Our Insights into M&A Trends - Global Dynamics

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CLIFFORD CHANCE

Contents

M&A - The Global Picture

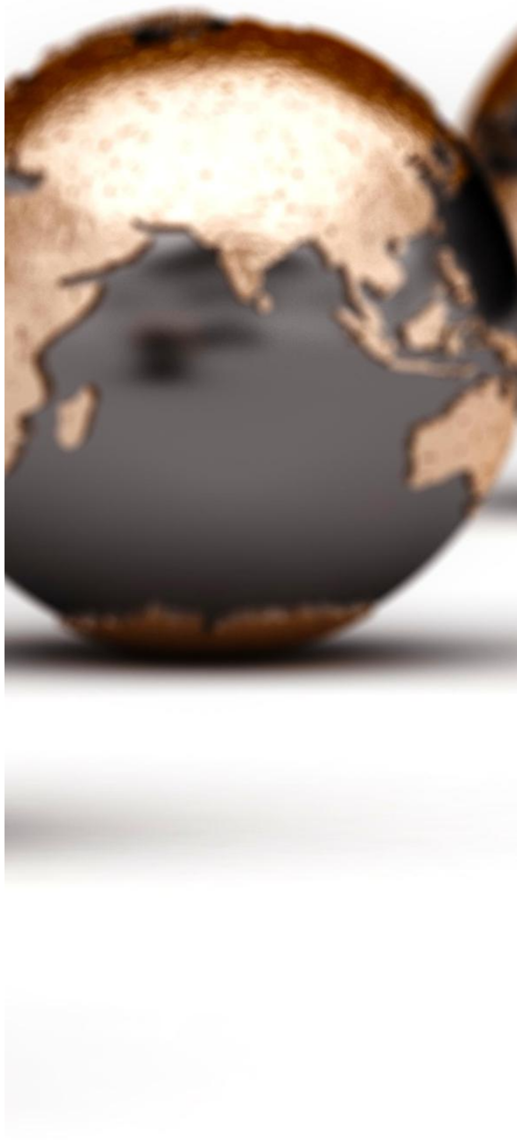
“There's no doubt that we are experiencing a challenging period for M&A. Significant macro-economic and political factors are combining to create an unsettled global picture, including: the spectre of double-dip recession in many developed countries; the possibility of nations exiting the Euro; political instability across the Middle East; forthcoming Presidential elections in the United States, Russia and France and leadership transition in China in 2012.

Despite this unsettled environment, some areas of the market are performing relatively well: in particular natural resources and energy assets remain in demand, with shale gas M&A particularly strong in 2011. Inbound investment into China, Australia and Latin America also remain relatively strong.

What we are hoping for in 2012 is stability in the economic markets, and a decrease in geo-political risk, which will have the effect of encouraging buyers and sellers to re-engage in M&A discussions. Without these factors, there is unlikely to be any major uptick in general overall levels of activity and the current caution surrounding transformational "bet the shop" deals will continue. Even if this is the case though, we anticipate a continued focus on cross border activity and opportunities for increased activity around strategic alliances, asset swap deals and other transactions with lower risk, as well as spin-offs and deals arising from corporate debt restructurings and regulatory change.

Once confidence returns, the fundamentals are certainly in place for M&A activity to increase significantly towards the end of the year and into 2013 – in particular there are significant cash reserves on corporate balance sheets in North America and Europe, and liquidity in PE funds seeking deal opportunities. Equally on the sell-side regulatory change will increasingly drive the need for continued consolidation in some sectors, particularly financial services. Relatively low valuations mean we could see more unsolicited transactions and innovative deal structures.”

Matthew Layton
Global Head of Corporate
Clifford Chance LLP



Overview of Trends

Significant sector and regional variations

Rise in protectionism and political pressure

Global impact of Eurozone uncertainty

Sharp decline in activity levels in second half of 2011, and uncertain outlook

Gap between buyers' and sellers' expectations

Increased focus on anti-corruption measures

Growth markets expected to continue to create M&A opportunities

Overview of Trends

Changing landscape of public deals

Rapidly evolving merger control environment

Sweeping changes to regulatory landscape

Increasing cross-border activity

Private equity adjusting to the credit squeeze

Debt markets in Europe are particularly challenging

Shareholder pressure and scrutiny on the rise

Global activity levels

Sharp decline in second-half of 2011, and uncertain outlook

Global M&A activity for 2011 increased 2.5% over 2010 - transactions totalled US$ 2.18 trillion. Whilst 2011 was the strongest worldwide performance since 2008, activity levels declined for each quarter during the year. 2011 saw the collapse of a number of headline deals including the highest value deal, AT&T/T-Mobile USA

Second-half of 2011 saw significant decline in M&A, as continuing Eurozone crisis impacted. In particular, Q4 2011 saw a 31.9% drop in Asia-Pacific M&A, a 28.7% drop in European M&A and a 9.3% drop in US M&A (compared to Q3 2011)

Cross-border M&A is a continuing trend – comprised 41.5% of global M&A activity in 2011 (cross-border between individual countries). Deals between regions are up 19.6% on 2010

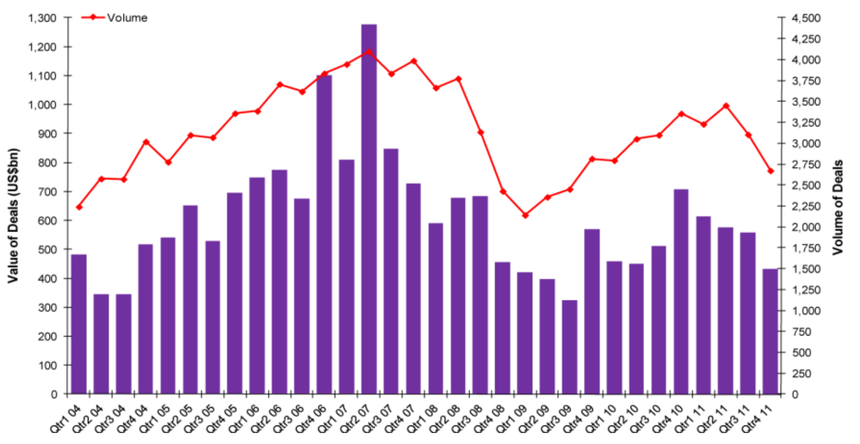
M&A activity in the emerging and high growth markets totalled US$459.7bn in 2011, a decline from 2010 but nevertheless the second highest total over the past decade. Inbound M&A into these markets was up19.1% (compared to 2010), with Europe being the largest investor

Energy, Mining and Utilities was the most active sector generally in 2011 (value of deals = US$557.7 bn), and the most active for cross-border M&A

Overall, 2011 was the strongest year for private equity buy-out activity since 2008 (US$277.7bn, accounting for 12.9% of M&A deals), however Q4 saw a 33.7% drop compared to Q3 2011 (with Europe and Asia-Pacific experiencing a 40% and a 66.9% drop respectively)

Announced public M&A for 2011 was ahead 16.5% on 2010, with 2011 being the least hostile period since 2007

