SPACs take off in Asia

All Q1's global deal data

M&A monitor

Q1 2022

What European buyers need to know about US deals

Special report from the Freshfields M&A forum

Freshfields Bruckhaus Deringer

Welcome to our Q1 M&A monitor

In this edition we lead with a special report from our recent M&A forum, where senior dealmakers joined a Transatlantic group of Freshfields partners to discuss what European buyers need to know about US deals.

Here we round up the key takeaways, including:

- the critical directors' duties under Delaware law and how they influence the deal process;
- whether it's possible to negotiate exclusivity in US M&A;
- managing the role of activists and other institutional shareholders;
- potential landmines in US IP agreements;
- how to approach management and employee retention;
- the challenges of navigating CFIUS;
- the changing US antitrust landscape;
- how deal agreements are adapting to mitigate enhanced regulatory risk;
- issues relating to employee equity awards and shareholder approvals; and
- the evolution of US deal protections.

In this edition, we also examine the growth of SPACs in Asia (page 15), with both Singapore and Hong Kong welcoming their first SPAC listings since the start of the year (thanks to some outstanding work from our teams), as well as the usual quarterly deal data (page 17).

On page 15 we examine the growth of SPACs in Asia, with both Singapore and Hong Kong (above) welcoming their first SPAC listings since the start of the year.

Freshfields M&A Forum: Acquisitions of US targets by European buyers

On March 9, 2022, Freshfields welcomed leading dealmakers to its inaugural M&A Forum exploring the key considerations for European investors acquiring US targets.

Hosted by London M&A Partner Julian Long, the session featured insights from other key members of Freshfields' US and UK teams: Damien Zoubek, co-head of the firm's US Corporate and M&A practice (New York); Corporate and M&A partner Sebastian Fain (New York); People & Reward partners Lori Goodman (New York) and Alice Greenwell (London); and Antitrust, Competition and Trade partners Aimen Mir (CFIUS) and Meghan Rissmiller (Merger Investigations, both Washington, DC). Here are the highlights – if you would prefer to watch the session instead, click here.

Our M&A Forum explored key issues for European buyers considering US acquisitions, focusing on getting the target board to signing and navigating the period between signing and closing

Freshfields M&A Forum: Session 1

The choreography of getting a US target board to signing


Julian Long
Partner, London


Damien Zoubek
Partner, New York


Sebastian Fain
Partner, New York


Lori Goodman
Partner, New York

How a European acquiror successfully leverages – and avoids tripping over – the duties and processes of US target boards

Damien Zoubek and **Sebastian Fain**, *Corporate and M&A, New York*

- Non-US buyers will often ask whether directors of a US public company have a fiduciary duty to "shop" a bid (i.e., try to solicit a higher offer) and also whether they can agree to exclusivity.
- In US public M&A, the relevant duties under Delaware law (where most US public companies are organized) are the duty of care and the duty of loyalty. These duties are owned to the company's shareholders alone and not other constituencies.
- The key cases in Delaware for understanding these duties within the context of public company sale transactions are Revlon and Unocal.
- Revlon applies where a company is selling "control" (and under Delaware case law that means majority cash deals) and holds that because a mostly cash takeover bid represents the last chance for shareholders to secure a control premium for their shares, the directors must follow a process that is reasonably designed to achieve the best price reasonably available. However, the Delaware courts are clear that there is no single legally prescribed approach for directors to satisfy their Revlon obligations.
- One way directors can meet their Revlon duties is by preserving in the merger agreement their ability to respond to an unsolicited bid and pay an appropriate breakup fee to terminate an existing offer. That said, US boards are generally conditioned to conduct either an active or passive a pre-signing market check instead; competition is seen as

> The board may even theoretically take a lower headline price if they believe the long-term value proposition of the transaction is better.

the easiest route to obtain a premium and it is more difficult for competing bidders to "jump" a signed deal (although there are many examples where deal jumps do occur).

- The Unocal case and its progeny provide that any break-up fee or other deal protection cannot be preclusive and make a competing bid not reasonably attainable, so there are limits to how tight deal protections can be (i.e., break-up fees tend to be in the range of 2-4 percent of equity value at the deal price).

