International
Comparative
Legal Guides

Practical cross-border insights into mergers and acquisitions

Mergers & Acquisitions
2022

16th Edition

Contributing Editors:

Lorenzo Corte & Scott C. Hopkins
Skadden, Arps, Slate, Meagher & Flom LLP

ICLG.com

Expert Analysis Chapters

1 **2021's Most Interesting Developments in M&A**
Adam O. Emmerich & Trevor S. Norwitz, Wachtell, Lipton, Rosen & Katz

7 **Key Drivers and Trends: Digitization, Decarbonization and SPACs**
George F. Schoen & Jenny Hochenberg, Cravath, Swaine & Moore LLP

Q&A Chapters

11 **Australia**
Atanaskovic Hartnell: Lawson Jepps & Sanya Bhatnagar

18 **Austria**
Schoenherr: Christian Herbst & Sascha Hödl

29 **Belgium**
Van Olmen & Wynant: Luc Wynant & Jeroen Mues

36 **Brazil**
Pinheiro Neto Advogados:
Joamir Müller Romiti Alves, Carlos Elias Mercante, Cristina Liu & Camila Otani Nishi

43 **British Virgin Islands**
Walkers: Matthew Cowman & Patrick Ormond

50 **Bulgaria**
Schoenherr (in cooperation with Advokatsko druzhestvo Stoyanov & Tsekova): Ilko Stoyanov & Katerina Kaloyanova-Toshkova

60 **Canada**
Blake, Cassels & Graydon LLP: Markus Viirland & Richard Turner

69 **Cayman Islands**
Maples Group: Nick Evans, Suzanne Correy & Louise Cowley

76 **Croatia**
Vukić & Partners: Iva Sunko & Ema Vukić

83 **Cyprus**
E & G Economides LLC: Virginia Adamidou & George Economides

90 **Czech Republic**
Wolf Theiss: Tereza Naučová & Michal Matouš

98 **Denmark**
Bech-Bruun: Steen Jensen & David Moalem

105 **Finland**
Dittmar & Indrenius: Anders Carlberg & Jan Ollila

112 **France**
Fidal with contributions by Almain:
Stéphanie de Robert Hautequère, Gacia Kazandjian, Sally-Anne Mc Mahon & Geoffrey Burrows

118 **Germany**
Ebner Stolz: Dr Heiko Jander-McAlister, Dr Roderich Fischer, Dr Jörg R. Nickel & Dr Christoph Winkler

126 **Hong Kong**
de Bedin & Lee LLP: Derek Chalmers

134 **Hungary**
Oppenheim Law Firm: József Bulcsú Fenyvesi & Mihály Barcza

141 **India**
Shardul Amarchand Mangaldas & Co.:
Raghubir Menon, Sakshi Mehra, Tanmayee Chaulkar & Rooha Khurshid

150 **Ireland**
Philip Lee LLP: Inez Cullen & John Given

159 **Italy**
NUNZIANTE MAGRONE: Fiorella Alvino & Fabio Liguori

166 **Japan**
Nishimura & Asahi: Tomohiro Takagi & Keiichiro Yamanaka

175 **Luxembourg**
GSK Stockmann: Marcus Peter & Kate Yu Rao

181 **Malaysia**
Azmi & Associates: Norhisham Abd Bahrin & Syed Zomael Hussain

188 **Malta**
DF Advocates: Dr. Maria Paloma Deguara & Celia Mifsud

196 **Montenegro**
Moravčević Vojnović and Partners in cooperation with Schoenherr: Slaven Moravčević & Petar Vučinić

204 **Netherlands**
Houthoff: Alexander J. Kaarls & Kasper P.W. van der Sanden

213 **Norway**
Aabø-Evensen & Co Advokatfirma:
Ole Kristian Aabø-Evensen

228 **Serbia**
Moravčević Vojnović and Partners in cooperation with Schoenherr: Matija Vojnović & Vojimir Kurtić

236 **Singapore**
Bird & Bird ATMD LLP: Marcus Chow & Xing Yi Tan

244 **Slovakia**
URBAN STEINECKER GAŠPEREC BOŠANSKÝ:
Marián Bošanský & Juraj Steinecker

Q&A Chapters Continued

250 **Slovenia**
Schoenherr: Vid Kobe & Bojan Brežan

261 **South Africa**
Bowmans: Ezra Davids & Ryan Kitcat

269 **Spain**
Roca Junyent SLP: Natalia Martí Picó & Xavier Costa Arnau

276 **Switzerland**
Bär & Karrer Ltd.: Dr. Mariel Hoch

284 **Taiwan**
Lee and Li, Attorneys-at-Law: James Huang & Eddie Hsiung

291 **Turkey**
Kolcuoğlu Demirkan Koçaklı Attorneys at Law: Bihter Bozbay İnan, Gözde Zorlu & İrem Cansu Demircioğlu

