Editor’s Note:

First and foremost, I would like to take this opportunity to thank Gordon Cameron for his leadership over the past six years as editor of our Committee’s newsletter. I also wish to extend our gratitude to those who have contributed to the newsletter, making it possible for Committee members to be informed and updated on the global trends of international M&A and Joint Venture transactions. As incoming editor of the newsletter, needless to say, I am counting on your continued contributions!

Going forward, my efforts will certainly be taken up in trying to maintain the high standards of newsletters past. Thanks to the submissions of our contributors, the newsletter will continue to seek to capture relevant trends in the market. To this, we will also seek to attract contributions from some regions less represented in past newsletters, such as Latin America, the Caribbean and the Middle East. With the above in mind, the current issue of the newsletter addresses (i) the topical subjects of cybersecurity and ever-increased transparency across jurisdictions with respect to corporate entity beneficial ownership, (ii) the more classic M&A topics of fairness opinions, dissenters’ rights, competition notifications and demerger/spin-off transactions, as well as (iii) other more general developments in corporate law. We hope you will enjoy this edition’s submissions.

Lastly, the ABA SIL’s Spring Meeting in Washington D.C. is right around the corner! Please see below for further information on our Committee’s substantive program. For further information, there is a comprehensive on-site brochure you can download in the ABA web page dedicated to the 2017 Section of International Law Spring Meeting (you can be directed to this page by typing the following link to your web browser goo.gl/5SOG5).

I hope you enjoy reading this newsletter. I look forward to seeing you all next week in Washington D.C.!

Eric D. Kuhn

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SPRING MEETING SUBSTANTIVE PROGRAM

THURSDAY, APRIL 27, 2017

11:00 PM - 12:30 PM: SHOW ME THE MONEY: REP AND WARRANTY INSURANCE AS AN ALTERNATIVE TO ESCROWS AND HOLDBACKS

The program will deal with the following questions: How does warranty and indemnity insurance work? When do you encounter/when do you need it? What practical difficulties are associated with such insurance and what impact does it have on an M&A deal?

4:30 PM - 6:00 PM: HOW TO SELL A NON-U.S. BUSINESS TO A U.S. PUBLIC COMPANY

A number of factors, including cash laden corporate balance sheets, a strong U.S. dollar and a growing economy contribute to an appetite of U.S. based companies for M&A opportunities outside the U.S. This of course creates potentially exciting selling opportunities for owners of non-U.S. businesses. However, dealing with a U.S. buyer, particularly one that is publicly owned, entails certain unique challenges arising from U.S. regulatory, securities law and other legal requirements as well as the expectations of U.S. corporate buyers. This panel will explore a number of those challenges (with a focus on current hot topics) and will offer suggestions for coping with them.

FRIDAY, APRIL 28, 2017

9:00 AM - 10:30 AM: NAVIGATING THE STORMY WATERS: MAC CLAUSES, EARN OUT AND OTHER PROTECTIVE COVENANTS - DO THEY STAND THE TEST OF TODAY’S MACRO-ECONOMIC AND POLITICAL CLIMATE?

Threats to the stability of the financial system and markets, unexpected changes to the international political framework and the fear of terrorism have continued to send shock waves through the M&A arena for the past decade. Parties have attempted to address the resulting uncertainties through MAC clauses, earn-outs, variable purchase price mechanisms and other protective structures. This panel will analyze how well these mechanisms have fared and what courts have made of those attempts and will endeavor to draw conclusions for the drafting of future agreements.

There are also a number of other sessions in which our Committee is a co-sponsor. Please check the program of the Spring Meeting for details.

Our Committee breakfast will be held on Thursday morning, at 8:00 a.m. in the Presidential Ballroom, followed by our Committee Business Meeting from 9:00 a.m. to 10:00 a.m. at the New York Room. This business meeting is an excellent opportunity to plan future activities. You are strongly encouraged to attend.

Our Committee dinner with the Europe Committee (following an old tradition of cooperating with our friends from this Committee) will be held on Wednesday, April 26, at 7:30 pm at Mulebone, 2121 14th Street NW, Washington, DC 20009 (www.mulebonedc.com). Jim Black will send more details.

We also follow the more recent tradition of having a joint event with the China Committee and the Asia-Pacific Committee with a dinner on Thursday, April 27 at 7:30 pm at Medium Rare in Capitol Hill, 515 8th St. SE, Washington, D.C. (www.mediumrarerestaurant.com/dinner.php). Luis González and his colleague Justin Bogda will be disseminating more information.
COUNTRY UPDATE ON BELGIUM

CYBERSECURITY DUE DILIGENCE IN M&A
by Steven De Schrijver, Partner, and Fauve Vander Schelden, Associate, at Astrea.

Over the past years, security breaches and malware attacks have become increasingly common. Traditionally, strategic investors and PE firms have mainly focused on financials, employment and strategy when carrying out M&A due diligence. According to a report of NYSE Governance Services/Veracode, less than 50% of buyers carried out cybersecurity and IT due diligence. In 2015, another report revealed that nearly 80% of deal makers did not specifically list cybersecurity as a part of their due diligence process. However, given the increasing number of security breaches and malware attacks, cybersecurity should be integral to M&A due diligence.