Employing the right tactics for maximizing speed and exclusivity

- Within this fiduciary construct, boards of US targets will almost always reject any request for exclusivity unless it is close to the end of the process or the bidder is paying such an attractive price (and threatens to walk away) that the target board is confident no other bidder would be likely to pay more. Some bidders try to pre-empt (i.e., offer a higher price to end a competitive process), but in our experience this invariably results in them paying more for no gain. A target's advisers will almost certainly counsel the board to shop the bid anyway unless there is a cognizant threat that the incumbent bidder will withdraw if the target contacts other parties. A better strategy for buyers is to indicate at the start of the negotiations that they are willing to move as fast as possible and that their participation is predicated on working outside of a broader process to sell the target.
- In transactions where all or a significant portion of the consideration is stock, Revlon duties do not apply, but the Unocal doctrine must still be adhered to in relation to deal protections.
- With respect to a sales process, where Revlon is not applicable, the business judgement rule is the applicable standard of review, and the target board will feel like it has much more latitude to go bilateral earlier in the process. The board may even theoretically take a lower headline price if they believe the long-term value proposition of the transaction is better.
- Of course, it is not just the law of fiduciary duties that determines how these situations play out – deal dynamics and investor sentiment are also critical.
- Once a deal is signed, the background of the negotiations, including the sale process that target went through, disclosed in the company's proxy statement in great detail. Shareholders will therefore know whether and when the board agreed to exclusivity, what other bidders were contacted or made inbound approaches (on an anonymized basis), the price of other bids that were made and the board's deliberative process, all of which makes it harder to favor one bidder without a compelling justification to do so.
- The other key Delaware case is Corwin. Here, the Court held that even if a board does not comply with its Revlon duties (absent bad faith), as long as everything is disclosed in the proxy statement and the transaction is approved on an uncoerced and fully informed basis by a majority of disinterested shareholders, the business judgement rule applies.
- As a result, any plaintiff litigation (which happens in nearly every US public company deal) is unlikely to survive the motion to dismiss stage (i.e., there will be no discovery). Given how powerful this is to protect target boards, we are seeing proxy statements contain more and more information to defeat plaintiff claims that Corwin should not apply because the proxy was deficient from a disclosure standpoint.
- Despite the power of Corwin, we are not seeing target boards say that they can disregard Revlon and rely on Corwin instead. However, it gives target boards comfort that so long as they try in good faith to satisfy their Revlon duties, any hindsight second-guessing can be dismissed with a fully informed and uncoerced shareholder vote.

> Activists will engage directly with a company's shareholders and launch extensive PR campaigns articulating why a transaction is not the right choice for the business.

Do CEOs or boards have the final say?

- The CEO of a US public target will generally lead the negotiations, but the board has the final say. Buyers therefore need to be wary of a CEO getting out ahead of their board. As an example, the CEO should be going back to the board to get price guidance and ultimately agree the deal value. Failing to do so obviously risks the target board ultimately rejecting the deal or recutting the price, but also creates legal exposure.
- If this happens, the CEO could be construed as breaching his or her fiduciary duties and the buyer could be accused of being an aider and abettor. The Delaware courts are very focused on process, so understanding the dynamics between a CEO and the board at large is important. Likewise, because every meeting and discussion of substance will need to be disclosed in the proxy these issues are likely to be seen by plaintiffs' attorneys.

Managing the evolving role of activists, actively managed funds, and institutional shareholders

Damien Zoubek and **Sebastian Fain**, *Corporate and M&A, New York*

- Activism is often a catalyst for transactions (e.g., sales of divisions or whole businesses, spinoffs etc), so buyers looking for assets should monitor where activists are building stakes.
- Activism is also an issue once a deal has been signed. Activists may choose to oppose a deal, or they may push a buyer to raise its bid (known as bumpitrage).
- In both scenarios, the activist playbook is to create as much PR and investor relations difficulty as possible. Activists will engage directly with a company's shareholders and launch extensive PR campaigns articulating why a transaction is not the right choice for the business.
- It is therefore vital from the outset to have a clear PR and IR strategy that clearly lays out the strategic rationale of the transaction from the point of view of shareholders. As with any interaction with activist investors, parties need to anticipate the activist's objections and respond proactively.
- Activism is not limited to shareholders of targets seeking a higher price; we have also seen examples of activists at the buyer arguing that they are overpaying, or the transaction is not the right strategic decision for them.
- Making matters more complicated, different investor groups are now adopting activist tactics. We have seen active fund managers start campaigns to oppose deals, and encouraging activists to do the work.
- Activists generally are unlikely to oppose a cash sale via an auction unless they believe there has been a process deficiency.
- To mitigate activism risk, sellers must anticipate the market reaction, including by getting their bankersto analyse when their investors came in and at what price, to assess whether a transaction is going to be viewed favorably by the investor base.
- The buyer's board and management should consider whether they will need a shareholder vote that might provide an activist with the opportunity to oppose.
- It is important for parties to talk to their proxy solicitors and find out how they see the situation. They also have data that can be critical in responding to an activist.

