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Corporate M&A

Gibralter
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Hassans

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GIBRALTAR

Law and Practice

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1. TRENDS

1.1 M&A Market

Gibraltar has established prominence in online gaming (where it is a market leader), insurance (primarily UK-facing, with one in five cars in the UK presently covered by Gibraltar insurers) and, more recently, fintech (where it has pioneered the provision and continuing development of a regulatory framework for distributed ledger technology). The jurisdiction has not traditionally been a primary M&A market, with most activity involving mergers and acquisitions of large multinational groups of which a Gibraltar company forms part, sometimes as the target entity but typically as an indirect subsidiary.

Naturally, and as has seemingly been the case worldwide, the outbreak of COVID-19 caused a multitude of deals and transactions to be postponed or suspended, with corporations refraining from pursuing new endeavours in favour of preserving liquidity and capital reserves in order to mitigate against the effect of the pandemic. However, in recent months – and noting that corporations and large players in the market have adjusted to or are welcoming the perceived "beginning of the end" of the pandemic – a clear rebound in M&A activity has been noticeable, with certain corporate trends emanating as recently as the fourth quarter of 2020.

1.2 Key Trends

The top trends exhibited during the course of 2020 were primarily driven by corporations' responses to the COVID-19 pandemic. Corporations in this jurisdiction have generally prioritised consolidating operations to improve corporate structure efficiencies, including:

- pursuing specific asset-related divestitures and sale of high-value non-core assets;
- restructuring of group operations in order to optimise intercompany arrangements and practices; and
- clearing and eliminating dormant entities and/or subsidiaries, with a view to reducing non-essential maintenance costs, risks of non-compliance and/or unnecessary exposure to potential liabilities, together with improving structure perception and credibility in order to attract new third-party investment.

1.3 Key Industries

Financial and wider regulated services industries (specifically gaming, insurance, fintech and funds) have experienced the majority of M&A activity in Gibraltar in the past 12 months. This is expected to increase further in light of the Gibraltar and UK's recently announced framework affording presently exclusive market access to a large section of financial services firms to their respective jurisdictions.

As has been the case in most countries where lockdown and other social-distancing measures have been pursued, consumer-facing industries (specifically tourism, hospitality and retail) have been the most affected by the pandemic.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

The primary technique/legal means for acquiring a company in Gibraltar is through the purchase of a company's issued share capital, which will ordinarily include entry into a form of share purchase agreement (with tailored representations, warranties and undertakings), together with a related instrument of transfer. The transfer of shares must be approved by board resolution of the target entity and the making of corresponding private and public updates to its register of members. The transfer may also require advance

regulatory approval of the Gibraltar Financial Services Commission where a Gibraltar entity subject to its regulation is directly or indirectly involved or affected by the transfer.

2.2 Primary Regulators

The primary regulatory authority relevant to M&A transactions in Gibraltar is the Gibraltar Financial Services Commission, although – depending on the nature and process of the applicable M&A transaction – each of the Supreme Court of Gibraltar, the Gibraltar Companies Registry and Gibraltar Income Tax authorities may also feature.

2.3 Restrictions on Foreign Investments

There are generally no Gibraltar law restrictions on foreign investments in Gibraltar, subject to compliance with any employment requirements of general application as well as any typical conditions of the Gibraltar Financial Services Commission for pursuing a prescribed regulated activity (which could require, for example, physical presence or other requirements).

2.4 Antitrust Regulations

Gibraltar has various key pieces of antitrust legislation designed to, inter alia, protect consumers and to ensure the operation of fair and undistorted markets with regards to both goods and services, together with empowering statutory bodies to uphold and enforce these. Notable pieces of legislation include the following:

- the Competition Act 2020, which provides a general prohibition on agreements, transactions and decisions which may affect, prevent, restrict or distort trade and competition;
- the Financial Services Act 2019 (together with numerous applicable subsidiary legislation in the form of sector-specific regulations), governing the provision of financial services in Gibraltar, and empowering the Gibraltar Financial Services Commission (as the financial services regulator) to uphold good business market practices and consumer protection; and
- the Fair Trading Act 2015, which governs the operation of consumer markets and business trading practices and licensing requirements in Gibraltar, as regulated by the Office of Fair Trading as the business trading regulator.

2.5 Labour Law Regulations

Pursuant to the Employment Act 1932 (and per Gibraltar's pre-Brexit transposition and continued application of the provisions of the EU's Acquired Rights Directive 77/187/EC, which provides the European standard on labour and employment law matters), certain extensive employee consultation and information provisions and other rights form part of the pertinent Gibraltar legislation. Notably, acquirers should be primarily mindful of provisions relating to the automatic transfer of any applicable employees by the seller which would form part of the applicable M&A transaction. Additionally, to the extent that a Gibraltar target company is regulated by the Gibraltar Financial Services Commission, additional requirements (including regarding regulated pension schemes) will also require close attention.

2.6 National Security Review

There is no specific national security review of acquisitions in Gibraltar, although Gibraltar's Proceeds of Crime Act 2015 (together with other pertinent national security legislation, including the Terrorism Act 2018), bestows wide-ranging powers on the relevant authorities to gather information and investigate potential criminal conduct (including money laundering, terrorist financing and proliferation financing), transacted or attempted to be transacted through relevant financial business (with corporate mergers and acquisitions being potentially within scope).

