HERBERT SMITH FREEHILLS

M&A IN 2019
SUCCEEDING IN A CLIMATE OF DISRUPTION

In 2018, global M&A volumes reached their highest point since the financial crisis and, despite a noted slow down in pace during Q4, deal activity recorded near peak levels in many markets – a positive and unanticipated result given the ongoing political and economic uncertainties.

The key drivers in 2018 were corporates with cash seeking rationalisation and growth, private equity with dry powder to invest and cheap debt. These drivers prevailed over the headwinds of political and economic uncertainty, populist protectionist trends leading to greater political interest in deals and high value expectations.

Across all of the markets that we cover we identified a number of common, significant factors for dealmakers in 2018. Central to these was the possibility of the disruptive influence of third parties in the M&A process.

In this report we focus on five M&A disruptors that we expect to see more of in 2019:

- **Politicians** armed with new foreign direct investment powers continue to assert themselves, with an increasing tendency towards protectionism even where the national security concern is not obvious.
- **Anti-trust regulators** have greater powers and are growing in confidence – their willingness to take bold and sometimes unpredictable decisions can derail, or at least delay, the transaction.
- **Investors** are more willing than ever to assert their views and are not afraid to interfere with an M&A process or agitate to create one.
- **Talent** is an increasingly vital asset on an acquisition and, on technology-related acquisitions, the retention of individuals behind the technology can be key to a successful deal.
- **Interlopers** are taking advantage of longer deal timetables to disrupt M&A transactions, either by making a competing offer for the target or by targeting the buyer.

We also report on the views of our colleagues on regional activity in 2018 and the outlook for 2019.

"There are increasing notes of caution being sounded for the prospects for the global M&A market in 2019. The situation in China, the threat of trade wars, the continued uncertainty of Brexit for the UK and the whole of Europe and the tightening of debt markets are some of the indicators that the market may be more subdued than in 2018.

Notwithstanding these uncertainties, corporates remain well-placed to engage with M&A - they have strong balance sheets and access to corporate debt and, perhaps most importantly of all, boards are under pressure to sharpen their strategic focus and to move forward in the face of rapid technological change.

Whilst the outlook for 2019 remains uncertain, what we can say with confidence is that deal execution will continue to be challenging over the next 12 months. It is more important than ever to plan carefully for the risk of disruption from third parties to ensure that the path to completion is as smooth as possible.

The "new normal" of continuous disruption will also be reflected in the way that we do deals. We expect to see increasing evolution of the use of technology and data in M&A, as the analytic possibilities and efficiencies that new technologies offer are explored in M&A origination and execution."

GAVIN DAVIES
HEAD OF GLOBAL M&A PRACTICE

Politicians — the global trend of political intervention

Countries traditionally open to foreign direct investment tightened their regimes in 2018

The backdrop to this shift in approach was a rise in protectionism on a global scale, with governments keener than ever to preserve their own country's position in increasingly global value chains, as well as protecting their own national security.

Much of the global focus has been on the evolution of the Committee for Foreign Investment in the United States, but developments in Europe, such as the UK's proposals for a distinct national security regime and the tightening of Germany's foreign direct investment (FDI) controls are equally relevant. For 2019, those involved in cross-border M&A need to be aware that the concept of national security will be extended beyond defence-related activities to include critical infrastructure, communications assets and advanced technology.

Although the most high-profile prohibition decisions to date have tended to relate to acquisitions by Chinese companies, most FDI regimes apply to any foreign buyer if the deal could result in a threat to national security or, in some regimes, involve "national champion" companies or sectors of "strategic importance".

