covered under the EA.

The EA effectively provides for a rollover of benefits and obligations. The prevailing terms of employment enjoyed by the EA employees immediately before the transfer will remain unchanged pursuant to the transfer of employment, and the buyer steps into the shoes of the seller as the 'employer' as though the employment contracts were originally made with the buyer (i.e. there is no break in the continuity of service, and the buyer will recognise the EA employees' years of service with the seller).

However, the EA permits the buyer and the EA employees to negotiate and agree on new or different terms of employment. This is particularly helpful in practice where material differences in remuneration and benefits policies do not permit a wholesale recognition of all prior terms of employment. In such cases, it would be typical to re-issue a new offer of employment to the EA employees.

For employees who do not fall under the ambit of the EA (non-EA employees), their employment with the seller will first need to be terminated and then re-employed with the buyer. The termination and re-employment is typically achieved by way of a joint letter to be issued by both parties to the affected non-EA employees, whereby notice of termination is given and an offer of re-employment is made.



Non-EA employees are at liberty not to accept the offer for re-employment with the buyer. Alternatively, the transfer documents may also be drafted as individual letters, a notice of termination from the seller and a fresh offer of employment from the buyer. The transfer documents (whether a single notice of termination from the seller or a joint letter) should include appropriate language waiving all rights to termination payments/liabilities and releasing the seller from any claims by the employees in relation to their termination of employment with the seller and subsequent offer of employment by the buyer.

Since the offer of re-employment with the buyer is a fresh offer, the buyer is not legally bound to recognise the non-EA employees' years of service or their existing terms of employment. However, based on experience in practice and in order to encourage acceptance by the relevant non-EA employees, it is common for the new employer, being the buyer, to recognise years of service and match, or better the terms of employment.

### 6.1.3 Transfer of business

The same considerations in relation to the transfer of employees, which apply to the acquisition of assets, will apply to a transfer of business in Singapore.

## 6.2 Approval or Consultation Requirements

While there are no formal approval or consultation requirements in relation to the acquisition of shares, consultations must be conducted for EA employees prior to the transfer of the EA employees pursuant to the acquisition of assets, or the transfer of business.

Under the EA, the seller is required to consult with EA employees, as soon as it is reasonable and before the transfer of employment takes place, on matters including the following:

- timing of the transfer
- implications of the transfer, and
- any measures envisaged by the companies to be taken in connection with the transfer.

The buyer is obliged to furnish the seller with all necessary information to conduct such consultations. If the consultations are not reasonably conducted, the Ministry of Manpower (MoM) may, among other things, order the consultations to be conducted in a form and manner prescribed by the MoM. While not strictly required given the deemed transfer of employment under the EA, it is common for parties to issue a joint letter to the EA employees to notify them of the transfer.

If any dispute arises in relation to the transfer of employees, the MoM has the power to delay or prohibit the transfer of employment and order the transfer of employment to be subject to such terms as the Commissioner considers just. Given the effect of s. 18A of the EA, it is plausible that a delay or prohibition against the transfer of employment will impact the completion of the transfer of undertaking. As such, it would be advisable to conduct consultations with EA employees as soon as it is reasonable to do so, to avoid any unforeseen delay to the completion of the transfer of employment.

Further, if a trade union is involved, the matter may also be similarly referred to the Industrial Arbitration Court (under s. 31(c) of the Industrial Relations Act (cap. 136; IRA)). The powers of the court in relation to such a dispute is set out in s. 36 of IRA, but include being able to delay or prohibit the transfer of employment of an employee who is a member of the trade union; and being able to order that the transfer of employment of the employee who is a member of the trade union be subject to any terms the court considers just.

It is important to note that the above consultation requirements only apply to EA employees and will not apply to non-EA employees, in relation to either the acquisition of assets or transfer of business. This is due to the fact that the employment of the non-EA employees must first be terminated by the seller, before being subsequently re-employed by the buyer.

That said, it is also generally recommended that the buyer require the seller to produce an undertaking that key employees (identified in the due diligence process), will remain with the target company post-acquisition, as applicable, since it is unlikely that the key employees of the target company will fall under the ambit of the EA. Further, it might also be prudent to first consult with the employees of the target company, regardless of the method of transfer, to assess and understand the number of employees who are not willing to either transfer with the acquired assets or business, and allocate sufficient time for the employees to serve out their requisite notice periods and/or transfer their know-how, as required.

### 6.3 Protection against Dismissal

Generally, with the exception of the termination of pregnant employees and the termination of employees on grounds of age, there are no other issues in relation to the termination of employment, as long as the requisite notice period is given to the employee prior to the termination.

EA employees will be statutorily entitled to a notice period of up to four weeks, depending on the length of the employee's service with the target company. EA employees may also be paid a salary in lieu of the notice, if an employer wishes to terminate the employment of the employee with immediate effect.

Non-EA employees must be released according to the termination procedures as set out in their respective employment contracts.

It is important to note that generally, pregnant employees are afforded a measure of protection against dismissal under the EA and/or the Child Development Co-Savings Act (cap. 38A). It is also worth considering the guidelines and requirements in relation to the termination or re-hire of older employees of between the age of 62 and 65, as set out in the Retirement and Re-employment Act (cap. 272A) and the Tripartite Guidelines of the Re-Employment of Older Employees.

No legislation in Singapore provides for payment of compulsory retrenchment benefits (i.e. payments given by employers to compensate for the loss of employment) upon making an employee redundant. This is a matter usually dealt with in the employment contract. In the absence of contractual obligations to pay retrenchment benefits, it is market practice to pay ex-gratia retrenchment benefits of between two and four weeks' salary for each completed year of service, up to a maximum of 10 to 12 months.

## South Africa

### 1.1 Overview

The South African government adopts a positive approach to foreign investment and seeks to create a user-friendly and reliable environment in which, generally speaking, the same regulations apply to both foreign and domestic investors.

South Africa's judiciary applies the rule of law, as enshrined in the Constitution (the supreme overarching legislation affording fundamental substantive and procedural rights to both locals and foreigners alike).

### 1.2 General Legal Framework

Following the repeal of the Companies Act (No. 61 of 1973) on 1 May 2011, the Companies Act (No. 71 of 2008) became the primary legislation governing companies in South Africa. In addition to its objectives of simplification and improving flexibility, efficiency and transparency in relation to companies, the Companies Act set out to modernise and harmonise the South African company law regime along the lines of best practice jurisdictions internationally. It contains various requirements for mergers and acquisitions involving South African companies (including shareholder approval requirements, takeover regulations, provisions for good corporate governance and fair treatment of minority shareholders). It also establishes the basic requirements for the formation, administration and dissolution of companies, duties of company directors and requirements to ensure enhanced accountability, transparency and good corporate governance.

### 1.3 Corporate Entities

A South African company is formed through the process of incorporation, involving the lodgement of a notice of incorporation and the company's Memorandum of Incorporation (MOI) together with supporting documentation and company forms with the Companies and Intellectual Property Commission (CIPC).

The Companies Act distinguishes between profit and non-profit companies and allows for the formation of four types of profit companies: private companies, public companies, personal liability companies and a state-owned companies.

In instances where it has employment contracts within and/or conducts business in South Africa, a foreign company may also be required to register with CIPC as an 'external company' (branch).

This handbook focuses on private company M&A and although the same general principals govern private and public company M&A activity, there are also differences, in particular in the case of exchange listed public companies to which the requirements of the South African Securities Exchange (JSE Limited) apply.

#### 1.3.1 Private companies

A private company is a profit company which is prohibited from offering its shares to the public, and accordingly the transferability of its securities is restricted in its MOI. There is no distinction between limited or unlimited companies as in English law jurisdictions and due to its separate legal persona, the shareholders of a private company are not personally liable for the debts and obligations of the company unless such liability is created contractually by, for example, guarantee or suretyship. There are no minimum share capital requirements for private companies.

No limit applies to the number of shareholders in a private company, but there will typically be substantially fewer than for a public company. It is commonly used as corporate vehicle for the conduct of smaller businesses and is less stringently regulated by the Companies Act than public companies. Unlike public companies, a private company is, for example, not obliged to have its financial statements audited, unless it meets a specific 'public interest score' determined with reference to its number of shareholders, employees, the extent of its third-party liability, and turnover.

### 1.3.2 Public companies

By contrast to a private company, the shares in a public company may be offered to the public, subject to prospectus and other detailed regulatory requirements. As with private companies, the members of a public company are not liable for the debts and obligations of the entity, which is typically used as a vehicle for the conduct of larger businesses in which a greater number of shareholders have an interest. The securities in a public company may be listed on a stock exchange, such as the Johannesburg Stock Exchange, in which event (and in addition to more stringent regulation under the Companies Act) it must also comply with the JSE Limited Listings Requirements. The listing rules require the company to comply with the King Code of Corporate Governance containing principals designed to ensure good corporate governance. There are no minimum share capital requirements for a public company.

## 2. Acquisition Methods

In South Africa, a business can be acquired either through a purchase of the shares in the company of the target business, or through a purchase from the company of the business itself as a going concern. In addition, the acquisition of specific targeted assets can be implemented through a simple asset purchase transaction. In 2011, the Companies Act also introduced a separate statutory concept of legal merger between two companies. In practice, however, this mechanism is still largely untested and infrequently used.

### 2.1 Acquisition of Shares

Technically, all that is required for the transfer of legal title in a private company, is for a securities transfer form to be executed by the seller and the name of the purchaser of the shares to be entered into the company's securities register. In the case of the acquisition by a non-resident of shares in a South African company, the new share certificate issued to the non-resident purchaser is to be endorsed 'non-resident' in accordance with South African Exchange Control Regulations, to permit the future remittance of dividends and other distributions by the local target to the non-resident purchaser. In most cases, a sale of shares agreement is prepared to record warranties, indemnities and the other salient transaction terms agreed between the parties.

### 2.2 Acquisition of Business or Assets

The transfer of a business as a going concern or of specified targeted assets,<sup>1</sup> is given effect through execution of a sale of business or of an assets agreement. In the large majority of cases, the agreement coupled with delivery of the underlying assets to the purchaser will be sufficient for the transfer of legal title, irrespective of the class of the business assets. One exception, however, is for immovable property (real estate/land and buildings) which under the Alienation of Land Act (No. 68 of 1981) requires preparation of additional transfer documents and registration of the transfer of the property in the South African Deeds Office for title to the property to pass.

If the subject of the acquisition constitutes all or the greater part of the assets or undertaking of the seller, approval of the seller's shareholders by special resolution (75% vote) is required. The disposal of a business normally also triggers an automatic transfer of employees.

### 2.3 Statutory Merger

The Companies Act created a new statutory mechanism allowing for the merger of two companies, resulting in the assets and liabilities of one company being transferred to the other and the subsequent dissolution (through automatic deregistration by the CIPC) of the non-surviving company. The three essential requirements for this procedure are:

- execution of a merger agreement

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<sup>1</sup> The distinction here is between a transfer of all assets, liabilities, contracts, employees etc. relating to the business; to be distinguished from a pure asset sale where only certain 'cherry-picked' assets are transferred and the rest left behind.

- satisfaction of a solvency and liquidity test in respect of each of the merging companies upon implementation of the merger, and
- approval of the merger by special resolution (75% vote) of the shareholders of the merging entities.

The statutory merger is a recent addition to South African company law and, as such, is yet to be fully exploited. The process requires each of the merging companies to give notice of the merger to each of their respective known creditors, triggering a right for a creditor to seek leave to apply to a court for a review of the merger on grounds that the creditor would be 'materially prejudiced' by the amalgamation. It also allows dissenting minority shareholders in certain circumstances to force a buy-back of their shares at fair value. For this reason, the statutory merger mechanism is seldom, if ever, used in practice and the acquisition of a business in South Africa will almost invariably still involve the purchase of either the shares of the company owning that business or of the business itself as a going concern.

### 3. Negotiation, Signing and Closing

#### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical South African purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1.	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. All types are encountered, including working capital adjustment, cash-free debt-free, NAV adjustments.
2.	Is there a collar on the adjustment?	Collars on the adjustment of a purchase price common. Parties often agree on a floor or a cap on the adjustment.
3.	Who prepares completion balance sheet?	Either party may prepare the completion balance sheet, although it is more often the seller given that it has the relevant financial information easily at hand. The purchaser is given the opportunity to review the balance sheet and annual financial statements, with referral to an independent expert in the event of a dispute.
4.	Is the balance sheet audited?	Usually prepared by an audit firm but not formally 'audited', which implies a process not typically followed, as special purpose accounts are being prepared.
5.	Is an earn-out common?	More common in transactions where the seller continues to manage the target company after closing. Less common where seller is exiting completely.
6.	Is a deposit common?	Not common.
7.	Is an escrow common?	Common.
8.	Is a break fee common?	Uncommon.

### Conditions Precedent

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|-----|---|---|
| 9.  | Material Adverse Change (MAC) completion condition? | Common, in particular where a long period is required from execution of the purchase agreement to obtain regulatory approvals and satisfy other conditions precedent. The scope/definition of the MAC is often a key negotiation point. Typically, the purchase agreement does not become operative on occurrence of a MAC and transacting parties walk away. |
| 10. | Is the MAC general or specific?                     | Both seen.  |
| 11. | Quantification of MAC?                              | Common. Depends on whether MAC is general or specific.  |

### Covenants, Access

- |     |   |  |
|-----|---|--|
| 12. | Is a non-compete common? Do you use waterfall/blue pencil provisions?                             | Common, except for private equity sellers. Waterfall/blue pencil provisions used.  |
| 13. | Non-solicit (of employees)?   | Common (in conjunction with a non-compete).  |
| 14. | Non-solicit (of customers)?   | Common (in conjunction with a non-compete).  |
| 15. | Broad access to books, records, management between sign and close?                                | Generally, yes, in private transactions, but avoid circumstances which could be interpreted as taking over control of the target and sharing of sensitive information between competitors. |
| 16. | Is it common to update warranty disclosure or notify of possible breach? What is the consequence? | Updating schedules common, but scope should be limited. Notification of possible breach common. In case of material breach, right to terminate.  |
| 17. | Is a separate tax covenant/indemnity or tax deed common?  | Common, but usually contained in warranties schedule to purchase agreement and not in a separate tax deed.   |

### Representations and Warranties

- |     |   |   |
|-----|---|---|
| 18. | Materiality in representations – how is it quantified (e.g. by a \$ amount)?      | Materiality in representations, determined with reference to an agreed threshold amount is almost always present.   |
| 19. | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers becoming more common and depend on the risk-sharing in the deal. Often limited to actual knowledge and due enquiry of a specified list of senior management. |
| 20. | Is a warranty that there is no materially misleading/omitted information common?  | Fairly common, but ultimately a negotiated position.  |
| 21. | Is disclosure of data room common?  | Becoming more common.   |

### Repetition of Representations and Warranties

- |     |   |   |
|-----|---|---|
| 22. | Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?  | Repetition during the interim period to closing and at closing is common. Bring-down certificates not very common.                      |
| 23. | What is the applicable standard? True in all material respects? Material Adverse Effect standard?   | True and accurate in all material respects is common but often carve out for fundamental representations which must be absolutely true. |
| 24. | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon.   |

### Limitations on Liability

- |     |  |  |
|-----|--|--|
| 25. | What is the common cap amount (as a percentage of purchase price)?   | Usually 100% of purchase price.  |
| 26. | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Both seen regularly.   |
| 27. | What are the common exceptions to the cap?   | Key warranties often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.  |
| 28. | Is a deductible or basket common?  | Both common.   |
| 29. | Is a <i>de minimis</i> common?   | Yes.   |
| 30. | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | In terms of the common law it is 3 years from the date at which a plaintiff became aware of the claim. In terms of the agreement, it is usually 12–24 months from closing, except for tax, environmental and competition-related warranties where a longer period is typically agreed. |
| 31. | Is warranty insurance common?  | No.  |

### Reliance

- |     |  |           |
|-----|--|-----------|
| 32. | Do financiers seek to rely on purchaser's due diligence reports? | Uncommon. |
|-----|--|-----------|

### Set-offs against Claims

- |     |  |                       |
|-----|--|-----------------------|
| 33. | Is a set off against claims for tax benefits common? | Becoming more common. |
| 34. | Insurance proceeds?                                  | Becoming more common. |
| 35. | Third party recoveries?                              | Becoming more common. |

## Damages, Knowledge

- |     |  |  |
|-----|--|--|
| 36. | Obligation to mitigate damages?  | Yes, an automatic requirement of South African common law. |
| 37. | Exclusion of consequential damages?  | Common.  |
| 38. | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? | Not common.  |

## Dispute Resolution

- |     |   |   |
|-----|---|---|
| 39. | Does local law allow for a choice of governing law? What is the common governing law? | Yes, but it is common practice for South African law to be chosen as governing law in the case of a local target company/business.  |
| 40. | Is litigation or arbitration more common? If arbitration, where?                      | Arbitration has become more common than litigation as dispute resolution mechanism. The seat of arbitration is normally in South Africa with the Arbitration Foundation of South Africa or the Association of Arbitrators being the main arbitral bodies. |

## Stamp Duty

- |     |  |  |
|-----|--|--|
| 41. | If stamp duty is payable, is it normally shared? | Securities transfer tax (0.25% of the higher of purchase consideration and fair market value of the shares being transferred) levied against the target company, which bears the statutory obligation to pay the tax to the South African tax authorities. Company has statutory right to reimbursement by purchaser. The parties may agree a different arrangement to address the effect of the tax liability. This could include sharing the tax or one party reimbursing the other. |
|-----|--|--|

## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

There is no legal requirement for an agreement for the transfer of legal title to shares to be in writing. It is, however, the established market norm and accepted best practice for an agreement for a share transfer to be documented by the seller and purchaser in a written sale of shares agreement.

### 3.2.2 Transfers of assets

An agreement for the sale of assets need not be recorded in writing, except where writing is a validity requirement (e.g. in agreements for the sale, exchange or donation of land under the Alienation of Land Act, No. 68 of 1981).

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

Under the Companies Act, the transfer of title to certificated shares requires entry of the transfer in the company's securities register. The company may only make such an entry if the transfer is evidenced by a proper instrument of transfer that has been delivered to the company, or if the transfer was effected by operation of law. The form of the instrument of transfer is typically determined by the company in its MOI and invariably is a written share transfer form.



Uncertificated or dematerialised shares are shares not evidenced by a certificate or written instrument and of which record is kept in an electronic register. Transfer of ownership in uncertificated shares is effected by debiting the account in the uncertificated securities register from which the transfer is effected and crediting the account in the uncertificated securities register to which the transfer is made, on receipt of an instruction to transfer from the owner of the shares.

### 3.3.2 Transfers of title to assets

Execution of the sale of business/sale of assets agreement is almost always in itself sufficient for the transfer of legal title to the business/assets being sold. In exceptional circumstances and depending on the asset class involved, registration of the transfer may be required for ownership to pass. The primary example is immovable property (land and buildings) in respect of which registration of transfer in the South African Deeds Office is required to effect transfer of ownership.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Certain mergers in South Africa are subject to approval from the competition authorities, who look at two major issues relating to proposed mergers before issuing consent:

- the effect the merger will have on local competition in the particular business sector, and
- any possible public interest issues that might be triggered.

The scope of public interest is defined in a number of ways throughout different pieces of legislation, with the Competition Act's interpretation specific:

- a public interest can mean the merger's effect on issues in a particular sector or region
- issues surrounding employment and labour
- the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive, and
- the ability of local industries to compete in international markets and arenas.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical South African purchase transaction, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

#### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	The size of the merger will determine whether a filing is voluntary or mandatory. A distinction is drawn between small, intermediate and large mergers. A small merger may be implemented without approval of the Competition Commission and no filing is required, unless the Commission requires notification within 6 months of the merger's implementation. A small merger may also be voluntarily notified, which could arise if it is likely that Commission would disallow the merger on competitive or public interest grounds. Filing is mandatory for both intermediate and large mergers.
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## Timetable

2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p><i>Intermediate merger:</i> initial period of 20 working days which may be extended once by 40 working days, i.e. the Competition Commission must finalise its decision within a total of 60 working days of the filing.</p> <p><i>Large merger:</i> unless the Competition Tribunal exercises its right to extend the review period, a decision is taken within 60 days of the initial filing.</p>
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### 4.2.1 Filing obligation

To trigger a filing obligation and mandatory approval, the acquisition transaction must qualify as a 'merger'.

The Competition Act defines a 'merger' as occurring when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.

To further clarify this position, the Act describes 'control of a firm' as being present when a person:

- beneficially owns more than 50% of the issued share capital
- is entitled to exercise the majority of the voting rights exercisable at a general meeting of the firm (or has the ability to control such voting rights)
- either directly or through a controlled entity, is able to appoint or veto the appointment of a majority of the directors of the firm, or
- has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to above.

An 'intermediate merger' is defined in the Act as a merger where:

- gross South African turnover, or gross South African asset value of target group equals or exceeds ZAR80 million, and
- any combination of the gross South African turnover (or gross South African asset value) of the acquiring group with the gross South African turnover (or gross South African asset value) of the target group equals or exceeds ZAR560 million.

A 'large merger' is defined in the Act as a merger where:

- the gross South African turnover or the gross South African asset value of the target group equals or exceeds ZAR190 million, and
- any combination of the gross South African turnover (or gross South African asset value) of the acquiring group with the gross South African turnover (or gross South African asset value) of the target group, equals or exceeds ZAR6.6 billion.

For mergers that are notifiable (intermediate or large mergers), the following process must be followed:

- merger filing lodged with the Competition Commission
- lodging includes signing of prescribed forms and providing prescribed information (including on the effect of the merger on the public interest grounds specified in the Competition Act), and

- a filing fee must be paid (ZAR100,000 for intermediate mergers and ZAR350,000 for large mergers).

#### 4.2.2 Timetable

Intermediate mergers will be scrutinised by the Competition Commission within a set 60-business-day period, running from the date of lodging the filing. If a decision is not made within that fixed period, the merger will be deemed to be approved unconditionally. For large mergers, the Commission will investigate the merger, but the final decision rests with the superior Competition Tribunal. The Commission has an initial 40 business days (commencing on the date of lodging the filing) to investigate the merger, but may apply to the Tribunal for one or more extensions in that period (each extension may not exceed 15 business days). Once the investigation by the Commission is complete and its recommendation has been submitted to the Tribunal, the Tribunal may either allocate a date for hearing or (in more complex matters) require a pre-hearing conference with interested or involved parties. The Tribunal has 10 days after the Commission has submitted its recommendations within which to either allocate a date for hearing or arrange a pre-hearing conference. The Tribunal is not bound to issue its decision within a prescribed period. Interested parties who may be involved in the investigation or application process include the merging companies' trade union representatives and employee representatives. They are entitled to receive a redacted version of the filing and may participate in the merger proceedings (and may also appeal against the decisions of the Commission and Tribunal). If the public interest is at stake, the minister of economic development is also entitled to participate by making representations on these grounds. Third parties may also intervene in large merger proceedings. While the Commission attempts to finalise its investigations as quickly as possible and the Tribunal to make a timely decision, realistically, the potential involvement of other interested parties, or the potential for ministerial review, may add to the time required for a decision.

#### 4.2.3 Penalties

Merger clearance must be received before the parties may implement the transaction. Implementation of an intermediate or large merger in the absence of approval by the competition authorities, may attract severe penalties. Under the Competition Act, the merging parties can be fined up to 10% of their South African turnover and exports in the immediately preceding financial year. The Competition Tribunal can also go a step further by ordering divestiture by the new merged entity of assets which would cause market concentration in the merged entity, or declare the merger agreement or part of it void. The flouting of applicable sectoral approvals will also render the transaction void and may have other sector-specific consequences.

### 4.3 Anti-Bribery, Corruption and Money Laundering

In South Africa, the concept of bribery is referred to as 'corruption', which is a crime that may be committed by both public officials and private individuals, and by both public and private entities. The Prevention and Combating of Corrupt Activities Act (No. 12 of 2004) (PACCA), creates the statutory offence of corruption.

Under the PACCA, 'corruption' is very broadly defined together with other specific offences relating to corrupt activities, covering a range of specific persons and specific matters. The Companies Act seeks to prevent corrupt activities within companies through the practice of good corporate governance and provides protection for whistle-blowers. Extensive legislation and regulations also deal with industry-specific corruption.

In general, a person will commit corruption if he or she directly or indirectly accepts or offers to accept 'gratification' from another person, or gives or agrees to give gratification to any other person for his or her benefit, or that of another, and the aim of such giving or receipt is to induce the other party to act in an improper manner in the performance of that individual's duties. 'Gratification' is broadly defined and includes money, donations and gifts, employment, avoidance of loss or liability and any other valuable consideration or benefit of any kind. The maximum penalties for corruption vary according to the severity of the offence and include imprisonment and fines.

South Africa, although not a member of the Organisation for Economic and Cooperative Development (OECD), is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires signatory nations to adopt acceptable measures

to combat the potential bribery of any foreign public official, as more fully set out in Appendix D. Further, while South African law on corruption is not as onerous as that of the United Kingdom or North America, even where an 'associated person' bribes another person in order to benefit a company, regardless of the company's knowledge, it is important to keep in mind the wide jurisdictional scope of the UK Bribery Act and the US Foreign Corrupt Practices Act (as detailed in Appendix D). For example, the UK Bribery Act is applicable to any corporate entity which conducts business anywhere in the United Kingdom, thereby possibly bringing into its ambit many South African companies.

#### 4.4 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Foreign investors should note that certain regulations govern the inflow and outflow of foreign capital through South Africa.

##### 4.4.1 Exchange controls

The Financial Surveillance Department of the South African Reserve Bank regulates and monitors the inflow and outflow of foreign exchange across South Africa's borders. To this end, South African Exchange Control Regulations are binding on all South African residents and in respect of the flow of money from residents to non-residents offshore. As regards funds coming into South Africa as opposed to leaving it, foreign companies are permitted to freely invest in and repatriate profits from South Africa, subject to prior exchange control approval for the investment. The approval is typically granted as a matter of course and within a few days of submission of documentation to the exchange control authorities (including a so-called 'fair value letter' issued by an auditor), evidencing to their satisfaction that the acquisition of local assets is to be implemented at fair market value and on arm's length terms.

In an M&A context, the requirement for exchange control approval is most often encountered in relation to the following transactions:

- the purchase of or subscription for shares in a South African resident company by a non-resident
- the grant of 'financial assistance' (including inward foreign loans or credits) by a non-resident to a resident, or
- guarantees, suretyships, indemnities or similar, provided by residents, resulting in the creation of obligations for the resident to make payments offshore.

In the absence of prior approval for these transactions, the South African target company/borrower will not be permitted to remit dividends or other distributions, or make interest or capital payments to non-resident shareholders/lenders.

Other transactions that require prior approval by the exchange control authorities include the purchase of goods by residents from non-residents and the payment by residents of royalties, licence fees, management fees and similar, to non-residents.

The exchange control authorities would also be involved in transactions where South African residents purchase assets outside the country. These assets could include share ownership or transfers in a foreign company, or undertaking a merger that will create shareholdings by South African residents in a foreign entity.

The procedure for seeking approval from the exchange control authorities primarily involves the submission of a written application and supporting documents through one of South Africa's authorised foreign exchange dealers appointed as such by the South African Reserve Bank. These include all of the leading South African commercial banks (they are all authorised dealers). The process is generally informal as there are no other prescribed forms.

The exchange control authorities are particularly concerned about the skirting of regulatory duties and taxes by residents and non-residents transacting over South Africa's borders and are therefore specifically watchful of 'loop structures'. This occurs when a South African resident acquires an

interest in a foreign company, which is itself conducting business in or has interests in South Africa. The authorities will be wary of particular 'circular' investments being routed through South Africa and could demand special prior approval for transactions of this nature.

#### 4.4.2 Industry-specific regulation

##### ***Banking***

For control and ownership of banks in South Africa, the legislation dictates that any entity (either local or foreign) may not acquire more than 15% of the shares or voting rights in a bank (or its controlling company) without prior regulatory approval. The greater the control or ownership sought, the more stringent the approval requirements become. Any holdings between 15% and 49% require approval from the South African Registrar of Banks, while the approval of the Minister of Finance is required for holdings above 49%. Regardless of the extent of control or ownership sought, the Banks Act states that no acquisition may be contrary to the public interest.

The Minister of Finance may overrule the jurisdiction of the competition authorities in bank mergers, if in his discretion he decides that it is in the public interest to do so.

##### ***Broadcasting and electronic communications***

The Electronic Communications Act (No. 36 of 2005) regulates the issuing of a licence to operate or own either commercial broadcasting or electronic communications network services. It establishes a clear advantage favouring South African residents over 'foreign nationals' (a term not actually defined in the Act).

With regard to commercial broadcasting, the Act stipulates that a foreign national may not, directly or indirectly, exercise control over, or have a commercial interest in more than 20% of a broadcasting licensee. It also states that no more than 20% of the directors of a licensee may be foreign nationals.

In the case of foreign nationals applying for a licence for electronic communication network services, the Act provides that only South African residents or South African companies may apply for a licence.

##### ***Insurance***

The acquisition of a 25% shareholding or more of an insurer in South Africa requires the approval of the insurance registrar, who can refuse an application on public interest grounds.

##### ***Air services***

Air services are deemed to be services of significant importance in South Africa and the authorities aim to keep such services strongly under the control of South African residents.

Consequently, the Air Services Licensing Act (No. 115 of 1990) provides that only South African residents or South African companies (of which at least 75% of the voting rights must be held by South African residents) may be issued an air services licence. An exemption from these thresholds can however be granted by the Minister of Transport.

These seemingly strict requirements are currently being tested and queried by parties interested in pan-African flight services.

##### ***Mining and minerals***

In terms of the Mineral and Petroleum Resources Development Act (No. 28 of 2002) (MPRDA), an application for a prospecting right, mining right or associated rights, may be refused by the Minister of Mineral Resources if the granting of the right could result in:

- 'an exclusionary act'
- the prevention of fair competition, or

- a concentration of the specific minerals under the control of the applicant.

Similarly, the Precious Metals Act (No. 37 of 2005) provides that the South African Diamond and Precious Metals Regulator (the DPM regulator) must take the Black Economic Empowerment Charter for the mining sector into account in considering applications for licences, permits or certificates. In addition, the DPM regulator can refuse an application for 'public interest' reasons (not defined in this Act either).

The 'public interest' concept is also used in the MPRDA which obligates the regulator to ensure that the grant of a prospecting, mining or associated rights, will further objectives of the MPRDA regarding the welfare of all South African citizens and the provision of opportunities for economic participation to South African citizens previously disadvantaged by the system of 'apartheid'. The requirement for Black Economic Empowerment (see more detail below) in relation to South African mining assets, invariably requires a degree of economic participation in mining companies by historically disadvantaged South Africans (HDSA) through ownership and voting participation. Although, theoretically, multinationals are afforded some leeway in satisfying these requirements in that they are allowed to implement so-called 'equity equivalents' as an alternative to HDSA ownership in a South African mining subsidiary, in practice, a foreign investor in a South African mining business would usually have to ensure that a 26% equity interest is held by HDSAs.

It is clear that, like air services, mining as a sector is extremely important to South African business and identity. Therefore the granting of prospecting and mining rights is strictly regulated, as are transfers of existing rights. In order for a prospecting or mining right (or any interest in either) to be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of, special written approval from the Minister of Mineral Resources must be obtained. This includes acquiring a controlling interest in a company that holds such rights or interests. Only if the change in control is within a listed company, can the ministerial consent be waived.

The recently published Mineral and Petroleum Resources Amendment Bill contemplates significant changes to the present mining regulatory regime. It envisages even stricter governmental control of the transfer of shares in mining companies and of the prospecting or mining rights held by mining companies. It also contemplates power being granted to the Minister of Mineral Resources to designate certain minerals as 'strategic minerals' which would then be subject to export control; and the introduction of measures to stimulate greater local beneficiation of South African minerals. The Bill has however been subject to severe criticism by both local and multinational mining companies with South African mining interests, and has been referred back to the South African parliament for further consideration and public consultation.

#### 4.4.3 Import/export controls

Import and export controls are administered by the International Trade Administration Commission of South Africa (ITAC) under the International Trade Administration Act 2002. An import/export permit will be required from ITAC to import/export 'controlled goods'. Out of approximately 6,650 tariff lines in the South African version of the International Harmonised Commodity Description and Coding System, 276 are under import control and 177 under export control.

Products subject to import/export control include, radioactive isotopes and chemical elements for medical and industrial purposes; pneumatic tyres; products subject to the 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances; fossil fuels; arms and ammunition; gambling devices; used electronic equipment; used medical equipment; used aircraft; and waste and scrap.

Export control measures are also exercised to comply with the provisions of the Montreal Protocol on Substances that Deplete the Ozone Layer and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The import and export control measures or restrictions are limited to those allowed under relevant World Trade Organization Agreements.

#### 4.4.4 Black economic empowerment policies

Black economic empowerment (BEE) is a process driven by the South African government through legislation, which aims to remedy historical racial imbalances and achieve economic transformation by increasing the number of 'black people' (African, Indian and Coloured South African citizens) who participate in, manage and control the South African economy. BEE is fundamental to economic activity in South Africa and aims, through a mix of compulsion and incentive, to encourage the opening-up of the economy to those previously excluded by the system of 'apartheid'.

The intention is for BEE to be broad-based. This entails:

- a 'scorecard approach' in terms of which companies are rated on various pillars of empowerment (each carrying a number of points), including: ownership; management control; employment equity; skills development; preferential procurement; enterprise development; and socio-economic development, and
- a drive to spread the benefit of BEE across a broad group of black people including black women, black young people, black workers, black unemployed people and black people with disabilities.

The mechanism for the advancement of the BEE objectives contained in the Broad-Based Black Economic Empowerment Act (No. 53 of 2003; BEE Act) has been the creation of The Codes of Good Practice on Broad-Based Black Economic Empowerment (the Codes), which are binding on government institutions. These institutions must apply the Codes in a wide range of interactions with the private sector, including contractual relationships and the issuing of business/operational licences. The Codes provide a detailed framework for government institutions to measure the contribution to BEE by businesses, pursuant to the institutions' statutory obligation to perform such measurement under the BEE Act. The Codes regulate government interaction with all sectors of the economy. Private enterprises are not obliged to apply the Codes and the Codes simply provide the means for determining an enterprise's BEE status. Non-compliance with the Codes will not result in a civil or criminal sanction but the Codes aim (through a process of economic compulsion) to ensure that the private sector (in dealing with the organs of state and public entities) complies with the BEE criteria. If an enterprise seeks a licence, concession or contract to provide goods or services to, or partnership agreement with, any organ of state or public entity, BEE is one of the factors that is taken into account in deciding whether or not to award the benefit being sought. Furthermore, entities that do not themselves seek any licence, contract, etc., from any public entity or organ of state may prefer to procure goods and services from entities that have good BEE credentials because this improves their own BEE status.

Certain industries, such as construction, mining, financial services and liquid fuels have, through legislation regulating those industries, developed transformation charters providing for BEE in those particular industries. Under the Codes, such charters can be recognised as 'transformation charters', which are binding only upon the businesses in that industry and not on organs of state or public entities. Transformation charters can also be afforded the elevated status of 'sector codes', whereupon they will bind the industry sector participants and organs of state and public bodies alike. In the absence of an industry charter/sector code for a specific industry, the Codes will be taken account of in any BEE measurement of the entity in question.

The amended Codes were published in October 2013 and are expected to come into force on 1 May 2015. The New Codes will increase the emphasis on certain priority BEE elements including black ownership and skills transfer.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

A securities transfer tax is levied on the transfer of shares (certificated and uncertificated) at a rate of 0.25% of the higher of the amount of the consideration for or fair market value of the shares. The target company is liable for payment of the tax but parties are free to agree to reimburse the target.

## 5.2 Acquisition of Assets

Transfer duty is levied on the value of any property acquired by any person by way of a transaction or in any other way. 'Property' means land and fixtures and includes real rights in land, rights to minerals, a share or interest in a 'residential property company' or a share in a share-block company, for example. The tax is payable by the person acquiring the property. The currently applicable transfer duty rates are set out below.

Value of property (ZAR)	Transfer tax rates (ZAR)
0–600,000	0%
600,000–1 million	3% on the value above 600,000 but not exceeding 1 million
1 million–1.5 million	12,000 plus 5% on value above 1 million but not exceeding 1.5 million
1.5 million+	37,000 plus 8% on the value above 1.5 million

## 5.3 Mergers

Merger relief is available in respect of transfer taxes, provided the applicable requirements are fulfilled.

## 5.4 Value Added Tax

The transfer of a business or assets constitutes a vat-able supply attracting VAT at the standard rate of 14%. If, however, the sale of the business or assets is capable of being structured as the transfer of a business as a going concern and both the seller and purchaser are registered VAT vendors at the effective time of the sale, the transaction can be zero-rated for VAT.

# 6. Employee Issues

## 6.1 Method of Transfer under Local Law

### 6.1.1 Acquisitions of shares

Where control of a business is transferred by way of a share transfer and the legal identity of the employer remains the same, there is no need to provide for the transfer of employment contracts. The rights and obligations existing between the employer and employees will remain in existence after the share acquisition.

After the share acquisition, should the employer, under new direction and ownership, wish to make changes to the employment relationship, it may do so by way of negotiation or industrial action.

### 6.1.2 Acquisitions of assets

The automatic transfer of employees in an asset sale takes effect pursuant to the provisions of section 197 of the Labour Relations Act 1995 (LRA), provided that the asset sale comprises the sale of a business (which includes the whole or a part of any business, trade, undertaking or service) from one employer to another employer, as a going concern.

### 6.1.3 Transfer of business

If a transfer of business as a going concern takes place, employees who are assigned to the business transfer automatically, i.e. by operation of law in terms of s. 197 of the LRA. The new employer (i.e. purchaser) is automatically substituted in place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer of the business and the transfer does not interrupt an employee's continuity of employment. All the rights and obligations between the old employer and an employee at the time of transfer continue in force as if they had been rights and obligations between the new employer and an employee.



Any act of the old employer before the transfer, including dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered an act of the new employer.

Generally, terms and conditions that cannot transfer automatically due to their specific structure, e.g. benefit plans, commission, bonus or stock option arrangements, if any, should be replicated as closely as possible and must be on the whole not less favourable to the employee than the current position. This deviation from identical continuation is only applicable where the continuation is technically impossible or unreasonable by objective standards. Any changes to compensation and/or benefits require the affected employees' written consent, and that consent will be valid only if the employees are fully aware of their right to be transferred under identical terms.

The automatic consequences of a transfer of business may be amended through collective bargaining between either the old employer, the new employer, or the old and new employers acting jointly, and the appropriate employee representative body or person. In any such negotiations, the employer(s) must disclose all relevant information that will allow effective engagement by the employee representative body or person.

## 6.2 Approval or Consultation Requirements

The old employer and/or the new employer must notify each of the transferring employees in writing of the transfer. The notice ought to include the following information:

- that their employment will be transferred in terms of the LRA
- that the old employer and new employer have agreed to a valuation, as at the date of transfer, of the following:
  - leave pay accrued to transferred employees
  - severance pay that would have been payable to the transferred employees in the event of a dismissal by reason of operational requirements, and
  - any other payments that have accrued to the transferred employees but have not been paid.
- The terms of the written agreement between the old employer and the new employer regarding:
  - which employer is liable for paying the sums referred to above, and in the case of the apportionment of liability between them, the terms of the apportionment, and
  - what provision has been made for the payments contemplated above if any employee becomes entitled to receive a payment in future.

Provided the employees are automatically transferred to the new employer as set out above, there are no additional statutory approval or consultation requirements; but the above procedures are recommended as best practice.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

If the new employer intends to make any transferring employees redundant, it should consider carefully the employees' rights to damages in an unfair dismissal case, as a dismissal will be automatically unfair if the reason for the dismissal is simply a transfer of business as a going concern, or a reason related to a transfer of business as a going concern.

Despite this, if the operational requirements of the new employer genuinely necessitate a reduction of the workforce, then the new employer may commence redundancy proceedings.

Under South African law, when an employer contemplates redundancies due to operational requirements (i.e. structural, economic, technological or similar needs), it must undertake a process of consultation. The law requires the consultation process to commence when redundancies are contemplated, so a decision to retrench cannot be a *fait accompli* (i.e. pre-determined) as the employer cannot have taken the decision to retrench before the consultation process commences. If the employer has already taken (or seems to have taken) such a decision before consultation, the entire process is likely to be undermined on the basis that it is procedurally unfair and each of the retrenched employees will be entitled to approach the authorities for relief. In such circumstances, the relief is likely to be granted. It is therefore imperative that the employer consults with its employees in good faith when redundancies are contemplated.

The persons who must be consulted are:

- if a collective agreement exists, those persons identified in the collective agreement
- if there is no collective agreement, the workplace forum (the employee representative body)
- if there is no workplace forum, any trade unions representing the employees, or
- if there is no trade union, the employees likely to be affected individually, or their representatives nominated for this purpose.

The consultation process is commenced by the employer issuing written notice inviting the employees to consult with it. The notice must include all relevant information, including:

- reasons for the proposed dismissals
- alternatives considered by the employer before proposing the dismissals, and reasons for rejecting each of those alternatives
- the number of employees likely to be affected and the job categories in which they are employed
- the proposed criteria for selecting which employees to dismiss
- the time when, or the period during which, the dismissals are likely to take effect
- the severance pay proposed
- any assistance that the employer proposes to offer to the employees likely to be dismissed
- the possibility of future re-employment of dismissed employees
- the number of employees employed, and
- the number of employees the employer has made redundant on the basis of its operational requirements in the preceding 12 months.

The employees must be afforded an opportunity to make representations and/or suggestions on any of the issues listed above. If the employer rejects the employees' representations and/or suggestions, it must give reasons. If any representations and/or suggestions are made in writing by employees, the employer's response must similarly be provided in writing.

The consultation process is a joint consensus-seeking process. In other words, the parties must try to reach agreement on the different issues, such as:

- appropriate measures to avoid dismissals
- appropriate measures to minimise the number of dismissals

- appropriate measures to change the timing of the dismissals
- appropriate measures to mitigate adverse effects of the dismissals
- the method and criteria for selecting employees to be dismissed (however, if there is no agreement, the employer must use fair and objective criteria in making the decision), and
- severance pay for the dismissed employees.

If an employer employs more than 50 employees and contemplates large-scale redundancies, there are additional considerations, most notably whether a facilitator may be appointed to assist in the consultation process (as best practice would dictate).

### 6.3.2 Penalties

Where transferred employees terminate their employment because the new employer, after transfer, altered the employee terms and conditions of employment either without consultation, or in a way that has the effect of employing transferred employees on terms and conditions that are on the whole less favourable to them than those provided by the old employer, those resignations may constitute constructive dismissal. Constructive dismissal is recognised as an unfair dismissal in South African law.

Should any employees be unfairly dismissed (i.e. due to procedural and/or substantive unfairness), the following remedies are available to dismissed employees:

- reinstatement (usually with back-pay)
- re-employment either in the work in which the employee was employed or in other reasonably suitable work on terms that are on the whole not less favourable than before, or
- compensation.

The re-instatement/re-employment of a dismissed employee are the primary remedies available and are generally ordered in all cases where there is an unfair dismissal unless:

- the employee does not want to be re-employed
- a continuation of the employment relationship would, under the circumstances, be intolerable
- it is not reasonably practicable for the employer to reinstate/re-employ, or
- the dismissal was only unfair in the procedural sense.

If re-instatement/re-employment is not ordered, the remedy must take the form of compensation in addition to any other sums the employee may be entitled to.

In the case of an unfair dismissal, the maximum compensation limit is 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. In the case of an automatically unfair dismissal, the maximum compensation is 24 months' remuneration, calculated on the same basis.

# Spain

## 1.1 Overview

Spain can now be considered a sophisticated market for M&A transactions. EU harmonisation has had a significant impact on the traditional continental legal landscape, such that the legal system can nowadays be said to meet European standards.

The Spanish Administration is split into three levels: national, regional, and municipal (local). All three levels have different regulations and authorities granting licences and permissions, with businesses generally requiring licences and permits from regional and/or local authorities.

## 1.2 General Legal Framework

Business acquisition agreements are not regulated by any specific law, and their content can, and will vary greatly depending on the covenants, agreements and undertakings of the parties to the agreement.

Acquisition agreements are, however, subject to the general provisions of the Civil Code, the Commercial Code, the Companies Act and the Commercial Registry Regulations, among others. The Companies Act is relevant to a number of M&A issues, with mandatory provisions regulating, among other matters, financial assistance for the purchase of shares, share capital amendments and requirements for the payment of dividends.

## 1.3 Corporate Entities

Spanish Corporate Law provides for a wide range of company types. The most commonly used are limited liability companies, either in the form of:

- *Sociedades Anónimas* (SA, i.e. corporations), or
- *Sociedades de Responsabilidad Limitada* (SRL or SL, i.e. limited liability companies).

Sole shareholder companies are permitted under Spanish Law and no major restrictions apply to them, other than the requisite of adding the word '*unipersonal*' (i.e. sole shareholder) or its abbreviation 'U' (so we often see SLU or SAU) to the corporate name and the obligation to keep a special book to record agreements between the company and the sole shareholder.

### 1.3.1 Corporations (SA)

A corporation (SA) is a corporate structure mostly designed for large corporations that require the availability of control mechanisms or sophisticated legal structures. Listed companies or companies which must comply with investment regulations must take the SA form.

An SA may adopt special rules to call meetings, meet the minimum quorum or set voting rights. Operationally, therefore, the SA resembles a typical US corporation.

The minimum capital required to incorporate an SA is EUR60,000, of which at least 25% must be paid-in upon incorporation. Payment of the outstanding portion of capital must be carried out as indicated in the company's by-laws.

### 1.3.2 Limited liability companies (SRL/SL)

By contrast to SAs, SRLs were originally conceived to be used for small or family-owned companies where trust and personal relationships are the founding principles. For this reason, the legal structure and operational mechanisms of an SRL are less sophisticated and in general, more flexible than those of an SA. That said, Spanish corporate law imposes significant restrictions on the transfer of quotas of SRL companies and the statutory voting requirements are more stringent than those applicable to an SA. Nowadays, most of the Spanish subsidiaries of multinational companies adopt the form of SRL companies.

The minimum capital amount required to incorporate an SRL is EUR3,000 – all of which must be paid-in upon incorporation.

## 2. Acquisition Methods

In Spain, share purchases are generally more common than asset purchases. However, an asset purchase has advantages that may, in certain circumstances, make it more attractive to a purchaser, e.g. the purchaser might favour an asset purchase in order to limit inheritance of liabilities to the assets acquired, rather than to the whole company (although the purchaser may in any case be liable for certain pre-transfer liabilities in relation to labour, tax and environmental matters).

### 2.1 Acquisition of Shares

Shares in SA companies may be represented either by share certificates or accounting entries, and may be freely transferred (unless the by-laws set out otherwise when shares are registered, e.g. specific first refusal rights in favour of other shareholders or the company itself). Shares represented by share certificates could be registered (in favour of a specific person) or unregistered (in favour of whomever holds the certificate at any time). If shares are registered shares, they can be transferred by endorsement of the relevant share certificates to the purchaser for registered shares. Transfer of unregistered shares is performed by handing over the relevant certificates, but the transfer will not be effective *vis-à-vis* third parties, until notarised before a notary public (for transfers carried out without the intervention of a financial institution or securities broker). Notarising transfers of shares (even if not legally required) is common practice. Transfers of registered shares must in addition be recorded in the Shareholders' Register.

SL share capital is represented by quotas, which are not 'negotiable securities' and cannot be represented by share certificates or accounting entries. An SL cannot be listed on the securities markets. SL quotas must be transferred by means of a notarial deed (and the transfer recorded in the Quotaholders' Register).

A share purchase agreement (SPA) is usually prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction. Contracts, or, in some cases, administrative authorisations/permits/licences may contain 'change of control' provisions which trigger the need for prior consent of the counterparty to the contract or the relevant public authority to complete the sale.

Share deals are not subject to consultation or approval by employees, although it is common practice to inform employees as a matter of courtesy. However, if as part of the share deal it is envisaged that employment-related measures will be adopted which will imply material changes in working conditions, geographical mobility, dismissals, etc. of the employees, it will be necessary to open a consultation with employee representatives to inform and negotiate with those representatives the measures to be taken and their effect on employee working conditions (see 6).

### 2.2 Asset Acquisitions

The purchase of all of the assets of a company is regarded as a 'going concern purchase' and not as the purchase of each individual asset. However, each individual asset must be transferred in accordance with the formalities for a transfer that applies to that type of asset. For some assets, this will simply be the case of delivering the asset to the purchaser, but in other cases the formalities are more prescriptive, as is the case with real property (which requires notarisation and registration with the relevant public registry), *in rem* rights (e.g. mortgage, pledge), or intellectual property (e.g. trade marks).

Permits and licences are not automatically assigned in transfers of the business' entire assets (i.e. transfers of going concerns), so an application for consent to assign will have to be made to the relevant authority, or a new licence or permit will be required – which may be a disadvantage for some asset deals. Contracts are not automatically assigned either. Tax and labour liabilities may be transferred as part of the asset purchase.

An asset purchase agreement (APA) is usually prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction.

Asset deals do not require prior consultation with or approval of employees, although there is an obligation to inform employees where an entire business is being sold. As with share acquisitions, if as part of the asset deal it is envisaged that employment-related measures will be adopted (e.g. material changes in working conditions, geographical mobility, dismissals, etc.), it will be necessary to open a consultation with employee representatives to inform and negotiate with those representatives the measures to be taken and their effect on employee working conditions (see 6).

## 2.3 Mergers

Under Spanish Law, two or more companies can merge either by incorporation or by absorption.

In mergers by incorporation, the merging companies are wound up without going into liquidation and are succeeded by a new company, incorporated as a result of the merger, which acquires, by universal succession (transfer by operation of law), all assets and liabilities (including contracts, except where the contract itself prevents such a transfer). The former shareholders of the extinguished companies become shareholders of the successor company in accordance with the share exchange rate agreed as part of the merger.

In mergers by absorption, one or more companies (the absorbed companies) are wound up without going into liquidation and are absorbed by another company (the surviving company) which acquires, by universal succession, all their assets and liabilities. The former shareholders of the absorbed companies become shareholders of the surviving company in accordance with the share exchange rate agreed as part of the merger.

Mergers can thus be used in Spain as an alternative business transfer method, and Spanish law additionally regulates other reorganisation operations, including partial or total demergers or spin-offs, and global assignments of assets and liabilities, which also have the advantage of universal succession.

Spanish law allows and regulates all of such reorganisation operations cross-border.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

The parties in an M&A negotiation are under a duty to act in good faith. Anyone in breach of that duty will have to compensate for direct damage caused (normally the costs of the negotiations) in the event of unjustified breach of negotiations.

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Spanish purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common (all types, including working capital adjustment, cash-free debt-free, NAV adjustments).
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	Usually prepared by buyer.
4	Is the balance sheet audited?	Not necessarily, although common in medium-sized and large deals.

5	Is an earn-out common?	Not common. Used exceptionally in industries where sellers continue being involved (e.g. advertising).
6	Is a deposit common?	Not common.
7	Is an escrow common?	Not common.
8	Is a break fee common?	Uncommon.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	Uncommon, typically resisted by sellers, only available where there is a long period before execution and completion and limited to very specific events.
10	Is the MAE general or specific?	Specific is more common.
11	Quantification of MAE?	Common.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	More common in certain sectors and if sellers are individuals. Waterfall provisions common.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Generally get this for private deals, but some sellers resist and seek to mitigate this by adding exceptions and limitations. NB: competition law issues around potential 'gun-jumping'.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules is common but limited to things like lists of contracts or employees. Confirmation of representations and warranties at closing is common. Where material breach, right to terminate.
17	Is a separate tax covenant/indemnity or tax deed common?	Common.
<b>Representations &amp; Warranties</b>		
18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen and often quantified by reference to a Euro amount.
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge is often qualified (frequently by reference to a specific group).
20	Is a warranty that there is no materially misleading/omitted information common?	Uncommon, but used sometimes.
21	Is disclosure of data room common?	Common. References to 'fully, fairly and specifically disclosed' or to equivalent wording to define meaning of 'disclosed' common.

## Repetition of Representations & Warranties

- |    |   |   |
|----|---|---|
| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?  | Repetition at completion common. Not common between signing and completion. Bring-down certificate at completion is common. |
| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard?   | True and accurate in all material respects is common.   |
| 24 | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Common.   |

## Limitations on Liability

- |    |  |   |
|----|--|---|
| 25 | What is the common cap amount (as a percentage of purchase price)?   | Commonly less than 100%. Ranges from 10%–50% in larger deals and up to 100% in small deals.   |
| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Usually warranties only.  |
| 27 | What are the common exceptions to the cap?   | Key warranties are often excepted (e.g. title, capitalisation, authority). Tax and other specific areas of concern/identified liabilities generally are not capped or have higher caps. |
| 28 | Is a deductible or basket common?  | Both are common (to exclude small claims).  |
| 29 | Is a <i>de minimis</i> common?   | Common.   |
| 30 | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | General survival of 18–24 months common. Common to carve-out fraud, tax and social security (statute of limitations).   |
| 31 | Is warranty insurance common?  | Uncommon. Used occasionally in some private equity deals, as well as with insolvent/distressed sellers.   |

## Reliance

- |    |  |            |
|----|--|------------|
| 32 | Do financiers seek to rely on purchaser's due diligence reports? | Sometimes. |
|----|--|------------|

## Set-offs against Claims

- |    |  |                               |
|----|--|-------------------------------|
| 33 | Is a set off against claims for tax benefits common? | Common.                       |
| 34 | Insurance proceeds?                                  | Common for actually received. |
| 35 | Third party recoveries?                              | Common for actually received. |



**Damages, Knowledge**

36	Obligation to mitigate damages?	Common.
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Common to have provisions dealing with impact of knowledge of buyer (no liability if buyer had knowledge except for tax and other identified liabilities).

**Dispute Resolution**

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. Common to choose Spanish law if target is in Spain.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. ICC arbitration in London or Paris or arbitration administered by a Spanish arbitral body in a Spanish venue common.

**Stamp Duty**

41	If stamp duty is payable, is it normally shared?	No stamp duty payable on share sales (unless assets of target include real estate under certain circumstances).
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### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares

Agreements for the sale of shares must be in writing, and where involving SL companies, the sale must be documented through notarisation and comply with the transfer restrictions specified in the company's by-laws. Transfers of unregistered SA shares carried out without any intervention of a financial institution or securities broker also require notarisation. Market practice in the majority of cases is for transfers of shares in SA companies to also be notarised.

#### 3.3.2 Transfers of assets

The general rule is that the transfer of assets and assignment of contractual positions does not require any special formality for their validity and effects, and can be carried out by executing a private agreement by seller and buyer where assets being transferred are identified and a price allocated to each asset. Certain exceptions require notarisation and/or registration with a public registry: e.g. real estate, government contracts, contracts which take the form of a public deed, or assets under leasing or renting or subject to specific registration requirements. While not required by law, the parties often choose to notarise asset purchase agreements (APAs) in order to benefit from notarisation effects (e.g. certainty of date and content *vis-à-vis* third parties or authorities).

Also as a general principle of Spanish law, contracts may be assigned only with the mutual consent of the parties, unless the contract expressly states otherwise. While the contracts may include a provision authorising the parties to assign the same, normally the contracts to be assigned/acquired would require the prior written consent of the counterparty to be assigned.

#### 3.3.3 Mergers

The steps involved in a merger, which in general terms follow a very similar process in both spin-offs and global assignment of assets and liabilities, are:

- *Preparation of the merger project* (or common draft terms of merger): the members of the management bodies of each company participating in the merger draw up and sign a merger project. The merger project must be approved by the shareholders of each company

participating in the merger within six months of the merger project's date. Failure to approve the merger project makes it void. The project will contain a full description of the proposed merger process and its terms and conditions, including the share exchange rate applicable, as well as other information detailed in the relevant laws regulating the operation

- *Expert's report:* if any of the merging companies is a corporation (SA) or a *sociedad comanditaria por acciones* (an entity type which would be equivalent to a limited partnership with shares), the members of the management bodies of each of the merging companies must request the commercial registry to appoint one or more independent experts to issue reports on the merger project and/or the net value contributed by each merging company. Where more than one expert is appointed, the law also provides the directors with the option of requesting that only a single report be prepared between them. The report is divided into two parts, the first including an assessment of whether or not the share exchange rate is justified (including their opinion on whether the methods used to calculate such exchange ratio are adequate). The second part of the report, which is applicable when the surviving company is an SA and new shares in the same are issued as a result of the merger, must confirm whether the net equity of the absorbed entities fully covers the value of the new shares issued<sup>1</sup>

The law regulating mergers and similar reorganisations provides that the first part of the expert's report is not required if that has been approved by all the shareholders of all of the merging companies

- *Directors' report:* the directors of each of the merging companies must draw up a report containing detailed explanations and justifications for the merger project from a legal and economic point of view, with reference in particular to the exchange rate and to any particular difficulties in valuing the companies intervening in the merger. It will also address the impact, if any, of the merger on shareholders, creditors and employees
- *Information obligations:* each of the merging companies must comply with certain information obligations in respect of its shareholders, employees (to be exercised through the employees' representative body if such a body exists), bondholders, and special rights holders. From the moment the notice calling the shareholders' meeting to decide upon the merger is published, certain documents and information should be made available to all those parties
- *Mergers following leveraged acquisition:* if during the three years prior to the merger any of the merging companies has incurred in leverage to take the control of any of the other merging companies or to acquire certain assets of the same, the following rules apply:
  - the merger project must indicate the resources and terms for repayment of the debt incurred to take control or acquire the assets
  - the directors' report must indicate the reasons for taking control or acquiring the assets, reasons for the merger, and a financial and economic plan indicating the resources available and objectives to be reached
  - In this type of merger, a report from independent experts will be required even if it is an abbreviated (simpler) merger,<sup>2</sup> including a statement from the expert about the existence of financial assistance (financial assistance being prohibited under Spanish law: e.g. repayment of the debt for acquisition using the assets of the target entity)
- *Merger balance sheet:* mergers must be carried out on the basis of merger balance sheets (i.e. those approved by the General Meetings of the entities involved). The merger balance sheets can be the annual balance sheets which form part of the annual accounts of the entities participating, as long as they have been closed within the last six months of the date of the merger project. Where the annual balance sheet does not comply with this requirement,

<sup>1</sup> The establishment of the exchange ratio is carried out by the directors, and set out in the merger project and in the report from the directors on the same. The experts appointed need to assess whether that ratio is justified.

<sup>2</sup> As may apply to parent-subsidary mergers.

a balance sheet dated within the three months preceding the date of the merger project must be prepared, employing the same methods and criteria used in preparing the latest annual balance sheet. If the company is subject to audit, the merger balance sheet must be audited by the company's auditors and the auditor's report submitted to the general shareholders' meeting for approval

- *Approval of the merger:* the merger project must be adopted by the general meeting of each merging company. After the resolutions have been passed, a notice must be published in the Commercial Registry *Official Gazette* and in two leading local newspapers in the provinces where each of the merging companies has its registered office. The notice must refer to the shareholders' and creditors' rights to obtain the full text of the adopted merger agreement and of the merger balance sheet, and to the creditors' rights to challenge the merger. The merger cannot be completed by registering it to make it public before one month has elapsed from the date of the last publication of the notice of the proposed merger. During this period, the creditors of each of the merging companies have a window in which to challenge the merger to protect their credit rights and call-in payment or satisfactory guarantee to secure payment of any debt/monies owed
- *Merger deed:* the merger has to be notarised in the form of a 'public deed'. The resulting merger deed must then be registered with the commercial registry, after which the registered entries of the dissolved companies will be cancelled. The merger becomes effective for all legal purposes (notwithstanding accounting effects)<sup>3</sup> on the date of registration of the merger deed with the commercial registry of the domicile of the surviving company. That registration is considered to be retroactive to the date of filing of the deed with the commercial registry
- *Abbreviated merger:* no expert's report, directors' report or share exchange documentation (assuming no increase of capital of the surviving entity takes place) will be required if the merging companies fall under any one of the situations described below:
  - the surviving company owns the entire share capital of all of the absorbed company or companies
  - the absorbed company has the entire share capital of the surviving company
  - the surviving company and the absorbed company or companies are owned directly by the same shareholder (merger between 'sister' companies).

Also known as a 'simplified' or 'special' merger.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

When effecting a merger or an acquisition involving Spanish companies or foreign companies conducting business in Spain, Spanish competition rules must be taken into consideration. The Competition Act 2007 regulates merger control.

A transaction is subject to merger control when it affects, on a lasting basis, the structure of control of the undertaking, or that part of an undertaking being acquired or merged. 'Control' is defined as rights, contracts or other means which (either separately or in combination), confer on the acquirer the ability to exercise decisive influence on an undertaking. Control may be held by one party alone or by several parties acting jointly.

In particular, the following transactions may be subject to approval:

- a merger between two or more formerly independent undertakings

<sup>3</sup> Accounting effects of a merger are determined by accounting regulations, so it may or may not be the case that such effects coincide with the remaining effects of a merger.

- the acquisition of control over the whole or part of one or more undertakings
- the creation of a joint venture and, in general, the acquisition of joint control over one or more undertakings, when these undertakings perform, on a lasting basis, all the functions of an autonomous economic entity.

Notification must be given once the parties reach agreement. The transaction cannot be implemented until the competition authority has approved the same.

The merger control and anti-trust regulators are:

- the *Comisión Nacional de los Mercados y la Competencia* (CNMC), which is the authority with power to review and approve a concentration following notification, on its own initiative and/or after receiving a complaint from a third party. The competition directorate is in charge of the investigation and will submit its proposal to the council which will then resolve
- the council of ministers, which can also assess key concentrations (those already challenged by the council) on the basis of criteria of general interest, e.g. environmental protection, social policies, etc.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Spanish purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

### 4.2.1 Thresholds

Mandatory notification is required if either of the following thresholds is met:

- the combined volume of sales of the parties in Spain is equal or greater than EUR240 million and at least two of the parties to the concentration have a minimum volume of sales in Spain of EUR60 million each, or
- as a result of the transaction, a market share (at a national level or in a geographical market) equal to or greater than 30% in any relevant market is acquired. A filing is triggered if:
  - the combined share (acquirer plus the target) is above 30%
  - the target alone has a market share of above 30%. If the buyer alone has a market share above 30% and there is no overlap of activities between the parties to the transaction, notification is not required (see *de minimis* exception below).

An exception to this general rule applies, namely that the transaction does not need to be notified where:

- the volume of sales of the target in Spain does not exceed EUR10 million, and
- the individual or combined market share is not equal to or greater than 50% in any relevant market.

If a transaction subject to approval has not been notified, the CNMC can request the parties to notify the transaction. In such case, the filing must be made within 20 days.

Failure to notify and/or going ahead to implement a transaction without approval may be sanctioned with a fine up to 5% of the global total turnover of the infringing company(ies) in the preceding fiscal year. Where parties are unsure whether an operation should be notified or not, a written inquiry may be filed to the CNMC to seek guidance on the matter, describing the transaction and including accurate and relevant information such as turnover or estimates of the market shares of the parties.