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

The most significant M&A development in Gibraltar in the last three years is arguably the recently announced (31 December 2020) in-principle agreement, providing a detailed framework for the conclusion of a post-Brexit UK-EU legal instrument governing Gibraltar's future relationship with the EU, with the treaty aimed to be concluded and implemented by the end of June 2021.

Summarily, the agreement hopes to allow for the creation of an arc of shared prosperity – extending from Gibraltar into the nearby Spanish hinterland – by Gibraltar's adoption of the relevant parts of the Schengen *acquis* such as to allow for the removal of the land frontier with Spain and the free movement of people and goods. The soon-to-be-had access to short and long-stay Schengen visas pursuant to Gibraltar residency, together with the preliminary accord's recognition of Gibraltar's fiscal and legal autonomy (against the backdrop of its well-regulated and compliant global reputation), are adding to the attractiveness of Gibraltar and already resulting in early relocations of high net worth individuals and businesses, in particular those which are UK-facing.

Another contender for primary recent development is the Gibraltar and the UK governments' permissions regime, affording presently exclusive market access to a wide range of licensed financial services firms to passport their respective services to and from each jurisdiction. This has already seen some EU businesses that interact heavily with the UK market, and which are facing equivalence difficulties post-Brexit, relocating to Gibraltar. In particular, the depth and breadth of the Gibraltar/UK equivalence market may prove difficult to match even in circumstances where some form of equivalence is ultimately negotiated by the UK and EU directly, given the greater commonalities between the UK and Gibraltar's systems and processes in light of their shared common law roots.

3.2 Significant Changes to Takeover Law

There is a legislative reform programme being driven by the Gibraltar Financial Services Commission which has already yielded significant, recent advancement in the consolidation and modernisation of Gibraltar law and practice in the regulated space, where M&A activity is more prevalent. The as-of-yet relatively nascent nature of this jurisdiction's M&A market, as well as the fact that there is no takeover history, may perhaps explain the absence of specific takeover provisions within current legislation.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

The comparatively fledgling nature of the local M&A market means that pre-offer strategies (such as initial stake building) are not generally a feature of the Gibraltar M&A space.

4.2 Material Shareholding Disclosure Threshold

There are no material shareholding disclosure thresholds and filing obligations in Gibraltar in relation to private or public (non-listed) entities. For listed entities, however, and pursuant to the Disclosure of Interests in Shares Act 1998, all persons who acquire a notifiable interest in a listed company's share capital (with reporting obligations at 10%, 25%, 50% and 75% thresholds of aggregate nominal value) owe an obligation of disclosure to notify the relevant listed company. Furthermore, for regulated entities, a decision by any person to make a takeover bid (no matter the

proposed ownership level) must be made public without delay and the person must inform the Gibraltar Financial Services Commission of the bid at the first reasonable opportunity.

Notwithstanding the foregoing, any acquirer who acquires any legal holding (ie, direct shares of any amount and value) in the target company will have its name and details registered at Companies House, Gibraltar and included in the Register of Members kept by the target company in its books at its registered office.

More generally, Gibraltar incorporated the 5th EU Anti-Money Laundering Directive into domestic legislation (ie, the Proceeds of Crime Act 2015) with the directive having already been implemented into the legislation by way of the Register of Ultimate Beneficial Owners Regulations 2017. Broadly speaking, a person is an ultimate beneficial owner (UBO) if they directly or indirectly:

(i) hold more than 25% of the shares in a company;
(ii) hold more than 25% of the voting rights in a company;
(iii) hold the power to appoint or remove a majority of the board of directors of a company;
(iv) have the right to exercise a significant influence or control over a company; or
(v) have the right to exercise a significant influence or control over a trust or firm (or similar non-legal arrangement) where that trust or firm meets one or more of the criteria in points (i) to (iv) above.

A person is also a UBO where they are in agreement with another UBO and they jointly meet one or more of the criteria. This requirement applies to, amongst others, companies or legal entities incorporated in Gibraltar, trusts and partnerships. The UBO must be registered with the Register of Ultimate Beneficial Owners within Gibraltar as soon as it becomes one, with this information requiring to be maintained by the legal entity, and changes to the information must be reported to the UBO register within 30 days. The UBO register is now available to members of the public. However, they only have access to the name, month and year of birth, nationality, the country of residence and nature and extent of beneficial interest upon payment of a small fee; fuller details are available to international competent authorities upon request.

4.3 Hurdles to Stakebuilding

Whilst a Gibraltar company can privately, contractually agree to alternative provisions as amongst its relevant stakeholders and officers on all manner of matters, whether in its articles of association (which are available for public inspection) or within a private shareholder agreement, this does not obviate statutory obligations. This means that, for example in the case of listed companies, exceeding material shareholding thresholds will trigger reporting obligations notwithstanding contrary private agreement.

4.4 Dealings in Derivatives

Dealing in derivatives is permitted in Gibraltar under the Financial Services Act 2019. However, this is a regulated activity under Gibraltar law, and would be subject to prior authorisation/monitoring by the Gibraltar Financial Services Commission.

4.5 Filing/Reporting Obligations

On the basis that dealing in derivatives is a regulated activity under Gibraltar law, investment firms carrying out this activity are required to adhere to ongoing periodic notification and reporting requirements set by the Gibraltar Financial Services Commission under the Financial Services Act 2019 (together with the applicable subsidiary legislation, including the Finan-

cial Services (Investment Services) Regulations 2020). Summarily, these include notification of:

- all changes to the firm's management body;
- changes to the threshold conditions re a firm's regulated activity which they have authorisation for;
- controllers and their holdings in said investment firm; and
- annual provision of external auditor's report to the GFSC re safeguarding governance arrangements for client financial instruments and funds.