US landmines for IP-sensitive acquirors

Sebastian Fain,
Corporate and M&A, New York

- In the US, IP licenses may by their terms purport to give the signatories access to all of the target's IP and all of its affiliates' IP, with the term "affiliate" broadly defined. This could be problematic because it may be read as covering future affiliates, i.e., the entire corporate group of an acquiror.
- The case law on how courts interpret this type of "up the chain" affiliate definition differs between states. In New York for example, the general view is that it applies to affiliates at the time of signing unless otherwise expressed, but in Delaware the courts have taken it to cover future affiliates. This potentially puts the target company at risk of litigation if the counterparty believes it has not been given the IP rights it is entitled to.
- There are ways to structure around this, but none are perfect. In an asset deal the buyer may try to not acquire a problematic license or package the contract and try to sell it. Buyers may also, depending on the way the contract is drafted, be able to adapt their charter so it prevents the agreement from binding upstream affiliates.
- The strategy for dealing with these types of licenses will be fact- and jurisdiction-specific. In industries where technology is critical (such as technology and healthcare), buyers should focus on this issue early in their diligence in order to have time to find a solution that is also acceptable to the seller.

How to approach management and employee retention – the latest techniques and risks

Lori Goodman,
People & Reward, New York

- Buyers will typically want to know when they can start talking to the target's CEO and management team about post-closing roles, employment arrangements, retention packages and the like.
- Here again, fiduciary duties apply – officers owe fiduciary duties to the company's shareholders (and in most cases the CEO is also a director, so clearly has fiduciary duties in that capacity). As a result, these types of compensation discussions implicate duty of loyalty considerations. The plaintiffs' theory around this would be that management engaging in compensation discussions puts them in a position where they are conflicted and may favor one bidder over another based on their post-closing roles and what their compensation may (or may not) be.
- The way that US public company boards deal with this is to control when the management team is allowed to engage in these discussions and under what process and procedures.

"In an asset deal the buyer may try to not acquire a problematic license or package the contract and try to sell it.

> There are also plenty of cases where the target is not running an auction and the board agrees to engage in bilateral negotiations after a pre-signing market check that does not yield any better offers.

Damien Zoubek,
Corporate and M&A, New York

- Against this backdrop, these talks in many cases only take place in the final days before signing, so buyers should build this into the deal timeline. This is especially true in an auction or competitive situation where the price may not be known until the auction is complete and a buyer is picked; in these scenarios it is quite normal for the target board to restrict such discussions until after winner is known and the price and other key deal terms are agreed. At that point, the conflict issue is mostly abated as there is no way for the management team to arguably "sway" the transaction to any one bidder.
- Buyers also need to take guidance from the target's board on this topic, rather than simply negotiating with the relevant individuals without confirming with the board that these conversations can take place. That does not preclude them from saying in their opening bid letter how important it is to retain management or that holding on to key personnel is a predicate to reaching agreement on a transaction. Issues arise when bidders try to have these discussions with the CEO or other management team members before management is authorized by the target board to do so. Again, it is important to remember that, as with the deal process itself, there will be detailed disclosure in the proxy statement of any discussions around management compensation, and so shareholders (and plaintiffs) will have full visibility into when these conversations happen along the process timeline.
- Sometimes it is not possible to do things in this order and every situation is fact specific. We have advised on auctions involving strategics and PE bidders where both wanted to retain the target's founder, who was also the controlling shareholder. It is unrealistic to expect a founder in this situation to agree to support a deal (and therefore pick a winner and end the auction) without also being able to choose where they would prefer to work, whether and how much equity they are being asked to rollover etc. So, in that situation (where we had a special committee that made this decision), we freed the CEO up for retention talks (on a chaperoned basis) at an earlier stage. As with other things in US public company fiduciary duty cases, the courts are more accepting of process steps that are discussed and approved by the board (or a committee) in advance as opposed to them happening without the board's knowledge or input.
- There are also plenty of cases where the target is not running an auction and the board agrees to engage in bilateral negotiations after a pre-signing market check that does not yield any better offers. In these cases, the target board may free up the management team earlier because a bidder has been selected and price has been agreed with several weeks to go for diligence and contract negotiations.
- In a private deal where the target has employee shareholders (and possibly even friends and family among the stockholders) the fiduciary considerations are the same, but the litigation risk is significantly lower. Whether and how the target board in those cases will manage this issue will be up to them, based on the make-up of their company's shareholder base.

