CLIFFORD

CHANCE

A GLOBAL SHIFT

OPPORTUNITIES IN A CHANGING LANDSCAPE

Our M&A insights and deal intelligence 2019

C L I F F O R D

C H A N C E

1. DIGITAL BORDERS | 4 | Why data flows matter to M&A

2. MINDCRAFT | 12 | Smart use of intellectual property in 2019 M&A

3. REAL ASSETS | 18 | The widening search for stable returns

4. DOING DEALS DIFFERENTLY | 26 | Strategic partnerships are the spirit of the age

5. GLOBAL M&A DATA | 32 | The outlook for 2019

OPPORTUNITIES IN A CHANGING LANDSCAPE

"Welcome to this year's review of global M&A. We look ahead to some of the trends that may shape M&A in 2019, a year where successful boards and investors will identify opportunity amid the challenges of trade tensions, political uncertainty and increasing regulatory scrutiny. We explore a number of specific themes we see as highly relevant in the current environment.

As data creates greater economic value, governments are regulating and often restricting its flow through data localisation laws, data privacy regulations and technical controls. Businesses reliant on data are structuring international transactions to account for this new landscape of digital borders.

Intellectual property is creating and influencing transactions, and is viewed as a key target asset to be exploited. IP assets have been behind the success – and indeed challenges – of a number of recent, large M&A deals.

Against this backdrop of volatility, the predictable returns from infrastructure, energy and real estate assets have renewed appeal, with record levels of capital available. That traditional markets have themselves become less predictable, is encouraging investors to ramp up risk appetite and broaden their horizons.

In a fluid economic environment, companies are taking advantage of the flexibility of strategic partnerships as a less capital-intensive complement to traditional M&A, pooling expertise and sharing costs to defend market position or to expand into new markets and technologies.

We hope you enjoy reading this report and welcome your own views on what will no doubt be a fascinating year ahead in the M&A arena."

Guy Norman,
Global Head of Corporate,
Clifford Chance LLP

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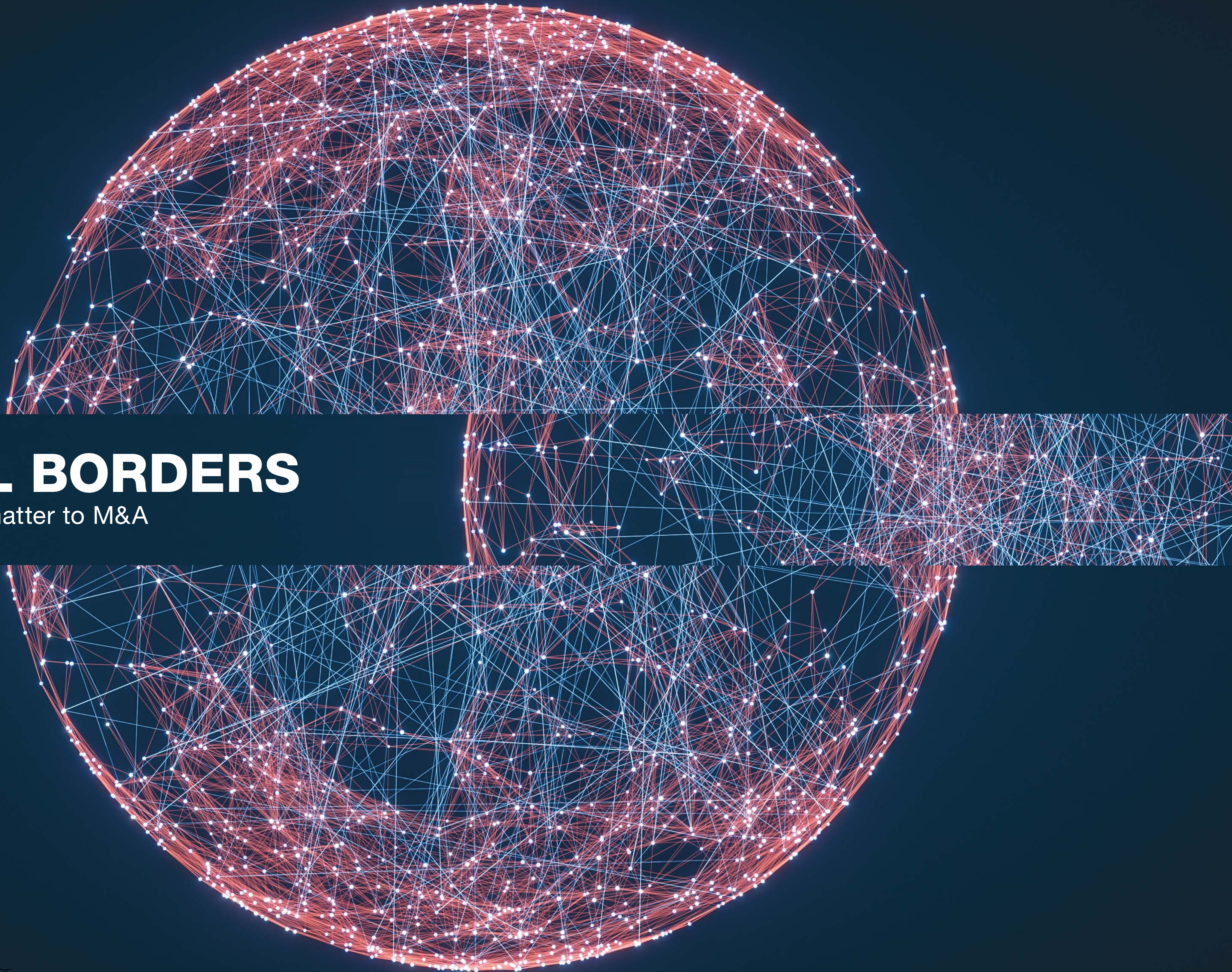

DIGITAL BORDERS

Why data flows matter to M&A

Global data flows now generate more economic value than the global trade in goods. How data is used, stored, transferred, processed and protected is central to how businesses across sectors generate value and stay competitive in 2019.

But governments are regulating and restricting the flow of data through data localisation laws, data privacy rules and censorship. Data has become a matter of national security, of individual rights, of technological dominance, of how countries are governed and elections fought, and in some cases, of sovereignty.

China is foremost in these efforts, creating and enforcing a properly Chinese sphere of cyber-sovereignty, by technological and regulatory means. In the US, we are seeing increased governmental scrutiny of, and intervention in, inbound tech deals under the guise of national security. Elsewhere, rules designed to protect individual privacy rights, such as the EU's GDPR, impose territorial restrictions.

Just as traditional barriers to trade have shaped the M&A strategies of multinational businesses, these newer digital borders are critical to how businesses – ever more reliant on data – structure their operations and enter new markets.

US$ 11tn

Estimated annual contribution of cross-border data flows to global GDP by 2025[1]

57%

Of deals with a Chinese buyer reviewed by the Committee on Foreign Investment in the United States (CFIUS) were approved in 2018[2]

50

The number of countries that have adopted data localisation laws[3]

US$ 7.89bn

Estimated Fortune Global 500 spend on GDPR compliance in the run-up to its coming into force[4]

1 Source: Mckinsey Global Institute
2 Source: Dealreporter, 2018
3 Source: Albright Stonebridge Group, 2015
4 Source: IAPP and EY estimate, 2017

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THE TRENDS WE ARE SEEING

POLITICAL, TECHNOLOGICAL AND COMMERCIAL BORDERS

How technology and data are traded across borders plays a complex and central role in deals, just as it becomes a central issue in international political and trade disputes.

- **Protectionism goes digital:** Investment control regimes, most notably the Committee on Foreign Investment in the United States (CFIUS), are targeting deals focused on technology and data. China's technical barriers and internet regulations have created a protected market, where national champions have come to dominate and foreign entrants must play by its distinctive rules.

- **The 5G race gets politicised:** With 5G defining the next generation of the world's data infrastructure, an openly political battle is being fought over who its technology leaders will be. Chinese companies are under increased scrutiny.

- **Data privacy and digital borders:** EU data protection rules have created the first free trade zone for data, ensuring its unrestricted flow to those within the club, and policing transfers 'at the border' – i.e. between members and non-members. This drives non-European businesses to establish footholds within the EU, and has also seen non-EU countries align their data privacy standards to secure access to the EU data market on the same terms as EU members – most recently, Japan in late 2018.

- **Data havens create new opportunities:** Bucking the trend of exclusionary measures, jurisdictions such as Singapore are allowing the free movement of data across borders to jurisdictions with similar data privacy and data security laws – see Facebook's recent decision to construct a US$1 billion data centre in Singapore as a hub for the Asia Pacific region.