#### 4.2.2 Notification form

The information and data to be included in the notification form is prescribed by the Competition Implementing Regulation, Royal Decree 261/2008, as follows:

- information about the notifying party and all the other parties to the concentration, including the full name or corporate name, address, telephone and fax numbers and tax identification number or identification code, the nature of the company's business, and the names, addresses, telephone and fax numbers of persons the CNMC may contact with their job position. If the notification is submitted by a representative(s) of the parties, a power of attorney in favour of that person must also be included (but that power of attorney need not be notarised or apostilled)
- a description of the structure of the transaction (e.g. merger, asset purchase, management contract, joint venture, etc.):
  - the likely effects of the transaction on the undertakings concerned
  - whether the merger is to be accomplished through a public bid or tender offer
  - the structure of ownership and control of the combined entities once the transaction is completed
  - a full list of the companies controlled, either directly or indirectly, by the parties to the concentration
  - a similar list of companies or individuals who control the parties to the merger/concentration, and
  - documents attesting to the approvals of the transaction by the governing bodies of the parties.
- a description of financial details, including any funds or financial aid or support which will be received, what kind of support that will be and how much (monetary amount), as well as the proposed or expected date of implementation of the transaction
- information regarding turnover of the parties in Spain, the EU and worldwide
- information on the relevant market, including:
  - a brief description of the goods or services sold or provided by each of the parties to the transaction, and a description of those products and/or services which are regarded as interchangeable or substitutable
  - the total size of the market over the last three fiscal years, including Spanish and EU markets
  - market shares of the parties and of each of the major competitors
  - prices of main competitors during the last fiscal year
  - a description of the distribution channels used by the parties to the transaction
  - major customers and suppliers of the parties
  - the characteristics of supply and demand in the industry, and
  - a detailed description of any barriers to entry for any new competitors (e.g. tariff and non-tariff barriers, limits on access to raw materials and skilled labour, difficulties in creating a distribution network, regulatory obstacles, etc.).

- ancillary restrictions in the agreement, e.g. non-compete clauses, confidentiality clauses, purchasing obligations, licence agreements
- general information about the potential benefits of the concentration, with an emphasis on how the concentration would improve production or marketing, promote technical or economic development, and benefit customers or end-users.

A short-form notification (requiring less detail) can be used if either of the following four circumstances is met:

- where none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a market which is upstream or downstream of a market which another party to the concentration is engaged in, or
- where the participation of the parties in the market, being negligible or minor, is not capable of having a significant effect on competition. Participation of minor importance will be considered to exist when the participants in the concentration:
  - do not have a combined market share above 15% in the same product or service market at national level or in a geographic market defined within Spain, or
  - should they reach a combined market share of more than 15% and less than 30% the addition of share (the new/to-be-acquired share) is not greater than 2%, and
  - reach an individual or combined share of 25% in a product market upstream or downstream of a market in which the other party to the concentration is active at national level or in a geographic market within Spain, or
- where a party is to acquire sole control of a company or several companies or parts of companies over which it already has joint control, or
- where, in the case of a joint venture, the latter is not engaged and is not expected to engage in activities on Spanish territory or its activities in Spain will be marginal. The activities of a joint venture will be considered to be marginal in Spain if its turnover does not (or is not expected to) exceed EUR6 million.

#### 4.2.3 Timing

The CNMC must take a decision within the following statutory deadlines:

- Phase I review: one calendar month from the date of receipt of the notification by the CNMC  
  
The CNMC may grant clearance before the end of the one-month term if the transaction does not raise competition issues and in particular where the parties have pre-notified the transaction (making it logical to seek to pre-notify transactions before formal notification)
- Phase II: if the CNMC proposes that the transaction should be further investigated, the concentration will go to second phase investigation. The CNMC must deliver its decision within two months of that date (of the CNMC's decision to initiate Phase II proceedings). After the two months, if the CNMC resolves to prohibit the concentration or attaches any conditions to its authorisation, the Minister of Economy and Competitiveness will have 15 days from that decision, to refer the decision on the concentration to the Council of Ministers for reasons of general interest. Then, the Council of Ministers may:
  - confirm the resolution issued by the CNMC, or
  - decide to authorise the concentration, with or without conditions. The Council of Ministers' decision must be duly justified on reasons of general interest other than protecting competition, such as: defence and national security, protection of public security or public health, free movement of goods and services within the national

territory, environmental protection, promotion of technological research and development, guarantee of adequate maintenance of the objectives of sectorial regulation. The Council of Ministers has up to one calendar month to adopt and notify its decision on the concentration.

Note that concentrations which extend beyond the national borders of any one member state may be scrutinised at EU level. If the annual turnover of the combined businesses exceeds specified thresholds in terms of global and European sales, the proposed merger would be notified to the European Commission. This allows companies trading in different EU member states to obtain clearance for their mergers in one go. See Appendix A for further reference on the EU Merger Control.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Until CNMC authorisation is granted, the parties cannot act as if the merger or concentration has been approved. This means that the acquirer cannot exercise 'control' over the target or over the entity being merged with. Care must be taken in the waiting period (pending CNMC approval), in relation to potential problems surrounding 'gun-jumping' and information exchange.

#### 4.3.1 Gun-jumping

'Gun-jumping' occurs where companies implement the transaction before approval is granted by the CNMC.

Parties may not implement the transaction pre-approval, and the CNMC can fine the parties for doing so (up to 5% of total global turnover).

#### 4.3.2 Information exchange between competitors

Until the transaction is approved and implemented, acquirer and target or the merging companies remain competitors and should behave as such, including respecting the rules on information exchange. Any exchange of commercially strategic, sensitive information before completion (e.g. current or future prices, customer details or market strategies) between the parties to the transaction may infringe the law, because information exchange creates a risk of future co-ordination of strategies between competitors. For this reason, companies must act on the market and remain independent until the transaction is approved and implemented by the parties.

For further information on information exchange and gun-jumping see Appendix B.

### 4.4 Anti-Bribery, Corruption and Money Laundering

#### 4.4.1 Offences by individuals

The Spanish Criminal Code (the CC) is the main source of anti-corruption regulation in Spain. It criminalises both bribery of a public servant or official (public corruption) and bribery in commercial relations (private corruption).

Public corruption is defined as directly, or by means of a third party:

- offering, promising or requesting, or
- receiving or accepting an offer or a promise of anything of value such as to induce a public official to carry out an act contrary to his/her public duties, or refrain from doing, or delay in doing what the public official is legally obliged to do.

The CC defines 'public official' broadly to include any individual exercising public functions. This concept includes not only public servants, but also members of parliament (both the national parliament and the autonomous community parliaments), elected members of city halls, employees of publicly owned companies and employees of public concessions, among others.

The offence of public corruption is punishable by three to six years' imprisonment, fines of up to EUR288,000, and disqualification from acting as a public servant or official for a period of 7–12 years.

Private corruption refers to:

- the promise, offer or grant by an executive, director, employee or agent of a legal entity, or
- the receipt, request or acceptance by an executive, director, employee or agent of a legal entity, directly or by means of a third party, of an unjustified benefit or advantage as compensation for the recipient breaching his or her obligations in the acquisition or sale of goods or services.

The offence of private corruption is punishable by six months' to four years' imprisonment, disqualification from the right to carry out an industrial or commercial activity for a period of one to six years, and a fine amounting to three times the value of the benefit or advantage.

Both briber and recipient of the bribe can be held liable, since the CC penalises both active and passive bribery.

The CC also penalises bribery of foreign public officials, defined as directly or by means of a third party, offering, promising or granting any unjustified advantage in order to corrupt (or have the intention to corrupt) a foreign public official or official of an international organisation, for their own benefit or that of a third party, with the purpose of causing them to act or not to act in relation to the performance of their public duties to obtain or maintain a contract or any other irregular profit in connection with international economic activities. This offence is punishable by two to six years' imprisonment and a fine of up to EUR288,000.

Finally, the CC also penalises 'influence peddling' or putting undue influence on a public servant or official. This offence is punishable by six months to two years' imprisonment, a fine amounting to twice the value of the benefit, and (if applicable) a prohibition on acting as public servant or official from three to six years.

#### 4.4.2 Offences by legal entities

If any of the above crimes have been committed by a director, officer, representative or employee of a legal entity, for the benefit and on behalf of that entity, those parties may also be criminally liable, sanctionable by:

- fines (the amount will vary depending on the crime, any aggravating or attenuating circumstances, and the specific company's financial condition)
- the winding up of the entity
- suspension of the legal entity's activities for a maximum period of 5 years
- closure of premises and establishments for a maximum period of 5 years
- a prohibition on the legal entity's continuing to engage in the activities in the course of which the offence was committed (this may be for a defined period of up to 15 years, or indefinite)
- ban from receiving subsidies and other public grants, public sector contracts and tax/social security rebates and incentives, for up to 15 years, or
- judicial intervention, for as long as considered necessary (up to a maximum of 5 years).

Spanish legal entities will only be criminally liable for corruption crimes committed by their employees if the employees have been able to commit the corruption crime because of failure by its directors or officers to exercise 'due control' over them. Consequently, despite the fact that the CC does not explicitly recognise compliance programmes as mitigating circumstances of criminal liability (see, however, **4.4.3**), the majority of Spanish legal doctrine has concluded that if the legal entity can prove that it had exercised over its employees due control by means of a compliance programme or a similar instrument, it would not be criminally liable.



#### 4.4.3 New Criminal Code

On 21 January 2015 the Spanish Congress approved a Bill amending the CC, which is expected to be enacted, with any relevant amendments, in due course.

This Bill clarifies the issues relating to compliance programmes adopted by companies, confirming that such programmes may exempt companies from criminal liability for crimes committed in their names and to their advantage by their legal representatives, directors, or employees. It further provides that the only way a legal entity can escape criminal liability is to show that:

- its decision-making body has adopted (and effectively implemented) suitable supervision and control measures to prevent crimes from being committed
- the supervision of the operation of and compliance with the prevention model has been entrusted to a body with self-governing powers of initiative and control
- the individual perpetrators of any such crime have fraudulently evaded the prevention models, and
- the supervising body has not failed in proper supervision and control.

The Bill fleshes out the content and requirements of such programmes in great detail.

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Under Royal Decree 664/1999, foreign investments are defined as investments effected in Spain by individuals or companies not residing in Spain. The determining factor is the place of the investor's residence.

With the exception of certain sectors (air transport, radio, television, gambling, telecommunications, and national defence), the liberalisation of foreign investment in Spain was further enhanced by Royal Decree 664/1999. Following completion of any investments in Spain, however, non-residents must notify the authorities of the investment for statistical purposes (as set out below). Such monitoring does not unduly hinder or delay an investor's freedom to make payments or to transfer currency or other assets. It should be noted, however, that Spanish authorities are also entitled to request reasonable information relating to a transaction and to require that the relevant payments or transfers are carried out through licensed financial institutions.

#### 4.5.1 Exchange controls

Exchange controls have been liberalised for a long time in Spain. The general rule is that any currency is freely transferable through a registered bank, from Spain to any country and vice versa.

Individuals and legal entities resident in Spain – other than payment service providers registered with the Bank of Spain (banks and financial institutions, among others) – must report to the Bank of Spain (*Banco de España*):

- any type of transaction (i.e. transactions and operations involving collections, payments, and/or money transfers abroad, as well as changes in accounts or financial positions as debtors or creditors) which they carry out with non-residents, and
- the credit and debit balances with foreign parties and variations of the same.

The information must be sent electronically to the Department of Statistics of the Bank of Spain using the forms available on the official website [www.bde.es](http://www.bde.es). Alternatively, an XML file, also published on the website, may be sent.

Individuals and legal entities must obtain an electronic certificate issued by one of the certification authorities of the Bank of Spain.

The frequency of the reporting is the following:

- Monthly, within 20 days of the end of each calendar month if the value of the transactions or the balance of assets and liabilities for the previous year is EUR300 million or more
- Quarterly, within the 20 days of the end of each calendar quarter if the value of the transactions or the balance of assets and liabilities for the previous year are EUR100 million or more but less than EUR300 million
- Annually, within 20 days of the end of each calendar quarter if the value of the transactions or the balance of assets and liabilities for the previous year is less than EUR100 million.

If those limits are not reached in the requisite time-period, but are exceeded within the current year, this must be reported at the time the limits are exceeded.

If the value of the transactions or the balance of assets and liabilities for the previous year are not more than EUR1 million, they need only be reported to the Bank of Spain if the bank expressly requests this, and within two months of such a request.

The annual report may be filed in summary form if the value of the transactions or the balance of assets and liabilities for the previous year do not exceed EUR50 million.

#### 4.5.2 Foreign investment approvals and notifications

The General Directorate of Economy and Trade (*Dirección General de Comercio e Inversiones*) must be notified of any foreign investment in the following list:

- participation in Spanish companies, including incorporation, share purchases, capital increases or any other operation resulting in a participation in the share capital of or the acquisition of rights in a company (e.g. subscription of rights over future shares, etc.)
- incorporation of a Spanish branch or increase of the funds of that Spanish branch
- acquisition of transferable securities represented by the issuance of debt by a Spanish resident or company
- participation in investment funds recorded with the Spanish Stock Exchange Commission (*Comisión Nacional del Mercado de Valores*)
- purchase of real estate property located in Spain amounting to at least EUR3,005,060.52, or any other amount if the investment originates from a tax haven (as listed in Royal Decree 1080/1991)
- other forms of investment (e.g. foundations, community property, etc.) amounting to at least EUR3,005,060.52, or of any other amount if the investment originates from a tax haven (as listed in Royal Decree 1080/1991).

The notification must comply with certain requirements set out below and it must be executed by filing the corresponding form (Forms DP-1 to D-4).

When the investment originates from a tax haven, prior notification of the investment must be given in addition to any subsequent notification (explained below) required by any other foreign investment. As an exception, prior notification is not required in respect of an investment carried out by means of an acquisition of listed shares or when the foreign participation does not reach 50% of the Spanish company.

Notification is generally for information and statistical purposes (although the tax authorities may use the information for tax collection purposes). The notification does not limit the ability of the foreign investor to remit income outside of Spain, where it is derived from the investment, or proceeds of any subsequent divestment of which notification must also be made.

As a general rule, with a few exceptions, a foreign investment in Spain must be legalised by means of a document granted before a Spanish notary public by the non-resident investor and notification must be made with the General Directorate of Economy and Trade. The Spanish notary public can also file the notification on the corresponding form. Before doing so, however, the investor must show that it has obtained relevant administrative consents or clearances, and that the foreign contribution has taken place, and the investor is not a resident of Spain. Where such contribution is a transfer of funds, a bank certificate should be obtained.

Once the foreign investment is legalised, the form must be presented for registration at the General Directorate of Economy and Trade of the Ministry of Industry, Tourism and Trade. Registration is completed and the papers that certify it normally obtained within a few days after the filing of the form.

#### 4.5.3 Industry-specific regulation

Most activities are unrestricted in Spain and can be freely conducted by any company. By way of exception, however, operating in some specific areas needs previous administrative authorisation. Regulated sectors include telecoms, energy, defence, natural resources and financial services (and are subject to prior administrative authorisation or notification).

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Share transactions are normally exempt from transfer tax and VAT. A share transaction would, however, become taxable if the tax authorities find that a transaction has been carried out as a share deal instead of via a direct acquisition of the asset with the sole purpose of avoiding taxes (tax evasion). In that case, the transaction would be taxed as if the asset had been directly acquired.

### 5.2 Acquisition of Assets

If the deal does not entail transfer of all the assets of a business unit, the indirect taxation implications would need to be considered on a case-to-case basis. For instance, real estate may accrue either VAT or transfer tax, while shares, receivables and customer lists can be transferred on a tax-free basis.

If real estate is among the assets of the going concern transferred, a transfer tax will be levied on the transfer of that real estate. Transfer tax normally applies on the acquisition of a property, except where VAT is applicable.

The purchase of real estate property outside the scope of VAT (normally when the seller is not a business or a professional/entrepreneur) would be subject to transfer tax.

### 5.3 Mergers

Company reorganisations, (e.g. mergers, spin-offs, etc.) are not subject to capital duty tax, even if they do not fall within the tax neutral regime. The transfer to Spain of a company's effective centre of management or registered office from another member state is also not subject to this tax.

For VAT, even if the merger is not included in the special tax regime, as long as the transfer of assets and liabilities of a business or a part of them could be considered as an independent and separate activity, the transfer will not be subject to VAT.

### 5.4 Value Added Tax

Share deals are normally exempt from Transfer Tax and VAT, except in cases of tax fraud (see **5.1**) in which case the transaction would be taxed as if the asset was directly acquired.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

The mere transfer of shares is not considered a transfer of an undertaking for employment law purposes and will not involve the transfer of employees but simply a change in the ownership of the employer (not a change in the employer *per se*). As such, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the purchaser therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the target company.

If there is an integration of the target company's business with the purchaser's business post-share acquisition, this is likely to constitute an acquisition of assets or a business transfer, and the considerations set out below will be relevant.

#### 6.1.2 Acquisition of assets

If a company transfers a group of assets that functions independently and that permits continuity in the business and services, a transfer of undertakings will occur and the affected employees will automatically transfer to the acquiring company. The 'autonomous' assets and activity can be all or part of the companies' business, such that the transfer could entail the entire company's business or an identifiable part of it. The employees receive a new employer automatically, whether or not they 'approve' the new employer. The employee cannot oppose the transfer of the business simply because the employee does not want an employment relationship with the new employer. If the employees do not want to become employees of the new employer, they can terminate their contracts by voluntary resignation, without payment of any severance compensation. The employee(s) nonetheless may attempt to contest the transaction alleging that the requirements of Article 44 of the Worker's Statute (which governs the transfer of undertakings), have not been met and, thus, that the transaction does not result in their automatic transfer to the new owner. Such employee allegations would need to be proven in court to prevent the transferee from becoming their new employer.

#### 6.1.3 Mergers and spin-offs

If a company merges with another company, a transfer of undertakings will likely occur and the affected employees will automatically transfer to the resulting company. If a company implements a spin-off and transfers a group of assets that function independently and that permit continuity in the business and services after the transaction, a transfer of undertakings will likely occur and the affected employees will automatically transfer to the purchaser company. See the other considerations set out in **6.1.2** since the consequences for the employees described in this paragraph apply only to transfers of employees due to mergers or spin-offs.

#### 6.1.4 Transfer of business

##### ***Acquired Rights Directive and automatic transfer of employees***

The EU Acquired Rights Directive has been implemented in Spain under Article 44 of the Worker's Statute, which governs the transfer of undertakings. By that provision, a change of ownership of an enterprise, work centre or production unit does not terminate employment relationships. As a result of the change of ownership, employees may automatically transfer by operation of law to the new owner. This happens only where the following requirements are met:

- whatever is transferred should have the capacity to function autonomously or independently
- that independent division or 'unit' should continue to function without a significant interruption to business activity before and after the transfer
- the transfer should involve the transfer of some form of title to property (as opposed to simply being a transfer of pure activity). However, in late 2005, the Spanish Supreme Court changed its position on the requirement that title to property transfer and held that if the nature of the activity was predominantly based on human resources, the transfer of undertakings rules

could be triggered without the transfer of property, if (and only if) the acquiring company hired an essential (in number and competence) part of the personnel of the acquired company.

If the requirements for an automatic transfer under Article 44 exist, the transferee will automatically take over the employment rights and obligations of the transferor.

If the transaction does not meet the requirements to qualify as a transfer of undertakings, the employees will not automatically transfer to the other company, and each employee will either need to consent to his or her transfer to the different entity or will remain employed by the transferor.

### ***Considerations on automatic transfers and employee-related liability***

Where employees are transferred automatically to the new employer (under Article 44), the following should be taken into consideration.

#### ***General employees***

The transfer does not give rise to any severance rights or obligations under law. The transferee assumes all previously existing rights and obligations of the transferor with respect to the employees. The employee becomes an employee of the transferee automatically, whether or not the employee consents to this.

As the transferee takes over all the rights and obligations of the transferor and becomes the new employer, as a general rule it assumes all of the obligations of the transferor with respect to the employee, regardless of the source of those obligations, i.e. whether the transferor has assumed these voluntarily or involuntarily, by collective bargaining agreement, by execution of an individual contract, or by any other previous actions, express or implied.

The transferee becomes jointly and severally liable with the transferor for a period of three years for all those obligations unsatisfied prior to the transfer in respect of existing employees, including:

- compliance with all relevant court decisions
- past salaries due
- any outstanding social security payments
- any fines for breach of applicable regulations, and
- pension plan obligations.

However, liability for social security taxes owed to the Social Security Administration are subject to a four-year statute of limitation, and other statutes of limitations may also apply depending on the specific liability involved.

With regard to obligations to employees arising after the transfer, both the transferor and the transferee are held jointly and severally liable the day after the transfer if the transfer is subsequently declared a felony. Otherwise, only the transferee is held liable for obligations arising after the transfer.

Unless otherwise agreed, any collective bargaining agreements applicable to the affected employees are automatically transferred to the transferee until either its date of expiry or the day a new collective agreement is applied to that business unit.

Employees representatives of the transferor will maintain their representative status only if the transferred business unit maintains its autonomy.

#### ***Senior executives***

Senior executives who qualify for the application of the special employment rules of RD 1382/1985 may terminate their contracts upon a business transfer or where there is a significant change in the ownership of the employer that results in either a change in the company's board of directors or a

change in the main company's activity or approach to the activity, as long as the executive exercises this right during the three-month period following the changes. If that is the case, the executive is entitled to the severance compensation agreed in his/her contract or, in the absence of any relevant contractual provisions, to compensation equal to seven days' salary for each year of service up to a maximum of six months' salary.

## 6.2 Approval or Consultation Requirements

### 6.2.1 Works Council/employee information requirements

If the transfer of undertakings will involve an automatic transfer of employees, both the transferor and the transferee are obliged to inform the employees' representatives or works council (including relevant trade unions) of a proposed business transfer with sufficient notice prior to the transfer. If the company has no employee representatives, each of the company's employees should be furnished specific and relevant information. The information to be provided should include the following:

- the proposed date of the transfer
- reasons for the transfer
- legal, economic and social implications of the transfer for employees involved, and
- any measures to be taken with regard to the employees. If the transaction is a merger or spin-off, the employees' representatives must receive the same corporate documentation as the shareholders.

The law provides that the information should be provided reasonably in advance, without specifying any minimum period; what is considered reasonable notice depends on the circumstances, but normally is not less than 15 days. Where there is a merger or company spin-off, the relevant information should be provided when the shareholders' meeting is called to pass the relevant resolutions.

A company may be fined for failure to comply with this obligation to provide information. However, no consent is required to implement the transfer.

Works councils are entitled to provide a non-binding report within 15 days of being notified of the transfer of business if the transfer occurs through a merger, consolidation or modification of the legal status of the company, and this may have an impact on the employees. This report is regarded as an opinion on the transfer and its impact on the employees, and not binding either on the works council, employees or company.

Note, however, that failure to comply with works council's information rights on a transfer will result in an administrative sanction and a fine of between EUR626–EUR6,250 may be imposed on the company by the labour authorities either as a consequence of the authorities investigating the transaction under their own initiative or as a consequence of a complaint from the works council.

### 6.2.2 Works Council consultation requirements

If the transferor or transferee anticipate adopting new measures in connection with the employees as a result of the transfer, they must consult with the employees' representatives on the measures to be adopted and their consequences for the employees. The consultation must occur sufficiently in advance of the implementation of the employment measures. Depending on the nature of the measure, a specific procedure may apply that should be considered as well. For example, the consultation period for a collective transfer or collective substantial alterations to working conditions is a minimum of 15 days. Regardless of whether or not an agreement is reached with the employees' representatives during this period, the employees involved and their representatives must be notified of the company's decision with at least 7 days' prior notice.

Also depending on the nature of the measure, employees may be entitled to terminate their employment contract and receive a severance payment. If, for example, the employees are affected by a collective transfer that requires a change of residence, the employees are entitled to terminate

their employment contract and receive severance compensation equal to the value of 20 days of their total salary calculated pro rata from their total salary for each year worked at the company, capped at a maximum of 12 months salary (i.e. the employee's annual salary is divided by 365 days to work out daily salary for severance purposes).

In such cases of relocation which entail a required change of residence, affected employees alternatively have the right to contest the transferor's decision individually (or collectively with other affected employees) if they consider such substantial alteration of working conditions is unjustified.

If the court rules that the relocation measure(s) adopted by the company are unjustified, employees are entitled to be relocated to their previous workplace and under the previous working conditions. Should the company breach the court's resolution declaring the measure(s) to be unjustified, affected employees would then be entitled to terminate their employment contracts and subsequently be entitled to receive compensation for unfair dismissal.

Similar procedural requirements and rights to termination with severance pay also may apply to certain other substantial alterations of employment conditions.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

It is common that the purchaser requests the seller to dismiss all or some employees that would otherwise be transferred to the purchaser before the transfer. However, recent case law has declared those dismissals null and void, and that the seller has acted fraudulently by impeding the employees to automatically transfer to the purchaser by virtue of law. The courts can order reinstatement of employees with back pay.

After the transfer of undertakings has effectively taken place, the purchaser can decide to make all or some of the transferred employees redundant, following the specific dismissal process established by law. Depending on the number of employees to be made redundant, it will have to follow the collective redundancy process (which involves consultation with the employees representatives or, in their absence, with the employees) or take the individual dismissal route (which does not require consultation).

The collective redundancy process will be triggered if the relevant threshold is met:

- if 100 or fewer employees are employed by the entity in Spain, then it is triggered if 10 or more are made redundant within a 90-day period
- if 100–300 employees are employed, 10% of the employees or more need to be made redundant within a 90-day period
- if more than 300 employees are employed, 30 or more need to be made redundant within a 90-day period.

When all employees are made redundant, the collective redundancy process will also be triggered but only if the company employs more than 5 employees.

If the number of dismissals does not meet these thresholds, the dismissals are subject to the individual dismissal procedure which is a more straightforward process.

### 6.3.2 Penalties

Penalties will be imposed for failure to follow the information or consultation requirements, ranging from EUR626–EUR6,250.

## Sweden

### 1.1 Overview

Sweden is a sophisticated market for M&A. Being a civil law jurisdiction, its law is typically statutory.

### 1.2 General Legal Framework

Sweden has been a member of the EU since 1 January 1995, and Swedish business law has been moving successively towards conformity with EU standards since then. Many changes had already been made under the European Economic Area (EEA) agreement, which came into force on 1 January 1994.

The most frequently used business vehicle in Sweden is the limited liability company (*Aktiebolag/AB*), which is governed by the Companies Act (2005:551) which came into force in Sweden on 1 January 2006 replacing the previous Act of 1975.

### 1.3 Corporate Entities

The Companies Act provides for two forms of limited liability companies: private and public. The distinction is based on whether a company may offer shares and other securities to the general public. Companies wishing to offer such securities must be public limited liability companies, while other companies are called private companies.

The shareholders of the AB are generally not liable for its obligations beyond their share in the equity, and are thus shielded from unforeseen liabilities.

#### 1.3.1 Private companies

A private company is not allowed to offer its shares to the public. The shareholders' liability is limited to the amount paid (if any) for shares which they own. The minimum share capital for private companies is SEK50,000.

Swedish limited liability companies are managed by a board of directors. The board of a private limited liability company must consist of at least one director. If the board consists of one or two directors, at least one deputy director must be appointed. The managing director and at least half the number of directors and deputies, if any, must, without special permission from the Companies Registration Office, be resident in the EEA, i.e. the EU member states, Norway, Iceland and Liechtenstein.

Under the Act on Board Representation for the Privately Employed (1987:1245), the employees of a business employing at least 25 persons may appoint two members and two deputy members to the board of directors. A prerequisite for board representation, however, is that there is a collective agreement in force between a trade union and the employer.

#### 1.3.2 Public companies

In contrast to a private company, the shares in a public company may be offered to the public (subject to compliance with detailed regulatory requirements). As with private companies, the shareholders' liability is limited to the amount paid (if any) for shares which they own. The minimum share capital for public companies is SEK500,000.

Public limited liability companies must have a board of directors consisting of at least three persons. The same residency requirements and employee representation rights apply to public as to private companies. At least half of the directors of the board must be appointed by the general meeting of shareholders. Public limited liability companies must have a managing director.



## 2. Acquisition Methods

The purchase of a Swedish business can take a number of different forms. There are basically three vehicles for taking control of a business in Sweden: via the acquisition of shares; acquisition of assets; or a merger. The most common form of acquisition, especially for the acquisition of a larger business, is the purchase of shares. Transfers of assets are generally preferred as regards sale of small businesses. Mergers are seldom used for acquisitions, but are used more frequently for internal reorganisation purposes.

### 2.1 Acquisition of Shares

Shares in a Swedish company constitute personal property. Thus, the Sales of Goods Act (1990:931) (SGA) is, *prima facie*, applicable to their sale and purchase. However, it is not entirely clear to what extent the SGA is pre-empted by the Act on Debt Instruments (1936:81). The issue is relevant because if the SGA applies, then (in the absence of express agreement between the parties) a number of provisions of the SGA detailed below would be applicable to a sale of shares. If not, then the Act on Debt Instruments provides that the seller is not responsible for the solvency of the transferred goods unless it has been warranted or represented by him.

Case law indicates that the SGA applies if all the company's shares (or a majority of them) are sold, while the Act on Debt Instruments is applicable if only a small portion of shares are sold. It is not clear, however, what proportion of shares in terms of percentages is involved and when one act takes over from the other. Purchasers of shares therefore normally require warranties and representations from the seller.

### 2.2 Acquisition of Assets

In the case of an acquisition of assets, the SGA will, however, apply. The SGA establishes strict requirements and, accordingly, purchasers should seek extensive indemnifications and sellers should be wary of giving extensive representations and warranties. The SGA regulates the relationship between seller and purchaser. The SGA contains provisions concerning the determination of price, place of delivery of the goods and the time for the performance of the purchase contract, any right of retention of goods or withholding of payment, the risk of loss of the goods, the yield on the goods, delays on the part of the seller or the purchaser, defects and deficiencies in the goods, interest payable on the price and insolvency rules. Furthermore, the SGA regulates the rejection of goods and the repudiation of contracts of purchase, and title to the goods. However, the SGA is not mandatory and may be excluded by agreement between the parties.

### 2.3 Mergers/Other Acquisition Methods

The Companies Act contains rules on formal mergers, amended in order to comply with the EC Third Company Law Directive, the subsequent Directive 2011/35 concerning mergers of public limited liability companies, and the EU Directive on Cross-Border Mergers of Limited Liability Companies. The Third Directive and the subsequent Directive regulate mergers of public companies, whether by acquisition, formation of a new company, or absorption of a wholly-owned subsidiary. Although these Directives were required to be implemented in respect of Swedish public companies only, the merger regulations apply to all companies, due to the possibility of mergers occurring between public and private companies.

The Cross-Border Directive applies to mergers of limited liability companies formed in accordance with the law of a member state and having their registered office, central administration or principal place of business within the Community, provided at least two of them are governed by the laws of different member states.

Swedish limited liability companies may merge only with companies with legal residence within the EEA. In practice, companies registered within the EEA will almost without exception be regarded as having their legal residence in the EEA.

Under the Companies Act, a merger may take place:

- between an acquiring company on the one hand and one or more transferring companies on the other hand, where the acquiring company remains in existence (absorption), or
- between two or more transferring companies which form a new, acquiring company, where none of the existing companies remain in existence (combination).

Holders of convertible debt instruments, debt instruments with a right to subscribe for new shares, participating debentures or other securities carrying special rights in the transferring company must have at least equivalent rights in the acquiring company as they had in the transferring company unless they are entitled, according to the merger plan, to have their securities redeemed by the acquiring company.

The Companies Act also contains rules on the division (demerger) of companies. Under these rules, division may either be effected by:

- the acquisition of all rights and obligations of the company being divided by one or more companies, after which the company being divided is dissolved without prior liquidation proceedings, or
- one or several companies acquiring the rights and obligations from the company being divided without dissolving it.

In both cases consideration will be paid to the shareholders of the company being divided, either in the form of cash or in the form of shares.

European Companies (so-called *Societas Europaeas* or 'SE companies') are separately regulated in Sweden, but are in general treated as Swedish limited liability companies. Council Regulation No. 2157/2001 on the Statute for a European company (SE) includes specific conditions regarding how SE companies may merge. The Cross-Border Directive and the Swedish cross-border merger regulations apply to SE companies in the same way as to Swedish limited liability companies.

### 3. Negotiation, Signing and Closing

#### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Swedish purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. Cash-free debt-free adjustments are normal. Working capital and NAV adjustments are also common.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	This is usually prepared by the buyer.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	More common in smaller transactions, particularly if seller retains stake. Less common where seller is completely exiting.

6	Is a deposit common?	Extremely uncommon.
7	Is an escrow common?	Common.
8	Is a break fee common?	Uncommon.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	Uncommon.
10	Is the MAE general or specific?	Both are seen.
11	Quantification of MAE?	Sometimes.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, but not from private equity sellers. Waterfall provisions uncommon.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close	Common. NB: competition law issues around potential 'gun-jumping'.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Uncommon to update disclosures. Updating schedules is common but limited to things like list of contracts. Notification of possible breach is common. In case of material breach, right to terminate.
17	Is a separate tax covenant/indemnity or tax deed common?	Uncommon.
<b>Representations &amp; Warranties</b>		
18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen, but are often not quantified (other than specific warranties, e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are growing. Often limited to the actual knowledge and due enquiry of a specified list of senior management.
20	Is a warranty that there is no materially misleading/omitted information common?	Less common than in the past.
21	Is disclosure of data room common?	Common.
<b>Repetition of Representations &amp; Warranties</b>		
22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates not very common.

23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects is common but often carve-out for fundamental representations, which must be absolutely true.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.

### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Commonly less than 100%. Mid-cap and larger deals see lower caps, e.g. 10%–30%.
26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Usually warranties only.
27	What are the common exceptions to the cap?	Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps.
28	Is a deductible or basket common?	Deductible is more often resisted and a tipping basket more common.
29	Is a <i>de minimis</i> common?	Common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 12–18 months common. Common to carve out fraud. Tax is commonly longer than general warranties.
31	Is warranty insurance common?	Increasingly common in private equity exits.

### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Yes, becoming common.
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### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Common.
34	Insurance proceeds?	Common for actually received.
35	Third party recoveries?	Common for actually received.

### Damages, Knowledge

36	Obligation to mitigate damages?	Required by law for damages; however usually explicitly stated in purchase agreement.
37	Exclusion of consequential damages?	Limitation to 'direct damage' common.

- |    |  |         |
|----|--|---------|
| 38 | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge has no effect on warranty/indemnity? | Common. |
|----|--|---------|

### Dispute Resolution

- |    |   |  |
|----|---|--|
| 39 | Does local law allow for a choice of governing law? What is the common governing law? | Yes, but it is generally accepted market practice that Swedish law applies for Swedish target companies. |
| 40 | Is litigation or arbitration more common? If arbitration, where?                      | Arbitration is more common. SCC or ICC in Stockholm.   |

### Stamp Duty

- |  |                |
|--|----------------|
| If stamp duty is payable, is it normally shared? | No stamp duty. |
|--|----------------|

## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

There is no legal requirement for an agreement for the sale of shares to be made in writing. However, market practice in the majority of cases is for a share transfer to be documented between the seller and the buyer by way of a written share purchase agreement (SPA). In Sweden these agreements are typically more concise than in the United States or the United Kingdom.

### 3.2.2 Transfers of assets

There is no general legal requirement for an agreement for the sale of assets to be made in writing. Transfer of land will however require specific written documentation. As with share transfers, market practice is that asset transfers are documented in a purchase agreement.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

The shares of a limited liability company in Sweden may be registered with a Central Securities Depository (CSD), and are thus called CSD companies. In CSD companies, no share certificates may be issued. Being a CSD company is however common only for listed companies or companies with a greater number of shareholders. Euroclear Sweden AB manages the share register for CSD companies.

The majority of companies are not CSD companies, and are commonly referred to as 'coupon companies'. In coupon companies, the board of directors manages the share register/shareholders' ledger. Buyers of shares will normally have to present a share certificate to the board of directors, who will then register the buyer in the share register.

### 3.3.2 Transfers of title to assets

As indicated above, in a transfer of assets, written contracts may be required by law or in order to fulfil an applicable registration requirement. For example, contracts for the sale of land must be in writing (Chapter 4 §1 of the Land Code). Perfection of the transfer of assets in Sweden normally requires a physical transfer of the assets. In the context of an M&A transaction, this is normally accomplished through the buyer taking possession of the premises of the target business.

## 3.4 Formalities for Mergers/Other Acquisition Methods

### 3.4.1 Mergers

#### ***Domestic mergers***

To initiate a formal merger process, the board of directors of the transferring company or companies and, in the case of absorption, the acquiring company, prepare a joint merger plan specifying certain information required by law. In the case of a combination, this plan serves as the certificate of incorporation of the new company. The merger plan must be examined by the authorised or approved auditors of the transferring company and, in the case of absorption, by the auditors of the acquiring company. The examination must be as comprehensive and detailed as required by generally accepted auditing standards. The auditors must submit a written report on their examination of each of the companies.

Within one month of the preparation of the merger plan, the acquiring company (or in the case of combination, the oldest of the transferring companies) must submit the plan for registration to the Companies Registration Office. Along with submitting the merger plans for registration, the merger plan must also be made public, by publication in the *Official Gazette*.

The merger plan must be submitted for approval at a general meeting of the shareholders in all the assigning companies. Such a meeting may not be held until one month after the registration has been made public unless all merging companies are private, in which case it may be held no earlier than two weeks after that date. If owners of at least 5% of all shares in the acquiring company so require, the merger plan must also be submitted to a general meeting of the shareholders of the acquiring company. Such a request must be made within two weeks of the registration of the merger plan being made public. Shareholders representing two-thirds of both the votes cast and the shares represented at the meeting, must approve the plan in order for it to be adopted.

When the merger plan has been adopted by the companies, each of them must notify this in writing to its known creditors. The creditors of the acquiring company need not, however, be informed if the auditors have stated in their report on the merger plan that they do not see the merger as entailing any risk for these creditors. The acquiring company or, in the case of a combination, the oldest of the assigning companies, must apply for permission to the registration office to implement the plan.

Having examined the application and found no bar to it, the registration office must then summon all creditors of each company involved in the merger. The summons will instruct those who wish to contest the application to state this in writing by a fixed date, failing which, they will be deemed to have consented to the application. If no such objection is made, the registration office will give its consent to the merger plan. However, if a creditor contests the application within the prescribed time, the registration office will refer the matter to the court where the registered office of the acquiring company is located. The court will grant permission for the merger if it is shown that the creditors who have contested the application have been fully satisfied or have received adequate security for their claims.

Upon the registration office's or the court's approval (as the case may be), the board of directors of the acquiring company may report the merger for registration to the registration office. The board must also, in the case of absorption, report the increase in the share capital of the acquiring company for registration and, in the case of a combination, the election of the board of directors and auditors. On registration, the transferring company or companies are dissolved.

#### ***Cross-border mergers***

To initiate the merger process, the board of directors of the transferring company or companies and, in the case of absorption, the acquiring company, prepares a joint merger plan specifying certain information required by law. The merger plan is then examined by authorised or approved auditors and, where applicable, by special examiners. One of the companies must then submit the plan for registration to the Companies Registration Office. The merger plan and the registration is made public.

The merger plan must be submitted for approval at a general meeting of the shareholders in the transferring company and, where applicable, in the acquiring company. Such a meeting may not be held until one month after the registration has been made public unless all merging companies are private, in which case it may be held no earlier than two weeks after that date. Shareholders representing two-thirds of both the votes cast and the shares represented at the meeting, must approve the plan in order for it to be adopted.

When the merger plan has been adopted by the companies, each of them must notify this in writing to its known creditors. One of the companies will then apply for permission to the registration office to implement the plan.

Having examined the application and found no bar to it, the registration office must then summon all creditors of each Swedish company involved in the merger. The summons will instruct those who wish to contest the application to state this in writing by a fixed date, failing which, they will be deemed to have consented to the application. If no such objection is made, the registration office will give its consent to the merger plan. However, if a creditor contests the application within the prescribed time, the registration office will refer the matter to the court where the registered office of the acquiring company is located. The court will grant permission for the merger if it is shown that the creditors who have contested the application have been fully satisfied or have received adequate security for their claims.

Upon the registration office's or the court's approval (as the case may be), the board of directors for the company in the country where the surviving company will have its legal residence may report the merger for registration to the registration office. The merged company is registered in this country, and the transferred company can be deregistered.

### 3.4.2 Division/demerger

Division (de-merger) is achieved by the registration of draft terms of division in writing with the registration office within one month of having been drawn up by the company being divided and each recipient company. The draft terms of division shall also be made public through publication in the *Official Gazette* and must be submitted to a general meeting of the company being divided for approval. If shareholders holding more than 5% of the shares in each recipient company so require, a general meeting of this company to approve the draft terms must also be held. The draft terms require the approval of a two-thirds majority of votes and shareholders present at the respective general meetings.

When the terms have been adopted, the company being divided must apply for permission to execute the terms. The draft terms shall be declared pending if the division is subjected to a merger filing and shall be rejected if the merger filing leads to a negative decision by the relevant competition authority.

If any of the company's creditors objects to the division, the terms may not be executed unless the creditor receives full payment or satisfactory security. If permission for the execution of the terms of division is granted, the division must be registered, and is effective from such registration. The effect of a registration is that the recipient company will assume the liabilities and the assets transferred and that the shareholders in the company being divided will become shareholders in the recipient company if shares form a part of or all the consideration. The company being divided will also be dissolved. Any complaint must be made within six months of the date of the general meeting, failing which the right to file suit is lost. A simplified procedure is available for divisions of private companies.

There is currently no specific procedure for cross-border divisions.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Competition matters are governed by the Competition Act (2008:579). The substantive competition rules in the Act are essentially identical to the EEC and to the EEA competition rules.

Under the Competition Act, the Competition Authority (*Konkurrensverket*) and the Stockholm District Court (*Stockholms Tingsrätt*) supervise and control compliance with the Competition Act. The Market Court (*Marknadsdomstolen*) is the appeal court.

A merger or acquisition must be notified to the Competition Authority if the parties to the transaction have a combined aggregate annual turnover in Sweden in excess of SEK1 billion and at least two of the undertakings concerned have an annual turnover in Sweden in excess of SEK200 million for each of the undertakings. Transactions below the second threshold may also be subjected to an obligation to notify the competition authority if particular grounds exist for doing so. One such ground may be if multiple transactions, each below the threshold, are carried out. The Competition Act also contains a specific regulation concerning multiple transactions between the same persons or companies. Such transactions carried out within two years are to be treated as one transaction. To calculate this figure, the aggregate annual turnover of the purchaser's group of companies is taken into account, whereas for the seller, only the annual turnover of the target company is accounted for.

For mergers, acquisitions and joint ventures between economic entities with an EU dimension, see Appendix A.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Swedish purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
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### Timetable

2	In practice, what is the timetable for clearance (in first phase and second phase review)?	<p>The statutory deadlines within which the competition authority must take a decision are for Phase I, 25 business days from the date a complete notification is received by the authority and for Phase II, 3 months from the date when the authority has made known its decision to instigate an in-depth investigation.</p> <p>For Phase I the competition authority will be prepared to clear a transaction earlier if the deal does not raise competition issues and in particular where the parties have engaged in an extensive pre-notification process. In practice, the clearance decision may be obtained prior to the deadline but usually (due to heavy workload or holidays) etc., the authority uses the full review period.</p> <p>For Phase II the authority will be prepared to clear a transaction earlier and the review period varies depending on the complexity of the transaction. The authority can also extend the review period one month at a time if the parties give their consent. In exceptional circumstances, the period may be extended without consent.</p>
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A merger or acquisition that fulfils the requirement for mandatory notification may be prohibited, or the acquiring company may be required to dispose of the business acquired or part of it, if:

- it is likely to significantly impede the existence or development of effective competition on the Swedish market as a whole or a substantial part of it, and
- a prohibition may be made without causing harm to essential interests of national security or economical support.

The effect of a prohibition is that the acquisition is null and void. The Competition Act does not provide for divestiture of already existing concentrations.

The competition authority has 25 business days after receiving a complete notification of a transaction to decide whether to initiate an in-depth investigation. This time-period may be extended by 10 business days if the parties offer commitments, which could be a solution in cases when the competition authority has indicated that it might have certain objections with the transaction and therefore plans on initiating an in-depth investigation. By offering the commitments the parties can avoid being involved in an in-depth investigation procedure if the commitments are accepted by the competition authority.

During those 25 or 35 business days, the parties may take no further action to complete the transaction. If no decision is issued within that period, the transaction is automatically cleared. The normal procedure is, however, that the competition authority will issue an approval or objection decision, as the case may be.

The authority must normally initiate proceedings at the Stockholm district court within three months of the date of its decision to initiate an in-depth investigation. The district court must then issue its decision within six months. If the judgment of the court is appealed to the Market Court, the Market Court has three months from the expiry of the period allowed for appeal in which to reach a final judgment.

#### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

The notification to the Competition Authority should be made before the transaction is completed and the parties may take no action to complete the transaction before the investigation period has expired. The rules regarding gun-jumping in Sweden are very similar to the EU rules and for further information see Appendix on Information Exchange/Gun-Jumping. One difference between the Competition Act and EU competition legislation is that the Competition Act does not provide for any sanctions for gun-jumping. However, the competition authority can, if necessary, impose a prohibition for the parties to take no action to complete the transaction before the investigation period has expired and this prohibition may be combined with a conditional fine order.

No commercially sensitive information may be exchanged between the parties during this period, since such exchange would risk anti-competitive information exchange infringing the competition rules. See Appendix on Information Exchange/Gun-Jumping for further information.

#### 4.4 Anti-Bribery, Corruption and Money Laundering

In Swedish legislation there is no distinction between bribery of public officials and private bribery. Further, there is no distinction between bribery of foreign or domestic public officials. However, the involvement of a public official will act as an aggravating circumstance and make it more likely that a benefit is deemed a bribe. Bribery is regulated by the Penal Code (1962:700), Chapter 10, Section 5(a)–(e). There is also some ancillary legislation that could be applicable in relation to bribery issues, such as the Marketing Act (2008:486) and the Swedish Income Tax Act (1999:1229).

In addition to the offences of taking and giving a bribe, 'trading in influence' and negligent financing of bribery are also punishable offences related to bribery. Trading in influence involves the act of taking or giving an improper benefit in order to influence a person's action or decision in the exercise of public authority or in public procurement. An individual acting on behalf of a company that provides money or assets used by a third party for the giving of a bribe may be found guilty of negligent financing of bribery.

#### 4.4.1 Consequences of bribery

##### ***For the individuals involved:***

The Penal Code establishes the same range of penalties for the public officials as for individuals that bribe public officials. The penalties are:

- a fine (proportional to the income of the individual, limited to a maximum of SEK150,000) or up to 2 years of imprisonment
- if deemed a gross crime, between 6 months and 6 years of imprisonment (the non-exhaustive lists of criteria to be considered include the position of the individual, the value of the benefits, whether the bribery has been part of systematic criminal activity or criminal activity of large proportions or otherwise is of a particularly material kind).

#### 4.4.2 For the company/legal entity:

- Administrative fine between SEK5,000 and SEK10 million (requires that the company has not done what could be reasonably expected to prevent the bribery or that the bribery has been committed by an individual in a leading position or with special responsibility for supervision).

##### ***Facilitation payments***

The Penal Code does not specifically recognise so-called 'facilitation payments'. Facilitation payments are considered improper benefits and thereby constitute bribery. Cash payments to public officials may objectively be seen as improper due to the nature of the benefit (cash) and the position of the receiver (public official).

##### ***Regulator with jurisdiction to prosecute corruption***

The Swedish Prosecution Authority has jurisdiction to prosecute corruption cases, which are processed and executed by prosecutors at its National Anti-Corruption Unit.

#### 4.4.3 Money laundering

The administrative regulations that aim to prevent companies from contributing to transactions that involves money laundering are found in the Act on Measures against Money Laundering and the Financing of Terrorism (2009:62). The Money Laundering Act implements the EU Directives on money laundering (91/308/EEC, 2001/97/EC and 2005/60/EC). The penal sanctions are set out in the Penal Code and in other penal legislation. The Act on Penalties for the Financing of Particularly Serious Criminality in Certain Cases etc. (2002:444) implements the United Nations International Convention for the Suppression of the Financing of Terrorism. This Act includes both penal provisions and regulations for businesses engaged in the financial sector regarding duties to inspect and report etc.

The Money Laundering Act applies to banks and finance businesses, life insurance companies, businesses that trade in financial instruments or conduct other financial operations, independent insurance intermediaries, investment funds, real estate brokers, casino businesses, auditors and tax advisors, among others. Those entities are prohibited from participating in transactions that could be presumed to involve money laundering. The Money Laundering Act also involves certain obligations such as controlling the identity of the party proposing the transaction, keeping records, examination and reporting duties, prohibition to disclose and developing internal routines.

#### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

No currency exchange controls, foreign investment approvals or import/export controls of general application apply in Sweden.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

The general rule is that Swedish limited liability companies must pay corporate income tax on capital gains on the profit from selling shares or receiving dividends. Accordingly, companies generally have a right to a deduction when realising a loss on shares. The capital gains tax rate for limited liability companies in Sweden is 22% (January 2015).

If a Swedish limited liability company owns shares in another Swedish limited liability company that are either:

- not listed (and not subject to continuous public listing due to market-like trading)
- listed, but the shareholder holds more than 10% of the votes in the company and has held the shares for more than 12 months, or
- the holding is motivated by the shareholder's business,

dividends and capital gains are then subject to a participation exemption and therefore tax-free.

The participation exemption is, under certain circumstances, also applicable to holdings of shares in foreign limited liability companies.

An exception from the participation exemption will apply for so-called 'shell companies', where the market value of cash, shares and other marketable instruments (other than shares held for business reasons) and similar assets exceeds 50% of the consideration paid for the shares.

If the participation exemption applies, the company does not have a right to deductions for capital losses.

### 5.2 Acquisition of Assets

Generally, transfer tax liability is only triggered on the transfer of real estate in Sweden. The tax (also known as 'stamp duty'), is based on the higher of the tax assessment value and the purchase price, and is levied at the rate of 4.25% if the buyer is a legal entity and 1.5% if the buyer is a private individual. Buyer and seller are jointly liable to pay the tax and the parties should therefore agree who shall be liable for the tax between themselves. Generally, stamp duty is paid by the transferee.

Provided that certain conditions are met, a sale of a real property is exempt from stamp duty if followed by a subsequent sale of the same property (a 'transfer purchase'). If the prerequisites for a transfer purchase are fulfilled, stamp duty is levied on the second transaction only.

A tax exemption from stamp duty on the first sale may be available if:

- the subsequent sale is made at the same terms and conditions as the initial sale. There is scope only to amend the time for accession and time for payment
- the subsequent sale is made within 3 months of the first sale
- the seller in the subsequent sale has not purchased the real property from a group company as the seller, and
- the buyer in the subsequent sale not a parent company or a subsidiary to the seller in the same sale.

In this context, by 'group company' means a company that, directly or indirectly, owns or is owned by another company and where the shareholding represents at least 50% of the votes, i.e. a transaction between a company and a minority shareholder is not disqualified from a tax exemption.

### 5.3 Mergers

According to the Swedish Income Tax Act (1999:1229), mergers are restructurings, where a company's assets, liabilities and obligations are assumed by another company (the 'surviving company') with the consequence that the assigning company is dissolved without liquidation.

The direct taxation of mergers has been harmonised by EU Directive 2009/133. Mergers that are encompassed by the Directive are according to the Swedish implementation so-called 'qualified mergers' and the capital gain (in the Directive defined as 'the difference between market value and the tax base'), shall be deferred until the assets have finally been divested or been subject to any other transaction, which is subject to taxation.

Only certain company forms may participate in a qualified merger, these are listed in the Income Tax Act which also refers to an appendix to the directive.

To be treated as a qualified merger certain requirements must be met:

- the assigning company shall, directly previous to the merger, be liable to Swedish income tax for at least a part of its business and the surviving company shall directly subsequent to the merger be subject to a corresponding tax liability in Sweden
- compensation for assumed shares may only be paid to the other owners of the assigning company (i.e. those shareholders other than the surviving company)
- the tax assessment year may not include a period exceeding 18 months when the assigning companies assessment period is consolidated with the surviving company through the merger.

If the merger is qualified, the surviving company enters into the assigning company's position for tax purposes, i.e. the tax base of the assigning company is assumed and added to the tax base of the surviving company.

In general, net operating losses from the previous year (losses carried forward) are deducted from the current profit figure. If losses carried forward exceed the current profit, the remaining losses are accumulated and carried forward (with no time limit). Loss restriction rules are applicable when a change of ownership means that the purchasing company holds more than 50% of the votes of the shares, or otherwise has the controlling influence in a company with losses carried forward from the previous year. The losses carried forward can be reduced to 200% of the purchase price and any additional losses are forfeited (blocked). Further, the remaining losses carried forward can be blocked in this way five years after the year of the change of ownership. Those restriction rules are applicable also when a company with losses carried forward is subsumed in a merger. These rules do not apply, however, when a subsidiary is absorbed, as no change of ownership occurs, but they may apply to a subsidiary's assumption of its parent company.

The Merger Tax Directive also contains special rules on tax avoidance and Sweden's general law against tax evasion applies to mergers.

### 5.4 Value Added Tax

Generally, sales of assets and services are subject to VAT at a rate of 25%. Certain sales are exempt of VAT and certain sales are subject to VAT at a lower rate.

The transfer of shares is generally exempt of VAT.

VAT may be payable on transfer of taxable assets (e.g. inventory and goodwill). However, where the transfer meets certain requirements in order to be categorised as a 'transfer of a going concern', the transfer will not be deemed as a taxable supply and no VAT will be payable.

Based on the existing legislation and case law there is a certain degree of uncertainty as to what constitutes a transfer of a whole or distinct part of the business. The question must be determined on a case-by-case basis taking into account all the facts. Facts normally considered are whether

liabilities have been acquired or if only assets have been purchased; whether the purchaser intends or actually continues to perform the business activity carried out by the seller or not; and whether personnel, client stock, trade name, premises etc. are transferred to the purchaser.

According to the Swedish Supreme Administrative Court the acquired business must be able to act as a unit and be able to realise specific business goals in order for the exemption to apply. Normally a transfer qualifies as a transfer of a going concern if the majority of the assets and liabilities are transferred to the purchaser, and more importantly, the purchaser will in fact continue the taxable activity carried out by the seller.

Consequently, for the exemption to apply it is required that:

- it is a transfer of the whole or a distinct part of the business
- the seller is VAT liable and the purchaser is or becomes VAT liable in connection with the purchase (or has the right to VAT refund), and
- the business will continue after the transfer.

The transfer agreement should also contain a VAT clause stating that both the seller and the purchaser agree that the transfer under the agreement qualifies as a VAT exempt transfer of a going concern in accordance with the Swedish VAT Act.

If the parties should agree that the transfer qualifies as a VAT-exempt transfer of a going concern, the risk is with the seller. Should the tax authority take a dissenting view regarding the VAT treatment of the agreement and instead qualify the transaction as VAT-liable, the seller would have to report and pay 25% VAT on the purchase price or, in case only part of the purchase price is subject to VAT, on the portion of the purchase price which is subject to VAT. Further, the tax authority would most likely charge interest and levy tax surcharges amounting to 20% of the non-reported VAT.

To avoid the risk of tax surcharges, should the tax authority come to a dissenting opinion on the VAT treatment, the seller (or both parties jointly) could submit an open disclosure (including a copy of the agreement) to the authority explaining why the transfer should be VAT-exempt. The agreement and the letter should be submitted together with the VAT return in the reporting period when business is transferred to the purchaser. This would normally secure VAT-exempt status and also eliminate the risk for tax surcharges and of unnecessary liquidity strains on both the seller and the purchaser.

In order to secure the seller's right to charge VAT should the tax authority consider the transfer as VAT-liable, a VAT clause securing that right should be included in the business transfer agreement. The clause should state that if the authority should qualify the transaction as VAT-liable, the purchaser undertakes to pay to the seller, against receipt of a valid invoice, VAT on the purchase price or, if only part of the purchase price is subject to VAT, on the portion of the purchase price which is subject to VAT.

Even when treating the transfer as a VAT-exempt transfer of a going concern the seller must still issue a valid invoice (without VAT) on the sale of the assets. Further, the invoice should state that no VAT has been charged since the transaction is considered as a VAT-exempt transfer of a going concern in accordance with the Swedish VAT Act.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In a share acquisition, the employment conditions of the employees of the target company remain unchanged since the employer remains the same.

### 6.1.2 Acquisition of assets

In the case of an asset acquisition, Sweden has implemented the EU Directive 2001/23 relating to the safeguard of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. This means that on the transfer of an undertaking or a division of an undertaking, the employees are entitled to transfer to the buyer. The transferred employees have the right to transfer on unchanged terms and conditions of employment. The only change is that the buyer is the new party to the employment contracts.

In Sweden, an employee may object to being transferred to a new employer. If an employee refuses to transfer the employee will remain employed with the seller but may then be exposed to a potential redundancy scenario.

## 6.2 Approval or Consultation Requirements

According to the Co-Determination in the Workplace Act (1967:580), local labour unions may to some extent influence decisions affecting their members. If there is a collective bargaining agreement in place the unions with which that agreement has been reached have certain rights including the right to be consulted about important changes to the business, such as business transfers. If no collective bargaining agreement is in place, the employer must consult with each of the unions whose members are affected. The unions can normally not veto the employer's decision, but are merely entitled to be consulted before the decision is made. If the consultation is not concluded properly, the employer will be liable for damages to the unions.

In share transfers, the target company is normally not obligated to consult with any union. However, the seller and the buyer of the shares may be obliged to consult the pending divestiture/acquisition if the transaction would entail a substantial change to their respective business.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

Swedish law does not require a written contract of employment. The employment relationship continues, unless otherwise agreed in specific cases. The Employment Protection Act (1982:80) restricts the grounds on which an employment contract may be terminated on the basis that there must be objective reasons. Such reasons may be attributable to the employee personally, such as absenteeism, or to the employer, such as redundancy. In each case, the employer must attempt to relocate the employee within the company. Employees are granted a period of notice which may range from one to six months depending on their years of service.

The basic principle when deciding which employee/s should be dismissed in a redundancy scenario is that the employee with the longest aggregate period of employment with the company is entitled to stay longest. A list should be prepared for each location/branch of the company and for each collective bargaining agreement where one exists, ranking employees according to length of service.

If the employment is terminated due to redundancy, there is no requirement for the employer to pay any redundancy compensation to the employees apart from normal salary and other benefits of employment during the period of notice.

However, if new jobs become available during their notice period or within nine months of the expiry of the employment, the employer is required to offer to re-employ its former employees. In order to be entitled to be re-employed employees must be sufficiently qualified for the open or new position and must inform the employer that they are asserting their right to re-employment.

### 6.3.2 Penalties

Damages awarded for failure to consult unions properly are normally in the range of SEK50,000–100,000 per union but can be considerably more than that. Failure to transfer employees correctly may also result in claims for damages for wrongful termination. Such damages consists of general damages for the violation of the employee's rights (normally not exceeding SEK125,000) and economic damages to compensate the employee for loss of income. The latter damages depend on the employee's aggregate term of employment and are capped at the equivalent of 32 months' salary.

### 6.3.3 Information and consultation requirements

The Co-Determination Act of 1976 requires employers to keep the trade union with which it has a collective bargaining agreement continually informed about developments in the economy of the business, matters of production and staff policy. Before any reductions in the workforce are made based on redundancy or work shortage, employers must consult the unions. If an employer is not party to any collective bargaining agreement, a similar obligation to inform nevertheless still exists in relation to every union that has a member employed by the employer.

# Switzerland

## 1.1 Overview

Switzerland is a federal state consisting of 26 cantons, which in turn comprise a number of municipalities. The country's laws and regulations are adopted at all three levels (federal, cantonal and municipal). The rules of corporate and contract law applicable to mergers and acquisitions are enacted at the federal level. The federal and cantonal tax laws applicable to mergers and acquisitions have been harmonised.

## 1.2 General Legal Framework

The legal framework for mergers and acquisitions is generally regarded as liberal and open to foreign investors, who will not face undue regulatory restrictions in Switzerland. The applicable legal framework differs slightly depending on whether an acquisition is structured as an acquisition of shares or an acquisition of assets, and different legal provisions apply to acquisitions by way of a merger.

The legal framework has changed in recent years, in particular in relation to mergers and tax, as a result of:

- the entry into force of the Merger Act in July 2004, designed to create a more comprehensive and detailed regime for corporate transactions and reorganisations such as mergers, spin-offs, transfers of businesses with assets and liabilities, and transformations of companies and other legal entities
- amendments to the Federal Direct Tax Act and Federal Act on the Harmonisation of Cantonal and Municipal Direct Taxes which set clearer rules with regard to the so-called 'indirect partial liquidation theory' after many years of turmoil and uncertainty created by a 2004 decision of the Federal Supreme Court.

## 1.3 Corporate Entities

The main forms of corporate entity in Switzerland are:

- share corporations (*Aktiengesellschaft/AG*; *société anonyme/SA*; 'corporations'), and
- limited liability companies (*Gesellschaft mit beschränkter Haftung/GmbH*; or *société à responsabilité limitée/Sàrl*, 'LLCs').

### 1.3.1 Corporations

The corporation is regulated by Articles 620 and following of the Swiss Code of Obligations (CO).

The minimum share capital of a corporation is CHF100,000. The share capital does not have to be fully paid-in, but at least 20% and a minimum of CHF50,000 must be paid-in. The shares in a corporation may be either bearer shares or registered shares and must have a minimum par value of CHF0.01. Bearer shares can only be issued if their full par value has been paid-in.

The shareholders of a corporation are in principle neither liable for any obligations of the corporation nor required to pay-in any additional share capital, except for the obligation to pay-in the share capital subscribed for.

The corporate bodies of a corporation are the general meeting of the shareholders, the board of directors, and, as a rule, the auditors. The board of directors consists of one or more individuals and is entrusted with the ultimate direction of the business of the corporation and the supervision of, and control over, the management. While being generally responsible for the management of the corporation, the board of directors is authorised to delegate the management of the business or part of the business to one or several members of the board of directors (managing directors) or to third parties (executive directors) by way of adopting specific organisational regulations.



### 1.3.2 Limited liability companies

LLCs are regulated by Articles 772 and following of the CO.

The capital of an LLC is called 'quota capital' (being divided into quotas). Each quotaholder may hold one or several quotas. The par value of each quota must be stipulated in the articles of incorporation and must be at least CHF100. However, each quota may have a different par value. The minimum quota capital of an LLC is CHF20,000 and must be fully paid-in at the time of incorporation.

Quotaholders in a LLC are in principle neither liable for any obligations of the company nor required to pay-in any additional capital (except, as stated, for the obligation to pay-in the quota capital subscribed for), unless the articles of incorporation require quotaholders to make supplementary financial contributions in excess of their capital contributions.

The corporate bodies of an LLC are the general meeting of the quotaholders, the managing officers, and, as a rule, the auditors. The managing officer(s) are entrusted with the management of the business of the LLC. All the managing officers are entitled (and indeed obliged) to collectively manage and represent the LLC, unless otherwise provided for in the articles of incorporation.

## 2. Acquisition Methods

The sale and purchase of a Swiss business can take a number of different forms but there are basically three mechanisms for taking control of a business in Switzerland: by the acquisition of shares, by the acquisition of assets or by a merger.

The most common form of acquisition is the purchase of shares. The sale of assets is generally, from a seller's perspective, less tax-efficient and is mainly used in acquisitions pertaining to a business unit or divisions not organised in one or more separate legal entity(ies). Mergers are more frequently used for internal reorganisation purposes, but can in certain circumstances also be used in acquisitions.

