

CorporateLiveWire

MERGERS & ACQUISITIONS 2021 VIRTUAL ROUND TABLE

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Introduction & Contents

This year's roundtable details the latest regulatory changes in Belgium and Japan. Our chosen experts address the impact and shift in strategy for deal makers since the outbreak of COVID-19. It also explores the reasons why 2021 is on track to be the largest year ever recorded in M&A. Other highlighted topics include a discussion on typical stumbling blocks to deal completion, the post-Brexit M&A landscape, and the importance of local knowledge in cross-border deals.



James Drakeford
Editor In Chief



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Meet The Experts



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Shigeki Tatsuno is a partner at Anderson Mori & Tomotsune and specializes in the area of mergers and acquisitions, joint ventures, and cross-border investments. Mr. Tatsuno has extensive experience in advising venture companies and advising on PE funds. He also provides advice to foreign and domestic clients on intellectual property issues/ transactions and general corporate matters. He is qualified in Japan and New York, and has received Bachelor of Law from University of Tokyo and LL.M. from New York University, School of Law.



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Steven De Schrijver is a partner in the Brussels office of Astrea. He has 20 years of experience advising Belgian and multinational companies on mergers and acquisitions, joint ventures, corporate restructurings, acquisition financing, private equity and venture capital, debt structuring and secured loans. He has been involved in several national and cross-border transactions mostly in technology-oriented sectors.

Steven is also recognised as one of the leading commercial IT lawyers in Belgium specialising in new technologies (such as data protection, e-commerce, software licensing, technology transfer, IT-outsourcing, cloud computing, etc.).

Steven holds a law degree from the University of Antwerp (magna cum laude, 1992) and an LL.M Degree from University of Virginia School of Law (1993). He received the ILO Client Choice Award 2012 in the General Corporate Category for Belgium.

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Andrew Sherman is a Partner in the Corporate Department of Seyfarth Shaw LLP. He focuses his practice on issues affecting business growth for companies at all stages, including developing strategies for licensing and leveraging intellectual property and technology assets, intellectual asset management and harvesting, as well as international corporate transactional and franchising matters.

He has served as a legal and strategic advisor to dozens of Fortune 500 companies and hundreds of emerging growth companies. He has represented U.S. and international clients from early stage, rapidly growing start-ups, to closely held franchisors and middle market companies, to multibillion dollar international conglomerates. He also counsels on issues such as franchising, licensing, joint ventures, strategic alliances, capital formation, distribution channels, technology development, and mergers and acquisitions.

Mr. Sherman has written nearly 30 books on the legal and strategic aspects of business growth, franchising, capital formation, and the leveraging of intellectual property, most of which can be found on Amazon. He also has published many articles on similar topics and is a frequent keynote speaker at business conferences, seminars, and webinars. He has appeared as a guest commentator on CNN, NPR, and CBS News Radio, among others, and has been interviewed on legal topics by The Wall Street Journal, USA Today, Forbes, U.S. News & World Report, and other publications.

Mr. Sherman serves as an adjunct professor in the M.B.A. programs at the University of Maryland and as well as the law school at Georgetown University and is a multiple recipient of the University of Maryland at College Park's Krowe Excellence in Teaching Award.

Meet The Experts



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I entered the Ecole Normale Supérieure (a leading French higher education school) in 1964 as a physics student. I passed the highest competitive examination level (agregation) for teachers in France in this field in 1968. I graduated as Doctor in Physics (PhD) in March 1973 and published my thesis on Abnormal Hall effect in semiconductors.

Then, while associate professor at the University of Paris (Paris VII), I worked as a solid state physics researcher in various areas, including hot electrons and semimagnetic semiconductors.

I joined Electricité de France (EDF) in November 1979 as Secretary General to the utility's Research and Development Executive Vice President. In 1982, I moved to the Fuel Procurement Department, where I was responsible first for fuel oil and then the uranium and enrichment purchases for EDF's plants. I was nominated Manager of this department in 1987. With a purchasing budget of 17 billion French francs (3,5 billion Dollars), the Fuel Department is a dominant force on the international uranium and nuclear services markets.

I created the Development and Commercial Strategy Division on February 15, 1989, becoming Electricité de France's first woman Executive Vice President. I defined EDF's commercial policy and its portfolio of new activities; negotiated the sale of electricity to EDF's leading industrial customers; and also headed the team in charge of local development of EDF's industrial wasteland.

I joined the Cogema Group (today Areva group) in 1992 becoming Chairman of the Board, Chief Executive Officer, of SGN Eurisys Group on March 23, 1992. SGN Eurisys Group, the world leader in nuclear fuel cycle engineering has under my leadership diversified significantly in other fields as Chemicals, Oil and Environment while increasing its industrial services and international activities. The Eurisys group was the foremost supplier of engineering and services to industry, with a total turnover of about 1 billion dollars and 9,000 employees including 3,000 engineers and professionals. It was operating in 50 countries, mainly in Europe, Japan and United States.