298 **United Kingdom**
Weil, Gotshal & Manges (London) LLP: David Avery-Gee & Murray Cox

306 **USA**
Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Thad Hartmann

ICLG.com

Key Drivers and Trends: Digitization, Decarbonization and SPACs

George F. Schoen

Jenny Hochenberg

Cravath, Swaine & Moore LLP

Introduction

Day-to-day life and consumer demand have undergone profound changes in the last two years, in no small part due to the COVID-19 pandemic. Digitization has permeated, and indeed dominated, virtually every aspect of social interaction, including how we meet each other, how we learn, how we shop and pay for things, and even how we obtain healthcare. Video conferences, digital education, e-commerce, contactless payments and digital healthcare have become deeply entrenched in our way of life. Not surprisingly, companies in those fields have played a large role in the 2021 M&A deal book.

The last two years have also heralded an increased awareness of social and environmental issues and a desire to accomplish social missions by directing investments into companies that champion certain causes. Decarbonization and combating climate change, in particular, have been a dominant point of investor focus and have generated a flurry of activity in the clean energy and sustainability sectors. Activists have also embraced "net zero" as a theme underpinning many of their campaigns.

Economic stimulus measures adopted in response to the COVID-19 pandemic have led to a period of almost unprecedented liquidity across investor classes (venture capital, private equity and the public markets), driving competition and valuations for in-demand companies to record highs. The boom in IPOs by special purpose acquisition vehicles (SPACs) in particular has generated a new class of M&A players looking to execute on transactions in the near term and has dramatically reshaped the M&A landscape.

In this chapter, we examine some of the key drivers and trends in 2021, focusing on notable developments in digitization and decarbonization and the role SPACs have played in the M&A deal book.

Digitization

The modern day conglomerates

In 2021, several technology companies followed a move that Google made several years ago in renaming itself as Alphabet, signaling that it was more than just a "search" company and indicating a multi-platform approach. In December 2021, Square, a technology titan co-founded and led by Twitter's Jack Dorsey, announced that it was changing its corporate name to Block, to distinguish the corporate parent entity (*Block*) from its several businesses (or "*building blocks*"). The name change was in recognition of Block's growth over the last decade from its beginnings as a seller-focused business back in 2009. It also signaled its ambitions for more growth in the future as "an overarching ecosystem of many businesses united by their purpose of economic empowerment."[1] Earlier in the year, Block had agreed to acquire Afterpay, a global "buy now, pay later" (BNPL) platform organized in Australia, in a $29 billion buyout – a transaction that would be the largest takeover in Australia's history. The acquisition was a step in strengthening and enabling further integration between Blocks' two current main ecosystems, Seller (focused on sellers) and Cash App (focused on individuals).

Another example is Facebook renaming itself as Meta. The new name, accompanied with a new infinity-shaped logo, underscores the company's plans to focus on the next digital frontier, the "*metaverse*" – the unification of disparate digital worlds into a composite universe combining online, virtual and augmented worlds. According to Meta, this concept is poised to be the next major social platform and several tech companies are expected to build it over the next decade.

Also in 2021, Amazon agreed to acquire MGM Studios for $8.45 billion in May and amassed a 20% stake in Rivian before the electric vehicle (EV) start-up went public via an IPO in November. Building on its prior acquisitions of self-driving start-up Zoox, online pharmacy PillPack, doorbell and home security camera start-ups Ring and Blink, and grocery store chain Whole Foods, Amazon has emerged as a true "do-everything-for-everyone company."[2]

This activity in the tech space occurred against the backdrop of deconsolidation in the industrial space. In November 2021, General Electric and Toshiba each announced plans to separate into three standalone companies to increase focus and enhance shareholder value. These planned spin-offs are coming on the heels of the complex break-ups of DowDuPont and United Technologies, each of which also split up into three independent public companies in the last two years. In June 2021, Honeywell, another industrial corporate mainstay, announced plans for its latest spin off – the separation of its quantum computing business, which would then merge with a software firm.

