



M&A in the Digital Economy

by Raphael Tay and Lim Kar Mern

Smart devices. Online platforms. Blockchain. Cloud computing. Hyper-connectivity. Technology acquisition was the number 1 driver of the global M&A volume in 2018, and will continue to increase drastically as businesses continue to innovate to meet changing demands — new consumption patterns, new platforms and new business models.¹

M&A Strategies of the Era

Companies know that in order to survive in the current competitive landscape, putting in place a business strategy that is designed for the digital world is critical. Companies are looking at acquiring software, infrastructure, skills in operating within the digital economy and even online platforms as a business model. The cards are on the table: Adopt, transform or be dropped.

Technological innovation

According to a recent Deloitte report, we will see many industries converging and integrating to gain market share or to diversify their products and services.² Many advanced manufacturing companies are using M&A to enhance their products. For example, the core motivation behind Japanese pharmaceutical company Takeda acquiring the international biotech company Shire at US\$62 billion was to complement their portfolio in gastroenterology and neuroscience and, with Shire on board now as the centre of R&D, they are able to extend their products to rare diseases and plasma-derived therapies in oncology and vaccines.³

Increasingly, companies in industrial manufacturing have been divesting non-core assets to focus on their business

- 1 JP Morgan, "2019 Global M&A Outlook: Unlocking Value in a Dynamic Market" (January 2019) <<https://www.jpmorgan.com/jpm/pdf/1320746694177.pdf>> (accessed 4 October 2019)
- 2 Deloitte, "The State of the Deal: M&A Trends 2019" (2018) <<https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acquisitions/us-mergers-acquisitions-trends-2019-report.pdf>>
- 3 Allie Nawrat, "Takeda-Shire Deal: The Strategy Behind Japan's Largest Foreign Acquisition" (2 September 2019) <<https://www.pharmaceutical-technology.com/deals-analysis/takeda-shire-deal-japan-largest-foreign-acquisition/>> (accessed 7 October 2019). The two companies have a complementary portfolio in gastroenterology and neuroscience, and upon completion of the deal in January 2019, Shire would contribute its strength in rare diseases and plasma-derived therapies.

and buying core strategy assets divested by others. We see that they are in fact making acquisitions outside of their sector to add technological innovation as an effort to meet customer demands for a more services-led approach and digitally enabled services.⁴ The Swedish company IKEA in 2017 acquired TaskRabbit, an online platform that enabled users to sign up as independent contractors who could be hired as temporary workers to get things done around the house like cleaning, moving and packing and heavy lifting. Following from IKEA's acquisition of TaskRabbit, IKEA now has an assembly service that serves more than 50 cities across the US, the UK and Canada.⁵ IKEA, like many other companies, is less likely to develop its own in-house capabilities as it is simply more efficient to acquire such tech companies than to develop a strategy that is not part of its core business.

Platforms as a business model

In such a consumer-led economy, businesses are using acquisitions to enable new ways of making payments,⁶ buying insurance as investments,⁷ offering loans and giving wealth advice to add value to their core products and services.⁸ With enabling innovations like blockchain providing robust digital infrastructure to transform settlement and clearance services, we are seeing customer-oriented platforms becoming major targets for acquisition. For example, when PayPal acquired Braintree Payments in 2013, Braintree turned PayPal into a one-stop payment gateway for merchant acquiring services and payment processing around the globe. This

has attracted major customers such as Uber and Airbnb, which led to the processing of more than US\$50 billion in total authorised payment volume in 2015, quadrupling the payment volume in two years.⁹ PayPal is becoming one of the first international companies to gain a payments licence in China, after PayPal's acquisition of 70% stake in Guofubao Information Technology Co (GoPay).¹⁰

Media content and subscribers

Folks in the media industry are looking at acquiring subscription bases, technological capabilities, platforms and content in order to deliver targeted and compelling entertainment experiences. The urgency in delivering content is so great that even CBS¹¹ and Viacom¹² who had split in 2005, are merging again to provide a wider breadth of content that will hopefully put them as competitors with other streaming service-based companies like Amazon, Apple, Disney and Netflix. CBS and Viacom each have their own streaming devices and together, ViacomCBS will be offering a library of more than 140,000 TV episodes and more than 3,600 movies.¹³

Acqui-hiring

Industries across the board are also not only looking to acquire the right technology to develop their products but are also looking for the right people with the right skill set to utilise and leverage technology for their businesses. Acqui-hiring is a very popular strategy used by often mid to large organisations to snap up talent and in some

