The Mergers & Acquisitions Review

Thirteenth Edition

Editor
Mark Zerdin

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Thirteenth Edition

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PREFACE

2018 was the year of the mega-deal, with an unprecedented number of big-ticket mergers taking place across a range of jurisdictions and sectors. In the first six months of 2018, global deal value rose by 59 per cent compared to 2017, despite volumes falling by 12 per cent. Although there was a considerable drop off in activity in the second half of the year, 2018 nonetheless saw robust overall performance by market participants, with global activity in 2018 exceeding US$3 trillion for the fifth consecutive year.

The United States remained the most targeted and acquisitive region globally in 2018; however, the deal-making landscape in the US for the remainder of 2019 presents a mixed picture. On the one hand, tax reform, a more relaxed US regulatory climate and growing cash reserves present a favourable environment for investors. On the other, dealmakers are likely to be concerned by the trade dispute between the US and China – which is already threatening economic growth and, at the time of writing, shows no sign of abating – and the ongoing uncertainty regarding antitrust policies, which may lead to increased scrutiny of M&A deals.

In Europe, after a record-breaking start to the year, the prolonged uncertainty caused by stuttering Brexit negotiations and wider political tensions across the continent finally caught up with dealmakers in the second half of 2018. In line with a softening of the global economy, the value of European deals in H2 plummeted to its lowest level since 2013, and the volume of transatlantic deals between North America and Europe also fell by 29 per cent year-on-year.

One of the main disruptors to M&A activity over the past 12 months has been the rise in political intervention in cross-border deals. In particular, concerns over national security have led to the tightening of foreign investment regimes and antitrust regulations, coupled with more active enforcement by regulators. This growth in protectionism is likely to remain one of the main obstacles facing dealmakers in the near future.

Nevertheless, looking forwards into the remainder of 2019, there is certainly cause for optimism: private equity continues to enjoy record-breaking levels of dry powder, and developments in technology are driving both the sector itself and the facilitation of deals more broadly. Finally, and perhaps most importantly, the past 12 months have highlighted the resilience of companies and private equity firms in their navigation of global political uncertainty and economic shifts.

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I would like to thank the contributors for their support in producing the 13th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 47 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
July 2019

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Chapter 44

UNITED KINGDOM

Mark Zerdin[1]

I OVERVIEW OF M&A ACTIVITY

In the UK, 2018 was truly a year of two halves: after the first six months of record-breaking levels of activity, deal-making plummeted by a remarkable 47.6 per cent in H2.[2] Nevertheless, thanks to the exceptional start to the year, the total value of UK M&A activity in 2018 still reached £182.6 billion, the highest annual value since 2015. Of this figure, £119.9 billion was recorded in H1.

There were 1,560 recorded deals in 2018. The largest of these was Comcast Corporation's high profile takeover of Sky plc, which, after months of dramatic negotiations, ultimately resulted in a deal valued at over €42 billion. Other high-value deals included GlaxoSmithKline's acquisition of the remaining 36.5 per cent stake in its consumer healthcare joint venture with Novartis for €10.5 billion – the largest deal in the rapidly growing pharmaceutical, medical and biotech sector – and Melrose's hostile takeover of GKN for €9.8 billion.[3] One of the most notable deals in the second half of 2018 was the shake up in the European telecoms sector as a result of Vodafone's £16 billion acquisition of Liberty Global's operations in Germany, the Czech Republic, Hungary and Romanial, Vodafone's largest acquisition for almost two decades.[4]

The value of inward M&A, which was driven by US investment, increased from £35.2 billion in 2017 to £71.1 billion in 2018, largely due to the number of high profile deals in the first half of the year. By contrast, the value of outward M&A fell from £77.5 billion in 2017 to £22.7 billion in 2018. None of these outward acquisitions were ranked as very high value deals (above £10 billion).[5] These trends are consistent with the fall in the value of the pound.

Although public M&A deal volume decreased slightly in 2018 compared with 2017, with 42 firm offers announced for Main Market or Alternative Investment Market (AIM) companies, it was still a driver of much of the deal-making. Indeed, there was a substantial rise in deal value, with an aggregate deal value of £122.1 billion in 2018 in contrast to £45 billion recorded in 2017.[6] Schemes of arrangement remained the most popular choice of structure, accounting for 74 per cent of all firm offers announced in 2018.

1 Mark Zerdin is a partner at Slaughter and May.
2 Mergermarket, 'Deal Drivers EMEA 2018'.
3 Mergermarket, 'Deal Drivers EMEA 2018'.
4 Experian Market IQ, 'United Kingdom and Republic of Ireland M&A Review, H1 2018'
5 ONS – Office for National Statistics, 'UK Mergers and Acquisitions Activity in Context, 2018'.
6 LexisNexis, 'Public M&A Trend Report 2018'

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At the time of writing, there is still significant political uncertainty in the United Kingdom, particularly concerning the final stages of negotiations to leave the European Union and the looming threat of a no deal Brexit. This lack of clarity has subdued the market, and dealmakers are likely to remain cautious while this uncertainty persists.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Companies Act 2006 provides the fundamental statutory framework, and with the law of contract forms the legal basis for the purchase and sale of corporate entities. In addition, the City Code on Takeovers and Mergers (Takeover Code) regulates takeovers and mergers of certain companies in the United Kingdom, the Isle of Man and the Channel Islands. The Takeover Code has statutory force and the Takeover Panel (Panel) has statutory powers in respect of transactions to which the Takeover Code applies. Breach of any of the Takeover Code rules that relate to the consideration offered for a target company could lead to the offending party being ordered to compensate any shareholders who have suffered loss as a consequence of a breach. In addition, breach of the content requirements of offer documents and response documents may constitute a criminal offence. The Panel also has the authority to issue rulings compelling parties who are in breach of the requirements of the Takeover Code to comply with its provision, or to remedy the breach. These rulings are enforceable by the court under Section 955(1) of the Companies Act. The Takeover Code has a wider scope than the EU Takeovers Directive, and applies if the offeree (or potential offeree) is a UK public company and, in some instances, if the company is private or dual-listed.

