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MERGERS & ACQUISITIONS 2017

VIRTUAL ROUND TABLE

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Introduction & Contents

The Mergers & Acquisitions 2017 Roundtable features eight experts from around the world. Highlighted topics include due diligence considerations; the implementation of an effective post-merger integration strategy; cross-border complications; and an in-depth look at M&A trends in key industries such as healthcare, cybersecurity and infrastructure. Featured countries are: Belgium, Brazil, China, India, Japan, United Kingdom and United States.

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

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

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Lisa has been working in the information industry for over twenty years and has a detailed knowledge of both company financial information and M&A data. She holds a post graduate qualification in Business and Management from Salford University and in 2013 also sat and passed the Certified Merger & Acquisition Advisor (CM&AA) certification programme in the US.

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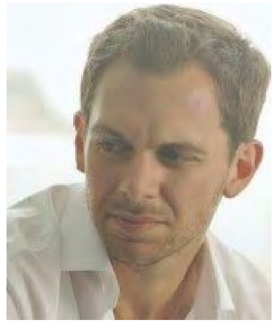
Lisa writes a regular blog providing insight on current deals and emerging trends. Other written contributions include an article in "Mergers and Acquisitions – A Practical Guide for Private Companies and their UK and Overseas Advisors" published by Kogan Page

Lisa is frequently asked to speak at international events on M&A trends both global and regionally.

MEET THE EXPERTS



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Emilian Papadopoulos is president of Good Harbor, a cyber risk advisory firm. He leads the firm's business operations and advises Boards, CEOs, investment professionals, and government leaders on managing cyber risk. He has helped clients across sectors including energy, insurance, law, technology, defense, and manufacturing.

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He works primarily with boards, CEOs, private equity, family office, and senior leaders and company owners in Fortune 1000 businesses with a particular emphasis on Middle Market mid-sized companies with annual sales of 100 million-1 billion USD to impact sustainable growth and profitability opportunities.

With 25+ years of international experience in consulting activities balanced between both multinational and family controlled enterprises in many business sectors Scott has had the unique opportunity to assist over 135 CEO's and Senior Business Leaders across North and South America, EMEA countries, and Asia.

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- Former President of the Brazilian Antitrust Authority, CADE (1996-2000).

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1. Can you talk us through the current M&A landscape in your jurisdiction?

Jhunjhunwala: With the stimulus provided to policies and schemes – such as the "Make in India", "Ease of Doing Business in India" and "Digital India" – the Indian M&A landscape has witnessed tremendous growth from 2016 onwards.

Coupled with the policy initiatives undertaken by the Government, the Government has also actively participated in overhauling dated legislations to synchronise the legislative growth with the economic growth of the country.

As of September 2017, domestic M&A deals stood significantly higher as compared with to the same period last year. Deals such as the acquisition of eBay's business in India by Flipkart, merger of PropTiger with Housing.com and with the country witnessing the largest foreign direct investment in the real estate space, by the Singapore Sovereign Wealth Fund investing in DLF Cyber City Developers, the M&A sphere in India has been given the much-anticipated impetus.

To give a brief outlook of the M&A activity in India in recent times, the bi-annual results recorded by analysts' project that the telecom, consumer services and financial services sectors have attracted the maximum capital investment. A decline has been witnessed in the health care sector, from last year. On the venture capital front, majority of the investments were early stage. Interestingly, one of the largest investments in H1-2017 was a PIPE transaction, with KKR investing $654 million in Bharti Infratel.

Given the dynamics of M&A transactions, specifically cross border transactions, deal sophistication and synchronised implementation of the legislation is the need of the hour. While efforts are being made in this direction, investors continue to struggle with the current regime. By way of an example, while the setting-up of an escrow post-closing of a transaction has been a welcome step, diverse interpretations on what is permissible under Indian law has considerably limited its usage . Further, investors are seemingly hard-pressed to compromise on deal structures, given the lack of incorporation of internationally accepted structures in India, one common example being acquisition financing through leveraged buyouts.

Popadopoulos: The cybersecurity industry has experienced significant M&A activity in recent years, with transactions led by a mix of private equity, pure-play cybersecurity companies, and other strategic acquirers looking to expand their breadth of offerings to include cybersecurity.

In 2017 year-to-date [December], there have been 99 M&A transactions totalling $7.1 billion volume, per a recent report from Momentum Partners.[1] One notable trend is an increasing emphasis on start-ups' path to profitability, as compared to a historic focus on revenue growth "at all costs." We probably would have seen a bit more M&A activity were it not for the fact some companies are holding out for an IPO, though only a few companies have filed for IPOs, and those that have gone public have had mixed results.

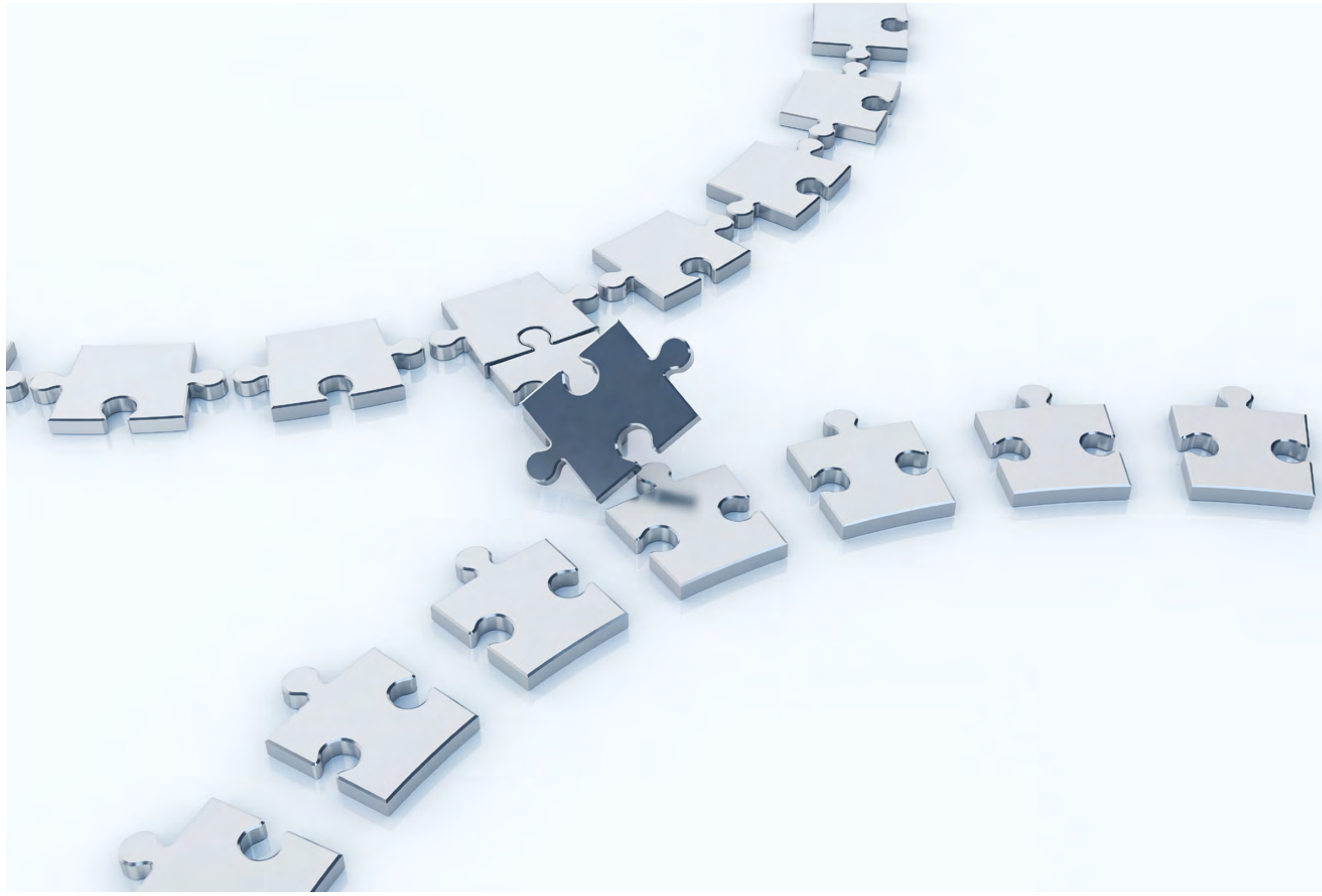
Oliveira: In Brazil, the relevant merger authority is the Administrative Council of Economic Defence ("CADE"). CADE is organised in three internal bodies: the Administrative Tribunal of Economic Defence; the General Superintendence ("SG"); and the Department of Economic Studies. The competitive assessment of merger cases is initially handled by SG, which has powers to approve transactions that do not amount to competitive concerns. Complex mergers or mergers that amount to relevant antitrust concerns are referred by the SG to the Administrative Tribunal of Economic Defence for final judgment.

CADE has been improving as a competition authority in the recent years and now it figures as one of the top 10 agencies in the world according to the "Rating Enforcement 2017", from the Global Competition Review. It continues to lead antitrust efforts among Latin American countries and has succeeded in publishing new guidelines related to compliance programmes, leniency agreements, cease-and-desist agreements and horizontal mergers, which is positive in terms of more clarity and efficiency for the Brazilian antitrust bar.

The primary merger legislation in Brazil is Law Nº 12,529/2011 (known as the "the Brazilian Competition Act"), which regulates CADE's structure and all proceedings handled by the authority, including investigations into anticompetitive practices.