In 1998, I joined Capgemini as General Manager of Utilities Global Market Unit (electricity, water, gas). I was in charge of developing Capgemini's group presence in the Utilities Market that was undergoing important changes linked to the deregulation, new technologies and new customer services. May 2000, after the merger of Capgemini with Ernst&Young, I was nominated Corporate Vice President and Global Leader of the Sector Energy, Utilities and Chemicals (Oil, Gas, Utilities and Chemicals). This sector represented 11% of the Capgemini total revenue in 2010, compared to 4% in 1998, and spans over North America, Europe and Asia Pacific and includes 11,000 consultants. The Energy, Utilities and Chemicals Global sector's ambition is to serve both global and regional clients to their satisfaction, to increase the group's market presence and to ensure a sustainable development in this important sector. In 2004, I created the global marketing unit at Capgemini, that I developed and lead until 2008. Since July 2012, I am adviser to Capgemini chairman for energy matters.

From September 2010 to April 2015, I have been non-executive chairwomen of TDF, a large European broadcasting company.

I am the founder and general manager of COWIN, a consulting company.



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Colleen is a transactional lawyer who serves as outside general corporate counsel and advisor to middle market clients. She assists her clients in mergers, acquisitions, divestitures, joint ventures, succession planning, venture capital investments, and general corporate governance matters. She regularly advises clients on Hart-Scott-Rodino premerger notification filings. Her diverse client base includes privately held companies, portfolio companies, private equity firms, American subsidiaries of foreign owned entities and public companies, government contractors, manufacturers, distributors, and real estate entities and serial entrepreneurs. Her work has been highly regarded in publications such as IFLR1000 USA and The Best Lawyers in America.

Q1. Have there been any recent regulatory changes or interesting developments?



Steven De Schrijver

Schrijver: The Belgian legislator has introduced three new concepts through the Law of 4 April 2019 concerning the abuse of economic dependence, unfair clauses and unfair market practices in B2B relations. Given the large scope of the B2B Law, (nearly) all agreements used in the Belgian corporate and M&A practice are subject to the B2B Law: sale and purchase agreements (whether share deals or asset deals), shareholder agreements, joint venture agreements, non-disclosure agreements, (transitional) service agreements, etc. For now, only agreements relating to financial services fall outside this scope of application. The law contains, for instance, a black list, with clauses that are prohibited in any event, and a grey list, with clauses that are refutably presumed to be unfair. It has also introduced a general fairness principle, meaning that certain imbalanced clauses may be found imbalanced and therefore abusive, leading to them being null and void. More than ever it is important to carefully draft B2B contracts and maintain supporting documents to provide context to certain clauses.

Belgian practitioners are looking at the emergence of special purpose acquisition companies (“SPACs”). Up until now, no SPAC has been listed on Euronext Brussels. Nevertheless, SPACs are on the rise in neighbouring countries: regulators in France, Italy, Luxembourg, the Netherlands, and the UK have recently approved prospectuses for SPACs.



Shigeki Tatsuno

Tatsuno: Certain revisions to the Companies Act came into effect on 1 March 2021. Among these revisions is the introduction of a “Share Delivery” transaction structure to facilitate corporate acquisitions by way of stock exchanges in Japan. The Share Delivery scheme enables a Japanese stock corporation (the “Acquirer”) to acquire stocks in another domestic stock corporation (the “Target”) in a manner that makes the Target a subsidiary of the Acquirer following the acquisition, and to pay its own stocks to the Target’s stockholders as consideration. With the introduction of the Share Delivery scheme, there are now expectations of a marked increase in the number of stock-for-stock acquisitions.

June 2021 also saw revisions to Japan’s Corporate Governance Code, which sets out the key principles for effective governance of listed companies in Japan (the “Code”). Broadly, the Code has been revised with the following objectives (among others):

- **Improvement of board performance:** The revised Code requires disclosure of the skill sets of every director and engagement of independent outside directors with appropriate management experience.
- **Enhancement of corporate diversity:** To encourage diversity in terms of the age, experience, gender and other characteristics of executives and board members, the revised Code requires companies to determine their needs and strategy, identify personnel who meet these requirements, and disclose their workplace diversity data.
- **Enhancement of sustainability:** The revised Code requires companies to formulate and disclose their basic policies on sustainability initiatives, and to take a proactive (as opposed to a reactive) approach to sustainability and ESG-related issues.
- **Protection of minority shareholders:** The revised Code provides specific guidance for the protection of minority shareholders, such as guidance on the procedures for examining transactions that conflict with the interests of minority shareholders.
- **Strengthening audit reliability, internal controls and risk management:** The revised Code requires, among others, internal audit departments to report directly to the board of directors and board of auditors.

Q2. How has the COVID-19 pandemic impacted the M&A landscape in your jurisdiction?



Andrew J. Sherman

Sherman: The COVID-19 pandemic has impacted the M&A landscape in the United States on a wide variety of fronts, some of which are short-term but many of which will permanently change how M&A deals are done, as well as the key variables driving enterprise values over the long run.