The Financial Services and Markets Act 2000 (FSMA 2000) regulates the financial services industry and makes provision for the official listing of securities, public offers of securities, and the communication of invitations or inducements to engage in securities transactions. Following substantial amendments to the FSMA 2000, brought about on 1 April 2013 when the Financial Services Act 2012 (FS Act) came into force, financial regulation is split between two bodies: the Financial Conduct Authority (FCA), which regulates conduct in the retail and wholesale markets, and the Prudential Regulation Authority, which is responsible for the prudential regulation of banks and other systemically important institutions. As a consequence of the FS Act, more than 1,000 institutions (including banks, building societies, credit unions and insurers) are now dual-regulated. The UK Listing Authority Sourcebook of Rules and Guidance (which includes the Listing Rules, the Prospectus Rules and the Disclosure Guidance and Transparency Rules (DTRs)), promulgated by the FCA in its capacity as the UK Listing Authority (the competent authority for the purposes of Part VI of the FSMA), includes various obligations applicable to business combinations involving listed companies, and contains rules governing prospectuses needed for public offers by both listed and unlisted companies. The Listing Rules, in particular, set out minimum requirements for the admission of securities to listing, the content requirements of listing particulars and ongoing obligations of issuers after admission. The Criminal Justice Act 1993 contains the criminal offence of insider dealing and, from 3 July 2016, the EU Regulation on Market Abuse (MAR) (with the Listing Rules, the DTRs and the Takeover Code) regulates the civil regime for insider dealing.

Merger control rules are contained in the Enterprise Act 2002, although they do not generally apply to mergers in relation to which the European Commission (Commission) has exclusive jurisdiction under the EU Merger Regulation. In addition, specific statutory

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regimes apply to certain areas, including water supply, newspapers, broadcasting, financial stability, telecommunications and utilities, and these separate regimes may have practical implications in merger situations.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Takeover Panel: changes to the Takeover Code and practice

There have been relatively few changes to the Takeover Code since the last edition of *The Mergers & Acquisitions Review*. The two main updates this year were the amendments to Rule 29 and the approval of provisional legislation that will come into force if and when the UK leaves the EU.

In addition, while there have been no further legislative changes to the Code regarding the increased disclosure obligations, which, as outlined in the previous edition, came into force on 1 January 2018, there has been a shift in practice in reaction to this legislation. It has been noticeable that the Panel does now expect parties to disclose substantially more information – about, for example, the future of their business – than they may previously have been accustomed to providing.

It is also worth considering how wider trends impact takeovers in practice. In particular, the increasing influence of the Pensions Regulator (which now has greater powers to intervene in transactions) and the global rise in protectionism are both likely to affect how takeovers are conducted. It is foreseeable that legislation will be updated in the future to reflect these trends, but in the meantime practitioners should consider how such changes may impact the structure of their transactions.

Rule 29

On 17 October 2018, the Takeover Panel introduced a series of amendments to Rule 29 (on asset valuations). The amendments do not materially alter the current application of Rule 29; rather, the changes primarily codify existing practice and provide increased clarification. Subject to some remaining variations, the amendments broadly bring Rule 29 in line with Rule 28 (on profit forecasts). These variations include, for example, the requirement for parties to undertake asset valuations fully; unlike Rule 28, there is no cover for ordinary course profit forecasts, which enable parties to circumvent the reporting requirements under Rule 28. The Panel has justified this on the basis that asset valuations are more subjective than profit forecasts. Additionally, Rule 29 requires the parties to produce a valuation report. This has always been the case, but the amended Rule 29 now sets out the requirements for this report in much more detail.

Brexit – provisional amendments

On 6 March 2019, Response Statement (RS 2018/2) was published, in which the Panel adopted the majority of the changes proposed by the Code Committee in relation to the UK's planned withdrawal from the European Union. The amendments will take effect on exit day (within the meaning of Section 20 of the European Union (Withdrawal) Act 2018). Two particularly notable points arise from the Response Statement. First, the rules regarding shared jurisdiction and the rules aligning the treatment of EEA shareholders with other

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overseas shareholders will be removed. Secondly, it is interesting that the Panel decided not to get rid of the EU conditions, a decision that the Panel has acknowledged is for purely pragmatic reasons.

ii Contractual interpretation

Contractual interpretation is an ever-changing landscape, and it is important for M&A practitioners to keep abreast of recent developments, which may provide useful lessons when drafting transaction documents. A selection of noteworthy cases that have come before the courts in the past year are highlighted below.

In *Rock Advertising v. MWB Business Exchange*, the Supreme Court held that a variation clause in a contract, which required modifications to be in writing, invalidated a subsequent oral agreement to vary a contract.[7] The Court gave effect to the contractual provision and reasoned that it would be contrary to party autonomy if parties were not able to bind themselves as to the form of future variations. This means that, from the point that a contract is made, the parties' autonomy is qualified according to what the parties have agreed. While *Rock Advertising* does not disturb the general law that parties are able to vary a contract subject to the necessary conditions being met, the decision does mean that parties can now be more certain that their written agreements fully reflect the terms of their agreement.

The Court of Appeal considered a dispute concerning the interpretation of a force majeure clause in *National Bank of Kazakhstan v. BNY Mellon*.[8] The appellants, NBK, sought declarations to the effect that BNY Mellon was not entitled to freeze assets located in London on the basis that Belgian and Dutch orders were not recognisable in England. BNY Mellon relied upon a clause in a global custody agreement that excused any non-performance (here, the failure to follow the NBK's instructions) caused by 'any order [. . .] imposed by any [. . .] judicial [. . .] authority'. The Court interpreted the clause broadly, giving the words their plain meaning, and held that the scope of the clause did extend to the Belgian and Dutch orders. This case is also an important reminder that international parties may be exposed to (potentially) conflicting laws in the different jurisdictions in which they operate.

Chudley v. Clydesdale Bank concerned the identification of a class for the purposes of the Contracts (Rights of Third Parties) Act 1999 (Act).[9] The Court of Appeal ultimately held that, where a bank had (wrongfully) entered into a contract with an investment company that specified how investors' money should be held, the investors were entitled to claim the benefit of the contract, despite being unaware of the existence of the contract at the time of their investment. Crucially, the Court confirmed that the use of the term client account in the contract was sufficient to expressly identify a class (namely clients investing in the scheme) for the purposes of the Act, and that the appellant investors were within that class. This case is of particular interest because, in reaching this decision, the Court determined that the identification of a class relied on the construction of the contract as a whole.

7 *Rock Advertising Ltd v. MWB Business Exchange Centres Ltd* [2018] UKSC 24

8 *National Bank of Kazakhstan & Anor v. The Bank of New York Mellon SA/NV London Branch* [2018] EWCA Civ 1390.