### 2.1 Acquisition of Shares

An acquisition of shares (or 'share sale') is from a transactional point of view much simpler than an acquisition of assets, because no individual transfers of title to the various assets of the company are necessary and all the liabilities of the company are transferred with the company without having to observe any special transfer formalities or to obtain any release from creditors. Share acquisitions also require fewer formalities as compared with acquisitions of assets. A share purchase agreement is usually signed by the parties to set out their respective rights and obligations with regard to the share sale.

### 2.2 Acquisition of Assets

Since the entry into force of the Merger Act on 1 July 2004, it has been possible to conduct sales and acquisitions of assets either as:

- transfers of assets and liabilities under the Merger Act, or as
- transfers of defined assets and liabilities under the Swiss Civil Code and the CO (a single transfer).

The advantage of the new regime under the Merger Act is that one single deed of transfer is sufficient for the assets and liabilities to be transferred by operation of law (as opposed to an acquisition of assets structured as a transfer of defined assets and liabilities in which the transfer of each and every asset and liability must be made in the form provided for in the Civil Code and the CO). The advantage of single transfers is that the buyer acquires only the liabilities listed in the agreement and transferred in that transaction. In addition, the terms of a single transfer of assets and liabilities can be kept confidential, while the documents governing a transfer of assets and liabilities under the Merger Act need to be filed with the commercial register, to which third parties may obtain access.

## 2.3 Mergers

The Merger Act contains specific rules on mergers. A merger is defined as the combining of all assets, liabilities and contractual obligations of two or more companies: the parties to the transaction being one absorbing company and one or several transferring companies. All claims and liabilities as well as all contractual obligations are transferred by law to the absorbing entity upon the registration of the merger in the commercial register. At the same time, the shareholders or quotaholders or other members (members) in the transferring company generally become members in the absorbing company and the transferring company is dissolved.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

Under Swiss law, and irrespective of the existence (and/or terms) of any document such as a letter of intent or a memorandum of understanding, entry into negotiations imposes certain duties on each party involved. In particular, each party has a general duty to negotiate in good faith – which may mean (for example) advising the other party about any decision not to pursue the transaction and not to continue negotiations in those circumstances.

While the conduct of negotiations does not in itself impose any duty to conclude an agreement or proceed with the contemplated transaction, a bad faith withdrawal from negotiations or other breaches of the pre-contractual duty to negotiate in good faith may cause the a relevant party to be in breach of the requirement to act in good faith, so that the party in breach may be obliged to indemnify the other party for losses or damages that result from such breach. However, such losses/damages would extend to costs incurred unnecessarily, as opposed to any lost profits or other potential losses. This form of pre-contractual liability is also known as the '*culpa in contrahendo*'.

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Swiss purchase agreements. Baker & McKenzie's fully interactive comparison of these across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. The most common mechanisms are 'cash-free/debt-free with a normal level of working capital' and NAV adjustments.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	Usually the buyer/target company.
4	Is the balance sheet audited?	Frequently reviewed by an audit firm (i.e. accountants), but only occasionally audited.
5	Is an earn-out common?	Quite common in private equity transactions, less common in other transactions.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Quite common, in particular with private individual sellers.
8	Is a break fee common?	Uncommon.

**Conditions Precedent**

9	Express Material Adverse Event (MAE) completion condition?	Quite common. Sometimes 'replaced' by the repetition of the representations and warranties as of closing.
10	Is the MAE general or specific?	Both seen, frequently specific following negotiation.
11	Quantification of MAE?	Increasingly seen.

**Covenants, Access**

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, but not from private equity sellers. Waterfall provisions uncommon.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Generally obtained in private deals. NB: competition law issues around potential 'gun-jumping'.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Notification of possible breach common. Where material breach, right to terminate because repetition of representations and warranties is a condition for completion.
17	Is a separate tax covenant/indemnity or tax deed common?	Separate tax covenant/indemnity almost universal. Tax deed uncommon.

**Representations and Warranties**

18	Materiality in representations - how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen, but often not quantified (other than specific representations and warranties, e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers depend on risk-sharing in the deal. Often qualified to best knowledge after due enquiry of a specified list of senior management.
20	Is a warranty that there is no materially misleading/omitted information common?	Not very common.
21	Is disclosure of data room common?	Common.

**Repetition of Representations and Warranties**

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates not very common.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects common, but often carve-out for fundamental representations and warranties which must be absolutely true.

- |    |   |  |
|----|---|--|
| 24 | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Reasonably common when representations and warranties are qualified by materiality thresholds. |
|----|---|--|

### Limitations on Liability

- |    |  |   |
|----|--|---|
| 25 | What is the common cap amount (as a percentage of purchase price)?   | Largely dependent on bargaining power, extent of due diligence and risk-sharing. Typically 10%–33%, but also possibly up to 50%, subject to higher cap for title and specific representations and warranties.       |
| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Usually only to warranties.   |
| 27 | What are the common exceptions to the cap?   | Key representations and warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.       |
| 28 | Is a deductible or basket common?  | Deductible is more often resisted and a tipping basket more common.   |
| 29 | Is a <i>de minimis</i> common?   | Common.   |
| 30 | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | General survival of 18–24 months. Tax commonly longer than general representations and warranties. Special duration for other representations and warranties on a case-by-case basis, e.g. on environmental issues. |
| 31 | Is warranty insurance common?  | Increasingly common in private equity exits.  |

### Reliance

- |    |  |         |
|----|--|---------|
| 32 | Do financiers seek to rely on buyer's due diligence reports? | Common. |
|----|--|---------|

### Set-offs against Claims

- |    |  |                                       |
|----|--|---------------------------------------|
| 33 | Is a set-off against claims for tax benefits common? | Common.                               |
| 34 | Insurance proceeds?                                  | Common for amounts actually received. |
| 35 | Third party recoveries?                              | Common for amounts actually received. |

### Damages, Knowledge

- |    |                                     |   |
|----|-------------------------------------|---|
| 36 | Obligation to mitigate damages?     | Required by law for warranty damages. Usually incorporated in purchase agreement. |
| 37 | Exclusion of consequential damages? | Common.   |

- |    |  |  |
|----|--|--|
| 38 | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? | Negotiated on a case-by-case basis together with the disclosure concept. |
|----|--|--|

### Dispute Resolution

- |    |   |   |
|----|---|---|
| 39 | Does local law allow for a choice of governing law? What is the common governing law? | Yes. Swiss law.   |
| 40 | Is litigation or arbitration more common? If arbitration, where?                      | Arbitration is still more common. Frequently in Geneva or Zurich according to the rules of arbitration of the Swiss Chambers of Commerce (Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution). |

### Stamp Duty

- |    |  |                          |
|----|--|--------------------------|
| 41 | If stamp duty is payable, is it normally shared? | Negotiated case-by-case. |
|----|--|--------------------------|

## 3.3 Formalities for Execution of Documents

### 3.3.1 Transfers of shares

There is no legal requirement for a share purchase agreement to be made in writing. However, in practice, share purchase transactions are in the vast majority of cases governed by a written share purchase agreement duly executed by seller and buyer. Share purchase agreements are becoming gradually more detailed, in line with international trends.

### 3.3.2 Transfers of assets

In a transfer of assets, a written contract may be required for the transfer of specific assets, e.g. for an assignment of receivables. Furthermore, real estate assets can only be transferred by a notarial deed. Subject to these specific formal requirements, there is no general requirement for a transfer of defined assets to be based on a written agreement. In practice, however, assets and liabilities forming a business are in most cases transferred on the basis of a written agreement duly executed by the parties. As a special rule, a written agreement is necessary for transfers of assets and liabilities made in accordance with the Merger Act.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

An acquisition of shares does not require any formalities, other than endorsement of the share certificates for transfers of registered shares (the simple delivery of the share certificates is sufficient for transfers of bearer shares). The articles of incorporation of many Swiss corporations do, however, contain restrictions for the transfer of registered shares and in such cases the approval of the board of directors is necessary to validly transfer the shares.

### 3.4.2 Transfers of title to assets

#### ***Transfers of assets and liabilities under the Merger Act***

The Merger Act introduced a new legal regime for the transfer of assets and liabilities of both companies and sole proprietorships registered in the commercial register. Upon the conclusion of a written agreement and the entry of the transfer into the commercial register, those entities can transfer all or part of their assets and liabilities in one step. The transfer becomes legally effective for all relevant assets and liabilities upon entry in the commercial register. The agreement must be in written

form and if real estate assets are involved, the relevant sections of the agreement must take the form of a public deed.

To protect the interests of creditors, the prior debtor (i.e. the transferring company) remains jointly and severally liable with the new debtor (i.e. the receiving entity) for debts incurred before the transfer of assets and liabilities for a period of three years.

It should be noted that, under the prevailing interpretation of the Merger Act, no automatic transfer of contracts will occur in the event of a transfer of assets and liabilities. The consent of the counterparties (whether explicit or tacit) is therefore necessary for a valid transfer of the contracts.

### ***Transfers of defined assets and liabilities under the Civil Code and CO***

In a transfer of individual assets and liabilities (which in practice is more frequent than a transfer of assets and liabilities under the Merger Act), the transfer agreement is not in itself sufficient to effect the transfer of the ownership of the assets it covers. The agreement only creates an obligation for the seller to take all steps required by law for the transfer of each asset being sold, and for the assumption of each liability being transferred. Consequently, the form of transfer required by law must also be observed (e.g. endorsement for negotiable instruments; notarised deed for real estate; or transfer of possession for movable property; or applications to registers).

With regard to the transfer of the liabilities relating to the business, it is necessary to distinguish between the internal assumption of liabilities between seller and buyer and the external assumption of liabilities, which is only possible if the third party creditor consents to the change of debtor. Contracts, too, are subject to the same principle: their transfer from seller to buyer is normally only possible with the consent of the counterparty to the relevant contract.

## **3.5 Formalities for Mergers**

The first step required in a merger is for the merging companies to execute a written merger agreement, which must set out the exchange ratio between the shares in the transferring company and those of the absorbing company (as well as other matters). While a merger agreement generally entitles the shareholders of the transferring company to receive shares in the absorbing company, the merger agreement may permit a choice between participation and a settlement in cash. Further, a merger agreement may provide for settlement only (a so-called squeeze-out merger), provided that the merger agreement is approved by at least 90% of the members in the transferring company.

In addition to the merger agreement, each company participating in the merger must prepare a written report on the merger; which must in particular explain and justify, both from a legal and from an economic point of view, the purpose and consequences of the merger.

The merger agreement, merger report and the balance sheets which form the basis for the merger must generally be verified by a specially qualified auditor, unless the transaction falls within the scope of an exception contemplated by the Merger Act (e.g. a simplified parent–subsidiary merger). Prior to the approval of the merger agreement by the general meeting of each company, each of the merging companies must allow time for a 30-day window in which its members may inspect the merger agreement, the merger report, the audit report, the annual accounts and annual reports for the preceding three financial years of the merging companies. The companies involved in a merger must also notify their respective employees' representatives of the merger prior to the merger resolution of the general meeting. Failure to comply with this requirement may enable employees' representatives to request the courts to prohibit entry of the merger in the commercial register.

The merger agreement must be submitted to the general meeting of each company for approval. The merger resolution must be in the form of a notarial deed. In the case of a corporation, the approval requires a qualified majority of two-thirds of the votes of the shares represented at the general meeting, and the absolute majority of the par value of the shares represented, subject to the special 90% majority for squeeze-out mergers. The merger will become legally effective upon registration in the commercial register.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

The Swiss Cartel Act is based on three pillars:

- the Act generally prohibits agreements which restrict competition
- the abuse of a dominant market position is prohibited, and
- the Competition Commission has authority to control mergers and other concentrations of enterprises.

So-called 'hardcore' horizontal and vertical restraints (see **4.2.2**) as well as abuses of a dominant position can be sanctioned directly by fines amounting to up to 10% of the Swiss turnover achieved in the three preceding financial years. The Competition Commission also has powers to conduct 'dawn raids'.

Mergers and acquisitions in Switzerland are thus affected by competition laws in two respects: merger control and agreements restricting competition.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Swiss purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Reviewing agency or authority		
1	Reviewing agency or authority?	Competition Commission.
Filing Obligation		
2	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory, if the thresholds/requirements are met.
Timetable		
3	What are the statutory deadlines within which the authority must take a decision?	<p><i>Phase I:</i> preliminary investigation within one month of complete notification. The Competition Commission must notify the parties within one month of receiving the notification if it intends to open an in-depth investigation. If no such notice is communicated within that time period, the concentration may be implemented or consummated.</p> <p><i>Phase II:</i> in-depth investigation to be completed within 4 months of the Commission's giving notice. The Competition Commission must complete its investigation within four months unless prevented from doing so for reasons attributable to the parties.</p>

4	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p><i>Phase I:</i> The Competition Commission is usually prepared to clear a transaction earlier, i.e. between the second and fourth week, if it does not raise any competition concerns (i.e. in cases where simplified filings are mutually agreed beforehand).</p> <p><i>Phase II:</i> These cases have been rare so far. The Competition Commission would generally use the full review period.</p>
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As in EU member jurisdictions, Switzerland applies a pre-merger approval system. Its purpose is to prevent the formation or reinforcement of dominant positions in any given relevant market. A merger under the provisions of the Cartel Act includes any form of transaction whereby two enterprises combine some or all of their commercial activities under common management. Accordingly, the scope of the pre-merger control system covers not only mergers and acquisitions but also any contractual or other form of transactions which economically lead to a concentration of enterprises.

A notification to, and the approval of, the Competition Commission is necessary if the following thresholds are met:

- the combined aggregate turnover of the enterprises concerned amounts to at least CHF2,000 million worldwide or to CHF500 million in Switzerland, and
- the aggregate turnover in Switzerland of each of at least two of the enterprises concerned amounts to at least CHF100 million.

Special rules for the calculation of threshold values apply to the banking and insurance sectors, as in the EU.

Regardless of whether these thresholds are met, a merger must be notified and approved if one of the participating enterprises was found in a previous decision to have a dominant position in a market which would be directly or indirectly affected by the merger.

#### 4.2.1 Procedure

Enterprises wishing to merge and fulfilling the requirements for notification and approval need not notify the Competition Commission within a given deadline from the date of agreeing to merge. However, the legal effect of a concentration requiring notification will be suspended, and it will not be possible to complete the concentration until the Commission has received notification and has approved the transaction. If the Commission does not open a Phase II investigation within one month of notification, the concentration is deemed authorised. If the parties proceed without notifying the Commission and therefore have not obtained its approval, they expose themselves to fines and to the dissolution of the merger by the Commission.

Upon receipt of the complete notification, the Commission has one month in which to examine the contemplated merger. During this period, the merger transaction may not be consummated.

If, during the one-month period, the Commission finds evidence that the merger could result in the creation or reinforcement of a dominant position, the Commission will undertake an in-depth investigation. The Commission then has four months in which it must examine the merger in detail. In that case, unless the Commission decides otherwise, the merger transaction may not be consummated before it has been approved. If the Commission does not complete a Phase II investigation within four months, the concentration is deemed authorised, unless the Commission makes a ruling that it was prevented from conducting an investigation for reasons attributable to the parties.

If the merger creates or strengthens a dominant position capable of eliminating effective competition, and does, or would not result in a substantial improvement of competition in another market (which would outweigh the disadvantages of any dominant position), the Competition Commission may prohibit the merger or allow it subject to certain conditions. Under the Cartel Act, a merger will be



deemed to create or strengthen a dominant position if the relevant enterprise(s) can behave independently of any other market participant with regard to supply or demand. Although the Commission need only analyse effects on the Swiss market for these purposes, it does need to take into account the evolution of the market as well as the position of the enterprises in the international market.

The Federal government may, in exceptional circumstances, override a Competition Commission prohibition and authorise a merger, if it considers the merger is necessary to safeguard predominant public interests.

#### 4.2.2 Agreements restricting competition

Swiss competition laws prohibit agreements which significantly affect competition in any market for goods or services, or reduce efficient competition and which are not justified by economic efficiency (Article 5 Cartel Act). In substance, the conditions for the validity of these agreements are comparable to those prevailing in the EU. In the context of mergers and acquisitions, non-competition covenants may be construed as agreements for the sharing of a market and are subject to restrictions as to time, space and scope.

If agreements contain restrictions directly related, and necessary to the implementation of the concentration itself (so-called 'ancillary restraints'), these are covered by the decision of the Competition Commission; if not, their anti-competitive effects may need to be assessed under the general rules contained in Article 5 of the Cartel Act. As in the EU, agreements are regarded as directly related and necessary to implementation only where, absent those agreements, the concentration could not be implemented or could only be implemented under more uncertain conditions.

If the Competition Commission finds that an agreement eliminates effective competition or restricts it without justification, the agreement will be deemed to be void to that extent and the parties to the agreement expose themselves to fines applicable to certain horizontal and vertical restraints (i.e. price-fixing; market partitioning; re-sale price maintenance; and absolute territorial protection) as well as abuses of a dominant position. In situations which are not covered by those just listed, fines can be imposed only if the parties do not remedy an infringement upon being found to infringe Swiss competition law. Enterprises can pre-empt such difficulties by notifying restraints of competition to the Commission prior to their taking effect.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

Co-ordinated activities between the parties to a transaction prior to closing will come under the scrutiny of the Competition Commission, since parties who are competitors are expected to act as competitors until the concentration is consummated.

Pre-closing coordination between the parties may constitute a violation of the prohibition to consummate the transaction before merger control clearance is granted and therefore exposes the parties to the risk of being fined. In addition, any joint activities between the parties prior to closing may be considered unlawful agreements restricting competition. Article 5 of the Cartel Act, prohibiting restrictive agreements, is applicable throughout the pre-closing process.

As a general rule, prior to closing, the parties should act as independent entities and not make any joint business decisions until the transaction has closed. Similarly, neither party should base any of its independent business decisions on competitively sensitive information obtained from the other party in the course of negotiations, due diligence or transition planning.

The exchange of competitively sensitive information between competitors should be carefully structured and monitored to avoid any illegal conduct and to minimise the risk that the information will be used inappropriately should the transaction be aborted.

Further information and broad principles of information exchange and 'gun-jumping' can be found in Appendix B.

## 4.4 Anti-Bribery, Corruption and Money Laundering

Anti-bribery, corruption and money laundering regulations exist in Switzerland, but are generally regarded as not directly relevant to mergers and acquisitions, and are therefore not discussed in further detail.

### 4.4.1 Exchange control, foreign investment restrictions and trade regulation

There are no Swiss exchange controls and there is no restriction on the repatriation by investors of profits and capital gains from Switzerland.

There are no foreign investment approval requirements of general application in Switzerland. However, both foreign investors and Swiss companies controlled by foreign investors need a special authorisation in the circumstances set out at **4.5**.

## 4.5 Industry-Specific Regulation

### 4.5.1 Acquisition of real estate or real estate companies

The Swiss Act on the Acquisition of Real Estate by Non-Residents (*Lex Friedrich* or *Lex Koller*) regulates and restricts the acquisition by foreigners of real estate, and must always be taken into consideration if the target company owns real estate. It is no longer necessary, however, to apply for an approval under this legislation if the real estate owned by the target company is used as a permanent place of operation of a business (trade, manufacturing or independent professions). Under certain circumstances (e.g. significant land reserves within the target company; ownership of land used for residential purposes; or acquisition of a real estate company). The approval of cantonal authorities may nevertheless be required for transfers of ownership.

### 4.5.2 Acquisition of banks or securities dealers

A foreign investor (individual or entity) wishing to acquire a controlling stake in a Swiss bank or a regulated Swiss securities dealer needs the prior approval of the Swiss Financial Market Supervisory Authority (FINMA). Authorisation will be granted:

- if the country of the foreign investor grants reciprocity
- if the competent authorities of that country ensure consolidated supervision deemed appropriate by FINMA, and
- if the applicant can show that its acquisition of the controlling stake will not affect the regular conduct of the bank's or securities dealer's operations.

## 4.6 Export Controls

Switzerland is member of all major export control regimes, including the Australia Group (AG), the Nuclear Suppliers Group (NSG), the Missile Technology Control Regime (MTCR), the Wassenaar Arrangement (WA), the Chemical Weapons Convention and the Biological Weapons Convention.

The export, import, and transit of goods which can be used for both civilian and military purposes (dual-use) is regulated by the Federal Act of 13 December 1996 on the Control of Dual-Use Goods and of Specific Military Goods.

The State Secretariat for Economic Affairs (SECO)<sup>1</sup> is responsible for export control in Switzerland. SECO can deny an export licence if there is reason to assume that export of the goods violates any international agreement.

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<sup>1</sup> [www.seco.admin.ch](http://www.seco.admin.ch)

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

The sale and purchase of shares is subject to transfer taxes (federal securities transfer stamp tax) of 0.15% of the purchase price on the transfer of Swiss shares (0.3% of the purchase price on the transfer of foreign shares), if one or both parties to the transaction or an intermediary participating in the transaction qualify as a securities dealer as defined by the Federal Stamp Tax Act. Banks, investment advisers and asset managers qualify as securities dealers; other companies may also be 'securities dealers' if they have, in their last annual financial statements, securities (including interests in subsidiaries) with a book value exceeding CHF10 million. An exception applies to intra-group transfers of shares representing a stake of at least 20%.

### 5.2 Acquisition of Assets

There is, as a general rule, no transaction tax on transfers of assets, except for real estate. Since real estate transfer taxes are levied at cantonal and municipal levels, but not at federal level, this will depend on the location of the real estate. Real estate transfer taxes are levied by a number of Swiss cantons at a rate of up to 3%.

### 5.3 Mergers

Merger transactions are as a general rule exempt from securities transfer stamp tax and real estate transfer taxes, but it is highly recommended that each individual transaction is carefully analysed to determine whether the exemptions do apply.

### 5.4 Value Added Tax

No VAT is levied in Switzerland on the sale of shares.

The sale of assets is, as a general rule, subject to VAT at a rate of 8%, but if the buyer is also subject to VAT, it may be able to deduct that sum as input VAT, or obtain a refund.

If a business (i.e. assets and liabilities qualifying as or representing a business or part of a business) is transferred between two VAT-payers, the VAT can be satisfied by the parties by applying a notification procedure and jointly filing the notification form. The parties are thus relieved from charging VAT and then applying for the deduction or refund of VAT as input VAT. The notification procedure generally also applies in merger transactions.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of a share purchase, there is no change to the situation of the employees, who will continue to be employed on the same terms and conditions by the target company. The buyer therefore inherits all rights and duties *vis-à-vis* the employees by virtue of becoming the new owner of the target company.

#### 6.1.2 Acquisition of assets

If an acquisition of assets is part of the transfer of a business (consisting of assets, liabilities and agreements), the rules applicable to the transfer of employees in the context of a transfer of business will be applicable (see **6.1.4**).

#### 6.1.3 Mergers

See **6.1.4**.

#### 6.1.4 Transfer of business

In the case of transfers of a business (covering assets, liabilities and agreements) as well as in the case of mergers and spin-offs, the Merger Act and Article 333 of the CO provide for the automatic transfer of the employment contracts of the employees of the entity or business that is transferred to the acquirer, as long as the employees concerned do not oppose their transfer.

If an employee opposes the transfer of his or her employment contract, the employment relationship is automatically terminated upon the expiry of the legal term of notice (1–3 months depending on the duration of the employment relationship), irrespective of any longer term of notice that may be fixed in the employment agreement.

Upon the transfer of an employment agreement, the new employer takes over all liabilities (including those outstanding prior to the transfer date) *vis-à-vis* the employees, but the former employer remains jointly and severally liable for any claims of the employees that are due and payable prior to the date of transfer, and any claims of the employees becoming due until the time at which the employment agreement can legally be terminated or is actually terminated as a result of the opposition of the employee.

### 6.2 Approval or Consultation Requirements

For every merger, spin-off and/or transfer of business under the Merger Act, employers are under the obligation to inform the employees concerned about the transfer, the reasons for the transfer and the legal, economic and social consequences of the transfer for the employees. If, due to the transfer, measures likely to affect the employment conditions are contemplated, the employees' representatives (or, if there are none, all the employees of both the transferring company and acquiring company) must be informed of those changes sufficiently in advance so as to offer them the opportunity to make comments on the proposed changes. Though the employer is not obliged to accept proposals made by the employees' representatives or employees, it is obliged to explain why any specific proposal is rejected.

The consultation procedure must be completed before the binding decision of the competent corporate body is taken. Although the Merger Act does not provide any indication on the duration of the consultation procedure, it is advisable to allow a period of at least 15 days based on the relevant case law on collective dismissal. This is especially important given that the Merger Act entitles the employees' representatives (or, in its absence, each single employee) to request the court in the place of the company's registered seat to prohibit the registration of a merger, spin-off or transfer of business in the commercial register. Should the court prohibit the registration of the transfer, the transferring company must start a new consultation procedure.

### 6.3 Protection against Dismissal

#### 6.3.1 Redundancies

In Switzerland, it is possible to dismiss employees without seeking special approval, by giving them the notice provided for by law or in the employment agreement. However, in the case of a collective dismissal which reaches the thresholds stated in Article 335d CO (where the dismissal concerns more than 10 employees in a business employing 20+ but <100 employees; or 10% of the total number of employees in a business that employs 100+, but <300 employees; or 30 employees in a business that employs 300+ employees) – special requirements apply. Any employer contemplating a collective dismissal must consult with the employees' representatives and give them at least the opportunity to present proposals concerning measures to avoid or limit the number of dismissals and limit their consequences. The employer must also inform the employees and the cantonal employment office of the reasons for the collective dismissal and details of those dismissals. In addition, a social plan must be presented by the employer in cases of collective dismissal by an employer of 250+ employees.

#### 6.3.2 Penalties

If the employer does not satisfy these requirements, the termination of the relevant employment contracts will be deemed abusive and the employer must pay an indemnity to the affected employees, which may equal up to two months' salary.

# Taiwan

## 1.1 Overview

Mergers and acquisitions are common transactions in corporate practice in Taiwan. Under Taiwan law, a merger generally refers to the consolidation of two or more companies into one existing (surviving) or new company. The term 'acquisition' refers to the purchase by one company (buyer or acquiring company) of either the shares or assets of another company (target company).

## 1.2 General Legal Framework

Taiwan has a codified, civil law legal system. The major codes are Civil, Criminal, Civil Procedure and Criminal Procedure. The contents of the Codes were drawn from the laws of other countries with similar codified systems (e.g. Germany and Japan) and from traditional Chinese laws. The supreme law of Taiwan is its Constitution.

The Company Act of Taiwan is the main governing law on the establishment, composition, governance and dissolution of companies. The last amendment to the occurred in 2013 and makes an abusive shareholder liable in certain cases instead of the company.

Prior to the promulgation of the Enterprise Merger Law (EML), the Company Act applied to different aspects of M&A activities, but since 2002 the EML has afforded companies additional ways to conduct M&A activities, such as statutory 100% share swaps, statutory spin-offs and statutory acquisitions of shares or assets.

## 1.3 Corporate Entities

The Company Law recognises four types of locally incorporated companies. Two of these, companies limited by shares (CLSs) and limited companies (LCs), provide all shareholders with limited liability. The other two are (both unlimited liability companies) result in greater shareholder liability and so are rarely used. Among the four business vehicles, a CLS is the most commonly used by foreign investors.

A CLS may issue public shares following a resolution adopted by its directors and with the approval of the Securities and Futures Bureau (SFB) of the Financial Services Commission within Executive Yuan. The shares of a public company may be listed on Taiwan Securities Exchange (TSE), traded on the over-the-counter market (OTC market) or the emerging market operated by the Gre Tai Securities Exchange if the transaction meets the applicable criteria. Both the Company Act and the Securities and Exchange Law are also applicable to public companies.

### 1.3.1 Companies limited by shares (CLS)

A CLS may either be composed of two or more shareholders or one shareholder who is a government or a legal entity. A CLS must also have authorised capital, at least one quarter of which must be paid in full before its incorporation can be completed. In addition to the requirement of authorised capital, a CLS must also have minimum paid up capital, the amount of which varies depending on the type of company in question, e.g. a commercial bank must have a minimum paid-in capital of at least TWD10 billion. A company engaged in a business without an industry-specific minimum capital requirement must have a capital of at least TWD500,000. Minimum paid-in capital may be used for any business purpose immediately after it is paid in.

After the initial issue of shares and upon subsequent issues of new shares, a CLS must offer 10% to 15% of its newly issued shares to its employees, unless the company has FIA approval and is 45% or more owned by foreign investors.

Shares can be issued in a CLS with or without physical certificates. However, when the value of a CLS's total capital reaches or exceeds TWD500 million, the CLS must issue share certificates. For a newly incorporated CLS or a CLS modifying its registration, shares should be issued within three months of the completed incorporation or modification. A CLS with total capital stock of less than TWD500 million can not issue share certificates unless provided for in its articles of incorporation.

For a public CLS, shares may be issued and be represented by certificates or with one certificate representing all newly issued shares or shares can be issued on a scripless basis without any certificate. Shares of a CLS may be transferred by endorsement and delivery and then registered with the CLS where shares are issued with certificate(s), or by registering the shares with the CLS alone where shares are issued without certificates. However, a promoter cannot transfer his/her initial shares subscribed upon incorporation within the first year after the CLS is incorporated.

A non-public CLS must have at least three directors, who can be elected either from among the shareholders or from persons other than shareholders. A non-public CLS must also have at least one supervisor (statutory auditor) who may either be elected from among its shareholders or persons other than the shareholders; however at least one supervisor must be a Republic of China (ROC) resident, except where that supervisor is a foreign shareholder or the representative of a foreign corporate shareholder whose investment has acquired an FIA. Where a CLS has only one shareholder, all the functions of the shareholders may be exercised by the board of directors.

### 1.3.2 Limited companies (LCs)

An LC can have one or more shareholders, half of whom must be ROC nationals holding more than 50% of the registered capital. However, this requirement is waived for foreign investors who have acquired FIA for investment in an LC. An LC should have a minimum capital of TWD250,000 unless provided otherwise, with the amount of capital contribution by each shareholder provided in the company's articles of incorporation. No share certificates are issued; instead, the company issues non-negotiable certificates of capital contribution.

Shareholders of an LC may transfer their 'capital contribution' upon the written consent of the majority of the other shareholders. Directors may transfer their capital contribution with the written consent of all other shareholders. A shareholder who does not consent to a transfer has a priority right to purchase the transferred capital. However, if the shareholder elects not to purchase the transferred capital, then he or she is deemed to have consented to the transfer. An LC must have one to three directors elected from the shareholders or the persons other than the shareholders. If more than one director is appointed, a chairman must also be elected. A vice-chairman may also be elected. The chairman and vice-chairman need not be ROC nationals resident in Taiwan.

The names of the shareholders must be provided in the articles of incorporation. Each director or shareholder has one vote. However, the shareholder vote may be based on the amount of capital contribution if so provided in the articles of incorporation.

## 2. Acquisition Methods

Mergers and acquisitions in Taiwan can be effected through asset purchase, share purchase or merger. The EML only applies to M&A between CLSs and mergers between CLS and LC where CLS become a surviving entity. The EML does not apply to M&A between LCs. The following provisions focus on the CLS, as it is the most commonly used by foreign investors.

### 2.1 Acquisition of Shares

Under current law, share purchases may be effected by any of the following methods.

#### 2.1.1 Traditional share purchase

Existing shares of a private company can generally be sold and purchased free of legal restrictions (although the seller may be restricted by contractual obligations towards third parties).

Notwithstanding the tax implications that a share purchase may impose, in the form of a 0.3% securities transaction tax and a 10% (for individuals) or 20% (for corporations) alternative minimum tax (see 5. below), the main drawback of a share purchase transaction is that it involves a sale of the target company together with all its liabilities, including contingent or undisclosed liabilities.

### 2.1.2 Statutory share swap

A company may acquire 100% of the outstanding shares of a target company by issuing new shares to swap with all of the target's outstanding shares (Art. 29, EML). The buyer, or issuing company, is exempt from deed tax, VAT, securities transaction tax and stamp duty for this kind of transaction, and land value increment tax is also deferred (see below). After the share swap, the issuing company and its now 100%-owned target company may consolidate their income or losses for income tax purposes, with the issuing company being the sole taxpayer.

## 2.2 Acquisition of Assets

Unlike a share purchase, an asset purchase has historically involved a higher tax cost. While a traditional asset purchase is still viable in certain circumstances, the EML has broadened the landscape with other options.

### 2.2.1 Traditional asset purchase

Until recently, sellers were less inclined to agree to a traditional asset sale because this attracted higher tax costs (see below). Buyers, however, preferred an asset purchase because the liabilities of the target were seldom automatically transferred and buyers could contractually exclude the transfer and assumption of specific assets or liabilities of the target company that they did not wish to assume. In certain cases, prior consent of third parties may be required before certain assets, contracts of liabilities can be transferred. With the enactment of the EML, new options have emerged which are favourable to both parties, giving the buyer certain opportunities to pick and choose while keeping the seller's taxes low.

### 2.2.2 Statutory acquisition of assets

Statutory acquisition of assets is now permitted under Articles 27 or 28 of the EML. These articles deal with the following transactions:

- a general assumption of assets and liabilities (as defined in Art. 305, Civil Code)
- a transfer of the whole or essential part of a company's assets or business (as defined in Art. 185(1)(ii), Company Law)
- assumption of all of the assets or business of another company, which has a significant effect on the buyer's own business (as defined in Art. 185(1)(iii), Company Law), and
- a wholly owned subsidiary issuing new shares as consideration for acquisition of the whole or essential part of the parent company's assets or business (as defined in Art. 28, EML).

Under the EML, consideration for an asset acquisition may be cash, shares and/or other assets.

The EML permits exemptions of VAT, deed tax, stamp duty, and securities transaction tax and deferral of land value increment tax for certain qualifying transactions (see below). The statutory asset acquisition option is favourable to both buyers and seller as it minimises taxes, allows the buyer to exclude, to some extent, specific liabilities of the target company, and permits the carrying forward of favourable tax attributes of the target company to the buyer under certain circumstances (see below).

### 2.2.3 Statutory spin-off

Prior to the EML, statutory spin-offs were not a favoured option since they did not enjoy the tax benefits under the Company Law. Now, under Article 32 of the EML, a divesting company may spin off a business unit to an existing or newly incorporated company in exchange for shares of that company. Tax incentives for such an option are generally the same as those in statutory acquisitions of assets. However, in a spin-off, the company receiving the spun-off assets will become jointly and severally liable, to the extent of the value of the assets acquired, for any debts or obligations existing within a two-year period prior to the date of the spin-off. This necessitates extensive due diligence on the buyer's part.

## 2.3 Mergers

### 2.3.1 Statutory merger

A statutory merger of two companies limited by shares is possible under Article 316 of the Company Law or under Articles 18–21 of the EML. The surviving company can either be one of the existing companies or it may be a new company but, in either case, it must be limited by shares. Statutory mergers offer a number of benefits. For instance, as a general rule, a statutory merger does not require any third party consents or transfers. Additionally, following the enactment of the EML, statutory mergers have been generally accomplished without attracting tax liabilities (see below).

If the target company is to be liquidated after the acquisition of its shares or assets, a statutory merger is preferable as it will not attract income tax upon the distribution of the remaining assets of the liquidated company. Further, the surviving entity can, in some cases, continue to enjoy the favourable tax attributes of the extinguished entity, such as exemption from income tax (e.g. for strategically-important industries) and investment tax credits.

### 2.3.2 Simple parent-subsidary merger

If an acquiring company owns 90% or more of the outstanding shares of a target company, the merger can be consummated following a simple approval from the boards of the merging companies, as there are fewer shareholders requiring protection since the major shareholders will be acquiring the company (Art. 19, EML). Article 316-2 of the Company Law provides similar procedures for simple parent–subsidiary mergers.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

There is no specific pre-contractual obligations for both parties in M&A activities stipulated in the Company Act or the EML. However, under the Civil Code, Article 245-1 provides pre-contractual obligations for both parties. Even if the contract is not constituted, non-negligent parties are entitled to recover their loss from the other party who:

- has concealed, in bad faith, or provided a dishonest explanation for a significant contractual matter on the other party's enquiry
- intentionally or grossly negligently divulged the other party's confidential information, which the other party explicitly requested be kept confidential, or
- any other matter obviously contrary to good faith.

Note that the claim for the pre-contractual obligation will be extinguished by limitation if not exercised within two years.

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Taiwanese purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

- |  |  |
|--|--|
| <p>1. Is a purchase price adjustment common?</p> <p>What type is common (e.g. debt-free, cash-free)?</p> | <p>Purchase price adjustments common for more sophisticated deals. For deals with less sophisticated parties this is not common.</p> |
|--|--|



2.	Is there a collar on the adjustment?	Collars not common.
3.	Who prepares completion balance sheet?	Usually the target company.
4.	Is the balance sheet audited?	Not necessarily.
5.	Is an earn-out common?	More common in private equity transactions when the sellers continue to manage the target company after closing. Less common where seller is completely exiting. Earn-outs commonly capped.
6.	Is a deposit common?	Not common.
7.	Is an escrow common?	Not uncommon.
8.	Is a break fee common?	Uncommon.
<b>Conditions Precedent</b>		
9.	Express Material Adverse Event (MAE) completion condition?	Common.
10.	Is the MAE general or specific?	Usually general.
11.	Quantification of MAE?	Sometimes seen.
<b>Covenants, Access</b>		
12.	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall provisions, etc. uncommon.
13.	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14.	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15.	Broad access to books, records, management between sign and close	Generally get this for private deals.
16.	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Uncommon unless significant gap between signing and closing. Notification of breach quite common.
17.	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax indemnity, usually included in purchase agreement.
<b>Representations and Warranties</b>		
18.	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but are often not quantified (other than specific warranties, e.g. contract value).
19.	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are growing. Often limited to the actual knowledge and due enquiry of a specified list of senior management.
20.	Is a warranty that there is no materially misleading/omitted information common?	Sophisticated sellers try to omit this representation – and if pressured, limited to fraud or intention to mislead.

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|-----|------------------------------------|---------------|
| 21. | Is disclosure of data room common? | Not uncommon. |
|-----|------------------------------------|---------------|

### Repetition of Representations and Warranties

- |     |   |   |
|-----|---|---|
| 22. | Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?  | Repetition at completion common. Bring-down certificate is common.  |
| 23. | What is the applicable standard? True in all material respects? MAE standard?   | True and accurate in all material respects is common but often carve out for fundamental representations which must be absolutely true. |
| 24. | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Double materiality usually avoided.   |

### Limitations on Liability

- |     |  |   |
|-----|--|---|
| 25. | What is the common cap amount (as a percentage of purchase price)?   | Buyer will ask for 100% but possible to negotiate down. Tax or specific areas of concern may be carved-out from the limitation.   |
| 26. | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Both seen regularly, depending on the level of sophistication of the parties.   |
| 27. | What are the common exceptions to the cap?   | Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated. |
| 28. | Is a deductible or basket common?  | Not uncommon to have these limitations.   |
| 29. | Is a <i>de minimis</i> common?   | Not uncommon.   |
| 30. | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | Cap on term to 1.5 to 2 years is common. For tax, 5–7 year liability is common.   |
| 31. | Is warranty insurance common?  | Uncommon.   |

### Reliance

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|-----|--|-----------|
| 32. | Do financiers seek to rely on purchaser's due diligence reports? | Uncommon. |
|-----|--|-----------|

### Set-offs against Claims

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|-----|--|-----------|
| 33. | Is a set-off against claims for tax benefits common? | Uncommon. |
| 34. | Insurance proceeds?                                  | Uncommon. |
| 35. | Third party recoveries?                              | Uncommon. |

**Damages, Knowledge**

- |     |  |  |
|-----|--|--|
| 36. | Obligation to mitigate damages?  | Not required by law, but sometimes incorporated in contracts by express terms. |
| 37. | Exclusion of consequential damages?  | Common.  |
| 38. | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? | Often silent.  |

**Dispute Resolution**

- |     |   |   |
|-----|---|---|
| 39. | Does local law allow for a choice of governing law? What is the common governing law? | Yes. Taiwan law.  |
| 40. | Is litigation or arbitration more common? If arbitration, where?                      | Both are common. If an offshore entity is involved in the transaction, it often requests for arbitration outside Taiwan, e.g. in Singapore. |

**Stamp Duty**

- |     |  |  |
|-----|--|--|
| 41. | If stamp duty is payable, is it normally shared? | Each agreement holder is responsible for the stamp duty levied on the agreement. Stamp duty for chattels transfer agreement: TWD12 per agreement. Stamp duty for real property transfer agreement is 0.1% of the purchase price. |
|-----|--|--|

**3.3 Formalities for Execution of Documents****3.3.1 Transfers of shares**

For statutory 100% share swaps, a share-swap agreement must be presented to the shareholders at the shareholders' meeting.

**3.3.2 Transfers of assets**

A transfer of the whole or essential part of a company's assets or business, or assumption of all of the assets or business of another company, which has a significant effect on the buyer's own business must be presented to the shareholders at the shareholder's meeting.

For other asset transfers that do not constitute the whole or an essential part of a company's assets or business, and assumptions of assets of another company that do not have a significant effect on the buyer's own business, no written contract is generally required. Some exceptions include transfers of patents and trademarks because the registrations of the change of owner must be evidenced in written assignments or documents. Contracts for the sale of real property do not require a written agreement under the current Civil Code in Taiwan. Article 166-1 of the Civil Code does require contracts made for the transfer, creation, or alteration of rights over the real property to be made in writing to the notary public, but that provision is currently not in force. That said, it would be advisable for contracts for the transfer of real property rights to be in written form and notarised for evidentiary purposes.

**3.4 Formalities for Transferring Title to Shares or Assets****3.4.1 Transfers of title to shares**

Although a contract for the sale of shares does not need to be in writing, where ownership of shares is evidenced in a registered share certificate, Article 164 of the Company Act requires that the title

transfer be made by way of endorsement, and the name or title of the assignee indicated on the share certificate. Bearer share certificates may be assigned simply by delivery-up of the share certificate.

For scripless shares, the transfers of title will be conducted via the Centralised Securities Depository Enterprise with which the buyer will hold an account in it to deposit of securities and engage in book-entry settlement.

### 3.4.2 Transfers of title to assets

Although technically a contract for the sale of real property does not need to be in writing under the current Civil Code, transfers of title to real property through transactions must be made in writing to the extent that the transfers will not take effect until registered with local land office. (Art. 758, Civil Code) The transfer of rights *in rem* of other property will not be effective until the personal property has been delivered to the buyer (Art. 761, Civil Code).

A mortgage may neither be transferred nor furnished as security for any other claim by separating it from the property that it secures. Therefore, a transfer of a mortgage should be made together with a transfer of the property it secures. Note, however, that where only the claim is transferred, the mortgage securing such property will be transferred automatically even without registration with the local land office.

For aircraft and ships, transfer of title must be registered with the Civil Aeronautics Administration or the Shipping Administration Authority of the port of registry.

## 3.5 Formalities for Mergers

For statutory mergers, a merger agreement must be presented to the shareholders at the shareholders' meeting.

For statutory spin-offs, a spin-off plan must be presented to the shareholders at the shareholders' meeting.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Under Taiwan's Fair Trade Law (FTL) of 1991 and last amended in November 2011, a combination that meets certain statutory thresholds requires prior notification to and approval from the Fair Trade Commission (FTC). A 'combination' is broadly defined to include:

- an enterprise merging with another enterprise
- an enterprise holding or acquiring the shares or capital contributions of another enterprise to the extent of one-third or more of the total voting shares or total capital of that enterprise
- an enterprise accepting the transfer of, or leasing from, another enterprise the whole or the principal part of the business or properties of that other enterprise
- an enterprise operating jointly with another enterprise on a regular basis or being entrusted by another enterprise to operate the latter's business, and
- an enterprise directly or indirectly controlling the business operation or the appointment or discharge of personnel of another enterprise.

The FTC has made clear in various rulings that an enterprise includes a foreign enterprise for these purposes.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Taiwanese purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

### 4.2.1 Threshold requirements for notifying FTC

For each of the above combinations, if any of the following filing thresholds under Article 11 of the FTL is met, a prior notification must be filed with the FTC:

- the enterprises participating in the combination ('participating enterprises') will, through the combination, achieve a market share in the sector of one-third or more
- any of the participating enterprises prior to the combination already had a market share of one-quarter or more in the sector in the Taiwan market
- the amount of revenue in Taiwan of the participating enterprises in the preceding fiscal year exceeds TWD10 billion and TWD1 billion respectively for non-financial institutions, and TWD20 billion and TWD1 billion for financial institutions. (Note that filing is required once one of the companies meets the upper threshold and the other meets the lower threshold).

combinations are exempt from the FTC filing obligation if:

- any of the participating enterprises already holds 50% or more of the voting shares or capital contribution of another enterprise in the combination and combines with that other enterprise
- 50% or more of the voting shares or capital contribution of the participating enterprises is held by the same parent enterprise
- an enterprise assigns all or an essential part of its business or assets, or all or part of its independently operable business to another separate and new enterprise solely established by that original enterprise, or
- an enterprise decreases the amount of its issued outstanding shares by purchasing treasury shares pursuant to the Company Law or Securities Exchange Law and, as a result of that decrease, causes an original shareholder to hold one-third or more of the voting stock of, or interest in, the enterprise.

### 4.2.2 Factors to be taken into account during FTC review

In its review of a combination application, the FTC will determine whether the advantages to the national economy derived from the combination outweigh the disadvantages in competition terms. If it decides that the advantages outweigh the disadvantages, the combination will be approved. The FTC will consider the following factors in ascertaining the disadvantages, namely, whether:

- the company after combination may monopolise or dominate the market
- the combination will create or establish additional barriers to entry into the relevant market, or
- the combination will change the market structure and the degree of market concentration.

In determining whether a combination brings any advantages to the overall economy, the FTC generally takes into account factors such as cost reduction, technological/operational efficiency and improvements to the performance of the business. During the review period, the FTC may invite comments from the public either by announcing the combination filing on its website and/or holding a public hearing to invite public opinion.

#### 4.2.3 FTC review procedure

The FTC may adopt either the expedited procedure or the regular procedure to review combination filings.

When reviewing a prior notification, the FTC will consider the following factors: volume of sales of the parties to the combination; market shares of the parties to the combination; production and inventory; import and export volume; and the nature of the relevant markets.

The FTC adopts expedited procedures in the following cases:

- Where the enterprises filing the application for a combination with the FTC fall within the revenue threshold under Article 11.1.3 of the FTL and where their respective market shares can be characterised as follows:
  - in a horizontal combination, the combined market share after the combination will be less than 20%; except where the market share of the two largest enterprises in certain specified markets will be two-thirds of the relevant market or the market share of the three largest enterprises, three-quarters of the relevant market, or
  - in a vertical combination, the combined market share after the combination in each individual market will be less than 25%.
- In the case of conglomerate combinations, where there is no possibility of significant potential competition between the combining parties, subject to the following factors:
  - the impact of relaxation of regulations and control on cross-industry operation by the combining parties
  - probability of cross-industry operation by the combining parties due to technology advancement
  - existence of earlier cross-industry development plans of the combining parties other than the combination itself, or
  - other factors that affect the likelihood of material potential competition.
- combinations between a controlling enterprise and its subsidiary that changes the manner of their relations such as:
  - one of the enterprises participating in the combination directly owns more than one-third and less than one-half of the voting shares or paid-up capital of the other combining party
  - a company combines with another company which has a controlling or subordinate relationship with the former company
  - a company combines with another company, which is also a subordinate company of the former company's controlling company
  - a company transfers part or all of the shares or capital contributions of another enterprise to its controlling or subordinate company, or
  - a company transfers part or all of the shares or capital contributions of another enterprise to a company which is also a subordinate company of the former company's controlling company.

Even if the filings meet the above criteria to qualify for the expedited procedure, the regular procedures may still be applicable if the FTC deems that:

- the combination is of significant public interest
- one of the combining parties is a 'holding company'<sup>1</sup>
- the relevant market or calculation of market shares of the companies participating in the combination is difficult to determine
- the relevant market has high barriers to entry, market concentration or other unfavourable and questionable circumstances that severely limit competition.

The combining enterprises must submit a completed application form and the relevant documents to the FTC for review (e.g. information about the combining enterprises and respective market shares).

Under the FTL, enterprises may not close the combination within 30 days of the date on which the FTC accepts their completed combination application. The FTC may request a further 30-day extension. The FTC may attach conditions or require undertakings in any of its decisions to ensure that the overall economic benefit of the combination outweighs the disadvantages resulting from any restraint in competition.

Although some high-profile M&A activities have attracted media attention to their antitrust effects on relevant markets and industries in Taiwan (resulting in FTC scrutiny), in practice, most combination applications do not provoke FTC objections.

#### 4.2.4 Offshore combination

The term 'offshore combinations', as used by the FTC in Principles adopted in 2000 and amended most recently in 2012,<sup>2</sup> means a combination of two or more foreign enterprises outside of Taiwan, which falls within the scope of Article 6 of the FTL.

According to the Principles, an offshore combination must notify the FTC in advance of any combination if it meets the statutory thresholds in Article 11 of the FTL (thus, Art. 11 is applicable also to foreign enterprises). The following factors will be considered, among others, when deciding whether an offshore combination should be subject to FTC review:

- its likely impact on Taiwan and foreign markets
- the nationality, residence and principal place of business of each participating enterprise
- whether the parties wish intentionally to affect Taiwan's market or market segment competition via the combination
- the possibility that the combination will conflict with laws or policies of the countries of the combining enterprises
- whether or not administrative decisions against the entities would be enforceable
- the impact of any enforcement action on the foreign enterprises involved in the combination, and
- the impact/potential effect of applicable international treaties, agreements or international organisations.

<sup>1</sup> As defined in the Taiwan Stock Exchange Corporation Regulations for the Review of Stock Exchange Listings Applications by Investment Holding Companies or the Financial Holding Company Act.

<sup>2</sup> FTC regulation: the Handling Principles regarding Offshore combinations (the Principles).

The Principles state that the FTC should not exercise jurisdiction over an offshore combination if neither of the participating enterprises has any equipment for use in manufacturing or to provide services, or if they have distributors, agents or other substantial sales channels in Taiwan. The FTC will also not exercise jurisdiction over an offshore combination which fulfils the thresholds but has (or will have) no direct, substantial, or reasonably foreseeable impact on the Taiwan market (e.g. where no Taiwan businesses are engaged in any similar industry). However, as this is considered on a case-by-case basis, in practice prior notification to the FTC will still be necessary.

#### 4.2.5 Penalties

If a combination that meets the statutory thresholds is not notified in advance or if the combination is consummated prior to the expiry of the review period, the FTC may prohibit the combination; set a deadline by which the parties must be split into separate enterprises; order the compulsory divestiture of assets and/or shares; order a compulsory discharge of personnel; adopt other necessary measures; and impose an administrative fine of between TWD100,000 and TWD50 million.

#### Filing Obligation

Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
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#### Timetable

In practice, what is the timetable for clearance (in Phase I and Phase II review)?	Under the FTL, a merger filing must be made prior to completion of the transaction. If no objection is raised within 30 days of all the application documents being filed with the FTC, the parties may go ahead with closing. Since the FTC will normally request the parties to submit additional information or respond to certain additional queries, which may take 1–2 weeks, it is recommended that applicants file 60 days before the closing.
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### 4.3 Exchange of Competition-Sensitive Information and ‘Gun-Jumping’ Issues

In practice, the FTC is likely to consider as a prohibited concerted action, any exchange between entities of competition-sensitive information relating to the price of goods or services, details about the quantity or make-up of products, or information about manufacturing facilities, competitors, or trading territory, etc. The FTC may fine those entities up to 10% of their total sales income in the previous fiscal year if found to be engaging in such unlawful concerted acts.

If a combination that meets the statutory thresholds set out in 4.2 is not notified in advance or if it is consummated prior to the expiry of the review period, the FTC may among other things:

- prohibit the combination
- set a deadline for the splitting up of the combination
- order compulsory divestiture of assets and/or shares
- order compulsory discharge of personnel
- adopt other necessary measures, and/or
- impose administrative fines of TWD100,000–TWD50 million.



## 4.4 Anti-Bribery, Corruption and Money Laundering

### 4.4.1 Anti-bribery and corruption

The main statutes governing anti-bribery/anti-corruption in Taiwan are the Anti-Corruption Statute and Criminal Code, both of which allow criminal sanctions (imprisonment and/or fines) to be imposed on parties for bribery of public sector officials.

The term 'bribery' is not statutorily defined. Both bribes and unjust enrichments are considered as bribery under the Criminal Code and are determined by the court on a case-by-case basis without any *de minimis* threshold. According to the Taiwanese courts, bribery involves money or any property that has monetary value, and unjust enrichment involves any tangible or intangible interests that will benefit or give satisfaction or pleasure to the recipient (e.g. food, sexual hospitality, or the discharging of a debt).

When determining whether bribery has occurred, the court will take into consideration the actions of the government official, the relationship between the giver and receiver, the types and value of the bribe, the timing of the gratification, etc.

Government officials are prohibited from demanding, soliciting, receiving, accepting, or agreeing to receive or accept any unjust enrichment, regardless of whether their actions fall within their job descriptions and within the limits of their authority (Arts 121 and 122, Criminal Code and Arts 4–6, Statute).

An individual offeror will be held liable if he or she tenders a bribe, promises to give or gives anything of value to a government official in return for that government official's performance of an act whether or not the act is part of his or her official duties (Art. 122(3), Criminal Code and Art. 11, Statute).

Under Taiwanese law, bribery or corruption applies to public bribery only. Bribery in a commercial context between private individuals is NOT considered 'bribery' under Taiwan law. Rather, an individual involved in the concept of private bribery under other jurisdictions will be regarded as being in breach of trust or breaching his or her fiduciary duties to the company, and held criminally liable under the Criminal Code (Art. 342).

The penalty for individuals (i.e. non-government officials) bribing government officials depends on whether the desired act (or abstaining to act) would violate the government official's duties as a public official, regardless of whether or not the official actually takes any action. If it would violate the public official's duties, the individual offering the bribe would be subject to imprisonment of one to seven years and a fine of up to TWD3 million. If the bribe is paid to induce an act or to abstain from an act that does not violate the government official's duties, the 'briber' could face imprisonment for up to three years and/or a fine of up to TWD500,000.

The penalty imposed on the government officials also depends on whether the requested activity violates the official's duties regardless of whether the official actually takes any action. If a government official demands, takes or promises to take bribes or other unlawful profits in exchange for his or her actions in violation of their duties, the penalties are imprisonment of no less than ten years (and up to life imprisonment) and a fine of up to TWD100 million. If a government official demands or accepts bribes in relation to acts which are outwith the government official's duties, the penalties are imprisonment for no less than seven years and a fine of up to TWD60 million (Arts 4 and 5, Statute).

### 4.4.2 Money laundering

The Taiwanese Money Laundering Control Act requires financial institutions to report any cash transaction exceeding TWD500,000 to the Investigation Bureau of the Ministry of Justice (MJIB), supplying the identity of the customer(s) involved. Breach of this law by a financial institution is punishable by a fine of between TWD200,000 and TWD1 million.

The Act also requires financial institutions to report any financial transaction which it suspects could relate to criminal activity. Failure to report is punished by fines of TWD200,000–TWD1 million. However, if the financial institution is able to prove that the apparent breach of the law was not an intentional or negligent act of an employee, the institution will not be fined.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Foreign investments are regulated by the Statute for Investment by Foreign Nationals (SIFN) and the regulator in Taiwan is the Investment Commission of the Ministry of Economic Affairs (MOEA).

### 4.5.1 Exchange controls

Taiwan exercises foreign exchange controls over inward and outward remittances. The control applies only to the conversion of foreign exchange into local currency or vice versa, but not to the ownership of foreign currency.

Foreign exchange settlement can be made through a foreign exchange bank by submitting to the Central Bank of the Republic of China (Taiwan) (CBC) a Foreign Exchange Payment or Receipt Transaction Declaration Form accompanied by evidentiary documents. However, no such prior approval is required for the following payments or receipts:

- revenue from exports of goods or services
- payments for the import of goods or services
- revenue from, or expenditure relating to direct investment<sup>3</sup> approved by MOEA, and
- where the aggregate remittance payments during a calendar year is
  - less than USD50 million for a resident entity or branch office
  - less than USD5 million for resident individuals, or remittance by a non-resident individuals or entities of sums less than USD100,000. (Note that these ceilings are subject to periodical adjustment by the CBC).

All other payments require the prior approval of the CBC, which is generally difficult to obtain.

### 4.5.2 Foreign investment approvals and notifications

Under the SIFN, foreign investors must apply for and obtain Foreign Investment Approval (FIA) from the Investment Commission in order to:

- establish a subsidiary or joint venture company
- acquire shares from existing companies (other than those shares listed on the TSE or Gre-Tai), or
- increase the amount of equity investment in an enterprise.

The major incentives FIA companies enjoy include:

- rights of repatriation of equity and loan investments, profits, interest and capital gains
- waivers of resident and nationality requirements of various statutes<sup>4</sup>

<sup>3</sup> e.g. inbound equity investments; e.g. remittance of dividends or profits

<sup>4</sup> The Company Law, Mining Law, Land Law, Maritime Law and Civil Aviation Law.

- no expropriation<sup>5</sup> for a period of 20 years, as long as the foreign investor continues to hold at least 45% of the total capital of the FIA company
- exemption from the requirement to issue 10%-15% of the new shares to employees or the public, if at least 45% of the stock of an FIA company is foreign-owned
- dividend withholding rate of 20%, and
- exemption from income tax for expats who conduct pre-FIA activities and meet certain residency requirements.

The Investment Commission maintains a blacklist that includes one industry sector in which foreign investment may be restricted by percentage (i.e. telecoms) and another in which foreign investment may be wholly prohibited (i.e. military products).

#### Time-frame for obtaining FIA clearance

<i>Investment type</i>	<i>Capital (TWD)</i>	<i>Estimated timeframe for FIA clearance<sup>6</sup></i>
Any, other than the restricted industries on the Negative List	investment amount or increased capital 500 million	2–4 days
Any, other than the restricted industries on the Negative List	≥500 million but ≤ 1.5 billion	3–5 days
Those restricted industries on the Negative List; or where the investment is in connection with M&A or spin-offs	≥1.5 billion	10–20 days
Those in connection with an international M&A or spin-off, or other extraordinary application		20–30 days.

To obtain a FIA, a foreign investor must submit a completed application form together with the required documents (i.e. an investment plan, a business operation plan, shareholder list and investor's information) to the Investment Commission for examination.

#### 4.5.3 Opening up of Chinese investments in Taiwan

Until recently, PRC citizens and entities organised under the laws of the PRC were prohibited from investing, directly or indirectly, in Taiwan. However, since 2009, the Taiwan government has adopted several regulations making PRC investments in Taiwan possible,<sup>7</sup> so that inbound investments by PRC investors is now allowed with the approval of the Investment Commission.

PRC investors are allowed to invest in 100 businesses of which 64 are in manufacturing; 25 in the services sector; and 11 the infrastructure sector. For infrastructure businesses, there are further restrictions on the shareholding percentage and total investment amount with respect to airport terminals and seaports.

<sup>5</sup> That is, the government will not remove the private property of the business enterprise for public use.

<sup>6</sup> The estimated timeframe can be extended at the discretion of the Investment Commission.

<sup>7</sup> Regulations governing People's Republic of China Investors' Investment in Taiwan; Regulations governing the Set-up of Branches and Liaison Offices by PRC Profit-Seeking Enterprises in Taiwan; Approved List of Industries by PRC Investors' Investment in Taiwan (Approved List).

## ***Financial services***

In April 2009 the FSC passed the PRC Securities Investment Regulations<sup>8</sup> which allowed direct investment in Taiwan securities listed on the TSE and the Gre-Tai. In 2010, the FSC passed draft amendments to relax certain provisions of the law relating to financial services sector (banks, securities and futures exchanges, insurance companies),<sup>9</sup> in particular, allowing cross-establishment of branch offices by institutions in both Taiwan and Mainland China, and clarifying the requirements for PRC entities (or entities with PRC shareholdings) to invest in those sectors.

### **4.5.4 Industry-specific regulation**

#### ***Financial Institutions Merger Law***

The Financial Institutions Merger Law (FIML) was passed in December 2000 creating tax incentives including the following:

- mergers are exempt from stamp duty and deed tax
- land value increment tax is deferred upon a merger until the land is transferred on again in a subsequent transaction
- goodwill arising from the merger can be amortised (within 5 years of closing the deal)
- merger expenses can be amortised (within 10 years of closing the deal)
- losses on the sale (by reason of a merger) of non-performing loans can be deducted against income (within 15 years of closing the deal)
- the 5-year loss carry-forward privilege of the merging entities can be retained for use by the surviving company or new entity created by the merger for deduction against the company's net income (within 5 years of the occurrence of such loss).

#### ***Financial Holding Company Act***

Merger and acquisition transactions in connection with financial holding companies are subject to special rules under the Financial Holding Company Act (FHCA) of 2001, as amended in 2009. The FHCA contains certain key provisions.

- a mechanism is provided for asset-liability transfers and share swaps to facilitate the conversion of banks, insurance companies and securities firms into financial holding companies (FHCs) or their subsidiaries
- tax and non-tax incentives are available, e.g. tax exemptions and reductions in fees and costs associated with the setting-up of a FHC
- banks, insurance companies and securities firms listed on the TSE and Gre-Tai seeking to convert into an FHC must transfer 100% of their shares to the FHC and set an effective date for the listing of the FHC on the TSE or Gre-Tai<sup>10</sup>
  - with the prior approval of the Financial Supervisory Commission, an FHC and its subsidiaries may sell an additional product or service to existing customers of each other to enhance synergies within the financial group, as long as the interests of FHC clients

<sup>8</sup> Regulations governing PRC Investors in Conducting Securities Investment and Futures Transactions.

<sup>9</sup> Regulations governing Approvals of Banks to Engage in Financial Activities between the Taiwan Area and the Mainland (China) Area, Regulations governing Approvals of Securities and Futures Transactions between the Taiwan Area and the Mainland Area, and the Regulations governing Approvals of Insurance Transactions between the Taiwan Area and the Mainland China Area.

<sup>10</sup> These requirements were instituted in order to simplify and make more transparent the equity structure of FHCs while still protecting the interests of the shareholders.

will not be harmed, and the relevant entity must obtain the prior consent of its clients for the exchange of information among the FHC and its subsidiaries

- the FHC and its 100%-owned subsidiaries may prepare consolidated financial statements and joint tax returns
- foreign FHCs may submit application forms and documentation to the Taiwan government for recognition and approval to enjoy the same rights as those granted to local FHCs
- an FHC's business generally includes management of those companies in which it invests; however, if the FHC invests in a venture capital company, no responsible person or employee of the FHC must also manage target companies in which the VC invests
- the FHC's investments are generally restricted to the financial sector, unless special approval from the Financial Supervisory Commission has been obtained; however, even with approval to invest in a corporate entity in another non-financial sector, the FHC and its representatives must not hold the position of director or supervisor of that entity being invested in, nor designate a person to be the manager of that entity, unless it with the approval of the Financial Supervisory Commission
- subsidiaries of the FHC may not invest in or hold shares of the FHC.