4 Ernst & Young, "2019 Mergers & Acquisitions Sector Outlook" (2019), at p 6.
 5 Zac Estrada, "IKEA Now Offers Taskrabbit Furniture Assembly Service in the US" (13 March 2018) <<https://www.theverge.com/2018/3/13/17116276/ikea-taskrabbit-furniture-assembly-service-us>> (accessed 8 October 2019)
 6 Ingrid Lunden, Jon Russell, "Naspers-owned PayU Doubles Down On India With \$70M Deal To Buy Wibmo" (12 April 2019) <<https://corporate.payu.com/news/payu-acquires-digital-payments-company-wibmo-70-million>> (accessed 11 October 2019)
 7 Alison Coleman, "Four InsurTech Startups Shaking Up the Insurance Industry" (9 July 2019) <<https://www.forbes.com/sites/alisoncoleman/2019/07/09/four-insurtech-startups-shaking-up-the-insurance-industry/#328e9b929f4a>> (accessed 11 October 2019)
 8 iMoney, "The Rise Of Robo Advisors In Malaysia, A Beginner's Investing Guide" (27 November 2018) <<https://www.imoney.my/articles/beginners-guide-robo-advisor>> (accessed 11 October 2019)
 9 Bill Ready, "Two Years After Acquisition, Braintree's Authorised Payment Volume to Cross \$50B This Year" (17 September 2015) <<https://www.braintree-payments.com/blog/two-years-after-acquisition-braintrees-authorized-payment-volume-to-cross-50-billion-this-year/>> (accessed 7 October 2019)
 10 Paul Sawers, "PayPay To Be The First Foreign Online Payment Platform In China After Acquiring 70% Stake In GoPay" (30 September 2019) <<https://venturebeat.com/2019/09/30/paypal-to-be-the-first-foreign-online-payment-platform-in-china-after-acquiring-70-stake-in-gopay/>> (accessed 7 October 2019)
 11 CBS Corporation owns Showtime the premium cable and satellite TV network.
 12 Viacom houses brands such as Comedy Central, MTV, Nickelodeon and Paramount Pictures.
 13 Julia Alexander, "CBS and Viacom Are Merging To Become ViacomCBS" (13 August 2019) <<https://www.theverge.com/2019/8/13/20746894/cbs-viacom-merger-acquisition-all-access-mtv-bet-streaming-value>> (accessed 7 October 2019)

instances, to remove competition in the market.¹⁴ This strategy has become so popular that some companies are even employing advanced data analytics to determine the exact technical and digital talent required for the critical roles, commonly at pre-completion and post-completion stages where more data would be available.¹⁵

Current parameters of cross-border M&A¹⁶

Cross-border transactions involve several key considerations such as legal, financial, social and political. Within the legal portion, lawyers would be looking at the legal framework of the transaction which includes dealing with the legal entity structure, sector-specific regulation, competition authorities, taxation, cultural differences and now more than ever, information and data security.

Given the evolution of our digital world, how do we identify the right type of lawyers who will know how to navigate around the perils of the digital world?

Increased communication and cultural nuances

In the era where joint ventures and strategic alliances are abound, we will see more lawyers embracing collaborating with not only other lawyers but also consultants, bankers and tech specialists, who are often from different cultural backgrounds. We may see lawyers becoming more adept at reading body language or even being multilingual, learning up three to five languages foreign languages in their lifetimes.

This will certainly be helpful in deciphering a party's perspective in the context of their cultural background and then consolidating and presenting that information in

a manner digestible for the other. Being acquainted with multidisciplinary platforms, employing IT solutions and speaking in the industry jargon that the client understands will become all the more fundamental as the digital economy accelerates.

Law and regulatory compliance

We will see a heightened awareness of cross-border regulatory compliance in terms of new bespoke laws, regulations and amended legislation designed for the era of digitisation. In ASEAN alone, we see many member countries' willingness to adopt digitisation through their regulatory approaches in the FinTech sectors of P2P lending, equity crowdfunding, digital payments, digital assets or cryptocurrencies and insurtech. All 10 of the ASEAN member countries have either provided for regulations to specifically regulate each of these sectors, and where they are not regulated, the government has not prohibited the activity, with the exception of Myanmar who has only prohibited cryptocurrency related activities completely.¹⁷

With the General Data Protection Regulation (GDPR) in place, all companies that process personal data while offering products and services to any individual situated in the EU at the time of data processing will be subject to GDPR, regardless of where the company is located.¹⁸ Closer to home in February 2019, Thailand passed the Personal Data Protection Act (PDPA) that is strongly modelled on GDPR and gives Thailand similar extra-territorial powers to enforce the law on any company in the world that processes data while offering any product and services to anyone situated in Thailand.¹⁹

14 For further information on 'acqui-hiring', please see "Acqui-hiring: The New Trend of Acquisition" by Raphael Tay and Ko Chia Chea at page 9