Freshfields M&A Forum: Session 2

Navigating to closing and how to prepare for the journey

Julian Long
Partner, London

Aimen Mir
Partner, Washington DC

Meghan Rissmiller
Partner, Washington DC

Damien Zoubek
Partner, New York

Lori Goodman
Partner, New York

Alice Greenwell
Partner, London

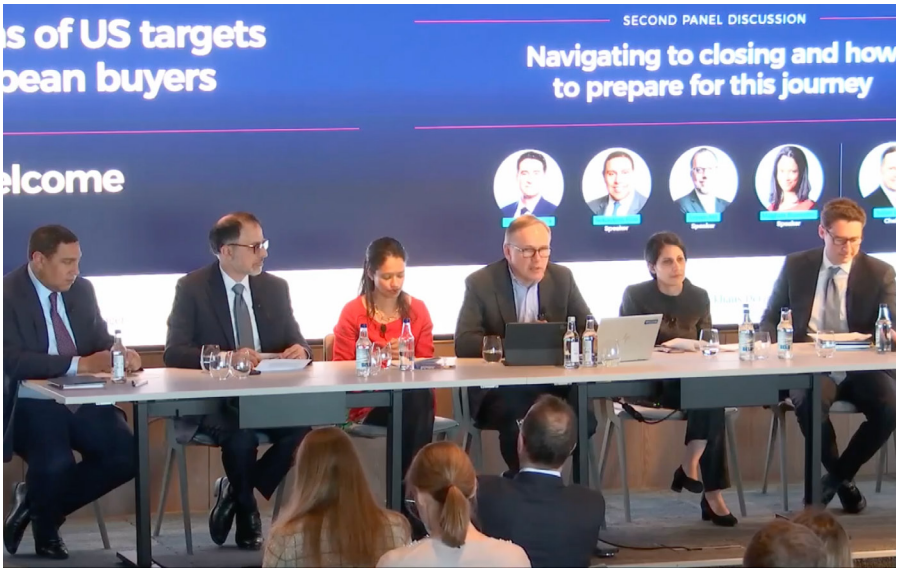
CFIUS/FDI and protectionism

Aimen Mir,
CFIUS, Washington, DC

- Under the Trump administration, the authorities of the Committee on Foreign Investment in the United States (CFIUS) were expanded to cover non-controlling investments and to create a mandatory filing requirement, among other things. At the same time, CFIUS's resources were strengthened, allowing it to scrutinize more deals.
- As a result, it is no longer a viable strategy to try to rely on CFIUS not detecting the transaction – indeed last year CFIUS called in more than 100 non-notified deals, a few of which involved European companies. CFIUS's greater resources also mean it is more willing to impose conditions on companies.

Is CFIUS just an issue for Chinese investors?

- President Trump was very vocal about US/China tensions. That has continued under the Biden administration, which, if anything, is more focused and deliberate.
- Almost all direct Chinese investments are heavily scrutinized by CFIUS, creating a long and uncertain deal process with heightened risk of failure. However, the committee is on the lookout for any China nexus. The investor's limited partners; its co-investors (and even any history of Chinese co-investments); and the extent of its China footprint (e.g., R&D facilities, JVs and even the commercial importance of China as a market) are all seen as potential red flags. A similar lens is applied to Russia.
- Historically, CFIUS has drawn a clear line between issues of national security and economic interest. However, in recent years economic considerations have become more readily accepted as national security considerations, in line with the view of China as a strategic competitor across all areas of the economy.
- In some areas, the key CFIUS risk factor is the sensitivity of the target rather than the identity of the buyer. But whereas in the past these calculations typically involved assets in defence, technology, and government supply chains, in a post-COVID world, more activities are deemed "critical" (healthcare being a prime example highlighted by the pandemic).



How should buyers respond?

- Navigating CFIUS requires a sophisticated understanding of how the government perceives risk. As an example, Chinese companies will often push for broad strategic agreements with their Western counterparties. While these may mean little on the ground, to a US government official they may look like a route to technology transfer. Articulating the commercial context around issues such as these, in government-friendly terms, is essential.
- Buyers need to know when and how to push back if the government identifies a potential risk and seeks mitigation. What are the concerns, and is there an acceptable alternative to address them that protects the commercial interests of the parties?
- The decision on whether to file requires expert judgement. Often the government may have access to information that even the parties do not have that could risk the deal. Likewise, filing in an abundance of caution may see conditions imposed on the transaction that would not have occurred had the parties chosen not to file.
- It is critical to front-load CFIUS analysis given the potential impact of the process on deal terms and timelines. Failing to give CFIUS considerations sufficient attention early in the deal process can result in inadequate diligence and preparation, which can lead to an unnecessarily long CFIUS review process.
- Sometimes the committee can do something unexpected, such as during a recent deal that had no apparent major risks but where the government was concerned that the merged business would become a target for Chinese interference. In scenarios such as these, the challenge is then to negotiate the protections the government requires without destroying the operational or commercial rationale for the transaction.