Financial groups may create an FHC under one of two mechanisms:

- via the transfer of assets and liabilities, in which case the entity that plans to be converted into an FHC transfers major assets and liabilities to a new or existing company; the net value of the transferred assets liabilities will be deemed the equity investment in the new or existing company; the transferor will subsequently convert into the FHC and the transferee will become a subsidiary of the FHC. A key advantage of this mechanism is that the transferor retains its listing status if it was listed prior to the transfer, or
- by the swapping of shares. Shareholders of a company seeking conversion into an FHC will, in the shareholders' meeting, approve the swap of all the company shares in exchange for new shares issued by a new or existing company to be designated as the FHC. Shareholders of the company thus become shareholders of the FHC, and the FHC becomes the sole shareholder of the converted company. The swapping of shares is the most convenient way to set up an FHC. However, the new FHC has to apply for to be listed on a securities exchange, which means that the competent authorities will review whether the new FHC meets all the requirements for listing.

#### 4.5.5 Import/export controls

Taiwan restrictions on the import and export of information technology equipment is subject to the Regulations Governing Strategic High-Tech Commodities of Taiwan. If the equipment is classified as a commodity subject to export restrictions on the Wassenaar Dual Use List, it will be considered a strategic high-tech commodity (SHTC) and will require a Taiwanese export licence (unless an exception or exemption applies). The following exceptions/exemptions are generally available for commodities classified as 'SHTCs':

- for commodities exported to non-restricted countries, the requirement to attach specific supporting documents to the permit applications is relaxed when:
  - the total value is less than USD5,000
  - the commodities are exported for exhibition and will be re-imported, or
  - importer and end-user are government agencies, universities or academic institutions, or
  - as otherwise approved by the authorities.

Permits for commodities that qualify under this exception are normally approved in 1 day.

- retail exception: e.g. installed software on items that are readily available on the retail market (based on the EU Dual Use List retail exception)
- other EU Dual List exceptions: because Taiwan has adopted the EU control lists for identifying SHTCs, the relevant agency will generally allow the other exceptions/exemptions authorised by the EU control lists.

Other than these exceptions/exemptions, everything else will need an export licence. No exception/exemption applies just because equipment is exported to another country that has a comparable export control procedure; or the equipment is exported only to another affiliate entity

Imported goods are grouped into three categories with varying degrees of restrictions:

- permissible commodities may be imported under import permit by trading companies and manufacturers. However, the Bureau of Foreign Trade (BoFT) may impose restrictions on the procurement areas of imports either the type of product and the geography/place of export and the qualifications of applicants
- controlled commodities are those which no trading company may import, but under special circumstances factories and manufacturers may apply to import these commodities
- prohibited goods are barred mostly for reasons of security, health and safety or economy. No such goods may be imported by trading companies or factories or manufacturers.

Importers must be Taiwanese entities, which may include branches of a foreign corporation, and must be registered with BoFT. There is no requirement to use local agents or lodge deposits for custom clearance in Taiwan. Letters of credit are commonly used, but other payment methods or financing arrangements may also be used.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

A securities transaction tax (currently 0.3% of sale proceeds) is imposed on the sale of shares but not on asset purchases or mergers under the EML.

On a statutory share swap, the buyer, or issuing company, is exempt from deed tax, VAT, securities transaction tax and stamp duty if the voting shares of the acquiring company comprise at least 65% of the consideration given.

### 5.2 Acquisition of Assets

On a traditional asset sale, stamp duty on a chattels transfer agreement is payable at a rate of TWD4 per agreement; and stamp duty on a real property transfer agreement is 0.1% of the purchase price. On a statutory acquisition of assets, the buyer, or issuing company, is exempt from deed tax, VAT, securities transaction tax and stamp duty if the voting shares of the acquiring company comprise at least 65% of the consideration given.

### 5.3 Mergers

The buyer, or issuing company, is exempt from deed tax, VAT, securities transaction tax and stamp duty if the transaction is conducted under to Article 32 (statutory spin-off) or Articles 18–21 (statutory merger and simple statutory parent-subsidiary merger) of the EML.

## 6. Employee Issues

M&A activities in Taiwan give rise to issues regarding the transfer of employees, payment of severance pay, mass redundancies and the assumption of accrued pension obligations of the target company. Employment issues related to reorganisation or transfers of business entities are generally

governed by Article 20 of the Labour Standards Law (LSL). However, the EML includes employment provisions (some of which differ from the LSL provisions), and govern those activities that fall under the EML's definition of the terms 'merger', 'acquisition' and 'spin-off'. The EML provisions benefit employers engaged in M&A, as they create procedural certainties with regard to notices of employee transfer, increased flexibility in meeting employee severance requirements, and the possibility of transferring the pension reserves of the target company in proportion to the employees being transferred.

## 6.1 Method of Transfer under Local Law

### 6.1.1 Acquisition of shares

Since the purchase of shares does not change the employer–employee relationship of the buying and selling entities, this type of acquisition usually does not by itself give rise to labour concerns under the LSL or the EML. One possible exception is where the selling entity has employee benefits or equity plans such as employee stock option directly sponsored by its parent company, and that sponsorship would be affected by the change of ownership. In such cases, employees' consent may be required to change to such plans unless the original benefit or equity plans empowered the employer to act without that consent.

### 6.1.2 Acquisition of assets

Asset purchases, transfers of business and mergers may each be governed by either the EML or Article 20 of the LSL, depending on the scale of the purchase. Article 20 of the LSL generally applies to transfers of employees where a business entity is reorganised or changes ownership. The CLA as well as the Supreme Court have interpreted that an acquisition (change of ownership) is recognised under the LSL where all rights of the original legal entity are transferred or extinguished and the original legal entity is dissolved accordingly. In contrast, the EML will apply to transfers of employees in any company transaction that meets the EML-specific definitions of 'merger', 'acquisition' or 'spin-off'. 'Acquisition' is defined as the acquisition of shares, business or assets of another company in exchange for shares, cash or other assets in accordance with the relevant laws. As such, there may be cases where EML may impose labour requirements on certain transactions that might not otherwise trigger regulation under Article 20 of the LSL, e.g. M&A activities that involve asset purchases of less than 100% of a company's assets.

Though the EML mirrors some LSL provisions, it expands the scope of companies that are subject to regulation to include companies involved in asset purchases. Companies interested in conducting a statutory acquisition of assets or spin-off (thereby enjoying various EML tax incentives) should pay special attention to EML employment requirements, since such transactions are likely to be classified as acquisitions under the EML.

The EML requires that the company divesting its assets or business give advance notice of the transaction and pay pension (if eligible for retirement) or severance payments to employees who are not offered employment after the acquisition or spin-off and who rejected such offer. For employees continuing employment after the acquisition or spin-off, the company divesting its assets or business must appropriate to the employees' pension fund the full amount due under the relevant labour laws and regulations to obtain the labour authority's approval for transferring the pension fund directly to the acquiring company or to the spun-off company. However, the EML does not provide any penalty clause against companies that fail to comply with the requirement to appropriate the amount due in the pension fund. In practice, most companies choose to make alternative arrangements instead of directly transferring the pension fund.

Alternatively, the acquirer and seller of the assets may enter into agreements with employees so as to transfer their employment directly to the acquirer. The acquirer will then assume their seniorities at the seller (i.e. maintain employees' rank and status), and the seller will not be required to provide them any advance notice (or payment in lieu) or severance pay for the transfer.

### 6.1.3 Merger of financial institutions

The Law Governing Merger of Financial Institutions (LGMFI) governs mergers between banking enterprises, securities and futures enterprises, institutions covered by the insurance enterprise and

other institutions approved by the Financial Supervisory Commission. When a financial institution undergoes merger, reorganisation or assignment, the rights and interests enjoyed by its employees are handled in accordance with the LSL which will pass to the new employer (Art. 19).

## 6.2 Approval or Consultation Requirements

There are no approval or consultation requirements with respect to transfer of employees in M&A transaction other than the negotiation/consultation process required by the Protective Act for Mass Redundancy of Employees.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

The Protective Act for Mass Redundancy of Employees 2003, as amended in June 2014, will apply to M&A activities in any of the following circumstances; where the target company has:

- fewer than 30 employees and intends to lay off 10 or more within 60 days
- more than 30 but fewer than 200 employees and intends to lay off more than 20 within 1 day or more than one-third of the total within 60 days
- more than 200 but fewer than 500 employees and intends to lay off more than 50 employees within 1 day or more than one-quarter of the total number within 60 days, or
- more than 500 employees and intends to lay off more than 80 employees within 1 day or one-fifth of the total number within 60 days.

If the transfer of the target company's employees will result in any of the circumstances listed above, the target company must notify the local labour bureau and relevant parties of its redundancy plan in writing and also publish an announcement 60 days prior to its occurrence. Further, within 10 days of the date of submission of the mass redundancy plan, the target company and its employees must enter into negotiations on the redundancy plan. If the employees and/or target company refuse to do so, or fail to reach an agreement, the local labour bureau must, within 10 days of the unsuccessful negotiation or agreement, invite the employees and target company to form a negotiation committee to negotiate the terms of the redundancy plan and propose alternatives.

Because the statutory procedures for mass redundancy are onerous, the employee layoff plan in an M&A transaction should be well organised and confirmed by the buyer as early as possible, so that the mass redundancy circumstances listed in the bullet points above can be circumvented or the mass redundancy procedures followed. Alternatively, the target company is advised to offer enhanced severance packages and enter into mutual termination agreements with the affected employees rather than subject them to layoffs.

### 6.3.2 Penalties

Businesses will face fines of TWD100,000–TWD500,000 if they:

- refuse to enter into negotiations on the redundancy plan
- refuse to appoint negotiating representatives or fail to notify the workers to elect their negotiating representatives
- prevent employees from accessing HR advice about re-employment and/or vocational training, or
- arbitrarily reassign the jobs of the workers or terminate the workers' positions during the period when the redundancy plan is being negotiated.



## Thailand

### 1.1 Overview

Several laws and regulations govern M&A activities in Thailand, and, depending on the investor's activity, will be subject to different sets of laws and regulations based on:

- the status of involving corporate entities
- the types of acquisition method, and
- the industry of the target business.

### 1.2 General Legal Framework

Different laws and regulations govern each the different merger and acquisition activity. For private-company mergers and acquisitions, the rules and procedures are mainly to be found in the Civil and Commercial Code (CCC), while public companies should look to the Public Limited Company Act 2535 (1992) (PLC Act). Public companies whose shares are traded on the Stock Exchange of Thailand (SET) must comply with the Securities and Exchange Act 2535 (1992; SEC Act), and also with the rules and regulations of the SET, Securities Exchange Commission (SEC) and Capital Market Supervisory Board (CMSB).

### 1.3 Corporate Entities

The nature and form of limited liability companies in Thailand is essentially the same as in many other jurisdictions. The capital is divided equally and is represented by shares in a designated (par) value. The liability of each shareholder is limited to the unpaid portion of the shares held. Limited liability companies may be either private companies, which are subject to the CCC, or public companies, which are subject to the PLC Act.

#### 1.3.1 Private limited companies

To establish a private limited company, at least three natural persons (not necessarily Thai citizens) must act as promoters (founders), with each holding at least one share, thus becoming a shareholder upon incorporation. The par value of share of a private limited company is at least THB5 and each share must be at least 25% paid-up. Generally, there are no restrictions as to the nationality of the directors, except for companies in certain commercial sectors. Shares in a private limited company may not be offered publicly. However, a private limited company may issue certain kinds of debt instrument to the public, subject to the approval from the Securities and Exchange Commission (SEC), under the authority of the SEC Act.

#### 1.3.2 Public limited companies

There must be at least 15 promoters in order to apply to incorporate a public company. The promoters must subscribe to at least 5% of the total shares, and must hold those shares for two years from the company's incorporation (registration) date, except where approval from the shareholders meeting has been obtained. In addition, at least 50% of the promoters must be residents of Thailand. The shares in a public limited company must be fully paid-up. The board of directors must have no less than five members. At least half of the board of directors must reside in Thailand. The directors must make full disclosure of their shareholdings in the company or its affiliates and generally have greater responsibility than directors of private limited companies. Only the shares in public limited companies may be offered publicly and traded on the SET. Public limited companies may also issue debentures and other forms of securities to the public.

## 2. Acquisition Methods

Three main forms of M&A are recognised in Thailand.

Strictly speaking, the concept of 'merger' is not recognised in Thai law; instead the concept of 'amalgamation' is used but for these purposes the term 'merger' is used in the generally understood sense.

Mergers and acquisitions can take the form of an:

- amalgamation or a consolidation
- acquisition of the shares in a target company, or
- acquisition of assets of the target company.

In addition to these three main forms, there are also some situations where, for commercial reasons, a combination of acquisitions is necessary. Generally, the transaction begins with a share acquisition to acquire an entire entity, and is then followed by an amalgamation or asset acquisition to transfer of all or a part of the assets to the acquiring entity.

Despite recent amendments to the CCC, merger procedures are still considered to be complex and relatively time-consuming, which means acquisitions of shares or of assets are generally more common in Thailand than merger procedures.

### 2.1 Acquisition of Shares

In a share acquisition a potential acquirer seeks to buy a majority share in the acquired company (or effect a takeover). Both acquiring and acquired entities survive, but the acquired entity becomes a subsidiary of the acquiring entity.

### 2.2 Acquisition of Assets

In an asset acquisition, both the acquiring and the acquired entities survive. The acquired entity merely divests its assets or business(es) and transfers them to the acquiring entity. After completion of the transaction, whether or not the acquired company is dissolved or is maintained to carry out different business activities can be considered as a separate issue.

### 2.3 Mergers (Amalgamation)

Once two or more companies are merged, the merged company will become a new company and the merging companies will lose their legal personality (CCC or PLC Act). The new company will inherit all assets, liabilities, rights, duties and responsibilities of the merging companies.

Major drawbacks of amalgamation is that the new corporation loses the opportunity to treat the net loss of the original corporation as an expense when computing net profit for tax purposes, and the transaction may involve several complicated, time-consuming legal procedures.

## 3. Negotiation, Signing and Closing

### 3.1 Pre-Contractual Obligations

Depending on the transaction, the M&A process typically starts with the identification of assets, determination of the most appropriate acquisition vehicle, and preparation of preliminary documents. Those documents (e.g. non-disclosure and confidentiality agreements, memoranda of understanding and letters of intent) stipulate obligations of the parties to the transaction and often key terms and conditions of the acquisition agreements. Whether or not such documents form a contract or legally bind the parties to them depends on their own terms.

## 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Thai purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. All types are seen, including working capital adjustment, cash-free debt-free, NAV adjustments.
2	Is there a collar on the adjustment?	Collars not common. May be required for public companies.
3	Who prepares completion balance sheet?	Usually prepared by the target company (but the buyer may be involved in process of preparing the accounts).
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	More common in private equity transactions when the sellers continue to manage the target company after closing. Less common where the seller is completely exiting. Earn-outs commonly capped.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Not uncommon.
8	Is a break fee common?	Uncommon.

### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Uncommon, typically available only where there is a long period before execution and completion or a foreign seller.
10	Is the MAE general or specific?	Both are seen.
11	Quantification of MAE?	Uncommon.

### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, but not from private equity sellers. Waterfall provisions uncommon.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Generally get this for private deals.

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|----|---|---|
| 16 | Is it common to update warranty disclosure or notify of possible breach? What is the consequence? | Updating schedules is common but limited to things like lists of contracts. Notification of possible breach is common. Where material breach, right to terminate. |
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| 17 | Is a separate tax covenant/indemnity or tax deed common? | Common to have tax indemnity, usually included in purchase agreement. |
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### Representations & Warranties

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| 18 | Materiality in representations – how is it quantified (e.g. by a \$ amount)? | Materiality qualifiers commonly seen but often not quantified (other than specific warranties e.g. contract value). |
|----|--|---|

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| 19 | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers are growing. Often limited to actual knowledge and due enquiry of a specified list of senior management. |
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| 20 | Is a warranty that there is no materially misleading/omitted information common? | Always requested by buyers, but typically one of the most contested warranties. |
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| 21 | Is disclosure of data room common? | Becoming more common. |
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### Repetition of Representations & Warranties

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| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common? | Repetition at completion common. Bring-down certificate not very common. |
|----|--|--|

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| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard? | True and accurate in all material respects is common but often carve-out for fundamental representations which must be absolutely true. |
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| 24 | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Double materiality usually avoided. |
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### Limitations on Liability

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| 25 | What is the common cap amount (as a percentage of purchase price)? | More buyer-friendly. Usually end up with cap at the purchase price. Key warranties usually unlimited or higher than general warranties. |
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| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Both seen regularly. |
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| 27 | What are the common exceptions to the cap? | Key warranties often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated. |
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|----|-----------------------------------|-------------------------------------|
| 28 | Is a deductible or basket common? | Uncommon to have these limitations. |
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| 29 | Is a <i>de minimis</i> common?  | No <i>de minimis</i> qualification.  |
| 30 | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)? | Commonly 3–5 years. Tax/fraud negotiations start unlimited but often end up around 10 years. |
| 31 | Is warranty insurance common?   | Uncommon. Starting to see it in private equity exits.  |

#### Reliance

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| 32 | Do financiers seek to rely on purchaser's due diligence reports? | Uncommon. |
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#### Set-offs against Claims

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| 33 | Is a set off against claims for tax benefits common? | Not commonly seen.            |
| 34 | Insurance proceeds?                                  | Common for actually received. |
| 35 | Third party recoveries?                              | Common for actually received. |

#### Damages, Knowledge

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| 36 | Obligation to mitigate damages?  | Civil law system so not required by law. Not usually stipulated in the purchase agreement. |
| 37 | Exclusion of consequential damages?  | Quite common.  |
| 38 | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? | Often silent.  |

#### Dispute Resolution

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| 39 | Does local law allow for a choice of governing law? What is the common governing law? | Yes, if not contrary to public policy. Thai or English law is more common. |
| 40 | Is litigation or arbitration more common? If arbitration, where?                      | Case-by-case basis.  |

#### Stamp Duty

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| 41 | If stamp duty is payable, is it normally shared? | Stamp duty if signing or bringing original purchase agreement into Thailand. 0.1% of par value or of purchase price whichever is higher. Usually buyer pays. |
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### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares

For private companies, transfers of shares to an acquirer is valid only if made in writing (commonly referred to as the 'share transfer instrument'), and signed by the transferor and the transferee whose signatures must be certified by at least one witness. The number of shares to be transferred must also be specified in the share transfer instrument.

The transfer of a public limited company's shares is made by: endorsing the share certificate with the names of the transferor, signing by the transferee and transferor, and delivery of the share certificate. Where the transfer is of shares in a SET listed public limited company, the transfer must comply with the requirements of the SET regulations, e.g. the transferee must submit an Application for Registration of Securities Transfer to SET.

### 3.3.2 Transfers of assets

The documents required for a transfer of assets will depend on type of assets involved. For example, the transfer of immovable property, such as land and buildings, is valid only if made in writing and registered with the competent governmental authority (i.e. the Land Registry Office).

For transfers of movable property valued above THB20,000, the CCC requires:

- a written document signed by the parties to the contract, or
- evidence of the deposit, or
- evidence of partial payment enforce agreements to transfer movables.

## 3.4 Formalities for Transferring Title to Shares or Assets

### 3.4.1 Transfers of title to shares

Transfers of shares in a private company will be ineffective against the company and third persons until the share transfer and the name and address of the transferee are recorded in the share register book of the company.

Transfer of shares in a public company will be effective against the company upon the company's receipt of a request to register the transfer of the shares, but is not effective as against third parties until the company registers the transfer of the shares in its share register book. Although not mandatory, it is normally recommended that the company prepare and submit to the Ministry of Commerce a new list of shareholders showing the transferee as the holder of the shares.

Where the transfer of listed shares deposited with Thailand Securities Depository Co. Ltd (TSD), or where the shares involved are in scripless form, the transfer can be effected by transferring the shares from the account of the transferor's custodian or broker to the account of transferee's custodian or broker. The TSD must confirm that the transfer has happened and record it against that custodian's or broker's TSD account.

As with acquisitions of shares in listed public companies, additional regulatory requirements need to be meticulously considered, including reporting requirements for the sale or purchase of listed shares exceeding a 5% threshold, and tender offer requirements.

### 3.4.2 Transfers of title to assets

Generally, a transfer of ownership of assets classified as immovable property would not be complete until registered with the competent governmental authority (i.e. the Land Registry Office). Transfers of movable property, on the other hand, can be completed merely on delivery of the property, although for certain types of property (e.g. ships of five tonnes and over, floating houses, beasts of burden and machinery), changes in the title deeds or to the governmental register will also be needed.

Some assets are not transferable, including some governmental licences; pending litigation claims; and land to which restrictions apply on its transfer (e.g. licences to operate businesses detrimental to health, or to possess hazardous substances; or land with transfer restrictions for a certain period of time (e.g. 5 years)). In practice, non-transferrable governmental licences must be reapplied for by the acquiring party. The transferring party must also file an application to cancel its existing licence.

For private companies, no specific clause in the CCC requires a company or its board of directors to obtain approval from the shareholders prior to any sale or transfer of all, most or a major proportion of the assets of the company. This silence means two schools of thought have developed on the need

for shareholder approval for the sale or transfer of all, most or a major proportion of the assets of the company. The first is: 'no specific legal requirement – no shareholder approval required'. The second school of thought argues that since the acquisition is likely to have a significant impact on the interests of the shareholders, approval must be obtained prior to the transaction.

For public companies, the PLC Act clearly specifies that the sale or transfer of all or a substantial portion of the business of a public company to another person requires a vote of not less than three-quarters of the total number of votes of shareholders who attend the meeting and have the right to vote. Under the SEC Act, whether the purchase, sale or transfer of assets relating to the listed company should be subject to the approval of the board of directors or shareholders will depend on various factors, such as the value of the assets or the contracting parties (e.g. connected persons as defined in the sub-ordinated regulations).

### 3.5 Formalities for Mergers

For mergers between two private companies, between two public companies, or between a private company and a public company, a special resolution of shareholders with an affirmative vote of at least three-quarters of the votes of all shareholders is needed.

After the special resolution of shareholders has been passed, the CCC and PLC Act also require publication of the announcement of the merger in local newspapers and notification of the merger to the creditors to give them the opportunity to object. The window for objection is open for 60 days for private companies and 2 months for public companies. In relation to public company shareholders and the rights of 'dissenters' (shareholders who object to the proposed merger), the merging company should generally arrange to purchase the dissenter's shares at fair market value—i.e. the price last traded on the exchanges prior to the date of the shareholders' resolution—or, if no such trading price can be ascertained, a price determined by an independent valuer. Dissenters who refuse to sell their shares within 14 days of receiving such an offer to purchase them at fair market value will be deemed to be in agreement with the merger.

If a company's articles of association specify requirements that are stricter than the applicable provisions under the CCC or PLC Act detailed above, the articles of association requirements prevail.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

The Trade Competition Act 2542 (1999) (Competition Act) prohibits any merger or acquisition that would create a monopoly or lead to unfair competition, unless permission is first obtained from the Trade Competition Commission prior to the merger or acquisition.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Thai purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Share acquisitions, asset acquisitions, and amalgamations all fall within the ambit of the Competition Act.

Under the Competition Act, a merger includes, among other things:

- a merger between two or more manufacturers, sellers or service providers, causing one business to be terminated or causing the two businesses to be merged into a new business
- an acquisition of the whole or part of another business' assets in order to control the business management policy administration or management, and
- an acquisition of the whole or part of another business' shares in order to control the business policy, administration or management.

The Trade Competition Commission has full authority to prescribe any merger conditions required to obtain pre-merger permission, including criteria on combined market shares, sales turnover, the amount of capital, shares or assets. However, the Commission has not yet used these powers.

Applicants must (in theory: see below) submit applications for permission to the Commission in accordance with its procedures, criteria and conditions, which are to be published on a regular basis in the *Government Gazette*. That said, at time of writing, no procedure, criteria or conditions have ever been announced.

Therefore, at the time of writing, no merger of any type needs permission from the Trade Competition Commission.

However, if any M&A results in any business entity gaining a dominant position, that entity will be prohibited by the Competition Act from abusing its dominant position (e.g. from imposing unfair prices for the purchase or sale of goods or services; imposing unfair conditions on customers; or ceasing, reducing or limiting a service or supply without reasonable cause).

The Competition Act states that 'dominant position' will be periodically defined and prescribed by the Commission. The last time this was updated was in January 2007, when the Commission announced the threshold for market dominance which now effectively applies to all industries operating in Thailand. A dominant position will be found if:

- a single business entity has 50% market share or more, and sales of THB1 billion or more in the previous year, or
- any of the top 3 business entities in a particular industry or industry segment have a combined market share of 75% or more and combined sales turnover in the previous year of THB1 billion or more (in which case, all 3 would be classified as dominant players—except for any entity which individually has a market share below 10% or a sales turnover in the previous year of less than THB1 billion).

On 31 October 2014, the Trade Competition Commission resolved these thresholds to be as follows:

- any entity with 30% market share or more, and sales of THB500 million or more in the previous year, or
- any of the top 3 business operators in a particular industry or industry segment (goods or service market) with a combined market share of 75% or more, and combined sales turnover in the previous year of THB500 million or more, whereby all 3 would be classified as dominant players, except for any entity which individually has a market share below 10% or a sales turnover in the previous year less than THB500 million.

As of the date of this writing, the proposed amendment is being considered by the Cabinet.

In addition to the Competition Act, other laws peculiar to certain sectors may apply to any merger or acquisition that would create a monopoly or lead to unfair competition: for example, laws specifically regulating the energy or telecoms sectors.

### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.  Merger control legislation has been enacted but the notification thresholds have not yet been set by the competition authorities. Filings are not required until the thresholds have been set.
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### Timetable



2	In practice, what is the timetable for clearance (in first phase and second phase review)?	N/A.
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### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

There is no specific law and regulation in relation to these issues in Thailand.

### 4.4 Anti-Bribery, Corruption and Money Laundering

The Penal Code of Thailand generally criminalises the offering of property or other benefits to public officials, as well as the acceptance or demand of property by those officials. Public officials acting or failing to act (or delaying acts) contrary to their official functions is also a criminal offence. The Penal Code specifically criminalises:

- bribery of public officials, public prosecutors and judges
- the soliciting or acceptance of gifts by public servants, public prosecutors and judges
- malfeasance in order to gain some property or benefit by
  - public officials, and/or
  - prosecutors and judges.

Where a private party offers property or benefits to a public official, the Penal Code criminalises that act:

- in relation to the giver, if the act is designed to induce a public official to act contrary to his functions, and
- in relation to the receiver, whether or not the act is contrary to or in accordance with their function (i.e. even if the giver's act is not specifically unlawful on the giver's part if made to induce a public official to act in accordance to their functions, it is nevertheless a criminal act on the part of the public official).

The Anti-Money Laundering Act, 2542 (1999) (AMLA) and laws and regulations made under it govern anti-money laundering and counter-terrorism acts in Thailand. The AMLA is designed to prevent money laundering and combat the financing of terrorism. If the requirements of the offence are found to be present, the offender will be deemed to have committed the offence and will be subject to sanctions in Thailand, regardless of the place of offence. For a money laundering, a person must be involved in transferring, accepting the transfer of, or converting funds which are related to the commission of a 'predicate offence'. The AMLA defines 21 predicate offences relating to:

- narcotics
- prostitution
- public cheating or fraud
- embezzlement or cheating/fraud under laws governing financial institutions
- malfeasance in office or corruption by officials
- extortion or blackmail committed using the influence of a secret society or criminal association (i.e. organised crime)
- evasion of customs duties under customs laws
- terrorism

- gambling
- being a member of a racketeering group or participating in an organised criminal group which constitutes an offence under relevant laws
- offence relating to receiving stolen property
- counterfeiting or alteration of currencies, seal, stamp and ticket trading
- forging a document of right, electronic cards or passports
- offence relating to the unlawful use, holding, or possessing of natural resources or a process for illegal exploitation of natural resources
- murder or grievous bodily injury which leads to the acquisition of assets
- restraining or confining a person only where it is to demand or obtain benefits or to negotiate for any benefits
- theft, extortion, blackmailing, robbery, gang-robbery, fraud or misappropriation
- piracy
- unfair securities trading practice, and
- arms or arms equipment.

The AMLA imposes duties on financial institutions to police/help enforce these laws by conducting due diligence on customers and reporting suspicious transactions, namely:

- any transaction involving cash in an amount greater than or equal to THB2 million or its equivalent in any other currency, including the transfer of money via BAHTNET and SWIFT, whether domestically or cross-border
- any transaction involving assets of a value greater than or equal to THB5 million or its equivalent in any other currency if it relates to immovable property, a ship of 6 tonnes or more, or a steam- or a motor boat of 5 tonnes or more, including a houseboat, or
- any of the following transactions, regardless of the amount of cash or the value of assets; transactions that:
  - are more complicated for the financial institution to conduct than a normal transaction
  - appear to lack economic rationale
  - seem to be intentionally construed to avoid compliance with the Act, or
  - relate to one of the above 'predicate offences'.

#### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Foreign investors should give careful consideration to the following laws which apply to M&A transactions in Thailand.

#### 4.5.1 Exchange controls

The Bank of Thailand (BOT) administers Thailand's system of exchange control on behalf of the Ministry of Finance. Some transactions require the direct approval of BOT; others can be dealt with by any commercial bank in Thailand (to which BOT has delegated authority as its agents). In all matters involving foreign currency, currency inflows must be properly recorded, and contracts and other legal papers adequately documented. The government implemented three rounds of foreign exchange deregulation during 1990–1992. These liberalising measures were intended to make funds for international business transactions freely available and remove the requirement for prior BOT approval. In general, most foreign currency exchange transactions may now be processed through any commercial bank in Thailand, although BOT does have the residual discretion to question and investigate a foreign currency payment where no reasonable grounds have been given for the remittance or where the proper procedures have not been followed.

##### ***Imports***

Most payments for imports can be approved by commercial banks. The banks require documents like invoices, bills of collection, and, where appropriate, import permits, to be submitted to ensure the transaction is bona fide before approving the payments. Importers may make payments by either withdrawing the foreign currency from their own foreign currency deposit (FCD) accounts at a Thai commercial bank or by purchasing foreign currency from commercial banks in an amount not exceeding the value of the goods to be imported.

##### ***Exports***

Exports are free from exchange restrictions. However, export proceeds above a certain value must be obtained within 360 days of the date of export. Once obtained, the Thai resident is required to immediately convert them into Baht with a commercial bank in Thailand, or deposit them into an FCD account opened with a commercial bank in Thailand, within 360 days of the date of obtaining those export proceeds.

##### ***Foreign currency deposit accounts***

FCD accounts may be opened by residents and non-residents at commercial banks. Non-residents include branches or agents abroad of companies incorporated in, or individuals residing in Thailand, but not branches or agents in Thailand of companies incorporated, or individuals residing abroad.

The foreign currency deposited in an FCD account must represent funds received from offshore, or funds bought, converted, or borrowed by the resident from a commercial bank in Thailand. In the case of funds received onshore without eligible offshore obligations at the end of everyday, the FCD account should not have funds received onshore without eligible offshore obligations more than USD500,000 per depositor.

Starting 12 October 2010, Thai exporters having export proceeds from an offshore source, in a foreign currency deposit account, and opened with a commercial bank in Thailand, can transfer that foreign currency (up to the amount of the export proceeds received) to counterparties in Thailand for payment of goods or services.

##### ***Non-resident Baht accounts and non-resident Baht accounts for securities***

A non-resident may open a non-resident Baht account, of which there are two primary types: Non-resident Baht Accounts and Non-Resident Baht Accounts for Securities (NRBS). In general, commercial banks can receive Baht into Non-resident Baht Accounts (NRBAs) if those funds:

- represent the exchange value of remitted foreign currency
- are transferred from another NRBA
- are received as payment for goods, or

- represent Baht converted from foreign currency withdrawn from the FCD account of a non-resident. Withdrawals of Baht from an NRBA can be made for various purposes, subject to certain exemptions, e.g. investment in securities or derivatives traded on an exchange.

Non-residents may also open Non-resident Baht Accounts for Securities (NRBS). The deposit and withdrawal of Baht into/from NRBSs must be for specific allowed purposes. Commercial banks can receive Baht into an NRBS if the funds:

- represent the exchange value of remitted foreign currency or Baht converted from foreign currency withdrawn from the FCD account of a non-resident
- are transferred from another NRBS, or
- are received as a return on investment in securities and derivatives traded on an exchange. The withdrawals must be made to invest in securities or derivatives traded on an exchange.

Note that the transfer of funds from an NRBA to an NRBS, and vice versa, is not permissible.

### ***Exchange control and promoted businesses***

Under the Investment Promotion Act (IP Act), foreign investments in promoted industries are accorded incentives and privileges, including guarantees on the repatriation of profits, dividends, interest, and imported capital. A promoted individual or an investor in a promoted activity can be granted permission to remit or take out foreign currency relating to the return of capital and payments under loans and other contracts.

#### **4.5.2 Foreign investment approvals and notifications**

### ***Foreign Business Act***

The Foreign Business Act 2542 (1999) (FBA)<sup>1</sup> is designed to prohibit or restrict foreigners from participating in specified business activities in Thailand and requires licences to be obtained prior to engaging in certain businesses. However, a foreigner may wholly own a business in Thailand, unless the specific activity of that business is restricted under the FBA or is otherwise prohibited by another law.

The FBA defines 'aliens' or 'foreigners' as natural persons or juristic (legal) entities who do not possess Thai nationality. Companies are considered 'foreign' for these purposes if 50% or more of their share capital belongs to foreign individuals or juristic entities.

The prohibited or restricted businesses under the FBA are categorised in three schedules. Those activities contained in Schedule 1 are business activities that foreigners are not permitted to undertake for special reasons, so licensing foreign nationals or entities is not possible in those areas.

Schedule 2 consists of businesses considered to be of concern on national security or safety grounds; or could have an impact on Thai art and culture, customs, native manufacture/handicrafts; or an impact on natural resources or the environment. Foreigners may engage in Schedule 2 businesses only with permission from the Minister of Commerce, which in turn can only be issued with a resolution of the Cabinet.

Even if licenced, those foreign entities must include Thai nationals (or juristic persons that are not foreigners under the FBA, holding at least 40% of the capital of that foreign legal entity). Also, at least two-fifths of the directors must be Thai. However, the Commerce Minister, by and with the resolution of the Cabinet may, in certain cases, reduce the required Thai shareholding percentage; but in no circumstances below 25%.

Schedule 3 comprises businesses where it is considered that Thais are not yet prepared to compete with foreign national or entities. Foreigners may engage in Schedule 3 businesses only with the permission of the Director-General of the Department of Business Development, the Ministry of

<sup>1</sup> In force since 3 March 2000, replacing the Alien Business Law of 1972.

Commerce, by and with approval of the Foreign Business Board. If a foreign enterprise receives this permission, the foreign entity can be 100% foreign-owned and there is no requirement for a minimum number of Thai directors.

### ***Exemptions to the FBA under the Treaty of Amity***

Many of the restrictions imposed by the FBA do not apply to Americans since Thailand and the United States have entered into the Treaty of Amity and Economic Relations 1996. Among the treaties to which Thailand is a signatory, the Treaty of Amity is by far the most important for FBA matters. The Treaty allows US nationals and companies incorporated in the United States or Thailand that are majority owned and controlled by US nationals, to largely conduct business in Thailand as if they were a Thai national. In cases of US companies incorporated in the United States, they typically do business via their branch or representative offices in Thailand. In other cases, they would take other forms of business vehicle, e.g. incorporating an American majority-owned company or acquiring majority shares in an existing company in Thailand. However, the Treaty still prohibits an American (either an individual or an entity) from undertaking any of six restricted business activities:

- transportation and carriage
- fiduciary functions
- banking involving depository functions
- exploitation of land or natural resources, and
- domestic trade in indigenous agricultural products.

Before undertaking any other restricted business (as specified in the FBA, i.e. other than the above 6 areas), a US individual or entity must apply to the Director-General of the Department of Business Development at the Ministry of Commerce for a foreign business certificate acknowledging the carrying on of that specific restricted business.

There is some uncertainty surrounding the continued availability of exemptions for US nationals under the Treaty due to Thailand's WTO obligations, since the WTO derogation allowing for the existence of the Treaty expired on 31 December 2004. There has been an extension for the submission of applications (for an unspecified period), and many US investors have applied for protection under the Treaty during this period of extension.

### ***Board of Investment and Industrial Estate Authority exemptions***

Foreigners that have been granted investment promotion from the Board of Investment (BoI) or permission to operate industrial or export businesses by the Industrial Estate Authority of Thailand (IEAT) in relation to the businesses described in Schedules 2 or 3 will also be exempt from the FBA. In this respect, they must notify the Ministry of Commerce and procure a certificate from the Director-General, who will issue the certificate within 30 days of the date of receipt of the notification.

### ***Land ownership***

Land may only be owned by Thai nationals or companies in which Thai nationals own 51% or more of the registered share capital and more than half the number of its shareholders are Thai nationals (Land Code of Thailand). Foreign nationals or entities are generally not allowed to own land in Thailand—with some exceptions noted below.

### ***Exception for certain levels of investment***

The Land Code was amended in 2002, in line with current government policy to boost investment in Thailand, and now allows foreigners who bring into Thailand not less than THB40 million for at least a 5-year investment in government bonds, property funds, investment-promoted companies or business, to own land for residential purposes with an area of not more than 1 rai (equivalent to about 1,600 sq. m).

Foreign nationals and entities can also own Thai land:

- if their businesses is being supported/subsidised by the Board of Investment (BoI), or
- the land to be acquired is located in an industrial estate zone controlled by the Industrial Estate Authority of Thailand (IEAT).

While it is possible for a company with non-Thai shareholders to own land, if there are any foreign shareholders in the company, the Thai shareholders will be required by the local land office to demonstrate that they have the funds necessary to invest in that company and are not merely nominees of the foreign shareholders; and that the company is not 'sham' (has not been organised specifically to circumvent the prohibition against foreign ownership of land).

Significant sanctions apply to any person found to have acquired land as an agent of a foreign national or company, including a fine of up THB20,000 or up to two years' imprisonment, or both.

When considering the purchase of land in Thailand, a land due diligence should be carried out at the local land office and particular care given to the verification and examination of title, the site, the likelihood of title revocation due to illegal issuance of title documents, any potential overlap with public land or forest reserves, the availability of utilities and access, zoning and building restrictions, and any legal encumbrances on the land (e.g. rights of way or servitudes).

#### *Exception for condos*

The above restrictions on foreign land ownership are relaxed in relation to condominiums.

Condo development, although not one of the restricted businesses listed in the schedules to the FBA, is subject to certain conditions. Condo developers must generally own the building(s) and the land beneath it intended to be registered as a condominium. And foreign nationals or entities are generally prohibited from owning land (Land Code).

To get around this (and create another exception) the Condominium Act 2535 (1992), as amended, specifies five situations in which foreign individuals or legal persons will be entitled to own condominium units as follows:

- holding foreigner residence permit under the law on immigration
- foreigners permitted to enter Thailand under the law on investment promotion
- a juristic person deemed to be foreigner under the Land Code, registered as such under Thai law
- a juristic person who is a foreigner under the Announcement of the Executive Council No. 281 dated 24 November 1972 holding an investment promotion certificate under the law on investment promotion
- foreigners or juristic persons deemed by Thai law to be foreigners, who have brought into Thailand foreign exchange or withdraw the money from the non-resident Baht account or withdrawn the money from the foreign currency deposit account.

But in no cases will foreigners be allowed to own more than 49% of the total floor area of all the condominium units in any one development.

#### 4.5.3 Industry-specific regulation

In addition to the FBA, several statutes impose conditions of majority ownership and management by Thai nationals in specific business sectors.

### ***Financial institutions***

Commercial banks, finance companies are primarily subject to the Financial Institution Business Act 2551 (2008) (FIBA)<sup>2</sup> and regulations stipulated by the BOT as regulator.

All financial institutions including commercial banks, retail banks, subsidiaries of foreign financial institutions, branches of foreign banks, representative offices of foreign financial institutions, finance companies and 'credit foncier' companies, are supervised under the same set of regulations.

In relation to the ownership of the financial institutions, the FIBA requires that Thai nationals must hold not less than 75% of the total number of shares with voting rights and that at least three-quarters of the total number of directors be Thai nationals. However, this limitation can be relaxed at the discretion of BOT.

Foreign nationals may be allowed to hold up to 49% of the total number of voting shares sold in a financial institution, which is reviewed on a case-by-case basis and upon request. Foreigners are allowed to comprise more than 25% of the company's voting shares, but not more than 50% of the directorship of a company.

### ***Insurance***

The legislation requires that Thai nationals must hold more than three-quarters of the total number of voting shares sold and that at least three-quarters of the total number of directors must be Thai nationals.<sup>3</sup>

The Insurance Acts also empower the Office of Insurance Commission (OIC), on a case-by-case basis and upon request, to permit non-Thai nationals to hold up to 49% of the company's voting shares sold and to allow foreigners to comprise more than one-quarter, but not more than half, of the board of directors of the company.

Where the insurance company's standing or operations are likely to be detrimental to the insured parties or to the public, the Minister of Finance, at the OIC's request, may allow the company's shareholding or directorship structure to differ (i.e. to allow the foreign shareholding ratio to be more than 49%).

On 18 December 2014, the National Legislative Assembly passed further amendments to the Insurance Acts, which would give a statutory footing to that discretion (i.e. giving to the Ministry of Finance greater authority to issue special permission for insurance companies to increase their foreign shareholding ratio beyond the 49% threshold). Apart from cases where the insurance company's financial standing or operations are such that this exceptional clearance could damage the insured parties or the public, the Ministry of Finance will be able to grant this relaxation if by doing so it would improve the financial stability of the insurance company or increase the stability of the insurance industry overall. These amendments were finally announced in the *Government Gazette* on 5 March 2015 and came into force on 6 March 2015.

The Insurance Acts also stipulate that amalgamation may be carried out only between two or more public companies licensed to operate an insurance business. The amalgamation of insurance companies is governed by the PLC Act. The insurance companies intending to amalgamate must submit to the OIC for approval, a plan detailing the amalgamation. The merged company would then be deemed licensed to operate an insurance company.

### ***Telecoms***

Certain types of service provider in the telecommunication business must be licenced by the National Telecommunication Committee (NTC).<sup>4</sup> For instance, telephone service providers in Thailand are generally required to obtain NTC licences, except those that were already operating prior to the enactment of the TBO (who must operate their business in a manner consistent with the TBOA).

<sup>2</sup> Which replaced the Commercial Banking Act 2505 (1962) as amended.

<sup>3</sup> Life Insurance Act 2535 (1992), as amended, and the Non-Life Insurance Act BE 2535 (1992), as amended.

<sup>4</sup> Under the Telecommunication Business Operation Act 2544 (2001) (TBOA), as amended.

Further to amendments to the TBOA in 2006, the foreign shareholding limit has been relaxed, so that the foreign share of ownership in a Thai telecoms company is now capped at 50%. An older law which stipulated the minimum number of directors who must be Thai nationals has also been eliminated (i.e. the board of directors can now be entirely 'foreign').

### ***Shipping***

The Thai Vessel Act 2481 (1938) imposed a restriction on foreign ownership in a juristic entity owning a Thai vessel operating in Thai territorial or international waters.

In relation to a company owning a vessel operating in Thai territorial waters, at least 70% of the capital in the company must be owned by Thais (either individual or entity) and not less than half of its directors must be Thai nationals. With regard to a company owning a Thai vessel used in international marine transport, at least 51% of the capital in the company must be owned by Thais (either individual or entity) and not less than half of its directors must be Thai nationals.

### ***Employment Provision and Employment Seekers Protection Act 2528 (1985)***

Recruitment agency work is reserved for Thai nationals under the FBA. In addition, both the manager of the establishment and any corporation formed as a recruitment agency must be Thai. For certain other sectors, such as hotel operation and pharmaceutical dispensing, regulations may require that the individual holder of the licence be an individual Thai national. The appropriate government department should be contacted to determine if there are any restrictions on foreign participation in a given sector.

#### **4.5.4 Import/export controls**

The Export and Import Act, 2522 (1979) (EIA), one of the general laws governing import and export controls, authorises the Ministry of Commerce to designate classes of goods that are subject to import and export controls. Controls usually take the form of permission and licensing, or prohibition. Currently, 64 classes of goods are placed under the import control regime (i.e. requiring import licences or quota licences), or are banned from importation by the Ministry of Commerce. The categories of import-controlled goods are subject to change at any time by Notifications from the Ministry of Commerce, so any prospective importer should always check for the latest Notifications from the Ministry. The Export and Import Act also established the Foreign Trade Board.

In addition to the EIA, other goods are caught by the import controls set out in other laws, such as:

- the Drug Act 2510 (1976): establishing that to import a modern drug, a licence from the Food and Drug Administration, Ministry of Public Health is required
- the Minerals Act 2510 (1967): establishing that without appropriate permission from the Director-General of the Department of Primary Industries and Mines, an importer is prohibited from importing tungstic oxide, tin ore, and metallic tin in quantities weighing more than 2kg
- the Ancient Monuments, Antiques, Objects of Art, and National Museum Act, 2504 (1961): establishing that antiques or objects of art, whether registered or not must not be imported without the permission of the Director-General of Fine Arts
- the Armaments, Ammunition, Explosives, Fireworks, and Imitation Firearms Act 2490 (1947): prohibiting all persons from producing, buying, possessing, using, ordering, or importing military hardware, ammunition, or explosive devices unless with a licence from the Ministry of Interior. An importer or manufacturer must also obtain the appropriate licence from the Ministry of Defence in order to process military equipment, ammunition, and explosive devices, or the raw materials for their manufacture, and
- the Cosmetics Act, 2535 (1992): stipulating that for the purposes of protecting public health, any importer of controlled cosmetics must provide the name and location of the office and place of manufacture or storage of the cosmetics; the name, category, or kind of cosmetics to be imported, and the main ingredients of those cosmetics.



The Export and Import Act also authorises the Ministry of Commerce to subject products to export control. Currently, 40 classes of goods are under export controls.

Certain goods require export licences under other laws as well, such as under the Tobacco Act, 2509 (1966), which covers the seeds, plants, and leaves of tobacco. These cannot be exported from Thailand without the permission of the Director-General of the Excise Department.

Certain goods such as sugar and rice are subject to export licences under the Export Standards Act, 2503 (1960). The purpose of the Export Standards Act in this case is to ensure that such goods comply with quality standards when being exported from Thailand.

In addition, exporters of agricultural commodities may find that membership of certain trade associations is mandatory. These trade associations may impose their own regulations for membership, which in practice act as additional export controls.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

When a share transfer instrument is executed, the original of the share transfer document will be subject to stamp duty at the rate of 0.1% of the sale price or the paid-up value of the shares, whichever is higher, while any duplicate (normally there are two original share transfer documents, the second original is the duplicate) will attract stamp duty at the fixed rate of THB5.

If the acquisition of shares does not involve the share transfer instrument, e.g. because it involves the endorsement and delivery of share certificates or the transfer of scripless shares, no stamp duty applies. The transfer may be subject to the TSD service fee, which is at the minimal amount.

### 5.2 Acquisition of Assets

In cases involving the transfer of immovable property, the transferor will normally be subject to 3.3% 'specific business tax' on the gross receipts from the transfer of immovable property, a 2% transfer fee, and 0.5% stamp duty (stamp duty may be exempt if the specific business tax is paid). The sale of immovable property is also subject to a 1% withholding tax that can normally be used as a credit against corporate income tax.

Currently, the transfer of an entire business is exempt from specific business tax and stamp duty related to immovable property, as a result of the current government's policy of encouraging M&A.

### 5.3 Mergers

Exemptions apply in relation to specific business tax and stamp duty (including a land registration fee) on receipts from the transfer of immovable properties as a result of amalgamation, under certain conditions imposed by the Director-General of the Revenue Department.

### 5.4 Value Added Tax

No VAT is imposed on the sale of shares.

For transfers of movable property, 7% VAT will generally be imposed and it must be filed with the Revenue Department, unless it is a transfer of the entire business (see below) and the transferee is in the 7% VAT band. In that case, no VAT will apply on the transfer of movable property. Note that the VAT rate will increase to 9% from 1 October 2015 onwards, unless there is further extension of the reduction of the VAT rate. i.e. VAT does not apply to the transfer of an entire business because the transfer of an entire business does not fall within the definition of 'sale' under s. 77/1(8)(f) of the Revenue Code.

A transfer of assets under an amalgamation is not considered a sale transaction for VAT purposes and is not subject to VAT.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In share acquisitions, the target company, as employer, continues its operations. The share acquisition only results in a change to the shareholding structure of the target company, without creating any impact on the company's workforce.

#### 6.1.2 Acquisition of assets

A merger in the form of an asset acquisition does not, in principle, affect the employment relationship between the transferor and its employees because the transferor remains the employer regardless of whether or not it will continue its business operations. However, if the transferee wishes to hire any employee of the transferor, the transferor's employees will need to be transferred to the transferee. In that case, the employees must consent to the transfer of their employment, and will be entitled to rights and benefits no less favourable than those they previously enjoyed when working with the transferor. Otherwise, their employment will be deemed terminated and will be entitled to statutory severance pay.

#### 6.1.3 Transfer of business

Where a transfer of employment is the result of a business/property acquisition, the transfer of employment does not take place automatically. Without the consent of employees, either express or implicit, the employees will remain the employees of the selling company, and their employment would be terminated by the selling company. At the time of the transfer of employment, the new employer may not change the existing employment terms and conditions if the changes would result in less favourable employment terms and conditions, unless consent is obtained from the employees. Where consent is not obtained, the employment of non-consenting employees will be deemed terminated and the terminated employees will be entitled to statutory severance pay.

#### 6.1.4 Mergers

Where there is a change of employer due to a transfer, inheritance or any other reason, or where the employer as a legal entity transfers or merges with any other legal entity, all rights of the employees towards the former employer remain unaffected, and the new employer must assume all the rights and duties of the former employer towards the employees (s. 13, Labour Protection Act 2541 (1998)).

Upon amalgamation, the employment will be deemed to continue in force, unless employees expressly refuse to continue their employment with the new company. The new company must assume both rights and duties in relation to the employment from the former employer. If the employee refuses to work with the new company, the employment would be deemed terminated immediately upon the amalgamation, even if the intention was to have the employees perform the same work (in the same position) in the new company. In that case, the new company must assume the severance pay duty from the former employer and pay severance to those employees who do not consent to the transfer of employment.

### 6.2 Approval or Consultation Requirements

Approval or consultation requirements are not applicable in Thailand.

### 6.3 Protection against Dismissal

#### 6.3.1 Redundancies

Thai labour law does not specifically address a situation of redundancy, whether or not resulting from a merger. As such, general provisions on termination of employment will apply to a situations of redundancy. In this regard, under Thai law, an employer may terminate its employees at any time as long as the employer duly gives notice of termination (or makes payment in lieu) and pays all statutory payments to the employee. Redundancy is not a ground for non-payment of severance pay under Thai law. Therefore, should the employer terminate the employee on a ground of redundancy, the

employer must pay severance pay to the employee at a rate prescribed by law i.e., an employee who has worked:

- for at least 120 days consecutively, but less than 1 year, shall be paid wages of not less than 30 days, at the last wage rate, or not less than the wage for the work performed in the last 30 days in respect of an employee who receives a wage based on work-units performed
- consecutively for at least 1 year, but less than 3 years, shall be paid wages of not less than 90 days at latest wage rate, or not less than the wage for the work performed in the last 90 days in respect of an employee who receives a wage based on work-units performed
- consecutively for at least 3 years, but less than 6 years, shall be paid wages of not less than 180 days at the latest wage rate, or not less than the wage for the work performed in the last 180 days in respect of an employee who receives a wage based on work-units performed
- consecutively for at least 6 years, but less than 10 years, shall be paid wages of not less than 240 days at the latest wage rate, or not less than the wage for the work performed in the last 240 days in respect of an employee who receives a wage based on work-units performed
- for 10 years or more consecutively, shall be paid wages of not less than 300 days at the latest wage rate, or not less than the wage for the work performed in the last 300 days in respect of an employee who receives a wage based on work-units performed.

#### 6.3.2 Dismissal of members of an employees' committee

It should also be noted that under s. 45 of the Labour Relations Act 2518 (1975) (the LRA), employees working in a company which has 50 or more employees may among themselves establish an employees' committee. Generally, an employer cannot dismiss an employee who is a member of that committee, or perform any act which may result in that employee being unable to continue working unless permission is obtained from the relevant regional labour court. Therefore, at the time of amalgamation, if an employee who is also a member of the employees' committee does not consent to work with the new company, the employment of that employee will be deemed terminated and the new company must apply for permission from the relevant regional labour court in accordance with the LRA.

The LRA also provides protection for employees against dismissal where there is a demand for a collective bargaining agreement or for an amendment of that agreement, or where the company has entered into a collective bargaining agreement with employees or the labour union. As in the case of the employees' committee, an employer cannot undertake 'unfair conduct' by dismissing employees who are representatives of employees, members of the labour union, or members of the labour federation involved unless the employees involved are in serious breach of work regulations (e.g. have committed a criminal offence against the employer or neglected their duties for 3 consecutive days without justifiable reason). This protection for employees must be taken into consideration at the time of amalgamation to ensure the employment of employees who do not consent to work in the new company is not terminated in violation of the LRA.

#### 6.3.3 Penalties

A concept of 'unfair termination' applies under Thai law. Under this concept, regardless of the reasons for termination given to the employee, if employee consider that the termination is unfair, they can complain before the court (or tribunals/hearings process) on the ground of 'unfair termination' seeking compensation or re-instatement. Note that redundancy is not a statutory ground for termination under Thai law. Therefore, employers risk claims of unfair termination from employees.

If an employee decides to bring a claim of unfair termination against the employer, the court will normally look to various facts and procedures surrounding the termination (e.g. whether the reason for termination is real and genuine, whether appropriate payments have been made to the employee), to determine whether the termination is fair or not. Should the court find that the termination is unfair, it may order the employer to either pay compensation to the employee or re-employ the employee. The amount of compensation may be over and above any statutory payments that the employer has already paid to the employee, depending on the circumstances of the case. It will depend on the

employee's length of service, the employee's age, the hardship suffered (or which will be suffered) by the employee as a result of termination and the reason for termination.

In addition, the termination of employment of an employee who is a member of the employees' committee in violation of the LRA would result in criminal liabilities for the employer in the shape of a fine not exceeding THB1,000 or imprisonment for a term not exceeding one month, or both.

Where there is 'unfair conduct', a terminated employee can file a claim with the Labour Relation Committee (LRC), which has authority to order the employer to cease such unfair conduct. Violation of an LRC order would result in criminal liabilities for the employer—either a fine not exceeding THB10,000, or imprisonment for a term not exceeding six months, or both.

# Turkey

## 1.1 Overview

Turkey is a civil law jurisdiction with a legal system based on various European models, notably Swiss, French, German and Italian.

Recently Turkey has seen a regulatory renaissance in terms of the legislation applicable to mergers and acquisitions, corporate governance and capital markets. The Commercial Code No. 6102 (CC), Code of Obligations No. 6098 (CO) and Capital Markets Law No. 6362 (CML), all dating to 2011 and 2012, represent just some of those relatively new statutes. Hundreds of pieces of secondary legislation have also been enacted under those new laws. The Turkish market has been adapting to these changes since their enactment.

## 1.2 General Legal Framework

The main piece of legislation governing mergers and acquisitions in Turkey, which entered into force with significant amendments in 2012, is the CC. Besides this, the CO, the CML and its various related Communiqués, the Corporate Tax Code and the Code on the Protection of Competition also apply to merger and acquisition transactions.

## 1.3 Corporate Entities

Our focus here is on private company M&As. While public companies may face some of the same issues there are substantial differences in the laws and regulations that apply to public and private companies.

The most common types of private companies in Turkey are joint stock companies (JSCs) and limited liability companies (LLCs). The incorporation requirements, liability of the shareholders, mandatory corporate bodies and share transfer methods differ for each.

The main piece of legislation public companies must observe is the CML, which is a fundamental regulation for all investors and institutions in Turkish capital markets. Only JSCs can be public companies. If a company has more than 500 shareholders, it is required by law to become listed on a stock exchange.

### 1.3.1 Joint stock companies (JSC)

A JSC is incorporated with an issued share capital of at least TRY50,000. Shares can be divided into different classes with different nominal values and rights. A JSC can be incorporated with a single shareholder, which can be a natural person or a legal entity.

A simple majority shareholding controls a JSC for most purposes. The law imposes only a limited number of mandatory super majority requirements for shareholder meetings and decisions. Shareholders can add to the list of qualified majority decisions, or provide for a higher (but not lower), quorum and voting requirements than those set out in the law.

A shareholder's responsibility for a JSC's debts is limited to that shareholder's contribution to the company's share capital. A shareholder's liability for debts (including public debts) is also limited to that shareholder's contribution to the company's share capital.

A JSC's supreme governing body is its general assembly, which has certain non-delegable duties. Besides this, a JSC is managed by a board of directors, which may be composed of one or more directors. Directors are not required to be shareholders. Neither the directors nor the managers need be Turkish citizens or residents of Turkey. Legal entities can be elected as directors, in which case the legal entity must appoint a natural person as its representative, who must be officially registered and announced.

JSC audits must be conducted by independent auditing firms, by sworn financial advisers or independent accounting advisers.

### 1.3.2 Limited liability companies (LLC)

An LLC is incorporated with an issued share capital of at least TRY10,000. The nominal value of capital shares may be set in the articles of association at a value of at least TRY25. The nominal value of shares in different classes may differ, but the nominal value of all capital shares must be at least TRY25 or multiples thereof. An LLC must have at least one, but no more than 50 founders. The founding shareholders may be individuals or legal entities.

An LLC cannot engage in certain commercial activities, e.g. banking, financial leasing, factoring, consumer financing, brokerage, portfolio management, investment counselling, insurance, independent auditing or free trade zone operations.

A shareholder is liable only for an LLC's debts to the extent of its shareholding in the LLC, any contractual obligations to make additional payments, and any secondary duties set out in the articles of association. LLC shareholders are also liable for public debts like tax and social security premiums. Shareholders are not required to be Turkish citizens or residents, and need not have a legal presence in Turkey.

An LLC's supreme governing body is its general assembly of shareholders, which has certain non-delegable duties and rights. The company's management and representation can be delegated to one or more shareholders with the title of 'manager', to all shareholders or to third parties. At least one shareholder must have the authority to manage and represent the company.

A manager can be a natural person or a legal entity, who need not be a citizen of or resident in Turkey. Where a legal entity is appointed as a manager of an LLC, a natural person must be appointed to represent the legal entity manager. LLCs are subject to independent audit.

## 2. Acquisition Methods

In Turkey, a business can be purchased either by way of a share purchase (including by way of subscription into a capital increase) or an asset purchase. Turkish law also provides the possibility for two or more companies to merge.

### 2.1 Acquisition of Shares

Share transfers are subject to different requirements depending on whether they are for JSCs or LLCs.

In JSCs, share transfers need not be performed in the presence of a notary public, and there is no need for a separate written share transfer agreement to satisfy a validity condition, despite market practice.

Where JSCs have issued share certificates, the share transfer is performed through endorsement and physical delivery of the share certificates. In order for the share transfer to be valid, it must be registered on the share ledger of the company if that transfer is made subject to the approval of the board of directors in the articles of association of the company. Share transfers can be limited only on very limited grounds.

In LLCs, share transfers and transactions establishing transfer obligations must be made in writing, and the parties' signatures must be notarised. Unless otherwise provided in the articles of association, share transfers must be approved by the general assembly. The general assembly can refuse to approve a transfer without justification, unless otherwise provided in the articles of association. The articles of association may prohibit share transfers.

### 2.2 Acquisition of Assets

When a business is being transferred by way of an asset transfer, in practice, each individual asset needs to be transferred in accordance with the formalities applicable to that type of asset. For some assets, this will simply be a case of delivering the asset to the buyer; in other cases, (e.g. real estate), the formalities are more prescriptive.

Under Turkish law, the acquisition of all or a substantial portion of the target company's assets may be deemed a 'transfer of business' and be subject to registration with the relevant trade registry and publication in the *Trade Registry Gazette*. Although the 'transfer of a substantial portion' is not clearly defined in the law, legal academics and the case law would look at whether the:

- assets subject to transfer can be deemed a separate business line on their own
- the assets transferred are sufficient to ensure continuity of the activities of an enterprise, or
- whether the transferor's capacity to operate in that line of business would be lost or significantly decrease after the transfer.

Despite the common misunderstanding that asset transfers are liability-proof as opposed to share transfers, liabilities do follow the assets to a great extent.

## 2.3 Mergers/Other Acquisition Methods

### 2.3.1 Merger

The CC provides the possibility for two or more companies to merge in line with a merger agreement to be drafted by their managing bodies and approved by their general assemblies. A merger can be realised by following two methods:

- merging-in method: one or more companies (the merged company(ies)) merge into an existing company (the surviving company), or
- new incorporation method: two or more companies merge into a new company to be incorporated for this purpose (the new company).

In the new incorporation method, both of the merged companies disappear whereas in the merging-in method, the surviving entity continues to exist as a legal entity.

### 2.3.2 Full demerger

A full demerger can be defined as a transaction whereby a company's entire assets, receivables and payables are transferred to two or more other companies that already exist or will be newly incorporated. All assets and liabilities are transferred together at their book values. As a result of demerger, a company is dissolved without liquidation, and in return, the new companies' shares are given to the dissolved company's shareholders pro rata to their shareholding.

Accordingly, in a full demerger operation, the dissolved company's assets and liabilities are transferred in their entirety to two or more companies, and in return, the dissolved company's shareholders acquire the new companies' shares.

### 2.3.3 Partial demerger

Partial demerger is the transfer of a company's immovable assets shown on its balance sheet, or the participation shares held for at least two years, or one or several of the production or service enterprises the entity owns, to an existing or newly formed company as capital in kind at their book values.

During the transfer of production or service enterprises as capital in-kind, as an obligation, the assets and liabilities required to continue operations in a manner that will ensure the integrity of the enterprise should be transferred to the new company in their totality.

A company that owns a single production or service enterprise cannot transfer the enterprise within the scope of a partial demerger operation, because under the partial demerger concept, the demerged company should be in a position to remain operational with its remaining assets after the demerger.

In partial demergers, the demerged company can retain the new company's shares, or the shares can be given directly to the demerged company's shareholders. In cases where the new company's shares are distributed among the demerged company's shareholders in consideration for the transferred assets, the demerged company's capital may need to be reduced.

### 3. Negotiation, Signing and Closing

#### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Turkish purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1.	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. Working capital and net debt/cash adjustments common. However, depending on valuation method, NAV or EBITDA adjustments also seen in practice.
2.	Is there a collar on the adjustment?	Collars are not common.
3.	Who prepares completion balance sheet?	Usually prepared by buyer but seller has the right to object to balance sheet and in that case an independent audit firm usually assigned to settle disputed items in completion balance sheet.
4.	Is the balance sheet audited?	Almost always audited.
5.	Is an earn-out common?	Generally not common, but quite common in transactions where the sellers continue to manage the target company and there is a pricing gap between buyer and seller.
6.	Is a deposit common?	No.
7.	Is an escrow common?	Yes, common.
8.	Is a break fee common?	Not common. Rarely seen in publicly held target companies due to the fact that signing of the transaction must be publicly disclosed.

#### Conditions Precedent

9.	Express Material Adverse Event (MAE) completion condition?	Common even in deals where there is a short period between signing and closing.
10.	Is the MAE general or specific?	Usually general but both seen. Country risk generally carved-out.
11.	Quantification of MAE?	Common as a percentage of assets or income.

#### Covenants, Access

12.	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall/blue pencil provisions not common.
13.	Non-solicit (of employees)?	Common (in conjunction with non-compete).