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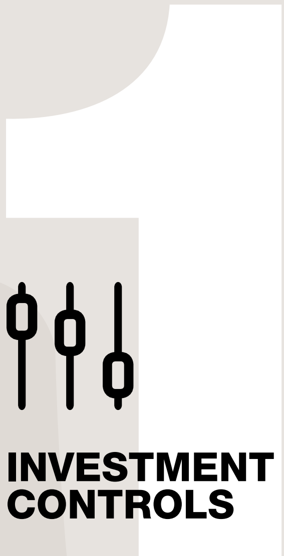
WE’RE HELPING BUSINESSES DECIDE ON THE BEST LOCATIONS FOR INVESTMENT IN DATA CENTRES AND CLOUD SERVICES BY MAPPING GLOBAL REGULATIONS, IDENTIFYING RESTRICTIONS AND HIGHLIGHTING GEOGRAPHIC OPPORTUNITIES.

”

Luke Grubb,
Head of Asia-Pacific Technology Group,
Singapore

NAVIGATING DIGITAL BORDERS

WHEN PLANNING M&A IN NEW MARKETS BUYERS SHOULD CONSIDER THE FOLLOWING FIVE WAYS DATA CAN MAKE OR BREAK A DEAL



INVESTMENT CONTROLS

Determine the level of sensitivity and assess chances of success. Does the target jurisdiction have an investment control regime that restricts investments in data or data-related technologies?

DATA REGULATION

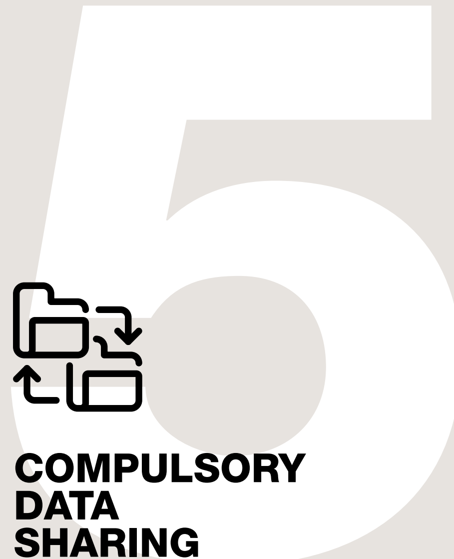
Understand whether the data central to unlocking the value of the transaction will be impeded by local regulations. What types of data are regulated in the target jurisdiction? Personal data is widely regulated, but other types of data can also be subject to restrictions. The export of research data or technology improvements, for example, is restricted in China.

DATA LOCALISATION LAWS

Understand whether localisation requirements will prevent the intended use of key data. Should legal requirements be driving the structure to ensure that processing takes place through a local establishment? Does the target jurisdiction have laws that require target data be held in that jurisdiction? Does it prevent such data from being transferred outside of that jurisdiction?

DATA PRIVACY STANDARDS

Business models that thrive in certain countries may not be viable in others. Your analysis should include appropriate solutions: for example the relevant consents, or use of anonymisation and pseudonymisation. What data privacy standards does the target jurisdiction impose on the collection, processing, transfer and storing of personal information? Certain restrictions can be particularly problematic. For example, sensitive personal data (such as medical data), or the right to be forgotten.



COMPULSORY DATA SHARING

Ensure the standards imposed in the target jurisdiction are compatible with the business' obligations under regulations in other jurisdictions, and also with its image, corporate culture and values. Under what circumstances does the target jurisdiction require data controllers to share data? Perhaps in connection with the prosecution of a crime, or as a matter of routine. The emerging Chinese Social Credit System will require sharing of data about individuals and businesses with government-mandated credit scoring bodies.

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DIGITAL BORDERS ARE HERE TO STAY

THE CLIFFORD CHANCE PERSPECTIVE

The early days of the internet saw cyberspace as an open frontier. No longer.

The online world is increasingly subject to the scrutiny of governments and regulators, and is even a battlefield for strategic rivalries. As our lives become increasingly mediated by technology and embodied in data, states inevitably seek to assert their power online through cyber-sovereignty.

Where investment protections and national security concerns once tended to focus on military technologies and industries, they now include a broader range of technology, data and online activity. This has played out differently in different jurisdictions:

- **United States:** questions of digital borders are inextricably linked to the current tensions between the US and China, a geostrategic rivalry which has become a technology arms race. Acquirers from China and other 'sensitive' jurisdictions may now treat the US as a no-go area for technology-focused transactions. In contrast, the US approach has not historically focused on stringent data regulations and the online world continues to be dominated in most markets by US tech companies.
- **European Union:** the EU's new data protection regime, embodied in the GDPR, grabbed the headlines in 2018 and is widely perceived as setting the high-water mark in terms of protection of individual privacy rights. In creating restrictions on the transfer of personal data, it also affects how online businesses transact inside the EU, and also with the EU from the outside. While, so far, largely avoiding the heavily politicised investment controls seen in the US, the trend amongst European governments (such as the UK) is towards greater assertions of control of technology-focused investments, including technologies at the heart of big data, such as AI.
- **China:** since restricting access to the Chinese internet by leading US tech companies in the late 2000s, China's internet has increasingly diverged from the rest of the world. Home-grown champions dominate, and the regulatory environment reflects Chinese approaches to information control. Big data and fintech have flourished over the last decade, but the particular features of Chinese data regulation (such as data localisation) make it a daunting market for foreign businesses to enter, notwithstanding recent market-access liberalisation. This could hamper the expansion of Chinese companies into markets with different standards of protection.

The growing concern over digital borders is driving a global push – announced at Davos 2019 by nearly half of the WTO members – to restart the stalled WTO talks to create a set of rules governing e-commerce and cross-border data flows. Perhaps we may soon see the emergence of 'digital visas' as countries seek mutually beneficial concessions.

2019 – LOOKING AHEAD

"In 2019, digital borders are the frontlines of the world's defining geopolitical rivalries. Understanding and anticipating how they work is key to successful deals."

Jennifer Mbaluto,
Senior Associate,
Technology Group,
London

5 PRACTICAL TIPS TO GET THE DEAL DONE

Doing data-rich deals in the era of digital borders needs a new approach. Data is no longer a box-ticking due diligence issue, but critical to structure and value.

1 HAVE A DATA STRATEGY

The viability of a deal may depend on whether the target's data is available to be extracted and reused post acquisition. Before you (as a buyer) can gauge to what extent digital borders will matter to your deal, you need clear objectives in terms of data. What data do you want? What data will need to flow in order for the business to function post acquisition? How will you extract value from the data?

2 MAP THE REGULATORY IMPACT

As a buyer, map the regulations that will impact the business post acquisition to ensure you can understand the real value of the data. Factor in restrictions and solutions that may be needed for your deal and your data to comply. Each potential obstacle to unlocking value should then become a specific item of diligence, and potentially of deal structuring. For example, optimal exploitation of the data may require a joint venture with a local partner.

3 DATA DEAL RISK

The deal process itself can be subject to data regulations so do not fail to consider these. This may include sharing the personal details of employees in diligence, making available information that could be characterised as competitively sensitive, or transferring data to a data room contrary to localisation restrictions. The deal process may require the scrutiny of data experts.

4 ANTITRUST AND POLITICAL RED FLAGS

Understand the political and antitrust risks that a deal may trigger. From CFIUS to merger clearance, questions of who gets access to what data are increasingly at the forefront of policy makers' and regulators' minds. It is not enough to understand the letter of the law. An appreciation of particular sensitivities around the outcome of a deal is also important.

5 POST M&A INTEGRATION

Data-related compliance is an increasingly complex area of regulation, with leading jurisdictions diverging sharply in their approaches. Understand the complexity and cost of keeping the business compliant once the target has been integrated into a multinational data-driven operation.

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MINDCRAFT

Smart use of intellectual property in 2019 M&A

The increased use of data and technology allows companies to rapidly scale their business, diversify and create new income streams through smart use of IP in M&A.

IP is one of the most flexible and portable assets. With creative thinking, the same IP asset can be 'sold and resold' repeatedly through innovative sales and licensing structures. Smart exploitation of IP enables scalable growth with little to no capital cost and is driving today's new business models.

The licensing of IP assets can also engineer a means of control over a business that a licensor elects to sell. IP rights are being used as deal catalysts, to create and influence transactions, as part of asset or product 'swaps', to drive bidder or partner preference and to adjust pricing and valuations.

EUR 5.7tn

IP-intensive industries contribution to EU GDP[1]

US$ 245m

Uber's settlement with Waymo over IP dispute

GBP 3.9bn

Coca-Cola acquires coffee chain Costa in a deal driven by brand value

GBP 1.7bn

Merger of CYBG and Virgin Money with the perpetual right to use the iconic Virgin Money brand

1 Source: EU Intellectual Property Office, 2018

TRENDS WE ARE SEEING

DEMOCRATISING THE ASSET BASE

Businesses are learning how intellectual property can be flexed to drive value and efficiency, including in M&A.

- **New revenue streams to squeeze value:** We are seeing structured licensing arrangements across different sectors and fields, creating new, separate revenue streams in different territories. Sophisticated players – including those outside the IP-rich and IP-sensitive tech and pharmaceutical sectors – are exploiting their IP assets without significant capital outlay.