Additional merger control rules are set out in: CADE Resolution Nº 1/2012 ("CADE's Internal Rules"), which contains procedural rules and also regulates the functioning of the authority; CADE Resolution Nº 2/2012 (as amended by CADE Resolution No. 9/2014), which sets forth rules regarding the merger review process (rules for calculating the turnover criteria, the notification forms, etc.); CADE Resolution Nº 10/2014, which details the concept of associative or collaborative agreements for purposes of merger control; and CADE Resolution Nº 13/2015, which regulates investigation pro-

1 http://momentum.partners/docs/Monthly/Cybersecurity_Snapshot_August_2017.pdf



ceedings into mergers not reported to CADE, mergers implemented prior to CADE's approval and/or mergers untimely reported to CADE. There is no specific legislation or regulation for merger control related to foreign mergers or investments.

Other regulatory agencies have no jurisdiction over the competition aspects of mergers, but play important roles in the approval of such mergers on regulatory issues. Such agencies may issue opinions on the competition aspects of these mergers, which are taken into consideration by CADE but are not binding on its final decision.

Wright: 2017 is certainly providing its own share of continuing drama for the UK with the triggering of Article 50, and a snap general election. The results of which appear to have destabilised the country more than ever. The massive fall and limited rebound of the pound since the Brexit referendum theoretically should have made UK-based business even more attractive to foreign buyers. However, this apparent attractiveness is being tempered by uncertainty as to what the UK will be able to negotiate with the EU in relation to its formal exit in 2019 and the impact of this on the UK economy and labour force.

Despite all this uncertainty, UK-based companies are still the third most targeted companies in the world (either by foreign or domestic buyers) after companies based in the US and China. That said, there is a noticeable downturn in both the number and value of deals announced as at the end of Q3-2017 compared with the same time in 2016; £220 billion versus £154 billion, a drop of 30%.

Concerns about the impact of Brexit also seem to be manifesting themselves in other ways, with deals involving UK targets being formally withdrawn reaching the highest levels since the 2007/08 global financial crisis. There were 40 deals announced in 2016 that have subsequently failed to proceed, with 68% of these happening after the 26 June referendum date.

This "wait and see" approach in relation to UK targets does appear to be limited to strategic buyers only, with private equity buyers clearly still viewing UK companies as good investment opportunities. This is demonstrated by over £31 billion of private equity investment into the UK so far already in 2017 and is the highest value recorded since the heady days of cheap debt and corporate credit available in 2007.

Davidson: The years following the recovery from the 2008 global financial crisis have realised robust M&A activity in the U.S., not unlike that occurring in the years immediately preceding that deep recession. The low interest rate environment coupled with a strong U.S. economy flush with cash has contributed to an aggressive investing environment.

The number of lenders and the capital allocated to middle-market lending has also increased dramatically. Middle-market investors have lots of dry powder (cash reserves) along with an apparently endless supply of debt capital to pursue relatively few deals. This flood of liquidity coupled with growing investor and lender appetite for middle-market loans have again resulted in the return of covenant-lite, borrower-friendly deal structures. In its tracking of new loans in the $1 trillion leveraged-loan market, Moody's Analytics determined that covenant strength is near record low with 75% of new loans now defined as covenant-lite. Further exacerbating this frothy M&A environment, lenders have also been pressured by competitive conditions to provide "dili-lite" faster and lighter diligence in shorter time frames. The combination of all these factors has again driven valuations to record levels.

> *"Due to the population downtrend in Japan and the consequent shrinking of the domestic market, the number of Japanese domestic M&A transactions has remained stagnant.*
> *- Shigeki Tatsuno"*

Still, this optimistic lending and investing environment coupled with such high valuations has signalled caution amidst potential trouble for some investors. For example, the California Public Employees Retirement System (CalPERS) announced a few months ago that it would begin reducing its allocation to private equity firms that it has perceived to have overpaid in transactions because of high valuations.

Schrijver: The Belgian M&A market is on the rise, but there is a drop in average deal size. The majority of transactions happen between small and medium-sized enterprises. It is a 'seller's market', with supply being lower than demand as there are few big targets on the market, and many buyers chasing after the same target. This results in contracts that are written in favour of the seller.

Many transactions have a cross-border element, which is not surprising as Belgium can be seen as an interesting entry point to business in Europe. As a result, there is a growing number of Belgian companies being taken over by foreign companies, as opposed to the diminishing amount of Belgian companies acquiring companies abroad, partially due to political instability in the neighbouring countries. A challenge for Belgium is now to keep decision centres in Belgium, as many companies acquired by foreign multinationals will have their headquarters elsewhere.

Tatsuno: Due to the population downtrend in Japan and the consequent shrinking of the domestic market, the number of Japanese domestic M&A transactions has remained stagnant. By contrast, M&A volume involving foreign buyers or sellers continues to grow, spurred both by foreign investors' perception of Japan as a positive market, and the desire of Japanese firms to overcome dwindling domestic growth opportunities. In particular, private equity funds ("PE Funds"), whether domestic or foreign, have been driving the M&A scene in Japan.

2017 has seen some M&A deals of relatively large sizes. Mid-sized companies lacking appropriate succession planning, as well as start-ups involving innovative and cutting-edge technologies have also attracted the attention of PE Funds.

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

Jhunjhunwala: As India's growth story progresses, legislative reforms are being slowly initiated. Some of the recent reforms and developments are set forth below:

GAAR: With the General Anti-Avoidance Rules ("GAAR") coming into force from 1 April 2017, revenue authorities are now empowered to regulate taxation based on 'substance' of a transaction, while ignoring its form. Thus, in relation to any 'tax benefit' arising on or after 1 April 2017, 'commercial substance' will be a crucial consideration for any structure to pass the muster of GAAR.

Liberalisation of the Foreign Direct Investment Policy: The current foreign direct investment policy has been further liberalised with foreign direct investment being permitted under the automatic route, for multiple sectors. Additionally, a number of sectors such as defence, real estate and single brand retail trading have seen progressive changes. A big relief to the stakeholders in the financial services is that the FDI policy now permits 100% foreign investment under the automatic route in 'regulated' financial services.

Phasing out of the FIPB: To further liberalise the foreign exchange laws, the Government has phased out the FIPB as a nodal body governing foreign investment. With this change, specific executive ministries of the Government have been empowered to provide approvals as required under the FDI policy, and monitor compliance of conditions under the FDI approvals. This is expected to further simplify foreign investment processes into India.

Insolvency Code, 2016: The Insolvency and Bankruptcy Code, 2016 (the "Code") aims at boosting investor confidence by improving timelines for debt recovery, and providing a structured and transparent process. The Code is largely modelled after UK laws, and provides for a structured process called the insolvency resolution process. The Code also provides for a clear waterfall of distributions in liquidation. While this is a welcome step, its success would largely depend on the capability of institutions to implement the Code. Further, the current code and the various insolvency procedures that are being initiated create an opportunity for distressed M&A.

Corporate governance norms: The last couple of years have seen significant changes in the corporate governance regime in India. Corporates and regulators alike are keen on establishing a structured corporate regime to ensure effective governance of companies. Recently a committee on corporate governance formed by the Securities and Exchange Board of India ("SEBI"), namely the Kotak Committee has issued its report with over a hundred recommendations, which may result in a complete overhaul of the corporate governance norms in India, if implemented. However, given that SEBI only regulates public listed companies, other regulators such as the Ministry of Corporate Affairs have already raised concerns on the jurisdiction of SEBI to recommend these changes and the implementation of the recommendations of the Kotak Committee. It will be interesting to see if the regulators are willing to work harmoniously to improve the corporate governance norms.

Oliveira: One important development recently undertaken by Cade was the new Guideline for Horizontal Merger Transactions analysis (known as "H Guide").

The new guideline has brought important improvements upon the original one clarifying the methodology used by the agency in horizontal mergers.

The first guideline was approved by the Joint Ordinance SEAE/SDE nº 50, in 2001, to achieve the goals of Law nº 8.884/1994. This new Guideline, however, was written based on Articles 88 and 90, item I to IV, of the Brazilian Competition Act, of 2011, and on better practices adopted by other important jurisdictions such as the U.S. Department of Justice ("DoJ"), the Federal Trade Commission ("FTC") and the European Commission.

It is worth mentioning that the methodology presented in the guideline is neither compulsory nor meant to exhaust other alternative methods of analysis. Each analytic process must be suitable to each practical case. The H Guide aims at improving CADE´s transparency and provide instruments to analyse the net non-negative effect of a merger on the market and consumer welfare. Besides the classical merger type of analysis, the H Guide innovates by presenting a complementary alternative methodology. The classical merger analysis follows four steps: (i) relevant market identification, (ii) concentration level analysis, (iii) possibility of abuse of market power – entry barrier and rivalry and (iv) economic efficiency. A fifth step was added to the classical analysis, which is possibility of purchasing power. The alternative methodology considers complementary instruments (e.g.: counterfactual analysis and simulations) and other factors might be affected by the merger (elimination of mavericks, two-side market, and others).

Davidson: Recently, foreign investments such as Russia's acquisition of 20% of U.S. uranium that occurred during the Obama administration and involved Clintons and the Clinton Foundation have come under increased scrutiny. In addition, Chinese acquisitions of U.S. companies across industries are at an all-time high, setting new records. Chinese companies, most of which are Chinese government-owned have been investing in American businesses across industries that include new vehicle technology, energy resources such as coal mining and metals, food processing, technology, and even entertainment.

This has prompted the U.S. Government to raise concerns with foreign transactions, particularly Chinese investments and acquisitions. Congress recently proposed legislation that would authorise the U.S. Department of Commerce to perform a review of foreign investments to determine their impact on U.S. economic interests and industries. The proposed United States Foreign Investment Review Act of 2017 proposes that the Commerce Department undertake a new review of foreign investments in and acquisitions of U.S. businesses distinct from national security reviews conducted by the Committee on Foreign Investment in the United States ("CFIUS"). The legislation would provide the government agency with authority to approve, bar, or require alteration of a transaction based on its consideration of long-term strategic economic interests of the United States.