14.	Non-solicit (of customers)?	Common (in conjunction with non-compete).
15.	Broad access to books, records, management between sign and close?	Common as long as the business of the target is not interrupted. Need to avoid arrangement that could be interpreted as taking over control of target.
16.	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating disclosure schedules and notifying possible breaches between signing and closing common. Buyer is entitled to terminate where a breach leads to a MAE. In cases of no MAE, additional escrow pot rarely discussed if the disclosure may lead to a material loss but cannot be qualified as MAE.
17.	Is a separate tax covenant/indemnity or tax deed common?	Common to have specific tax representations and warranties included in purchase agreement. Also common to have specific tax indemnity when specific tax risk is identified in due diligence. Tax deeds only seen in transactions governed by UK law.

### Representations and Warranties

18.	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen and quantified (usually by monetary thresholds).
19.	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers common for sellers and senior management. Knowledge generally defined as any knowledge that persons would have had if and when diligently fulfilling their respective duties on target side.
20.	Is a warranty that there is no materially misleading/omitted information common?	Common.
21.	Is disclosure of data room common?	Data room and disclosure scope is one of the crucial points and much-debated by the parties. Common practice is to have a specific disclosure for each representation. However, sellers mostly tend to attach data room documents/CD (where virtual data room) to purchase agreement as an annex. This approach sometimes succeeds with strategic investors but private equity investors rarely accept disclosure of data room.

### Repetition of Representations and Warranties

22.	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition of the representations and warranties at completion common. Accordingly, common to update disclosure letter before completion.
23.	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	In the event of a 'per claim threshold' concept in transaction document, 'material' qualifier not common in warranties since 'per claim threshold' sets materiality. In cases where no such concept is agreed: true, correct and accurate in all material respects common, but often carve-out for key representations and warranties.

24. Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.
- Not common.

### Limitations on Liability

25. What is the common cap amount (as a percentage of purchase price)?
- Mostly range from 20%–60% of purchase price depending on risks identified during due diligence, nature of investor and volume of investment, but can go up to 100%.
26. Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?
- Usually warranties only.
27. What are the common exceptions to the cap?
- Key warranties often excepted (e.g. title to shares, authority). Also specific warranties on tax and specific areas of concern depending on diligence results and line of business (e.g. environment), sometimes specific higher caps common. Any breach of contract by way of gross negligence or fraud excepted from limits.
28. Is a deductible or basket common?
- Both used in practice but basket more common.
29. Is a *de minimis* common?
- Common.
30. How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?
- General survival of 12–24 months common. Common to carve-out key or specific warranties (e.g. title, authority, tax, employment and environmental). Title and capacity warranties and gross negligence and fraud almost always carved-out.
31. Is warranty insurance common?
- Generally uncommon but expected to be common in private equity exits.

### Reliance

32. Do financiers seek to rely on buyer's due diligence reports?
- Common.

### Set-offs against Claims

33. Is a set-off against claims for tax benefits common?
- Common.
34. Insurance proceeds?
- Common for actually received.
35. Third party recoveries?
- Common for actually received.

### Damages, Knowledge

36. Obligation to mitigate damages?
- Common.
37. Exclusion of consequential damages?
- Common.

- |     |  |  |
|-----|--|--|
| 38. | Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity? | Common to provide for a representation from buyer that 'except as disclosed in the purchase agreement, it is not aware of any breach of the representations at the time of closing'. |
|-----|--|--|

### Dispute Resolution

- |     |   |  |
|-----|---|--|
| 39. | Does local law allow for a choice of governing law? What is the common governing law? | Yes. Choice of governing law is allowed if there is a foreign element in the agreement, but generally accepted market practice is that Turkish law applies for Turkish target companies. Recently, PE investors tend to prefer English law as governing law. |
| 40. | Is litigation or arbitration more common? If arbitration, where?                      | Arbitration more common. International arbitration (usually ICC), seat of arbitration depending on nationality of parties.   |

### Stamp Duty

- |     |  |  |
|-----|--|--|
| 41. | If stamp duty is payable, is it normally shared? | Stamp duty applies. Usually shared by parties equally. |
|-----|--|--|

## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

There is no legal requirement for a sale of shares agreement to be made in writing. Market practice in the vast majority of cases is for a share transfer to be documented between the seller and the buyer by way of a written share sale/purchase agreement.

### 3.2.2 Transfers of assets

In a transfer of assets, written contracts may be required by law or to fulfil an applicable registration requirement. Some non-exhaustive examples of contracts that must be in writing are:

- contracts for the sale of immoveable property must be signed and registered with the title deed registry
- transfers of motor vehicles must be made before the notary public
- transfers of trade marks and patents must be notarised after execution by the parties.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

In JSCs, the company must adopt a board resolution for the approval of a share transfer and registration of the transfer to the company's share ledger (if required by the articles of association). In order for a share transfer to be legally valid against the company (i.e. so that the transferee can exercise its shareholder rights), it must be registered on the share ledger of the company. Where the company has issued share certificates, the share transfer is performed by the endorsement and physical transfer of the share certificates.

### 3.3.2 Transfers of title to assets

The transfer of immoveable property must be registered with the title deed registry under the name of the new owner. Likewise, sales of a motor vehicle must be registered with the traffic registry.

If an asset sale is deemed a 'transfer of business', it needs to be registered with the relevant trade registry and announced in the *Trade Registry Gazette* (see **2.2.1**).

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Turkish competition law generally follows the EU framework both in terms of legislation and practice. While the main parliamentary Act (Law No. 4054 on the Protection of Competition) has almost identical provisions to Articles 101 and 102 of the Treaty of the Functioning of the European Union, the Turkish Competition Authority issues guidelines and communiqués that are parallel to those issued by the European Commission to flesh out enforcement priorities and practices. As competition practice in Turkey is relatively new (Law No. 4054 on the Protection of Competition entered into force on 13 December 1994 and the Board was founded in 1996), where there are no precedents or case law precedents, both the Board and appeal courts often refer to the decisions of the European Commission and the Court of Justice of the European Union.

Currently, The Turkish parliament is in the process of amending the Law on the Protection of Competition. The Draft Law was sent to the Presidency of the Turkish Parliament on 23 January 2014; however it has not yet been enacted. The Draft Law is designed to be more compatible with the actual enforcement of the law and to further harmonise Turkish practice with EU competition law.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Turkish purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

#### Filing Obligation

- |    |  |  |
|----|--|--|
| 1. | Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)? | <p>Mandatory.</p> <p>Article 7 of the Law on the Protection of Competition establishes that M&amp;A leading to the creation or strengthening of a dominant position, and significantly lessening competition in any relevant market in Turkey, is unlawful and prohibited. According to the Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board (based on Art. 7), a transaction that leads to a change of control in the target company and exceeds the thresholds set out by the Board, can be validated only after an Article 7 review.</p> |
|----|--|--|

#### Timetable

- |    |  |  |
|----|--|--|
| 2. | In practice, what is the timetable for clearance (in Phase I and Phase II review)? | <p><i>Phase I:</i> generally concluded by the competition authority within 3-4 weeks.</p> <p><i>Phase II:</i> generally concluded within 6-9 months.</p> |
|----|--|--|

#### Thresholds

- |    |   |  |
|----|---|--|
| 3. | What are the jurisdictional thresholds? | <p>According the Communiqué, a transaction must be notified to the competition authority if the:</p> <ul style="list-style-type: none"> <li>• combined Turkish turnover of buyer and target exceeds TRY100 million and the Turkish turnover of buyer and target (separately) exceeds TRY30 million (Test 1), or</li> <li>• the worldwide turnover of one of the parties</li> </ul> |
|----|---|--|

exceeds TRY500 million (approximately USD220 million) and the Turkish turnover of the assets or businesses subject to the acquisition (for acquisitions), or the Turkish turnover of at least one of the parties (mergers) exceeds TRY30 million (approx. USD14 million) in Turkey (Test 2).

If the above thresholds are exceeded, and if there is a change of control in the target, a notification must be submitted to the competition authority.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

There are no explicit rules in Turkey, but Turkish competition law prohibits the exchange of sensitive information between competitors as a general rule. Therefore, where the Board finds that exchanging highly sensitive information, particularly among competing parties, could suggest collusion prior to the closing of a merger or acquisition transaction, it may impose administrative sanctions.

### 4.4 Anti-Bribery, Corruption and Money Laundering

In the absence of a general anti-corruption law, relevant regulation is found in various other Turkish laws which contain anti-corruption provisions; primarily: the Criminal Code, Law on the Declaration of Property and Combating Bribery and Corruption, and the Law on Ethics for Public Officials.

#### 4.4.1 Criminal offences

##### ***Bribery***

Under the Criminal Code, bribery is defined as, directly or through an intermediary, providing a benefit to a public officer or a third party appointed by a public officer for the performance or non-performance of an act relating to their official duty. Benefits can be monetary or non-monetary. The court evaluates intention on a case-by-case basis considering all the circumstances of the case. A person receiving a bribe and a person advancing a bribe are both caught by the same prohibition. Although representatives of listed companies are also treated as public officials for these purposes, this is not the case for representatives of non-listed companies. The relevant law is not, however, applicable to those bribing foreign public officials.

The Criminal Code establishes that 'criminal sanctions may not be imposed upon legal entities'. Under this provision, therefore, private legal entities can only be subject to two penalties:

- revocation of licence/permit, and
- confiscation of property or material interests relating to the offence.

Under the Misdemeanour Law No. 5326, where a representative, board or employee of a legal entity commits bribery in favour of the legal entity itself, the legal entity will be sanctioned separately (fined).

##### ***Money laundering***

The prohibition on money laundering carries penalties of imprisonment for three to seven years, and punitive fines. Money laundering is undertaken when any person transfers assets that are the proceeds of serious crime to a foreign country, or carries out various transactions to conceal the assets' illegal source and creates the impression of lawful acquisition.

##### ***Failure to notify crime***

Under the Criminal Code, any person failing to notify the authorities of an offence being committed faces imprisonment for up to one year. Criminal liability also results from failure to inform the authorities where a crime has already been committed and it would still be possible to limit the

consequences of that crime by informing the authorities. The law provides an exemption for privileged persons (those who could not serve as witnesses in any litigation), such as close relatives of the accused.

### ***Malpractice and professional misconduct***

Under the Criminal Code, a public officer who causes suffering to individuals or the public by acting contrary to their official duties, or by securing any unjust benefit from third parties, is subject to imprisonment for six months to two years. Any public officer who causes suffering to individuals or the public by delaying or neglecting their duties or securing any unjust benefit from third parties, will be imprisoned for three months to one year.

### ***Declaration of Property Law***

The Turkish Declaration of Property Law requires public officials to surrender to their employer(s) any and all gifts or granted items which:

- they receive from foreign states, international institutions, other international legal entities, any non-Turkish private person or legal entity or institution, and
- have a value exceeding 10 times the net total of the statutory minimum annual salary applicable at the time.

The gifts or items/goods must be surrendered to the employer within one month of receipt.

Persons failing to deliver to the institutions they work for, any and all property exceeding the statutory limits which is ten times of the statutory minimum salary (TRY949.07 for 2015), face imprisonment and a fine. No sanction is expressly provided for a person providing a gift or a benefit.

#### **4.4.2 Administrative offences**

### ***Public Procurement Law***

Bid-rigging or attempting to rig bids by fraudulent or corrupt acts, promises, unlawful influence, undue interest, collusion, falsification, bribery or other actions are among the prohibited acts which the Public Procurement Law establishes as unlawful. Persons convicted of violating this law will be prohibited from participation in any tender procedure with any public body for at least one year and up to two years, depending on the conduct. The prohibition penalty can be reduced to a minimum of six months (and up to one year) where successful tender participants violate the law, but have not yet executed the procurement contracts involved (unless their execution is due to a *force majeure* event). Where the violation is committed after execution of the procurement contract, the performance guarantees provided by the winning bidder will be forfeited and the contract terminated.

### ***Gifts and entertainment***

Public officials cannot accept gifts and cannot take any benefit for themselves personally, or for their relatives, or for third parties (either individual persons or business entities), directly or through an agent, from any individual or business entity, any service or beneficial relationship if it is related to their public duties. The Law on the Public Officials Ethics Board details the disciplinary sanctions for such breaches (Law on the Public Officials Ethics Board and related secondary legislation).

## **4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation**

In Turkey, there is no requirement to obtain governmental approval or permission for foreign investments due to Turkey's overarching/general principle of treating foreign investors as equals with Turkish investors. However, approval may be required for investments in regulated industries, such as banking and finance, regardless of the origin of the investment. These requirements exist principally because of the nature of the business concerned rather than as mechanisms to control foreign investment.

#### 4.5.1 Exchange controls

The government abolished restrictions on Turkish Lira convertibility by facilitating the exchange by foreign investors of proceeds from Turkish securities transactions by Council of Ministers Decree No. 32 on protecting the Value of the Turkish Currency (the Currency Protection Decree). This enables Turkish citizens to purchase securities on foreign securities exchanges; permits residents and non-residents to buy foreign currency without limitation and to transfer foreign currency abroad; and permits Turkish companies to invest abroad without ministerial approval. International transfers, however, should be reported to the Under-secretariat of the Treasury (under the Capital Movement Circular issued by the Central Bank).

The Currency Protection Decree also allows persons not residing in Turkey to purchase and sell shares in Turkish public companies, provided transactions are facilitated through a Turkish bank or brokered under Turkish capital markets law, and the relevant gains and the purchase price are transferred through a bank or suitable financial institution licensed in Turkey.

The Currency Protection Decree regulates foreign exchange transactions and instruments representing foreign currency (including securities and other capital market instruments), and the use and management of foreign exchange and imports and exports of Turkish currency. Persons residing abroad may freely transfer funds to Turkey either in Turkish currency or foreign currency. Certain limitations apply, however, regarding exporting Turkish currency and foreign currency.

Funds in Turkish currency or foreign currency may be freely transferred abroad through Turkish banks. Turkish banks are, however, required to notify the Central Bank regarding transfers greater than USD50,000 (or its equivalent in Turkish or other currency) within 30 days of the transfer. An exception exists for transfers made for import, export and 'invisible' transactions.

#### 4.5.2 Foreign investment approvals and notifications

Foreign investments in Turkey are primarily governed by the Foreign Direct Investments Law No. 4875 (FDI Law) and the Regulation on the Implementation of the Foreign Direct Investments Law (FDI Regulation).

As a general principle, the FDI Law treats foreign investors and Turkish investors equally.

The FDI Law defines foreign investors as:

- citizens of foreign countries and Turkish citizens residing abroad, or
- legal entities established abroad under the laws of foreign countries or international institutions.

Although prior approval is not required, share transfers by foreign persons (other than routine capital market transactions) must be reported to the Foreign Investment General Directorate of the Under Secretariat of the Treasury (General Directorate) within 30 days of completion of the transaction. An annual report obligation to the General Directorate with respect to their operations is also imposed.

#### 4.5.3 Industry-specific regulation

In general, if the sector of the target company is regulated, it is likely that the sector regulator's approval will be necessary for the transaction. Examples are the Banking Regulation and Supervision Agency for acquisition of banks and certain other financial institutions; the Capital Markets Board for brokerage houses, portfolio management companies and other companies active in the capital markets; the Treasury for insurance and pension companies; the Energy Market Regulatory Authority for energy distribution and generation companies; and the Radio and Television Supreme Council for acquisition of broadcasting companies.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

As a general rule, the gain earned by a company from the sale of shares is subject to corporate income tax at the standard rate of 20%. If the shares have been held for at least two years, however, 75% of the gain from the sale can be exempted from corporate income tax if:

- funds for the sale price are received before the end of the second calendar year following the year on which the sale occurred
- that portion of the gain benefiting from the exemption is maintained in a special reserve account on the balance sheet for five years, and
- the selling company's main field of activity is not the trading of securities.

If the shares in a joint stock company are issued and held by an individual for more than two years, however, the gain is not subject to income tax. Otherwise, it will be subject to income tax at a varying rate between 15% and 35%. This exemption does not apply to the transfer of the participatory shares in limited liability companies.

An agreement for the sale of shares is subject to stamp duty. Turkish law imposes stamp duty on all agreements and documents that reference a monetary value.

If there is more than one agreement or transaction under the same document, which are not related to each other or arising from the same source, stamp duty will have to be paid for each of them separately. If the agreements and transactions contained in one document are related and arise from one source, stamp duty is paid on the agreement or transaction which states the highest figure.

If the sale of shares is exempt from corporate income tax, however, the agreement is also exempt from stamp duty.

For 2015, stamp duty is levied at a rate of 0.948% of the highest figure in the document. The total stamp duty arising from each document will be subject to a ceiling to be determined on an annual basis (Art. 14, Stamp Duty Law). The maximum stamp duty that can be paid for one document is TRY1,702,138 for the year 2015.

### 5.2 Acquisition of Assets

For asset acquisitions, the acquirer can achieve a step-up in basis, as the assets will be recognised for tax purposes at the acquisition price and will be, therefore, depreciated over that price.

The acquirer recognises the amount by which the acquisition price of the enterprise exceeds its net asset value as a price mark-up, which represents goodwill. Acquired goodwill can be depreciated over five years for tax purposes, at the rate of 20% of the acquisition costs per year. For other business assets, depreciation depends on the nature of the assets and their estimated useful life as determined by Ministry of Finance communiqués.

### 5.3 Mergers

A tax neutral regime applies to mergers, as long as certain requirements under the Corporate Income Tax Law are met. Under the tax-neutral regime, only the taxable profit earned by the merged company until the merger date is subject to Corporate Income Tax (CIT) at the rate of 20%.

To benefit from tax neutrality:

- both companies must have their registered office or headquarters in Turkey
- balance sheet values of the merged company must be transferred to the acquiring company as a whole and reflected to its balance sheet



- the merged company's corporate income tax declaration prepared for the term before the merger date (i.e. the date on which the board decision on the merger of the merged company is registered with the Trade Registry) must be submitted to the tax authorities within 30 days of the date on which the merger was published in the *Trade Registry Gazette*
- if the merger has been realised between the months in which the fiscal year ends and the submission date for corporate income declarations, a corporate tax declaration relating to the previous fiscal year of the merged company must be submitted together with the corporate tax declaration
- the acquiring company must undertake to the tax authorities that it will pay all tax liabilities of the merged company and will perform its other duties.

For mergers subject to the tax-neutral regime, the acquiring company can also deduct losses arising in the past five years of the merged company from the corporate income tax base if:

- the losses carried forward for each year are separately shown in the corporate tax declaration
- both companies have submitted their corporate tax declarations within the last five years
- the total tax loss to be carried forward does not exceed the equity capital of the merged company at the merger date, and
- the acquiring company continues to operate in the field of activity of the merged company for at least five years upon the merger.

Mergers subject to the tax neutral regime are also exempt from VAT.

## 5.4 Value Added Tax

### 5.4.1 Acquisitions of shares

Under the Turkish taxation system, VAT is levied upon delivery of goods and provision of services. Accordingly, all delivery of goods and services realised in Turkey within the scope of commercial, industrial, agricultural or professional activities and all kinds of importation of goods and services into Turkey are subject to VAT (VAT Law No. 3065).

A transfer of shares by an individual is not subject to VAT. If the transferor of the shares is a legal entity, the transfer will be subject to VAT at the rate of 18%. The transfer of shares in a joint stock company is exempt from VAT if the shares are in issued form. The transfer of participatory shares in a limited liability company is, however, subject to VAT if the shares have not been held for two or more years.

Under Turkish law, no separate registration has to be made for VAT purposes, as a single tax registration is made for all applicable taxes. VAT returns are submitted on a monthly basis by the end of the 24th of each month, and the taxes declared must be paid by the 26th of the same month.

### 5.4.2 Acquisitions of assets

In an asset deal, unless qualified as a commercial enterprise transfer, the transfer of the assets is in principle regarded as several distinct supplies of goods, each subject to VAT at 18%. VAT does not apply to the sale of real estate held for at least two years by corporate entities not engaged in the trading of real estate.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

The mere acquisition of a company's shares will not raise issues from an employment law perspective as the company will continue to be the employer *vis-a-vis* its employees.

#### 6.1.2 Acquisition of assets

The mere acquisition of a company's assets does not lead to automatic transfer of its employees to the buyer, as long as the acquisition of assets does not amount to a 'transfer of business'. The employees of the company whose assets are acquired by another employer will therefore not automatically transfer to the acquiring party as a result of the acquisition.

#### 6.1.3 Transfer of business

Transfer of business or a part of the business is regulated under Article 6 of Labour Code No. 25134 (the Labour Code). For the purposes of this section 'economic integrity' is the essential concept where there is a 'workplace' transferred to another employer, especially where a part of a 'workplace' is transferred to a third party.

The Supreme Court of Appeal has ruled that if a business unit, which preserves its 'economic identity' after being carved out of the employer's organisation, is transferred, the transfer will be deemed a 'workplace transfer'. The characteristics of the business identity must be determined on a case-by-case basis. For instance, if a workplace, whose essential activities are manufacturing and production, is to be transferred, then transfer of material assets will be taken into consideration to identify the workplace transfer. In sectors where 'service' provision outweighs 'goods' manufacturing, however, weight will be attached to know-how, patents, licence and labour elements to assess whether there is a transfer of business.

Unlike in other European countries, Turkish transfer of business norms do not give affected employees the right to object to the transfer.

Transfer of a commercial enterprise, or a part of the business, does not affect employment relationships valid in the transferred business. In principle, the employment contracts are automatically transferred to the transferee employer along with the transferred workplace, with all rights and debts due by the day of transfer. In a transfer of a workplace or a part of the workplace, transferred employment contracts survive the transfer untouched and remain in effect between those employees and the transferee employer under the same terms and conditions.

The transferor employer and transferee employer are severally liable for a period of two years for the employees' receivables which have become due before the transfer. In practice, the transferor and transferee employers enter into a bilateral agreement or set up recourse mechanisms in the corporate agreements to regulate their undertakings for these liabilities.

The transferor or transferee employer cannot terminate the employment contracts merely due to the transfer of business or a part of the commercial enterprise. The transferor or transferee employer's termination rights require economic or technological reasons or a change in organisational set-up.

#### 6.1.4 Mergers

The CC provides for certain special provisions in terms of corporate law regarding transfer of employment contracts involving mergers and acquisitions.

In mergers and acquisitions under the CC, the merged/acquired company's employees are entitled to object to the transaction. This rule applies where a merger agreement involves an existing or a newly formed company acquiring one or more companies whose assets are not liquidated but transferred to the acquiring company.

If employees object to the acquisition/merger of the company they work for, that objection will not halt the transaction in question. Nevertheless, the objecting employee can halt the transfer of the employment contract to the transferee employer and terminate it at the end of the statutory notice period; the transferor employer and the employee remain liable to fulfil the employment contract until its termination.

Unless otherwise decided or unless it is evident from the circumstances, the employer cannot transfer rights under a service contract to a third party.

The transferor company's shareholders (who were liable for company debts before the acquisition), continue to be severally liable for debts arising from the employment contracts and that are due until the day of merger/acquisition.

## 6.2 Approval or Consultation Requirements

Apart from the objection right noted above, there is no obligation on employers to consult with the affected employees unless a collective bargaining agreement so requires.

## 6.3 Protection against Dismissal

### 6.3.1 Redundancies

Under the Labour Code, redundancy is a valid business reason for dismissal.

However, the transfer of a business, merger or acquisition cannot be the sole reason for dismissal. Nevertheless, the law reserves the previous and new employers' rights to dismiss employees for organisational, technological or economic reasons. In other words, these transactions can lead to redundancy scenarios where employees need to be dismissed.

If the new employer is planning redundancy dismissals post-transaction, the labour costs related to the dismissals should be calculated before the transfer. Also, where collective dismissal is planned, a timeline should be planned with a view to allowing sufficient time to give notice to government authorities.

Where employees will be dismissed due to redundancy, the High Court expects the employer to have the decision cleared by the employer's relevant corporate bodies (e.g. board of directors or general assembly), and include in the resolution details of the planned redundancies, e.g. timeline, name of the relevant departments and number of affected employees as well as the social selection criteria used in identifying which employees should be made redundant. The employer is also expected to enforce this corporate decision in a consistent and fair manner.

In redundancy dismissal situations, employers should observe the following two principles:

- the last resort (*ultima ratio*) principle, and
- the principle of social selection.

Neither of those two principles is regulated under the Labour Code, as both derive from case law of the Supreme Court of Appeal.

Termination due to business necessity, as one of the valid reasons for termination of employment, must be the 'last resort' for an employer to dismiss an employee: i.e. before dismissing the employee, the employer must have considered less drastic measures and possibilities to avoid termination, e.g. transferring the employee to another suitable position or to another suitable workplace with their written consent within six business days, in line with the procedure for changes to working conditions; or asking the employee to take unpaid leave for a period of time; or stopping overtime work in the workplace and applying shorter working hours.

Applying Supreme Court of Appeal rulings in this area, the advisable course would be for the employer to also comply with the principle of social selection. This principle takes into account employees' social condition at the time of their dismissal. According to the Supreme Court of Appeal,

selection of employees for redundancy must be based on objective criteria. This means that, during the selection process, the employer must compare the employees carrying out the same work and also take into account criteria such as efficiency, being late to work due to sickness, not showing due care while performing duties, seniority, entitlement to retirement, being married and having children, or age. In other words, the criteria on which the social selection is based must be clear as well as objective and general.

Dismissals due to redundancy can sometimes amount to 'collective dismissal'. Under the Labour Code, collective dismissal occurs upon dismissal of at least:

- 10 employees where the number of employees is between 20-100
- 10% of the employees where the number of employees is between 101-300, or
- 30 employees where the number of employees is 301 or more

—on the same date or on different dates within a period of one month, complying with the required notice periods to be calculated based on each employee's length of service.

Where an employer wishes to proceed with collective dismissal of employees for economic, technical, organisational or similar reasons due to the requirements of the enterprise, workplace or business, the employer must give dismissal notices in writing of any collective redundancies (30 days prior to the redundancy dismissal) to:

- the union representative in the workplace
- the Regional Directorate of the Ministry of Labour and Social Security, and
- the Turkish Employment Institution.

The dismissal notice becomes effective 30 days after notification to the Regional Directorate. The notice must include information on the reason for the dismissal, the number of and category of employees to be dismissed and the timetable for the dismissals. The statutory notice periods for each employee will start running from the 31st day following notification to the Regional Directorate.

Following this notification, the employer and union representative in the workplace should meet to discuss the planned dismissals to prevent collective dismissal, decrease the number of employees who would potentially be dismissed and minimise the negative consequences of collective dismissal on employees. That meeting, however, is only consultative. Meeting minutes must be prepared and signed. Following the meeting, each individual employee to be dismissed must be given a written dismissal notice clearly and sufficiently setting out the reasons for their dismissal.

If the employer intends to employ employees for work of the same nature within six months of completion of the collective dismissal process, it is expected that the employer will give preference to previously dismissed employees with relevant qualifications. If the previously dismissed employees accept the job, the employer must re-employ them.

### 6.3.2 Penalties

Failure to comply with the above dismissal norms will render the dismissals invalid. The labour courts can order affected employees' reinstatement and compensation claims for up to 12 months' salary.

In addition, if an employer does not observe the above collective dismissal process, a monetary fine of TRY555 (in 2015) per employee dismissed in breach of the collective dismissal process, will be payable by the employer (acquirer/buyer). The labour courts will also be likely to consider the dismissals invalid and order reinstatement and compensation, in favour of the employees, up to 12 months' salary associated with reinstatement.

# Ukraine

## 1.1 Overview

Ukrainian legislation contains a basic set of rules governing corporate mergers and the acquisition of Ukrainian legal entities. Acquisitions of businesses and companies are usually carried out through the acquisition of the shares of a joint stock company (JSC). JSCs may be 'public' or 'private' (i.e. a public JSC is established by a public offering and subscription of shares, whereas the shares of a private JSC are privately placed among the founding shareholders), or through the purchase and assumption of the participatory interests of a limited liability company (LLC). Asset acquisitions are rare, as they are technically burdensome and time-consuming and involve the imposition of VAT.

The Ukrainian market for corporate acquisitions has been formed, to a significant extent, by acquisitions of state-owned enterprises, either directly from the state in the privatisation process or on the secondary market. Such former state-owned enterprises usually exist in the form of a public JSC, and accordingly, acquisitions are most frequently structured as the purchase of shares.

## 1.2 General Legal Framework

The basic rules governing various issues concerning the establishment, maintenance and liquidation of business legal entities in Ukraine, as well as the sale and purchase of shares or participatory interests in business entities, are set out in the Civil Code and the Commercial Code of both adopted on 16 January 2003, and effective since 1 January 2004. Otherwise, the Law on Companies, dated 19 September 1991, as amended, governs various issues related to establishing, maintaining and liquidating companies in Ukraine. Another relevant law, the Law of Ukraine on the State Registration of Legal Entities and Individual Entrepreneurs became effective on 1 July 2004.

A new Law on Joint Stock Companies (the JSC Law) came into force in 2009. The JSC Law contains a number of novelties, particularly, it divides all joint stock companies into public and private, introduces the notions of a corporate secretary, ordinary and privileged shares, and cumulative voting. The law required all joint stock companies to bring their statutory documents into compliance with the new corporate legislation within a two year transition period.

## 1.3 Corporate Entities

The following types of companies may be established in Ukraine under the Company Law:

- joint stock companies (JSCs)
- limited liability companies (LLCs)
- companies with additional liability
- full liability companies, and
- companies with combined liability.

Of these, the most common vehicles for conducting business activities in Ukraine are JSCs and LLCs, both of which embody the concept of limited liability for investors.

### 1.3.1 Limited liability companies

The legal nature of an LLC is similar to that of a German GmbH and/or a French SARL. Investors in an LLC – i.e. its interest-holders or participants – are liable for the LLC's commitments only to the extent of their capital contributions to its charter capital (capital). Their participatory (i.e. ownership) interests in the LLC are expressed in the form of the respective percentages of the LLC's capital owned by them. Participatory interests in an LLC do not qualify as 'securities' for purposes of the applicable Ukrainian legislation and therefore are not subject to registration with the National Commission on Securities and the Stock Market of Ukraine (the NSC).

Currently, no minimum capitalisation is required to establish an LLC.

Under the applicable legislation, the management of an LLC may take either of two forms: a 'directorship' (collective management) or a 'director' (individual management). The form of the LLC's management and the number of its members may be decided at the discretion of the participants as specified in the LLC's charter (articles of association). The directorship/director is responsible for the day-to-day operations of the LLC. The director/directorship's members are appointed and removed by the participants' assembly.

The participants' assembly consists of the participants (i.e. the interest holders) of the LLC. Each participant has the number of votes proportionate to the percentage of its interest in the LLC's capital.

The audit commission (consisting of elected participants or their representatives), exercises control over the financial and economic activities of the management of the LLC. There must be at least three members of the audit commission of an LLC. The audit commission must report its findings to the participants' assembly of the LLC. The audit commission approves the annual reports and balance sheets of the LLC before they are presented to the participants' assembly. No balance sheet may be approved at the participants' assembly without the conclusion of the audit commission.

### 1.3.2 Joint stock companies

JSCs are very similar in form and operation to US corporations, German AGs, and French SAs. A JSC is a company with a capital divided into shares of equal par value. Shareholders of a JSC are liable for the latter's obligations only to the extent of their respective equity contributions to its capital.

JSCs may exist in the form of either a public or a private company (the rough equivalents of open and closed JSCs that existed under the former legislation). The number of shareholders in a private JSC may not be more than 100. The first issue of shares upon the establishment of either a public or a private JSC must be made exclusively by means of a private issue of shares among the founders of the JSC.

A public JSC may issue additional shares by means of public and private issues of shares. Further, a public JSC is obliged to enter its shares onto the list of at least one of the Ukrainian stock exchanges. A private JSC may issue additional shares only by means of a private issue of shares. If a shareholders' meeting of a private JSC adopts a decision to carry out a public issue of its shares, then its charter must be amended: in particular, the type of JSC must be changed from private to public. The change of a JSC's type from private to public and vice versa is not considered to be a 'transformation' (a form of legal restructuring in Ukraine) of the JSC.

A JSC may be established either by a single founder or by a group of founders. The following statutory restrictions also apply to the establishment and operation of a JSC:

- a wholly-owned subsidiary in the legal form of a JSC may not be established by another wholly-owned subsidiary (either foreign or Ukrainian)
- a JSC may not have among its shareholders only legal entities-shareholders, which are wholly-owned by the same person
- a subsidiary in the legal form of a JSC, which is wholly-owned by a foreign company, under the current version of the Land Code may not own agricultural land in Ukraine, and
- a minimum capitalisation of 1,250 times the official minimum monthly salary as of the date of the formation of the JSC is required to establish a JSC (i.e. since 1 January 2014 UAH1,522,500).

An issue of shares by both a private and a public JSC must be registered with the Ukrainian National Commission on Securities and the Stock Market (the NSC) by means of the registration of a share issue and an offering prospectus, as well as a report on the results of the issue of shares and the issue of a certificate on the registration of the shares issue. If a JSC fails officially to register any issue of its shares with the NSC, any and all of the share purchase agreements entered into with respect to such a share issue, as well as with respect of any subsequent share issues, will be deemed ineffective.

The shareholders' meeting is the highest governing body and is responsible for policy decisions of the JSC.

Shareholders' voting rights are based on the principle of 'one share one vote', except for cases of cumulative voting. Shareholders' meetings require a quorum of at least 60% of all voting shares in order to be validly and lawfully held (as opposed to 60%+1 share pursuant to the Company Law). The period for issuing a prior notice for convening the shareholders' meeting and communicating the agenda of that meeting is 30 days. Further, the JSC Law provides that:

- JSCs (both public and private), which have 25 shareholders or less, may approve shareholders' decisions by polling, as opposed to voting in person at the shareholders' meeting, and
- a wholly-owned JSC is exempt from the requirement to convene and hold shareholders' meetings instead, the powers vested in the shareholders' meetings are to be performed by the sole shareholder.

According to the JSC Law, a supermajority vote, consisting of three-quarters of the total number of votes of the shareholders registered for the particular shareholders' meeting, is required to pass resolutions on:

- amendments to the charter
- cancellations of 'treasury shares' (shares bought out by the JSC)
- changes of the JSC's type
- issues of shares
- increases/decreases in capital, and
- terminations and spin-offs, with exceptions.

In addition, the charter of a private JSC may establish an additional list of matters, which require a supermajority vote or even a unanimous vote. All other resolutions may be adopted by a simple majority of the votes of those shareholders registered for the relevant meeting and holding shares allowing them to cast their votes on certain issues.

The JSC Law provides for cumulative voting, which is as a new voting mechanism in the Ukrainian legislation. Cumulative voting must be used for the appointment of the members of the supervisory council and/or the audit commission. Depending on the type of the JSC and the number of its shareholders, the use of cumulative voting is either mandatory or voluntary.

The requirement to appoint a supervisory council applies to a JSC which has 10 or more shareholders. According to the JSC Law, an individual or a legal entity-shareholder, may be elected as a member of the supervisory council. The supervisory council represents the interests of the shareholders between the shareholders' meetings and exercises control over the JSC's management to the extent indicated by the JSC's charter. Members of the supervisory council of a JSC may not be members of its management or of its audit commission. The JSC Law establishes a list of matters which fall under the exclusive competence of the supervisory council. The supervisory council may establish permanent or temporarily committees and elect a corporate secretary, who shall be responsible for the JSC's relationships with its shareholders and/or investors.

The management of the JSC's day-to-day business activities may take either of two forms: a 'management board' (collective management) or a 'director' (individual management). The management generally reports to the shareholders' meeting and to the supervisory council.

According to the JSC Law, a JSC with less than 100 shareholders must establish either an auditor or elect an audit commission and a JSC with more than 100 shareholders must elect an audit commission. The corporate secretary and the members of the other bodies of the JSC may not be

elected as members of the audit commission (the auditor). The audit commission may be elected either to carry out a special audit of the financial-and-commercial activity of the JSC or for a definite term. An individuals or a legal entity-shareholder of the JSC, may be elected as a member of the audit commission.

Depending on the correlation between the market value of a particular asset or service (the subject matter of a particular transaction) and the total assets of the JSC, certain (i.e. material) transactions will require approval by either the supervisory council or the shareholders' meeting. Additionally, transactions with the 'interested parties' will also require approval by either the supervisory council or the shareholders' meeting. A shareholder, who has voted at the shareholders' meeting against certain issues that were adopted, will be entitled to request the mandatory buy-out of its shares by the JSC.

Both private and public JSCs are subject to 'regular' and 'special' reporting and disclosure requirements. 'Regular reporting' is a disclosure on an annual (for private JSC) and quarterly and annual basis (for public JSC) of information on the results of the financial and business activities of the JSC. 'Special reporting' is an ad hoc disclosure of information about any actions which may influence the financial or business activities of the JSC and lead to a significant change in the value of its securities. In addition, the JSC Law has established the following publication requirements:

- an entity intending to purchase a significant shareholding in a JSC (10% or more) must notify the JSC in advance about its intention in writing and must publicise its intention in the official press, and
- a person who has acquired a controlling shareholding in a JSC (50% or more), must make an offer to all of the other shareholders to purchase their shares at a price not below market price, and must notify the NSC and the stock exchange (for a public JSC) about such offer.

### 1.3.3 Joint venture/co-operation agreements

Contractual investment vehicles are represented in Ukraine by a variety of agreements on joint business activities. The most common type of agreement is the joint activity agreement, whereby the parties combine their funds, know-how, business reputation, and/or publicity into their joint operations. Such contractual joint ventures must maintain separate accounting records and must establish separate bank accounts for their joint operations. Any income generated by the participants in such contractual joint ventures from their engagement in such joint operations is also taxed separately from their respective incomes generated from their principal business activities. Both domestic and foreign investors may carry out investment activities on the basis of joint activity agreements. Joint activity agreements between foreign investors and their Ukrainian partners must be registered in the manner established by the Cabinet of Ministers.

## 2. Acquisition Methods

Ukrainian legislation allows two types of mergers. These are by absorption, where one of the merging entities survives and the other disappears, and by consolidation, where all the merging entities merge into one newly established entity. Save for internal corporate restructuring, merger techniques are not currently widely used in Ukraine for the purpose of the acquisition of companies and businesses. Instead, acquisitions of businesses and companies are usually carried out through the acquisition of the shares of a JSC or through the purchase and assumption of the participatory interests of an LLC. Asset acquisitions are rare, as they are technically burdensome and time-consuming and involve the imposition of VAT.

### 2.1 Acquisition of Shares

A purchaser acquiring the shares of a target company will acquire all of the obligations and liabilities attaching to it.

### 2.2 Acquisition of Assets

An asset acquisition may be structured either as the acquisition of the 'total gross assets' of the target company, or as the acquisition of only a portion of the target company's assets.



### 2.2.1 Acquisition of the 'total gross assets' of the target company

A sale of target company's total gross assets is a sale of a business as a going concern, including all of its rights and obligations.

### 2.2.2 Acquisition of separate assets of the target company

In this type of asset sale, the purchaser is free to select the assets it is willing to acquire (including accounting receivables and the contractual rights of the target company) save where the acquired assets are subject to any encumbrance, the purchaser will only be liable for those obligations of the target company which it expressly assumes. Hence, a sale of assets is preferable in situations where the target company has significant liabilities which the purchaser does not wish to assume. Where the business is subject to licensing, an asset acquisition becomes less attractive, since the licences and permits issued to the target company are not transferable. In addition, the transfer of the target company's rights to certain types of assets (e.g. an interest in land) is subject to a certain amount of discretion of the state authorities.

## 2.3 Mergers/Other Acquisition Methods

Ukrainian legislation allows two types of mergers. These are absorption, where one of the merging entities survives and the other disappears, and consolidation, where all the merging entities merge into one newly established entity.

### 2.3.1 Merger by absorption

Under the Ukrainian legislation, a merger by means of absorption entails the legal reorganisation of the merging entity. The consequences of such a merger lead to the dissolution of the merging company as a legal entity, while the company into which the merging company transfers its assets and liabilities continues to exist as the legal successor to the merging company. The merger is deemed complete from the moment of the execution by the merging company of a 'transfer balance act' (the relevant document), effecting the transfer of its assets and liabilities to the surviving company, and upon the removal of the merging company from the state register.

### 2.3.2 Merger by consolidation

Consolidation is effected through the forming of a new legal entity, either a JSC or an LLC, and through two or more merging entities transferring all of their assets and liabilities into the newly formed entity in exchange for ownership rights in the newly formed entity.

## 2.4 Acquisition of State-Owned Enterprises

The privatisation of Ukrainian state-owned enterprises is carried out by the State Property Fund (the 'SPF'). The SPF determines the method of sale of each particular enterprise, usually through a commercial tender procedure, as well as the type of sale. The main features of the acquisition of a state-owned enterprise may be summarised as follows:

- a potential purchaser of a state-owned enterprise operating in certain sectors of the economy (mostly industrial) must meet certain criteria to qualify as an 'industrial investor'
- due diligence in respect of a state-owned enterprise subject to sale is usually limited and it is nearly impossible to persuade the SPF to remedy any deficiencies discovered as a result of the due diligence conducted prior to the sale
- the SPF is rarely receptive to heavy negotiations of the relevant transactional documentation and always uses a standard acquisition agreement, of which only minor changes are permitted by the SPF the choice of the governing law is limited to the laws of Ukraine
- the acquisition agreement usually contains investment obligations of the purchaser such obligations may not necessarily require direct cash investments, but almost always oblige the purchaser to maintain certain production and employment levels of the acquired state-owned enterprise

- the acquisition agreement is subject to mandatory notarisation, the cost of which is relatively high (0.1% of the value of the acquired state-owned enterprise), and
- generally, the payment of the purchase price should be effected in Hryvnia, the Ukrainian currency (recent changes to the legislation have allowed payment for privatised property in convertible foreign currency for non-residents and companies with foreign investments).

### 3. Negotiation, Signing and Closing

#### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Ukrainian purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

#### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. The common adjustment is for cash and debt (i.e. cash-free/debt-free) on the condition that there is an adequate or pre-agreed working capital.
2	Is there a collar on the adjustment?	Sometimes. Upward adjustment limit more common than downward adjustment limit.
3	Who prepares completion balance sheet?	Completion balance sheet is usually prepared by the buyer, which may vary depending on the stake being purchased (i.e. 100% or a minority stake).
4	Is the balance sheet audited?	Not common.
5	Is an earn-out common?	Yes, depending on the type of business being bought.
6	Is a deposit common?	A deposit will sometimes be used.
7	Is an escrow common?	Very common.
8	Is a break fee common?	Not very common but used sometimes.

#### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Common, especially if market conditions deteriorate.
10	Is the MAE general or specific?	Varies from deal to deal.
11	Quantification of MAE?	Very common.

#### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Very common, though high risk of being unenforceable in Ukraine. Waterfall provisions are not normally used.
13	Non-solicit (of employees)?	Common.
14	Non-solicit (of customers)?	Common.

15	Broad access to books, records, management between sign and close?	Some access is usually give to the buyer. Broad access or control in the form of veto rights over certain transactions can create competition law risks.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Whenever there is repetition of warranties at closing, the seller will normally request a right to update the disclosures made at signing. Consequences vary and include the right to abort the deal.
17	Is a separate tax covenant/indemnity or tax deed common?	Very common.

### Representations and Warranties

18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Representation not common. Warranties often qualified by monetary thresholds of materiality. Use of qualifiers e.g. 'key customer' or 'material IP' also common.
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge is usually qualified as actual knowledge acquired after due enquiries of senior managers. A list of specific people is also used.
20	Is a warranty that there is no materially misleading/omitted information common?	Depends on bargaining position of the buyer as such warranty is strongly resisted by the seller. Generally, not common.
21	Is disclosure of data room common?	Depends on the bargaining position of the buyer and on how organised the due diligence process was. Such disclosure is sometimes accepted by the buyer but is not common.

### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Common. Bring-down certificates not common.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate is common.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Not common.

### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	100% for title and capacity warranties (and other fundamental warranties). Cap on liability under business warranties varies from deal to deal. Overall liability cap (for all claims) is often 100% of the purchase price or, on larger transactions, less.
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Varies from deal to deal. Often the cap also applies to liability under indemnities.
27	What are the common exceptions to the cap?	It is common to have different caps for, e.g. title and capacity warranties and for liability for other claims under the SPA.
28	Is a deductible or basket common?	Very common.
29	Is a <i>de minimis</i> common?	Very common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	One to three years common. Fraud often exempted.
31	Is warranty insurance common?	Not common.

### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Not common.
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### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Used sometimes in respect of actually received amounts.
34	Insurance proceeds?	Used sometimes in respect of actually received amounts.
35	Third party recoveries?	Used sometimes in respect of actually received amounts.

### Damages, Knowledge

36	Obligation to Mitigate Damages?	Common.
37	Exclusion of consequential damages?	Common but varies from deal to deal.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Used sometimes in relation to actual knowledge.

### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, depending on whether the parties are resident outside of Ukraine (which is often the case). English law.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration is more common. LCIA or the Arbitration Institute of the Stockholm Chamber of Commerce.

### Stamp Duty

41	If stamp duty is payable, is it normally shared?	Not payable in Ukraine.
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## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

The principal requirements for a share (participatory interest) sale in Ukraine may be summarised as follows:

- the shares (participatory interests) may only be transferred to the purchaser after they have been paid up in full and the shares of a JSC may only be sold after having been registered with the NSC
- the shares of a JSC may only be sold through a licensed securities trader
- for acquisitions of a participatory interest of an LLC or the shares of a private JSC (if provided for in the charter), the purchaser must ensure that all of the non-selling participants (shareholders) in such company have waived their pre-emptive rights in respect of the participatory interest (shares) offered for sale.

### 3.2.2 Transfers of assets

Normally, a written contract is required to transfer assets. The law will also require signing of a contract before a notary in some cases, in particular to transfer land.

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

In case of the acquisition of shares issued in electronic form, the purchaser must open an account in securities with a licensed custodian and ensure that the shares are transferred to such account.

In case of the acquisition of a participatory interest in an LLC, or shares in a private JSC, the purchaser must ensure that the highest corporate governing body of the target company has adopted a decision on the introduction of amendments of the target company's charter reflecting the purchaser as a new participant (shareholder), and, in the case of an LLC, that such amendments are registered with the Unified State Register of Legal Entities and Individual Entrepreneurs (state register).

### 3.3.2 Transfers of title to assets

When a business is being transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer that applies to that type of asset. In particular:

- the assignment by the target company of its contractual obligations to the purchaser generally requires the consent of each individual creditor
- an agreement for the transfer of real estate is subject to mandatory notarisation and the imposition of state duty in the amount of one percent of the value of the relevant agreement charged by the notary, as well as to mandatory state registration, and
- the transfer of certain types of assets (e.g. vehicles) must be documented in a prescribed form and such transfer is subject to further registration with the relevant authorities.

## 3.4 Formalities for Mergers

### 3.4.1 Merger by absorption

#### ***Joint stock companies***

The general shareholders' meeting (GSM) of the merging company must approve the following decisions:

- with the approval of not less than three-quarters of the votes represented at the GSM: to initiate a reorganisation by means of a merger
- and with the approval of more than 50% of the votes represented at the GSM:
  - to approve the draft merger agreement, and
  - to approve the transfer balance act.

In addition, the GSM of the surviving company must approve by more than 50% of the votes represented at the GSM the following decisions:

- to initiate the company's reorganisation by merging with the merging entity
- to approve the draft merger agreement, and
- to approve a new share issue for the exchange of shares through the increase of the surviving company's capital by the amount of the capital of the merging company.

Furthermore, the entities participating in the merger must sign the merger agreement.

Both the merging company and the surviving company must file with the NSC, and publish in one of the NSC's official newspapers or bulletins a notification of the reorganisation within two business days of the date on which the reorganisation is approved by their respective GSMs.

The surviving company must approve a charter and must register the new share issue with the SSC. The shares of the merging company will in turn be annulled by the SSC.

Further, the shareholders of both the merging and the surviving companies must exchange the shares that they previously held for the newly issued shares of the surviving company.

### ***Limited liability companies***

Mergers of LLCs follow similar rules to mergers of JSCs. The decision to initiate a reorganisation through a merger, as well as other decisions made in connection with such a transaction, must be adopted by a simple majority vote at the participants' assembly meeting of the LLC.

#### **3.4.2 Merger by consolidation**

In the case of a merger by consolidation, the highest body of corporate governance of each of the merging companies must adopt the following decisions with the approval of more than 50% of the votes represented at the GSM or participants' assembly:

- to initiate a reorganisation by means of a consolidation (for JSCs this decision requires the approval of not less than three-quarters of the votes represented at the GSM)
- to approve the draft merger agreement
- to approve the transfer balance (act), and
- in the case where the newly formed company is a JSC, to approve the new issue of shares by the newly formed company.

Thereafter, a meeting of the newly formed company must be held, whereby its charter must be approved and the officers of the company appointed. Where the company is a JSC, it must also register its shares with the NSC.

### 3.4.3 Additional requirements for mergers

#### ***Securities regulation compliance***

Although mergers involving JSCs do not require approval of the NSC, the participants in such mergers must undertake a number of steps involving the NSC in order to comply with applicable securities regulations. In particular, those legal entities that will disappear as a result of the merger must initially apply to the NSC for the cancellation of the circulation of their shares, and subsequently, for the annulment of the NSC registration of their shares. In turn, the surviving or newly formed entity should register the new issue of its shares with the NSC.

In the context of the acquisition of the shares of a JSC, the parties should be mindful of the heavily regulated procedures for the opening of accounts with the shareholders, registrars and custodians, as well as the re-registration of the shares in the purchaser's name. The foregoing requires the submission of a large number of documents, the format of which is strictly prescribed by the NSC.

#### ***Creditor protection***

The Ukrainian corporate legislation requires the merging company(ies) to notify its (their) creditors of the merger within 30 days of approval of the decision on the merger (for JSCs). LLCs must notify the state registration authority within three business days of approval of the merger decision and give to creditors at least two months waiting period to submit their claims. In this case, the creditors have the right to require the rescission or accelerated performance of the obligations of the merging company(ies) owed to them.

Also, under the Civil Code, the prior consent of a creditor is required for any assignment by a debtor of its obligations to a third party. Even if the merging companies choose not to execute separate assignments in respect of the transferred liabilities of the merging entities, the requirements of the Civil Code may still apply to deem such transfer as an assignment, thereby requiring the creditor's consent.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Under Ukrainian anti-monopoly legislation, the following transactions may require the prior approval of the Anti-Monopoly Committee (AMC):

- mergers and consolidations
- acquisition of direct or indirect control over an entity by way of, among other things:
  - any direct or indirect acquisition of assets of a business entity constituting an 'integral property complex' (i.e. business property with a complete production cycle, along with the real estate on which the property is sited, as well as an autonomous engineering, communications, and energy supply system)
  - the conclusion of agreements relating to the management, concession, and/or lease in respect of that property complex
  - the appointment or election as a CEO, deputy CEO, or chairman of the supervisory board of a person who already holds one of those positions in another business entity
- the establishment of a business entity, which will, for a considerable period of time, independently carry out business activities, by two or more independent business entities (i.e. not under common control), as long as the establishment does not involve those parties in competitive behaviour, and

- direct or indirect acquisition of, obtaining ownership of, or management of the shares (participatory interests) of a business entity, if that acquisition results in obtaining, or exceeding, a quarter or a half of the voting rights in the target company.

This applies also to foreign-to-foreign transactions. The mere fact that the target does not have any sales, assets, subsidiaries, branches, representative offices, etc. in Ukraine, will not be sufficient in itself to conclude that filing is not required, since, under Ukrainian competition law, there are no special rules with respect to foreign-to-foreign transactions which do not affect competition in any Ukrainian product/services market where the financial or market share thresholds are met. This means that if parties to the proposed transaction exceed (even slightly) the financial or market share thresholds (or even if only one party exceeds one of the Ukrainian thresholds), formally there is a nexus with the Ukrainian market, and the parties must obtain AMC approval (i.e. even for foreign-to-foreign transactions which basically have no impact on competition in Ukraine).

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Ukrainian purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Filing Obligation		
1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	Mandatory.
Timetable		
2	In practice, what is the timetable for clearance (in Phase I and Phase II review)?	<p>In both Phases I and II, the AMC normally uses the full review period.</p> <p>In Phase II, in cases that do not raise too many competition concerns, clearance may be granted before the end of the review period.</p>

The above transactions will be subject to the prior approval of the AMC if the aggregate asset value or the aggregate sales volume of all of participants in the transaction for the previous fiscal year exceeds the Hryvnia equivalent of EUR12 million (calculated on a worldwide basis) based on the exchange rate set by the NBU on the last day of the previous fiscal year, as long as:

- the aggregate asset value or the aggregate sales volume of at least two of the participating entities (calculated on a worldwide basis) exceeds the Hryvnia equivalent of EUR1 million at the NBU exchange rate as of the last day of the previous fiscal year, and
- the aggregate asset value or the aggregate sales volume of at least one participating entity on the territory of Ukraine exceeds the Hryvnia equivalent of EUR1 million at the NBU exchange rate on the last day of the previous fiscal year.

In determining if these monetary thresholds have been met, the definition of a 'participating entity' includes not only the actual merging, consolidating, acquiring or target entity, but also all of the business entities under the common control of that entity.

AMC approval is also required for any transaction where the market share of any party or the combined market share of all parties to the transaction (together with their respective 'related-by-control' entities (such as subsidiaries)) in any product market exceeds 35%, and the transaction takes



place in that or in a closely related product market, regardless of whether the above financial thresholds are met.

The AMC has 15 days for initial review to determine whether the application is complete and whether it clears the first hurdle of the AMC accepting it for full consideration. Once the application is accepted for substantive review, the AMC has 30 days to make its decision. A merger or an acquisition may not be completed unless and until the AMC has issued its approval. The parties may, however, sign the merger (acquisition) agreement, provided that the completion of the merger (acquisition) is conditional upon the receipt of AMC approval.

The fee for processing an AMC merger control application is UAH5,100.

#### 4.2.1 Exemptions from notification requirements

The following transactions are specifically exempted from the AMC merger control approval requirement discussed above:

- establishment of a business entity designed to, or resulting in, the coordination of competitive behaviour between the business entities setting up the new business or between those entities and the newly established business entity (i.e. this is a 'concerted action' and is thus regulated by the AMC through a procedure separate from the merger control procedure)
- the acquisition of shares (participatory interests) in a business entity by a person whose principal business is the performance of financial or securities operations, where the acquisition has been undertaken with the purpose of the subsequent resale of the shares, and that party does not vote on any governing body of the business entity, and the shares (participatory interests) are resold within one year of this purchase
- transactions between business entities under common control, provided that that control was initially established lawfully under Ukrainian anti-monopoly legislation, and
- the acquisition of control over a business entity or division, including the right to manage and to administer the property of that business entity, by an appointed receiver in bankruptcy proceedings or by a state official.

#### 4.2.2 Liability

The AMC is authorised to consider cases in violation of the legislation governing the protection of economic competition and to render decisions in those cases including decisions to:

- confirm the fact of the violation of legislation
- stop the violation
- confirm a business entity as one holding a dominant position in a given market
- split up a business entity holding a dominant position in a given market
- impose penalties, and
- block securities in securities accounts.

Failure to comply with the merger control regulations may result in AMC imposing a fines of up to 5% of the global annual turnover of the participating groups (including all related-by-control entities; e.g. subsidiaries) for the fiscal year preceding the year in which fine is imposed. The AMC tends not to impose the maximum fine, and decides on the level of fines on a case-by-case basis. However, fines have recently been increasing, with one recent case involving failure to notify in a foreign-to-foreign transaction amounting to USD80,000.

The AMC may exercise these powers (in respect of failures to obtain prior AMC approval for concentrations) for five years after the completion of the relevant transaction.

Failure to obtain AMC merger control approval may serve as a legal ground for the reversal of any transaction where AMC approval was not obtained. Claims to invalidate a transaction can be made by the AMC, any party to the transaction, or any third party whose rights were violated by the transaction.

In practice, the risk of AMC refusal or invalidation will be significantly higher if the transaction has been widely publicised in the press and media, and whether it will adversely affect protected markets in Ukraine.

The AMC also undertakes periodical reviews of different markets (sometimes prompted by a notification from an overseas merger control authority), carries out research and investigations; and certain markets are under constant scrutiny. The authority has a tracking electronic database which analyses changes in the structure of groups (for entities which have previously filed in Ukraine). Thus, when parties notify the AMC of a subsequent transaction, that transaction may receive more attention than otherwise. In most of the cases the AMC learns about unnotified deals by reviewing press and media and public announcements of such deals.

### 4.3 Exchange of Competition-Sensitive Information and ‘Gun-Jumping’ Issues

Transaction documents will commonly include pre-completion covenants. In particular, the seller may be asked to undertake not to enter into certain transactions or not to enter into such transactions without the consent of the buyer. These are problematic from the point of view of Ukrainian law because such veto rights can amount to acquisition of control by the buyer prior to obtaining of merger approval for the deal. Instead of express veto rights, the buyer will often request appointment of an observer who will have access to documentation and a right to attend board meetings.

Care should also be taken by the buyer in appointing representatives to the governing bodies of the target (e.g. its board of directors) prior to obtaining of merger approval as this can also be viewed as acquisition of control over the target.

### 4.4 Anti-Bribery, Corruption and Money Laundering

Compliance issues are currently high on the list of priorities for all multi-national companies doing business in Ukraine, for a number of reasons. First, there is a clear perception that the problem of corruption in Ukraine is significant, a fact borne out by the 2014 Transparency International Corruption Perceptions Index which ranks Ukraine 142 out of 176 countries. Second because, in an effort to address Ukraine’s corruption problem, new legislation on anti-corruption was introduced in Ukraine in July 2011 making it necessary for multi-nationals to take another look at their compliance policies and procedures. Last, all of the above developments have been occurring against the backdrop of the introduction of the UK Bribery Act (see Appendix D), the enhanced enforcement in the United States of the Foreign Corrupt Practices Act and increasing levels of cooperation between enforcement authorities across the United States and Western Europe in terms of the supervision and regulation of the business conduct of their companies overseas, particularly in high-risk emerging markets.

#### 4.4.1 Anti-corruption legislation

On 1 July 2011, the Law on Prevention of and Counteraction against Corrupt Practices in Ukraine (Anti-Corruption Law) entered into force. The Anti-Corruption Law sets out the main principles for combating corruption. In addition, relevant amendments to the Criminal, Administrative Offences, and Criminal Procedural Codes entered into effect at the same time as the Anti-Corruption Law. Adopted on 17 May 2012, the Law on the Amendment of Certain Legislative Acts of Ukraine in Connection with Adoption of Law on Prevention of and Counteraction against Corrupt Practices in Ukraine, introduced changes to a number of laws and regulations designed to implement the Anti-Corruption Law.

#### 4.4.2 Corruption misconduct

The Anti-Corruption Law defines ‘corruption misconduct’ as an intentional act which has the features of corruption, and is performed by a ‘relevant person’ (as defined below). The relevant person is subject to criminal, administrative, civil, and/or disciplinary liability. Corruption itself is defined as:

- the use of authority granted by virtue of occupying a certain position, to receive improper benefits, or to accept an offer/promise of improper benefits for personal benefit or for the benefit of other persons, and
- an offer/promise, or the actual grant, of improper benefits to such relevant persons or, on the request of that person, to other persons, in order to facilitate improper use of their authority.

The following persons, among others, will qualify under the above rules, and are at risk of facing corruption charges:

- Ukrainian civil servants
- foreign civil servants
- officers of international organisations
- officers of legal entities, and
- 'public service providers', i.e. officials performing public service roles, even if not civil servants, e.g. auditors, notaries, experts, valuation professionals, arbitrators, and others.

Although the Anti-Corruption Law covers the corrupt misconduct of officials of legal entities (i.e. commercial bribery), legal entities are not liable under the legislation, only natural persons.

#### 4.4.3 Gifts

The Anti-Corruption Law prohibits relevant persons from receiving any gifts other than in accordance with the generally recognised standards of hospitalities and within the expressly allowed limits. Those standards and limits are based on a calculation of the official minimum monthly salary. So, at any one time, the value of a gift may not exceed that monthly salary. Within a calendar year, a relevant person is not allowed to receive gifts from one source to the value of more than two non-taxable minimum income amounts as set on the 1st of January of the current year. The amount of the statutory minimum monthly salary is regularly updated, so for example for December 2014 the official minimum monthly salary was UAH1,218. The non-taxable minimum income amount is also regularly updated and in 2014, it was UAH1,218.

Any gift made for the purpose of influencing a government official's exercise of his or her functions is considered a bribe, even if its amount is negligible.

#### 4.4.4 Transparency requirements

The Anti-Corruption Law ring-fences certain types of information as non-confidential (i.e. public), and to which access, therefore, cannot be limited by its owner. Such information includes data regarding any types of remuneration and/or charitable assistance received by a civil servant.

#### 4.4.5 Financial control and limits on state officials' activities

The Anti-Corruption Law expressly requires state officials to take active measures to prevent any conflict of interests. If such a conflict arises, the state official must immediately disclose it. In addition, information about a state official's property, income, expenses, and financial obligations must be declared and is subject to public disclosure.

State officials are not allowed to have any income in addition to their salaries, apart from income received from medical or sports judging practice or artistic or scientific activity. Also, for one year after their resignation, former state officials are prohibited from occupying certain positions and roles within companies they have previously monitored in their official capacity.

#### 4.4.6 Liability

Any losses and/or damages caused by corruption misconduct must be duly compensated to the state and/or to the injured party. Decisions of a state body adopted as a result of a corruption offence may be challenged in court.

#### 4.4.7 Ensuring compliance

The Anti-Corruption Law itself does not indicate any mandatory or recommended actions to reduce the risk of violations or would mitigate the sanctions or other negative consequences. However, the precautions that would protect a company from being penalised under US or European anti-corruption legislation (e.g. adoption of anti-corruption policies, policies on monitoring and investigation of employees, etc.) could be adopted in Ukraine also. However, due to Ukrainian laws on employment and privacy, as well as the absence of any court practice for Anti-Corruption Law and related matters (other than bribery criminal cases), each particular situation must be assessed on a case-by-case basis to avoid claims of invasion of privacy or illegal processing of personal data. Any internal compliance policy adopted by the company must be localised (and translated into Ukrainian) to be enforceable in Ukraine. Conducting an 'anti-corruption due diligence investigation' of potential business partners and intermediaries before engaging in business activity with them is also recommended.

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

The principal legislative Acts governing foreign investments in Ukraine are the Law on the Regime of Foreign Investment, adopted on 19 March 1996, and the Law on Investment Activity, adopted on 18 September 1991. The latter established the general principles of investment activity in Ukraine, irrespective of the nationality of the investor. However, this law is rarely relied on in the context of foreign investments in Ukraine due to the pre-eminence of the Foreign Investment Law (FI Law), which will apply in the first instance.

The term 'foreign investment' for the purposes of the FI Law covers all forms of value invested by foreign investors into objects of investment activity, for the purpose of obtaining profits or achieving a social effect. An enterprise with foreign investment is defined as any type of organisational form created in accordance with the applicable Ukrainian legislation, where the foreign investment into the enterprise's charter capital is at least 10%.