- **Antitrust regulators show their teeth:** Historically permissive when it came to these kinds of transactions, regulators are showing a greater interest in smaller IP-driven deals, and in deals where there is merely potential for the target's technology to be stifled post-transaction, or bundled with that of the buyer, even if the traditional economic thresholds for review are not met. The European Commission has recently intervened to prevent the creation of a 'critical mass' of IP rights that would allow higher royalties to be negotiated.

- **IP in China:** With an ever-increasing number of patent filings, IP has been elevated to a level of strategic importance for Chinese corporates across industries. More companies are targeting IP-rich transactions, and the Chinese government is making the institutional changes needed to give comfort to companies that their IP assets will be adequately protected. For instance, China recently established a unified National IP Appeals Court in the form of an IP Tribunal within the Supreme People's Court – a further step to promote uniformity and predictability in tech disputes.

"Antitrust regulators are interested in 'killer acquisitions' in pharmaceutical deals, where a target's innovation projects are sidelined or discontinued to pre-empt future competition. We should expect a similar approach in other sectors in 2019."

David Tayar,
Antitrust Partner,
Paris

DEAL INSIGHTS

SUCCESSES AND MISFORTUNES DEFINE RECENT HIGH-PROFILE M&A DEALS

DIVERSIFICATION AND GROWTH

Coca-Cola's GBP 3.9bn acquisition of coffee chain Costa*

- The transaction represents a strategic push into coffee as a new market category for Coca-Cola. Costa's brand and reputation, including in key emerging markets, helps Coca-Cola gain instant market entry.
- Costa's market value when acquired by Whitbread in 1995 was GBP 19m.

TRANSFORMING THE BANKING LANDSCAPE

UK banking group CYBG acquires Virgin Money*

- The largest banking merger in the past decade, combining two successful challenger banks with modern and innovative technology to create the first true national competitor of scale to the largest incumbent banks.
- The combined group will have the capabilities, scale and national presence required to lead the way in the openbanking environment with a full-service offering across retail and SME and the perpetual right to use the iconic Virgin Money brand.

NON-CORE OPPORTUNITIES

Permira's acquisition of Cisco's SPVSS business*

- Permira bought Cisco's SPVSS platform, a business consisting of video technology assets and cloud technology services. For Cisco the deal was part of a strategy of refocussing on core assets. For Permira it was an opportunity to launch Synamedia as an exciting standalone business. For both parties the transaction was a complex carveout, with ongoing cross-licensing of IP assets a key aspect of the deal.
- Since the deal closed, Sky, a leading UK telecoms provider and a key customer of Synamedia, has taken a co-investment stake in the business alongside Permira.

CHINA – IP DRIVING THE DEAL

Ping An Good Doctor (PAGD) and Grab's mobile healthcare solutions joint venture*

- Two tech companies, PAGD and Grab, join forces to form a joint venture to deliver mobile healthcare solutions in Southeast Asia.
- PAGD is a one-stop healthcare services platform in China, with proprietary artificial intelligence technologies for online consultations. The deal allows PAGD to replicate its successful business model in a vast market where healthcare solutions are developing apace.

UNPLEASANT SURPRISES

Uber's acquisition of Otto gave rise to significant IP litigation which finally settled in 2018

- The acquisition of Otto was intended to boost Uber's capabilities in autonomous driving. However, Otto's main founder, Anthony Levandowski, had previously worked at Waymo, an autonomous driving company, which alleged that Levandowski had stolen its trade secrets and IP technology. In 2018, Uber gave Alphabet, the parent company of Waymo, US$ 245m worth of its shares as part of a settlement deal.

* Clifford Chance advised on each of these transactions.

IP IN M&A

THE CLIFFORD CHANCE PERSPECTIVE

Uber's acquisition of Otto – a case study in the opportunities and risks of investing in an IP-driven business

- **The deal:** Otto was a start-up specialising in technology for self-driving trucks. Uber bought Otto in 2016 and was widely reported to have paid US$ 680m in shares. Otto's main founder, Anthony Levandowski, was a former engineer at Waymo, an autonomous driving company and part of Alphabet (Google). Waymo alleged that Levandowski had misappropriated its IP and trade secrets and implemented that technology in Otto. Waymo sued Uber for the infringement and 'calculated theft' of its self-driving technology. Waymo and Uber settled in February 2018, for US$ 245m of Uber shares.
- **Consideration for acquisition:** It is thought that Levandowski was granted 5.31 million Uber shares (approximately 45% of Uber's consideration for the acquisition) contingent on certain milestones, but was dismissed by Uber before his shares vested. It is believed he forfeited these shares along with other Otto employees, so Uber may well actually have paid far less than is thought for Otto.
- **Profit-sharing milestones:** Otto's founders were reportedly entitled to 20% of the profits of Uber's future self-driving truck profits. Clever transaction planning may have protected the Uber position in the acquisition of an IP-rich business with little revenue and few tangible assets. Paying with a promise to issue shares at certain milestones is a way to protect downside risk if there is a problem with the IP you are acquiring. Uber may only have parted with a relatively small amount of cash: reportedly US$ 100,000 to certain Otto employees.
- **Downside risks:** The deal has been problematic for Uber for a range of reasons:
  - Serious reputational damage. The affair is said to have exposed a catalogue of bad practices at Uber, including corporate espionage
  - A payout of Uber shares to Waymo as part of the settlement may have eroded transaction value
  - Far from accelerating the progress of Uber's autonomous vehicle programme (it was thought that Levandowski would save Uber a significant amount of R&D time), this is likely to have delayed progress

This is a hard lesson in the need to do adequate diligence in IP-rich transactions, but (potentially) a good lesson in deal structure. Buyers attracted by IP assets should obtain proof of ownership such as assignments and/or registrations that the IP and technology are owned by the target company and not by a founder, consultant or other third party. Balancing due diligence with creative and risk-adjusted consideration structures is a sensible approach to any IP or data-rich acquisition. This gives the acquirer the opportunity to test the validity, ownership and value of the technology or data, while mitigating adverse consequences from factors not identified in diligence.

2019 – LOOKING AHEAD

"We're seeing more tactical ways of mobilising IP to engineer, structure and control a deal. This can be complex but putting pressure on a business in order to get and test the best price, or take pole position in a competitive sale, can be a highly effective strategy."

Ling Ho,
IP Partner,
Hong Kong

5 PRACTICAL TIPS TO GET THE DEAL DONE

Smart use of IP in M&A can achieve value far greater than the sum of the parts.

1 BE CLEAR ON YOUR IP STRATEGY

Prior to any deal, as a seller, ensure you know what IP assets you have, and that they are protected and efficiently used. This includes maintaining IP registrations, monitoring for infringement, understanding competitors' landscapes and maintaining confidentiality and business secrecy. To maximise value, think about licensing deals to drive additional revenue streams from the existing IP portfolio, particularly as this may involve little capital investment.

2 PROTECT YOUR REPUTATION

Ensure your deal documents and licensing agreements give you adequate control or recourse if your counterparty misuses your IP, as the value of IP is often tied up in consumer opinion and a change in public perception can destroy your brand. Increasingly, we see the inclusion of contractual provisions permitting the immediate termination of licences or exits in the event of adverse reputational events.

3 BE SMART WITH CONSIDERATION MECHANICS

Structure deal consideration to maximise value and mitigate risk when acquiring or disposing of an IP-rich business. As a buyer, deferred or milestone-based consideration helps to price the future success of IP, validate the vendor's claims, retain key personnel and focus the minds of those with the most to gain. Profit-sharing arrangements may reduce initial outlay when speculative or untested technology (or data) is acquired.

4 GET DILIGENCE RIGHT

Make sure you can identify what IP is driving the value of your deal. As a buyer, you need to be certain about the target's ownership and encumbrances. Where prior ownership has made title to the IP unclear, obtain confirmatory assignments or protection before completing the deal. Make sure the IP you are acquiring will let you do everything you intend to do with the target's business, and that you have a clear picture on any existing or potential disputes.

5 FOCUS EARLY ON ANTITRUST

Regulators across the globe are increasingly viewing IP and data-focused M&A deals with suspicion. Gather evidence early to counter potential objections, e.g. to show that the parties' data is replicable and non-unique and that the deal will not lead to anticompetitive withholding or bundling of IP. Where appropriate, develop tailored remedies that address concerns with minimum business disruption, e.g. access, interoperability or non-assertion commitments.

REAL ASSETS

The widening search for stable returns

Data-driven M&A grabs headlines, but unprecedented levels of fundraising in 2018 demonstrate the continued attractiveness of real assets such as infrastructure, energy and real estate.

In an uncertain world, the predictability of real asset returns has renewed appeal for a broadening range of investors.

With developed infrastructure markets perceived as less certain, institutional investors are looking further afield for opportunities. Competition is increasing, with record capital raised and new players entering the market.

Investments in strategic real assets – including transport, social infrastructure and networks – also bring influence at a time when it is important to have 'a seat at the table'.

Increasing competition for assets requires international investors to have well-defined localised strategies and an ability to maximise the attractiveness of their deal terms, while balancing the protection of their investment.

