The Mergers & Acquisitions Review

Fifteenth Edition

Editor
Mark Zerdin

The LawReviews

THE MERGERS & ACQUISITIONS REVIEW

FIFTEENTH EDITION

Editor
Mark Zerdin

THE LAWREVIEWS

PUBLISHER
Clare Bolton

HEAD OF BUSINESS DEVELOPMENT
Nick Barette

TEAM LEADERS
Joel Woods, Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS
Rebecca Mogridge, Katie Hodgetts, Joey Kwok

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Isabelle Gray

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Louise Robb

SUBEDITOR
Nadine Catto

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-805-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AABØ-EVENSEN & CO ADVOKATFIRMA

ACCORD CHAMBERS

ǼLEX

AFRIDI & ANGELL

AGUILAR CASTILLO LOVE

BAKER MCKENZIE

BIRD & BIRD ATMD LLP

BREDIN PRAT

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CMS ROMANIA

DEBEVOISE & PLIMPTON LLP

DRYLLERAKIS & ASSOCIATES

HAMMAD & AL-MEHDAR

HENGELER MUELLER PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

HEUKING KÜHN LÜER WOJTEK

HOGAN LOVELLS

LENZ & STAEHELIN

MAKES & PARTNERS LAW FIRM

MAPLES GROUP

MATOUK BASSIOUNY & HENNAWY

MCCARTHY TÉTRAULT LLP

OPPENHEIM LAW FIRM

PINHEIRO NETO ADVOGADOS

SCHINDLER RECHTSANWÄLTE GMBH

SLAUGHTER AND MAY

TMI ASSOCIATES

TORRES LAW, PLLC

TSVETKOVA BEBOV & PARTNERS

URÍA MENÉNDEZ

WACHTELL, LIPTON, ROSEN & KATZ

WHITE & CASE LLP

WINSTON & STRAWN LLP

CONTENTS

PREFACE

As highlighted by the previous edition of *The Mergers & Acquisitions Review*, the resilience of companies was severely tested in 2020 by the covid-19 pandemic. However, the second half of 2020 saw a rebound in M&A activity, with deal totals 122 per cent higher in value (US$2.5 trillion) and 5 per cent higher in volume (16,700 deals) compared to the first half of the year.[1]

The figures for the first half of 2021 tell a similar, and equally promising, story – deal value has almost tripled from €849.8 billion in the first half of 2020 to €2.4 trillion in the first half of 2021.[2] This strong rebound has taken place in tandem with the broader recovery of the global economy, and the re-surfacing of countries from national lockdowns.

Leading the charge were the North American M&A markets, which saw deal value almost quadruple from €285.6 billion in the first half of 2020 to €1.2 trillion in the first half of 2021.[3] US dealmaking, in particular, has benefited from a substantial injection of capital into the economy by the Biden administration, most notably the US$1.9 trillion coronavirus relief bill approved by Congress in March, as well as a proliferation in the number of special purpose acquisition companies (SPACs) and the unprecedented levels of funds raised thereby. In the Americas more broadly, the leading sectors for the first quarter of 2021 were technology, media and telecoms (548 deals totalling US$206.1 billion), industrial and chemicals (300 deals totalling US$100.8 billion) and financial services (170 deals totalling US$99.5 billion).[4]

The buoyancy of M&A activity in North America has meant that Europe's share of global M&A value has decreased from 28 per cent in 2020 to 21 per cent in the first half of 2021.[5] Notwithstanding this proportionate decline, European dealmaking has also enjoyed a prosperous first half of 2021, with volume up 44 per cent and value rising 89 per cent year-on-year.[6] Private equity was particularly active in this period, with private equity firms investing €193.2 billion in buyouts during the first half of 2021, almost equalling the €194.5 billion of buyout activity recorded across the whole of 2020, and exceeding the

1 Mergermarket, 'Global dealmakers: Cross-border M&A in 2021'.
2 CMS, 'Road to recovery: European M&A Outlook 2022'.
3 ibid.
4 Mergermarket, 'Deal Drivers: Americas Q1 2021'.
5 CMS, 'Road to recovery: European M&A Outlook 2022'.
6 ibid.

€168.8 billion and €174.7 billion recorded in 2019 and 2018, respectively.[7] In the first half of this year, private equity firms substantially reconfigured their portfolios, with 614 exits worth a total of €101.4 billion (in excess of pre-pandemic levels) taking place.[8]

Looking forward to the remainder of 2021 and beyond, there is plenty of cause for optimism. The unique challenges posed by the pandemic appear, at least for now, to be behind us, and the restoration of normality (or at least a new normal), in global M&A and in the broader sense, is taking shape.