9 *Chudley and others v. Clydesdale Bank Plc (t/a Yorkshire Bank)* [2019] EWCA Civ 344.

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IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Inward M&A increased notably in 2018: foreign acquisitions of UK companies were valued at a total of £71.1 billion, compared with £35.2 billion in 2017.[10] Foreign investment was largely driven by the US, and resulted in a number of high profile deals such as US media firm Comcast's acquisition of Sky. Nevertheless, although the UK retained its position as the top investment destination in Europe, research indicates that foreign direct investment (FDI) to the UK has fallen by 19 per cent since the vote in favour of leaving the EU.[11] In contrast, neighbouring countries appear to be reaping the benefits of Brexit-related uncertainty, as FDI into other western European economies (such as Luxembourg, France and the Netherlands) has been on the rise.[12] While the UK remains in its current state of limbo, investors are likely to adopt a more cautious approach to investing in the UK.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Technology, media and telecoms

The technology, media and telecoms (TMT) sector was a particularly fruitful area for M&A activity in 2018, with some of the largest deals ever recorded in this industry. The strong performance in the UK was mirrored globally: the TMT sector increased by 4 per cent, the biggest growth worldwide.[13] In the Americas, for example, the TMT sector was by far the highest in terms of deal volume, and the second highest (behind the energy, mining, oil and gas sector) in terms of deal value in 2018.[14]

The focus of the media industry was dominated by two headlines in 2018: the merger between Disney and 21st Century Fox, and the battle for Sky. Disney's US$71.3 billion acquisition of the film and TV assets held by 21st Century Fox, which was approved by shareholders in July 2018 and completed in March 2019, was one of the biggest media mergers ever recorded. While Fox does still exist independently of Disney, the direction of the corporation has now shifted away from entertainment to focus on news and sports. Commentators have speculated that this transaction will trigger a wave of similar mergers in the media business, as media providers react to the ever-growing influence of streaming films and television online.

In September 2018, Comcast outbid rival 21st Century Fox in a US$39billion takeover of the broadcaster Sky, acquiring more than 75 per cent of shares in the British telecommunications company. After months of negotiations, the deal was ultimately struck by means of a blind auction with three rounds, an unusual process for a deal of this nature.

Another megadeal in the TMT sector was Vodafone's €18.4 billion purchase of Liberty Global's cable assets in the Czech Republic, Germany, Hungary and Romania. This was the largest telecom deal and the second-largest deal in the TMT sector in 2018. Subject to regulatory approval – which at the time of writing has not yet been confirmed – the deal will make Vodafone the largest provider of high-speed broadband and cable services in Europe.

10 Office for National Statistics, 'Mergers and Acquisitions Involving UK Companies, Annual Overview: 2018'.
11 *Financial Times*, 'The fDi Report 2018'.
12 Ibid.
13 CityAM, 'UK bags Europe's M&A top spot with $247 billion of deals in 2018 as TMT mergers grow'.
14 Mergermarket, 'Deal Drivers Americas 2018 Full Year Edition'.

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Driven by the continued growth of AI, cloud computing and advanced security solutions, the importance of the TMT sector looks set to continue into 2019. Within the TMT sector, areas such as 5G, smart speakers, radio and 3D printing are predicted to prove popular among dealmakers in the coming year.[15]

ii Shareholder activism

As noted in the previous edition, the past few years have seen a considerable increase in shareholder activism. Looking forward into the remainder of 2019, US-style activism in the UK and across Europe is likely to continue, with activists both affecting the course of, and acting as a catalyst for, future deals. The influence of activists has been particularly notable in transactions structured as schemes of arrangement. As schemes of arrangement allow the bidder to acquire 100 per cent control of the target if the scheme is approved, the statute governing them contains a series of protections for minority shareholders. Activist investors have been making increased use of these statutory provisions in the hope of securing more favourable economic terms in a trend known as 'bumpitrage'.[16]

In 2018, activist investors launched campaigns at 25 companies (spending £5.72 billion on shares), in contrast to the 11 companies targeted in 2017.[17] Notable examples of activist shareholder involvement in 2018 include Elliott's influence both in Melrose's takeover of GKN and in a campaign prompting UK retailer Whitbread to offload Costa Coffee to Coca-Cola. Elliott was also publicly hostile to Temenos's recommended offer for Fidessa, and came out in support of the competing bid from ION investments instead.

iii Protectionism and national security implications in the M&A context

One of the major trends that has emerged over the past 12 months has been the rise in protectionism, both within the UK and globally. The recent upsurge in protectionist measures has been fuelled by heightened concerns about national security and chiefly relates to foreign investment restrictions, antitrust regimes and takeover rules enabling regulators to influence, or even prevent, the outcome of a deal. It is predicted that this emerging trend will cause a sharp slowdown in takeover activity over the course of 2019 and add to trade tensions as the government increases its power to scrutinise investments.

Under the Enterprise Act 2002, the government has powers to intervene in relevant merger situations that are deemed to affect national (or public) security, media plurality or the stability of the financial system. Recently, there have been growing concerns that national security is insufficiently protected under the current regime as, for example, the CMA can only assess a proposed merger referred to it by the government if two or more enterprises have ceased to be distinct enterprises, and one of two tests is satisfied: the acquired company's annual turnover exceeds £70 million; or the merged entity would have a minimum 25 per cent share of sales or purchases in the United Kingdom of goods or services of a particular description.[18]

Against this background, during the past year the government made a series of short-term and long-term proposals to address national security concerns, and on 15 March 2018, the

15 Deloitte's TMT UK Report.

16 'Bumpitrage in schemes: the growing threat', PLC, 27 October 2016; PLC, 'Public M&A Trends and Highlights 2017'.