Global M&A Activity - Quarterly

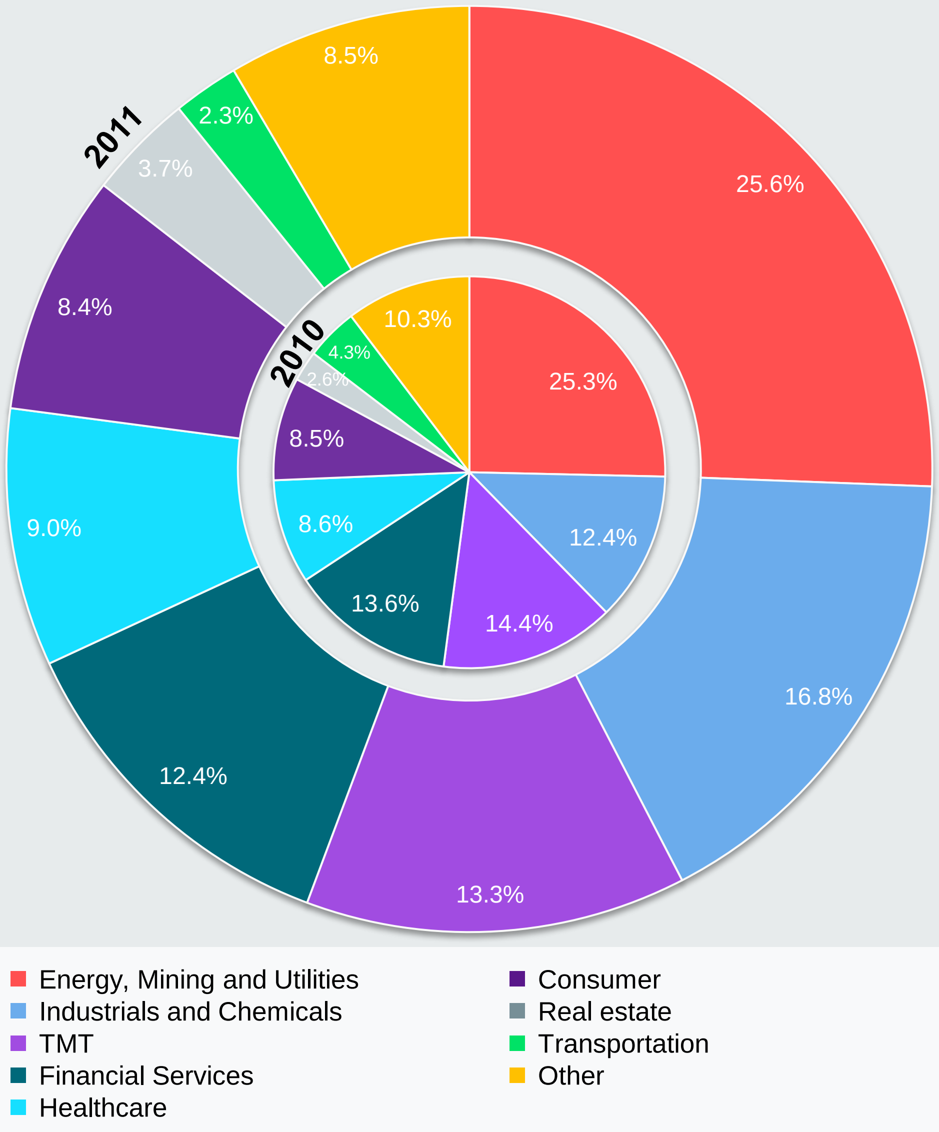


Roger Denny, Head of M&A, Asia:
"Global M&A will continue to be affected by the Eurozone crisis, the risk of recession and politics in 2012. Deals are still going to be done even in this unsettled environment though, and with a reasonable prospect of greater stability emerging, we expect to see significantly more confidence in doing deals as the year progresses"

Source: mergermarket M&A Round-up for Year End 2011

Sector variations
and outlook for 2012

2011 market share: showing change from 2010 market share



"The energy, mining and utilities sector has been the most active sector by value in 2011 with some US$557.1 bn in announced deals, up 3.6% from 2010 (US$537.7 bn). This buoyant market has been fuelled in part by the Asian superpowers continued fight for natural resources and assets becoming available at reasonable prices. The frenzy is expected to continue unabated, fuelled by strong demand for natural resources, the rush to secure shale gas expertise and with particular focus on the untapped resources of less well developed regions, such as Africa"

David Lewis, Head of Energy (Oil & Gas and Mining) M&A

"Financial institutions, particularly in Europe and the US, are being forced to reassess their strategic priorities as a result of ongoing and anticipated regulatory changes. Regulatory change, economic pressure and political uncertainty are driving increasing numbers of divestitures of assets (particularly non-core assets), divisions and/or teams by financial institutions who are focused on improving their regulatory capital positions. Whilst these drivers present difficult and ever-shifting challenges, particularly for the larger and well-established financial institutions, they also present real opportunities for new entrants and smaller players in the sector, wishing to gain a foothold in the market"

Patrick Sarch, Co-head of Banks Sector M&A

"The CG&R sector is an important sector for global M&A activity (around 8%) with Asia-Pacific outbound M&A, in particular, growing rapidly. We see the regions with the greatest potential as being Asia (in particular China and Japan) and Russia. In China, the dynamism of outbound M&A is fuelled by the rising purchasing power of the Chinese consumer, the huge foreign reserves and strong Renminbi and government policy encouraging overseas acquisitions. Japan benefits from a strong Yen and strong balance sheets, but limited growth in Japanese domestic market, leaving little choice but to look offshore. Russia has a buoyant M&A market with a growing affluence of middle classes"

Catherine Astor-Veyres, Head of CG&R M&A

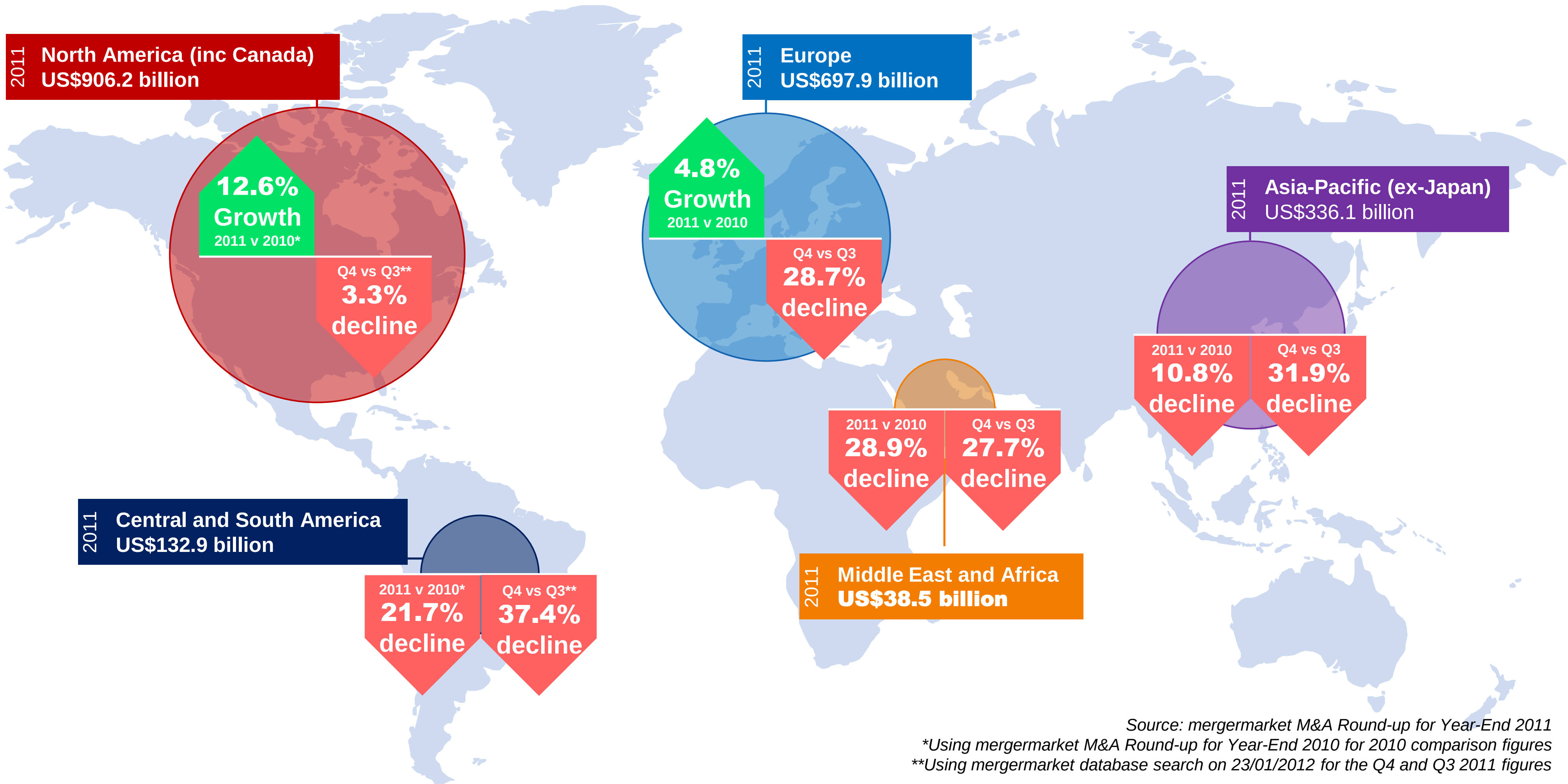
"2011's uptick in M&A activity in the healthcare sector shows no sign of dwindling. Companies already confronted with expiring patents and weak pipelines are facing increasing healthcare budget deficits and regulatory constraints which negatively affect their margins and continued patent challenges that force them to adopt inorganic growth strategies. Changing demographics, and a desire to improve healthcare infrastructure, keeps healthcare in the focus of major stakeholders and investors in established and emerging markets alike"