US and global antitrust trends

Meghan Rissmiller,
Antitrust, Washington, DC

- The tone of the US antitrust agencies – the Federal Trade Commission and the Department of Justice – has changed in recent years, as it has among other competition authorities across the world. Previously the agencies were open to collaborating to find solutions to perceived competition concerns. Today, in the words of Jonathan Kanter, head of the DoJ's antitrust division, they are "enforcers, not regulators."
- Aside from tone, substantive assumptions have also changed. Historically, the agencies have not sought to intervene in vertical or non-horizontal mergers because such deals were often seen as pro-competitive and efficiency-enhancing. However, in the last year or so we have seen five challenges of vertical transactions.
- Likewise, it used to be the assumption that difficult deals could be resolved via remedies. Today, the agencies have stated a preference to litigate rather than accept "imperfect" or complex remedies. We are likely to see remedies going forward only when they are both: 1. simple and 2. structural, as well as continued US enforcer hostility to behavioral remedies, which contrasts with at least the EC's position.
- Finally, the agencies are taking a more expansive view on theories of harm – previously their primary focus was on price and quality (i.e., the consumer welfare standard), now they are more open to considering the impact of transactions on innovation and labor markets, among other things.

How is this affecting deal timelines?

- FTC head Lina Khan has introduced meaningful process changes that are affecting deal timelines; as an example, engaging earlier at the Commission level in Staff investigations and requiring more from the Staff to defend closing an investigation.
- Early in the pandemic, measures were taken to suspend the early termination of the HSR process, which meant that the normal 30-day waiting period could be shortened to as little as 15 days for deals with no competitive impact. This was originally explained as being temporary to deal with a record number of filings but is still in place today, extending the timelines of even non-controversial deals.
- At the same time, the DoJ and FTC are taking longer to decide which one will review a particular transaction. Knowing when to submit the HSR notice is therefore a critical call – go too early and much of the 30-day window could be eaten up by this back-and-forth. (The implication being that the Staff will have less time to perform its initial investigation and could force parties to seek additional time even when there are no issues).
- The FTC has also rescinded its prior approval policy and started to include prior approval requirements in consent agreements. A prior approval requirement means that if a party enters into a consent, any future deals in the same relevant market (even those that are not HSR reportable) must be approved by the FTC in advance. This can have serious implications for companies that plan to do multiple acquisitions, especially where the conditions can extend for up to 20 years.
- Finally, both the FTC and DoJ have begun sending letters to parties at the end of the HSR period stating that they can close their deals, but that the relevant agency has not completed its investigation (so-called "close at your own risk" letters). Post-closing reviews of complex transactions have always been possible, but the letters are new and introduce further uncertainty into the process of getting to closing.

Important new trends in the allocation of antitrust and CFIUS/FDI risks

Damien Zoubek,
Corporate and M&A, New York

- Historically, buyers doing horizontal deals generally knew how to assess and navigate the antitrust landscape, how long it would likely take to get through the second request process and how to propose and implement remedies to alleviate regulatory concerns. Parties generally negotiated regulatory commitments in merger agreements within this framework and could usually assess which areas posed risk and whether remedies were practical. And where there was some daylight in the agreed remedy standard and potential risk areas, protections such as reverse break fees could be discussed.
- However, given the current environment, relying on traditional analysis, negotiating tactics and merger agreement tools may not be sufficient.
- Today, vertical mergers are now being challenged more regularly. Unlike horizontal overlaps, vertical deals may not offer any feasible structural (divestiture) remedies, and behavioral remedies are largely off the table because the FTC and DoJ don't like them relative to structural solutions. This is a great example of how parties and their advisers are having to think about how to make deal documents work in these grayer areas. From where we sit, we see M&A agreements evolving in a few ways.

"Today, vertical mergers are now being challenged more regularly.

> If the buyer wants key individuals to remain, they may choose to convert their severance packages into retention payments that extend over a period of years.

