

THE MERGERS &
ACQUISITIONS
REVIEW

THIRTEENTH EDITION

Editor
Mark Zerdin

THE LAWREVIEWS

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PREFACE

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

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

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

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

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

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

Mark Zerdin

Slaughter and May

London

July 2019

ICELAND

*Hans Henning Hoff*¹

I OVERVIEW OF M&A ACTIVITY

In 2019, the Icelandic economy is facing its first downturn after the very strong phase seen since the start of the country's economic recovery from the crisis that started in 2008. This downturn is to some extent due to the bankruptcy of WOW air in late March 2019, which resulted in a severe decrease in the number of tourists travelling to Iceland. However, while the tourism sector had greatly helped the Icelandic economy and stabilised the Icelandic krona, a slowdown of the tourism boom had been expected for some years.

There was a considerable number of M&A during the past year spanning the whole range of industries existing in Iceland. In the tourism sector, the Icelandair hotel chain, which was put up for sale last year, appears to have been acquired by the Malaysian Berjaya Corporation. While a Marriot hotel is currently being built next to Harpa, Reykjavik's iconic concert and convention centre at the Reykjavik harbour, for about US\$175 million, the share of the developer Carpenter & Company in the project has decreased, and a number of Icelandic investors have stepped in, increasing their share to 66 per cent. Another transaction in the energy sector was the US\$373 million spent by an investment vehicle held by 14 Icelandic pension funds together with Ancala Partners on a 66.6 per cent share in HS Orka. HS Orka produces geothermal energy in south west Iceland, and also owns a 30 per cent stake in the Blue Lagoon, which is one of the top destinations for tourists in Iceland.

There was even some public M&A activity. An investment company named AU 3 ehf. made a takeover bid for a 27 per cent stake in Heimavellir, a listed real estate company, but had to withdraw its bid after the stock exchange operator declined the request of 81 per cent of the shareholders to delist the company.

There were also some notable deals in the seafood sector. Iceland Seafood International acquired the Icelandic seafood company Solo Seafood for US\$65 million. Solo Seafood owns the distribution company Icelandic Iberica, which is mostly active in Spain. Following the acquisition of HB Grandi by Brim last year, Brim sold its 33 per cent share in the seafood company VSV Iceland for US\$75 million.

At the same time of the demise of WOW air, Icelandair, the former national carrier, strengthened its capital base, while US-based PAR Capital Management acquired a 12.4 per cent stake in the company investing US\$44 million.

Prosthetic producer Össur withdrew from the stock market in Reykjavik, and it has been listed in Copenhagen alone since 2017. In addition, the country's largest listed

¹ Hans Henning Hoff is partner at Heuking Kühn Lüer Wojtek.

company, Marel, which produces fish and meat-processing machinery, has taken up a dual listing, with its stock now being traded on the Amsterdam stock market in addition to being listed in Iceland.

The restructuring and repayment of the national foreign debt is still occurring much faster than scheduled initially. The tourism sector has even out-rivalled the fishing sector, and the earnings of this power-intensive industry with its aluminium smelters and silicon metal plants. With this strong tax income, the state has further decreased its national debt and also refinanced the remaining debts with very favourable conditions. Due to the improved credit rating and the low interest on international markets in general, Iceland managed to issue a bond of over €500 million, which will run for five years and only bears 0.122 per cent interest per year. At the beginning of 2019, the national net debt was 593 billion kronur, which is 23 per cent of GDP. This is a huge step forwards compare to the end of 2013, when the national debt was 50 per cent of GDP.

As in previous years, the four publicly listed real estate companies Reginn, Reitir, Eik and Heimavellir have strengthened their property portfolios.

There is some ongoing debate regarding the renewal and improvement of the country's infrastructure. For example, under review is how a train system could improve transport in Reykjavik and the area surrounding the city, and the extension or even relocation of existing airports is also being looked into. Because hydropower and geothermal energy make up the largest portion of the energy market, it has taken some time to set up Iceland's first wind farms; however, the first larger projects have now been realised.

Such infrastructure investment could create opportunities for international and domestic investors alike. Several Icelandic pension funds have thus set up an infrastructure investment fund that aims at financing infrastructure projects in public-private partnerships.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The Icelandic legal system is similar to the legal systems of other Nordic countries, and is particularly influenced by the legal systems of Denmark and Norway. However, it is also influenced more by case law than its neighbouring Nordic jurisdictions, and thus its legal system is closer to a common law system. Even though Iceland is currently not aiming for accession to the EU it has, together with Norway and Liechtenstein as the other European Free Trade Association (EFTA) states that are also part of the European Economic Area (EEA), adopted much of the EU legislation due to the EEA rules. However, the Third Energy Package has still not been adopted in Iceland. It is subject to very controversial debates.