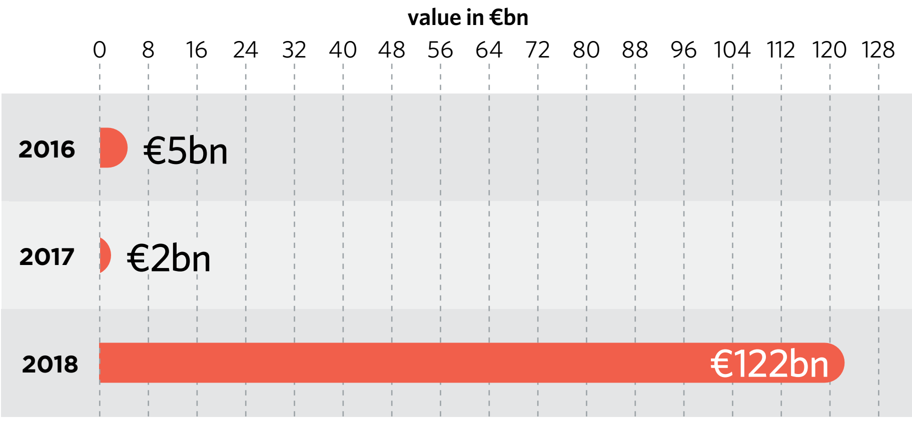
FDI regimes tend to be less transparent than the merger control process, with some countries choosing not to publish any decisions, or only very brief details. It is also apparent that FDI authorities are starting to liaise with each other more behind the scenes, so adopting a global (and consistent) approach to FDI filings will be key in 2019.

In some cases, it will be advisable for dealmakers to consider whether any remedies could be offered up in order to ease the FDI process. FDI approval is inherently political, so understanding the process and communicating effectively with stakeholders is critical.

Blocked deals

- Broadcom's hostile bid for Qualcomm was blocked in the US
- Yantai Taihai Corp's acquisition of Leifeld Metal Spinning AG (a manufacturer of aerospace materials) was abandoned before being blocked in Germany
- Hong Kong based CKI's takeover offer for APA Group was blocked in Australia

The value of deals abandoned due to foreign direct investment intervention



Source: PARR/Acuris

"Checking for possible FDI filings is now a key regulatory consideration in cross-border M&A, alongside merger control filings. Sensitive engagement with the authorities, at the right time, will help to navigate the FDI process and minimise delay."

Veronica Roberts
London

Anti-trust regulators — armed and ready to intervene

The number of merger control regimes worldwide is on the rise: there are already over 120 and the list is growing

In 2018, we saw far more active enforcement, with many regulators using market intelligence and international co-operation to identify unnotified deals. Filings can now be triggered even where the target has limited or no connection to the jurisdiction, and a corporate culture of full global compliance means that deal-doers need to consider early on where filings need to be made and factor these into the deal timetable. Timetables for review vary widely and can be very lengthy in some jurisdictions, even for a first phase review.

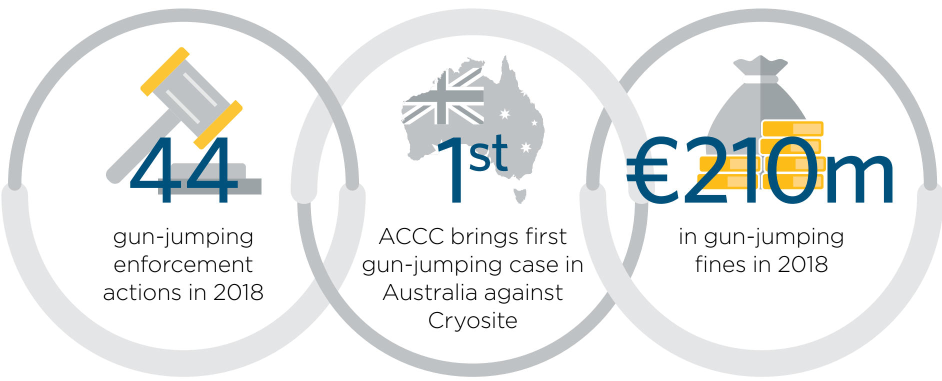
We are also seeing regulators intervening more in deals to extract remedies from parties (and, in the worst cases, to block deals where no suitable remedies can be agreed). There is a growing trend for regulators to request many more internal documents from deal parties in these cases. We have also seen regulators focusing on the impact of a deal on innovation/R&D competition, in addition to the impact on existing market competition.

As well as issuing more fines for failure to notify and the provision of inaccurate information in merger filings, regulators have also started to focus more on verifying that the buyer does not start to exercise control over the target assets while awaiting the outcome of the merger review, a practice known as gun-jumping.

This makes it more important than ever in 2019 for market participants to identify any potential merger control issues up front and plan carefully how to deal with them on a global basis. Key to this process will be anticipating how competitors could react – complaints will inevitably mean a closer review.

