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Standstills Still Needed: Confidentiality Agreements After *Martin Marietta Materials*

BY DANIEL SEROTA

Daniel Serota is a counsel at Linklaters LLP, specializing in mergers and acquisitions, private equity and corporate governance. Mr. Serota was featured in a **New York Times** *article as one of the approximately 100 individuals under 40 years old who make up the "next generation of deal makers" The views expressed are those of the author and may not be representative of the views of Linklaters LLP or its clients. Contact: daniel.serota@linklaters.com*

The recent decision in *Martin Marietta Materials v. Vulcan Materials*, which has been affirmed by the Delaware Supreme Court, interpreting a confidentiality agreement's limitation on use of confidential information ("Use Limitations") and requirement to keep such information confidential to prevent the launch of a hostile offer, has the M&A legal community buzzing with the potential impact on M&A practice and whether or not there is a need to clarify confidentiality agreements. While these issues are genuine, factors which may limit the impact of the *Martin Marietta* decision have been generally overlooked and the failure to focus on what hostile actions Use Limitations would permit may lead to overconfidence about the lack of need for explicit standstills. While the analysis in *Martin Marietta* should be considered in the drafting and negotiation of confidentiality agreements, external and internal counsel need to be careful not to rely on *Martin Marietta* providing the same protection as a standstill due to differences in governing law, the fact specific analysis imposed by the court and the scope of the restrictions imposed by a Use Limitation as compared to a customary standstill.

Martin Marietta's Impact May be Limited

For most M&A legal issues involving public companies, the Delaware Chancery Court and the Delaware Supreme Court serve as the most important and relevant forum. As a vast majority of U.S. public companies are incorporated by Delaware,

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From the EDITOR

Offshore M&A: Another Waiting Game

With domestic economic recovery a question mark and with Europe showing signs of entering a Continent-wide recession, M&A dealmakers have endured a frustrating 2012 so far, and there are only few traces of improvement as we enter the autumn. Even the "offshore" markets—which include Hong Kong, Mauritius, Bermuda, the Cayman Islands, the British Virgin Islands, Guernsey, and the Isle of Man—have experienced a noticeable slowdown in new deals, although there are some positive counter-trends.

A study of second-quarter 2012 offshore M&A activity by offshore law firm and fiduciary group, Appleby, which has 12 offices worldwide in major offshore territories and financial centers, found that there were 447 deals announced or completed in the sector, down 4% from the first quarter. More strikingly, the number of deals was down 34% from second-quarter 2011 with second-quarter 2012 being the lowest, in terms of deal numbers, of the past 10 quarters, Appleby said.

As Peter Bubenzer, Appleby's group chairman, wrote in an introduction to the survey: "We believe that it is unlikely that the floodgates will suddenly open for increased deal flow any time soon, but a certain level of robustness is beginning to emerge in the offshore M&A figures. In quarter three, continuing global uncertainty is likely to be the most significant factor driving transactions on and offshore." Such uncertainty includes the potential for a new U.S. president to be elected in November, and China's upcoming once-a-decade leadership shuffle. "Given the confluence of these events, there is unlikely to be an uptick in the willingness of businesses to enter into transactions in the coming six months," he wrote.

The majority of completed offshore deals last quarter were minority stake transactions (53% of total volume, and 28% of total value, for second-quarter 2012). Appleby credited the large volume of such deals to continuing uncertainty in both economic forecasts and deal pricing, which are causing buyers to veer away from whole-business acquisitions.

One positive sign in offshore M&A was that deal sizes were increasing. Appleby found that the average deal in second-quarter 2012 was $83.7 million, which is the second-highest average in over two years. By contrast, average deal size had hit a low of $41.6 million in fourth-quarter 2011. This is a likely sign that there has been an increase in bank finance "for the right borrowers...the most reliable of customers and those with whom [banks] already enjoy strong relationships," Appleby said.

The healthiest offshore sector is currently financial services, as companies in the sector were the target of 155 deals with an aggregate deal value of $5 billion and representing 35% of offshore deal activity for the quarter.

Our back-to-school issue addresses other areas of international M&A as well, including a detailed look at the new Brazilian M&A regime, which could be a game-changer for that country. We hope our readers had a good and productive summer. Given that it's election time and that the economy remains lively, if erratic, odds are that the autumn will provide its share of challenges.

CHRIS O'LEARY

MANAGING EDITOR

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the laws of Delaware govern the fiduciary duties of directors and officers, corporate law issues and most merger agreements. However, confidentiality agreements are creations of contract law and most confidentiality agreements involving public companies are not governed by Delaware law. *Martin Marietta* was decided by a Delaware court because the confidentiality agreement was governed by Delaware law. One of the most popular choices, if not the most popular choice, of governing law for confidentiality agreements with respect to M&A is New York law. As a result New York courts and New York law will determine many, if not the majority of, disputes regarding the interpretations of confidentiality agreements with respect to M&A. While New York courts (or courts in other non-Delaware jurisdictions) may decide to follow Chancellor Strine's analysis in *Martin Marietta*, it is not clear that they will do so and companies seeking protection from hostile overtures should not rely on Use Limitations or confidentiality obligations to protect themselves.

Chancellor Strine's analysis of the confidentiality agreement in *Martin Marietta* was not conclusive based on the document itself and relied of the history of its negotiation and the motivation of the parties and their executive officers. Among the crucial factors was the concern of Martin Marietta's CEO to maximize confidentiality as he had recently became CEO and did not want to put the company in play. He specifically instructed the company's general counsel to draft a confidentiality agreement with Vulcan that reflected such concerns.

At the outset, the transaction was anticipated to be an acquisition of Martin Marietta by Vulcan. However as the economic fortunes of the companies changed, the target became the hunter. Martin Marietta's interests had changed and it now wanted the confidentiality agreement (which contained bilateral Use Limitations and confidentiality obligations) to be less restrictive. Chancellor Strine focused on the original motivation in determining that the Use Limitation, which provided that information could only be used in furtherance of a "business combination transaction between [the parties]," and the confidentiality obligations, restricting disclosure of such information and the discussions between the parties, prohibited Martin Marietta from launching a hostile offer for and proxy fight for control of Vulcan, disclosing the prior discussions between Martin Marietta and Vulcan (even if required by securities laws as a result of a hostile offer) or from making disclosures based on such confidential information and prior discussions to stockholders and the investment community in order to argue for the transaction. These facts may not be present in many potential transactions. If Martin Marietta's CEO had been confident that his company would be the acquirer not the target from the onset, he may not have been concerned about his company being put in play. Furthermore, while the confidentiality agreement was bilateral, many confidentiality agreements entered into with respect to potential acquisitions are unilateral. In unilateral confidentiality agreements, while the potential acquirer may be concerned that its interest if disclosed could start a bidding war, it would not be concerned about keeping its information confidential because it presumably wouldn't share any confidential information.

