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Feature Articles
A. Regulatory Framework

In general, mergers and acquisitions in Indonesia are governed by the following laws and regulations:

(a) Law No. 40 of 2007 regarding Limited Liability Companies (‘Company Law’) as well as its implementing regulation, i.e. Government Regulation No. 27 of 1998 regarding Mergers, Consolidations, and Acquisitions of Limited Liability Companies (‘PP 27’);

(b) Law No. 25 of 2007 regarding Investment as well as its implementation, i.e. Presidential Regulation No. 44 of 2016 regarding List of Business Fields that are Closed to Investment and Business Fields that are Conditionally Open for Investment, Regulation of Head of Investment Coordinating Board (BKPM) No. 14 of 2015 regarding Guideline and Procedure of Principle License in Investment as amended by Regulation No. 6 of 2016, and Regulation of Head of Investment Coordinating Board (BKPM) No. 15 of 2015 regarding Guideline and Procedure of Investment Licensing and Non-Licensing; these laws and regulations only apply to the merger and acquisition transaction which involves a foreign investment;

(c) Law No. 5 of 1999 regarding Prohibition of Monopoly and Unfair Business Competition as well as its implementing regulation, among others: Government Regulation No. 57 of 2010 regarding Merger, Consolidation, and Shares Acquisition which may Cause the Monopoly Practice and Unfair Business Competition, Government Regulation No. 57 of 2010 regarding Merger or Consolidation and Shares Acquisition which May Cause the Monopoly Practice and Unfair Business Competition, Business Competition Supervisory Commission (Komisi Pengawas Persaingan Usaha or KPPU), Regulation No. 11 of 2010 regarding Consultation on Merger or Consolidation of Business Entity and Acquisition of Shares in the Company, and KPPU Regulation No. 13 of 2010 regarding Guidelines on Merger, Consolidation of Business Entity and Acquisition of Shares which may cause Monopoly Practices and Unfair Business Competitions, as lastly amended by KPPU Regulation No. 2 of 2013;

(d) Law No. 8 of 1995 regarding the Capital Market as well as several other regulations issued by the Capital Market and Financial Institution Supervisory Agency (Badan Pengawas Pasar Modal dan Lembaga Keuangan or BAPEPAM-LK) which is currently known as Financial Services Authority (Otoritas Jasa Keuangan or OJK), such as:

(i) Financial Services Authority (Otoritas Jasa Keuangan) Regulation No. 54/POJK.04/2015 on Voluntary Tender Offers;

(ii) Rule No. IX.G.1 on Mergers and Acquisition of Public Companies or Issuer
Companies as an attachment to the Decree of Chairman of BAPEPAM-LK No. Kep-52/PM/1997;

(iii) Rule No. IX.H.1 on Public Company Acquisition as an attachment to the Decree of the Chairman of BAPEPAM-LK No. Kep-264/BL/2011;


(v) Financial Services Authority (Otoritas Jasa Keuangan) Regulation No. 31/POJK.04/2015 on Disclosure of Material Information or Fact by Issuers or Public Company; and

(vi) Financial Services Authority (Otoritas Jasa Keuangan) Regulation No. 29/POJK.04/2015 on Issuers or Public Company exempted from Reporting and Disclosure Requirement.

These laws and regulations will be applied only if either the target or the purchaser is a publicly listed company;

(e) Related tax regulations, among others: Law No. 7 of 1983 as currently amended by Law No. 36 of 2008 regarding Income Tax Law, Law No. 8 of 1983 as currently amended by Law No. 42 of 2009 regarding Value Added Tax Law No. 21 of 1997 as currently amended by Law No. 20 of 2000 on the Acquisition Duty of land and/or building, and Government Regulation No. 34 of 2016 on Income Tax of transfer of land and building and conditional agreement and its amendment; and

(f) Any other specific regulations depending on the nature of business of the target or the purchaser (as applicable), such as banking sector, forestry, mining.

B. Mechanics of Mergers and Acquisitions

Mergers

Company Law and PP 27 define a merger as a legal act which is conducted by a company or more to merge itself into another company which has existed previously and the merging company will then be dissolved.

Since there will be a transfer of assets and liabilities of the merging company into the merged company, the tax aspect of a merger transaction will relate to the following:

(a) Transfer Tax

Transfer tax will be in the form of:

(i) VAT (in the event that one of the parties of the merger is not a registered taxable entrepreneur); and/or

(ii) fees for acquisition of land and building (bea perolehan hak atas tanah dan bangunan or BPHTB) if the transfer relates to property/land. At the request of the taxpayer, the Director General of Taxation may grant a BPHTB reduction of up to 50% for land and building rights transfers in business mergers or consolidations at book value;

(b) Income tax as a result of capital gain by the transfer of assets and liabilities of the merging company to the merged company.

Transfers of assets in business mergers must generally be conducted at market value. Gains resulting from this type of restructuring are assessable, while losses are generally claimable as a deduction from income. However, a tax-neutral merger, under which assets are transferred at book value, can be conducted subject to the approval of the Director General of Taxation, in which the merger plan must pass a business purpose test by the Director General of Taxation. As for a tax-driven arrangement, it is prohibited and therefore tax losses from the combining companies may not be passed to the surviving company.
Acquisitions

In Indonesia, there are two types of acquisitions: shares acquisitions and asset acquisitions. For the purpose of this article, we will only elaborate further on shares acquisitions. Company Law defines a shares acquisition as a legal act conducted by a legal entity or individuals to acquire either all or most of the shares in a company which may result in a change of control of such company.

A shares acquisition can be achieved by means of:

(a) Transfer of majority shares in the target company to the purchaser

If the acquisition is achieved by a transfer of shares, the seller will have an obligation to pay taxes in relation to the capital gain achieved for such transfer of shares under the following conditions:

(i) if the seller is an Indonesian tax subject, the obligation to pay tax on the capital gains is the seller’s obligation. There is no obligation on the part of the buyer to withhold any amount from the sale price;

(ii) if the seller is not an Indonesian tax subject, the resident buyer must withhold 20% of the estimated net income (i.e. the capital gain amounting to 25% of the transaction value) to the seller from the sale of the shares, except where the taxation of capital gains is reserved to the treaty partner by an applicable tax treaty. To obtain the benefit of the applicable tax treaty, the seller must comply with the certification, eligibility, information and reporting requirements in force in Indonesia. Currently, the seller would need to provide a certificate of tax domicile issued by competent tax authority (the Internal Revenue Service) to the purchaser and the company;

(iii) if the target is a publicly listed company, the obligation to pay tax on the capital gains as a result of the transfer of shares will be subject to final income tax at the rate of 0.1% of the gross amount of the transaction, provided that the share being sold is not a founder share. If it is a founder share, then the tax will be added by 0.5% of the nominal value of the shares in the company by the closing of the stock exchange at the end of 1996 or the nominal value of the shares in the initial public offering if the shares of the company are listed on the stock exchange after 1 January 1997.

In relation to this tax obligation, if the seller is a multinational company, they usually prefer to complete the deal outside of Indonesia, in a country which has a favourable tax regime for them, e.g. they usually own the shares in an Indonesian company through their subsidiary in country X (‘A Co’) which has a favourable tax regulation to them. Once they decide to exit from the Indonesian company, they will do the transaction through A Co so that the sale will be conducted in country X for the purpose of having a lower tax rate rather than doing the transaction in Indonesia.

D CO

Country Z

Y CO

Country C

The sale will be done in Country X by the sale of Y Co’s shares

A CO

Country X

PT XYZ

Indonesia
However, if Country X is a tax haven country, the disposal of shares of A Co in Country X might be subject to tax pursuant to Regulation of Minister of Finance No. 258/PMK.03/2008 regarding Withholding of Income Tax of Article 26 for the Income of Sale or Transfer of Shares as Intended under Article 18 Paragraph (3c) of Income Tax Law Which is Obtained by Non-resident Taxpayer (‘PMK 258’). Pursuant to PMK 258, the transfer of shares of a company which was established in a tax haven country and has a special relationship with Indonesian company or permanent establishment in Indonesia is subject to 20% of the estimation of the net amount. The estimation of the net amount will be calculated as 25% from the sale price. However, if the country origin of the seller has a tax treaty agreement with Indonesia, the withholding of the income tax for the gains will only be conducted once the treaty provides that Indonesia has the right of taxation for this type of transaction. We believe that there is no special rule dealing with the disposal of stock in real property, energy, and natural resources companies.

Under Bank Indonesia Regulation No. 17/3/PBI/2015 on Mandatory Use of Rupiah in the Territory of Indonesia (‘BI Regulation’), Bank Indonesia requires every business actor to set a price of a good and/or service in Rupiah. In addition to BI Regulation, Bank Indonesia has issued a circular letter No. 17/11/DKSP as implementing regulation of the BI Regulation on 1 June 2015 (‘Circular Letter’). Article 2 point A of the Circular Letter clearly mentions that every business actor in Indonesia must set the price of a good and/or service only in Rupiah and is prohibited from setting the price in any other currency (dual quotation); or

(b) Issuance of new shares in the target company to be subscribed by the new shareholder which dilutes the share proportion of the previous shareholder in the target company

If the acquisition is achieved by subscription of new shares in the company, the subscription of these new shares will not be subject to tax. Nevertheless, if such subscription of new shares is based on the conversion of an existing loan (i.e. shareholder loan, advance payment and/or convertible bond), such conversion shall be subject to be taxed (if the amount of advances (shareholder loan) is lower than the value of shares, the difference may be deemed as deemed interest given to the lender, which will be subject to income tax). Further, Government Regulation No. 15 of 1999 stipulates that the conversion of a certain form of claim into shares must be announced in two newspapers.

In the event the conversion of the existing loan comes from offshore, the Regulation of Bank Indonesia (Peraturan Bank Indonesia) No. 16/22/PBI/2014 concerning Reporting of Foreign Exchange Flow Activity and Reporting of the Application of Prudential Principles in Management of Offshore Loan of Non-Bank Corporations (‘PBI No. 16/22/PBI/2014’) states that an Indonesian company (and individual, as relevant) conducting foreign exchange activities, inter alia, obtaining an offshore loan, must submit foreign exchange traffic reports (‘Foreign Exchange Traffic Report’) and the application of prudential principles reports (‘Prudential Principles Reports’) periodically to Bank Indonesia in accordance with the provisions and procedures set forth in PBI No. 16/22/PBI/2014 and subsequent implementing regulations prevailing from time to time.

The Foreign Exchange Traffic Report consists of reports on:

(i) the execution of the loan agreement, the realisation and repayment of the loan thereunder including all payments of interest under the loan agreement;

(ii) foreign exchange activities other than offshore loan conducted by an Indonesian company (which includes a guarantee granted by an Indonesian
Feature Article: Mechanics of M&A in Indonesia

Finance and Bank Indonesia as of the effective date of the loan agreement and subsequently every three months; or

(c) Mandatory Tender Offer for a Publicly Listed Company

If the acquisition transaction occurs in a publicly listed company, it will trigger a mandatory tender offer (‘MTO’) since there is a change of ‘controller’ in the publicly listed company. A controller is defined as a party who (i) owns more than 50% of the issued shares in the company; or (ii) has less than 50% of shares but has the means to determine the management and/or policies of the company. However, the change of controller as a result of an issuance of new shares pursuant to a rights issue is exempted from a MTO requirement.

In order to conduct a MTO, the new controller must:

(i) submit a draft announcement of the information disclosure in relation to the MTO along with its supporting documents to OJK and the target company within two business days after the takeover announcement;

(ii) submit any changes and/or additional information on the draft announcement and its supportive documents within five business days after receipt of the request to change the draft from the OJK (if any);

(iii) announce the information disclosure in at least one Indonesian daily newspaper having national circulation within two business days after receipt of the letter from OJK stating that the new controller may announce the disclosure of information on the MTO (the new controller must also submit evidence of the announcement in a daily newspaper as mentioned above to OJK within two business days after the date of the announcement).

The Prudential Principles Reports consist of:

(i) the application of prudential principles report;

(ii) the application of prudential principles report which has passed attestation procedure;

(iii) information on the satisfaction of credit rating requirement; and

(iv) financial statements.

Other than the above, the utilisation of certain types of offshore loan, i.e. (i) loans related to project development whose financing is in the nature of ‘nonrecourse’, ‘limited-recourse’, ‘advanced payment’, ‘trustee borrowing’, ‘leasing’ and so forth; (ii) loans related to project development whose financing is based on ‘BOT’, ‘B&T’ and so forth, shall be coordinated under the Team PKLN as required by the Presidential Decree No. 39 of 1991, dated 4 September 1991 concerning Coordination of the Management of Offshore Loan (‘Decree No. 39/1991’). Further, article 12 of Decree No. 39/1991 stipulates that the borrower of an offshore loan shall submit a regular report to the PKLN team regarding the performance of the obtained offshore loan.

In addition, article 3 of the Minister of Finance Decree No. KEP-261/MK/IV/5/1973 concerning Rules on the implementation for obtaining offshore loan, as later amended by No. 417/KMK.013/1989 and No. 279/KMK.01/1991 stipulates a regular report regarding offshore loan shall be submitted to the Department of Finance and Bank Indonesia as of the effective date of the loan agreement and subsequently every three months; or
disclosure in respect of the MTO must include:

- the background of the takeover;
- details of the estimated number and percentage of shares to be purchased;
- details of the number and percentage of shares of the target company that has been acquired, including call option, any rights to receive dividend or any benefit as well as proxy in voting rights in the target company;
- details of the new controller, including name, address, nationality and affiliation relationship with the target company, if any (for individual) or the establishment, capital structure, board of directors and commissioners, shareholding composition, beneficial owner and affiliation relationship with the target company, if any (for non-individual);
- details of the target company, including name, address, and line of business;
- terms and conditions of the MTO i.e. purchase price and calculation method, MTO period, terms payment, purchase mechanism, and explanation on any governmental approvals that must be obtained in relation to the MTO, if any;
- names and addresses of the capital market supporting institutions or professionals involved in the MTO; and
- any other important information i.e. details of any lawsuit in relation to the takeover and additional information that is required so that the disclosure is not misleading;

(iv) conduct the MTO within a 30-day period as of the day following the date of the announcement of the information disclosure as stated in (iii) above;

(v) make a MTO settlement, with money transfer, at least no later than 12 business days after the end of the MTO period; and

(vi) submit a report on the MTO’s result to OJK within five business days after the end of the MTO settlement. The settlement of the MTO transaction must be made with money settlement as mentioned in (v) above. It cannot be exchanged with a securities settlement.

The price of a MTO transaction is regulated as follows by the regulations regarding the MTO:

(i) in the event the acquisition is directly exercised over shares of a publicly listed company listed and traded at the stock exchange, the lowest MTO price must be at least:

- the average of the highest price of the daily trading at the stock exchange during the last 90 days before the acquisition announcement or the negotiation announcement; or
- the exercise price of the acquisition, whichever is higher;

(ii) in the event the acquisition concerns shares of a publicly listed company listed and traded at the stock exchange, however during the period of 90 days or more before the acquisition announcement or before the negotiation announcement, the said shares were not traded on the stock exchange or its trade was temporarily suspended by the stock exchange, the MTO price must be at least:

- the average of the highest price of the daily trading at the stock exchange during the last 90 days before the acquisition announcement or the negotiation announcement; or
- the exercise price of the acquisition, whichever is higher;
(iii) in the event the acquisition concerns shares of either a publicly listed company or an equity issuer whose shares are unlisted, the MTO price must be at least:

- the exercise price of the acquisition; or
- the fair price determined by the appraiser, whichever is higher;

(iv) in the event the acquisition indirectly concerns shares of a publicly listed company listed and traded at the stock exchange, the MTO price must be at least equal to the average of the highest price of daily trading at the stock exchange during the last 90 days before the acquisition announcement or negotiation announcement;

(v) in the event the acquisition is indirectly exercised over shares of a publicly listed company listed and traded at the stock exchange, but during the last 90 days or more before the acquisition announcement or before the negotiation announcement, was not traded at the stock exchange or its trade was temporarily suspended by the stock exchange, the MTO price must be at least the average of the highest price of daily trading at the stock exchange during the last 12 months counted backwards from the last trading day or the day the trade was temporarily suspended; and

(vi) in the event the acquisition is indirectly exercised over shares of either a publicly listed company or an equity issuer whose shares are unlisted and not traded on the stock exchange, the MTO price must be at least equal to the fair price as determined by the appraiser.

The period for price determination, as mentioned in (i) and (iv) above, will follow the exercise period of the MTO in the event the exercise of the MTO exceeds the deadline of 180 days as of the negotiation announcement (provided that this MTO price calculation is higher than the MTO price under (i) and (iv) above).

Following the takeover, if a new controller owns more than 80% of paid-up shares of a target company after exercising the MTO, the new controller must transfer a portion of the shares to the public, so that there will be at least 20% shares of the target company owned by at least 300 persons within two years as of completion of the MTO.

In the event the Takeover results in ownership of more than 80% of paid-up shares of the target company, a MTO must still be carried out to give the public shareholders the chance to benefit from the offer price determined under Rule IX.H.1, even though the new controller will later have to divest at least the same percentage of shares it has acquired in the MTO to at least 300 persons within two years.

The above obligations will not apply if the target company undertakes a corporate action (such as a rights issue) which dilutes the new controller’s shareholding and results in compliance with the minimum free float requirement as explained above.

If change of control in a publicly listed company results from an issuance of new shares by virtue of the rights issue of a pre-emptive right (which is defined as a right attached to a share enabling the shareholders to purchase new securities, including shares, securities convertible into shares and warrants, before they are offered to other parties), under the Financial Services Authority (Otoritas Jasa Keuangan) Regulation No. 29/POJK.04/2015, the requirements to make a MTO are waived.

Prior to making a rights issue, the Listco must submit a registration statement relating to the rights issue to the OJK at least 28 days before the extraordinary general meeting of shareholders (‘Registration Statement’). Under current Indonesian regulations, Listco may not proceed with a rights issue until the
or acquisition results in a change of control in the company, the employees will be entitled to request for a termination and receive severance payment from the company. Pursuant to Law No. 13 of 2003 regarding Manpower ('Labour Law'), once the employees decide to terminate their employment with the company, the company will be required to pay the severance package to the employee, which amounts are regulated under the Labour Law or the company’s regulation or the Collective Labour Agreement. The components of the severance package are severance payment, service appreciation payment and compensation payment.

**Documentation**

In general, the following documents are required to be prepared for a merger and acquisition transaction:

- announcement of the summary of the merger/acquisition plan to the public through at least one newspaper having nationwide circulation;
- announcement to the employees in writing;
- resolution of general meeting of shareholders or circular resolution of shareholders of the company approving the merger/acquisition plan;
- BKPM’s approval on the merger/acquisition plan (applicable only if it involves foreign investment);
- Notarial deed of acquisition or deed of merger in Indonesian language;
- approval or receipt of notification in relation to the merger/acquisition from the Ministry of Law and Human Rights;
- announcement of the result of merger/acquisition in at least one newspaper having nationwide circulation;
- updated shareholders’ register of the company as a result of the merger/acquisition;

**Timeline**

The timeline for mergers and acquisitions depends on the complexity of the transaction. For a normal transaction, the process should be completed within two to four months. However, for a complex transaction or a transaction which involves a publicly listed company, the process could take longer.

**Employees**

Pursuant to article 127 of Company Law, a company must announce to its employees any plan of change of ownership at the latest by 30 days prior to the call of a general meeting of shareholders for the agenda of change of ownership in the company. In general, the employees do not have a direct say in a merger or an acquisition. However, if the merger and/or acquisition becomes effective. Unless stipulated otherwise by OJK, the Registration Statement will become effective only after the shareholders approve the rights issue at an extraordinary general meeting of shareholders. In practice, OJK will review and give comments on the Registration Statement document within 28 days.

Before making a rights issue, if a public company seeks to raise a specific amount, Listco must obtain a guarantee from a party, the Standby Purchaser, which agrees to purchase any remaining excess rights shares ('Remaining Excess Rights') at a price which is at least equal to the exercise price. There are no restrictions on the identity of such a party. Any party may act as the Standby Purchaser, including the principal shareholder of Listco.

If, after the excess rights application by the shareholders, there are still Remaining Excess Rights, the Standby Purchaser will be responsible to purchase the Remaining Excess Rights at the exercise price and must pay for the Remaining Excess Rights within two working days after the end of the trading period.
• new share certificates of the shareholders of the company as a result of the merger/acquisition;
• updated company registration number.
If the transaction involves a merger or an acquisition through an issuance of new shares, a merger/acquisition plan will be required in addition to the abovementioned documents. A merger/acquisition plan should consist of the following information, among others:
• name and domicile of the merging/acquiring and surviving/acquired entities;
• the reason behind the merger/acquisition transaction;
• the method of assessment and conversion of shares of the merging company into the shares of the surviving company;
• the amount of shares to be acquired (for acquisition transactions only);
• the readiness of the funding (for acquisition transactions only);
• draft amendment of the articles of association of the company after the merger/acquisition (if any);
• financial statement of the merging company (for merger transactions only);
• further plan or ceasing of business activities of the merging company (for merger transactions only);
• pro-forma balance sheet of the surviving company/the acquiring company;
• the manner of settlement on the status, rights, and obligations of the members of the board of directors, board of commissioners, and employees of the merging/acquired company;
• the manner of settlement on the rights and obligations of the merging company against the third party (for merger transactions only);
• the manner of settlement on the rights of the shareholders who do not approve the merger/acquisition of the company;
• the names of the members of the board of directors and board of commissioners of the surviving company as well as their honorariums, salaries and allowances for merger transactions only);
• the estimated period of entering into a merger/acquisition;
• the report on the situation, development and result that have been attained of the merging company (for merger transactions only);
• the main activities of the merging company and the alteration occurred during the current accounting year (for merger transactions only);
• the detailed issues arising during the accounting year that affect the activities of the merging company (for merger transactions only).

C. Anti-trust Review

Notification to KPPU of a merger or acquisition transaction is mandatory only when the transaction is not conducted between affiliated companies and the value of assets or the value of sales of the companies involved in the transactions exceeds a certain amount, i.e. (a) if the combined national assets of the parties to the transaction exceed IDR 2.5 trillion (approximately USD 205 million); and/or (b) if the combined national turnover (revenue) of the parties to the transaction exceeds IDR 5 trillion (approximately USD 410 million); and/or (c) if the combined national assets exceed IDR 20 trillion (approximately USD 1.65 billion) once the parties are banking institutions. Combined national assets or national turnover means the total amount of assets and turnover of the parties to the transaction and their parents/subsidiaries in Indonesia. In the event that the abovementioned thresholds are met, then the merger/acquisition transaction must be reported to KPPU within 30 days of its effective date. Failing to comply with this
requirement may result in a sanction in the amount of IDR 1 billion (approximately USD 81 thousand) per day of delay provided that the maximum administrative sanction that can be imposed due to the delay will not exceed IDR 25 billion (approximately USD 2.05 million). In practice, in 2014, KPPU only imposed fines to four companies which failed to submit the notification on time, the total of which was around IDR 8.25 billion for a total of 41 delay days, or approximately IDR 200 million per day.

Nevertheless, recently, KPPU has been taking a stricter approach to business actors’ compliance with the notification requirement in respect of their merger, consolidation and share acquisition. The mandatory notification to KPPU is in place only if the value of the merger, consolidation and share acquisition exceeds the threshold limit as stipulated by the prevailing regulation. The stricter approach is apparent from KPPU’s current uncompromising attitude in imposing fines on companies which are tardy in their compliance with the notification requirement. This year sees KPPU’s tendency of increasing the amount of the fines, as shown in a recent case where a company which was late in submitting the required notification of its offshore acquisition was made to pay IDR 2 billion for its four days of delay, or IDR 500 million per day.

The KPPU also provides a chance for business entities conducting mergers/acquisitions to have a pre-consultation with the KPPU in the event that the transaction might be complex, so that they will have time to evaluate the transaction and provide remedies to the KPPU if the KPPU believes that the merger/acquisition transaction may potentially result in monopoly or unfair business competition.

The KPPU regulations state that once the KPPU has confirmed the submission is complete, it will conduct an initial review, which should be completed within 30 business days as of the confirmation date. If the KPPU concludes that the proposed transaction does not result in a monopoly and/or unfair business competition, it should announce its opinion by the end of the 30-day period. However, if based on its initial review the KPPU finds that (a) the HHI index after the proposed transaction is above 1800 with the delta above 150; (b) the parties concerned or their affiliates have a dominant position, the KPPU will conduct a subsequent review, which should be finalised within 60 business days after completion of the initial review. However, the prevailing legislation is silent on the maximum duration to review the completeness of the submission. Based on our experience, the duration usually depends on the complexity of the overlapping business of the parties concerned, so there is no exact timeline for the KPPU to confirm that the submission is complete.

D. Tax Protection in a Merger/Acquisition Transaction

In the agreement for a merger or acquisition, the parties to the agreement usually put a representations and warranties clause where the seller or the target provides certain representations and warranties to the purchaser in relation to the condition of the stock and/or business asset, such as (a) the seller or the target company has paid all of its tax obligations to the government as of the execution date of the agreement and will provide the purchaser with a list of outstanding tax obligations that may be incurred in the future until the closing date from time to time, (b) in the event that after the closing date, the result of the tax correction made by the authorised agency appears to be beyond the reasonable tax propriety, the seller/the target agrees and binds itself to bear all of the payments in connection to such tax correction provided that such tax correction has resulted from the transaction done by the target company prior to the closing date, (c) the seller/the target company has made all returns, given all notices and submitted all computations, accounts or other information required to be
made, given or submitted to any tax authority in accordance with the laws, and all such returns and other documentation were and are true, complete and accurate, (d) the seller/the target company has not carried out, been party to, or otherwise involved in any transaction where the sole or main purpose or one of the main purposes was the unlawful avoidance of tax or unlawfully obtaining of a tax advantage. In addition, the purchaser could also add a tax covenant from the seller to the purchaser as a schedule to the agreement.

Aside from the representations and warranties clause itself, an indemnity or a payment for misrepresentation or incorrect warranties is usually provided for under the agreement. The parties to the agreement can set aside a certain amount of money as a remedy of such misrepresentations or incorrect warranties.

Nevertheless, if the tax issues in the target company are too complicated and too costly to be remedied, the purchaser usually decides not to acquire the shares in the target company but acquire its business instead. In this case, the purchaser usually sets up a new company or acquires a new company with a good record which will further acquire the business of the target company.

E. Recent Developments

Effective as of 12 May 2016, the Indonesian government enacted a new Investment Negative List, as regulated under Presidential Regulation No. 44 of 2016 (‘Negative List’) which revokes the previous negative list. This Negative List supported several policies enacted by Indonesian government, which aim to shorten the administrative procedures on licensing. We are of the view that the Indonesian government is willing to attract foreign investors to invest and build their business in Indonesia through the Negative List and such licensing policies. These changes might affect mergers and acquisitions transactions in Indonesia once foreign investment is involved. However, in the case of mergers and acquisitions, the Negative List seems to maintain the policy of grandfathering existing companies which in general means that the new policy in the Negative List will not apply to the existing companies which have obtained approval from Investment Coordinating Board prior to the issuance of the Negative List, subject to the fulfilment of certain requirements. The Negative List provides that in the event of a change in shareholding composition resulting from a merger or an acquisition in the same line of business, the maximum foreign shareholding is:

(a) in the case of a merger, as per the investment licence of the surviving entity;
(b) in the case of an acquisition, as per the investment license of the acquired company.

In addition, as of 1 July 2016, the Indonesia government enacted the Law No. 11 of 2016 on Tax Amnesty (‘Tax Amnesty’), in which the Indonesian government will allow the taxpayer to write off their outstanding and payable tax obligations after the taxpayer has first disclosed their assets and pay certain ransom fees. The enactment of this Tax Amnesty might also affect mergers and acquisitions transactions in Indonesia.
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A. Introduction

With a size of 676,000 square kilometres and a population of more than 51 million, the Republic of the Union of Myanmar, also called the Golden Land, has become the rising star among the ASEAN countries. Attracted by its rich natural resources, young population and geographical location bordering important trade partners, such as China, India, Bangladesh, Thailand and Laos, more and more investors are entering this recently opened frontier market.

In the past few years, foreign direct investment has increased year by year. After the first democratic election of civilian government in November 2015, officially ending 50 years of military rule, it is expected that Myanmar’s economic development will accelerate further. The approved foreign direct investment statistics published by the Directorate of Investment and Company Administration speak for themselves:

(a) 2012/2013: USD 1.4 billion;
(b) 2013/2014: USD 4.1 billion;
(c) 2014/2015: USD 8 billion; and
(d) 2015/2016: USD 9.5 billion.

The legal system of Myanmar is based on the colonial British common law, but it also comprises of Myanmar statutes and customary law. Since its political opening, the country has undertaken numerous legal reforms and revised or replaced many of the laws dating back to the British colonial era. Among the most important reforms concerning foreign investors is the enactment of the Foreign Investment Law (2012), the Special Economic Zone Law (2014) and the Arbitration Law (2016).

However, despite recent reforms, many outdated laws and regulations are still in effect and continue to pose risks for foreign investors, not least the lack of suitable protection of intellectual property rights. The lack of transparency of administrative and judicial practices, political sanctions, foreign exchange and payment restrictions, and a general lack of investment protection, free trade and double tax agreements pose further challenges to foreign investors.

B. Establishment of a business presence in Myanmar

Myanmar corporate law provides different types of business vehicles for foreign investors, namely, a branch or representative office of a foreign company, or a subsidiary in the form of a limited company.

When establishing a presence in Myanmar, there are generally three options:

- Registration under the Companies Act (1914) only;
- Additional registration under the Foreign Investment Law (2012); or
- Additional registration under the Special Economic Zone Law (2014) for businesses located in a Special Economic Zone.

Registration under the Companies Act 1994

Registration under the Companies Act (1914) currently consists of two main steps: application
for a trade permit, followed by registration with the Company Registration Office.

(a) Trade Permit

Any foreign investor wanting to conduct business in Myanmar is required to obtain a so-called ‘trade permit’. Under the Companies Act (1914), any branch or representative office of a foreign company, or any fully foreign-owned limited company is considered ‘foreign’. Exemptions apply only for joint ventures entered into by foreign investors with the Myanmar government under the Special Company Act (1950).

Note: Pursuant to the draft of the revised Companies Law, only companies with a certain percentage of foreign ownership will in future be considered ‘foreign’.