High value procedural fines

- Altice was fined €124 million for implementing its takeover of PT Portugal prior to notifying and receiving European Commission approval
- Facebook was fined €110 million by the European Commission for providing incorrect/misleading information in the WhatsApp acquisition



Top fines by value

Source: PARR/Acuris

"Anti-trust regulators are confidently and proactively asserting their powers and showing their appetite to intervene in transactions. They are also more willing than ever to sanction those who get the process wrong."

Markus Lauer
Frankfurt

Investors — shareholders as key players

Investors, both activist and institutional, took an ever more active stance on M&A in 2018

Shareholders' influence on M&A activity has been on the rise for some time but their increasing willingness to take a stance on even the largest transactions means that boards must, more than ever, consider the views of their investors when contemplating M&A activity.

In part, the influence of shareholders on M&A is due to activist investors, who may agitate for a board to undertake a transaction (for example Whitbread's decision to demerge Costa Coffee and Unilever's disposal of its spreads business), or intervene in a transaction that has been announced with the aim of forcing a buyer to pay a higher price for a target (seen for example on the takeover of SAB Miller by AB InBev), a practice known as bumpitrage.

The refusal simply to follow a board's recommendation is not confined to activist shareholders. In 2018, we saw disgruntled UK investors force the board of Unilever to drop proposals to simplify its corporate structure and move its headquarters to the Netherlands. We have also seen parties forced to renegotiate the terms of a transaction requiring shareholder approval in response to the views of major shareholders.

Boards contemplating M&A in 2019 should therefore sound out key investors pre-announcement where possible, taking care to do so within the confines of any legal and regulatory restrictions. However, even when they do that, shareholders' initial views may change, a risk that is increased where there is a protracted deal timetable as a result of anti-trust or other clearance procedures.

Listed companies and their M&A counterparts will therefore be focused on the steps they can take to protect a deal, such as securing shareholder approval early in the transaction timetable, agreeing a break fee or obtaining binding commitments from shareholders to vote in favour of a transaction.

Shareholder impact on deals

- Elementis renegotiated the purchase price for Mondo Minerals post-announcement
- Thyssenkrupp announced it would split into two separate listed companies following pressure from shareholders
- Unilever's proposed relocation and restructuring was blocked by shareholders
- Whitbread demerged Costa Coffee following pressure from shareholders

OF FTSE 100 COMPANIES HAVE AN ACTIVIST ON THE REGISTER

OF FTSE 250 COMPANIES HAVE AN ACTIVIST ON THE REGISTER

Value of shares held by shareholder activists worldwide

US$m = 533,285

Source: CapitalIQ

"Shareholders are forming their own views around the M&A strategies of listed companies and are more willing to challenge proposed deals. Boards cannot assume that shareholders will simply follow the board's recommendation. They must take their shareholders' views into account when contemplating any M&A activity."

Caroline Rae
London

Talent — retaining the key individuals

The value of innovative technology can quickly diminish without the continued involvement of the individuals who created it

Tech acquisitions by non-tech companies in 2018

- AB InBev's acquisition of WeissBeerger, a developer of analytic solutions that allows them to track beverage consumption in real time in any on-premise account
- L'Oréal's acquisition of ModiFace Inc., an augmented reality and artificial intelligence company
- Toyota's acquisition of a stake in Grab, a technology company that offers ride-hailing and logistics services through its app

The legal challenges around acquiring innovative technology, such as intellectual property ownership and cybersecurity, are well known to dealmakers. But buyers are also recognising the crucial role that the individuals behind the technology play on a successful deal.

Securing the buy-in of the innovators or those who understand the technology became an essential part of the M&A process in 2018 – from deal origination through to integration.

In the year ahead, it will be important to identify at an early stage any key individuals needed for the transition period and for the longer term. Traditional deal mechanisms to incentivise management and key employees, including earn outs and bonus structures, should be discussed early on.

These mechanisms can be complex and heavily negotiated but the buyer should be less concerned about obtaining "buyer-friendly" arrangements and more focused on whether the incentive arrangements operate in a way that genuinely motivates the individuals concerned and aligns their interests with the company's operational targets and objectives. Corporates are showing more willingness to learn from private equity management incentive plan techniques, and more creativity in crafting bespoke incentive solutions within a corporate framework.