Agreements regarding domestic deals up to a certain size are conducted mostly in Icelandic and are fairly short. Larger deals (e.g., with international parties or financing) are usually conducted in English, and the documents are more detailed. The expansion of Icelandic investors into Europe and other parts of the world pre-2008, and the financial crisis bringing foreign creditors into close contact with Iceland, have contributed to bringing domestic M&A documents close to international practice.

It is quite common for privately held companies to have a group of shareholders rather than being held entirely by one person. Therefore, negotiations usually include talks with several shareholders even though the more active shareholders lead the discussions, and speak also for those who have only invested in the company but are not involved in its management.

Main sources of corporate law are the Icelandic Limited Act and the Stock Corporation Act. Transferring shares in a company does not require notarisation. Shareholder lists that

have to be kept by boards do not have to be submitted to the Register of Enterprises, but the Act on Financial Statements requires that shareholders and their shareholdings at year-end are disclosed in companies' financial statements, which have to be published.

Under both Acts, a squeeze-out of the minority shareholders can be requested if one shareholder holds more than 90 per cent of the capital and votes in a company. Likewise, a minority shareholder can demand redemption of its shares if a single shareholder holds more than 90 per cent of the capital and votes in a company. The articles of association may contain rules about the redemption of shares and the valuation method; only in a stock corporation must there be a statement about this question in the articles of association even if there is no deviation from statute law. The redemption price offered by the requesting party can be challenged by the other party, and if no agreement is reached, court-appointed experts shall determine the price.

The main rules for public takeovers are to be found in Chapter 10 of the Act on Securities Transactions. A mandatory offer to the other shareholders shall be made if a shareholder has acquired 30 per cent of the votes in a listed company, either by its own shareholding or by acting in concert with other shareholders. A mandatory offer shall also be made if a shareholder has gained the right to appoint the majority of the board members. A mandatory takeover bid must be made within four weeks after the shareholder knew or should have known that the relevant threshold had been crossed. The offer period ranges from four to 10 weeks. The decision to make a voluntary takeover offer must be announced without undue delay. If a target company faces financial problems, the Icelandic Financial Supervisory Authority can grant an exemption from the duty to make a mandatory offer to a party that wants to save the company from serious financial problems or that wants to take part in the financial restructuring of the company if its board agrees to this. The breakthrough rule has not been implemented in Iceland. While the Financial Supervisory Authority monitors compliance with these rules, the rules of the NASDAQ OMX Iceland stock market regulate the trading of securities in listed companies.

New foreign direct investments may now be again eligible to tax and other benefits pursuant to the Act on incentives for initial investments in Iceland.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Due to the fact that only a handful of companies remained listed on the Icelandic stock exchange during the turbulence following 2008 and the modest size of the market in general, it is unsurprising that there were few changes in the legislation on takeovers in Iceland after the modernised Act on Securities Transactions entered into force in November 2007. Since then, only minor amendments have been made.

The same applies to corporate law. While there were many changes and debates about changes in insolvency law and restructuring, and competition issues in general, there have been few changes to the corporate law during the past couple of years. However, changes due to the Shareholder Rights Directive and other changes in the legislative EU framework have been adopted.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The Icelandic software company Origo has sold a 55 per cent stake in the software company Tempo, valuing the whole company at US\$62.5 million. The purchaser is Los Angeles-based Diversis Capital, which specialises in software and technology companies. Software company Libra was sold to Dutch company Five Degree, again signalling how international the markets have become.

While the privatisation of Íslandsbanki and Landsbankinn has still not been fully accomplished, Arion banki now has more shareholders from the private sector. Two funds managed by Tacom Capital Advisors purchased a 5 per cent share in Arion for UK£41.8 million. From the bankruptcy estate of Arion's predecessor, Kaupthing, the fashion company Karen Millen is now for sale, and it is expected that the buyers will be international investors rather than investors from Iceland.

While Iceland has now got a quite active startup scene, quite a few Icelandic startups have managed to procure funds from foreign sources, the latest example being Kerecis with a US\$16 million round in order to further enhance its products in the healthcare market.

A mid-cap deal was the divestment of Gear4 by Strax, which sold its subsidiary that produces accessories for mobile phones to ZAGG, which is based in Utah, US, for €35 million (plus a possible earn-out of €9 million).