4.6 Transparency

In the absence of any regulated market rules and regulations (in the context of a public M&A transaction directly or indirectly involving a Gibraltar entity that is publicly listed on a recognised stock exchange), or any restrictions or conditions stipulated by the Gibraltar Financial Services Commission, typically on a case-by-case basis (in the context of an M&A transaction directly or indirectly involving a Gibraltar regulated entity) or, additionally, where any provisions affecting a relevant Gibraltar company (whether within its articles of association, under a shareholder agreement, or otherwise) so require it, Gibraltar law does not require shareholders to disclose or make known the purpose of their acquisition and their intention regarding control of the target company.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

Other than in the case of M&A transactions directly or indirectly involving a Gibraltar-regulated entity (for which the Gibraltar Financial Services Commission requires that any bid be made public without delay and the bidder is required to inform them of the bid at the first reasonable opportunity), and in the absence of any regulated market rules and regulations (in the context of a public M&A transaction directly or indirectly involving a Gibraltar entity that is publicly listed on a recognised stock exchange), or any private contractual agreement (whether pursuant to a Gibraltar entity's articles of association, under a shareholder agreement or otherwise) there are generally no Gibraltar law provisions stipulating at which stage a target company is required to disclose a deal. Ultimately, this is likely to be negotiated and agreed upon by the parties, and will likely be driven by commercial factors and the parties' requirements.

5.2 Market Practice on Timing

There is no substantive difference between market practice and strict Gibraltar legal requirements regarding timing of disclosure of deals, noting that the only express statutory provision relates to deals directly or indirectly involving a Gibraltar-regulated entity, where bids require to be brought to the attention of the Gibraltar Financial Services Commission at the first reasonable opportunity and made public without delay.

5.3 Scope of Due Diligence

The level and scope of due diligence customarily undertaken will vary depending on the size and magnitude of the transaction, as well as whether the transaction is (i) private, (ii) public, and/or (iii) involves a Gibraltar-regulated activity.

Due diligence in private transactions will likely be restricted in scope to basic searches on publicly available records in order to confirm the particulars of the target company, and confirming any existing encumbrance on the shares or existing claims by third-party creditors. Larger-scale M&A transactions will likely involve an enhanced search and analysis of the target company, including all records contained within the target company's statutory minute-book, and review of all historical transactional documents (inclusive

of board minutes/written resolutions and shareholder resolutions). Full due diligence will also include requests for provision of copies of all relevant correspondence pertaining to the target company. Finally, it is common practice that a form of virtual data room be created for all requested documentation to be uploaded for the acquirer's (and respective advisors') review and inspection.

In the context of a public M&A transaction, the acquirer will undertake a due diligence exercise on publicly available information and may, depending on the form of the transaction (notably in the case of a hostile takeover) make a determination on whether additional due diligence is required. In the case of public M&A transactions, there will be a need to adhere to the disclosure obligations of any rules/regulations prescribed by the public market on which the public company's shares are traded on.

Lastly, and in the context of an M&A transaction concerning a regulated Gibraltar entity, the Gibraltar Financial Services Commission may utilise its wide powers of discretion to reserve its right as the regulator to request and impose additional disclosure and/or due diligence obligations on any of the concerned parties.

Thus far, the foregoing has not in our experience been impacted by the pandemic, with parties largely continuing to carry out due diligence as per ordinary course.

5.4 Standstills or Exclusivity

The use of standstill and/or exclusivity agreements is typically fact-dependent and may arise in circumstances where there is sensitivity and/or high costs or risks (reputational or wider commercial) involved. In the absence of any requirements which may be imposed by the Gibraltar Financial Services Commission in instances where a Gibraltar-regulated entity may be directly or indirectly involved and/or by the regulations of a relevant stock exchange, parties are broadly free to negotiate and agree on whatever standstill or exclusivity arrangements they may wish.

5.5 Definitive Agreements

It is permissible under Gibraltar law for the tender offer terms and conditions to be documented in a definitive agreement. In the absence of any requirements imposed by the Gibraltar Financial Services Commission in instances where a Gibraltar-regulated entity may be directly or indirectly involved, parties are broadly free to contract. In our experience, however, it is only the terms and conditions of the agreement – following acceptance of such tender offer or agreement to general heads of terms – which are normally included within the definitive agreement.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

On the basis that there are no statutory limitation time periods for public and private acquisition and sale transactions, the length of the process of such transactions will likely be determined by the size and circumstances of each transaction, including the parties' negotiations and ability to timely reach an agreement.

The same may be said for transactions including regulated entities, save for the time allowed by an offeror for accepting a bid, which must be not less than two weeks nor more than ten weeks from the date of publication of the offer document. An offeror may extend the period during which a bid will remain open for acceptance but only if (i) the offeror gives at least two weeks' notice of the offeror's intention of closing the bid, and (ii) doing so will not be contrary to an offeree company and must not be hindered in the conduct of its affairs by a bid for its securities for

longer than is reasonable. The Gibraltar Financial Services Commission may grant a derogation from the period to allow the offeree company to call a general meeting of shareholders to consider the bid.

Thus far, governmental measures taken to address the pandemic in Gibraltar have not created any major practical delays or impediments to the deal-closing process.

6.2 Mandatory Offer Threshold

Unless stipulated in the articles of association (eg, tag-along rights), in unregulated private and public M&A there are generally no Gibraltar law requirements to make a mandatory or compulsory offer. However, it should be noted that listed entities will need to comply with any relevant stock exchange requirements.