Peter Dieners, Head of Healthcare M&A

Regional Picture

Significant regional variations in 2011 – strongest activity in North America and Europe

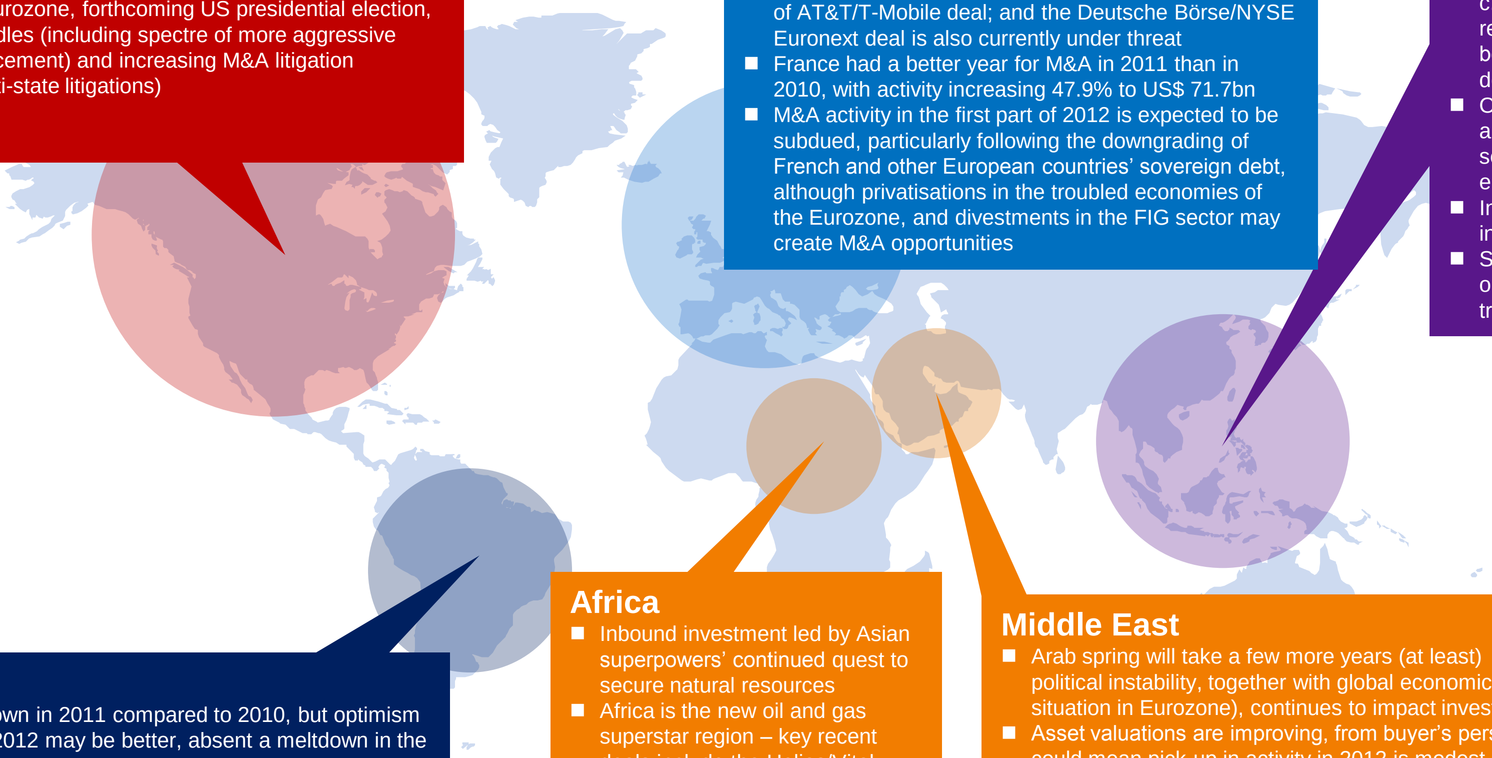
Map highlights: (i) value of M&A transactions within each region in 2011; (ii) growth/decline in activity for 2011 as compared to 2010, and (iii) growth/decline in activity for Q4 2011 as compared to Q3 2011:



Source: mergermarket M&A Round-up for Year-End 2011
**Using mergermarket M&A Round-up for Year-End 2010 for 2010 comparison figures*
***Using mergermarket database search on 23/01/2012 for the Q4 and Q3 2011 figures*

Regional Picture

Key impacts in different regions



North America
- Strong H1 and weaker H2 in 2011
- US inbound M&A decreased to second lowest since 2005, outbound M&A increased to highest level since 2008
- Drivers for M&A in 2012 include: relatively favourable valuations, high corporate cash balances, expected US tax changes, and under-invested PE funds
- However factors which may hamper M&A activity include: upheaval in Eurozone, forthcoming US presidential election, regulatory hurdles (including spectre of more aggressive antitrust enforcement) and increasing M&A litigation (including multi-state litigations)

Europe
- Concerns about a break up of the Euro and recession in the Eurozone saw a sharp decline in European M&A in second half of 2011 – 33.2% lower than first half of year
- Some Eurozone countries saw Q4 M&A activity decline dramatically from Q3 (Ireland was down 95%, Spain down 61.6% and UK down 44.6%)
- German activity levels suffered as result of the collapse of AT&T/T-Mobile deal; and the Deutsche Börse/NYSE Euronext deal is also currently under threat
- France had a better year for M&A in 2011 than in 2010, with activity increasing 47.9% to US$ 71.7bn
- M&A activity in the first part of 2012 is expected to be subdued, particularly following the downgrading of French and other European countries' sovereign debt, although privatisations in the troubled economies of the Eurozone, and divestments in the FIG sector may create M&A opportunities

Asia-Pacific
- Inbound investment into Australia broke new records in 2012, with c.40% of deals from the mining and resources sector – and Australia became China's top investment destination for the first time
- Outbound M&A from the region also strong, driven by the desire to secure natural resources and energy
- Increasing interest in investments in listed entities
- Strong and continuous trends on outbound M&A by Japanese trading houses and corporates

South America
- M&A activity levels down in 2011 compared to 2010, but optimism that activity levels in 2012 may be better, absent a meltdown in the Eurozone or China
- Inbound activity from developed markets (US, Spain, Japan,) and increasingly from China
- Outbound activity largely driven by Latin blue chips looking to establish themselves as truly global players
- Intra-LatAm M&A activity also expected, as companies in Mexico, Brazil ,Colombia etc seek to expand into neighbouring markets

Africa
- Inbound investment led by Asian superpowers' continued quest to secure natural resources
- Africa is the new oil and gas superstar region – key recent deals include the Helios/Vitol acquisition of Shell's Africa downstream business

Middle East
- Arab spring will take a few more years (at least) to yield definitive changes – regional political instability, together with global economic issues (including unresolved situation in Eurozone), continues to impact investor appetite in the region
- Asset valuations are improving, from buyer's perspective, but higher execution risk could mean pick-up in activity in 2012 is modest. The drive by countries such as Libya and Iraq to rebuild (and growing interest from Qatar, for example, to invest in them) could be a new source of M&A activity in the region
- Greater interest in SMEs, as private equity firms amongst others look for smaller, more digestible deals
- Regional sovereign wealth firms increasingly looking at club deals to minimise risk and maximise know-how sharing

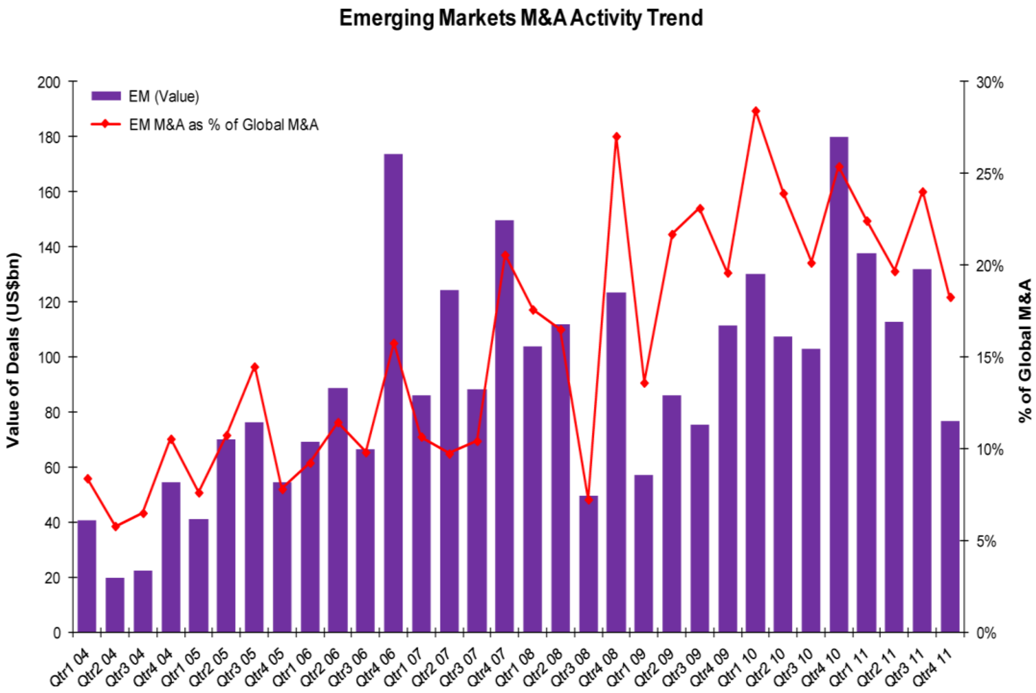
Expected drivers of M&A activity in 2012