The break-up of e-commerce from traditional retail

E-commerce has experienced explosive growth during the pandemic, which has put it on a very different trajectory from traditional brick-and-mortar retail and has created ripe opportunities for deal making and activist campaigns. In March 2021, the owner of Saks Fifth Avenue announced the separation of its e-commerce business Saks.com from its traditional retail business. The separation has been immensely successful and, according to media reports, Saks.com has begun preparations for an IPO that could take place in the first half of 2022 at a $6 billion valuation (three times the valuation of Saks.com in March when the separation was announced).[3]

Emboldened by the Saks model, activists have been urging other retail business to separate their digital and retail operations to unlock value. In October 2021, Jana Partners took a stake in Macy's and urged it to spin off its e-commerce business. In an investor presentation, Jana argued that Macy's online business on a standalone basis could be worth double the value of the combined company.

Following a similar blueprint, in November 2021, another activist investor, Engine Capital, pushed Kohl's to consider splitting its e-commerce business or selling the entire company. In a publicly released letter to Kohl's board of directors, Engine Capital said that if Kohl's separated its e-commerce divisions, the standalone company could be valued at $12.4 billion or more, which dwarfed the whole company's market capitalization of $6.7 billion at the time.[4] The investor also urged the company's board of directors to undertake a market process and test how much well-capitalized financial sponsors would be willing to pay for the entire company.

Going hand-in-hand with the rise of e-commerce, freight and logistics have been another sector that has experienced tremendous growth and has seen a fresh round of deal making. In the field of aviation leasing, AerCap acquired the GE Capital Aviation Services business (GECAS) of GE for more than $30 billion. Danish shipping company Maersk, which is active in ocean and inland freight transportation, made several acquisitions within e-commerce logistics. Finally, U.S. shipping and logistics company ArcBest, which through its primary subsidiary ABF Freight is one of the nation's largest less-than-truckload carriers, agreed to acquire truck brokerage firm MoLo Solutions.

Digitization of healthcare and education

Looking ahead to 2022 and beyond, digital healthcare and digital learning appear poised for breakthrough deal making, as consumer demand for home health and learning services continues to grow. This past year marked record levels in venture capital funding for digital health and ed-tech startups and the foray of several unusual suspects in the healthcare space.

In December 2021, Oracle announced that it would buy electronic medical records company Cerner for $28.3 billion, which put it on the map as a potential major player in the health technology world. This is the largest deal in Oracle's 44-year history. Consumer electronics retailer BestBuy also ventured into healthcare, announcing the acquisition of Current Health in October, a leading care-at-home technology platform providing remote patient monitoring and telehealth. Also, in August 2021, workforce solutions provider Adtalem completed the acquisition of Walden University, an online healthcare education provider that would enhance its ability to address unmet demand for healthcare professionals in the U.S.

Decarbonization and the Future of Oil & Gas

Another prominent theme of 2021 has been widespread investor disassociation with legacy oil and gas businesses. Over the year, energy companies have faced immense pressure to minimize or divest fossil fuel operations from activist investors, institutional investors and social activists alike. Even where companies have made significant efforts in the clean and renewable energy space, investors have been reluctant to give them credit for those achievements so long as they house oil and gas operations under the same roof. As a result, what we are beginning to see is a push towards the creation, via separation and M&A, of pure play oil and gas companies, held apart from alternative energy companies.

In May 2021, Engine No. 1, a small and virtually unknown (at the time) hedge fund, stunned Wall Street by defeating energy giant ExxonMobil in a proxy fight. Engine No. 1 ran a proxy contest grounded on the thesis that investing for social good is good for the bottom line and that ExxonMobil should reduce its carbon footprint – and won three director seats. Engine No. 1's success was made possible with the support of Exxon's largest institutional shareholders, BlackRock, Vanguard and State Street, all three of whom voted in favor of some of the hedge fund's director nominees.

In another groundbreaking development, also in May, a Dutch court ordered Royal Dutch Shell to reduce its worldwide CO_2 emissions by 45% by 2030 (compared to 2019 levels). The court found that Shell was subject to an unwritten "standard of care" towards society at large and, as a result, had a duty to reduce its CO_2 emissions – irrespective of national and international regulation. In its rulings, the court noted that protection against climate change is a human right.[5]

In the wake of the Dutch court's decision (which is currently under appeal), in October 2021 activist investor Third Point announced a $750 million stake in Shell and in a client letter urged Shell to separate into two companies – one with legacy businesses that provide steady cash flow, such as refining, and another one housing its renewables unit and other units that require substantial investment.

Similarly, in September 2021, Elliott Management publicly urged SSE, the multinational energy company headquartered in Scotland, which was previously known as Scottish and Southern Energy, to list the entirety of its renewables business. By creating two separate companies, Elliott argued that SSE could accelerate the green-energy investments required for it to become UK's renewable champion. In response to Elliott's overture, SSE announced a set of strategic initiatives, including a £12.5 billion plan to increase investment across its renewable energy and electricity networks business over the next five years. Elliott sent a public letter to the board decrying the initiative as "lack[ing] ambition."[6] In its letter, Elliott also said SSE should add two new independent directors to the board with renewables experience and begin a strategic review of its business.