In the short term, many small and mid-sized businesses relied on government assistance programmes such as PPP and EIDL and their financial performance and stability revolved around the cash infusion they received from those programmes in spring 2020 to date. But as these owners consider a sale of their businesses, buyers are engaging in deeper due diligence and discovering weak financial statements and broken business models, which have led buyers to question the long-term financial stability of the seller, which also leads to some confusion as to what the company may be truly worth. Some sellers who were heavily dependent on these programmes may need to wait to enter the marketplace until 2023 or 2024 to demonstrate their viability and financial stability (without assistance).

A second concern revolves around the due diligence topic of compliance. The COVID-19 pandemic exposed certain weaknesses and raised new challenges for small to mid-size companies, as well as large companies in the areas of Occupational Safety and Health Administration (“OSHA”) compliance, state and local employment laws, employment classification issues (particularly in states like California with the AB-5 legislation) as well as the on-going current confusion regarding vaccination policies.



Colleen Pleasant Kline

Kline: Although there was an initial slowing during the early months of the pandemic, since May/June 2020 we have seen an increase in overall deal volume, strategic partnerships, and divestitures. Buyers were at first slower in the earlier stages of the pandemic, when it was unclear what shutdowns may or may not occur; but most strategic or financial buyers have accepted the somewhat fluid environment that COVID has businesses in, particularly in the Mid-Atlantic. Many PE or portfolio companies are looking for opportunities to acquire or consolidate certain businesses, and many of the smaller or mid-market clients are realising with supply chain challenges the need to find strategic partners to help provide better leverage as they navigate the current environment. Government contract mergers and acquisitions has remained steady, with continued emphasis on cyber and health IT firms.



Steven De Schrijver

Schrijver: The Belgium M&A market saw a decline in deal value throughout 2020. Despite an increasing recovery towards the end of the year, the deal value was only about €20 billion, one of the lowest of the last decade and a decrease of 50% compared to 2019. It has, however, to be noted that the decrease was overall smaller than expected. The figures of 2019 may also have been abnormally high because of a few very large transactions. Certain sectors, such as life sciences and technology, were also less impacted than others. The 10 largest deals of 2020 amounted to a deal value of around €8 billion. The 2021 statistics will most probably show a further recovery of the M&A market, which is set to continue in 2022.

It would not be surprising if there is an increase in distressed M&A during 2022, as some companies may perhaps no longer enjoy financial support from the state without which they would not have survived the pandemic, and will now see their financial reserves dwindle. This could be especially true for the retail and leisure sectors.

The COVID-19 pandemic has also impacted the M&A process itself. For instance, due diligence had to focus on matters such as the compliance with state sanitary measures (e.g., the obligation to work from home or to create a safe working environment for employees), financial aid granted to distressed companies, the impact of the pandemic on the performance of contractual obligations, etc. Contractually, the wording on force majeure had to be considered carefully and material adverse change (“MAC”) clauses saw a slight increase in use.

Q2. How has the COVID-19 pandemic impacted the M&A landscape in your jurisdiction?



Shigeki Tatsuno

Tatsuno: COVID-19 has had a dramatic effect on society on a global scale. One consequence is that result of this is the virtualisation of life and work. But an equally pronounced impact of the pandemic is its effect on businesses, with many companies being jolted into rapid adjustments to enhance their efficiency or, in some cases, to stay afloat. M&A has been a key tool for companies to carve-out their non-core businesses, even profitable ones, from their core operations, to facilitate organisational and operational focus. Accordingly, COVID-19 has been a key stimulus of M&A activity in Japan, and indeed globally.

M&A activity has also been driven by the loose monetary policy adopted by many central banks around the world. The ensuing liquidity from such policy has trickled down into financial institutions and investment funds. This has resulted in increased activity by foreign investment funds in Japan to acquire Japanese companies or the carved non-core businesses that they have carved out. An example is the recent sale by Shiseido of its personal care business to CVC partners



Pino Bacinello

Bacinello: The IMF estimates that in 2020 the global economy shrunk by 4.4%, the worst since the Great Depression in the 1930's, and with many countries that spun into a recession. The good news is that it also predicts a global growth of more than five per cent in 2021, driven primarily by India and China, as well as a return to growth for countries – such as the UK, Italy, and others – that suffered the devastating impact of the COVID crisis.

An important factor for the anticipated recovery and growth will be the return to normality for global travel which is currently highly restricted. Creating even more murkiness to the restrictions are the new “virus variants” brightened only by the daily news of changes and availability of immunisations. Travel and tourism is a major economic driver for many businesses in many developed countries, and such travel restrictions have created huge drops in some shopper segments, while other shopper segments experience huge increases as a direct result of the said restrictions. The question is, will this change in spending behaviour be here to stay? Or, will it continue post-pandemic? I don't think any of us know the answer but what I think is clear is that this has created some company winners and some company losers.

Clearly, just as the pandemic impacted most of the world, it has also impacted global M&A activity. Both seller and buyers however, appear to be optimistic about the future business and economic horizon, though both sellers and buyers appear resolved at the most likely prospect that it will be 2022 to 2023 before we return to pre-pandemic levels, and a more balance seesaw.