Most pundits expect that such legislation will likely pass and have a slowing effect on the recent race-paced level of cross-border transactions.

Schrijver: 2017 has been a reform-heavy year for the Belgian M&A market. An important incoming reform is based on the Belgian government's agreement on corporate tax reform. This, among other changes, will decrease corporate income tax from 33% to 25% by 2020, abolish capital gain tax on shares held longer than one year and abolish fairness tax based on an ECJ ruling. Capital reductions based on tax reserves will be requalified into dividend distribution, meaning they will no longer be tax-neutral. Furthermore, the European Anti-Tax Avoidance directives will be implemented, resulting in a maximum interest cap of 30% for intra-group loans, and exit taxation.

Other reforms are the new Anti-Money Laundering act establishing an Ultimate Beneficial Owners-register, in implementation of an EU directive, and the new Collateral Act, creating the new national pledge register, which is expected to enhance the granting of credit to companies.

Currently the government is also working on the long-awaited new Companies Code, which will simplify and clarify corporate law in a significant manner, relax current restrictions and adapt corporate law to recent developments in European law.

Tatsuno: The Ordinance on the Act on Labor Contract Succession in a Company Split (the "Ordinance") and guidelines thereto (the "Guidelines") were amended last year to reduce the impact of a company split on the affected employees in the split company. These amendments (the "Amendments") aim at obtaining the understanding and cooperation of the affected employees and labour unions in a company split through holding informal and formal consultation with employees, providing sufficient advance notice to employees and labour unions, and allocating an adequate period within which certain categories of employees may object to the transfer of their contracts to the successor company.

Additionally, new guidelines concerning matters to be considered by companies in business transfers and mergers came into effect last year to (i) ensure that companies obtain the genuine and informed (as opposed to the coerced or misguided) consent of their employees before such employees may be transferred as part of a business transfer and (ii) enhance the mutual understanding between the transferor and its employees so as to facilitate a smooth business transfer.

3. How has Brexit impacted (i) inbound and (ii) outbound M&A activity?

Newton: The biggest Brexit impact I have observed is in the board room. Directors and CEOs are waking up to the importance of challenging their assumptions. Previously, many boards and leaders had assumed "Brexit will never happen". This, along with other rapid changes in world events, has provided a catalyst for change in approaches to risk.

Leading companies are now looking at the stability of their global platforms, the assumptions underpinning growth and prosperity. In Europe, this is driving M&A activity because companies do not want to be exposed to unnecessary risks. Previously, having a base only in the UK, or only in another EU nation would be accepted, whereas today companies are choosing to have a physical presence in both areas.

Wright: As previously highlighted the main issue for corporate buyers looking at UK companies as a way of expanding their own growth is the uncertainty surrounding not just Britain's future relationship with the EU, but also it would seem the stability of the current government. Many commentators note the government seems racked with in-fighting and appears very distracted from the key task of negotiating the best deal possible for the country after Brexit in March 2019.

When looking at inbound cross-border activity, it is not so surprising to see a significant downturn on previous years. Foreign buyers have accounted for 56% (£86 billion) of inbound deal flow as of the end of Q3-2017. This compares with a total value of £220 billion in 2016, of which 64% of these deals happened in Q3, immediately after the Brexit referendum. This suggests that foreign buyers saw the comparative cheapness of UK companies, due to the devaluation of sterling, as a limited window of opportunity to be taken advantage of.

UK acquirors of foreign businesses are certainly not showing any signs of concern about the impact of all this domestic uncertainty on their own growth ambitions. The last three years have seen each year set a record on the previous, with 2015 originally being the first year that saw UK acquirors spend more on foreign targets than the previously recorded high in 2007. The first three quarters of 2017 have already surpassed the total figure recorded for all of 2016, with £120 billion of announced deals. This boom in outbound activity really does make sense from a strategic perspective. If the UK is unable to secure trade deals that are comparable with those that it benefits from as being part of Europe, how else are UK companies that trade internationally going to be able to continue with easy access to global markets unless they own a company that still operates from within the EU or is based in another country that already has established trade agreements?

Schrijver: Undeniably, the uncertainties resulting from the instable political climate of the last 18 months – Brexit and the political elections (US, France, The Netherlands, Austria) – have had an impact on the M&A activity in Belgium and Europe. Whilst, at present, the Belgian appetite for deals is rather modest compared to the M&A boom in 2015 and the first half of 2016, M&A appetite is expected to remain stable in the coming years. Specifically, the TMT sector has been the catalyst of M&A activity in Europe since Brexit and will increasingly continue to do so in the near future.

The Belgian M&A activity has remained robust with an

increase in closed deals during the first half of 2017 by Belgian bidders including Solvay, UCB, House of Talents, Mediahuis and Besix. Moreover, the Belgian M&A market has seen some large transactions involving foreign bidders for Belgian targets, including Betafence, ADB Safegate and Eni Belgium. These transactions usually involve Asian investors as they remain highly interested in European targets with a specific interest in German businesses and Brussels-based companies serving as gateway to the EU's single market.

According to statistics, a slight increase in worldwide completed deals involving Belgian bidders can be seen during H1-2017.

Interestingly, in the UK itself, after the prevailing uncertainty, a small post-Brexit boom took place in Q4-2016 with foreign acquirers taking advantage of a much weaker GBP.

4. What types of transactions are at greatest risk of an antitrust challenge?

Oliveira: The Brazilian Competition Act (Law Nº 12,529/2011) determines that mergers that "result in the elimination of competition in a substantial part of a relevant market, that may create or strengthen a dominant position, or that may result in the domination of a relevant market" should not be authorised by CADE. According to the law, a dominant position takes place when a company or a group of companies is capable of unilaterally or co-ordinately changing market conditions or when it controls 20% or more of the relevant market considered. The law states that both the dominant position and lessening of competition test should be assessed, but most decisions rendered by CADE tend to focus more on the first test rather than the latter, given that a merger would normally be cleared by CADE if such transaction does not create or strengthen a dominant position.

These types of mergers may be cleared by CADE if they: (i) cumulatively or alternatively (a) increase productivity or competitiveness, (b) improve the quality of goods or services, or (c) encourage efficiency and technological or economic development; and (ii) a relevant part of the resulting benefits is transferred to consumers.

Schrijver: It goes without saying that large, cross-border M&A transactions, including businesses in different jurisdictions, that require antitrust clearances to be obtained from several (supra)national competition authorities, are at greatest risk to become subject of an competition law challenge as they have to comply with multiple national competition law regimes. For the largest global M&A deals, it is not uncommon for parties to have to file notifications in more than a dozen jurisdictions around the world. Globally, there are more than 90 merger control regimes, each with differing merger control notification requirements.

Apart from merger control legislation, in order to assess the potential risk of antitrust challenges, it is important to see whether the negotiating parties are active in the same horizontal market (and are thus competitors), find themselves in a vertical commercial relationship (e.g. distributor and manufacturer) or are two (or more) totally unrelated businesses (e.g. bakery and bicycle store). Needless to say, an M&A transaction between two companies active on the same horizontal market will be at greatest risk of an antitrust challenge given the fact that they are direct competitors and agreements concluded between them have a fair chance of limiting competition in the market on which they are active. Such horizontal agreements, in particular, require thorough scrutiny of competition authorities to ensure sufficient competition in the market. However, this does not entail, that vertical agreements – between two actors on a different level in the supply chain (e.g. distributor and manufacturer) – cannot have anti-competitive effects, but the risk is of course smaller as they will not be competing directly with each other.

Another important antitrust consideration is the sharing of commercially sensitive information between two (initial) competitors that are planning to engage in an M&A transactions. Not only after closing the deal, for instance, when a new vehicle to collaborate has been established (i.e. joint venture), but also in the pre-signing phase anti-competitive effects may occur. When negotiating an asset deal, share transfer, mergers, spin-offs, etc., commercially sensitive information might already be exchanged between the negotiating parties-compet-

itors which might be regarded as 'coordinated practices' or 'tacit collusion' (cf. article 101 TFEU), resulting in a competition law infringement on the part of both parties. As such, companies should always be careful when disclosing trade-sensitive information during a due diligence, particularly when such disclosures are not ancillary to a lawful purpose. Having detailed information on, for instance, a competitor's prices, costs, customer contracts, wages, and other such sensitive data can enable a company to restrain competition by fixing prices or restricting output. Although the actual act of exchanging information is not illegal, it can potentially raise an inference of an illegal agreement to restrain competition.

Tatsuno: M&A transactions with exposure to the Chinese market, such as acquisitions of Japanese companies with Chinese subsidiaries, may trigger merger control filing requirements under the laws of China. As the timeline for obtaining the approval of the Anti-Monopoly Bureau of the Chinese Ministry of Commerce could vary from transaction to transaction, this could present risks in transactions that are time-sensitive.

Additionally, the Japan Fair Trade Commission (the "JFTC") is now considering the regulation of data usage. Amongst other things, the JFTC may prohibit the usage of market dominance to collect and monopolise data, on the basis that such activities violate anti-trust laws. Should such activities be regulated by the JFTC through its guidelines, regulatory risks may arise in acquisitions involving Japanese targets that deals significantly in data.

5. What are the most important factors to consider when conducting due diligence? How is technology changing or adapting the role of due diligence?

