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Abbreviations

ACCC	Australian Competition and Consumer Commission
aka	also known as
Art	Article
AMERICAS	North and South America
APAC	Asia Pacific
ATAD	Anti Tax Avoidance Directive
BCG	Boston Consulting Group
BEPS	Base Erosion and Profit Shifting
BRICS	Brazil, Russia, India, China, South Africa
CADE	Brazil Administrative Council for Economic Defense
CAGR	Compound Annual Growth Rate
CCI	Competition Commission of India
CO2	Carbon dioxide
CPI	Corruption Perceptions Index
DG	Directorate General of the European Union
DOJ	US Department of Justice
DR-CAFTA	Dominican Republic - Central America Free Trade Agreement
EAR	US Export Administration Regulation
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
EFTA	European Free Trade Association
e.g.	for example (*exempli gratia*)
EMAS	Eco Management and Audit Scheme
EMEA	Europe, Middle East, Africa
ENISA	European Union Agency for Network and Information Security
EPS	Environmental Policy Stringency (index published by the OECD)
etc.	and other similar things (*et cetera*)
EU	European Union
EUR	Euro
EY	Ernst & Young
f	and the following (single)
ff	and the following (multiple)
FCPA	US Foreign Corrupt Practices Act
FinTech	Finance technology
FIRRMA	US Foreign Investment Risk Review Modernization Act
FTC	US Federal Trade Commission
GDPR	EU General Data Protection Regulation
HHI	Herfindahl-Hirschman-Index
IAEAA	International Antitrust Enforcement Assistance Act

i.e.	*id est*
IP	Intellectual property
ISO	International Standardization Organization
IT	Information technology
ITAR	International Traffic in Arms Regulation
JV	Joint Venture
KFTD	(South) Korea Fair Trade Commission
M&A	Merger and Acquisition
MOFCOM	China Ministry of Commerce
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
ORF	Österreichischer Rundfunk
RMB	Chinese Yuan (*renminbi*)
SAR	Suspicious Activity Report (UK Proceeds of Crime Act)
Sec	Section
subpara	Subparagraph
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USD	United States Dollar
U.S.C.	United States Code
vs.	*versus*
WARN	US Worker Adjustment and Retraining Notification Act
WHO	World Health Organization
WTO	World Trade Organization

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Abstract

Cross-border M&A makes a major percentage of the global M&A volume every year. When conducting an M&A project the exposure to effects and liabilities out of public law has to be considered. In domestic cases public law is usually known and dealt with adequately. In international cases however astonishing implications can arise from (1.) past misconduct of the target company, (2.) the closing procedure (e.g. the controlling entity becomes foreign) as well as (3.) the future development of the legislation. They can involve administrative penalties, monetary fines, the withdrawal of permits and licenses, and even the interdiction of the M&A deal. Therefore they have to be evaluated thoroughly.

As this topic has not been treated scientifically as a whole so far this thesis will start out with the design of an approach for the selection of relevant fields of public law. These fields cover competition, tax, employment, environment, import/ export, cybersecurity including data protection, corruption and - as a special topic - FinTech. For each field the objectives and protective purposes are determined. Then an overview of the global legislations with a focus on recent developments as well as the potential pitfalls is given. And finally a way to mitigate the risks related to the individual field of public law is proposed. Selected topics are wrapped up with real-world examples of M&A projects affected by public law.

Keywords

International M&A, public law, due diligence, risk, successor liability, algorithm.

1. Introduction

In today's globalized economy there are two basic concepts for growing a company - organic and inorganic growth[1]. While organic growth is focused on increasing the head count (and hopefully the turnover as well as the revenue) of a company by hiring new staff, inorganic growth may be achieved by merger, acquisition or the formation of joint ventures.

Organic growth is often induced by objective, external factors such as a generally bullish market situation or high individual client expectations in terms of quality, quantity or time (e.g. hiring design staff for a new project or increasing manufacturing capacity). Sometimes organic growth has to be achieved in very limited time when reacting to critical external forces.

In contrast to that inorganic growth may be rather strategically driven by management decisions with the following factors in mind:

- Improving competitiveness by cutting costs due to synergies
- Increasing stability by area and market diversification
- Adding strength by broadening the operational capabilities and knowledge

Deloitte research shows that the main drivers for cross-border M&A are revenue growth and access to new products and channels[2]. In 2015 the total volume of cross-border M&A deals amounted to nearly USD 1.4 trillion representing 31% of global M&A activities. Furthermore the study reveals that within six years from 2010 to 2015 the average deal value increased from USD 1.8 billion to USD 2.6 billion while the number of deals remained stable at around 400 … 500. It is remarkable that in the same time frame the outbound Chinese M&A activities grew with a Compound Annual Growth Rate (CAGR) of 52.3%. The same study says that "a thorough understanding of tax, regulatory and political risks […] (is) imperative to cross-border deal success". On the other hand companies continue to employ alternative approaches such as greenfield investments or joint ventures.

This thesis is dedicated to investigating the different fields of public law that are critical for cross-border M&A cases and give an overview of relevant global legal systems in these areas. Fields such as competition law, environmental regulations,

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[1] compare to *Kuntz,* Organic vs. Inorganic: Which Way to Grow? ForbesBrandVoice 2014.

[2] *Deloitte,* Cross-border M&A, Deloitte M&A Institute (2017) 3 ff.

employment law or compliance with anti-corruption provisions will be covered. Real-world examples will be given to demonstrate the impact of public law on M&A activities. A special chapter is dedicated to the current topic of FinTech M&A. Finally a simple algorithm determines how to prioritize the various fields of law in an M&A project.

At first glance international M&A seems to be identical to cross-border M&A. However imagine the case where company A1 in country A acquires company B1 in country B from company A2 in country A. Then there is an international context because countries A and B are not identical but the transaction is purely national from A1 to A2 and therefore not cross-border. However both international and cross-border M&A are affected by non-domestic legislation. Therefore the terms will be used interchangeably throughout this thesis.

2. Law in M&A

2.1. Introduction

In 1957 Igor Ansoff suggested a table-style framework comparing the four basic ways for a business to grow[3]. Known today as the "Ansoff matrix", this framework is a two-by-two matrix relating the current and future products of a company to its current and future market.

Assuming that M&A is the vehicle to realize growth in a certain case the Ansoff matrix indicates four basic options:

Exhibit 2.1: Ansoff matrix - Examples for classification of a potential target

New Market	A company with comparable products in a market that is not yet developed by the buyer	A startup in a market new to the buyer
Existing Market	An established competitor in the home market	A startup in the home market
	Existing Product	**New Product**

In the Ansoff matrix all decisions are based on economical parameters, e.g. company size, product portfolio and brand. But very soon a legal perspective is essential to rule out potential deal-breaking aspects and secure the legal basis for the further process. Often contract law is perceived the most relevant legal field in M&A because the contractual relations and negotiations between the parties are of ultimate importance.

2.2. A Typical Legal Due Diligence

The due diligence review (usually simply *due diligence*) is an investigation of strengths, weaknesses and risks associated with an M&A project usually executed by the buy-side as well as the vendor, especially when critical business secrets shall not be disclosed to the potential buyers (who may be active in the same industry). This approach ("sell-side due diligence") is often used when the vendor is actively seeking for a buyer because it allows to provide the exact same set of information to all potential buyers. In most cases however the due diligence is carried out by the buy-side based on information provided by the target in a real or virtual data room.

[3] *Ansoff,* Strategies for diversification, Harvard business review 1957, 35 ff.

The due diligence is composed of several areas, the most common usually being strategic and operational due diligence[4]. Strategic due diligence includes commercial and financial due diligence. The legal due diligence - often being part of the commercial due diligence - is extremely important because it investigates the ownership of assets (real estate, equipment, intellectual property…) and the legal obligations towards clients, suppliers and financial institutions (all of these included in private law) as well as the regulatory framework the target is operating in (public law). The following list is compiled from several sources[5]:

1. Areas of (predominantly) private law
   - Shareholder structure
   - Company/group structure
   - All contracts regarding joint ventures, mergers, acquisitions
   - Assessment of general management including power of attorney
   - Ownership situation of all assets
   - Lease contracts of movables and immovables
   - Employment contracts, internal agreements; unions
   - Contracts with suppliers including disputes
   - Contracts with clients including disputes
   - Contracts with financial institutes; potential liabilities
   - Issues related to product liability
   - Licenses, patents, brands and related agreements and disputes
   - Insurance policies (including *directors and officers liability insurance*) and risks not covered by insurance
2. Areas of public law
   - Permissions, concessions and related documentation
   - Restriction of competition
   - Subsidies, grants

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[4] compare to *A.T. Kearney,* Due Diligence: Think Operational (2008) 1 f.

[5] compare to *Schlitt/Schäfer/Becker,* Checkliste Legal Due Diligence, http://www.ipobox-online.de/anhang/checkliste-legal-due-diligence (retrieved on September 14, 2018); *Klumpp,* Due Diligence Checkliste - Unternehmenskauf - Unternehmensverkauf, https://www.tech-corporatefinance.de/blog/unternehmensverkauf-unternehmenskauf/due-diligence-checkliste-unternehmenskauf-unternehmensverkauf/ (retrieved on September 14, 2018).

Above list may vary from project to project. However the amount of topics assigned to public law is a clear indication that the focus of a classical legal due diligence is on contract law. Private law is applied to contractual relations between natural or legal persons. The M&A deal is closed by unanimous declarations of will by the parties under the preconditions of the applicable privat law.

Public law on the other hand is applicable to cases where the state uses its sovereign power to enforce the law against subjects within the boundaries of the national territory or even beyond (e.g. in tax law). Once a company merges with or acquires another company in another state the buy-side becomes subject to the sovereign power of this state. This includes submission to the legislation and regulations of this state and enables the state to influence the business of the company by legal means. Implications of public law could include high monetary penalties as well as the withdrawal of operating licenses, standing down the company for indefinite time. Consequently it is important for the buy-side to know about the potential problems, what effects could materialize and how to mitigate these effects properly.

3. A Priority Driven Framework for M&A Public Law

Limited time, a small team and the vast number of difficult to judge foreign laws and regulations call for a structured classification of the various fields of public law. Not all laws can be dealt with at the same time and some are not ultimately relevant in the beginning of an M&A project while others may be dealbreakers. This thesis proposes to use a priority driven framework to assess the right legal field at the right time. This has the advantage that forces can be concentrated on the critical topics first in order to identify and deal with absolute dealbreakers as early as possible in the process.

3.1. How to build a framework

A framework is a structured approach on how to properly solve a complex problem with limited resources. Often frameworks are highly specialized for a unique question, e.g.: “Does it make sense for company A to acquire company B?”

Such a question is often called a *guiding question* because it guides to the goal of a problem in an easily comprehensible way. Because such a guiding question often cannot be answered in a comprehensive manner a potential approach to solving this problem will be described in short.

First we have to decide on the relevant subquestions that can be researched and addressed within a single module. Extensive research in the last decades has revealed a variety of solutions. An adaptation of *Cossin’s* approach could lead to the following four modules[6]:

- The subjective aspects (why A wants to acquire B, what will they do with B?)
- The objective aspects (due diligence; how does B look like, how do they behave?)
- The environment (how does the market develop, how could the competitors react?)
- The financial aspects (is the price justified, what is the risk?)

Second we will discuss who will deal with these modules. In a classical M&A project all of these may be looked into by dedicated teams with specialized knowledge: The first issue may be addressed by the M&A leading organization, the

[6] compare to *Cossin,* An M&A Oversight Framework for Boards, https://www.imd.org/board/publications/MAOversightFramework/ (retrieved on September 14, 2018).

second by a set of due diligence teams (including business due diligence, technical due diligence etc.), the third by the marketing department and the fourth field may be assigned to the finance branch.

Since these teams have individual unique topics they are able to operate in parallel (at the same time). Hence the third part of the framework design regarding the algorithm is already complete - the teams may operate in parallel but are not forced to. A (partial) serial approach may always be chosen, e.g. in case some special results of another team are required to go on.

In order to come to a satisfying result, I will formulate a suitable guiding question for this thesis:

"How can we make sure that public law does not frustrate an M&A project?"

This guiding question implies several priorities. First of all the stress is put on public law. Contract law makes a huge part of any classic legal due diligence anyway and therefore will not be part of this thesis. There are many definitions available for the scope of public law. With regards to this thesis the following distinction is made: Contract law covers any relation between natural or legal persons while public law is applicable to relations and issues between the state and its individual citizens (including natural and legal persons).

Second reference is made to M&A. An M&A project is usually executed under time pressure. Nonetheless support from external experts often cannot be obtained easily due to its classified nature. Consequently the approach has to be as efficient as possible to prevail.

Third there is always a certain risk related to M&A projects. On one hand any approach has to be as safe and holistic as possible to limit the risks to acceptable levels. On the other hand finally the efforts wasted shall be minimized with an efficient process.

Finally this leads me to the summary of the design requirements for the process that will be used to assess the critical public law topics with regards to M&A:

1. Decide on the critical fields of public law (aka modules)
2. Decide who should take care of these modules and
3. Decide on the algorithm for the process

4. High safety standards and efficiency considered in the whole process

3.2. Part 1: Critical fields of public law

As stated above the fields of public law are defined as governing the relations between the state and its individual citizens. Besides company ownership the individual branches of law may define several other characteristics relevant for the nationality of a company. These may include the seat of the headquarters, the place of incorporation or the nationality of the managing director[7]. There is a theoretical possibility that the transaction is deemed international for one area of law and domestic for another. This thesis focuses only on transactions where the nationality of the company (as defined by the respective law) changes due to the transaction. Consequently international and cross-border M&A shall have the same meaning for the purpose of this thesis.

When identifying the critical areas of public law there is no reliable general source. Therefore the example of a simplified business process of a manufacturing company is used to identify the areas of public law relevant for the business. For any service company a similar process could be derived and the legal areas may well be the same. From the perspective of public law the marketing phase has no other legal boundary conditions than the sales phase. Consequently for the sake of simplicity the marketing phase is implied to be part of the sales phase.

[7] compare to the provisions in Art 4 of *OECD,* Articles of the model convention with respect to taxes on income and on capital (2003) 8.

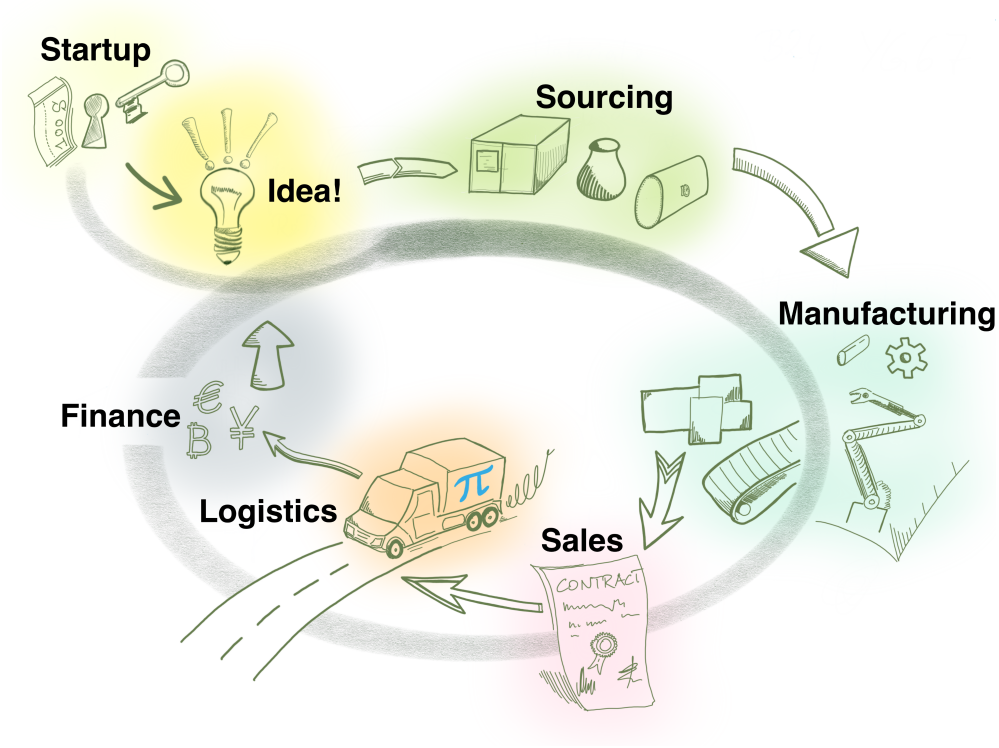

Exhibit 3.1: The fictitious business process

In the first step the required resources are broken down in exhibit 3.2.