Indeed, the apparent ease with which some cyber-attacks have occurred highlights the importance of cybersecurity. Nevertheless, according to the report of NYSE Governance Services/Veracode, 52% of respondents would consider acquiring a company that recently suffered from a high-profile data breach, albeit at a significantly lower value. Hence, although data breaches to date do not seem to be deal breakers, they do have a considerable impact on deal valuation.

Why Do We Need Cybersecurity Due Diligence?

Nowadays, acquiring IT-companies without carrying out due diligence can be risky. The Verizon/Yahoo! and Telstra/Pacnet cases demonstrate the risks associated when proper cybersecurity due diligence has not been carried out, and offer classic examples of cybersecurity breaches that were not revealed during due diligence.

In Verizon/Yahoo!, Yahoo! only disclosed a security breach two months after Verizon announced that it would acquire Yahoo! In Telstra/Pacnet, Telstra learned only weeks after the deal had been closed that Pacnet had been the victim of a hacking incident. As a result, Telstra considered taking legal action against the sellers, based on the theory that the sellers knew about, but failed to disclose to Telstra, the hacking attack before the deal closed.

These incidents show the potential litigation risks associated with data breaches in M&A transactions, as well as the considerable impact on deal valuation such breaches can have, given the damage to the target’s system and the potential loss of data that a breach can cause. Buyers should consider carrying out appropriate cybersecurity due diligence before closing the deal.

Step-plan to Conduct a Cybersecurity Due Diligence

Prior to conducting in-depth cybersecurity and compliance audits, a buyer should ensure that the target has taken the necessary steps to protect its data and to comply with applicable law. A well-developed cyber questionnaire, tailored to the industry in which the target operates, might help to provide a comprehensive overview of the target’s operations and its related cyber-documentation.

Cybersecurity due diligence should be carried out from both legal and technical perspectives. This should include necessary cyber experts who can assess from a technical point of view whether the target has taken appropriate measures to protect personal data and whether the target has in place appropriate escalation procedures in the event of a data breach (for instance, in accordance with the ISO27001 standard, or measures similar to the “Cyber Essentials”, a good practice scheme adopted in the UK), and to identify any vulnerabilities of the target’s system, and the costs associated therewith.

A review of the target’s cyber-documentation and related information should be carried out in parallel by legal advisers and technical experts, and should include review and analysis of the following in respect of the target:

- the privacy and data protection policy;
• insurance policies (i.e., the cybersecurity insurance policy) to assess which risks are covered/excluded;
• the incident policy and the Disaster, Recovery & Business Continuity Plan, to assess whether appropriate measures are included to escalate notification procedures in case a data security breach occurs and to ensure the target’s continuity;
• information about any data security breaches and other incidents, including information on all notifications and reports that were issued to the respective supervisory authority, as well as any responses received; and
• social media presence, including review of a list of all social media platforms on which the target is present, and how the target uses social media (through review of employee manuals, handbooks and policies).

It should also be pointed out that, as a result of the new EU Data Protection Regulation, national regulators in the EU will start to pay more attention to cybersecurity breaches. As of mid-2018, when the EU Data Protection Regulation enters into force, EU national regulators may impose more powerful penalties (i.e., levying of fines up to €10 million, or in case of an undertaking, up to two percent of the total worldwide annual turnover) on companies that violate the rules set forth in the EU Data Protection Regulation (which include the taking of appropriate technical and organizational measures to ensure an appropriate level of security and the reporting of security breaches and incidents to the supervisory authority).

In addition to the above, in the above review reveals certain vulnerabilities, a buyer could carry out a more in-depth analysis, which could include a so-called “White Hat Hacker Attack” by a cybersecurity expert. A buyer could also carry out a cybersecurity audit, as well as an audit of the software applications, to assess how secure they are.

**Conclusion**

With the expansion of the virtual storage of personal data and sensitive information, the importance of cybersecurity will only increase going forward. Cybersecurity due diligence should be ever more present in M&A deals to identify any insufficient cyber security and/or breaches or incidents at a target, as these might have a considerable impact on deal valuation. Cybersecurity experts can provide valuable support and input to a buyer to determining the consequences and possible costs associated with any identified vulnerabilities, and to assess whether any such vulnerabilities are material and can adversely affect valuation. Finally, after the deal has closed, cybersecurity policies and plans should be periodically re-evaluated to ensure smooth post M&A integration.
COUNTRY UPDATE ON CANADA

Recent Yukon Court Decision Raises Questions as to Whether there is a New Standard for Fairness Opinions in Canadian Plans of Arrangement
by Jason Saltzman, Partner in Securities and Capital Markets at Borden Ladner Gervais LLP.

The Supreme Court of Yukon recently approved an amended plan of arrangement whereby ExxonMobil Corporation would acquire all of the outstanding shares of InterOil Corporation (“InterOil”). The approval came a few months after the Yukon Court of Appeal denied the initial plan of arrangement despite the fact that the plan had received approval from over 80% of InterOil’s shareholders.