To varying degrees, some companies have been impacted negatively, and some positively, while others have sustained no impact. Most companies were caught off guard by the pandemic, and were hence forced to look down the barrel of their survival and growth strategies, and where in most cases, each recognises the need to grow by acquisition, through the M&A process, and in order to accelerate their respective recovery, or continued growth post the pandemic. While companies are trying to determine which pandemic induced changes might be somewhat temporary, and which might be more permanent, what to do to recover, or maintain the growth, or grow to avoid a decline, what we have learned from the COVID pandemic experienced thus far is that investment in technology, and digital capabilities will be critical to a company's growth and essential for their survival.



Colette Lewiner

Lewiner: Following the COVID-19 pandemic, citizens and politicians wish to build a more environmentally friendly “New World”. On one hand they are toughening the environment related regulations (for example, the European Union will increase its commitment on greenhouse gas emissions reduction in 2030), and on the other hand politicians are announcing large amount of stimulus funds to green the economy.

Q3. The way transactions are approached has shifted significantly since the emergence of COVID-19. Will any of these changes outlast the pandemic?



Andrew J. Sherman

Sherman: The impact of COVID-19 on changes to the M&A landscape that may be more permanent include an increase in deployment of virtual data rooms, an increase in virtual and deal and transactional teams, and the need for an entirely new approach relating to the critical due diligence issues surrounding corporate culture, given that many companies are still facing human capital shortages and wide gaps in their organisational charts. This will make it very difficult for buyers to get their arms around employee engagement, retention and turnover rates. More indirectly, it may be increasingly difficult to measure the value of brand and reputation, customer loyalty, consistency of repeat orders, as well as customer concentration and dependency issues.

Finally, it appears that the impact of ESG on M&A is here to stay and buyers (especially public company buyers) will now do a much more strategic and deeper dive into issues around environmental impact, diversity and inclusion and good corporate citizenship. Optics will be important as both public and non-public buyers who will want to avoid the “taint” of integrating with a company post-closing that might soil their otherwise strong ESG brand and commitment.



Steven De Schrijver

Schrijver: One of the most significant changes may be the digitalisation of the process itself. Whereas virtual due diligence was already common, virtual conferences, negotiations and closings now have become the standard in many instances. The digital process saves the parties' time and may allow deals to be concluded faster and more easily. The move of organisations to the cloud and an increase of working from home will further stir this evolution.

From a contractual and due diligence perspective, COVID-19 has probably raised awareness with respect to certain previously unthinkable scenarios that have now always to be taken into account, such as sanitary measures that impede businesses from conducting business in an ordinary way.



Shigeki Tatsuno

Tatsuno: COVID-19 has made it difficult for companies to hold in-person meetings and conduct site visits, particularly in the context of cross-border M&A transactions. To overcome these difficulties, many have turned to virtual means of conducting such activities. As a result, Zoom, Teams and other video-conferencing platforms have become an essential part of the way transactions are conducted. In terms of performing due diligence, virtual reality headsets – which provide virtual viewing experiences – are now increasingly popular for virtual site visits. It is unclear whether the conduct of these activities will revert to the way they were before the breakout of the pandemic, but some have argued for certain activities (such as virtual meetings) to stay.

Q3. The way transactions are approached has shifted significantly since the emergence of COVID-19. Will any of these changes outlast the pandemic?



Pino Bacinello

Bacinello: The COVID-19 pandemic has caused a strategic reset with growth-orientated companies and having bold investment intentions with their focus aimed at growth, rather than “just survival” to the other side. Companies are reframing their growth strategies by investing their way out of crises through M&A fuelling the local, cross border, and global M&A markets. As travel restrictions begin to ease and the pandemic begins to reflect a more secure and safe environment, global M&A activity will follow and begin to close in on the pent-up demand. Acquisitions during weak economies often create higher values than most other times. This applies at regional, national and global environments.

The growing interest in global M&A will, still for some time, be negatively impacted by the limited and restrictive travel globally however, there is a mounting desire by growth-orientated companies to take advantage of the current lows within our global economic environments, to execute their respective strategic “growth by acquisition” agendas, and position themselves to exceed industry growth benchmarks, and benefit from acquisition synergies during their own recovery, as well as once we can see ourselves back to some form of normality. Another benefit will be that while accelerating their own growth, companies can also focus on their transition and integration with their target companies during these interesting times, while their competitors may be busy just trying to survive.

These are different times, and demand more reason for companies to look for growth beyond their own core business, by diversifying both in products and services, as well as markets. Global markets are already a playground for large and public companies, but may soon also become a playground for mid and lower mid-market private enterprise. Such strategy if done right, can not only create value by acquiring under-performing assets during weak economic times, but may also de-risk some companies that may have been hit hard by the recent COVID pandemic and economic crisis.