Exhibit 3.2: The steps of the fictitious business process and its related resources

Process steps	Relevant resources
Commencing business	Funds, foundation of corporation
Idea generation, product development	Personnel, data, IT
Procurement of raw material, components and machinery	Personnel, funds, material, import
Manufacturing	Personnel, material, machinery
Sales	Personnel, funds, market
Logistics	Personnel, forwarder, export
Finance	Investment, capital management

In the second step similar resources are assigned to common areas and third legal areas are related to these groups:

Exhibit 3.3: Resources and related areas of public law

Groups of resources	Related areas of public law
Foundation of corporation	Corporate law
Personnel	Employment law
Import, Export	Import/export law
Materials, manufacturing	Environment law Personnel safety law
Market	Competition law
Data, IT	Data protection law Cybersecurity law
Funds, capital management, investment	Tax law Corruption law Money laundering law

Above list gives an overview on the relevant legal areas concerned with international M&A. From this list such areas have to be derived that could impose an obstacle to the M&A project.

Corporate law usually governs legal personality, liability, ownership and management[8]. These areas describe the processes of incorporation, transfer of ownership, managing the company and how the company is seen by and interacts with other parties. These issues are mainly of administrative nature in order to guarantee a common understanding of the rules of the game and equal treatment of comparable companies in the same territory. Research suggests that the level of corporate law can directly influence national development. However it is understood that corporate law puts states in a competition of favouring and thereby attracting companies[9]. Consequently corporate law is rather seen as an organizational facilitation mechanism than an obstacle to international M&A and is not further discussed in this thesis.

[8] *Armour/Hansmann/Kraakman,* The essential elements of corporate law. What is Corporate Law? (2009) 2 f.

[9] *Pistor/Keinan/Kleinheisterkamp/West,* The evolution of corporate law: A cross-country comparison, Journal of International Economic Law 2002, 791 ff.

In contrast to that **employment law** safeguards the interests of the employees. Especially the EU with its *Transfer of Undertakings Directive*[10] developed a strong legal standard on the treatment of employees during the transfer of a company. Under most circumstances the employment contracts will continue to prevail and an instant dismissal for exceptional reasons under the title of the transfer is not possible but the contractual notice periods remain. As a consequence an immediate reorganization directly following the transaction is subject to the legally defined or contractual time periods and payment of bonuses if applicable.

Import/export regulations can play important roles if the state tries to exert power on the company by either limiting the import of components and raw materials or by restricting the export of goods. For some industries (e.g. the weapons industry) and countries (or rather combinations of manufacturer's and buyer's nationality) these limitations can be critical and shall be observed.

Environment law may be concerned if natural resources are either used (e.g. for a production process) or have to be protected (e.g. from pollution). The first case is less critical because the related law follows a rather administrative purpose (e.g. CO2 certificates or the regulation of rare materials). However the UN emphasize the importance of human rights with regards to environmental aspects in its latest publication written by the first UN Special Rapporteur on Human Rights and the Environment[11]. It can be expected that the public interest in processes harming the environment will increase in the upcoming years on a global basis. Accordingly environmental protection law will increase, presumably in those countries with currently less strict regulations.

Law concerning **personnel safety** has a purely protective purpose and is usually framed in a strict way. Some countries however are known to favour the employer's position with a low level of control at the cost of health and safety. The International Trade Union Confederation estimates that in 2017 at least 2.78 million employees died because of accidents or exposure to hazardous substances at their

[10] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 2001/82, 16.

[11] *UN*, Framework principles on human rights and the environment (2018) 5 f.

workplaces[12]. However the World Health Organization (WHO) is continuously developing recommendations on occupational health and safety. The importance of the topic is - in the view of the WHO - sufficiently present in its 192 member states with some countries lagging behind[13]. From M&A perspective two issues could be interesting in this regard: First the development of stricter standards. In the light of the WHO's statement of recognition this could seem to be rather unlikely. And second the damage that could be done to the brand of the buyer in case of low health and safety standards which is not a topic concerning law primarily. Actually no example could be found where health and safety topics severely influenced an M&A project. Therefore health and safety is not considered of high relevance for this thesis.

The modern free market relies on competition as one of the main columns. A healthy degree of **competition** can only be guaranteed if a sufficient number of suppliers is available and authorities on a global basis strictly control M&A activities especially beyond a certain market share. With authorities co-operating on a global scale in this regard the worst consequence would be the prohibition of the deal. Consequently it is wise to investigate how the merger could be seen by the authorities in order to prepare adequately.

Cybersecurity is one of the major challenges of the presence. Cybersecurity comprises infrastructure security (e.g. the resilience of the IT systems) and data security (especially the prevention of data theft). Nowadays data is not only stored on national in-house servers anymore but globally and - as soon as in the cloud - probably in places even the owner cannot determine easily anymore. 75 % of IT specialists say in a recent Austrian survey that classical IT security measures are not sufficient while 61 % rate the employees' behaviour as a potential risk[14]. In international M&A different issues depending on the project phase can be identified. For example in the preparation phase client data cannot be simply passed on to potential buyers due to privacy restrictions. And in the post-merger phase it has to be

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[12] *International Trade Union Confederation,* Unions are organising for safer, healthier, decent work, https://www.ituc-csi.org/IMG/pdf/28_april_2018_en.pdf (retrieved on September 14, 2018).

[13] compare *WHO,* Declaration on Workers Health (2006), 2 f and http://www.who.int/occupational_health/regions/en/ (retrieved on September 14, 2018).

[14] *ORF,* Mitarbeiter laut IT-Experten "Schwachpunkt", https://orf.at/stories/2448930/ (retrieved on September 14, 2018).

decided what data is provided to which entities and locations of the company. Some countries might even require that specific data is kept confidential within special branches of the company (e.g. in the case of defense technology). Therefore legal issues with data protection have to be considered in international M&A.

Finally if it comes down to the financial issues the following schemes can be imagined to impede international M&A: First money that has to be paid to the state by the company (**taxes**). Second money that is unduly paid by the target company to a state representative (**corruption**). Third money that is unduly transferred from illegal actions to the legal assets of the target (**money laundering**). Taxes can be too high when compared to other situations, e.g. because they have to be paid twice in two different countries due to absence of a bilateral tax treaty. And corruption and money laundering can be a problem in terms of prosecution and damage to the brand e.g. if the target's undue practices are related to the buyer in the post-completion phase. While extraordinarily high taxes may be a dealbreaker, money laundering and corruption are general risks that have to be addressed in the due diligence in order not to backfire at a later stage.

3.3. Part 2: Who should do it?

M&A is a multidisciplinary task often carried out under high time pressure and financial risk. Therefore the error margin is extremely low. Furthermore there are no two identical M&A projects because even details may have severe impact. However for the success of the M&A project it is critical that these details are identified on time and dealt with correctly. In this regard an M&A project is similar to an industrial innovation project. Consequently the setup of an innovation team is analyzed and evaluated if a similar approach makes sense for an M&A project.

The standard approach for a c*reative innovation team* is to collect a number of experts in different fields across functional units thereby combining detailed knowledge on the issue with broad strategic perspectives. Since ideas are often built on other ideas everybody within the team shall be given equal voice. Hence it could make sense to clarify from the beginning that the hierarchy of the normal functions does and should not play a role in the innovation process.

With regards to team size and hierarchy an M&A team could be compared to the personnel of a small enterprise which is not doing dedicated creative work on a

regular basis but is expected to be generally creative in daily work. The following similarities between conventional small enterprises and M&A teams come to mind:[15]

1. Both are doing a job that generally is not perceived as creative.
2. Both have a strict hierarchy.
3. Both teams are working in an encapsulated environment with only limited help from outside.
4. Both have a relatively low fault tolerance.

But why would creativity make a difference in M&A projects? As asserted above the critical issues may always be different. Some may be linked to potential violations of law by the target in the past - which have to be identified in order to determine potential risk, costs and price. In other projects the success may depend on the development of the legal system (e.g. in dynamic legal fields such as environment, tax or competition). There is no standard solution for such issues. As a consequence I highly recommend to promote the creativity of an M&A team in two regards:

1. A structured approach to deal with unstructured data in the course of the present project as well as future projects (comparable to idea management and the related documentation efforts)
2. The reduction of hierarchy levels as much as possible when discussing diffuse matters

3.4. Part 3: The algorithm

First the individual phases of the M&A project will be determined. Depending on the source the number of phases may vary from four to ten[16]. For the purpose of this thesis the M&A project is divided in five phases:

1. The *strategy phase* where the target company will be determined.

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[15] compare *Zajkowska,* How to create innovative team in small organization - integrated solutions on the example of microenterprises in Poland, Human Resources Management & Economics 2016, 119.

[16] compare *Maverick,* Maverick's Four Phases of M&A, https://maverickllc.com/the-four-phases-of-m-a (retrieved on September 14, 2018) and *Corporate Finance Institute,* Overview of the M&A Process, https://corporatefinanceinstitute.com/resources/knowledge/deals/mergers-acquisitions-ma-process/ (retrieved on September 14, 2018).

2. The *clarification phase* where the target company is approached and the potential further collaboration is discussed and evaluated (including the due diligence).
3. The *negotiation phase* where the absolute conditions of the contract are negotiated and finally the contract is signed.
4. The *completion phase* between contract signing and coming into force where topics intentionally left open in the negotiation phase can be settled.
5. The *integration phase* after coming into force of the contract.

In the second step the algorithm will be outlined. Since this thesis is generally applicable on a global basis, the algorithm does not specify which legal areas have to be considered in which phase but rather gives guidance on how to choose these legal areas.

In the first stage the potential dealbreakers have to be identified and dealt with. In case the dealbreaker can be clarified without input data from the target company, this issue shall be dealt with in the *strategy phase* and otherwise in the *clarification phase*. In the second stage the less critical issues (no dealbreaking capacity) shall be addressed. The absolute conditions to the contract (e.g. the availability of certain certificates) shall be settled prior to the signing of the contract in the *negotiation phase* while the rest of the topics can be postponed to the *completion phase*. The negotiation phase is also the latest point where potential shortfalls shall be clarified with the authorities.

It shall be noted that the selection and segmentation of legal areas shall be done in a due and anticipating manner. Again stress is put on potential changes of law that may influence the profitability of the deal. Such changes may depend on the intensity of market activity. Drastic changes in relevant markets could provoke stringent regulatory actions. As a consequence not only the past but also the future situation from a strategic point of view shall be considered. Taking the external factors such as the market (competitors, clients etc.) and the legislative response into account, the approach could be shaped as shown in exhibit 3.4.

An overview of the complete process will be shown in the final chapter.

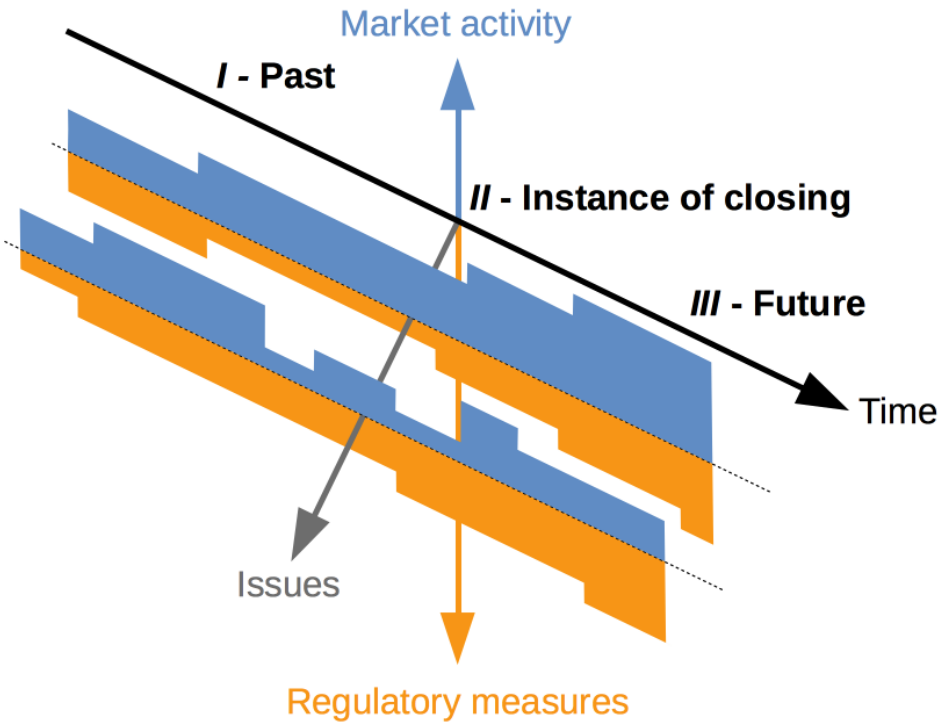

Exhibit 3.4: General approach for the check of M&A regulatory issues with the following focuses: *I* - past conduct of the target, historical developments in law etc.; *II* - closing and consequent changes applying in the regulatory setup; *III* - integration of the target, potential changes to the regulatory frameworks

4. Competition Law

Competition is one of the corner stones of the free market. It ensures efficiency (by lower prices and higher quality) and promotes product variety as well as innovation. Therefore administrative bodies are not only monitoring the business conduct of national and global companies but also investigating the consequences of proposed or realized mergers or acquisitions.[17]

4.1. Objectives of competition law

In 2003 the OECD hosted the Global Forum on Competition where the objectives of modern competition law were discussed. Although the countries' contributions depended strongly on their respective situations the three main objectives of competition law according to the OECD will be summarized and construed: First the core objectives of competition law include the process of competition, favouring the position of consumers with low prices, a variety of product choices, innovation and efficiency. Accordingly companies shall be limited in their freedom to acquire shares of other companies in the same business sector if there is a risk of higher prices or reduced innovation. Second competition law is used to promote objectives of public interest and thereby exert regulating power. The term *public interest* is supposed to allow a broad and flexible interpretation of the law, either stricter or less strict but always in accordance with the legal requirement of predictability. And finally there are objectives within a *grey zone* between the former two objectives that should promote small and medium enterprises and avoid undue concentrations of economic power. Although these *grey zone* objectives often are not explicitly mentioned in the law they are in line with the core objectives to a certain extent.[18]

[17] *European Commission - DG Competition,* Making markets work better (2016) 3 f.

[18] *OECD,* The objectives of competition law and policy (2003) 3 f.

4.2. International legislation on competition concerning M&A

4.2.1. OECD

The OECD recommends to its member states to strongly cooperate in competition issues[19]. The following mechanisms are expressly stated:

1. The notification of a potentially affected other member state
2. The exchange of information
3. The coordination of actions

4.2.2. EU legislation on competition

In Europe not only the national competition authorities are responsible for the evaluation and approval of mergers and acquisitions but also the EU authorities as soon as a certain European scale is reached. In this regard the *Treaty on the Functioning of the EU* (TFEU) is the primary legal basis for legislation impeding the establishment of cartels and competition-limiting constructs. Title VII of the TFEU deals with "Common rules on competition, taxation and approximation of laws". Under chapter 1, section 1 the most important articles regarding competition in the internal market of the EU can be found. According to the very broad definition of Art 101 TFEU all practices with negative impact on the competition of the internal market are prohibited (especially resulting in higher prices or disadvantages for other market participants). Exemptions may be granted if the practices lead to a consumer benefit and keep the market mechanisms alive. *Concentrations*[20] of companies such as mergers, acquisitions and joint ventures are understood to be covered by Art 101[21]. Art 102 TFEU focuses on the establishment of fair prices while Art 103 TFEU is the basis for all secondary EU law. According to Art 105 TFEU the European Commission shall ensure the compliance with Art 101 f.

Besides the primary law the EU established a decent amount of secondary legislation on merger in general and competition. Three secondary acts are very important: First the regulation EC 01/2003 with regards to general rules of

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[19] *OECD,* Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, https://legalinstruments.oecd.org/en/instruments/192 (retrieved on September 14, 2018).

[20] compare to Art 3 Council Regulation 2004/139/EC of 20 January 2004 on the control of concentrations between undertakings, OJ L 2004/24.