EUR 3tn

In 2018, the 100 largest property fund managers in the world managed EUR 3tn of assets between them, almost double the amount in 2014[1]

US$ 930bn

The amount of global investment in transport assets (airports, rail, seaports, roads, tunnels and bridges) in 2018, an 11% increase from 2017[3]

GBP 4.46bn

Global Infrastructure Partners' acquisition from Ørsted of a 50% interest in the 1,218MW Hornsea 1 offshore wind farm. The largest single project financing ever in the global renewable energy sector

US$ 173bn

Dry powder raised for investment into infrastructure assets reaches a new all-time record as at October 2018[3]

1 Source: IPE Real Estate
2 Source: Infrastructure journal
3 Source: Prequin

3

THE TRENDS WE ARE SEEING

THE SEARCH FOR STABILITY

Data-driven M&A grabs headlines, but unprecedented levels of fundraising in 2018 demonstrate the continued attractiveness of real assets such as infrastructure, energy and real estate.

- **Investor types are multiplying and looking globally:** In the hunt for long-term revenue streams at acceptable risk levels, investors are seeking to invest record-breaking amounts of capital. These include large corporates and traditional private equity players with new dedicated infrastructure funds. As demand outpaces supply in developed markets, high multiples for assets have led investors to broaden their geographic horizons.

- **M&A terms converging:** With investors from across the world participating in competitive sale processes for sought-after assets, local/regional market norms regarding deal terms are being challenged and becoming more consistent across geographies. In Latin America, for example, we see this in respect of pricing mechanisms and liability regimes.

- **Buying for experience and influence:** In addition to stable returns, investment in certain sectors has also been driven by a need to gain expertise for changing domestic markets (e.g. offshore wind) or demographics (e.g. senior living). Governments are increasingly active and interested - the US and China making significant pledges to the International Development Finance Corporation and Belt and Road projects respectively.

- **Increasing political sensitivity:** 2018 saw a surge in domestic interventions aimed at protecting sensitive or critical assets from foreign ownership. This trend is likely to continue as laws to strengthen foreign direct investment regimes in the US, the EU, UK, Germany, France, the Netherlands, Hungary, Switzerland and Australia have all been passed, or were considered, throughout 2018. We are also starting to see government scrutiny of deals, not only on buyer nationality, but on the basis of a wider concern that a target's R&D might not be maintained. All investors in tech-related infrastructure should take note.

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AMID TRADE RESTRICTIONS AND TALK OF FRAGMENTATION, A MORE CONSISTENT GLOBAL LANGUAGE FOR REAL ASSET DEALS IS EMERGING AS INVESTORS BROADEN THEIR HORIZONS.

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Thais Garcia,
M&A Partner, Americas

OPPORTUNITIES IN 2019

TOLL ROADS
EAST AFRICA

- Kenya and Uganda have each launched billion dollar toll-road PPP projects, which are currently under tender. These countries both have significant infrastructure spending deficits (outpaced by economic growth and development) which cannot be met through public finance alone, due to existing levels of sovereign debt. As trade links to land-locked neighbours in East and Central Africa, the road projects are critical to the progress of these economies, and are the largest such projects in the region. Considerations for potential investors will include use of political risk insurance and guarantee products to protect revenue streams, and guard against currency devaluations.

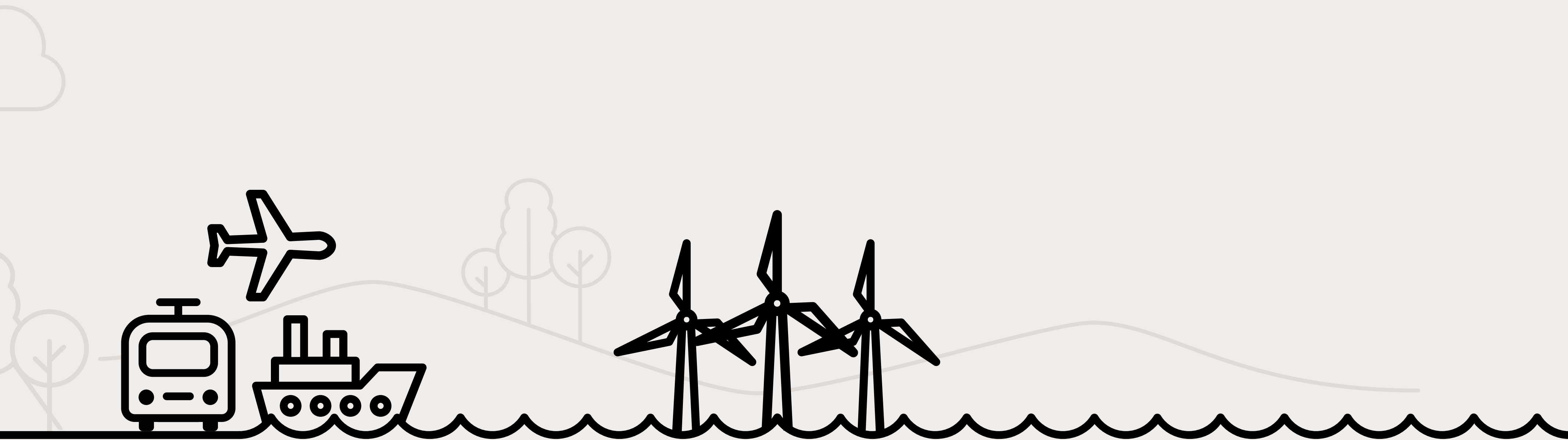
LOGISTICS REAL ESTATE
EUROPE

- With well-established political and predictable legal systems, Europe remains attractive for overseas real estate investment and the logistics market is one of the hottest sectors. The growth of e-commerce and rampant supply chain reconfiguration will continue to drive occupier demand for logistics space. Logistics and industrial portfolios are expected to come to market, as well as opportunities to develop new sites close to large cities ('last mile logistics').

- Successful investments will include joint ventures with key operators, platform acquisitions of assets together with management teams, and fund investments offering co-investments with asset managers.

ENERGY ASSETS
AUSTRALIA

- Australia will continue to present attractive M&A opportunities as its five-year Asset Recycling Initiative scheme tails off at the end of 2019. This may include secondary trades in recently privatised transmission and distribution networks, listed energy companies being taken private and a smaller number of privatisations, including back-up power generators. We expect investors to continue monitoring regulatory and policy changes, including stapled structures and concessions available to foreign investors.



AIRPORTS, PORTS AND RAILWAYS
BRAZIL

- President Bolsonaro recently announced that he wants Brazil to attract up to BRL75bn (US$ 20bn) from privatisations through consessions and grants, including BRL7bn (US$ 1.9bn) through privatising 12 airports, four port terminals and several railways. This will be initially trialled in March, through the auction of the concession rights to three airport blocks. Bidders will be interested in the administration's identification of the relevant assets, its ability to bring them to market and its attitude to private sector involvement, including bidder rights, concession extensions and restrictions on international investment.

OFFSHORE WIND
TAIWAN

- Taiwan has set aggressive renewable energy targets, in particular the development of 5.5GW of offshore wind to be fully implemented by 2025. It has awarded gigawatt-level projects and is now the fastest moving commercial offshore wind market in APAC. The programme in Taiwan is supported by rewarding feed-in tariffs, which have attracted interest from leading offshore suppliers and international investors. New entrants need to familiarise themselves with the developing legal and regulatory framework around tariff and offtake arrangements.

THE ROLE OF FINANCIAL INVESTORS IN DEBT FINANCING

THE CLIFFORD CHANCE PERSPECTIVE

Non-banks (insurers, pension funds and debt funds) are increasingly interested in financing real assets. While this phenomenon is much more pronounced in the US, UK and parts of Europe, we anticipate investor and borrower demand driving this trend further afield.

Since the global financial crisis, we have seen a steady increase in non-bank investors financing real assets. In addition to their own quests for diversification, they have been encouraged to do so by governments and borrowers, both seeking an alternative to bank debt to ensure funding availability. For some, this has meant adding infrastructure to long-standing real estate portfolios.

There is of course a natural fit between real assets and institutional debt. Generally the significant capital cost and long pay-back period means longer term debt is preferred, which matches institutional requirements for long-term yield. The pricing 'sweet spot' for institutional debt is usually at a longer maturity than the bank equivalent.

The liquidity provided by the institutional debt market is particularly vital for large projects and most large real asset financings now approach institutional investors alongside banks. The number of interested institutions continues to grow, with many investing in focused real asset in-house expert teams to originate and manage the investments.

The idea that institutional investors will not take construction risk has frequently been shown to be incorrect, with many willing to take risk across a range of sectors. Mature sectors such as roads are well-covered. We have also seen investment in 'build to rent' residential property, where construction risk is mitigated through a solid business plan from the developer.

The UK's Hornsea offshore wind financing, the largest renewables financing globally to date, is another construction phase project (albeit with the benefit of Ørsted support) which involved a number of institutional investors lending senior debt alongside a bank group, with a pension fund providing mezzanine finance.