In order to obtain a trade permit, a certain amount of capital must be physically brought into Myanmar. The registration of a business under the Companies Act (1914) generally requires a capital commitment of USD 50,000. Higher amounts apply for registrations under the Foreign Investment Law (2012) or the Special Economic Zone Law (2014).

The capital requirement applies to limited companies as well as branch and representative offices of foreign companies. It should be noted though that the capital may be fully spent in the course of the business operations.

The issuance of a trade permit may further be subject to certain conditions imposed by law or ministerial policy.

Note: Pursuant to the draft of the revised Companies Law, the trade permit requirement will be abolished.

Despite the fact that the required business licence is called a ‘trade permit’, ‘foreign companies’ are not allowed to conduct most trading activities since 2001. This general prohibition is enforced by the Ministry of Commerce.

While the prohibition of the Ministry of Commerce does not apply to the sale of goods produced by a foreign company in Myanmar, the import and subsequent sale of goods are still restricted. Only the distribution of specific goods through joint ventures with Myanmar partners (such as new cars, construction materials, agricultural and medical products) and certain trading activities of foreign companies located in the Thilawa Special Economic Zone are currently permitted.

(b) Branch Office

A branch office is able to act independently and may engage in legitimate profit-making activities (such as services, but not trade).

However, it will not be treated as a separate legal entity from the foreign company it represents. Consequently, any and all contracts it enters into and the legal obligations, debts and liabilities arising therefrom shall be binding and enforceable against the foreign company.

For tax purposes, while a branch office is treated as a non-resident foreign entity, its income is taxed at a rate of 25%, which is the same rate that applies to resident companies.

It should be noted that the formalities to register a branch office are more cumbersome than those of the incorporation of a limited company, both in volume and complexity. In particular, the following documents of the foreign company have to be provided as part of the registration of the branch office:

(i) a notarised and legalised copy of the memorandum and articles of association of the foreign company;

(ii) a notarised and legalised copy of an appointment letter or power of attorney for the authorised representative;

(iii) a notarised and legalised copy of the annual report or the audited financial statements of the foreign company for the previous two years; and

(iv) a board of directors’ resolution of the foreign company approving the registration of the branch office in Myanmar,
the intended investment amount, and the appointment of the representative.

All of the above documents must be submitted in English. Hence, if the original document (e.g. memorandum and articles of association) is in another language, an official translation must be provided.

The registration of a branch office takes approximately one to two months. However, it is possible to obtain a temporary registration certificate and a temporary trade permit, both of which are valid for up to six months, within one week from submission of the complete set of documents.

(c) Representative Office

A foreign company may also choose to register a representative office.

In practice, a representative office is actually registered as a branch office with a limited scope of activities, comprising of only non-profit making activities such as market observation. A representative office is not permitted to engage in any commercial or profit-generating activities.

(d) Limited Company

A limited company is a fully-fledged, independent legal entity and the most common business vehicle chosen by foreign investors in Myanmar.

Such companies currently require a minimum of two shareholders, whether natural persons or corporate entities. The shareholding can be 100% foreign. However, certain business activities require a certain percentage of local shareholding or are even entirely prohibited for foreign investors.

A limited company must further appoint a minimum of two directors, both of which can be foreign. There is currently no requirement for the directors to be resident in Myanmar.

Note: Pursuant to the draft of the revised Companies Law, limited companies may in future be incorporated with one

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Alexander Bohusch advises primarily on investment projects in Singapore, the Republic of the Union of Myanmar and the Asia/Pacific region. These advisory services especially comprise the areas corporate law, international taxation and corporate compliance.
As mentioned above, in most cases, a limited company is not allowed to trade, but can provide all kinds of services and can engage in profit-generating activities.

For tax purposes, a limited company is treated as a resident. The applicable corporate tax rate is 25%. Tax is generally also applicable to income from sources outside of Myanmar, unless a double tax agreement with such other country provides otherwise. Currently, Myanmar only has double tax agreements with Singapore, Malaysia, India, South Korea, Thailand, Laos, United Kingdom and Vietnam.

To incorporate a limited company under the Companies Act (1914), the following information and documents are required:

(i) the intended name of the limited company to be formed;
(ii) intended activities;
(iii) particulars of the individual shareholders (passport details, residential address, occupation) or corporate shareholders (a register extract or certificate of incorporation and the articles of association);
(iv) a board of directors’ resolution of each corporate shareholder approving the incorporation of the limited company in Myanmar, stating the intended investment amount and the appointment of a corporate representative; and
(v) particulars of the directors (passport details, residential address, occupation).

All of the above documents must be submitted in English. Hence, if the original document (e.g. the certificate of incorporation) is in another language, a translation must be provided.

The incorporation of a limited company takes approximately one to two months. However, it is possible to obtain a temporary incorporation certificate and a temporary trade permit, both of which are valid for up to six months, within one week from submission of the complete set of documents.

**Foreign Investment Law (2012)**

The registration of a limited company or a branch office of a foreign company under the Foreign Investment Law (2012) requires the same steps as set out above, but additionally it requires the prior approval of the Myanmar Investment Commission (‘MIC’).

MIC is a government-appointed body and is responsible for the verification and approval of investment proposals in certain business sectors. It is formed under the Foreign Investment Law (2012) and the Myanmar Citizen Investment Law (2013), and comprises of representatives and experts from government and non-government bodies as well as the private sector.

(a) Investment under the Foreign Investment Law (2012)

The conditions for registration under the Foreign Investment Law (2012) are more stringent (e.g. regarding share capital, employment of local workforce) compared with a company registration only under the Companies Act (1914). The processing time of an application under the Foreign Investment Law (2012) also takes longer than registration under the Companies Act (1914).

While the additional registration under the Foreign Investment Law (2012) is generally optional for foreign investors, certain activities such as manufacturing and infrastructure projects as well as investments restricted under Notification 26/2016 may usually be undertaken only by so-called MIC companies.

Foreign investments under the Foreign Investment Law (2012) require a permit issued by the MIC. Details regarding the application procedure, specifying the economic sectors in which foreign investments are allowed, the criteria to be met and conditions the MIC may impose in order to approve an application are set out in
guidelines and regulations complementing the Foreign Investment Law (2012).

The MIC will generally consider the following aspects of the proposed investment:

(i) development of local employment opportunities;
(ii) know-how transfer;
(iii) promotion and expansion of exports;
(iv) support and development of the local infrastructure;
(v) development of a modern and energy-efficient industry;
(vi) manufacturing of goods that are currently imported; and
(vii) protection and conservation of the environment.

The main advantages of registration under the Foreign Investment Law (2012) are significant tax incentives and the possibility to enter into long-term lease agreements (50 years with the possibility to extend for two additional terms of 10 years each). Section 27 of the Foreign Investment Law (2012) provides, among others, for the following benefits:

(i) five-year tax holidays that may be extended;
(ii) tax exemptions for re-invested profits;
(iii) accelerated depreciation on capital assets;
(iv) tax relief on income tax of up to 50% on profits from exports;
(v) tax deductions for research and development;
(vi) exemptions from customs duties on capital assets imported during the construction period to be used in the business;
(vii) exemption from customs duties on raw materials imported during the first three years of production;
(viii) relief on customs duties on imports for the expansion of the business; and
(ix) exemption from commercial tax for exports.

Note: Pursuant to the draft of the Myanmar Investment Law, the MIC will have more flexibility with regard to the award of incentives. For example, income tax exemptions for three up to seven years may be granted depending on the location of the investment project.

(b) Registration Process

While the Foreign Investment Law (2012) does not specify a minimum investment amount, in our experience, the MIC usually requires a capital commitment (in cash or in kind) of at least USD 500,000 to 1 million.

The procedure for registration with the MIC under the Foreign Investment Law (2012) is as follows:

(i) the investor prepares a complete and comprehensive proposal;
(ii) the proposal is submitted to the MIC;
(iii) the Commission Office examines the submitted application to assess whether the documents are complete;
(iv) the accepted proposal is then submitted to the weekly meeting of the Proposal Assessment Team, and the investor will be informed whether the proposal has been accepted or rejected by the MIC;
(v) the Commission Office will coordinate and consult with the regional government and relevant ministries on their recommendations for the accepted proposal;
(vi) upon receiving the recommendation, the proposal will be submitted to the MIC meeting; and
(vii) the MIC permit will be issued to the investor upon obtaining the approval from the MIC.
Companies intending to set up their business in one of the Special Economic Zones have to register under the Special Economic Zone Law (2014). The application process includes an application for company registration with the Company Registration Office. Please note that registration under the Special Economic Zone Law (2014) and registration under the Foreign Investment Law (2012) are (currently) mutually exclusive.

The Special Economic Zones are linked to major infrastructure projects, including the construction of deep sea ports, power grids and pipelines to neighbouring countries. Several Special Economic Zones are currently under development in Myanmar, with the Thilawa Special Economic Zone being the first to be operational.

The Thilawa Special Economic Zone is located about 20 km south-east of Yangon and has been commercially operational since September 2015.

(a) Investment in Thilawa
Subject to certain conditions, investors in the Thilawa Special Economic Zone generally have the right to engage in any business which is not prohibited under the law, including manufacturing and provision of services. One advantage of locating a business in Thilawa is that wholesale trading activities are also allowed, as described in detail below.

Thilawa is divided into a ‘free zone’ for export-oriented enterprises including their supporting businesses and a ‘promotion zone’ for investors active in the domestic market. A company is considered export-oriented if its exports amount to a minimum of 75% of the production value. Incentives are offered to investors in both the free zone and the promotion zone.

Benefits available to export-oriented investments in the free zone include the following:

(i) income tax holidays for the first seven years from the commencement of the commercial operation;

(ii) tax relief of 50% for additional five years on the income tax rate for the second five years;

(iii) tax relief of 50% for a further five-year period on the profit which is reserved to be reinvested in the business within one year;

(iv) import exemption from customs duties and other taxation paid at the time of

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Fabian Lorenz advises his clients in the areas of commercial, corporate and general contract law, as well as international employment and immigration matters.
Investments intending to serve primarily the domestic market shall be established in the promotion zone and may enjoy incentives such as:

(i) tax holiday for the first five years from the commencement of the commercial operation;

(ii) tax relief of 50% for an additional five years on the income tax rate for the second five years;

(iii) tax relief of 50% for the third five years on the profit which is reserved from the business as a reserved fund, if it is reinvested within one year in the business;

(iv) import relief from customs duties and other relevant taxation for five years from the commencement of business on the import of equipment and instruments not for sales as well as spare parts, construction materials for the factory, warehouse and office, motor vehicles and other materials which are essential for the business;

(v) import refund of customs duties and other taxation paid at the time of import of trading goods, motor vehicles and other materials which are essential for the free-tax wholesale trading, export trading as well as services and transport;

(vi) permission to carry forward losses for five consecutive years after the year in which the losses were incurred;

(vii) general exemption from commercial tax may be given;

(viii) exemption from commercial tax may be given for manufactured goods which will be exported;

(ix) exemption from commercial tax may be given for goods acquired from the domestic market or the promotion zone and brought into the free zone;

(x) exemption of income tax for dividends distributed to shareholder(s) based on the profits accrued locally for which tax has been paid (note: Myanmar currently does not levy any withholding tax on dividends);

(xi) income tax deductions for training of skilled or semi-skilled workers and staff of the management, as well as expenses for research and development related to the investment project;

(xii) possibility to enter into long-term lease agreements (50 years with an option to renew for a further term of 25 years);

(xiii) possibility to sell, mortgage, lease, exchange or gift land lease, land use and buildings to third parties; and

(xiv) no restriction or control of prices of the products, services or goods manufactured in the free zone.
Foreign investors intending to trade their own products produced overseas have to meet the following conditions:

(i) minimum investment of USD 2 million (excluding leasing costs for the land);  
(ii) establishment of a warehouse at the investor’s lot in the Special Economic Zone; and  
(iii) provision of value-adding services or activities.

Foreign investors intending to act as distributors for third-party manufacturers have to meet the following conditions:

(i) minimum investment of USD 3 million (excluding leasing costs for the land);  
(ii) establishment of a warehouse at the company’s lot in the Special Economic Zone;  
(iii) provision of value-adding services or activities;  
(iv) the parent company or a group company must have established places of business in at least five countries, a minimum of 10 years’ experience in international trading, minimum three years’ average annual consolidated sales of at least USD 500 million and a paid-up capital of at least USD 25 million; and  
(v) the Myanmar entity must be appointed as official agent or distributor by the overseas manufacturer.

Wholesale includes the direct sale to end-users in the case of industrial materials in bulk as well as the direct sale of industrial machinery and equipment with a sales price in excess of USD 500,000.

The term ‘adding value’ is defined widely and includes:

(i) repacking, labelling and any other form of processing of imported products; and/or  
(ii) quality control, laboratory testing, maintenance and other technical services.
In practice, the trade prohibition has thus been effectively abolished for foreign investors operating in the Thilawa Special Economic Zone. However, some restrictions remain: retail sales outside of the Thilawa Special Economic Zone are excluded from the trade permission, as is the sale of ‘four-wheel vehicles’ and motorcycles, to which special regulations by the Ministry of Commerce apply.

(c) Registration Process

As the investments in a Special Economic Zone fall under the ambit of the Special Economic Zone Law (2014), the Management Committee of the respective Special Economic Zone will process the investment applications. Thilawa offers a so-called One-Stop Service Centre, where all relevant licences, permits and approvals can be applied for and additional services are offered (e.g. labour registration or visa services for foreign employees).

The One-Stop Service Centre is staffed by representatives from various authorities, including:

(i) Commerce and Consumer Department, Ministry of Commerce;
(ii) Department of Custom, Ministry of Planning and Finance;
(iii) Department of Internal Revenue, Ministry of Planning and Finance;
(iv) Department of Immigration and National Registration, Ministry of Labour, Immigration and Population;
(v) Labour Department, Ministry of Labour, Immigration and Population;
(vi) Department of Human Settlement and Housing Development, Ministry of Construction;
(vii) Myanmar Port Authority, Ministry of Transport;
(viii) Directorate of Industrial Supervision and Inspection, Ministry of Industry;
(ix) Department of Environmental Conservation, Ministry of Natural Resources and Environmental Conservation;
(x) Central Bank of Myanmar; and
(xi) Directorate of Investment and Companies Administration, Ministry of Planning and Finance.

The One-Stop Service Centre offers streamlined procedures for matters such as:

(i) company administration;
(ii) tax filing;
(iii) financing/Central Bank matters;
(iv) immigration and visa matters; and
(v) import/export procedures.

The general procedure for registration in the Thilawa Special Economic Zone is as follows:

(i) the investor completes a questionnaire provided by the Management Committee;
(ii) a land reservation agreement will be signed with the developer of the Special Economic Zone before submitting the investment application;
(iii) a complete and comprehensive investment application is then submitted to the Management Committee, which will include:
   - location of the land in the Special Economic Zone, and location of the factory;
   - water supply and electricity supply plan;
   - building/factory construction plan;
   - plan for installation of machinery and equipment;
   - environmental management plan; and
   - Investment Application Form (Form-1) and its cover letter;
(iv) the Management Committee will examine the submitted application and come to a decision within 30 days;
(v) after receiving the permit, the land lease agreement can be signed with the developer and has to be submitted to
the Management Committee within six months after issuance of the investment permit;

(vi) the new company has to be registered at the One-Stop Service Centre of the Special Economic Zone, which can be done at the time the investment application is submitted. However, the new company’s registration will be completed only when the investment permit is granted. The same documentation is required as for a company registration with the Company Registration Office, namely:

• the intended name of the limited company to be formed;
• intended activities;
• estimated expenditure for the first year of operations;
• particulars of the individual shareholders (passport details, residential address, occupation) or, in the case of corporate shareholders, a board of directors’ resolution of each shareholder approving the incorporation of the limited company in Myanmar, stating the intended investment amount and the appointment of a representative, a register extract or certificate of incorporation and the articles of association;

(vii) the building permit and fire safety certificate have to be obtained (the respective application can be submitted at the time of the investment application, and will first be reviewed by the developer to check if the standards are in compliance with their regulations, and then by the Management Committee to check for further compliance);

(viii) for every investment project an Environmental Conservation and Prevention Plan has to be submitted; and

(ix) for some industries, additionally an Initial Environmental Evaluation Report (IEE Report) or an Environmental Impact Assessment Report (EIA Report) is required.

The above documents must be submitted in English. Hence, if the original document (e.g. the certificate of incorporation) is in another language, a translation must be provided.

After obtaining the above permits, construction of the project may commence:

(i) construction of the warehouse and facilities, connection of infrastructure (e.g. water, sewage, electricity), application for an Electricity and Boiler Certificate;

(ii) tax registration;

(iii) exporter/importer registration, filing of master list and material list;

(iv) employment registration;

(v) immigration matters for foreign employees; and

(vi) registration of loans/financing/foreign exchange transactions.

Commercial operations must be commenced within three years of issuance of the investment permit. On special request, an extension for this period can be granted.
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Feature Article: Investments in Myanmar
With a staff strength of more than 40 in our office in Yangon, comprising of Myanmar and European lawyers complemented by internationally trained professionals, Luther is assisting clients in all stages of the business lifecycle, namely, from the incorporation of a Myanmar entity, through on-going legal and tax advice, to support services such as corporate secretary, accounting and payroll.

Luther is a full service law firm with more than 350 lawyers and tax advisors worldwide. In addition to legal and tax advice, Luther Corporate Services provides business establishment and company formation services, corporate secretarial services, bookkeeping and accounting, payroll, corporate and tax compliance, as well as payment administration services.

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

For the purposes of the legal, regulatory and contractual review of mergers and acquisitions in Bangladesh (‘M&A’) and, where applicable, detailing of corporate counsel practice points in relation thereto, we list out below the various M&A transaction structures available in Bangladesh.

(a) Asset Purchase
This refers to the acquisition of a business via purchase of its assets rather than the owning entity’s shares. An asset purchase may be preferable due to: (i) the higher risk to the acquirer in a share acquisition of assuming the target entity’s undisclosed liabilities, which risk is far higher in jurisdictions where there is greater exposure to tort or other contingent liabilities; and (ii) potential tax benefits to the acquirer from being able to record the assets in the acquirer’s books at the consideration paid for such assets and therefore achieve ‘stepped-up basis’ in the business assets so acquired. In Bangladesh, however, acquisitions of a business via an asset purchase is uncommon due to: (i) the difficulty in and, in the case of gas connections for a manufacturing facility, the impossibility of obtaining consents for the assignment to the acquirer of critical permits and licences and third-party contracts; (ii) in the case of movable property, incurrence of substantial stamp taxes and possibly value added tax on the value of such property; and (iii) in the case of real property, the transfer to and registration of such property in the acquirer’s name incurs significant transfer costs and taxes, including stamp tax, advance tax and registration costs.

(b) Incorporation of a New Joint Venture Entity
This refers to the incorporation of a new Bangladesh private or public company limited by shares via subscription of ordinary and/or preference shares therein, by foreign and/or local joint venture shareholders to engage in any transaction or business, including: (i) to acquire a business via purchase of its assets (as detailed above); (ii) to start a new business, such as in the technology and/or outsourcing sector; (iii) to engage in a regulated activity under a licence issued by a regulatory agency, e.g. the provision of telecommunications services under a licence issued by the Bangladesh Telecommunications Regulatory Commission (‘BTRC’); or (iv) under a financeable Bangladesh government-backed power purchase agreement or similar guaranteed requirements or an off-take contract, to engage in and build, operate and own/build, operate and transfer a power or other infrastructure project.

(c) Strategic Acquisition of All or Substantially All Interests in a Target
This refers to the acquisition by a foreign or local strategic acquirer of substantially all/majority of the unlisted shares of a Bangladesh target. Strategic acquisitions to
accomplish horizontal or vertical mergers occur in Bangladesh generally in the ready-made garments manufacturing sector. In such strategic acquisitions, the selling shareholder’s interests are generally purchased in whole at once or over time, with the acquirer taking complete control of the acquired entity/facilities, so the emphasis is mostly on past matters and ensuring that the acquirer is able to be made whole for any misrepresentations by the selling shareholder. Specifically, in such 100% acquisitions, the acquirer’s counsel would focus on an in-depth due diligence of the target and the seller, with issues brought up in such review reflected in specific deal-related representations and warranties of the selling shareholder in the share purchase agreement (‘SPA’) and indemnification of the acquirer in case of a material breach thereof. In regards to such indemnification rights and obligations in the SPA, it would be a reasonable request by the acquirer to hold back a portion of the purchase price in order to secure the selling shareholder’s indemnification obligations under the SPA.

(d) Acquisition by an Investor/Alternative Investment Fund of Minority Interests in a Target

This refers to a foreign or local private equity or other alternative investment fund acquiring generally a minority interest in a Bangladesh target. Unlike the above example of a 100% acquisition of shares, this is an acquisition where the focus of legal and contractual matters takes on an additional dimension in regards to governing the on-going relationship of the parties as co-owners in the target (generally specified in a shareholders’ agreement and thereafter incorporated in the target’s amended articles of association).

(e) Substantial Acquisition of Listed Securities

This refers to the acquisition by a foreign or local acquirer of the listed shares of a target ‘without’ and ‘within’ the Dhaka Stock Exchange Ltd (‘DSE’) and Chittagong Stock Exchange Ltd (‘CSE’) trading systems, pursuant to the BSEC (Substantial Acquisition of Shares, Takeover and Control) Rules 2002.

(f) Amalgamations and Restructuring

This is between two Bangladesh private or public limited companies, having listed or unlisted shares, with the approval of the High Court Division of the Supreme Court of Bangladesh (‘High Court’) in an order specifying shares or/and other consideration issued/paid to the non-surviving entity’s shareholders in accordance therewith.

Considering the above transactions, the key laws and regulations are as follows:

(a) The Companies Act 1994 (‘CA 1994’), which regulates:

(i) acquisition of shares by way of subscription in a new private or public company limited by shares, incorporated by two or more joint venture shareholders by filing:

- the memorandum of association, setting forth, among other items, the objects of the entity (section 7). Objects clauses may be amended under section 12(1) by a special resolution passed by the affirmative vote of 75% of the shares represented at an EGM held with 21 days’ prior notice (section 87). The amendment shall not take effect until and except in so far it is confirmed by a court order under section 12(2); and

- the articles of association, in which certain provisions of schedule I to CA 1994 are deemed to be contained therein, relating to adjournment of general meetings, instrument appointing a proxy, director share qualification of at least one share,
investment fund, the restriction imposed by section 58 on a company being prohibited from directly or indirectly purchasing its own shares limits such investor’s exit options as it cannot rely on the target to buy it out in the event of an exit trigger;

(v) CA 1994 has various sections relating to the protection of minority interests by way of petitioning the court for relief (subject to having standing to do so):

• under Section 71, if the share capital of a company is divided into different classes of shares, and the rights attached to any class of shares are varied, the holders of less than 10% in aggregate of the issued shares of that class, who did not consent, may apply to the court to have the variation cancelled;

• if, on the application of members having not less than one-tenth of the shares issued, the court finds that the affairs of the company or powers of the directors are being exercised in a manner which is prejudicial to one or more of those members, it may make such order as prayed for or such other order as it deems fit; and

• under section 230, when an offer is made to purchase all of a target’s shares from its shareholders and where 75% of such target’s shareholders have approved the transferee’s offer, then the transferee can bind the dissenting shareholders (who did not vote to approve the offer) by notice thereof, and be bound to purchase the dissenting shareholders’ shares on the same terms as provided to the majority. A dissenting shareholder may petition the court for relief from being bought out pursuant to section 230.

(vii) section 228 provides for the applicable creditors and/or members to approve by vote of 75% or more of such creditors
and/or members present at a meeting, a proposal or scheme of arrangement or reorganisation of a company and thereafter to submit the same except in connection with an application to the High Court to petition the court to issue an order in connection therewith. Section 229 allows for the parties to a section 228 application to present a scheme of amalgamation for a transferor company to be amalgamated into a transferee company, either by way of the High Court sanctioning such scheme (‘Scheme’) or by issuance of a new order by the High Court.

(b) The Contract Act 1872 (‘CA 1872’), which governs the interpretation of acquisition contracts, contain the following relevant key provisions:

(i) all agreements are contracts if they are made with the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void (section 10);

(ii) past consideration is valid (unlike English Law, where past consideration is not valid);

(iii) sections 73 and 74 contain the provisions for damages for a breach of contract;

(iv) section 73 provides for payment by a defaulting party of compensation for loss or damage which naturally arises from the defaulting party’s breach or which the parties knew likely to result from the breach when they made the contract. Compensation is not paid for any remote or indirect loss that results from the breach;

(v) section 74 provides for payment of liquidated damages on a breach of contract, as stipulated in the contract. The sum is not left for a competent court to determine. The suffering party will receive this amount, whether or not it has actually suffered any loss or damage. The provision does not distinguish between liquidated damages and penalty. A contract clause need not clarify that the amount agreed by the parties as liquidated damages is not in the nature of a penalty.

(c) Income Tax Ordinance 1984 and the Statutory Regulatory Orders issued thereunder provide significant guidance on structuring merger and acquisition transactions:

(i) in regards to share subscriptions, there is no tax consequence as the company receiving such subscription funds does not earn any ‘income’ at the time of subscription;

(ii) in the event of a share transfer, no tax is imposed on the seller of the shares:

- if the transfer is of unlisted securities under a gift, will, bequest or irrevocable trust (section 2(66)); or
- if the transfer is of unlisted or listed securities under a plan of amalgamation (section 2(2)) where the consideration is only in the form of securities of the surviving entity (capital gains tax would attach on any portion of the consideration paid in cash).

In regards to the tax consequences on the transfer of listed securities by way of gift, will, etc., per section 53M any transfer by way of gift, will, etc. of listed securities owned by sponsor shareholders, directors or placement holders attracts a capital gains tax thereon of 5% between the market price of such shares and the cost of acquisition thereon;

(iii) furthermore, amalgamation of a wholly-owned subsidiary with the parent company does not raise any tax issues for the surviving parent, as liability of capital gains tax (‘CGT’) can only be on the transferor and not the transferee, being the parent in this case;

(iv) the CGT rate for listed securities (other than by sponsor shareholders, directors or
Other key laws and regulations, detailed in responses to the questions below, are as follows: the Foreign Exchange Regulation Act 1947 (‘FERA 1947’), and the regulations promulgated thereunder by the Bangladesh Bank (‘BB’), the central bank of Bangladesh, which regulations are compiled by the BB in the Guidelines for Foreign Exchange Transactions Volume 1 & Volume 2 (2009), and updated by BB’s circulars issued from time to time (collectively, the ‘ForEx Guidelines’), the Securities and Exchange Ordinance, 1969, the Securities and Exchange Commission (Substantial Acquisition of Shares, Takeover and Control) Rules 2002 (‘SEC Acquisition Rules 2002’), Bangladesh Securities and Exchange Commission (Public Issue) Rules 2015 (‘Public Issue Rules’), Bangladesh Securities and Exchange Commission (Alternate Investment) Rules 2015 (‘Alternate Investment Rules’), and the Competition Act 2012. If an agreement provides for dispute resolution through arbitration, the Arbitration Act 2001 governs the process of arbitration if the parties have chosen to resolve disputes through mechanisms provided in the Arbitration Act 2001. The value of instruments of transfer and registration of shares are governed by Stamp Act 1899.

In addition to these key laws and regulations, there are other sector-specific laws depending on the types of companies involved, such as Bangladesh Energy Regulatory Commission Act 2003, Insurance Act 2010, Telecommunications Act, 2001 (‘TA 2001’) etc. TA 2001 is the principal law that primarily governs merger matters of all licensees in the telecommunications sector.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

In connection with an acquisition of shares by way of a share transfer, as opposed to statutory amalgamation, the following regulatory bodies/agencies play a key role:
additional disclosure requirements, many private limited companies artificially keep their paid up capital below the above amount so as to avoid applying for BSEC’s approval. BSEC recently also promulgated the Alternative Investment Rules and the Public Issue Rules. The former established the regime under which an alternative investment fund and a fund manager may be registered in Bangladesh, for purposes of raising funds within and outside of Bangladesh. This unfortunately does not take into account foreign private equity funds which are governed by limited partner (‘LP’) agreements and covenants therein, and which may find it impossible to be governed by a parallel regulatory regime that may conflict with their existing agreements with their LPs. The Public Issue Rules, promulgated a few months after the Alternative Investment Rules, provided a shorter lock-in period upon an IPO of one year (from the original three years) for existing shareholders who are “Alternative Investment Funds”. BSEC also regulates and oversees, along with the DSE and the CSE, substantial acquisitions of listed securities under the SEC Acquisition Rules 2002, pursuant to which:

(i) under section 6, if any person, either an existing shareholder or a new subscriber, wants to acquire shareholding of more than 10% of a company outside the stock exchange, such person must submit a proposal to the existing shareholders by issuing a public notice expressing an intention to acquire shares;

(ii) per section 7, if the acquisition is through a stock exchange, then the acquirer must issue a public notice through a merchant bank licensed with BSEC;

(iii) under section 17, when an acquirer publishes a notice of its intention to acquire shares in a company, any other person can

(a) Registrar of Joint Stock Companies and Firms (‘RJSC’)

This is relevant where partnerships and private and public limited companies are registered by filing of organisational or applicable charter documents by the partners or promoters, as the case may be, of the entity being registered. The RJSC also serves as the agency overseeing the statutory and annual filings required of firms/companies in order to be considered as in good standing with the RJSC. Any acquisitions of shares by way of:

(i) subscriptions and issuances of new shares in companies to existing or new shareholders, or

(ii) transfers to an acquirer of shares previously held by exiting shareholders of companies, are required under CA 1994 to be registered with the RJSC. However, the RJSC may not register any share issuances or acquisitions concerning the target unless and until the target complies with its corporate filing requirements and update all of its records. Accordingly, one of the first key due diligence activities in a share acquisition transaction is to review the target’s public records at the RJSC and ensure compliance of filing requirements. Furthermore, as, under section 159 of CA 1994, banks and financial institutions are required to record with the RJSC all mortgages and charges in order to perfect the same (or risk that the mortgages/charges will be voided if not recorded with the RJSC), an initial due diligence review of a target’s RJSC records provides a good picture of the liabilities of the target.