[21] *Slaughter and May,* An overview of the EU competition rules (2016) 2.

competition (Art 101 f TFEU) comes to mind[22]. The most dominant topic in this regulation is the definition of the power of the European Commission with regards to competition. The Commission may at its own discretion investigate and order interim measures. It is furthermore allowed to require companies to provide essential information and may even enter the companies' premises without prior notice for collecting evidence and interviewing employees (widely known as *dawn raids*). In this regard the Commission may be supported by the *Directorate General Competition* and national competition authorities. Ultimately fines are defined either for the case of improper information by the company (up to 1 % of the previous financial year's turnover) or for infringements of Art 101 ff TFEU and the neglect of interim measures (up to 10 % of the previous financial year's turnover).

Second in 2004 the EC *Merger Regulation* entered into force. It is applicable to concentrations with *Community dimensions* based on the turnover of the involved companies as defined in Art 1 and defines the jurisdiction of the Commission regarding these concentrations[23]. If the conditions for application of this regulation are given the companies have to inform the Commission in advance which will commence investigation of the suggested deal's compliance with the requirements of the internal market and its competition.

Finally directive 2014/104/EU defines the procedural code for compensation of damages out of competition law infringements[24]. Its scope is defined in Art 2 directly referring to the enforcement of Art 101 f TFEU as well as national competition law. The directive's main focuses are cartels and similar schemes in accordance with Art 101 f TFEU. With regards to M&A the applicability of this directive seems to be limited. In particular it can be argued that M&A projects satisfying the requirements of the *Merger Regulation* are already controlled by the Commission and the national authorities and therefore are only approved if no harm to the internal market and its participants is to be expected. Only as long as mergers,

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[22] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 2003/1.

[23] *Slaughter and May,* The EU Merger Regulation - An overview of the European merger control rules (2018) 1.

[24] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 2014/349.

acquisitions or joint ventures are below the criteria to be dealt with by the Commission (e.g. turnover below the limits) they are likely to be subject to the consequences laid down in this directive.

In 2017 the European Commission published the proposal for a directive regarding the empowerment of national competition authorities[25]. One special aspect of some national laws in the EU allows to restructure a company in order to avoid the payment of fines out of competition proceedings. Therefore the Commission intends to lay down a common basis for the prosecution of competition infringements with comparable enforcement and penalties across the EU.

On an international basis the EU has cooperation agreements with the EFTA countries as part of the EEA agreement including Switzerland, the US, Russia, China, South Korea, Japan and many other nations especially in eastern Europe and Latin America[26].

4.2.3. US legislation on competition

In the US competition law is known as anti-trust law. Here two agencies are responsible for the approval of mergers and acquisitions - the US Department of Justice (DOJ) and the Federal Trade Commission (FTC)[27]. Based on the three most relevant legal acts (the *Clayton Act*, the *Sherman Act* and the *Federal Trade Commission Act*, in 1976 amended by the *Hart-Scott-Rodino Antitrust Improvements Act*) these agencies monitor and scrutinize intended M&A projects that would result "in higher prices, lower levels of service and reduced innovation"[28].

In general the Sherman Act prohibits national as well as international schemes (contractual or not) that obstruct the development of a free and equal

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[25] Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, EC COM 2017/142.

[26] compare the complete list at *European Commission - DG Competition,* Bilateral relations on competition issues, http://ec.europa.eu/competition/international/bilateral/ (retrieved on September 14, 2018); *European Commission - DG Competition,* European Economic Area and competition policy, http://ec.europa.eu/competition/international/multilateral/eea.html (retrieved on September 14, 2018).

[27] *US Department of Justice and the Federal Trade Commission,* Horizontal Merger Guidelines (2010).

[28] *US Federal Trade Commission,* Reforms to the merger review process (2006) 3.

market[29]. Similarly the *Federal Trade Commission Act* declares "unfair methods of competition in or affecting commerce" unlawful[30]. Specifically for M&A the *Clayton Act* outlaws any project that "may […] substantially […] lessen competition"[31]. Regarding international cooperation the *International Antitrust Enforcement Assistance Act* (IAEAA) enables US authorities to enter into bilateral agreements with foreign authorities in order to collect and exchange non-domestic evidence[32].[33]

The behaviour of the agencies during the assessment of the potential M&A partners is laid down in the *Horizontal Mergers Guidelines*. The agencies assess thoroughly the effect of the M&A project on the market development - partly relying on experience regarding *soft facts* (e.g. client orientation or innovation strength within the market) as well as *hard facts* (e.g. indicators such as the *Herfindahl-Hirschman Index* - HHI - for market concentration).[34]

The US agencies entered into agreements on international cooperation with Australia, Brazil, Canada, China, the EU, India, Russia and eight other countries[35].

4.2.4. Legislation on competition in Asia

In the last years the countries in the Asia-Pacific region increased their efforts towards effective competition regulations. In **China** the Anti-Monopoly Law was set in force in 2008 and is the main basis for the enforcement of the competition policy. The Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) is the responsible agency regarding M&A control[36]. Once notified by the parties (depending on the margins defined by the State Council) MOFCOM will assess the envisaged

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[29] 15 U.S.C. § 1 (The Sherman Antitrust Act, Section 1).

[30] 15 U.S.C. § 45 (Federal Trade Commission Act, Section 5).

[31] 15 U.S.C. § 18 (Clayton Act, Section 7).

[32] *White*, International judicial assistance in antitrust enforcement: The shortcomings of current practices and legislation, and the roles of international organizations, Administrative Law Review 2010, 267 ff.

[33] *US Department of Justice and the Federal Trade Commission*, Antitrust Guidelines for international enforcement and cooperation (2017) 4 f.

[34] *US Department of Justice and the Federal Trade Commission,* Horizontal Merger Guidelines (2010) 18 ff.

[35] *US Department of Justice,* Antitrust Cooperation Agreements, https://www.justice.gov/atr/antitrust-cooperation-agreements (retrieved on September 14, 2018).

[36] *OECD,* Competition Law in Asia-Pacific - A Guide to Selected Jurisdictions (2018) 37 f.

deal and determine whether its impact on the market requires the deal's interdiction or other regulating measures based on the market share and concentration.

The *Competition Act 2002* regulates the control of M&A activities with relation to **India**. A dedicated authority, the Competition Commission of India (CCI) does not only assess future deals but also investigates the market for the presence of any undue restrictions on a regular basis. The CCI cooperates with the EU, the US, Canada, Australia, Russia and the BRICS Competition Authorities.[37]

In **Japan** the *Antimonopoly Act* prohibits the formation of M&A schemes obstructing or limiting competition. Here the notification threshold is determined by Cabinet Order. The investigation procedure may be split in two phases. The deal is assessed by the Japan Fair Trade Commission following the *Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination*. Similar to the US the HHI is employed as a reference for horizontal mergers.[38]

The (South) **Korea** Fair Trade Commission (KFTD) enforces the topics related to competition based on the *Monopoly Regulation and Fair Trade Act*. The international collaboration includes fifteen countries and organisations (such as the EU, the US, Japan, China, Russia, Australia, Brasil and Canada). Cross-border M&A projects have to be notified to the KFTD at a *lower threshold* than purely domestic cases. The assessment is again based on the HHI (in horizontal mergers) and on a combination of HHI and market share (in vertical mergers).[39]

4.2.5. Legislation on competition in Latin America

In **Brazil** the Administrative Council for Economic Defense (CADE), an administrative agency reporting to the Ministry of Justice investigates large M&A

[37] *OECD,* Competition Law in Asia-Pacific - A Guide to Selected Jurisdictions (2018) 63 f.

[38] *OECD,* Competition Law in Asia-Pacific - A Guide to Selected Jurisdictions (2018) 83 f.

[39] *OECD,* Competition Law in Asia-Pacific - A Guide to Selected Jurisdictions (2018) 95 f.

projects and decides on their approval as part of its preventive functions[40]. Among others Brazil cooperates with Russia, China, Japan, South Korea, and France[41].

In **Chile** the competition authorities are organized in a special way. First there is the prosecutor, the *Fiscalía Nacional Económica* leading the investigations and eventually bringing the critical cases before the court of the *Tribunal de Defensa de la Libre Competencia*. The personnel of these two bodies is chosen by stringent criteria and acts fully independent from the government or other administrative branches. In case of doubt the Supreme Court can review the merits as well as the legality of the court's decision[42]. Among others the prosecutor maintains cooperations with the US, Canada, Australia, Mexico, Peru and the EU[43].

4.2.6. Legislation on competition in Russia

Since 2004 the Federal Antimonopoly Service of the Russian Federation has been responsible for all topics related to competition including the regulation of international M&A projects[44]. The Russian delegations participate actively in UNCTAD and OECD activities such as the drafting of a toolkit for international cooperation among the competition authorities[45]. Russia officially cooperates with

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[40] *Brazil Ministry of Justice - Administrative Council for Economic Defense,* Guidelines - Competition compliance programs, current version on http://en.cade.gov.br/topics/publications/guidelines/compliance-guidelines-final-version.pdf (retrieved on September 14, 2018).

[41] *Brazil Ministry of Justice - Administrative Council for Economic Defense,* Cooperação bilateral, http://www.cade.gov.br/assuntos/internacional/cooperacao-bilateral-1?_authenticator=12b193e7bb4590e097031b8a9abea3545f31906c (retrieved on September 14, 2018).

[42] *Chile Fiscalia Nacional Economica,* Independence of the Competition Authority - Chile, http://www.fne.gob.cl/wp-content/uploads/2017/10/OECD_Contribucion_3.pdf (retrieved on September 14, 2018).

[43] *Chile Fiscalia Nacional Economica,* Cooperation Agreements, http://www.fne.gob.cl/en/international/cooperation-agreements/ (retrieved on September 14, 2018).

[44] *Federal Antimonopoly Service of the Russian Federation,* General Information, http://en.fas.gov.ru/about/what-we-do/general-information.html (retrieved on September 14, 2018).

[45] *Federal Antimonopoly Service of the Russian Federation,* UNCTAD discussion group on international cooperation reported on the work progress, http://en.fas.gov.ru/press-center/news/detail.html?id=53179 (retrieved on September 14, 2018).

the EU (and some EU member states individually), the US, India, China, South Korea and others[46].

4.3. How to mitigate competition regulations

An international M&A project in most cases has to be approved in accordance with the law of all subsidiaries' countries (depending on the respective notification thresholds and requirements). I propose three steps in order to make sure that competition regulations are satisfied with regards to an M&A project:

4.3.1. Step 1 - compliance with the general goals of competition law

First it is important to understand what are the reasons why competition laws are furnished with great dedication all around the world. A merger can reduce competition and consequently lead to increased prices and decrease service, quality, diversity and innovation. In this regard the authorities may (depending on the jurisdiction and its favour for consumer interests) order measures to guarantee the preservation of the current levels. Therefore if the profitability of an M&A projects relies on the adverse change of one of the above factors chances are high that after the regulating interference of the authorities the project is not feasible anymore. Consequently with regards to competition a company shall strive for growth due to increased market share or positive synergies but not to the disadvantage of the market itself or its clients. Recent Deloitte research shows that only one of the five main strategic drivers for M&A can be related to one of the above topics (expanding the customer base in existing markets, which is ranked the number one reason for M&A by 19 % respondents in 2018)[47]. The other drivers include technology acquisition (20 %), the diversification of products or services (16 %) and the strengthening of the digital strategy (12 %). Depending on the actual market situation the *pro-competition* aspects of a deal may be shown easier with the latter drivers, such as a positive effect of the economies of scale - especially in markets with persistent strong rivalry. These pro-competitive factors have to be focused on already in the beginning of the project because authorities may collect a large

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[46] *Federal Antimonopoly Service of the Russian Federation,* International Cooperation - Treaties & Agreements, http://en.fas.gov.ru/international-cooperation/cooperation-agreements/ (retrieved on September 14, 2018).

[47] *Deloitte,* The state of the deal - M&A trends 2018 (2017) 7 ff.

number of documents for the deal assessment and any contradiction there could destroy a beautified reasoning afterwards.[48]

4.3.2. Step 2 - market concentration analysis

As mentioned above some authorities use the HHI for the assessment of the market concentration as a measure of its competitiveness and the impact of a merger or acquisition. The HHI is the sum of the market shares' squares and ranges from theoretically 0 to 10000 in all affected market segments[49]. Thereby larger market shares are proportionally stronger weighted than smaller shares. Often a *safe harbour* is provided given the HHI is below certain thresholds defined by the authorities with the consequence that the deal is likely not to be scrutinized at all[50]. As an example the KFTC rules are discussed here to show the mathematical application.

The KFTC provides a different set of safe harbour requirements for horizontal and vertical mergers. In *horizontal mergers* the absolute threshold for noncritical deals is represented by an HHI of less than 1200 (e.g. ten companies with an equal market share of 10 %: $10 \times 10^2 = 1000$). Between an HHI of 1200 and 2500 the increase between pre- and post-merger should be below 250 (the increase is twice the product of the market shares of the participating companies e.g. in the case of two companies with market shares of 8 % and 12.5 %: 2 x 8% x 12.5% = 200). Above an HHI of 2500 the increase shall remain below 150.

In *vertical mergers* competition is less likely obstructed than in horizontal mergers because the shares in the individual markets usually don't change drastically. This is in fact underlined by an FTC's study on remedies where it was found out that between 2006 and 2012 only 4 % of remedies where applied to

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[48] *International Financial Law Review,* Merger control: Why is competition law relevant to M&A? http://www.iflr.com/Article/3181876/Merger-control-Why-is-competition-law-relevant-to-M-A.html (retrieved on September 14, 2018).

[49] *US Federal Trade Commission,* Mergers - Competitive Effects, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects (retrieved September 14, 2018).

[50] *Kerber/Kretschmer/vonWangenheim,* Market Share Thresholds and Herfindahl-Hirschman-Index (HHI) as Screening Instruments in Competition Law: A Theoretical Analysis (preliminary draft), https://www.researchgate.net/publication/228429664_Market_Share_Thresholds_and_Herfindahl-Hirschman-Index_HHI_as_Screening_Instru-ments_in_Competition_Law_A_Theoretical_Analysis (retrieved on September 14, 2018).

vertical mergers.[51] Therefore the two alternative criteria applied by the KFTC are less strict: Either first the HHI of the market segments is below 2500 while the market shares of the companies are below 25 %. Or second each company ranks not higher than number 4 in each active area.[52]

A thorough market analysis and the knowledge of the authorities' assessment methods can show quickly if a deal will likely be approved or investigated. In this regard mainly the market shares and domination of market segments after the merger are relevant.

4.3.3. Step 3 - anticipation of the authorities' orders

In some cases the requirements posed on the parties by the authorities can be foreseen, e.g. when the overall deal is likely to be approved but in a limited number of smaller market segments a higher concentration arises. Then the authorities may order certain appropriate measures. The German *Bundeskartellamt* (the federal cartel authority) distinguishes two basic segments, (I.) the divesture of the concerned branch and (II.) behavioural remedies such as (a.) the removal of financial or contractual links with competitors, (b.) the provision of critical infrastructure or licenses and other intellectual property rights to competitors or that (c.) customers are given the opportunity to step out of valid long-term contracts[53].

Depending on the circumstances one remedy is more likely than another. According the FTC divestures are by far the most often applied remedies with a share of 85 %[54]. The market concentration analysis should have already highlighted any critical areas in this regard in order to evaluate adequate measures which could even be proposed to the authorities as promoted e.g. by the *Bundeskartellamt*[55] or the Australian authorities[56].

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[51] *US Federal Trade Commission,* The FTC's Merger Remedies 2006 - 2012 (2017) 7.

[52] *OECD,* Competition Law in Asia-Pacific - A Guide to Selected Jurisdictions (2018) 104.

[53] *Bundeskartellamt,* Guidance on Remedies in Merger Control (2017) 19 ff.

[54] *US Federal Trade Commission,* The FTC's Merger Remedies 2006 - 2012 (2017) 8.

[55] *Bundeskartellamt,* Guidance on Remedies in Merger Control (2017) 3.

[56] *OECD,* Competition Law in Asia-Pacific - A Guide to Selected Jurisdictions (2018) 25.

4.3.4. Appeal against the authorities' decision

The procedure of appeal depends on the jurisdiction - especially on how many levels of appellate courts are involved and what role and capacity they have. One must keep in mind that M&A is a rather complex issue and often the authorities are working under heavy time pressure (sometimes even legally defined, e.g. China, Japan and South Korea have a 30 + 90 days evaluation period for the first and second stage of scrutiny respectively[57]). Therefore errors in the fact finding or decision making process may occur easily. In this case the decision should be appealed to the responsible court or tribunal.