Additionally, in respect of Gibraltar-regulated entities, the Gibraltar Financial Services Commission must direct a buyer to make a mandatory offer if the buyer:

- acquires securities which, when taken together with securities in which persons acting in concert with the buyer are interested, carry 30% or more of the voting rights of a company; or
- together with any person acting in concert with the buyer:
  - (a) is interested in securities to which the aggregate carry is not less than 30% of the voting rights of a company but does not hold shares carrying more than 50% of those voting rights, and
  - (b) acquires an interest in any other securities which increases the percentage of securities carrying voting rights in which the buyer is interested.

6.3 Consideration

In public M&A, the consideration for the transfer, or each of the transfers, envisaged is to be shares in the transferee company, or one or more of the transferee companies, receivable by members of the transferor company, or transferor companies, with or without any cash payment to members.

In private M&A, the most common forms of consideration in relation to the acquisition of a target company are usually by cash (either transferred between bank accounts or by accounting entries for intercompany transactions) and/or by the putting in place of a receivable/promissory note or loan arrangement for the full or partial purchase price of the target company. In circumstances where the entities are all entities of the same group, it may also be common to assign, transfer and set off any existing intercompany positions as amongst the acquirer and the seller as consideration.

For Gibraltar-regulated entities, a buyer may offer securities, cash or a combination of both as consideration, but the exclusive alternative of cash must be available.

Common tools and methods used to bridge valuation gaps include:

- staged closings, whereby the remaining balance of the agreed upon consideration may be deferred to a later date once the acquired asset or company achieves an agreed-upon monetary or performance threshold or milestone; or
- escrow arrangements, whereby the acquirer may agree to deposit a portion of the purchase price in an escrow account, only to be received (in whole or in part) by the vendor once any outstanding issues and/or risks may be resolved or conditions met (eg, re future performance over an agreed period, etc).

6.4 Common Conditions for a Takeover Offer

Unless stipulated in the articles of association (eg, tag-along rights), in unregulated private and public M&A, there is generally no Gibraltar law prescription regarding the form of offers, nor any requirements to make a mandatory or compulsory offer. However, it should be noted that listed entities will need to comply with any relevant stock exchange requirements.

With respect to regulated entities, the Gibraltar Financial Services Commission must direct a buyer to make a mandatory offer if the buyer:

- acquires securities which when taken together with securities in which persons acting in concert with the buyer are interested, carry 30% or more of the voting rights of a company; or
- together with any person acting in concert with the buyer:
  - (a) is interested in securities to which the aggregate carry is not less than 30% of the voting rights of a company but does not hold shares carrying more than 50% of those voting rights, and
  - (b) acquires an interest in any other securities which increases the percentage of securities carrying voting rights in which the buyer is interested.

Other than that, Gibraltar companies are largely free to contract and agree to such offer conditions as they may see fit.

6.5 Minimum Acceptance Conditions

In the context of non-regulated private and public transactions, there are no statutorily prescribed minimum acceptance conditions/thresholds regarding tender offers. In the case of regulated entities, however, see requirements set out in **6.4 Common Conditions for a Takeover Offer**.

6.6 Requirement to Obtain Financing

Gibraltar law does not prevent the making of an offer subject to the condition of being successful in obtaining financing.

6.7 Types of Deal Security Measures

In the absence of any regulated market rules and regulations (in the context of a public M&A transaction directly or indirectly involving a Gibraltar company publicly listed on a recognised stock exchange), or restrictions or conditions stipulated by the Gibraltar Financial Services Commission (in the context of an M&A transaction concerning a Gibraltar-regulated entity), there are generally no Gibraltar law provisions inhibiting an acquirer of a target company from seeking to negotiate and implement deal security measures. Traditional mechanisms and arrangements have included forms of cross-indemnities and break-fee arrangements.

In the current climate, and ill effects which the COVID-19 pandemic is having on the marketplace, the authors would expect an increase in parties' seeking to negotiate terms including:

- force majeure clauses;
- specific warranties and representations (particularly for businesses and/or target companies operating as a going concern); and
- forms of protective insurance to benefit and protect either party (or their respective stake and/or policy-holders).

There have not been any changes to the regulatory environment that have impacted the length of interim periods.

6.8 Additional Governance Rights

A bidder not seeking 100% ownership of a target may pursue the attribution of specific preferential rights (including with respect to voting, preferential dividends, etc) to the shares it shall be

acquiring, typically by corresponding provision within the target entity's articles of association.

6.9 Voting by Proxy

Absent any specific prohibition in the applicable company's articles of association or under ancillary contractual arrangements – such as, for example, a shareholders' agreement – it is permissible under Gibraltar law for shareholders to vote by proxy.

6.10 Squeeze-Out Mechanisms

Gibraltar statute provides that if a buyer has acquired not less than 90% of the shares to which the offer relates and not less than 90% of the voting rights carried by such shares, the buyer can squeeze out the minority shareholders and acquire their shares at a fair price, provided that it does so within three months of the end of the time allowed for acceptance of the bid.

Alternatively, if the buyer holds not less than 90% of all shares in the company, which carry not less than 90% of the total voting rights in the company, minority shareholders can require the buyer to acquire their shares in the company at a fair price within three months of the end of the time allowed for acceptance of the bid.

Further, after making a petition to the Gibraltar court – by either a member of the target company and/or the relevant governmental minister in charge of such affairs – against unfair prejudice, the court may order the purchase of the shares of any members of the company by other members or by the company itself.