In denying the initial plan, the Court of Appeal found that, among other things, the fairness opinion that InterOil received from its financial advisor Morgan Stanley was deficient in a number of regards, including the failure to disclose Morgan Stanley’s success-based fee, the failure of the fairness opinion to attribute any value to InterOil’s Elk-Antelope asset, for which shareholders of InterOil were receiving a contingent resource payment (“CRP”) subject to a cap, and the failure to provide any discussion of the valuation process undertaken by Morgan Stanley. In addition, certain other governance matters were cited by the Court of Appeal, including the apparently passive role that the board’s transaction committee took in considering the plan.

The plan was amended by increasing the cap on the CRPs although the up front, base consideration payable to InterOil shareholders was unchanged. InterOil also retained BMO Capital Markets to provide an independent, fixed-fee, fairness opinion.

In its written decision approving the plan (released on March 1, 2017), the Supreme Court of Yukon appears to have gone even further than the Court of Appeal in considering whether an independent fairness opinion and a review by an independent committee should be required in respect of all plans. The Supreme Court judge specifically noted that the revised plan included an independent fixed fee fairness opinion prepared by a reputable expert, as well as a report of the transaction committee of the board of directors. He went as far as to state: “In my view, these requirements provide a minimum standard for interim orders of any plan of arrangement. It is not acceptable to proceed on the basis of a Fairness Opinion which is in any way tied to the success of the arrangement.”

The idea that an independent fairness opinion and an independent committee report are now a “minimum standard” is a significant departure from current legal requirements and industry practices relating to plans. In fact, while most boards obtain fairness opinions, there is no legislative requirement to do so. Further, where a fairness opinion is obtained, it is fairly common for the company’s financial advisor, who is often entitled to a success-based fee, to provide such an opinion. In addition, in transactions where there are no conflicts or independence issues at play, there may be no reason, and certainly no legislative requirement, to strike a separate board committee to evaluate the transaction.

It is also interesting to note that the decision refers to an affidavit provided to the Court by the head of BMO’s Canadian Mergers & Acquisitions group in which he expressly adopted in its entirety the BMO fairness opinion and provided detailed “expert evidence” with respect to the substantive fairness of the plan to InterOil’s shareholders. The judge stated that, “I particularly endorse the practice of appending the fairness opinion to the affidavit of an expert from BMO Mergers and Acquisitions group in order to comply with this Court’s expert evidence rule.” This step appears to have been taken in response to the Court of Appeal’s statements that the Morgan Stanley fairness opinion did not constitute evidence of fairness and the only evidence of fairness in the matter consisted of the report and testimony provided by parties opposing the plan. The Morgan Stanley fairness opinion was likely given to the board to help it discharge its fiduciary duties and not for the purpose of a court proceeding. However, once proceedings began, this distinction may have been lost, and InterOil may have tried
to put more weight on the Morgan Stanley opinion than was appropriate. In any case, the decision of the Yukon Supreme Court seems to suggest that a fairness opinion should be entered as evidence in support of the application — not something legislatively required or generally done in the past.

It will be interesting to see whether this decision will be followed, or otherwise change the way plans are considered, by other courts in Canada, or if it will have an effect on industry practice. The Court of Appeal did note a number of reasons specific to InterOil why an independent fixed fee fairness opinion was appropriate, and it would be a real stretch to both industry practice and legislative requirements for the Supreme Court to impose a requirement that such an opinion be required for every plan. If this decision were followed by other courts such that all plans, regardless of whether there were conflicts or independence issues, required active involvement by independent committees and a second, non-fixed fee, fairness opinion, it could significantly increase transaction costs for plans. For example, in the case of InterOil, BMO was paid a fixed fee of US$ 4 million to provide its fairness opinion.
Interim Payment Relief: New Developments Regarding Dissenters’ Rights under Cayman Merger Law
by Ramona Tudorancea, Corporate/M&A Specialist at Loeb Smith.

In an interim judgement issued on January 26, 2017 in the matter of Blackwell Partners LLC et al v. Qihoo 360 Technology Co Ltd ("Blackwell Partners"), in a lengthy and well-reasoned decision, Hon. Mr. Justice Charles Quin Q.C. ruled that interim payments pursuant to the Grand Court Rules1 could be requested by dissenting shareholders and granted by the Court during the judicial proceedings initiated to determine the “fair value” of the dissenters’ shares under Section 238 of the Cayman Islands statutory merger regime2 (the “Cayman Merger Law”).3 This decision brings a new and significant development for minority shareholders in their quest to obtain the “fair value” for their shares in the context of a merger take-private.

Qihoo 360 Technology is a leading Internet company in China that was listed on the New York Stock Exchange (NYSE) and subsequently taken private using the Cayman Merger Law in 2016 for an aggregate merger offer price in excess of US$ 9 billion. As part of the merger take-private transaction, a fairness opinion on the merger offer price of US$ 51.33 per share was issued by JP Morgan Asia and the merger was approved the Board of Directors in December 2015 and then by the shareholders in March 2016. However, a number of minority shareholders disagreed with the merger offer price and dissented under Section 238 of the Cayman Merger Law.

Without prejudice to the final determination of “fair value” for their shares, the dissenting shareholders immediately requested payment of an amount of US$ 16,892,549.01, representing the portion of the merger consideration to which they were entitled, based on the US$ 51.33 merger offer price per share. They also requested security for their claims. They were refused on both counts and, failing agreement, the company had to apply to the Cayman Court to seek a “fair value” determination.