(b) Bangladesh Securities and Exchange Commission (‘BSEC’)

In connection with the issue of capital, a private limited company must first obtain BSEC’s consent prior to increasing its paid up capital to BDT 100 million. As such consent comes with significant
acquire those shares within two weeks of publishing the notice;
(iv) any company in financial distress can be acquired by any financial institution or scheduled banks or any other person or group of persons or by another company by following the process stated in the SEC Acquisition Rules 2002.

(c) High Court
In regards to statutory amalgamation under sections 228 and 229 of CA 1994, the High Court may either by the order sanctioning the Scheme or by any subsequent order make provisions for all or any of the following matters:
(i) the transfer to the transferee entity of the whole or any part of the undertaking and of the transferor’s properties and liabilities;
(ii) appropriation by the transferee company of any shares, debentures policies or other like interest in the transferor;
(iii) the reconstruction or amalgamation of the share capital by consolidation of shares of different classes or by division of shares into shares of different classes or both;
(iv) the continuation by or against the transferee of any legal proceedings pending by or against the transferor bank/financial institution;
(v) the dissolution of the transferor entity;
(vi) provision made by the transferor/transferee entities for dissenting stakeholders;
(viii) such other matters as may become necessary in view of the proposal made in the scheme.

(d) Others
For business combinations or acquisitions in the telecommunications sector, statutory pre-approval is required from the BTRC. For banking companies, the Bangladesh Bank is the regulatory body from which pre-approval must be obtained. In this regard, it may be noted that the Bangladesh Bank has published detailed guidelines for banks and financial institutions to follow in proposing to move forward with an amalgamation. Such guidelines provide the most detailed regulatory observations on the criteria used by a regulator and the High Court in approving a Scheme. This is valuable, especially in light of the stricter scrutiny of amalgamation Schemes as seen in the recent obstacles placed in Summit Group’s amalgamation plan for its energy subsidiaries. Further, public listed companies have notification requirement to BSEC, which is made as a necessary party when approval is sought from the High Court. As the BSEC is the regulator of public listed companies, it can represent itself before the High Court and submit observations to add additional conditions to be followed in relation to the contemplated amalgamation. Following the approval of the amalgamation scheme by the High Court, records of all the companies are updated at the RJSC.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are comparatively uncommon in the Bangladesh jurisdiction. For public listed companies under the SEC Acquisition Rules 2002, a ‘competitive takeover’ following public declaration of an acquisition is allowed, and a ‘bailout takeover’ to rescue weak companies with a negative net worth is also allowed. Under section 230 of CA 1994, a transferee whose offer has been accepted by 75% of the shares represented in meeting can notify the dissenting transferor shareholders (those who did not accept the offer) of exercising a transferee’s rights under the said section, in which case unless the dissenting shareholders petition the High Court to stop the transferee’s exercise of such right, the dissenting shareholders must sell, and the transferee must buy, their shares at the same price and terms offered to the majority.
4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

As discussed in answer to question 2, sector-specific legislations regulate takeovers and mergers in Bangladesh and restrict a transferee’s ability to acquire interests in the licensed company. Under a number of telecommunication licences, for instance, not only is there a ceiling, and in certain instances even outright prohibitions, on foreign direct and indirect ownership of or participation in the licensee company, but also security clearance vetting requirements by and information requests from the BTRC for its prior approval of a transferee act to discourage participation in such an industry by those not already cleared.

5. What documentation is required to implement these transactions?

Conditions of an acquisition or fresh issuance of shares may be additionally governed by a share subscription agreement or SPA and, in the event of the acquisition of a minority interest, a shareholders’ agreement. In an acquisition of shares, after obtaining approval from sector-specific regulatory authorities for companies which require pre-approval and for companies not requiring regulatory approval, the usual documentation is:

(a) a receipt of the encashment certificate from the scheduled bank for the purchase price as such funds are required to be transferred to the seller’s bank account by the purchaser prior to the closing or at the closing;
(b) share transfer instruments, RJSC Form 117, in respect of the sale shares signed by the seller and the buyer;
(c) an affidavit of the transfer of the sale shares;
(d) share certificates duly signed for the transfer;
(e) a duly executed resignation letter from the seller resigning as managing director/director of the company if the seller is transferring its entire shares;
(f) no objection certificates from the existing shareholders of the company waiving their rights of first refusal;
(g) minutes of meeting of the board of directors of the company:
  • approving the sale of shares where the seller participates and approves the transfer in writing;
  • authorising the company to take any and all actions in relation thereto regarding the share purchase and transfer of sale shares;
  • accepting the seller’s resignation as managing director/director of the company if the seller is transferring its entire shares etc;
(h) a duly executed form to reflect the changes in the list of directors etc.

Following the closing, the purchaser shall cause the company to duly file all requisite filings and returns relating to the transactions contemplated as above with the RJSC.

6. What government charges or fees apply to these transactions?

A stamp duty of 1.5% on the full transaction value is applicable in the case of a transfer and purchase of shares. For a fresh issuance of shares, stamp duty is not applicable. However, for a fresh issuance of shares above the value of BDT 100 million, BSEC’s approval is required. An application fee of BDT 5000 is payable. In addition, an appropriate consent fee is also collected by BSEC on the issued value which is determined by BSEC in the Consent Letter.
7. Do shareholders have consent or approval rights in connection with a deal?

Unless the articles of association require the board of directors to obtain approval from shareholders in relation to a deal above a certain threshold, there is no generic requirement to obtain shareholders’ approval. A director is barred by statute from entering into deals supplying goods or services to a company of which it is also a director. Without approval of a general meeting of shareholders, directors are also barred from entering into a deal in which the company’s undertaking is being sold or disposed of or remitting any debt of a director of the company.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

There is no statutory obligation in relation to any duty to stakeholders in connection with a deal unless the same is pre-agreed in the articles of association of the company. There is provision for calling an extraordinary general meeting on requisition by one-tenth of the shareholders on any matter, and a special meeting on requisition does not exclude scrutiny of any potential deal.

9. In what circumstances are break-up fees payable by the target company?

There is no statutory obligation in relation to break-up fees payable by the target company to a purchaser investor. However, it is a common practice for the seller in an acquisition transaction to request a non-refundable down payment if closing does not occur by a specific date or is delayed as a result of the acquirer being unable to fund the acquisition or fulfil one or more conditions precedent provided for in the share subscription agreement and/or SPA.

10. Can conditions be attached to an offer in connection with a deal?

Conditions may be attached in connection with a deal in a pre-agreed manner through the share purchase agreement and/or share subscription agreement. In addition, amalgamation permission by the High Court may include conditions if they are imposed by a regulator.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Financing by financial institutions by way of extending credit facilities may require lien of shares of the company and/or creation of floating or fixed charges, hypothecation or mortgage on the company’s future and current assets. Shareholders or directors may extend shareholders’ loans to the company. CA 1994 further recognises financing through a ‘premium’ over the face value of any share subscription for any specific purpose or payment of redemption of preference shares subject to approval of the board. Financing by issuance of a debenture is also allowed under CA 1994; however, any issuance of debenture in the form of debt security (e.g. bond) must be approved by BSEC pursuant to Private Placement of Debt Security Rule 2012. The rules on the issuance of debt security, whether secured or unsecured issue, require mandatory retention of quota for subscription of offered debt security by banks and financial institutions. Any creation of charge or security, pursuant to any relevant financing, must be registered at the RJSC, failure of which renders the creation of charge or mortgage void ab initio. Enforcement of a charge or mortgage created by financial institutions is conducted through specialist money loan courts. For private individual financing from shareholders or other financing institutes not recognised as licensed institutions, either arbitration may be pursued or a money suit may be filed. A company’s creditors may also resort
12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

The stake of minority shareholders may be diluted if, on call for a fresh subscription pro-rata, such minority shareholders refuse to pay and if such shares are then subscribed by the majority or a third party. Furthermore, as detailed above, section 230 of CA 1994 provides for the buying out of all interests of dissenting shareholders by a transferee whose offer has been accepted by 75% or more of the shareholders of the transferor/target company. However, in such instance, the dissenting shareholders may petition the High Court to stop the transaction. Similarly, minority shareholders being subjected to unconsented-to variations in the rights of the shares held by them may petition the High Court to stop such variations pursuant to section 71 of CA 1994. Finally, as long as minority shareholder(s) individually or collectively hold 10% of the outstanding shares in a company, they will have standing to petition the High Court under section 233 of CA 1994 to review the majority’s/board’s actions for any evidence of undue prejudice against the minority.

13. What is the waiting or notification period that must be observed before completing a business combination?

Save for serving of notice for meetings such as board meetings, shareholders’ extraordinary and special meetings, or as required by the applicable regulator to be provided under consents for such deal, or such notification periods as may be provided in a High Court Order under sections 228/229 of the CA 1994, there is no notification period that must be observed before completing a business combination.

14. Are there any industry-specific rules that apply to the company being acquired?

As discussed above, specific industries require compliance with the industry-relevant legislations prior to any acquisition. For example, telecommunications, banking, insurance, broadcast, power generation, stock brokerage, travel agency, etc. are some specific sectors in which industry-specific rules in relation to ownership must be complied with prior to any acquisition.

15. Are cross-border transactions subject to certain special legal requirements?

Cross-border transactions are subject to additional compliance with ForEx Guidelines. Bangladesh has a restrictive foreign exchange regime where outward remittance of foreign exchange requires specific approval from the Central Bank, Bangladesh Bank, unless the Bangladesh Bank has issued a prior circular authorising a particular transaction to be generally exempt. However, there has been a significant liberalisation of the policy in regards to the repatriation of the aforementioned sale proceeds. Prior to the issuance of Bangladesh Bank’s FE Circular 32 of 31 August 2014 (‘Circular 32’), the Bangladesh Bank, under Chapter 9, Paragraph 3(B) of the Foreign Exchange Guidelines (2009), would previously consider for repatriation proceeds of sale of unlisted securities of an amount not exceeding the net asset value of the securities (as determined from the audited financial statements of the target company). The Circular 32, however, has provided two additional methods of valuation (market value and income approach), which in most cases are likely to provide a higher valuation of the fair value, being the amount that may be repatriated, of the securities and thus the amount the Bangladesh Bank would allow for repatriation.
16. How will the labour regulations in your jurisdiction affect the new employment relationships?

The labour laws in Bangladesh do not take into account of mergers and acquisitions or notification of the same to the labour force. Labour Act 2006 and the Labour Rules 2015 promulgated thereunder require notification to the Bangladesh government Dept. of Labour, Chief Inspector of Labour of an organogram of a factory and changes thereto, including appointment of new managers of a factory. When such managers are changed, the establishment is required to report to the Chief Inspector. Further, any gratuity, pension, etc. that is in force and provided by the previous employer would be deemed to be continuing unless the contract of employment is renewed with new conditions. The Act also provides for prescribed processes for layoffs, retrenchment, termination by employer without stigma, etc., which processes the new employer would be under a statutory obligation to follow.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Competition Act 2012 provides for pre-approval/permission from the Competition Commission for any merger or acquisition effecting competition in any sector or market. When the Act becomes effective following the formation of the contemplated Competition Commission which will be in charge of the enforcement of this Act, it may impact M&A activities significantly. Recently, the High Court has issued a direction for the addition of an independent valuation of shares of merged entities, and has added that for every amalgamation hearing of listed companies, BSEC should be added as a party for the regulator to make observations regarding conditions in a proposed amalgamation/merger scheme before the court.
1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The key laws and regulations that govern mergers and acquisitions (‘M&A’) in Brazil are:

(a) Law No. 10,406, dated 10 January 2002 (‘Brazilian Civil Code’), generally applicable to limited liability companies;
(b) Law No. 6,404, dated 15 December 1976 (‘Brazilian Corporate Law’), applicable to corporations;
(c) Law No. 12,529, dated 30 November 2011 (‘Brazilian Anti-trust Law’); and
(d) rules issued by the Securities and Exchange Commission of Brazil (Comissão de Valores Mobiliários (‘CVM’)), in general terms, applicable to transactions involving publicly held companies and investment funds.

Other relevant laws and regulations applicable or indirectly related to M&A transactions in Brazil are:

(a) resolutions issued by the National Monetary Council and rules issued by the Central Bank of Brazil, if the deal involves any financial institution and/or foreign investment and/or investor; and
(b) Law No. 5,172, dated 25 October 1966, Brazilian National Tax Code.

Industry-specific regulations apply to sectors such as energy, oil and gas, mining, telecommunications, advertising, among others, where regulatory or self-regulatory agencies are responsible for enacting and enforcing new rules and supervising the market (e.g. Agência Nacional de Energia Elétrica (‘ANEEL’), for energy-related transactions; Agência Nacional do Petróleo, Gás Natural e Biocombustíveis (‘ANP’), for oil- and gas-related transactions) (see also question 14).

Lastly, the recently formed Brazilian Takeover Panel (Comitê de Aquisições e Fusões (‘CAF’)) provides certain guidelines for M&A transactions by means of a self-regulatory code (akin to that adopted by the takeover panel in the UK). Submissions of M&A transactions to the CAF are not currently mandatory though.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The most relevant government regulators and agencies that may be involved in general M&A transactions in Brazil are:

(a) the CVM (if the transaction involves publicly held companies and/or investment funds);
(b) the Administrative Council for Economic Defense (‘CADE’), which oversees anti-trust issues (if the transaction impacts market competition conditions’); and
(c) the Central Bank of Brazil, depending on specific aspects of the transaction (if the transaction directly involves financial institutions, foreign investments and/or investors).

As mentioned in question 1, transactions involving companies that carry out regulated
activities may also involve other Brazilian regulatory agencies such as ANEEL or ANP, among others (see also question 14).

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Yes, hostile bids are permitted under Brazilian law. However, due to several reasons (e.g. the stage of development of Brazilian capital markets and the largely concentrated ownership of Brazilian corporations), hostile bids are still very rare. In fact, there have been only three hostile takeovers (or attempts thereof) to date: the acquisition attempt of Perdigão by Sadia in 2006, the acquisition of GVT by Vivendi in 2009, and the acquisition attempt of Paranapanema by Vale in 2010.

Legal requirements and obligations related to takeover bids are provided for in the Brazilian Corporate Law and CVM Instructions. Whether hostile or friendly, takeovers of publicly held companies trigger similar obligations for the acquiring company (e.g. launching a public offer to acquire shares owned by non-controlling shareholders).

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation)

In addition to the Resolutions of the National Monetary Council and rules issued by the Central Bank of Brazil (regarding transactions involving financial institutions) and the Brazilian Anti-trust Law (which establishes a pre-notification review, i.e. anti-trust approval amounts to a condition precedent; see also footnote 1 in question 2), there are several specific laws that establish restrictions for transactions involving regulated industries and sectors. Also, CVM rules require any third party that acquires the corporate control of a publicly held company to launch a mandatory tender offer at 80% or 100% of the acquisition price, depending on the company’s bylaws or special listing segment (companies may opt to list their shares and adhere to one of three special segments created by the São Paulo Stock Exchange: Level 1, Level 2 and New Market (Novo Mercado), the last of which providing for the most stringent governance rules). See also question 14.

5. What documentation is required to implement these transactions?

M&A transactions usually involve the preparation and execution of the following documents:

(a) Preliminary Documents

As in other jurisdictions, negotiations usually result in the execution of a binding non-disclosure agreement by the parties. In the early stage of a transaction, the parties also frequently enter into a (non-)binding term sheet and/or letter of intent which sets out the key terms and conditions of the intended deal.

(b) Share/Asset Purchase Agreement/Investment Agreement

The main document governing an M&A transaction is typically an investment agreement, a subscription agreement or a share/asset purchase agreement. Such agreements normally follow international standards in terms of style and drafting, but adapted to address certain Brazilian law

1 Pursuant to Brazilian Anti-trust Law and Ministries of Finance and Justice Joint Resolution No. 994/2012, M&A transactions in which: (a) at least one of the companies or its economic group has gross annual Brazilian earnings of at least R$750 million; and (b) at least one of the other companies or its economic group has gross annual earnings of at least R$750 million or higher must be previously notified and filed by the parties before CADE.
issues and requirements. Certain carve-out or prior corporate or asset reorganisations may also be agreed upon and the applicable documents may be required.

(c) Shareholders’ (Quotaholders’) Agreement/ Joint Venture Agreement

Unless the buyer purchases 100% of the target company, the buyer and seller(s) negotiate and enter into a shareholders'/quotaholders’ agreement which governs, among others, the management of the company and restrictions on transfer (e.g. rights of first refusal, tag along and drag along rights and registration rights). If the transaction involves the combination of business with shared control or the formation of an independent entity to achieve a specific purpose, parties enter into a joint venture agreement that governs the management of the company.

(d) Corporate Documents

Documents generally executed on the closing date to implement the transaction (e.g. amendments to bylaws or articles of association of the target company, minutes of the board of directors, shareholders’ resolutions). Typically, these documents have to be registered with the relevant state Board of Trade (Junta Comercial) (and, if foreign, with the Registry of Titles and Documents after the due process of notarisation and translation by a sworn translator into Portuguese).

6. What government charges or fees apply to these transactions?

For transactions requiring an anti-trust approval, companies must pay a R$85,000 processing fee in order to have the transaction reviewed and approved by the CADE.

General transactions involve notarisation and filing fees before the Board of Trade, which vary according to the state in which the transacting companies are located but are not significant (should not exceed US$2,000).

Prior regulatory consents normally do not lead to any material charges or fees payable to the relevant government authorities.

7. Do shareholders have consent or approval rights in connection with a deal?

Generally, yes. While shareholders of a corporation may or may not have such rights, quotaholders of a limited liability company do have consent or approval rights in connection with an M&A transaction. As a general rule, the general meeting is the supreme management body of a company and it is convened to discuss and approve:

(a) amendments to the bylaws and/or articles of association of the company;
(b) the company’s transformation, merger, spin-off;
(c) an increase or reduction of the company’s capital;
(d) the appointment or removal of members of the board of directors, officers and managers, as applicable;
(e) the company’s accounts; and
(f) an issuance of securities, as applicable.

Specifically, with regard to shares’/quotas’ acquisition by a third party, shareholders/quotaholders have some particular approval rights. In the case of limited liability companies, quotas may be transferred to a third party only if quotaholders representing 75% of the corporate capital approve the assignment and the respective amendment to the company’s articles of association (i.e. quotaholders representing 25% of the corporate capital have a veto right with regard to an acquisition transaction). With respect to corporations, considering that the transfer of shares to a third party does not depend on the amendment of the company’s
bylaws, shareholders do not have the power to approve or disapprove an acquisition transaction.

In addition, when it comes to capital increases, both quotaholders and shareholders have pre-emptive rights to subscribe to the newly issued quotas/shares pro rata to their equity in the respective company. In addition to that pre-emptive right, specifically, with regard to limited liability companies, quotaholders representing 25% of the corporate capital before the capital increase have a veto right in relation to the new entrants.

Lastly, it is important to note that quotaholders/shareholders may have other rights (such as the right of first refusal and tag along rights) under existing quotaholders’ or shareholders’ agreements, joint venture agreements, bylaws (corporations) or articles of association (limited liability companies).

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

In general terms, pursuant to Brazilian Corporate Law, controlling shareholders owe a duty to the interests of a company's shareholders and employees and to the impact of the company’s operations on the community, in addition to the controlled company’s interest. With respect to M&A transactions, the controlling shareholders’ main fiduciary duty is to pursue the company’s best interest, which may be particularly complex in transactions involving related parties (e.g. controlling and controlled companies) and may even give rise to the controlling shareholder being personally liable in case of abuse of controlling power.

In a similar fashion, directors, officers, and managers (in limited liability companies) also have fiduciary duties before the company and its shareholders/quotaholders. Their main obligation is to carry out the company’s businesses with reasonable care, skill and diligence, and they may be held personally liable in civil and administrative suits for losses suffered by the company or the shareholders/quotaholders in case of non-compliance with such obligation.

9. In what circumstances are break-up fees payable by the target company?

Brazilian law does not contain a specific regulation on M&A break-up fees. However, the parties are free to establish break-up fees in M&A related agreements in order to protect: (a) the negotiations from the influence of third-party bidders; or (b) the parties from breaches by the other party of its obligations under the preliminary documents of the transaction (e.g. non-fulfillment of certain conditions precedent).

As such, break-up fees are typically provided for in the preliminary documents of a given transaction (e.g. a binding letter of intent) or in the main agreements (e.g. when related to the breach or default of conditions precedent).

10. Can conditions be attached to an offer in connection with a deal?

Yes, and they frequently are in Brazil. The conditions that will be set out in an agreement will depend on the type of transaction and the industry in which the companies involved in the deal carry out their activities. Some of the common conditions are:

(a) completion of a due diligence process in satisfactory terms to the buyer;
(b) preservation of the company’s financial condition;
(c) obtaining all corporate and necessary government approvals and authorisations, including the approval of the CVM (in the case of publicly held companies’ takeovers) and the CADE, if necessary;
(d) closing of the transaction within a determined period of time;
(e) completion of a prior corporate reorganisation;
11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

There are no regulations that require a minimum level of financing for any given M&A transaction. While a few transactions related to financial institutions (e.g., the incorporation of a bank) do require a certain minimum amount of capital, except for bank needs to provide funding guarantees to an OPA (Oferta Pública de Aquisição, public acquisition offer) in the cases provided for under Brazilian regulation, there is no regulation regarding the amount of financing to be employed in an acquisition of an existing company (financial institution or not).

If the buyer does opt to carry out a leverage buy-out, for instance, the transaction would include a loan agreement and related collaterals. Collaterals are usually established under share pledge agreements or, depending on the complexity of the transaction, fiduciary transfers/assignments of real estate properties or receivables, usufruct rights over the shares, pledges over the assets of the target company or bank guarantees (e.g., letter of credit).

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

The Brazilian Corporate Law provides for a squeeze out procedure in the case of a tender offer in which the relevant bidder intends to but is not able to acquire 100% of the target’s shares for the purpose of delisting the publicly held company. In this case, if the remaining shares represent 5% or less of the free float after such a tender offer, the remaining shareholders may be squeezed out (by the company itself or by the controlling shareholders). The procedure set out in Brazilian Corporate Law and in CVM Instructions requires, in summary, that:

(a) the company convene a general meeting to resolve the squeeze out; and
(b) the squeezed-out share price be the same as that of the tender offer adjusted by monetary correction.

13. What is the waiting or notification period that must be observed before completing a business combination?

As of 2011, under the Brazilian Anti-trust Law, pre-closing notification and approval is required. Even though the Reporting Commissioner may allow parties in complex cases to close the transaction before CADE’s clearance is obtained, there has not been any such case to date. Hence, there is no waiting notification period to be observed with regard to transactions subject to CADE’s approval.

On the same topic, certain M&A transactions are subject to a different kind of waiting period. Transactions such as spin-offs and capital reductions, for instance, can be effectuated – and the measures related to business combination can be taken – without the prior approval by certain creditors, but are still subject to creditors’ challenge and, potentially, may be reversed in some cases.

Depending on the type of company (corporation or limited liability company), the company’s creditors have a period of 60 or 90 days after registration and publication of the transaction to oppose such capital reduction or spin-off.
14. Are there any industry-specific rules that apply to the company being acquired?

Yes, there are several specific laws that provide for restrictions applicable to some industries. A non-exhaustive summary of the restrictions is set out below:

(a) Airports and Airlines

Cross-ownership of airport operators and airlines companies is regulated by a specific law. Pursuant to this regulation, foreign investment in these companies must be limited to 20% of the corporate capital.

(b) Broadcasting

Ownership of broadcasting companies, which is regulated by the Brazilian Federal Constitution, must be held by Brazilian companies and/or Brazilian individuals.

(c) Financial Services

There are several rules applicable to the financial services sector. In short, the Central Bank of Brazil must approve and/or be notified of transactions involving financial institutions.

(d) Energy

Ownership and cross-ownership of energy companies is regulated by several specific laws and regulations issued by ANEEL.

(e) Rural Real Estate Property

Ownership of rural real estate is regulated by a specific law, which, among other provisions, restricts ownership and occupation by foreign investors up to a maximum limit of 70% of the real estate's total area. Besides, Brazilian companies controlled, directly or indirectly, by foreign entities or individuals may only lease from third parties or own rural properties upon prior authorisation from government authorities, and are subject to additional restrictions.

(f) Mining

Mining rights may only be held by Brazilian legal entities, and are subject to specific conditions and restrictions under the Brazilian Mining Code and regulations by the National Department of Mining Production (Departamento Nacional de Produção Mineral).

15. Are cross-border transactions subject to certain special legal requirements?

Except for (a) the restrictions mentioned in question 14; and (b) the registrations with the Central Bank of Brazil related to transactions in which foreign investments or investors are involved, cross-border transactions are not typically subject to any special legal requirements.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

M&A transactions themselves are not usually a cause for terminating a target company’s existing employment agreements. Nevertheless, as the buyer’s economic group becomes liable for all labour-related contingencies of the target company’s economic group, the target company’s labour practices are closely scrutinised during due diligence exercises (to estimate contingencies that may arise out of employment relationships and may become an issue in an M&A transaction negotiation).

With respect to asset acquisition (establishment acquisition), the acquirer may be considered liable for labour matters and relationships that have been created prior to the acquisition of the premises of the company. When it comes to share acquisition, there is no change in employment arrangements.

In regard to transactions involving the transfer of employees, the acquisition vehicles should be structured taking into consideration the labour structure of the target companies and the best manner for transferring the employees and, at the same time, maintaining the most beneficial employment terms provided by Brazilian
Labour Law (such as vacation and any other social security rights).

It is also critical to assess whether there are labour conditions that are more favourable to certain employees either in the buyer’s or in the target company’s economic group, as such conditions may have to be extended to the target company’s or to the buyer’s employees after the transaction is completed, even in the absence of new employment relationships.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

(a) New Rural Real Estate Property Regulation

Bill No. 4059/2012 is being considered by the National Congress. This regulation aims at regulating and authorising the ownership of rural real estate properties by foreign investors, either directly or through Brazilian-domiciled entities. As mentioned in question 14, there is currently a specific regulation that restricts the ownership and occupation by foreign investors up to a maximum limit of 70% of the real estate’s total area.

(b) CVM Instructions

There are new Instructions and/or amendments to existing CVM Instructions that are either being discussed or under analysis and may impact M&A activities:

(i) disclosure: CVM Public Hearing Notice SDM n. 05/2016 is currently under analysis. It proposes to amend CVM Instruction n. 358/2002, which regulates the disclosure of information by publicly held companies;

(ii) crowdfunding-based investment: CVM Public Hearing Notice SDM n. 06/2016 is currently open for public consultation. It aims at governing the distribution of securities of small-sized companies in a public offer without the need to register with the CVM; and

(iii) new regulation on private equity funds (‘FIPs’): CVM Instruction Nos. 578 and 579 recently modified certain key legal rules that govern Brazilian FIPs, ensuring a more flexible framework, e.g. FIPs are now permitted to invest in both corporations and limited liability companies, and the bylaws may provide for different classes of quotas (interests), therefore establishing different economic and voting rights, as well as obligations, for investors; specifically, CVM Instruction No. 579 sets out new accounting standards and rules applicable to FIPs and the assets held by them (fair market value versus equity pick-up method).

(c) New Commercial Code

There are some bills under discussion in the Congress that aim at amending the commercial code (and also the corporate chapter of the Brazilian Civil Code) so as to provide for a new overarching corporate law regime. While it is still uncertain whether such bills will be approved (as they are facing growing criticism by the market), they provide for the following, among others:

(i) associations will be entitled to take part in corporate combinations, such as mergers and spin-offs, if allowed by their respective bylaws; and

(ii) within 60 days of the publication of the documentation related to a completed merger, creditors that uphold to have suffered losses as a result of such a merger may plead for its annulment.

(d) New Mining Code

In 2013, the Brazilian Federal Government proposed to the National Congress a bill on a new Brazilian mining code. Since then, the Brazilian Government, Congressmen, mining companies and other parties interested in the mining industry in Brazil have been discussing the bill and certain
controversies on some of the key points. To date, no consensus has been reached. Among others, the bill establishes the following:

(i) all new exploration licences and exploitation concessions to be granted under the new legal framework will be preceded by public bids, which any third party interested in exploring deposits and exploiting mines may attend;

(ii) mining concessions already granted will remain subject to the legal framework currently in force; however, the new legal framework will apply if:

- such mining rights are transferred to another entity;
- the mining company is involved in any corporate reorganisation (such as a merger or spin-off); or
- the corporate control of the mining company is transferred to third parties, either directly or indirectly;

(iii) concessions for the exploitation of mines will be granted under concession agreements (the standard drafts of which have not been prepared yet) and will be limited to 40 years, renewable for an additional term of 20 years, provided that the mining company is in full compliance with all obligations set forth thereunder;

(iv) royalties due on mining activities (known as CFEM), which currently range from 0.2% to 3% over net revenues, will be increased to a maximum rate of 4% over gross revenues (net of taxes over sales); and

(v) DNPM, the current government agency in charge of regulating mining activities in Brazil, will be replaced by ANM, a federal agency with autonomy in relation to the federal government (similar to other Brazilian regulated sectors, such as telecommunications, electric energy, oil and gas, civil aviation); however, principles and policies applicable to the mining sector will be issued by CNPM, a federal council that will be in charge of advising the Brazilian President on broader mining matters and proposing guidelines for the sector.
1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The key laws and regulations that govern and are of significance to mergers and acquisitions in India are the Companies Act, 1956, the Companies Act, 2013, the Securities and Exchange Board of India Act, 1992 (‘SEBI Act’), the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (‘Takeover Code’), the Foreign Exchange Management Act, 1999 (‘FEMA’), the Competition Act, 2002 (‘Competition Act’), the Indian Contract Act, 1872 (‘Contract Act’), and the Income Tax Act, 1961 (‘Income Tax Act’).

The applicability of these laws depends on the nature of the entities (whether listed, unlisted or private company) involved in the merger or acquisition and the nature of the transaction. The Companies Act, 1956 and the Companies Act, 2013 are the principal legislations which provide for mergers and acquisitions that are either required to be carried out by involvement of the court of law or effected through private arrangements. The provisions of the Companies Act, 2013 pertaining to mergers have not yet come into effect; therefore, the mergers provisions of the Companies Act, 1956 are still applicable and govern the mergers of Indian companies.

The SEBI Act and the Takeover Code also apply if one of the parties to the merger or acquisition is a listed company, in which case the provisions of the listing agreement of the stock exchange on which the stock of the company is listed are required to be complied with. The Takeover Code provides for acquirers to make disclosures of shareholdings and encumbrances and public announcements, and to make open offers in cases of acquisition of shares or voting rights beyond a certain threshold percentage, consolidation of holdings, and acquisition of control over a company.