More generally, certain provisions may be included in the articles of association of the target company prescribing the manner in which to compulsorily acquire minority stakes.

6.11 Irrevocable Commitments

Given the nascent nature of Gibraltar's M&A market, there is a relative scarcity of data and experience upon which to draw, but the lack of Gibraltar statutory prescription in these matters means that there is typically substantial flexibility in the types of mechanisms that are employed in providing for shareholders to agree to an offer, including allowing for irrevocable commitments by shareholders (with or without opt-outs in given circumstances). The negotiation of these can take place at any stage and will be fact-specific (and may depend on the relationships with and identities of shareholders), but typically would come at a stage where there is already substantive agreement between the primary deal-makers.

7. DISCLOSURE

7.1 Making a Bid Public

In both public and private corporate M&A, there is no requirement to make a bid public. However, it shall become public if said arrangement requires court sanction where a court hearing is required and the relevant disclosure is made to the court of the intended arrangement. Similarly, the directors of each of the public merging companies must deliver, inter alia, a copy of the draft terms of merger to the Registrar of Companies in Gibraltar, who then publishes in the *Gibraltar Gazette* a notice at least one month before the date of any shareholder meeting of that company summoned for the purpose of approving the proposed arrangement.

For regulated entities, a person must promptly make public, and at the first reasonable opportunity inform the Gibraltar Financial Services Commission, of any decision by that person to make a takeover bid. Where a bid has been made public, the boards of the offeree and offeror companies must inform the representatives of their

respective employees of the fact or, where there are no such representatives, inform the employees themselves.

7.2 Type of Disclosure Required

The type of disclosure required for the issuance of shares in a business combination with a Gibraltar element may depend on whether the entity is private/public, listed and/or regulated.

In all cases there must be adherence to the requirements of the Register of Ultimate Beneficial Owners Regulations 2017, being continuing obligations on UBOs with 25% or more voting/economic interests (as more particularly set out in **4.2 Material Shareholding Disclosure Threshold**). There shall also be requisite filings at Companies House, Gibraltar regarding the incumbent legal shareholder(s) and any changes to a Gibraltar entity's share capital.

Public and listed entities may also see additional and ongoing disclosure obligations (eg, notification of changes to capital or board of directors' composition).

With listed entities, there may be additional disclosure requirements driven by the rules and regulations relating to the market/exchange on which they are listed. In the case of Gibraltar-regulated entities, where the issuance is pursuant to a takeover bid, there is also an obligation regarding a decision by any person to make a takeover bid requiring to be made public without delay, as well as to inform the Gibraltar Financial Services Commission of the bid at the first reasonable opportunity.

Finally, save for the aforementioned, and while noting that there is no other express statutory prescription regarding the form of disclosures relating to an issuance of shares in a Gibraltar company, Gibraltar is a common law jurisdiction and, as such, dishonestly concealing any material fact or making a statement that is false or misleading with the intention of inducing, or being reckless as to whether doing so may induce another party to enter into an agreement (including with respect to acquiring/disposing of shares), amounts to a criminal offence.

7.3 Producing Financial Statements

In relation to public mergers or private schemes of arrangement (which require court sanction), a directors' explanatory report shall be required which must set out the legal and economic grounds for the draft terms and specify any special valuation difficulties.

In addition, a supplementary accounting statement may be required which must consist of (i) a balance sheet dealing with the state of affairs of the company as at a date not more than three months before the draft terms were adopted by the directors, or (ii) where the company would be required to prepare group accounts if that date were the last day of a financial year, a consolidated balance sheet dealing with the state of affairs of the company and the undertakings that would be included in such a consolidation. Both GAAP and IFRS are accepted in Gibraltar with IFRS being the most commonly used standard.

In relation to regulated entities, although formal accounts are not technically required to be furnished within the offer documents, an offeror must prepare and make public in good time an offer document containing, inter alia, the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it (with particulars of the way in which that consideration is to be paid), information concerning the financing for the bid and the future business of the offeree company and, in so far as it is affected by the bid, the offeror company. Accordingly, it is customary for accounts to be prepared in these circumstances in order to substantiate and

address the offer document financial requirements set out above.

7.4 Transaction Documents

In relation to public mergers or private schemes of arrangement (which require court sanction), a draft of the proposed terms of the merger/scheme must be drawn up and adopted by the directors of the merging companies together with a directors' explanatory report, a supplementary accounting statement and an expert's report (the latter three may not be required in certain statutory prescribed circumstances). There may be further requirements under the relevant stock exchange where the entity is listed.

In relation to regulated entities, an offeror must prepare and make public in good time an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid. An offer document must be communicated by the offeror to the Gibraltar Financial Services Commission before it is made public and, when it is made public, must be communicated by the boards of the offeree and offeror companies to the representatives of their respective employees, or, where there are no such representatives, to the employees themselves.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

In both public and private M&A transactions, the company's board of directors are the key decision-making body. The directors must have regard to their fiduciary duties and act in the best interests of the company as a whole, essentially considering all interested persons, including the company in itself, its shareholders and third-party creditors.

More generally, directors' duties are not generally codified in Gibraltar statute but, by virtue of the common law's application in Gibraltar, directors are subject to certain fiduciary duties, which include:

- a duty to act in the best interests of the company as a whole;
- a duty to exercise a degree of skill and care that may be reasonably expected from them; and
- a duty to act for a proper purpose, as more particularly set out in the company's articles of association, which ordinarily impose certain specific duties to secure proper use of the powers bestowed upon directors.