A smaller outbound investment was the acquisition of the Scottish engineering company KSLD by the Icelandic engineering company Efla. This investment is the last of a series of acquisitions in other European countries such as Norway.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

With the tourism sector slowing down, the focus of investors is more on infrastructure projects, and the past year has shown in general how closely linked the Icelandic economy has become to both the economies of North America and Europe. Because economic activities were in full swing over the past couple of years, virtually all types of transactions – not only public and private deals, but also, for example, management buyouts – can be seen again. Almost all industries are involved. While the large banks are not yet still fully privatised, the concentration of the market continues. The former investment bank Kvika (the successor to Straumur Investment Bank) accomplished four takeovers during the past year. The acquisition of asset management company GAMMA for US\$20 was the last in this series, at least for the time being.

With the initial public offering of Arion bank and new shareholders joining, the privatisation of the banking sector has started for the second time since 2003, and questions of Landsbankinn's future ownership is still of high interest due to the bank's eminent role in financing many of the larger companies in Iceland.

The concentration of the real estate market, with the large listed companies Reginn, Reitir, Eik and Heimavellir strengthening their property portfolios, continues. The Icelandic Competition Authority has approved Reginn's acquisitions of two real estate companies named HTO and Fast-2.

As previously mentioned, investment focus has moved slightly away from the booming tourism sector to other parts of the economy and to infrastructure projects.

One of the most thriving sectors is still life sciences. In addition to the pharmaceutical company Alvogen, which is led by former Actavis CEO Robert Wessman, there is quite a number of smaller companies that are increasing their international reach and may, mid-term,

contribute a significant portion to Iceland's earnings abroad. Often, such development is accompanied by M&A activities, and it is likely that large international players will also acquire some of the Icelandic startups in this field.

Geothermal energy production is currently a hot industry, and up to 7 billion kronur will be spent on research and demonstration projects in the European project Geothermica. In addition, Iceland is participating in the European Strategic Energy Technology Plan, which aims to improve low-carbon technologies. Iceland, with its wealth of renewable energies, is a preferred platform for such projects.

In terms of business success, Marel, the producer of fish and meat-processing technology, must be mentioned in this context. Not only has Marel's annual turnover continued to grow; Marel has increased its market position in many of its key markets and continues its profitable operations.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The new banks, Landsbankinn (successor to Landsbanki), Arion banki (successor to Kaupthing) and Íslandsbanki (successor to Glitnir), which took over domestic businesses during the banking crisis in 2008, still have very strong market positions and continue their profitable operations. The privatisation in the banking sector will most probably also impact the financing of deals.

Depending on the parties to an M&A deal, the financing varies. Pension funds and institutional investors often pay in cash. Companies either opt for traditional bank financing or also issue bonds. The bond market in Iceland has picked up again, and faster than the stock market, after the 2008 crisis. The financing of growth in the parts of the economy that have been expanding also depends on the type of investment. In the tourism sector, new hotel buildings have mostly been financed domestically, but the investments of foreign entities in energy-intensive industries seem to be financed from abroad to a considerable extent. Iceland is at a crossroads, with its decades-old tradition of linking almost all loan agreements to the consumer price index. However, this relatively new development that loans are without an indexation seems to get stronger every year.

VII EMPLOYMENT LAW

The Transfers of Undertakings Directive² was transformed into Icelandic law in 2002. The Icelandic Act on the Legal Position of Employees in the case of a transfer of an undertaking is applicable if a business unit is transferred in such a way that it maintains its characteristics (i.e., the structure of assets that are used in an economic objective regardless of whether it is a main or ancillary part of the operations). If such a transfer occurs, the rights and obligations of the transferor transfer to the purchaser, and the purchaser shall observe the remuneration and work conditions according to the collective labour agreement until it expires under, or is terminated or superseded by, a new collective labour agreement. The same principle applies in the case of a transfer regarding a bankrupt entity, with the exception that rights because of non-performance by the assignor do not transfer in this case.

2 Directive 2001/23/EC.

The transferor and the purchaser shall jointly inform the union workplace representatives (or the employees themselves if there are no representatives) about the date of the transfer, the reasons for the transfer, and the legal, economic and social consequences of the transfer for the employees, and whether any measures are planned regarding the employees. The aforementioned information shall be given well in advance, and if there are plans to take measures regarding the employees, the matter shall be discussed with their representatives (or otherwise directly with them) to reach an agreement. Both parties, transferor and transferee, are obligated under these provisions.

The Icelandic Act on Mass Redundancies is applicable if at least 10 employees are made redundant in a company of 21 to 99 employees, if at least 10 per cent of the employees are laid off in a company of 100 to 299 employees, or if at least 30 employees are made redundant in a company with 300 or more employees. With the objective of reaching an agreement, a decision regarding layoffs shall be announced immediately to union workplace representatives or to another representative elected by employees for that purpose. Regarding cooperation, an attempt shall at least be made to avoid mass redundancies, reduce the number of affected employees or mitigate the consequences for them with the assistance of social measures that have, *inter alia*, the objective of facilitating a transfer to a new job or occupational retraining.