Generally (and not opposing any special provisions of certain jurisdictions) appeals of M&A decisions can be based on two individual reasons[58]. First in case of an unreasonable verdict, e.g. because there was contrasting and credible evidence presented or the ordered measures are unjustified and maybe even in strong contradiction to the case law. This reason seems to be the most likely one. Second a legal error in the proceedings that was essential for the decision must be proven. Given the standardized process and specialisation of most related courts on M&A topics this ground seems unlikely to apply and has to be reasoned thoroughly.

4.4. Examples for M&A projects related to competition issues

To wrap up the chapter on competition an overview of recent M&A projects with relation to competition issues will be provided.

4.4.1. Halliburton & Baker Hughes

In November 2014 the oil service provider Halliburton Co (number two of the world market) announced plans to acquire the direct competitor Baker Hughes Inc (number three of the world market). In the course of the international proceedings the US (DOJ and FTC), Brazilian (CADE), Australian (ACCC) and EU (DG Competition) authorities[59] alleged that this concentration would lead to higher prices,

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[57] *OECD,* Competition Law in Asia-Pacific - A Guide to Selected Jurisdictions (2018) 11.

[58] compare *Court of Appeal BC,* Online Help Guide - How to Appeal Your Conviction https://www.courtofappealbc.ca/appeal-conviction-guidebook/step-1.2-reasons-for-appealing-your-conviction (retrieved on September 14, 2018).

[59] *European Commission,* Press release: Statement by Commissioner Vestager on announcement by Halliburton and Baker Hughes to withdraw from proposed merger, http://europa.eu/rapid/press-release_STATEMENT-16-1642_en.htm (retrieved on September 14, 2018).

reduced innovation or reduced choices for customers “eliminating important head-to-head competition in markets for 23 products and services”[60].

At that time the world market leader Schlumberger NV published an annual revenue of USD 27.8 billion[61]. Combining the revenue of Halliburton[62] and Baker Hughes[63] would have led to a revenue of USD 25.7 billion in 2016 and ultimately resulted in a global duopoly in the area of oil field services according to the U.S. Attorney General[64]. Deal economics were substantially damaged by the general market situation and the rigorous regulatory requirements. Hence Halliburton preferred to cancel the deal and pay a termination fee of USD 3.5 billion to Baker Hughes.

4.4.2. Oracle & Sun

Before 2009 Sun was a provider for computer infrastructure including hardware and software (notably the world’s leading open source database *MySQL* after its acquisition in 2008). Being in a financially weak position Sun was acquired by Oracle in 2009 for a price of USD 7.6 billion. Because of the open source nature of MySQL Sun didn’t have a large revenue-based market share. Nevertheless MySQL was the leader among the open source databases - competing with Oracle - and the European Commission worried about the future market development. However Oracle announced that existing contracts with Sun’s clients would be amended. Furthermore the Commission identified alternative future competitors in other products (such as PostgreSQL) and spin-offs facilitated by MySQL’s open source thereby maintaining a basic competition level. Consequently the deal was approved by the Commission.[65]

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[60] *US Department of Justice,* Justice Department Sues to Block Halliburton’s Acqusition of Baker Hughes, https://www.justice.gov/opa/pr/justice-department-sues-block-halliburton-s-acquisition-baker-hughes (retrieved on September 14, 2018).

[61] *Schlumberger,* Annual Report 2016 (2017) 2.

[62] *Halliburton,* Annual Report 2016 (2017) 1.

[63] *Baker Hughes,* Annual Report 2016 (2017) 2.

[64] *Stone,* Halliburton and Baker Hughes scrap $28 billion merger, https://www.reuters.com/article/us-bakerhughes-m-a-halliburton-idUSKCN0XS1KW (retrieved on September 14, 2018).

[65] *European Commission,* Press release: Mergers: Commission clears Oracle’s proposed acquisition of Sun Microsystems, http://europa.eu/rapid/press-release_IP-10-40_en.htm (retrieved on September 14, 2018).

4.4.3. Linde & Praxair

A recent decision in the context of M&A was taken by the European Commission with regards to the proposed merger of Linde (headquarter in Germany) and Praxair (headquarter in the US). These were among the four largest suppliers for industrial and medical gases (including supply of gas as well as engineering and installation of gas plants). The Commission noted that the gases provided by Praxair and Linde are essential components for a variety of businesses and institutions. Based on the *Merger Regulation* the Commission investigated the impact of the merger on economy. A critical topic was the combined power of both companies in the European Economic Area (EEA). Therefore the Commission approved the merger on the conditions Praxair and Linde had already offered during the approval process:

- Divestment of Praxair's gas business in the EEA
- Transfer of Praxair's shares in an Italian joint venture to its partner
- Divestment of helium sourcing contracts that are not essential to satisfy the volume provided to the EEA

The Commission coordinated its investigations with the US authorities (in particular the FTC) and Canadian competition authorities.[66]

[66] *European Commission,* Press release: Mergers: Commission clears merger between Praxair and Linde, subject to conditions, http://europa.eu/rapid/press-release_IP-18-5083_en.htm (retrieved on September 14, 2018).

5. Tax Law

Each year an extensive amount of publications on new developments in tax law is written on an international basis - e.g. EY's worldwide corporate tax guide with more than 1800 pages[67], KPMG's report on the new US tax law with over 200 pages[68] or Deloitte's tax landscape 2018 on new tax developments in Russia with 60 pages[69]. Beyond that the international authorities and institutions such as the European Commission add more material, e.g. the Commission's overview on taxation trends in the European Union 2018[70] or the OECD's update on tax certainty in July 2018. The latter report states that "frequency of changes in the tax system is one of the leading sources of tax uncertainty in the OECD"[71]. This shows that tax law is a very dynamic area of law. Consequently this thesis will focus on developments with strong influence on international M&A only.

5.1. Objectives of tax law

According to the OECD[72] tax law has the following general main objectives:

- Increase and maintain economic efficiency (economic development)
- Guarantee growth
- Distribute income in a fair way (with employment as a basic requirement)
- Provide state functions such as administration and health care
- Environmental stability
- Promotion of innovation

Tax revenues allow the state to provide basic functions such as administration, security and health care - the higher the taxes the higher standards can be provided[73]. On the other hand a favourable tax system may act as an

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[67] *EY,* Worldwide Corporate Tax Guide 2018 (2018).

[68] *KPMG,* Tax Reform - KPMG Report on New Tax Law (2018).

[69] *Deloitte,* Tax Legislation - Tax landscape 2018: key developments and outlook (2018).

[70] *European Commission,* Taxation Trends in the European Union - Data for the EU Member States, Iceland and Norway, 2018 Edition (2018).

[71] *OECD,* Update on Tax Certainty, IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors (2018) 26.

[72] *OECD,* Work on Taxation (2018) 29.

[73] compare *Bräutigam,* Building Leviathan, IDS Bulletin 2002, 10 f.

instrument to attract investors[74]. Therefore the state has to balance the tax rate accordingly to provide a comfortable mix of service and economic activity.

5.2. International legislation on tax concerning M&A

Recently there has been a number of revised tax laws on international level affecting M&A. The most relevant developments recently include[75]:

1. The OECD Base Erosion and Profit Shifting (BEPS) project and its consequences within the national legislations (including the EU Anti-Tax Avoidance Directives)
2. The US Tax Cuts and Jobs Act introduced in 2017, a major tax reform

5.2.1. Taxes relevant for M&A projects

Before discussing the treatment of international M&A deals with regards to tax it makes sense to briefly look at the different types of tax that could possibly apply. For that purpose a variety of globally common taxes from a comprehensive source on international M&A taxation was collected[76]:

- Capital gains tax
- Income tax
- Withholding tax
- Value added tax
- Real estate transfer tax
- Stamp duties
- Share transfer tax
- Tax on management incentives

The application of these taxes mainly depends on the country, the nationality of the parties (as well as the application of an appropriate acquisition vehicle) and the deal type (share or asset deal)[77].

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[74] *OECD,* Do lower taxes encourage investment? http://oecdinsights.org/2015/11/18/do-lower-taxes-encourage-investment/ (retrieved on September 14, 2018).

[75] *KPMG,* Taxation of cross-border mergers and acquisitions (2018) 2.

[76] compare *Taxand Economic Interest Grouping,* Global Guide to M&A Tax (2017).

[77] compare *KPMG,* Taxation of cross-border mergers and acquisitions (2018).

5.2.2. OECD BEPS project

At the 2012 G20 summit the OECD was appointed to prepare measures for the avoidance of base erosion and profit shifting resulting in the 2013 *Action Plan on Base Erosion and Profit Shifting*[78]. The main objectives were the limitation of (legal) tax planning methods applied by mostly large international groups and companies which thereby were able to reduce their corporate taxes to around 5 % while others paid up to 30 %[79]. The BEPS action plan included inter alia the following issues that could be relevant for international M&A[80]:

- Action 2: Neutralize the effects of hybrid mismatch arrangements
- Action 4: Limit base erosion via interest deductions and other financial payments
- Action 6: Prevent treaty abuse
- Action 13: Re-examine transfer pricing documentation (including transparent country-by-country reporting)

It is not about the objectives of the BEPS alone but currently OECD countries all over the world are evaluating their legal system in order to determine how to comply with the BEPS action plan. In this regards tax law may undergo severe changes over the course of the next years resulting in substantial uncertainty for the M&A decision makers.

OECD countries are promoting the adaptations dictated by the BEPS project quite actively. In the European Union the two *Anti-Tax Avoidance Directives* (ATAD I and II) where published and have to be transferred to national law by beginning of 2019 (ATAD I)[81] and beginning of 2020 (ATAD II)[82]. These directives cover mainly hybrid mismatch arrangements leading to undue double non-taxation within the EU

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[78] compare *OECD,* Action Plan on Base Erosion and Profit Shifting, https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en#page1 (retrieved on September 14, 2018).

[79] *OECD,* Press release: OECD urges stronger international co-operation on corporate tax, http://www.oecd.org/tax/oecd-urges-stronger-international-co-operation-on-corporate-tax.htm (retrieved on September 14, 2018).

[80] compare *KPMG,* Optimism for 2017 M&A activity is tempered by concerns over the impact of BEPS and increased deal scrutiny, https://home.kpmg.com/xx/en/home/insights/2017/04/m-and-a-predictor-global-tax-perspective.html (retrieved on September 14, 2018).

[81] Council Directive 2016/1164/EU of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 2016/193, 1.

[82] Council Directive 2017/952/EU of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, OJ L 2017/144, 1.

(ATAD I) as well as with third countries (ATAD II) thereby addressing (among others) OECD BEPS actions 2, 4 and 6 (especially the *General Anti-Abuse Rule*). Action 6 is furthermore supported by the EU Parent-Subsidiary Directive and the EU Interest and Royalty Directive. Action 13 (country-by-country reporting) is addressed by a number of legislative acts: the *EU Accounting Directive*, the *EU Capital Requirement Directive*, the *EU Mutual Assistance Directive* and the *EU Accounting Directive*.[83]

5.2.3. US 2017 Tax Cuts and Jobs Act

In the beginning of 2018 the *Tax Cuts and Jobs Act* went into effect reducing the corporate tax rate to 21 % (from previously 35 %) and promoting the repatriation of estimated USD 1.5 trillion to USD 2 trillion of overseas cash with a one-time tax of 15.5 %. These measures are expected to substantially drive M&A activities due to the following reasons:

- An increased liquidity for M&A projects out of higher corporate earnings
- A higher number of noncore asset sales due to lower taxes and in a similar way
- Increased “parting” of portfolios (the acquisition of the complete company is followed by divesting noncore assets)

On the other hand the number of highly leveraged acquisitions (rather relying on debt than equity) and deals mainly designed for tax avoidance could decrease. Furthermore about 70 % of the repatriated overseas cash is estimated to belong to only ten companies in technology and health care for who capital is not critical for financing M&A projects. Finally any change of law leads to uncertainty and hereby potentially limits M&A efforts although over time this issue will lose relevance.[84]

5.3. Mitigation of tax law

With tax laws differing strongly from country to country and changing on a regular basis the tax planning aspect of an M&A project becomes increasingly important. Three key factors have to be kept in mind[85]:

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[83] *KPMG,* OECD BEPS Action Plan (2017) 7.

[84] *Boston Consulting Group,* The Impact of US Tax Reform on Corporate Strategy and M&A, https://www.bcg.com/publications/2018/impact-us-tax-reform-corporate-strategy-m-and-a.aspx (retrieved on September 14, 2018).

[85] compare *Deloitte,* M&A - How tax adds value to M&A transactions (2013) 2.

1. The certainty about the seller's proper tax conduct in case the buyer can be held responsible
2. The legal avoidance of uncalled-for tax and the utilization of legal tax reduction means
3. The identification of tax optimization potential and tax assets

The first issue has to be evaluated under the general assessment of successor liability. The related risks can be mitigated to some extent by the choice of the deal type (share or asset deal). The latter two topics are summarized under the term *tax planning*: **Tax planning** refers to the task of structuring the M&A deal according to the optimum balance between tax load and sustainability in terms of tax law stability[86]. Tax planning includes the choice of the deal type (share vs. asset deal including the appropriate tax reducing mechanisms), acquisition vehicle (type and nationality of the acquiring entity) and acquisition funding.

First the impact of the deal type should be assessed. The general advantages of **asset deals** are the direct acquisition of materialized property of the target, e.g. machines, organizations, intellectual property or real estate and that the purchase price can be depreciated for tax purposes over the next years. This means that attractive parts of a business can be carved out of the target easily but could also potentially increase the price.

In contrast to that a **share deal** could lead to lower taxes than compared to an asset deal and since it could be in favour of the target company the price could be lower as well. On the other hand the buyer could be held liable for the seller's past misconduct in many jurisdictions thereby posing an additional risk on the transaction.

Second the acquisition vehicle in international M&A can be usually chosen between domestic and foreign vehicles which in some jurisdictions make sense to be further segmented in companies and holding structures due to different taxation.

Third the funding of the acquisition is relevant because debt (financing by banks or financial institutions incurring future obligations) could lead to a tax

[86] *Taxand Economic Interest Grouping,* Global Guide to M&A Tax (2017) 5.

advantage in terms of deductible interest in contrast to equity (financing by selling property, e.g. stock, and thereby clearing any obligations with immediate effect).[87]

[87] compare the approaches of the various countries in *KPMG,* Taxation of cross-border mergers and acquisitions (2018).

6. Employment Law

While in former days employment law wasn't seen as sufficiently relevant to be addressed during the due diligence it can nowadays be of huge importance in some jurisdictions that provide special protection to employees during an M&A deal or - especially in the EU - more broadly *transfer of undertakings*[88]. It can either be impossible to lay off somebody only on the grounds of the transfer or very costly. Again - as with tax law issues - the choice of the deal type (share vs. asset deal) affects the answer to the governing questions, what will happen to the employees and what does it cost. In this chapter an overview on the general terms and legal strategies will be given. A substantial amount of the matters discussed here is based on the comprehensive information provided by White & Case in their *Employment Law Toolkit for Cross-Border M&A Deals*.[89]

Generally whenever employee data is exchanged between the parties, the related data protection regulations have to be followed and either the employee's consent given or data anonymized. This topic will be covered later in this thesis.

6.1. Objectives of employment law

According the European Commission the EU employment law is targeted towards the following three general main objectives[90]:

1. Provision of a clear framework of rights and obligations in the work place
2. Protection of the employees' health
3. Promotion of economic growth

As these targets are compatible with most societies and their goals around the world, they can be assumed to be valid in the vast majority of countries although the actual level of protection can be different (e.g. compare US and EU employment provisions). And since employees are usually dominated by the decisions of their

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[88] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 2001/82, 16.

[89] *White & Case,* Employment Law Toolkit for Cross-Border M&A Deals (2014) 1 f.

[90] *European Commission,* Labour law, http://ec.europa.eu/social/main.jsp?catId=157&langId=en (retrieved on September 14, 2018).

employers they are eligible for effective protection by law (again outside of the US)[91]. The major risks can be found in the transfer of employees (cost risks) and the compliance with legal requirements (risks of employee claims or penalties)[92].