A foreign investment may be made by means of contributing the following items:

- foreign currency recognised as convertible by the National Bank of Ukraine (NBU)
- Ukrainian currency, as established by the laws of Ukraine
- any kind of movable or immovable property, together with associated property rights
- shares, bonds, other securities, and corporate rights (e.g. ownership rights to a share in the capital of a legal entity established in accordance with the applicable Ukrainian legislation or the laws of other countries) denominated in foreign currency
- monetary claims and rights to require the performance of contractual obligations, which are guaranteed by 'first class' (reputable and recognised) banks and have a foreign currency value confirmed in accordance with the laws of the country of the investor or with the customary practice in international trade
- all types of intellectual property rights, the foreign currency value of which is confirmed in accordance with the laws of the country of the investor or with the customs of any practice in international trade, and verified by an expert evaluation in Ukraine, including copyrights, rights to inventions, useful models, industrial designs, trademarks and service marks, know-how, and other forms of intellectual and industrial property legalised (registered) in Ukraine
- the right to conduct business activities, including rights to use natural resources granted pursuant to legislation or international agreements, the foreign currency value of which is confirmed in accordance with the laws of the country of the investor or with the customary practice in international trade, and
- other 'valuables' as defined by relevant Ukrainian legislation (FI Law).

Foreign investors may carry out investment activities on the basis of agreements on joint activities concluded with Ukrainian companies (Joint Activity Agreements/JAAs). Such contractual joint ventures must maintain separate accounting records and must establish separate bank accounts for their joint operations. In order to obtain protection under the Law on Foreign Investments, a JAA must be registered in the manner established by the Cabinet of Ministers of the Ukraine.

#### 4.5.1 Exchange controls

The payment of dividends by a Ukrainian company to a non-Ukrainian shareholder will be regarded as the repatriation from Ukraine abroad of foreign 'direct investment' and the payment of income from such investment.<sup>1</sup> To convert UAH into foreign currency for the purpose of such payments, the Ukrainian company must submit certain documents to the Ukrainian commercial bank, including a bank statement and/or other documents evidencing the initial monetary investment by the foreign investor into the capital of the Ukrainian company or payment for the shares in the Ukrainian company.

In addition, contracts between foreign and Ukrainian companies which provide for settlements in foreign currency are regulated by the requirements of the Payments Abroad Licensing Rules<sup>2</sup>.

In accordance with the above pieces of legislation, foreign currency payments by a Ukrainian party, including contributions to the capital of non-Ukrainian companies<sup>3</sup> may be made only upon obtaining an individual NBU licence, unless the payment abroad in foreign currency is made:

- under a foreign economic contract for purchased goods, services, works, objects of intellectual property and other proprietary rights (other than currency values), and
- under a loan from a non-resident, and in order to pay interest thereon.

#### 4.5.2 Foreign investment approvals and notifications

Foreign investors are entitled to certain privileges and guarantees under the FI Law, provided that their investment has been duly registered with the appropriate state authorities. Depending on where the foreign investment activity is deemed to be economically concentrated, the foreign investment must be registered by the regional state administration, the state administration of the cities of Kyiv and Sevastopol, or the government of the Autonomous Republic of Crimea. The registration of a foreign investment must be effected within three business days of the actual implementation of the investment.

The registration of a foreign investment may be rejected only where this involves violation of the formal registration procedure. The rejection of the registration of a foreign investment must be documented in written form and must specify reasons for the rejection. The rejection may be challenged in court.

#### 4.5.3 Guarantees to foreign investors

The FI Law provides the following guarantees to foreign investors:

- protection against changes in legislation: the foreign investor is guaranteed protection against changes in the foreign investment legislation for a period of 10 years. This has been narrowly interpreted by the courts, however, to apply only to changes of matters relating to nationalisation, expropriation and similar matters

<sup>1</sup> NBU Regulation on Cross-Border Settlements, approved by NBU Board Resolution No. 280, of 10 August 2005.

<sup>2</sup> Decree of the Cabinet of Ministers of Ukraine No. 15-93, of 19 February 1993, On the System of Currency Regulation and Currency Control and the Regulation on the Procedure for the Issue of Individual Licences for Payment Transfers of Foreign Currency Abroad of Ukraine with the Purpose of Payment for Banking Metals and Performance of Other Currency Operations, approved by the Resolution of the NBU No. 266 dated 7 June 2004

<sup>3</sup> Except where the Ukrainian party is a bank or other financial institution that has obtained a general NBU licence for the performance of foreign currency operations.

- protection against nationalisation: the foreign investor's investment may not be nationalised. State bodies cannot expropriate foreign investments, with the exception of emergency measures in the event of natural disasters, accidents, epidemics, or animal disease epidemics. Expropriation in those cases may be carried out only on the basis of decisions of bodies authorised by the Cabinet of Ministers of Ukraine
- guarantee for compensation and reimbursement of losses: the foreign investor has the right to be reimbursed for losses, including lost profits and moral damages incurred as a result of any action, failure to act, or the improper performance of the state bodies of Ukraine or of officials with regard to their obligations owed to foreign investors or companies with foreign investment. All expenses and losses of the foreign investor must be reimbursed either at the current market rate or based on a reasonable valuation certified by an auditor
- guarantee in the event of termination of investment activity: the foreign investor is guaranteed the right to remit its revenues and to withdraw and repatriate its investments from Ukraine, free from export duties within six months of the termination of the investment activity, and
- guarantee of repatriation of profits: after the payment of taxes, duties, and other mandatory payments, the foreign investor is guaranteed the right to the unimpeded and immediate transfer abroad of all profits and other proceeds in foreign currency legally earned as a result of the foreign investment.

In the event of the termination of the investment activity, the foreign investor has the right, within six months of the date of the termination, to recover its investment in kind or in the currency of the investment in the amount of the actual contribution (taking into account any possible reduction of the charter capital), without the payment of any fees or duties. A foreign investor has the right to recover the benefits from its investment in cash or in kind based on the actual market value of the investment at the time of the termination of the investment activity, unless otherwise stipulated by applicable Ukrainian legislation or international agreements to which Ukraine is a party.

#### 4.5.4 Industry-specific regulation

As a general rule, the FI Law provides that foreign investors will benefit from what is referred to as the 'national regime' (i.e. non-discriminatory treatment) for investment and other economic activity on the territory of Ukraine. However, this concept is subject to other provisions of the applicable Ukrainian legislation and international agreements to which Ukraine is a party. Accordingly, the relevant Ukrainian legislation contains certain restrictions with regard to the maximum permissible extent of foreign investment into companies carrying out activities in certain industry sectors, such as broadcasting, publishing, banking and auditing.

#### 4.5.5 Restrictions on land ownership

Legal relations in the field of land ownership and related rights are governed primarily by the Land Code which came into effect on 1 January 2002. Subject to an exception for agricultural land, Ukrainian individuals and legal entities are not restricted in their ownership, use or disposition of land.

Foreign individuals and legal entities may own, use and dispose of certain non-agricultural land in Ukraine, but are explicitly prohibited from owning agricultural land. Foreign legal entities may own only non-agricultural land:

- within the limits of a city or village, if they purchase buildings or structures or land plots for construction purposes
- beyond the limits of a city or village, if they purchase the buildings or structures on those land plots. State or municipal non-agricultural land may, however, be sold to a foreign legal entity if it establishes and registers a permanent establishment in Ukraine in the form of a commercial representative office in Ukraine.

The Land Code appears to not allow Ukrainian companies with 100% foreign investment the right to own any land in Ukraine (this is not explicitly clear); but Ukrainian legal entities founded by Ukrainian individuals or legal entities and joint ventures may own land in Ukraine. No similar restriction applies,

however, to the lease of land by Ukrainian legal entities with 100% foreign investment (Land Code). A joint venture founded with the participation of foreign legal entities and individuals may acquire ownership rights to non-agricultural land according to the procedure established by the Land Code. In particular, state land may be sold to a foreign legal entity (and, accordingly, to a JV) by the Cabinet of Ministers, subject to the prior approval of the sale by the *Verkhovna Rada* (Supreme Council of Ukraine); and municipal land may be sold to a foreign legal entity (and accordingly, to a JV) with the permission of the relevant municipal authorities, subject to the prior approval by the Cabinet of Ministers.

#### 4.5.6 Import/export controls

Another benefit granted to foreign investors under the FI Law is the exemption from import duties on a foreign investor's contribution in kind to the charter capital of its enterprise (with foreign investment)—excluding goods for sale or goods for the investor's own consumption. However, if such property is sold or otherwise transferred by the foreign investor within three years of the foreign investment being recorded in the balance sheet of the enterprise (e.g. on termination of the enterprise's activities), the enterprise with foreign investment must pay the import duty calculated on the basis of the customs value of the property converted into Ukrainian currency at the official exchange rate established by the NBU on the date of the alienation of that property.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

Ukrainian legislation does not provide for any stamp duty or similar transfer taxes to be paid in connection with the sale or purchase of shares (or any other corporate rights) in a Ukrainian legal entity. However, when structuring the acquisition of the shares of a Ukrainian joint stock company, the parties should factor in and allocate the costs of the services to be provided by the independent shareholders' registrars or custodians. This issue may be addressed either by renegotiating the costs of the services of the shareholders' registrar or custodian (usually established in the relevant agreement with the target entity) or by splitting the costs between seller and purchaser.

### 5.2 Acquisition of Assets

A state duty may apply to notarised transactions on the sale of real property, the sale of integral property complexes, the privatisation of state-owned companies, and mortgages of real estate (among other things). The rate of the state duty may vary significantly, depending on the nature of the transaction.

### 5.3 Mergers

Mergers are expressly exempted from VAT and generally no adverse consequences arise in connection with mergers.

### 5.4 Value Added Tax

VAT is generally not payable on the purchase of shares. The sale of company's assets will be subject to VAT at a rate of 20%.

The transfer of assets as part of a corporate reorganisation (e.g. a merger) from a merging entity to a surviving entity is specifically exempted from VAT, provided that:

- the surviving entity acts as the legal successor of the entity transferring the assets, and
- both the merging and the surviving entity are registered for VAT purposes.

The exchange of the shares of a merging entity for the shares of a surviving entity should also be VAT-exempt.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of a share purchase, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company, and the purchaser therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the target company.

#### 6.1.2 Acquisition of assets

On an asset sale, the transfer of the employees from the target company to the purchaser is not within the discretion of the parties, but is subject to each employee's consent.

#### 6.1.3 Transfer of business

In labour law, there is no developed concept of the transfer of business in Ukraine (as there is in certain EU member states operating under the TUPE Directive) but see **6.3.1**.

### 6.2 Approval or Consultation Requirements

See **6.3.1**.

### 6.3 Protection against Dismissal

#### 6.3.1 Redundancies

In the case of a liquidation, reorganisation, bankruptcy or restructuring, an employee may be dismissed only if:

- the employer is unable to transfer the employee to another job, or
- the employee rejects the offer to be transferred to another job.

No employee may be terminated during the period of his or her temporary illness or disability or when the employee is on annual leave. However, this prohibition does not apply when a target company is being liquidated.

The dismissal of an employee for reasons of liquidation, reorganisation, bankruptcy or restructuring also requires the consent of any relevant trade union committee. An employment agreement may be terminated within one month after such consent has been obtained by the employer. The consent of the trade union committee is not required if:

- a trade union committee has not been formed in the company, or
- the employee is not a member of the trade union.

In addition, the management of the entity undergoing a reorganisation is under an obligation to conduct negotiations with the trade unions, with a view to minimising potential redundancies and the deterioration of labour conditions.

Ukrainian employers must give employees at least two months' notice of any planned terminations due to staff reduction or reorganisation.

An employer must also inform the State Employment Authority of any expected redundancies not later than two months before they are due to occur. That notice must list the profession, position and compensation of each employee to be made redundant. Within 10 days of the implementation of the redundancies, the employer must submit to the authority a second notice with a list of the redundant employees' names.



The employer must make a severance payment of one month's salary to each employee terminated for reasons of a liquidation, reorganisation, bankruptcy or restructuring, and also pay compensation for any unused vacation, any other compensation payments which may be due to the employee under the applicable Ukrainian legislation and the employee's accrued salary in full.

When a purchaser acquires a Ukrainian company which is a signatory to a corporate collective agreement, the old employer's corporate collective agreement will remain in effect for a period of not more than one year. During this one-year period, a new collective agreement must be negotiated by the employees and the new employer.

#### 6.3.2 Penalties

Any employer failing to comply with the above requirements to give notice of any expected redundancies to the State Employment Authority is subject to a penalty equal to the sum of the annual salary of each employee made redundant.

## United Arab Emirates

### 1.1 Overview

The United Arab Emirates (UAE) is a federation formed in 1971 between the seven of Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah, Umm Al Quwain and Ras Al Khaima. Federal laws in the UAE have supremacy over the laws of individual Emirates. However, each Emirate is permitted to enact its own legislation in areas other than those exclusively reserved to federal jurisdiction or where the federation has not yet exercised its legislative powers.

The UAE is a civil law jurisdiction and as with most civil law jurisdictions, its legislative framework consists of statutory codes which regulate civil and commercial relationships between natural and legal persons. Civil transactions are administered by Federal Law No. 5 of 1985 (the Civil Code) whereas Federal Law No. 18 (the Commercial Code) regulates commercial transactions. As the UAE's legal system is based upon the codes of Shari 'ah Law (i.e. Islamic Law), matters not addressed in either the Civil Code or the Commercial Code will be supplemented by the application of Shari 'ah Law.

To promote a more diverse and attractive economic environment, the UAE government created a legal framework in which economic free zones could be established in each of the Emirates. There are around 60 different free zones in the UAE, some of the key ones being the Dubai International Financial Centre (DIFC), the Jebel Ali Free Zone (JAFZ), the Dubai Multi Commodities Centre (DMCC) and the Dubai Technology and Media Free Zone (commonly known as 'Tecom').

### 1.2 General Legal Framework

When establishing a business in the UAE, the first decision to be made will be whether to locate the business in the UAE within one of the free zones or outside of a free zone (being outside the free zones is commonly referred to as being 'onshore').

The free zones foster an attractive environment for business by offering parties:

- 100% foreign ownership
- zero tax rates on corporate income
- no foreign exchange controls
- no restriction on capital repatriation
- no currency restrictions
- no import or re-export duties (except for products entering onshore UAE)
- freedom from excessive regulation.

Often the most important factor for setting up in a free zone is the ability of a foreign party to own 100% of the entity in the free zone. This is because foreign ownership onshore in the UAE is generally limited to 49% of a company. For further details of the UAE's foreign ownership restrictions see **4.5.2**. The main restriction with respect to free zone entities is that they are limited to doing business within the free zone in which they are incorporated, and are not permitted to do business onshore in the UAE.

The laws governing a company's formation and operation onshore are Federal Law No. 8 of 1984 (the CCL) and the Civil Code. The CCL also applies to entities registered in the free zones, but only in respect of matters which are not specifically governed by regulations adopted by the free zone. Most of the free zones have adopted only limitation regulations in this regard and so the CCL applies in many respects (save for the DIFC which has enacted an extensive body of its own legislation - see **1.6**).

In a number of areas, such as criminal law, federal laws apply equally onshore and within the free zone. In other areas, such as labour law, free zone laws exist in conjunction with, and sometimes subordinate to, the relevant federal law.

### 1.3 Corporate Entities Onshore in the UAE

Corporate entities may be formed onshore in the UAE under either the CCL or the Civil Code. The CCL provides for seven different corporate forms. The Civil Code provides for only one corporate form, a general partnership also known as a civil company that undertakes 'professional' or 'consultancy' activities such as law firms, architecture, engineering and accounting firms.

In the context of private M&A transactions, the most common forms of company incorporated onshore in the UAE are the limited liability company (LLC) and the private joint stock company (PJSC) formed under the CCL.

Civil companies are not generally permitted to have corporate shareholders and so do not commonly feature in M&A transactions. PJSCs are subject to more onerous administrative obligations and it is for this reason that the LLC is the onshore entity most commonly encountered.

#### 1.3.1 Limited liability companies

The LLC structure offers limited liability to its shareholders and provides that the number of shareholders must be a minimum of two and not more than 50.

The CCL does not prescribe a minimum capitalisation for an LLC, however there must be sufficient share capital for the realisation of the objectives of the company. This will be judged by the relevant Emirate-level authority which will regulate the incorporation of the company (e.g. in Dubai it is the Department of Economic Development).

The share capital must be made up of equal shares (meaning that having different classes of shares is not permitted) and does not have to be paid-up or deposited with a UAE bank. Government regulations can impose higher minimum capital requirements with respect to certain classes of company or types of activity.

The UAE's foreign ownership restrictions (see **4.5.2**) mean that a foreign party can only ever hold 49% or less in an LLC. Despite this, the LLC structure is flexible so that appropriate safeguards for the minority party can be included in the registered constitutive documents of the LLC (variously referred to as a 'contract of establishment' or a 'memorandum and articles of association').

Minority protections can include:

- supermajority voting
- management control
- disproportionate allocation of profits
- shareholding agreements and other contractual arrangements that supplement the memorandum and articles of association.

#### 1.3.2 Joint stock companies

The CCL recognises two types of joint stock company (each a JSC): public and private. The UAE foreign ownership restrictions apply equally to a JSC. Key features of a JSC are:

- procedures for JSC formation are complicated, time-consuming and require a number of special approvals
- it is not possible to predict with any certainty the time-frame for establishment of a JSC (but it is likely to take several months at least)

- the minimum capital requirements are high (AED10 million for public JSCs; AED2 million for private JSCs)
- a public JSC must have at least 10 founders and a substantial percentage of the shares must be offered in a public offering, while a private JSC must have at least three founders
- the chairman and a majority of the board of directors of the JSC must be UAE nationals
- in contrast to an LLC, the structure does not permit flexibility with respect to minority protections
- the JSC is more heavily regulated than an LLC.

For these reasons, JSCs are not commonly used in the context of private M&A transactions, except where government regulatory or other policy requirements mandate the use of a JSC structure.

### 1.3.3 Branches of a foreign company

A foreign company can set up a branch onshore in the UAE. A branch does not have a separate legal personality and remains liable for all the liabilities of the parent company. The branch can be 100% foreign-owned but must appoint a UAE national (or company 100%-owned by UAE nationals) as a local agent. Branches are generally only permitted to undertake the same activities as the parent company.

As branches do not have separate legal personality, they cannot be transferred from one party to another. To transfer a branch either the assets must be acquired, or in some circumstances the branch can be converted to a company, and then the shares in the resulting company can be transferred.

## 1.4 Corporate Forms in the Jebel Ali Free Zone

A foreign party can set up a company in JAFZ with the benefit of 100% foreign ownership through one of the following corporate forms.

### 1.4.1 Free zone establishments (FZE)

An FZE is a corporate entity with a single shareholder which has a separate legal personality to its shareholders and provides limited liability to its shareholder (which can be either an individual or a corporate entity). There is no minimum share capital requirement for the formation of an FZE. The FZE is required to lease space in the JAFZ.

### 1.4.2 Free zone companies (FZCO)

An FZCO is similar to an FZE, except that it requires a minimum of two and maximum of five shareholders.

### 1.4.3 Branches of foreign or local companies

A branch of an overseas or UAE company can be set up in JAFZ. The branch is not a separate legal entity from the parent company and the parent company will be liable for all of the branch's liabilities. In addition, there is no minimum share capital requirement.

### 1.4.4 Offshore companies (OFC)

An OFC is subject to a separate set of regulations and is restricted as to the activities it can conduct in JAFZA (e.g. it cannot have a physical presence in the JAFZ). OFCs are permitted to hold real estate in certain areas of Dubai and must engage an agent in JAFZ. They can hold bank accounts in the UAE and engage with professional advisers in the UAE.

The OFC is commonly used as a holding company in the region; however, due to the limited JAFZ regulations that govern its operation and the potential problem of not being permitted to have different classes of shares, it is not suitable, for example, where complex shareholding arrangements are necessary or desirable.

## 1.5 Corporate Entities in Tecom

Tecom does not distinguish between an FZE and an FZCO but rather combines them into one entity called a free zone limited liability (FZ-LLC). Branches of foreign or local companies can also be established in Tecom. FZ-LLCs are substantially the same as an FZCO in JAFZ, except that they are subject to AED50,000 minimum share capital requirements (or higher for certain activities).

## 1.6 Corporate Entities in the Dubai International Financial Centre

The DIFC has been set up as a global financial centre within the UAE as part of a broader Dubai strategy to increase its profile as a leading regional financial hub. The aim is to attract global and regional financial institutions, companies and service providers to operate in the DIFC.

The DIFC offers the same benefits as other free zones in terms of 100% foreign ownership, capital repatriation and zero tax on corporate income.

The DIFC is essentially exempt from UAE civil and commercial laws and is largely a self-regulated common law jurisdiction. However, UAE criminal laws and specific federal regulations, such as anti-money laundering, still apply in the DIFC.

The eight main sectors of activities in the DIFC are:

- banking (commercial banking, investment banking, trade and export finance, project and infrastructure funding, treasury services, and correspondent banking)
- insurance (global and regional insurers, reinsurers and brokers)
- wealth management (special investment products and advanced asset management products)
- capital markets (underwriting, merger and acquisition advisory, venture capital, private equity, private banking, trade finance, and brokerage service)
- professional services (legal, accounting and audit, consulting, compliance, recruitment, risk management, and data and research providers)
- global corporates (legal framework, tax offering, and UAE's wide network of double tax agreements)
- management offices (holding companies, proprietary investment offices, single family offices (see **1.6.5**) and marketing operations)
- retailers (business and lifestyle facilities).

As with the other free zones, DIFC companies are not allowed to carry on business outside the DIFC. If a DIFC company wishes to perform activities outside the DIFC or maintain a separate presence onshore in the UAE, it will need to set up either a branch office or a new company onshore and obtain the necessary licences from relevant federal or emirate authorities.

The most common types of corporate form available to set up business operations in the DIFC are as follows.

### 1.6.1 Company limited by shares (CLS)

A CLS is the most common entity used for carrying out regulated financial services, consultancy services and investment holding. It must have at least one shareholder and the liability of its shareholders is limited to their capital contribution, and at least two directors who need not be UAE residents.

The minimum capital requirement for any DIFC company is USD50,000, unless it is a regulated entity whereby its minimum capital requirement would depend on its prudential category as licensed by the Dubai Financial Services Authority (the DFSA). It may offer shares to the public and issue securities.

### 1.6.2 Limited liability company (DIFC LLC)

A DIFC LLC is usually established to carry out retail commercial business such as restaurants, stationery shops, cafes and grocery stores. Its shareholders are termed as 'members' who own 'membership interests' in the DIFC LLC which is equivalent to shares. It must have at least two members (shareholders) and up to 50 members. Liability of its members is limited by their capital contribution. Management of the DIFC LLC is through either an executive manager or a board of managers.

It should be noted that under DIFC Companies Law, a DIFC LLC cannot conduct a regulated activity. A LLC cannot raise capital by offering membership interests through a public offer or issue of securities.

### 1.6.3 Special purpose company (SPC)

An SPC is a limited liability company; a specific purpose corporate vehicle used for financing or investment structures. An SPC is limited in the activities it may carry out, referred to as 'exempt activities' in the SPC regulations. An SPC may perform financial services if licenced by the DFSA. It cannot carry out trading business or act as a general holding company.

An SPC cannot have more than three shareholders, is not required to hold annual general meetings of its shareholders; and is not required to maintain, file or audit its accounts. In addition, there is no requirement to lease office space in the DIFC. However, it is mandatory for an SPC to hire a corporate service provider in the DIFC whose role would be similar to a company secretary.

### 1.6.4 Limited liability partnership (LLP)

An LLP is a partnership entity typically used by lawyers, auditors, accountants, architects and consultants in the DIFC. To carry out financial services under an LLP, an application for a licence must be submitted to the DFSA.

Liability of partners in LLP is limited by their capital contribution and the rights and duties of the partners are governed by the limited liability partnership agreement, a copy of which must be submitted to the DIFC authority.

### 1.6.5 Single family office (SFO)

An SFO can be a company or a partnership which is established within the DIFC providing services only to a 'single family'. A single family constitutes either one individual or a group of individuals who are bloodline descendants of a common ancestor.

To qualify as an SFO the assets of the single family must have investable or liquid asset of a minimum of USD10 million. An SFO must appoint an authorised representative who is an ordinarily resident in the UAE and possess sufficient seniority, authority, access and resources to operate the SFO.

### 1.6.6 Regulated and non-regulated entities

Any entity in the DIFC wishing to offer financial services must obtain the relevant licence from and will be regulated by the DFSA, which is the sole independent regulatory authority for financial services in the DIFC. A regulated entity in the DIFC (termed an 'authorised firm' by the DFSA) must comply with

certain regulations applicable to its prudential category in relation to paid-up capital, authorised personnel, conduct of business and annual reporting.

Other commercial activities which are not financial services do not require licences from the DFSA and are not subject to regulatory compliance of the DFSA rules.

#### 1.6.7 DIFC court

The DIFC courts have jurisdiction over civil and commercial matters arising out of or relating to contracts concluded or performed within the DIFC. They also have jurisdiction to hear disputes:

- arising out of transactions or incidents related to activities undertaken within the DIFC, or
- where the parties have agreed to submit their dispute to the jurisdiction of the DIFC courts.

Matters relating to the insolvency of DIFC corporate entities are also subject to the jurisdiction of the DIFC courts. By contrast, criminal matters relating to the DIFC are governed by the relevant federal UAE laws and fall within the exclusive competence of the UAE courts (i.e. non-DIFC courts).

The DIFC court allows the registration of practitioners from any jurisdiction provided they have been admitted to practice in their respective home countries. This allows litigants to have access to unlimited expertise from around the world.

DIFC legislation provides that execution of DIFC court judgments or arbitral awards ratified by that court must be executed by the competent entity with jurisdiction outside the DIFC in accordance with the rules and procedures of that entity and any agreement or memorandum of understanding made between the DIFC court and the relevant competent entity.

## 2. Acquisition Methods

In the UAE, transactions are usually concluded via either a share purchase or an asset purchase. Statutory mergers can also be concluded under UAE law, but are not commonly used.

### 2.1 Acquisition of Shares

A share purchase in the UAE will share many commonalities with share purchases in other jurisdictions. The key transactional document will be the share purchase agreement. Further details of the procedure for transferring shares is set out in **3.4**.

### 2.2 Acquisition of Assets

An asset purchase in the UAE will share many features of asset purchases in other jurisdictions. The key transactional document is the asset purchase agreement. This does not need to be submitted before any authorities and can therefore be drafted in the language preferred by the parties.

Unless the assets to be transferred are of a type that are registered (e.g. registered trademarks, motor vehicles, real estate, etc.), there is no need to file any documentation with the relevant authorities. If registered assets are to be transferred, the parties would typically execute a short-form document to that effect rather than filing the long-form asset purchase agreement which contains the full terms of the transaction with the authorities.

### 2.3 Mergers

The CCL provides for the merger of UAE companies by way of amalgamation (where two companies merge by disappearing into one newly formed company) and absorption (where one company merges into another such that only the merged company survives). These provisions are complex, largely untested and are therefore not generally used in the context of private M&A transactions.

### 3. Negotiation, Signing and Closing

#### 3.1 Pre-Contractual Obligations

##### 3.1.1 Duty of disclosure

Parties can terminate a contract if the other party makes a misrepresentation to the other and the contract has been entered into by a 'gross cheat' (Art. 187, Civil Code). Deliberate silence about a fact or circumstance will be treated as a misrepresentation if it is proved that the person misled the other and thereby would not have agreed to the contract if aware of that fact or circumstance (Art. 186, Civil Code).

Although the courts are not bound to adhere to case precedents under UAE law, the UAE courts have provided the following indications in previous cases of how liability would be determined under Article 187:

- it is necessary to prove that there has been both a 'misrepresentation' and a 'gross cheat'
- the criteria used to determine whether there has been a 'gross cheat' depends on the factual circumstances at the discretion of the court
- for a 'gross cheat' to be found, there must be a serious discrepancy between the true value of the thing sold and the price for which the buyer is buying it, to the extent that the victim would not have entered into the contract if the 'gross cheat' had not occurred
- the burden of proving that there has been a 'gross cheat' lies with the party making that allegation.

Depending on the facts, it is possible that the above provisions could be used to imply an obligation to disclose material information even where the seller has not specifically been asked to confirm the same as part of the due diligence process. However, it is recommended that buyers do not rely solely on this provision and try to make the due diligence questionnaire process as comprehensive as possible. Sellers should be cautious of this provision and note the risk that there may be liability issues if any relevant facts are not disclosed that they might be obliged to disclose under this obligation of good faith.

#### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical UAE purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

##### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. We see all types, including working capital adjustment, cash-free debt-free, NAV adjustments. We also see locked box arrangements.
2	Is there a collar on the adjustment?	Collars are not common.
3	Who prepares completion balance sheet?	Depends on the negotiating strength of the respective parties but more commonly the buyer.
4	Is the balance sheet audited?	Not usually audited, although sometimes on medium-sized and large deals.
5	Is an earn-out common?	Not common at all.



6	Is a deposit common?	Not unusual.
7	Is an escrow common?	Common as a completion mechanic to ensure that payment is made at completion.
8	Is a break fee common?	Uncommon.
<b>Conditions Precedent</b>		
9	Express Material Adverse Event (MAE) completion condition?	Uncommon, typically resisted by sellers, only available where there is a long period between signing and completion and limited to very specific events.
10	Is the MAE general or specific?	Both seen.
11	Quantification of MAE	Uncommon.
<b>Covenants, Access</b>		
12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common. Waterfall/blue pencil provisions are quite common.
13	Non-solicit (of employees)?	Common (in conjunction with a non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, management between sign and close?	Common for private deals.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Updating schedules is common. Notification of possible breach is common. Where material breach, right to terminate.
17	Is a separate tax covenant/indemnity or tax deed common?	Uncommon.
<b>Representations &amp; Warranties</b>		
18	Materiality in representations—how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but often not quantified (other than specific warranties, e.g. contract value).
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge is often qualified (frequently by reference to a specific group).
20	Is a warranty that there is no materially misleading/omitted information common?	Common.
21	Is disclosure of data room common?	Common

## Repetition of Representations & Warranties

- |    |   |  |
|----|---|--|
| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring down certificate at completion common?  | Highly dependent on strength of respective parties' bargaining position but if permitted, common to only repeat at closing with no bring-down certificate. |
| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard?   | True and accurate in all material respects common but often carve-out for fundamental representations which must be absolutely true.                       |
| 24 | Is double materiality common? E.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Uncommon.  |

## Limitations on Liability

- |    |  |   |
|----|--|---|
| 25 | What is the common cap amount (as a percentage of purchase price)?   | Commonly 20%–50%, sometimes higher if the facts permit.   |
| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Usually warranties only.  |
| 27 | What are the common exceptions to the cap?   | Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated.                 |
| 28 | Is a deductible or basket common?  | Both are common.  |
| 29 | Is a de minimis common?  | Common.   |
| 30 | How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?                              | From 12–36 months (usually at least one full audit cycle under buyer's ownership) for general representations and warranties except for tax (if applicable), fundamental warranties/specific indemnities. |
| 31 | Is warranty insurance common?  | Uncommon. Very new and untested in the UAE market.  |

## Reliance

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|----|--|-----------|
| 32 | Do financiers seek to rely on purchaser's due diligence reports? | Uncommon. |
|----|--|-----------|

## Set-offs against Claims

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|----|--|--|
| 33 | Is a set off against claims for tax benefits common? | Uncommon due to lack of taxes levied in the UAE. |
| 34 | Insurance proceeds?                                  | Common for actually received.                    |
| 35 | Third party recoveries?                              | Common for actually received.                    |

**Damages, Knowledge**

36	Obligation to mitigate damages?	Usually specifically included in the purchase agreement.
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Often silent.

**Dispute Resolution**

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. UAE law common (and likely to be implied) for purchase agreements between two UAE parties. English law commonly used for all other transactions.
40	Is litigation or arbitration more common? If arbitration, where?	Arbitration in the Dubai International Financial Centre or overseas jurisdictions commonplace and recommended as awards can generally be enforced without a local court rehearing the case.

**Stamp Duty**

41	If stamp duty is payable, is it normally shared?	No stamp duty payable. Notarisation fees for transfer of shares in a limited liability company paid by each party.
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**3.3 Formalities for Execution of Documents**

See 3.4.

**3.4 Formalities for Transferring Title to Shares or Assets****3.4.1 Transfers of shares**

A share purchase agreement (SPA) is typically signed between the relevant parties to the acquisition of shares. An SPA can be drafted in English, does not have to be notarised and the parties can sign the signature page without having to sign or initial each page of the SPA.

To transfer the shares in the LLC, a separate Arabic share transfer agreement is required. If the share transfer agreement is drafted in bilingual format (i.e. in Arabic and any other language, usually English) it must be attested by a sworn translator in the UAE before the existing and new shareholders of the company then sign it before a notary public.

In addition to the transfer agreement, a schedule of amendment to the Arabic articles of association (or a bilingual version) must also be signed before a notary public. The attested, signed and notarised documents must then be submitted to the Department of Economic Development (DED) in the relevant Emirate. The DED will update the commercial licence of the company and issue a new licence stating the names of the new shareholders with their shareholding. The transfer agreement and the schedule of amendment of the articles of association can also be combined into one document in certain Emirates.

If a purchaser of shares is itself a corporate entity, the DED and notary public will require the constitutional documents of the purchaser along with a shareholder or board resolution (purchaser resolution) resolving to acquire the shares and to appoint a signatory to sign the transfer documents before the notary public. The purchaser's constitutional documents and purchaser resolution must be legalised by the UAE embassy in the country of origin of the purchaser and attested at the Ministry of

Foreign Affairs in the UAE. Following legalisation of the documents, the documents must then be translated into Arabic and attested by a sworn translator in the UAE.

Shareholders in an LLC have statutory rights of pre-emption on all transfers of shares.

For companies registered in the free zones, similar documents are required to effect the transfer of shares. The difference is that the existing shareholders and the purchaser go to the free zone authority to sign the transfer documents instead of going to the notary public. The transaction documents and the purchaser resolution do not have to be translated into Arabic.

### 3.4.2 Transfers of assets

Sale contracts for assets in the UAE are subject to the Civil Code. Movable assets may be transferred between parties without concluding a sales contract, it can instead be effected through a purchase order, as long as the name of the purchaser and seller are included, the movable assets and the purchase price are clearly defined and the purchaser either signs the purchase order or approves it in writing in order to evidence its acceptance.

Certain registered assets may require a separate transfer agreement to be entered into or a procedure to be followed. Such assets include real estate, vehicles, employees or registered intellectual property.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Competition law in the UAE is governed by Federal Law No. 4 of 2012 (the Competition Law) which came into effect on 23 February 2013. The Competition Law establishes for the first time in the UAE a framework regime of both merger control and prohibition of anti-competitive agreements and the abuse of dominant market position. Implementing provisions were issued on 27 October 2014 but many key areas remain uncertain.

The Competition Law applies to 'establishments' (i.e. businesses) in relation to their economic activities in the UAE and even outside the UAE whenever such activities impact competition in the UAE. Federal and local governmental entities or government-controlled entities as well as small and medium-sized enterprises (SME) are exempt from the provisions of the Competition Law. Some provisions are grey areas still, as they have not been defined by the legislation (e.g. the term 'SME' and the level of federal or local government control required in order for the exemption to apply).

Establishments operating in the following sectors (which include some of the most prominent industries in the UAE), are also exempt from the anti-trust provisions of the law:

- telecommunications
- financial services
- cultural activities (readable, audio and visual)
- pharmaceutical
- utilities
- waste disposal
- transportation
- oil and gas, and
- postal services.

The Competition Law prohibits restrictive agreements (written or verbal) whose 'subject' or 'objective' is to 'prejudice, limit or prevent competition', including:

- agreements that have the object or effect of directly or indirectly fixing purchase or selling prices so as to adversely affect competition
- agreements that set terms and conditions for the sale and purchase of goods or performance of services
- collusion in bids and tenders
- agreements limiting trade, production, development or investment
- agreements blacklisting certain entities for sale or purchase of goods and services, and
- agreements that either limit the supply of products and services or flood markets with products and services.

Weak-impact agreements (agreements that will not have any significant competitive effect on the relevant – geographic or product – market) are exempt from this prohibition based on the combined market share of the parties subject to the agreement. However, the threshold criteria for this *de minimis* exception have not yet been defined.

The Competition Law further prohibits the abuse of a dominant position that prejudices, limits or prevents competition. Actions that can constitute an abuse of dominance include, but are not limited to, predatory pricing, indirect resale price maintenance, trade restraints, ancillary restraints or price manipulation. The market share threshold that is likely to indicate dominance has not yet been defined.

It is possible for parties to restrictive agreements or engaging in practices that may amount to an abuse of dominance to obtain an exemption from the UAE Ministry of Economy if they can show that the agreements or practices will enhance economic development, competition or create benefits to consumers.

That said, to date, the Competition Law has had very little impact on the conduct of business activities in the UAE in practice, given the absence of operational implementing regulations. Therefore, businesses that consider that a contemplated agreement or practice may potentially have an impact on competition in the UAE, must consider whether or not to submit an application to the Ministry of Economy, pending the adoption of further implementing regulations.

## 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) under the Competition Law.

The concept of 'economic concentration' under the Competition Law covers transactions such as mergers or acquisitions of assets, proprietary or usufruct rights which are akin to leasehold rights, stocks or shares that enable one establishment or a consortium of establishments to control, directly or indirectly, the other entity. The concept of 'economic concentration' therefore appears broad enough to cover joint venture agreements. The Competition Law provides that a notification must be made to the Ministry of Economy in writing at least 30 days prior to completion of an 'economic concentration' where an as yet unspecified market share threshold is reached. The regime suspends mergers that constitute economic concentrations pending clearance by the Ministry of Economy.

## Filing Obligation

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|---|--|---|
| 1 | Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)? | <p>Mandatory. Entities that fail to comply with notification requirements will be subject to fines of:</p> <ul style="list-style-type: none"> <li>• 2%–5% of annual revenue from the unlawful sales of products or services in question, within the UAE in the latest fiscal year, or</li> <li>• where the figure above cannot be calculated, between AED500,000–AED5 million.</li> </ul> |
|---|--|---|

## Formalities

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|---|--|---|
| 2 | In practice, what is the timetable for clearance (in Phase I and Phase II review)? | <p>Not yet been specified.</p> <p>Clearance will be deemed granted after the expiry of 90 days from the date of submission of the application. This 90-day period may be extended by an additional 45 days.</p> <p>Applications for approval must be made on the prescribed form prepared by the Ministry of Economy.</p> |
|---|--|---|

## 4.3 Exchange of Competition-Sensitive Information

Pending clearance from the Ministry of Economy, relevant establishments 'should not perform any action or procedures for the accomplishment of the economic concentration.' The Competition Law therefore prohibits unlawful pre-merger coordination between parties to an economic concentration. Establishments that fail to comply with this prohibition will be subject to fines of between AED50,000 and AED500,000.

## 4.4 Anti-Bribery, Corruption and Money Laundering

### 4.4.1 Anti-bribery and corruption

The UAE does not have a specific anti-bribery/corruption law. However, there are several provisions dealing with anti-bribery/corruption in the public and private sectors, contained in different pieces of legislation. These provisions can be mainly found in Federal 3/1987 Promulgating the Penal Code (Penal Code) and Federal Law 11/2008 concerning Federal Government Human Resources (HR 2008).

The Penal Code makes it punishable for public officials to solicit or accept a donation or advantage of any kind or a promise, to commit or omit to carry out a legitimate duty of their function, perform any act in violation of their function or an act which is not part of their function. Likewise, if an individual offers to a public official, a donation or an advantage of any kind or a promise of anything of the like, to persuade a public official to commit or omit an act in violation of the duties of his or her function (even if the official declines the bribe)—that individual will face sanctions under the Penal Code. However, bribers of public officials may be exempt from liability, if they inform the judicial or administrative authorities of the crime before it is discovered.

The term 'public official' has a wide meaning under the Penal Code and includes any individual employed by a government ministry or department as well and any individual who performs a job relating to public service by virtue of a mandate given to them by a duly authorised public official.

The anti-bribery provisions of the Penal Code cover non-public officials (e.g. members of the board of directors of a company, private institutions, or any manager or employee in those entities) as well. Non-public officials will face sanctions under the Code if they ask for themselves (or someone else), or accept or take, a benefit or gift (or promise of a gift or benefit) in exchange for doing or abstaining from doing an act which is part of their job or in breach of their duties (even if they intend not to perform the requested act or perform an act which the other party has requested them not to do).

The provisions of the Penal Code apply to all crimes committed in the UAE and do not make any distinction between the mainland or free zones. It also does not matter whether an entity is domestic or foreign.

The HR 2008 is more extensive in that it not only prohibits an employee from accepting, taking, offering or requesting bribes, but also prohibits the employee from accepting any gifts from third parties unless they are token marketing or promotional gifts bearing the name and emblem of that third party.

#### 4.4.2 Money laundering

The UAE has put in place a wide range of regulations to combat money laundering, including provisions in the Penal Code, Federal Law 4/2002 concerning the Incrimination of Money Laundering (the AML Law) and various directives of the UAE Central Bank. The AML Law includes provisions regarding the concealment arrangements and acquisition, use and possession, failure to disclose and tipping off.

Since the issuance of the AML Law, various ministries and governmental agencies have stepped up efforts to combat money laundering. The regulations of the Emirates Securities and Commodity Authority and the insurance authority provide for the appointment of skilled and independent compliance officers who are to regularly report to an Anti-Money Laundering Unit. The regulations also insist that entities falling within their jurisdiction perform necessary due diligence on their customers.

In the DIFC, the DFSA issued the Anti-Money Laundering, Counter Terrorist Financing and Sanctions Module in 2013. This requires member firms to establish and maintain effective policies, procedures, systems and controls to prevent opportunities for money laundering in relation to the firms and their activities. It also contains certain requirements regarding appointment of a money laundering reporting officer (in certain cases), 'know-your-customer' requirements and suspicious transaction detection and reporting.

The UAE is currently a member of several international and regional anti-money laundering organisations including the Financial Action Task Force on Money Laundering. It is a founding member of the Middle East and North Africa Financial Action Task Force and is the first country in the region to become a member of the Edgemont Group of Financial Intelligence Units which is an informal international network of financial intelligence units

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

#### 4.5.1 Exchange control

The UAE has no foreign exchange controls. The UAE Dirham is pegged to the US dollar at a rate of AED3.67 to USD1.

#### 4.5.2 Foreign investment restrictions

UAE nationals, or companies wholly-owned by UAE nationals, must own at least 51% of the capital of any onshore company formed in the UAE under the CCL (Art. 22, CCL). The normal maximum permitted foreign ownership in a company formed under the CCL is therefore 49%.

The UAE has implemented a policy which permits 100% ownership of UAE companies by individuals or companies from the Cooperation Council for the Arab States of the Gulf. The precise scope of this policy is unclear and it is left to the discretion of the various individual registration departments (usually the DED in the relevant Emirate) to implement.

While the CCL contemplates fines and imprisonment for breaching its terms, in practice the UAE is very pro-business and there is very limited risk of any direct challenge by the UAE authorities. The relevant authorities in the UAE do not monitor compliance with the UAE's foreign ownership restrictions or compliance with the CCL more generally. Any breach, once identified, is likely to be dealt with via a request to correct the contravention. Contraventions are most likely to be identified by a notary public (e.g. on a share transfer) or a licensing authority (e.g. in connection with annual licence renewal). Compliance is normally ensured because without the correct licence or without

certain notarised documents companies quickly find it difficult to continue their day-to-day business in the UAE.

A civil company formed under the Civil Code, can be 100% foreign-owned but shareholding in that company is normally limited to individuals (and is therefore of limited application for private M&A transactions).

#### 4.5.3 Industry-specific regulation

The UAE has no mandatory foreign investment approvals of general application. However, approvals or notifications may be required in the case of acquisitions in certain industry sectors such as defence, banking and insurance, principally because of the nature of the business rather than as a mechanism to control foreign investment.

Additionally, certain business activities (e.g. real estate brokerage) are reserved for UAE nationals or companies wholly-owned by UAE nationals.

#### 4.5.4 Import/export controls

The UAE authorities can ban or restrict the export, import, re-export, transiting or trans-shipping of commodities that pose a threat to the public safety or hygiene, environment, natural resources or national security of the UAE, or if the UAE's foreign policy requires this (Federal Law 13/2007 concerning Commodities Subject to Import and Export Control). The law also bans the export or re-export of strategic goods, including arms and military hardware, chemical and biological materials and dual-use items without a special licence.

A company's right to import goods into the UAE may depend on its licenced activities, the nature of goods to be imported or the purpose of importing them.

Where a product is the subject of a registered agency agreement (which gives the importer exclusive rights to import that product) that product cannot also be imported into the UAE by a third party, except with the written permission of the registered commercial agent.

The UAE has adopted a sanctions regime against Israel (Federal Law 15/1972 on the Israeli Boycott). Although its original restrictions have been somewhat relaxed by the UAE government, the import, exchange, possession or trade in goods, commodities or products of Israeli origin is still prohibited. The boycott also applies to monetary instruments and other negotiable instruments of Israeli origin in the UAE.

## 5. Transfer Taxes

### 5.1 Taxation in the UAE

The UAE does not have a federal tax system in place. There are no taxes with respect to personal income tax in the UAE.

Individual Emirates have passed their own tax decrees dealing with corporate income tax. Each Emirate's decree is similar in content and impose corporate income tax designed to be applied to all corporate bodies – but in reality corporate income tax is only imposed on oil companies and branches of foreign banks.

### 5.2 Mergers and Acquisition of Shares

No taxes are levied on the acquisition of shares. Taxes may be levied on the transfer of certain assets (e.g. real property) and a transfer of shares in an entity which holds certain assets (e.g. real property) may also trigger tax liabilities.



### 5.3 Value Added Tax

There is no sales tax or VAT in the UAE, although Dubai and certain other Emirates impose taxes on some goods and services, including, for example, sales of alcoholic beverages, hotel and restaurant bills.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In share purchases, the employment relationship between the employee and the target remain unchanged.

#### 6.1.2 Acquisition of assets

There is no automatic transfer of employees on an asset sale. This means that employees need to go through a termination and rehire process, as they will need to be employed by (and be under the sponsorship of) the buyer entity. This is usually achieved by the seller, buyer and employee entering into a tri-partite agreement to transfer the employment to the buyer.

Employers in the UAE must pay an end-of-service benefit or 'gratuity' to employees when their employment is terminated (unless it is terminated for specified reasons). The gratuity is calculated according to length of service (Federal Law 8/1980 on Regulation of Labour Relations (the Labour Law)). Conditional on reaching 12 months' continuous service, employees are entitled to 21 days basic salary for every year of service, rising to 30 days after five years of continuous service.

Upon a transfer of employment, the parties (including the employee) can mutually agree whether it is to be paid at the time of termination or rolled over to be paid at the time the employee's employment with the new entity ends.

### 6.2 Approval or Consultation Requirements

No approval or consultation requirements apply in the UAE and there are no works councils or trade unions or other collective employee bodies. Accordingly, employee termination entitlements are provided in the Labour Law, visa sponsorship conditions and any contractual terms agreed between the parties. The company should therefore communicate and consult directly with each employee regarding any termination or transfer of employment.

On termination of employment, an employer must ensure that the relevant authority is informed of the termination and that residence visas (for expats) and work permits are cancelled. An employer is obliged to arrange for the cancellation of the visa within 30 days of the termination date.

### 6.3 Protection against Dismissal

Redundancies are not recognised under UAE law. As such, there are no specific economic reasons an employer must prove to justify a termination. Instead, a redundancy process must fall within the existing termination provisions of the Labour Law.

An individual may be terminated during their probationary period without notice or alternatively for the following reasons:

- if a contract is for a fixed-term termination can occur upon the expiry of the fixed term, or if the employee engages in the type of behaviour outlined in Article 120 of the Labour Law (which details various types of gross misconduct), and
- if a contract is for an indefinite term there must be a 'legitimate reason' for termination or the employee must have engaged in the type of behaviour outlined in Article 120 of the Labour Law.

A 'legitimate reason' will usually be connected with the employee's performance. If the termination of an employee is based on a 'legitimate reason', notice of at least 30 days must be given and a severance gratuity paid. The Labour Law requires the following process to be carried out before a disciplinary sanction, including dismissal, is imposed:

- notify the employee in writing of the charge
- invite the employee to a meeting and listen to their representations
- investigate the matter and provide the employee with written reasons of any penalty to be imposed, which should also be recorded in the employee's personnel file.

If an employee is not dismissed for a 'legitimate reason' or in accordance with Article 120, the termination may be considered 'arbitrary'. If an employee is dismissed arbitrarily, the Labour Law permits the employee to seek compensation up to a maximum of three months salary. Arbitrary dismissal under the Labour Law includes situations where the dismissal has no connection to the employee's work performance, or is done in retaliation against an employee's filing a complaint or making a claim against the employer that proves to be correct.

The UAE courts have on prior occasions decided that redundancies as a result of mergers and/or downsizing are not 'arbitrary'. However there have not been any reported cases since September 2008 on the issue. The Ministry of Labour has indicated as non binding guidance that it expects some compensation to be paid to the redundant employee, although the maximum amount payable should be three months' salary.

## United Kingdom

### 1.1 Overview

Although a unified sovereign state, the United Kingdom comprises three distinct legal jurisdictions – England & Wales, Scotland, and Northern Ireland – each with its own laws. While company law is broadly consistent throughout the United Kingdom, there are major differences in the laws of the different jurisdictions in some areas, notably land law.

### 1.2 General Legal Framework

The Companies Act 2006 (CA 2006) replaced almost all of the previous regime governed by the Companies Act 1985 (CA 1985) under which companies in England & Wales had been operating for the past 20 years. While CA 2006 significantly streamlined the regulatory regime for private companies, the wider framework of insolvency, merger control, pensions, data protection and other legislation and regulation also applies.

### 1.3 Corporate Entities

There are two main types of company that can be established in the United Kingdom – private companies and public companies. This handbook focuses on private company M&A, and while some of the issues may also be faced by public companies, it should be noted that there are substantial differences in the laws and regulations that apply to public and private companies.

#### 1.3.1 Private companies

A private company is not allowed to offer its shares to the public and may be either limited or unlimited. In the case of an unlimited company, the personal liability of the members for the debts and obligations of the company is unlimited. A private company can be limited either by shares or by guarantee. In the case of a private company limited by shares, the shareholders' liability is limited to the amount unpaid (if any) on shares that they own, whereas in a private company limited by guarantee, the members will agree to contribute a certain amount to the company's assets on a winding up and their liability will be limited to this amount. Because of the limited recourse to shareholders in the case of a limited company, there is greater regulation of limited companies compared with unlimited companies (for example, rules relating to maintenance of capital).

#### 1.3.2 Public companies

In contrast to a private company, the shares in a UK public limited company (UK Plc) may be offered to the public (subject to compliance with detailed regulatory requirements). As with private companies limited by shares, the liability of the members of a UK Plc is limited to the amount unpaid (if any) on the shares each member holds, though in the case of a UK Plc, each share must be paid up to at least one quarter of the nominal value of the share and the whole of any premium on such share. In order to be a UK Plc, a company must have an issued share capital of at least GBP50,000. UK Plcs (whether listed or not), are subject to additional requirements of CA 2006 that do not apply to private companies, while those that are listed in the United Kingdom are subject to further regulation, including: the Listing Rules; the Prospectus Rules; the Disclosure and Transparency Rules; the Financial Services and Markets Act 2000; the rules of the recognised investment exchange on which the shares are listed; the UK Corporate Governance Code and the provisions of the City Code on Takeovers and Mergers.

#### 1.3.3 Limited liability partnerships

The Limited Liability Partnership (LLP) is a business vehicle introduced in April 2001. An LLP is a hybrid with characteristics of both companies and partnerships. As such, certain provisions of the CA 2006 and the Partnership Act 1890 apply – modified as necessary – to LLPs. An LLP is a body corporate that is incorporated under the Limited Liability Partnerships Act 2000 and like a company, has a separate legal identity from its members. LLPs are also similar to private limited companies in that the liability of all members of an LLP is limited to the amount that such member has contributed to the LLP (in contrast to general partnerships where the partners have unlimited liability and limited partnerships where the liability of only some of the partners, the limited partners, is limited). However,

LLPs are generally taxed in the same way as a partnership and the document that governs the relationship between the members is, as in the case of a partnership, a private document agreed by the members.

## 2. Acquisition Methods

In the United Kingdom, a business can be purchased either by way of a share purchase or an asset purchase. There is no separate statutory concept of legal merger between two companies in the United Kingdom as in certain other jurisdictions, such as the United States. Although the UK regulations which implement the EU Directive on Cross-Border Mergers have created a framework for cross-border mergers between UK companies and EEA companies, these have had limited impact in the United Kingdom given the extended timetable involved, concerns around the need for creditor consent, and the other existing methods that are available to UK companies which enable them to achieve similar outcomes.

### 2.1 Acquisition of Shares

Generally, all that is required to transfer legal title to the shares in a UK private company is for a Stock Transfer Form to be executed by the seller, stamped with duty paid at the rate of 0.5% of the consideration and then registered in the register of members of the relevant company. Prior to registration, a share certificate in relation to the shares that have been transferred will need to be provided (or if no share certificate is available, an appropriate indemnity for the lost share certificate) by the selling shareholder. A share purchase agreement is prepared to record the agreement of the parties on their respective rights, obligations and liabilities in connection with the transaction.

### 2.2 Acquisition of Assets

When a business is being transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer that applies to that type of asset. In respect of some assets, this will simply be a case of delivering the asset to the purchaser, but in other cases, the formalities are more prescriptive, such as in the case of real property or intellectual property. It is, therefore, necessary to include a provision, either in the purchase agreement governing the purchase of the business and its assets or in separate agreements, for the relevant formalities to be complied with. As with a share acquisition, there is an asset purchase agreement to record the respective rights, obligations and liabilities of the parties.

### 2.3 Mergers/Other Acquisition Methods

#### 2.3.1 Merger

Unlike in the United States, there is no simple UK statutory procedure that permits two UK companies to merge whereby one of them succeeds to all the assets and liabilities of the other and the latter is then automatically dissolved. For this reason, the acquisition of a business in the United Kingdom will almost invariably involve the purchase of either the shares of the company owning that business or some or all of the assets comprising that business. Where a UK company and non-UK company are involved, then a merger may be technically possible but unlikely to be used in practice.

#### 2.3.2 Hive-down

A 'hive-down' is a process by which the selling company transfers some of its assets and liabilities to a newly incorporated company, usually a wholly owned subsidiary of the selling company. The purchaser then acquires all the shares in the newly formed subsidiary. This mechanism is popular with receivers or administrators wishing to attract purchasers to the profitable limbs of an otherwise unattractive business.

### 3. Negotiation, Signing and Closing

#### 3.1 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical UK purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

##### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. The normal mechanism is 'cash-free/debt-free with a normal level of working capital'. NAV adjustments are also normal and can be independent.
2	Is there a collar on the adjustment?	Collars are not common. May be required where public companies are involved.
3	Who prepares completion balance sheet?	This is usually prepared by, or on behalf of, the buyer.
4	Is the balance sheet audited?	Usually prepared by an audit firm (i.e. accountants) and checked by one too but not formally 'audited'. (Audit implies a process which is not typically followed because you are preparing special purpose accounts).
5	Is an earn-out common?	Not so common generally. Reasonably common in tech sector.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Reasonably common.
8	Is a break fee common?	Uncommon.

##### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Not very common, but seen – whether expressed as a condition or as a right to terminate.
10	Is the MAE general or specific?	Both seen.
11	Quantification of MAE?	Increasingly seen.

##### Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Common, but not from private equity sellers. Waterfall provisions uncommon.
13	Non-solicit (of employees)?	Common (in conjunction with non-compete). Private equity sellers will give a non-solicit of employees.
14	Non-solicit (of customers)?	Common (in conjunction with a non-compete).
15	Broad access to books, records, and management between sign and close?	Generally get this for private deals. NB: competition law issues around potential 'gun-jumping'.

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| 16 | Is it common to update warranty disclosure or notify of possible breach? What is the consequence? | Updating schedules common but limited to things like list of contracts. Notification of possible breach common. In case of material breach, right to terminate. |
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| 17 | Is a separate tax covenant/indemnity or tax deed common? | Almost universal. |
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### Representations & Warranties

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| 18 | Materiality in representations – how is it quantified (e.g. by a \$ amount)? | Materiality qualifiers commonly seen but often not quantified (other than specific warranties, e.g. contract value). |
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| 19 | How is knowledge qualified (e.g. specific people, actual/constructive knowledge)? | Knowledge qualifiers depend on risk-sharing in the deal. Often limited to actual knowledge and due enquiry of a specified list of senior management. |
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| 20 | Is a warranty that there is no materially misleading/omitted information common? | Very uncommon. |
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| 21 | Is disclosure of data room common? | Common. |
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### Repetition of Representations & Warranties

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| 22 | Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common? | Repetition at completion common. A 'bring-down' certificate is not very common. |
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| 23 | What is the applicable standard? True in all material respects? Material Adverse Effect standard? | True and accurate in all material respects common but often carve-out for fundamental representations which must be absolutely true. |
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| 24 | Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation. | Double materiality usually avoided. |
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### Limitations on Liability

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| 25 | What is the common cap amount (as a percentage of purchase price)? | Commonly less than 100%. Mid-cap and larger deals see lower caps, e.g. 20%–50%. |
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| 26 | Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)? | Usually warranties only. |
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| 27 | What are the common exceptions to the cap? | Key warranties are often excepted (e.g. title, capitalisation, authority). Often tax and specific areas of concern, sometimes with specific higher caps. Separate caps can be negotiated. |
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| 28 | Is a deductible or 'tipping basket' common? | Deductible is usually resisted and a tipping basket more common. |
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29	Is a <i>de minimis</i> common?	Common.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 18–24 months common. Common to carve-out fraud. Tax is commonly longer than general warranties.
31	Is warranty insurance common?	Increasingly common in private equity exits.

#### Reliance

32	Do financiers seek to rely on purchaser's due diligence reports?	Common.
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#### Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Common.
34	Insurance proceeds?	Common for actually received.
35	Third party recoveries?	Common for actually received.

#### Damages, Knowledge

36	Obligation to mitigate damages?	Required by law for warranty damages (not indemnities). Usually incorporated into purchase agreement.
37	Exclusion of consequential damages?	Common.
38	Is it common to include provisions that there is no liability if buyer had knowledge, or that the buyer's state of knowledge has no effect on warranty/indemnity?	Often silent.

#### Dispute Resolution

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes. English law.
40	Is litigation or arbitration more common? If arbitration, where?	Litigation is more common.

#### Stamp Duty

41	If stamp duty is payable, is it normally shared?	No. Buyer pays.
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## 3.2 Formalities for Execution of Documents

### 3.2.1 Transfers of shares

There is no legal requirement for an agreement for the sale of the legal and beneficial title to shares to be made in writing. However, a transfer of an equitable interest in a share must be in writing and signed by the person disposing of the interest (see **3.2.2**). Market practice in the majority of cases is for a share transfer to be documented between the seller and the buyer by way of a written share sale/share purchase agreement (SPA).

### 3.2.2 Transfers of assets

In a transfer of assets, written contracts may be required by law or in order to fulfil an applicable registration requirement. Some non-exhaustive examples of contracts that must be in writing are:

- contracts for the sale of land (s. 2, Law of Property (Miscellaneous Provisions) Act 1989)
- declarations of trust over land (or any interest in it; s. 53(1)(b), Law of Property Act 1925)
- assignments of the benefit of a contract (but note that equitable assignments do not need to be in writing)
- transfers of the legal title to shares
- transfers of most intellectual property rights
- guarantees, and
- dispositions of an equitable interest or trust (s. 53(1)(c), Law of Property Act 1925).

## 3.3 Formalities for Transferring Title to Shares or Assets

### 3.3.1 Transfers of title to shares

Although a contract for the sale of shares does not need to be in writing, s. 770 of CA 2006 (and the constitutional documents of most companies) requires a written transfer to be signed by or on behalf of the transferor and lodged with the company before the new shareholder is registered as the owner of the legal title to the shares. Accordingly, transfer of title to the legal and beneficial interest in shares usually involves the following three stages:

- entry into a written SPA for the sale and transfer of the shares
- delivery by the seller to the buyer of an instrument of transfer (Stock Transfer Form) in respect of the shares, upon Completion of the SPA. The buyer of the shares becomes the beneficial owner of the shares upon delivery of the Stock Transfer Form but the seller remains the legal owner until the Form is registered by the target company. Exercise by the buyer of the rights attaching to the shares is usually effected by the appointment of the seller as the attorney of the purchaser
- approval of the Stock Transfer Form by the board of the target company and registration of the name of the buyer in the target's register of members, upon which the buyer becomes the legal and beneficial owner.

If a transfer is of the beneficial interest only, then the delivery and registration of a Stock Transfer Form is not required (but see **3.2.1** in relation to the need for the transfer to be in writing and signed by the transferor).

### 3.3.2 Transfers of title to assets

Both SPAs and asset sale/purchase agreement (APAs) ordinarily require only the signature of one person, usually a director, duly authorised by the board of the party, but in some cases, the agreement, or any ancillary documents to be executed, may need to take the form of a deed, with additional technical requirements (see **3.3.3**).

Other documents that must be executed as deeds include:

- conveyances or transfers of land or any interest in land and most leases of land (many types of transfers of land are also required to be in prescribed form under the Land Registration Rules 2003)
- mortgages and charges



- sales by mortgagees
- powers of attorney
- appointments of trustees.

### 3.3.3 Note on deeds

Deeds are distinguished from other forms of written contract in requiring additional execution formalities beyond a simple signature for the instrument to be enforceable. The four key requirements for a valid deed are that it must be:

- in writing
- intended to take effect as a deed and this must be clear from the face of the instrument (s. 1(2)(a), Law of Property (Miscellaneous Provisions) Act 1989)
- validly executed as a deed (s. 1(2)(b), Law of Property (Miscellaneous Provisions) Act 1989). The specific statutory regimes governing the execution of deeds by individuals are contained in s. 1(3), Law of Property (Miscellaneous Provisions) Act 1989; and by companies incorporated in the United Kingdom in ss. 43–52, CA 2006)
- delivered. At common law, a deed is delivered when a party shows an intention to be bound by it, even if it retains possession of the document. There is also a rebuttable statutory presumption that a deed is delivered when executed by a company (s. 46(2), CA 2006 and s. 74A Law of Property Act 1925).

The distinction between deeds and other forms of written contract is important for two main reasons:

- Deeds are generally enforceable despite a lack of consideration (but not in equity), and
- The limitation period for actions brought under a simple contract is 6 years from the date on which the cause of action accrued (s. 5, Limitation Act 1980), whereas the limitation period is generally 12 years in the case of a deed (ss. 8, 19 and 20, Limitation Act 1980).

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Mergers, acquisitions and the creation of certain joint ventures can trigger merger filing obligations to competition authorities around the world. In the United Kingdom, merger filings to the UK Competition & Markets Authority are voluntary. A filing may nonetheless be recommended if the transaction potentially raises substantive antitrust issues. The United Kingdom is also subject to the EU Merger Regulation (EUMR) which applies where the turnovers of the companies involved in a transaction exceed certain thresholds. Further details on the EUMR are set out in Appendix A. If the EUMR thresholds are met then notification to the European Commission is mandatory, and the UK merger control rules will not usually apply. Conversely, if the EUMR thresholds are not met, the EU rules will not usually apply. Under the EU rules, the parties are not permitted to close the transaction until it is cleared by the European Commission.