17 Lazard's Annual Review of Shareholder Activism, 2018

18 Enterprise Act 2002, Section 23.

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Department for Business, Energy and Industrial Strategy (BEIS) published the government's response to its consultation on short-term proposals, which amend the merger control jurisdictional thresholds.[19]

On 15 March 2018, the government confirmed its decision to lower the turnover threshold from £70 million to £1 million in the dual use and military use sector, and in parts of the advanced technology sector. Lowering the threshold to £1 million means that the turnover threshold will obviously be easier to meet, and a higher number of deals will be open to review by the CMA. Second, the government decided to introduce a new share of supply test in these two sectors. The new test, instead of only looking at the share of sales that a merged entity has, will also look at the share of sales of the target business before the merger. If the pre-merger share of sale of the target is 25 per cent or more, then the new share of supply test will be met, and the transaction will be subject to CMA scrutiny. These two changes will not replace the existing turnover and share of supply tests, but will exist alongside the existing CMA referral regime. The proposals will be brought into effect by the Enterprise Act 2002 (Share of Supply Test) Amendment Order 2018 (which has been laid before Parliament) and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018.[20]

On 24 July 2018, the government went a step further by publishing proposals to review transactions on national security grounds. The proposals are directed at investments from potentially hostile foreign states, which are seen as more risky than UK-based acquirers, particularly in sectors such as national infrastructure and advanced technologies. The proposals would give the government the power to call in transactions for review (which could be a lengthy process), and parties would be able to voluntarily notify their transactions. The proposed national security regime would, where legal, take priority over applicable merger control regimes. For example, the government could clear an anticompetitive transaction in circumstances where it had national security grounds for allowing the transaction to proceed. In June 2018, for example, the government intervened, on grounds of national security, in the proposed £44 million acquisition of Northern Aerospace Limited by a subsidiary of China's Shaanxi Ligeance Mineral Resources. Although this transaction was ultimately cleared, it lapsed on account of the delay and uncertainty. Thus, in an increasingly challenging regulatory environment, parties may be less inclined to engage in large, transformative deals.

Melrose Industrial's hostile takeover of GKN plc in the first quarter of 2018 is the best recent example of increased levels of government scrutiny over deals with public interest implications. In the final stages of this dramatic acquisition, the CEOs of Melrose and GKN were required to appear before the BEIS Committee and, 48 hours before the GKN shareholder vote, the UK government intervened by writing a letter demanding binding commitments from Melrose. The intervention was justified on the grounds that GKN was important to the UK's national security. The demands, including commitments to continue operating GKN as a UK business and investing in research and development projects, were considered the latest example of the government being increasingly willing to intervene in

19 Department for Business, Energy and Industrial Strategy, 'National Security & Infrastructure Investment Review' (15 March 2018) and 'Enterprise Act 2002: Changes to the Turnover and Share of Supply Tests for Mergers' (15 March 2018).

20 Department for Business, Energy and Industrial Strategy, 'National Security & Infrastructure Investment Review' (15 March 2018).

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takeovers.[21] In addition to the post-offer undertakings agreed with the Panel, Melrose also entered into deeds of covenant and undertakings in favour of the Ministry of Defence and the BEIS with respect to the GKN business. As a result of these commitments, the government ultimately decided that statutory intervention was not required.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In 2018, 42 firm offers were announced for AIM or Main Market companies that were subject to the Takeover Code.[22] The use of debt financing to fund or part fund offers rose when compared to 2017, with 21 offers involving a debt portion (compared to 15 in 2017). The use of short-term bridge facilities remains popular, particularly for larger deals; the facilities are typically refinanced in the bond markets or with longer-term loan refinancing.

Rule 24.3(f) of the Takeover Code requires that offer documents must contain a description of how an offer is to be financed and the source or sources of the finance. In particular, an offer document must provide details of the key terms of the debt, including the interest rates and any step up or variation provided for (which would include market flex rights). Following the publication of the announcement of a firm intention to make an offer, any documents relating to the financing of the offer must be published on a website no later than 12 noon on the following business day (Rule 26.2(b)). The disclosure of any market flex provisions included in the financing arrangements can therefore be a contentious issue. Disclosure of negotiated flex rights pursuant to Rule 26.2 may lead to higher funding costs, as it can put potential syndicate members on notice of the arrangers' ability to increase the interest payable (within the agreed parameters).

Rules 24.3(f) and 26.2 were introduced in 2011; in its 2012 review of the 2011 amendments to the Takeover Code, the Panel noted that as a result of the concerns outlined above, dispensation had been granted from the Rule 26.2 requirement in relation to disclosure of flex rights. This gives the parties a period of up to 28 days to complete syndication before publication of the offer document, which must then include details of the flex in accordance with Rule 24.3(f). Whether this 28-day concession will be long enough to complete syndication will depend upon the proposed timetable.

VII PENSIONS AND EMPLOYMENT LAW

i TUPE risk in M&A transactions

Although a pure share transfer typically does not engage the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), two key cases in 2017 highlighted the risk of employees successfully arguing that TUPE applies in relation to intra-group integration activities following completion of an M&A deal.

In *ICAP Management Services Limited v. Dean Berry and BGC Services (Holdings) LLP*,[23] the court considered the application of TUPE in the context of a share sale of a parent company. The court held that the TUPE argument failed on the basis that there was no

21 *Financial Times*, 'UK issues demands over Melrose's £7.8 billion hostile bid for GKN'. Accessed 13 April 2018.

22 PLC, 'Public M&A Trends and Highlights 2018'.

23 *ICAP Management Services Limited v. Dean Berry and BGC Services (Holdings) LLP* [2017] EWHC 1321 (QB).

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transfer of the business in which employees were employed, as opposed to control of that business. The mere fact of control is insufficient to show that a transfer has taken place from the target subsidiary to the new parent company. The critical test is whether the new party has become responsible for carrying on the business, has incurred the obligations of the employer, and has taken over the day-to-day running of the business. The relevant test can be summarised as whether the new party has 'stepped into the shoes of the employer'.

This test was expounded by the Employment Appeal Tribunal (EAT) in *Guvera Ltd v. Ms C Butler and others*,[24] in which the EAT rejected the idea that it is a necessary condition of a TUPE transfer that the transferee has assumed the obligations of employer towards the employees of the undertaking (for example, by paying the employees' wages). Rather, the factors outlined in *ICAP Management* were said to be important, but not necessary, aspects of a multifactorial test to find a TUPE transfer has taken place. In *Guvera*, the parent company went beyond exercising ordinary supervision of the subsidiary, including making and directly implementing key business decisions and directly handling a redundancy process. The EAT therefore found this gave rise to a TUPE transfer.

From a practical perspective, it is important to analyse the TUPE risk at the level of the day-to-day management of the business. While the purchaser may have a clear commercial interest in integrating the target's business into its own, integration affecting day-to-day management (such as hirings and firings) will lead to a greater risk of a TUPE transfer occurring. In contrast, the kind of global strategic oversight that is inevitable in group companies with shared ownership will not be sufficient. Having group-wide policies on HR and remuneration matters, for example, should be seen as low risk, provided that implementation of those policies is a matter for each individual company.