While some companies that experienced strong sustained growth during this pandemic, not all will continue to sustain it post-COVID, and will be well served to look to growth by utilising M&A to tap into new diversified offerings or markets. The most obvious global M&A activity growth sectors are likely to be digitalisation companies and or industries, technology, and direct to consumer sales businesses, and perhaps with growing sensitivity in environmental and social governance issues.

Q4. Globally, 2021 is shaping up to be the biggest year in history for M&A activity. What are the main factors driving this growth?



Andrew J. Sherman

Sherman: 2021 is in fact on track to be the largest year ever recorded in M&A in the United States. It is predicted that by the end of calendar year 2021, over \$6 trillion in reported transactional value will be completed. Of this, the technology industry alone accounts for over \$1 trillion of the total reported value. It is also estimated that there may be several more trillion in unreported transactions in the lower middle market and small business deals that go uncaptured by the current data gatherers.

So what’s driving nearly \$10 trillion in transactional value? The first relevant data points in the United States is the tens of thousands of small business owners that are in the baby-boomer demographic, who are choosing for health or lifestyle reasons to retire and do not necessarily have a workable family succession plan in place. Many of these business owners were probably planning an exit over the next five to 10 years, but their personal plans may have changed or been influenced by the harsh realities of COVID-19.

Who will buy all of these businesses? Well, beyond the typical private equity or strategic buyers, we are also facing what we call the “Great Resignation.” In July 2021, 4.1 million people quit their jobs and in August 2021, an additional 4.3 million people quit their jobs. Many of these families do plan to re-enter the workforce, but perhaps as entrepreneurs or small business buyers they may soon be re-labelling this trend the “Great Turnover” if in 2022 and 2023 a significant increase in 40 and 50-somethings wind up actually buying many of these businesses from 60 to 70-somethings. Many of these families have seen their wealth and net worth increase thanks to stock market gains and increases in real estate prices, creating access to equity which empowers risk and gives these buyers more control of their future destiny.



Colleen Pleasant Kline

Kline: In my opinion there are several key factors that are drivers for growth: (i) the typical cycle for financial buyers required to deploy cash or find an exit horizon for their funds, (ii) the need to examine or invest in businesses that help to address the global supply chain issues, (iii) healthcare, and (iv) a larger consolidation among lower mid-market businesses as a result of COVID and examining the need for strategic partnerships. COVID-19 presented unique opportunities for more technology and the use of it, but it also highlighted several weaknesses in our manufacturing and supply chain within the United States. Businesses with cash to deploy find themselves with the opportunity to consolidate, or find complementary businesses as a means to address opportunities presented or the challenges identified as a result of the pandemic and the change in lifestyle among many as we continue to navigate through the pandemic.



Steven De Schrijver

Schrijver: Companies compete for in-demand assets. This in combination with macroeconomic factors has led to high valuations of assets. These factors include: (i) low interest rates; (ii) the desire of companies to acquire innovative, digital, or technology-enabled businesses or assets (which are necessary to make their business sustainable in the long run); (iii) large amount of cash at the disposal of PE and VC actors; and (iv) an economic recovery in most states that saw a sharp decrease in their GDP.

In other words, due to the pandemic, many companies wanted to achieve the acceleration of digitalisation and transformation of their businesses as quickly as possible. Companies also needed to fill urgent gaps in the skills, resources, and technologies needed to create value in the long-term. Due to M&A being the fastest way to achieve these goals, the landscape for the right deals quickly became highly competitive.

There are also companies in certain sectors such as technology and biotech that have done fairly well during the pandemic and are now looking for opportunities. Perhaps these can be found in the growing number of distressed assets and businesses. These may decide to put parts of their activities up for sale. The cash they will receive from the transaction can then be used for the core business. Or their business can be acquired all together to create further efficiencies.

Another factor contributing to the M&A boom is the SPAC market, accounting for 12% of total global M&A. Going public through a SPAC merger has become popular in VC-funded private companies and start-ups, as it allows acquiring parties to avoid the more onerous regulatory checks of a traditional IPO.



Shigeki Tatsuno

Tatsuno: As noted above, globally, COVID-19 has set off a rise in the volume of M&A activity. As a result, the number of M&A transactions has hit a new record in 2021.

Q5. How is the current financial market impacting the way deals are being structured?



Shigeki Tatsuno

Tatsuno: There is currently considerable liquidity in the financial markets. A direct result of this is that commercial banks are now eager to provide M&A financing, thus enabling many M&A transactions to be conducted via debt-financing. Nevertheless, many dealmakers are keeping a close watch on movements in the financial markets, including possible changes in the policies of major central banks, particularly the expected tapering of monetary policy by the U.S. federal reserve and the dampening effect it may have on the volume of M&A transactions.

Q6. Which industries or jurisdictions currently provide the best opportunities?



Steven De Schrijver

Schrijver: Certain sectors – such as life sciences, technology and telecom – have done well despite the pandemic. These sectors may create opportunities for PE funds willing to invest in promising or healthy companies. On the other hand, sectors that have ran into difficulties – including retail, food, leisure and manufacturing – may provide the opportunity to acquire targets for a lower price than would normally be the case and hold these participations until the global economy stabilises.