Cultural differences can of course become a major obstacle to any successful M&A integration process but they are particularly pertinent in tech acquisitions where a buyer's more "corporate" culture can stifle a young technology business. As corporates seek to collaborate with such individuals, full acquisition is not always the preferred solution. The rise of corporate venture capital similarly demonstrates the appetite of corporates for alternative ways to partner on opportunities in new technologies and new markets.

"We have seen an increased focus on talent acquisition and the use of legal tools to create a culture where key individuals are motivated, incentivised and empowered. This can be the key to a successful tech acquisition."

Graeme Preston
Tokyo

Interlopers — more opportunity to intervene

In 2018, we saw a number of M&A transactions disrupted by interlopers - third parties gate-crashing M&A with a competing bid for the target or a supervening bid for the bidder. Whilst in some cases the competitive bidding for a target increased the price paid, in others the competing bidders joined forces or the transaction simply failed following the third party's expression of interest. This is a trend we expect to continue in 2019.

Case study 1
Disney/Fox/Comcast/Sky

21st Century Fox announced a recommended offer for Sky in December 2016. During the lengthy competition and public interest review that followed, Comcast emerged with a competing offer. Following an auction procedure run by the UK Takeover Panel to resolve the ongoing competitive situation, Comcast finally secured control in October 2018. In the meantime, Disney had agreed to acquire Fox in the US, in the face of competition from Comcast.

Case study 2
Klépierre/Hammerson/intu

Hammerson announced a recommended offer for intu in December 2017. The deal had an extended timetable due to the need for merger control clearance and, in March 2018, Klépierre approached Hammerson about a possible offer. Hammerson rejected the approach and subsequently terminated the transaction with intu.

Case study 5
Abertis Infrastructure

After an eight month battle in which they competed with each other to acquire Abertis Infrastructure in Spain, Italy's Atlantia and Hochtief joined forces and made a consortium bid for the company which was successful.

Case study 4
Blackstone/ Investa/Oxford Properties

Blackstone Group's May 2018 push for Australia's Investa Office Fund was overtaken by a competing bid from Canada's Oxford Properties Group just two days before Investa's shareholders were due to vote on the original offer. Blackstone raised its offer three times but Oxford prevailed and sealed the deal to acquire one of Australia's largest office real estate companies for US$2.4 billion.

Case study 3
Fidessa

Temenos announced a recommended cash offer for Fidessa in February 2018. Two days before the meeting to approve the bid, Fidessa announced it had received approaches from two other parties about a competing offer. Shortly before the deadline set by the UK Takeover Panel by which they had to clarify their intentions, Ion made a higher offer which was recommended by Fidessa. The Temenos transaction was terminated and the other potential offeror walked away.

"Longer transaction timetables mean that there is a greater risk of an interloper intervening in a transaction. Boards should consider how they can mitigate any risk, for example when deciding when to secure any shareholder approval."

Mark Bardell
London

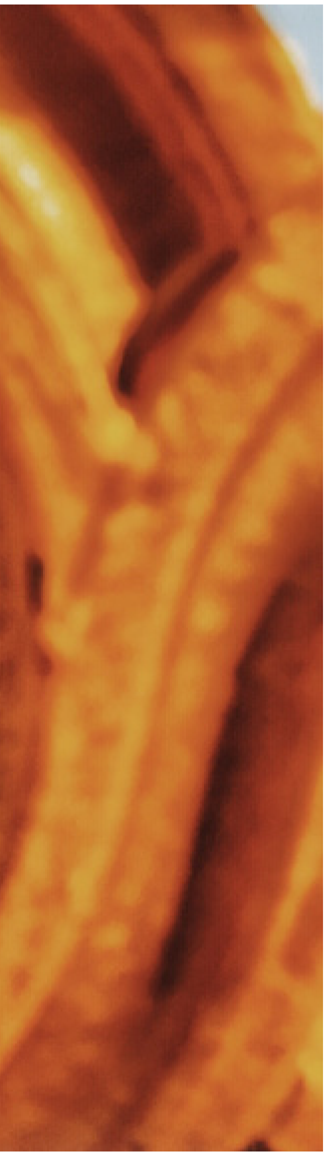
A view from Europe

M&A deal highlights in continental Europe in 2018

- Akzo Nobel's sale of its speciality chemicals business to Carlyle and GIC
- Atlantia and Hochtief's joint investment in Abertis
- China Three Gorges's offer for EDP
- E.ON's offer for innogy

Frédéric Bouvet
Paris

Alberto Frasquet
Madrid



"The level of M&A activity in continental Europe was significant in 2018. While there were slightly fewer deals than in the preceding year, the total value of M&A transactions increased compared with 2017 due to, amongst other things, a number of mega-deals across a broad range of sectors (energy and utilities, construction, industrials, chemicals and TMT) and different countries (Germany, France, Spain and Portugal).