Growth markets

Creating M&A opportunities in 2012

The value of growth markets M&A activity represented more than 20% of global M&A in each of the last three years, although activity levels fell in 2011. If the negative effects of the Eurozone situation continue and the outlook for the US market remains uncertain, the emerging and high growth markets represent potentially the greatest opportunity for increased M&A activity in 2012

- Cross-border M&A into growth markets was particularly strong in 2011 with total value exceeding 2010 levels by 19.1%
- Significant inbound investment from organisations based in developed markets chasing opportunities for higher potential growth outside their traditional markets. Buy-out activity is also increasing
- Drivers for growth in 2012 include: forecast economic growth rates, access to key natural resources and potential for greater returns on investment than in more developed regions
- Challenges for inbound M&A activity include: evolving regulatory environments, difficulties associated with cross-border due diligence, level of legal protections afforded by local laws and courts, and perception of increased corruption risk
- Successful execution of M&A requires understanding of local practice, and how this is developing in response to the challenges for inbound M&A activity. Norms for more developed markets are often not appropriate
- Outbound M&A is being driven by major privately owned companies who are looking for opportunities to access natural resources and enter new markets



Source: mergermarket M&A Round-up for Year-End 2011

Growth markets:
Spotlight on the BRICs

We put a spotlight on the BRICs – which still represent nearly 2/3 of total growth market M&A by value – to explore the key trends in the markets and some of the challenges to be overcome to enable cross-border M&A to be undertaken successfully

- **Value of M&A** in China increased by 8% from 2010 levels to US$103 bn in 2011
- **Inbound M&A activity** continues to increase as foreign investors shift focus from export manufacturing to tap into China's massive domestic consumption market
- **Evolving merger control environment**, combined with the newly-introduced national security regime, increase deal uncertainty for high-profile cross-border transactions
- **High-profile corruption scandals** have led to greater focus on anti-corruption risk and diligence
- **Revised Industry Catalogue for Guidance of Foreign Investment** (takes effect 30 January 2012) promises to open up Chinese market to foreign investment in new technology, high-end manufacturing, energy conservation, environmental protection and modern services sectors
- **Rise of domestic RMB private equity funds** is increasing competition for quality targets in China
- **Outbound M&A activity** is sharply rising - 286 transactions totalling US$22 bn completed in H1 2011, driven by a desire to secure natural resources, expand into new markets, and acquire brands/technologies. Privately owned companies likely to lead the wave of outbound M&A in 2012

- **Value of M&A** in Brazil increased by 8% from 2010 levels to US$85 bn in 2011
- **Private equity interest is strong,** with international houses opening offices/acquiring stakes in local managers
- **Evolving merger control environment**, with suspensory filings due to be introduced in 2012
- **Joint venture or minority investments** common for inbound transactions, so investor benefits from local experience of dealing with extensive licences, permits, regulatory supervision, etc
- **Due diligence often flags numerous issues**, compared to M&A in developed markets, including employee lawsuits, historic tax litigation, potential environmental liability etc. Apportionment of liability discussions may be extensive, particularly if foreign investor is unfamiliar with market
- **Targets are often privately-held family grown businesses,** resulting in difficult negotiation dynamics (e.g. selling shareholders may have unrealistic views of value, and/or desire to block change)
- **Outbound M&A activity** expected to continue increasing. As well as investment into developed markets, there is new focus on investment into other Latin American countries
- **Domestic debt finance available** for outbound M&A, but can add an additional deal execution risk as some local banks lack experience/understanding of typical issues arising on cross-border transactions

Source: mergermarket M&A database searches undertaken on 11 January 2012 based on the dominant geography of the target.

Growth markets:
Spotlight on the BRICs (continued)

- **Value of M&A** in India reduced by 43% from 2010 levels to US$29 bn in 2011
- **Inbound M&A** increased 63% from US$14 bn a year ago (April-Nov 2011), primarily in hot sectors of services, construction, power, computers and hardware, telecoms and housing, real estate and pharmaceuticals. Steep depreciation in Rupee and stock market falls currently make Indian targets attractive for foreign investment
- **New Indian Takeover Code** raises the threshold for mandatory public offerings to 25% (previously 15%). Value and volume of PIPE deals likely to increase but require careful structuring. Minimum offer size increased to 26% (from 20%)
- **Evolving regulatory environment -** new Government approvals required for foreign ownership of Indian pharmaceutical companies may dampen M&A in this 'hot' sector. Expected liberalisation of telecommunications regulations are likely to help consolidation in this sector
- **Merger control rules –** came into force in 2011, introducing timelines for obtaining antitrust approval of up to 7 months in some cases, increasing deal uncertainty and requiring greater focus on deal protection provisions
- **New Direct Taxes Code** expected later this year will significantly impact structuring of inbound and outbound investment. Recent ruling in favour of Vodafone in its dispute with Indian tax authorities is positive for foreign investment into India
- **Outbound M&A** amounted to approximately US$7.5 bn in April to December 2011. Energy assets, particularly in SE Asia, Africa and Australia, are attractive targets for outbound M&A

M&A trends in India were discussed in our recent webinar "Market developments in India", which is available through the Clifford Chance Global M&A Toolkit at www.cliffordchance.com/GlobalM&AToolkit

- **Value of M&A** in Russia remained steady in 2011 at US$75 bn
- **Inbound M&A** focused on infrastructure, transportation and financial sectors (alongside the evergreen energy sector). Increased focus on quality of target /management team, and 'value-add' investors who can contribute expertise and/or international experience
- **State institutions and banks** increasingly active, acting essentially as PE investors undertaking own-book M&A. State banks are also a key source of finance for many Russian deals
- **Use of minority or 50/50 investment structures** typical on inbound transactions. 100% acquisitions by foreign corporates remain relatively rare
- **Domestic political situation** likely to cause a short term cooling of inbound investment, with international investors taking a 'wait-and-see' approach regarding the presidential elections
- **Private equity market** continues to mature, notwithstanding ongoing difficulties with fundraising. Impact of international PE houses remains limited
- **Off-shore structures** typically used, both for cross-border and local M&A as most domestic enterprises held through offshore arrangements
- **Evolving regulatory environment** – recent strategic investments law still creating uncertainty, but likely to reduce as greater practice develops
- **Moderate outbound M&A** expected to continue (particularly in energy and financial sectors), assuming economic situation remains relatively benign

Source: mergermarket M&A database searches undertaken on 11 January 2012 based on the dominant geography of the target.