Martin Marietta is Clarifying, not Shocking

The determination in *Martin Marietta* that the Use Limitation and confidentiality obligations in the confidentiality agreement would prevent Martin Marietta from making a hostile offer for Vulcan is not shocking. In addition to the materials cited by Chancellor Strine regarding this potential risk, the possibility that Use Limitations and confidentiality obligations could act as a hidden standstill often arise in general discussions about confidentiality agreements and can arise in their negotiations. However, most confidentiality agreements remain silent as to whether Use Limitations and confidentiality obligations prevent a hostile offer due to a bidder's reluctance to send mixed messages about their intent at a time when they are presumably entering into a friendly process. Furthermore, even if a target is willing to disclose confidential information without an explicit or implicit standstill, it may be concerned about how to distinguish between permissible and

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impermissible use of the target's information and to what extent confidential information or discussions may be disclosed in connection with such offer. As a result, both a target and a bidder may determine that it was in each of their best interests not to clearly resolve the issue. However, *Martin Marietta* highlights the risk in this approach and as a result practitioners and principals may need to recalculate the risks of silence versus potential disruptions as a result of raising the specter of a hostile offer at a time when the parties are looking to have a friendly exploration of potential business combinations.

Why Standstills Are Still Needed Even if *Martin Marietta* Applies

Even if *Martin Marietta* is not limited to Delaware confidentiality agreements but instead applies to the confidentiality agreements governed by laws of New York and other states, there would still be a need for standstill provisions. In addition to the fact-specific nature of the decision and the potential for significantly different facts than noted above, the protections arising from Use Limitations and confidentiality obligations fall short of the full protections of a customary standstill. The confidentiality agreement in *Martin Marietta* was interpreted as prohibiting the use of confidential information in order to launch a proxy contest and a unilateral exchange offer as it was not a transaction between the parties and that the disclosure of such confidential information, including the prior discussions between the parties, was a result of Martin Marietta's voluntary actions rather than an external legal demand.

However, other techniques exist to further a hostile offer which would not be prevented by such restrictions. For example, such restrictions certainly would not necessarily prevent a bidder from sending a confidential "bear hug" letter to the target's board even if such letter was designed to force the target to publicly disclose the offer and included a waiver by the bidder to allow such disclosure. Furthermore, a bidder could likely send a public "bear hug" letter so long as it didn't disclose any confidential information, the fact that a confidentiality agreement exists or that prior discussions had taken place and did not launch a proxy contest or exchange offer or take other action to unilaterally implement a business combination. Any of these actions, which would be prohibited by a traditional standstill, may lead to additional pressure on the board from existing stockholders and an influx of merger arbitrage investors who want the board to promptly act to sell the company. Additionally, unlike a traditional standstill, Use Limitations and confidentiality obligations would not prevent bidders from meeting with the target stockholders. Furthermore, unlike a traditional standstill, the Use Limitations would only provide protection so long as the information provided was both material to the bidder's offer and remained non-public. To the extent the information provided by the target is no longer material or became publicly available (or a combination thereof), the Use Limitations would no longer provide protection (as presumably the information that remains confidential is not material and thus presumably not used by the bidder in making or pursuing a hostile offer) and the only restrictions on a bidder's ability to pursue a hostile offer would be its obligation to keep its prior discussions with the target confidential. Finally, a traditional standstill offers additional important protections, such as prohibitions on equity and debt stake building, which may not be prohibited under a *Martin Marietta*-type implicit standstill if such acquisitions were not made for the purpose of launching a hostile offer or proxy contest.

Confidentiality Agreements for Acquisitions of Assets or Subsidiaries; Explicit Standstills

While the discussion above has focused on reasons that targets should not overly rely on *Martin Marietta*, potential bidders should not ignore the analysis of Chancellor Strine. In addition to the possibility that Use Limitations will be generally interpreted to act as an implicit standstill with respect to the target, bidders should consider at least two potential issues that could arise from an expansive reading of *Martin Marietta*. First, where the target is not a public company but a significant subsidiary or business of a public com-

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pany, the Use Limitation may act as a standstill on its public parent company. To the extent non-public information about the target could factor into the valuation of the parent, the bidder may be prevented from making a public unsolicited offer for the parent. Secondly, for confidentiality agreements that contain explicit standstills there remains the risk that certain actions that may not be prohibited under the explicit standstill (due to exceptions such as third party offers or otherwise) would still be prohibited under the implicit standstill pursuant to the Use Limitation. However, since the analysis in *Martin Marietta* relied on a determination of the parties' intent, a good argument exists that when the parties have drafted an explicit standstill the Use Limitation should not be read as a more expansive implicit standstill.

Conclusion

While *Martin Marietta* highlights the risks that Use Provisions and confidentiality obligations may be broadly interpreted to act as implicit standstills, its impact may be limited by its fact-specific analysis and that most confidentiality agreements are not governed by Delaware law. Despite such limitations, external and internal counsel will need to evaluate such risks in connection with the negotiation and entry into confidentiality agreements. While it is possible that *Martin Marietta* may result in more explicit drafting regarding the scope of Use Limitations and confidentiality obligations, in many cases bidders and their counsel may determine that at the initial stages of discussions that seeking to explicitly preserve its option to go hostile would put such discussions at risk. At the same time, sellers and their counsel, if they have decided to forgo an explicit standstill, may still want to raise the possibility of an implicit standstill and may find difficult to define what would constitute permissible exceptions to the Use Limitation and confidentiality obligations.

Brazil's New Merger Control Regime Brings Big Changes: But What Do They Mean for the Lawyer Negotiating the Deal?

BY FIONA SCHAEFFER, MICHAEL CULHANE HARPER AND MARCOS EXPOSTO

Fiona Schaeffer is a partner in the New York office, Michael Harper is an associate in the São Paulo office, and Marcos Exposto is a Foreign Legal Intern in the New York office of Jones Day. Contact:fschaeffer@jonesday.com.