Offshore wind is a relatively new sector for institutional investors, but they have been driven here by deal volume and potential for yield. In addition, the sector is maturing (with developed supply chains, proven technology and developers having shown an ability to manage risk), and regulated subsidy regimes provide the contracted cash flows which investors seek. Looking forward, as subsidies across Europe tend to be reducing, the question remains whether the financial investors will be prepared to bear merchant risk, or if the corporate power purchase agreement market will grow to provide sufficient secure cash flows to support the huge investment needs of renewable energy projects.

As financial investors look to put their capital to work in different markets, financing trends from one market quickly transfer into others, particularly within regions (e.g. Europe). For example, in some large real estate financings, 'cov-lite' loans have been adopted from the leveraged market. Institutions have also demonstrated the ability to provide financing for acquisitions on a 'certain funds' basis, fixed pricing during bid processes, and phased drawdowns for construction projects. With appetite for large commitment sizes and increasing flexibility, they look set to maintain and extend their market position.

2019 – LOOKING AHEAD

"The hunt for yield is driving financial investors to new sectors, new jurisdictions and new positions in the capital structure. Many have built expert teams and stated ambitious allocation targets, so we expect them to continue to grow their real asset portfolios, providing much-needed liquidity for the mega deals."

Clare Burgess,
Infrastructure Finance
Partner, London

5 PRACTICAL TIPS TO GET THE DEAL DONE

The ability to successfully assess and position transaction risk will distinguish bidders competing for real assets in new markets.

1 STRUCTURE FOR RISK APPETITE

New entrants to the market should consider investing in different levels in the capital structure, or investing alongside strategic players, as a way of minimising exposure to the risk of new geographies or asset classes. Successful investors continue to create 'platform' assets to maximise return on time invested, or create scale (where project size is small), while ring-fencing liabilities.

2 MANAGE REGULATORY CONSENTS

Consider in advance the impact on the transaction timetable and sale process of multiple foreign investment, regulatory and antitrust regimes. Consult your advisers to address the sharing of transaction risk, and where applicable construction risk, between buyer and seller.

3 ASSESS THE CHANGING REGULATORY LANDSCAPE

Important for longer term holders is a strong understanding of the wider political landscape – not just the current regulatory regimes – including how it may affect the pipeline of new assets available for development/M&A, and your ability to successfully exit.

4 FOCUS ON KEY DEAL TERMS

Sellers running competitive auction processes do not expect to bear buyer risk. Successful buyers on the other hand, adapt their approach on issues to seller expectations, balancing their desire for protection, while maximising the attractiveness of deal terms.

5 CREATE TARGETED INCENTIVISATION

Management teams with specialist knowledge, and with relationships with regulators and local stakeholders, remain at a significant advantage. In the context of competitive auctions, winning management through appropriately tailored incentivisation can be crucial. For longer term holders, whose exit horizon may not be aligned with management's, this may mean putting in place synthetic exit arrangements for management, which should be correctly tailored to minimise misalignment and funding-related issues.

4

DOING DEALS DIFFERENTLY

Strategic partnerships are the spirit of the age

In a shifting commercial climate, agility is no longer a tactic but a necessity, and the resurgence of strategic partnerships is challenging the traditional pre-eminence of M&A.

Businesses are gaining exposure to new opportunities by taking advantage of the flexibility and speed of alternative combinations to respond to industry disrupters, work in new ways and capitalise on complementary strengths.

Upfront decision-making on how strategic partnerships are run, who runs them and potential exit routes is essential.

46%

Percentage of executives say that they are looking to drive innovation through alternative structures, including partial divestments, joint ventures and revenue sharing and collaboration agreements. Nearly twice as many as in 2017[1]

GBP 9.8bn

The combined sales of GlaxoSmithKline and Pfizer's proposed consumer health joint venture

40%

Percentage of executives now reviewing their portfolio of assets and businesses every six months, up from 27% in 2017[2]

1 Source: Global Corporate Divestment Study 2018 (EY)
2 Source: Global Capital Confidence Barometer (EY, October 2018)

THE TRENDS WE ARE SEEING

MAXIMISING OPPORTUNITIES AND RESPONDING TO THREATS THROUGH STRATEGIC PARTNERSHIPS

Companies are defending their core markets and seeking growth, while deploying cash wisely and sharing risk.

- **Disruption prompts deals:** Incumbents have been seeking to buy out smaller disrupters to level the playing field with large tech companies. Businesses are increasingly partnering with tech start-ups that would otherwise pose this threat. Partnerships and alliances can often be agreed and announced more quickly than M&A transactions.
- **Innovative collaboration:** Businesses are giving up total control in favour of building capabilities, by:
  - teaming up with industry peers and rivals – using strategic partnerships to build scale, protecting their models and value chain from tighter margins, higher costs and/or external disrupters. In the face of increasing cost bases and faltering demand, retailers in particular are embracing joint purchasing alliances.
  - moving away from the traditional focus of joint ventures (i.e. horizontal integration) in favour of pooling their skills to accelerate entry into new markets (e.g. foreign retailers partnering with Chinese tech platforms in 'smart retailing' joint ventures), or to develop and share new technology (e.g. Ford and VW's global alliance to collaborate on commercial vehicles and new services).
- **Every dollar counts:** Shareholders continue to pressure businesses to manage their costs and exercise greater discipline in capital allocation. Strategic partnerships can de-risk deals by minimising upfront financial investment in new ventures, or in existing businesses by effectively selling part of the venture to a partner, while spreading the cost of new technologies and R&D amongst several industry players.

"Increasing interest in alliances is not limited to cost reduction. They can enable partners to broaden geographic influence, share expertise and access disruptive digital technologies."

Dessislava Savova,
Corporate Partner and Head of CG&R, Paris

DEAL INSIGHTS

STRATEGIC PARTNERSHIPS CREATE VALUE IN DIFFERENT WAYS

APPLYING CORE SKILLS TO OTHER OPPORTUNITIES

UOB and Grab
(Financial Services and Ride Sharing)

- In November 2018, United Overseas Bank and Grab, one of southeast Asia's largest ride-sharing companies, announced a regional strategic partnership to offer payment services to Grab's customers in Singapore and accelerate the use of digital services among ASEAN's growing base of digital consumers.
- Leveraging UOB's strength in financial services and Grab's platform, the partnership allows UOB to expose its financial products and services to Grab's customers, embed features of its upcoming digital bank within Grab's app, and explore greater areas of collaboration with Grab (such as fleet financing and treasury management solutions). Grab capitalises on UOB's customers as a ready-made client-base to expand its payment products arm.

BUILDING GREATER SCALE WITH LESS

GlaxoSmithKline and Pfizer*
(Consumer Healthcare)

- In December 2018, GSK and Pfizer announced that they had agreed to form a healthcare joint venture by combining their consumer health businesses into a single entity with sales of approximately £9.8 billion. As one of the largest global consumer healthcare businesses, the joint venture will create a category-leader in pain relief, respiratory, vitamin and mineral supplements, digestive health, skin health and therapeutic oral health.
- In an increasingly competitive market for over-the-counter products, the combined business is expected to have greater scale, while generating substantial cost savings for both partners and allowing them to focus on their respective strengths in developing higher-margin pharmaceuticals. GSK also anticipates that the cash-generative consumer health business will provide strong cashflow to assist the funding of its R&D pipeline.

PARTNERING WITH DISRUPTERS

Carrefour and Google
(Consumer Goods and Technology)

- In June 2018, Carrefour, one of Europe's largest retailers, announced its strategic cooperation with Google regarding the development of new distribution models and user purchase experiences for French consumers. The cooperation is based on three key initiatives: the availability of Carrefour on a new Google shopping website and Google Assistant in France, the creation of a Carrefour-Google innovation lab, and the acceleration of Carrefour's digitalisation. Google brings to the partnership its technology and skills in AI, cloud, and consumer shopping interfaces like the Google Assistant, while Carrefour contributes its product expertise and know-how in logistics and sales.
- This cooperation is the first of its kind between Google and a retailer for the French market. It is aimed at offering new and innovative user experiences for the French market, with the common objective for the two groups of bringing together their expertise and putting it at the service of consumers. The cooperation is focused on innovation and technological progress, and it is part of Carrefour's key strategy regarding its digital transformation.

* Clifford Chance advised on this transaction.

PARTNERING FOR GROWTH

THE CLIFFORD CHANCE PERSPECTIVE

Strategic partnerships are an increasingly flexible complement to M&A in the face of changing market dynamics.