Jhunjhunwala: Given the evolving stringent governance requirements, due diligence has become a key component in transactions for investors. While typically deal breakers stem from commercial issues, investors have become cognizant of the implications of legal non-compliances in the long term. Primarily, risks for the investors are associated with non-compliance with laws, such as mandatory approvals which have not been sought from the requisite regulators. Even if such risks are capable of being regulated, it may take considerable time for the regulators to record and regulate such non-compliances, resulting in a delay of the completion of a transaction. Further, approval of the transaction from multiple regulators may also be a considerable challenge given that the regulators may take contrary views on the transaction, resulting in delay and uncertainty. From a diligence perspective, issues such as non-payment of stamp duties on instruments, non-payment of mandatory registration duty on mandatorily registerable instruments, termination of contracts due to 'change of control' provisions, are some of the important factors to be considered while conducting a legal diligence. Therefore, advisers must adopt a more holistic and focused approach towards diligence, including understanding the requirements and concerns of the sector in which investment is being made.

With the advancement of technology, it is becoming easier to conduct diligence by accessing documentation in a virtual data room, instead of conducting the diligence physically. This has drastically reduced the time spent on diligences. Further, a number of IT/ITES companies are promoting the use of specific software to be used during the diligence, to make the diligence process time efficient and focused. Law firms and other professional advisers are also welcoming the use of technology in the conduct of a diligence exercise. With the increased use and reliance on technology, digitisation throughout the country is being promoted. Most Indian governmental authorities, central and state have digitised public documents, which has ensured easier access and time efficiency, during a diligence. Having said that, a lot needs to be done further as India still lacks consolidated public databases for several items, including, in relation to a simple item such as a litigation search.

Newton: Due diligence is an interesting challenge to address. What you may have observed is that organisations tend to put a tremendous focus on financial, tax, and asset/IP due diligence. What is missing is a detailed study of the key people. Within the target organisation, there are 10 to 15 leaders that are making the business as successful as it is today, and can be leveraged for the future. What are the intentions of those business leaders? Are they aligned with remaining in the business? What makes them satisfied about their career? How will they fit in the new company? How will their capabilities assist in realising the new strategy?

Technology is changing the traditional due diligence and audit, making it faster, more accurate and requiring less people. Yet this is still not addressing the most critical issues. In most M&A deals, the new owners have a plan of what they will do with the target. Up to 70% of acquisitions never achieve their original goals. This is a strategic issue, a people issue, and an area that must be addressed in due diligence. At the moment, this is ignored often because the people responsible for the due diligence are from legal and finance. I recommend adding key members to the team to make sure there is a clear understanding of not only the financial stability and legal position of the organisation, and also from a human side. Keeping those key leaders and ensuring they can work within your new organisation is the key to success.

Popadopoulos: When companies in most sectors merge or acquire targets, they often neglect cybersecurity as an element in their due diligence. Companies need to assess whether a target has already been hacked and also what risks exist for it to suffer a high-consequence breach or disruption in the future. This depends not just on the target's technology but also on its governance, policies, the nature of the business, and how resilient it is. Equipped with this information, a company can negotiate better valuation, indemnifications, or other protections. When Verizon was buying Yahoo, we learned that Yahoo had suffered a major breach, and Verizon ultimately negotiated a price reduction of $350m and better liability protection, but it is fortunate that Verizon found out before the deal was closed. If it hadn't, it might have overpaid and incurred unexpected liability risk. The cybersecurity community has an adage: "There are two kinds of companies: those that have been hacked and know it, and those that have been hacked and don't know it yet." This is true across all sectors, from critical infrastructure to consumer products, from retail to insurance to transportation and technology. So, any company acquiring or merging with a target should do due diligence on cybersecurity.

Wright: Pursuing an acquisition is likely to be one of the most business-critical decisions a CEO and his or her board will make in the life cycle of a company, be it a small privately-owned company or a listed multinational. The need to ensure that the acquisition provides shareholder value and achieves the strategic growth identified by carrying out an acquisition rather than growing the company organically can't be understated.

Comprehensive due diligence is one of the key factors to ensuring that having identified what you believe to be the best target company, you understand it, "warts and all", and have a clear view as to how it is structured and operates.

There are many core areas of the business that should be reviewed in detail, and working with the right advisors is also important.

Understanding the company in terms of its history, objectives, future plans and its culture to determine whether there is a "fit" between the two entities is a starting point. Ensuring that the company meets its legal obligations and has no legal issues pending, both from an operational and structural perspective, is most important. Who are the company's senior management team, and will they stay or will they leave because of the deal? What employee talent lies below the top level of executives? Detailed information relating to the target company's products or services in terms of pricing, market competitiveness and its intellectual property are a prerequisite for ensuring that if the acquisition proceeds maximum revenue gains can be fulfilled. Ensuring that you understand the existing customer base, the market for the products or services and which competitors are out there are also crucial. A thorough understanding of the company's financials and its assets, whether they be tangible or intangible, should be a prerequisite for you as the acquiror to determine whether you want to move forward with due diligence on the other business as areas detailed previously.

Due diligence used to be a time-consuming manual process with large amounts of documents needing to be exchanged and reviewed by both the buyer's advisors and the target's advisors. This information used to be held in a physical location, which could only be accessed by one bidder at a time in the case of multiple bids for a single target company. With the advent of "virtual deal rooms", where the information generated for all the different aspects of due diligence is held in a central and secure location on an extranet, information can be shared and accessed in a timelier manner by the appropriate people.

Increasing advancements in artificial intelligence has recently seen the arrival of technology companies specifically targeting the due diligence process. The process inevitably includes the need for advisors to review large amounts of lengthy and often detailed documents looking for critical pieces of information. If the use of artificial intelligence can help pin point the relevant information that then becomes subject to a "manual" review, then this technological development will be another game changer when it comes to the M&A deal process.

Schrijver: There are many reasons for conducting due diligence, including the following:

- Confirmation that the business is what it appears to be;
- Identify potential "deal killer" defects in the target and avoid a bad business transaction;
- Gain information that will be useful for valuing assets, defining representations and warranties, and/or negotiating price concessions; and
- Verification that the transaction complies with investment or acquisition criteria.

The amount of due diligence that needs to be conducted is based on many factors, including prior experiences, the size of the transaction, the likelihood of closing a transaction, tolerance for risk, time constraints, cost factors, and resource availability. It is impossible to learn everything about a business but it is important to learn enough such that you lower your risks to the appropriate level and make good, informed business decisions.

Every transaction will have different due diligence priorities. For example, if the main reason you are acquiring a company is to get access to a new product they are developing to accelerate your own time to market, then the highest priority task is to ensure that the product is near completion, that there are no major obstacles to completion, and that the end product will meet your business objectives. In another transaction, the highest priority might be to ensure that a major lawsuit is going to be resolved to your satisfaction.

The information produced by companies is greater than ever, and increasing. Many estimate that the volume of data has doubled in the last two years, and it is forecast to double again in the next two. Data processing and data analytics become more and more important.

Many clients are used to using tech and expect their

"A due diligence review typically involves large legal teams going through documents (physical data room or more and more virtual data rooms) looking for litigation issues, key contract clauses (e.g., change of control, assignment, liability, termination, etc.), corporate governance, intellectual property, etc.

- Steven De Schrijver"

advisors to be able to do similar things, and provide information. Due diligence will be less about hours but more about value that advisors can provide.

A due diligence review typically involves large legal teams going through documents (physical data room or more and more virtual data rooms) looking for litigation issues, key contract clauses (e.g., change of control, assignment, liability, termination, etc.), corporate governance, intellectual property, etc. Generally, it takes many hands and many hours/days to complete. There are now tools that can automate this process using AI, including finding specific legal concepts and generating written reports about what was found. This will certainly have an impact on how the due diligence process is conducted in the future although it is undoubtedly the case that experience lawyers will still be required to draw the conclusions from this data crunching and provide strategic advice to clients.

Tatsuno: One of the most important factors in an M&A bid is ensuring the allocation of sufficient time for the conduct of proper due diligence. This would often mean commencement of due diligence at the early stages of a bid. Besides giving a buyer an idea of what an appropriate bidding price would be, timely due diligence also demonstrates the buyer's commitment to the transaction. To achieve a productive and expeditious due diligence exercise, buyers should also draw up document request lists that are focused on key aspects of the target's business. For example, by targeting industry-specific information, buyers can mitigate information overload and avoid being distracted by irrelevant information.

Turning to due diligence technology, software developers are now coming up with applications that are expected, in the near future, to be capable of quickly identifying and summarising information that is material to specific transactional contexts. Going forward, these developments are expected to transform the way due diligence is conducted globally. The last few years, however, have not seen any major technological disruption of the manner in which legal due diligence is carried out. This is particularly the case in Japan, where information is available predominantly in the Japanese language.

6. Can you outline the importance of implementing an effective post-merger integration strategy?

Newton: The post-merger integration strategy will determine the degree of success of the acquisition. Too often, there is euphoria surrounding the completion of the deal, and integration is left as an after-thought. Additionally, while a number of professional advisors are used to completing the transaction, it is often assumed that management alone will be able to manage the post-merger integration responsibilities.

The impact on all stakeholders in the acquired firm need to be considered for integration to be a success. Particularly in the case of a foreign acquisition, there are a number of important considerations that must be addressed.

In discussing strategy, one of those most successful integration approaches I have seen work is the installation of a common process for strategy within both the new acquisition and the acquiring company. This common process platform serves as a way to rationally discuss the key decisions that must be made, removing emotion and legacy from the new opportunities.

An overlooked consideration in post-merger integration is the impact culture will have on the business. Today, many acquisitions can involve very different cultures, as for example when an Asian firm acquires a European firm, or an American firm is acquired by a French conglomerate. It is not enough to say "delegate this to HR" or "it will work itself out." There needs to be a program put in place from the entire leadership team top down that addresses how this can be managed. Large scale failures, such as the Mercedes/Chrysler acquisition, were a result of poor cultural fit, and no reach to integration. In the most successful cases, what you observe is that the CEO, the board, and senior management had a well thought through process they installed to ensure the transition was managed successfully.