I would like to thank the contributors for their support in producing the 15th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 36 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
November 2021

7 Mergermarket, 'Deal Drivers: EMEA HY 2021'.
8 ibid.

Chapter 20

ICELAND

Hans Henning Hoff[1]

I OVERVIEW OF M&A ACTIVITY

In 2021, the covid-19 pandemic has affected the Icelandic economy in many areas. However, as Iceland was one of the first countries to launch a coronavirus tracing app and because it created a capable landscape of test centres and infection-tracing teams, Iceland has coped with the pandemic in a remarkable way with very few casualties. However, the pandemic has also shown that Iceland's economy is closely linked to the markets in Europe and North America. Therefore, the tourism sector, which had greatly helped the Icelandic economy after the financial crisis of 2008, has faced difficult times since the outbreak of the pandemic. Even in these difficult times, however, there are already many positive signs.

Íslandsbanki, which has been owned by the Icelandic government since the financial crisis, was publicly listed on 21 June 2021 and the issue of 35 per cent of the overall capital in the bank was oversubscribed nine times by financial investors and individuals. Among the larger shareholders is even a sovereign wealth fund from Abu Dhabi with a shareholding of about 1 per cent. The proceeds from the sale amount to 55 billion kronur. This initial public offering (IPO) was a long awaited step in the Icelandic state's privatisation of their holdings in the Icelandic banks. Currently, only Landsbankinn is still state-owned and it is still being discussed whether the Icelandic state shall now also start to privatise its last large shareholding in a commercial bank.

The new airline Play started operations this spring and the company's successful IPO was on 9 July 2021. The issue was oversubscribed eight times. The other Icelandic airlines are slowly recovering from the restrictions during the pandemic; Icelandair has secured the financing for its new planes and Air Atlanta now operates as a cargo airline only, adding seven Boeing 747 and Airbus A340 aircraft to its existing fleet of nine Boeing 747 freighters.

Despite the pandemic, there has been considerable M&A activity during the past year. In February 2021, funds advised by Goldman Sachs acquired the majority in the software company Advania together with the management and the Danish financial investor VIA Equity. Advania's turnover has grown by 20 per cent per year for the last five years. In August 2021, Advania acquired the majority in the Norwegian information technology company Visolit, which had itself purchased several smaller competitors in the past. The merger is still subject to merger control clearance but is planned to take effect before the end of 2021. After this merger, more than 2,500 employees will work for the combined company.

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

Other notable mergers include the takeover of Kvika banki by the shareholders of insurance company TM which was subsequently integrated into Kvika together with the leasing company Lykill fjármögnun, which was purchased in the beginning of 2020.

There was also some public M&A after a successful takeover bid for Skeljungur (Shell Iceland) by the investment company Strengur. Following the takeover, there were plans for a delisting or the change into the First North segment of the stock exchange. The takeover bid was financed by Kvika banki and by the US investment firm Taconic Capital.

There were also transactions regarding stakes in Iceland's iconic Blue Lagoon as two investors sold their shareholdings in the thermal spa to the investment company Stoðir and to an investment vehicle of 14 Icelandic pension funds. In these transactions, the Blue Lagoon was valued at around €400 million.

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

There is still an ongoing debate regarding the renewal and improvement of the country's infrastructure. 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, there are now a number of projects around the island. Also, several harbours are being extended, and there are promising signs regarding the Finnafjord Port Project in North East Iceland, a joint effort between German port operator Bremenports and several public bodies in Iceland.

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 European Union (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 owing to EEA rules. Finally, the Third Energy Package was adopted in Iceland in 2019 and was 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.

The main sources of corporate law are the Icelandic Limited Act and the Stock Corporation Act. Transferring shares in a company does not require notarisation. 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. By now, the ultimate beneficial owners of a company shall be listed in a database to this end. A person is regarded to be an ultimate beneficial owner if one exercises control over the company or owns at least 25 per cent or the interest, shares or votes in the company.

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.

Strategies to increase transparency and predictability

While it was previously sometimes difficult to obtain reliable information about the real owner of a company, the Act 82/2019 on the registration of ultimate beneficial owners of companies has increased the accessability of such information. While delayed filing for bankruptcy is still occasionally seen in Iceland, it appears that there are improvements even in this difficult field.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Owing 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 resulting from the Shareholder Rights Directive and other changes in the legislative EU framework have been adopted.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

In December 2020, Sensa, a subsisiary of Iceland Telecom was divested to Norwegian tech company Crayon for 3.25 billion kronur. Sensa specialises in IT consulting and employs 115 staff.

Also in December 2020, Dutch company Total Specific Solutions acquired all shares in the Icelandic software company dk hugbúnaður for an undisclosed amount.

In early 2021, US-based tech firm Aptos purchased the Icelandic software company LS Retail, which employs 250 staff.

In the beginning of July 2021, the acquisition of payment service provider Valitor by Rapyd, an international fintech and payment service platform, was announced for US$100 million. The Seller was Arion banki which finally sold this subsidiary that it had acquired in the wake of the financial crisis of 2008.