The M&A market in continental Europe is likely to remain a sellers' market with an increasing level of interest from international buyers.

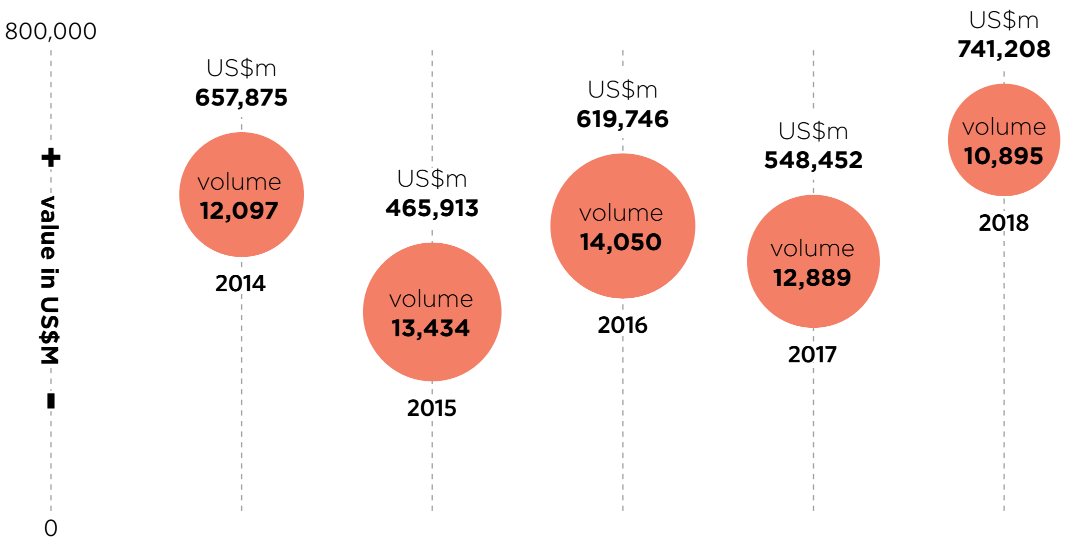
The expectations for 2019 are also positive and confidence in the M&A market in the continent for the coming 12 months remains strong, although there are some factors that may have a negative impact.

On the positive side, the availability of different financing options for M&A deals will satisfy the appetite of buyers. Along with traditional bank lending, alternative debt providers and more liquid debt capital markets will boost options. Private equity houses will continue to play a key role in the market, both because they are looking to divest and release returns from their current portfolios and because they have considerable dry powder, raised in recent years. Overseas buyers are also expected to be among the key players in the market and we anticipate an increased level of inbound M&A activity, both in terms of volume and value.

There are however a number of factors that may cause M&A in Europe to slow down. These include, in particular, political instability and geopolitical risk, increasing protectionism and political intervention, and a reduction in GDP growth forecasts. Greater equity capital market volatility may also be a negative factor for public M&A activity, although it might also serve to boost the interest in private deals and, thus, have a positive impact on M&A activity overall.

Finally, it seems reasonable to expect that, as has been the case for the last few years, the M&A market in Europe will remain a sellers' market with competitive sale processes for high quality assets targeted by a significant number of bidders, including both corporates and financial buyers."

European deal value and volume over the last five years



Source: Thomson Reuters

A view from UK

"As we entered 2018, there were concerns that politics and Brexit would dampen the optimism seen in an extremely strong performance in Q4 2017. Such concerns were unfounded.

M&A activity in 2018 continued to be strong in the UK, with the market seeing a good number of mega-deals. It is no surprise at all that these approaches came from international buyers, notably the US where the weakness of the pound continued to attract bidders to UK targets.

Private equity continued to be an important contributor to M&A, both directly and indirectly, with its regular participation in auction processes keeping pricing full. However, there was a noticeable lack of activity in the UK on the part of some of the largest private equity houses.