- First, we're seeing longer outside dates, even for transactions where the parties agree there should not be any substantive antitrust risk. We had a recent deal where the outside date was something like 15 months just to budget for the remote possibility of a challenge, despite the parties and their advisers agreeing the substantive risk was low. Longer outside dates, in turn, put pressure on interim operating covenants, which govern how the business is run between signing and closing.
- Second, more parties are committing to litigate in deal agreements because the FTC and DoJ are showing their propensity to challenge transactions in court (the route by which the agencies block deals under the US antitrust laws).
- Third, we are seeing reverse breakup fees agreed to more and more, even in contracts with a "hell or high water" clause (where theoretically there should be no scenario where this sum would be payable). But with parties having to evaluate the possibility of the US government simply challenging deals it views as anti-competitive (including under non-traditional antitrust theories), litigation has to be part of the strategic toolkit.
- Fourth, we are seeing an increase in "fix-it-first" strategies, where companies are completing divestitures before going to the antitrust authorities to eliminate their concerns.
- Finally, in complex, cross-border deals, having a global antitrust strategy is critical. Buyers need to think about where they need to file, and when, to mitigate the risk of a regulator stepping in to block a deal after their counterparts in other countries have approved it (antitrust authorities are increasingly coordinating across borders). Careful thought – even if it takes time – can produce a swifter result than proceeding with all deliberate speed from the get-go.

Navigating the latest execution risks relating to employees and shareholder approvals in the US

Lori Goodman,
People & Reward, New York

- The sums involved in terminating employees during change-of-control transactions can be a shock for European acquirors – US public company CEOs and management teams are often entitled to significant severance packages through their employment contracts.
- CEOs and other senior individuals may even be able to resign voluntarily and receive this enhanced severance; some contracts contain a "good reason" provision, which allows the individual to quit and still receive a pay-out under certain conditions. Egregious conduct (such as cutting pay) would qualify, but so might less obvious issues such as the fact the CEO is now in charge of a subsidiary rather than the main business.
- If the buyer wants key individuals to remain, they may choose to convert their severance packages into retention payments that extend over a period of years. Here, the complexities of the US tax code, such as Section 409A and section 280G, need to be carefully thought through.

Even if the buyer is not US-listed, it will still need to comply with the securities law exceptions that cover employees.

- Section 409A applies to deferred compensation, very broadly defined, which can cover severance. It imposes a penalty tax on employees if compensation is not structured carefully to comply with its payment timing rules, and converting severance into retention is tricky. Section 280G imposes an excise tax on the individual, and a lost deduction on the company, if payments in connection with a change in control exceed 3x the individual's average compensation over the past five years.
- Some executives may also have tax gross-up clauses in their contracts, whereby their employer pays any additional income taxes they incur. Given the fact that in some deals the severance packages together can run into tens of millions of dollars, these will also be closely scrutinized by the buyer's shareholders. There are ways to "mitigate" the Section 280G consequences in a public deal, and lots of time is often spent on this.

How do European buyers deal with US employee equity?

- Whether it is stock options or restricted shares, the basic choices for a buyer have historically been to cash them out or roll them over. Today, we are increasingly seeing target employees' equity roll over into cash that pays out over the vesting schedule of the awards.
- In a stock deal this is generally straightforward to do, but in a cash deal the buyer has to determine what ratio to use for the conversion, and there are strict rules under Section 409A of the US tax code about not increasing an employee's spread value as a result of a deal.

Alice Greenwell,
People & Reward, London

- In some situations, employees who used to receive target stock will now receive acquirer stock. In other cases, the target stock will be canceled, and new stock granted under the acquirers' plan.
- This needs careful thought however, not least because the route chosen may require shareholder approvals. This needs to be wrapped into the overall deal approvals, otherwise the buyer may find it has significant awards to satisfy and no means to satisfy them.

Lori Goodman,
People & Reward, New York

- Additionally, there may be securities laws considerations. Even if the buyer is not US-listed, it will still need to comply with the securities law exceptions that cover employees. Rule 701 of the Securities Act is typically relevant at the federal level, and the buyer has to meet the technical requirements of the laws in every state where the target's employees live.
- If the buyer wants to do a cash-out, they must assess the employees' equity plan to make sure this is allowed (although US plans are typically flexible).
- Most US benefit plans are contractual rather than statutory, so parties must negotiate post-closing benefits and compensation comparability covenants. Often the buyer commits to maintain compensation and benefits for a period after closing, which may require HR input at an earlier stage in negotiations to ensure the buyer can meet its commitments.
- It is also important to consider whether equity can be included in any go-forward promises, because many European companies have tighter controls than in the US around how far down the organization equity awards can go. Sometimes buyers will say they will provide cash to match equity, but some choose not to because it leads to a very large packages.