Businesses should therefore be aware of this potential TUPE risk when structuring a transaction and planning post-completion integration steps.

ii Employment status

Employment status remains a hot topic, particularly in those sectors (such as the gig economy) in which workers have traditionally been classified as self-employed but are now claiming to be entitled to certain employment rights. The government commissioned Matthew Taylor, the Chief Executive of the Royal Society of Arts, to conduct a review of modern employment practices;[25] the result report was published in July 2017.[26] The Taylor Review recommended significant reforms to the current categorisation of workers and self-employed individuals, and the rights attaching to each status.

The government issued its response in February 2018,[27] in which it generally agreed with the Taylor Review, but has chosen to consult on many of the recommendations before setting firm policy changes. It therefore launched a number of consultations in conjunction with its response, including regarding employment status.[28]

24 *Guvera Ltd v. Ms C Butler and others* UKEAT/0265/16/DM.

25 www.gov.uk/government/groups/employment-practices-in-the-modern-economy.

26 www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf.

27 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679765/180206_BEIS_Good_Work_Report.pdf.

28 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679853/FINAL_-_Employment_Status_consultation_-_FOR_UPLOADING_and_PRINTING.pdf.

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The employment status consultation contemplated new legislation that would set out the test to be met for an individual to be categorised as an employee, either using existing case law criteria or on the basis of new criteria. The paper also considered the possibility of aligning the definitions of employed and self-employed under the employment rights system and the tax system. However, the consultation makes clear that no decisions have been made about whether or how to reform employment status, so imminent legislative change appears unlikely for the moment. The consultation closed on 1 June 2018.

The government responded to the Taylor Review consultations in December 2018, publishing a policy paper – the Good Work Plan.[29] This included a commitment by the government to legislate to improve the clarity of the employment status tests and tackle misclassification. There will also be proposals on how to align the employment status framework for tax and employment rights. However, the government said it first needs to conduct yet more research into employment status, so imminent legislative change appears unlikely for the moment.

For now, businesses should remain alive to the risk that the individuals within their workforce may be incorrectly classified, and that the rights and responsibilities attaching to those individuals may be subject to change. This could have significant financial and reputational implications for businesses, particularly in the current political climate. Purchasers should therefore conduct thorough due diligence on the employment status of a target's workforce and seek appropriate indemnity protection where necessary.

iii Minimum contribution rate increases under auto-enrolment

There is mandatory auto-enrolment in the United Kingdom. This means that companies are required to offer (most) workers at least a defined contribution tax-registered pension plan providing a minimum level of contributions. These requirements have been introduced on a staged basis. Since 6 April 2019, the minimum total contribution is 8 per cent of an employee's qualifying earnings[30] (of which the employer must contribute at least 3 per cent). This recent increase to the cost of auto-enrolment will need to be taken into account by purchasers as part of a target's continuing employment costs.

iv Abolition of contracting out for defined benefit schemes

On 6 April 2016, contracting out of the state pension in defined benefit schemes was abolished as part of the introduction of the reformed UK state pension system. Employers have therefore lost the national insurance rebate to which they were previously entitled as a result of contracting out of the state pension.

The abolition of contracting out could be a relevant consideration for those purchasers considering taking on a target's (now formerly contracted out) defined benefit scheme that is still open to future accrual (although such schemes are now rare), as the employer would be required to pay a higher level of national insurance contributions.

However, a statutory modification power has been introduced that allows employers unilaterally to amend scheme rules governing accrual rates and member contribution levels

29 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766167/good-work-plan-command-paper.pdf.

30 The contribution rates do not apply to all of an employee's pay, but only to the amount falling within the qualifying earnings band. For the 2019–2020 tax year, qualifying earnings are gross annual earnings between £6,136 and £50,000.

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so far as is necessary to compensate the employer for the loss of its national insurance rebate. This power is subject to certain restrictions and would require consultation with employees. The power is available until 5 April 2021.

v Transfers of previous service benefits

A seller may require the purchaser to continue to offer a target's employees membership of a defined benefit pension scheme, including accepting a transfer of the employees' (and possibly former employees') previous service benefits into that scheme, although this is now relatively unusual.

If a transfer is to be carried out on a without consent basis,[31] certain requirements must be met. Prior to 6 April 2018, it was not possible to transfer contracted-out rights without consent to a scheme that had never been contracted out. The abolition of contracting out on 6 April 2016 meant that newly established schemes could not therefore receive a without-consent transfer of contracted-out rights. Since 6 April 2018, such transfers are permissible, but only if certain conditions are met. On acquisitions, transfers would usually be made with members' consent, but they could be made on a without-consent basis, particularly if it is intended also to transfer the benefits of any former employees.

vi Further scrutiny planned of corporate activity impacts on pensions

The government is planning to intensify the Pensions Regulator's scrutiny of how corporate activity may affect pension provision. A number of changes (announced in a response to consultation, published in February 2019) may be introduced through the 2019 Pensions Bill.

One change will introduce a requirement for employers or parent companies to make a declaration of intent, addressed to the pension scheme trustees and shared with the Pensions Regulator, ahead of certain business transactions, such as the sale of the controlling interest in a sponsoring employer, stating how the employer proposes to mitigate any detrimental impact on the pension scheme.

There will also be new civil penalties of up to £1 million, and new criminal penalties involving unlimited fines, up to seven years' imprisonment (the custodial sentence could be imposed for wilful or reckless behaviour in relation to a pension scheme), or both. The targets of some of these new punitive measures would be the employer sponsoring the pension scheme and anyone associated or connected with that employer.

Changes are also planned for the Pensions Regulator's financial support direction (FSD) regime, including an extension of the regime's scope to capture employers' controlling, individual shareholders, and a broadened range of targets for a contribution notice (issued where an FSD has not been complied with) to include persons associated or connected with the FSD recipient.

vii Guaranteed minimum pension equalisation requirement

Purchasers taking on a target's defined benefit scheme containing a form of contracted-out benefit known as guaranteed minimum pensions (GMPs) will need to understand any funding implications of an equal treatment ruling. Every pension scheme containing GMPs is affected by the 2018 ruling because the unequal design of GMPs is mandated by legislation.