The dissenting shareholders presented as evidence two valuation reports indicating a value per share ranging from US$ 124.40 to US$ 290.49 per share (well in excess of the merger offer of US$ 51.33 per share). While the fair value determination proceedings are ongoing before the Court, the company agreed to pay into court a security deposit of US$ 92 million, well in excess of the total value of their shareholdings of US$ 16,892,549.01. The dissenting shareholders requested an interim payment in respect of their merger consideration because, they argued, whatever the outcome of the fair value determination, they would still be paid a substantial sum in respect of their shares. In an interim judgement issued on January 26, 2017, the Court decided in favor of the dissenting shareholders and ordered an interim payment of US$ 16,892,549.01, representing the portion of the merger consideration they were offered, based on the US$ 51.33 merger offer price per share.

The judgment in this case has opened the door to petitions for interim payment being filed systematically by dissenting shareholders as part of Section 238 proceedings, at least in the amount of the merger consideration offered generally to shareholders. This will slightly change the balance of power in negotiations between the target and dissenting shareholders, possibly encouraging settlement earlier in the process or for higher amounts.

The security payment made into court by the target in this case was more than five times the amount previously offered to the dissenting shareholders as “fair value”, and likely contributed to the decision of the Court to grant

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1Order for interim payment in respect of sums other than damages (O.29, r.12).
2Part XVI (sections 232 to 239A) of the Cayman Islands Companies Law.
3Under the Cayman Merger Law, shareholders who elect to dissent from the merger have the right to receive payment of the “fair value” of their shares if the merger is consummated, but only if they deliver to the company, before the shareholders’ vote which approves the merger, a written objection (and then comply with all procedures and requirements of Section 238 of the Cayman Islands Companies Law).
an interim payment to the dissenting shareholders. However, in our view, the absence of an agreement as to a security deposit paid into Court should not prevent the Court from granting interim payments. Further guidance on this matter is expected as dissenting shareholders in other pending cases will likely request interim payments on account of the “fair value” of their shares being at least equal to the offered merger consideration.

At this early stage, it seems unlikely that any interim payments ordered as part of Section 238 proceedings will exceed the merger consideration as approved as part of the Merger Agreement. However, Blackwell Partners does not expressly preclude the possibility. Also, an argument can be made that if the target itself, during negotiations with dissenting shareholders, offered more than the original merger consideration (and if this fact is not disputed by the parties), the Court may take into account this higher figure.

Overall, even if it is quite early to tell, Blackwell Partners will certainly impact dissenting shareholder strategies in the context of merger take-privates, and possibly contribute to the rising number of Section 238 petitions in the Cayman Islands.
COUNTRY UPDATE ON DENMARK

A Few, However, Important Legislative Changes
by Lise Lotte Hjerrild, M&A Partner at Horten Law Firm.

Ban on Shareholder Loans Lifted

Until recently, Denmark was one of a few countries in the EU which did not allow companies to grant loans to their shareholders, apart from parent companies. This was, unquestionably, a competitive disadvantage.

Legalized subject to a few conditions

This restriction was changed on January 1, 2017, upon new legislation taking effect. Under the new legislation, a loan to any shareholder is permitted subject to a few (market) conditions:

- The loan must be within the limits of the company’s distributable reserves and granted on market terms;
- The decision to grant the loan must be made by the general meeting or under an authorization from the general meeting; and
- The decision to grant the loan cannot be made until after the first annual report has been approved.

No immediate change of tax regime – however, there are still benefits to be obtained

Unfortunately, the legislative change did not alter the tax regime. This means that shareholders who are (i) natural persons or tax-transparent legal entities, and (ii) hold a controlling interest in the company, will still be taxed as if the loan proceeds were income or a dividend.

Subsequently, Danish tax authorities issued guidance on the tax treatment of outstanding interest on taxable shareholder loans. The amended guidance only relates to the loans issued to majority shareholders and is a mere “codification” of the Danish tax authority’s (SKAT) current practice.

A Danish minority shareholder of a Danish company will, however, be able to gain a tax advantage in cases in which the shareholder needs liquidity. In such cases, the company can choose to lend the shareholder the needed liquidity instead of paying out a dividend. This provides for a tax advantage to the shareholder in that the loan proceeds would not be taxed as capital income and the shareholder would receive a tax deduction for the interest paid to the company. The company would, of course, be taxed on this interest, but as individuals are taxed at a higher rate than companies in Denmark, the net end result would still be positive. This will of course be most relevant where the shareholder’s and the company’s interest are aligned.

If a shareholder loan is made to a foreign majority shareholder that is a natural person, he or she will have limited tax liability as the loan proceeds will be considered salary or dividends, both of which are taxed at source. The ultimate tax liability would then depend on the application of any double taxation treaty in place.

Registration of “Actual Owners” Soon to take Effect

On May 23, 2017, a change to the Danish companies act will take effect, creating an obligation for companies to register its actual, ultimate owners. Such registrations must be completed no later than October 1, 2017. The purpose is to create full, public visibility in Danish companies’ ownership structure. The requirement for companies to register its actual, ultimate owners includes all companies regardless of form or structure except for branch offices or companies whose shares are traded on a regulated market.