6.2. Mitigation of employee transfer risk

6.2.1. US employment law as an example for liberalism

In the US the employment regulations are governed by the doctrine of *employment at will* to great extent. For a **share deal** this means that first the employees are directly and fully carried over and second the new controlling body can lay off or change contracts nearly without limits (that could be given by contractual agreements, union agreements or in rare cases by law, e.g. concerning discriminatory acts or mass lay-offs). Furthermore there are usually no *vested rights* such as salary level or job title - American employees can be treated fairly flexibly in the course of a share deal.

In case of an **asset deal** the situation is similar provided there is no union's protection or contractual provision (which shall be reviewed as part of the legal human resources due diligence). Unions however could promote and enforce acquired rights under some circumstances in an asset deal.[93]

6.2.2. Global jurisdictions with higher standards of employee protection

In a **share deal** the situation is often similar to the US (transfer of employees to the new entity) with two major differences:

1. The *doctrine of vested rights* usually preserves and protects employees' contractual conditions under the change of stock ownership.
2. In case of a small number of European countries worker representatives have to be informed and consulted prior to closing.

Consequently all normal procedures regarding lay-offs have to be followed and acquired rights such as severance pays or pension plans have to be granted.

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[91] compare recital 3 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 2001/82, 16.

[92] *Perkins Coie,* Employment Law Issues in M&A Deals (2016) 1 f.

[93] *White & Case,* Employment Law Toolkit for Cross-Border M&A Deals (2014) 2 f.

Furthermore *constructive dismissals* (undue employer's behaviour directed at employees' resignation) are usually prohibited by law. Therefore after closing it will be difficult for the new management to restructure or change the employment conditions unilaterally.

Hence an **asset deal** could be supposed to be more favourable. However this is not entirely true because of two alternative doctrines that are applied widely:

1. The *acquired rights doctrine*
2. The *de facto firing doctrine*

The *acquired rights doctrine* basically says that all rights an employee acquired due to law, contract, union agreement or other mechanisms can be enforced against the employer's successor after a transfer of undertakings because the legal relations remain intact. This doctrine is employed e.g. in the EU (via the Transfer of Undertakings directive), Brazil and Singapore.

On the other hand the *de facto firing doctrine* presumes that the seller - although the assets are sold - remains the employer of the related personnel until the payment of the legally required fees (e.g. severance and notice pay) resulting in a (costly) mass firing. Consequently the buyer is free to choose from the employees who to further engage (under new contracts with potentially different conditions) and has no liability for old vested rights.

In order to save the severance and notice payment, there are two options for the parties to structure the deal:

1. A formal employer substitution
2. An informal employer substitution

A **formal employer substitution** shifts the vested rights from the seller to the buyer by law. First the employees (or their representatives) usually have to approve the substitution. Second the seller usually assumes (contractually defined) responsibility for employment claims during a limited period after the closing.

In an **informal employer substitution** the parties agree that the seller will offer comparable conditions to the employees upon their agreement to resign and waive all severance and notice claims. Jurisdictions employing the *de facto firing doctrine* include China, India and Japan.

It can be concluded that whatever the situation may be all alternatives shall be investigated thoroughly and the related costs calculated in order to find the optimum solution in terms of cost and legal certainty for the parties.[94]

6.3. Mitigation of other employment law risks

Besides the transfer issue the following three topics of public law shall be reviewed as part of a human resources due diligence[95]:

- Compliance of policies and contracts with law
- Time tracking, compliance of working time with law
- Work authorization status

Beyond that *health and safety* issues will also be discussed briefly in this section.

6.3.1. Employment contracts and related documents

When reviewing contractual topics where the liability for a third's behaviour may be passed on to the buyer it makes sense to assess three segments, in particular the past, the present situation and the future[96]. In the first place **past** events are only relevant as long as legal consequences arose or could potentially arise. Accordingly all disputes and claims brought up by employees or their representatives (e.g. unions or works council) shall be considered from three perspectives: the justification, the level of dispute settlement (e.g. negotiation or litigation) and their further relevance (e.g. if rules were adapted or more thoroughly followed).

Second the **present** situation has to be reviewed. Here the hierarchy of rules from law to internal regulations and finally the compliance with all these rules have to be assessed. Furthermore current disputes shall be had a look into and their potential consequences in terms of costs and brand evaluated.

Third the **future** potential and risks of such claims have to be estimated. Beyond that the stability of the legal situation and the impact of a potential change of

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[94] *White & Case,* Employment Law Toolkit for Cross-Border M&A Deals (2014) 3 ff.

[95] *Perkins Coie,* Employment Law Issues in M&A Deals (2016) 1 f.

[96] compare to the approach of *Burton,* M&A Academy - Mergers & Acquisitions Employment Issues (2017).

law on the deal's success should be evaluated. In some countries the law requires the employer to notify the staff about planned mass lay-offs or plant closures with a certain advance period, e.g. the US Worker Adjustment and Retraining Notification (WARN) act (60 days of advance notification, otherwise financial compensation)[97].

6.3.2. Health and safety issues

For occupational health and safety a similar pattern as in the previous section can be applied. First the history in terms of incident/accident statistic, claims and settlement should be reviewed. Then a thorough look shall be had into the safety regulations, their compliance with law and application in everyday work, certificates, audit reports and current procedures.[98]

This approach shall not be limited to production or construction processes but also applied to work places and office buildings where any health or safety risks could arise (e.g. regarding sanitary facilities, factory canteens and ventilation systems). Here among others the topic of asbestos comes up[99] which is also of (financial) relevance in case buildings are to be refurbished or adapted due to increased handling and disposal efforts.

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[97] *Wolf,* Meeting WARN Act Obligations Amid Mass Layoffs and Closures (2009) 1 f.

[98] compare to the *Government of British Columbia,* Due Diligence Checklist, https://www2.gov.bc.ca/assets/gov/careers/managers-supervisors/managing-occupational-health-safety/due_diligence_checklist1.pdf (retrieved on September 14, 2018).

[99] compare to *Health and Safety Executive,* Managing asbestos in buildings: A brief guide (2012).

7. Environmental Law

Research for the 2018 Environmental Performance Index shows that the largest threat for public health is found in air pollution - a major problem in quickly growing countries such as India and China. In this regard a recent study published at the US National Academy of Sciences even suggests that air pollution damages the human brain and consequently degrades cognitive capabilities[100].

On the other hand about sixty percent of the world's countries reduce their CO2 emissions year by year and the efforts on protection of habitats are a success. However two different aspects have to be considered, environmental health on one hand (e.g. absence of pollution), which is usually supported by economic welfare, and the vitality of the ecosystem on the other hand (e.g. the diversity of species), suppressed by industrialization in general.[101]

7.1. Objectives of environmental law

Environmental law on a global basis deals with all kinds of human effects on nature and the environment in general. The following matters are especially relevant for M&A transactions[102]:

- Pollution of air, water and soil e.g. due to manufacturing processes
- Waste management including the management of hazardous materials
- Decontamination
- Resource management

It can be observed that emerging economies are generally less strict regarding environmental provisions[103]. Nonetheless recent developments in the US

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[100] *Zhang/Chen/Zhang,* The impact of exposure to air pollution on cognitive performance, http://www.pnas.org/content/early/2018/08/21/1809474115 (retrieved on September 14, 2018).

[101] *Yale Center for Environmental Law & Policy,* 2018 Environmental Performance Index - Global metrics for the environment: Ranking country performance on high-priority environmental issues (2018) 3.

[102] compare *European Commission,* Principles of EU environmental law - EU environmental law and national Courts: the key role of the national judge (2012) 2.

[103] *Murray,* The international environmental management standard, ISO 14000: A non-tariff barrier or a step to an emerging global environmental policy? Journal of International Economic Law 1997, 577 ff.

show that environmental efforts can be easily watered down by political or economical reasons[104].

7.2. International legislation on environment concerning M&A

Environmental law tries to bind companies to certain minimum standards in order to prevent undue or irreversible damages to the environment. However legal requirements are varying widely across the nations. Since environmental aspects often are also critical for the neighbouring countries a number of international initiatives emerged over the last decades. National legislation however depends strongly on the challenges and needs encountered in the respective area and no general assessment can be made. Anyhow the OECD compares the stringency of environmental law on a global basis every year. Therefore a short overview of the worldwide situation will be given in the beginning.

7.2.1. The OECD Environmental Policy Stringency Index

Annually the OECD publishes the Environmental Policy Stringency (EPS) Index. This index represents a composition of fourteen individual indicators in the area of climate and air pollution thereby allowing a large-scale comparison of global environment protection standards.[105]

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[104] *Greshko/Parker/Howard/Stone,* A Running List of How President Trump Is Changing Environmental Policy, https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/ (retrieved on September 14, 2018).

[105] compare *Botta/Koźluk,* Measuring Environmental Policy Stringency in OECD Countries: A Composite Index Approach (2014) 14 ff.

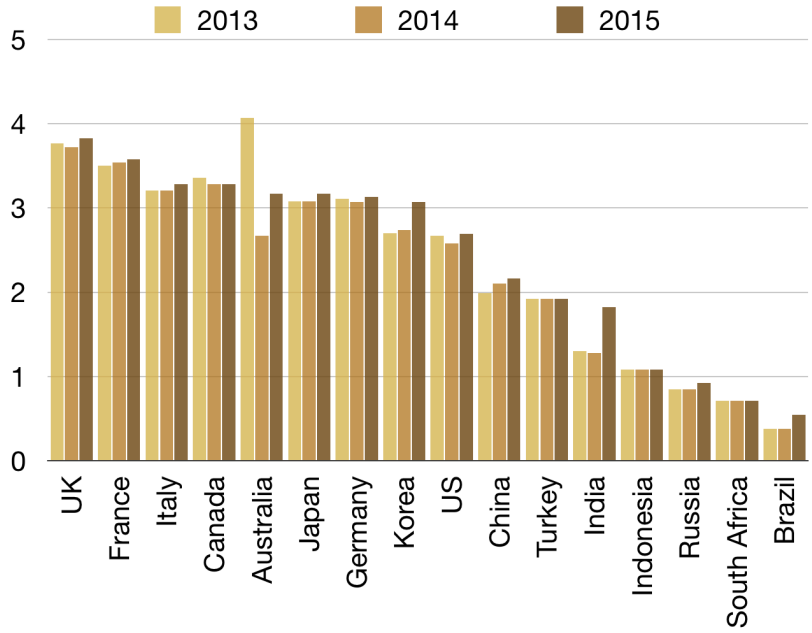

Exhibit 7.1: A comparison of the EPS for selected countries in 2013, 2014 and 2015

The BRICS countries are at the lower end of the EPS index with Brazil having the least stringent provisions in the line-up.

7.2.2. International environmental standardization

In 1996 the International Standards Organization (ISO) published the 14000 series of environmental standards regarding an *Environmental Management System*[106]. This standard is compatible with the European Commission's *Eco-Management and Audit Scheme* (EMAS) in such a way that EMAS over-fulfils ISO's requirements[107]. Both are applied voluntarily but may be required e.g. due to client's procurement regulations and therefore are vital for participation in worldwide trade. Neither ISO 14000 nor EMAS can be qualified as substantive law, since they only provide harmonization in procedural rules[108].

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[106] compare the overview given in *International Organization for Standardization,* ISO 14001: Key benefits (2015).

[107] *European Commission,* EMAS - Factsheet, http://ec.europa.eu/environment/emas/pdf/factsheets/EMASiso14001_high.pdf (retrieved on September 14, 2018).

[108] *Murray,* The international environmental management standard, ISO 14000: A non-tariff barrier or a step to an emerging global environmental policy? Journal of International Economic Law 1997, 579 ff.

7.2.3. EU environmental law as an example for transnational law

The basis for EU environmental law is given in Art 191 (2) TFEU with the following guiding principles[109]:

- Principle of precaution (risk management in case of scientific uncertainty resulting in non-discriminatory and proportional measures)
- Principle of prevention
- Principle of rectification at source
- *Polluter pays* principle (implemented in the *Environmental Liability Directive*[110])

The voluntary EMAS regulation was already discussed above. Beyond that there are several framework directives (e.g. the *Water Framework Directive*[111]) and specialized directives (e.g. the *Air Quality Directive*[112]). In this regard the EU's principle of subsidiarity should be mentioned that "seeks to safeguard the ability of the Member States to take decisions and action and authorises intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level"[113]. Consequently only topics of transnational relevance (such as environmental topics where more than one member state may be affected) can be legally addressed by the EU.

Finally the EU has implemented a number of *market-based instruments* regarding the environment since the publication of the related green book in 2007[114], such as[115]:

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[109] *European Parliament,* Environment Policy: General Principles and Basic Framework (2018) 1 f.

[110] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 2004/143, 56.

[111] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 2000/327, 1.

[112] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 2008/152, 1.

[113] *European Parliament,* The Principle of Subsidiarity, Factsheets on the European Union (2018) 1 f.

[114] *European Commission,* Green Paper on market-based instruments for environment and related policy purposes (2007).

[115] *European Environment Agency,* Environmental taxation and EU environmental policies (2016) 7 ff.

- General and mixed market-based instruments (usually non-binding, e.g. incentives for electricity utilities in order to increase interconnection rate)
- Taxes (non-binding alternatives to energy efficiency measures), tariffs, fees and incentives
- Tradable permits (including emission rights)
- Producer responsibility schemes (especially for waste)

The majority of market-based instruments established in 2016 was non-binding (24 out of 42 total). With 27 market-based instruments (15 non-binding, 12 binding) the highest attention was paid to the topic of waste[116].

7.3. Mitigation of M&A risks related to environmental law

Environmental law while being often relatively strict usually has a number of exceptions in place. In the case of the Environmental Liability Directive these are defined in Art 4:

- armed conflicts and similar grounds
- exceptional natural disasters
- the jurisdiction of certain international conventions and treaties (e.g. nuclear incidents)
- issues where no individual operators can be identified
- issues related to defense and international security

In case of proven liability depending on the applicable law and the circumstances the following monetary consequences have to be considered:

- Costs for rectification or reconfiguration (e.g. of a production process) and cleaning (e.g. of property)
- Suspension of operation until the relevant legal requirements are met (down time costs)
- Increased certification efforts
- Fines, fees
- Damage to the brand

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[116] compare to *European Environment Agency,* Environmental taxation and EU environmental policies (2016) 8, figures 2.2 and 2.3.

In order to identify all potential pitfalls the past, present and future situation regarding environmental topics shall be investigated. First the **historical** disposal of hazardous waste and the contamination of soil and buildings leading to any infringements of applicable law at the given time shall be examined. Some of these critical issues may be hidden from an external observer. Consequently the risk of *hidden defects* shall be allocated during the negotiations and correctly considered in the asset price. In case of successor liability the seller should testify the absence of any critical issues contractually and be bound to a reasonable penalty.

Second the **present** situation shall be analyzed. In this context mainly the compliance with applicable present law and technical standards and the internal regulations as well as the strict obedience to these during the work process shall be assessed. Any technically sound standards may be used as a reference, even if not formally binding. Deviations may be reasonable but have to be sufficiently justified (depending on the significance of the standard).

Third the **future development** of the legal boundaries shall be investigated. There may be transnational laws, treaties or recommendations already in force that have to be implemented in the future. Furthermore if comparable countries already consider certain environmental aspects in their legislation, it could be anticipated that law for the given area could be harmonized. Finally the political situation regarding the likelihood of a directional change in environmental matters and the public opinion shall be assessed for indications[117]. If the deal relies on the legal status quo a risk provision may be foreseen to cope with unexpected events.

[117] compare to *Anderson/Böhmelt/Ward,* Public opinion and environmental policy output: a cross-national analysis of energy policies in Europe (2017).

8. Import and Export Limitations

International trade is governed by the relations between the exporting and the importing country. The involved states may either open their markets for each other via bi- or multilateral treaties (e.g. the internal market promoted by the EU[118]) or control the goods and services crossing borders. According to the World Trade Organization (WTO) this control can be achieved on three legal levels[119]:

1. The physical level (administration, e.g. restrictions and their enforcement by customs authorities)
2. The technical level (standardization and licensing)
3. The fiscal level (including customs duty, tariffs and taxes)

These control mechanisms potentially increase the administrative effort, duration of transport or costs related to international trade. Furthermore political motives (such as national security or protection of domestic markets) can lead to effective restrictions of cross-border exchange of goods. In this topic it will be discussed which hurdles to consider during an M&A project and how to overcome these.