Shigeki Tatsuno

Tatsuno: With the ageing population in Japan, policymakers are promoting greater interest in Japanese start-ups involving the latest technologies, such as the internet of things (IoT), artificial intelligence (AI) and financial technology (FinTech), in hopes of leveraging them to enhance productivity and economic growth in various industries. As the Japanese government is expected to introduce more initiatives in the coming years to incentivise investments in these areas, they present opportunities for foreign investors.

Investments in the healthcare technology sector have been particularly favoured in recent years by both domestic and overseas companies in view of the ageing demographics that many countries are experiencing. Opportunities in this sector have been abundant, what with the continued rise in the number of local “med-tech” start-ups and the recent inclination of large domestic companies, such as Hitachi, to spin off some of their ancillary medical technology divisions to focus on their core businesses.

Beyond the domestic market, Japanese companies in recent years have been particularly focused on emerging markets, including Southeast Asia, where sizable and young demographics provide an attractive counterpoint to Japan’s shrinking population. The flourishing tech ecosystem that is emerging from the Southeast Asian region is also drawing venture capital from Japan. With that said, the legal, commercial and political systems differ significantly from country to country within Southeast Asia, and care needs to be taken in navigating the potential pitfalls presented by the diversity of systems.



Colette Lewiner

Lewiner: One-third of post COVID-19 stimulus plans in the European Union will be devoted to environmental related projects. They will provide good investment opportunities in renewable energies (solar photovoltaic, onshore and offshore wind), electrical batteries, electrical vehicles, “green” hydrogen production, energy efficiency, and low carbon investments.

Q7. What are the most significant post-Brexit changes to M&A in the UK and Europe?



Steven De Schrijver

Schrijver: We see a number of important implications of Brexit for M&A between the UK and the EU:

(i) Cross-border mergers between UK companies and EU usually depend on the presence of bilateral mechanisms allowing cross-border mergers with UK companies: for instance, under Belgian legislation a cross-border merger with the UK is possible if it is also permitted by UK legislation.

As the EU Merger Directive is no longer applicable to the UK, the European Commission no longer has exclusive control over mergers involving a UK party. Therefore, at least two regulators (from the UK and the EU) will have to be involved to approve such concentrations. This will require more time and costs, but also increases the risk of conflicting conditions to the approval of the concentration.

(ii) The “transfer of undertakings” principle for the automatic transfer of employees in asset transactions may no longer be applicable in case of a UK target.

(iii) European private M&A transactions are often based on UK law and inspired by UK market practices. In absence of a UK connection, it may no longer be sensible to submit them to UK law and UK courts. Indeed, UK courts may no longer be bound by ECJ case law. In addition, mutual enforcement and recognition of judicial decisions between the UK and EU may cause difficulties.

(iv) If commercial contracts of the target have territorial effect within the EEA, the UK is no longer covered. The due diligence should review whether such commercial contracts do, and continue to, operate in the UK. If not, this has to be repaired contractually, but this is not always feasible. This could have consequences for the value of those contracts and thus possibly also for the value of – and purchase price for – the target.

(v) It is still uncertain whether future changes to UK privacy law will be considered adequate by the European Commission, or whether the UK’s adequacy decision may be lost. This would lead to major issues with respect to the transfer of personal data to the UK.

Q8. How important is local knowledge when conducting cross-border M&A and what other considerations need to be factored in?



Colleen Pleasant Kline

Kline: Local knowledge is extremely important in conducting cross-border M&A transactions. Not only does a Buyer need to understand local laws and regulations, and the impact on tax and financial expectations. Depending on the size of the parties involved and how frequently they engage in cross-border transactions, I find many buyers are surprised by the significant differences in employment law and struggle with how to merge two unique cultures while complying with both a U.S. and a more global regulatory environment. While taxes are always a significant driving factor in how a transaction may be structured or impacted, I also think it is important to understand the local culture and expectations to make certain any synergies expected are realised.

*“One-third of post COVID-19 stimulus plans in the European Union will be devoted to environmental related projects.”
- Colette Lewiner -*

Q8. How important is local knowledge when conducting cross-border M&A and what other considerations need to be factored in?



Steven De Schrijver

Schrijver: It is always strongly recommended to involve local counsel when conducting cross-border M&A. Local counsels will have a good knowledge of the local M&A environment, local customs and business practices, important cultural aspects, and may connect the deal team with local experts (e.g., tax or accounting advisors, or specialised lawyers).

From a legal point of view, there are of course also many benefits. Local counsel may for instance inform the deal team of contractual clauses that may be held null and void due to overriding mandatory law of the foreign jurisdiction. When dealing with regulatory matters, local counsel will be able to provide more insight into the procedural aspects (e.g., how can the regulator be approached informally to seek guidance?) and the regulatory practices.



Shigeki Tatsuno

Tatsuno: Many M&A transactions do not close or, even if closed, ultimately fail for unsuccessful integration of the target into the acquiring group, due to failure to recognise and address differences in corporate culture.