A very wide definition
By definition, an actual owner can only be a natural person who owns or control a “sufficient” share of a company or exercises control through other means. The ownership/control can be direct and indirect. The term “actual owners” encompass all natural person owners, including foreign natural persons as well as a natural person that is the owner of a foreign holding company.

According to the legislation, a “sufficient” share is roughly 25% ownership/control. However, this is only a rule of thumb and can vary widely based on the actual circumstances. Less than 25% ownership can be sufficient to be considered an actual owner, if, by way of example, an owner also has the right to appoint members of the board or veto the company’s annual account.

Responsibility and sanctions

The company itself is responsible for gathering and registering information about its actual owners. The registration must include the extent of the rights of the actual owners, and must be kept up to date. If a company has no actual owners or the actual owners cannot be located, the executive management of the company will be regarded (and recorded) as the company’s actual owners. Failure to meet the registration requirements is subject to penalty in form of a fine. The fine will be to the company; depending on the circumstances, the executive management might also be liable.
At some point, the company’s evolution may involve one or a mix of greenfield investments, private equity involvement or a corporate spin-off. In Finland, we have seen spin-offs for purposes of restructurings where ultimate ownership is unaffected, such as the ongoing cross-border merger of Nordea’s Danish, Finnish and Norwegian subsidiaries or the contemplated merger of Danske Bank’s Finnish activities, each of which includes the partial demerger of their Finnish mortgage credit banking activities in accordance with mortgage credit banking license requirements. We have also seen spin-offs for purposes of creating legally separate units for public exit, such as Sievi Capital Plc’s 2012 Scanfil Plc spin-off and IPO, YIT’s 2013 Caverion Plc spin-off and IPO, or Digia Plc’s 2016 Qt Group Plc spin-off and IPO. Generally, spin-offs in Finland will take one of three forms to avoid or minimize recognition of tax by the parties involved: a full or partial demerger, a sale of shares, or a sale and transfer of business. This article looks at how these three arrangements are carried out in Finland.

The Demerger (Partial or Full)

The tax requirements under a tax-neutral demerger are provided for by Finland’s tax legislation implementing the EU Merger Directive, which requires that the amount of cash consideration not exceed 10% of the share consideration. As one might expect, the regulations allowing for tax-free treatment are subject to a number of stringent conditions. The primary difference in terms of legal process between the full and partial demerger is whether the entity subject to demerger ceases to exist after the transaction or whether the carved-out assets form an independent business. Therefore, the following process description for tax-neutral demergers can be largely considered to overlap both types of demerger:

- Demerger plan is executed by the company’s board;
- Demerger plan is filed with the trade register within one month of signing;
- EGM summons is issued no sooner than two months and no later than one month prior to the EGM, and at the EGM, resolutions must approve (by no less than two thirds within each share class and also aggregate shares present) the demerger plan and the demerger, which approval must occur within four months of the plan registration but no later than one month prior to the plan’s due date; and finally;
- The board notifies the trade register of the demerger implementation within six months of the demerger resolution at the EGM.

The demerger is completed once the trade register records the demerger, which will typically occur at the demerger plan due date, unless a known or unknown creditor, as a result of a public summons issued during this period by the company, opposes the demerger. It is uncommon for a demerger process in Finland to be cancelled by the trade register due to creditor opposition. It should also be noted that a demerger, similar to a merger, does not result in a clean break in respect of pre-transaction company liabilities under the Finnish Companies Act.

Sale of Shares

The share sale process in Finland is subject to corporate income and transfer taxes. Due to the interplay of the exemptions under both taxes, unless the sale of shares is for a stock exchange listed company, a spin-off will not avoid both of these forms of taxes.

Generally, capital gains and losses as a result of disposal of fixed asset shares are deemed ordinary business income (the general corporate income tax being 20% in 2017). However, the sale of shares will be considered tax-exempt under certain conditions, most importantly that:

- a Finnish resident seller has held at least 10% of the company’s capital;
• for a period of at least one year, and
• the shares belong to the fixed business assets of the seller.

However, the relevant exemption from the transfer tax on transfers of shares in Finnish limited liability companies (generally 1.6%, otherwise two percent for real estate companies, housing companies and real estate holdings) requires that the buyer and the seller be non-Finnish tax residents. This transfer tax exemption is not even extended to the transfer of shares of real estate companies, housing companies and real estate holdings.

Standard formalities, such as corporate resolutions approving and entering into relevant share transfer and related agreements and updating share registers, will be required under this process.

Sale and Transfer of Business

Lastly, a business can be spun-off in a business transfer (i.e., asset sale) through a carve-out from the divesting company. Such a transfer may be carried out without triggering taxable capital gains or transfer tax consequences if:

• all assets, liabilities and reserves attributable to a business entity or several business entities are transferred to the newly established company;
• the newly established company then continued the business in question and provides newly issued shares as consideration to the transferring company; and
• the transferring company can show that there are justified business grounds for doing the transfer in this manner.

Companies planning to divest certain business areas in a tax-neutral manner should make the necessary business transfers well in advance and possibly seek advance tax rulings from the Finnish tax authorities on the matter, as the Finnish tax authorities have been eager to set aside serial transactions based on general anti-avoidance provisions.