Damien Zoubek,
Corporate and M&A, New York

- It is important to remember that none of these considerations restricts the buyer's ability to sever in the US.
- The merger agreement will be expressly clear that the individual employees do not have privity with the company to enforce; it is a moral obligation that buyers tend to comply with, but not something that can be litigated by those affected. With that said, buyers do comply with these commitments as they go to broader reputational and employee relations considerations that can be very important for dealmakers, especially repeat buyers.

How deal protections in the US have evolved, and what this means for European acquirors

Sebastian Fain,
Corporate and M&A, New York

- Deal protections in the US have remained unchanged in recent years. Most US deals have no-shop covenants but will allow the target to negotiate with a topping bidder with a "superior proposal" prior to the shareholder vote on the deal. The original bidder will generally have last-look matching rights and the right to a break fee should the target choose to proceed with the interloper.
- Delaware case law states that break fees can go as high as approximately 4 percent of the target's equity value at the sale price, although in bigger deals, break fees tend to be between 2 and 3 percent (given the law of large numbers). Outside the US, break fees are typically limited to 1 percent, so in situations where there are deal protections on both sides, one party may assert the need for equality where it plays to their advantage. Where the deal agreement includes fiduciary concepts on both sides, this will often push the parties towards the lowest common denominator.
- In the US, what constitutes a "superior offer" is at the discretion of the board using agreed criteria (price, likelihood of completion, etc), whereas in other jurisdictions there may be a set price increment or percentage above the incumbent transaction that has to be met.
- In stock deals, we sometimes see acquirers try to negotiate so that the target cannot terminate to take a superior proposal and simply change its board recommendation (a so-called "force-the-vote" provision). Doing so is permissible under Delaware law as a fiduciary matter, but even in stock deals is not the norm. However, the target's shareholders still have the final say and are able to vote down he transaction.
- Another issue worth noting is that private equity transactions, the agreements will often include a "go shop" clause where the target has the right to solicit for a period of time after signing and pay a lower break-up fee for a bidder that emerges during this window. This is not a legal requirement but is included due to the perception that there could be conflicts in PE deals where management teams are rolling over.

"Most US deals have no-shop covenants but will allow the target to negotiate with a topping bidder with a "superior proposal" prior to the shareholder vote on the deal.

HKEX Hong Kong Exchange Square and International Finance Center

SPACs take off in Asia

As our latest De-SPAC Debrief shows, 2021 was a banner year for US de-SPAC deals. Keen to foster their own SPAC ecosystems, both Singapore and Hong Kong have recently launched new regimes. Here, we round up the latest developments.

In September 2021 Singapore became the first major Asian bourse to introduce a SPAC listings regime, closely followed by the Hong Kong Stock Exchange (HKEX) in January 2022.

January saw three SPACs list on the Singapore Exchange (SGX), which together raised around S$476m (US$385m). Singapore's SPACs are expected to cast a wide net across the Asia Pacific region for acquisition targets, while the initial group of Hong Kong listing applications suggests their focus will primarily be on China (indeed, most Hong Kong SPACs have been capitalised by mainland Chinese investors).

Both the Singapore and Hong Kong SPAC regimes should provide a natural listing alternative for emerging companies in South and Southeast Asia. Until now these companies have been targeting mergers with US-listed SPACs, which is currently a challenging route for Chinese companies in particular. Having two "close-to-home" SPAC markets for Asian companies is a positive development

Arun Balasubramanian,
Partner, Hong Kong

Hong Kong rules set higher bar than other markets

Many aspects of Hong Kong's regime are unique and considered tougher than those in other markets. For instance, only professional investors can subscribe to and trade in a SPAC's shares before it merges with a target. At least 20 of those must be professional institutional investors, and the IPO is required to raise at least HK$1bn (c.US$128m). By contrast, Singapore has made SPACs available to small retail investors and has set its minimum valuation at lower at S$150m (c.US$110m).

To date the HKEX has received 11 listing applications, seven of which were handled by Freshfields (including the first by Aquila Acquisition Corporation). Freshfields Partner Arun Balasubramanian, who led the Aquila advisory team alongside fellow partners Grace Huang and Teresa Ko, said: "This was a very complex project executed under significant time pressure. We effectively developed a new commercial, execution and documentation framework in consultation with the HKEX and various intermediaries in parallel with the application itself.