31 That is, without the consent of the members whose benefits are to be transferred.

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The High Court decided that schemes must address the sex inequalities brought about by GMPs earned by service from 17 May 1990 (the ability of members to earn GMPs stopped on 6 April 1997).

VIII TAX LAW

While Brexit loomed large in 2018, we have seen some significant (non-Brexit-related) changes to the UK's domestic tax landscape. Among others, the taxation of non-residents in respect of UK land was overhauled, a new tax charge on offshore receipts from intangibles was introduced and the transferable tax history, an innovative measure in the oil and gas area, became reality.

i Brexit

HM Revenue & Customs (HMRC) have published a large volume of information setting out, in particular, how businesses should prepare for a no-deal Brexit, but a lot is still to play for. Given the uncertainty at the time of writing, the precise tax consequences of Brexit remain unclear.

It should, however, be noted that, in addition to creating potential VAT and customs issues on cross-border transactions, Brexit may mean that UK companies are no longer able to avail themselves of certain tax-related benefits of the UK's membership of the European Union, for example benefits under the Parent–Subsidiary Directive.[32] If UK parent companies can no longer rely on this Directive (which abolishes withholding taxes on payments of dividends between associated companies of different Member States), dividends would be received subject to withholding tax at the relevant double tax treaty rate, and this is not necessarily zero (for instance, in respect of dividends from German and Italian subsidiaries, it would be 5 per cent). Intra-group payment flows should, therefore, be reviewed, and holding structures for future acquisitions designed, with this in mind.

ii Investing in real estate, equity or debt

Over the past year, the government has introduced a number of changes to the taxation of non-residents investing in UK land. With effect from April 2019, any gain on a disposal of an interest in UK land (irrespective of whether it is a residential property) by a non-resident is subject to UK capital gains tax or corporation tax. The charge also applies in respect of a disposal of assets (such as shares) that derive at least 75 per cent of their value from UK land if a non-resident has a substantial indirect interest in that land. Offshore corporate landlords will be subject to corporation tax rather than income tax from April 2020 (although the non-resident corporate landlord scheme will continue to apply). It should also be noted that, from 1 March 2019, the time limit for filing a stamp duty land tax return has been shortened from 30 to 14 days.

Private equity structures are often set up so as to allow managers to benefit from entrepreneurs' relief (ER) in respect of capital gains realised on an exit. Broadly, ER is available where an individual has held a minimum 5 per cent interest in a company for a certain minimum period, and its effect is to reduce the capital gains tax rate to 10 per cent.

32 Council Directive 90/435/EEC of 23 July 1990.

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For disposals on or after 6 April 2019, qualifying for ER has become more difficult. The minimum holding period has been extended from 12 to 24 months, and an economic substance requirement has been added to the 5 per cent interest test; previously, this test was satisfied if an individual held 5 per cent of the voting rights and 5 per cent of the ordinary share capital in a company. The application of this test may be further complicated by a recent decision that preference shares with cumulative and compounding return count as ordinary share capital.[33] On a more positive note, if, on or after 6 April 2019, an individual's stake is diluted to below 5 per cent, he or she may be able to elect to protect the availability of ER in respect of gains accrued before such dilution. Raising additional capital is likely to be more straightforward as a result.

With effect from 29 October 2018, the government introduced a market value rule for transfers of listed securities to a connected company. It is likely that this measure is only the first step towards the introduction of a broader market value rule, given that the government has already consulted on extending it to transfers of unlisted securities and transfers to connected persons that are not companies.

From 1 January 2019, the regulatory capital securities regime has been replaced by the hybrid capital instruments regime. At a debtor's election, the new regime applies a favourable tax treatment to instruments under which the debtor is entitled to defer or cancel a payment of interest, but that do not contain any other significant equity features. Under the new regime, it is irrelevant whether the instrument forms part of the debtor's regulatory capital, as the regime is open to non-regulated as well as regulated entities. This may result in more diverse investment opportunities as other players, such as utilities, move into a space previously reserved for banks and insurers.

iii Withholding tax on interest

The UK imposes a 20 per cent withholding tax on yearly interest arising in the UK. The concept of yearly interest was considered by the Supreme Court in the *Lehman Brothers* case.[34] The case concerned statutory interest that did not accrue from day to day, but was payable at the end of the *Lehman Brothers* administration. Given that the administration lasted more than one year, the Supreme Court decided that the statutory interest was yearly interest and subject to withholding tax. On this basis, it is possible that contractual interest on late payments could be subject to withholding tax if the period of default runs for a year or more.

iv Using tax losses

As part of the overhaul of the relief of corporate income losses that took effect in 2017, the UK introduced provisions limiting the set-off of carried forward losses to 50 per cent of a group's profits above £5 million (with stricter restrictions for banks). On 29 October 2018, the government announced its intention to introduce a similar limitation in respect of the relief of carried-forward capital losses. The measure is intended to take effect from 1 April 2020 and, based on HMRC's consultation on its delivery, anti-forestalling rules are likely to be introduced in respect of transactions signed before, but completing after, that date.

33 *Warshaw v. HMRC* [2019] UKFTT 0268 (TC).

34 *HMRC v. Joint Administrators of Lehman Brothers International (Europe) (In Administration)* [2019] UKSC 12.

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In the previous edition of *The Mergers & Acquisitions Review*, we noted that the use of tax losses through surrenders as group or consortium relief may be affected by the *Farnborough* case,[35] in particular in the context of joint ventures, because the case called into question whether, for the purposes of the grouping rules, a shareholders' agreement is a constitutional document, and therefore whether its provisions can be taken into account to determine an entity's controller. During the case's appeal, the appellate court[36] did not, unfortunately, address this point. Therefore, joint venture partners may wish to consider locating provisions on voting rights in the joint venture entity's articles of association rather than the shareholders' agreement.

v Anti-avoidance, transfer pricing and controlled foreign companies

Buyers may want to focus due diligence on, and seek robust warranties in respect of, remuneration structures for UK employees. In 2017, the government introduced the loan charge, a tax charge on certain disguised remuneration loan balances outstanding as at 5 April 2019. Given the recent public backlash following reports of a number of suicides linked to the measure and calls for action against employers, there is a risk of financial and reputational damage for companies that made use of the relevant disguised remuneration schemes.

Under the off-payroll working rules commonly known as IR 35, individuals providing services through a personal services company may be treated as employees for tax purposes. Currently, the service provider determines whether IR 35 applies where services are provided to a private sector client. The government intends to change this such that, from April 2020, the determination must, instead, be made by the client – a move likely to substantially increase compliance burdens.