- **Knowing your deal:** When considering a strategic partnership, it's essential for the business to establish an internal strategy that clarifies its priorities, strengths and deficiencies. Businesses may find that collaboration on certain elements of their value chain with competitors can carry fewer antitrust risks (particularly where an incumbent's existing market share isn't increased by the collaboration), given the threat posed by disrupters to the ecosystem of the industry in which they operate.
- **Sharing data and IP:** Strategic partnerships almost inevitably mean asset and risk-sharing. The pooling of data and technology by the partners and generated through the alliance will likely contribute to growth in both the volume and value of such data and technology for all involved. There will be greater focus on the contribution, ownership and exploitation of that data, both during and after the life of the partnership, adding a layer of complexity to customary negotiations around the ownership and contribution of IP.
- **Enhancing specific elements of the value chain:**
  - A strategic partnership can be a faster way to lock in a growth opportunity or expand into a new market, especially if it does not involve consolidation of market share or control over another business.
  - Given lingering concerns – especially in Europe and Asia Pacific – about the power of the major tech companies and the fate of legacy businesses with significant market shares, joint ventures between tech companies and industry incumbents are now attracting closer antitrust and regulatory scrutiny. Businesses partnering with major tech companies are therefore likely to focus on forming alliances around specific elements of their value chain, such as R&D and procurement.
- **Attracting and retaining talent:** Good incentives packages are vital to attracting and retaining the right people with the right expertise. The commercial structure and costs of these rewards will be heavily negotiated, as sign-ons, long term incentives and other retention awards linked to performance measures will need to be aligned with the strategy and goals of the strategic partnership.
- **Getting closer:** Soaring valuations and intense competition for quality assets mean businesses do not always have the investment capital to acquire high-value targets, or attractive businesses may be privately held and not for sale. Strategic partnerships can open doors for incumbents to collaborate with otherwise tightly knit entities – a stepping stone towards an eventual acquisition.

2019 – LOOKING AHEAD

"Working with historic competitors and disrupters is not always straightforward. Getting key people behind the partnership is critical and this requires thoughtful, tailored incentivisation. The reward side of a strategic partnership will be increasingly critical to fostering the success of cross-industry collaboration."

Sonia Gilbert,
Employee Incentives
Partner, London

5 PRACTICAL TIPS TO GET THE DEAL DONE

Strategic partnerships need careful planning to maximise the chances of success.

1 ASSESS REGULATORY RISK

Merger control clearance may be required if certain thresholds are triggered. Be mindful of this, as it is usually for the parties to self-assess antitrust risks. Regulatory approvals may also be necessary in sensitive industries such as media and telecoms, financial services and pharmaceuticals, even if a partner only has a minority interest in the alliance.

2 SECURE YOUR INFLUENCE

Governance rights between established industry players are likely to reflect relative economic contribution to the alliance. Conversely, founders generally wish to retain significant influence. Consider whether the corporate governance standards provide effective checks and balances and how risk of deadlock in decision-making is dealt with.

3 INCENTIVISE KEY TALENT

Personal alignment to the strategic partnership's time frame and specific objectives is crucial to ensure the goals of key individuals match those of the business. Early collaboration is essential, particularly to determine how incentives will be structured and costs met. Entering into an alliance will likely have implications for your existing incentive arrangements.

4 SECURE IP AND DATA

Clearly identify any pre-existing IP to be contributed, and new IP that will be developed through the partnership. Secure upfront agreement to the ownership of both existing and new IP in order to avoid disputes. It may be necessary to establish common ownership of, or licensing regimes for, IP and data created through the alliance to allow their use after the alliance has ended, coupled with use restrictions and confidentiality obligations to protect value.

5 PLAN FOR TOMORROW

Many strategic partnerships will be time-limited. Determine your exit strategy upfront and consider whether any special circumstances before the end of its natural life – such as failure to satisfy the business plan – should trigger an early exit. A buyout of your partner or a perpetual licensing arrangement may be an option.

5

GLOBAL M&A DATA SET

The outlook for 2019

Using insight and deal intelligence from across our global network and 2018 year-end data from Mergermarket, we analyse the key trends and drivers for global M&A in 2019.

Like others, we have been anticipating the start of a downturn driven by falling GDP growth, the slowdown of China and rising global debt, as well as the ongoing political and economic uncertainties caused by the US/China trade war and Brexit. The fact that this has yet to materialise in our M&A practice is both pleasing and perhaps surprising, with activity levels and our pipeline holding up robustly to date. We have seen evidence of this in the wider market, with Bloomberg recording the strongest start to the year since 2000 in terms of deal value. We believe that the strategic and economic drivers for businesses and investors, coupled with the ongoing pace of technological development, will continue to maintain a significant degree of momentum for M&A this year.

+222%

Increase in outbound M&A from APAC into Europe, driven by China and Japan. This included two of the three largest cross-border deals in 2018 (Takeda/Shire and China Three Gorges/Energias de Portugal)

US$ 39bn

Comcast Corporation's takeover of Sky Plc, the largest deal in the TMT sector in 2018. TMT increased (+4%) to become the largest sector by M&A value globally

+39%

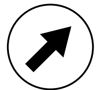
Increase in value of intraregional M&A in the Middle East and Africa in 2018, compared with 2017

US$ 9.6bn

Suzano's acquisition of Fibria Celulose in Brazil, the largest intraregional transaction in Central and South America in 2018

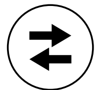
GLOBAL M&A DATA SET

WE IDENTIFY TRENDS, LOOKING AT DEAL VALUE FOR 2018 AS COMPARED WITH THE PREVIOUS YEAR.



Global M&A activity was up +12% by value for the year at US$ 3.5tn, despite deal volume being down -3%. Q2 was the strongest quarter of the year with US$ 1.1tn across 5,204 deals, including several of the year's top deals, such as Takeda/Shire and Sky/Comcast.

M&A values were up in all major regions, with the largest increases in North America (+14%), Europe (+17%) and Middle East/Africa (+10%). Asia-Pac was also up (+4%).

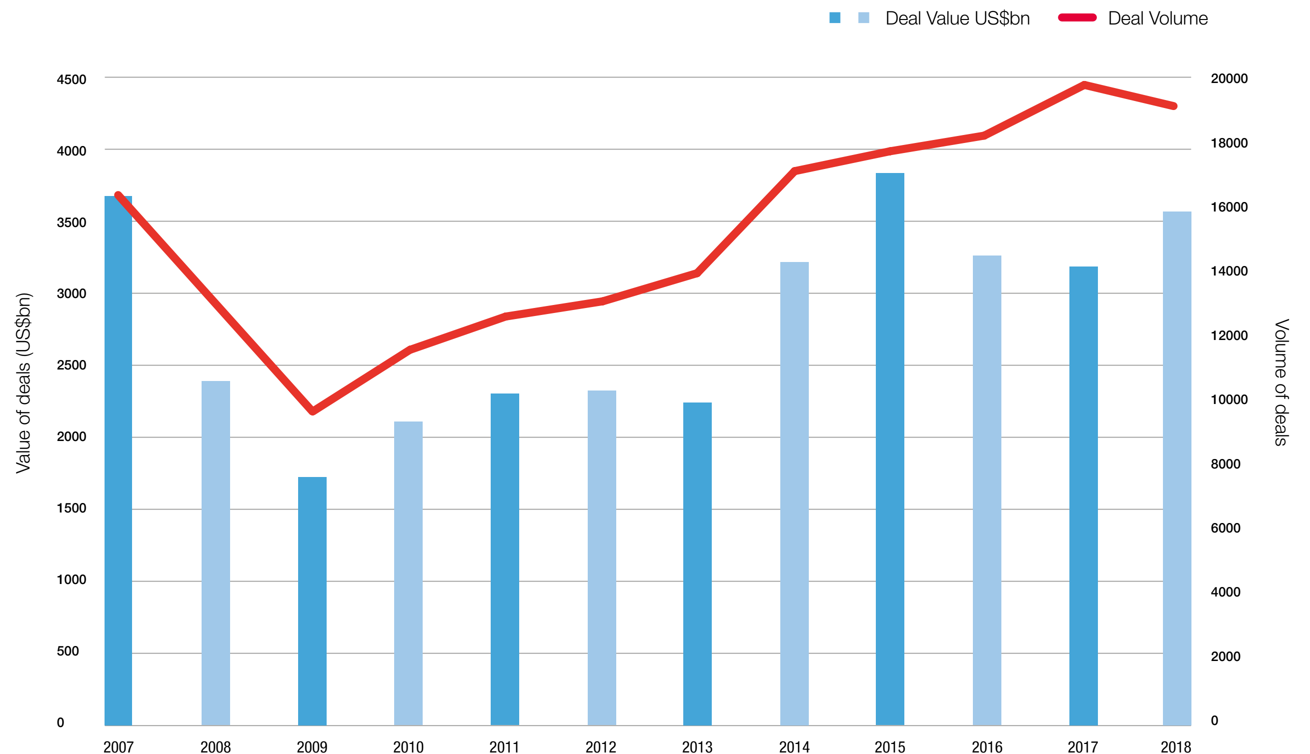


Cross-border M&A comprised 38% of total M&A globally. The largest cross-regional M&A investment flows in 2018 were from North America into Europe and Asia Pac into Europe. In China, whilst total outbound activity was slightly down, there was a significant increase in the value of Chinese deals into Europe and Middle East/Africa.

The hottest sectors in 2018 (in terms of total deal value and rise in market sector share) were TMT and Energy/Mining/Utilities. The top deal by value in the TMT sector was Comcast/Sky, and in the Energy/Mining/Utilities sector was E.ON/innogy S.E.