Cross-border mergers and acquisitions or acquisition of an Indian company by a person resident outside India have to comply with the provisions of FEMA and the regulations, guidelines, directions and circulars made under FEMA that regulate foreign investments in India. The Foreign Direct Investment Policy issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, is the guiding and regulatory policy on the specific limits of investment in, or acquisition of, an Indian company by a person resident outside India in a particular sector or activity.

The Competition Act controls business combinations, i.e. mergers, acquisitions and amalgamations, which cause, or are likely to cause, an appreciable adverse effect on competition within the relevant market in India. Hence, an approbation of the Competition Commission of India, a quasi-judicial authority constituted under the Competition Act, has to be sought in case the combination meets the prescribed financial thresholds. De minimis provisions for exemption of certain combinations are also envisaged under the Competition Act.

Further, the provisions of the Income Tax Act have considerable commercial bearing on transactions involving mergers and acquisitions in India, especially on the applicability of
capital gains tax. In cross-border transactions, provisions of the Double Taxation Avoidance Agreement signed between India and the relevant country may also be applicable.

Acquisitions pursuant to private arrangements may also attract the application of the Contract Act.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

Mergers and acquisitions in India are effected either as required by sanction of the relevant High Court(s) in whose jurisdiction the registered offices of the companies involved in the merger are located, or by way of private arrangements. In the case of a merger through the court, the Official Liquidator and the Regional Director having delegated power of the Central Government of India are also involved in the process of sanctioning the schemes of merger.

The relevant provisions of the Companies Act, 2013 pertaining to mergers are yet to be notified. After the said provisions are notified, matters that presently require sanctioning by the court shall be dealt with by the National Company Law Tribunal (‘NCLT’), which has recently been constituted.

The Securities and Exchange Board of India (‘SEBI’), a quasi-judicial body, is involved in and acts as regulator for the process of mergers and acquisitions where a listed company is involved.

The Competition Commission of India (‘CCI’) is an important government authority in the context of mergers and acquisitions. CCI regulates combinations that cause, or are likely to cause, an appreciable adverse effect on competition within India based on certain prescribed financial thresholds.

The Reserve Bank of India (‘RBI’), acting as an administrative body for FEMA, has the authority to regulate and permit transactions involving foreign exchange and cross-border transactions. Certain mergers and acquisitions require specific approval of the government of India, involving authorities such as the Department of Industrial Policy and Promotion and the Foreign Investment Promotion Board (‘FIPB’). The Cabinet Committee on Economic Affairs may also be involved if the proposed investment exceeds the prescribed limit.

In addition to the above, there are certain sector-specific authorities that play an important role in mergers and acquisitions in such sectors, and additional permission from such sector-specific regulators may also be required.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are not prohibited in India. However, due to the nature and structure of companies and regulatory guidelines in India, hostile bids are not common. In the case of a private limited company which is closely owned and controlled by the promoters or a group of promoters and whose shares are not freely traded, the acquisition is typically carried out by private negotiations and arrangements. The possibility of hostile bids in such a case is not practical.

For listed companies, since there is no prohibition under the Takeover Code against making hostile offers, a hostile acquirer may launch a voluntary offer or make a competing offer against a public offer. However, a hostile bid for a widely-held listed company in India is also not common in light of the public offer mandated by the Takeover Code. Further, the promoters and promoter group generally have substantial stock and are typically in a controlling management position in most Indian listed companies. Hence, they are in a position to monitor stake building by the potential hostile bidder, which enables them to adopt some control defence strategies, such as scorched earth, poison pills and white knights. In India, the white knight strategy has been widely used to resist hostile
acquisitions. Thus, control defences in India are mainly promoter-driven, and successful hostile bids are not common due to the aforesaid reasons and the stringent disclosure requirements under the Takeover Code.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

The Competition Act provides that certain mergers and acquisitions can be restricted or considered void by CCI. The test is, inter alia, whether the proposed combination causes, or is likely to cause, an appreciable adverse effect on competition in the relevant market in India. Further, in the context of cross-border transactions, foreign shareholding in the Indian company breaching the sectoral cap prescribed for that particular industry is not permissible. Also, investments in certain sectors or business activities are subject to specific security clearance by the relevant authorities of the government of India for the investment or for the involvement of foreign management personnel. Some examples of industries in which foreign investments are regulated are defence, civil aviation, telecommunications, railway infrastructure in sensitive areas, the field of underground mine construction, after which he founded a dotcom which grew to be India’s largest women’s portal, with a focus on e-commerce. The company was subsequently acquired by the Times of India group. Thereafter, Rahul managed and grew the Indian operations of one of the first knowledge process outsourcing companies set up in India, along with a team of consultants from McKinsey.

Rahul Chadha
Managing Partner, Chadha & Co.

Rahul is the Managing Partner of Chadha & Co. He works closely with senior management of leading multinational clients of the firm on strategy formulation, M&A, private equity, government policy, regulatory and management issues that impact their business in India.

Rahul started his professional career in 1992 with Unilever’s Indian subsidiary. Subsequently, he set up and managed, as a director, a joint venture company with Singaporean and Ukrainian partners in

In addition to his degree in Law, Rahul holds a bachelor’s degree in Electronics and Communication Engineering from the University of Delhi and an MBA from the Indian Institute of Management Bangalore.
Cross-border mergers and acquisitions require additional documentation for the purpose of informing and obtaining approval from the Reserve Bank of India and the government of India, as applicable.

In the event that the merger or acquisition is handled through an escrow mechanism, an escrow agreement is typically executed by the parties concerned.

6. What government charges or fees apply to these transactions?

Stamp duty is a major component of the charges and fees payable to the government in mergers and acquisitions. Stamp duty is payable on the instrument and, barring a few cases that are subject to a central levy, stamp duty is governed by the stamp legislation of the state in which the transaction takes place. Stamp duty varies from state to state.

Acquisitions by way of transfer of shares in physical form are subject to a stamp duty of 0.25%, payable uniformly in India, of the market value of the shares on the trade date. No stamp duty is levied on a transfer of shares held in dematerialized form. Stamp duty is also separately payable on share transfer agreements or asset transfer agreements as per the rate prescribed under the stamp legislation of the state in which such agreement is executed and performed, which is generally a nominal stamp duty.

For court-driven mergers, a court fee is payable at the time of filing the application with the court as per the rules of the respective High Court. Additionally, many states of India have expressly provided, in their state legislation, that the order of the High Court sanctioning the merger and amalgamation shall be considered as ‘conveyance’, and an instrument of ‘conveyance’ is chargeable to the applicable stamp duty of that state. However, there are various other states that have not made such express provisions.
7. Do shareholders have consent or approval rights in connection with a deal?

The Companies Act, 1956 (as presently applicable to merger cases) provides for a requirement of consent of the shareholders who are a majority, representing three-fourths in value, for the purpose of sanctioning of the scheme of merger by the court. Accordingly, the High Court, while sanctioning the scheme, directs the company and ensures that the shareholders’ meeting is convened and the aforesaid consent of the shareholders is obtained. For acquisitions where the provisions of the Takeover Code become applicable, prescribed fees are payable to SEBI at the time of filing the letter of offer with SEBI. The fee depends on the consideration payable under the open offer.

If the merger or acquisition is required to be notified to the CCI, the applicant has to pay a prescribed fee at the time of filing the form. Presently, the filing fees for Form I and Form II are INR 1.5 million and INR 5 million respectively.

Neeraj Prakash
Partner, Chadha & Co.

Neeraj Prakash is a Partner in the firm, with more than 13 years of experience of successfully practicing corporate and commercial laws. Neeraj practices in the areas of Mergers & Acquisitions, Joint Ventures, Government tenders, corporate and commercial transactions (including deal structuring, negotiation, documentation and execution of transactions), Foreign Direct Investment and setting up of businesses in India, competition law and general corporate legal and regulatory advisory.

He has represented companies ranging from start-ups to multinationals and has practiced in industries including manufacturing, logistics, health care, retail, electronics, banking, and infrastructure with special focus on the power sector and railways, and is regularly involved in cross-border matters.

Neeraj has substantial experience in conceptualisation of transactions, from negotiation and drafting of transaction documents and carrying out due-diligence, to monitoring of pre and post-closing obligations. With his vast knowledge and experience in commercial transaction laws, Neeraj has handled complicated client situations effectively. He has assisted a wide variety of multinational companies in obtaining necessary regulatory and legal approvals required to consummate transactions, including approvals from Foreign Investment Promotion Board, Reserve Bank of India, Ministry of Corporate Affairs, Competition Commission of India and other regulatory bodies, and has also advised clients in making necessary regulatory filings to comply with Indian laws and regulations.
In addition, the Companies Act, 2013 enables the minority shareholders (not fewer than 100 shareholders of the company or not less than one-tenth of the total number of its shareholders, whichever is less, or any shareholder(s) holding not less than one-tenth of the issued share capital of the company) to approach the NCLT in the event prejudice is caused to their interest. A provision for a class action is also stipulated in the Companies Act, 2013. The rights of these shareholders sometimes may have an impact on proposed mergers.

In the event of acquisitions by way of private arrangements, the shareholders’ consent is obtained as the shareholders are parties to the deal.

8. **Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?**

Unlike the earlier legal position under the Companies Act, 1956, the Companies Act, 2013 has codified the fiduciary duty of directors. Accordingly, the directors of an Indian company owe a fiduciary duty to the company and its shareholders. The provision stipulates that a director must act in good faith for the benefit of its members as a whole, and in the best interests of the company. Directors are required to exercise their duties with due and reasonable care, skill and diligence and to exercise independent judgment. Thus, a general duty has been cast on a company’s directors to explain to the shareholders the commercial prudence, rationale, benefits, risks etc. of the merger/acquisition at the time of recommending the deal to the shareholders for their approval, thereby enabling the shareholders to make an informed and considered decision.

Controlling shareholders have no express and direct obligations or duties towards the other shareholders in connection with the deal. However, balancing provisions have been provided for the minority shareholders to challenge the deal if the same is prejudicial to their interests.

In the event the target company is a listed company, the Takeover Code casts an additional obligation on the board of directors of the target company to constitute a committee of independent directors to provide reasoned recommendations on each offer, which recommendations are required to be published by the company.

9. **In what circumstances are break-up fees payable by the target company?**

The payment of break-up fees is not prohibited in India. It can be contractually agreed upon between the parties, but it is not very common in India for the target company to agree on break-up fees with the acquirer. The Contract Act provides for damages in case of a breach of contract. Such damages are generally limited to compensation for direct losses resulting from non-performance by the breaching party.

Hence, in most cases, the party in breach of the terms of the letter of intent or memorandum of understanding agrees to reimburse the expenses incurred by the other party in connection with the transaction.

10. **Can conditions be attached to an offer in connection with a deal?**

Parties to a share acquisition or business acquisition can privately negotiate and agree upon the terms and conditions for consummating the deal. Typically, in India, some of the prevalent conditions include, inter alia, the findings of a comprehensive due diligence exercise, material adverse change, hold back condition, minimum level of acquisition etc.

In the case of an acquisition of a listed company, the Takeover Code acknowledges and provides for a conditional offer whereby an acquirer may make an open offer conditional as to the minimum level of acceptance. In such a case, the competing offer can also be made conditional as to the minimum level of acceptance. However, the competing offer can
be conditional only if the original offer is also conditional.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Mergers are generally different from acquisitions in the way they are financed. Mergers are generally cashless and involve share swaps. Financing is important in acquisition deals.

In the case of a private acquisition, i.e. where the target company is not a listed company, there is no legal requirement on the level of financing. Typically, the seller negotiates on the terms under the acquisition agreement/document to secure the financial ability of the purchaser to complete the acquisition. The financing options available for acquisitions are not very wide and are being evolved in India for domestic acquirers.

In the case of a listed company where the acquisition triggers a mandatory public offer under the Takeover Code, a provision to secure the acquirer’s performance of the financial obligations is stipulated under the Takeover Code. The acquirer, not fewer than two working days prior to the date of the detailed public statement of the open offer for acquiring shares, is required to deposit a part of the consideration (as prescribed under the Takeover Code) payable under the open offer in an escrow account. The escrow account may be created by way of a cash deposit, a bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank, or a deposit of frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

A new provision, which is yet to be notified and become effective, has been included in the Companies Act, 2013 whereby if an acquirer becomes a shareholder holding 90% or more of the shares in a company, it shall make an offer to the minority shareholders to buy the shares held by such minority shareholders in the company. However, it is not envisaged in the said provision that such an offer is mandatorily required to be accepted by the minority shareholders. Further, a ‘sell out right’ is also provided, whereby the minority shareholders may make an offer to the majority shareholders to purchase their shares.

In the case of a listed company, another set of regulations mandates that at least 25% of the shares of a listed company are held by public shareholders for the purposes of continuous listing. Therefore, an acquisition beyond this threshold by majority shareholders is not permitted in the case of a listed company.

Thus, it is challenging in the Indian legal framework to squeeze out minority shareholders. At times, companies have utilised the route of a scheme of arrangement to squeeze out minority shareholders, which has been discouraged by the Indian courts.

13. What is the waiting or notification period that must be observed before completing a business combination?

For the purposes of business combinations, certain timelines have been prescribed in the Takeover Code in relation to the process of an acquisition of a listed company where the acquisition triggers the requirement for an open offer, such as timelines for opening an escrow account, filing a detailed public statement and a draft letter of offer, making a competing offer, receiving the comments on the letter of offer from SEBI etc. The said prescribed timelines vary from 2 to 15 working days. Typically, the total time involved in completing an acquisition ranges from four to eight months, depending on various factors.
In the event a combination is required to be notified to the CCI, the Competition Act and the related regulations prescribe timelines for various actions to be undertaken by the applicant and the CCI. The party that proposes to enter into a combination is required to notify CCI within 30 days of approval of the proposal relating to the merger or amalgamation by the board of directors of the enterprise concerned, or execution of any agreement or other documents for acquisition of shares, assets, voting rights or control, as the case may be.

CCI is required to form its prima facie opinion, within 30 days from receipt of the notice, as to whether the combination is likely to cause, or has caused, an appreciable adverse effect on competition within the relevant market in India. If CCI’s prima facie opinion is in the affirmative, a detailed investigation is then conducted by CCI, and the combination cannot be effected until CCI pronounces its decision. However, if CCI does not pass an order or issue directions within a period of 210 days from the date of filing the notice with CCI, the combination shall be deemed to have been approved by CCI.

In a cross-border acquisition where the acquisition requires the prior approval of the Foreign Investment Promotion Board or the Reserve Bank of India, typically, a period of 30 to 45 working days is taken for such an approval.

For court-driven mergers, no timeline is prescribed for completing the process and for passing the order by the court. However, once the provisions relating to mergers under the Companies Act, 2013 are notified and come into effect, matters relating to mergers will be dealt with by the NCLT. At present, such matters are heard by the respective High Court having jurisdiction over the registered office of the company. The NCLT is a specialised body dealing only with cases relating to company laws and related laws; hence, it is expected that the cases of court-driven mergers would be concluded in a speedy manner.
in Depository Receipt or both. Additionally, the Central Government of India, in consultation with the Reserve Bank of India, may make rules with respect to cross-border mergers and amalgamations as mandated in the Companies Act, 2013, which may prescribe certain regulatory requirements and restrictions. Cashless issues of shares on account of the merger of a foreign company with an Indian company may require prior approval of the FIPB.

With respect to acquisitions, the acquisition of an Indian company by a foreign party and the acquisition of a foreign company by an Indian party are regulated by the policy of the government of India and the rules and regulations made by the Reserve Bank of India under FEMA. Inward investment in India is typically termed as 'foreign direct investment', and outward investment and acquisition is termed as 'overseas direct investment'; both are governed by the specific guidelines for the respective transactions.

Broadly speaking, a foreign party is allowed to hold 100% of the shares of an Indian company, unless there is a sectoral cap prescribed for any business activities carried out or proposed to be carried out by the Indian company. Sectoral caps have been provided for some of the regulated industries and may also have some conditions attached to allowing the limit of investment by a foreign party. Some examples of industries with sectoral caps are retail trade, insurance, banking, defence etc.

Foreign investment may be made under either the automatic route (where no approval of the government or Reserve Bank of India is required), or the approval route as prescribed under the relevant guidelines. There are certain sectors where foreign direct investment is prohibited, such as chit funds, agricultural or plantation activities, real estate business, lottery, atomic energy, railway operation etc.

Similarly, the financial limits and other conditions for overseas direct investment are also prescribed, and the same need to be complied with when undertaking such a transaction.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

From the perspective of mergers and acquisitions, the Indian labour and employment related laws may not have a substantial impact on the transactions if certain legal points of caution are addressed, such as continuation of service and related benefits, terms of employment before and after the transaction etc. Employees in India can be classified broadly into two categories: workmen and managerial personnel or non-workmen. Workmen’s relationship with the company is governed by various legislations and the rules framed thereunder. The relationship of non-workmen is governed primarily by their employment contract. Labour is a concurrent list subject under the Indian Constitution. Accordingly, the Central Government of India as well as state governments enact labour laws and related rules. Therefore, although the employees’ relationship and regulatory requirements may vary from state to state, the Industrial Disputes Act, 1947 primarily governs the transfer or termination of employees where the industrial undertaking is the subject matter of a merger or acquisition.

Apart from the above legal issues, there could be some human resources, trade union, social or political issues, which need to be handled with caution. The nature and magnitude of such issues may vary from state to state.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

There are certain proposed changes that will have a significant impact on M&A activities. These proposed changes are focused on the broad themes of creating opportunities,
facilitating ease of doing business in India, and reducing vulnerability.

Some of the notable proposed changes include notifying the procedure for court-driven mergers prescribed under the Companies Act, 2013 (which will be dealt with by NCLT), a new concept of short form mergers (i.e. mergers between two or more small companies or between a holding company and its wholly-owned subsidiary company – where no approval of NCLT would be required), and mergers of Indian companies and foreign companies.

On the regulatory front, the limits for foreign investments in certain sectors such as insurance, defence, multi-brand retail etc. are expected to be further relaxed. Various changes have also been proposed in labour and employment laws at the centre and state levels, which will improve the ease of doing business in India and may impact M&A activities.
1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Myanmar lacks a comprehensive legal regime for mergers and acquisitions, and corporate transactions are governed by the general laws and regulations as well as ministerial policies. Key laws that govern corporate transactions include:

(a) The Companies Act (1914);
(b) The Special Company Act (1950);
(c) The State Owned Economic Enterprises Law (1989);
(d) The Foreign Investment Law (2012);
(e) The Myanmar Citizens Investment Law (2013);
(f) The Special Economic Zone Law (2014);
(g) The Securities Exchange Law (2013); and

A new Companies Law and a new Investment Law have been submitted to the Myanmar Parliament and may be enacted in the near future. The information provided herein is thus subject to change.

While it is possible for Myanmar companies to be publicly listed and their shares to be traded since the opening of the Yangon Stock Exchange in March 2016, the acquisition of shares in a publicly listed company is currently prohibited for foreign investors.

Foreign acquisitions are accordingly carried out by investments or share purchases in unlisted companies, or establishment of a new foreign-owned company and acquisition of an existing business by way of an asset transfer.

This article will deal with acquisitions of and investments in unlisted companies.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

When establishing a business in Myanmar, there are generally three options:

(a) Registration under the Companies Act (1914) only;
(b) Additional registration under the Foreign Investment Law (2012) or Myanmar Citizens Investment Law (2013); or
(c) Additional registration under the Special Economic Zone Law (2014) for businesses located in a Special Economic Zone.

For companies registered under the Foreign Investment Law (2012) or the Myanmar Citizens Investment Law (2013), an acquisition of existing shares or admission of new shareholders would be subject to approval of the Myanmar Investment Commission. For companies registered under the Special Economic Zone Law (2014) and located in one of Myanmar’s Special Economic Zones, corporate transactions would be subject to approval of the Special Economic Zone Management Committee.

For a company incorporated only under the Companies Act (1914), the relevant government authority is the Companies Registration Office of the Directorate of Investment and Company Administration. In practice, any foreign investment or acquisition of shares in such a company would however be subject to approval by the relevant ministry, as further stipulated in Notification 26/2016 of the Myanmar Investment Commission.
In addition, approval by the Myanmar Competition Commission may be required for a transaction which results in a merger of businesses.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids to take over a company’s shares are not common in Myanmar. Until recently, the shares of possible target companies were not publicly traded. While this has changed since the opening of the Yangon Stock Exchange, there have not yet been any hostile takeover bids, and Myanmar is lacking relevant legal provisions.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

Any investment in Myanmar is subject to foreign investment restrictions, which are stipulated in the Constitution of Myanmar (2008), the State Owned Economic Enterprises Law (1989), the Foreign Investment Law (2012) and its subsidiary legislation. In addition, restrictions relating to certain economic activities are enforced by ministerial policy.

Any investment or acquisition is further subject to the laws under which a target company was incorporated, such as the Companies Act (1914), the Foreign Investment Law (2012) or the Special Economic Zone Law (2014).

In this regard, it is important to note that the Companies Act (1914) differentiates between ‘Myanmar Companies’ and ‘Foreign Companies’. A ‘Myanmar Company’ means a company whose entire share capital is, at all times, owned and controlled by citizens of Myanmar. Any other company is considered a ‘foreign company’. Accordingly, any company whose share capital is partly owned and controlled by a foreigner or foreign-owned company, even if the ratio of foreign shareholding is minimal (e.g. one share), is considered a foreign company.

Pursuant to the draft of the revised Companies Law, only companies with a certain percentage of foreign ownership will in future be considered ‘foreign’.

If a foreign investor intends to acquire shares of a foreign company registered with the Myanmar Investment Commission under the Foreign Investment Law (2012), such a transaction may be permitted by the Myanmar Investment Commission, provided that the share transfer complies with the requirements and procedures of the law, in particular Notification 26/2016 which divides economic activities of foreigners into the following categories:

(a) Prohibited economic activities;

(b) Restricted economic activities which are allowed only in the form of a joint venture with a Myanmar citizen (or Myanmar-owned company); and

(c) Restricted economic activities which are allowed only under specific conditions.

An acquisition of shares in a foreign company, which is incorporated without registration under the Foreign Investment Law (2012), would be subject to the provisions of the Companies Act (1914) and is further subject to approval of the relevant ministry as stipulated in Notification 26/2016.

In practice, foreign investments into Myanmar companies, whether registered under the Citizens Investment Law (2013) or only under the Companies Act (1914), were until recently not possible. This practice seems to have changed, and an acquisition of shares in a Myanmar company may now be allowed, provided that the foreign investment would be permitted for a Myanmar registered ‘foreign’ target company. Any such investment would further result in the target company’s re-registration as a ‘foreign’ company.

Accordingly, an investment in or acquisition of a target company established under the Citizens Investment Law (2013) would be subject to approval of the Myanmar Investment Commission. An acquisition of shares in a
Such mergers may be prohibited if they are intended to create excessive market domination and/or a reduction of competition creating a market where only a single business or few businesses exist. If the market share resulting from merging businesses exceeds a level prescribed by the Myanmar Competition Commission, such merger may not be allowed. (No threshold has been stipulated.)

Exemptions may apply, if:

(a) After a merger, the business remains as a small- or medium-sized business as defined under the laws;
(b) A single business or a group of businesses could otherwise collapse or is about to become insolvent; and/or
(c) A co-operation of businesses results in promoting exports or is instrumental in advancing technology, development of technology or entrepreneurship.

Alexander Bohusch was born in 1979. He studied law at the Freiburg Albert-Ludwigs University. After his studies, he spent longer periods of time in, inter alia, Singapore, the Philippines and Malaysia. Alexander Bohusch has worked for Luther LLP in Singapore as a “Registered Foreign Lawyer” since 2010. Since 2013, he is further acting as Location Head and General Manager of Luther Law Firm Limited and Luther Corporate Services Limited in Yangon, Myanmar.

Alexander Bohusch advises primarily on investment projects in Singapore, the Republic of the Union of Myanmar and the Asia/Pacific region. These advisory services especially comprise the areas corporate law, international taxation and corporate compliance.
5. What documentation is required to implement these transactions?

The necessary documentation for an acquisition of shares depends on the law(s) under which the target company was registered.

Any share transfer of a company incorporated under the Companies Act (1914) requires a duly stamped instrument of transfer, which shall be filed with the Companies Registration Office. Subject to approval of the share transfer, the Companies Registration Office will subsequently issue a certificate of registered document confirming the transfer of shares.

For an acquisition of shares in a company registered under the Foreign Investment Law (2012), Form 6 (for the transfer of all shares) or Form 7 (for the transfer of some shares) shall be submitted to the Myanmar Investment Commission to apply for approval of the intended transfer. Additional documents may be requested by the authorities, such as a recommendation letter from the Internal Revenue Department for the transfer of all shares in a company.

Finally, the acquisition of shares in a company incorporated under the Citizens Investment Law (2013), the Special Economic Zone Law (2014) or the Special Company Act (1950) may require additional documents depending on the exact nature of the transaction.

6. What government charges or fees apply to these transactions?

For the transfer of shares in an existing company, the following general fees apply:
(a) Share Transfer Form fee of MMK 200;
(b) Registration fee of MMK 25,000; and
(c) Stamp duty of 0.3% of the value of shares being transferred.

Further, the share transfer may be subject to capital gains tax of 10% (or such higher rates as prescribed, for example, for the transfer of shares in companies in the oil and gas sector).

7. Do shareholders have consent or approval rights in connection with a deal?

Shareholders’ consent or approval rights may be stipulated in the memorandum and articles of association and/or a shareholders’ agreement.

Fabian Lorenz was born in 1982. He studied law in Bochum and Freiburg im Breisgau (Germany) as well as in Hong Kong. After completing his legal traineeship in Germany and China, he obtained a Master’s degree in Sinology and worked in the legal department of a German-Chinese company in Hamburg (Germany). Fabian Lorenz joined Luther in Yangon, Myanmar in 2014.

Fabian Lorenz advises his clients in the areas of commercial, corporate and general contract law, as well as international employment and immigration matters.
8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Under the Companies Act (1914), directors and controlling shareholders do not owe a special duty to the stakeholders in connection with a deal. The directors do, however, owe a general fiduciary duty to the shareholders.

9. In what circumstances are break-up fees payable by the target company?

Such fees may be a contractual issue under Myanmar contract law.

10. Can conditions be attached to an offer in connection with a deal?

Conditions would be a contractual issue and are generally allowed under Myanmar contract law.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

With the licensing of several foreign banks to provide corporate banking in Myanmar, domestic sources of financing are now available.

However, any financing from overseas does have to comply with Myanmar’s foreign exchange restrictions, and any loan from overseas to a Myanmar borrower requires the approval of the Myanmar Central Bank (and possibly additional authorities such as the Myanmar Investment Commission).

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Myanmar law does not provide any rules or regulations for squeezing out minority shareholders. Any share transfer requires the approval of the transferring shareholder.

13. What is the waiting or notification period that must be observed before completing a business combination?

Myanmar law does not provide any rules or regulations for waiting or notification periods.

14. Are there any industry-specific rules that apply to the company being acquired?

Any investment into or acquisition of shares in a company must comply with the prohibitions/restrictions on foreign investments set out above, pursuant to which certain economic activities may be prohibited, allowed only in the form of a joint venture with Myanmar citizens, or permitted under specific conditions.

15. Are cross-border transactions subject to certain special legal requirements?

All cross-border transactions are subject to the same legal requirements mentioned above.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Myanmar labour law is governed by numerous old and new laws. In practice, employment relations in Myanmar are further heavily influenced by the policies of the Ministry of Labour, Immigration and Population.

However, Myanmar labour law does not provide for any specific provisions concerning the transfer of employment as a result of a merger or acquisition. Where an acquisition of a business is carried out by way of an asset transfer, the former employer, the new employer and the employees may agree on a contract for the transfer of employment. Such agreement would be subject to approval by and registration with the relevant Township Labour Office.

If an employee does not consent to a change in employer or to entering into any transfer arrangement, the employee’s existing
With a staff strength of more than 40 in our office in Yangon, comprising of Myanmar and European lawyers complemented by internationally trained professionals, Luther is assisting clients in all stages of the business lifecycle, namely, from the incorporation of a Myanmar entity, through on-going legal and tax advice, to support services such as corporate secretary, accounting and payroll.

Luther is a full service law firm with more than 350 lawyers and tax advisors worldwide. In addition to legal and tax advice, Luther Corporate Services provides business establishment and company formation services, corporate secretarial services, bookkeeping and accounting, payroll, corporate and tax compliance, as well as payment administration services.

Together, Luther Corporate Services and Luther Legal Services have 18 offices in Europe and Asia, including Belgium, China, Germany, Great Britain, India, Luxembourg, Malaysia, Myanmar and Singapore.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Drafts of a new Companies Law and a new Investment Law combining the Foreign Investment Law (2012) and the Myanmar Citizens Investment Law (2013) have been submitted to the Myanmar Parliament and may be enacted in the near future.
With a staff strength of more than 40 in our office in Yangon, comprising of Myanmar and European lawyers complemented by internationally trained professionals, Luther is assisting clients in all stages of the business lifecycle, namely, from the incorporation of a Myanmar entity, through on-going legal and tax advice, to support services such as corporate secretary, accounting and payroll.

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The majority of mergers and acquisitions are not heavily regulated in New Zealand and are given effect through a private contract for the sale and purchase of shares or assets. However, additional layers of regulation apply if one of the entities is listed or widely held, if the merger involves competitors, or if foreign buyers are investing in significant or sensitive New Zealand assets.

**Companies Act 1993**

If the merger or acquisition is effected through a New Zealand registered company (e.g. as vendor and/or purchaser), and involves the acquisition or disposal of assets, rights or liabilities that have a value of more than half the value of the relevant company prior to the transaction, the transaction will constitute a major transaction under the Companies Act 1993 (‘Companies Act’) requiring approval of that company’s shareholders by a special resolution, being a default threshold of 75% of the votes of all shareholders entitled to vote and voting, unless otherwise increased (‘Special Resolution’).

**Amalgamations**

If the merger or acquisition is effected through a New Zealand registered company and involves the acquisition or disposal of assets, rights or liabilities that have a value of more than half the value of the relevant company prior to the transaction, the transaction will constitute a major transaction under the Companies Act 1993 (‘Companies Act’) requiring approval of that company’s shareholders by a special resolution, being a default threshold of 75% of the votes of all shareholders entitled to vote and voting, unless otherwise increased (‘Special Resolution’).