In such a spin-off, it must be noted that where the transferring company is an ongoing business, the newly established company must provide continued employment to employees working for the transferred business, and thus, these transferring company’s employees will automatically transfer to the newly established company as part of the purchased ongoing business.
M&A Update April 2017
by Ramesh Vaidyanathan, Managing Partner at Advaya Legal.

The first quarter of 2017 saw the government of India staying on course in its commitment to significantly improve the ease of doing business in the country. One important aspect of achieving this business friendly environment is the regulatory framework for cross-border transactions.

While there has been a 15% decline in the number of M&A deals between 2015 and 2016, the cumulative announced value of the deals increased by almost 68%. It was an encouraging year for startups as they contributed 70% of the 917 private equity and venture capital investments, although there was a dip of about 12% from the number of similar transactions in 2015.

There is still no reason to be disheartened as most of the key regulatory changes were brought about by the government in the course of the last year. The Goods and Service Tax regime, which will unify indirect taxes around the country and is one of the most awaited regulatory overhauls, will be rolled out from July this year. 2017 is expected to be even bigger and better for the M&A and JV space in the country.

Given below is a brief update on the recent regulatory changes in India and significant cross-border transactions.

Combination Threshold Provisions Clarified

Under the (Indian) Competition Act, 2002 (“Act”), ‘combinations’ generally refer to mergers, acquisitions, restructurings or other methods by which entities combine to form a new entity. All combinations crossing specific quantitative thresholds, whether through their affiliate businesses in India or outside, are required to seek approval of the Competition Commission of India (“CCI”), the anti-trust regulator, before giving effect to the combination.

A combination was exempted from seeking such an approval if it fell within the de-minimis threshold set by the government in 2011. This created ambiguity over the years for some of the following reasons:

- they were being considered only for acquisition cases and not in cases of mergers, amalgamations or acquisition of control; and
- transferor’s total assets and turnover were being considered to determine the applicability of the exemption instead of the assets and turnover of the relevant segment/portion/business of the enterprise that is being combined with another enterprise.

To clear up this ambiguity, the Ministry of Corporate Affairs issued a notification last month (“Notification”) clarifying that these de-minimis exemptions under the Act will be applicable to all cases of acquisitions, mergers, amalgamations and acquisition of control. Further, the Notification specifies that where only a portion of a business is being acquired, the value of the assets and turnover attributable to the relevant portion of business will be considered to determine the applicability of the thresholds under the Act, and therefore, parties will no longer be obliged to look to the seller’s assets and turnover. The current thresholds are: value of assets of the target enterprise being not more than INR 3.5 billion (approximately US$ 54 million) in India or the turnover of such enterprise being not more than INR 10 billion (approximately US$ 154 million) in India. These limits will hold well until March 2022.

This will help large group companies enter the Indian market without the hassle of a time-consuming combination approval from the CCI in the circumstances discussed above.

Idea-Vodafone Merger
UK’s Vodafone announced in March that it was merging its Indian subsidiary with Idea Cellular, a local competitor, in an US$ 23 billion deal. The merger will result in the formation of the largest wireless telecom carrier in India, which is the world’s second largest telecom market after China. The new company is expected to serve 400 million customers in the country, thereby acquiring 35% customer share and 41% revenue share of the telecom market in India. This will unseat Bharti Airtel as the market leader in the space.

**Other Recent International M&A and Joint Venture Deals in India**

- Quess Corp Limited, one of India’s leading integrated business services providers, recently announced that the company has signed definitive agreements to acquire Comtel Solutions, Singapore that develops solutions for banking, hi-tech manufacturing, telecommunications, logistics and healthcare industries. The deal is expected to be worth around US$ 20 million.
- GMR Infrastructure Ltd. announced that its unit GMR Energy Ltd. has tied up with Malaysia’s TNB Repair and Maintenance to set up an O&M JV for the power sector. GMR Energy had in May 2016 agreed to sell 30% stake in its “select portfolio” of assets to TNB for US$ 300 million.
- Apollo LogiSolutions, a wholly owned subsidiary of Apollo International, has formed a joint venture for liquid logistics operations in India with Hong Kong-based Singamas, a manufacturer of containers, operator of terminals and container depots and provider of logistics services. The joint venture, ‘ALS Singamas Logistics Ltd’, will invest around US$ 47 million over the next three years to develop an ecosystem and deliver value to its customers.
- Britannia Industries has invited Greek baker Chipita to make rolls, croissants, and other dough products in a joint venture to meet the demands of a rapidly urbanising home market and a MoU has been executed between the companies. Britannia will most likely hold the majority stake in the venture that will involve an initial manufacturing investment of about US$ 11 million.
- UK-based global player in pest control and hygiene services, Rentokil Initial, has entered into a joint venture with Pest Control India to consolidate leadership position in the fast-growing Indian pest control market. The London Stock Exchange (LSE) listed company will hold 57% in the newly formed venture.

**Conclusion**

2017 is expected to be a tumultuous year for businesses all over the world in the aftermath of ‘Brexit’ and some of the protectionist movements around the world. It will be interesting to see whether the Indian M&A and JV market stays apace with the massive expectations that come with its fast growing economy and rapid liberalization. The central government has also set an ambitious target of jumping 40 places in the next round of “ease of doing business” rankings of the World Bank and has been engaging with stakeholders to move up the ranks. With such a pro-active business-friendly approach, stable rupee and demographic enthusiasm, India is expected to meet the projected growth rate of 7.7% in 2017.
Country Update on the Netherlands

UBO Register and Central Register of Shareholders
by Eva Das, Partner, and Ingrid Viertelhauzen, Senior Associate, at Stibbe.