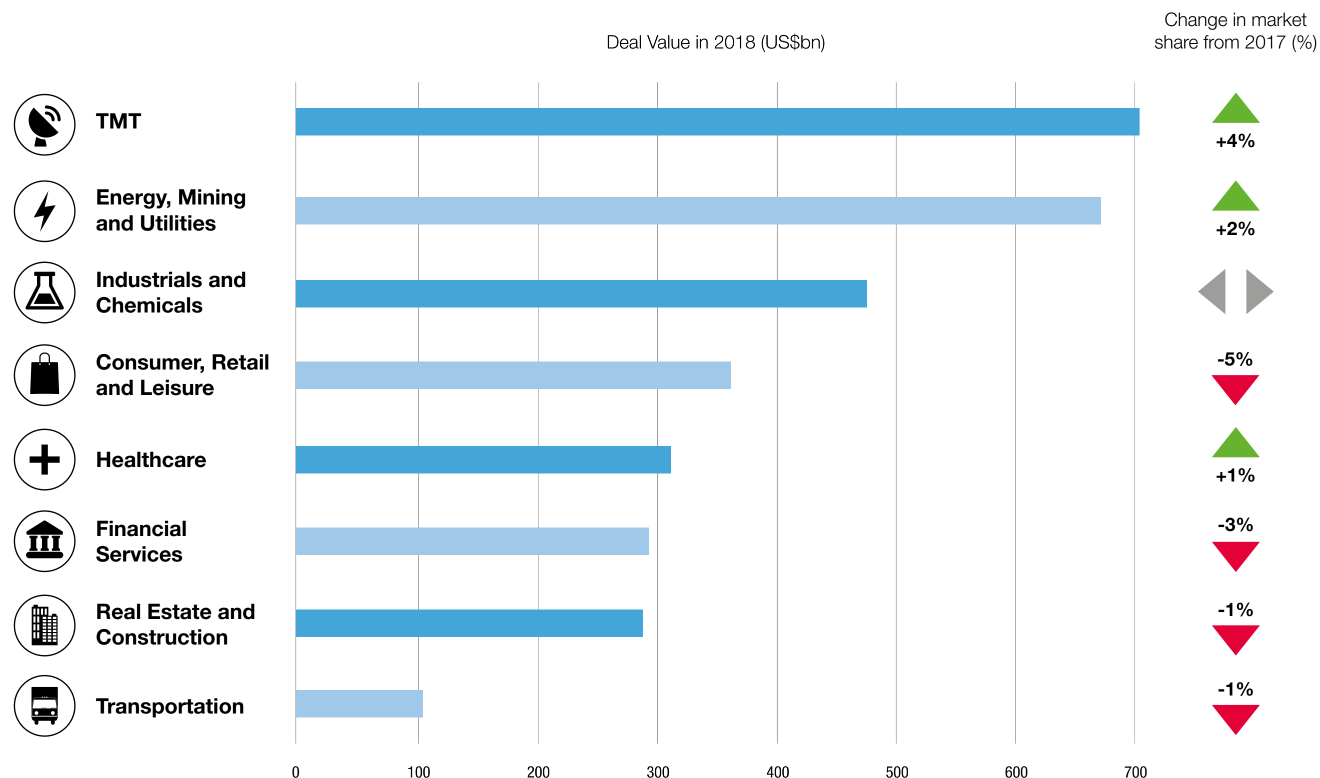
Financial sponsor M&A globally in 2018 was US$ 980bn, which comprised 28% of total M&A (flat when compared with 2017). Financial sponsor IPOs totalled US$ 62bn, which was 32% of total IPO value globally.

GLOBAL M&A ACTIVITY



Source: Mergermarket

SECTOR TRENDS



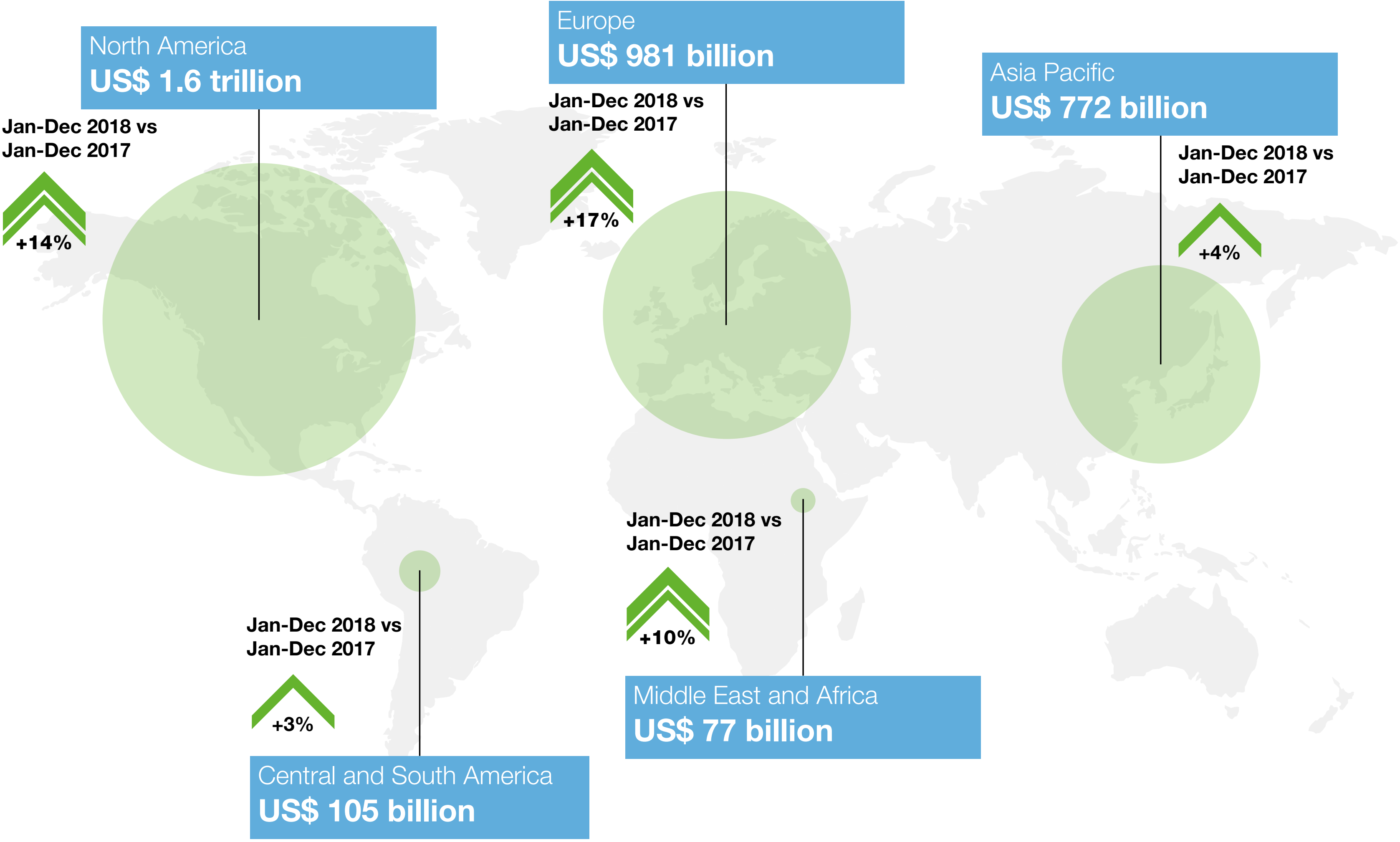
Source: Mergermarket

"Even as the politics of technology and telecommunications become ever more fraught and the hurdles to cross-border deal-making multiply, we do not see the TMT sector cooling any time soon. The forces of disruption and innovation that are accelerating business lifecycles are strongest in the TMT sector, and that is sure to continue generating M&A."

Anand Saha,
Corporate Partner,
Technology Group,
New York

GLOBAL M&A DATA SET

REGIONAL TRENDS



Source: Mergermarket

Note: Interactive maps showing investment flows into and out of each region are available on the Clifford Chance Global M&A Toolkit – www.cliffordchance.com/GlobalM&AToolkit

US

- In the US, sector consolidation, disruption and private equity buyouts continued to drive transformational acquisitions and large-cap deals (Dr Pepper Snapple/ Keurig Green Mountain merger and KKR's acquisition of Thomson Reuters' Refinitiv), resulting in a 15% increase in M&A value (US$ 1.5tn). Whilst inbound activity declined (-10%), outbound M&A remained near its highest annual level (US$ 3.2bn) as US companies continued to look for growth in new regions with exposure to different markets and consumer dynamics.

- The effects of the 2017 US tax reform, strong capital markets and debt markets which drove M&A activity in H1 were buffeted by slowing economic growth, increasing interest rates, escalating trade tensions and political instability in H2.

LATIN AMERICA

- In 2018, we saw a decrease in inbound transactions (-9%) and outbound transactions (-13%), due in part to the political changes across the region, with several presidential elections and new governments taking office in 2018. However, there was a spike in intraregional activity (+30%).