15 Ali Korotana, James McLetchie, Kevin Van Ingelgem, "M&A Success, Powered By Advanced Analytics" (August 2019) <<https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/m-and-a-success-powered-by-advanced-analytics>> (accessed 9 October 2019)

16 Scott Whitaker, Andrew Scola, "Key Considerations for Cross-border M&A Planning" (1 February 2019) <<https://www.fm-magazine.com/issues/2019/feb/cross-border-mergers-acquisitions-planning.html>> (accessed 4 October 2019)

17 CCAF, ADBI, FinTechSpace (2019). "ASEAN FinTech Ecosystem Benchmarking Study. Cambridge, UK" <<https://www.jbs.cam.ac.uk/faculty-research/centres/alternative-finance/publications/the-asean-fintech-ecosystem-benchmarking-study/>> (accessed 4 October 2019).

18 Marcus Evans, Anna Rudawski, "EDPB Clarifies Territorial Scope of GDPR" (6 December 2018) <<https://www.dataprotectionreport.com/2018/12/edpb-clarifies-territorial-scope-of-the-gdpr/>> (accessed 8 October 2019)

19 For further information on Thailand's PDPA and other jurisdictions, see "Cross-Border Comparison of Privacy Laws — Malaysia, Thailand, Australia and Singapore" by Raphael Tay, Lim Kar Mern, Fabian Horton, Piyabutr Bunaramrueang and Benjamin Tham at page 30

	P2P Lending	Equity Crowdfunding	Digital Payments	ICO/Crypto	InsurTech
Brunei	Unregulated but not prohibited	Regulated under bespoke regulation	Unregulated but not prohibited	Regulated under existing legislation	Regulated under existing legislation
Cambodia	Regulated under existing legislation	Regulated under existing legislation	Regulated under existing legislation	Regulated under bespoke legislation	Regulated under existing legislation
Indonesia	Regulated under bespoke regulation	Regulated under bespoke regulation	Regulated under bespoke regulation	Regulated under existing legislation	Regulated under existing legislation
Laos	Regulated under existing legislation	Regulated under existing legislation	Regulated under bespoke regulation	Unregulated but not prohibited	Regulated under existing legislation
Malaysia	Regulated under bespoke regulation	Regulated under bespoke regulation	Regulated under bespoke regulation	Regulated under bespoke regulation	Regulated under existing legislation
Myanmar	Regulated under bespoke regulation	Unregulated but not prohibited	Regulated under bespoke regulation	Prohibited	Regulated under existing legislation
Philippines	Regulated under existing legislation	Unregulated but not prohibited	Regulated under bespoke regulation	Regulated under existing legislation	Regulated under existing legislation
Singapore	Regulated under existing legislation	Regulated under existing legislation	Regulated under bespoke regulation	Regulated under existing legislation	Regulated under existing legislation
Thailand	Regulated under bespoke regulation	Regulated under bespoke regulation	Regulated under bespoke regulation	Regulated under bespoke regulation	Regulated under existing legislation
Vietnam	Unregulated but not prohibited	Regulated under existing legislation	Regulated under bespoke regulation	Unregulated but not prohibited	Regulated under existing legislation

Source: Cambridge Centre for Alternative Finance, ADB Institute, FinTechSpace

Cybersecurity

Compliance is interrelated with cybersecurity especially where meeting international protection standards are concerned. Cybersecurity is another important aspect that could either make or break the deal. In instances where security is compromised, we will see purchasers making significant reductions to the value of the target simply because of the risks that they would have to bear in the lack of security infrastructure.²⁰

A famous example is when Verizon Communications Inc. reduced its original deal offer by US\$350 million when Yahoo Inc. was reported to have suffered two massive

data breaches.²¹ With more businesses using digital payment services, online platforms or just keenly focused on big data, cyber threats that did not quite affect pre-digital incumbents will start to become an increasingly worrisome issue. For example, from restaurant chains with customer's credit card information, a manufacturer's information for a product design or even the pursuit of big data which has massive amounts of potentially sensitive data that must be secured and managed throughout the transaction — all of this are vulnerable to cyberattacks. We will see increased pressure to identify gaps in data protection or regulatory violations on both local and international level so that they may be included in any disclosures. There may also be

an increase in additional completion agreements such as any shared liability agreements resulting from third-party litigation in respect of any data breaches in the target.

