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Global M&A Hot Topics

19th Annual International Mergers & Acquisitions Conference

June 14, 2022

Moderators:

- **Ting Chen**, Cravath, Swaine & Moore LLP, New York, New York, USA
- **Roland Turnill**, Slaughter and May, London, England

Speakers:

- **Annika Clauss**, Hengeler Mueller, Frankfurt, Germany
- **Daniel Daeniker**, Homburger AG, Zürich, Switzerland
- **Francisco Müssnich**, Barbosa, Müssnich & Aragão, Rio de Janeiro, Brazil;
Latin American Regional Forum Liaison Officer, Securities Law Committee
- **Franziska Ruf**, Davies Ward Phillips & Vineberg LLP, Montréal, Québec,
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Global Regulatory Environment

- Antitrust
 - Calls for more aggressive antitrust enforcement and overhaul of merger review, with certain regulators signaling increased openness to new theories of antitrust enforcement
 - Increased willingness to use procedural barriers and new legislation to deter M&A activity, compounded by coordination among antitrust regulators in different jurisdictions that has led to divergent outcomes
- Foreign Direct Investment
 - Proliferation of FDI merger review – increase in number of foreign investment regimes (in particular, mandatory filing regimes)
 - Expanded jurisdictional scope and increased scrutiny and penalties in existing regimes, including expanded lists of “sensitive” industries
 - Varied and increasingly opaque regulations
 - Need for regulatory dialogue (if possible) to understand evolving practices and procedures



Global Regulatory Environment

- Trends or developments in deal terms and structures to address regulatory risk
 - “Efforts” standard to obtain all clearances required to close
 - Obligation to litigate
 - Outside or longstop date
 - Specificity of process, including whether acquiror or target controls strategy and what mandatory/voluntary filings are made
 - Ticking fees
 - Reverse termination fees
 - Conditions



Shareholder Activism

- The lower levels of global activism during the pandemic have rebounded in 2022
 - 73 new campaigns launched globally in Q1 2022, one of the busiest quarters for activism on record
- M&A continues to be the most common agenda item for activists when targeting companies valued at over US\$500 million, accounting for 30% of activist activity in Q1 2022
- M&A-related campaigns had the following objectives:
 - Scuttle/sweeten an existing deal
 - Of the scuttle/sweeten campaigns launched against European targets, activists were successful in 20% of scuttle campaigns and the deal price increased in 66% of sweeten campaigns
 - Break-up or divestiture
 - Sale of the company
- ESG dimension



Shareholder Activism: Evolving M&A-Related Trends

Activist Tactic	Commentary	Notable Examples
<p>Convergence of Private Equity and Activism</p>	<ul style="list-style-type: none"> ▪ Activists have become bidders for all or part of companies ▪ Offering to serve as financing source to “get the deal done” ▪ Activists are opening up private equity investment arms – e.g., Elliott ▪ Some PE shops have leveraged activist tactics to exert pressure 	 Elliott / Veritas  Icahn  Donerail Group
<p>Activists are Teaming Up with Strategics and Financials to Escalate M&A Activity</p>	<ul style="list-style-type: none"> ▪ Proposed deals from strategic buyers have included simultaneous pressure from an activist campaign ▪ Activists have teamed up with PE shops and other strategic investment vehicles to access more dry powder to facilitate larger transactions 	 Elliott / Vista  Starboard / Acacia  Icahn / Xerox  Elliott / Brookfield / Nielsen
<p>Primed M&A Markets Have Activists Pushing Companies to Explore Strategic Alternatives</p>	<ul style="list-style-type: none"> ▪ Activists are pushing for companies to consider strategic alternatives (primarily M&A / break-ups) to drive value creation ▪ Activists have grown even more vocal in regard to announced transactions from their portfolio companies 	 Elliott  Third Point  Flossbach von Storch  3D Investment Partners

ESG and M&A

- Institutional investors continue to be vocal about their expectations on how companies should confront and disclose ESG risks
- Increasing amount of “green” investing puts pressure on valuations in critical industries (fossil fuels, mining, cement, etc.)
 - Strategy adjustments in the wake of this trend (e.g., Holcim selling its Indian cement activities and shifting focus into adjacent industries)
- Role of ESG issues in companies’ assessments of potential M&A targets
 - 65% of respondents in a 2021 Baker Tilly International survey indicated that ESG is important when considering an investment, and 60% indicated that their firms had walked away from a potential investment due to a negative assessment on ESG issues at a potential target
 - 77% of respondents indicated that climate change is the most important ESG issue at their firm



ESG and M&A

- Assessment of a target's ESG profile in due diligence investigation
 - Development of remediation plans, review processes and post-closing integration strategy to address ESG-related issues identified during the investment process
- ESG-specific representations and warranties in transaction agreements, including with respect to environmental, privacy and data security, labor relations, corruption and anti-bribery and “#MeToo” matters
- ESG as a key component of transaction messaging in deal announcements and rollout materials



Russian Invasion of Ukraine

- Impact of conflict – global sanctions, energy prices, looming Russian debt default – on M&A activity
 - Abandoned M&A (Spectris / Oxford, Gett)
 - Divestiture of Russian assets (Société Générale, Kinross, Hyve, Shell)
- Diligence – Financial, regulatory and reputational risk
 - Sanctions compliance
 - Operations, investments, facilities, employees and other activities in Russia, Belarus, Ukraine, Crimea and the so called People’s Republic of Luhansk and Donetsk
- Deal provisions
 - Representations and warranties
 - Provisions to address uncertainty (Apollo / Tenneco)





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