**Schemes of arrangement**

The Companies Act provides for a court-sanctioned amalgamation known as a scheme of arrangement. Court approval is required where the amalgamation involves an overseas company or the amalgamated company will not satisfy the solvency test, and is desirable where an amalgamation is complex or there are difficulties obtaining shareholder approval through normal means.

A scheme of arrangement typically involves the bidder and target company jointly developing an offer structure that target shareholders vote on, and the High Court may order that the scheme be binding on such terms and conditions as the court thinks fit.
New Zealand Stock Exchange Listing Rules

Entities listed on New Zealand’s stock exchange, operated by NZX Limited (‘NZX’), are subject to listing rules (‘NZX Listing Rules’) that apply directly to issuers and market participants and indirectly (through market participants) to investors. The NZX Listing Rules are highly prescriptive; of relevance to mergers and acquisitions are the following requirements:

(a) 50% shareholder approval for major transactions or related party transactions, or 75% shareholder approval where required by the Companies Act;

(b) a listed company must continuously disclose material information to the market, which may include transactions involving the sale of more than 5% of issued securities; and

(c) there are also specific rules that govern the rare occurrence of a takeover of a listed entity that is not governed by New Zealand’s Takeovers Code (see ‘Takeovers Code’ below).

Financial Markets Conduct Act 2013

The Financial Markets Conduct Act 2013 (‘FMCA’) requires mandatory shareholder disclosure if a person has 5% or more of a class of quoted voting products in a listed issuer. The FMCA also provides regimes which generally prohibit persons who possess undisclosed material information regarding a public issuer from trading, advising or disclosing this information, known as insider trading, as well as practices that involve creating a false impression of market information, known as market manipulation.

Takeovers Code

New Zealand’s Takeovers Code applies to ‘Code Companies’ to ensure that shareholders of listed and widely held companies are well informed of, and can participate in, changes of control in their company. The Takeovers Code prescribes a detailed framework for material investment in Code Companies, and ensures disclosure to, and equal treatment of, shareholders in Code Companies.

A Code Company is a New Zealand registered company that is listed on the NZX (or has been listed in the previous 12 months) or has 50 or more shareholders holding a voting right and 50 or more share parcels. The Takeovers Code prohibits a person (directly, indirectly or through their associates) from becoming the holder or controller of voting rights in a Code Company where that interest would be 20% or more. This rule captures existing holders or controllers of 20% or more of the voting rights who wish to increase their holding or control. Exemptions to the fundamental rule allow a person to become the holder or controller of an increased percentage of the voting rights in a Code Company without contravening the Takeovers Code and include:

(a) a Code-compliant full offer for all voting and non-voting securities of the target;

(b) a Code-compliant partial offer for a specified percentage of voting securities that would result in the offeror holding or controlling more than 50% of the voting rights;

(c) acquisition or allotment of voting securities approved by an ordinary resolution (excluding the persons acquiring, disposing of or allotting the securities and their associates);

(d) unlisted small Code Companies with an enterprise value of NZ$20 million or less;

(e) a 5% creep exception for persons that hold or control between 50% and 90% of the voting rights applies once in a 12-month period;

(f) by a compulsory acquisition if the person already holds 90% of the voting rights in the Code Company;

(g) a court-approved scheme of arrangement under the Companies Act; and
2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The New Zealand Companies Office is the government agency that handles amalgamation applications, and the High Court of New Zealand regulates schemes of arrangement.

The Financial Markets Authority (‘FMA’) is the government agency that regulates capital markets and financial services in New Zealand (including administering the FMCA). The FMA promotes and facilitates the development of fair, efficient and transparent financial markets in New Zealand and can take action against issuers in breach of the applicable regulations.

The Takeovers Panel is responsible for administering and enforcing the Takeovers Code in New Zealand. The Takeovers Panel consists of practitioners appointed by the Governor General who operate in the merger and acquisition market, including lawyers, directors and investment bankers.

As mentioned above, the ComCom is New Zealand’s competition regulator, and the OIO assesses applications for consent of foreign investment.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Yes, hostile bids are permitted in New Zealand.

The default position is that shareholders have the right to sell their shares, subject to any limitations imposed in a company’s constitution or shareholders’ agreement, if applicable. While these limitations can empower the board of directors to prevent certain transfers which may hinder the possibility of a hostile bid, such transfer restrictions are not permitted for entities listed on the NZX.

Both amalgamations and schemes of arrangement, which are more flexible and certain in nature, require director approval, thus effectively preventing their use in the context of a hostile bid.

(h) an individual or class exemption granted by the Takeovers Panel.

Commerce Act 1986

New Zealand’s anti-trust legislation, the Commerce Act 1986 (‘Commerce Act’), applies to all mergers and acquisitions and prohibits business acquisitions and other conduct that substantially lessens competition in a market.

Merging firms can apply to the Commerce Commission (‘ComCom’) for clearance or authorisation of a proposed merger. The ComCom will clear a merger if it is satisfied that the merger is not likely to substantially lessen competition in a market. Alternatively, the ComCom may authorise a merger that substantially lessens competition in a market, if the merger is likely to result in a benefit to the public. Authorisations for mergers are relatively rare.

The clearance and authorisation processes are not mandatory at any stage of a merger, and notification is not required at any point. Accordingly, the ComCom has the power to investigate and commence proceedings if it suspects that a merger or acquisition has breached the Commerce Act. The ComCom may also impose injunctions and make orders such as the divestiture of assets or shares.

The ComCom cannot grant clearances or authorisations retrospectively, so participants of a proposed merger must assess in advance whether the merger could give rise to a substantial lessening of competition in a market in New Zealand and, if so, the merger should be made conditional on ComCom approval.

Overseas Investment Act

The Overseas Investment Act 2005 (‘OIA’) applies to all mergers and acquisitions, and certain foreign investment will require consent from the Overseas Investment Office (‘OIO’) (see question 15 for further information).
Regulated takeovers of Code Companies can be hostile; however, friendly offers are relatively common in New Zealand. Directors who do not agree with a proposed bid usually provide written statements containing adverse recommendations to shareholders.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

New Zealand does not undertake a national security review of merger and acquisition activity, other than through the OIO and, in certain cases, Ministerial review, where all applications for consent are tested against prescribed investment criteria. One potential consideration for the OIO will be control of strategically important infrastructure on sensitive land. Applicants must be of good character, have relevant business experience or acumen, be able to demonstrate a financial commitment to the investment, be eligible for visa or entry permission under New Zealand’s immigration laws and, in certain cases, demonstrate a benefit to New Zealand (see question 15 for further information). See question 1 for a discussion on New Zealand’s ‘anti-monopoly’ legislation, the Commerce Act, and question 14 for industry-specific regulations.

5. What documentation is required to implement these transactions?

Private Treaty

The vast majority of mergers and acquisitions in New Zealand are documented by private treaty, and the parties can include in the sale contract (almost) any agreed terms, conditions, warranties and indemnities. A typical private treaty contract in New Zealand includes a comprehensive suite of vendor warranties, which are disclosed against through a due diligence process.

Amalgamations

A merger effected by way of amalgamation requires a standard form application, which can be completed online through the Companies Office. Short form amalgamations require resolutions from the board of each amalgamating company, various director certificates and directors consent forms. A long form amalgamation also requires an amalgamation proposal setting out the terms of the proposal to be attached to the amalgamation application.

Schemes of Arrangement

A company wishing to undertake a merger through a scheme of arrangement must submit an application to the High Court for approval. The High Court has discretion to approve the arrangement subject to orders it thinks fit, including, for example, an order for a shareholder meeting to be held to approve the arrangement. A Code Company undertaking a scheme of arrangement is also required to submit a no-objection letter from the Takeovers Panel unless the High Court is satisfied that the shareholders of the Code Company will not be adversely affected by an arrangement as compared to regulation under the Takeovers Code. When providing a no-objection statement, the primary question that the Takeovers Panel will consider is whether shareholders will be adversely affected by the transaction being implemented by a scheme rather than by a takeover under the Takeovers Code. To obtain a no-objection letter, an applicant must provide an independent adviser’s report on the merits of the transaction for each class of shareholders and a draft notice of meeting.

Regulated Takeovers

The Takeovers Code heavily prescribes the required documentation for a regulated takeover of a Code Company, including the terms of the takeover offer itself, director recommendations and an independent report. The Takeovers Panel also encourages summaries of key information.
For an acquisition or allotment approved by an ordinary resolution, the directors of a Code Company must obtain an independent report on the merits of the acquisition or allotment with regard to the interests of the shareholders voting on the resolution to approve it. The independent report must be sent to the shareholders and the Takeovers Panel along with statements from the directors as to whether or not they recommend approval and their reasoning.

Commerce Commission Authorisation or Clearance
Applicants seeking a clearance or authorisation for a merger or acquisition must complete the ComCom’s prescribed application form. Applicants are encouraged to provide additional information that may be relevant to the ComCom’s assessment of the merger or acquisition.

Overseas Investment Office Consent
Applications are made by way of a letter from the applicant to the OIO along with supporting information. In relation to sensitive land applications, this includes a detailed business plan addressing the benefits to New Zealand.

6. What government charges or fees apply to these transactions?
The fees that apply to amalgamations, schemes of arrangement and regulated takeovers are de minimis. ComCom and OIO fees can cost up to NZ$23,000 and NZ$54,000, respectively, in addition to any legal fees and other transactional costs.

7. Do shareholders have consent or approval rights in connection with a deal?

Private Treaty
As noted earlier, if the merger or acquisition is effected through a New Zealand registered company (e.g. as vendor and/or purchaser), and involves the acquisition or disposal of assets, rights or liabilities that have a value of more than half the value of the relevant company prior to the transaction, the transaction will require approval of that company’s shareholders by a Special Resolution.

Amalgamations
A long form amalgamation requires a Special Resolution of the shareholders of each amalgamating company. Shareholder approval is intrinsic to a short form amalgamation.

Schemes of Arrangement
There is no mandatory requirement for shareholder approval to be obtained in relation to a scheme of arrangement involving a non-Code Company. However, the High Court has the discretion (which it commonly exercises) to require that shareholder approval of the scheme be obtained.

Where a scheme affects the voting rights of a Code Company, there is a mandatory requirement for shareholder approval of the scheme. This typically requires approval by 75% of the votes of each class of shareholder that is entitled to vote and voting, as well as the majority of votes of all shareholders entitled to vote.

Regulated Takeovers
Regulated takeover offers must be made to each shareholder of the target Code Company. Regulated takeovers are subject to a mandatory 50% minimum acceptance condition (see question 10), unless the shareholders of the target approve otherwise.

An allotment or acquisition of voting securities requires an ordinary resolution of shareholders excluding the persons acquiring and disposing the voting securities and their associates.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Directors
Directors are subject to various prescribed
duties under the Companies Act, such as the duties to act in good faith, in the best interests of the company, and to not act in a way which would create a substantial risk of serious loss to the company’s creditors. Director’s duties are generally owed to a company; however, shareholders may bring a derivative action in the company’s name if required.

Directors’ duties in regulated takeovers
If the transaction involves a target Code Company, the directors of the target company must follow the prescribed process for responding to a bidder, and provide adequate disclosure to shareholders throughout the process. For example, a report from an independent adviser on the merits of any proposed takeover is to be provided to the shareholders. The independent adviser appointed by the target company will be considered by the Takeovers Panel, which will grant its approval only if it is satisfied that the adviser is competent to act and is independent of all parties involved in the transaction.

The Takeovers Code requires the directors of a target Code Company to make a recommendation to the shareholders about what the shareholders should do regarding the transaction, or give their reasons for not making a recommendation to the shareholders.

The Takeovers Code also broadly prohibits defensive tactics. Directors of a target Code Company that have received a takeovers notice or have reason to believe an offer is imminent must not take any action which could result in an offer being frustrated, or shareholders being deprived of an opportunity to decide on the merits of the offer. Guidance from the Takeovers Panel lists specified actions as potentially qualifying under defensive tactics, which includes:

(a) acquisition or disposition of a major asset;
(b) incurrence of a material new liability or making a material change to an existing liability (e.g. variation of existing contracts to include clauses that would be triggered by a takeover);
(c) declaration of an unusually large dividend;
(d) material issues of securities; or
(e) acquisition of an asset that would render the offer subject to regulatory approval that was not anticipated by the offeror prior to the issuing of a takeover notice.

Controlling Shareholders
Generally, a controlling shareholder does not owe any duties to the target company or its fellow shareholders. Accordingly, when making decisions as a shareholder, other than in exceptional circumstances, a person need only have regard to their own personal interests.

9. In what circumstances are break-up fees payable by the target company?

In New Zealand, except for recovery of expenses by a target Code Company, break-up fees are a matter of negotiation between the parties. Break-up fees payable by the target are not typical in the New Zealand market (although break fees payable by a bidder who fails to satisfy a condition are from time to time observed).

A target Code Company has a statutory right to recover properly incurred expenses from an offeror in relation to a regulated offer or takeover notice.

10. Can conditions be attached to an offer in connection with a deal?

Yes, conditions can be attached to an offer in connection with a deal. Common conditions include obtaining the requisite regulatory approval (including OIO and ComCom), no prescribed events occurring such as material breaches, events of default and insolvency events, and no material adverse change to the target’s company or business.
Regulated Takeovers

The Takeovers Code imposes a compulsory condition where the offeror does not already control more than 50% of the voting rights. In that case, a takeover offer for a Code Company must contain a minimum acceptance condition which requires the offeror to receive sufficient acceptances to result in the offeror controlling more than 50% of the voting rights in the target company.

In addition, the Takeover Code restricts the offeror’s freedom to impose conditions in its offer. Specifically, the offeror may make the offer subject to conditions only if the fulfilment of the condition is not under the control of the offeror or dependent on the offeror’s judgement.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Except as noted below, the parties are free to agree the financing arrangements of a merger or acquisition. Depending on the transaction dynamics, the bidder may seek to include finance condition in a private treaty sale.

Schemes of Arrangement

While there are no mandatory minimum financing requirements for a scheme of arrangement, the High Court may look at financing as a factor in determining whether to sanction a binding scheme.

Regulated Takeovers

An offeror under a regulated takeover for a Code Company must confirm that it will have sufficient resources available to meet the consideration that would be provided upon full acceptance of its offer. While there is no explicit prohibition on a finance condition in a regulated takeover, fulfilment of any such condition cannot be under the control of the offeror (accordingly, in practice, the offeror’s financing needs to be arranged ahead of the launching of the offer). Note that consideration in a takeover bid must be the same for all securities belonging to the same class.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Regulated Takeovers

The Takeovers Code allows a dominant shareholder in a Code Company holding or controlling 90% or more of the voting rights to forcibly squeeze out minority shareholders by way of compulsory acquisition. Once a person and their associates hold or own 90% of the voting rights, they become a dominant owner and must notify the Takeovers Panel and issue an acquisition notice to outstanding security holders within 30 days of becoming a dominant owner. Shareholders may then object to, or accept, that offer. After a prescribed 21-day period has passed, the dominant owner can compulsorily acquire the remaining shares within seven days. If the dominant owner does not compulsorily acquire the shares, the holders of the remaining shares also have the right to require the dominant owner to purchase their shares.

Minority shareholders can often be squeezed out if the takeover is structured as a scheme of arrangement (see question 7 for further information).

Non-regulated Takeovers

There are no explicit minority shareholder squeeze-out rights for non-Code Companies. However, amalgamations and schemes of arrangement can be used to squeeze out minority shareholders.

As discussed in question 8, the Companies Act allows shareholders that believe they have been prejudiced to apply to the court for an order to remedy the prejudice. In addition, shareholders who vote against certain Special Resolutions may also require the company to purchase their shares under the Companies Act.
13. What is the waiting or notification period that must be observed before completing a business combination?

Amalgamations

An amalgamation requires the board of each amalgamating company to provide notice to every secured creditor of the company and, for long form amalgamations, to the public not fewer than 20 working days before the amalgamation is proposed to take effect.

Schemes of Arrangement

There is no mandatory waiting period for a scheme of arrangement; however, any application for court approval will be subject to the scheduling requirements of the High Court.

Regulated Takeovers

The Takeovers Code imposes strict timelines throughout the prescribed process. The regulated bid process is commenced by the delivery of notice of the bidder’s intention to make a takeover to the target, the Takeovers Panel and NZX (if the target is a listed company). After at least 14 clear days and within 30 days of that notice, the bidder must launch the offer by delivering an offer document to shareholders, the target, NZX and the Takeovers Panel or let the notice lapse. The offer period must not be shorter than 30 days and not longer than 90 days. If a variation notice is sent, varying the offer, the offer must remain open for at least 14 days after the notice is sent.

An acquisition or allotment of voting securities requires notice to be sent to shareholders along with the report from an independent adviser at least 10 working days prior to the shareholders meeting.

See question 12 for the notification periods for compulsory acquisitions under the Takeovers Code.

14. Are there any industry-specific rules that apply to the company being acquired?

In addition to the general regulation outlined above, certain industries require sector-specific approval in order to make an investment. As examples only:

(a) aviation: prior written consent of the Crown is required before a person acquires 10% or more of voting rights in Air New Zealand Limited (New Zealand’s national carrier);

(b) telecommunications:
   (i) prior written consent of the Crown is required before a person acquires 10% or more, or a non-New Zealand national acquires more than 49.9%, of the voting rights in Chorus (New Zealand’s largest telecommunications infrastructure company); and
   (ii) network operators have duties to notify the Government Communications Security Bureau of proposed changes affecting the ownership, control, oversight or supervision of any equipment, system or service that falls within an area of specified security interest;

(c) banks: to be a registered New Zealand bank, certain ownership requirements must be satisfied, and in order for a person to acquire a direct or indirect qualifying interest of 10% or more of the voting securities in a New Zealand incorporated registered bank, prior written consent of the Reserve Bank of New Zealand ("RBNZ") is required;

(d) insurers: before a potential acquirer takes control of a licensed insurer, the RBNZ must be notified, and the RBNZ must determine whether the insurer will continue to satisfy all licensing requirements post-acquisition;

(e) non-bank deposit takers ("NBDTs"): the RBNZ’s prior written consent is required for a transaction that will result in a person gaining a level of influence over a NBDT which would allow a person to directly or indirectly appoint 25% of the NBDT’s governing body or have a qualifying
The consent process for sensitive land is more involved and prolonged.

All applications for consent are tested against prescribed investment criteria. Applicants must be of good character, have relevant business experience or acumen, be able to demonstrate a financial commitment to the investment, and be eligible for visa or entry permission under New Zealand’s immigration laws. Applicants for sensitive land consent are also required to demonstrate that their investment will, or is likely to, benefit New Zealand and, in certain cases, that the benefit is substantial and identifiable.

The OIO currently aims to process consent decisions between 55 and 75 working days, depending on the complexity of the assets being acquired and excluding the time where the OIO is waiting for further information to be provided or is consulting with third parties. There is a high approval rate for high quality and well prepared applications.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

If the transaction proceeds by a share sale, the purchaser will acquire all employees with the target on their existing terms of employment subject to any change of control provisions contained in employment or collective bargaining contracts. If the transaction proceeds by an asset sale, employees need to be offered new employment contracts by the purchaser, if desired.

The Employment Relations Act 2000 protects certain classes of vulnerable employees who have a right to transfer their employment to the purchasing entity on their existing terms and conditions.

15. Are cross-border transactions subject to certain special legal requirements?

Approval of foreign investment in New Zealand is principally regulated by the OIA. Foreign investment requires consent from the OIO or relevant Ministers if it will result in the acquisition by an overseas person (or associate) of a direct interest in, or 25% or more ownership and/or control of interests in, sensitive land and/or significant business assets. The acquisition of fishing quota is also regulated.

Significant business assets are high value businesses with more than NZ$100 million of assets. Sensitive land includes the foreshore or seabed, reserves and non-urban land.
17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Overseas Investment Regime

As discussed in the answer to question 15, the OIA requires investors from foreign countries to receive consent from the OIO for investments exceeding NZ$100 million. However, under the Trans-Pacific Partnership that New Zealand signed in February 2016 (‘TPP’), the threshold for significant business assets that will apply to investors from TPP countries will be increased to NZ$200 million once the TPP is ratified by all TPP signatories. This increased threshold is yet to be implemented.

The Treasury recommended in its regulatory impact statement published in March 2016 that the additional targeted exemptions to the investment screening regime should be applied, including exempting transactions between overseas persons for specified land that may be considered ‘less sensitive’.
1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Merger and acquisition transactions in Oman fall within three main categories: (a) acquisition of shares in a target company; (b) asset purchases; and (c) acquisition of shares through a private placement exercise, involving the target company issuing new shares to an acquirer pursuant to a capital increase.

The application of laws and regulations to a merger or acquisition depends on which of the three main categories the transaction falls into and, in the case of a share purchase transaction, also on the legal status of the target (i.e. whether it is a limited liability company (‘LLC’), a closed joint stock company (‘Private Joint Stock Company’), or a public joint stock company (‘Listed Company’)).

The following laws are relevant to all merger and acquisition transactions:

(a) The Commercial Companies Law (Royal Decree 4/74) (‘CCL’);
(b) The Oman Commercial Law (Royal Decree 55/90);
(c) The Competition and Anti-Trust Law (Royal Decree 67/2014) (‘Competition Law’); and
(d) The Civil Transaction Law (Royal Decree 28/2013).

The following laws and regulations come into play only when the target involved is a Listed Company:

(a) The Capital Market Law (Royal Decree 80/98) (‘CML’);
(b) The Law Establishing the Muscat Securities Depository and Registration Company (Royal Decree 82/98);
(c) The Executive Regulations of the Capital Market Law (CMA Decision 1/2009); and
(d) The CMA Regulations Governing Acquisition of 25% or more of the shares of a public joint stock company (‘Significant Acquisition Rules’).

In the event that a share purchase transaction involves an acquisition of shares by foreign acquirer(s) in a target company, the Foreign Capital Investment Law (Royal Decree 102/94) also applies.

The provisions of industry-specific laws and regulations also become relevant in the context of merger and acquisition transactions involving companies operating in certain business sectors (see question 14 for further detail).

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

In connection with transfers of shares in an LLC and asset purchase transactions, filings need to be made with the Ministry of Commerce and Industry (‘MOCI’).

A transfer of shares in a Private Joint Stock Company or Listed Company involves the Muscat Securities Market (‘MSM’) and the Muscat Clearing and Depository Company SAOC (‘MCDC’).

In the case of a significant acquisition of shares (25% or more of the issued share capital) in a Listed Company, the prior approval of the market regulator, the Capital Market Authority
(‘CMA’), is required under the CML and Significant Acquisition Rules.

If the transaction requires competition approval, then a filing needs to be made with the Public Authority for Consumer Protection (‘PACP’).

Industry-specific regulators and agencies also play a role where a transaction involves a target which is regulated by such a regulator or agency (see question 14 for further detail).

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

The concept of a hostile bid is not covered by Omani legislation at present. We understand that the CMA is contemplating issuing a takeover code, applicable to significant acquisitions of shares in a Listed Company, which includes provisions concerning hostile bids. However, it is not clear at present when and in what final form the code is likely to be issued.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

Article 7(b) of the CML prohibits one or more persons who/that are closely related from owning 25% or more of the shares in a Listed Company unless such shareholding is held in accordance with the Significant Acquisition Rules. The Significant Acquisition Rules require the CMA to accept or reject an acquirer’s application to acquire or increase its stake in a Listed Company to or above the 25% threshold within a week from the date on which a written application, explaining the case for the acquisition, is submitted to the CMA.

Foreign investors can, singly or collectively, own up to 70% of an Omani company’s share capital. However, if a foreign investor wishes to acquire more than 70% of the issued share capital of a target, the approval of Oman’s Council of Ministers is required.

For a foreign investor to make an investment in an Omani company, the investee company must have a minimum issued capital of OMR 150,000. This minimum issued capital requirement is increased to OMR 500,000 where a foreign investor proposes to acquire more than 70% and up to 100% of the share capital of the investee company.

Under the Competition Law, merger and acquisition transactions which involve economic concentration (defined as a transfer of shares or assets resulting in ‘dominance’ in a relevant market) must seek and obtain the approval of the PACP prior to closing a transaction. Dominance is defined as directly or indirectly controlling 35% or more of the market share of a particular market.

The acquisition of shares in an LLC through a share purchase is subject to statutory pre-emption rights vested by law under the CCL in other shareholders of the LLC.

There are also restrictions on the transfers of shares under industry-specific laws (see question 14 for further detail).

5. What documentation is required to implement these transactions?

In a share purchase involving a transfer of shares in an LLC, the main acquisition documents are:

(a) a long-form share sale and purchase agreement, which includes detailed provisions concerning the transaction and includes representations and warranties, closing conditions and so on. This document is normally executed in English or in bilingual form (English and Arabic), and is normally prepared by the buyer’s lawyers;

(b) an escrow agreement (if any) which is prepared by the buyer’s lawyers;

(c) a disclosure letter (if any) which is prepared by the seller’s lawyers;

(d) a short-form share sale and purchase agreement in the Arabic language which follows
purchase agreement are not necessary and are normally replaced by:

(a) a tri-partite agreement entered into among the transaction parties and a broker (this document is normally prepared by the broker);

(b) share transfer forms in the form issued by the MSM executed separately by each transaction party.

In an asset purchase transaction, the main acquisition documents are:

(a) a long-form asset sale and purchase agreement, including detailed provisions concerning the transaction, and a detailed list of assets and representations and warranties concerning the assets, closing

Omani banks, investment houses, issuers, asset managers, funds, private equity participants, multinationals, publicly-listed companies, and trading houses. He routinely advises on corporate and securities matters including corporate governance, directors’ duties, listing and disclosure requirements, and competition rules. Recently Patel advised Italy’s energy and telecom cable giant, Prysmian on its €100mn acquisition of a majority shareholding in Oman Cables Industry, and the divestment of a majority stake in Oman’s leading cinema company to Majid Al Futtaim Cinemas. Other recent transactions include advising the government on its US$2.5 billion international bond issue and its ‘first of a kind’ US$-denominated sovereign sukuk (US$500mn) by way of private placement.

Patel is a UK-qualified solicitor and a solicitor of the High Court of Mumbai. He is ranked by Chambers and the IFLR as a leading lawyer and recommended by the Legal 500.
conditions and so on. This document is normally executed in English or bilingual form (English and Arabic), and is normally prepared by the buyer’s lawyers;

(b) an Arabic (or Arabic and English) short-form asset sale and purchase agreement recording the business sale, which is filed with the MOCI at closing.

In a transaction involving the acquisition of shares through a private placement exercise and the target company issuing new shares to an acquirer pursuant to a capital increase, the main acquisition documents are:

(a) a long-form share subscription agreement, including detailed provisions concerning the transaction and conditions precedent to subscription;

(b) an information memorandum;

(c) minutes of the extraordinary general meeting of the target’s shareholders approving the private placement of new shares;

(d) amendments to the articles of association of the target company to reflect the increase in share capital;

(e) filings on the commercial register maintained by the MOCI to record the increase in share capital.

In the event that the private placement exercise concerns a Listed Company, the transaction documents also include a prospectus to be filed with the CMA.

6. What government charges or fees apply to these transactions?

The registration of a transfer of shares in an LLC at the MOCI requires the payment of a transfer fee, which is based on value but capped at a nominal amount of OMR 100.

A transfer of shares in a Private Joint Stock Company or Listed Company needs to be undertaken by a licensed broker and requires the payment of brokerage. A broker is permitted to charge brokerage of up to 0.35% of the value traded on each side of the trade (i.e. on the buy-side as well as on the sell-side). The brokerage includes a commission-based fee payable to the MSM, which is set at 0.1% of the value traded.

There are no prescribed fees payable for registering an asset transfer agreement with the MOCI. However, the registration of transfers of individual assets from the seller to the buyer incurs the payment of registration fees, the most substantial of which are real estate registration fees. Real estate registration fees are payable for registration of land transfers and are charged at 3% of the value of the land transferred.

There is no fee payable for recording a capital increase consequent upon a private placement exercise. However, in the case of a Listed Company, the MCDC charges Listed Companies an annual ad valorem fee that is calculated based on its issued share capital. A capital increase resulting from a private placement of shares results in the Listed Company being required to pay additional depository fees on account of the increased capital.

7. Do shareholders have consent or approval rights in connection with a deal?

The acquisition of shares in an LLC through a share purchase is subject to statutory pre-emption rights vested by law under the CCL in other shareholders of the LLC. In order for a transfer of shares in an LLC to go through, the shareholders of the LLC would need to waive their statutory pre-emption rights.

Shareholders do not have consent or approval rights in connection with a merger or acquisition involving a bilateral sale and purchase of shares in a Private Joint Stock Company or Listed Company.

An asset purchase transaction involving the sale by an Omani company (whether an LLC, a Private Joint Stock Company or a Listed
Conditions normally included in a share purchase agreement include:
(a) approval from regulatory authorities that have jurisdiction over the target company;
(b) consents from third parties such as lenders, key clients/customers and suppliers of the target company;
(c) no material adverse change or change of law having a material adverse effect on the business or prospects of the target occurring between the date of the share sale and purchase agreement and closing;
(d) no breach of a material covenant having occurred between the date of the share sale and purchase agreement and closing.

Conditions precedent that are sometimes included involve:
(a) the availability of acquisition funding;
(b) the issuance of a legal opinion from counsel confirming satisfaction of the conditions precedent.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?
There is no legal requirement on the level of financing. As mentioned above, Oman does not have takeover legislation in place which could be expected to prescribe such requirements.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?
There is no legal provision for minority shareholders to be squeezed out. However, it is possible for an acquirer to take a Listed Company private by moving for its conversion into an LLC or a Private Joint Stock Company and seeking its delisting.
As part of any such conversion and delisting process, the CMA would impose an exit offer obligation, which enables minority
shareholders to exit the company. However, in the event that minority shareholders do not participate in the exit offer, they would continue to remain shareholders of the delisted company, and they would not be subject to being squeezed out.

13. What is the waiting or notification period that must be observed before completing a business combination?

In transactions requiring clearance from the PACP under the Competition Law, the PACP is granted a period of up to 90 days, from the date of filing an application for merger clearance, to provide a response. In the event that the PACP does not reply to the application within the stipulated 90 days, this is deemed an implied consent for the transaction to proceed. In practice, the PACP normally replies to an application for merger clearance within a fortnight of the application being filed.

