The evolution of the legal profession in M&A: “Law reflects what happens in society”

In Paul Van Hooghten’s long career, many legal trends have emerged, significantly impacting M&A practices.

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In an exclusive interview with MandA.be, Paul Van Hooghten (Jones Day), a veteran in the international M&A arena with over 35 years of experience, sheds light on the challenges, opportunities, and legal trends shaping the landscape of mergers and acquisitions. From navigating cross-border deals to anticipating future developments, Van Hooghten offers valuable insights garnered from his extensive career.

Paul Van Hooghten, Of Counsel at law firm Jones Day, is a seasoned corporate lawyer with over 35 years of experience, advising Belgian and international private equity houses, multinational companies, and financial institutions on various aspects of corporate law. His expertise includes corporate governance, mergers and acquisitions (including public takeovers), joint ventures, and private equity.

Paul is author of several publications on corporate and commercial law, is a regular speaker at conferences and a guest lecturer at the University of Brussels. Paul is also a director and officer of the American Chamber of Commerce in Belgium and a council director of the Legal Council of the Conference Board. He has worked in both Belgium and New York City.

Challenges and opportunities in cross-border deals

Paul, you bring a wealth of experience, particularly in international M&A. Can you share some insights into the challenges and opportunities inherent in cross-border transactions, considering diverse legal frameworks?

“Indeed, the majority of transactions nowadays have international aspects. Even a transaction between two Belgian parties will nearly always have an international aspect as for example a foreign subsidiary or branch.

This prevalence of cross-border deals presents two significant challenges. Firstly, transactions often operate under the legal framework of the target country, which can be unfamiliar territory for the acquiring party.

Secondly, cultural nuances and negotiation styles vary across regions, emphasizing the importance of having a local partner well-versed in the legal landscape and customs of the target country. An international law firm with a strong local presence will be useful in that respect. It will ensure a deeper understanding of potential issues and will enhance decision-making during negotiations.”

Drawing from your experience in both Belgian and New York City legal environments, how do these landscapes differ, and what insights have you gained from navigating these diverse settings?

“The primary distinction lies in deal size and sophistication. Major financial hubs like New York and London facilitate larger and more complex transactions, fostering a culture of expertise and innovation. They also attract a lot of talent from all over the world in various specialties which on its turn creates a unique ecosystem of expertise and know-how. In contrast, regions like Belgium offer a more intimate market, characterized by smaller-scale deals. However, because of its international and open economy, sophistication of M&A in Belgium is high.”

Preparation for sale: buy side vs. sell side

Are you more frequently involved in buy-side or sell-side transactions?

“We engage in both buy-side and sell-side activities, reflecting the dynamic nature of the Belgian market. As an M&A lawyer, it is crucial to understand the perspectives of both buyers and sellers, as it enhances one’s ability to anticipate the other party’s concerns and preferences.

For example, I emphasize the importance of early preparation for sellers, recommending a preparatory due diligence, known as vendor due diligence, to identify and address timely potential issues.

As a buyer will proceed with its own due diligence and will typically use the results thereof as a price negotiation tool, it is definitely worth to anticipate and remedy any (potential) issues before the start of a sales process. Such proactive approach enables sellers to strengthen their position and mitigate risks during negotiations."

Legal trends in M&A: Insights from the field

What are the significant legal developments observed in M&A over recent years?

"There are many. In all the years of my career, I have never known a dull moment. This is also the interesting thing about being a lawyer. The law is actually the emanation of what happens in society. For example, the war in Ukraine triggered sanctions which on its turn have an impact, both economically and legally, on M&A. The Green Deal proclaimed by the EU has a far reaching effect on the legislative framework of M&A."

Could you describe the emergence of a few of these trends during your career?

"Several legal trends have emerged, significantly impacting M&A practices. For example, where in the eighties many Belgian companies in one or other form had revenues outside the normal economy (which complicated acquisitions), this is hardly the case any more. This is due to a more effective tax enforcement but also by the awareness of sellers that such practices have a negative impact on the sale price of the company (or even make a sale impossible).

On the other hand, stronger regulations exist now regarding money laundering and Know Your Client with specific obligations for lawyers, bankers and other professionals. Other examples of increased regulation are the rise of environmental legislation and its resulting civil and even criminal liabilities and more recently GDPR compliance. Together with taxes, they have become central in M&A due diligence processes.

The rise of cybercrime and cybersecurity has also a major impact on M&A. The lack of cybersecurity may not only affect the attractiveness and price of the target, but may be a serious risk for the acquiring party. Even when the latter is a well-secured company, hackers may use poor cyber security in the target to get access to the IT system of the acquirer. Avoid that Trojan horse!

