

## Public mergers and acquisitions in the Cayman Islands: market analysis overview

Gary Smith and Ramona Tudorancea  
Loeb Smith Attorneys

[global.practicallaw.com/w-006-9987](http://global.practicallaw.com/w-006-9987)

### TRANSACTIONS

#### 1. What have been the largest or most noteworthy public M&A transactions in the past 12 months?

In 2016 public M&A activity in the Cayman Islands continued to be marked by an increasing volume of take-private transactions involving Chinese companies previously listed on NASDAQ or NYSE. In this context, "Chinese companies" mean Cayman Islands-domiciled entities within a corporate structure (for example, as part of a VIE structure) where the ultimate operating entity is based in the People's Republic of China.

Among the most noteworthy transactions completed in 2016 and involving Chinese companies, were the take-privates of the following companies:

- China Ming Yang Wind Power Group (NYSE: MY), a wind turbine manufacturer.
- China Nepstar Chain Drugstore (NYSE: NPD), a retail drugstore chain.
- E-Commerce China Dangdang (NYSE: DANG), a business-to-consumer e-commerce company.
- E-House (China) Holdings (NYSE: EJ), a real estate services company.
- iDreamSky Technology (NASDAQ:DSKY), an independent mobile game publishing platform.
- Ku6 Media Co (NASDAQ: KUTV), an internet video company focused on user-generated content.
- Qihoo 360 Technology Co (NYSE: QIHU), an internet company.
- Mecox Lane (NASDAQ: MCOX), a multi-brand and multi-channel retailer specialising in health, beauty and lifestyle products.
- Sky-mobi (NASDAQ: MOBI), a mobile application platform and game publisher.
- Youku Tudou (NYSE: YOKU), a multi-screen entertainment and media company.

Several other similar transactions are in the process of being completed.

2016 public M&A transactions focused on new technology/innovative companies, often in the internet or internet-related sectors. Over half of the take-privates completed in 2016 related to companies with an estimated market value in excess of US\$300 million.

### Deal structures

#### 2. What have been the major trends in the structuring of public M&A transactions?

##### Methods of structuring public M&A transactions

The Cayman Islands laws principally relevant to the conduct of public M&A are:

- The Companies Law (2016 Revision) (Companies Law).
- The Limited Liability Companies Law 2016 (LLC Law).
- Common law.
- Equitable principles.

Part XVI of the Companies Law (sections 232 to 239A) establishes a streamlined statutory merger regime (Merger Regime) which facilitates mergers and consolidations between one or more companies provided:

- At least one constituent company is incorporated under the Companies Law.
- All of the following are applicable:
  - the directors and shareholders of each company participating in the merger approve the merger;
  - the shareholder vote is passed by special resolution at an extraordinary general meeting (EGM);
  - the shareholder voting threshold for approving a merger is at least two-thirds of the votes cast (provided no specific provisions in the company's articles of association (articles) stipulate a higher threshold, and provided the votes cast meet the requirement for a quorum).

The LLC Law also includes a similar framework for Cayman Islands limited liability companies.

In addition to the Merger Regime, public M&A transactions can also be structured as:

- Mergers, amalgamations and reconstructions by way of a scheme of arrangement under sections 86 and 87 of the Companies Law and sections 42 and 43 of the LLC Law.
- Takeover offer (tender offer) and minority squeeze-outs under section 88 of the Companies Law and section 44 of the LLC Law.

Take-private transactions are typically structured as mergers to be carried out under the Merger Regime, with the acquisition group using a Cayman Islands-exempted company as the acquiring corporate vehicle (*see below, Take-private transaction*).

---

The Merger Regime is attractive for both companies and investors, due to the process being relatively straightforward and simpler than either a:

- Takeover offer (tender offer) under section 88 of the Companies Law.
- Court-approved scheme of arrangement under section 86 and 87 of the Companies Law.

### **Take-private transaction**

The most straightforward structure used for a merger take-private is for a new company (MergerCo) to be formed in the Cayman Islands by the investors adhering to

the takeover group (often involving the founders/managers of the listed company, its parent and/or several private equity investors acting as sponsors for the purposes of the take-private transaction) (Buyout Group) and to then take on finance and to be ultimately merged with the company that is the target of the take-private (Target).