Ideally, senior executives with a deep understanding of the acquirer's culture should be involved in the M&A process from the start, to familiarise themselves with the corporate culture of the target company, and to draw up pragmatic plans for the manner in which the acquirer's corporate philosophy can be introduced to the target to create synergistic outcomes.

A successful and efficient integration process is also often dependent on key persons at the target company. It is therefore important, even as early as the due diligence stage, for the acquirer to identify personnel capable of contributing to a smooth integration and successful future operations. The acquirer should as soon as practicable after identifying such personnel, induce them to stay with the target company through reassurance or discussion of future incentives.

Placing key persons from the acquirer within the target company would also enable the acquirer to win over the target's employees by establishing a good rapport. Respect towards the target's employees is also essential.

It is also worth mentioning that the corporate de-merger mechanism under the Companies Act of Japan is different from the spin-off scheme available under U.S. law. As noted above, many companies in Japan are carving out non-core businesses from their operations. To do so, many utilise the de-merger mechanism. In this regard, acquirers should be aware that the Employment Contracts Succession Act applies to de-mergers. What this means is that employees mainly engaged in transferred or carved-out businesses have the right, if they so wish, to be transferred together with the de-merged business, even if their employment contracts fall outside the scope of the de-merger agreement. This is one of the several ways in which the de-merger mechanism in Japan differs from the spin-off scheme in the U.S., and consultation with legal counsel is essential when acquiring a carved-out business in Japan.

"Advisors should be able to think outside the box in order to solve certain potential impediments to the transaction (e.g., a W&I insurance could be considered to facilitate the negotiations on the representations and warranties)"
- Steven De Schrijver -

Q9. What steps can be taken to help maximise deal value?



Steven De Schrijver

Schrijver: Preparation is key. Businesses should carefully consider the targets they would like to acquire or invest in, involving tax and financial experts at an early stage to review the feasibility and the opportunity of a potential deal. Strategy, operations, financial and tax teams should cooperate from the outset of acquisition planning.

Similarly, legal advisors should be involved early in the negotiations, especially when putting the first terms on paper in a MoA. It may be sometimes better to hold longer negotiations on the MoA as these may make the process of negotiations the transaction documents themselves easier and limit the chance that a deal can be cancelled after a lengthy and cumbersome due diligence process.

Advisors should be able to think outside the box in order to solve certain potential impediments to the transaction (e.g., a W&I insurance could be considered to facilitate the negotiations on the representations and warranties). Finally, sufficient time should be spent on assessing the target's organisation and culture in order to plan an efficient and welcomed further post-acquisition integration.



Shigeki Tatsuno

Tatsuno: In recent transactions, a substantial portion of a company's value can often be found in its intellectual properties ("IPs") and other intangible assets. Where ownership of such assets belongs to a company's employees, the value of the company could be significantly affected if the relevant employees leave the company. One way of dealing with this problem is for companies to establish the rule that works created in the course of employment belong to the company. Alternatively, a company could do its best to retain those employees who own IPs that are key to the company's operation and value.

Q10. Currently, what are the biggest stumbling blocks to closing M&A transactions?



Colleen Pleasant Kline

Kline: The largest stumbling blocks to closing an M&A transaction is often managing expectations and the timeline. With significant increase M&A activity in the last year, and particularly the last quarter, many of the outside professionals who provide M&A services are facing increased workload, often with decreased resources due to the war on talent occurring. As a result, certain timelines to complete quality of earnings, and other reviews are taking slightly longer than in normal years in my experience. Clients, particularly sellers who are unsophisticated in complex transactions, struggle to understand both the importance of these tasks for a buyer and the impact on overall deal timeline.



Steven De Schrijver

Schrijver: There are many stumbling blocks to closing M&A transactions. In most cases, these are non-legal (e.g., changed financial circumstances, difficulties in the negotiation on finances, etc.). Legal issues that often arise include: (i) the discovery of large potential liabilities during the due diligence which may not be acceptable to the buyer, such as on-going litigations or tax disputes; (ii) discussions on the scope, time limit and caps of representations and warranties; (iii) IP ownership issues, leading to a decreased value of the target; and (iv) the non-fulfilment of conditions precedent, such as a failure to obtain third-party consents (e.g., merger approval).

Q10. Currently, what are the biggest stumbling blocks to closing M&A transactions?



Shigeki Tatsuno

Tatsuno: Antitrust clearance is often seen as a stumbling block to closing, particularly in multi-jurisdictional M&A transactions. Depending on the jurisdiction involved, the clearance time needed could sometimes be prohibitively long. This creates a lot of deal uncertainty.

Foreign investment restrictions also present hurdles to closing. Recently, many countries have expanded the scope and stringency of their foreign investment regime. For example, stricter rules on foreign investments have had the effect of restricting or even prohibiting investments in the technology sector, widely regarded as critical to a country's infrastructure, in certain countries. However, foreign investment regulations may sometimes be too complex, broad and/or fluid, and this causes significant uncertainty in cross-border M&A transactions in certain sectors.