Finally, as sanctions are increasingly used by countries as a foreign policy tool, they are a growing attention point in M&A. Where in the nineties the number of countries on one or other sanction list (there is not only a list issued by the EU, but also by the UN, the US and other individual countries) was relatively low.

Currently there are over 40 sanctions regimes in place only for the EU. If you acquire a company that has done business with Russia or Iran, for example, you could face severe fines and incur reputational damage. When assessing this risk, do not only take into account the EU sanctions legislation but also the US OFAC rules as they are far reaching, very severe and actively enforced.

But economical trends impact also the type of clients wherewith one works. For example, in the seventies and eighties, US and later also Japanese multinationals massively invested in Belgium attracted by Belgian's central location but also by certain tax incentives as for example coordination centers. Although US investments are still very important in Belgium, there is no longer the same influx of new investments. Over the years I saw also whole industries coming and going as for example the automotive sector."

What about Foreign Direct Investments (FDI). Is that also a major legal trend in M&A?

“Absolutely, Europe has finally realized that it should not let non-EU companies buy European companies. Although mainly aimed at Chinese companies, all non-EU foreign investors, including for example US companies, must take into account FDI. Certain investments must obtain prior clearance which can slow down transactions. It can also result in fewer potential buyers for transactions.

For example at one point Chinese buyers in particular drove up the price of acquisitions in Belgium. Because they were interested in acquiring European technology, they sometimes offered twice as much as other buyers. As FDI will restrict the number of potential buyers it will have a negative impact on the M&A market. But it is right that Europe arms itself. If Europeans want to make an acquisition in China, they are subject to even more stringent rules.”

What is your take on the growing emphasis on Environmental, Social, and Governance (ESG) factors?

“ESG is still in its early stages at the moment because major parts of the Green Deal still need to be implemented. There are two sides to ESG. Of course I fully applaud the ethical motives of ESG. I think we definitely need to be conscious about our environment and make the planet greener. Lead by example. There is no doubt whatsoever about it.

However, you can wonder whether Europe isn’t shooting itself in the foot a bit. I recently heard the following boutade: ‘the Americans make it, the Chinese copy it, and the Europeans regulate it.’ Probably Europe focuses too much on regulation without taking into account the geopolitical and strategic realities of this world.

Europe should also ask whether the regulation is not merely a ‘check the box’ exercise with a disproportionate cost for the companies and very little real impact on the environment. Regulation should not prevent innovation, but should support it. Would it not be wiser to invest all these monies (they include not only all advisory and implementation costs incurred by companies, but also costs incurred by the governments in overseeing and enforcing all these rules) in R&D and new innovative technology which has a positive effect on the environment?

Ideally such products could be commercialized and exported all over the world. It would have a more direct positive effect on the environment while at the same time supporting our companies and creating jobs in Europe. This being said, I see that the younger generation is very conscious of this and take many great initiatives, for example, start-up companies active in water treatment, solar energy, waste reduction, et cetera.”

How can ESG regulation become a disadvantage for European companies?

“We should be careful that all these regulatory costs are not putting our own companies at a competitive disadvantage. I see several elements there. First of all, the Americans, the Chinese and the Indians, don’t have to incur all these regulatory costs which eventually will increase the price of European products. So that can be a competitive disadvantage for European business.

Secondly, the extensive reporting obligations may make European companies vulnerable. Who will read those reports? Action groups or commercial third-party litigation funds might use these reports to engage in American-style litigation not necessarily out of a genuine concern for climate and environment, but with a view to extract a settlement from these

companies. Without wanting to minimize the need for ESG, we should not close our eyes for possible unwanted side effects either."

The future of M&A: Trends and predictions

Reflecting on your extensive experience advising private equity firms and multinational corporations, what trends do you foresee shaping the future of M&A?

"The trend towards greater professionalization in M&A is evident, driven by the prevalence of auction processes and the rise of private equity. Additionally, the integration of artificial intelligence (AI) promises to revolutionize M&A practices, streamlining document review and due diligence processes. However, amidst these technological advancements, the human element remains indispensable. Building rapport and ensuring smooth post-closing integration are critical for long-term success in M&A transactions."

How can practitioners continue to create value in M&A amidst evolving trends and technologies?

"While AI and automation offer significant efficiencies, the human touch remains indispensable in fostering trust and facilitating effective communication. Post-closing integration requires empathy and transparency to ensure a seamless transition for all stakeholders. Ultimately, honoring commitments and maintaining open lines of communication are fundamental principles for creating enduring value in M&A transactions."