VIII TAX LAW

A corporation is considered to be resident in Iceland if it is registered here, and if it has its real management here or if its home, according to the company's articles, is in Iceland.

Because Iceland is not a Member State of the EU, EU Directive 2009/133/EC on mergers is not applicable in Iceland.

There is the possibility of a tax-exempt merger if the absorbed company is completely absorbed by the absorbing company with all assets and liabilities, and the only consideration is shares in the absorbing company excluding any cash component. Under very strict requirements, a tax-exempt cross-border merger is possible. The main criterion for this is that the acquiring company is resident in the EEA or EFTA regions or in the Faroe Islands.

Foreign individuals and legal entities have to pay a withholding tax on dividends received. The applicable rate is 20 per cent for legal entities and 22 per cent for individuals. If dividends are paid from an Icelandic corporation to a foreign limited liability company in the EU or EEA, the withholding tax can be partly or fully refunded after a tax assessment. If a tax treaty is applicable, the withholding tax rate may also be reduced. Interest payments by an Icelandic company to a non-resident are generally subject to withholding tax. The tax rate is 12 per cent. If the recipient is a legal entity, the tax might be reduced according to a tax treaty Iceland is party to. If the recipient is an individual, a small tax-exempt amount is applicable. In a Supreme Court judgment of 2012, it was ruled that interest paid on a loan taken in an acquisition company to finance the acquisition of shares in the target company and that was merged together with the acquisition company in the target company is not deductible.

Regarding thin capitalisation of companies, it should be noted that Iceland only has a general anti-avoidance provision that might be applicable. In addition, a regulation regarding transfer pricing was enacted on 1 January 2015. The regulation applies to businesses with more than 1 billion kronur in revenue or assets, and requires the documentation of transactions between related entities.

The tax base generally follows commercial accounts. The tax resident's worldwide income is taxable, with the possibility of deducting expenses made to generate that income.

Tax grouping rules allow for a tax consolidation in Iceland, the main prerequisite being a minimum shareholding of 90 per cent in the other companies of the tax group, which must all be in Iceland. There is no difference in the taxation of distributed or retained earnings. The new Act on Stamp Duties, which entered into force on 1 January 2014, provides only for the levying of a stamp duty for the transfer of ownership in real estate and in ships.

IX COMPETITION LAW

Merger control proceedings are governed by the Icelandic Competition Act, and a notification of a merger is required if the combined revenues of the merging companies reach 2 billion kronur and if at least two of the merging parties have a revenue in Iceland of at least 200 million kronur. For the determination of the revenue, parent companies and subsidiaries are also relevant if they are directly or indirectly controlled by the merging companies.

If a merger has occurred that does not meet the above requirements for triggering a notification duty, but the relevant combined revenue is 1 billion kronur and the Icelandic Competition Authority is of the opinion that the merger may still reduce effective competition, it may order the merging parties to submit a notification of the merger.

The notification of a merger shall be jointly filed by the merging parties after the conclusion of an agreement, the announcement of a public bid or the acquisition of a controlling interest in a company, and before completion of the respective merger. It must not take effect while the Competition Authority is still examining the case. However, upon application, an exemption to this rule may be granted.

Upon receipt of an application, the Competition Authority will notify the parties within 25 working days as to whether it will further look into the case. This notification is a prerequisite to interdict a merger. If a merger is to be interdicted, this must happen within 70 working days from the time of the Competition Authority's announcement that it intends to investigate the matter. If further information is required, the period may be extended by up to 20 working days.

X OUTLOOK

The economic outlook for Iceland is still rather positive, in particular because the country has the possibility to react to the economic downturn in allowing the krona lower against the main currencies of the countries Iceland doing trade with. Unlike the strategy of the Icelandic National Bank before 2008, there is now a much stronger minimum reserve policy in place, which should result in greater stability for the financial sector and, following indirectly from that, for other businesses.

The general investment climate is still positive and the government, which has been in office since the parliament elections held in autumn 2017, is also pursuing many long-term projects that should help to keep Iceland in upcoming years within that group of European countries that are well prepared for the future.

The strong economy, still relatively low unemployment rate and highly educated population, along with the country's wealth of energy and natural resources, offer a stable environment for M&A activities in Iceland.

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Hans Henning Hoff is qualified in both Germany and Iceland. He studied law, Scandinavian languages and history at the universities of Erlangen, Reykjavík and Bonn, and obtained his *Dr jur summa cum laude* from the University of Munich with a thesis on the influence of Roman law on the oldest written Icelandic law.

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