With the enactment of its new Competition Law, Brazil's merger control regime has become another significant regulatory hurdle for cross-border deals. Under the prior regime, reportable transactions could close pending approval. Now they must be approved by the Brazilian competition agency before they can close.1 This change directly impacts the timing and potentially the outcome of cross-border mergers and acquisitions. Furthermore the statutory waiting period for CADE (the Administrative Council for Economic Defense) to review a reportable transaction can be as long as 330 days. On paper, this makes Brazil's merger review regime the outlier on any deal timetable and there is no fast track review process equivalent to the HSR initial waiting period or the EU first phase. It is hoped that CADE will implement a fast track or first phase review to allow non-strategic and unproblematic deals to be approved within a discrete time period comparable to the EU and the U.S.2 That said, CADE has publicly stated that "non-complex" deals will be decided within 30-60 days of the notification being accepted and it is encouraging that all non-complex cases have been cleared quite quickly to date. CADE has released statistics informing that the average

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time in these first months for the clearance of non-complex cases is 18 days. However, CADE has yet to deal with a "complex" case and it is difficult to predict how long it will take, on average, to review potentially problematic cases, until CADE has established a track record.

The new pre-merger review system and the consolidation of multiple reviewing agencies into a single independent authority with additional resources likely will lead to a more active and effective system for reviewing reportable mergers in Brazil. Acquisitive companies with local operations or revenues in Brazil should take steps to prepare for the new pre-merger control regime, as it may significantly affect the course and timetable of their next deal. Not only will the new regime affect the overall deal timetable, but it will require significantly more preparation upfront as the new notification form requires a voluminous amount of information. The chart below highlights the most significant changes and thereafter we examine what this all means for your next deal involving Brazil.

What Has Changed In Brazilian Merger Control		
	Before	**Now**
Deadline to File	15 business days from execution of first binding document.	No deadline. Transaction can be notified at any time after closing.
Waiting period	None. Transaction could be closed at any time before approval.	Up to **240 days** from date of filing of a complete notification. May be extended to **330**. In practice, this period may be significantly shorter; it is necessary to wait until the authority's gather more experience with the new system to draw any conclusions on the actual timeframe for merger review. In **public takeover bids,** tendered securities can be purchased prior to approval, but voting rights cannot be exercised without CADE's approval.
Thresholds	(i) Group turnover (for either purchaser or seller) of at least R$ 400 million; or (ii) combined market share higher than 20% in overlapping markets.	(i) One party's* turnover of at least R$ 750 million; and (ii) Second party's* turnover of at least R$ 75 million. No market share threshold. * Party's turnover includes all entities in same corporate group (even for the seller).
Transactions covered	Very broad -- mergers, acquisitions and joint ventures and broad range of cooperative agreements.	"Concentration acts", defined as: (i) mergers; (ii) acquisitions of control. As defined by CADE, this includes minority shareholdings (20%+ in general and 5%+ for companies in overlapping or vertically related markets); (iii) incorporations of another company; or (iv) joint ventures or any other form of association agreements (except consortia formed to participate in public bids).
Gun Jumping	Not applicable. CADE imposed hold-separate obligations pending review in minority of cases that raised serious competition concerns.	Agreement may be declared void and fines imposed (R$ 60,000 to R$ 60 million).

Impact on Deal Negotiations, Documents, and Pre-Merger Operations

Closing Conditions and Termination Date

Reportable transactions that meet Brazil's thresholds now need to include antitrust approval in Brazil (as well as other mandatory pre-merger approvals) as a condition precedent to closing. The parties will need to allow sufficient time before the termination date (or allow for an extension) for merger approval to be obtained in Brazil. In developing the deal timetable, the parties will need to consider: (i) the time required to prepare the notification (taking into account the exceptional amount of information required in "complex" cases); (ii) that the waiting period only commences after the Superintendent General has confirmed the notification is complete (there is no formal timeline for this) and; (iii) the actual review period which could be as long as 330 days, although as noted above, experience to date indicates that the review will move quickly for non-strategic transactions (*i.e.*, not involving competing or vertically related businesses).

Antitrust Risk Allocation

Since CADE now has the power to block a deal outright or require divestitures or other remedies as a condition to approval, merging parties will need to evaluate these risks in negotiating antitrust risk allocation covenants. Under the old law, sellers generally would not need to worry about antitrust concerns in Brazil being an impediment to closing as the parties generally were free to close during CADE's review process. The seller typically was not concerned about divestitures because these issues were typically handled post-closing by the purchaser on its own. And from the purchaser's perspective, the risk that the deal would be derailed or modified due to antitrust concerns was minimal in most cases especially since the regulator had virtually no negotiating leverage after the deal closed. Now, merging parties will need to assess the significance of competitive overlaps in Brazil and factor these risks into the overall risk allocation negotiation.

Gun Jumping and Closing Around Brazil

Notifications can be filed at any time prior to the consummation of the deal, preferably after the execution of a binding agreement. Parties that fail to notify reportable transactions or close pending approval are at risk of the deal being declared void and being fined from R$60,000 (U.S. $30,000) up to R$60 million (U.S. $30 million).[3] Furthermore, pending CADE approval, merging parties cannot: (i) modify their physical structures, or transfer or combine assets; (ii) influence another party's commercial decisions; or (iii) exchange sensitive information that is not necessary for reaching a preliminary binding agreement. As in other pre-merger jurisdictions, parties will need to be sensitive to gun jumping concerns in negotiating the covenants relating to the conduct of business prior to closing, in developing protocols for the disclosure of competitively sensitive information and in integration planning activities generally.

Presumably, the gun jumping prohibitions do not reach the integration of activities outside of Brazil's borders as long as the involved operating companies, assets, and businesses in Brazil continue to be independent. However, there is no clear guidance or precedent yet. If a pending review ever becomes a significant impediment to closing (*e.g.*, because CADE's decision would still be pending long after other mandatory clearances have been obtained), it is likely that this thesis will be tested.

With respect to public takeover bids, notification may be made on public announcement and the bid may be completed pending CADE's approval.[4] However, during this time, the acquirer cannot exercise voting rights to stock acquired except with CADE's permission, where it is necessary to preserve the value of the investment.

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Which Transactions are Reportable

Covered Transactions ("Concentration Acts")

Under the prior law, the list of transactions subject to merger control was very broad, even reaching certain standalone cooperative agreements in addition to usually reportable deals. The new law narrows the scope of merger control and defines a "concentration act" as a transaction where: (i) two or more previously independent companies merge; (ii) one or more companies acquire, directly or indirectly, by any means, partially or fully, the control of one or more companies; (iii) one or more companies incorporate another company or companies; or (iv) two or more companies execute a joint venture or any other form of association agreement.[5]

(i) Definition of Control and Acquisitions of Minority Shareholdings

It should be noted, however, that the concept of "control" is very broad. Article 90 of the new law excludes transactions that do not confer control, namely those transactions in which the acquirer is unable to influence the behavior of the company being acquired. The Merger Regulations interpret this to mean that a minority acquisition confers "control" if it results in the acquirer holding at least 20% of the target company. If the target company is a competitor of, or vertically related to, the purchaser, the acquisition of "control" is presumed if the deal entails the transfer of minority shareholdings of as little as 5% of the target. This threshold is too low, and could require notification of passive minority acquisitions where the acquirer cannot even obtain the necessary information from the target to complete the merger notification, much less exercise operational control over the target. This rule also affects the definition of corporate group, which is broader than other jurisdictions, encompassing not only entities subject to common control, but also entities in which any group company holds a direct or indirect share of at least 20%.