Intellectual property

We would, of course, also be looking at an increase of IP issues, especially if the target company runs its core business with technology. We may see an increase in such assets being used as collateral in financing and even if it is clear that the target company is the owner of the IP asset, it may still be subject to third-party rights pursuant to any licence granted by the IP owner. We would have to give serious consideration into the relevant licence agreement terms to determine the rights, obligations and terms of

20 Kim S Nash and Ezequiel Minaya, "Due Diligence on Cybersecurity Becomes Bigger Factor in M&A" (5 March 2018) <<https://www.wsj.com/articles/companies-sharpen-cyber-due-diligence-as-m-a-activity-revs-up-1520226061>> (accessed 6 October 2019)

21 Anjali Athavaley, David Shepardson, "Report: Verizon Close to Yahoo Deal, Price Cut of \$250-350MM" (15 February 2017) <<https://www.foxbusiness.com/markets/report-verizon-close-to-yahoo-deal-price-cut-of-250-350mm>> (accessed 7 October 2019). The reduction was US\$350 million less than the original agreed price of US\$4.83 billion.

use regarding the licensed IP.²² Key issues that are often flagged up, especially in relation to the use of software, relate to maintenance fees, scope of use, exclusivity, assignability, territorial limits and sublicense rights. With the proliferation of software being modified and enhanced, detailed review of any terms of use of the software must be considered to ascertain whether the software product also has open source components which may provide certain restrictions in their terms and conditions.²³ There are many open source projects out there granting the user full rights to use and modify the original source code, but there are also instances where source codes are being purchased from a software developer, subject to distribution of the code to third parties. In such instances, we may anticipate the drafting of any novation agreements or waiver letters upon completion of the deal for the continuing use of the code.

Digital taxation

Tax is a local jurisdictional matter and in cross-border M&A, we would not only have to consider capital gains tax issues but also stamp duty, value-added tax, incentives, subsidies and tax relief for new investments.²⁴ However, at the rate of disruption of the brick-and-mortar economy, imposing tax on digital service providers will soon be the next big source of tax revenue. We already see many countries around the world introducing digital tax rates of up to 25%.²⁵ For deals relating to the business of using

an online platform for delivery of products and services, we would need to keep an eye out on how these taxes will be subsumed (if at all) as it will ultimately determine the structure of the deal. By 1 January 2020, foreign owners of online platforms anywhere outside of Malaysia that targets consumers in Malaysia may be taxed for their digital service.²⁶

Moving forward... online

With different M&A key drivers of the last few years, transactional lawyers are able to also increase their legal capabilities in any deal from many aspects just by being digitally equipped. Options span from paying for legal outsourcing firms to review and analyse agreements,²⁷ expanding on natural language processing and other legal AI tools to assist cross-border teams to analyse big chunks of data in an automated fashion to opting for virtual data rooms that provide secure online environments to review increasingly voluminous amount of data.²⁸

It is now not only imperative to show that we have understood the client's business strategies, we must also be tech-relevant to support the client through their digital transformations. Staying relevant and up to date with innovative technologies may just be the most important key to unlocking the most value out of an M&A deal for the client in the digital economy.

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22 Holland & Knight LLP, Andersen L "Trey" Baldy, "10 Key Intellectual Property Issues for M&A Deals" (16 November 2016) <<https://www.lexology.com/library/detail.aspx?g=d31b0b13-8de7-4607-b5ec-43826a8d6dd2>> (accessed 4 October 2019)

23 Open Source Initiative <<https://opensource.org/osd>>

24 EY Global, "How shifting tax rules can complicate M&A deals" (19 June 2019) <https://www.ey.com/en_gl/tax/how-shifting-tax-rules-can-complicate-m-a-deals> (accessed 4 October 2019)

25 Annie Musgrove, "Digital Tax Around the World: What To Know About New Tax Rules" (19 September 2019, updated 11 November 2019) <<https://quaderno.io/blog/digital-taxes-around-world-know-new-tax-rules/>> (accessed 11 November 2019)

26 The Service Tax (Amendment) Act 2019 was passed by the Dewan Rakyat (House of Representatives) of the Malaysian Parliament on 8 April 2019 <http://www.federalgazette.agc.gov.my/outputaktap/20190709_A1597_BI_Act%20A1597%20BI.pdf>

27 Document proofing provided by legal outsourcing companies such as *SmithDehn India*, where they check for defined terms, cross-references, citations, numbering, grammar and even drafting — lawyers will worry less about such embarrassments and pay more attention instead to the substance of an agreement: <<http://www.smithdehnindia.com>>

28 Natural language processing (NLP) is the use of an AI software that is able to read "natural language" and it would be able to read a contract and provide analysis on how certain key clauses differ from what it is typically expected in, for example, a supply agreement. As NLP is a machine learning software, it will increase its ability to be more accurate with time. Richard Tromans, "Legal AI: A beginner's guide" <<https://blogs.thomsonreuters.com/legal-uk/wp-content/uploads/sites/14/2017/02/Legal-AI-a-beginners-guide-web.pdf>> (accessed 8 October 2019)