If the parties to a transaction are competing entities, it is important to remember that they remain competitors until completion of the transaction and must take care not to exchange competitively sensitive information. See Appendix B for further information.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical UK purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

UK merger control legislation is contained the Enterprise Act 2002 (EA02) and enforced by the Competition & Markets Authority (CMA). The EA02 applies to anticipated or completed transactions where:

- two or more 'enterprises' cease to be distinct (i.e. are brought under common control or ownership)
- either one or both of the following criteria is satisfied:
  - the UK turnover associated with the enterprise which is being acquired exceeds GBP70 million (the turnover test)
  - as a result of the merger a share of 25% or more in the supply or consumption of goods or services of a particular description in the United Kingdom (or in a substantial part of the United Kingdom) is created or enhanced (the share of supply test).

The target company will be 'brought under common control or ownership' in the following circumstances:

- when one party acquires a controlling interest in the other party (legal control)
- when one party acquires the ability to control the commercial policy of the other (de facto control)
- when one party acquires the ability to materially influence the commercial policy of the other (material influence)
- where a party which already has material influence or de facto control acquires a higher level of control.

The CMA will often examine a share acquisition of 15% or more to see whether it might result in the ability to exercise material influence and applies a rebuttable presumption that shareholdings conferring more than 25% of the voting rights give rise to material influence. In assessing material influence, the CMA focuses on the acquirer's ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target in this context means the management of its business, in particular in relation to its competitive conduct, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives. The ability to veto special resolutions and, importantly, the actual likelihood of exercising such veto, will usually indicate material influence. In addition to the shareholding acquired, the CMA will look at other factors such as the degree of board representation, the level and nature of other shareholdings (and previous voting patterns), and any other special rights or relevant agreements.

### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	<p>Voluntary.</p> <p>If the parties do not notify a merger to the CMA, the CMA can, of its own initiative, start a preliminary investigation into the transaction, within 4 months of closing the deal or the transaction coming to the CM's attention, whichever is later. In practice, the CMA monitors the press and is increasingly and routinely following up with parties to transactions that have not been notified in order to assess whether it has jurisdiction over the transaction. The CMA will typically send a letter to the parties requiring, among other details, information about areas of overlap between the acquirer and target and a description of the products supplied by each party with estimates of their share of the supply.</p>
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## Timetable

2 In practice, what is the timetable for clearance (in Phase I and Phase II review)?

*Phase I:* the CMA must decide whether to refer the merger to Phase II within 40 working days starting from the first working day after the CMA confirms to the parties that the notification is complete. If the parties did not notify the merger and the CMA started the investigation of its own accord, the timetable starts on the first working day after the CMA confirms that it has received sufficient information to begin its investigation.

*Phase II:* the CMA given 24 weeks (extendable by up to a further 8 weeks) from the date of referral to Phase II to investigate and make its final decision.

It is likely that the CMA will take the full 40 working days for a Phase I decision. For Phase II, the average length of time is approximately 5 months. Where undertakings have been accepted, the length of the Phase II process is approximately 7–12 months. The CMA introduced a fast-track reference procedure in 2009. This procedure allows the merging parties to request an accelerated referral to Phase II where they agree, and there is sufficient evidence to indicate, that the test for reference (that there is a realistic prospect of a 'substantial lessening of competition' (SLC)) would be met. Parties can ask the CMA to fast track the case to Phase II immediately after they notify the deal to the CMA or at any stage during the Phase I investigation. The CMA has indicated that candidate cases for fast track reference are likely to be 'binary' cases, where, to the extent that the CMA finds a concern with the merger, that concern would impact on the whole or substantially all of the transaction, and not just one part, which could be resolved through structural undertakings in lieu of reference.

### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

As merger filings are voluntary in the United Kingdom, it is possible to close the transaction during the preliminary investigation by the CMA prior to obtaining merger clearance. However, the CMA will usually make interim orders in respect of completed mergers to prevent any action that might prejudice the taking of remedial action by the CMA. An interim order will remain in place until the merger is cleared or remedial action is taken, unless varied, revoked or replaced. If the CMA suspects that the parties to the completed merger have already started to integrate, it may also require the parties to unwind that integration. Further, completing without first obtaining approval carries the risk that the completed transaction may be terminated by disposal of the acquired business following an investigation.

Parties who are competitors are required to act as competitors until any transaction between them is closed. The permissible scope of coordinated activities between the parties is therefore limited during the pre-closing period. See Appendix B for further information.

## 4.4 Anti-Bribery, Corruption and Money Laundering

The Bribery Act 2010 entered into force on 1 July 2011, introducing a comprehensive anti-bribery regime that implements the OECD Anti-Bribery Convention<sup>1</sup> in the United Kingdom. Conduct prior to this was regulated by the previous patchwork of statutory<sup>2</sup> and common law offences. The old legislation and common law continues to apply to offences committed wholly or partly before entry into force of the Bribery Act.

Offences under the Bribery Act can be committed in relation to behaviour in both the public and private sectors. It also introduces a strict liability offence for companies for failure to prevent bribery by their employees or other associated persons (such as agents). The only available defence is for a company to establish that it had 'adequate procedures' in place that were designed to prevent the relevant acts of bribery. The Bribery Act provides no exemption for facilitation payments.

### 4.4.1 General offences

The Bribery Act catches the offering, promising or giving of a financial or other advantage, with the intent that such advantage induces a person (not necessarily the recipient) to perform their function improperly<sup>3</sup> (active bribery; s.1). A mirror offence is provided for regarding the requesting, agreeing to receive, or accepting of a financial or other advantage with improper intent (passive bribery; s.2). Both active and passive bribery offences also apply to indirect bribes offered, made or requested (for example, via local agents, distributors or consultants).

Though these general offences of active and passive bribery apply to the private and public sector, the Bribery Act also creates a separate offence to cover active bribery of foreign public officials (FPOs; s.6). The meaning of FPO is defined broadly, covering both individuals who hold a legislative, administrative or judicial role, or who otherwise perform a public function, as well as representatives of public international organisations (such as the World Health Organisation or United Nations) and employees of state-owned enterprises. This distinct offence is easier to establish in that it focuses on an intent to influence the FPO in the performance of their function so as to secure business or a business advantage, as opposed to an intent to induce them to perform their function improperly.

A bribe may be comprised of money or any other advantage (including hospitality, gifts, travel, political or charitable donations).

The general offences and FPO offence apply to any conduct that takes place in the United Kingdom and any conduct of UK companies or nationals wherever it occurs.

### 4.4.2 Corporate offence

Under the corporate offence introduced by the Bribery Act 2010 (s.7), a company may be held liable for failure to prevent bribery by an 'associated person' (meaning an employee, agent, distributor, consultant, subsidiary or any other person deemed to be performing services on behalf of the company) where they bribe another person with the intent to obtain or retain business or a business advantage (e.g. the securing of required licences or permits, or favourable taxation treatment) for the company. There is no need for the company to be involved in or have any knowledge of the conduct. Further, the 'associated person' need not be subject to jurisdiction themselves.

The territorial scope of the corporate offence is extensive, applying to any UK company or non-UK company which carries on a business, or part of a business, in any part of the United Kingdom. Though the 'carrying on a business' test has not yet been subject to judicial interpretation in relation to the Bribery Act 2010, it is clear that it is meant to be interpreted broadly and could catch companies on a number of different basis.

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<sup>1</sup> See Appendix D: OECD Convention and Signatories, FCPA and UK Bribery Act 2010 Summaries

<sup>2</sup> Notably, the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916.

<sup>3</sup> A relevant function or activity may be deemed to have been performed 'improperly' if it is performed in breach of a relevant expectation (e.g. that it will be performed impartially or in good faith) or there is an outright failure to perform the function and this failure in itself breaches a relevant expectation (s. 4).

The only defence under the corporate offence is for a company to have in place 'adequate procedures' designed to prevent persons associated with it from undertaking such conduct. An indication as to what such procedures might consist of is provided in the relevant Ministry of Justice Guidance.<sup>4</sup>

The consequences for companies found liable for bribery under the Bribery Act 2010 may be severe. The level of fine that may be imposed is unlimited (s.11(3)), and the SFO can use its powers under the Proceeds of Crime Act 2002 to recover unlawfully obtained property.<sup>5</sup> Discretionary debarment from procurement is also possible.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

The United Kingdom has no exchange controls or mandatory foreign investment approvals of general application. Various approvals or notifications may be required in the case of acquisitions in certain fields, such as the banking, utilities, media and insurance sectors. However, these requirements exist principally because of the nature of the business concerned rather than as mechanisms to control foreign investment.

The UK government has reserve powers under the Industry Act 1975 which enable it to intervene when there is a change of control (i.e. affecting 30% or more) of an 'important manufacturing undertaking' resulting in control vesting outside the United Kingdom, which is contrary to the interests of the United Kingdom. Although these powers have not been exercised in recent years, in particularly sensitive cases – for example, acquisitions in the defence industry – it may be prudent to seek an assurance that the powers will not be exercised.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

A purchaser will generally be responsible for the stamp duty (a transfer tax) payable on the acquisition of shares, calculated at the rate of 0.5% of the stampable consideration (which will include amounts satisfied by the payment of cash or the allotment of marketable securities, together with the value of certain liabilities assumed or released). Relief is available (on making a claim) for transfers of shares between associated companies provided the necessary conditions are met. There are very few mitigation techniques available to reduce the stamp duty liability on a share acquisition and these techniques generally require the full cooperation of the seller.

### 5.2 Acquisition of Assets

A purchaser will generally be responsible for any stamp taxes payable on the acquisition of assets. While stamp duty at 0.5% remains payable on the transfer of shares and other marketable securities, stamp duty is not payable on assets that can be transferred by delivery e.g. inventory and moveable plant and machinery, intellectual property rights, goodwill or debts.

#### 5.2.1 Stamp duty land tax

Stamp duty land tax (SDLT) is a tax on land transactions and is payable on the acquisition of a chargeable interest in land. It is calculated at a sliding rate of up to 4% on commercial property and up to 15% on residential property of the stampable consideration. Unlike stamp duty, the scope of which has been significantly reduced to instruments effecting a transfer of stock and marketable securities and interests in certain partnerships where it is necessary to document or register the transaction, SDLT is not a voluntary tax and, under the SDLT regime, any UK land transaction is liable to the charge wherever and however the relevant transfer instrument is executed, regardless of the tax residence of the buyer of the UK land interest and regardless of whether the transaction is effected by an instrument.

<sup>4</sup> Ministry of Justice, 'Bribery Act 2010: Guidance to help commercial organisations prevent bribery'. Available at <https://www.gov.uk/government/publications/bribery-act-2010-guidance>.

<sup>5</sup> Full text available at <http://www.legislation.gov.uk/ukpga/2002/29/contents>

In recent years the UK government has progressively tightened the anti-avoidance rules applying to SDLT and the scope for reducing SDLT payable on an asset transfer that involves land is now limited. Under these rules, HMRC have the power to disregard one or more steps in a multi-stage transaction, and assess SDLT on basis of a direct transfer from seller to buyer. It is not necessary to show that there is a tax avoidance motive. The UK courts have recently demonstrated their willingness to apply these rules to strike down SDLT avoidance schemes. In addition, the United Kingdom now has a General Anti-Abuse Rule (GAAR) which applies to a wide range of taxes, including SDLT.

### 5.3 Value Added Tax

VAT is generally not payable on the purchase of shares. VAT may be payable on the purchase of taxable assets (e.g. inventory and goodwill). However, where the transfer meets certain requirements in order to be categorised as a 'transfer of a going concern', then the transfer will not be a taxable supply and no VAT will be payable.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares

In the case of a share purchase, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the purchaser therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the target company. If there is an integration of the target company's business with the purchaser's business post-acquisition, this is likely to constitute an acquisition of assets or a business transfer, and the considerations set out below will be relevant.

#### 6.1.2 Acquisition of assets

The automatic transfer of employees on an asset sale takes effect pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), provided that the asset sale comprises the sale of an undertaking, for example a sale of a business (or an identifiable part as described in TUPE).

Employees of the seller's business have the right to refuse to transfer to the purchaser, but they are treated as having resigned without entitlement to severance compensation if they exercise this right and consequently, will have no remedy against either the seller or purchaser. There are two exceptions to this rule:

- where employees resign in response to a repudiatory breach of contract by the employer
- where the transfer involves or would involve a substantial change in working conditions to the material detriment of the transferring employees.

In these circumstances, employees will be regarded as dismissed and may have claims for unfair dismissal. Assuming that employees do not exercise their right to object to the transfer, the purchaser stands in the place of the seller as regards the employees' contracts of employment.

### 6.2 Effect of a TUPE Transfer

#### 6.2.1 Restrictions on contractual variations

TUPE does not permit changes to terms and conditions of employment other than in certain very limited circumstances. Where the sole or principal reason for a change to terms and conditions is the TUPE transfer itself, such change will not be permitted and will be void unless:

- it is an economic, technical or organisational reason (ETO reason) entailing changes in the workforce and the employer and employee agree to the variation
- the terms of the employment contract permit the employer to make such a change e.g. a mobility clause or some other provision giving the employer flexibility, or

- the relevant contractual term is incorporated from a collective agreement and the variation is implemented more than one year after the TUPE transfer and the employee's rights and obligations, taken altogether, are no less favourable.

These provisions only apply if both the change to terms and conditions, and the TUPE transfer, take place after 31 January 2014. For TUPE transfers that took place before 31 January 2014, there were even stricter restrictions on making changes to terms and conditions. While it has become easier for employers to change terms and conditions because of a TUPE transfer, harmonisation for the sake of harmonisation will still not be permitted, and there remains some uncertainty over how employment tribunals will interpret the new provisions. Therefore, the purchaser should only attempt to effect contractual variations with the greatest of care and after taking appropriate legal advice.

Note that any changes to terms and conditions which have no connection with the TUPE transfer can be made subject to normal legal principles.

#### 6.2.2 Notification of employee liability information

TUPE requires the seller to provide the purchaser with 'employee liability information'. This is a prescribed list of information and includes the identity and age of each transferring employee, as well as their particulars of employment and outstanding employee litigation. The information must be supplied within 28 days of the relevant transfer or sooner, (for transfers that took place before 1 May 2014, the deadline was 14 days before the relevant transfer). It can be made in more than one instalment and can be given indirectly, through a third party. The penalty for breach of this obligation is an award of such amount of compensation as an Employment Tribunal considers 'just and equitable', having regard to any loss sustained by the purchaser which is attributable to the failure, and the terms of any commercial agreement between the seller and the purchaser relating to such failure. There is, however, a minimum award equivalent to GBP500 per employee in respect of whom there has been a failure to comply with the obligation to provide the information, unless the employment tribunal considers it just and equitable to award a lower sum in all the circumstances.

#### 6.2.3 Information and consultation requirements

Consultation requirements triggered by an acquisition of assets where TUPE applies are set out below. There is no equivalent obligation in respect of share purchases, and trade unions or other employee representatives have no right to be informed and consulted merely because the employer company is to change hands, unless the employer company has agreed to do so, for example in a collective agreement, or where a 'national works council' has been set up under the Information and Consultation of Employees Regulations 2004 (the ICE Regulations) – see further at **6.4.1**.

In an asset sale, there is an obligation on the seller to give to 'appropriate representatives' (trade unions or elected representatives of affected employees) prescribed information about the asset sale sufficiently in advance of the asset sale to allow consultation (if required) to take place (see below). If the employer recognises a trade union in respect of all the affected employees, the appropriate representatives are trade union representatives. This covers all those employees in the bargaining unit, whether they are union members or not. Where there are affected employees outside the bargaining unit, the employer must inform and consult other representatives in respect of those employees. These could be representatives specifically elected for the purposes of the TUPE transfer, or an existing representative body.

Therefore, employers may well find themselves engaged in two simultaneous but separate consultation exercises – the first involving a recognised trade union; and the second involving elected representatives of other employees. The employer must facilitate an election process where necessary. Elected representatives will of course be anxious to secure concessions from employers at least as favourable as those negotiated by their trade union counterparts and this may significantly impact the duration of the consultation exercise.

Consultation with the appropriate representatives must take place where any 'measures' are envisaged in relation to the affected employees by either the seller or the purchaser – for example redundancies, changes to terms and conditions of employment or other operational matters. However, TUPE only requires the seller or purchaser to consult with representatives of their own employees, not those of the other party. It is possible that employees retained in the seller's employment and/or the purchaser's existing employees may also be affected by the transfer – in which case the obligation to inform and consult may also arise in relation to those individuals.

Consultation must be 'with a view to seeking agreement' to the measures envisaged.

Technically, a seller should start informing and/or consulting with the appropriate representatives before the asset purchase agreement is signed. However, it is common practice in the United Kingdom to delay information and consultation until after the agreement has been signed. This commonly takes place in the gap between signing and completion. However, if measures are incorporated into the commercial deal, or are inevitable as a result of the deal, details of the measures should ideally be consulted upon before the deal is signed.

Penalties will be imposed for a failure to consult, in the form of a protective award equivalent to up to 90 days' pay (maximum) for each employee. A failure to consult collectively may also render any dismissals unfair.

### 6.3 Protection against Dismissal

An employer's ability to dismiss fairly where there is a TUPE transfer is severely restricted. Any TUPE transfer-related dismissals are automatically unfair unless the reason for the dismissal is an ETO reason entailing changes in the workforce, which is interpreted narrowly to mean a change to the numbers or functions or location of the employees.

A seller will not be able to rely on a purchaser's ETO reason (e.g. the fact that the purchaser does not need the employees post-transfer) which means that pre-transfer dismissals are almost invariably unfair.

There is an obligation to inform and consult with trade unions and/or elected employee representatives with regard to collective redundancies involving at least 20 employees, including those arising in the context of an asset or a share purchase.

Where an employer recognises a trade union, it must consult with that union in relation to the proposed redundancies of employees who are within the bargaining unit. Therefore, as in the context of consultation on an asset purchase where TUPE applies, employers may well find themselves engaged in two separate collective consultation exercises – the first involving a recognised trade union; and the second involving elected representatives of other employees. Again, the employer must facilitate the election process if necessary. Alternatively, and as with TUPE consultation, an employer could choose to consult with an existing body of elected representatives who were not specifically elected for the purpose of redundancy consultation.

The employer must inform and consult 'in good time' and in any event, 45 days before the first dismissal takes effect (where 100 or more redundancies are proposed) or 30 days before the first dismissal takes effect in all other cases. To begin consultation, prescribed information must be given to trade unions and/or employee representatives in writing; consultation must be with a view to reaching agreement as to how best to avoid redundancies, to reduce the numbers of employees involved and to mitigate the effects of the proposed dismissals. It is also worth noting that elected representatives enjoy various statutory protections.

As well as the requirement to collectively consult, the employer must also consult with the employees on an individual basis about the proposed redundancies.

Where the purchaser wishes to make redundancies immediately after an asset sale where TUPE applies, the seller and purchaser may agree to carry out collective redundancy consultation pre-sale provided certain requirements are met.



## 6.4 Other Information and Consultation Obligations

### 6.4.1 Information and consultation agreements

Employees in undertakings employing more than 50 employees may acquire the right to be informed about the business' plans and economic situation, and consulted about important decisions taken by their employer that could impact on their working conditions – particularly where there is a threat to employment. This right arises under the ICE Regulations. If 10% of the employees make a valid written request to negotiate an information and consultation agreement (I&C Agreement), or if the employer gives notice of its intention to do so, the employer must then enter into negotiations with employees' negotiating representatives to put information and consultation arrangements in place.

The parties are free to put in place whatever I&C Agreement can be agreed. This is known as a 'negotiated agreement' and is subject to certain requirements. However, where the employer and the employee negotiating representatives fail to reach an agreement within the time allowed (usually 9 months after the request or notification, or a longer negotiating period as may be agreed), standard information and consultation provisions (SICPs) set out in the ICE Regulations will apply by default. Employers may be able to avoid having a negotiated agreement or SIPC if, at the time of the employees' request to negotiate, there is in place a 'pre-existing agreement' meeting certain requirements set out in the ICE Regulations.

### 6.4.2 European Works Councils

Employees in community-scale undertakings employing at least 1,000 employees within the EEA and at least 150 employees in each of at least two member states of the EEA may acquire the right to set up a European Works Council (EWC) to be informed about transnational employment matters under the Transnational Information and Consultation of Employees Regulations 1999 (TICE Regulations). If a written request is made by employees or their representatives covering 100 or more employees in at least two member states, or the employer's central management initiates the process, central management must set up a special negotiating body to negotiate an EWC agreement.

The parties are free to put in place whatever EWC agreement can be agreed. However, where central management and the employees/representatives fail to reach an agreement within three years of the EWC request being made, the default model EWC will apply.

Generally, EWCs will only be concerned with transnational employment matters (e.g. transnational closures, redundancies and mergers affecting more than one member state). There is no right to be informed about matters affecting only one member state, unless the EWC agreement provides for more extended information obligations.

## United States

### 1.1 Overview

Mergers and acquisitions in the United States are complicated transactions. The process generally affords the knowledgeable buyer the opportunity to learn about the target business in depth before buying to reduce the risk of post-closing surprises. Moreover, US buyers use sophisticated documentation to precisely allocate the risks of the business between buyer and seller and to protect the seller against undisclosed liabilities. To take full advantage of these opportunities, a non-US investor will benefit from highly experienced legal and other advisers, beginning in the earliest planning stages of an acquisition.

### 1.2 General Legal Framework

The United States has a federal system of government. Under this federal system, the laws of the 50 separate states (along with US territories and the District of Columbia) co-exist in parallel with the national or federal law. The US laws generally applicable to merger and acquisition transactions (including contract law and corporations law) are state laws and not federal laws. The statutory law and common law of the individual states of the United States (i.e. Delaware) supply the basic legal framework for M&A transactions in the United States.

The statutory laws of the state in which the target corporation or other business entity is formed will govern many important aspects of a transaction. State statutory laws establish certain requirements that must be satisfied for a target to validly enter into and consummate a transaction, including requirements for board and stockholder approvals. State common law provides many other rules and principles that impact M&A transactions. For example, extensive case law has been developed in the Delaware courts with respect to the fiduciary duties applicable to boards of directors, including in the acquisition context.

While M&A transactions in the United States are generally governed by state laws, the US Congress legislates on certain matters that affect acquisition transactions. For example, the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) allows the US federal government to evaluate the antitrust implications of proposed acquisition transactions, and an amendment to the Defense Production Act of 1950 contained in the 1988 Omnibus Trade and Competitiveness Act (the Exon-Florio Act) authorises the President to review mergers, acquisitions and takeovers that could result in the control of a US business by a foreign person. There are also statutes applicable to certain regulated industries that contain advanced notice or approval requirements. Further, US federal securities laws contain requirements that affect the structure and process of many acquisition transactions.

Given the expansive legal framework governing M&A transactions in the United States, it is important for parties to consult with counsel to determine whether a proposed transaction complies with all applicable state and federal laws and regulations.

### 1.3 Corporate Entities

In the United States, there are several types of entities used for business purposes, including corporations, limited liability companies and various forms of partnerships. The most common entities utilised for acquisition vehicles are corporations and limited liability companies.

#### 1.3.1 Corporations

A corporation is the traditional acquisition vehicle used by non-US buyers. A corporation may be organised in any state, territory or the District of Columbia. A corporation consists of three principal constituencies: the stockholders (the owners of the corporation), the board of directors (which has the power to carry out substantially all corporate acts not specifically reserved to the stockholders) and the officers (who are responsible for the day-to-day operations of a corporation). Corporations generally enjoy the benefit of limited liability. The stockholders of a corporation are not personally liable for the debts, obligations or liabilities of the entity. US corporate law has few mandatory provisions, however corporations do have mandatory centralised management. Control of the business and affairs of a corporation is vested in the corporation's board of directors, and the stockholders are generally not involved in the day-to-day management of the affairs of the

corporation, although stockholder approval is required for certain significant transactions such as mergers.

The corporation is the only form of share company in the United States. There are no restrictions on the transferability of shares. There is also no restriction on the number of stockholders (except in the case of a close corporation) and no limitation on non-US persons acting as stockholders in a US corporation except in certain regulated industries, including, among others, defence, banking, insurance, domestic air or water transportation, energy, and radio and television broadcasting. A corporation's income is subject to 'double taxation'. A corporation must pay taxes on its income when earned, and the stockholders must pay taxes on any dividends or other distributions they receive from the corporation.

### 1.3.2 Limited liability companies

The laws of all states in the United States provide for the organisation of limited liability companies, or LLCs. Limited liability companies are becoming increasingly popular for privately-held businesses in the United States. A limited liability company offers the flexibility to describe the entire relationship of the parties by contract, while still providing a limitation on the liability of all of the members to their investment in the company. The owners of an LLC are its members, and are analogous to a corporation's stockholders. No minimum or maximum applies to the number of members (i.e. one member is acceptable). The members typically enter into a limited liability company operating agreement (or LLC agreement), which governs the operation of the LLC, including the members' contractual rights, obligations and restrictions relating to their membership interests in the company. The member or members may generally select any management structure they desire. The member or members may operate the company directly or may themselves appoint officers or managers to operate the daily affairs of the LLC. The ownership interests of the members in an LLC are known as membership interests or membership units. There are no limitations on the transferability of shares under statute, however members may provide for restrictions in the LLC agreement. For US tax purposes, it is possible to treat an LLC as a partnership, or 'pass-through' entity, which avoids taxation at the entity level and passes the company's profits and losses through to the members, which can be very advantageous to a non-US acquirer.

## 2. Acquisition Methods

A private company can be acquired through a purchase of stock, a purchase of substantially all the assets or a merger or consolidation under state law. The best method to use in any particular transaction depends on a number of factors, such as commercial considerations, tax considerations, third party and corporate consents and deal process and timing.

### 2.1 Acquisition of Shares

The acquisition of shares or membership interests is generally simpler than asset acquisitions, especially if there are only a few stockholders and all are willing to sell. Where shares are acquired, all assets remain in the target company and few transfer documents are required. Retaining assets such as licences, permits and franchises avoids the difficulties of obtaining consent from the issuing government agencies. Additionally, unlike in asset acquisitions, third-party consents for the assignment of important contracts and leases will generally not be required, unless they contain change of control clauses. In a share acquisition, the target company will usually retain its tax attributes, both favourable and unfavourable, assuming that the business is continued. There are, however, limitations on the future use of some attributes, such as net operating losses. A higher purchase price paid for the business may not be reflected in the tax basis of the target corporation's assets after the acquisition, unless the seller consents to certain elections, which are rarely made when the seller is a US taxpayer.

### 2.2 Acquisition of Assets

In an asset acquisition, the buyer or its subsidiary acquires specified assets and liabilities of the target company. This may comprise 'substantially all' of the target's assets or only a division or line of business. The seller retains those assets and liabilities not acquired by the buyer. An asset acquisition is more complex than a share acquisition because all assets must be transferred. Clear identification of the specific assets to be transferred and the specific liabilities to be assumed is critical in an asset

acquisition. An asset acquisition will generally trigger 'anti-assignment' clauses in the target's key contracts, licences and permits, necessitating third-party consents for the transfer of certain valuable assets of the target. If assets are acquired, the buyer's tax basis in the assets may be increased to reflect the actual purchase price. However, favourable tax attributes of the target corporation will normally be lost in an asset acquisition.

## 2.3 Mergers

All state laws provide for the merger of corporations and most states now provide for the merger of limited liability companies and other entities (including mergers of different forms of entity). In a merger, two entities are joined by operation of law, with all assets and liabilities becoming the property of the surviving entity (or a new entity) solely by filing a certificate of merger. Normally, one entity disappears and the other continues as the successor to both lines of business. The principal advantage of a merger is that it typically only requires a majority consent from the target company's stockholders for the buyer to obtain all of the target company's stock (although dissenting stockholders may have the right to obtain an appraisal of their shares and recover the appraised value in lieu of the amount offered to them in the merger). In a merger, the transfer of assets and the exchange of target corporation shares are automatic. No separate transfer documents are required. Valuable permits, contracts, etc. may also be easier to transfer in a merger than in an asset sale, but these do not remain in the same corporate entity unless the target is the surviving entity in the merger. The structure of the merger will determine whether the merger is treated as an asset or stock acquisition for tax purposes.

## 3. Negotiation, Signing and Closing

### 3.1 Preliminary Agreements

In the United States, it is common for the buyer and seller to enter into preliminary agreements before negotiating the acquisition agreement. The potential buyer of a business and the target company and/or sellers generally enter into a confidentiality or nondisclosure agreement prior to the commencement of due diligence. This is usually the first agreement signed by the parties in a potential transaction. Confidentiality agreements are often unilateral, imposing confidentiality obligations on the buyer with respect to the information provided by the target. However, a buyer will generally seek to make such obligations mutual if the target is also going to perform due diligence on the buyer (e.g. in a stock-for-stock acquisition).

The parties may sign a letter of intent setting out the principal points upon which the parties have reached tentative agreement. This is typically signed by the parties following initial due diligence and prior to negotiation of the definitive transaction agreement. The letter of intent is useful in identifying important issues between the parties early in the process before the parties have invested substantial time and money. Its disadvantages are that it may delay the preparation and signing of a definitive contract. Except for certain matters, such as confidentiality, 'standstill', and the like, a letter of intent is typically not legally binding between the parties. However, a US party will be most reluctant to make important changes in the terms set out in the letter of intent absent a significant change in the target or in the circumstances of the transaction. A letter of intent may also create legal liabilities if one of the parties fails to negotiate the definitive agreement in good faith. Finally, the letter of intent may address significant matters, such as limitations on the liability of the seller, that should be carefully analysed before being agreed to. Thus, it is important that all matters of importance to the non-US buyer, especially the material terms and the structure of the transaction, be considered and reviewed with legal counsel before a letter of intent is signed.

### 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical US purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

## Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments are common. Working capital adjustments are most common. Cash-free debt-free also prevalent. Other adjustment metrics may also be used depending on the facts (primarily the valuation drivers) of the particular transaction.
2	Is there a collar on the adjustment?	Collars on the adjustment are not common.
3	Who prepares the completion balance sheet?	Usually the buyer.
4	Is the balance sheet audited?	Not necessarily. Historical balance sheets for completed fiscal years often audited. Interim balance sheets typically unaudited.
5	Is an earn-out common?	Not uncommon. They were included in 25% of 2012 deals, according to ABA's 2013 Study. <sup>1</sup>
6	Is a deposit common?	Uncommon.
7	Is an escrow common?	Relatively common.
8	Is a break fee common?	Uncommon.

## Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Common.
10	Is the MAE general or specific?	The MAE definition is usually general and forward-looking, and generally includes specific carve-outs.
11	Quantification of MAE?	Uncommon.

## Covenants, Access

12	Is a non-compete common? Do you use waterfall/blue pencil provisions?	Relatively common; however, enforceability is a question of state law and varies from state-to-state. Blue-pencilling provisions are commonly included in a severability clause in the agreement. Most states permit courts to modify non-competes. Some states allow modification only if the agreement contains a severability clause.
13	Non-solicit (of employees)?	Common (in conjunction with non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with non-compete).
15	Broad access to books, records, management between sign and close?	Generally given to buyers, although target may seek to limit access to specified members of the management team.

<sup>1</sup> ABA's 2013 Private Target Mergers & Acquisitions Deal Points Study.

16	Common to update warranty disclosure or notify of possible breach? What is the consequence?	Ability to update disclosure schedules usually limited to lists of contracts and similar ordinary course changes. Notification of possible breach is not uncommon. In case of material breach, right to terminate.
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17	Is a separate tax covenant/indemnity or tax deed common?	Common to have specific tax covenant/indemnity included in the purchase agreement.
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### Representations & Warranties

18	Materiality in representations—how is it quantified (e.g. by a \$ amount)?	Materiality qualifiers commonly seen but are not often quantified (other than specific warranties, e.g. contract value).
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19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers usually based on constructive knowledge (after due inquiry), although actual knowledge standard also used. Commonly limited to list of specified persons or group of persons.
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20	Is a warranty that there is no materially misleading/omitted information common?	Increasingly less common. According to the ABA's 2013 Study <sup>2</sup> , approx. 36% of 2012 deals included a so-called '10b-5' rep.
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21	Is disclosure of data room common?	Uncommon.
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### Repetition of Representations & Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is a bring-down certificate at completion common?	Repetition at completion common. Bring-down certificates at closing common.
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23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	Both accurate 'in all material respects' standard and MAE standard common.  Often carve-outs for fundamental representations which must be absolutely true.
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24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.
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### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Can range from less than 10%–100% of purchase price. According to the ABA's 2013 Study, <sup>3</sup> for 2012 deals with caps the average was 16.6% of the purchase price.
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<sup>2</sup> ABA's 2013 Private Target Mergers & Acquisitions Deal Points Study.

<sup>3</sup> ABA's 2013 Private Target Mergers & Acquisitions Deal Points Study.

26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Caps commonly apply to indemnification obligations in the whole agreement (although breach of seller's/target's covenants are often carved out of the cap). Other limitations on liabilities (e.g. baskets) commonly apply only to the representations and warranties. Specific representations and warranties or other items in the agreement may have different cap amounts.
27	What are the common exceptions to the cap?	Fraud is usually excepted from the cap. Certain fundamental representations and warranties (e.g. authority, capitalisation, due organisation and title) are also commonly excluded. Often tax and specific areas of concern are excluded or may have specific higher caps. Breaches of seller's/target's covenants are also often carved-out of the cap.
28	Is a deductible or basket common?	Baskets are common. According to the ABA's 2013 Study, <sup>4</sup> of the 2012 deals with survival provisions, 59% had 'only above deductible amount' baskets, 32% had 'dollar one' baskets and 5% had a combination of the two.
29	Is a <i>de minimis</i> common?	Increasingly common. According to the ABA's 2013 Study <sup>5</sup> , of the 2012 deals with baskets, only 30% included a <i>de minimis</i> eligible claim threshold.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	General survival of 12–24 months common. Common to carve-out fraud. In addition, tax, employee benefit and environmental matters are commonly carved-out and typically survive until the expiration of the applicable statute of limitations. Other representations and warranties often carved out include authority, no conflict, capitalisation, due organisation, title and brokers/finders fees.
31	Is warranty insurance common?	Not yet common, but increasingly used. Currently used predominantly by private equity sellers.

## Reliance

32	Do financiers seek to rely on purchasers' due diligence reports?	It is not standard market practice in the United States for law firms to allow third parties to rely on due diligence reports.
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## Set-offs against Claims

33	Is a set-off against claims for tax benefits common?	Common.
34	Insurance proceeds?	Common.
35	Third party recoveries?	Common.

<sup>4</sup> ABA's 2013 Private Target Mergers & Acquisitions Deal Points Study.

<sup>5</sup> ABA's 2013 Private Target Mergers & Acquisitions Deal Points Study.

**Damages, Knowledge**

36	Obligation to mitigate damages?	Not common to incorporate express requirement to mitigate losses in the acquisition agreement, but required under the laws of some states (e.g. New York and Delaware).
37	Exclusion of consequential damages?	Common to expressly exclude 'consequential damages'.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Not common to include such so-called 'anti-sandbagging' provisions. Agreements often silent on this point.

**Dispute Resolution**

39	Does local law allow for a choice of governing law? What is the common governing law?	Yes, parties may choose governing law. Often Delaware or New York.
40	Is litigation or arbitration more common? If arbitration, where?	Litigation is more common.

**Stamp Duty**

41	If stamp duty is payable, is it normally shared?	No stamp duty in the United States.
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**3.3 Formalities for Execution of Documents**

Documents must be executed by any person with authority to do so on behalf of the entity. Typically, authority is evidenced by a resolution of the board of directors or a certificate delivered by a company officer. Certain documents, such as those conveying real estate, have execution requirements under the relevant state law such as notarisation.

**3.4 Formalities for Transferring Title to Shares or Assets****3.4.1 Transfers of title to shares**

In a purchase of shares or LLC membership interests represented by certificates, the seller will typically deliver certificates representing all of the shares or membership interests in the target corporation either endorsed to the buyer or accompanied by an executed 'stock power' (or power of attorney) authorising the transfer of the shares or membership interests on the books of the target. Membership interests not represented by certificates will be transferred by a form of assignment.

**3.4.2 Transfers of title to assets**

When a business is being transferred by way of an asset purchase, each individual asset needs to be transferred in accordance with the formalities for a transfer applicable to that type of asset. Title to real estate will be transferred by deeds for each parcel. (Title certificates are also used in certain locations). Deeds must typically be notarised and recorded in the locality in which the real estate is located. Recording will be completed on the date of the closing or shortly afterwards. At the closing, the title insurance company will execute and deliver a binding commitment insuring title to the real estate. Personal property will be transferred by bill of sale, which requires no formalities. Agreements and other intangibles will be transferred by a form of assignment, which may be combined with the bill of sale. Separate assignment documents may be required for patents and certain other assets, some of which are subject to formal requirements.



### 3.5 Formalities for Mergers

In a merger, the parties will execute a formal plan of merger (in most states) for filing with the secretaries of state of the jurisdictions in which the respective corporations or limited liability companies are organised. This document may be considerably shorter than the definitive merger agreement and may have to be notarised. These formalities will be accomplished immediately prior to the closing and the plan of merger may be sent ahead to the appropriate state agencies to be ready for filing on the date of closing. All assets and liabilities transfer solely by filing the certificate of merger. No separate transfer documents are required.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

US antitrust law prohibits any acquisition or merger that would have the tendency to lessen competition or create a monopoly. Although a number of factors are considered when assessing the effect of a transaction on competition, market concentration is commonly the most important factor. If a US acquisition meets certain minimum size levels, a Hart-Scott-Rodino pre-merger notification must be filed with the US Department of Justice and the Federal Trade Commission. Issues also arise under US antitrust laws when there is an exchange of information and pre-closing activities between competitors before completion of a transaction, even if the transaction itself is not ultimately challenged on antitrust grounds.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical US purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

#### Filing Obligation

1	Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?	<p>Mandatory.</p> <p>If a US acquisition meets certain minimum size levels, a Hart-Scott-Rodino pre-merger notification must be filed with the US Department of Justice (DoJ) and the Federal Trade Commission (FTC). The filing thresholds are revised periodically but as of the date of this publication, in general, a filing is required for acquisitions with a value of USD305.1 million or more, regardless to the size of the parties; or less than USD76.3 million if the parties meet the size of persons tests. Detailed financial and descriptive information concerning the ultimate parent of the acquiring and target corporations, their product lines and the transaction itself must be included. The ultimate parent will be the corporation that is highest in the chain of ownership if the actual buyer is a subsidiary. If the ultimate parent corporation is privately owned (as would be the case with many family-owned enterprises), the ultimate parent may be the family itself. Although the notification may appear burdensome and unnecessarily intrusive, buyers can normally comply with the law by disclosing only a reasonable amount of business information.</p>
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## Timetable

2	In practice, what is the timetable for clearance (in first phase and second phase review)?	<p>Parties must wait 30 days after the filing to complete the acquisition, although early termination of the waiting period may be requested. It is not permissible to proceed with the acquisition prior to expiration of the waiting period even if the transaction is made expressly subject to divestment in case the government later objects. Managerial and financial control of the target must remain with the seller until expiry of the waiting period. However, the effective date of the acquisition may be made retroactive (to a date prior to expiry date), thereby giving the buyer the financial benefit of the target company's operations during the waiting period if the transaction ultimately proceeds.</p> <p>The DoJ or FTC may request additional information at any time during the waiting period, in which case the waiting period will be suspended until the information is provided. Because such second requests can be very burdensome and time-consuming, parties are usually quite willing to discuss the transaction and provide additional information to the government to avoid a second request. Parties should ensure that all information provided is accurate and complete, especially if the timing of the acquisition is important.</p> <p>Hart-Scott-Rodino filings are confidential. US government authorities will not even confirm or deny if a filing has been made (unless the parties have requested an early termination of the waiting period). Therefore, filing a notification should generally not jeopardise an acquisition or create unwanted publicity in the United States or in the buyer's home country.</p>
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### 4.3 Exchange of Competition-Sensitive Information and 'Gun-Jumping' Issues

The FTC and DOJ can challenge information exchanges and pre-closing activities under the Sherman and FTC Acts. US competition law restricts the exchange of confidential, commercially sensitive information in order to ensure that the parties remain fully in competition with one another until the closing of the transaction. It is therefore important to ensure that information transfers between the parties comply with the applicable competition laws.

The parties may also violate the Sherman and HSR Acts if the purchaser obtains beneficial ownership of the target company before the expiration of the necessary waiting periods. This is often referred to as gun-jumping and can result in the imposition of substantial fines. Any pre-closing integration activities need to be closely monitored to assure that managerial and financial control of the target remain with the seller until the waiting period has expired.

See Appendix B for general guidelines regarding gun-jumping and the exchange of competition-sensitive information. However, these are general guidelines and competition advice should always be obtained in connection with any contemplated disclosure of potentially competition-sensitive information as well as pre-closing activities when the parties have a pending HSR Act filing.

## 4.4 Anti-Bribery, Corruption and Money Laundering

### 4.4.1 Foreign Corrupt Practices Act (FCPA)

The US Foreign Corrupt Practices Act (FCPA) prohibits bribery payments to foreign government officials and requires 'issuers' to maintain detailed accounting records and adequate internal controls.

The FCPA has two components: anti-bribery provisions and accounting provisions. The anti-bribery provisions prohibit bribery payments directly or indirectly to foreign government officials corruptly in order to obtain some improper business-related benefit. The accounting provisions seek to prevent accounting practices designed to hide corrupt payments by requiring companies to maintain accurate books and records and adequate internal accounting controls.

In recent years, US authorities have increasingly brought FCPA and other enforcement actions against non-US companies or US subsidiaries of foreign companies. In addition, many US companies are conducting more extensive FCPA and other compliance-related due diligence into their foreign business partners and requesting them to provide FCPA/anti-bribery and other compliance-related representations, warranties and covenants. Accordingly, it is important for non-US companies planning to enter into a joint venture, business combination or other business relationship with a US company or otherwise conducting operations in the United States to be familiar with these compliance-related issues. See Appendix D for an overview of who is covered by the FCPA and what the FCPA prohibits.

### 4.4.2 Anti-money laundering

The US money laundering statutes generally prohibit all persons, including individuals and companies, from knowingly engaging in monetary or financial transactions with the proceeds of unlawful activity, which includes a long list of domestic and foreign crimes. Although 'knowledge' is required for money laundering offences, actual knowledge includes the concept of 'wilful blindness'. Therefore, companies or individuals that ignore 'red flags' or suspicious indicators in the course of normal business activities could be deemed to have knowledge that proceeds were derived from illegal activities, and in violation of the money laundering laws.

The US anti-money laundering scheme is composed of two specific criminal statutes (18 USC, §§1956 and 1957) and regulations promulgated pursuant to the 1970 Bank Secrecy Act (BSA), as amended by the USA Patriot Act of 2001 (Patriot Act). The statutes, which provide for both criminal and civil penalties, broadly prohibit persons from conducting certain monetary or financial transactions while knowing or being wilfully blind to the fact that the funds involved were derived from illegal activity.

## 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

Foreign acquisitions of US businesses are assisted by a general absence of exchange controls, government regulation, or licensing of foreign investment or foreign acquisitions in the United States. Foreign-owned enterprises also generally have access to federal and state investment incentives and benefits. Many states have offered significant tax and other incentives to induce non-US manufacturers of automobiles and other items to establish facilities in such states. However, foreign-owned enterprises and certain acquisitions of US companies by non-US entities are subject to some regulations and reporting requirements.

### 4.5.1 Exchange control

The United States exercises few controls over foreign exchange transactions by US citizens or non-US persons. No approval of the US Department of Treasury or other finance authority is required to make an investment. Subject to applicable tax rules, a foreign-owned enterprise is generally free to invest capital and to remit profits, repatriate capital and/or pay interest and royalties to a non-US parent without any license or restriction. However, the US government monitors foreign exchange transactions of substantial size. Although this monitoring is only for informational purposes, failure to make full and accurate disclosure where required could result in serious criminal penalties under money laundering and other federal statutes.

#### 4.5.2 Foreign investment approvals and notifications

##### ***Exon-Florio***

The 1988 Omnibus Trade and Competitiveness Act contained the Exon-Florio amendment to the Defense Production Act of 1950 (DPA). It established the authority for the US government to review and block, on national security grounds, any 'covered transaction', i.e. any transaction which could result in control, by a foreign person, of business activities in US interstate commerce. The Foreign Investment and National Security Act of 2007 further amended the DPA with respect to such authority. Rather than having a transaction completely blocked or unwound, it is possible to modify a transaction or take specific mitigating actions to alleviate concerns identified in a review. Exon-Florio is administered by the US Committee on Foreign Investment in the United States (CFIUS), a committee composed of independent departments and agencies of the US government, such as the departments of Defence, Treasury, Homeland Security and Justice.

Reviews are conducted primarily pursuant to voluntary notification of proposed or completed transactions. If CFIUS approves a transaction that is voluntarily notified to it, parties will benefit from being certain that the transaction is no longer subject to review. A transaction that is not voluntarily notified runs the risk of being reviewed by CFIUS later, which could potentially result in the transaction having to be unwound in whole or part.

There is no definition of 'national security'. The resulting vagueness provides the US government with flexibility in terms of the grounds, including political considerations, on which a covered transaction is reviewed. Based on previous reviews, national security considerations can be raised by US businesses which, among other things:

- provide products and services to federal, state, or local authorities, especially products or services directly related to defence, security or law enforcement, or even products or services involving information technology, telecommunications, energy, natural resources or industrial products if they indirectly affect security-relevant functions of governmental authorities
- engage in the production of advanced technologies that may be useful in defending, or in seeking to impair, US national security, including the design and production of semiconductors and other equipment with dual commercial and military application such as cryptography, data protection, internet security and network intrusion detection
- participate in the US energy sector, including US businesses that hold major energy assets or those that are involved in exploitation of natural resources, transportation or transmission of power
- engage in research and development, production or sale of technology, goods, software or services subject to US export controls, or
- have access to classified information.

In terms of analysing possible risk to national security, the nature of the would-be buyer is also considered. In this regard, based on past reviews, any of the following types of buyers can raise national security considerations:

- foreign parties from countries with poor records on non-proliferation and other national security-related matters
- foreign parties whose intentions could impair US national security, including plans to terminate contracts with the US government, and
- foreign government-controlled parties, including foreign government agencies, state-owned enterprises, government pension funds and sovereign wealth funds.

To formally notify CFIUS of a transaction requires a written filing. The filing must contain a significant amount of prescribed information, including the latest available transaction documents. The accuracy of the information must be certified by the CEO or the CEO's designee. Before the filing is made,

informal consultations are typically undertaken with CFIUS and/or specific departments or agencies that could have a concern. It is very important that if any potential concerns are identified, they be addressed in the filing by proposing modifications to the transaction or specific mitigating action that could be taken.

Once a transaction is formally notified to CFIUS, assuming the notice is deemed by CFIUS to be complete, CFIUS has 30 days to conduct its review. The review can result in approval of the transaction or initiation of a formal investigation. If CFIUS finds that an investigation is warranted, it then has 45 days to conduct the investigation, during which it may request additional documents and personal appearances by the parties, and make its decision. An investigation is likely where, among other situations, the transaction:

- threatens to impair US national security and that threat has not been mitigated during the 30-day review
- is a foreign government-controlled transaction, or
- results in foreign control over critical infrastructure that, in the determination of CFIUS, could impair national security, if that impairment has not been mitigated.

After a formal CFIUS investigation, the US president has 15 days to review and approve the decision. Transactions will be allowed to proceed without interference unless action is taken by the government within these time periods.

Unreported transactions will continue to be subject to review at any time. Therefore, if in doubt, it will make sense to report any transaction that could be considered a 'covered transaction' to CFIUS before proceeding with an acquisition.

### ***Reports***

Foreign-owned enterprises are required to make periodic, direct investment reports to the US Department of Commerce pursuant to the International Investment Survey Act of 1976 if 10% or more of a substantial enterprise is foreign-owned. Investment by non-US persons in real estate requires additional reports, particularly to US tax authorities, under the Foreign Investment in Real Property Tax Act. The acquisition and transfer of agricultural land must be reported to the US Department of Agriculture. Real estate acquisitions may also give rise to other, non-federal, reporting obligations. A non-US buyer of industrial property in a rural area should be careful to ascertain whether any portion of the property purchased can be considered agricultural property, but no specific report is necessary for acquisition of non-agricultural land.

### ***Restricted industries***

Ownership by non-US persons of certain restricted industries is limited or regulated by the federal government or some state governments. Restricted industries include, among others:

- defence
- banking
- insurance
- domestic air or water transportation
- energy, and
- radio and television broadcasting.

In some states, the railroad industry as well as the agricultural and other real estate industries are also restricted. A non-US buyer contemplating a purchase of a company in one of these industries should consult with US legal counsel at the earliest possible stage about potential restrictions.

## 4.6 Industry-Specific Regulation

Although the regulation of businesses is relatively limited in the United States, most businesses operate with a variety of governmental licences and permits. These include:

- general business licences
- building permits and certificates of occupancy relating to structures
- boiler permits, and other permits to operate certain forms of machinery and equipment, and
- vehicle licences and registrations.

In addition, specific governmental licences and franchises may be necessary for certain kinds of businesses. It may be possible to transfer these to the buyer in an asset acquisition. More often, however, new licences and permits should be obtained. Arrangements for transferring or obtaining these documents must be made so they are in place at the closing if the business is to continue without interruption. Even vehicle registrations may present problems, since their transfer may take some time.

Government licences and permits are generally not assignable even though material to the business. They may also terminate in the event of a material change in control of the target. Termination in this manner is normally the result of local-level practice rather than being the result of any statute. If new licences or permits need to be issued, the buyer will want to be certain it can obtain them prior to the closing. The agreement will generally call for disclosure of the licences and permits used by the business and have a representation as to assignability.

## 4.7 Import/Export Controls

Once an acquisition is complete, the buyer should be aware of a few potential import and export control compliance details that can significantly impact the business' operations if mishandled. (Although the list below is by no means an exhaustive list of post-acquisition trade compliance issues to consider).

First, the business needs (among other things) a customs bond if it is importing. If a new entity was created that bought assets in the acquisition, then that new entity will need a customs bond in its name. If the acquisition is one of shares, a new customs bond may not be needed. If the acquired business remains and continues to operate under the same name, its pre-existing customs bond can simply be maintained. However, it is common in a share purchase acquisition for there to be an official name change of the acquired company, and in such a case the business must officially change its importer-of-record name with US Customs and Border Protection and have the name change reflected in its customs bond by either executing a bond rider or obtaining an entirely new bond in the new company name.

Second, if the business exports goods under licences from the US Department of State, Department of Commerce, and/or Department of Treasury, these may need to be assigned or transferred or altogether new licences may need to be obtained in the name of the new entity.

Finally, both the US Department of State and Department of Commerce follow a rule that an export is deemed to have occurred when certain foreign nationals, when present in the United States, are exposed to information relating to an item which is subject to export controls. These are so-called 'deemed exports'. If a licence would be needed to export that information to the home country of the foreign national, then a licence is needed for the deemed export to legally occur. This can become an issue for a foreign buyer, because it is likely that the buyer will dispatch certain of its employees to the acquired business in the United States to assist with post-acquisition integration. If the operations of the business concern items which require licences when exported, it may be necessary to acquire licences for deemed exports of information relating to these controlled items to the foreign-national employees of the buyer.

## 5. Transfer Taxes

Many state and local jurisdictions impose sales, use or other transfer taxes on the sale of certain categories of assets, including real property. Transfer taxes generally do not apply to the sale of stock where the legal title to the asset does not change. However, a few states impose a stock transfer tax, and a few states impose a real estate transfer tax on the sale of a controlling interest in a real property entity. Whether a merger is subject to transfer taxes will depend on whether the structure is treated as an asset or stock acquisition for tax purpose. In any event, transfer taxes are relatively low in most states (Florida is an exception for real estate), so using a share acquisition instead of an asset acquisition for the purpose of avoiding transfer taxes is generally less of a concern in the United States than in many other countries.

Value added tax (VAT) is generally not payable on the purchase of shares. VAT may be payable on the purchase of taxable assets (e.g. inventory and goodwill). However, where the transfer meets certain requirements in order to be categorised as a 'transfer of a going concern', then the transfer will not be a taxable supply and no VAT will be payable.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares or mergers

In general under federal and state employment laws in the United States, if a transaction involves a transfer or exchange of the equity ownership of the target business, all of the assets and liabilities remain with the target business and only the target's equity ownership changes. In this form of transaction, no termination of employment occurs from the transaction itself because the employees of the acquired entity remain employed with their current employer, the same as before the transaction. However, employment contracts may contain a provision where a change in control provision in the target company would constitute a termination or trigger an employee's right to terminate.

#### 6.1.2 Acquisition of assets

If a transaction involves the sale or transfer of the underlying assets and liabilities of a business, the status of the employees becomes an important issue. If the employees are intended to transfer along with the assets and liabilities, they must be terminated by the current employer and formally accept a new offer of employment with the new employer. If no offer is made to an employee, or is accepted by the employee, that employee remains employed by the existing business and does not transfer with the underlying assets and liabilities. Generally speaking, unless the buyer is obligated under the terms of the deal or an applicable collective bargaining agreement, there is no requirement by the new employer to offer employment to all employees working for the business. Therefore in the United States, except where contractual provisions require otherwise, the buyer can pick and choose which employees are worthy of an offer, depending on the needs of the business.

### 6.2 Approval or Consultation Requirements

Employees have no statutory right to review, approve, or even be consulted about an acquisition of their employer.

### 6.3 Protection against Dismissal

#### 6.3.1 Redundancies

Unlike many non-US jurisdictions, there are no US statutes requiring employees to be retained or given specific severance pay on termination of employment in an acquisition, although federal law (e.g. the Worker Adjustment and Retraining Notification Act, more commonly known as the 'WARN' Act) and some similar state laws, as well as many collective bargaining agreements, require advance notice if an entire plant is to be closed or a certain percentage of employees are to be terminated. Depending on the degree of continuity in an acquisition, such statutes or contract provisions may apply to the buyer. Federal law also requires that a terminated employee be allowed to continue any

employer-sponsored health programme for a period of time but at the expense of the employee. Certain states, such as Massachusetts, may impose this cost on the employer.

In addition, most US employers have adopted employment policies that may legally bind successors. These will often provide for some form of termination compensation or severance, unless the employees are offered employment with substantially the same salary and, perhaps, benefits by the acquiring corporation. For this and other reasons, the seller will often insist that the buyer agree to employ its existing workforce and may want to specify the terms and conditions of that employment. As with other economic issues, these matters will be negotiated between the buyer and seller. Related matters, such as accrued vacation pay, will probably have to be dealt with as well, since the employees will expect to retain these accrued benefits after closing. A non-US buyer especially will not want to appear to be insensitive to employee expectations.

### 6.3.2 Penalties

Failure to provide the requisite notice under the WARN Act may expose the employer to claims for back pay and benefits for the period of violation (up to 60 days), as well as a civil penalty of USD500 for each day of violation. Many states have 'mini-WARN Acts' with lower thresholds for employers to be covered by the statute and greater monetary exposure, so employers must determine if they have statutory obligations even if they are not covered by the federal WARN Act.



## Vietnam

### 1.1 Overview

In the last 10 years, Vietnam has made numerous international commitments in a bid to liberalise its foreign investment regime, resulting in some dramatic changes to domestic law.

In 2006, Vietnam brought into force two laws partially motivated by its accession to the World Trade Organization (WTO): the Enterprise Law (60/2005/QH11), and the Investment Law (59/2005/QH11).

Vietnam continues to attract foreign investment. Apart from via direct investment, foreign investors also achieve market access by way of mergers and acquisitions, both onshore in Vietnam and offshore when there are existing foreign investors.

In November 2014, the National Assembly passed new laws to supersede both of the above laws with effect from 1 July 2015, in the:

- Investment Law (67/2014/QH13; the Investment Law 2015), and
- Enterprise Law (68/2014/QH13; the Enterprise Law 2015).

It is generally understood that it is easier to purchase an offshore entity with investment in a Vietnam-established enterprise than to purchase the latter directly onshore. This is largely due to the greater sophistication and clarity of the legal systems in most of the commonly used offshore jurisdictions. However, adjustments to the business activity, location, form, capital and term of the project all require the consent and approval of the relevant investment certificate issuing authority (ICIA), and if applicable, the Vietnamese partner. Tax implications related to the purchase of an offshore holding entity should also be noted.

### 1.2 General Legal Framework

The Investment Law and the Enterprise Law are the two main legislative frameworks governing matters relating to foreign investment in Vietnam, including investment by way of M&A transaction. The above new laws which are due to take effect on 1 July 2015 adopt a pro-investor, liberalising approach, aiming to reduce administrative bureaucracy and better facilitate foreign investment into Vietnam.

M&A is in general also subject to regulations under laws regarding competition, foreign exchange control, securities, employment and tax.

### 1.3 Corporate Entities

Under the Enterprise Law, companies in Vietnam are referred to as 'enterprises'. There are four types of enterprise in Vietnam, the:

- single member limited liability company (SM LLC)
- multiple member limited liability company (MM LLC)
- joint stock company (JSC), and
- public joint stock company (public company).

Under the Enterprise Law, an LLC may take the form of either an SM LLC (one member) or an MM LLC (two or more members). An LLC has its own charter and board of authorised representatives of the member(s), known as the Board of Members (BOM), and has the right to establish dependent units, such as branches or representative offices, domestically or abroad.

A member of an LLC is responsible for the debts and liabilities of the enterprise to the extent of the amount of capital that the member has contributed or committed to contribute to the enterprise. Unlike a JSC, an LLC cannot issue shares.

### 1.3.1 Single member limited liability companies

An SM LLC is owned by one organisation or individual member (company owner) who is liable for the debts and liabilities of the enterprise to the extent of the amount of the charter capital of the enterprise. An SM LLC has the same legal status as an MM LLC, but the company owner has more autonomy with regards to decisions made about the enterprise. The company owner may appoint either a representative to be President, or more than one representative to create a BOM, which will implement the company owner's rights and obligations on its behalf. Under the current Enterprise Law, if the company owner is an individual he or she will be the President of the SM LLC. From 1 July 2015, the company owner may hire another person to serve as the President. The Enterprise Law 2015 also:

- removes the statutory term of office of not exceeding five years - which is currently applicable where the company owner is an organisation and has appointed only one authorised representative
- limits the number of authorised representatives to create the BOM to three to seven persons, with their terms of office not exceeding five years.

Similar to an MM LLC, an SM LLC must have a director or general director appointed by the President or the BOM, who is responsible for the day-to-day operation of the enterprise and is usually the legal representative of the enterprise, although the charter may provide otherwise. From 1 July 2015, the Enterprise Law 2015 allows for an SM LLC to have several legal representatives, as long as one of them resides in Vietnam and must authorise another person if he/she needs to travel abroad. Unlike the current Enterprise Law, the Enterprise Law 2015 stipulates that the President or the Chairman of the BOM will be the default legal representative if the charter is silent on that point.

The company owner must appoint between one and three controllers who bear responsibility for supervising the performance of the BOM (or the President) and the director (or general director), and carrying out other tasks assigned by the company owner. The controllers can have a term of office not exceeding three years under the 2005 law, but this is increased to a term of office not exceeding five years under the 2015 provision.

A company owner must contribute capital in a full and timely manner. Under the 2005 Enterprise Law, an SM LLC cannot decrease its charter capital. However, the Enterprise Law 2015 allows it to decrease its charter capital in two cases:

- when the LLC returns part of its contributed charter capital to the LLC owner, as long as the LLC is continuously operating for more than two years from the date of enterprise registration and the LLC ensures that it is able to pay all debts and other liabilities after returning the capital to the company owner
- when the company owner fails to contribute the charter capital as committed.

An SM LLC may increase its charter capital by way of additional investment from the company owner or by obtaining capital contributions from other persons. In the event that part of the charter capital is contributed by or transferred to another organisation or individual, the enterprise must register to convert into an MM LLC within 15 days of the date of transfer (or within 10 days of the date of complete transfer according to the Enterprise Law 2015).

The company owner can be liable for the financial obligations of the SM LLC to the extent of all assets owned by him/her/it for failing to contribute, or to contribute in an insufficient amount or in an untimely manner, the registered charter capital.

### 1.3.2 Multiple-member limited liability companies

An MM LLC is an enterprise that has more than one but no more than 50 members, which may be organisations, individuals, or a combination of both. A member can transfer, dispose of or ask the enterprise to buy back its capital contribution portion in accordance with the Enterprise Law or as stipulated in the enterprise charter.

An MM LLC must have one director or general director of the company appointed by the BOM, who may or may not be a member of the enterprise. The general director is responsible for the day-to-day operation of the enterprise and, as provided for under the current Enterprise Law, is usually the legal representative of the company, although the charter may provide otherwise. The Enterprise Law 2015, on the other hand, allows the company owner/BOM to determine who will act as the legal representatives of the enterprise, as well as the number of legal representatives of the enterprise, as long as one of the legal representatives resides in Vietnam and must authorise another person if he/she needs to travel abroad.

The BOM is the highest decision-making body of an MM LLC and its member voting rights are allocated in proportion to their respective capital contribution. An MM LLC having more than 11 members must also establish a control committee.

### 1.3.3 Joint stock companies

Under the Enterprise Law, a JSC is an enterprise whose charter capital is divided into shares held by three or more organisations or individuals. The shareholders are responsible for the debts and liabilities of the enterprise to the extent of the amount of their contributed capital. A JSC can issue securities to raise capital and it may be listed on the securities exchange.

The founding shareholders of a JSC must subscribe to at least 20% of the total number of common shares that the JSC is authorised to offer for sale. The JSC must have common shares and may have preferred shares and/or issue bonds.

Under the Enterprise Law, a JSC generally has a General Shareholders Meeting (GSM), a Board of Management (BOM), and a director or general director. The GSM consists of all shareholders having the right to vote and is the highest decision-making body of a JSC. The BOM is the managing body of a JSC consisting of no fewer than three and no more than 11 members if the enterprise charter does not provide otherwise. A control committee is required for a JSC with more than 11 shareholders who are individuals, or with a shareholder that is an organisation owning more than 50% of the total number of shares in the enterprise. The control committee consists of three to five members if the enterprise charter does not provide otherwise, and at least one of its members must be an accountant or an auditor. In general, the control committee is responsible for supervising the performance of the BOM and the director/general director, and carrying out other tasks assigned by the GSM. Members of the control committee must not concurrently hold the position of director/general director in another enterprise.

The director/general director is appointed by the BOM for a term of up to five years and can be re-appointed. The director/general director is responsible for the day-to-day operation of the enterprise. The director/general director is the legal representative of the enterprise, unless the charter gives this status to the chairperson of the BOM. The director/general director of a JSC must not concurrently hold the position of director/general director in another enterprise.

Under the Enterprise Law 2015, a JSC has two options for structuring its management bodies:

- GSM, BOM, control committee, and general director (or director): The Control Committee will be optional if the JSC has fewer than 11 shareholders and the institutional shareholders together hold less than 50% of the total shares, or
- GSM, BOM, and general director (or director): In this case, at least 20% of the members of the BOM must be independent members, and there must be an internal audit committee under the BOM.

'Independent members' of the BOM are board members who:

- are not currently working for the enterprise or its subsidiary
- have worked for the enterprise or its subsidiary for the last three years
- are entitled to salary or remuneration from the enterprise except for allowances which members of the BOM are entitled to in accordance with regulations

- have a spouse, natural parent, adoptive parent, natural child, adopted child or sibling who is a major shareholder of the enterprise or a manager of the enterprise or its subsidiary
- directly or indirectly owns 1% or more of the total voting shares in the enterprise, or
- have been members of the BOM or the control committee for the last five years.

The Enterprise Law 2015 also allows for enterprises to have several legal representatives, as long as one of them resides in Vietnam and must authorise another person if he/she needs to travel abroad. If the enterprise charter is silent, the chairman will be the default legal representative.