Across the globe, BHP, one of Australia's and the world's top mining companies, announced in August 2021 that it would sell its entire oil and gas portfolio to Woodside Petroleum, an Australian petroleum exploration and production company, in a A$40 billion transaction. BHP's decision to go green came amidst intense scrutiny from investors and against the backdrop of its efforts to orient its business model towards "future-facing" commodities of copper and nickel that will be increasingly needed to manufacture electric batteries.[7]

From Hot to Lukewarm: SPACs

Last year witnessed an unprecedented boom in capital raising by SPACs – in 2021, there have been over 600 IPOs of SPACs, which have raised in excess of $160 billion in funds. The vast majority – nearly 500 – of them are still looking for M&A targets.[8]

SPACs were hot in the first half of 2021, and mergers with SPACs were a highly pursued way for private companies to become publicly traded. It also allowed some start-up and other high-growth companies to access the public equity markets before they might otherwise have been eligible targets for a traditional IPO. SPACs were indeed so popular that many celebrities, ranging from movie stars to professional athletes, became SPAC sponsors, including Shaquille O'Neal and Alex Rodriguez to name just a few.

However, in the second half of the year, investor sentiments toward SPACs began to sour due to a confluence of several factors, including the oversaturation of demand for target

companies relative to supply, lackluster post-merger stock price performance of companies that merged with SPACs, increasing regulatory scrutiny from the SEC and a slew of fiduciary duty and federal securities lawsuits targeting SPACs. The IPOX SPAC Index, an index designed to track the aftermarket performance of SPACs that pursued an IPO in the U.S, was down approximately 15% for the year. At the same time, federal securities class action lawsuits involving SPACs were at an all-time high, with 32 filed in 2021.[9]

One of the hottest sectors in 2021 in terms of SPAC activity was clean/alternative energy, and especially EVs and adjacent fields. Of the approximately 260 business combinations with SPACs announced in 2021, over 30 involved companies with an industry focus in renewable energy, sustainability or EVs.[10] One notable example included Swedish electric car maker Polestar, which was backed by actor Leonardo DiCaprio, going public by merging with a SPAC at an enterprise value of $20 billion. Interestingly, SPAC mergers in the EV space have also attracted the most "stock drop" securities lawsuits,[11] including in connection with acquisitions of the Faraday Future Intelligent Electric, Arrival, Lightning eMotors, Hyzon Motors, Romeo Power, Canoo, Lordstown Motors and XL Fleet.

Celebrity involvement in a SPAC has not guaranteed success; indeed, star-backed SPACs, by and large, have not performed well. Based on data from *Fortune*, 21 out of 33 SPACs tied to famous public figures have posted negative returns for 2021,[12] including Jay-Z's cannabis-focused The Parent Company, which lost approximately 85% of its value during 2021. At the very tail end of 2021, Colin Kaepernick's SPAC made headlines as its deal with Change Co., a California lender focused on minority borrowers underserved by traditional banks, collapsed due to the former quarterback's alleged reluctance to promote the transaction on live television.[13]

It will be interesting to see what is in store for SPACs in 2022 – whether SPACs will become a permanent, albeit less turbo-charged, feature of U.S. capital markets and deal making or will instead recede to pre-2020 status.