By comparison, in the United States, the Hart-Scott-Rodino Act (HSR) only captures acquisitions of voting securities, *i.e.*, those that entitle the holder to vote for the issuer's board of directors.[6] Furthermore, foreign-to-foreign transactions generally are exempt from the HSR Act except where the acquisition will confer control of the foreign issuer[7] and that issuer's business has a sufficient nexus to the United States.[8] In the European Union, a notifiable concentration is deemed to occur only where a change of control (defined as "decisive influence") occurs on a lasting basis through a joint venture, merger, or acquisition.[9]

(ii) Investment Funds

For investment funds, the Merger Regulations provide that "control" includes: (a) funds subject to common control or management, (b) investors that hold a direct or indirect share of more than 20% of any of the funds, and (c) portfolio companies in which at least one of the funds holds a direct or indirect share of at least 20%. Also, especially with respect to companies in which a group holds a minority stake, there is no guidance on the calculation of turnover.

We understand that CADE is preparing further guidance on the practical application of this test to investment funds. We hope this will take into account the potential difficulty of accessing information from companies in which a fund has a minority interest as well as minority investors in the fund and the resulting delay in the review process. Most importantly, this expansive definition of a corporate group (see below) may require the notification of transactions that have little nexus to Brazil and raise no competitive concerns whatsoever.

(iii) Joint Ventures and Cooperative Agreements

The new law expressly identifies joint ventures as reportable concentrations, assuming the relevant thresholds are met. However, the law makes no distinction between full function joint ventures (*i.e.,* an entity that operates an independent business on a lasting basis) and cooperative joint ventures. Full function joint ventures are presumably subject to merger control, but the status of cooperative agreements is unclear and a case-by-case analysis may be necessary.

The new law does not on its face appear to require the notification of standalone cooperative arrangements such as licensing, distribution, supply, and technology transfer agreements, as the

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previous law was interpreted to require in certain cases. CADE has indicated that it will clarify this through further regulations. The reference to "association agreements" still leaves room for undesirably broad interpretations of the scope of reportable concentrations. It is hoped that CADE's guidance will not open the door to the notification of standalone cooperative agreements (i.e., not ancillary to a reportable deal) that in other jurisdictions are analyzed under other competition law provisions relating to anticompetitive agreements. Also, the law sets out an exception for consortia that are formed in connection with public bids.

New Thresholds

The new merger control regime creates a minimum turnover threshold for the second party and eliminates the much-criticized 20% market share test. When the new law went into force, the Ministry of Justice and the Ministry of Finance issued a joint decision to increase the turnover thresholds[10] so that a "concentration act" is notifiable[11] if:

1. The corporate group of one of the parties to the transaction had turnover of at least R$ 750 million (U.S. $399 million[12]) in Brazil in the last calendar year; and

2. The corporate group of another party to the transaction had turnover of at least R$ 75 million (U.S. $39.9 million) in Brazil in the last calendar year.

Increasing and expanding the thresholds to require two parties to derive turnover in Brazil is a positive change, as it focuses on deals with local effects. However, the thresholds apply to the turnover of all of the members of the corporate group of the seller, not just the target, which may trigger the notification of deals with little or no effects in Brazil.

(i) Corporate Group

The definition of corporate group is broader than other jurisdictions, capturing minority interests of 20% or more, not just wholly owned or majority owned subsidiaries.

(ii) One year look-back period

CADE may require the notification of transactions that fall below the thresholds, if they raise antitrust concerns, within one year of execution of the agreement. Purchasers should bear this "look back" power in mind before implementing substantial price increases or making other post-merger changes that customers are likely to object to. It is not clear whether parties would be subject to any hold-separate obligations or whether CADE would be able to unwind a deal or impose divestitures after it has closed.

Merger Review Timetable and Review Process

Deadline to File

Notifications can be filed at any time prior to the consummation of the deal, preferably after the execution of a binding agreement. Parties that fail to do so may have the agreement declared void[13] and may be subject to fines that range from R$ 60,000 (US $30,000) to R$ 60 million (U.S. $30 million).[14] Furthermore, pending CADE approval, merging parties cannot: (i) modify their physical structures, or transfer or combine assets, (ii) influence another party's commercial decisions, or (iii) exchange sensitive information that is not necessary for reaching a preliminary binding agreement.[15]

Waiting Period

The new merger law details the timeframe and procedural rules for the review of mergers.[16] There is a maximum statutory time period for the review of a transaction: a final administrative decision must be issued within 240 days from the date of notification.[17] This may be extended by 60 days at the request of the merging parties or 90 days if CADE determines the transaction requires further review, resulting in a maximum of 330 days.[18] CADE has consistently indicated that the 240 days statutory period is an outside date and that it does not intend to take this much time even in complex cases. So far, the Superintendent General has reviewed non-complex deals rather

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quickly, often in less than 30 days, but no complex cases have yet to be submitted to CADE's Tribunal.

The inclusion of a Summary Procedure for "non-complex" transactions is a positive initiative, but it lacks a critical element, namely an intermediate ("first phase" or "initial") waiting period for the review and approval of eligible deals. The OECD recommends that competition jurisdictions provide clearly defined, expedited time frames for these types of transactions to "provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance."[19] Even though CADE has stated publicly that it expects non-complex transactions to be cleared within 30 days and complex mergers to be reviewed within 240 days, this is not a binding commitment and the excessively long waiting period applies equally to all filings.

CADE deserves credit for its track record of reviewing simple cases expeditiously since the new regime came into effect. It is hoped that CADE can continue to meet this self-imposed deadline, but as a matter of law, merging parties still must take into account the almost 11-month statutory period in developing their deal timetables, closing conditions, and termination dates.

Notification Forms

The Merger Regulations include two notification forms: the first is for complex transactions (the Non-Summary Procedure), and the second is the Summary Procedure.[20] The information requirements differ drastically depending on the category in which the deal falls.