8.1. Objectives of import/export law

The goals of import and export regulations can be summarized as follows[120]:

- Protection of the people (e.g. from dangerous goods to be imported or arms to be exported to unintended third countries)
- Protection of sensitive goods (e.g. export of cultural goods, import of waste)
- Financing of state functions (e.g. by customs duties)
- Market protection (e.g. from counterfeits or products from low cost countries)

These restrictions could become relevant for M&A in three different ways: First the target could have violated import or export regulations in the past. Sometimes this happens without even being aware of. And often the buy-side

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[118] compare to Art 26 of the Treaty on the Functioning of the European Union, OJ C 2012/326, 47.

[119] *WTO,* Dictionary of Trade Policy Terms (2003), 135.

[120] compare to *European Commission,* The EU customs union: protecting people and facilitating trade, The European Union Explained (2014) 3 f.

remains liable for these violations (depending on successor liability). Second the M&A project itself can infringe import or (more likely) export regulations. In the US for certain industries even sharing knowledge of the business in an internal meeting (online or face to face) to a third foreign party could violate law under certain circumstances. Third the buyer's options in integrating the target company could be limited by import or export restrictions. This could be the case where export licenses originally issued to the target are withdrawn by the authorities because of undue characteristics of the buy-side.[121]

8.2. The US customs law as an example for a comprehensive international import export law and its effect on M&A

The US is known to employ a comprehensive system of customs regulations including control of a number of specialized industries. Furthermore there is a decent amount of publications and - even more important - adjudicated case law related to M&A available. Beyond that the authorities - starting from the 1993 *Customs Modernization Act* - began to proactively publish easily understandable guidelines and handbooks on how to comply with customs law under the premises of *informed compliance* and *shared responsibility*.[122]

With the recent change in administration US customs underwent a substantial transformation. Initially the Customs and Border Protection authority's focus was on the entry ports to the US with experts on special customs matters dispersed over the country. Now the authority establishes *Centers of Excellence and Expertise* that are tailored to certain local industries, e.g. oil and gas in Houston, electronics in Los Angeles and automotive in Detroit[123].

The US as a member of the WTO has to comply with the WTO trade policies. The US regulations are reviewed rather frequently on a two years basis by the WTO[124].

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[121] compare *Gatti/Valenstein,* Import/export and other international risk areas in M&A transactions (2016) and *McVey,* Export Compliance Issues In Mergers And Acquisitions (2011).

[122] *US Customs and Border Protection,* An Informed Compliance Publication (2017) 3 f.

[123] The currently active centers can be found online: *US Customs and Border Protection,* Centers of Excellence and Expertise, https://www.cbp.gov/trade/centers-excellence-and-expertise-information (retrieved on September 14, 2018).

[124] compare the related reports of the years 2014 and 2016, *WTO,* Trade Policy Review - United States (2014) and *WTO,* Trade Policy Review - United States (2016).

As laid down in Art 1 of the *General Agreement on Tariffs and Trade*[125] a country cannot be discriminated in terms of import or export duties (also known as the *most favoured nation* clause). Exceptions to this rule may be based on economic and non-economic grounds[126] (e.g. compare the US *Generalized System of Preferences*[127]).

Matters more relevant for M&A may be found in relation to bi- or multilateral treaties. While the negotiations for the *Transatlantic Trade and Investment Partnership* (TTIP) were halted after the 15th round of negotiations[128] there is a number of other similar treaties in force, including the *North American Free Trade Agreement* (NAFTA) and the *Dominican Republic-Central American Free Trade Agreement* (DR-CAFTA). The US Presidents' announcement to renegotiate NAFTA for better conditions and the threat of withdrawal could however lead to increased M&A activities in the area, especially regarding production facilities[129].

8.2.1. General principles of US customs law enforcement

As stated above the US customs authorities rely on the basic principles of *informed compliance* and *shared responsibility*. A mainstay within the duties of an importer is the principle of *reasonable care* exercised by the company in the course of its customs related actions and filings. However due to its general wording and broad application it is impossible to find a conclusive definition of the term but specialized frameworks have to be applied[130].

US customs law is familiar with the term of a *cooperative company* in a sense that cooperation with the authorities during investigations (that may include a waiver of statute of limitations) would reduce fines drastically in the end[131].

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[125] *WTO,* The General Agreement on Tariffs and Trade - Marrakesh Declaration of 15 April 1994.

[126] *Fotoh,* Exceptions to and the Fate of the Most-Favoured-Nation Treatment Obligation under the GATT and GATS (2001) 8 f.

[127] *Office of the United States Trade Representative,* U.S. Generalized System of Preferences: Guidebook (2018) 6 ff.

[128] compare the final document at the moment: *European Commission,* Report of the 15th round of negotiations for the Transatlantic Trade and Investment Partnership (2016).

[129] *Deloitte,* The beginning of a new M&A season: Future of the deal (2018) 33.

[130] *US Customs and Border Protection,* An Informed Compliance Publication (2017) 7 ff.

[131] *Heubert/Edelman,* The Missing Topic on Your M&A Due Diligence Checklist: Successor Liability for Export/Import and Sanctions Violations (2015) 56.

The issue of *successor liability* was already mentioned above. This topic was first publicly encountered in the Shields Rubber case in 1989[132] and later in the Sigma Aldrich case from where it developed a proven track record[133]. The difference of share and asset deals in this regard has been strongly debated in the last decade[134]. Remembering the situation when successor liability was "surprisingly" alleged for the first time it could also be brought forward in any share deal or other configuration in the future and therefore has to be considered thoroughly in the course of the M&A proceedings. Since the Court of International Trade's decision in the Adaptive Microsystem case in 2013 it is at least clear that successors may be held liable for export as well as import topics based on the *mere continuation doctrine*[135].

Finally the topic of *deemed export* is worth mentioning. The items restricted for export including essential intellectual property may not be sold to or shared with someone from a restricted country inside of the US. In this regards even telephone conferences can be of relevance[136]. It has to be kept in mind that even oral information conveyed during a telephone conference may violate certain export regulations targeted at non-disclosure of information critical e.g. for national security[137].

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[132] *Gatti/Valenstein,* Import/export and other international risk areas in M&A transactions (2016) 9.

[133] *Fellmeth,* Cure Without a Disease: The Emerging Doctrine of Successor Liability in International Trade Regulation, Yale Journal of International Law 2006, 128 ff.

[134] compare "all acquirers" according to *Barker/Lee/Ginsberg*, Buyer Beware: Successor Liability for Export Violations and Due Diligence Measures to Identify and Mitigate Deal Risks, The M&A Lawyer 2007, 2 ff vs. "only asset acquirers and depending on state" according to *Fellmeth,* Cure Without a Disease: The Emerging Doctrine of Successor Liability in International Trade Regulation, Yale Journal of International Law 2006, 138 ff.

[135] *Braumiller/Leeds/McCauley*, Buying Import & Export Violations: Successor Liability Risk & Its Impact on the Bottom-Line, https://www.braumillerlaw.com/buying-import-export-violations-successor-liability-risk-impact-bottom-line/ (retrieved on September 14, 2018).

[136] *US Department of Commerce - Bureau of Industry and Security,* Deemed Exports, https://www.bis.doc.gov/index.php/policy-guidance/deemed-exports (retrieved on September 14, 2018).

[137] *Gatti/Valenstein,* Import/export and other international risk areas in M&A transactions (2016) 25.

8.2.2. Special rules and regulations of US customs law concerning M&A

The US export regulations are administered by a number of federal authorities. These include the US Department of Commerce's Bureau of Industry and Security, the Department of State's Directorate of Defense Trade Controls, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Drug Enforcement Administration, the Nuclear Regulatory Commission, the Office of Foreign Assets Control and the Bureau of the Census[138].

The US customs law includes a number of special provisions for individual topics or industries. The *Export Administration Regulations* (EAR) by the US Department of Commerce contains critical items under ten categories of its Commerce Control List. This list contains commercial civilian products that could possibly be used for military applications (dual use principle). In contrast to that the *International Traffic in Arms Regulation* (ITAR) list including the US *Munitions List* mainly focuses on weapons and defense technology and is administered by the US State Department. Beyond that the different limitations on restricted entities, embargoed countries or prohibited reexport (e.g. selling the used ITAR goods to a third party) have to be considered. There are however plans to harmonize these controlled item lists and enforcing authorities.[139] Consequently the list of items requiring a means of export control mechanism may be adapted in the near future.

In this regard it could be seen as a spearhead action that by mid of August 2018 the *Foreign Investment Risk Review Modernization Act* (FIRRMA) was signed into law[140]. FIRRMA is targeted at improving control mechanisms for protecting critical US technology and infrastructure (raising concerns of national security) from foreign control out of M&A activities (including share deals) - especially with Chinese

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[138] compare to the latest list on the internet: *US Customs and Border Protection,* Export Licenses, https://www.cbp.gov/trade/basic-import-export/export-docs/export-licenses (retrieved on September 14, 2018).

[139] compare to *US Congressional Research Service,* The U.S. Export Control System and the Export Control Reform Initiative (2018).

[140] *US Department of Treasury,* Press release: Treasury Secretary Mnuchin Statement on Signing of FIRRMA to Strengthen CFIUS, https://home.treasury.gov/news/press-releases/sm457 (retrieved on September 14, 2018).

involvement: Sec 1719 (b) requires specific scrutiny and periodical reporting on the extent of Chinese investment including relevant patterns[141].

8.3. Mitigation of M&A risks related to import or export regulations

As outlined in this chapter legal import and even more so export restrictions can pose high risks on an M&A project. This topic should be addressed in three steps: First the law and adjudicated cases on the question of successor liability shall be assessed. This will determine risks related to the conduct of the target company in the **past** (including fiscal topics; application for and granting of licenses for controlled items; compliance with laws and technical standards; dealing with controlled or prohibited entities or countries) and may have a slight impact on the choice of the deal type, as share and asset deals may be regulated differently. If the risks related to liabilities for potential misconduct in the past are substantial this may even be a dealbreaker.

Second issues related to the **sharing of critical information** during the due diligence shall be observed (e.g. related to defense topics). Some export provisions may require certain measures for the sharing of the target's internal information with foreign third parties (such as the buyer or external reviewers in case of deemed export). Authorities shall be consulted upfront in order to find a legal way to share and scrutinize relevant internal information.

Third the **future** course of business related to import and export administration shall be assessed. In international M&A the change of nationality could easily be of concern and may require a dedicated control vehicle for adequate mitigation (such as a domestic board of directors). Under some legislations (e.g. compare the current US approach regarding Chinese investments in sectors critical for national security or regarding licensed military items) the change of control over a company may require a notification of the authorities by law and may also terminate certain licenses for the handling of controlled items which may have to be reapplied for. The related risk of complications shall be addressed.

As an integrated part of the due diligence and negotiations the risks shall be quantified and wherever possible contractually allocated to one of the parties based

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[141] compare *Latham&Watkins,* Client Alert - White Paper: New Law Governing Foreign Direct Investment in the United States Brings Significant Changes to CFIUS Review (2018) 2 ff.

on the reps and warranties duly provided by the other party. Whenever a strictly enforced provision with a certain risk is encountered it shall be communicated between the parties and the further approach regarding review and scrutiny by the authorities discussed. Some jurisdictions provide for a substantial reduction of fines in case of voluntary disclosure and cooperation by the company. However it is clear that this might have legal consequences for at least one of the parties.[142] In share deals an indemnification clause in the share/equity agreement regarding the various liabilities can help to mitigate risks[143].

[142] This section summarizes the relevant topics and findings presented by *Heubert/ Edelman,* The Missing Topic on Your M&A Due Diligence Checklist: Successor Liability for Export/Import and Sanctions Violations (2015); *Gatti/Valenstein,* Import/export and other international risk areas in M&A transactions (2016); *McVey,* Export Compliance Issues In Mergers And Acquisitions (2011); *Shapiro,* Reasonable Care: A Checklist for Compliance (2014); *US Department of Commerce - Bureau of Industry and Security,* Introduction To Commerce Department: Export Controls (2010).

[143] *Germany Trade & Invest,* Guide to Mergers & Acquisitions in China and Germany (2015) 87 f.

9. Cybersecurity

In this chapter different aspects of cybersecurity laws during an M&A project will be discussed. Since the two are closely intertwined by nature data protection topics will also be covered here. The high potential risks shall be kept in mind when dealing with matters of cybersecurity. As an example in the Verizon-Yahoo! case a discount of USD 350 million was granted because of a past data breach and certain future liabilities assumed by the seller[144].

9.1. Objectives of cybersecurity law

Cybersecurity is a relatively new topic to the public law sphere. Therefore only a minimum amount of provisions have been published so far. The EU published a draft for an EU Cybersecurity Act in September 2017. This proposal can be seen as one of the most recent developments in the field of international cybersecurity legislation. According to the EU the two main objectives of public law in this field are:

- Protection of networks and information services
- Protection of individual's personal data

Obviously these general objectives can be segmented in more specific targets which include the preparation of the EU (unified regulating measures and authorities), its member states, citizens and businesses (including educational increase of awareness). In this regard the EU does not limit the concerns of cybersecurity to criminal threats but keeps a broad understanding of *cyber threats* including natural disasters or extended blackouts of the electrical systems.[145]

9.2. International legislation on cybersecurity concerning M&A

From a global perspective two recent acts related to cybersecurity could have major impact on international M&A projects: First the European General Data Protection Regulation (GDPR) and second the Chinese cybersecurity law, both having different goals. The GDPR predominantly protects personal data related to

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[144] *Trope/Smedinghoff,* The Importance of Cybersecurity Due Diligence in M&A Transactions, Business Law Today 2017, 3.

[145] compare to *European Commission,* Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification ("Cybersecurity Act") (2017) 1 ff.

the EU (and therefore may be applicable for a foreign company doing business in Europe). On the other hand the Chinese cybersecurity law is geared towards a national cyber threat protection scheme including mandatory data storage on Chinese territory which has the potential of severely restricting post-merger data operations of multinational companies.

9.2.1. The EU General Data Protection Regulation

The GDPR effectively entered into force on May 25, 2018[146]. Its territorial scope (Art 3 GDPR) extends beyond the EU's borders by being applicable to any business in the world processing data of EU member state citizens. In this context the *processing of data* includes the offering of goods or services (even if they are for free) and any monitoring of the persons behaviour.

According to Art 5 GDPR data not only has to be minimized to a reasonable amount for the given task and objective but also kept actual and accurate, requiring the company to check for updates on the data on regular basis while protecting the identity of the individual as far as possible. In Art 6 GDPR the alternative grounds for lawful data processing are stated. Explicit consent (which has to be proven by the company according to Art 7 GDPR) has to be given by the individual as long as there are not other reasons valid.

Beyond that the GDPR provides broad requirements for transparency, information on, access to and rectification or deletion of the collected data by the individual.

Under chapter 4 of the GDPR the general obligations (control and recordkeeping) as well as the security requirements (depending on state of the art and the processed data's level of detail) are defined. Furthermore the communication requirements for data breaches are regulated. In chapter 5 the transfer of data out of the EU to third countries or international organizations is laid down. And chapter 8 defines the remedies and penalties connected to misconduct with regards to personal data. Here the administrative fines can be as high as

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[146] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, (General Data Protection Regulation), OJ L 2016/119, 1.

EUR 20 million or 4 % of the total worldwide annual turnover (Art 83 subpara 4 f GDPR).

9.2.2. China's cybersecurity law

The recent Chinese cybersecurity law came into force in mid 2017. This law is applicable to any operator of computer networks in general as well as operators of *Critical Information Infrastructure* (including broadcasting, energy, finance, transport and communications). The latter are required to store certain data in China (*data localization requirement*). Regarding data compliance the provisions can be categorized in three groups: First **network security** requires trained personnel, protocols and technological measures in order to prevent cyberattacks. Second the protection of **personal data** is slightly similar to the GDPR's provisions in a way that users have to consent to data processing, shall be allowed to access and modify the data and have to be informed in case of a data breach. Third the **content monitor** is especially relevant for the internet because user content has not only to be monitored and checked for legality but also removed and reported in case of illegality.