Q11. As we come towards the end of President Biden's first year in office, do we have a clearer picture as to how his administration will approach M&A transactions from a competition and anti-trust perspective?



Andrew J. Sherman

Sherman: The Biden Administration will clearly be exercising greater scrutiny over M&A transactions from an anti-trust perspective, particularly in the industries where this Administration perceives unfair competition or excessive competition barriers. Industries on their radar screen clearly include big tech, healthcare (and new drug development) quantum computing. Industries such as environmental services, education, semi-conductor manufacturing and multi-family housing are unlikely suffer as much scrutiny, since there is still much work to be done and more investment needed in these areas.



Colleen Pleasant Kline

Kline: The FTC under President Biden's administration has signalled that it intends to take a much more aggressive approach to merger review. Not only has the agency indicated that they intend to examine how certain private equity deals may be structured, a blog post this summer also created significant murkiness on how the FTC treats debt in stock deals, and it appears to imply that prior guidance are no longer the position of the agency, and rendering a resource often used to assist in a fact specific analysis highly questionable. The net result is that we will see an increase in required regulatory filings, and the agency taking what appears to be a much deeper dive in certain transactions.



Q12. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?



Andrew J. Sherman

Sherman: There are several trends and market conditions in the United States which should be closely monitored and which will have either a very positive or negative impact on the M&A marketplace in 2022 and beyond. The forecast is generally robust for next year and could easily be another record-setting year, but we plan to carefully monitor the following key trends and market conditions:

- Interest rates and the cost and access to M&A acquisition capital.
- Tax rates with a partial focus on capital gains and estate tax exemption limits.
- Inflation risks, with a special focus on energy costs.
- Geo-political risks, with a special focus on US/China relations.
- Supply chain dysfunctionality.
- The upcoming 2022 and 2024 elections.
- The management of the Omicron variant and overall management of the pandemic in 2022 as we work toward herd immunity.



Colleen Pleasant Kline

Kline: I see key trends in re-domesticating or increasing more local manufacturing and distribution capabilities, particularly within healthcare and continued investments in pharmaceuticals. I expect to see continued growth in the technology sector in response to the fact that a more mobile work environment is likely to continue, and businesses realise the need to use technology to address labour challenges. In my local market, I am seeing a slight downward trend toward office commercial real estate, but a slight uptick on industrial/laboratory real estate transactions. While there is a perceived need to increase the manufacturing capabilities within the United States, the labour market challenges may present difficulties in expanding this.



Steven De Schrijver

Schrijver: We expect the number of M&A transactions in Belgium to be on the rise again, given that financing remains relatively cheap and a large number of PE and VC actors remain willing to invest in promising targets. In fact, in around 36% of all Belgian transactions private equity funds are involved. The market will most likely remain a sellers' market, especially when PE players will compete with each other for attractive targets in certain sectors. Statistics also show that the valuations and multiples for targets remain higher, which is another sign of a highly competitive PE environment.

We further expect a rise in distressed M&A. The governmental financial support measures to companies during the COVID-19 pandemic will slowly be decreasing, while the Belgian moratorium on bankruptcies ended in January 2021. Certain companies have been kept alive thanks to these measures, but it is likely that they may not be able to fully recover. This may provide the opportunity for stronger competitors to acquire their peers.

From a legal perspective, an important development will be Belgium's first FDI screening mechanism, which in certain cases may lead to a transaction being blocked or additional conditions being imposed. It will be interesting to see how this mechanism will apply in practice and whether or not it will create significant challenges to foreign investors who are willing to invest in certain sectors that are essential to the Belgian economy.

"I expect to see continued growth in the technology sector in response to the fact that a more mobile work environment is likely to continue, and businesses realise the need to use technology to address labour challenges."

- Colleen Pleasant Kline -

Q12. What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?



Shigeki Tatsuno

Tatsuno: Japan seems to have kept the pandemic under control, and restrictions on businesses are therefore expected to be further lifted. Assuming a global improvement in pandemic control, it is anticipated that 2022 will witness even greater levels of domestic and cross-border M&A activity.

Japanese businesses will also continue to be targeted for acquisition by foreign companies and funds for their technology. At the same time, Japanese companies are expected to seek targets and markets of value abroad.

In terms of the change we hope to see, there has been growing focus on ESG and SDG investing, and more and more companies are under pressure to take environmental, social and other sustainability issues into consideration in their investments and activities. Companies are increasingly accountable to their shareholders on these issues and have to keep them in mind in all the activities they undertake. This is an important development and we hope to see companies taking a more serious view of matters of sustainability. One example is the issue of human rights. There is currently no equivalent of the UK Modern Slavery Act in Japan, and we expect to see change in this in the near future.



Colette Lewiner

Lewiner: The post COVID-19 world will be different from the 'old' one. Work habits will change with more virtual interactions, business processes will become more digital, and travelling will be reduced. If new pandemic waves trigger new lockdowns, there will be a deep economic crisis that could trigger a social crisis creating unrest and discrimination. I wish that this will not be the case and that the 'new' world will be more friendly and greener.



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