A short-form notification or "Summary Procedure" is available for transactions that CADE has identified as having "less potential to harm competition."[21] Although this depends on the Superintendent's discretion, transactions are stated to qualify if:

- there are not any or only modest overlaps (below 20%) and no potential harm to competition;
- greenfield joint ventures or cooperatives;
- consolidation of controlling interests;
- entry of a new player; and
- any other deals that the Superintendent believes do not pose a threat to competition.[22]

The information requests focus on the details of the transaction and the operations of the notifying parties. There is, however, no formal premerger consultation process, which means that filing parties will not know in advance of filing whether the transaction will in fact be eligible to the Summary Procedure. A negative outcome in this preliminary assessment may delay the confirmation on the completeness of the notification and, as such, delay the beginning of the 240 days waiting period.

The Long Form notification requires a huge amount of information, some of which may be challenging to collect before the deal is made public. It includes, among other things:

- internal company documents, such as market assessment studies;
- detailed information on all overlapping products, including five years' worth of sales data;
- detailed information concerning the relevant market(s), including distribution channels, entry conditions, intellectual property and pricing strategies;
- information and contact details for competitors, customers and suppliers in all overlapping product areas;
- information on customer preferences; and
- a "counterfactual" description, *i.e.*, how competition in the market would look if the notified transaction was not completed.

These extensive information requirements apply even to non-overlapping minority shareholdings of the purchaser.

In addition to the burden it places on the parties, the long-form notification will require the Superintendent General to review a significant amount of information and documents with every such notification, further straining CADE's already stretched resources. It is hoped that CADE will adopt a

phased approach similar to the EU and US, which would reduce the amount of information required upfront and allow for more targeted and tailored information requests after filing only for transactions that merit further investigation.

Confidentiality

As a rule, the information submitted to CADE in the notification and review process is treated as public and is published on CADE's website (a complete copy of the public records for all cases can be accessed online). CADE's Merger Regulations, however, provide that certain types of information are eligible for confidential treatment. Examples include quantitative data on sales, market share estimates that are not otherwise public, copies of non-public agreements, among others.

Certain types of information are not eligible for confidential treatment including: (i) shareholding structure and identification of controlling persons; (ii) corporate structure of the groups; (iii) studies and market research prepared by third parties and not subject to confidentiality obligations; (iv) product portfolio; (v) market data on third parties; (vi) public agreements; and (vii) information the company would be required to report in Brazil or elsewhere.

Conclusion

The new merger law significantly overhauls Brazil's merger review system, consolidates investigation and decision-making power into one agency, introduces a pre-merger control requirement with objective and higher notification thresholds, and provides two tracks for notification of complex and non-complex transactions.

Brazil is to be commended for modernizing its review process and bringing it into line with other well-established pre-merger control jurisdictions. However, there is also room for some improvements and areas where further guidance would be useful. The new merger control regime will undoubtedly continue to evolve and issues we hope will be addressed in the near future include the lack of a first phase or initial waiting period that would give merging parties a date certain for the approval of benign transactions, the fact that the financial thresholds include the turnover of the seller's entire corporate group, not just the target being sold, the overly broad definition of control, and the burdensome notification forms. Just as other jurisdictions have refined their approach, made adjustments, and issued further guidance, it is encouraging that CADE appears to be open to refining its process and addressing issues of concern as it gains experience with the new regime.

NOTES

1. Law No. 12,529/11 (Brazil), *available at* http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Lei/L12529.htm. An English version is available at http://www.cade.gov.br/upload/LAW%20N%C2%BA%2012529%202011%20%28English%20version%20from%2018%2005%202012%29.pdf.
2. Currently, there is a short form notification for deals that involve no competition issues, but it is up to the Superintendent General to decide whether it is appropriate to use the short form in a particular deal and there is no date certain for the review to be completed. The short-form notification can be found at http://cade.gov.br/upload/Resolu%C3%A7%C3%A3o%202_2012%20-%20An%C3%A1lise%20Atos%20Concentra%C3%A7%C3%A3o.pdf.
3. In exceptional circumstances, upon the request of the parties, CADE may authorize a notified transaction to close before clearance if: (a) there would be no irreparable harm to competition, (b) the merger would be easily reversible if CADE later concluded that the transaction harmed competition, and (c) the target company would face serious financial losses if the deal were not allowed to proceed more quickly.
4. CADE Resolution No. 1/12 (Brazil), available at http://cade.gov.br/upload/Resolu%C3%A7%C3%A3o%201_2012%20-%20RICADE%20%282%29.pdf, art. 10. An English version is available at http://www.cade.gov.br/upload/LAW%20N%C2%BA%2012529%202011%20%28English%20version%20from%2018%2005%202012%29.pdf.
5. *Id.* at art. 90.
6. 15 U.S.C.A. § 18a; 16 C.F.R. § 802.30; 43 Fed. Reg. 33,450, 33,495 (July 31, 1978).
7. For corporate entities, control is defined as holding 50% or more of the outstanding voting securities of an issuer or having the contractual power to designate 50% or more of the directors of a corporation. For an unincorporated entity that has no voting

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securities, control is defined as having the right to 50% or more of the profits of the entity, or having the right in the event of dissolution to 50% or more of the assets of the entity. *See* 16 C.F.R. § 801.1(b).

8. The issuer and entities it controls must either hold assets located in the U.S. having an aggregate total value of over $68.2 million, or have made aggregate sales in or into the U.S. of over $68.2 million in the most recent fiscal year. *Id*. 802(b)-(c).
9. Council Regulation (EC) No. 139/2004 of 20 January 2004, articles 3(1) and 3(2), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF.
10. Originally, the new law stated that a transaction must be notified if (i) the corporate group of one of the parties to the transaction had turnover of at least R$ 400 million (U.S. $200 million) in Brazil in the last calendar year and (ii) the corporate group of another party to the transaction had turnover of at least R$ 30 million (US $15 million) in Brazil in the last calendar year.
11. Regardless of the thresholds, CADE maintains the right to review "concentration acts" that do not meet the thresholds within one year of completion.
12. Exchange rate of US$1 = R$ 1.8758 (December 31, 2011). Source: Brazilian Central Bank (www.bacen.gov.br).
13. This has not been applied yet and it is not yet clear how this sanction is going to be implemented and what CADE will interpret its powers to be regarding the possibility to void either the agreement or the merger notification.
14. CADE Resolution No. 1/12, *supra* note 4, art. 112.
15. *Id*. art. 108.
16. *See* Law No. 12,529/11, *supra* note 1, tit. VII, ch. I, tit. VI, ch. II.
17. *Id*. art. 88.
18. *Id*.
19. OECD, Recommendation of the Council on Merger Review § I.A.1.2.(iv) (Mar. 23, 2005), available at http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False.
20. Both notification forms can be found at http://cade.gov.br/upload/Resolu%C3%A7%C3%A3o%202_2012%20-%20An%C3%A1lise%20Atos%20Concentra%C3%A7%C3%A3o.pdf.
21. CADE Resolution No. 2/12 (Brazil), *available at* http://www.cade.gov.br/upload/Resolu%C3%A7%C3%A3o%202_2012%20-%20An%C3%A1lise%20Atos%20Concentra%C3%A7%C3%A3o.pdf, art. 6.
22. *Id.* at, art. 8.