14. Are there any industry-specific rules that apply to the company being acquired?

The provisions of industry-specific laws and regulations also come into play in merger and acquisition transactions involving companies operating in certain business sectors. These are summarised below:

(a) banking: for any entity to acquire more than 10% of the shares of any Omani bank, approval of the Central Bank of Oman is required;
(b) securities business: for any person to own more than 15% of the shares of an Omani company which is licensed by the CMA to engage in securities related business, approval of the CMA is required;
(c) electricity and desalinated water: investors wishing to acquire 20% or more of the voting capital of an electricity generation/desorlination company supervised by the Authority for Electricity Generation in Oman (‘AER’) must obtain the prior approval of the AER;
(d) insurance: investors wishing to acquire control over an insurance company licensed to undertake insurance business in Oman must obtain the prior approval of the CMA, which is also the insurance regulator; and
(e) telecommunications: investors wishing to make material acquisitions of shares of a telecommunications services provider licensed by the Telecommunications Regulatory Authority (‘TRA’) must obtain the prior approval of the TRA prior to any shareholding being acquired in such target company which would result in any of the following shareholding thresholds being exceeded: 5%, 10%, 20%, 33.3%, 50% and 66.6%.

15. Are cross-border transactions subject to certain special legal requirements?

There are no special legal requirements under Omani law for out-bound transactions. However, in relation to in-bound transactions, there are restrictions on foreign ownership in Omani companies (see question 4 for further detail).

Additionally, there are restrictions on foreign investment in companies operating in certain business sectors. These are summarised below:

(a) defence: the Omani defence sector (manufacturing and trading of weapons and munitions including armaments and military equipment) is exclusively government-controlled. Private sector investment in this sector is not permitted;
(b) media: foreign ownership is not permitted in publication houses which publish newspapers. Such organisations must be wholly Omani-owned and controlled. There are no specific disclosure obligations or approvals imposed on media companies. However, the sale or transfer of ownership
The buyer needs to obtain new labour clearances for transferring expatriate employees from the Ministry of Manpower and record the change of their employer with Omani immigration authorities.

The pensions of the employees who are Omani citizens are dealt with under the Social Insurance Law. This involves pension contributions being made to PASI on a monthly basis by the employee and the employer. PASI contributions are calculated as 11.5% of the employee’s salary (employer’s contribution), 7% of the employee’s salary (employee’s contribution) and 1% of the employee’s salary (government contribution, although in practice this is also paid by the employer).

In practice, each Omani employee needs to be registered with PASI, and each increment or change in the terms of employment needs to be recorded with PASI.

Once an Omani employee is transferred to the buyer, the buyer is obliged to pick up and take forward the seller’s former obligation to make monthly pension contributions.

Expatriate employees are entitled to receive end-of-service benefits at the end of their service with a particular employer. End-of-service payments are calculated at the rate of half a month’s basic salary for each of the first three years of employment service and one month’s basic salary for each subsequent year of service. Unless vested benefits are suitably dealt with in the agreements that document a business transfer, a buyer automatically inherits the seller’s entire obligation to pay expatriate employees their vested end-of-service benefits.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

We understand that the CMA is contemplating issuing a takeover code at some point in time. However, the final form of the code and the timeline for such issue are unclear at present.
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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Mergers and acquisitions in Pakistan are primarily governed by the following laws and regulations:
(a) The Companies Ordinance, 1984 (‘Companies Ordinance’);
(b) The Competition Act, 2010 (‘Competition Act’);
(c) The Competition (Merger Control) Regulations, 2007 (‘Merger Regulations’);
(d) The Securities Act, 2015 (‘Securities Act’); and
(e) Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations, 2008 (‘Takeover Regulations’).

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The major regulators of mergers and acquisitions in Pakistan are:
(a) The Competition Commission of Pakistan (‘Competition Commission’);
(b) The Securities and Exchange Commission of Pakistan (‘SECP’); and
(c) State Bank of Pakistan (‘SBP’).

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Yes, however they are relatively uncommon.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

**Competition Act**

The Competition Act provides that where an undertaking intends to acquire shares or assets of another undertaking or where two or more undertakings intend to merge the whole or part of their business and meet the pre-merger thresholds prescribed in the Merger Regulations, the concerned undertaking must seek clearance from the Competition Commission.

**Securities Act and Takeover Regulations**

Part IX of the Securities Act contains detailed provisions in relation to the acquisition of shares of a listed company. Where an acquirer intends to acquire more than 30% but less than 51% of the voting shares of a listed company or acquire control of a listed company, the acquirer is compulsorily required by the Securities Act to make a public announcement of an offer to acquire the voting shares of the target company. Pursuant to Regulation 14(1) of the Takeover Regulations where an acquirer acquires control of a listed company the acquirer is required to “make a public announcement of offer to acquire at least 50% of the remaining voting shares of the target company”. Further Regulation 14(2) of the Takeover Regulations provides that “Where the public offer is made conditional upon minimum level of acceptances, such minimum level shall not be more than 35% of the remaining voting shares”. A few types of transactions are exempt from making a...
public offer. For instance, acquisition of shares through a scheme of arrangement or exercise of an option by a bank or a financial institution does not require the acquirer to make a public offer.

Companies Ordinance

Schemes of arrangements for mergers or demergers are dealt with under sections 284 to 287 of the Companies Ordinance. These provisions, inter alia, allow one or more companies to enter into a compromise or arrangement with its members or creditors in respect of a merger or demerger of the concerned companies. Under the relevant sections, a company involved in a business combination has to file a petition with the High Court for an order to hold an extraordinary general meeting ('EOGM') where shareholders approve the business combination. Once the shareholders have approved the combination, the company must petition the court for its approval on the scheme of arrangement, which lays out the particulars of the combination including issues of property, liabilities and debts of the companies, share swaps, the continuation of any legal proceedings, and dissolution, without winding up, of one or more of the concerned entities.

Section 196 of the Companies Ordinance provides that the directors of a public company, or of a subsidiary of a public company, shall not, except with the consent of the shareholders in a general meeting, either specifically or by way of an authorisation, sell, lease or otherwise dispose of the undertakings or a sizeable part thereof (unless the main business of the company comprises of such selling or leasing).

5. What documentation is required to implement these transactions?

Competition Act

If the transaction relates to an acquisition of shares or assets, such transaction would be implemented by way of agreements or instruments. Wherever such acquisition or merger meets the pre-merger thresholds prescribed in the Merger Regulations, the concerned undertakings are required to submit a pre-merger application to the Competition Commission. Such application is to be in the form prescribed in the Schedule to the Merger Regulations and is to be accompanied by the following supporting documents:

(a) Written proof of the representative’s authority to act on the applicant’s/applicants’ behalf (if applicable);

(b) Copies of the final or most recent version of all documents bringing about the merger, whether by agreement between the merger parties, acquisition of a controlling interest or a public bid;

(c) In the case of a public bid, a copy of the offer document; if it is not available at the time of notification, it should be submitted as soon as possible and not later than when it is posted to shareholders;

(d) Copies of the most recent annual report and accounts (or equivalent for unincorporated bodies) for all the merger parties;

(e) Copies of all analyses, reports, studies, surveys, and any comparable documents prepared by or for any member(s) of the board of directors (or equivalent) or other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders’ meeting, for the purpose of assessing or analysing the merger with respect to market shares, competitive conditions, competitors (actual and potential), the rationale of the merger, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions. For each of these documents, indicate (if not contained in the document itself) the date of preparation and the name and title of each individual who prepared the document; and
(f) Copies of all business plans for each merger party for the current year and the preceding five years.

Securities Act and Takeover Regulations

Pursuant to the Securities Act, with regard to an acquisition of shares of a listed company, a number of notices, undertakings and disclosures are required to be made to the SECP, target company and the securities exchange on which the voting shares of the target company are listed. Some of the key filings are as follows:

(a) Disclosure of aggregate shareholding to the SECP, target company and securities exchange on which the voting shares of the target company are listed is required upon acquisition of more than 10% of the voting shares of a listed company. If additional shares are acquired within a period of 12 months after acquisition of more than 10% of the voting shares of a listed company, compliance with the hereinabove disclosure obligations shall be required only if the total acquisition exceeds an aggregate of 30%.

(b) The target company shall immediately, in writing, inform the stock exchange and SECP when a firm intention to acquire control or voting shares of the target company, beyond the thresholds prescribed under section 111 of the Securities Act, is notified to the board of directors of the target company. Section 111 of the Securities Act provides that a person shall make a public offer to acquire voting shares of the listed company if such person intends to acquire, directly or indirectly:

(i) voting shares, which (taken together with voting shares, if any, held by such person) would entitle such person to more than 30% of the voting shares of a listed company; or

(ii) additional voting shares in case the acquirer already holds more than 30%

but less than 51% of the voting shares of a listed company; provided that such acquirer shall not be required to make a fresh public offer within a period of 12 months from the date of the previous public offer; or

(c) Any person intending to acquire voting shares of the target company which will attract the provisions of section 111 of the Securities Act shall, after careful and responsible consideration, make a public announcement of such intention in the newspaper. The public announcement of an intention to acquire the shares of the target company shall contain the information as prescribed in Schedule III to the Takeover Regulations.

(d) A public announcement of offer shall be made by the acquirer within 180 days of making the public announcement of an intention to acquire voting shares or control of a target company beyond the thresholds prescribed under section 111 of the Securities Act. The public announcement of offer shall contain the information as prescribed in Schedule IV to the Takeover Regulations.

(e) The acquirer is required to furnish security for the performance of its obligations under the public offer. Such security can be in the form of a cash deposit or a securities deposit or a bank guarantee.

(f) The manager to the public offer has to file a due diligence certificate with the SECP prior to the public offer.

(g) Public announcements of the offer are required to be filed with the SECP along with the supporting documents specified in Schedule VII to the Takeover Regulations.

Companies Ordinance

As discussed above, if the acquisition involves a sale or disposal by the directors of a public company, or a subsidiary of the public company, of its undertakings or a sizeable part thereof,
such sale must be authorised by a resolution of the shareholders passed in a general meeting.

Where one or more companies are looking to enter into a Scheme of Arrangement under sections 284 to 287 of the Companies Ordinance, the concerned companies are required to file a petition with the court along with the Scheme of Arrangement which lays out the particulars of the combination including issues of property, liabilities and debts of the companies, share swaps, the continuation of any legal proceedings, and dissolution, without winding up, of one or more of the concerned entities.

6. What government charges or fees apply to these transactions?

**Competition Act**

Every pre-merger application made to the Competition Commission is required to be accompanied by a processing fee which varies depending on the turnover of the applicant. Regulation 5 of the Merger Regulations prescribes the following fees:

<table>
<thead>
<tr>
<th>Turnover of the applicant undertaking</th>
<th>Amount of fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 500 million rupees</td>
<td>200,000 rupees</td>
</tr>
<tr>
<td>More than 500 million but not exceeding 750 million rupees</td>
<td>400,000 rupees</td>
</tr>
<tr>
<td>More than 750 million but not exceeding 1,000 million rupees</td>
<td>500,000 rupees</td>
</tr>
<tr>
<td>More than 1,000 million but not exceeding 5,000 million rupees</td>
<td>700,000 rupees</td>
</tr>
<tr>
<td>More than 5,000 million but not exceeding 10,000 million rupees</td>
<td>1,000,000 rupees</td>
</tr>
<tr>
<td>Exceeding 10,000 million rupees</td>
<td>1,500,000 rupees</td>
</tr>
</tbody>
</table>

If the application is being made by an asset management company, the fee shall be charged on the basis of the value of assets under the management of merger parties, at the following rates:

<table>
<thead>
<tr>
<th>Assets</th>
<th>Amount of fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 5 billion rupees</td>
<td>200,000 rupees</td>
</tr>
<tr>
<td>More than 5 billion but not exceeding 7.5 billion rupees</td>
<td>400,000 rupees</td>
</tr>
<tr>
<td>More than 7.5 billion but not exceeding 10 billion rupees</td>
<td>500,000 rupees</td>
</tr>
<tr>
<td>More than 10 billion but not exceeding 50 billion rupees</td>
<td>700,000 rupees</td>
</tr>
<tr>
<td>More than 50 billion but not exceeding 100 billion rupees</td>
<td>1,000,000 rupees</td>
</tr>
<tr>
<td>Exceeding 100 billion rupees</td>
<td>1,500,000 rupees</td>
</tr>
</tbody>
</table>

**Securities Act and Takeover Regulations**

With respect to the acquisition of shares of a listed company, where an acquirer is required to make a public offer under the Securities Act; the public offer is required to be submitted to the SECP along with a non-refundable processing fee of 500,000 rupees.

**Companies Ordinance**

The order of the court passed under sections 284 to 287 of the Companies Ordinance sanctioning a Scheme of Arrangement has to be filed with the registrar within 30 days of the passing of the order. A nominal fee is payable for filing the order with the registrar.
Sale of Shares

The instrument providing for a sale of shares is chargeable to stamp duty. In the province of Sindh, such duty is chargeable, in the case of physical shares, at 1.5% of the face value of the shares.

The capital gain on disposal of shares of a company not being a public company is chargeable to tax. In the event that shares are held for one year or less, 100% of the gain is taxable, and if held for more than one year, 75% of the gain is taxable. The amount of such gain is added to the taxpayer’s total taxable income for a tax year and is not taxed separately.

The capital gain arising on disposal of shares of a public company shall be chargeable to income tax at the following rates:

**2017 Tax Year**

<table>
<thead>
<tr>
<th>Holding period</th>
<th>Rate of tax (Filer)</th>
<th>Rate of tax (Non Filer)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where holding period is less than 12 months</td>
<td>15%</td>
<td>18%</td>
</tr>
<tr>
<td>Where holding period is 12 months or more but less than 24 months</td>
<td>12.5%</td>
<td>16%</td>
</tr>
<tr>
<td>Where holding period is 24 months or more but less than four years</td>
<td>7.5%</td>
<td>11%</td>
</tr>
<tr>
<td>Where security was acquired before 1 July 2012</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

Notes:
1. Public company means a company in which not less than 50% of the shares are held by a government (Federal, Provincial or foreign), a company whose shares were traded on a registered stock exchange in Pakistan at any time in the tax year and which remained listed at the end of that year and a unit whose units are widely available to the public and any other trust as defined in the Trusts Act, 1882.
2. But the security was not acquired before 1 July 2012

Sale of Assets

A sale of assets, if comprising of goods that are not exempt from sales tax, may incur sales tax if the sale is made by an importer, manufacturer, wholesaler (including dealer), distributor or retailer.

Instruments for sale of moveable property are chargeable to stamp duty at rates applicable in the relevant province. The gain on the disposal of any moveable property, other than stock-in-trade, consumable stores, raw materials held for the purpose of business, depreciable assets or intangibles, is chargeable to tax. In the event that such property is held for one year or less, 100% of the gain is taxable, and if held for more than one year, 75% of the gain is taxable. The amount of such gain is added to the person’s total taxable income for a tax year and is not taxed separately.

Instruments providing for the conveyance of immoveable property are chargeable to stamp duty at rates applicable in the relevant province. The normal rate of such duty, as applicable in Sindh, is 2% of the value of the property as determined in accordance with prescribed valuation tables. Such instruments are required to be registered in order for the conveyance to take effect. Registration fee, as currently applicable in Sindh, is 1% of the value of the property as determined in accordance with prescribed valuation tables.
Any conveyance of immoveable property is also subject to capital value tax at the rates applicable in the relevant province. The gain arising on the disposal of immoveable property held for a period of up to five years shall be chargeable to tax at the rate of 10%, where the holding period of the immoveable property is more than five years, no capital gain tax shall be charged.

7. Do shareholders have consent or approval rights in connection with a deal?

Sale of Assets
Section 196 of the Companies Ordinance provides that the directors of a public company shall not, except with the consent of the shareholders in a general meeting, either specifically or by way of an authorisation, sell, lease or otherwise dispose of the undertakings or a sizeable part thereof (unless the main business of the company comprises of such selling or leasing). Furthermore, a sale of assets by a company may be subject to restrictions imposed by the constitutional documents of the company.

Scheme of Arrangement
Under Section 284 of the Companies Ordinance, the shareholders must approve of the scheme of merger or amalgamation in an EOGM. The scheme of arrangement is considered approved ‘if a majority in number representing three-fourths in value of the creditors or class of creditors, or members, as the case may be, present and voting either in person or, where proxies are allowed, by proxy at the meeting, agree to any compromise or arrangement’.

Private Company
A sale or issue of shares by shareholders of a private company may be subject to restriction under the constitutional documents of the company e.g. existing shareholders may have pre-emption rights or other subscription rights.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Scheme of Arrangement
Section 286(1)(a) of the Companies Ordinance requires directors and chief executives to disclose the directors’ or chief executive’s material interest in the merger to affected creditors and shareholders.

Securities Act
Section 119 of the Securities Act restricts the board of directors of the target company from taking certain actions during the public offer period. The board of directors shall not:

(a) sell, transfer, or otherwise dispose of or enter into an agreement for sale, transfer, or for disposal of the undertaking or a sizeable part thereof, not being sale or disposal of assets in the ordinary course of business of the company or its subsidiaries;

(b) encumber any asset of the company or its subsidiary;

(c) issue any rights or bonus voting rights during the offer period; or

(d) enter into any material contracts.

Controlling shareholders have a duty of good faith to minority shareholders. Also, Section 117 of the Securities Act restricts shareholders participating in a share purchase agreement with the acquirer from participating in the public offer.

9. In what circumstances are break-up fees payable by the target company?

The laws of Pakistan do not specifically regulate break-up fees. The Contract Act, 1872 allows compensation for any loss or damage caused by the breach that naturally arose in the usual course of business (including any loss that the parties knew about when they made the contract) but not for any remote or indirect loss sustained by the reason of such breach.
Transaction parties are allowed to agree to amounts of liquidated damages which would be payable upon termination of the transaction by the target company. However, liquidated damages clauses may not be enforced by the courts where such clauses impose liquidated damages by way of a penalty and not as a genuine pre-estimation of the actual loss that will be suffered by the acquirer.

10. Can conditions be attached to an offer in connection with a deal?

With regard to unlisted companies, the parties are free to establish conditions to the business combination that do not contravene the provisions of the Companies Ordinance.

For listed companies, an acquirer may make the public offer conditional upon a ‘minimum level of acceptance’ from the tendering shareholders (section 116 of the Securities Act and regulation 14 of the Takeover Regulations). Under current regulations, the acquirer can impose a ‘minimum level of acceptance’ of not more than 35% of the remaining voting shares of the target company.

Before proceeding with a public announcement of an offer, a potential acquirer must appoint a manager to the offer. The manager to the offer is required by law to ensure that before the public announcement of the offer is made, the acquirer has made firm arrangements for funds for payments to shareholders under the public offer.

Conditions attached with any deal would also have to satisfy the provisions of the Contract Act, 1872. This is particularly relevant in the case of contingency contracts. Contracts which are contingent on the occurrence of future events may not be enforceable till such events occur or may become void if the occurrence of such future conditions becomes impossible.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Generally, a buyer has arranged for financing separately, and the subject is not dealt with in the transaction documents.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Yes, but only in limited circumstances. Where a scheme or contract involving the transfer of shares or any class of shares in any company (the ‘transferor company’) to another company (the ‘transferee company’) has, within 120 days after the making of the offer on that basis by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within 60 days after the expiry of the said 120 days, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire the dissenting shareholder’s shares.

When such a notice is given, the transferee company shall, unless, on an application made by the dissenting shareholder within 30 days from the date on which the notice was given, the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company. The squeeze-out provisions are subject to certain additional conditions prescribed in the Companies Ordinance.

13. What is the waiting or notification period that must be observed before completing a business combination?

The Competition Act

The Competition Act prohibits undertakings from proceeding with a merger which meets the
pre-merger notification thresholds until such undertakings have obtained clearance from the Competition Commission.

Section 11(3) of the Competition Act states that ‘the concerned undertakings shall submit a pre-merger application to the Competition Commission as soon as they agree in principle or sign a non-binding letter of intent to proceed with the merger.’

Once this application has been submitted, the Competition Commission shall conduct a first phase review and it shall, within 30 days of receipt of the application, issue an order either allowing the merger or initiating a second phase review. If the Competition Commission chooses to initiate a second phase review, it may require the merger parties to provide such information as it considers necessary. The Competition Commission shall, within 90 days of the receipt of the requested information, make an order either allowing or rejecting the merger.

Takeover Regulations
The Takeover Regulations provide a fairly comprehensive timeline regarding the public offer for an acquisition of shares of a listed company. An acquirer must publish a public announcement of offer within 180 days of publishing a notice regarding its intention to acquire voting shares. The acquirer’s offer statutorily expires on the 60th day of the publication of the public announcement of offer. The acquirer is required to make payment for the tendered shares within 30 days of expiry of the acceptance period (60 days from the announcement of the public offer).

Scheme of Arrangement
There is no definite waiting period for a merger or amalgamation under the Companies Ordinance. The parties to a business combination must petition the court for an order to hold a shareholders’ meeting to approve the merger. The time and place of the meeting are determined by the court. Once the requisite number of shareholders have agreed to the merger, the companies must then seek the court’s sanction regarding the scheme of arrangement that provides the details of the proposed merger.

14. Are there any industry-specific rules that apply to the company being acquired?

Below are some industry-specific regulations on mergers and acquisitions.

Non-Banking Finance Companies
Yes. For example, an amalgamation of non-banking finance companies (‘NBFCs’) is subject to approval by the SECP under section 282(L)(4) of the Companies Ordinance. Also, unlike the general provisions where a majority representing 75% of the value of shares present at the meeting must approve of the merger, for the mergers of NBFCs, a majority representing two-thirds in value of the shareholders of each NBFC, present either in person or by proxy, must approve of the scheme.

Insurance Companies
With respect to insurance companies, the Insurance Ordinance, 2000 (‘IO’) provides that in the case of an acquisition of shares of more than 10% in an insurance company, or, in the case of a non-life insurer of the whole or any part exceeding 10% of the business located in Pakistan of the insurer, such acquisition shall not proceed unless the acquirer has obtained approval from the SECP. The IO further provides that the life insurance business of an insurer shall not be transferred to any person or transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme sanctioned by the court having jurisdiction over one of the concerned parties.

Banking Companies
Mergers and acquisitions of banking companies would also be governed by the Banking Companies Ordinance, 1962 (‘BCO’). Pursuant
to its powers under the BCO, the SBP regulates share acquisitions of banking companies e.g. SBP approval is required to hold 5% or more of the voting shares of a banking company. Similarly, the merger or amalgamation of banking companies requires approval from the SBP.

**Broadcast Media**

Companies providing broadcast media and related distributions services are required to be licensed under the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 which prohibits the grant of a licence to companies owned, controlled or managed by foreign nationals or companies. This in effect prevents any foreign entity from acquiring such companies in Pakistan.

**15. Are cross-border transactions subject to certain special legal requirements?**

Transactions involving foreign exchange and cross-border transfer of securities are also governed by the Foreign Exchange Regulation Act, 1947 (‘FERA’). Section 18(1) of FERA prohibits a person resident in Pakistan from doing any act whereby a company which is controlled by persons resident in Pakistan ceases to be so controlled. The SBP has not granted any general permission for such transactions as such any transaction involving a change of control of a company from a resident person to a non-resident person requires the special permission of the SBP.

Section 13(1) of FERA restricts, except with the general or special permission of the SBP, inter alia, the transfer of securities (including shares) to or in favour of a person resident outside Pakistan. Chapter XX of the Foreign Exchange Manual provides a general exemption from restrictions under section 13(1) in relation to the transfer and export of securities on a repatriation basis, provided the issue price or purchase price is paid in foreign exchange through normal banking channels, the purchase price is not less than the price quoted in the stock exchanges of the country or in the case of an unlisted company not less than the break-up value of the shares as certified by a practising chartered accountant.

**16. How will the labour regulations in your jurisdiction affect the new employment relationships?**

The laws governing labour and employee benefits do not specifically provide for business combinations. In the event that the business combination entails termination of more than 50% of the workforce or the closing down of the whole of the establishment, prior permission of the Labour Court, the Government of Sindh or the Government of Khyber Pakhtunkhwa shall be required under the West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 (‘Standing Orders’), the Sindh Terms of Employment (Standing Orders) Act, 2015 (as applicable in the province of Sindh) and the Khyber Pakhtunkhwa Industrial and Commercial Employment (Standing Orders) Act, 2012 (as applicable in the province of Khyber Pakhtunkhwa). Standing Orders apply to every industrial establishment or commercial establishment wherein 20 or more workmen are employed. The term ‘workman’ has been defined in the Standing Orders to mean any person employed in any industrial or commercial establishment to do any skilled or unskilled, manual or clerical work for hire or reward.

**17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?**

At the time of writing, we are unaware of any recent proposals for reforms or regulatory changes what will impact M&A activity.
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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Merger and acquisition transactions in the Philippines may be categorised into four types:

(a) share purchase,
(b) asset purchase,
(c) mergers and consolidations, and
(d) joint ventures.

Acquisitions of corporations are generally structured as share purchases for purposes of tax efficiency and simplicity. However, contracting parties may choose to utilise an asset purchase when the acquirer seeks to obtain only a portion of the assets of the target company or when there are risks, obligations and accountabilities of the target company which the acquirer does not want to assume. Business combinations may also be performed through mergers and consolidations. A merger involves a business combination whereby two or more corporations merge into a single corporation which shall be one of the constituent corporations. A consolidation, on the other hand, involves a business combination whereby two or more corporations consolidate into a new single corporation which shall be the consolidated corporation. Aside from mergers and consolidations, companies can be combined through a joint venture, which may be structured as:

(a) a contractual or unincorporated joint venture, or
(b) an incorporated joint venture registered with the Securities and Exchange Commission (‘SEC’).

The aforesaid merger and acquisition transactions are generally governed by the Corporation Code and the Civil Code of the Philippines.

The Securities Regulation Code (‘SRC’) finds relevance when listed companies are involved in the merger or acquisition. More specifically, if a person or group of persons intends to acquire at least 35% of the voting shares of a public company in one or more transactions within a 12-month period, the acquirer is required to disclose such intention and make a tender offer. Furthermore, if a person or group of persons which already holds at least 35% of the voting shares intend to acquire more than 50% of the voting shares of a public company, a similar tender offer requirement is imposed. Noteworthy is the 2015 Implementing Rules and Regulations of the SRC, which the SEC began implementing and enforcing in March 2016. In these new implementing rules, the acquisition of at least 15% of the equity shares of a public company triggers a disclosure action.

While there are no general limitations to foreign ownership in Philippine companies, the Philippine Constitution, the Foreign Investments Act of 1991 (‘FIA’), and numerous special laws contain certain nationality restrictions on the ownership of private lands, operation of public utilities, the conduct of retail trade business and other investment areas and activities. Nonetheless, recent Philippine legislation reflects a gradual relaxation of these nationality restrictions. Republic Act No. 10574, which took effect in 2013, enabled foreigners to own 60% of rural banks which were previously required to be 100% Filipino-owned. Furthermore, Republic Act No. 10881, which lapsed into law in July 2016, removed foreign equity restrictions.
for adjustment companies, lending companies, finance companies and investment houses. This new law allows 100% foreign ownership over these types of companies.

Merger and acquisition transactions involving regulated industries usually require the endorsement or approval of certain government agencies. Mergers or consolidations of banks, for example, require the prior approval of the Bangko Sentral ng Pilipinas (‘BSP’) and is subject to the guidelines and procedures contained in the BSP’s Manual of Regulations for Banks.

A major development in the Philippine legal landscape of mergers and acquisitions is the enactment of the Philippine Competition Act (‘PCA’) in July 2015 and the issuance of its implementing rules in June 2016. The PCA prohibits anti-competitive agreements and abuse of dominant position. More importantly, it requires parties to a merger or acquisition, including a joint venture, that meet the revenue of party and value of transaction thresholds (i.e. amounts exceeding PHP1 billion) to notify the Philippine Competition Commission (‘PCC’) prior to the execution of any definitive agreement and to obtain the approval of the PCC prior to the consummation of the transaction.

For joint ventures between government entities and private entities, the National Economic Development Authority issued the Revised Guidelines and Procedures for Entering Into Joint Venture (JV) Agreements Between Government and Private Entities in 2013 which provided an abbreviated and simpler procedure for public-private partnership projects.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

In general, the SEC and the Bureau of Internal Revenue (‘BIR’) are the government agencies that play key roles in merger and acquisition transactions in the Philippines.

The SEC is the national government regulatory agency which has supervision over all Philippine corporations. Statutory mergers and consolidations require the prior approval of the SEC.

The BIR, which is the Philippine taxing authority, also performs an essential role in merger and acquisition transactions. In a share purchase, the Corporate Secretary of the target company cannot register the shares in the name of acquirer without the written authorisation of the BIR. Similarly, for an asset purchase involving real property, the Registry of Deeds cannot issue a new title in the name of the acquirer without the said BIR authorisation.

Moreover, mergers and consolidations which are typically structured as tax-free exchanges require a BIR ruling to be obtained prior to their implementation.

As previously stated, merger and acquisition transactions involving regulated industries, such as banking, insurance and telecommunications, usually require the endorsement or approval of certain government agencies.

Finally, the PCC is a newly-constituted independent quasi-judicial body that is tasked to implement the PCA. The PCC has the power to review merger and acquisition transactions which meet the revenue of party and value of transaction thresholds (i.e. amounts exceeding PHP1 billion).

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are permitted in the Philippines. However, they are not common given that shares in most Philippine companies are held by only a few shareholders who are usually related. In addition, only an extremely small percentage of active Philippine companies are listed on the Philippine Stock Exchange (‘PSE’). Hence, the usual hostile takeover methods of engaging in a proxy fight or making an irresistible tender offer generally do not find application. Nevertheless, there have been
instances of high-profile hostile bids in the past decade, such as First Pacific’s takeover of the Manila Electric Company and the SM Group’s takeover of Equitable-PCI Bank.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

Republic Act No. 10667, otherwise known as the PCA, is the newly enacted anti-trust law of the Philippines. The PCA prohibits anti-competitive agreements and abuse of dominant position. The PCC has the power to review merger and acquisition transactions which meet certain thresholds. Hence, those transactions cannot be consummated before a favourable ruling from the PCC is obtained. The PCC shall make a determination of whether the transaction will substantially prevent competition.