Popadopoulos: When companies merge, they often focus on integrating products and sales, plus rationalising some straightforward corporate functions that become redundant and can deliver cost savings, but they ignore plans to merge IT and especially IT Security. Sometimes, management will even declare a decision not to integrate, but this rarely works: employees from the merging companies who are told to work together soon want to be able to dial each other's extensions on a joint phone system, share documents within a single technology platform, or email each other using a standard naming format. Even companies that plan to keep IT networks separate end up stitching them together.

Merging IT Security without a plan can be profoundly consequential for a few reasons. Firstly, if one IT system is already infected and is connected to another IT system without proper security, the second system can become infected.

Secondly, even if there is no existing compromise, failing to integrate IT Security creates additional risk. Cybersecurity is already an uphill battle that requires coherent execution across management and down to the analyst level. It also requires diligent execution of everything from the fundamentals (like patching systems quickly to avoid the kinds of effects we saw with the global spread of the WannaCry malware in 2017) to the sophisticated stuff (like a threat-hunting team looking for adversaries in the network). This kind of diligence requires employees who are motivated and focused. Effective cybersecurity also requires multi-year forecasting to match up the evolving threat space, desired technology acquisitions, and personnel time to implement them.

All of these essential ingredients go out the window without a plan. Budgets and procurement stall. Employees become distracted and make mistakes. Different people pull in different directions. Ultimately, IT security becomes degraded, and the risk of getting hacked goes up.

Finally, failing to integrate IT Security effectively is a missed opportunity. Two companies coming together could pool their information security talent, which is in short supply, to eliminate redundant tasks, focus on strengths, and share best practices. Merging companies may also be paying for similar technologies under different contracts, which could be rationalised to save money. Finally, negotiations with security providers and oversight of third parties is easier for a bigger company that can exercise more leverage in negotiations. In sum, a company that combines its information security teams in a planned way can achieve better results.

Wright: Having a clear and well thought out post-merger integration strategy is the final part of the M&A deal equation. Ensuring that having identified the right company to buy, carrying out in-depth and thorough due diligence, and then knowing how you are intending to integrate your acquisition are critical. As a buyer if each of these elements has been done correctly, you have given yourself the greatest chance of achieving a successful deal and increasing shareholder value and the return on your undoubtedly substantial investment in getting the deal completed. It is also imperative that the acquiring company allocates sufficient resource either internal, external or a combination of both, to work on the integration of the target company. There will be a lot to do and it is a critical time, which if not planned and executed effectively can result in a sub-optimal result, the effects of which will be felt for many years to come.

The due diligence process should have identified areas of synergistic opportunity over and above what may have been perceived prior to having a more detailed look at the target. It may also have identified any areas of potential cost savings. In order to capitalise on these, the post-deal integration should be carefully planned, allowing for sufficient resources and appropriate timescales for each phase of the integration to make sure that nothing is overlooked as the target company is absorbed into the buying company.

Communicating the strategic rationale for the deal and the future vision of the new entity is also key for both the employees of the acquiror and those of the target company who will no doubt be wondering what this deal means for them in terms of job security and their futures.

Davidson: Mergers that are considered disappointments or outright failures range to 70%, but even at the lower range estimate of 50%, these statistics reflects miserably on acquisitions achieving value creation. Without question, weak post-merger integration planning or no plan at all, is a primary reason for failed mergers. Integration is every bit as hard – or even harder – than the deal making itself.

Integration is complex since it covers a huge range of issues that must be considered mostly simultaneously – employee retention – particularly of the right employees – products and customer maintenance, company image and branding, performance measurement and management, administrative and facilities consolidation to rationalise operations, IT systems and processes, and much more.

Without a solid, well-conceived and professionally guided post-merger integration strategy that is well executed, the transaction is likely doomed to underperformance or worst, total failure. At a minimum, the transition plan must:

- Be implemented fast and in a minimal time frame – over months rather than years – to dramatically raise the odds of merger success.
- Include merger-tailored incentive programs to drive productivity and success during the transition.
- Communicate, explain, and then communicate again to reinforce understanding and commitment to the integration strategy throughout the transition period.
- Manage rather than be managed by the inevitable employee turnover by proactively retaining quality employees, while culling marginal employees as part of the consolidation process.
- Protect the bottom line – measure productivity and continue to drive profitability – stay customer focused and reposition to serve the defined marketplace, retain top talent, and stabilise the merged organisation quickly rather than slowly and methodically.

In short, place no less importance on the post-merger integration strategy as on the deal-making itself. Correctly define priorities and continuously focus on them throughout the entire implementation process.

Schrijver: Research shows that only about half of the M&A transactions conducted are successful. The most successful companies seem to be top link effective strategic formulation, pre-merger planning and post-merger integration. Having all three components is critical for success:

- A vision, strategically formulated, for where the company is going and how the deal fits. Companies then identify the appropriate targets and get the deal done.
- A pre-merger process that targets companies with the right capabilities, gets the deal done and begins the integration through rigorous planning and building of trust among the players.
- A post-merger process that seeks to capture well-defined sources of value and is led in a way that captures as much value as possible as quickly as possible.

Tatsuno: A successful and efficient integration process is often dependent on key persons at the target company. It is therefore important, even as early as the due diligence stage, for the acquirer to identify those persons who will be key to a smooth integration and successful future operations. Once identified, the acquirer should as soon as practicable, whether by providing reassurance or discussing future incentives, induce the key persons to stay with the target company.

The posting of suitable key persons from the acquirer to the target company often also enables the acquirer to "win the hearts and minds" of the target's personnel, through the establishment of rapport between the acquirer and the management team at the Japanese target company, and as the alignment of their respective visions.

7. What are the key issues that need to be considered by a foreign investor when planning an investment in your jurisdiction?

Jhunjhunwala: In order to achieve determined results, foreign investors must strategically consider multiple aspects of deal making, specifically those related to the local norms of jurisdiction in which they wish to invest.

India, is still at the nascent stages of liberalising foreign investments, and therefore due consideration needs to be given to the local laws, structures used in similar transactions, reactions of regulators in the past in similar transactions, the type of entities to be established, etc.

While most foreign investors are cognizant of the sector and industry in which the investment is proposed to be made, they must be willing to understand and appreciate the practical aspects associated with the local governance of the target company and the local nuances associated with each sector. For instance, in the pharmaceutical sector, the licensing authorities in each state may have a contrary view on the requirement of applying for a fresh license upon a 'change in constitution' of the investee company, upon the completion of a transaction.

Additionally, the investors must be cognizant that one or more regulatory approvals may be triggered for the consummation of certain transactions, and must therefore work with the counter-party to minimise regulatory exposure. For instance, if the deal envisages applications to be made to one or multiple regulators, parties must work harmoniously to prepare the applications in advance, in the prescribed format, to prevent any delays.

From a structure perspective, investors must be advised on the implications of investing in different instruments, such as equity, debt or convertible instruments. There are also some limitations around assured returns on investments for foreign investors – there have been some recent favourable court rulings around that, but the larger structuring issue still remains. Tax benefits and considerations, should be appropriately considered, to minimise exposure of tax liability to the investor and the target.

Newton: I think most foreign investors already cover some of the headline issues: intellectual property, trademarks, pricing, labour relations, assets, legal restrictions, anti-trust, for example.

There are a few areas though that are neglected, and can be costly long term. Compliance is an area that is often not looked at carefully by foreign investors. Large, successful, conscientious firms, such as GSK, have recently been subject to negative press and large fines due to compliance issues in China for example. When entering into a foreign market transaction, it is critical to take a close look at how compliance has been approached in the target firm, what the culture inside the company towards compliance is, and how it will be integrated into the acquiring company.

Secondly, a number of companies were recently "caught out" when China began rigidly applying foreign exchange repatriation restrictions and capital controls. The State Administration of Foreign Exchange (SAFE) employed longer than average waiting periods on approval for overseas payments, and requested additional documentation which was difficult for many multinationals to produce quickly and accurately. The question should be asked "As we invest in this foreign market, what capabilities do we need to invest in to be successful?"

What I recommend to business leaders is to take a careful look at your foreign investments, and investment plans, and build a matrix, listing the capabilities required, and your current state of readiness. For the highest impact on business areas, ensure that if you do not have the capabilities today, you are investing to be ready tomorrow.

Popadopoulos: Cybersecurity technology companies are critical links in national, corporate, and personal security. As a result, the nationality of the controlling party of a cybersecurity company can play a role in customer preferences, both in the enterprise and personal market. To take an extreme example, the U.S. government is currently battling with Kaspersky, a Russian antivirus company, because of its alleged ties to the Russian government. The U.S. Department of Homeland Security ordered all federal agencies to remove Kaspersky from their systems, and major companies like Best Buy, Office Depot, and Staples took note and stopped selling Kaspersky to customers. Of course, this is an extreme case: the founder of the company was once trained by Russian intelligence, and U.S. government officials allege clear links to Russian intelligence today.

Even in this case, Kaspersky has had a successful business in the U.S. for years, at least before the U.S. government became more vocal in recent months. So, a company with a foreign investor, especially from a non-adversarial nation-state, can absolutely succeed in business, but customer preferences with regard to nationality are worth evaluating. This is particularly true for companies that want to sell to the Federal government, and in cybersecurity, getting the credential of having sold to the Federal government is often an important validator for a company selling cybersecurity solutions in the commercial space.

The second question investors should explore is data flows. Countries are tightening rules about data privacy, what data can cross borders, and what conditions need to be met by companies that have a presence somewhere or sell to citizens of a particular country. If the company's product requires pulling lots of data back to a central cloud to perform big data analytics, or if the company collects lots of Personally Identifiable Information, these are important considerations, though probably not deal-breakers.