The Enterprise Law 2015 also provides for the position of the company secretary. The company secretary can be hired by the chairman of the BOM to assist him/her and the BOM in carrying out their relevant duties.

## 2. Acquisition Methods

The acquisition of an enterprise can take different forms:

- purchase of shares
- purchase of charter capital
- acquisition of assets, or
- merger or consolidation of a business.

### 2.1 Acquisition of Shares or Charter Capital

The purchase of shares or equity is classified as either direct investment under the Investment Law or indirect investment under Securities Law (Law 70/2006/QH11 adopted by the National Assembly on 29 June 2006 on securities).

Under the current Investment Law, the purchase of shares or equity by an investor so that the investor can participate in the management of an enterprise is considered direct investment; whereas, any purchase of shares that does not trigger participation in the management of the target enterprise is considered an indirect investment.

However, this distinction between indirect and direct investment is not well-drawn, as all investors are typically accorded with certain rights to participate in the management of an enterprise corresponding to their equity holding ratio in such enterprise.

Indeed, the Investment Law 2015 ceases to distinguish the purchase of shares or equity as a direct or indirect form of investment. Acquisitions of shares or charter capital only trigger the obligation to register the acquisition with the licensing authorities in two cases, i.e. the purchase of shares or equity by a foreign investor into:

- an enterprise operating in business sectors where foreign investors are subject to restrictive conditions, or
- a target enterprise results in that foreign investor owning 51% or more charter capital of the targeted enterprise.

The target SM LLC or MM LLC will need to subsequently register for the amendment of its enterprise registration certificate (ERC), unlike in a case where the target enterprise is a JSC, where no further ERC amendment is required.

## 2.2 Acquisition of Assets

An onshore enterprise could also acquire some or all of the assets of another enterprise. For this purpose, the assets of an enterprise which may be acquired include the following:

- valuable papers
- bonds, debts and other forms of borrowing
- contractual rights and comprising intellectual property rights, including trademarks, industrial designs, inventions, trade names, origin or appellations of origin of goods
- rights with respect to real property, including the right to lease out, assign, mortgage and use to provide guarantees
- items of revenue derived from investment activities, including profits and interest on shareholding, dividends, royalties and all types of fees
- other assets and rights with economic value in accordance with law and international treaties of which Vietnam is a member.

## 2.3 Mergers/Other Acquisition Methods

The Enterprise Law provides for merger, consolidation, division and separation as described below. All of these forms of restructuring enterprises take effect upon the approval of the relevant ICIA. Various rights and obligations cease to exist and others are assumed by the parties involved on an enterprise reorganisation.

### 2.3.1 Mergers

Under the Enterprise Law, an enterprise merger is defined as a process whereby one or a number of enterprises of the same type transfers all of its assets, legal rights, liabilities and benefits for the purpose of merging with another enterprise.

The Enterprise Law 2015 provides the same definition for 'enterprise merger', but does not require the merging enterprises to be of the same type.

After a merger is completed, the target enterprise will cease to exist and the surviving enterprise will assume the legal rights and interests of the target enterprise. Additionally, the surviving enterprise will be liable for unpaid debts, labour contracts, property obligations and other liabilities of the target enterprise.

### 2.3.2 Consolidation

Under the 2005 law, enterprise consolidation is a process whereby two or more enterprises of the same type combine all of their assets, legal rights, liabilities and benefits for the purpose of consolidating among themselves so as to become a new enterprise.

The Enterprise Law 2015 provides a similar definition of 'enterprise consolidation', but does not require the consolidation to be undertaken among enterprises of the same type.

In terms of consolidation, the consolidating enterprises will be extinguished upon completion and the new consolidated enterprise will assume the legal rights and interests, and is liable for the unpaid debts, labour contracts and other liabilities of the consolidating enterprises.

### 2.3.3 Division

Enterprise division means division of all assets, legal rights, liabilities and benefits of an enterprise for the purpose of establishing two or more new enterprises.

Under the Enterprise Law 2015, the definition of 'enterprise division' is made clearer, to mean the process whereby an LLC or a JSC may split up its members/shareholders and assets to establish two or several new enterprises in the following cases:

- a portion of capital/shares of members/shareholders, along with the respective assets, is divided between the new enterprises by the ownership ratio in the original enterprise and in correspondence with the assets transferred to the new enterprises
- all the portion of capital/shares of one or several members/shareholders, along with the respective assets, is transferred to the new enterprises, or
- both of the above.

In an enterprise division, the original enterprise will disappear and the newly established enterprises will be jointly liable for the unpaid debts, labour contracts and other liabilities of the original enterprise. However, the new enterprises may make agreements with creditors, customers and employees in order for one of them to perform these obligations.

#### 2.3.4 Separation

Enterprise separation is the transfer of a part of the assets of an enterprise for the purpose of establishing one or more additional enterprises of the same type.

'Enterprise separation' is defined as the process whereby an LLC or a JSC splits off, where a part of the assets/property, rights and obligations of an existing enterprise (the separating enterprise) are transferred to establish one or a number of new enterprises (the separated enterprises).

In the case of enterprise separation, the separating enterprise and the separated enterprise will be jointly liable for the unpaid debts, labour contracts and other liabilities of the separating enterprise, except where the separating enterprise, the separated enterprise, and the creditors, customers and employees of the separating enterprise agree otherwise.

### 3. Negotiation, Signing and Closing

#### 3.1 Pre-Contractual Activities

##### 3.1.1 Memorandum of understanding/Letter of intent

A preliminary agreement, such as a memorandum of understanding (MOU) or a letter of intent (LOI), is not a prerequisite to a merger or acquisition in Vietnam, but serves as a useful tool for the parties to reach an initial 'meeting of the minds'. Due to the potentially different business practices between a domestic Vietnamese enterprise and a potential foreign investor, a MOU or LOI is a means for the parties to flesh out their intentions and assumptions at an early stage.

##### 3.1.2 Due diligence

A potential investor may find it challenging to conduct a comprehensive due diligence exercise in Vietnam due to a lack of transparency among domestic enterprises. A target enterprise may invoke State secrecy laws to prevent disclosure of information if the State has equity in the enterprise. In addition, potential investors may find domestic enterprises' record-keeping and accounting practices lacking compared with international standards, making the task of verifying a target enterprise's compliance status even more challenging. Patience, diplomacy and good communication skills are necessary for obtaining the relevant information pertaining to a target enterprise.

Domestic enterprises in Vietnam are also typically unfamiliar with the documents required to be provided or disclosed in a due diligence exercise, or how to properly organise them for the other side. This may occasionally affect the results of a due diligence review, which may cause significant delays in obtaining information from the target.

### 3.1.3 Right of first refusal and lock-ups

Any investor in an MM LLC has the right to sell or otherwise transfer his/her/its portion of charter capital. However, he/she/it must provide the remaining investors in the enterprise the first opportunity to obtain the charter capital under conditions and terms that are equal to or better than that which it would offer a third party (pre-emption rights). Only after the remaining investors in the MM LLC have each refused this opportunity may a third party be offered the charter capital.

In a JSC, within three years of the date the enterprise receives an ERC, a founding shareholder has the right to freely transfer his/her/its common shares to another founding shareholder of the same enterprise and may only transfer his/her/its common shares to a third party if so approved in a GSM. In that case, the shareholder intending to transfer his/her/its shares would not have the right to vote on that transfer of shares and the approved transferee automatically becomes a founding shareholder of the enterprise.

## 3.2 Customary Issues in Negotiating Acquisition Agreements

The following is a brief overview of certain key provisions in typical Vietnamese purchase agreements. Baker & McKenzie's fully interactive comparison of these same provisions across the range of jurisdictions covered in this Handbook can be accessed by clicking [here](#).

### Purchase Price

1	Is a purchase price adjustment common?  What type is common (e.g. debt-free, cash-free)?	Purchase price adjustments common. All types seen, including working capital adjustment, cash-free debt-free, NAV adjustments.
2	Is there a collar on the adjustment?	Collars not common. May be required where public company.
3	Who prepares completion balance sheet?	Usually prepared by the target enterprise.
4	Is the balance sheet audited?	Not necessarily.
5	Is an earn-out common?	More common in private equity transactions when the sellers continue to manage the target enterprise after closing. Less common where seller completely exiting. Earn-outs commonly capped.
6	Is a deposit common?	Not common.
7	Is an escrow common?	Not uncommon.
8	Is a break fee common?	Uncommon.

### Conditions Precedent

9	Express Material Adverse Event (MAE) completion condition?	Uncommon, but typically only available where there is a long period before execution and completion or a foreign seller.
10	Is the MAE general or specific?	Both seen.
11	Quantification of MAE?	Uncommon.

### Covenants, Access

12	Is a non-compete common? Do you use waterfall/ blue pencil provisions?	Common.
13	Non-solicit (of employees)?	Common (in conjunction with non-compete).
14	Non-solicit (of customers)?	Common (in conjunction with non-compete).
15	Broad access to books, records, management between sign and close	Generally get this for private deals.
16	Is it common to update warranty disclosure or notify of possible breach? What is the consequence?	Uncommon.
17	Is a separate tax covenant/indemnity or tax deed common?	Common to have tax indemnity, usually included in purchase agreement.

### Representations and Warranties

18	Materiality in representations – how is it quantified (e.g. by a \$ amount)?	Not uncommon and quantified by \$ amount or percentage of change.
19	How is knowledge qualified (e.g. specific people, actual/constructive knowledge)?	Knowledge qualifiers are growing. Often limited to actual knowledge and due enquiry of a specified list of senior management.
20	Is a warranty that there is no materially misleading/omitted information common?	Always requested by buyers, but typically one of the most contested warranties.
21	Is disclosure of data room common?	Becoming more common.

### Repetition of Representations and Warranties

22	Is it common to repeat warranties at completion/at all times between signing and completion? Is bring-down certificate at completion common?	Repetition at completion is common. Bring-down certificates not very common.
23	What is the applicable standard? True in all material respects? Material Adverse Effect standard?	True and accurate in all material respects common but often carve-out for fundamental representations which must be absolutely true.
24	Is double materiality common? e.g. where a materiality qualification is included in the bring-down condition to one party's obligation to close as well as in one or more representation.	Double materiality usually avoided.

### Limitations on Liability

25	What is the common cap amount (as a percentage of purchase price)?	Commonly 100%.
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26	Does the cap (and other limitations on liabilities) apply to the whole agreement or just warranties (or other particular terms)?	Both seen regularly.
27	What are the common exceptions to the cap?	Title and authority warranties the most common exceptions. Due to the unpredictability of the Vietnamese tax system (and tax officials), it is very difficult to have the seller accept an uncapped tax warranty.
28	Is a deductible or basket common?	Uncommon to have these limitations.
29	Is a <i>de minimis</i> common?	Not uncommon.
30	How long does liability survive? Are there any common carve-outs (e.g. fraud, tax, key warranties)?	Case-by-case basis.
31	Is warranty insurance common?	Uncommon.
<b>Reliance</b>		
32	Do financiers seek to rely on purchaser's due diligence reports?	Uncommon.
<b>Set-offs against Claims</b>		
33	Is a set-off against claims for tax benefits common?	Not commonly seen.
34	Insurance proceeds?	Uncommon.
35	Third party recoveries?	Uncommon.
<b>Damages, Knowledge</b>		
36	Obligation to mitigate damages?	Required by law, but not common to incorporate to purchase agreement.
37	Exclusion of consequential damages?	Not commonly addressed.
38	Is it common to include provisions that there is no liability if buyer had knowledge or buyer's knowledge no effect on warranty/indemnity?	Often silent.
<b>Dispute Resolution</b>		
39	Does local law allow for a choice of governing law? What is the common governing law?	Vietnamese law preferred for enforcement in Vietnam.
40	Is litigation or arbitration more common? If arbitration, where?	Case-by-case basis. If by arbitration, Singapore and Vietnam more commonly seen

## Stamp Duty

- 41 If stamp duty is payable, is it normally shared? None.

### 3.3 Formalities for Execution of Documents

#### 3.3.1 Transfers of shares or equity

Under the Enterprise Law 2015, a transfer of shares in a JSC can be made via a written agreement or via the securities market.

For LLCs, the law is silent on whether a written contract is required. However, written contracts are required to fulfil certain applicable notification/registration requirements as well as to secure rights and obligations of related parties. In practice, typically the share transfer/capital transfer is documented between the seller and the buyer by way of a written share purchase agreement (SPA) or a charter capital transfer agreement (CCTA).

#### 3.3.2 Transfers of assets

Written contracts may be required by law or necessary to fulfil applicable notarisation/registration requirements.

Some non-exhaustive examples of transfers of assets which must be made in writing include contracts for the transfer of intellectual property rights<sup>1</sup> and contracts for the transfer of real estate projects<sup>2</sup>.

### 3.4 Formalities for Transferring Title to Shares or Assets

#### 3.4.1 Transfers of title to shares and equity

If the transfer of shares in a JSC is made in a written contract, it must be executed by the duly authorised representatives of both the transferor and the transferee. The transferee will only be recognised as a shareholder when its/her/his name is recorded in the shareholders register of the JSC (Enterprise Law 2015).

Although not explicitly provided for under the Enterprise Law 2015, the same approach would apply for the transfer of charter capital of an LLC. When the capital is fully contributed, the LLC is required to issue a capital contribution certificate, which evidences the ownership proportion of the LLC member.

Foreign investors must open a capital account at a Vietnamese bank to make payments for acquiring shares and equity (Enterprise Law 2015).

#### 3.4.2 Transfers of title to assets

Transfers of certain assets must be registered with (e.g. transfer of property rights) or notarised by (e.g. transfer of real estate projects) the relevant authorities to be effective. The agreement therefore must be executed by the duly authorised representatives of the parties.

### 3.5 Formalities for Mergers

If the surviving enterprise has a market share of 30%–50% of the relevant market, the legal representative of that enterprise must notify the competition management authority before conducting a merger (Enterprise Law 2015).

<sup>1</sup> Arts. 46.1, 138.2 and 194.3, Law No. 50/2005/QH11 adopted by the National Assembly on 29 November 2005 on Intellectual property as amended in 2009 (Law on Intellectual Property).

<sup>2</sup> Art. 17.1(dd), Law No. 66/2014/QH13 adopted by the National Assembly on 25 November 2014 on real estate business (Law on Real Estate).

The surviving enterprise must also register with the business registration authority to amend its ERC within 10 days of the merger, by submitting an application dossier in which the written merging agreement is a compulsory item.

## 4. Regulatory Framework

### 4.1 Competition Law Considerations

Conduct that restricts competition in Vietnam is regulated by the Competition Law (Law 27/2004/QH11 on Competition adopted by the National Assembly on 3 December 2004).

The Competition Law applies to business organisations, individuals and enterprises producing or supplying products or services in the public interest, enterprises operating in industries and sectors that represent state monopolies, and foreign enterprises and trade associations operating in Vietnam.

The Competition Law prevails wherever there is inconsistency between provisions of the Competition Law and other laws regarding acts that restrict competition and/or enable unfair competition. However, provisions of international treaties to which Vietnam is a signatory or participant will prevail over the Competition Law where such provisions are inconsistent with the provisions of the Competition Law.

The Competition Law and its implementing regulations govern four main areas, including:

- agreements in restraint of competition
- abuse of a dominant market position/monopolistic positions (collectively, 'abuse of dominance')
- economic concentration (i.e. merger control), and
- acts of unfair competition.

### 4.2 Merger Control Overview

The following is a brief overview of the merger control position (including thresholds and timetables for clearance) in a typical Vietnamese purchase agreement, the latter taken from Baker & McKenzie's Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions across the globe (see Appendix C for further details).

Under the Competition Law, economic concentration can take the form of a merger, a consolidation, an acquisition or a joint venture.

An economic concentration is prohibited if the combined market share of the enterprises participating in the economic concentration represents more than 50% of the relevant market, except where an exemption is granted upon satisfaction of the criteria prescribed by law. Where the enterprises participating in an economic concentration have a combined market share ranging from 30%–50% of the relevant market, the legal representative of those enterprises must notify the relevant competition administration authority. These enterprises can only proceed with the economic concentration after receiving the approval of that authority. The notification requirement does not apply where the post-transaction enterprise is a small or medium-sized enterprise under Vietnamese law.

The Competition Law also provides limited exemptions for prohibited cases of economic concentration subject to conditions. Applicants for exemption must submit a comprehensive application dossier to the competition administration authority prior to proceeding with any economic concentration activities.

### Filing Obligation

Is a filing obligation voluntary or mandatory (i.e. are there penalties for failure to notify or for implementing a transaction without notification or approval)?

Mandatory.

### Timetable

In practice, what is the timetable for clearance (in Phase I and Phase II review)?

Pre-acceptance review: 2–3 weeks. The Vietnam Competition Authority (VCA) may request changes to the submission to meet the requirements of the law.

Official review: the VCA often uses the full review period (45 days) and in complicated cases the deadline can be extended twice, each time by 30 days.

## 4.3 Exchange of Competition-Sensitive Information and ‘Gun-Jumping’ Issues

Vietnamese law does not explicitly prohibit the exchange of competition-sensitive information between competitors. However, it is expected that the VCA will treat certain information-sharing arrangements as evidence of illegal agreements in restraint of trade. Such a practice is consistent with the more developed competition laws of other jurisdictions where exchanges could be treated as evidence of an illegal agreement where:

- confidential price or market information has been communicated between competitors
- there has been an anticompetitive effect on the market, and
- there is no legitimate justification for the exchange of information (see Appendix B for further information).

Penalties for competition law violations are potentially severe. Prohibited agreements are unenforceable and can be subject to fines of up to 10% of the total revenue of each of the relevant entities from the financial year prior to the year in which the breach is committed. In addition, enterprises’ licences can be withdrawn and enterprises may be forced to sell their stakes to other enterprises or remove problematic contractual terms in the agreements that purport to restrain competition. While penalties actually imposed to date have tended to be relatively modest, the enforcement of competition law in Vietnam is intensifying. It is worth remembering that the exchange of information at this stage can be used as evidence, even many years into the future, of an ongoing anti-competitive agreement.

Gun-jumping could expose enterprises to fines in addition to the risk of being found guilty of cartel behaviour (i.e. of making agreements in restraint of competition) should any agreement, coordination or information exchange take place. The fine for failing to notify (if the transaction is subject to notification) or proceeding with prohibited transactions (if the transaction is prohibited without any available exemption) is severe – up to 10% of the total revenue of each of the participating entities from the financial year prior to the year in which the breach is committed. If an enterprise applied for exemption for a transaction (which otherwise would be prohibited) but proceed to implement the transaction before approval was granted, it could be fined VND200 million.

## 4.4 Anti-Bribery, Corruption and Money Laundering

### 4.4.1 Overview of Vietnamese anti-corruption laws

Anti-corruption, or anti-bribery, is governed mainly by the Law on Anti-Corruption<sup>3</sup> and the Penal Code.<sup>4</sup>

The Law on Anti-Corruption is considered a 'code of conduct' for persons who hold positions of responsibility and power (officials).<sup>5</sup> The Law on Anti-Corruption only covers the prohibited acts of officials, not bribery offences, for which we need to look at the Penal Code. The Anti-Corruption Law does not provide sanctions for non-compliance either, referring instead to the Penal Code, the Law on Cadres and State Officials and the Law on Public Employees.

For bribery, the Penal Code provides for the culpability of:

- officials, and
- those giving bribes or acting as intermediaries in bribery.

The Penal Code also establishes the elements of corruption-related crimes and relevant punishments.

### 4.4.2 Receiving bribes vs giving bribes

The Penal Code defines corruption offences which may be committed by persons holding positions of responsibility and power - including the receiving of bribes and other crimes (Section A, Chapter XXI). Other 'position-related crimes' (including the giving of bribes, acting as an intermediary for bribery and other offences) are provided under Section B, Chapter XXI.

Those who abuse their positions and/or powers, have accepted or intend to accept (directly or through intermediaries) money, property or other material interests in any form, worth VND2 million or more to perform or not perform acts for the benefit, or at the request of, the bribe-givers will be subject to criminal liability for the crime of 'receiving a bribe' (Art. 279, Penal Code (not *verbatim*)). They may also be considered to have received a bribe if the sum involved is less than VND2 million if one of the following aggravating circumstances is present:

- serious consequences are caused
- the offender has been previously disciplined for similar acts, or
- the offender has been previously sentenced for corruption crimes (as contained in Section A, Chapter XXI of the Penal Code).

Likewise, and mirroring the above, those who offer a bribe worth VND2 million or more; or worth less than VND2 million but where the action following the bribe:

- causes serious consequences, or
  - the offence is committed more than once.
- will be criminally liable for the crime of 'giving a bribe.'

As the law does not define 'serious consequences' for either crime, the authorities have wide discretion to determine for themselves whether there has been a serious consequence.

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<sup>3</sup> Law on Anti-Corruption, passed by the National Assembly on 29 November 2005, effective on 1 June 2006, as amended in 2007 and 2012 (Law on Anti-Corruption).

<sup>4</sup> Penal Code, passed by the National Assembly on 21 December 1999, effective on 1 July 2000, as amended in 2009 (Penal Code).

<sup>5</sup> Art. 1.3, Law on Anti-Corruption.

#### 4.4.3 Money laundering

The Anti-Money Laundering Law establishes measures to prevent, detect, stop and combat acts of money laundering (Law 07/2012/QH13 on Anti-Money Laundering, effective since 1 January 2013 (AML Law)).

The AML Law applies to a large number of organisations/individuals including financial institutions and individuals/organisations operating in relevant non-financial sectors, such as casinos/betting; real estate-related services; legal services; notary and accounting services; investment trust services, services of company establishment, management and operation; services of provision of company directors and executive secretaries. According to the provisions of the AML Law, the above organisations/individuals must conduct measures for client identification (i.e. 'know your client' or 'KYC' procedures) and must establish internal regulations on the prevention of money laundering and report to the State Bank of Vietnam if:

- they are implementing high-value transactions
- they become aware of suspicious transactions
- they see any electronic money transfers having a value exceeding thresholds provided by the State Bank of Vietnam, or
- they have grounds to believe that other organisations/individuals have committed acts of money laundering to finance terrorism.

The AML Law also provides that any individual/organisation violating the provisions of this Law will face administrative sanctions (e.g. VND500 million for organisations) or prosecution for criminal liability under the Penal Code (e.g. up to 15 years of imprisonment).

### 4.5 Exchange Control, Foreign Investment Restrictions and Trade Regulation

#### 4.5.1 Exchange controls

This part is relevant for M&A activities undertaken by foreign investors in Vietnam.

##### ***For target enterprises that have an investment certificate***

Under Vietnamese laws on foreign exchange control, if a foreign investor wishes to acquire shares/contributed capital of an enterprise operating in Vietnam which has already been issued with an investment certificate, the target enterprise must open a direct investment capital account (DICA) at a licensed bank in Vietnam. The foreign investor will have to transfer the payment for the shares/contributed capital acquisition to such DICA and the target enterprise will subsequently transfer the payment to the seller. The DICA can be denominated in VND or foreign currency.

Additionally, under the Enterprise Law 2015, if the foreign investor is an offshore investor, he or she or it will need to open a capital account at a commercial bank operating in Vietnam. The offshore investor's payment for the shares/contributed capital of an enterprise operating in Vietnam must be carried out via his/her/its capital account in Vietnam.

##### ***For target enterprises that do not have an investment certificate***

If a foreign investor acquires shares/contributed capital of an enterprise operating in Vietnam which has not been issued with an investment certificate, the foreign investor itself will have to open an indirect investment capital account (IICA) for the payment for the shares/contributed capital acquisition to the seller.

#### 4.5.2 Foreign investment approvals and notifications

When the Enterprise Law 2015 and the Investment Law 2015 take effect on 1 July 2015, they will have a major impact on the licensing procedures and approvals in Vietnam with respect to foreign investment. All 'foreign investment' – meaning investments by foreign investors and also economic

organisations in Vietnam with 51% or more foreign investment capital ('Majority EFIC') – will need investment approval in Vietnam.

#### 4.5.3 Investment registration

Foreign investors, as defined by the Investment Law 2015, are foreign nationals and foreign corporate entities who must have an investment project in Vietnam and be issued with an investment registration certificate (IRC). On obtaining the IRC, they must establish a corporate entity and be issued with an ERC.

Majority EFICs are also subject to the same IRC licensing procedures as foreign investors. For example, if the Majority EFIC establishes a new enterprise with even 1% ownership in Vietnam, that investment will also be subject to such IRC licensing procedures.

#### 4.5.4 Investment registration certificates

Foreign investors must submit an application dossier to the licensing authority and request the issuance of an investment registration certificate (IRC) before implementing the investment project. Depending on the size and nature of the investment project, different 'preliminary approvals' will need to be obtained before the IRC is issued:

- preliminary approval from the National Assembly (Art. 30, Investment Law 2015): for investment projects with a significant or potentially serious effect on the environment (e.g. nuclear power plants; change of land-use purpose of national parks, natural conservation zones, landscapes and protection zones; forest areas of 50 hectares or more used for scientific research or experimentation, etc.)
- preliminary approval of the Prime Minister (Art. 31, Investment Law 2015): for projects for the construction and operation of airports; air transportation; national seaports; casinos, etc.
- preliminary approval of the People's Committee (Art. 32, Investment Law 2015): for projects for which the state allocates or leases out land without auction, tendering or transfer; and investment projects which require a conversion of the land use purpose, etc.

For these investment projects subject to preliminary approval, the IRC will be issued within 5 working days of issuance of the preliminary approval, which takes at least 35 days. Investment projects that are not subject to preliminary approval will be issued the IRC within 15 days upon receipt of the dossier.

#### 4.5.5 Enterprise registration certificate

Foreign investors must submit an application upon the issuance of the IRC to the licensing authority. The required documents for the issuance of the ERC can be duplicated from the documents used in the application dossier for the issuance of the IRC. For all types of investment projects, the timeline for the issuance of the ERC is 3 working days from receipt of the dossier. Majority EFICs can implement investment projects under the additional IRC without being required to obtain an ERC to establish a new corporate entity for subsequent investment projects.

#### 4.5.6 Mergers & acquisitions

A two-step procedure applies to foreign investors acquiring ownership in target enterprises that are in industries subject to conditions applicable to foreign investors or to acquisitions resulting in foreign investors or economic organisations with foreign investment capital owning 51% or more of the charter capital of those target enterprises.

The two-step procedure consists of registration of the acquisition and registration to amend the ERC of the target enterprise. For the registration of the acquisition, the foreign investor and the target enterprise will submit an application dossier to the licensing authority to seek a written notice from that authority on the acquisition and be issued with that notice within 15 days of the submission date. The ERC of the target enterprise (i.e. an LLC) and the notification of the change of shareholders in the target enterprise (i.e. the JSC) will be amended/effective within 3 working days of issuance of the licensing authority approval on the acquisition.

#### 4.5.7 Public companies

A public company is defined as a JSC that:

- has already conducted a public offering of its shares
- has its shares listed on a stock exchange, or
- has its shares owned by at least 100 investors, excluding professional securities investors; and has a contributed charter capital of VND10 billion or more.

Decision No. 555<sup>6</sup> provides that foreign investors can only buy up to 49% of all public companies, including both listed and unlisted public companies (or for banks, a cumulative total of 30% subject also to individual shareholding limits). There are also tender offer requirements triggered when an acquirer makes an offer that would lead to an ownership of 25% or more of a public company.

#### 4.5.8 Import/export controls

Import/export activities are subject to post-clearance audits, which are conducted by the customs authority at any time within a five-year period from the date of the import/export. The audit may, at the discretion of the customs authority, focus on a specific international transaction or assess the regulatory compliance of the importer/exporter within the last five years as of the date of the audit.

As non-compliance issues are sometimes overlooked during customs clearance, the audit may retroactively impose remedies and sanctions.

Risks of violation may result from the following activities:

- import/export of banned goods, e.g. weapons, antiques, endangered animals and plants, used consumer goods
- import/export of goods subject to permits, tariff quotas, or state management: e.g. chemicals, minerals, tobacco, salt, eggs, sugar
- submission of invalid documents, e.g. certificates of origin, certificates of quality control, food safety certificates
- false declaration of exports/imports, including HS code, transaction price, quantity, duty amount, etc.

Vietnam also limits market access to foreign investors to certain service sectors. For example, Vietnam has limited the trading rights and distribution rights of foreign enterprises. Particularly, under the current phase-in of Vietnam's WTO commitments, Vietnam still maintains a distinction regarding foreign distributors, who are not entitled to import, distribute, or export cigarettes and cigars; books, newspapers and magazines; video records on various medium; precious metals and stones; pharmaceutical products and drugs; explosives; processed oil and crude oil; and rice, cane and beet sugar. Foreign entities cannot establish retail outlets (beyond the first outlet), without passing the 'economic needs test' (i.e. discretionary approval of the authority for second and subsequent retail outlet based on whether there is economic needs for the additional outlets).

### 4.6 Industry-Specific Regulation

The Investment Law 2015 does not itself, provide for a cap on foreign participation in Vietnamese enterprises (listed or unlisted) but states that foreign investors can own unlimited charter capital in a corporate entity, subject to exceptions under laws on securities, exceptions regarding equitised state-owned enterprises, and restrictions under international treaties and other Vietnamese laws.

<sup>6</sup> Decision No. 55/2009/QĐ-TTg dated 15 April 2009 regarding foreign investors holding rates on the Vietnamese securities market (Decision No. 555).



The Investment Law 2015 lists 267 business sectors subject to these conditions – applicable to both Vietnamese and foreign investors. This list is updated occasionally by the government. The conditions applicable to investments in these sectors are currently provided either in specialised laws governing the sectors in question or in the commitments made in international agreements or organisations of which Vietnam is a member, such as the WTO, which are generally commitments in terms of foreign participation in these sectors.

In terms of procedure, investment projects on this conditional list but which do not fall under the list of investment projects subject to the preliminary approval of the National Assembly, the Prime Minister, or the People's Committee, will only have to obtain an IRC and ERC by going through the licensing procedures described in 4.5, but must fulfil the condition stipulated under the relevant laws and regulations before implementing the investment project.

## 5. Transfer Taxes

### 5.1 Acquisition of Shares

The transfer of capital and shares is not subject to value-added tax (VAT). In addition, no other transfer tax is imposed on an acquisition of shares or acquisition of securities.

However, sellers will be subject to capital gains tax, at rates which differ depending on whether the sellers are individuals or corporate entities, and whether it is an acquisition of shares or capital. In particular, individual sellers pay personal income tax (PIT) at a rate of 20% on the gains they make from the transfer of capital in an LLC. For the acquisition of shares in a JSC, PIT will be imposed at the rate of 0.1% on the sales price. Corporate sellers, if they are foreign entities, will pay enterprise income tax (EIT) at a rate of 22% (20% from 1 January 2016) on any gains generated from the transfer of capital of a LLC or from the transfer of shares in a non-public JSC; and EIT at a rate of 0.1% on the proceeds made from the transfer of shares in a public JSC. If the sellers are local corporate entities, the EIT rate will be 22% on the gain (20% from 1 January 2016).

### 5.2 Acquisition of Assets

#### 5.2.1 Registry fees

It is mandatory to register the ownership of certain types of property in Vietnam. Registry fees, known in Vietnamese as *lệ phí trước bạ*, are imposed on purchasers of property when they register the ownership of the property.

The fee is only applicable to transfers in ownership of certain types of property, including vehicles, vessels, guns, buildings, houses and land.

Registry fees equal to 0.5% of the property value must be paid with respect to land and buildings. Different registry fee rates apply for other items. However, except in the case of motor vehicles with fewer than 10 seats, registry fees for one asset may not exceed VND500 million.

#### 5.2.2 Value-added tax

The transfer of tangible assets is subject to VAT. The rate may vary depending on the assets, but generally the standard rate is 10%.

### 5.3 Mergers

Mergers do not trigger registry fees or VAT.

## 6. Employee Issues

### 6.1 Method of Transfer under Local Law

#### 6.1.1 Acquisition of shares and charter capital

Where a foreign investor sells its equity in an enterprise, there should be no change in the identity of the employer and it may be said that no legal transfer takes place merely by virtue of a change in the ownership of the employer.

#### 6.1.2 Acquisition of assets

The acquisition of assets does not automatically transfer the employees from the vendor enterprise to the acquirer. The method for employee transfer in Vietnam is 'termination and re-hire', meaning the employees will terminate their employment with the vendor enterprise and sign new labour contracts with the acquirer.

#### 6.1.3 Mergers and other acquisition methods

In cases of merger, consolidation, division and separation of enterprises, the surviving enterprise must continue employing all employees of the vendor or diluted enterprise(s), and amend or supplement their labour contracts as appropriate (Labour Code). If the surviving enterprise is unable to employ all current employees and wishes to conduct any layoff, it must prepare and implement a labour usage plan in accordance with the requirements stated at **6.3**.

### 6.2 Approval or Consultation Requirements

Except for the approval of the ICIA, the law does not require the transferor to obtain the consent of a local labour authority, the employees or the trade union before the sale of an enterprise, nor does it require the transferor to give prior notice to the labour authority. However, if a layoff is to be conducted before or after the transaction, the applicable employer must comply with the requirement for consultation with the employee representative and notification to the labour authority (see **6.3**).

### 6.3 Protection against Dismissal

#### 6.3.1 Redundancies

In cases where the transaction results in employee layoffs, the law requires the applicable employer to go through a statutory set of procedures and formalities, which include formulation of a labour usage plan, consultation with the employee representative and notification to the labour authority.

In the case of lay-offs, the employer is required to pay the job-loss allowance to employees who have worked for at least 12 months. This allowance is equal to one month's salary for each year of service, but cannot be less than two months' salary. The duration of service used for calculating job-loss allowance does not include any period when the employee and the employer are participating in an unemployment insurance scheme.

Under the new Law on Employment which took effect on 1 January 2015, unemployment insurance is mandatory for all employees working under employment contracts lasting three months or more. In Vietnam, the unemployment insurance scheme was first established on 1 January 2009. This means that if a retrenched employee has worked for the employer prior to 1 January 2009 and participates in the unemployment insurance scheme afterwards, he or she will receive a job-loss allowance from the employer for the duration of service before 1 January 2009, and will enjoy unemployment benefits provided by the social insurance fund for the duration of his or her service while participating in the unemployment insurance scheme as of 1 January 2009.

Nevertheless, even though the employer is generally entitled to conduct layoffs in the case of an M&A transaction, it is usually recommended that the employer reaches mutual agreement on employment termination with the redundant employees to minimise the risks of these employees filing claims against the employer.

### 6.3.2 Penalties

Failure to pay the job-loss allowance in accordance with the law will result in an administrative penalty of up to the VND equivalent of USD1,000, depending on the number of employees affected. An employer will be required to pay this allowance in full plus interest.

Failure to comply with statutory retrenchment procedures may render the layoff illegal. If that is the case, the retrenched employees may take legal action and file claims against the employer for reinstatement and back-pay (salary and insurance contributions) for the time that they could not work.

**Appendices**

- A. EU Merger Control Regime Summary
- B. Broad Principles of Information Exchange and 'Gun-Jumping'
- C. GMAP Tool (Process Map/Summary)
- D. OECD Convention and Signatories, FCPA And UK Bribery Act 2010 Summaries
- E. Baker & McKenzie Offices and Associated Firms

## APPENDIX A

### EU MERGER CONTROL REGIME SUMMARY

#### 1.1 Introduction

EU Regulation 139/2004 (the Regulation) provides for mergers, acquisitions and joint ventures (which the Regulation refers to as ‘concentrations’) between economic entities (referred to in EU law as ‘undertakings’) with an EU dimension, subject to investigation by the European Commission. To a large extent, this ousts the competence of national merger control authorities in dealing with such concentrations. The Regulation also applies to the other EEA member states, namely Iceland, Norway and Liechtenstein.

Concentrations with an EU dimension must be notified to the Commission. Regulation 802/2004 implements Regulation 139/2004 in dealing with the content of notifications; calculation of time-limits in respect of notifications; procedure for hearings involving the parties concerned; and access to files and the treatment of confidential information.

#### 1.2 Timing and Procedure

Under Article 4(1) of the Regulation, concentrations with an EU dimension must be notified to the Commission before their implementation. Notification may be made at any time provided the parties demonstrate to the Commission in good faith their intention to conclude an agreement, for instance, based on a letter of intent.

The obligation to notify falls on the purchaser in the case of an acquisition; on both parties in the case of a full merger; and on the controlling parent companies in the case of a joint venture. Failure to notify may result in the imposition of a fine of up to 10% of the notifying party’s aggregate turnover.

Notifications must be made on a prescribed form (Form CO). Preparation for a notification should begin well in advance of signing (preferably 6–8 weeks prior). A large amount of information must be supplied to the Commission. It is standard practice to engage in pre-notification discussions with the Commission to ensure that the proposed transaction does not raise insurmountable concerns and that the final notification is in all material respects complete (see below). The parties must also consider, at an early stage, whether to request a pre-notification referral to the Commission or to one or more member states (see 1.5).

##### *Phase I review*

The Commission must begin to investigate the notification within one day of receiving it. Where the proposed concentration does not pose any competition problem, the Commission must announce its decision to this effect within 25 working days (Phase I). This will be extended to 35 working days if a member state has requested a referral of all or part of the notified concentration to that member state or if the parties to the Concentration submit commitments to the Commission to obtain clearance at this first phase.

##### *Phase II investigation*

Where the proposed concentration may adversely affect competition, the Commission will decide within Phase I whether to initiate full proceedings with respect to the proposed transaction (Phase II). These proceedings last for up to a further 90 working days. This period will be increased to 105 working days if the parties offer commitments (see 1.7 for examples) – unless commitments are offered less than 55 working days after the initiation of proceedings. The notifying parties may request an extension of the time-period within 15 working days of initiation of proceedings. The Commission may also extend the time-period at any time with the agreement of the notifying parties. That extension may not exceed 20 working days in total.

The Commission must decide within the Phase II period to declare the proposed transaction either compatible or incompatible with the EU merger rules. If it is incompatible, the Commission will prohibit the transaction and may order appropriate remedial action.

*European Commission's power to investigate, impose fines and suspend time-limits*

Time-limits are normally counted as of the working day following that on which a notification is received by the Commission. However, if the information contained in the notification is incomplete in any material respect, the Commission may decide not to 'start the clock' until the working day after that on which it receives the complete information. In such cases, the Commission will seek the missing information from the notifying parties and fix a date by which the information must be provided.

The Commission can request information from the parties (via a formal Decision), and conduct an unannounced inspection of the books and records on the parties' premises (in a so-called 'dawn raid'). The Commission may also conduct interviews with employees. The Commission has power to impose fines of up to 1% of aggregate annual turnover of the notified concentration, as well as periodic penalty payments of up to 5% of daily turnover of the notified concentration for each working day of delay on undertakings which supply incorrect or misleading information, miss the deadline for an information request (by Decision), or refuse to submit to an inspection.

The Commission can also suspend the Phase II time-limit if it needs to request information, or order an inspection (by Decision), owing to circumstances for which one of the undertakings involved in the concentration is responsible (typically, where a party has provided incomplete information within the time-limit fixed by the Commission, or has refused to cooperate with an investigation, or where the notifying parties have failed to inform the Commission of material changes to the facts provided in the notification). The suspension is lifted when the reason for the suspension is removed.

*Timing of the implementation of the Concentration*

Concentrations must not be implemented until they are declared compatible by the Commission, unless the Commission has granted a derogation at the parties' request. A derogation may be applied for and granted at any time, but may be made subject to conditions and obligations to ensure conditions of effective competition. The Commission may impose a fine of up to 10% of aggregate turnover of the notified Concentration on undertakings implementing a concentration without having been granted a declaration of compatibility or a derogation.

*Timing of referrals*

The timing implications of pre- and post-notification referral procedures are discussed at **1.5**.

**1.3 Scope of Merger Control – The Meaning of 'Concentration'**

The Regulation provides that a 'concentration' occurs where:

- two or more previously independent undertakings merge to become one new independent undertaking, or
- one or more persons controlling an undertaking acquire direct or indirect control of the whole or parts of another undertaking. Certain joint ventures fall within this second category.

A joint venture will be a 'concentration' for the purposes of the Regulation if two or more undertakings acquire joint control, and if the joint venture is 'full-function': i.e. performing (on a lasting basis) all the functions of an autonomous economic entity. Joint ventures that are not 'full-function' are not notifiable, but need to be assessed in accordance with the criteria of Article 101, paragraphs (1) and (3) of the Treaty on the Functioning of the European Union.

'Control' is defined as the ability, by whatever means, to exercise decisive influence on an undertaking by the ownership of or the right to use the assets, or rights or contracts conferring decisive influence on the composition, voting or decisions of the undertaking's organs. Effective control may, therefore, be acquired even where less than half of the voting rights are acquired. The Commission will take an individual decision in each case as to whether decisive influence may be exercised by the purchaser in accordance with the Commission's guidelines set out in its Notice on the concept of a concentration. For example, in one case, the Commission held that a 39% holding in a company whose remaining shares were widely dispersed, and where the next largest shareholder

had a 4% shareholding, was sufficient to give decisive influence. In another case, an increase in a shareholding from 20.94% to 25.96% was found to confer decisive influence, as it would result in the shareholder having more than 50% of the vote in the shareholders' meetings, since more than half the shareholders were small investors who did not exercise their voting rights.

The Commission has also held that moving from joint control of a joint venture to sole control will constitute a new concentration.

## 1.4 The Meaning of 'EU Dimension'

If a concentration is found to exist, it will be necessary to decide whether it has a EU dimension. If it has, the Regulation will apply; if not, the EU rules are inapplicable, but national merger control laws may apply. A concentration is assessed in terms of worldwide turnover, EU turnover and geographical distribution of turnover. Under Article 1.2 of the Regulation, concentrations have a EU dimension where the undertakings concerned have a combined aggregate worldwide turnover of more than EUR5 billion, the aggregate EU turnover of each of at least two of the undertakings concerned is more than EUR250 million, and all the undertakings concerned achieve more than two-thirds of their Community-wide turnover in one and the same member state.

Under Article 1.3 of the Regulation, concentrations also have a EU dimension where:

- i. the undertakings concerned have a combined aggregate worldwide turnover of more than EUR2.5 billion
- ii. in each of at least three member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million
- iii. in each of the three member states included in (ii) above, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR25 million
- iv. the aggregate community-wide turnover of each of at least two of the undertakings concerned is more than EUR100 million.

Purely national Concentrations are excluded: if each of the undertakings concerned achieves more than two-thirds of its aggregate community-wide turnover in the same member state, the concentration will not fall within the scope of the Regulation.

Aggregate worldwide turnover comprises the amounts received by the undertakings concerned in the preceding financial year from the sale of their products and services after deduction of sales rebates, VAT and other taxes directly related to turnover. The turnover calculation must include not only that of the undertaking which is party to the concentration, but also the group to which it belongs – that is, all those undertakings in which it separately or jointly has a controlling interest and those undertakings which separately or jointly have controlling interest in it and all other undertakings in which those undertakings also have a controlling interest.

However, there is an important exception from this accumulation rule. Where the concentration consists of the acquisition of a subsidiary or otherwise of only a part of an undertaking, only the turnover relating to that subsidiary or that part is taken into account (i.e. generally only the turnover of the target as opposed to the seller's entire turnover).

With regard to certain special sectors, namely, banks, credit and other financial institutions and insurance operations, turnover is not used and the calculation is based on a proportion of income items or gross premiums, respectively.

## 1.5 Referrals to and from Member States

### 1.5.1 Pre-notification referrals requested by the parties

Under the Regulation, the parties to the concentration can request a pre-notification referral of the whole or part of a concentration from the Commission to one or more member states if the concentration may significantly affect competition in a distinct market within a member state (Art. 4(4),

the Regulation). The parties can request a referral to the Commission if a concentration that does not have a Community dimension is nonetheless capable of being reviewed under the national laws of three or more member states (Art. 4(5), the Regulation).

A request under Article 4(4) or 4(5) must be made to the Commission in the form of a detailed 'reasoned submission', called 'Form R/S'. The Commission must forward the request to the relevant member states without delay. The member states have 15 working days from receipt of the request to veto it.

If, under Article 4(4), no member state vetos the request, the Commission has 25 working days from receipt of the request to decide whether to grant it. If, under Article 4(5), there are no vetos from any member states, the Commission will automatically have jurisdiction to review the concentration. However, a veto from one member state will result in the request being refused in its entirety.

### 1.5.2 Post-notification referrals requested by the member states

The Regulation gives flexibility to the member states to request a post-notification referral of the whole or part of a concentration from the Commission to the member state (Art. 9, the Regulation), or from the member state to the Commission (Art. 22, the Regulation).

A member state may make an Article 9 request within 15 days of receipt of a copy of the notification. The Commission has 35 working days from notification to examine the request. If the Commission agrees with the member state that the concentration threatens to affect significantly competition within a distinct market within that member state, it may refer all or part of the case to the member state. If the Commission finds that all or part of the concentration affects competition in a distinct market within the requesting member state, which does not constitute a substantial part of the Common Market, the Commission must refer the case to the member state. One or more member states may request an Article 22 referral within 15 working days of the date on which a Concentration is notified or otherwise made known to the requesting member state. This is provided that the Concentration does not have a Community dimension, but affects trade between member states and threatens to significantly affect competition within the territory of the requesting member state. The Commission may also invite one or more member states to make an Article 22 request. The Commission must inform the parties and the other Member States of an Article 22 request without delay. Other member states can join the initial request within 15 working days of being informed of it. The Commission then has to decide within 10 further working days whether to accept a referral. The requesting member states' national time-limits are suspended while the Commission examines the request.

## 1.6 Criteria for Evaluating Concentrations

The Commission will assess concentrations with a EU dimension by considering their effect on market structures and competition in the EU. Concentrations which will significantly impede effective competition in the EU or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, will be declared incompatible with the EU, and will be prohibited.

The Commission must, therefore, identify the relevant product and geographic markets in which the parties operate. The relevant product markets comprise the products supplied by the parties and any other products which can be regarded as substitutable, having regard to the characteristics, price and function of the parties' products. The relevant geographic market comprises the area in which the parties supply their products or services and which have similar competitive conditions, thereby excluding neighbouring areas where these conditions may be different.

Having identified the relevant markets, the Commission will consider whether any of the parties already enjoys a dominant position which will be strengthened by the concentration in any such market, or whether the concentration will create a dominant position in any such market, which will significantly impede competition in the whole or part of the EEA. The Commission will now also consider whether the concentration eliminates an important competitive constraint on non-dominant players in an oligopolistic market, as a result of which competition is significantly impeded in the whole or part of the EEA.



The concepts of 'significant impediment to effective competition' and 'dominance' are not defined in the Regulation, but in the Regulation's recitals. A combined market share of 25% or less is described as an indication that the concentration is compatible with the Community interest.

Full-function joint ventures are evaluated in the same way as all concentrations, that is, whether they will significantly impede effective competition. However, joint ventures may also lead to the coordination of the competitive behaviour of the parents. Such cooperative effects are appraised within the same procedure as the Concentration, but in accordance with the criteria of paragraphs (1) and (3) of Article 101 of the Treaty on the Functioning of the European Union. This means that the test will be whether the cooperative effects afford the undertakings concerning the possibility of eliminating competition in respect of a substantial part of the products or services in question. The Commission takes into account whether two or more of the joint venture's parents retain activities in the same market to a significant extent as the joint venture or in a market which is upstream, downstream or neighbouring that market.

## **1.7 Remedies**

**Prohibition:** the Commission can prohibit a merger. It also has power to order divestiture or other appropriate action, if a merger has been completed.

**Fines:** the Commission can impose fines of up to 10% of turnover on parties who give effect to a merger either during the suspensory period or after the Commission has issued a decision prohibiting the merger and also on parties who fail to divest a business or take other action which the Commission has ordered them to take.

**Commitments:** the parties may try to avoid a decision prohibiting the merger by offering appropriate commitments to the Commission. In practice, commitments have involved, for example, selling off interests in competing businesses; severing links with a major purchaser and reorganising exclusive distribution networks. Commitments may be offered during either Phase I or II.

## APPENDIX B

### BROAD PRINCIPLES OF INFORMATION EXCHANGE AND 'GUN-JUMPING'

Because a transaction may be subject to review by anti-trust/competition authorities locally or around the world, and because discussions between competitors or potential competitors can be misconstrued, it is important that the parties to a transaction take extensive precautions to comply with all applicable antitrust/competition laws as they negotiate the transaction agreement and between signing and closing.

#### 1. Creating Documents about the Transaction

- 1.1. All notes, minutes and other documentation of any kind whatsoever created by the parties to a transaction, their affiliates and consultants in connection with a transaction are likely to be reviewed by those competition authorities whose prior consent is required to implement the transaction.
- 1.2. For example, both the US<sup>1</sup> and EU<sup>2</sup> pre-merger notification forms require production of all studies, surveys, analyses, and reports prepared by or for an officer or director for the purpose of evaluating or analysing the acquisition, including market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. Accordingly, all documents that have been prepared to date that might fall within the scope of this requirement should be identified for submission and new documents that might fall within the scope of the requirement should be prepared in 'draft' so they can be reviewed by counsel before finalisation.
- 1.3. Furthermore, participants in negotiation and implementation task forces should recognise that any notes they take or emails or memos they write during the course of negotiations about the transaction agreement or between signing and closing can be obtained by antitrust authorities in the course of their review of the transaction. Notes should therefore be kept to a minimum and should not address issues that are competitively sensitive.

#### 2. Coordinated Activities by the Parties

- 2.1. Under antitrust/competition laws, parties who are competitors are required to act as competitors until any transaction between them is closed.
- 2.2. The period before closing of a transaction usually involves three business stages: negotiations; due diligence; and transition (or integration) planning. Because parties who are competitors are expected to act as competitors until the transaction is closed, the permissible scope of coordinated activities between the parties is limited during the pre-closing period.
- 2.3. There are two antitrust principles to bear in mind when negotiating transactions and taking implementing steps before closing. First, pre-closing coordination between the parties may violate the merger control laws of those countries where clearance is required before closing. Most merger control regimes provide for a period which prohibits the parties from integrating their operations before the antitrust/competition review has been completed or before a waiting period has expired. Penalties for non-compliance often include substantial fines.<sup>3</sup> Second, any joint activities between the parties prior to closing will be subject to review under applicable competition laws that prohibit contracts, combinations and conspiracies that unreasonably restrain trade. Because the parties remain competitors until the transaction has closed, any interim restrictive agreements between them could be illegal. The laws prohibiting

<sup>1</sup> Item 4(c) of the Notification Form required to be submitted by parties to transactions satisfying the notification thresholds of the US Hart-Scott-Rodino Antitrust Improvements Act of 1976.

<sup>2</sup> See 5.4 of Form CO relating to the Notification of a Concentration pursuant to Regulation (EC) No 139/2004.

<sup>3</sup> In the US fines for so-called 'gun-jumping' activity are up to \$16,000 for each day the parties are in violation. In the EU, the European Commission may impose penalties of up to 10% of the aggregate turnover of the parties involved.

restrictive agreements are applicable throughout the pre-closing process, even after merger control clearance has been obtained or any merger control waiting periods have expired.

- 2.4. As a general rule, prior to closing the parties should act as independent entities and not make any joint business decisions until the transaction has closed. Similarly, neither party should base any of its independent business decisions on competitively sensitive information, discussed more fully below, that is obtained from the other party in the course of negotiations, due diligence or transition planning. Where European authorities suspect that these rules have not been respected, they can and do carry out unannounced inspections or 'dawn raids' to verify the nature of any infringement.

### **3. Exchanging Competitively Sensitive Information**

- 3.1. The exchange of competitively sensitive information between competitors should be carefully structured and monitored to avoid any illegal conduct and to minimise the risk that such information will be used inappropriately if the transaction is aborted.
- 3.2. The parties to a proposed transaction typically exchange a wide variety of information when negotiating a transaction, conducting due diligence, and planning the integration of operations. Access to competitively sensitive information is often necessary for planning and valuing the transaction, but, as a general rule, the exchange of such information between competitors or potential competitors can raise antitrust/competition issues even if the parties do not engage in joint business activities prior to closing the transaction. The more information the parties exchange about their prices, costs, customers, strategies, etc., the more likely it is that competition may be threatened in the interim between negotiations and closing. The antitrust/competition authorities have expressed concern that such exchanges can enable the parties to coordinate their pre-closing activities without any express agreement. They have also expressed concern that the parties might use such information in an anticompetitive way if the transaction is ultimately abandoned.
- 3.3. Given these concerns, some safeguards are necessary to allow the parties to agree and implement their transaction within the letter and the spirit of the antitrust/competition laws. Such safeguards are intended to ensure the parties do not exchange competitively sensitive information and reduce the risk that either party would use any information to influence its interim operations or to harm the other party if the transaction is aborted.
- 3.4. The parties should limit the information that they exchange to what is relevant and necessary to negotiating the transaction agreement, the due diligence process, and transition planning, in order to avoid any suggestion that the transaction is a 'sham' attempt to engage in collusive behaviour.
- 3.5. The parties should limit the collection, exchange and dissemination of competitively sensitive information to those employees responsible for negotiating the transaction. Ideally, none of those employees should be responsible for the day-to-day business decisions or oversight of the overlapping business, thus reducing the risk of anti-competitive use of such information.
- 3.6. The parties can minimise the antitrust/competition risk by using an independent third party (e.g. a consulting firm) to collect, filter, and assess competitively sensitive information without disclosing such information to the other party. If necessary and relevant to the transaction, such information can be provided on a confidential basis subject to a confidentiality agreement with an independent third party for analysis and review. While the third party may not then exchange the information with the parties, it could provide a summary or redacted version of the information and advise the parties based on that information.
- 3.7. The parties should request advice from legal counsel when difficult situations arise. There is often a way to achieve the parties' goals without creating undue antitrust/competition risk.

#### **4. Communicating with the Media**

- 4.1. Discussion in the media of the proposed transaction by representatives of the parties can have extremely negative implications on the antitrust/competition analysis of the transaction unless carefully structured in consultation with legal counsel. The specific concern is that statements may be attributed to the transaction participants which might draw undue attention from antitrust/competition authorities, or more significantly, contradict an antitrust position that the parties may wish to assert. Accordingly, all media contact should be vetted by legal counsel.

#### **5. Other Safeguards**

- 5.1. Legal counsel need not be present at each meeting between the transaction participants, nor does legal counsel need to be consulted with respect to each joint activity. However, any questions regarding the scope of permissible information exchange and coordinated activity should be brought to the attention of legal counsel immediately. Safeguards, additional to those referred to in these guidelines, can be designed in consultation with legal counsel to limit the antitrust/competition law exposure within the context of proposed transactions.

## APPENDIX C

### BAKER & MCKENZIE'S GLOBAL MERGER ANALYSIS PLATFORM

Baker & McKenzie's team of antitrust experts around the world have collaborated to produce a truly innovative Global Merger Analysis Platform (GMAP). GMAP answers 90 detailed questions on merger control law in 120 jurisdictions. It is updated in real time. It provides more depth and more legal certainty than existing products on the market.

Multi-jurisdictional merger control analysis is easy to get wrong when a deal is moving quickly and time is of the essence. Assessing whether and where to notify can be time-consuming and expensive. Especially when the triggering thresholds are far from clear as is often the case in developing markets.

GMAP is not only the most comprehensive database on the substantive law, it also captures our field experience of enforcement practice. It provides a road map identifying the risks, the regulatory timetable, and the gating items that you can promptly feed into your corporate strategy and planning processes.

Tailored platform automation saves many lawyer hours. With GMAP we can instantaneously select a tailored matrix of relevant countries and the most pertinent questions that the analysis of your deal needs to cover. Pro forma short form views are immediately available to serve up the most useful selections of information. Reports can be sent to you by secure email link and reviewed securely online wherever you are. Word, Excel and PDF versions can be generated for broader circulation and processing within your business.

**Step 1. Generating a full filing analysis:** We can run a global analysis of where a transaction may require notification based on the parties' revenue data (and assets and market shares where relevant), within 24 hours of receipt of reliable data, and subject to a fee capped at GBP12K/ EUR15K/ USD20K.

**Step 2. Risk assessment in marginal jurisdictions:** GMAP tracks enforcement trends. We know the regulators and can anticipate how they will react. Any GMAP filing analysis can be complemented as needed by discussions with our merger control team on the legal risk and commercial implications of filing or not filing in any jurisdiction.

**Step 3. One touch co-ordination:** GMAP contains the contact details of merger control specialists in 120 countries, inside and outside of our global network. That group can streamline the notification process and lighten the regulatory burden in those jurisdictions you need to notify in. We co-ordinate filings, ensure consistency, manage cross-border agency co-operation, and obtain clearances to meet the most demanding deadlines.

Click here for the [GMAP demonstration video](#).

## APPENDIX D

**OECD CONVENTION AND SIGNATORIES,  
FCPA AND UK BRIBERY ACT 2010  
SUMMARIES**

**1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**

The Organisation for Economic and Cooperative Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) was signed on 17 December 1997 and entered into force on 15 February 1999. It has been adopted by all 34 OECD member countries in addition to five non-member countries.

**OECD States****Non-members**

Australia	Estonia	Ireland	Netherlands	Spain	Argentina
Austria	Finland	Israel	New Zealand	Sweden	Brazil
Belgium	France	Italy	Norway	Switzerland	Bulgaria
Canada	Germany	Japan	Poland	Turkey	Russia
Chile	Greece	Korea	Portugal	United Kingdom	South Africa
Czech Republic	Hungary	Luxembourg	Slovak Republic	United States	
Denmark	Iceland	Mexico	Slovenia		

Signatory nations are required to adopt 'such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage [...] to a foreign public official'. The definition of 'foreign public official' is broad, covering 'any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function or involved in a public agency or public enterprise; and any official or agent of a public international organisation'<sup>4</sup>, but it does not encompass private sector corruption.

It should also be noted that the OECD Convention is exclusively focused on active, transnational bribery. It does not address passive bribery (i.e. the requesting or receipt of bribes). The OECD Convention includes a carve-out for facilitation payments.

**2. US Foreign Corrupt Practices Act**

The anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) apply to three categories of persons and entities:

- **'issuers'** – a company with a class of securities, including depositary receipts, traded on a US exchange, or an entity that is otherwise required to file reports with the US Securities and Exchange Commission and their officers, directors, employees, agents and shareholders
- **'domestic concerns'** – any business with a principal place of business in the United States, or organised under US law, including individuals who are US citizens, nationals or residents and their officers, directors, employees, agents, and shareholders
- **certain persons and entities**, other than issuers and domestic concerns, **acting while in the territory of the United States**.

Even where a company appears to be neither an 'issuer' nor a 'domestic concern' within the meaning of the FCPA and there is no apparent US nexus, it can be difficult to exclude completely the possibility that there may have been some action with a US connection which DoJ or SEC could attempt to use

<sup>4</sup> Art. 1(4)(a).

as a basis for jurisdiction. The FCPA has been aggressively enforced against non-US companies on the basis of an expansive interpretation of its jurisdictional reach.<sup>5</sup>

Substantively, the FCPA prohibits offering to pay, paying, promising to pay, or authorising the payment of money or anything of value to a foreign public official in order to influence any act or decision of foreign public officials in their official capacity or to secure any other improper advantage in order to obtain or retain business. The FCPA prohibits payments made to 'any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly', to a foreign official. Thus, it captures direct bribes as well as bribes paid through third parties (such as local agents, distributors or consultants).

Under the FCPA, a person's state of mind is 'knowing' with respect to conduct, a circumstance, or a result if the person is aware that he is engaging in such conduct, that such a circumstance exists, or that that result is 'substantially certain' to occur; or he has a firm belief that such a circumstance exists or that a such result is 'substantially certain' to occur. Thus, a person has the requisite knowledge when he is aware of a high probability of the existence of such circumstance, unless the person actually believes that such a circumstance does not exist. This means that a business can be held liable for bribes paid by, for example, its local agents, distributors or consultants even if it did not actually know of them – in other words, having reason to know can be enough.

Therefore, as a practical matter, when applied to acts of third parties against the backdrop of US law on 'knowledge', 'wilful blindness' and 'conscious avoidance', the prohibitions of the FCPA are in effect similar to the offence of failing to prevent bribery by an associated person under s. 7 of the UK Bribery Act 2010 (discussed below).

The FCPA applies only to payments intended to induce or influence foreign officials to use their positions 'in order to assist ... in obtaining or retaining business for or with, or directing business to, any person'. This requirement is known as the 'business purpose test' and is broadly interpreted to apply to almost any payment which achieves or is designed to achieve an unfair business advantage for the payer (e.g. to secure required licences or permits, or favourable tax agreements).

While the FCPA applies only to payments to FPOs, this term too is defined very broadly in line with the OECD Convention to include employees of state-owned or operated entities, as well as public authorities and public international organisations. 'Anything of value' used to influence a foreign public official is also interpreted broadly, including directly and indirectly provided gifts, excessive travel and entertainment expenses, promises of future employment, and shares/securities.

In addition to its anti-bribery provisions, the FCPA also contains accounting provisions applicable to publicly traded companies (i.e. 'issuers'). These provisions provide that it is separately an offence to fail to have sufficient accounting controls and/or books and records which accurately and fairly reflect the transactions of the company.

### **3. UK Bribery Act 2010**

The UK Bribery Act 2010 has a broad jurisdictional reach and scope. It is therefore important to consider whether companies with a connection to the United Kingdom fall within the jurisdiction of the Bribery Act 2010.

The Act's main offences can be committed in relation to active bribery (i.e. offering or paying bribes) and passive bribery (i.e. requesting, agreeing to receive or receiving of bribes) in both the public and private spheres. Unlike the equivalent rules in many other jurisdictions, the Bribery Act 2010 provides no exemption for facilitation payments. As well as applying to the activities of UK companies, the main offences also apply to acts of non-UK companies that take place within the United Kingdom.

Importantly, the Act introduced a strict liability corporate offence of failure to prevent bribery by employees or other associated persons. The only defence to the corporate offence is for the company to prove that it had implemented 'adequate procedures' to prevent such acts of bribery. A company will be caught by the corporate offence where an 'associated person' (e.g. an employee, agent,

<sup>5</sup> Several of the most high-profile FCPA enforcement actions have been against foreign entities. See <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>

consultant or other person deemed to be performing services on behalf of the company)<sup>6</sup> bribes another person with the intent to obtain or retain business for the company or a business advantage (as under the FCPA, 'business advantage' has a broad meaning and includes required licences or permits, or favourable tax agreements). There is no need for the company to be involved in or have any knowledge of the conduct. Further, there is no need for the associated person to have been individually prosecuted or within jurisdiction of the Act.

The territorial scope of the corporate offence is extensive, applying to not only UK companies but equally to 'any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the [United Kingdom]'. Though this test has not yet been subject to judicial interpretation, it is clear that it is meant to be interpreted broadly and could catch companies on a number of different bases. While no definite view can be reached, it is apparent that jurisdiction may potentially be established over a corporate entity on the basis that it makes sales into the United Kingdom, has a branch office in the United Kingdom, or exercises management and strategic control over business in the United Kingdom. It is unclear whether a mere listing on a UK stock exchange would be enough. Once jurisdiction is established over a company, all of its acts are caught by the corporate offence, even if they take place wholly outside the United Kingdom.

As under the FCPA, what may constitute a bribe is defined broadly, meaning that a bribe may be comprised of money or any other advantage given directly or indirectly (including hospitality, gifts, travel, charitable and political donations).

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<sup>6</sup> 'Associated person' is not exhaustively defined and it is possible that it may capture other persons such as distributors, joint venture partners, or subsidiaries.



## APPENDIX E

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