Global impact of Eurozone uncertainty

The escalating Eurozone crisis has the potential to cause problems across the global economy. The key issues are around liquidity and funding, as all businesses are potentially impacted by banks' exposure to the continuing crisis. Where sovereign debt of Eurozone countries is downgraded, this has knock-on effects for domestic banks and ultimately for domestic organisations accessing finance or having to refinance. M&A activity is being affected as confidence decreases and the spectre of a double-dip recession in many developed nations increases

The risk of a Euro exit by one of more Eurozone countries continues to be very low, but buyers and sellers need to be mindful of that possibility, as well as other emergency scenarios, in respect of current and future M&A transactions. Due diligence to assess and analyse key areas of risk where the target operates in a potentially affected Eurozone country is advisable

Possible emergency scenarios:

Sovereign Default	Further countries require bail out	Financial Institution Failure
A sovereign defaults on its sovereign debt or proceeds with a coercive sovereign debt restructuring	Further Eurozone countries require financial assistance	A major financial institution becomes insolvent and/or enters into a resolution regime
Multi financial institution failures	**Euro exit consensual**	**Euro exit non-consensual**
More than one major financial institution becomes insolvent and/or enters into a resolution regime	A consensual withdrawal from the euro is negotiated	A non-consensual withdrawal from the euro is effected

Key potential impacts in context of an M&A deal may include:

1. → Financing of M&A deal in event of failure of financial institution (including impact on cash confirmation exercises on public bids)
2. → Euro exit may impact currency payment obligations in some contracts, creating obligation to pay in new national currency
3. → Euro exit may not alter currency payment obligations in other contracts - challenges for parties in affected Eurozone country to perform obligations
4. → Imposition of capital and exchange controls to avoid domestic bank run – effect on ability to perform contracts
5. → Risk of emergency legislation/measures in affected Eurozone country – potential adverse impact on land, licences, consents etc
6. → Market disruption, force majeure and MAC clauses may be triggered in target's key business contracts, financing, SPA/other M&A contracts
7. → Mismatches in "back to back" contracts, currency/basis risks, mismatches of assets/liabilities - increased likelihood of payment default/cross-default
8. → Potential conflict of laws in contracts
9. → Target's exposure to sovereign debt (whether directly or indirectly) of affected Eurozone countries – effect on deal value
10. → Hedging contracts – potential haircut on collateral; Euro exit may be a credit event under CDS contracts

Spotlights from around the globe

Deal execution trends - an international perspective

US M&A – The Headlines

- Greater judicial scrutiny of all parties
    - Management
    - Financial Advisors
    - Boards of Directors
    - Special Committees
    - Controlling Shareholders
- Increasing willingness of Delaware court to challenge valuation methodologies
- Increased disclosure of financial advisors' potential conflicts
- Break Fees
    - Increase in reverse break fees in strategic deals
    - Increase in multi-tier break fees
    - Increase in size of reverse break fees for willful breaches
- Continued focus and negotiation of MAC by all parties
- Evolving regulatory environment
    - Dodd-Frank rules still evolving
    - Increased enforcement of Foreign Corrupt Practices Act

French tax measures reduce appetite for inbound M&A

In the context of the financial crisis and the austerity plan implemented by the French government, certain tax measures have been adopted which may impact the appetite for inbound M&A transactions such as, in particular: the limitation on deductibility of interest on acquisition debt under certain conditions, the increase in registration duties payable on share acquisitions, and the increase in taxation of capital gains on share disposals

Asia Pacific Round-Up

Activity levels have remained varied during the last quarter largely due to volatility in the global markets and the fact that operating conditions for businesses remain tough, both of which cause valuation uncertainties

Inbound investment is strong, particularly into China and India, and Australia has seen record breaking figures, particularly in the mining and resources sector – with Australia becoming China's top investment destination for the first time. Outbound M&A from the region is also strong, driven by the desire to secure natural resources and energy – the charge being led by China's state owned enterprises and Indian companies. In addition to Australia, China and India, South East Asia, particularly Indonesia, Malaysia and the Philippines, continues to be an area of focus

There has been increasing interest in investments in listed entities, and we expect to see a number of private investments in public equity (known as "PIPE" transactions). Further, we are seeing private equity firms making IPO cornerstone investments and we expect this trend to continue during the first half of 2012

There are also strong and continuous trends on outbound M&A by Japanese trading houses and corporates in light of the strong Japanese Yen and a shrinking domestic market

Spotlights from around the globe

Deal execution trends - an international perspective

M&A in China – What's Market?

Consideration

- Completion accounts common
- Locked box is rare
- Escrow/retention fairly common (but subject to time limits for onshore deals under PRC law)
- Earn outs fairly common (also subject to time limits for same reasons)
- Fixed price possible for smaller-mid sized deals

Conditions

- Financing conditions very unusual
- Break fees are sometimes used

MAC

- Common (approximately 60%) for private (non-PE) deals although not always specifically defined in terms of fixing a monetary value

Warranty limitation period

- Approximately 60% of private deals do not have any limitation in warranty period
- 2-5 years for general warranties, 10 years for tax and environmental and unlimited period for title warranties
- Uncommon for small-midsized deals

Cap on liability

- Approximately 50-60% of deals have caps
- Range varies widely: caps of 100% still common for corporate deals (but can be as low as 10% for PE sellers)

Spotlight on Italy

With the arrival of Italy's new Prime Minister Mario Monti, the Italian Government seems to be particularly keen on attracting foreign investors. This trend is confirmed by the recent takeover by EDF of Edison (second largest Italian energy player), which, despite being a strategic asset, received full political support. The need of Italian Government to reduce sovereign debt might also lead to a new wave of privatisations. Moreover, Italy is experiencing a growing appetite by foreign investors (including from Far East) for Italian branded-goods and fashion manufacturers

Who is investing in Latin America – and what's hot in LatAm M&A?

- LatAm M&A in 2012 is likely to be dominated by strategic investors with less of a need to rely on financing. Strategic investors seeking to conserve cash may seek to team with a financial partner and contribute know-how, management expertise and technology to a venture, rather than capital

- However, regional and local private equity funds are increasingly becoming major players in LatAm M&A. In addition, more US and European private equity firms are opening offices in LatAm (for example, AXA Private Equity recently teamed with Ecus Capital in Chile, Blackstone acquired a 40% stake in Brazilian PE manager Pátria Investimentos, 3i and Mercapital opened offices in Brazil in 2011)

- Although acquisition financing from traditional sources such as European banks will likely remain tight, there seems to be an increasing appetite from local institutions to provide acquisition finance

- In light of market volatility, there likely will be greater focus on deal certainty and, in particular, the ability to close quickly; for particularly sought-after assets such as those tied to long term concession contracts, this will require purchasers to accept shorter diligence periods and less fulsome representations and warranties and to assume greater post-closing operational risks and uncertainties

- In a less than robust market, marginal assets (for example, minority interests or assets in countries subject to political or market uncertainties) likely will generate little interest, putting downward pressure on prices and sellers may need to provide "incentives," such as exclusivity and reimbursement of expenses, to induce a purchaser bid

- Tax structuring will continue to drive deals in a number of LatAm countries, including Argentina (where transactions involving an in-country participant are structured as offers subject to acceptance by the counter-party to avoid attracting stamp tax), Brazil, Colombia and Peru (which just last year enacted a law that taxes indirect sales of Peruvian companies (and makes the targeted Peruvian company jointly and severally liable for the payment of the taxes))

Spotlights from around the globe

Deal execution trends - an international perspective

Australian activity levels

Another world; boom times continue – but for how long?

	In 2011, M&A activity in Australia exceeded US$131 bn, higher than the total for the boom year of 2007*
	Mining sector accounted for 38% of inbound transactions,* emphasising the continuing importance of the Australian mining activity boom to both Australian M&A and global economic growth. In the coal sector alone, A$27 bn of deals were announced**
	Two thirds of all deals worth over A$100 million were cross-border,[#] with total inbound investment reaching a record US$62 bn*. Australia became the single largest investment destination for Chinese companies for the first time, eclipsing Hong Kong and Brazil*
	Due to the increased volume of cross-border transactions, the Foreign Investment Review Board is taking longer to decide applications from foreign bidders to acquire Australian companies or assets
	The majority of deals in 2011 were friendly, with only about 5% of deals contested[#]
	81% of public deals worth over $100 million involved cash consideration or a mix of cash and script.[#] This is a slight increase to 77% of public deals in 2010, suggesting target shareholders still require cash consideration for them to approve control transactions
	In the last quarter of 2011, private equity returned to the Australian market (particularly on the buy-side)
PLC	According to statistics published by the Australian Takeovers Panel for 2010, over 40% of takeovers of public companies were conducted by way of schemes of arrangement. Clifford Chance saw this trend continue in 2011[+]
	We have seen more companies divesting non-core assets to free up capital, to then invest in other assets

Sources: *"Chinese buyers favour Australia" *AFR*, 22-12-2011
#Clifford Chance analysis of announced deals with a value exceeding $100 million, mergermarket,January - December 2011
**"Mid-size coalminers endangered: De Lacy",AFR, 21-12-2011
+The Takeovers Panel – An Update 2011

Africa – the new oil and gas superstar region

Africa, particularly East Africa, has become the new oil and gas superstar region. Significant new discoveries have recently been made in Mozambique by ENI and Anadarko. In Tanzania, BG and Ophir Energy have discovered gas in all three exploration wells drilled offshore Tanzania. Drilling is also progressing in Kenya and Madagascar. Uganda has also drawn consideration interest, with Tullow having discovered considerable oil reserves