Finally, like any investor, foreign investors in cybersecurity should consider what strategic value they bring to the table for their prospective portfolio company, besides capital.

Oliveira: Brazil has a huge economic potential in terms of investments opportunities and market size. The problem, however, consists on coping with structural bottlenecks. The Global Competitiveness Index 2016-17, for instance, points the five most problematic factors for doing business in the country, which are tax rates, corruption, tax regulations, inefficient government bureaucracy and policy instability. Regarding competition issues, though, it is possible to distinguish four other peculiarities found in many emerging markets, including Brazil, that are also important to consider:

(i) In emerging economies, many relevant markets tend to be smaller and show higher concentration ratios than in mature economies. Many of these economies are late comers in the industrialisation process which implied greater volumes of initial capital from the beginning (and consequently higher barriers to entry). Moreover, high protection from foreign competition during the import substitution periods was a common characteristic of many countries. In most cases, the result was very high concentration rates, especially for the basic industrial inputs.

(ii) Entry barriers tend to be higher. Several reasons are associated with this fact, such as a lack of good infrastructure and high transaction costs for doing business.

(iii) The informal economy tends to be large in emerging economies and is usually not considered in antitrust analysis, but it does affect the competition dynamics.

(iv) Strong state intervention leads to several market distortions. In fact, many entry barriers are created by distortionary policies.

Wright: Until March 2019 and the formal exit of the UK from the European Union, no one is really going to know how Brexit will affect the UK in terms of its global trade agreements, migration, legislation and the rights of its citizens before this date.

This means that when looking to invest in UK companies, either via acquisition or the establishment of a new business operation, foreign-based organisations doing so will have to look carefully at the potential business risks they may face and ultimately should have a strategy should the doomsday scenario of a "Hard Brexit" happen.

The UK has long been a gateway for international companies looking to access the collective European market as a destination for their products and services, and this could be severely impacted by Brexit. The availability of a culturally diverse workforce helping to bring about increased competitiveness within the global marketplace could be lost. London has historically been viewed as one of the world's top global financial hubs. It has a leading global share of trading in many international markets and is also the European capital for hedge funds and private equity funds. If London were to lose its automatic "passport" right to do business across Europe this may well encourage foreign investors to pick easier countries in which to carry out foreign direct investment.

Schrijver: In Belgium, it is important to take note of the regional differences between its regions of Brussels, Flanders and Wallonia. Furthermore, the regulatory system in Belgium can be confusing and formalistic, requiring the assistance of local experts. A first matter to take note of is that hostile takeovers are possible, but rare. Belgian corporate law also has strict disclosure and transparency obligations when it comes to acquiring stakes in a company. There is also an obligation of negotiation in good faith. Particularly important is, while letters of intent are common, a deal will be binding once there is agreement on the price and the object of the deal, which are the essential elements. Furthermore, the due diligence process is particularly important in the Belgian M&A market, as it is the main method for risk-assessment.

Tatsuno: Labour issues are one of the key considerations for foreign investors in Japan. Japanese labour law prohibits the unilateral dismissal of employees unless such dismissal is, among other factors, "objectively justifiable". The standard for proving objective justification is so high, however, that it is extremely difficult for any employer in Japan to unilaterally terminate an employment contract. Foreign investors with the intention of undertaking pre/post-merger integration that involves reduction in Japanese employee headcount should accordingly bear this in mind.

Because of the traditional culture of lifetime employment, unilateral dismissal of employees in Japan can also be frowned upon as socially inappropriate. As an extension of this, employees in Japan generally expect to enjoy the same, if not a higher, level of employment conditions (such as in respect of salary and benefits) as the years of their service increase. Accordingly, foreign investors have to be careful, and should consult with labour lawyers, when offering reduced employment conditions as part of post-merger cost reduction measures.

To pre-empt such problems, prior communication with employees of the target Japanese company, carried out with understanding of local sensitivities, is often undertaken well before the consummation of the transaction.

When investing in Japan, foreign investors should also be mindful of the need to hold on to key persons at the target company, because they are often instrumental in ensuring a smooth ownership transition, especially in the technology sector. It is therefore essential to ensure that key employees at the target are not made to feel that their jobs are at risk because of the transaction, or that they would diminish in value in the course of any post-transaction restructuring.

8. Which (i) jurisdictions and (ii) industries currently provide the best M&A opportunities? What are the advantages and disadvantages of the various different types of deal structures?

Newton: Industrials today offer many excellent opportunities. In Northern Italy, for example, there are a stable of family controlled firms that possess valuable IP, have highly qualified staff in production and R&D, and can provide a pipeline of new technology for multinationals. As many of the firms are entering new generations, and they look at how to continue to grow, an investment from private equity, or from adjacent industries, becomes a viable solution.

I recommend taking a close look at companies in the metal and plastics businesses, as there is a high level of know how, in some cases good brand recognition, and industrial expertise that can be leveraged.

Deal Structures is a complex topic. What I would say is that in the case of deciding on a Joint Venture, be sure that all the terms are exceptionally clear from the beginning. What we have seen repeatedly in possible JV transactions is that there are some unsaid assumptions which, if not made clear, become "deal killers" or at least points of heavy friction in the transaction. One way to clear potential issues is to hold a two-day strategic session where the topics are laid out, the assumptions are written and made clear, and the parties come to an understanding. This upfront investment can save potential disputes following a JV implementation.

Oliveira: There are a lot of interesting M&A opportunities in Brazil right now, especially among infrastructure such as the water & sanitation sector. There are two main reasons for that:

Firstly, Brazil has a historical infrastructure gap, whether measured in terms of the physical capital stock or of the infrastructure services quality. Its impact on growth is significant and extensively covered on the literature. Since 1980, when investments in infrastructure started to decrease rapidly, real GDP per capita growth has averaged at a mere 0.7%. Calderón and Servén (2004), for instance, found that if Brazil's infrastructure stock and quality were to catch up with South Korea, per capita GDP growth rates would be higher by 4.4 percentage points.[1]

After several ineffective programs aimed to increase public investment rates, and after the most severe crisis in Brazilian history in 2015/16, there is a greater understanding that investments in infrastructure are essential for a sustainable growth. The lack of infrastructure and chaotic economic situation has raised awareness about the importance of the topic, so the current government is working in this direction. Last year, the government announced the Program of Investment Partnerships ("PPI" in Portuguese), which aims to increase government coordination and capacity for project planning and appraisal. The PPI, whose main objective is to create opportunities for national and foreign enterprises to participate and invest in infrastructure, will be responsible for the project governance and delivery of Public-Private Partnerships (PPPs) and concessions. 37% over a total of 146 projects have already been auctioned and more projects are about to come.

Secondly, Brazil's fiscal and savings constraints have

1 Calderón, César and Luis Servén. 2004. "The Effects of Infrastructure Development on Growth and Income Distribution" World Bank Policy Research Working Paper, no. 3400.

motivated a privatisation momentum. Even with the current fiscal adjustment, primary surplus and debt stabilisation should only occur in the middle of the next decade. In international comparison, public and private rates in Brazil are low, even relative to Latin American countries – an average of 18.7% of the GDP between 2005 and 2014, while Colombia had (20.1%), Mexico (21.4%), India (33.1%) and China (50.5%), according to IMF data. In addition, many Brazilian infrastructure groups are involved in the so-called "Lava Jato" operation investigations and are willing to get rid of valuable assets.

Among the different sectors included in PPI as well as in the pipeline of state and municipal governments, the water & sanitation sector draws the attention. The private capital still represents only a small portion of water and sanitation companies, with a total of 6% of the market share in the water market and 12% of the sewage sector. Over the last few years, concessions and PPPs in municipalities and partnerships with state companies were the most adopted type of deals. Municipal concessions will probably gain space in the coming years since they have a better public opinion due to the fiscal crisis. Also, there is an expectation for more restricted PPPs (sewage treatment or water production) with the states and broad partnerships using subconcessions and with the BNDES taking care of the modelling process.

Davidson: The health care industry is booming with more deal-making activity happening now than has occurred in decades, if not ever. The M&A transaction opportunities span companies operating the pharmaceutical and biotech sector, hospitals, health insurers, drug store chains, private equity, family offices, and financial services firms that invest in the health care sector.

The unsustainably soaring health care costs experienced after the costly, but failed Obamacare program have driven a shift in the health care market and that has in turn stirred additional M&A activity. Following the mandatory implementation of Obamacare, health care costs more than tripled the general inflation rate, approaching a 7% level in everything from doctors and hospitals to medical devices and drugs. In response, some of the largest industry players have announced growth plans that also include M&A transactions. Amazon recently expressed its intent to enter the pharmaceutical market in its recent seeking of regulatory approval to distribute pharmaceutical products in multiple states.

This has also prompted reactive M&A activity from its likely future competitors. One prominent example includes the recent bid by CVS Health for Aetna. CVS, with $177 billion in revenues generated from nearly 10,000 retail pharmacies and mail-order prescriptions, represents nearly 25% of the U.S. prescription drug market. It is also recognised as the country's largest pharmacy-benefit manager (PBM). Aetna, itself is a huge U.S. health insurer with revenues approximating $63 billion. This transaction would constitute the largest health care transaction yet.

Already, the large UnitedHealth insurer acquired Catamaran, a large PBM in 2015, which it merged into its own PBM, OptumR. Other potential insurance firm acquisition targets include WellCare, Centene, and Humana. In addition, the largest standalone PBP, Express Scripts, is also rumoured to be a potential target.

Alternative structures involving health care M&A transactions include joint ventures, strategic alliances, product acquisitions, option transactions, licensing and collaboration agreements.