In terms of sectors, the hottest sector was TMT but the banking sector saw consolidation amongst the challenger banks and pharma remained active. Infrastructure also remained highly active, largely impervious to geopolitical headwinds, with the exception of UK water.

So what are the prospects for the UK M&A market for 2019?

Continued uncertainty over Brexit, together with the associated possibility of an economic slowdown, may continue to have a negative effect on UK equity markets, which are an important reference point for corporate valuations and an important source of acquisition currency for corporates. If the downturn in equity markets is prolonged, it should start to give rise to a rebasing of sellers' pricing expectations (none too soon, some will argue).

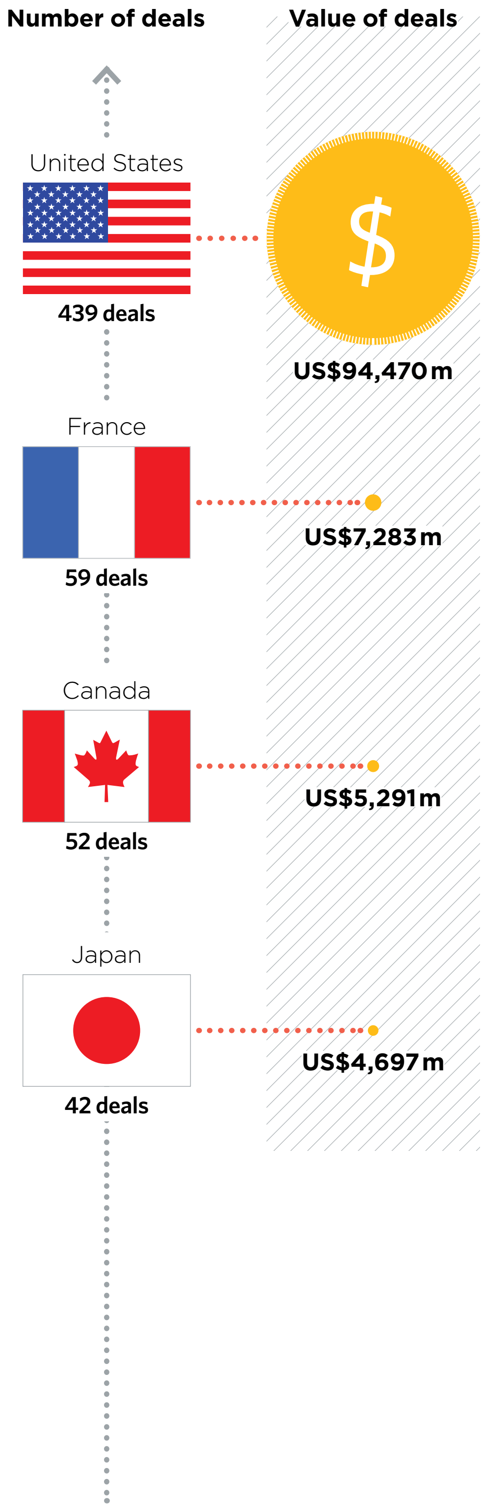
However, the conditions for continued M&A activity are in place. Corporates with strong balance sheets seeking rationalisation and growth, private equity houses with dry powder to invest and the availability of cheap debt - as well as corporates keen to counter the threat of disruption in their business, including as a result of Brexit - should all fuel activity in 2019 for both acquisitions and corporate venturing. End-of-cycle factors should be expected to persist, offering no relief from investor pressure to sharpen strategic focus and off-load non-core assets."

M&A deal highlights in the UK in 2018

- Comcast's acquisition of Sky
- Marsh & McLennan's offer for Jardine Lloyd Thompson Group
- Melrose's acquisition of GKN
- Takeda's offer for Shire

"UK M&A activity was surprisingly strong in 2018 as buyers adjusted to the 'new normal' and forged ahead with strategic acquisitions, despite Brexit and wider economic and geopolitical issues."