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» **Wescast Industries Inc.** on its proposed C$200-million acquisition by Sichuan Bohong Industries Co., Ltd. of the People's Republic of China.

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FTC Withdraws 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases

BY MATTHEW P. HENDRICKSON, GARY A. MACDONALD AND STEVEN C. SUNSHINE

Matthew Hendrickson is a partner in the antitrust and competition group in the New York office of Skadden, Arps, Slate, Meagher and Flom LLP. Gary MacDonald is a partner in antitrust, trade regulation and government enforcement matters in Skadden's Washington DC office. Steven Sunshine, a partner in Skadden's Washington DC office, is the North American group leader of Skadden's antitrust and competition practice. Contact: matthew.hendrickson@skadden.com or gary.macdonald@skadden.com or steven.sunshine@skadden.com

Signaling an intention to enforce antitrust laws more aggressively with monetary remedies, the Federal Trade Commission (Commission) revoked its 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases (Policy Statement) on July 31, 2012. In a 4-1 vote, the Commission decided that, contrary to the Policy Statement, monetary remedies no longer should be limited to "exceptional cases" where the violation was clear and other remedies would be insufficient to achieve the purpose of the antitrust laws.

The Commission introduced the Policy Statement in 2003, shortly after obtaining disgorgement by consent decrees in two cases.[1] The Policy Statement acknowledged that the monetary equitable remedies of disgorgement and restitution may be useful tools for government antitrust enforcement but should be reserved for "exceptional cases." It provided guidance that such cases may exist where (1) the violation was "clear," *i.e.*, at the time of the conduct, an offender reasonably could have expected that the conduct would be found illegal; (2) a reasonable basis existed to calculate a remedy; and (3) other remedies through criminal or civil litigation would not fully address the violation by taking back all ill-gotten gains from the defendant.

In rescinding the Policy Statement, the Commission now has taken the position that monetary equitable remedies no longer should be limited to exceptional cases, and that the first and third criteria had created an overly restrictive view of the Commission's options to seek monetary remedies. With regard to the first criterion, the Commission stated that the distinction between a "clear" violation of established law and a violation based on novel or unclear antitrust law "has little to do with whether the conduct is anticompetitive." The Commission also explained that the third criterion could be interpreted to impose an inappropriate burden that would require the Commission to demonstrate the insufficiency of alternative remedies. In addition, the Commission deemed the second criterion unnecessary because it is a well-established principle of antitrust law. On these bases, the Commission voted to withdraw the Policy Statement and rely instead on existing case law to guide its use of monetary remedies.

Commissioner Maureen K. Ohlhausen dissented from the withdrawal, stating she had "strong concerns" about the majority's intention to seek disgorgement for violations that might be unclear or sufficiently addressed by other remedies. She noted that adoption of the Policy Statement had been subject to a public comment process, garnered support from well-respected antitrust practitioners and achieved a level of government transparency, whereas the majority's withdrawal of the Policy Statement did not allow for public deliberation or provide any revised guidance to fill the void. She further stated that, in her experience, the Policy Statement had never inappropriately constrained the Commission.

Revocation of the Policy Statement is a clear signal that the Commission plans to use the threat of monetary remedies to increase its enforcement weaponry. Any attempt to impose a monetary payment in a litigated Commission enforcement action likely would be contested vigorously before the trial court. However, this policy change

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may have a greater impact on cases that previously would have settled without adjudication—now, in such instances, the Commission may demand a monetary remedy as well, particularly if it and the investigation target(s) cannot agree on a strong conduct remedy. Speculation has centered around current investigations that may have triggered the Commission's view that it needed to change its remedy policy, perhaps in its ongoing battles against so-called "pay-for-delay" pharmaceutical settlements or its investigation of Google. However, it also is worth noting that the Commission has become increasingly vigorous in antitrust enforcement in recent years and likely has been planning to change its position on disgorgement for some time. For example, in his concurring statement in the Commission's decision to file a complaint against Ovation Pharmaceuticals in 2008, Chairman Jon Leibowitz expressed some disagreement with the Policy Statement, stating that the Commission "should use disgorgement in antitrust cases more often." It is now clear that is exactly what the Commission intends to do.

NOTES

1. *FTC v. Mylan Labs, Inc.*, Civ. No.1:98CV03114 (D.D.C. 2001); *FTC v. The Hearst Trust*, Civ. No.1:01CV00734 (D.D.C. 2001).

The Liquidity Crunch (This Year's Model): Recent Delaware Cases Involving Controlling Stockholders

BY GREGORY V. GOODING

Gregory V. Gooding is a corporate partner in the New York office of Debevoise & Plimpton LLP. He is a member of the firm's Mergers & Acquisitions Group. A version of this article originally appeared in the Spring issue of the Debevoise & Plimpton Private Equity Report. Contact:ggooding@debevoise.com.

While most private equity portfolio companies are, indeed, private, financial sponsors sometimes control companies with minority public floats, either because the portfolio company has done an initial public offering or because the investor did not acquire the entirety of a public company target. Where the private equity investor has effective control of the board of such a company, it typically assumes that it will also be able to control any arms-length sale of the company to a third party, provided only that each stockholder of the company is treated the same way in such sale. However, recent decisions of the Delaware Court of Chancery call that assumption into question. These decisions suggest that the liquidity afforded a large stockholder in such a sale transaction may, in certain circumstances, constitute additional consideration not shared with the public stockholders and therefore creates a conflict of interests that limits the ability of the private equity sponsor and its director appointees to control the sales process.

Under Delaware law, a transaction in which a controlling stockholder is treated differently from other stockholders is subject to the exacting test of "entire fairness." Entire fairness requires the

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conflicted stockholder to prove that the deal was procedurally and substantively fair to the company's minority stockholders. Such claims are almost impossible to get dismissed at an early stage of the litigation process and can be expensive to settle. The only potential escape from the entire fairness box is to give a fully empowered special committee of non-conflicted directors control over the sale process and to condition the transaction on the approval of a majority of the shares held by non-conflicted stockholders.