While much of the exploration of late in East Africa has been carried out by small independent oil and gas companies, the majors have started to become interested. The likes of Total, Shell, Exxon Mobil, BG Group and Eni and Far East buyers looking for prized LNG positions are amongst those who are now taking notice of the opportunities that East Africa has to offer in light of high oil prices and improved technology

This rejuvenated belief in the region's untapped resources has the potential to result in a wave of mergers and acquisitions of smaller E&P companies by larger companies, including Asian companies such as Tokyo Gas and Chinese oil companies such as CNOOC and Sinopec, as these companies seek access to new resources and to obtain a strategic stake in the region. For example, Cove Energy plc, which has a stake in the valuable Mozambique asset along with Anadarko, has recently put itself up for formal auction following considerable interest from potential acquirers. There are suspicions that a similar fate may lie ahead for other small successful independents with interests in East Africa

Debt markets in Europe are particularly challenging *although accessible to top corporate borrowers*

The debt markets, particularly in Europe, currently operate in the shadow of the Eurozone crisis which came back to hit them in mid-July 2011. Until a solution to that crisis is in sight, the debt markets (and in particular the European debt markets) will not return to any sort of normality

- The bank markets face enormous challenges – several major European banks face borrowing costs that render corporate lending uneconomic (albeit the US dollar funding problem those banks had has been alleviated by the recent ECB/FED initiative); for all banks the changing regulatory environment (Basel III and its equivalents) are increasing the cost of capital and correspondingly reducing the ability to lend; and for those prepared to underwrite loans, they face a shrinking investor base (i.e. the European CLO is a dying breed). All of which are having, and will have, large repercussions in terms of liquidity and pricing
- That said, the very best corporate borrowers have proved that the bank markets very much remain accessible to them and they still command competitive pricing. They will continue to be able to raise acquisition finance and in relatively large amounts as banks will be willing to bridge the bond market for them. It is borrowers with credit ratings at the lower end of investment grade and below who will feel the pain in terms of liquidity and pricing
- The bond markets for the top corporate borrowers are equally accessible (hence banks' willingness to bridge such borrowers to those markets). It is again the lower end of the borrowing scale that generally finds the bond markets (and, in particular, the European high yield market) difficult to access. It is anticipated that these markets will become more accessible again, particularly when a Eurozone crisis solution appears – but at a price

Looking forward, and on the assumption of a solution to the Eurozone crisis, acquisition finance will become more accessible to others, not just top end corporate borrowers. However we are likely to see the following:

- much higher pricing
- wide ranging flex provisions
- better structured financings with less leverage and a relatively high equity component
- a greater dependency on the high-yield market
- bank underwritings continuing to be put together by way of book-building
- new sources of finance (i.e. managed funds (whether private or listed) and direct lending by major corporates)

Private Equity is adjusting
to the credit squeeze

The near-paralysis of the debt financing markets in Europe is clearly taking its toll on the private equity market, with a reduction of 40% in the value of European private equity deals between Q3 and Q4 2011

However, the market is adapting – significant numbers of mid-market deals and buy-and-build opportunities are still occurring and firms are increasingly looking at new jurisdictions

David Walker, Global Head of Private Equity said: *"Challenging debt markets are dominating the headlines, but a mismatch between buyer and seller price expectations, with sellers reluctant to transact at current values, is equally responsible for existing levels of activity. It remains to be seen how long this wait and see approach will continue, and this will have an impact on the outlook for 2012*

Whilst mega leveraged buy-outs look challenging in the short term, there is clearly activity in the market. Buy-and-builds are increasingly popular and we have seen a number of private equity exits to strategic buyers. With significant funds available, many of our clients are also talking to us about opportunities in growth markets, including those of Latin America, Israel and Asia"

Andrew Whan, Head of Private Equity in Asia develops this theme, saying: *"The outlook for 2012 in Asia is positive. With a relatively quieter last quarter of 2011, private equity houses are under growing pressure to put their funds to work. We are seeing an increasing interest in investments in listed entities (taking advantage of current attractive valuations) and expect to see a number of PIPEs and IPO cornerstone investments during the first half of the year. In addition to China, Indonesia, Malaysia and the Philippines continue to be an area of focus. A number of private equity houses continue to look for exits from their existing generation of investments (a number of exits having already been announced and/or executed this year)"*

Gap between buyers' and sellers' expectations

Significant gaps continue to emerge between sellers' and buyers' expectations, particularly in relation to valuation, but also in relation to deal terms. In addition, we are seeing a return to the more prolonged deal doing processes of the past as buyers require more extensive diligence to underpin their valuations as well as more downside contractual protection

Buyer

- **Buyers are generally more risk averse when assessing deal opportunities**
  - Increased focus on sector consolidation and achieving synergies
  - Reduced appetite to risk results in buyers taking measured approach to valuation
  - Buyers are reverting to the slower deal processes of old, with renewed focus on diligence to support and/or challenge valuations
  - Buyers are seeking more downside contractual protection
- **Volatile markets mean that deal certainty is key for buyers who are willing to brave markets. Buyers are often reluctant to pursue targets unless they are given a package of deal protection measures such as break fees, non-solicits etc**

Valuation

- **Where parties remain committed to executing a deal, variety of techniques being considered to bridge gap in expectations, particularly on high value transactions:**
  - contingent value mechanisms – used to allocate pricing risk or upside e.g. Used on Apollo/CVC takeover of Brit Insurance and in Sanofi-Aventis/Genzyme
  - vendor or stapled financing (stapled financing is on the attack in the US as a result of recent court decisions)
  - earn-outs (rarely seen on deals in UK; more common in China and the US)
  - strategic asset swaps to avoid the need for cash (e.g. GDF Suez/IPR combination)
  - break-up and consortium bids - to spread the cost of the acquisition whilst allowing consortium members to take assets they are interested in. Consortium bids in the US have declined, but are more commonly seen on overseas acquisitions by Chinese companies

Seller

- **Sellers with unrealistic expectations around valuation are still holding out for prices which match valuations undertaken prior to financial crisis**
  - in some cases, sellers conclude that it is better to "hold tight" for market recovery
- **Sellers also keen to secure deal certainty and, as such, there has been an increase in sellers seeking protections such as reverse break fees and go-shop provisions, particularly in the US**
- **In the US, we have seen an increase in larger reverse break fees if deal is terminated for antitrust issues (Google/ Motorola – 20% of deal value; ATT/T-Mobile – 10%-15% of deal value; depending on valuations)**
- **Use of "hell or high water" provisions, "warehousing" and back-stop purchaser structures (e.g. Kabel BW/Liberty Global), and "take or pay" structures (e.g. EMI)**

Shareholder pressure and scrutiny *on the rise*

- Activist investors come in many forms, including high-profile funds and shareowner groups such as unions and pension fund managers and asset managers. Their goals range from financial (e.g. increase in shareholder value through changes in strategy and the composition of boards, cost cutting etc.) to non-financial (e.g. adoption of environmentally friendly policies). Tools at their disposal include requisitioning meetings/voting down resolutions, pressuring boards and litigation
- Investor activism often comes to the fore where M&A/other corporate activity is being considered. Recent examples of investor backlash include HP's proposed acquisition of Autonomy, where HP shareholders were vocal in their opposition to the deal, and G4S's proposed acquisition of ISS (bid withdrawn in response to shareholders' lack of support for a transformational deal in the current environment, and chairman subsequently stepped down)
- There have also been challenges to M&A/corporate "inactivity" – accusations that shareholder value is not being enhanced as corporates are reluctant to put excess cash on balance sheets to work, or to return it to shareholders
- Activism has been on the rise in Europe over recent years, with approximately 50% of activist demands being met (fully or partially) in the period from 2007 to Q1 2011. In the UK, we have also seen renewed instances of shareholders exercising rights to requisition/vote down resolutions at general meetings in an effort to take control without paying a control premium
- Shareholder activism in the US has been mixed. As a result of new regulatory standards and increased shareholder pressure on companies, takeover defence mechanisms for public companies are down significantly over the past 10 years. There has been a general increase in M&A litigation (with 3/4 of public deals subject to litigation), including litigation in multiple US states. In 2011, the SEC's proxy access rule was struck down by a US court