8.2 Special or Ad Hoc Committees

Generally, whether it be public or private (in both instances also including regulated and listed entities) M&A transactions, it is not common in Gibraltar for the board of directors to establish special or ad hoc committees, but where a company has a two-tier board structure – or, in specific circumstances where it may otherwise be helpful, such as if some directors have a conflict of interest – they could have a management board and a supervisory board and/or such ad hoc committees as the situation may warrant.

8.3 Business Judgement Rule

The term "business judgement rule" is not prescribed under Gibraltar law nor, to our knowledge, has there been any activity in the market which has seen the courts in Gibraltar defer to the judgement of the board of directors in takeover situations.

However, more generally, the board of directors are the key decision-making body and are tasked with drafting the terms of the merger/scheme together with the directors' explanatory report and the supplementary accounting statement (for public mergers or private schemes of

arrangement) and the offer documents (for regulated entities), all of which are the documents which govern the relevant takeover, and accordingly offers the opportunity for them to exercise their business judgement and substantiate the commercial reasons for the proposed transaction (which the Gibraltar Court may take into consideration in exercising its discretion).

8.4 Independent Outside Advice

In all M&A transactions, it is common for directors of the relevant entities to seek independent outside advice from lawyers to advise on the relevant procedures and risks and to advise regarding potential forms of pursuance of the proposed combination and the drafting of the necessary documentation. For public mergers or private schemes of arrangement, there may be certain circumstances where an expert's report is also required, typically in situations involving financial considerations, and this is usually provided by an accountant or auditor.

8.5 Conflicts of Interest

Section 227 Companies Act 2014 provides that directors have a statutory duty to disclose the nature and extent of any conflicts of interests in contracts relating to the company. Given the relative infancy of Gibraltar's M&A market, there has not been much judicial involvement in this area and as such the authors have not seen conflicts of interest being a particular feature of scrutiny. However, it is certainly something that the Gibraltar courts are generally alive to when exercising their discretion regarding approval of proposed mergers or schemes of arrangement.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

Hostile tender offers are permitted but are not common in Gibraltar.

9.2 Directors' Use of Defensive Measures

On the basis that the directors, in accordance with their fiduciary duties, must act in the best interest of the company as a whole – and so would typically be expected to take such steps as may be consonant with these duties, and which shall be fact-specific – in Gibraltar, directors are allowed to use defensive measures in a hostile takeover as long as they are not contrary to Gibraltar law and do not unduly frustrate an offer.

9.3 Common Defensive Measures

Hostile takeovers are not very common in Gibraltar and as such there is currently no legislation or regulation which specially addresses defensive measures in a hostile takeover nor the parameters of what is and is not acceptable. Although, potentially, the directors may effectively frustrate an offer by any number of corporate transactions, which could include the reduction of the value of the target, either absolutely (eg, by declaring a substantial dividend payment) or to a particular bidder (eg, by disposing of any key asset), such actions could deny the intended selling shareholder with the opportunity to consider an offer and make a decision on its merits, with the directors potentially falling foul of their requirement to act in good faith as well as their wider fiduciary interests (discussed more fully in **8.1 Principal Directors' Duties**).

9.4 Directors' Duties

When enacting any defensive measures, the duties the directors owe are most commonly their duty to act in good faith, to promote the success of the company and to act within their powers; typically, these are set out in the company's articles of association, which may also contain specific guidance/prescription on the exercise of defensive measures in given circumstances.

9.5 Directors' Ability to "Just Say No"

Directors must act in the best interest of the company as a whole (ie, including all stakeholders), so must ensure that they do not frustrate an offer without justifiable grounds. As such, the "just say no" approach must be accompanied by a principled argument setting out a proper, defensible basis – for example, that the offer will be one that undervalues the target and its prospects and/or that the offer carries an insufficient premium for control.

In relation to regulated entities, there is an obligation on the board of directors to obtain prior authorisation of a general meeting of shareholders, in particular before taking any action, so their ability to "just say no" in these circumstances is further limited.

10. LITIGATION

10.1 Frequency of Litigation

Perhaps unsurprisingly, given that hostile takeovers are not common in Gibraltar, litigation is also very uncommon when it comes to M&A deals. Most M&A deals in Gibraltar are between connected parties, which reduces the risk of a litigious environment.

10.2 Stage of Deal

If there was any litigation in a Gibraltar M&A deal, they would generally involve issues such as poor due diligence, misuse of confidential information, competition and regulatory issues and minority shareholder rights, which may materialise at different stages of a deal's cycle (depending on when these become contentious).

10.3 "Broken-Deal" Disputes

The outbreak and spread of COVID-19 has injected additional uncertainty into the deal-making process of any transaction, no doubt occasioning disputes in existing but not-completed M&A deals and proposed but not-yet-entered-into M&A deals. The primary lessons learned may include a greater sensitivity to the potential impact of remote circumstances and an encouragement of a more robust analysis of risks, assumptions and estimates (eg, relating to revenues, earnings, operations and other material factors affecting performance) and perhaps highlighting the importance of performing enhanced due diligence to allow for better informed decision-making and agreement.

11. ACTIVISM

11.1 Shareholder Activism

Although shareholder activism is generally an important force – allowing shareholders to exercise greater responsibility and have a say in the running of the company, with their efforts capable of bringing about positive operational changes – the Gibraltar M&A market is an emerging market at present, so to date the authors have seen little reportable activity of shareholder activism.