The conflict between a controlling stockholder and the minority public stockholders is obvious where the controlling stockholder proposes to take the company private or seeks to obtain a higher price for its shares than that paid to the public stockholders. In the first case, the controlling stockholder stands on both sides of the transaction; in the second case, it is competing with the public stockholders over the allocation of the overall purchase price. But a conflict has not generally been thought to exist in a transaction involving a sale to a third party buyer in which all stockholders are treated in the same way. In two recent decisions, however, the Delaware Court of Chancery has held that a large stockholder may also be conflicted if it has an urgent liquidity need or if the market for the company's stock is not sufficiently robust to allow that stockholder to sell its entire stake into that market over a reasonable period of time.

In *N.J. Carpenters Pension Fund v. infoGROUP*[1] the Court of Chancery considered breach of fiduciary duty claims in connection with the all-cash sale of infoGROUP to CCMP Capital Advisors. Plaintiffs alleged that infoGROUP's 37% stockholder, who was also a member of the company's board, instigated the sale in order to satisfy his "desperate need for liquidity" and that the sale took place at a particularly inopportune time in light of a weak M&A market and the company's improving prospects. The court refused to dismiss these claims, finding that the 37% stockholder's need for liquidity was both material and not shared with the company's other stockholders. The court held that in certain circumstances "liquidity is a benefit that may lead directors to breach their fiduciary duties."

Similarly, *In re Answers Corporation Shareholders Litigation*[2] involved the all-cash, third-party sale of Answers Corporation, a thinly traded Delaware public company, 30% of the stock of which was held by a financial sponsor. Following closing, former Answers stockholders brought suit against the company's directors for breach of fiduciary duty and against the buyer for aiding and abetting such breach. Because the company's charter exculpated directors from liability for duty of care claims, plaintiffs could recover damages only if they were able to prove that the directors breached their duty of loyalty. On a motion to dismiss, the court held allegations that a sale transaction provided the only way for the 30% stockholder to get liquidity and that such liquidity constituted a benefit not shared with the other stockholders (who had the practical ability to sell their shares on the limited public market) to be sufficient to state a claim for breach of loyalty against the directors appointed by the 30% stockholder. Citing the infoGROUP decision, the court held that the stockholder's desire for liquidity could put those directors in a position where their interests conflicted with those of the public stockholders.

These two decisions should be contrasted with the outcome in *In re CompuCom Systems, Inc Stockholders Litigation*.[3] As with infoGROUP and Answers, CompuCom Systems was alleged to have been sold at a "fire sale price" so that its controlling stockholder could satisfy a "pressing need for cash" that resulted from the failure of the stockholder's other investments. In the case of CompuCom, however, the court dismissed fiduciary duty claims on the grounds that the sales process had been managed by a special committee of outside directors, which had hired independent counsel and financial advisors and that had agreed to the sale transaction only at the end of a multiyear exploration of strategic alternatives. Thus, while the CompuCom controlling stockholder avoided liability, it did so only by surrendering control over the sales process.

It's worth noting that the *infoGROUP* and *Answers* decisions involved motions to dismiss, and it is by no means clear that if matters were to be litigated to completion the defendants would be found liable for damages. However, these cases demon-

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strate that the Delaware courts are willing, as a legal matter, in the right circumstances, to view the mere size of the holdings of a controlling stockholder as putting that stockholder and its representatives on the subject company's board in a conflict situation. At a minimum, the inability to get rid of such a claim at the motion to dismiss stage means that the litigation will be substantially more time-consuming to defend and more expensive to settle.

These decisions do not mean that all sale transactions involving a public portfolio company will be subject to an entire fairness review, or that a special committee must always be used in such cases to limit liability risks. Particularly in the case where the large stockholder has no immediate need to sell and the public market is sufficiently liquid to provide a viable exit mechanism in the ordinary course, a court would have to go well beyond these recent holdings to impose liability based merely on the size of the controlling stockholder's interest. On the other hand, where a private equity fund stockholder is near or past the end of the fund's life, or a sponsor needs an exit to support its pending fund-raising initiatives, or the public market does not provide a realistic exit route for the large stockholder's investment (but does for other stockholders), the controlling stockholder and the company's board need to take the potential conflict into account. In these circumstances, private equity firms may well wish to consider using the types of procedural protections—such as a special committee and potentially minority stockholder approval—that have been developed in the context of going private transactions to limit litigation risk. Even if the controlling stockholder is confident of being able to satisfy the strict standard of entire fairness—which may well be the case assuming the company is adequately shopped, all stockholders receive the same consideration, and there is no reason to believe the time of sale to be particularly inopportune—the benefit of limiting the litigation risk inherent in a duty of loyalty challenge may well outweigh the cost of giving up control over the sales process.

NOTES
1. Del. Ch., Sept. 30, 2011.
2. Del. Ch., April 11, 2012.
3. Del. Ch., Sept. 29, 2005.

Trends in International M&A in 2012: A Mid-Year Review

BY RONAN O'SULLIVAN AND ROSS MCNAUGHTON

Ronan O'Sullivan is a partner, and Ross McNaughton is a senior associate, in the London office of Paul Hastings (Europe) LLP. Contact: ronanosullivan@paulhastings.com or rossmcnaughton@paulhastings.com.

As we move towards the end of the summer, we take stock of the international M&A environment and trends that we have experienced through the first half of 2012 and set out our expectations for the second half of the year. Whilst the global economic downturn and Eurozone sovereign debt issues undoubtedly continue to have a significant effect on M&A activity, there are some signs for optimism for the latter half of 2012, particularly with respect to in-demand sectors and territories. In this article, we examine the M&A drivers and fundamentals that are in place as well as the headwinds that are countering them.

Drivers

Despite the relative slowdown in M&A activity generally, it is clear that several of the key fundamentals for M&A activity are in place. For example, across the U.S., Europe and Asia there are many companies with excess cash on their balance sheets, which needs to be put to work, particularly in this era of historic interest rate lows. In addition, prospects for organic growth are relatively limited, given the wider economic backdrop, and there remains an appetite for companies to consider acquisitions to achieve growth targets and strategic objectives. Similarly, there also remains a significant amount of cash, or "dry powder," that is yet to be deployed by private equity firms, who have their own investors' expectations to meet.