Schrijver: Belgium has a dynamic economy and continues to attract significant levels of investment in aerospace and defence; chemicals, petrochemicals, plastic and composites; environmental technologies; agribusiness; food processing and packaging; health technologies; life sciences and biotechnology; transport and logistics; information and communication; and textiles, apparel and sporting goods, among other sectors. Over the past few years, Belgium has lost some of its traditional manufacturing base e.g. in the automotive industry (e.g., Ford, General Motors, Caterpillar).

Tatsuno: The last few years have seen Japanese companies increasingly focusing their attention on the emerging markets of Southeast Asia ("SEA"), where sizable and young demographics provide an attractive counterpoint to Japan's shrinking domestic population. More recently, Japanese companies seeking stable returns and established brands are also favouring investments in the more mature markets of the U.S. and Europe. Japanese companies often target, among others, the consumer product and food and beverage sectors in SEA countries. In mature markets, by contrast, Japanese buyers tend to seek targets in sectors relating life sciences, information technology and high-end or innovative manufacturing.

Most investors, whether they are Japanese companies investing abroad or foreign investors seeking a foothold in Japan, generally prefer share acquisitions, which tend to be more straightforward. However, as share acquisitions could sometimes result in the concomitant purchase of contingent liabilities or redundant business segments of a company, some buyers prefer a carve-out acquisition structure, such as a business transfer or corporate split, which allows them to focus only on a specific segment of a target.

9. What are the most common disputes in cross-border M&A transactions?

Jhunjhunwala: Disputes in cross-border M&A transactions are largely the same globally. These disputes may arise either pre-closing, or post-closing of the transaction. Pre-closing disputes more often than not stem from the non-compliance of the "no-shop" obligations of the parties, intentional non-fulfilment of the conditions precedent or breach of "standstill provisions". Typically, post-closing disputes arise as a result of breach of representations and warranties, increase in tax liabilities, non-observance of indemnification obligations of the parties, disputes regarding the post-closing purchase price adjustments, non-observance of the restrictive covenants such as confidentiality obligations, non-compete and non-solicitation obligations. Most transaction documents provide for a dispute resolution mechanism, such as arbitration. India follows a similar trend. In recent times, arbitration has gained considerable popularity as an alternate dispute redressal mechanism, and is usually the preferred form of dispute resolution mechanism adopted by disputing parties. As dispute resolution processes are contractual in nature, parties are at liberty to provide for multi-tier dispute resolution processes.

Newton: The root cause of disputes in cross-border M&A is that the acquisition is not performing as anticipated. Apart from outright fraud, which fortunately is not common and can be detected in due diligence, there are three main reasons for this dispute:

(i) Demand Generation is not working: In this case, the organisation is failing to execute on the basics of generating customer interest. Often, this is due to a change of key management and approach, or because customers are concerned with supplier concentration following an acquisition. You have cases where, post-acquisition, supplier concentration within a key customer exceeds 50%. Clearly, this is difficult for the customer to accept long-term. Here, the goal should be, prior to acquisition, to identify the customers where concentration will be high, and develop a plan for retention. Addressing concerns before they happen will be a less costly exercise.

(ii) Sales Force Effectiveness underperforming: This is often a case of an unfocused sales force following an acquisition. The sales force is not clear of the priorities of the new management group, and are focusing on the wrong areas, investing in the wrong capabilities. A "shotgun" type of approach results in which people want to hit a variety of targets, and have not clarified what are the biggest priorities and investments. This can be minimised with an approach to Strategy that, market by market, product category by product category, sits clear targets, metrics, and priorities.

(iii) Failure to Integrate: This is the biggest reason in more than 70% of acquisition failures and subsequent disputes.

Schrijver: Disputes usually arise after the closing of the deal. The most common post-closing disputes in cross-border M&A transactions are, inter alia, the following:

> *Most transaction documents provide for a dispute resolution mechanism, such as arbitration. India follows a similar trend.*
> *- Rabindra Jhunjhunwala*

(i) Breach of representations and warranties, in which case claims for breach of contract, damages, indemnity and/or rescission are often raised against the seller.

(ii) Fraudulent misrepresentation by the seller through manipulating, falsifying or withholding important information (e.g. overstated revenues and earnings, understated liabilities and deliberately incomplete disclosure).

(iii) Disputes arising out of the need of new owners to downsize staff and management.

(iv) Purchase price adjustment and performance-based deal mechanisms (e.g. earn-out provisions): As completion of a deal can take a significant amount of time after the relevant agreement has been signed, purchase price adjustments on future profits or turnover of the target (earn-out provisions) are often included in the transactional agreement. Such provisions are not rarely a significant source of dispute, as discussion often arises concerning the interpretation of these provisions (e.g. as to the applicable accounting principles), the level of consideration and management of the target company during the period between signing and closing.

Discussion between the contracting parties before closing only rarely occurs. If it does, it mainly pertains to issues such as (i) a breach of a letter of intent or the confidentiality or exclusivity agreement; or (ii) the non-fulfilment of conditions precedent, such as failure to obtain necessary governmental permits or confirmation by the board of directors.

Tatsuno: Many recent disputes in cross-border M&A transactions in Japan arise from breach of representations and warranties, whether due to inaccuracy in the financial statements of the target company, failure by the seller to disclose material documents or information, or otherwise.

Disputes arising from purchase price adjustments are also seen from time to time, especially in transactions involving substantial purchase prices, where minor differences in interpretation of the adjustment mechanism could make a significant difference.

Sometimes, Japanese parties prefer short-form transaction agreements that leave room for future discussion on certain material terms. In cases where short-form agreements are adopted, there is also potential for disputes on the interpretation of matters that have not been expressly provided for in the agreements.

10. What buyer protections exist for buyers entering into unfamiliar territory?

Jhunjhunwala: While a foreign buyer must have an appetite to bear the risks of investing in an unfamiliar territory, they must also ensure that adequate protection during and after the transaction are available, both contractually and under the laws of the jurisdiction in which the investment is being made. Diligence findings are often a key factor in determining the price adjustments that may be required to be made, based on the financial exposure to the foreign investors. Given the complexities involved in M&A transactions, most foreign investors also prefer provisioning for an indemnity escrow or an indemnity holdback in the transaction documents, to minimise their investment risks, resulting from a breach of representations, warranties and covenants. Such modes of deferred consideration have only recently been permitted and the jurisprudence around enforcement, etc., is nascent.

Recently, investors in both domestic and global M&A deals have sought some comfort with the investee company or the seller obtaining a representation and warranty insurance ("R&W Insurance") or a tax insurance. While in India, tax insurance is uncommon, R&W Insurance is steadily trending. India also has signed bilateral investment protection treaties with several countries so this should give foreign investors protection and comfort from the perspective that their investment is eventually safeguarded and the prevalence of "rule of law" cannot be denied.

Davidson: There are few protections – if any at all – for buyers entering unfamiliar territory. To the contrary, the risks and complexity increase exponentially. This demands local specialists in almost every specialty domain beyond legal and financial expertise alone. Today, all major transactions include a global dimension involving international operations – customers, vendors, investors, lenders, import/export, and a multitude of other major market participants and business factors.

The foreign complexity surrounding risk (local economic uncertainty, legal compliance, corporate governance, incongruent cultures, and management from thousands of miles across oceans) magnify the number of relevant issues that include:

- Financial and legal obligations regarding employees – pensions and other benefits such as vacations, terminations, and other human resource practices.
- Culture and management styles on which a successful integration may hinge.
- Enforceability of legal contracts across varying jurisdictions.

The potential disadvantage in complying with the U.S. Foreign Corrupt Practices Act (that applies to both public and privately-owned American companies), may place a U.S. company at odds with local business practices in several countries.

Varying information (e.g., U.S. Generally Accepted Accounting Principles (GAAP) versus International Financial Reporting Standards (IFRS)) and other locally accepted accounting practices and information differences, some of questionable quality, may create additional challenges to determine the facts required for clear decision-making.

In short, buyers must ensure their own protections by

"One way a buyer can protect itself is to arrive at an arrangement under which the seller will continue to hold a stake in the target, at least for a certain period of time, so as to position the seller as a co-stakeholder and motivate it to continue growing the target's business."

- Shigeki Tatsuno

engaging local experience and expertise in all pertinent jurisdictions.

Schrijver: Belgium has traditionally maintained an open economy that is highly dependent on international trade. Since WWII, foreign investment has played a vital role in the Belgian economy, providing technology and employment. It is one of the key economic policies of the current centre-right government to make Belgium a more attractive destination to foreign investment. Though the federal government regulates important elements of FDI such as salaries and labour conditions, it is primarily the responsibility of the regions to attract FDI. Flanders Investment and Trade (FIT), Wallonia Foreign Trade and Investment Agency (AWEX) and Brussels Invest and Export, seek to attract FDI to their own regions.

Belgium provides national treatment to foreign investors. Belgium has no debt-to-equity requirements. Dividends may be remitted freely except in cases in which distribution would reduce net assets to less than paid-up capital. No further withholding tax or other tax is due on repatriation of the original investment or on the profits of a branch, either during active operations or upon the closing of the branch. There are currently no limits on foreign ownership or control in Belgium. There are no distinctions between Belgian and foreign companies when establishing or owning a business or setting up a remunerative activity.

Tatsuno: One way a buyer can protect itself is to arrive at an arrangement under which the seller will continue to hold a stake in the target, at least for a certain period of time, so as to position the seller as a co-stakeholder and motivate it to continue growing the target's business.

Where the seller controls other entities along the target's business chain, which could be a source of supply or demand for the target, or provide synergies of some kind to the benefit of the target, the buyer could also make its acquisition conditional on the execution of some sort of a collaboration agreement between the target and the relevant seller-owned entity.