Endnotes

1. Press Release, Block, Inc., "Square, Inc. Changes Name to Block" (December 1, 2021), https://squareup.com/us/en/press/square-changes-name-to-block.
2. Christopher Mims, "Move Over, GE. The Tech Conglomerates Are the New Leaders of Industry", *The Wall Street Journal* (November 27, 2021), https://www.wsj.com/articles/move-over-ge-tech-conglomerates-amazon-apple-microsoft-are-the-new-leaders-of-industry-11637965497.
3. Cara Lombardo, "Saks E-Commerce Unit Begins IPO Preparations", *The Wall Street Journal* (October 17, 2021), https://www.wsj.com/articles/saks-e-commerce-unit-begins-ipo-preparations-11634508756.
4. Press Release, Engine Capital LP, "Engine Capital Sends Letter to the Board of Directors of Kohl's Regarding Significant Opportunities for Value Creation" (December 6, 2021), https://www.businesswire.com/news/home/20211206005263/en/Engine-Capital-Sends-Letter-to-the-Board-of-Directors-of-Kohls-Regarding-Significant-Opportunities-for-Value-Creation.
5. Rb. Den Haag 26 mei 2021, JOR 2021, 208 m.nt. (Milieudefensie/Royal Dutch Shell PLC) (Neth.).
6. Press Release, Elliot Advisors (UK) Limited, "Elliott Publishes Letter on SSE Calling for Immediate Action to Enhance Governance and Value" (December 7, 2021), https://www.businesswire.com/news/home/20211206005885/en/Elliott-Publishes-Letter-on-SSE-Calling-for-Immediate-Action-to-Enhance-Governance-and-Value.
7. Press Release, BHP, "Growing Value and Positioning for the Future" (August 18, 2021), https://www.bhp.com/news/media-centre/releases/2021/08/growing-value-and-positioning-for-the-future.
8. SPAC Statistics, SPACInsider, https://spacinsider.com/stats.
9. Stanford Law School Securities Class Action Clearinghouse & Cornerstone Research, Current Trends in Securities Class Action Filings, Stanford Law School, https://securities.stanford.edu/current-trends.html.
10. Custom Tables, SPACInsider, https://spacinsider.com/custom-tables (last visited January 6, 2021).
11. Cornerstone Research & Stanford Law School Securities Class Action Clearinghouse, "Securities Class Action Filings", 2021 Midyear Assessment, Cornerstone Research, https://securities.stanford.edu/research-reports/1996-2021/Securities-Class-Action-Filings-2021-Midyear-Assessment.pdf (last visited January 7, 2021).
12. Bailey Lipschultz & Bloomberg, "Celebrity SPACs Produced Lackluster Returns for Star-Struck Investors this Year", *Fortune* (December 16, 2021), https://fortune.com/2021/12/16/celebrity-spac-jay-z-martha-stewart-donald-trump-investors-2021.
13. Liz Hoffman & Andrew Beaton, "Colin Kaepernick SPAC Deal Collapses, Testing Celebrity Halo", *The Wall Street Journal* (December 24, 2021), https://www.wsj.com/articles/colin-kaepernick-spac-deal-collapses-testing-celebrity-halo-11640373559.

Acknowledgment

The authors wish to thank Jason L. Zhang, an associate at Cravath, Swaine & Moore LLP, for his contributions to this chapter.

George F. Schoen is a partner in Cravath's Corporate Department. He focuses his practice on mergers, acquisitions and joint ventures, including hostile and contested transactions. He also regularly counsels corporations and their directors on fiduciary duty and corporate governance matters, and has represented numerous companies in defending against hedge fund activism.

Mr. Schoen's clients have included Disney, IBM, Johnson & Johnson, Northrop Grumman, Olin and Time Warner. Mr. Schoen has been repeatedly recognized as a leading lawyer in M&A by, among others, *Chambers USA*, *The Legal 500 US* and *IFLR1000*. He was named a "Dealmaker of the Year" by *The American Lawyer* in 2019, one of "Hollywood's Top 20 Dealmakers" by *The Hollywood Reporter* in 2018 and one of "500 Leading Lawyers in America" by *Lawdragon* from 2016 through 2021.

Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019–7475
USA

Tel: +1 212 474 1740
Email: gschoen@cravath.com
URL: www.cravath.com

Jenny Hochenberg is a partner in Cravath's Corporate Department. She focuses her practice on mergers and acquisitions, corporate governance and disclosure matters and shareholder activism defense. Ms. Hochenberg's clients have included Afterpay, Cable One, IBM, Johnson & Johnson, Scientific Games and Time Warner.

Ms. Hochenberg has been recognized for her work in mergers and acquisitions by *Who's Who Legal: M&A and Governance* and *IFLR1000*, and has been named one of the "500 Leading Dealmakers in America" by *Lawdragon*. In 2021, she was shortlisted for the "M&A Lawyer of the Year" award at Euromoney Legal Media Group's Americas Women in Business Law Awards. Additionally, Ms. Hochenberg has been named in *Crain's New York Business*'s 2022 list of "Notable Women in Law".

Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019–7475
USA

Tel: +1 212 474 1235
Email: jhochenberg@cravath.com
URL: www.cravath.com

For over two centuries, Cravath has been known as one of the world's preeminent law firms. Each of our practice areas is highly regarded, and our lawyers are widely recognized for their best-in-class legal work. Our representation of significant global companies and financial institutions, some of which have retained the Firm from their inception, has enabled us to develop an extremely broad-based practice. We are not, and do not strive to be, the largest law firm measured by number of offices or lawyers, but rather to be the firm of choice for clients with respect to their most challenging legal issues, business transactions and critical disputes.

www.cravath.com

CRAVATH

Cravath, Swaine & Moore LLP

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: glg global legal group