11.2 Aims of Activists

With scarce evidence of substantial shareholder activism in Gibraltar, it is difficult to identify specific changes in their behaviour as a result of the pandemic. However – given that generally shareholder activism can encourage additional scrutiny over corporate executives and boards of directors, regarding growth and performance as well as reassessment of business strategies (including potential divestitures seeking to increase capital reserves and/or liquidity in exchange for dispensing with certain high-value non-core business components and/or assets), etc – it is possible that the pandemic-occasioned downturn, as well as the acceleration of digitalisation of the economy, may manifest itself in shareholders becoming more vocal and active in the way their entities are run.

11.3 Interference with Completion

On the basis that Gibraltar is a relatively nascent primary M&A jurisdiction, the authors have had little exposure to any elements of shareholder activism and as such have not generally experienced the interference of activists with the completion of announced transactions as a common feature.

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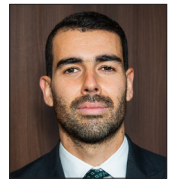

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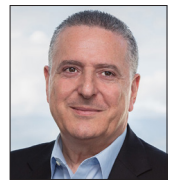

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Trends and Developments

Contributed by:
Tim Garcia, Matthew Torres, James Noguera and Michael Castiel
Hassans see p.23

COVID-19 and the Spectre of Brexit

The last year or so has been nothing if not disruptive. On a global scale, the world continues to try to manage the COVID-19 pandemic. In a narrower focus, the UK and the EU still (ironically) remain engaged in wrestling with the consequences of Brexit. Gibraltar (a British Overseas Territory) left the EU pursuant to the UK's departure, notwithstanding that 95.91% of its population voted to remain – this is perhaps unsurprising given its reliance on cross-border frontier workers to service its primary sectors of financial and wider regulated services, as well as tourism.

Accordingly, with analysts suggesting that the markets are recoiling for rebound – and with the light at the end of the tunnel afforded by worldwide vaccination efforts – the Gibraltar M&A space has also had the spectre of Brexit to contend with. Yet, the jurisdiction has lived up to its reputation of being as solid as the Rock of Gibraltar itself, demonstrating not only a resilience but also an ability to adapt to the vagaries of the pandemic and the UK and EU's "conscious uncoupling", allowing it to look forward with renewed optimism. There are arguably two key elements to this positive outlook.

UK/Gibraltar market access

M&A activity in Gibraltar continues to be very much financial and wider regulated services-centric, with the gaming, insurance and fintech industries being mainstays of the Gibraltar business space. Gibraltar is a primary international player in the online gaming world, it created – and continues to grow and evolve – the first regulatory environment for the provision of financial services relating to distributed ledger technology, and is prominent in the e-money, banking and insurance spheres, with Gibraltar companies presently insuring one in five cars in the UK.

The UK-facing nature of a lot of this business meant that securing continued market access to the UK was critical to many business operations and to the permanence of its current model. The maintenance of such access, however, now has a potentially wider significance and possible application given the UK and EU's continuing difficulties in agreeing a comprehensive equivalence regime for financial services activity in the immediate post-Brexit world.

Prior to Brexit, financial services firms in Gibraltar, the UK and all other EU countries enjoyed passporting rights allowing them to sell their services to each other's jurisdictions without additional regulatory clearance. The departure of the UK (and thereby Gibraltar) from the EU brought this to an end, both between the UK/Gibraltar and the rest of the EU states and between the UK and Gibraltar themselves in as much as arising automatically under EU law.

The UK-EU Trade and Cooperation Agreement reached on 24 December 2020 did not (and was not intended to) address questions of market access for financial services firms between the UK and the EU. As a result, this presently relies on the satisfaction of individual country requirements or equivalence determinations, generally only issued in circumstances where there is considered to be sufficient alignment. Given that the EU has thus far only granted equivalence on a time-limited basis in two areas it considers

important to it – derivatives clearing and the settling of Irish securities – and that EU equivalence determinations can be withdrawn with 30 days' notice, pending a more substantial and substantive equivalence agreement being reached between the UK and the EU, there is obviously far greater complexity, cost and uncertainty with the current proposition.

However, from Gibraltar's perspective – again noting that the majority of Gibraltar passporting activity pre-Brexit has been UK-centric – mutual access for a wide range of specified UK and Gibraltar financial services firms is already afforded under previously concluded arrangements, and the establishment of a new Gibraltar legal and institutional framework will align relevant Gibraltar law and practice with that of the UK in order to allow for this. Such access currently exists under transitional arrangements (renewable by HM Treasury for successive periods of 12 months), which have recently been extended until 31 December 2021.

As a part of mainland Europe, and with recent developments in the form of much anticipated bespoke Schengen-style arrangements – designed to allow greater fluidity and interaction between Gibraltar and the Schengen area than when it was an EU member – it is not beyond the realms of possibility that Gibraltar may soon position itself between the UK and the EU, acting as a potential intercessor on financial services between the two markets.

Whilst in response to the current EU/UK market access challenges there has been a significant increase in EU financial services firms setting-up UK offices in order to service the UK market, we have also seen a number of financial services firms relocate their UK-facing EU operations to Gibraltar in order to avail themselves of the current exclusive market access with the UK that Gibraltar enjoys (as well as such additional opportunities as the differentiated Schengen arrangements may in early course afford), and as an alternative route into the UK from a well-regulated, low-tax, reputable and compliant, common-law jurisdiction.