The Ultimate Beneficial Owner register


The UBO register will show the beneficial owners of corporate and other legal entities incorporated in the Netherlands. These entities must provide accurate and current information on their beneficial ownership, including the details of the beneficial interests held.

For companies acquiring or investing in Dutch entities or using a Dutch entity as acquisition or joint venture vehicle, this means that their beneficial owners will be included in the UBO register. This UBO register will be publicly accessible.

Fourth Anti-Money Laundering Directive


Per the Directive, a “beneficial owner” means any natural person who ultimately owns or controls a corporate or other legal entity. While under the Third Anti-Money Laundering Directive a percentage of ownership of more than 25% was deemed sufficient to meet this criterion, under the Directive this percentage serves as an indication of direct ownership. A percentage of ownership of more than 25% held by a corporate entity, which is under the control of a natural person, or by multiple corporate entities, which are under the control of the same natural person, serves as an indication of indirect ownership. Member States may provide a lower ownership percentage as an indication. The right to dismiss directors is another indication. The natural persons in senior management will be considered UBOs (also called “pseudo-UBO”) when there is any doubt or the UBO cannot be determined under these rules.

In July 2016, the European Commission published a proposal to amend the Directive. A broader definition of UBO in relation to passive non-financial entities is recommended in this proposal, which also gives a percentage of ownership of more than 10% (instead of 25%) as an indication of direct or indirect ownership. For this reason, more UBOs must be registered for these types of entities.

The Directive also outlines the minimum requirements for a UBO register. A further elaboration must take place at a national level. In the Netherlands, most provisions of the Directive will be implemented in the Prevention of Money Laundering and Terrorist Financing Act (Wet ter voorkoming van witwassen en financieren van terrorisme). On March 31, 2017, the Ministries of Economic Affairs, Finance and Security and Justice published for consultation a draft legislative proposal concerning the UBO register.

Implementation in the Netherlands

The Dutch legislative proposal defines a UBO as any natural person who ultimately owns or controls a corporate or other legal entity. It does not explain how entities can determine who their ultimate owner is or who can exercise control. This will be set out in more detail per entity in the Commercial Register Decree 2008. The
revised text has not been published yet. Currently, it is not clear whether the Netherlands will adopt a lower percentage as an indication.

The explanatory memorandum to the draft legislative proposal clarifies that pseudo-UBOs will be the daily policymakers of a corporate or legal entity, which could include the CEO or other members of the board.

The UBO register will be managed by the Chamber of Commerce (Kamer van Koophandel). It will be a public register containing the name, date of birth, nationality, and country of residence of the UBO and the nature and extent of their participation. Some of the details of the UBO will not be made public. However, law enforcement agencies are entitled to access a UBO’s date and place of birth, address, SSN and tax number, type, number, date and place of issue identification document and documentation substantiating the status of the UBO.

Central Register for Shareholders

Besides the UBO register, the Netherlands has been preparing a central register for shareholders (‘CRS’) for some time. The CRS should be distinguished from the UBO register. The CRS will include information on shares and shareholders (and pledgees and usufructuaries) of private companies and non-listed public limited companies, as well as European companies and cooperatives with a registered office in the Netherlands. The information will be provided by civil law notaries. Earlier this year, the preparations for the CRS were put on hold to prioritize the development of the UBO register. However, in an adopted motion, the government has made a request to continue the preparations for the CRS. The Labour Party submitted an initial bill on January 19, 2017 proposing that the CRS is held at the Royal Notarial Association (Koninklijke Notarieele Beroepsorganisatie). The accessibility of the register will be restricted.
Exit Rights Developments under the Spanish Companies Act
by Albert Garrofé, Partner, and Idoya Fernández, Counsel, at Cuatrecasas.

There have been few legislative developments of interest recently as Spain’s current government has not passed any relevant bills on corporate law. However, on December 31, 2016, the suspension of article 348 bis of the Spanish Companies Act (“LSC”) ended. This means that on January 1, 2017, the shareholders’ exit right in the event of failure to distribute dividends in unlisted public companies and private limited companies became effective.

Article 348 bis LSC grants shareholders an exit right if, in any corporate year (from the fifth year following the company’s registration in the commercial registry), the annual shareholders meeting fails to resolve to distribute at least one-third of the legally distributable income obtained through commercial operations according to the company’s corporate purpose. Therefore, if there are reasons to exercise this exit right, minority shareholders can leave the company and recover the value of their investment at fair value under the procedure established in the LSC.

Since its introduction into the LSC text, this right has been criticized for several reasons (mainly because it could cause additional financial difficulties for companies at a time of economic crisis). This has led to the rule being questioned by the legislator, which, without repealing it, postponed its application twice, the last time under the First Final Provision of Act 9/2015 (based on the Royal Decree-Law 11/2014), which extended its suspension to December 31, 2016.

For practical purposes, reinstating the right from January 1, 2017 implies that the right of separation for failure to distribute dividends could be exercised from the first annual shareholders meeting, held in the first half of 2017 (likely in June), approving the results of the 2016 fiscal year, and resolving not to distribute dividends under the terms and conditions of article 348 bis LSC.