Several infringements are provided for with fines that can be as high as RMB 500.000 (approx. EUR 65.000) which is substantially lower than under the regime of the GDPR. Furthermore the Chinese cybersecurity law allows the authorities to shut down websites and withdraw business licenses as a sanction.[147]

9.3. Legal protection and mitigation

As with some of the other legal topics it could make sense to look at the time axis of an M&A project for the assessment of the compliance with cybersecurity provisions. First the questions of successor liability and conduct of the target company in the **past** should be investigated. In this regard not only the local laws shall be taken into account but all provisions that might be applicable (e.g. the GDPR for any company that processes personal data of a EU citizen). If in doubt the presence of relevant business relations shall be assumed and the consequent measures applied. Furthermore the data processes shall be reviewed, including the purposes, type of data, adequacy, transfer to other parties and security measures in

147 *Reed Smith,* White Paper: China's Cybersecurity Law (2018) 1 ff.

place. Technical matters shall be benchmarked against the state of the art. Finally any historical cybersecurity proceedings (active - e.g. violation of law by the target company - and passive - e.g. data breaches) shall be reviewed and the handling of such events as well as the internal consequences rated. Also a particular uncertainty has to be considered since most of the cybersecurity provisions are rather new and dependable case law (especially in the M&A context) may not be available yet.

Second the information process during the **due diligence** shall be checked for compliance. Under many legal regimes it is mandatory to request the permission or at least inform people who's data is passed on and potentially processed by another party. Of course in the beginning of an M&A project when highest discretion is required this simply is not possible. Therefore the required data (usually the earlier the less) shall be *anonymized* and involved people shall be bound to strict confidentiality by *non-disclosure agreements*. In this regard no compromise shall be made regarding the state of the art of a virtual (digital online) data room. In case the seller was not subject to the GDPR before the due diligence but is given access to personal data protected by the GDPR all associated provisions become applicable and may require an update of the non-disclosure agreements. Alternatively the buyer could decide to exclude GDPR critical data from the data room.

Third if flaws in the target company's process (e.g. conduct, certificates, training of personnel) or technology are found the **future** impacts shall be assessed. This could include the cost of adaptation, the risks related to breaches (vulnerability) and a particular legal uncertainty during the implementation phase. Beyond that a change of law (comparison to recent cybersecurity amendments in comparable countries) and its impact on the business model shall be assessed.[148]

[148] compare *Reed Smith,* White Paper: China's Cybersecurity Law (2018) and *Davis Polk & Wardwell,* Impact of the European General Data Protection Regulation on U.S. M&A (2018).

10. Corruption Law

Compliance is one of the most frequently terms used in today's discussion of general business conduct. The scope of *compliance in general* includes any issue that could infringe external or internal rules and therefore takes all of the topics presented so far in this thesis into account. However the origins of compliance date back to the 1970's when the first law on corruption was set in force in the US (the *Foreign Corrupt Practices Act* FCPA)[149].

Today there are many different laws and regulations in place, ranging from national initiatives prosecuting corruption or bribery abroad to global approaches such as the *OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions* (informally the *OECD Anti-Bribery Convention*)[150].

10.1. Objectives of corruption law

Originally only the question of disclosure of payments to officials was discussed[151]. However today corruption law is aimed at avoiding any official's undue motivation to influence the business of a private company. This could happen in different ways such as:

1. An official is bribed by a company for placing an order[152]. This is also the common case regulated by the OECD convention[153].
2. An official is in parallel engaged in a leading function of a company[154].
3. A coach, athlete or arbitrator may accept a payment in order to influence the course of a sports competition in favour of a bet[155].

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[149] compare *Koehler,* The Story of the Foreign Corrupt Practices Act, Ohio State Law Journal 2012, 932.

[150] *OECD,* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2011).

[151] *Koehler,* The Story of the Foreign Corrupt Practices Act, Ohio State Law Journal 2012, 933.

[152] compare law in Belgium, *Clifford Chance,* Anti-Bribery and Corruption Review - June 2017 (2017) 8.

[153] *OECD,* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2011) 7.

[154] compare law in CZ, *Clifford Chance,* Anti-Bribery and Corruption Review - June 2017 (2017) 10.

[155] compare law in Germany, *Clifford Chance,* Anti-Bribery and Corruption Review - June 2017 (2017) 15.

The common goal remains to be the preservation of a healthy economical system with free and fair competition[156]. While some research suggests that there is no direct relation between the level of corruption and economic growth[157], some findings indicate a potential relation at least for certain countries regularly hosting target companies in international M&A[158].

The global *Corruption Perception Index* (CPI) ranks the level of corruption for 180 countries and is published annually by Transparency International[159]. In 2017 New Zealand ranked number one followed by some European countries. Outside Europe Singapore and Canada are among the top ten, closely followed by Australia and Hong Kong equally ranked number thirteen.

It has to be noted that in many jurisdictions also *money laundering* is seen as a part of corruption law and is consequently dealt with at the same time in a due diligence. A general definition could be "concealing the origins of illegally obtained funds"[160]. On the other hand in Belgium "the laundering of the proceeds of any unlawful act whatsoever" is considered as money laundering[161].

Money laundering is an offence often related to the banking sector predominantly - even explicitly by certain legal systems. Likewise in the UK there is a regulated sector mainly including financial institutions and accounting service firms with specialized anti-money laundering provisions applicable to their tasks[162]. But also the *Austrian Banking Act* presents a dedicated set of provisions in this regard[163].

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[156] *UK Ministry of Justice,* The Bribery Act 2010 - Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (2011) 2.

[157] *Lauritzen/Søndergaard,* The Effect of Corruption on Growth (2012) 62.

[158] *PwC,* Corruption Risk in Mergers & Acquisitions with International Partners (2013) 2.

[159] *Transparency International,* Corruption Perceptions Index 2017 (2017).

[160] *Pickworth/Anderson/Duthie*, Money laundering risks for non-regulated businesses (2017).

[161] *Baker & McKenzie,* Global M&A Handbook 2015 (2015) 74.

[162] *Pickworth/Anderson/Duthie*, Money laundering risks for non-regulated businesses (2017) 1.

[163] *Baker & McKenzie,* Global M&A Handbook 2015 (2015) 47.

10.2. International legislation on corruption concerning M&A

A variety of legislative activities in the field of corruption can be encountered all over the world ranging from national laws (such as the US FCPA and the UK *Bribery Act* 2010[164]) to global approaches such as the OECD Anti-Bribery Convention or the UN *Convention against Corruption*[165]. The EU addressed this topic with its *Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union*[166] and the *Council Framework Decision on combating corruption in the private sector*[167].

Because of their high global relevance the OECD Anti-Bribery Convention and the US FCPA will be discussed in more detail. Finally a short overview of the new *Sapin II* law in France is given[168].

10.2.1. The OECD Anti-Bribery Convention[169]

The Anti-Bribery Convention is aimed at reducing the payment of bribes in international transactions. Recent (2017) research shows that multinational corporations that are subject to jurisdictions where the Anti-Bribery Convention is in force decreased their bribery efforts compared to those in other jurisdictions[170].

This convention is generally applicable to the bribery of foreign public officials (Art 1 Anti-Bribery Convention) by natural and legal persons (Art 2; compare Art 3 for the sanctions against natural persons). The sanctions shall include criminal sanctions (including monetary sanctions and imprisonment) at the bare minimum but civil and administrative sanctions shall be considered (Art 3). Asking for or receiving bribe money is not sanctioned by the convention. Art 7 refers in particular to bribery

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[164] *UK Ministry of Justice,* The Bribery Act 2010 - Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (2011) 2.

[165] *UN,* United Nations Convention against Corruption (2004).

[166] Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 1997/195, 2.

[167] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 2003/192, 54.

[168] *Deloitte,* Risques de corruption - Anticiper, évaluer, agir (2016).

[169] *OECD,* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2011).

[170] *Jensen/Malesky,* Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention, International Organization 2017.

of domestic officials related to money laundering. Furthermore the adherence to accounting principles that prohibit any hidden financial transfers is described (Art 8). Finally Art 9 is especially relevant for international cases since here the extradition of nationals to other countries is regulated.

10.2.2 The US FCPA

In 2017 the US was the country with the highest number of corruption investigations (114 cases)[171]. The year before, US authorities collected USD 2.4 billion of fines related to corruption (part from the Odebrecht settlement with global fines amounting to USD 2.6 billion[172])[173].

The FCPA is enforced by both the Department of Justice and the Securities and Exchange Commission. It is part of Title 15 of the USC and prohibits the offering or transfer of any money to a foreign official or a foreign political party to place an order or facilitate business relations. Furthermore it covers the requirements of keeping records and a dedicated internal control scheme. Mondelez International during the closing phase with Cadbury Limited in 2010 was found guilty of violating these records provisions in an Indian subsidiary of Cadbury. While the payments to an Indian agent were below USD 100.000 Mondelez was ordered to pay a civil penalty of USD 13 million[174].

Sections 78 dd-1 and 78 dd-2 limit the application of the FCPA to US businesses (“issuers”) and US citizens or residents (“domestic concerns”). However with the adoption of section 78 dd-3 a very broad definition of subjected persons was introduced. Now nearly any natural or legal person (independent of nationality)

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171 *Freshfields Bruckhaus Deringer,* The global anti-bribery landscape (2018) 3.

172 originally USD 3.5 billion - see press release *US Department of Justice,* Odebrecht and Braskem Plead Guilty and Agree to Pay at least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History, https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve (retrieved on September 14, 2018) that were later reduced to USD 2.6 billion - see *Pierson*, U.S. jugde approves $2.6 billion fine for Odebrecht in corruption case, https://www.reuters.com/article/us-brazil-corruption-usa/u-s-judge-approves-2-6-billion-fine-for-odebrecht-in-corruption-case-idUSKBN17J1A7 (retrieved on September 14, 2018).

173 *Freshfields Bruckhaus Deringer,* Anti-bribery and corruption: global enforcement and legislative developments 2017 (2017) 40.

174 *US Securities and Exchange Commission,* Press release: Administrative proceeding - File No. 3-17759 (2017), https://www.sec.gov/litigation/admin/2017/34-79753-s.pdf (retrieved on September 14, 2018).

conducting business with a slight US context could be prosecuted under the FCPA (the FCPA's *extraterritorial reach*)[175].

The latest development in the FCPA context is the Deputy Attorney General's policy encouraging the attorneys to consider sanctions of other departments and even foreign jurisdictions for the same misconduct with wide discretion ("as appropriate") in order to "achieve an equitable result" by avoiding "unnecessary impositions of duplicative fines, penalties and/or forfeiture against the company"[176].

10.2.3 The French *Loi Sapin II*

In 2017 France set *Sapin II* in force with the goal of modernizing the laws regarding corporate transparency and anti-corruption and promoting internal anti-corruption measures. It is applicable to companies and groups either incorporated in France or having its headquarters there. Subsidiaries abroad are also covered.

Sapin II does not provide specific sanctions for corruptive misconduct but rather gives guidelines for the establishment of a corporate anti-bribery control mechanism as corruption is already sanctioned. The required actions include:

- A risk map according to geographic areas, clients, suppliers and agents
- Suitable control procedures
- A code of conduct
- An early warning system
- A whistleblower hotline
- Training and awareness building measures for exposed employees
- A control and evaluation scheme for the measures put in place

The implementation period for these measures is two years. The fines for non-compliance with these requirements can be as high as EUR 200.000 for corporate officers and EUR 1 million for the corporate entity[177].[178]

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[175] *de la Torre,* The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets, Cornell International Law Journal 2016, 470.

[176] *US Department of Justice - Office of the Deputy Attorney General,* Policy on Coordination of Corporate Resolution Penalties (2018), https://www.justice.gov/opa/speech/file/1061186/download (retrieved on September 14, 2018).

[177] *Deloitte,* France's new Sapin-II anti-corruption law: recommendations for French companies operating in the CIS (2017) 3.

[178] *Deloitte,* Risques de corruption - Anticiper, évaluer, agir (2016).

10.3. Mitigation of money laundering risks

As outlined above the presence of corruption in a company or its subsidiary can be a very expensive problem sometimes even putting the future existence of the company at risk (e.g. comparing Odebrecht's fine of USD 2.6 billion to the turnover of 2015 amounting to USD 12.2 billion[179]). Penalties may include civil compensation payments as well as administrative and criminal fines, in some legislations including imprisonment of corporate officers. Therefore in an M&A project the compliance with anti-bribery provisions shall be extensively investigated.

Today business is transnational and so are most laws on corruption, often targeted at the bribery of a foreign state official and consequently prosecuting misconduct of domestic companies abroad. However in some cases (e.g. under the FCPA) the nationality (e.g. seat, incorporation or headquarters) of the company are of minor relevance and only a certain degree of relationship to the prosecuting state is necessary to become liable with the result of parallel enforcements in several countries. Accordingly a thorough corruption due diligence shall be carried out and the potential risks identified and evaluated.

As one of the first questions successor liability shall be clarified. As an example under the FCPA the same provisions of corporate law apply for corruption topics as for other kinds of liabilities[180]. This means that under some conditions the buy-side company could be held liable for the infringements of the target. This depends on three factors: First the question has to be answered if the target company was under the **jurisdiction** of the authorities **prior to the closing**. Second it must be ascertained that the target **stopped** any corruptive misconduct. And third the buy-side should consider disclosing the misconduct to the authorities[181].

Then in order to find out about any potential risks of misconduct the due diligence shall be directed towards the following actions:

1. Investigation of the target company's historical case management (if any)

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[179] *Odebrecht,* Annual report 2016 (2017) 35.

[180] *US Department of Justice and US Securities and Exchange Commission,* A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012) 28.

[181] compare to the exemplary cases presented by *US Department of Justice and US Securities and Exchange Commission,* A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012) 30 ff.

2. Review of the target's risk map or - if not available - the establishment of such a map, showing the different global areas of activity as well as the background of clients, suppliers and agents
3. Evaluation of the control mechanisms of the target company as well as the individual output (e.g. regulations, compliance training schedules, audit reports)
4. Research for the applicable laws (of potentially several jurisdictions)
5. Matching of the presented risks to the control mechanisms and check of sufficiency
6. Define contractually which risks are assumed by the buyer (if possible, depending on deal type)

Since the main concern of corruption is in the marketing and sales phase, the related processes, organizations, habits, key employees and sales prices (benchmark against comparable products or services in comparable markets) shall be scrutinized in particular. In case of *any discrepancy* deeper investigations shall be commenced.[182]

In this regard it has to be finally kept in mind that under some jurisdictions the buy-side has to disclose any suspicious activities to the authorities (e.g. under the UK's Proceeds of Crime Act 2002 a Suspicious Activity Report (SAR) has to be furnished[183]).

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[182] compare to the ideas and solutions presented in *AlixPartners,* Cross-Border M&A: Bribery and Corruption Issues in International Transactions (2015); *PwC,* Corruption Risk in Mergers & Acquisitions with International Partners (2013); *KPMG,* Anti-Bribery and Corruption: Rising to the challenge in the age globalization (2015).

[183] *Handley,* Anti-corruption due diligence in M&A - the role of POCA, Financier Worldwide Magazine 2012, 1.

11. Special Topic: Disruptive Technology M&A

Research by Deloitte in 2018 shows that disruptive M&A deals related to tech-innovations have an increasing share in the global M&A landscape. Disruptive technologies include:

- Digital and social services
- Artificial intelligence (*AI*)
- *FinTech* (finance technology)
- *Big Data*
- *Internet of Things*
- *Cybersecurity*
- Robotics

From 2015 to 2017 around USD 634 billion were spent globally in these fields by technology companies, consumer businesses, telecom and financial services. Disruptive technology assets were increasingly acquired by non-tech companies. The most active markets were the US and Europe with more than USD 100 billion each over the last three years.[184]

Topics such as cybersecurity and data services were already covered in this thesis. FinTech companies however are sometimes treated differently by public regulators with often tailor-made regulative solutions. Due to their inhomogeneous nature they are hard to classify thereby posing a challenge from risk management standpoint for international M&A. For this reason the focus will be put on *FinTech* in this chapter.

11.1. FinTech

FinTech refers to innovative technologies in the area of banking, insurance, asset management and financial education such as electronic banking and digital payment.[185]

FinTech companies sometimes are part of a group of companies or independent startups avoiding the various internal regulations of a large corporation. However they usually work in environments highly regulated by law because of their

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[184] compare *Deloitte,* The beginning of a new M&A season: Future of the deal (2018) 14 ff.