Top acquirer nations of UK targets by deal value in 2018



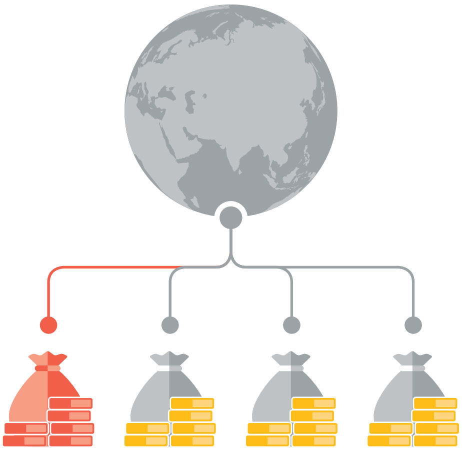
Source: Thomson Reuters

Antonia Kirkby
London

Roddy Martin
London

A view from Asia

Financial buyers poised to take off



A QUARTER OF THE WORLD'S PRIVATE EQUITY FUNDS ARE NOW FOCUSED ON ASIA.

359,000,000,000

THE PE SECTOR IS HOLDING **US$359 BILLION** IN ASIA-FOCUSED DRY POWDER.

Nanda Lau
Shanghai

Tommy Tong
Hong Kong

"Asia M&A thrived in 2018. Despite being in the eye of the geopolitical storm, China M&A prevailed, with outbound deals rebounding after a quieter year in 2017. Japan M&A recorded its strongest year since 1980, up 140% year on year, while Korea and the Southeast Asia nations shrugged off local political concerns to finish strongly.

Geopolitical tensions are unlikely to hold back Asian dealmakers for long in 2019 either.

The region's stock of truly global companies has exploded in recent years, and both old and new are hungry for

Japan Inc's overseas shopping boom

In a record year, Japanese outbound M&A more than doubled year on year, with deals worth US$179 billion announced in the first nine months of 2018 compared to just US$69 billion in the whole of 2017.

This increase includes two global top-ten deals:

- Sprint-T-Mobile merger
- Takeda's offer for Shire

M&A deal highlights in Asia in 2018

- Bharti's acquisition of Indus Towers
- GIC-led consortium's investment in Ant Financial
- Walmart's acquisition of Flipkart Internet
- Wanhua Chemical's acquisition of Yantai Wanhua Chemical Company

"Asian buyers have refocused on European, Middle Eastern and Asian targets, while multinationals wary of China tariffs are shifting to Southeast and North Asia. It's a swift and practical response to the search for growth."

growth. Japan and Korea's long-established conglomerates have been joined by new giants from China and Southeast Asia, and all are playing hard, both home and away.

Asia is no longer simply a target for disruption by Western companies and markets - it boasts effective global disruptors of its own. Alipay is accepted in Beverly Hills, while Didi, Grab and Go-Jek have taken on Uber across Asia.

Financing is unlikely to be a problem in the coming year. Asian corporates remain less highly leveraged than their Western counterparts, while bank lending is stable.

Private equity is burgeoning across Asia, with newly powerful home-grown funds, sovereign wealth funds, asset management companies and securities companies jostling with Western industry icons at the deal table.

TMT was the top deal sector this year and will remain the star of this disruption economy in 2019. We also expect strong activity in financial services, industrials, infrastructure and real estate.

2019 will demand a focus on deal mechanics. Asia's dealmakers will need to be nimble yet cautious. Deals will take longer to close, given the unpredictable political slant to foreign investment, national security and anti-trust reviews.

Concerted activity by financial buyers, if it emerges, could create more complex deal-making processes. Domestic and international shareholder activism is also on the rise in Asia markets, demanding extra caution by boards."

A view from Australia

"2018 was a blockbuster year for M&A in Australia.

We saw strong activity, with a number of mega-deals in the mix. Dominant sectors included property, financial services, telecommunications and media as well as energy and resources. There were different drivers for this activity.

In financial services, we had a Royal Commission looking into the banking and wealth management industries. This has been a catalyst for some banks to move away from vertical integration and focus on core areas.

In media, there was a lessening of regulation, allowing further consolidation in the sector.

In the energy and resources sector, we saw large capital expansion commitments by major iron ore producers which are also having a positive effect on supporting sectors such as mining services.

Other key drivers across the board were continued strong interest from foreign bidders, debt being readily available and increasing participation from private equity players with significant capital to deploy.

We are also seeing political headwinds, with a likely federal government election in 2019 as well as greater regulatory intervention and scrutiny on transactions, highlighting the need for careful planning and early strategic engagement.