There is also a level of opportunism within certain segments of the market. The continued challenges presented by the wider economic outlook have led to a re-evaluation of focus for certain companies and, in turn, have caused some assets to come to market, sometimes at a relative discount. This has led to the disposal of non-core assets by some, and, in certain cases, a general withdrawal from, or reduction in exposure to, certain of the more challenged economies within Europe. Many participants, particularly within the private equity sector, are setting themselves up to take advantage of these opportunities as and when they arise. The background economic conditions have also led to some owners looking for a strategic acquisition or partnership to ensure the continued viability, scale or prospects for their business.

In addition, regulatory changes being imposed in the financial sector, in particular, have also led financial institutions to seek to deleverage their balance sheet and dispose of non-core assets or businesses. These include disposals as a result of the impending Basel III capital requirements and, in the U.S., the implementation of the new regulatory standards under the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Volcker Rule (which prohibits or limits proprietary trading and hedge fund and private equity fund sponsorship by banks). These changes have led, for example, to several banks seeking to dispose of their asset or wealth management divisions, brokerage operations and servicing businesses.

Headwinds

Overall, it is clear that many of the fundamentals needed to create a healthy M&A environment are currently present. However, despite the fundamentals for activity being in place as described above, conditions globally remain challenging and there are still significant headwinds prevailing against a continued resurgence of M&A activity.

Confidence Is Key

One of the key issues mitigating against M&A activity generally is a profound lack of confidence. The continued uncertainties throughout the Eurozone, the changing political and regulatory landscapes in many key jurisdictions and the current global economic outlook, including a general slowdown in key growth territories like China, have manifested to produce a relatively uncertain and unstable environment and backdrop to the M&A arena.

The Eurozone crisis has undoubtedly had a limiting effect on M&A activity both within Europe and elsewhere. Despite the efforts of the various European politicians and policy makers and the ultimate outcome of the Greek elections in June this year, uncertainty remains in relation to the future of the peripheral member states and fears of a break-up, exit or sovereign default persist. In addition, the general downward effect that the Eurozone issues are having on growth prospects both in Europe and elsewhere, coupled with the anticipated effects of the broad ranging austerity measures, have also had a direct impact on the expected future performance of targets.

In addition, there have been and will continue to be, other uncertainties driven by the political environment in certain key territories. For example, within Europe the holding of the French elections in April and the Greek elections in May and June this year each caused uncertainty as to the stance that each member state would take as regards Europe depending upon which way the election results fell. In the U.S. much will also turn on the outcome of the forthcoming elections in November. On a related note, the continued instability in the Middle East is also having a detrimental effect on the M&A landscape, particularly in relation to deals emanating from or otherwise related to that jurisdiction.

All of the above means that potential buyers are facing the challenges of predicting with sufficient certainty how a potential target will perform in an uncertain environment. Whilst not insurmountable by any means, this has led to a greater degree of caution being exercised by management going into deals and to a recalibration of due diligence focus to fully access and understand these country and/or currency risks.

Other Challenges

There are other headwinds that also need to be to be navigated. For example, interest rates remain at a historic all time low and acquisition

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financing is relatively cheap, so in theory this should have a positive effect on the M&A market. However, for a variety of reasons, acquisition finance remains generally only available for high credit borrowers in respect of targets with particularly strong cashflows. In addition, whilst the high yield debt market and equity markets remain an option for some issuers in the U.S., the opportunities to raise finance to fund acquisitions in Europe remain particularly challenging. As a result, the trend has been for deals to be predominantly financed from existing cash resources and/or stock, which we expect to continue through the latter half of the year.

Separately, both shareholders and regulators appear increasingly willing to bear their teeth in response to acquisitions. On the shareholder front there has been an increased tendency for shareholders generally to be more willing and vocal in their stewardship of investee companies, led by the introduction of the Stewardship Code in the U.K. in 2010 and similar initiatives in other jurisdictions, and this has translated into the M&A context as well. For example, earlier this year Xstrata's shareholder vote in relation to its announced $65 billion merger with Glencore was postponed until September given shareholder concerns over executive pay.

On the regulatory front, the international merger regime is becoming increasingly complex, for example, with more and more territories introducing or amending their merger control regimes, and regulators remain willing to block deals which breach any of the applicable thresholds. For example, in February this year we saw the European anti-trust authorities block the proposed $7.4 billion merger of NYSE Euronext and Deutsche Boerse. This has made an early anti-trust analysis and assessment of deals across the affected territories particularly important and has also led to an increased importance for up-front discussions and agreement between the parties as to where the merger control risk should lie on any given deal.

Hotspots

Although headwinds remain, there are still certain sectors and territories that have performed well and are expected to remain favorable for activity throughout the latter half of the year.

As expected, the energy sector remains particularly buoyant in terms of volume, driven principally by the ongoing international competition for natural resource assets. The technology sector also remains active with strategic acquisitions, driven by the ongoing competition between the key market participants in this field.

Whilst the life sciences sector has not performed quite as favourably as last year, with activity down slightly, there has been some significant activity. Generally, this is expected to continue given the inherent challenges facing the life sciences sector generally, including impending patent expirations, declining pipelines and sales, decreased healthcare spend, regulatory reform and increased regulation.

In addition, and as noted above, we also expect activity to continue in the financial services sector as institutions continue to re-focus and dispose of non-core assets in light of the regulatory and other challenges faced by them.

In terms of territories, the emerging markets continue to be a source of attention for those looking to expand into high growth areas. For example, Latin America saw a rise in activity in the first half of the year, as did Africa. There continues to be an interest from international companies looking to expand into these territories and this is a trend we expect to continue going forward. As a result, there will continue to be a focus on certain of the key legal issues arising when considering deals in such regions, including robust assessments of anti-corruption risk in light of, for example, the Foreign Corrupt Practices Act in the U.S. and the Bribery Act in the U.K., as well as other issues such as tax, merger control, exchange control, foreign ownership restrictions, regulatory impediments and so on.

Conclusion

Overall, it is true that the downward trend in M&A activity experienced in the latter half of 2011 continued throughout the first half of 2012, principally due to the challenges and headwinds that continue to be present, as discussed above. However, there remains room for cautious optimism. In terms of figures, Q2 2012 was more vibrant than Q1, suggesting that the sluggish start at the beginning of the year can be overcome.

In any event, one thing is clear and that is that the approach to M&A needs to continue to adapt to reflect today's challenges and economic backdrop. As suggested above, it requires recognition by both buyers and sellers alike as to the environment in which they are operating. Deals can get done, but they require an early understanding and clear agreement as between the parties as to the apportionment of risk on any particular deal.

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