Shareholder transactions also call for caution. The recent *Union Castle* case[37] indicated that share issues are within the scope of the transfer pricing rules. It remains to be seen whether HMRC would seek to use this decision to re-characterise shares issued by a fatly capitalised subsidiary as debt and what ramification this may have for other shareholder transactions, such as the payment of dividends.

The government has amended the group financing exemption under the UK controlled foreign companies regime with effect from 1 January 2019, so as to exempt finance income that would otherwise be brought into charge as a result of it being derived from UK-connected capital, but not finance income that would otherwise be brought into charge as a result of it being derived from UK activity. Given the Commission's recent decision in this area,[38] it is expected that the exemption, as amended, should not be state aid.

vi VAT

The UK's VAT grouping rules have been amended so as to allow certain eligible individuals and partnerships to join a VAT group. However, at the time of writing, these amendments have not yet taken effect, and the date on which they will become effective has not yet been confirmed.

35 *Farnborough Airport Properties Ltd and others v. HMRC* [2017] UKUT 394.

36 *Farnborough Airport Properties Company & others v. HMRC* [2019] EWCA Civ 118.

37 *Union Castle Mail Steamship Company v. HMRC* [2018] UKUT 316 (TCC).

38 Press release IP/19/1948 and decision (2019) 2526 final.

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The European as well as the UK courts have had to grapple with questions around holding companies' ability to recover input tax. In the *Ryanair* case,[39] the Court of Justice of the European Union held that a holding company intending to provide management services to a takeover target can recover input tax on the cost of an abortive takeover. In contrast, input tax on the cost of a share sale was held to be irrecoverable.[40] A recent UK case concerned a holding company that provided management services to its two subsidiaries on the condition that it would not invoice for the services until the subsidiaries became profitable.[41] It was decided that the holding company did not carry on an economic activity and was, therefore, unable to recover input tax.

vii Intangibles, offshore receipts and digital services

The tax treatment of intangibles is bifurcated. Broadly, depending on the date of their creation or acquisition, intangibles are either treated as capital assets (CGT regime) or their tax treatment follows their accounting treatment (IFA regime). In an M&A context, the differences between the de-grouping rules under the two regimes has been a major point of criticism. In circumstances where CGT de-grouping charges would be added to the seller's disposal proceeds and covered by the substantial shareholding exemption (SSE), the IFA regime imposed de-grouping charges on the target, thereby increasing the tax costs associated with the transaction. It is welcome that, with effect from 7 November 2018, IFA de-grouping charges are disapplied where a SSE is available to the seller. In addition, a limited tax relief in relation to goodwill has been introduced with effect from 1 April 2019.

Where the due diligence process reveals that the target group holds its intangibles in a jurisdiction with which the UK does not have a double tax treaty containing a non-discrimination provision, the application of the UK's new income tax charge on offshore receipts from intangible property should be considered. Where a group's UK sales exceed £10 million, the new charge applies to the extent that the relevant offshore receipts are derived from UK sales. While it is imposed on the offshore recipient, the tax can be collected from its UK affiliates. It should be noted that transfers of intangibles made to avoid the new charge may be caught by anti-avoidance rules.

The government has further announced that, with effect from 1 April 2020, it will introduce a digital services tax chargeable at a rate of 2 per cent on revenues derived by certain digital businesses, such as search engines, social media platforms and digital marketplaces, from activities linked to UK user participation. The tax will not apply unless certain revenue thresholds are exceeded, and it is intended as an interim measure until an international consensus on the taxation of the digital economy has been reached.

viii Oil and gas

As announced in November 2017, the government has introduced certain measures to facilitate the transfer of late-life oil and gas assets, including the innovative transferable tax history.

Previously, pure mature field specialists with little prior activity in the North Sea were unable to obtain effective corporation tax relief for decommissioning costs. This was because the

39 *Ryanair Ltd v. The Revenue Commissioners* (case C249/17).

40 *C&D Foods Acquisition ApS* (case C-502/17).

41 *W Resources PLC v. HMRC* [2018] UKFTT 746.

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resulting losses would sit in the specialist buyer whereas the capacity to use those losses (by way of carry-back against tax previously paid) would be locked away in the seller. The government has addressed this by introducing the transferable tax history with effect from 1 November 2018. This measure allows a seller to transfer all or part of its tax history to the buyer.

The petroleum revenue tax rules have also been amended to allow a buyer to obtain tax relief for decommissioning costs incurred by the seller where the seller retains the decommissioning liability.

IX COMPETITION LAW

i The UK merger regime

The CMA has the power to carry out an initial Phase I review, and has a duty to refer any qualifying transaction for a detailed Phase II investigation if it believes that the merger will or may give rise to a substantial lessening of competition. Phase I decision-making is undertaken by the Senior Director of Mergers (or another senior CMA official). Phase II decision-making is undertaken by an independent panel of experts drawn from a pool of senior experts in a variety of fields.

Notification is voluntary in the sense that there is no obligation to apply for CMA clearance before completing a transaction. The CMA may, however, become aware of a transaction through its market intelligence functions (including through the receipt of complaints) and impose interim orders preventing further integration of two enterprises pending its review. There is a risk that it may then refer the transaction for a Phase II investigation, which could result in an order for divestment.

The CMA strongly encourages parties to enter into discussions in advance of formal notifications to seek advice on their submission to ensure that a notification is complete and to lessen the risk of burdensome information requests post-notification. The CMA aims to start the statutory clock within 20 working days (on average across all cases) of submission of a substantially complete draft merger notice. The average length of the total pre-notification period was 33 working days in the 2018 to 2019 financial year.[42] Some cases, however, require much longer pre-notification periods.

Once a transaction is formally notified, Phase I begins, and the CMA has a statutory time limit of 40 working days to reach a decision. The average length of Phase I was 36 working days during the 2018 to 2019 financial year.[43] The CMA may extend the 40 working day period in certain exceptional circumstances, such as if it is waiting for information from the merging parties. The CMA formally paused the statutory timetable in two Phase I cases during the 2018 to 2019 financial year.[44]

If the CMA's duty to refer a transaction to a Phase II investigation is engaged, the parties have five working days from the substantial lessening of a competition decision (SLC decision) to offer undertakings in lieu of a reference to the CMA (although they may offer them in advance should they wish to do so). If the parties offer undertakings, the CMA has until the 10th working day after the parties receive the SLC decision to decide whether the offer might be acceptable, in principle, as a suitable remedy to the substantial lessening

42 Mergers updates, Law Society Competition Section seminar, 12 March 2019. This figure was accurate as at 28 February 2019.