The exit right caused by failure to distribute dividends is an individual right held by each shareholder and the right to exercise it does not depend on owning a certain percentage of the share capital (owning one share is enough). Shareholders wishing to exercise their exit right must notify the company of their decision to exit within one month from the date of the ordinary general meeting. If the shareholder fails to agree on the fair value of the shares, an independent expert will determine that fair value. Within two months of receiving the expert’s report, the shareholder will be entitled to obtain the fair value of the shares. The LSC provides ways to ensure that this exit right does not damage the company’s creditors, if the shareholder’s exit is implemented via capital reduction.

The significant economic consequences for equity capital that may result from exercising this exit right, the questions that have risen regarding the literal interpretation of the rule, and the need to harmonize its practical consequences with future financing contracts warrant an analysis of the impact that reinstating this right could have on the minority shareholders of Spanish companies.
COUNTRY UPDATE ON UKRAINE

Recent Developments in M&A and Joint Ventures
by Anna Zorya, Partner, and Viktoriia Dobrynka, Associate, at Arzinger Law Office.

On March 23, 2017 the Ukrainian parliament adopted (and is planning to adopt additional) several long-awaited laws aimed at developing significantly the country’s general business environment. These laws cover several core areas: shareholder agreements, squeeze-out and sell-out procedures in joint stock companies, bank reorganizations and the elimination of the mandatory use of stamps for legal entities and private entrepreneurs.

Shareholder Agreements Law

For many years, domestic businesses and foreign investors have not benefitted from shareholder agreements to govern the workings of such entities. Coupled with a rigid domestic corporate legislation, the unavailability of shareholder agreements became one of the major reasons investors decided to incorporate outside of Ukraine.

Under the new shareholder agreement law, a number of conventional contractual arrangements that are widely available outside of Ukraine are now allowed, including:

- voting arrangements;
- share transfer restrictions (e.g., lock-up, drag along, tag along, purchase and sale provisions);
- negative covenants;
- deadlock resolution provisions; and
- irrevocable powers of attorney designations.

Under the new shareholder agreement law, these shareholder agreement provisions shall be binding only on parties to the agreement. The content of these shareholder agreements shall be confidential, unless otherwise agreed by the parties or provided by law (under Ukrainian law, information concerning the parties, their existence and the terms of shareholder agreements of public joint stock companies must be published).

It is worth noting that creditors may also be parties to shareholder agreements. This means that such agreements can be an effective tool for creditors to safeguard their interests by exerting control on material changes at a company. In such cases, the shareholders shall be required to exercise their rights in the manner agreed to with creditors (e.g. to vote or refrain from voting on certain matters, to act jointly or upon the consent of creditors or to buy or sell shares in an agreed manner).

This said, generally a party to a shareholder agreement cannot assert breach of that agreement as grounds to invalidate decisions of the company’s governing body. However, certain affected parties may seek court relief, including:

- to annul contracts with third parties, provided, that such third party knew or should have known that the contract was concluded in breach of the provisions of the relevant shareholder agreement;
- the award of damages, such as payment of a predetermined amount of damages or an amount calculated in the manner agreed among the shareholders (similar to liquidated damages); and/or
- specific performance in the event of a breach of a buy/sell obligation for shares (i) at a pre-determined price, or (ii) upon the occurrence of a predetermined event.

As a result of the adoption of the shareholder agreements law, we expect that the above changes will foster the inflow of investments to Ukraine.
Squeeze-out and Sell-out Procedures

Draft legislation (the “Draft Law”) will (if adopted) amend certain Ukrainian laws regarding shareholder governance level rights for joint stock companies. Under the draft law, a shareholder who directly or indirectly owns or acquired more than 95% of the ordinary shares of a company would have the right to purchase the remaining shares from the company’s minority shareholders. Conversely, minority shareholders would have the right to require such majority shareholder to purchase their shares. For such purposes, all transaction settlements shall be made through escrow accounts.

We note that the Draft Law also stipulates that if a public joint stock company changes its ownership structure to become a private joint stock company or reorganize itself as a limited liability company (which may happen more often given the recent adoption of stringent rules for the administration of public joint stock companies), the resulting entity will not be required to have all of the converting entity’s permits and licenses reissued. This provision is of the utmost importance as it will significantly ease the process of transforming existing public companies into private companies.

Reorganization of Banks

The Ukrainian parliament (by the adoption of the Draft Law) wishes to simplify the procedure of capitalization and reorganization of local banks. The relevant sections of the Draft Law offer two options for banks to comply with the requirements of the National Bank of Ukraine for capital increases and reorganizations:

- Capital increase through a merger of banks on the basis of a simplified procedure. This simplified procedure is intended to (i) significantly reduce the period of time state bodies (i.e. National Bank of Ukraine, National Securities and Stock Market Commission, Antimonopoly Committee) take to review the required documents and issue the necessary permits for reorganizations, and (ii) simplify the formalities to call required general meeting of banks; and
- Reorganization through termination of banking activities without liquidation of the legal entity. This option would allow a bank, upon termination of its banking license, to begin any other business activities as a regular legal entity without being required to be wound-up.