Rise in protectionism and political pressure

- High degree of political pressure on overseas' buyers ability to buy "home-grown" and strategically important businesses
- Sensitive areas include national security, media, key infrastructure and natural resources; although political and popular disquiet can also result where target is an iconic consumer brand (e.g. Cadbury, Parmalat)
- Our annual survey on Asian M&A trends (with Finance Asia) suggests that concerns over protectionism may have peaked - 63% of respondents (2010 = 77%)
- A good strategy for dealing with associated execution risk needs to be in place early in the deal process, identifying high risk jurisdictions and being alive and sensitive to the political angle. Engagement with all key stakeholders (including regulators, politicians and interested market participants) at the time of announcing the deal is essential

The rise in protectionism and political pressure is discussed in our recent webinar "Changing landscape for public M&A", which is available through the Clifford Chance Global M&A Toolkit at www.cliffordchance.com/GlobalM&AToolkit

Recent notable developments include:

Canada - BHP's bid for PotashCorp blocked by Canada's Industry Minister as unlikely to be of "net benefit" to Canada on the basis that natural resources are a key driver of economic growth

France - French Government (via an indirect shareholding) blocked attempted takeover by Danaher (US) of Ingenico (leading maker of payment terminals) on grounds that Ingenico essential to France's electronics industry

UK - Kraft's takeover of Cadbury (confectionery) gave rise to calls for a national interest test to be re-introduced, and media and political pressure led to extensive revisions to the UK Takeover Code to make hostile bids more difficult

Italy – Since the change of leadership in late 2011, the Government seems keen to attract foreign investment – confirmed by EDF's takeover of Edison (second largest energy player) which despite being a strategic asset, received full political support. This contrasts with decisions under the previous leadership to block the Parmalat takeover, for example, and to authorise the State-controlled Cassa Depositi e Prestiti to make strategic investments to protect Italy's most significant private companies

USA - Committee on Foreign Investment in the US (CFIUS) required Huawei to seek Presidential clearance for its acquisition of 3Leaf Systems; CFIUS blocked the acquisition of Firstgold (mining) by a Chinese SOE

China - Coca Cola's acquisition of Huiyuan Juice (2009) blocked by MOFCOM under new Chinese Anti-Monopoly law. There is lack of clarity as to how the Anti-Monopoly law and the new national security review mechanism (see page 25) will interplay on transactions

Australia - Due to ever increasing volume of inbound investment, the country's Foreign Investment Review Board is taking longer to assess applications – and if the acquirer is a "state-owned enterprise", FIRB seems more minded to impose conditions. Singapore Exchange's bid for ASX Ltd was blocked by Australian government

Protectionism and political pressure in practice: *Cross-border stock exchange M&A*

2011 saw a wave of cross-border stock exchange transactions fail to reach a successful completion. The Australian government's decision to block Singapore Exchange's bid for ASX on national interest grounds represented a stark example of protectionism in practice, and the European Commission's reported hostility on the NYSE/Deutsche Borse tie up highlights the antitust hurdles in this sector.

Protectionist sentiment and political pressure were evident on a number of other cross-border exchange deals during the course of the year:

Target	Bidder	Deal Value	Outcome
ASX Ltd (Australia)	Singapore Exchange	US$8.3 billion	Blocked by Australian government on national interest grounds
TMX (Canada)	London Stock Exchange	US$3.2 billion	Bid withdrawn due to lack of support from TMX shareholders following rival bid by Canadian consortium Maple playing nationalist card. Maple's bid is now facing antitrust scrutiny in Canada
NYSE Euronext (USA)	Deutsche Borse	US$17 billion	Announcement provoked protectionist sentiment in US. European Commission is reportedly set to block the deal on antitrust grounds
NYSE Euronext (USA)	NASDAQ OMX and IntercontinentalExchange	US$11 billion	Bid withdrawn after US antitrust authorities indicated they would not give clearance

The rationale for consolidation in the sector remains strong, so further deals in 2012 are likely, in particular small ones, such as TMX's recent acquisition of a minority stake in the Bermuda Stock Exchange. Larger tie-ups will continue to need careful antitrust planning, and assessment of the business impact of any remedies that may be required.

An evolving merger control environment

Antitrust regulation is on the rise

Antitrust regulation is on the rise – there are now over 100 merger control regimes across the globe. As more countries develop merger control regimes (e.g. India's new regime effective as of June 2011, and China's regime effective since August 2008), the opportunities for divergence increase. The difficulties of navigating the various regimes also increase, especially for multi-jurisdictional deals

Key trends in merger control environment:	Key Impact on M&A
Number of jurisdictions with mandatory filing obligations increasing every year	▪ Significant impact on deliverability of deals, predictability and process ▪ Introduction of new laws can create unanticipated filing requirements, disrupting the anticipated deal timetable ▪ Scope of the regimes can differ significantly. For example, an acquisition of a minority stake conferring only limited influence over a target can trigger a review in certain jurisdictions ▪ More filings means more scope for regulators to diverge in their assessments and eventual remedial action
Side-lining potential bidders with significant antitrust issues	▪ Strategic purchasers are engaging earlier in the sale process with regulators to address potential concerns and, where necessary, offering remedies, including divestments

Hot topic in antitrust: UK competition regime under the spotlight

The UK is one of the few countries in which merging parties are free to complete their deals without first securing competition clearance: a feature that is valued highly by dealmakers as allowing for efficient allocation of antitrust risk. In the coming months, the UK government is expected to announce wide ranging reforms of the UK competition regime. One of the options it is considering is a move to a system of mandatory filing and standstill obligations for qualifying M&A. Widespread opposition has been voiced to the proposal, so there is a good chance that it will not feature in the Government's plans, at least in its fullest form. However, enhanced standstill obligations and hefty increases in filing fees – up to an eye watering £220k per deal – are still on the cards.

Alastair Mordaunt, partner in our Global Antitrust Practice and former Director of Mergers at the UK Office of Fair Trading, notes:

"We are seeing an increasing reliance by merger control regulators on internal documents of merging parties as evidence of the likely competitive effects of a transaction. In the U.S., the Hart-Scott-Rodino filing requirements have recently been amended to require the provision of a much broader scope of documents prepared by the parties, their investment bankers, consultants or other third party advisors, including documents not specifically prepared for the notified deal. Prudent document creation has never been more important.

Another trend is the growing sophistication of economic modelling that is employed by regulators to assess the effects of mergers. The data intensiveness of these analytical tools means that appropriate antitrust planning and preparation – including early engagement with the authorities where appropriate – is critical to achieving antitrust success."

Foreign investment control: spotlight on China

CHINA – KEY FEATURES OF THE NATIONAL SECURITY REVIEW REGIME

- Details of China's new national security review mechanism were published earlier this year. The national security review regime requires acquisitions of Chinese companies by foreign investors which raise national security concerns to undergo review by the Ministry of Finance and Commerce ("**MOFCOM**")
- Reviews will be undertaken by a joint ministerial-level review committee ("**Committee"**) led by MOFCOM and the National Development and Reform Commission, and other industry authorities may also be involved

M&A activity

- M&A activity covered by the new regime includes:
  - purchases of equity in or assets of domestic companies by foreign investors;
  - purchases of equity in or assets of existing foreign-invested enterprises from Chinese shareholders; and
  - the establishment by foreign investors of wholly foreign-owned enterprises ("WFOE") by whom assets or equity are purchased from domestic companies

Sectors subject to national security review

- A broad range of sectors not only national defence concerns but also economic stability and social stability
- In particular, review will be required in respect of:
  - the acquisition of any stake by foreign investors in companies operating in the military industry or related industries; and
  - acquisitions that may result in foreign investors acquiring "actual control" in the following sectors: key agricultural products, key energy resources, key infrastructure, key transportation services, key technologies and key equipment manufacturing

Process for review

- If the proposed M&A activity falls within the remit of this regime, MOFCOM is required to file a request for national security review with the Committee within 5 working days
- The initial review process can last up to 30 working days. A special review process which can last up to a further 60 working days may be imposed on applications that are not cleared by the initial review process
- An applicant may not complete an M&A transaction which falls with the remit of the regime prior to obtaining MOFCOM approval
- If the Committee determines that the M&A activity under review will have a significant effect on national security, the transaction cannot be completed. Alternatively, it may approve the transaction subject to conditions so as to address the national security concerns. To avoid termination, transactions can be modified during the national security review process and re-submitted for the Committee's review