43 Ibid. This figure was accurate as at 28 February 2019.

44 Ibid. This figure was accurate as at 28 February 2019.

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of competition. If the CMA decides the offer might be acceptable in principle, a period of negotiation and third-party consultation follows. The CMA is required to decide formally whether to accept the offered undertakings, or a modified form of them, within 50 working days of providing the parties with the SLC decision, subject to an extension of up to 40 working days if there are special reasons for doing so.

At Phase II, the CMA must issue its decision within a statutory maximum of 24 weeks; this period is extendable in special cases by up to eight weeks. If remedies are required, the CMA has a statutory period of 12 weeks (which may be extended by up to six weeks) following the Phase II review within which to make a decision on any remedies offered by the parties.

The CMA has significant powers to impose interim measures to suspend or reverse all integration steps and prevent preemptive action in relation to both completed and anticipated mergers. This ensures that, although notification is voluntary in the United Kingdom, the CMA is able to prevent action being taken that would result in irreversible damage to competition. Severe financial penalties may be imposed for breaches of any interim orders or undertakings (capped at 5 per cent of the aggregate group worldwide turnover).

The CMA levies substantial filing fees in respect of the mergers it reviews (between £40,000 and £160,000), depending on the turnover of the target business.

ii Treatment of mergers by the CMA

The number of Phase I merger decisions made by the CMA in the 2018 to 2019 financial year (56) was down from the 62 taken in the preceding financial year, and significantly down from the peak of 210 merger decisions made by the Office of Fair Trading in the 2005 to 2006 financial year. Since the 2005 to 2006 financial year, 56 is the lowest annual figure for Phase I decisions, the average being 90 decisions per year over that period.

Of the 56 cases decided during 2018 and to date in 2019, 41 were cleared unconditionally, representing around 73 per cent of cases, up from around 66 per cent in the preceding year (including cases cleared under the *de minimis* exception). Eleven cases were referred for Phase II review (around 20 per cent), up from 15 per cent in the preceding year. Undertakings in lieu of a reference were accepted in two cases, down significantly from the 12 see in the preceding year. Of the 11 transactions referred to Phase II, one was prohibited, three were cleared unconditionally, four were cleared with remedies and three were cancelled or abandoned. Overall, the CMA intervened (i.e., prohibited or accepted remedies) in around 13 per cent of cases in the 2018 to 2019 financial year, which is around twice the rate of intervention from the Commission over a similar period. The higher intervention rate may be explained by the voluntary nature of the UK merger control regime, which means that parties may elect not to notify transactions that do not give rise to significant competition issues.

iii Recently published statements and consultations relevant to mergers

Lord Tyrie, the current Chair of the CMA, outlined proposals for the significant reform of the UK's competition policy in February 2019. With regards to merger control, the proposals include mandatory notification in the case of larger mergers that are likely to be the subject of review by multiple competition agencies globally while maintaining the voluntary system for smaller mergers. The rationale for the change is to avoid a situation post-Brexit whereby parties focus on notifications in mandatory regimes, which could put the CMA at a disadvantage when seeking remedies for UK-specific competition concerns if a global remedy package has already been agreed with other competition authorities.

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Further proposals to change the merger control regime were included in the 'Unlocking digital competition' report published in March 2019 by the Digital Competition Expert Panel that was appointed by HM Treasury. The report recommends that the largest digital companies with strategic market status should be required to make the CMA aware of all their intended acquisitions. The report also recommends the introduction of a balance of harms approach to the UK regime, which would require the CMA to assess the likelihood and the magnitude of the impact of a merger (both positive and negative), with mergers being prohibited where the harmful effects are expected to outweigh any merger benefits. The proposal follows from the review's conclusion that there has been under-enforcement in UK merger control in the past, especially in digital markets. The CMA is not, however, in favour, and has warned about the unintended consequences of introducing such a test.

The CMA also aims to continue to tidy up its existing guidance in the year ahead, with a focus on ongoing consolidation and refreshing its guidance to reflect current practice (at the time of writing, a consultation on interim measures has been reissued). The CMA also intends to consider further revision of its jurisdictional and procedural guidance and merger assessment guidelines depending on the status of the UK's exit from the European Union following the vote to leave on 23 June 2016.

iv Brexit and merger control

At the time of writing, it is expected that the United Kingdom will withdraw from both the European Union and the European Economic Area, which could cause significant changes to merger control regulation. It is likely that businesses will need to submit parallel notifications in the United Kingdom and European Union to obtain clearance for a deal, as the one stop shop principle should no longer apply (that is, the principle that if a merger has an EU dimension as defined in the EU Merger Regulation, it falls under the exclusive jurisdiction of the Commission). This could lead to a number of challenges for merging businesses, including increased regulatory burden. The CMA has emphasised in its Annual Plan for 2019 and 2020 that, from its perspective, the removal of the one stop shop principle would lead to an increased workload and may have an impact on its ability to cover other priority (but discretionary) areas such as market studies and investigations. In addition, the CMA expects its role in global mergers to change, with more extensive engagement with international regulators on both substance and potential remedies anticipated.[45]

X OUTLOOK

2018 was a lopsided year for M&A in the United Kingdom: following a bumper start to the year, activity fell dramatically during the second half of the year as political headwinds dampened deal-making spirits. Going into 2019, UK M&A suffered a third successive quarterly decline, hitting its lowest value since the EU referendum in June 2016. Q1 2019 saw just £27.4 billion spent on UK assets – a 36.6 per cent decrease from Q1 2018 – and no deals over the £5 billion mark were recorded.[46]

While Brexit uncertainty rages on, UK dealmakers are likely to remain cautious until greater political clarity is reached. Nevertheless, the availability of cheap debt, attractive

45 Competition and Markets Authority Annual Plan 2019/20.

46 Mergermarket, 'EMEA MA Activity Q1 2019'.

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bid financing costs and a weak sterling means that the UK is likely to remain a favourable environment for foreign investors. The rise in shareholder activism and developments in the technology sector – which supplied 16 per cent of the UK's deal count in Q1 2019 – are also likely to fuel M&A activity for the remainder of the year.

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Appendix 1

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