Also in July 2021, GIC, a Singapore sovereign wealth fund, signed up to become a shareholder in Arctic Green Energy, investing US$240 million. Even though Artic Green Energy is set up as an international company with many of its geothermal plants located in Asia, it is deeply rooted in the Icelandic tradition of utilising geothermal energy. In December 2020, Arctic Green Energy concluded a US$200 million funding with JP Morgan as sole placing agent to finance its future projects in Europe and elsewhere.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

While Iceland was for decades known only for its seafood and energy-related industry, it now has a lively startup scene, which is intended to fuel the future growth of the Icelandic economy. The hot industries are healthcare, IT and many research-driven ventures, such as Carbon Recycling International, which produces green ethanol from CO2. There are also companies such as bicycle parts producer Lauf forks and furniture maker NORR11.

Even though Iceland has currently no company in the pharmaceutical sector with the size of former generic drug company Actavis, there are a number of younger companies in this field and since this is a fast-evolving industry, there will certainly be some M&A activity in the future.

In the IT and software sector, startup fund Frumtak, run by Icelandic pension funds and banks, has divested an 11.33 per cent share in Controlant to other existing shareholders for an amout close to 2 billion kronur. Controlant develops software solutions with a special focus on pharmaceutical companies.

Marel, Iceland's largest company by market capitalisation, which is also listed in Amsterdam, has announced the purchase of more than 90 per cent of the shares in Valka which, like Marel, also specialises in the development and production of fish processing machinery.

At the same time, more established industries seem to struggle. The silicon plant built by German PCC SE temporarily ceased operations in June 2020 and first resumed its production in one of the two ovens in April 2021. In September 2021 it was announced that the company requires additional funds to be able to continue its business, 18 months after the last financial restructuring of the company. Given the fact that other planned silicon plants were never built in Iceland, the power-intensive industry in Iceland seems to face difficult times as power purchase agreements of aluminium smelters have also recently been renegotiated to lower the production costs of aluminium. These market-induced difficulties might also have some influence on the plant owners' future plans in Iceland.

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, the relatively new development of loans without an indexation seems to get stronger every year and also the Central Bank of Iceland has recently emphasised the significance of loan agreements that are not indexed. In addition it has, in a seldom-seen manner, imposed rules on maximum loan amount or earnings ratios for individuals.

VII EMPLOYMENT LAW

The Transfers of Undertakings Directive[2] 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.

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

2 Directive 2001/23/EC.

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 there, and if it has its real management there 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 to which Iceland is party. 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, 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 3 billion kronur and if at least two of the merging parties have a revenue in Iceland of at least 300 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 1.5 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 look further into the case. This notification is a prerequisite to interdict a merger. If a merger is to be interdicted, this must happen within 55 working days from the time of the Competition Authority's announcement that it intends to investigate the matter. If the parties involved propose possible conditions to the merger on the 55th day after filing the notification, the investigation period is automatically prolonged by 15 days. The parties may ask for an extension of the investigation period of up to 20 working days.

X OUTLOOK

Because Iceland has successfully kept infection figures low during the pandemic, more tourists visited Iceland in 2021 than the previous year, on a level, however, well below the last pre-pandemic year 2019. By the end of summer 2021, around 90 per cent of Icelanders were fully vaccinated, which should justify a cautiously optimistic outlook for 2022. Yet, as a result of the close ties with overseas markets, the growth of the Icelandic economy is closely linked to the economic development in Europe and the world in general.

As evidenced by the numer of deals, the general investment climate is still positive. The parliamentary elections held in September 2021 also show that most Icelanders can probably live with another four years of the current government coalition consisting of three parties (Independence Party, Left-Green Movement, Progressive Party).

With a sensible balance between economical questions and social welfare, the overall strategy of the government has created an open investment environment that has attracted a considerable number of foreign financial and strategic investors to invest in Iceland.

Part of this policy is also to pursue long-term projects that should help to keep Iceland in the upcoming years within the group of European countries that are well prepared for the future.

Appendix 1

ABOUT THE AUTHORS

HANS HENNING HOFF

Heuking Kühn Lüer Wojtek

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.

Hans advises domestic and international corporate clients and financial institutions in Germany and in Iceland. His areas of practice are corporate and commercial law, with a special focus on energy-related projects. Hans also has considerable experience in real estate transactions. Regarding corporate law, he advises his clients with regard to M&A transactions, corporate restructurings and joint ventures on an ongoing basis.

HEUKING KÜHN LÜER WOJTEK

Neuer Wall 63
20354 Hamburg
Germany
Tel: +49 40 35 52 80 0
Fax: +49 40 35 52 80 80
h.hoff@heuking.de
www.heuking.de

an **LBR** business

ISBN 978-1-83862-805-5