In addition, the Foreign Investment Act of 1991, and the Tenth Regular Foreign Investment Negative List (issued on 29 May 2015), contain detailed restrictions with regard to foreign ownership over certain investment areas and activities.

5. What documentation is required to implement these transactions?

Documentation requirements vary depending on the type of merger and acquisition transactions entered into by the contracting parties. In practice, a definitive agreement is executed to document final terms and conditions of the transaction, including the transaction structure, price, and conditions precedent to closing. Once the parties completely comply with the conditions precedent, an implementing deed or document is executed to consummate the transaction.

A share acquisition typically uses a Share Purchase Agreement which is implemented by a Deed of Absolute Sale of Shares of Stock. For an asset acquisition, parties usually sign an Asset Purchase Agreement which is consummated by the execution of a Deed of Absolute Sale or Deed of Assignment.

Mergers and consolidations require a plan of merger or consolidation which shall be approved by the board of directors and stockholders of each of the constituent corporations. After the approval of the plan of merger or consolidation, articles of merger or consolidation shall be executed by each of the constituent corporations and submitted to the SEC for approval.

Lastly, joint venture arrangements are documented using a Joint Venture Agreement. For incorporated joint venture arrangements, the parties further execute incorporation documents, such as the Articles of Incorporation and By-laws, for the creation of a joint venture company to be registered with the SEC.

6. What government charges or fees apply to these transactions?

Taxes are generally imposed on the sale or transfer of shares or assets, and the tax rate depends on the type, utilisation and other qualities of these shares or assets. A Certificate Authorising Registration (‘CAR’) issued by the BIR is required before a Corporate Secretary can register the transfer of shares of stock in the corporate books or before the Registry of Deeds can issue a new title in connection with a transfer of land. Nevertheless, a CAR is not required for the sale or transfer of movable property.

The sale of shares of stock is subject to a capital gains tax of 5% for the first PHP100,000 of net gain and 10% for net gain in excess of the said amount. In addition, a documentary stamp tax is imposed amounting to 0.375% of the par value of the shares sold. If the shares are listed on the Philippine Stock Exchange, the capital gains tax imposed is 0.5% of the gross selling price, and the transaction is exempt from documentary stamp tax.
7. Do shareholders have consent or approval rights in connection with a deal?

Generally, shareholders do not have consent or approval rights in connection with the acquisition of shares in, or assets of, another company. Board approval would suffice. However, if the transaction involves the sale of all or substantially all of the assets of a company, the approval of shareholders holding at least two-thirds of the outstanding capital stock of the selling company should be obtained.

Similarly, a plan of merger or consolidation requires the approval of stockholders holding at least two-thirds of the outstanding capital stock of each of the constituent corporations. Shareholders of a listed company have the right to sell their shares pursuant to a tender offer. The SRC and its implementing rules state that if a person or group of persons intends to acquire at least 35% of the voting shares of a public company in one or more transactions within a 12-month period, the acquirer is required to disclose such intention and make a tender offer. Furthermore, if the acquirer who holds at least 35% of the voting shares, intends to acquire more than 50% of the voting shares of a public company, a similar tender offer action is triggered.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

In the Philippines, directors have a fiduciary duty to the company’s stakeholders. The Corporation Code entrusts the board of directors with general corporate power and control over all corporate property. As such, directors owe a fiduciary duty to the company, including the duty to exercise utmost good faith in all transactions relating to their functions as directors, the duty to act for the benefit of the company and not for their own benefit. The Corporation Code contains a provision which renders
directors liable for damages for various acts which are detrimental to the company, such as voting for, or assenting to, patently unlawful acts of the company, acting with gross negligence or bad faith in directing the affairs of the company or acquiring personal or pecuniary interest in conflict with their duty as directors.

9. In what circumstances are break-up fees payable by the target company?

The payment of break-up fees for merger and acquisition transactions which do not proceed to closing is allowed in the Philippines as there are no specific laws or regulations governing break-up fees. While provisions on break-up fees may be incorporated in definitive agreements for merger and acquisition transactions, we have observed that such provisions are not common in the Philippines.

10. Can conditions be attached to an offer in connection with a deal?

For merger and acquisition transactions in the Philippines, it is typical for conditions to be attached to an offer relating to a deal. Binding offers are usually submitted to the target company or selling shareholders after the conduct of due diligence. Proposed actions to rectify or mitigate material adverse findings discovered through a due diligence audit are made conditions precedent to the signing of the definitive agreement or conditions precedent to closing. In addition, the required government approvals for certain transactions are also included as conditions precedent.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Philippine laws and regulations do not contain any general requirement on the minimum level of financing for merger and acquisition transactions. Hence, the contracting parties have some flexibility in determining the financing requirements for such transactions.

Nonetheless, various laws contain specific capitalisation requirements for certain industries which include banks, financing companies, insurance companies, educational institutions, and retail businesses with foreign equity. Such capitalisation requirements need to be financed and complied with in order to complete the merger or acquisition.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Currently, there are no Philippine laws or regulations that allow an acquirer to squeeze out or force minority shareholders to sell their shares in a company.

On the contrary, the Corporation Code provides protection to minority shareholders who may exercise their appraisal right in certain instances. An appraisal right allows any stockholder of a corporation to dissent and demand payment of the fair value of their shares in three instances:

(a) where any amendment to the articles of incorporation has the effect of changing or restricting the rights of any stockholder or class of shares, or of authorising preferences in any respect superior to those of outstanding shares of any class, or of extending or shortening the term of corporate existence; (b) in a sale, lease, exchange, transfer, mortgage, pledge or other disposition of all or substantially all of the corporate property and assets; and (c) in a merger or consolidation.

Moreover, for listed companies, minority shareholders are protected through the tender offer rules discussed above which grant minority shareholders the opportunity to sell their shares in the event of a significant change in ownership of the company.
13. **What is the waiting or notification period that must be observed before completing a business combination?**

For an acquisition of shares or assets in general, no waiting or notification period is prescribed in Philippine laws. However, for mergers or consolidations and for the sale of all or substantially all of the assets of a company, a stockholders’ meeting is required to be held to obtain the affirmative vote of stockholders representing at least two-thirds of the outstanding capital stock. Notification period for such stockholders’ meeting shall be at least two weeks prior to the date of the meeting.

The acquisition of at least 35% of the voting shares in a listed company triggers the requirement of a mandatory tender offer. In such a case, a waiting and notification period also applies as the acquirer or offeror is required to file and deliver SEC Form 19-1 to the SEC, the PSE and the target company, to comply with disclosure requirements to security holders and to publish the terms and conditions of the tender offer in two national newspapers of general circulation. A tender offer shall, unless withdrawn, remain open until the expiration of at least 20 business days from its commencement, provided that an offer should as much as possible, be completed within 60 business days from the date the intention to make such an offer is publicly announced.

The PCA also contains a waiting and notification period for merger and acquisition transactions which meet the thresholds for revenue of party and value of transaction (i.e. amounts exceeding PHP1 billion). The powers and functions of the PCC include the review of proposed mergers and acquisitions and the prohibition of mergers and acquisitions that will substantially prevent competition in the relevant market.

The PCA mandates that parties submit their notification to the PCC, and within 15 days, the PCC shall determine whether the submission and other relevant requirements are complete and in accordance with the rules or guidelines of the PCA.

The PCC shall then inform the parties of other information and documents that they may have failed to supply, or issue a notice to the parties that the notification is sufficient for the purpose of commencing a Phase I review of the merger or acquisition.

Within 30 days from commencing the Phase I review, the PCC may opt to inform the parties of the need for a more comprehensive and detailed analysis of the merger or acquisition under a Phase II review, and request other information and documents that are relevant to its review.

The issuance of such a request has the effect of extending the period within which the agreement may not be consummated for an additional 60 days. We note that in no case may the total period for review by the PCC exceed 90 days from the time the initial notification by the parties is deemed complete.

14. **Are there any industry-specific rules that apply to the company being acquired?**

Depending on the industry, some merger and acquisition transactions in the Philippines require certain rules issued by government agencies to be complied with and prior approval or endorsement of such agencies to be obtained. These industries include banking, insurance, education and retail trade.

To illustrate, mergers or consolidations of banks require the prior approval of the BSP and are subject to the guidelines and procedures contained in the BSP’s Manual of Regulation for Banks.

For retail trade, a proposed business combination needs to be compliant with the Retail Trade Liberalisation Act of 2000 (Republic Act No. 8762) which provides specific capitalisation requirements depending on the presence of
foreign equity and the type of retail products, among others.

15. Are cross-border transactions subject to certain special legal requirements?

The FIA provides that a qualified foreign national may conduct business in the Philippines upon registration with the SEC, or invest in a domestic enterprise to the extent allowed by law without the need of prior approval. Thus, direct foreign investment need not be registered with the BSP unless the foreign exchange needed for the repatriation of capital and remittance of dividends and earnings is purchased from the Philippine banking system. The BSP’s Manual of Regulations on Foreign Exchange Transactions is a consolidation of all regulations governing foreign exchange transactions and provides guidelines on cross-border transfers of local and foreign currencies.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

The Corporation Code’s provision on the effect of a merger or consolidation states that the surviving or consolidated company shall be responsible and liable for all the liabilities and obligations of each of the constituent corporations. However, the said provision is not categorical when it comes to the effect of a merger or consolidation on the employment contracts of existing employees. This was the core issue resolved in the case of Bank of the Philippine Islands vs. BPI Employees Union Davao Chapter-Federation of Unions in BPI Unibank (G.R. No. 164301, 19 October 2011). The Supreme Court ruled that employment contracts are deemed automatically assumed by the surviving corporation in a merger, even in the absence of an express stipulation in the articles of merger or plan of merger. Simply stated, a surviving corporation is considered the successor employer of the employees of the absorbed company. We opine that this jurisprudential precedent is also applicable to consolidations.

In share acquisitions, there is no change in the employment relationship as the target company continues to be the employer. However, in an asset acquisition, the acquirer does not assume any employment-related obligations, unless agreed upon by the parties.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Among the most anticipated reforms that will greatly impact M&A activity in the Philippines is Senate Bill No. 2945 prepared by the Committee on Trade, Commerce & Entrepreneurship of the Philippine Senate. Senate Bill No. 2945 is a proposed amendment to the Corporation Code which was enacted in 1980 and has not been amended since. The bill proposes, among others, to allow the formation of a one-person corporation compared to current corporations which require at least five individuals to act as incorporators and directors. The bill also proposes to extend the corporate life from 50 years to an indefinite period.
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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Transactions with respect to privately held companies are mostly structured as a share deal, an asset deal or a merger (transferring one company’s assets to another pre-existing company or transferring two companies’ assets into a new company). There is no specific statute governing the acquisition of a company whose shares are not listed on a stock exchange. Instead, the following rules apply:

(a) general rules on the sale of goods as set forth in articles 184 et seq. of the Swiss Code of Obligations of 30 March 1911, as amended (‘CO’);
(b) mergers and de-mergers of entities as well as transfers of assets and changes of legal forms are governed by the Swiss Act on Mergers, Demergers, Transfers of Assets and Transformations of 3 October 2003 (‘MA’).

In the case of public (i.e. listed) companies, in particular the following laws and regulations apply with regard to a public takeover offer:

(a) Swiss Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (‘FMIA’);
(b) Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 25 November 2015 (‘FMIO’);
(c) Ordinance of the Swiss Financial Market Supervisory Authority (‘FINMA’) on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 3 December 2015;
(d) Ordinance of the Takeover Board on Public Takeover Offers of 21 August 2008, as amended;
(e) Regulation of the Swiss Takeover Board of 21 August 2008, as amended;
(f) Listing Rules of the SIX Swiss Exchange, the main stock exchange in Switzerland, regarding disclosure requirements in relation to price-sensitive information and the listing and de-listing of shares.

Although the public takeover offer is the most common form of a change of control with regard to public companies, a takeover of a public company can also be performed by way of a statutory merger under the MA. As statutory mergers involving public companies are very rare in Switzerland, these are not further dealt with in this article.

Also, the Swiss Act on Cartels and Other Restraints on Competition of 6 October 1995, the Swiss Act on Acquisition of Real Property by Foreigners of 16 December 1983, as amended on 1 October 1997, and special sector-related rules in regulated industries apply in the context of Swiss merger and acquisition transactions (see question 4).

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The following regulators and agencies play key roles in merger and acquisition transactions:
(a) the Takeover Board (www.takeover.ch) is the regulator for takeover offers regarding public companies in Switzerland. It can issue binding orders which can be challenged before the FINMA. The decisions of the FINMA can be appealed to the Swiss Federal Administrative Court;

(b) the FINMA (www.finma.ch) is Switzerland’s independent financial markets regulator. Its mandate is to supervise banks, insurance companies, exchanges, securities dealers, collective investment schemes, and their asset managers and fund management companies. It also regulates distributors and insurance intermediaries.

(c) the Federal Competition Commission (www.weko.ch) is the regulator for merger control matters in Switzerland. Its tasks include combatting harmful cartels, monitoring dominant companies for signs of anti-competitive conduct and preventing the imposition of restraints of competition by the state.

The decisions of the Takeover Board and the FINMA, as well as most offer documents, are available at www.takeover.ch.

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He further specialises in advising small and medium-sized enterprises, particularly with respect to business succession and structuring.
3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are permitted in Switzerland. The FMIA regulates both friendly offers (i.e. the offer is supported by the target’s board of directors) and hostile bids (i.e. the offer is not supported by the target’s board of directors). There is no obligation to notify any authority, including the Takeover Board, or the target’s board of directors before announcing the offer to the public. Although most takeovers are friendly, the number of hostile bids has increased in Switzerland in recent years. Between 1998 and mid-2010, out of 128 public offers, 113 were recommended and 15 were hostile bids. Nevertheless, in 2015, only one hostile bid and one friendly bid were submitted.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

(a) Swiss Act on Cartels and Other Restraints on Competition of 6 October 1995 (‘Cartel Act’):

Under the Cartel Act, the Competition Commission must be notified of any concentrations of undertakings (including mergers, acquisitions of control and joint ventures), provided that in the business year preceding the concentration, the undertakings concerned together reported:

(i) an aggregate worldwide turnover of at least CHF 2 billion or an aggregated turnover in Switzerland of at least CHF 500 million; and
Moreover, according to the Lex Koller, the acquisition of certain real estate by foreign individuals, or companies that are controlled by such persons, is restricted and may require prior approval by the relevant cantonal authority where the real estate is located (see question 15).

(c) Special Regulations for Particular Sectors:
Special regulations have to be taken into account in connection with the acquisition of the business of a regulated industry (e.g. financial institutions as well as entities in the media, telecommunications, pharmaceuticals or transport sector). For example, newly qualified shareholders of a regulated financial institution (including a bank, securities dealer, insurance company, fund management company etc.) have to be notified to, and approved by, the FINMA.

(ii) at least two of the undertakings concerned reported an individual turnover in Switzerland of at least CHF 100 million.

Irrespective of the above conditions, it is mandatory to notify a planned concentration to the Competition Commission if the following two conditions cumulatively apply:

(i) one of the undertakings involved in the planned concentration has been held to be dominant in a market in Switzerland in a final and non-appealable decision under the Cartel Act; and

(ii) the concentration concerns either that market or an adjacent market, or a market upstream or downstream thereof.

(b) Swiss Act on Acquisition of Real Property by Foreigners of 16 December 1983, as amended on 1 October 1997 (Lex Koller):

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5. What documentation is required to implement these transactions?

For the sale of a privately held company, the key document is the transaction agreement: depending on the type of the transaction, a share purchase agreement, an asset purchase agreement or a merger agreement.

If listed companies are involved as targets, a transaction can be structured as:
(a) a tender offer for cash;
(b) an exchange offer for securities; or
(c) a combination thereof.

Before the buyer/offeror is granted access to the due diligence materials, pre-agreements such as a confidentiality agreement, a stand-still agreement and a letter of intent are normally executed. These documents set out the transaction process and mostly include provisions regarding exclusivity, confidentiality and break-up fees.

In most cases, public offers start with a preliminary announcement prior to the publication of the offer. A preliminary announcement is a short document which sets out the main terms of the offer (scope, price, kind of consideration, timetable and conditions). Within six weeks after the preliminary announcement, the offeror must publish the offer in a prospectus containing in principle the same conditions as those in the preliminary announcement. Prior to publication, the offeror must submit the offer to an independent audit firm or to a securities dealer for review. The audit firm or the securities dealer issues a short report, which has to be published together with the prospectus. Also, the board of directors of the target company submits a report to the holders of equity securities setting out its position in relation to the offer. The report of the board of directors of the target company may be published either together with the prospectus or after the publication of the prospectus.

On the business day following the date on which an offer is due to expire, the offeror must make an announcement through the electronic media and must simultaneously inform the Takeover Board and the SIX Swiss Exchange. The provisional interim announcement must state the number of equity securities acquired and held by the offeror and specify whether the conditions of the offer (if any) have been fulfilled. The definitive interim result must be published not later than four trading days after the expiry of the offer. If the offer has been successful, the acquiror has to grant the shareholders of the target company an additional acceptance period to tender any shares that are still outstanding. Upon expiry of this additional time period, the acquiror has to publish the final result of the tender offer.

The interim and final results must be distributed through:
(a) publication on either the offeror’s website or a website dedicated to the public offer;
(b) delivery to the major Swiss media, the major press agencies active in Switzerland as well as the major electronic media which distribute stock exchange information (financial information providers);
(c) delivery to the Takeover Board; and
(d) delivery to the SIX Swiss Exchange.

6. What government charges or fees apply to these transactions?

Depending on the type of transaction, the following charges or fees may apply:
(a) the sale of shares may be subject to a transfer stamp duty of 0.15% (for shares of a Swiss company) or 0.30% (for shares of a foreign company);
(b) the Takeover Board levies fees between CHF 25,000 and CHF 375,000, depending on the value of the transaction and the degree of difficulty of the proceedings;
(c) notaries’ fees are required in transactions where real estate is involved. Such fees are cantonal fees and may vary depending on where the real estate is located.
7. Do shareholders have consent or approval rights in connection with a deal?

According to the Swiss public tender offer regime, there is no particular requirement with regard to shareholders’ approval. However, the shareholders have to give their consent if, in the course of a public takeover, the share capital of the company has to be increased in order to issue the shares offered as consideration.

If the articles of association of the target company contain any anti-takeover measures (such as transfer restrictions on registered shares), the offeror will normally make its offer conditional on the cancellation of such provisions by the shareholders’ meeting (see question 10). Also, the offeror can make the offer conditional on getting a minimum acceptance, e.g. for at least 50% of the shares, or may seek irrevocable tender commitments from or conclude direct agreements with significant shareholders (see also question 10).

Moreover, shareholders holding directly or indirectly 3% or more of the voting rights in the target, whether exercisable or not:

(a) can obtain legal standing in takeover proceedings by applying to the Takeover Board within five trading days after the earlier of:
   (i) the publication of the prospectus, or (ii) if the first order by the Takeover Board on the offer is published before the prospectus (e.g. orders relating to the preliminary announcement), after publication of that order; and

(b) can, if they have not applied to obtain legal standing and have yet to participate in the proceedings, file an appeal with the Takeover Board against the first order issued by the Takeover Board on the offer within five trading days after publication of such

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9. In what circumstances are break-up fees payable by the target company?

In the case of private acquisitions, break-up fees payable by the target company may be contractually agreed on within the legal limits. However, it is not yet very common in Switzerland. In general, break-up fees, if any, are to be paid by the seller.

Pursuant to the practice of the Takeover Board, the amount of break-up fees payable by the target company in a public merger must be proportional and constitute a compensation for incurred costs and expenses. However, it is uncertain – and has yet to be decided by a court – whether break-up fees of a purely punitive nature are allowed.

It may be noted that in applying the principle of culpa in contrahendo, a seller and/or buyer might be considered to have breached their pre-contractual duties and might be obliged to pay damages. As the target company is not a party to the transaction, this principle, however, will in general not apply to it.

10. Can conditions be attached to an offer in connection with a deal?

In the case of private acquisitions, the bidder is free to submit a conditional offer. For example, offers will typically be subject to a successful due diligence exercise.

As regards public acquisitions, a distinction has to be made whether the public takeover bid is voluntary or not. If it is voluntary, the offer may be subject to clearly defined objective conditions, provided that the bidder has a justified interest to do so and that the outcome and the occurrence of the condition may not be substantially influenced by the bidder. If the bidder has to contribute to the fulfilment of the condition, the bidder has to take all reasonable measures to ensure the occurrence of the condition. When the offer period closes, the bidder must clearly state whether the conditions have

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Controlling shareholders do not owe any duties to minority shareholders.

Directors owe a duty of care and loyalty towards the company. Further, they have to act in the best interests of the company and to abstain from any action that could harm those interests.

However, anyone who directly or indirectly acquires equity securities representing more than one-third of the company’s voting rights in a listed Swiss target company is obliged to make a mandatory takeover offer to the remaining shareholders for all listed equity securities of the company. Companies may, by resolution of the shareholders’ meeting:

(a) waive the duty to make a mandatory takeover offer (opting-out); or
(b) raise the threshold from one-third to 49% (opting-up).

The FINMA’s predecessor, the Federal Banking Commission, had ruled that shareholders could not resolve on an opting-up or opting-out provision that applied only for a limited period of time and for a specific shareholder. The Takeover Board extended the scope of this rule to a general opting-out adopted by the shareholders’ meeting, if the resolution has actually or implicitly been taken in view of a specific transaction or in favour of a specific shareholder. However, the Takeover Board reversed this practice and held instead in a decision in 2012 that it would not challenge opting-out decisions if a majority-of-the-minority vote consented to it.

Moreover, the Takeover Board can grant exemptions from the duty to make a mandatory takeover offer if specific circumstances apply.
been satisfied. The bidder can reserve the right to waive certain conditions.

In contrast, mandatory bids must in principle be unconditional, except in the event of important reasons, such as obtaining regulatory approvals, absence of injunctions preventing completion, and recognition of the bidder as a shareholder with voting rights.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

In private mergers and acquisitions, the seller will typically ask for proof of financing and for representations and warranties of the buyer pursuant to which the buyer is in possession of the necessary funds to consummate the planned transaction. However, there are no mandatory requirements regarding the level of financing or debt-equity ratio.

In contrast, funding must be in place before a public offer is announced. Prior to its publication, the offer must be submitted to an independent audit firm (see question 5), which examines whether the offer is in compliance with the legal requirements. In particular, the audit firm reviews the financing of the offer and the availability of the financing. The offer is to be published in the prospectus (see question 5) containing, inter alia, all essential information regarding the financing of the offer (i.e. details of the sources of financing) and a confirmation of the audit firm that the bidder has taken adequate measures to ensure that the necessary financial means will be available on the closing date. Commitment letters from the supporting banks are generally sufficient as basis for the issuance of the funding confirmation.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Pursuant to Swiss law, minority shareholders of a company domiciled in Switzerland may be squeezed out in two different ways:

(a) articles 8(2) and 18(5) of the MA provide that in the case of a statutory merger of two or more companies, a minority shareholder may be squeezed out by decision of the shareholders of the transferring company if they hold at least 90% of the voting rights;

(b) pursuant to article 137 of the FMIA, a bidder in a public offer who holds more than 98% of the voting rights of the target company on expiry of the offer period may, within three months, request the court to cancel the outstanding equity securities by initiating an action against the company. The remaining shareholders may participate in these proceedings. The target company must re-issue such equity securities and allot them to the bidder either against payment of the offer price or against fulfilment of the exchange offer in favour of the holders of the equity securities which have been cancelled.

13. What is the waiting or notification period that must be observed before completing a business combination?

Pursuant to article 9 of the Cartel Act, planned concentrations of undertakings must be notified to the Competition Commission before their implementation if the conditions as set out under question 4 are fulfilled.

Within one month upon receiving notification of a planned concentration of undertakings, the Competition Commission decides if there are grounds for conducting an investigation and, if applicable, notifies the undertakings concerned of the opening of an investigation. If no such notice is issued within that time period, the concentration may be implemented without reservation. The undertakings concerned must refrain from implementing the concentration during this one-month examination period,
unless authorised by the Competition Commission to do so.

If the Competition Commission decides to conduct an investigation, the investigation should be completed within four months, unless the Competition Commission is prevented from doing so for reasons attributable to the undertakings concerned. Consequently, the entire procedure should not take more than five months from the date of notification. Upon completion of the investigation, the Competition Commission decides (in an appealable order) whether the concentration may be implemented (with or without conditions) or not.

In addition to the notification and waiting periods regarding concentrations, each legal entity involved in a statutory merger pursuant to the MA shall, during a 30-day period prior to the merger resolution, make available the following documents of all legal entities involved in the merger for inspection by the shareholders:
(a) merger agreement;
(b) merger report;
(c) audit report; and
(d) annual accounts and annual reports of the three preceding years and, if any, interim balance sheets.

Provided that all shareholders consent to it, small- and medium-sized companies may waive such right of inspection.

14. Are there any industry-specific rules that apply to the company being acquired?

Mergers and acquisitions involving banks and insurers are subject to the approval of the FINMA (see also question 4).

As regards banks, any bank incorporated under Swiss law or having a place of business in Switzerland must obtain a licence from the FINMA prior to engaging in business operations. Further, each person or legal entity must notify the FINMA prior to directly or indirectly purchasing or selling a qualified equity interest in a bank incorporated under Swiss law. This duty of notification also applies if qualified equity interests are increased or decreased in such a way that they reach, exceed or fall below the thresholds of 20%, 33% or 50% of the capital or voting rights respectively.

Similarly, taking up business operations as a securities dealer in Switzerland is subject to the prior approval of the FINMA. If a securities trading entity, which is organised pursuant to Swiss law, subsequently becomes controlled by a foreign person, it must obtain the approval of the FINMA. The same applies in the case of a foreign controlled securities dealer if a foreign holder of a substantial participation in such entity changes.

Further, insurance companies subject to the supervision of the FINMA must obtain an authorisation from the FINMA prior to commencing business operations. Mergers, de-mergers and conversions of insurance companies must likewise be approved by the FINMA.

Finally, transactions regarding other regulated industries (e.g. telecommunications, pharmaceuticals, radio and television) may be subject to certain restrictions, such as notification duties, regulatory approvals or other specific requirements (see also below).

15. Are cross-border transactions subject to certain special legal requirements?

The Lex Koller provides for several mandatory restrictions of the direct or indirect acquisition of property rights and/or rights similar thereto by non-residents or foreign-controlled companies. Any purchaser subject to the Lex Koller must obtain an authorisation from the competent local authorities. Otherwise, the property acquisition at hand remains non-effective. However, the Lex Koller does not apply to commercial real estate, such as business premises or plant locations.
Further, the purchase by foreign persons of shares in Swiss companies, which are active in regulated areas such as banking, insurance, transport, national defence, telecommunications, radio and television, is subject to certain restrictions.

Finally, as in many other countries, Switzerland has put in place and/or participates in international sanctions and embargos against certain countries and/or particular goods.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

If the employer transfers a business or a part thereof to a third party by way of a private asset deal, or by way of a statutory merger under the MA, the employment relationship and all ancillary rights and obligations automatically pass to the buyer, unless the employee refuses such transfer. Where the employee refuses the transfer, the employment relationship ends on expiry of the statutory notice period. Until then, the acquirer and the employee are obliged to perform the contract.

The former employer and the acquirer in a private asset deal are jointly and severally liable for any claims of an employee which fell due prior to the transfer or which fall due between that juncture and the date on which the employment relationship could normally be terminated or is terminated following refusal of the transfer by the employee. The same rules apply in a statutory merger.

Before the transfer of the business or the business unit takes place, the employer must inform the employees’ representative body or, where there is none, the employees directly, of the reason for the transfer and the legal, economic and social consequences for the employees. If any measures are expected to affect the employees as a result of such transfer, the employees’ representative body must be consulted before the relevant decisions are taken. In a statutory merger, the employees’ representatives of both the absorbing and the absorbed entities must be informed or consulted before the respective shareholders’ meetings resolve on the merger.

In contrast, in a private share deal and in a public takeover offer, a target’s board is not required to inform or consult its employees.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

On 1 January 2016, the FMIA and its ordinances entered into force, replacing substantial parts of the Federal Act on Stock Exchanges and Securities Trading.

Further, on 1 January 2016, the Federal Act on Combatting Money Laundering and Terrorist Financing was revised.

In addition, the stock corporation law is currently under revision. It is planned to introduce provisions regarding corporate governance to enhance the flexibility of capital structures and to update the requirements regarding annual general meetings of stock corporations.

Another ongoing revision relates to the provisions on the commercial register. As part of this revision, it is planned to abandon the requirement of a separate ‘Stampa Declaration’ when a new company is founded.

Finally, the Parliament is currently engaged in discussions regarding the revision of the Financial Services Act and the Financial Institutions Act. The planned changes would, inter alia, affect the Federal Act on Combatting Money Laundering and Terrorist Financing.
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Jurisdictional Q&A – Switzerland
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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Depending on the structure of the transaction, mergers and acquisitions in Taiwan are governed by several laws and regulations, including:

(a) The Company Act which provides the basic framework for transactions involving Taiwan companies, including provisions regarding transfers of shares, mergers, and sales of assets;

(b) The Business Mergers and Acquisitions Act which further governs mergers, share exchanges, spin-offs and certain other acquisitions;

(c) The Securities and Exchange Law and the rules and regulations promulgated thereunder, as well as listing rules of the relevant stock exchanges (i.e. the Taiwan Stock Exchange and the Taipei Exchange) which govern transactions involving public companies, including tender offers;

(d) The Financial Holding Company Act and the Financial Institutions Merger Act which govern mergers and acquisitions involving financial institutions;

(e) The Statute for Investment by Foreign Nationals and the rules thereunder which regulate transactions that involve foreign investments or dispositions;

(f) The Fair Trade Act which sets the thresholds and procedures for anti-trust review.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

Foreign parties to a merger or acquisition of a Taiwan company are required to obtain foreign investment approval from the Investment Commission of the Ministry of Economic Affairs. Parties that meet certain anti-trust thresholds must also submit an application to the Fair Trade Commission.