Additionally, as stated above, it is important for a buyer to identify key personnel at the target who are able to assist the buyer in navigating an unfamiliar business environment.

The buyer could also build in some provisions in the sale and purchase agreement for its own protection, such as indemnity and material adverse change clauses, as well as representations and undertakings that address any specific concerns the buyer might have.

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

Newton: Key Trends for 2018:

Acceleration of consolidation in industry: This will be a busy year.

Focus on Middle Market: Middle market opportunities are untapped, and both private equity and multinationals are addressing this. Middle market purchases as bolt-ons are gaining a new respect in the board room, and within the investment community, as a creative way to address long term growth and profitability.

Focus on Asia, and in particular China: The emerging middle class in China, neighbouring countries, and territories in Southeast Asia will deliver one billion new consumers to the market by 2030. This is a huge number of new potential customers, and one that cannot be ignored. Many companies still have insufficient focus on Southeast Asia, and as their leaders and boards recognise this gap, will invest. The rate of change in Southeast Asia and China are unprecedented, and present a unique occasion for companies to grow and to remain relevant.

Spotlight on IT: High profile IT breaches have proved to be not only embarrassing to companies, but also long-term value destroyers. As an example, the recent breach at Equifax has wiped billions, and impacted over 143 million Americans. Boards are well aware of the risks with IT, and there is an impetus to look carefully at IT, look for holes, and ensure systems will not be breached. In terms of acquisitions, due diligence on IT will become even more detailed, and buyers will address all possible avenues to protection from IT breaches.

E-commerce becomes simply commerce: We are already seeing this start to happen. Look at the recent acquisitions by Amazon of Whole Foods, and by Tencent, Baidu, and Alibaba in 2017. The future convergence into omnichannel is happening more quickly than forecast. In 2018, we will see M&A related to commerce and e-commerce accelerating.

In an ideal world, I would like to see boards become more diverse. The world is becoming much more global, yet the composition of boards remains distinctly homogeneous. An effort by the Chair, the CEO, and senior NEDs (Non-executive directors), needs to be made to increase board diversity. It is critical to have board members that "think" like your customers, suppliers, and regulators of tomorrow.

Lastly, in terms of strategy, we see a trend towards organisations adopting a process-based approach and rolling it out group wide. The old theory of top down strategy, or outside only strategy formulation, is no longer being invested in. This is a positive change that will accelerate profitability.

Oliveira: The consolidation of Competition Law and the role of CADE on the analysis of horizontal mergers have led to the elimination of the important competitive constraint and to a reduction of competitive pressures on the remaining competitors.

CADE is more and more seeking dialogue and agreement among mergers parties and third parties affected by the mergers. As a consequence of this trend, there is also a change on the way merger parties present their notification to the competition authority. It is expected that over the coming years the parties come to CADE with solutions of the possible effect of their merge. Therefore, by reaching an agreement among all parties the transitions cost of decision tends to decrease.

Wright: Looking globally there are both geopolitical and economic factors that will continue to influence deal activity for the remainder of 2017 and potentially into 2018. Geopolitical factors include Brexit as referenced previously and specifically in relation to inbound deals in to the UK. The new Trump administration has only recently announced its plans for corporate tax reform, which have yet to be passed as legislation. Should a reduction in corporate tax rates be achieved this may lead to an increase in domestic US deal activity, as large US companies have access to more cash that can be repatriated from overseas. It should also reduce the need for large US companies to carry out so-called tax inversion deals, where a US-incorporated company becomes a subsidiary of a company incorporated in a more tax-friendly country.

For a number of years, Chinese companies have been very active in their acquisition of foreign companies. However, more recently the Chinese government have increased their scrutiny of such deals in order to ensure that RMB capital outflows are more managed. As modest levels across the world of national GDP growth push more companies to look externally for their growth, a number of other governments are scrutinising more carefully the potential acquisitions of their countries' largest and strategically important corporate assets. This is irrespective of whether the acquiror be from China or anywhere else.

As previously referenced, private equity buyers have cash to spend, and when coupled with healthy corporate balance sheets the competition for good acquisition targets is fierce. This ultimately benefits the shareholders of the target companies as deal multiples and valuations are rising.

Davidson: Despite the vigorous level of M&A activity that has occurred since the end of the 2008 recession, early warning signs suggest that a cautionary and even a potentially troublesome environment may be in the offing. The City University of London Cass Business School recently completed a massive study covering 78,565 transactions over 25 years through 2016 that involved a change in control of the acquired company. Each reviewed transaction included revenues of at least $50 million involving one of the acquisition partners or a transaction valued at least $50 million.

Since the year of the financial crisis, announced mergers and acquisitions that failed to close reached an eight-year high after increasing for the third consecutive year. The study determined that the 2016 deal failure rate of 7.2% was well above the long-term average of 5.7%. A multitude of interviews with M&A experts suggested that uncertain political and economic environments were major contributing factors to the lack of transaction closings. These uncertainties coupled with high valuations, as mentioned earlier, may have been the determinant causes for the failed closings.

Geopolitical strife and uncertainty that are still rampant throughout the world continue to loom in 2017, and beyond. In addition, the cyclical nature of business economic trends remains omnipresent, as some view the level of M&A activity near a peak. A growing number of investors (and lenders too) are now questioning whether the inevitable downturn is imminent. Despite a strong U.S. and middle-market economy as of the 2017 third quarter end, many investors are becoming cautious given the long credit cycle, geopolitical uncertainties, and policy uncertainty related to failed the Obamacare and proposed tax legislation.

Regardless of the degree of optimism or perhaps, only cautious optimism, the high rate of transactions in 2016 that have gone awry suggest what appears to be a growing trend, particularly with certain transactions that indicate greater risk of failure. The Cass Study highlighted certain noteworthy trends discussed further below.

Firstly, geographic differences with the highest failure rate of 7.1% for announced acquisitions happened in the Asia-Pacific region. The North American rate is 6.4%. Second, industry-by-industry failures vary with the highest showing up in the materials and the real estate sectors at 7.7% and 6.8%, respectively. The lowest failure rates occur in the consumer/retail and health care sectors at 4.8% and 5.1%, respectively. By far the starkest differential occurs in the 11.1% failure rate for deals involving public-companies. These are an astonishing triple the 3.7% rate of private company acquisitions.

No one can predict the future; however, the best way to avoid surprises is to recognise and weigh the apparent trends.

Schrijver: Current record levels of cash held by private equity companies are pushing them towards a more active approach in finding interesting targets. They seem to be increasingly interested in the smaller deal segment and in exploring more risky industries. Intensified competition – from (newly created) family funds, international private equity funds, foreign strategic buyers and SMEs following a buy-and-build strategy – is putting upward pressure on prices and might limit potential returns.

Despite the expected retirement of the baby-boom generation, the demand for healthy companies exceeds the supply – it's not the quantity but the quality of the deal flow that causes problems. Many companies for sale are sub-prime: and hence, very difficult, or even impossible, to sell. As a consequence, investors are typically chasing the same deals, resulting in elevated prices and better conditions. We particularly notice seller-friendly contracts with few conditions, limited liability caps, and little locked money (escrow, earnouts, etc.). We also observe a drop in average deal size, as few big targets have been on the market.

Belgian M&A experts indicate that the M&A market has become more and more professional in terms of deal support. M&A process know-how is increasingly perceived as common knowledge, and the use of data rooms has improved substantially. In addition, more specialised sector advisory teams have been entering the Benelux M&A space. Notwithstanding this positive evolution, many advisors continue to stress the importance of educating entrepreneurs in terms of realistic price expectations.

The outlook for Belgian inbound M&A exceeds that for outbound transactions. Many scale-ups are sold in a rather early stage to multinational companies. In ad-

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>
> *- James F. Davidson*

dition, foreign funds are actively entering the Belgian market. Headquarters are likely to move abroad, causing undesirable economic effects on the local economy. In order to keep decision centres in Belgium, local companies should find ways to internationalise themselves instead of starting that process after a sale. Belgian companies should have the courage and support to become a consolidator instead of being acquired by an international group.

Regulatory uncertainty will remain high as a result of important political events like Brexit and upcoming elections in member states of the European Union. In addition, the global M&A market is still assessing the impact of the new US administration. Such uncertainty may have a diverse effect on companies' readiness to pursue complex deals and will contribute to companies scrutinising the regulatory landscape more thoroughly before evaluating transaction opportunities. This impact will mainly be reflected in the number of cross-border transactions. For the rest, amidst a strong global economic outlook, M&A appetite is expected to remain robust in the near future.

As a result of the economic crisis, potential buyers tend to start with a high-level due diligence to ascertain whether the target meets the acquisition requirements and to reduce the initial costs. If the results of the high-level due diligence are satisfactory, a more extensive confirmatory due diligence is conducted. Data rooms are currently in almost all cases virtual (online) data rooms. Generally speaking, in half of the transactions, a formal question and reply procedure is applied. Whereas auctions were previously quite rare (only half of transactions with a value over €100 million were auctions), currently three out of four such transactions are auctions. There seems to be a positive correlation between transactional value and the use of auctions.

Tatsuno: The expansionary monetary policy adopted by the Japanese government in recent years, which has been positively received in general, has led to an increase in corporate profits and an increase in Japanese M&A activities since 2012. With the recent landslide election victory for Japanese Prime Minister Shinzo Abe, the chief proponent of this expansionary policy, the general market optimism in Japan seems likely to continue. As a result, M&A trends in Japan, both inbound and outbound, are expected to remain buoyant in the coming year.

With the population decline in Japan, policymakers are hoping to promote greater interest in Japanese start-ups involving the latest technologies, such as the internet of things (or IoT), artificial intelligence and financial technology, in the hope that more effective utilisation of technology and artificial intelligence will lead to enhancements in productivity and economic growth.