- In 2019, we expect most of the investment opportunities to come from the energy and infrastructure sectors, particularly in Brazil, with the announced privatization of government-controlled entities and new auctions for energy and infrastructure projects. In addition, we expect to see an increase in inbound M&A activity in Chile, Peru and Colombia.

EUROPE

- In 2018 despite political volatility, Europe was the global region which saw the largest increase in M&A value (+17%). This was driven by an increase in inbound M&A (+43%), principally from North America (US$ 238bn) and APAC (US$ 213bn, a +222% increase), whilst intra-European M&A remained static.

- Spain was a European M&A hotspot in 2018, surging +132% to US$ 113bn. The UK continued to have the year-on-year highest deal value (US$ 247bn, +33%), driven by both strong domestic (GKN/Melrose) and US inbound activity (US$ 112bn, +93%) (Comcast/Sky, Marsh McLennan/Jardine Lloyd Thompson and GIP/Hornsea). Others saw drop-offs in value (Germany, -2% and Italy, -6%), the most significant being France (-42%).

AFRICA

- 2018 witnessed increased M&A activity, reflecting an improved macroeconomic, political and FX environment, with Morocco, Nigeria, South Africa and Kenya attracting the most interest. Foreign investment continues to be the primary source of M&A, but we are also seeing a rise in intraregional M&A driven by sector consolidation, particularly in the financial services and telecoms sectors, and by an increase in African PE funds.

- The outlook for 2019 remains positive, particularly in the energy and infrastructure sectors, with China continuing to play a significant role and an increased focus by the US. Consumer-driven sectors (including education, healthcare and FMCG) will continue to drive investment, especially where there is a crossover with the financial services and tech sectors.

ASIA PACIFIC

- China saw an increase in inbound M&A (+42%), linked in part to the opening up of new sectors to foreign investment. Outbound M&A decreased (-12%), although there were marked increases of outbound to Europe (+79%) and MENA (+177%). This contrasted with a drop in deals into the US (-42%), evidencing a switch away from the US market seen by potential Chinese buyers as increasingly risky, especially as a result of CFIUS controls and trade tensions between China and the US. Japan saw the largest swing, with a +96% increase in domestic M&A, driven by continued corporate carve-outs. Outbound saw a +118% increase with Takeda's US$ 59bn takeover of Shire the most prominent.

- Australia saw an increase in domestic M&A (+109%), with stock market volatility driving an increase in trade sales (as opposed to exits by way of IPO) and the announcement of several large public-to-privates (KKR/MYOB and Brookfield/Healthscope). Both trends are likely to continue in 2019.

MIDDLE EAST

- Deal values are up +10%, reflecting a significant increase in the number of blockbuster deals of over US$ 1 bn. In contrast, total outbound M&A for the region is down -39%, a reflection of greater focus on intraregional investment and infrastructure development. Energy and mining (US$ 9.5 billion+ over 22 deals), technology and, to a lesser extent, the consumer sectors, are particularly active. Outlook for M&A in 2019 is reasonably positive and will be driven by opportunistic private M&A for cash-strong corporates and further consolidation, often driven by government-backed cornerstone shareholders.

GLOBAL M&A TOOLKIT

Clifford Chance Global M&A Toolkit

The essential interactive resource for anyone involved in M&A transactions.

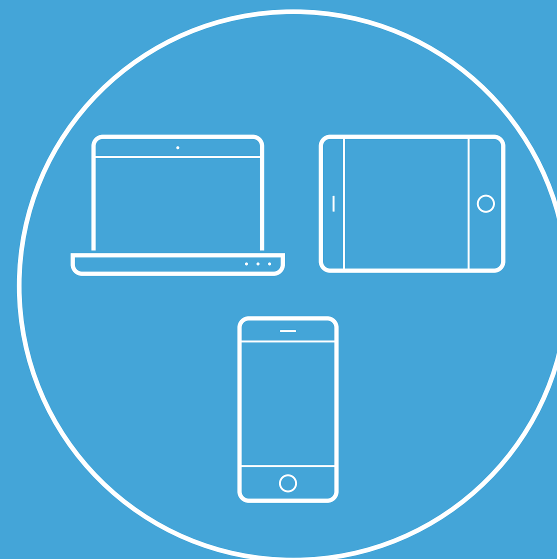
The Clifford Chance Global M&A Toolkit comprises a growing collection of web-based transaction tools, video content and in-depth analysis of the most important market and regulatory developments in M&A regimes across the globe.

www.cliffordchance.com/GlobalM&AToolkit

Global M&A Trends: Interactive investment flow maps

Our interactive maps show current M&A flows into and out of each major investment region of the globe giving you insights into the latest trends in cross-regional M&A. The maps are easy to use, simple and effective. Available through the Global M&A Toolkit at:

www.cliffordchance.com/GlobalM&ATrends



Editors for this publication

CHRISTOPHER SULLIVAN
T: +44 20 7006 5050
E: christopher.sullivan@cliffordchance.com

EDWARD HOLMES
T: +44 20 7006 2284
E: edward.holmes@cliffordchance.com

JENNIFER MBALUTO
T: +44 20 7006 2932
E: jennifer.mbaluto@cliffordchance.com

BRIAN HARLEY
T: +852 2826 2412
E: brian.harley@cliffordchance.com

CHRISTOPHER KEMP
T: +44 20 7006 6193
E: chris.kemp@cliffordchance.com

EDWIN WONG
T: +44 20 7006 5321
E: edwin.wong@cliffordchance.com

ERIKA BUCCI
T: +1 212 878 8142
E: erika.bucci@cliffordchance.com

STEFAN BRUDER
T: +49 697199 1771
E: stefan.bruder@cliffordchance.com

DANIEL HARRISON
T: +44 20 7006 4136
E: daniel.harrison@cliffordchance.com

ISABELLE HESSELL-TILTMAN
T: +44 20 7006 1681
E: isabelle.hessell-tiltman@cliffordchance.com

OUR INTERNATIONAL NETWORK

GLOBAL
GUY NORMAN
T: +44 20 7006 1950
E: guy.norman@
cliffordchance.com

AMERICAS
DAVID BRINTON
T: +1 212 878 8276
E: david.brinton@
cliffordchance.com

LATIN AMERICA
JAVIER AMANTEGUI
T: +34 915 907 576
E: javier.amantegui@
cliffordchance.com

BRAZIL
ANTHONY OLDFIELD
T: +1 212 878 3407 / +55 11 3019 6010
E: anthony.oldfield@
cliffordchance.com

ASIA PACIFIC
ANDREW WHAN
T: +852 2825 8903
E: andrew.whan@
cliffordchance.com

JAPAN
TATSUHIKO KAMIYAMA
T: +81 35561 6615
E: tatsuhiko.kamiyama@
cliffordchance.com

SINGAPORE
VALERIE KONG
T: +65 6410 2271
E: valerie.kong@
cliffordchance.com

AUSTRALIA
LANCE SACKS
T: +61 2 8922 8005
E: lance.sacks@
cliffordchance.com

CHINA
TERENCE FOO
T: +86 10 6535 2299
E: terence.foo@
cliffordchance.com

INDIA
NEERAJ BUDHWANI
T: +852 2826 2428
E: neeraj.budhwani@
cliffordchance.com

MIDDLE EAST
MOHAMMED AL-SHUKAIRY
T: +971 4503 2707
E: mo.al-shukairy@
cliffordchance.com

AFRICA
SPENCER BAYLIN
T: +44 20 7006 1519
E: spencer.baylin@
cliffordchance.com

TURKEY*
ITIR ÇIFTÇI
T: +90 212339 0077
E: itir.ciftci@
yeginciftci.av.tr

CENTRAL AND EASTERN EUROPE
ALEX COOK
T: +420 22 255 5212
E: alex.cook@
cliffordchance.com

RUSSIA
MARC BARTHOLOMY
T: +7 495 660 8006
E: marc.bartholomy@
cliffordchance.com

FRANCE
LAURENT SCHOENSTEIN
T: +33 14405 5467
E: laurent.schoenstein@
cliffordchance.com

GERMANY
THOMAS KRECEK
T: +49 69 7199 1524
E: thomas.krecek@
cliffordchance.com

BELGIUM
NIEK DE PAUW
T: +32 2533 5072
E: niek.depauw@
cliffordchance.com

NETHERLANDS
HANS BEERLAGE
T: +31 20711 9198
E: hans.beerlage@
cliffordchance.com

ITALY
UMBERTO PENCO SALVI
T: +39 028063 4241
E: umberto.pencosalvi@
cliffordchance.com

SPAIN
JAVIER GARCÍA DE ENTERRÍA
T: +34 915 904 102
E: javier.garciadeenterria@
cliffordchance.com

LUXEMBOURG
CHRISTIAN KREMER
T: +352 485050 201
E: christian.kremer@
cliffordchance.com

UNITED KINGDOM
NIGEL WELLINGS
T: +44 20 7006 8011
E: nigel.wellings@
cliffordchance.com

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