Coupled with the consolidating effects of the pandemic, accelerated digitalisation and significant levels of "dry-powder", this may also explain the relatively high volume of recent M&A activity in Gibraltar, particularly in the online gaming, insurance and fintech sectors.

Bespoke Schengen arrangements

As touched upon above, the manner of materialisation of Brexit is of critical importance to Gibraltar given its physical connection to mainland Europe and its reliance on the free flow of people across the land frontier with Spain, with approximately 15,000 people crossing the border daily, predominantly servicing Gibraltar's financial services (including gaming, insurance, banking, e-money and more recently fintech) and tourism industries.

Therefore, frontier fluidity is understandably high on the agenda when it comes to seeking to sustain these industries, which continue to be the primary sectors within which Gibraltar M&A activity takes place. However, the high levels of unemployment in neighbouring Spain (circa 35% in the adjacent city of La Linea, compared to circa 1% for Gibraltar), combined with Gibraltar accounting for 25% of the GDP of the wider Spanish *comarca* (county) of Campo de Gibraltar, mean that the stakes are high on both sides of the frontier.

With Gibraltar not having been included in the UK-EU Trade and Cooperation Agreement reached on 24 December 2020, a "hard Brexit" – and the potential adverse effects on the region as whole – was a very real and imminent possibility at the expiry of the Brexit transition period

at the end of 2020. Hence, the last-minute news on 31 December 2020 of an in-principle agreement establishing a proposed framework for a UK-EU legal instrument regarding Gibraltar's future relationship with the EU was very well received. Whilst the scope of – and thereby obligations set and opportunities afforded by – the Treaty is still to take final shape, the text of the preliminary accord (targeted for the end of June 2021) offers useful insight into its potential form.

At a high level, the overarching intention is to allow for an arc of shared prosperity covering Gibraltar and the nearby Spanish hinterland by "the application in Gibraltar of the relevant parts of the Schengen acquis necessary to achieve the elimination of the control on the movement of persons between Gibraltar and the Schengen area". It also envisages "a bespoke solution, based on an adaptation of a customs union between the EU and Gibraltar", leading to the removal of "the physical barriers between Gibraltar and the EU, suppressing the customs checkpoint at La Linea and making unnecessary the control of people for the purposes of customs checks", with authorisation and entry into Gibraltar and the Schengen area to be carried out cumulatively by first Gibraltar and thereafter Schengen operatives (using their respective databases) for arrivals at Gibraltar's airport and port facilities.

The unilateral issuance of residence permits by the Gibraltar authorities, subject to alignment with EU and Spanish standards and based on the existence of real links with Gibraltar, shall also afford access to short and long-term Schengen visas, adding further attraction to high net worth individuals and others considering relocation.

The preliminary accord also envisages substantial alignment by Gibraltar – including in terms of similar duties, trade policy and relevant EU customs, excise and VAT legislation, as well as on security, environmental, state aid, transport, IT systems, data and citizens' rights matters – to avoid distortions in the internal market. Crucially, however, it affirms Gibraltar as "a separate customs territory from the EU" and acknowledges limitation of alignment re EU customs, excise and VAT measures to those that are "relevant", suggesting scope for a truly "bespoke solution" that respects Gibraltar's legal and fiscal autonomy, together with the comparatively low-tax yet EU and OECD-compliant reputation it has built. Indeed, the expectation is that VAT measures will be limited to goods and not extend to services, thus preserving an important incentive for the continuing provision of financial and wider regulated services from the Rock.

This umbrella of new opportunities – both Schengen and UK market access-related – is anticipated to bring an influx of additional players into the market, and may well fuel further Gibraltar M&A activity.

Conclusion

Gibraltar's pro-business-oriented approach and ready access to key decision-makers mean that it has historically proven itself able to nimbly respond to changing market requirements. It is not only the cradle of the online gaming world but also, more recently, has a burgeoning fintech sector, partly thanks to its responsiveness and speed to market as well as its ability to continue to adapt and deliver.

Another area which may spark further stimulus is the revamping of Gibraltar limited partnerships' legislation, driven by the funds industry. The Limited Partnerships Act (which has received assent but is not yet in force at the time of writing) seeks to modernise existing limited partnership legislation, with notable changes including having limited partnership interests capable of being represented by shares, bonds, notes, loans or other debt securities or instruments, as

well as allowing Gibraltar limited partnerships to make a one-time election whether or not to have legal personality.

Limited partners are also afforded a statutory basis on which to be able to play a more active role in the affairs of the limited partnership (in certain permissible ways), as well as to vote on certain actions pro rata to their interests in the limited partnership, in each case without vitiating their limited liability from a Gibraltar legal perspective. The Protected Cell Limited Partnerships Act (again, assented to but not yet in force) shall allow for funds to be capable of being structured as a special form of limited partnership with one or more segregated cells, allowing for the creation of distinct sub-funds and arrangements within the same limited partnership, but with the benefit of statutory protection over the segregation of the assets and liabilities of each cell.

Gibraltar is always looking to develop and improve its offering, both domestically and internationally, and for many has proven to be the safest of ports in a storm. In the current state of global flux, with the private and multinational spheres and their wealth at risk of governmental redistributive efforts, Gibraltar will no doubt continue to use its best endeavours to deftly navigate the waters of change – be they pandemic, Brexit, OECD global tax-driven or otherwise – and seek to chart a course to continued prosperity.

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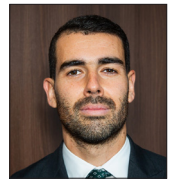

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