Despite this, we are confident that the strong deal momentum will continue in 2019, underpinned by strong foreign investment and private equity interest, robust activity in sectors such as financial services, property, healthcare and energy and resources, as well as demergers and divestments for companies looking to return to a core focus."

Malika Chandrasegaran
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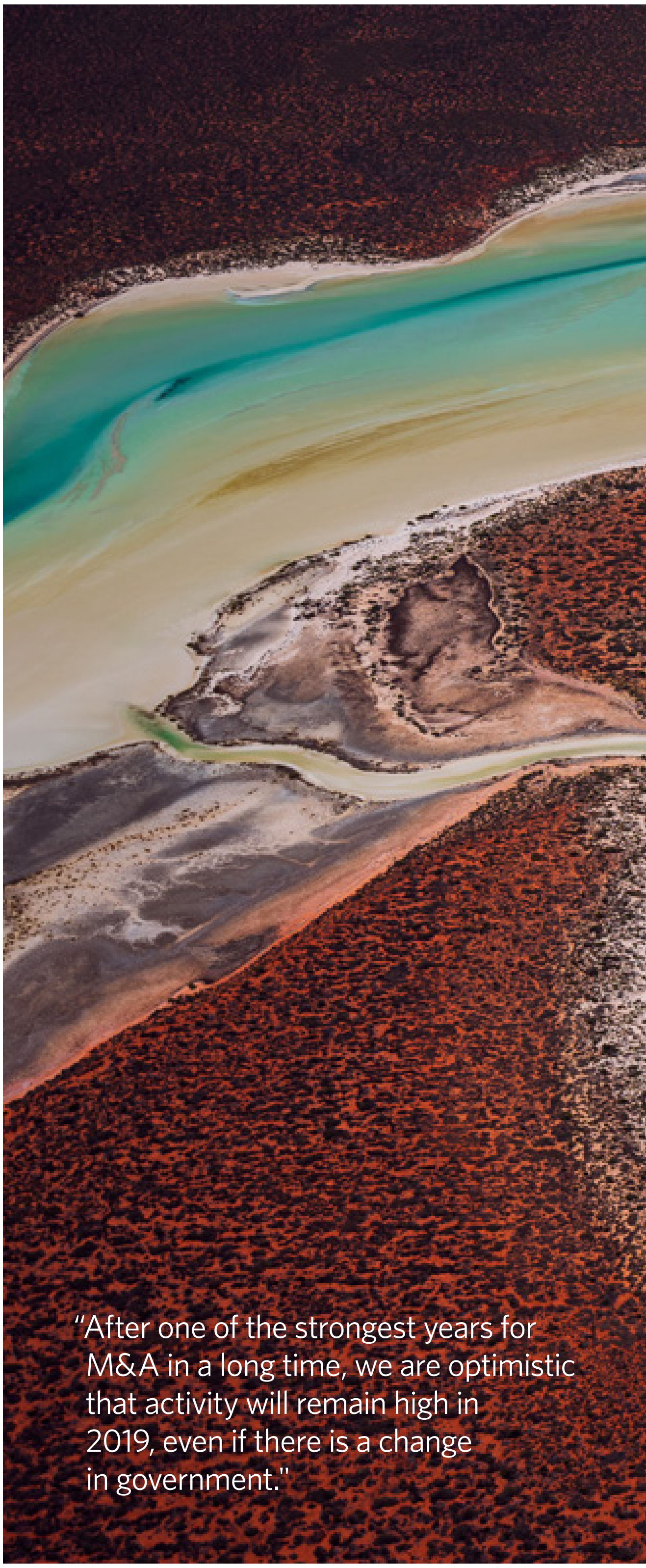
Andrew Rich
Sydney



M&A deal highlights in Australia in 2018

- Amcor's acquisition of Bemis
- Coles demerger from Wesfarmers
- Commonwealth Bank of Australia's proposed sale of Colonial First State Global Asset Management to Mitsubishi
- Santos' acquisition of Quadrant Energy
- TPG Telecom's proposed merger with Vodafone Hutchison Australia

Deals with an Australian involvement – 2018 a 34% increase on 2017

Announcement date	Deal value (US$m)	Number of deals
2014	122,470	1,739
2015	110,722	1,697
2016	111,964	1,799
2017	120,143	2,140
2018	161,319	2,061

Source: Thomson Reuters

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