Conclusion

- The new national security review system brings a heightened risk of deal uncertainty in China and has a potential impact on deal closing timetables
- Many ambiguities in the new law exist. For example, there is no clear definition of what is meant by "national security" or what constitutes a "key" sector. As such, the authorities have a broad discretion when assessing whether a transaction is ultimately subject to the regime
- In addition, there is no minimum size or value threshold for transactions before they trigger a national security review
- Foreign investors will need to consider potential Chinese targets carefully and develop a coordinated strategy to address possible concerns, and consider possibly modifying the scope or the structure of the transaction so as to simplify the national security review process and secure approval

Increased focus on anti-corruption measures

Anti-corruption legislation is developing, increasingly reaches across jurisdictions, and is being increasingly aggressively enforced

Extraterritorial exposure was previously most of concern in the context of the US Foreign Corrupt Practices Act (record US$1.8 billion in fines paid under FCPA in 2010); however, the UK Bribery Act came into force in 2011 and is widely seen as one of the most stringent and widely applicable anti-corruption regimes in the world

Increased focus on anti-corruption measures has created the following issues, risks and challenges for companies:

- Necessity to consider extra-territorial effect of anti-bribery laws
- Broader range of offences
- Failure to comply can lead to serious consequences, including criminal sanctions of imprisonment or fines, civil law claims, blacklisting in public, contracts being terminated and severe reputational risks
- Increasingly aggressive approach to enforcement
- Impact on M&A transactions (see box to right) due to inheritance of pre-acquisition liabilities of target companies
- More diligence required before business relationships established with third parties (e.g. JV partners)
- Increased focus on internal compliance structures, including clear, practical and accessible policies and procedures

To assist companies in dealing with these challenges, Clifford Chance provides a unique online compliance training solution, COMPLY. For further details, ask your usual Clifford Chance contact or one of the contacts listed on page 31

We are seeing the following impacts on M&A transactions:

Buyer

- Earlier, and more thorough due diligence on target's anti-corruption policies and compliance history (particularly if a "red flag“ sector , jurisdiction or business structure)
- Consideration of transaction structure e.g. asset deal/share deal/ joint venture? (JVs may lead to responsibility for violations of a JV partner)
- Additional robust representations, warranties and indemnities from sellers in relation to historical compliance
- Obtaining anti-bribery certifications from key persons at target
- Avoid transactions that can lead to unmanageable liability risk, or consider carve-outs of problematic business units
- Planning ahead - what anti-corruption practices and procedures will need to be implemented post-completion?

Seller/Target

- Commence and/or refine internal policies to meet highest standards of compliance with anti-bribery legislation before sale
- Statement of commitment from management
- Risk assessment and monitoring of compliance
- Vetting prospective employees and appropriate disciplinary procedures
- Education of employees
- Diligence of business relationships
- Address any historic incidents up-front as part of any sale process

Anti-corruption: spotlight on UK

Extraterritorial exposure: UK Bribery Act

- **Regime came into force on 1 July 2011. Previous legislation was considered inadequate and there was a poor record of enforcement**
- **New regime has stricter sanctions and fewer defences than the US Foreign Corrupt Practices Act**
  - Prohibits bribery in both domestic and foreign public and private sector
  - 4 principal offences:
    - To bribe
    - To be bribed
    - Failure by a commercial organisation to prevent bribery
    - To bribe foreign officials
  - Very wide application – all companies conducting business in the UK; does not require an act to have taken place in UK. UK prosecutors have announced intention to prosecute foreign companies early on
  - Impact on corporate hospitality, entertainment arrangements and facilitation payments
- **Sanctions:**
  - Individuals – up to 10 years' imprisonment and/or unlimited fine, exposure to claims for breach of duty
  - Companies – unlimited fine, civil claims, avoidance of contracts, reputational risk, implications on credit rating
- **Protections/defences**
  - Sovereign immunity
  - "Adequate procedures" in place
- **Enforcement in practice**
  - SFO signalled a new focus on bribery by companies in 2008 with a series of civil recovery orders, settlements and the first corporate criminal conviction for bribery in 2009
  - One successful prosecution of an individual in first six months of new regime, other investigations are under way
  - Investigation of foreign businesses is firmly on the SFO's agenda, despite constraints on its resources
  - Landmark use of Proceeds of Crime Act to clawback dividends from the parent company of subsidiary involved in bribery (January 2012): SFO promises more actions against shareholders

Sweeping changes to regulatory landscape *in the financial services sector*

Regulatory change

- Regulatory change is currently a driver of M&A activity, and will increasingly be so – this trend has been predicted for some time, but to date uncertainty has been a brake on widespread activity
- Flagship regulatory initiatives include "prudential" changes (capital and liquidity being squeezed) such as Basel III, Solvency II and Dodd-Frank; but also restructuring changes, aimed at reconstituting the market and the risks to which firms expose themselves (e.g. Volcker rule in the U.S.)

What's for sale?

- Many assets are now coming to market, as firms focus on their core businesses and divest assets to become more profitable or have less risk exposure (e.g. divestments of private banking businesses by Commerzbank and ING Bank). We are also seeing divestments to free up funds/capital. To date, sales of assets by the rescued banks have been limited but they will increase - RBS's sale of its aircraft leasing portfolio is a recent example
- Private equity/proprietary trading businesses being divested, such as HSBC's sale of its private equity business
- Consolidation is also a key trend, as the pressure on firms is driving the pursuit of scale – recent examples of consolidation in the industry includes Henderson's acquisition of Gartmore
- The sheer number of assets on the market poses a key challenge for sellers – as a result we are seeing increasing vendor due diligence and more preparatory work by sellers

Who are the buyers?

- Cash-rich businesses are the most interested buyers – there are real opportunities for well-capitalised firms, private equity houses, sovereign wealth funds, investment funds and portfolio aggregators
- Existing players pursuing growth strategies in emerging markets – as they are required to divest and realign their operations in some parts of the globe, firms are keen to pursue growth elsewhere, particularly in emerging markets, such as Barclays and Standard Bank's increasing focus on growth in Africa
- Emerging market or other strategic investors purchasing strategic assets
- Access to financing is proving to be the key challenge for all but the most cash-rich buyers. Also the continued uncertainty of the scope of the new rules means risk assessment remains difficult

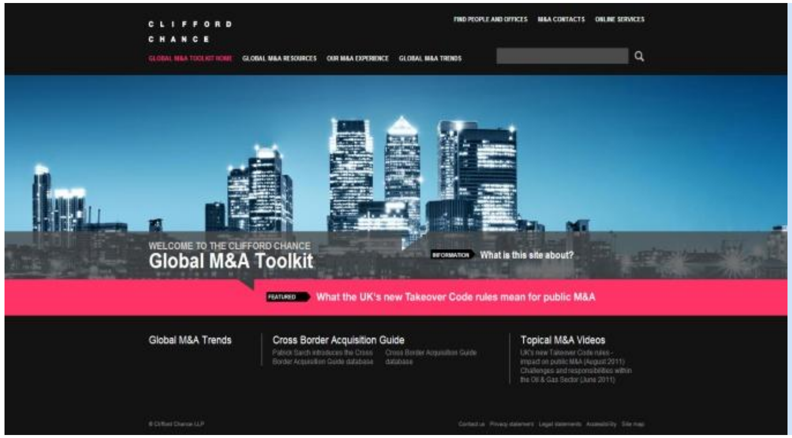
Our webinar on "Strategic drivers for the financial services sector in a sea of regulatory change" is available through the Clifford Chance Global M&A Toolkit at www.cliffordchance.com/GlobalM&AToolkit

Changing landscape of public deals

US versus UK approach

Interesting dynamics are in play: In the US, the Board of Directors of the target is the key gatekeeper in most transactions (as demonstrated by the 2011 *Air Products vs Airgas* decision where the Delaware courts upheld the use of a poison pill defence by a target board even though the majority of target shareholders said they would accept the offer). In stark contrast, the latest changes to the UK regime (Sept 2011) seek to protect target shareholders' interests by removing key decision-making from the target board

US	UK
Target Board Decides	**Target Shareholders Decide**
Market-driven timeline	Rigid timeline imposed by UK Takeover Code
Deal protection	No deal protection
Defences available	Limited defences available
Poison pills and staggered boards available	No poison pills available
Shareholder litigation a feature	Shareholder litigation not common
Significant disclosure requirements	Increasing disclosure requirements
US cases force increased focus on process; greater board accountability; SEC / shareholder driven corporate governance rights	New UK rules designed to take pressure and difficult decision-making out of target board's hands



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- **Downloadable M&A Tools**, including route maps, checklists and other resources to help scope and execute M&A transactions
- **An overview of our expertise** in each sector

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Coming soon: Our Cross Border Acquisition Guide will cover China. Also new inter-active M&A Tools to be launched

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