[185] *KPMG,* Value of Fintech (2017) 6 ff.

links to finance. Unfortunately a high amount of fairly complex regulations may reduce the innovativeness and opportunities to test new developments under real life conditions. Therefore an increasing number of countries started *sandbox* initiatives in order to reduce the regulatory impact on FinTech companies and support them (e.g. by reducing time to market) on one hand but still protect clients and consumers to a certain extent. Among others Indonesia, Malaysia, Singapore, Hongkong, Australia and most recently the UK provide special regulative approaches for national sandboxes[186]. Beyond that the UK started an initiative for a global sandbox in the *Global Financial Innovation Network* initiative[187] to cater for the global impact of innovative technologies on the finance industry.

11.2. Acquiring a FinTech company

When planning to acquire a FinTech company it is essential to understand the related risks. If the target is an established company or part thereof (with all the internal and external regulations of the mother thoroughly applied) then the acquisition is similar to a standard transaction and the sell-side may likely know how to behave during an M&A project. If however the target has a certain startup flavour (either an independent startup or part of a larger group but without the group regulations applying) the additional risks may be numerous. These risks can be segregated in three groups:

1. There may be a number of *internal risks* since many startups are developing the organization, product, service and market at the same time with limited resources - often for the first time.
2. There may be *external risks with immediate effect* on the startup, such as legal frameworks, licenses or administrative approvals.
3. And finally there may be *external risks* potentially affecting the startup at a *later stage*, such as market reception or barriers that become effective once a product or service is launched obstructing or degrading the offering.

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[186] compare LLM Thesis *Oswald,* Development of Regulatory Sandbox in Indonesia (2017) 7; *UK Financial Conduct Authority,* Regulatory sandbox lessons learned report (2017) 4.

[187] *Global Financial Innovation Network,* Consultation document - August 2018, https://www.fca.org.uk/publication/consultation/gfin-consultation-document.pdf (retrieved on September 14, 2018).

These risks are inherent to many different startup companies and I'd refer to them as *standard startup risks*. However for a FinTech company an additional set of legal issues could apply under the provisions of a *sandbox*. A sandbox is a restricted environment allowing a FinTech startup to try certain services and products without the application of all regulative provisions. Since there is no comprehensive information available on the acquisition of FinTech startups the inherent risk is relatively high when compared to established industries and has to be kept in mind. As a consequence a FinTech startup could require a different M&A approach to cover the additional risks.

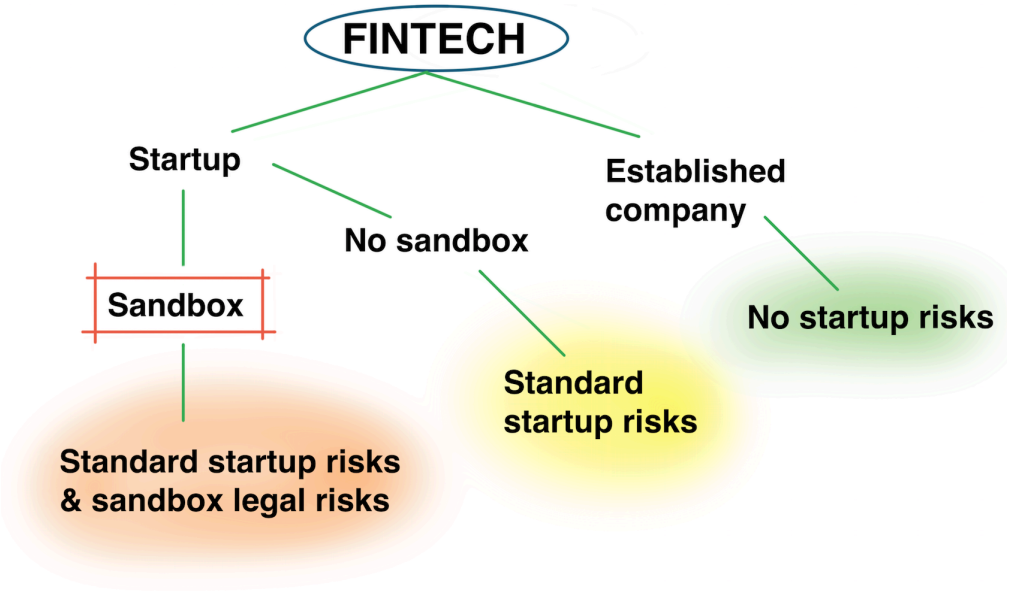

Exhibit 11.1: The critical questions for Sandbox startup acquisition (Green: an established company is assumed to have effective and efficient regulations in place; yellow: the *standard* elevated risks related to the acquisition of a startup; orange: there may be additional risks due to the *sandbox* environment for a startup that has no effective or efficient regulations in place yet)

Therefore when acquiring a FinTech company operating within a sandbox three major issues shall be raised:

1. There are still some rules applicable to the sandbox. Did the FinTech company comply with these in the **past**?
2. Does the **current process** of acquisition change the originally applicable rules? If so, what is the impact on the business?

3. For the **future**, when the simplified sandbox regulations are lifted, will the business still be attractive and economically sound? Potential barriers may be external (e.g. foreseeable change of law) or internal (e.g. delayed implementation of legally required control mechanisms).

12. The Algorithm

Any algorithm needs to prioritize the various fields of public law in order to (1.) check critical issues as soon as possible and (2.) enable the processing of several issues in parallel. Many different algorithms can be imagined depending on the involved jurisdictions (the applicable law), the nationalities of the parties (some legal requirements are linked to the nationality, e.g. in import/export) and the industry (e.g. the weapons industry have special legal requirements). However the method of determining the steps of the algorithm should always follow the same idea:

1. Topics which could destroy or impair the business model shall be clarified.
2. The areas with high potential fines shall be investigated.
3. The remaining areas can be clarified in parallel.

For my model algorithm I choose to check **competition law** first because in cases of considerable market concentrations competition law could impose some grave influences on M&A. In the worst case the deal could be interdicted by the authorities. Competition law is mainly focused on the post-merger phase when concentrations become effective in the market. Next I propose to investigate **import/ export law**. In some jurisdictions and industries (e.g. related to critical infrastructure or security) a change of the nationality of the controlling entity could lead to severe limitations of business. If there is a risk of deal-breaking in either of these cases because the business model is not feasible any more, it is often relatively easy to see hence requiring not a lot of time. On the other hand, forces can be focused on these critical items. These are also the reasons why I propose to handle these topics consecutively.

Then in the second step the **data protection** and **corruption law** shall be processed, especially related to the past conduct of the target company and the availability of and compliance with the appropriate rules because fines in these areas can be substantial. And finally the remaining topics of **tax law, environment law** and **employment law** shall be investigated.

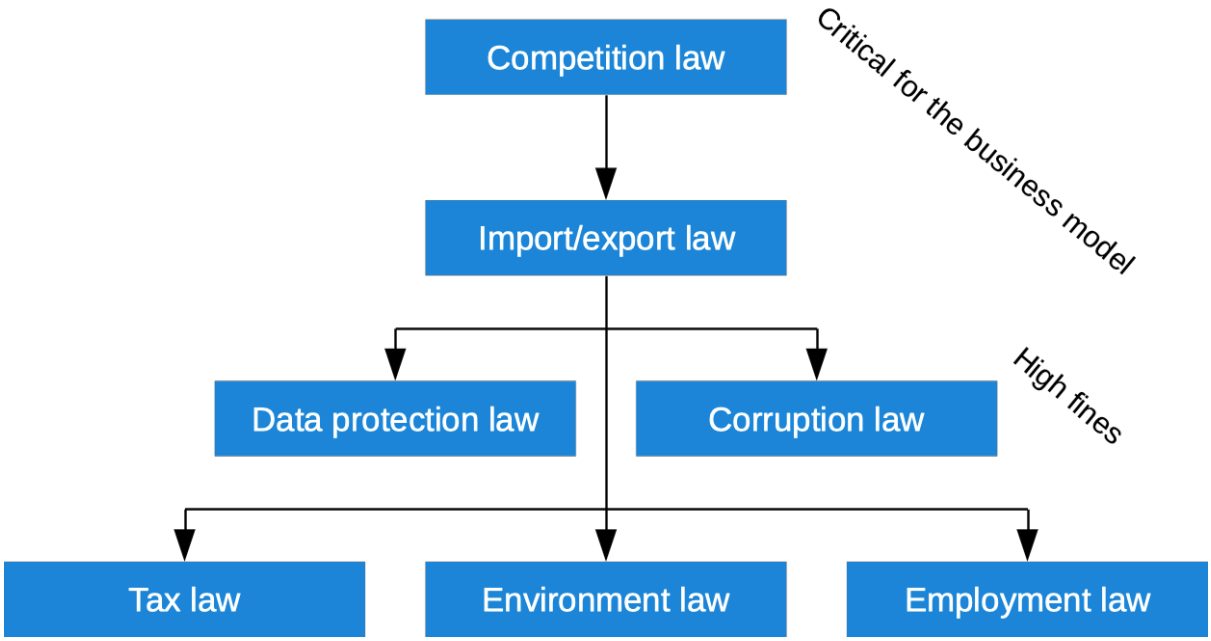

Exhibit 12.1: One priority-oriented approach for the efficient processing of public law in a cross-border M&A project

13. Summary and Outlook

Cross-border M&A is an efficient way to expand market coverage, use synergies and broaden product and service offerings. While contract law is usually the main legal topic to be dealt with in an M&A project, public law can have severe consequences on the feasibility. Therefore the consideration of public law's influence is of vital importance for any cross-border M&A project.

Public law comprises many different areas. Their relevance for a cross-border M&A project was determined by a priority driven framework based on a typical business process of a manufacturing company. My investigations show that the difficulties and time constraints of a typical international M&A project favour a multidisciplinary team dealing with the different areas in time domain (past - e.g. conduct of the target company; present - e.g. effects of the closing; future - e.g. development of the legal frameworks) because the tipping point of the closing changes the control of the enterprise and the legal boundary conditions substantially.

There are several approaches how to effectively deal with the different areas of public law in an M&A project. Their positions in the process are determined according to their priority in the given project based on nationalities, jurisdictions and industries involved. It basically follows three priorities:

1. Legal areas with the capacity to destroy the business model
2. Legal areas with high potential fines (and therefore high financial risks)
3. The other legal areas

It was the goal of this thesis to provide a comprehensive overview of the various areas of public law influencing cross-border M&A projects and how to mitigate them effectively. To some extent legislations can define their scope and range of application relatively freely. Beyond that the global jurisdictions are not engaged in cross-border M&A equally with some having higher practical impact than others. Therefore future researchers might be interested in which areas of public law from which jurisdictions have the statistically (and practically) highest influence and develop sophisticated mitigation procedures for these areas specifically. Furthermore in a world of constant changes and developments in technology new legal aspects are brought up and codified on a regular basis which could heavily influence tomorrow's M&A projects.

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Deutsche Kurzfassung

“Ansätze zur Reduktion der Auswirkungen des öffentlichen Rechts auf internationale M&A-Projekte”

Die vorliegende Arbeit bietet einen Überblick über die relevanten Themen des öffentlichen Rechts bei internationalen und grenzübergreifenden M&A-Projekten. Als Ausgangspunkt wurde untersucht, von welchen öffentlich-rechtlichen Teilbereichen ein Modell-Industrieprozess beeinflusst wird. Da ein erfolgreiches M&A-Projekt immer einen Wendepunkt in Gestalt des *Closing* beinhaltet, an dem sich die Besitzverhältnisse wesentlich ändern, wird die Betrachtung dieser Rechtsgebiete im **Zeitbereich** angeregt:

1. Vergangenheit: z.B. das Gebaren des *Targets* vor der Übernahme
2. Gegenwart: z.B. die Auswirkung der Änderung der Besitzverhältnisse auf die Unternehmensführung
3. Zukunft: z.B. die künftige Änderung der rechtlichen Rahmenbedingungen

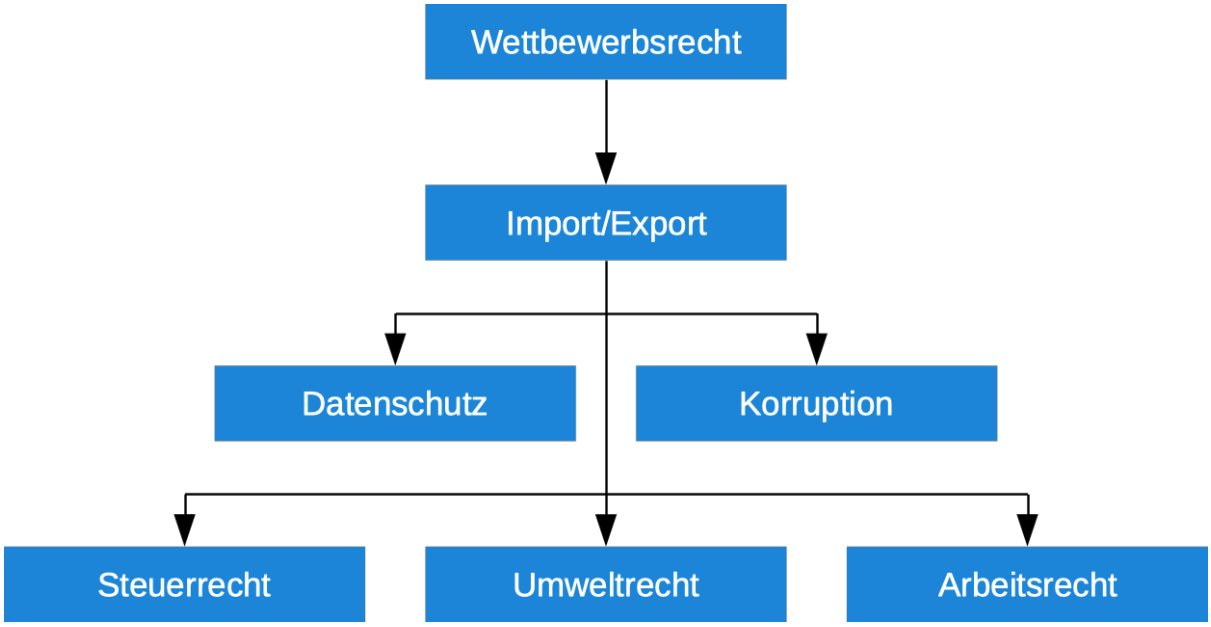
Für eine effiziente Abwicklung während eines M&A-Projekts wird in dieser Arbeit eine Unterteilung des öffentlichen Rechts in drei **Prioritäten** vorgeschlagen:

1. Rechtsgebiete, welche das Geschäftsmodell zerstören könnten
2. Rechtsgebiete, welche potentiell hohe Strafen mit sich bringen
3. Die restlichen Rechtsgebiete

Schließlich wird auf dieser Grundlage ein Beispielalgorithmus erarbeitet, der für jedes Projekt modifiziert werden kann. Das **Wettbewerbsrecht** kann die stärksten Auswirkungen auf das M&A-Projekt haben, da die Behörden bei kritischer Erhöhung der Marktkonzentration (Verringerung von Konkurrenz) den Firmenzusammenschluss verbieten könnten. Deshalb sollten die wettbewerbsrechtlichen Komplikationen früh untersucht werden. Ähnlich verhält es sich mit **Import/Export,** wo - in Abhängigkeit vom Industriegut - die Änderung der Nationalität des Firmensitzes zu wesentlichen Einschränkungen führen kann.
In den Bereichen des **Datenschutzes** und der **Korruption** ist hauptsächlich auf das Gebaren des *Targets* in der Vergangenheit und die vorhandenen internen Regelun-

gen abzustellen, um so - in der Regel hohe - Strafen zu vermeiden. Es sollten aber auch - insbesondere im Bereich des Datenschutzes - Vorgänge rund um die *Due Diligence* nicht aus den Augen verloren werden.

Schließlich sind die Rechtsgebiete des **Steuerrechts**, des **Umweltrechts** und des **Arbeitsrechts** zu untersuchen und deren Auswirkungen auf die Firmenübernahme auszuwerten bzw. möglichst günstige Übernahmewege zu ermitteln.



Eine derartige Arbeit wird einer globalen Rechtsbetrachtung nie gerecht werden. Da Rechtsetzung und Rechtsprechung einem dauernden Wandel unterworfen sind, bietet es sich jedenfalls an, regelmäßig die Auswirkungen von Änderungen und Anpassungen zu untersuchen. Hierbei könnte man sich in Hinkunft auch auf jene Länder konzentrieren, welche maßgeblichen Anteil an internationaler M&A haben und damit für derartige Projekte besonders von Bedeutung sind, sowie einzelne Rechtsbereiche aufgreifen, die sich gerade besonders stark verändern oder entwickeln.