"Overall, the market has reacted positively to the new listing rules," he added. "Both the SGX and the HKEX offer global standards of regulation, execution and disclosure, which should provide assurance to SPAC investors, promoters and targets."

Major investors look to seize SPAC opportunity

Looking ahead, the relative size and liquidity of the two markets suggests there is likely to be greater deal flow in Hong Kong. A number of well-known asset management, private equity and venture capital firms are already promoting Hong Kong SPACS, and it is expected that they will be able to draw on their deep sourcing and execution capabilities to find acquisition targets that will eventually be listed on the HKEX.

Market participants are aware that the HKEX does not permit "back door" listings by companies that are not ready to go public. The focus therefore is on finding high-quality targets that meet the HKEX's strict eligibility requirements and can go through an IPO-level due diligence and disclosure process.

Global M&A Q1 2022, activity by sector

Sector	Value $bn	%
1 TMT	321.21	31.63
2 Consumer*	159.76	15.73
3 Industrials and materials	148.91	14.66
4 Financials	137.08	13.50
5 Real estate	108.82	10.71
6 Energy and power	61.82	6.09
7 Healthcare	49.91	4.91
8 Infrastructure and transport	28.16	2.77
Total	**1,015.67**	**100**

* Includes retail

Sector	Volume	%
1 TMT	2,927	26.76
2 Consumer*	2,488	22.75
3 Industrials and materials	1,953	17.86
4 Financials	1,171	10.71
5 Healthcare	862	7.88
6 Real estate	674	6.16
7 Energy and power	487	4.45
8 Infrastructure and transport	376	3.44
Total	**10,938**	**100**

* Includes retail

Source: Refinitiv (data correct to 23/3/22)

Global M&A Q1 2022 – value and volume

Global*

M&A value
$1,015.68bn

M&A deal volume
10,940

Top 3 deals

1	Activision Blizzard/ Microsoft	$68.7bn
2	First Horizon/ Toronto-Dominion Bank	$13.5bn
3	Alleghany/ Berkshire Hathaway	$11.5bn

Inbound: most targeted markets

US 2,918 deals	$549.6bn
UK 948 deals	$67.1bn
China 752 deals	$46.2bn

Outbound: most acquisitive markets

US 3,342 deals	$614.4bn
UK 829 deals	$53bn
China 719 deals	$52.2bn

USA*†

M&A value
$549.59bn

M&A deal volume
2,918

Top 3 deals

1	Activision Blizzard/ Microsoft	$68.7bn
2	First Horizon/ Toronto-Dominion Bank	$13.5bn
3	Alleghany/ Berkshire Hathaway	$11.5bn

Inbound: markets investing into US companies

US 2,454 deals	$492.8bn
Canada 87 deals	$17.9bn
Japan 44 deals	$5.2bn

Outbound: markets US companies are investing into

US 2,445	$492.8bn
Netherland 36 deals	$26.5bn
UK 171 deals	$25.6bn

Europe*†

M&A value
$224.71bn

M&A deal volume
3,721

Top 3 deals

1	Orange España/ Masmovil Ibercom	$8.8bn
2	Allwyn Entertainment/ Cohn Robbins Holding	$7.4bn
3	Mimecast/ Proofpoint	$6.1bn

Inbound: markets investing into European companies

US 469 deals	$77.4bn
UK 678 deals	$41.7bn
Germany 315 deals	$15.1bn

Outbound: markets European companies are investing into

UK 660 deals	$34.8bn
US 199 deals	$23.4bn
Germany 349 deals	$19.9bn

Asia-Pacific*†

M&A value
$171.45bn

M&A deal volume
3,169

Top 3 deals

1	Baring Private Equity Asia/EQT	$7.5bn
2	Citigroup Inc- Consumer Banking Business/United Overseas Bank	$3.7bn
3	Paidy/PayPal Holdings	$2.7bn

Inbound: markets investing into Asia-Pacific companies

China 682 deals	$51.6bn
US 185 deals	$21.3bn
Japan 846 deals	$21.2bn

Outbound: markets Asia-Pacific companies are investing into

China 718 deals	$41.2bn
Japan 805 deals	$20.8bn
Hong Kong 52 deals	$15.6bn

Financial sponsor M&A – top 3 deals with buyside financial sponsor involvement

1. **$10.4bn** – Anaplan/ Thoma Bravo
2. **$7.7bn** – South Jersey Industries/ Infrastructure Investments Fund
3. **$7.5bn** – Baring Private Equity Asia/ EQT

* Deal value includes net debt of target | † Includes domestic deals | Source: Refinitiv | Data correct to 23/3/22