Additional regulatory authorities may be involved depending on the parties to the transaction. For example, the Securities and Futures Commission and the stock exchanges review filings involving listed companies, and approval from the Banking Bureau is generally required for transactions involving financial institutions. Pre-approval from the Central Bank of Taiwan may also be required if the closing of the transaction requires a large amount of foreign currency to be exchanged into Taiwan Dollars. If any of the relevant parties is in the telecommunications or media industries, then the approval from the National Communications Commission may be required.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are permitted in Taiwan, but historically there have been few cases due to various obstacles. For example, targets of a hostile bid are likely to raise complaints to regulators such as the Financial Supervisory Commission, the Investment Commission or the Fair Trade Commission, which can delay or stop the transaction. Taiwan corporate governance procedures can also make it difficult for a hostile acquirer to gain control of the target.
company’s board and management team in a timely manner, without the co-operation of the existing board.

However, hostile takeovers gained new interest during the past year when Advanced Semiconductor Engineering (‘ASE’) made an unsolicited tender offer to buy a significant minority stake in its competitor Siliconware Precision Industries (‘SPIL’). After a series of public disputes, including an extended review by the Fair Trade Commission, the companies eventually settled on terms of a business combination. While hostile bids remain rare in Taiwan, it is possible that the ASE-SPIL case could encourage more such deals in the future.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

Obtaining foreign investment approval from the Investment Commission is often a key hurdle for foreign investors. The review process can often take one to two months or longer, especially where the transaction involves politically sensitive issues or the possibility of significant ownership from mainland China (i.e. the People’s Republic of China). This is of particular concern for transactions involving tender offers, as there is a statutory limit on the number of days that a tender offer may remain open, and foreign investment approval must be obtained within that time for the tender offer to complete. The Investment Commission typically does not accept applications until the tender offer has actually launched, although a rare exception was made in 2015 in the case of Guangdong Fenghua Advanced Technology’s tender offer for Viking Tech. This deal was also significant for being the first successful tender offer for a Taiwan company by a mainland Chinese company.

Anti-trust review may also present an obstacle in mergers and acquisitions. Taiwan’s anti-trust thresholds include both revenue and market share criteria, so companies with low revenue but a relatively high market share in Taiwan may still trigger the requirement. Issues regarding market share can sometimes prolong the review, as there is often considerable ambiguity regarding what should define a particular company’s market share.

5. What documentation is required to implement these transactions?

Transaction documents in Taiwan are conceptually similar to other jurisdictions. Primary documents may include merger agreements, share exchange agreements, share purchase agreements and asset sale agreements, depending on the structure of the transaction. Ancillary documents, such as shareholder agreements and voting agreements, may also be used depending on the needs of the transaction.

In tender offers, it is typical for the buyer to enter into a share purchase agreement or tender agreement with the major shareholders prior to the announcement and launch of the tender offer. The material terms of such an agreement would need to be disclosed in the tender offer prospectus.

6. What government charges or fees apply to these transactions?

There are no government fees applicable to mergers and acquisitions in Taiwan, other than transaction and income taxes. In particular, sales of the shares of public companies and certificated shares of private companies are subject to a 0.3% securities transaction tax on the total transaction value, except where tax exemptions apply. Other types of transactions may be subject to applicable income tax.

7. Do shareholders have consent or approval rights in connection with a deal?

Mergers and share exchanges are required to be approved by a majority of the shareholders
present at a meeting where more than two-thirds of the shareholders are present. In the case of a public company, mergers and share exchanges may alternatively be approved by two-thirds of the shareholders present at a meeting where more than one-half of the shareholders are present.

Transactions that involve the delisting of a public company also require the approval of the holders of at least two-thirds of the total number of issued shares.

In the case of an asset deal, the transaction may or may not be required to be submitted to the shareholders, depending on the size of the transaction, impact to the company, and the company’s internal rules regarding acquisitions and dispositions of assets.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Directors and managers in Taiwan owe fiduciary duties to the company. Specifically, in the case of a merger or acquisition, Taiwan law requires the board to handle the matter in the best interests of the company.

Directors must also disclose any conflict of interest in matters that are presented to board meetings. Depending on the circumstances, directors may abstain from voting to minimise their risks in this respect.

Controlling shareholders (i.e. persons who exercise effective control over the company and its board) are subject to the same civil and criminal liabilities as directors. Shareholders with a conflict of interest in matters that are presented to a shareholder meeting may not vote on such matters, provided that a shareholder may vote on a merger or a share exchange in which the shareholder is also a party.

As of 2016, boards of public companies are required to establish a special committee to independently evaluate the fairness and reasonableness of mergers and acquisitions. Previously, such special committees were recommended but not mandated, and were rarely used in Taiwan except in tender offers or management buyout transactions.
9. In what circumstances are break-up fees payable by the target company?

The transaction documents may establish the terms and conditions for break-up fees. However, such arrangements are not very common for transactions involving public companies in Taiwan.

10. Can conditions be attached to an offer in connection with a deal?

Tender offers in Taiwan may have only a limited set of conditions. The buyer may specify a minimum number of shares that it requires to be tendered for the tender offer to be completed. The buyer may also petition to withdraw its tender offer if the target company experiences a material adverse change or if the buyer becomes bankrupt, provided that the regulator must approve such withdrawal. If the buyer needs to obtain an authority’s approval for the tender offer, it is required to expressly set out the details of such approvals as conditions to the tender offer. Other conditions to tender offers (such as financing conditions) are generally not permitted.

For other types of mergers and acquisitions, the transaction documents may establish the terms and conditions for the transaction to complete.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

The transaction documents may include financing or commitment letters as a condition to the transaction. As mentioned above, a buyer making a tender offer may not specify financing as a condition to the completion of the tender offer.

There are no regulations that require a minimum level of financing. However, if the buyer needs an authority’s approval for the completion of the transaction, the authority may sometimes require the buyer to submit certain documents (e.g. a bank’s commitment letter) to prove its source of funds and financial capability.

Financing requirements have recently been a topic of discussion among Taiwan regulators and the media as a result of Bai Chi Gan Tou Digital Entertainment defaulting on payment in its tender offer for XPEC Entertainment. Although all conditions for the tender offer had been satisfied, the buyer announced in August 2016 that it was withdrawing its offer and would not be making payment to the tendering shareholders. This incident has led to calls for stricter requirements on tender offers to ensure adequate funding will be available when the offer closes.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Minority shareholders may be squeezed out by means of either a merger or a share exchange. As of 2016, cash is a permitted form of consideration in a share exchange, which allows for a squeeze-out mechanism similar to a reverse triangular merger. In practice, a squeeze-out merger is commonly used after a tender offer so that the buyer can obtain 100% of the target company.

Both mergers and share exchanges are required to be approved by a majority of the shareholders present at a meeting where more than two-thirds of the shareholders are present. In the case of a public company, mergers and share exchanges may alternatively be approved by two-thirds of the shareholders present at a meeting where more than one-half of the shareholders are present.

Shareholders who are squeezed out in this manner may exercise dissenters’ rights to demand fair value for their shares. Beginning in 2016, the procedures for exercising dissenters’ rights have been amended to be more accessible to minority shareholders. To exercise such rights, dissenters must object to
the deal on or before the shareholder meeting that approves the transaction. The company and the shareholders will then have a 60-day period to reach an agreement on the fair value of the shares. If the company and dissenters cannot reach an agreement within that period, the company must first pay the amount that it considers to be fair to the dissenters, and also petition the court for a ruling on fair value for all of the dissenters. The fees of petition and the compensation of independent appraisers that may be requested by the court shall be borne by the company.

13. What is the waiting or notification period that must be observed before completing a business combination?

In a merger, each company needs to notify its creditors and grant the creditors at least 30 days to object to the merger. Also, at least 30 days before the completion of the merger, the acquirer must notify each employee of the target company that it wishes to retain and request their consent to transfer their employment to the surviving company. Employees that do not consent to the transfer are entitled to be paid severance upon the completion of the merger.

The above notification requirements also apply to spin-offs and certain other acquisitions. Transactions that require an anti-trust review by the Fair Trade Commission are typically subject to a 30-day waiting period, which can be further extended by an additional 60 days.

14. Are there any industry-specific rules that apply to the company being acquired?

Certain areas of business in Taiwan require special approvals or licences from the relevant competent authority, and thus transactions involving a target company in those industries may require the approval of such competent authority. Financial institutions in particular are subject to industry-specific rules regarding mergers and acquisitions, and approval from the Banking Bureau is generally required for transactions involving financial institutions.

In addition, certain industries are restricted or prohibited from mainland Chinese investment, as set forth on a ‘Negative List’ that is revised periodically. Transactions involving such industries are subject to heightened scrutiny by the Investment Commission.

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15. Are cross-border transactions subject to certain special legal requirements?

Depending on the structure of the transaction and the parties involved, cross-border transactions in Taiwan may require foreign investment approval from the Investment Commission, anti-trust approval from the Fair Trade Commission, and pre-approval from the Central Bank of Taiwan for the exchange of foreign currency if the amount exceeds a certain threshold.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Unlike some jurisdictions, Taiwan is not an ‘at-will’ jurisdiction, and thus employees generally may not be terminated without cause, except in certain statutorily permitted circumstances. As a corollary, employees generally cannot be automatically transferred to another entity without their consent.

This is often a key issue in asset deals involving the transfer of employees, as the parties will need to evaluate the target employees’ willingness to agree to the transfer and the costs involved. Furthermore, in a merger, the employees of the non-surviving company have the option to either transfer to the surviving company or terminate their employment with payment of severance. Depending on the circumstances, the parties may be able to carefully negotiate and draft voluntary resignations or other workarounds with the affected employees to address these issues.

On the other hand, in a share deal or a share exchange, labour and employment issues are less likely to arise as the employing entity does not change.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Taiwan voters elected the Democratic Progressive Party (‘DPP’) to control of the presidency and the legislature in 2016. Compared to the opposition party, the DPP is widely viewed as being less friendly to mainland Chinese investment in Taiwan. This change comes during a period where there has been a global surge in deals involving mainland Chinese buyers, many of which have expressed an interest in acquiring businesses or operations in Taiwan. It is too early to tell whether or to what degree the DPP government will increase restrictions on mainland Chinese investments. However, many market observers anticipate a heightened scrutiny of M&A activity involving mainland Chinese investors as a result.

The DPP government has also announced plans to encourage and foster start-up companies, including potentially revising the Company Act to permit companies to issue shares with preferential rights and eliminate the par value requirement for company’s share capital. These features were previously introduced to the Company Act in 2015, but are currently made available only to companies that are registered as ‘close companies’. The proposed revisions would make these provisions more widely available, allowing Taiwan companies to provide rights that are commonly requested by venture capital funds, such as veto rights and board seats.
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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

In Turkey, mergers and acquisitions are mainly governed by: (a) the Turkish Commercial Code numbered 6102; (b) the Turkish Code of Obligations numbered 6098; (c) the Capital Markets Law numbered 6362; (d) the Competition Law numbered 4054; (e) the Corporate Tax Law numbered 5520 together with the secondary legislation, such as regulations and communiqués, issued in line with these main pieces of legislation. Specific legislation for companies active in regulated markets (e.g. banks and insurance companies) should also be observed.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

According to the Communiqué on Mergers and Acquisitions Requiring the Permission of the Competition Board, mergers, acquisitions and formation of joint ventures in Turkey are subject to the Turkish Competition Board’s clearance, if: (a) the transaction parties’ aggregate turnover in Turkey exceeds TRY 100 million and the aggregate turnover of each of at least two of the transaction parties in Turkey exceeds TRY 30 million; or (b) the global turnover of one of the transaction parties exceeds TRY 500 million and the aggregate turnover of at least one of the parties in Turkey exceeds TRY 30 million.

In addition, even though approval is not required, the Capital Markets Board supervises transactions which involve a publicly traded company.

Other than those mentioned above, merger and acquisition transactions in regulated markets, such as energy, insurance, banking and financial services, media and telecommunications, are also subject to certain government bodies’ supervision and inspection.

In light of the above, the Turkish Competition Board, the Capital Markets Board, the Energy Market Regulatory Authority, the Undersecretariat of Treasury, the Banking Regulation and Supervision Agency and the Radio and Television Supreme Council may play key roles in a merger or acquisition transaction, depending on the transaction parties’ sectors, corporate structures and revenues. In addition, the parties must notify the Foreign Investment General Directorate of the Undersecretariat of Treasury upon share acquisitions by foreign individuals or entities.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

There is no legislation governing or prohibiting hostile bids. However, hostile bids are not common in Turkey as most of the companies’ corporate structures do not allow acquisition of control of a company through hostile bids. A vast majority of the publicly traded companies are controlled by a single or small group of shareholders, and the floating percentage is low which makes a hostile takeover practically impossible. Potential purchasers must usually co-operate with the controlling shareholders to buy shares and acquire control of the company.
4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

As mentioned in question 2, mergers, acquisitions and formation of joint ventures in Turkey are subject to the Turkish Competition Board’s permission, if: (a) the transaction parties’ aggregate turnover in Turkey exceeds TRY 100 million and the aggregate turnover of each of at least two of the transaction parties in Turkey exceeds TRY 30 million; or (b) the global turnover of one of the transaction parties exceeds TRY 500 million and the aggregate turnover of at least one of the parties in Turkey exceeds TRY 30 million.

In addition, merger and acquisition transactions involving certain sectors are subject to specific regulations. Accordingly, certain merger and acquisition transactions can be restricted or subject to an approval requirement:

(a) Share transfers of 10% (5% for public companies) or above, any other transaction which would cause a change of control, any change regarding ownership or using rights of a facility related to a company engaged in the electricity market are subject to the approval of the Energy Markets Regulatory Authority;

(b) A foreign entity’s shareholding ratio cannot exceed 50% of the paid-in share capital of a media service provider company;

(c) The majority of shares in a commercial airliner must be held by Turkish entities;

(d) Direct or indirect share transfers equal to or above 10%, 20%, 33% or 50% of insurance and reinsurance companies are subject to approval of the Undersecretariat of Treasury;

(e) Direct or indirect share transfers equal to or above 10%, 20%, 33% or 50% of banks are subject to approval of the Banking Regulation and Supervision Agency;

(f) Purchase of real property in Turkey or acquisition of limited rights regarding such real property by foreign individuals are subject to legal restrictions;

(g) Foreign legal entities are prohibited from directly purchasing real property in Turkey as a general rule. There are only three exceptions to this general rule. Such entities can purchase real property in Turkey only if they carry out their businesses within the scope of the Turkish Petroleum Law, the Tourism Incentive Law or the Industrial Zones Law;

(h) Foreign capital companies incorporated in Turkey, which have foreign shareholders (i) individually or collectively holding 50% or more of the shares of the said company; or (ii) having the right to assign or dismiss majority of persons in the company management, may acquire real property in Turkey provided that they complete a series of bureaucratic procedures;

(i) Additional approval of the relevant Governorship or Army General Staff may be required if the real property is located in a private security zone or a military security zone;

(j) Establishment of a liaison office is subject to the Ministry of Economy’s approval;

(k) Transfer of licences in the mining sector is subject to approval by the Ministry of Energy and Natural Resources. Incorporation and amendment of articles of association of banks, financial leasing companies, asset management companies, companies providing consumer financing and credit card services, insurance companies, holding companies, and independent auditing companies are subject to approval by the Ministry of Customs and Trade for both Turkish and foreign investors.
5. What documentation is required to implement these transactions?

The required documentation for merger and acquisition transactions varies based on the nature of the transaction. In Turkey, these transactions take place mainly by way of share transfer, share subscription, asset sale or joint venture formation. Mergers and spin-offs are also common for restructuring and consolidation purposes.

The required documentation for a standard merger or acquisition can be summarised as follows and is prepared based on internationally accepted principles and trends:

(a) Teaser

Teaser provides a summary of the target’s business, allowing potential bidders to initially assess the target and to consider the acquisition opportunity. No company name or customer names are disclosed in this document. Usually, investment bankers in co-operation with the seller’s management prepare the teaser to attract acquisition opportunities. Preparing a teaser is not a mandatory action but may be useful in deals involving a competitive bidding process.

(b) Non-disclosure Agreement (‘NDA’)

Upon reviewing the teaser (if any), sufficiently interested parties sign an NDA and receive confidential information from the target, together with an information memorandum (if any), and buyers initiate the due diligence exercise. Again, signing an NDA is not a mandatory action but prudent parties agree to sign an agreement to protect the exchanged information.

(c) Non-binding Term Sheet/Non-binding Offer/Letter of Intent/Memorandum of Understanding

Following the initial stage of negotiations, the parties execute a non-binding term sheet/memorandum of understanding/letter of intent or the buyer submits a non-binding offer for the target shares and the parties set the main principles of the transaction.

(d) Transaction Agreements

Following the buyer’s satisfactory due diligence exercise and the parties’ agreement on the transaction, the parties execute a share purchase agreement, share subscription agreement, asset transfer agreement, merger agreement or a joint venture agreement depending on the deal dynamics. If the buyer is not acquiring the entire share capital, the parties usually execute a shareholders’ agreement in addition to the relevant purchase agreement to set out the target’s governing principles and exit strategies.

(e) Corporate Documentation

In addition to the main transaction agreements, certain corporate documents will need to be prepared to reflect the parties’ mutual understanding of the target company’s corporate documents (e.g. amendments to the articles of association, board and shareholders’ resolutions for board appointments and signatory replacements, issuance of share certificates, and registration with the relevant trade registry).

6. What government charges or fees apply to these transactions?

Government charges or fees applicable to merger or acquisition transactions are mainly:

(a) value added tax (‘VAT’);
(b) personal and corporate income tax;
(c) trade registry fees; and
(d) notarisation fees.

For a share transfer transaction, 18% VAT will apply to the purchase price, unless such shares are of a joint stock corporation and in certificated form. Additionally, transfers of certificated shares of a joint stock corporation will not be subject to VAT, if these shares have been held for more than two years.

If a legal entity shareholder sells its shares in the target company, the sale transaction will trigger
a 20% corporate income tax. Principally, if the legal entity held transferred share certificates for more than two years, 75% of the corporate income tax will be exempted provided that the selling shareholder maintains the sale proceeds in its balance sheet for a minimum of five years. Sales of shares of a joint stock corporation by individuals, who held the transferred shares for more than two years in certificated form, are also exempted from 100% of personal income tax.

In principle, agreements executed in Turkey are subject to a 0.948% stamp duty calculated according to the highest monetary amount in the agreement. However, according to the Law on Amendment of Various Laws to Improve the Investment Environment numbered 6728 recently enacted on 9 August 2016, the share transfers in joint stock corporations and limited liability partnerships will be exempted from stamp duty.

As most of the corporate documentation requires to be notarised, notarisation fees should be also considered. For example, general assembly meeting minutes, certain board resolutions, signature declarations of new representatives appointed following the transaction need to be notarised. Law on Fees numbered 492 regulates the rates of fees to be charged for each notarization.

Most of the corporate documentation prepared in accordance with the type of merger or acquisition must be registered with the relevant trade registry, and such registrations will be published in the Trade Registry Gazette. Therefore, trade registry fees will also be applied at various rates.

7. Do shareholders have consent or approval rights in connection with a deal?

Shareholders can principally sell and transfer their shares in a joint stock corporation without obtaining other shareholders’ consent and/or approval, unless otherwise stipulated in the company’s articles of association. Additionally, shareholders’ agreements or joint venture agreements executed among the existing shareholders may contain provisions restricting share transfers.

According to the Turkish Commercial Code, share capital increases, mergers and spin-off transactions require various decision quorums. Additionally, in the event of a share capital increase, existing shareholders have statutory pre-emptive rights to acquire the newly issued shares. However, such pre-emptive rights can be limited or cancelled by the general assembly with a minimum of 60% of the total votes in joint stock corporations.

If the registered shares of a company have not been totally paid-in, then such shares can be transferred only if the target company approves such share transfer. However, the target company can refuse to approve such share transfer only if there is serious doubt regarding the transferee’s financial ability and if the transferee has not provided the security requested by the target company. Finally, in joint stock corporations, the board of directors has the right to refuse the share transfer and request the acquisition of the relevant shares by the target company, other shareholders or a third party of its choosing at their actual value at the time of the purchase request if the company’s articles of association include a just cause in line with the company’s field of operation and economic independence.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

The board members/directors have a duty of care and must protect the company’s interests while carrying out their duties diligently.

According to the Turkish Commercial Code, in a group of companies, controlling shareholders owe duties to the minority shareholders in its subsidiary. One of these duties is the prohibition of abuse of dominance. The controlling
shareholder or its directors may be liable in case of abuse of dominance over its subsidiary resulting from major structural decisions (e.g. a merger, spin-off or conversion). If the required conditions are met, the court may award compensation for losses of the minority shareholders, or request the controlling shareholders to purchase the other shareholders’ shares.

In addition to the above, directors or controlling shareholders have no deal-specific duty to the stakeholders.

9. In what circumstances are break-up fees payable by the target company?

Transaction documents may contain provisions related to the payment of a break-up fee, if any of the parties refrains from closing the transaction without any just cause. Depending on the dynamics of the transaction, a break-up fee in favour of the buyer or the seller may be introduced if the failure of one of the parties to close the deal would have a negative impact on the counter-party.

In practice, a target company may be forced to pay a break-up fee in circumstances such as where the target company does not take necessary actions to complete conditions precedent within a defined period of time as provided in the transaction documents; however, this is not very common. If the target company is a joint stock corporation, the payment of a break-up fee by the target itself may violate the prohibition of financial assistance rule.

Other than contractual grounds agreed mutually by the transaction parties, Turkish legislation does not provide any specific rules for the payment of a break-up fee.

10. Can conditions be attached to an offer in connection with a deal?

In Turkish legislation, the freedom of contract principle is embraced. Therefore, transaction documents may include various conditions depending on the transaction parties’ agreement. However, conditional mandatory offers are prohibited for publicly held companies, and any condition would require clearance from the Capital Markets Board e.g. buyers setting conditions regarding financing of transactions, obtaining regulatory approvals.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

The financing of a merger or acquisition is mostly dealt with in loan agreements and security agreements, such as commercial enterprise pledges, share pledges, assignment of receivables or mortgages. However, Article 380 of the Turkish Commercial Code prohibits transactions concerning the grant of advance loans or security by the target company (in the form of a joint stock corporation) for the purpose of acquiring the target company’s shares by a third party.

Article 380 provides two carve-outs to the general rule: (a) transactions performed by banks and financial institutions as part of their ordinary business; and (b) transactions facilitating share acquisitions by the target company’s employees or the subsidiary’s employees. Nevertheless, these carve-outs will be considered null and void if such transactions have a negative effect of reducing the target company’s statutory reserves.

Under Turkish law, there are no regulations that require a minimum level of financing.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

The Turkish Commercial Code and the Capital Markets Law stipulate certain squeeze-out mechanisms.

Article 141 of the Turkish Commercial Code provides that in the event of a merger, the merger agreement may provide a right to the shareholders of the dissolving company to receive the squeeze-out compensation in return.
for their shares in the dissolving company. Article 151 of the Turkish Commercial Code states that the merger agreement forcing the minority shareholders of the dissolving company to accept the squeeze-out compensation must be approved by at least 90% of the voting rights of the dissolving company. In addition, the shareholders to be squeezed out are required to make a payment corresponding to the ‘true value’ of their shares.

The second circumstance where the squeeze-out mechanism may be used is specified under Article 208 of the Turkish Commercial Code. Article 208 provides a squeeze-out right to the shareholder who controls, directly or indirectly, at least 90% of the share capital and has at least 90% of the voting rights (i.e. the parent company) in a joint stock corporation. If the minority shareholder prevents the company’s operations, acts in bad faith, creates perceptible disruption in the company or acts recklessly, the parent company is entitled to exercise its squeeze-out right.

Additionally, the Communiqué on Squeeze-out and Sell out Rights issued in line with Capital Markets regulates squeeze-out mechanism in public companies. Accordingly, if the total voting rights of a shareholder or group of shareholders acting jointly reach or exceed 98% or more in a public company, minority shareholders can be forced to exit the company by controlling shareholders.

The controlling shareholder can exercise the squeeze-out right after the expiry of a three-month period, which grants the minority shareholders the right to exercise the sell-out right. Upon expiry of the three-month period, the minority shareholders’ right to exercise the sell-out right terminates, and the controlling shareholder becomes entitled to exercise the squeeze-out right.

**13. What is the waiting or notification period that must be observed before completing a business combination?**

Please refer to our response to question 4 for obligations related to notifying and obtaining prior approval of certain government authorities for certain merger and acquisition transactions in regulated sectors. Even though there is no timeline specified for these obligations, obtaining necessary approvals in each case takes approximately four weeks depending on the workload of the government authority and the complexity of the transaction. Therefore, parties should determine a realistic interim period between signing and closing.

It is also worth noting that if the Competition Board does not respond to or take any action regarding the application submitted related to a merger or an acquisition or formation of a joint venture within due time, the Competition Board will be deemed to have consented to the transaction after the 30-day period as of the date of the notification according to the Competition Law numbered 4054.

**14. Are there any industry-specific rules that apply to the company being acquired?**

Companies operating in regulated sectors are subject to certain legal requirements and qualifications. For example, certain transactions of insurance companies (e.g. mergers and acquisitions, portfolio transfers and share transfers) are subject to the Undersecretariat of Treasury’s approval. Further, such companies must also meet certain requirements on an ongoing basis such as minimum capital requirements, qualifications for board members.

In addition to these, foreign investors are also required to meet certain requirements and may be subject to limitations depending on the sector they are investing in. Insurance, electricity, aviation, media and mining are examples of some of the sectors that are strictly regulated. Please refer to our response to question 4 for further information regarding industry-specific rules.
If a company is subject to a whole or partial spin-off, existing employees’ agreements will be transferred to the new legal entity with all rights and obligations, unless the existing employees object to such transfer according to the Turkish Commercial Code. In addition, the former employer and the new employer will be jointly liable for the receivables of the employees which became due prior to the transaction.

If the business will not be transferred in its entirety and only (certain) assets will be transferred, the employees are not automatically transferred. In order to transfer all or certain employees, written consent of each of those employees to the transfer must be obtained prior to the transfer of the employment agreement.

In addition, if the transferor employer is a party to a collective bargaining agreement, such collective bargaining agreement will continue to be effective until a new collective bargaining agreement is executed by the transferee employer. The transferee employer must also notify the public authorities (e.g. the provincial directorate of the Ministry of Labour and Social Security and the Social Security Institution) of the transfer of the workplace within 10 days as of the relevant transfer.

If a merger or acquisition relates to a share transfer, employment relationships will not be affected as a result of such transaction, since the legal entity (i.e. employer of the employees) will not change. However, in practice, if the buyer believes that the existing employment agreements are not in conformity with the labour law or if the target company does not comply with occupational health and safety requirements as per the outcome of due diligence reports, the buyer may set conditions precedent in the share purchase agreement for such issues.

15. Are cross-border transactions subject to certain special legal requirements?

Foreign investors and Turkish investors are treated equally in accordance with Turkey’s Foreign Investments Law unless international agreements specify otherwise. However, there are certain formality requirements for documents issued outside Turkey (e.g. notary and apostille certification). The representation authority of foreign companies must be proved by legal documents.

There are also sector-specific legal requirements that need to be fulfilled for cross-border transactions in regulated sectors. Please refer to our response to question 4 for further information.

On the other hand, cross-border merger and acquisition transactions should also be evaluated from the tax law perspective in line with international double taxation treaties.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

The effect of a merger or acquisition on employment relationships may differ according to the nature of the transaction. According to the Labour Law numbered 4857, if a workplace is acquired by a third party, all employment agreements in such workplace will be transferred to the new owner of the workplace. In other words, the employees are automatically transferred upon the transfer of a workplace to a new owner. Transfer of a workplace can be defined as transferring the economic identity of the workplace. In this regard, there are no specific assignment requirements, provided however that the terms and conditions of the employees’ employment remain the same. Otherwise, consent of the employees (and trade union, if any) must be obtained prior to such transfer. The transferor and the transferee will also be jointly liable for two years for any claim related to employment relationships which have arisen prior to the acquisition or at the date of the acquisition of the workplace.

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17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

In Turkey, the main pieces of legislation which apply to mergers and acquisitions, namely the Turkish Commercial Code, the Turkish Code
of Obligations and the Capital Markets Law, were revised in 2012, and we do not expect another revision in the near future. Government authorities and professionals involved in the merger and acquisition market in Turkey are still struggling to master the new mechanisms introduced by these changes and are trying to clarify the grey areas.

The Turkish Parliament recently approved three pieces of legislation regarding the investment environment in Turkey: (a) the Law on Amendment of Various Laws to Improve the Investment Environment; (b) the Law on Restructuring of Certain Receivables; and (c) the Law on Establishment of Turkish Asset Fund and Amendment of Various Laws.

The Law on Amendment of Various Laws to Improve the Investment Environment numbered 6728 was published in the Official Gazette on 9 August 2016 and has become effective. Accordingly, the share transfers in joint stock corporations and limited liability partnerships will be exempted from stamp duty and fees. The law also reduces the bureaucratic procedures and costs regarding the establishment of companies, as well as the liquidation procedures of companies.

The Law on Restructuring of Certain Receivables numbered 6736, which was published in the Official Gazette on 19 August 2016, enables restructuring of outstanding tax and other public receivables. It also provides an opportunity to close Turkish companies’ accounts against potential tax audits through voluntary tax base increases. The law also provides an opportunity to bring certain assets into Turkey under a voluntary disclosure programme without being subject to any additional tax.

Finally, the Law on Establishment of Turkish Asset Fund and Amendment of Various Laws numbered 6741 was published in the Official Gazette and entered into force on 26 August 2016. The main area of activity of the Turkish Asset Fund will be the formation and management of funds, contributing to the variety of capital market instruments, incorporating the publicly owned assets into the economy, providing external sources and participating in strategic and large-scale investments. The Turkish Asset Fund will operate through the Turkish Asset Fund Incorporation, which was established as a joint stock corporation with an initial share capital of TRY 50 million.
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The Fourth Edition of the LexisNexis Mergers & Acquisitions Law Guide 2017 provides you with a detailed review and analysis of the current legislation and regulations that govern mergers and acquisitions around the world, with a focus on the Asia-Pacific region.

The Guide helps you to understand M&A practices in unfamiliar jurisdictions through Q&A style chapters that can be easily compared with other jurisdictions, including: Bangladesh, Brazil, India, Myanmar, New Zealand, Oman, Pakistan, the Philippines, Switzerland, Taiwan and Turkey.

The Guide also contains feature articles which discuss topical and relevant legal issues such as Investments in Myanmar and the Mechanics of M&A in Indonesia.