**Take-private offer.** After obtaining legal and financial advice, the Buyout Group agrees on the terms of the proposed merger take-private and the consideration to be offered to the shareholders of the Target and makes an offer to the board of the Target (Initial Take-Private Offer). Since most of the take-private transactions are initiated by or with the involvement of the management or certain shareholders represented at board level, the merger process requires a special committee formed of independent directors (Special Committee) to be designated to review the take-private offer and negotiate on behalf of the Target with the Buyout Group. This is to both ensure the board is in compliance with the fiduciary duties it owes the Target and to avoid any accusation of self-dealing.

**Negotiations.** The Special Committee reviews and negotiates the offer with the help of its own independent legal and financial advice, which may lengthen the process. The typical mission of the Special Committee is to:

- Investigate and evaluate the Initial Take-Private Offer.
- Discuss and negotiate any terms of the merger agreement.
- Explore and pursue any alternatives to the Initial Take-Private Offer as the Special Committee deems appropriate (including maintaining the public listing of Target or finding an alternative buyer).
- Negotiate definitive agreements with respect to the take-private or any other transaction.
- Report to the board the recommendations and conclusions of the Special Committee with respect to the Initial Take-Private Offer.

**Board approval.** The directors of each company participating in a merger (MergerCo and Target) must approve the terms and conditions of the proposed merger (Plan of Merger), including, among other things:

- How the shares in each participating company will convert into shares in the surviving company or other property (for example, cash payable to shareholders).
- What rights and restrictions will attach to the shares in the surviving company.
- How the memorandum and articles of the surviving company will be amended.
- What the amounts or benefits paid or payable to any director consequent upon the merger will be.

**Shareholder approval.** For each constituent company (the MergerCo and the Target), the Plan of Merger must be authorised by a special resolution of the shareholders who have the right to

received notice of, attend and vote at the general shareholders' meeting, voting as one class with at least a two-thirds majority.

**Consents.** Each participating company must also obtain the consent of:

- Each creditor holding a fixed or floating security interest.
- Any other relevant consents or filings with relevant regulatory authorities (such as the Cayman Islands Monetary Authority or authorities in the overseas jurisdiction where the Target is registered and/or operates).

**Filing and registration.** After obtaining all necessary authorisations and consents, the Plan of Merger must be signed by a director on behalf of each participating company and filed with the Cayman Islands Registrar of Companies, who will register the Plan of Merger and issue a certificate of merger.

**Effective date.** The merger will be effective on the date the Plan of Merger is registered by the Registrar of Companies (unless the Plan of Merger provides for a later specified date or event). On the effective date:

- All rights and assets of each of the participating companies will immediately vest in the surviving company.
- Subject to any specific arrangements, the surviving company will inherit all assets and liabilities of each of the participating companies (MergerCo and Target).

Subject to the constitutional documents of each company, there are no restrictions under the Cayman Islands law on the type of consideration offered as part of a merger (which can be cash, securities, other property or a combination of assets). Different treatment between different classes of shares or among different shareholders within the same class is possible.

Merger take-privates are generally characterised by a cash consideration being offered to shareholders other than persons affiliated with the Buyout Group. Any dissenting shareholders are granted special appraisal rights under the Companies Law, ensuring they obtain "fair value" for their shares under section 238 of the Companies Law.

### **Private equity**

---

## **3. What has been the level/extent of private equity-backed bids in the past 12 months?**

---

About half of the 2016 merger take-privates included private equity firms among the sponsors in the original non-binding proposals. In one case, a private equity firm launched a competing bid at a higher price and managed to convince several other investors to join in.

### **Finance**

---

## **4. How were the largest or most noteworthy public M&A transactions financed?**

---

In about 50% of the reported merger take-privates of Chinese companies completed in 2016 using the Merger Regime, the founders/managers of the listed company, its parent and/or several private equity investors acting as sponsors for the purposes of the take-private transaction (Buyout Group) paid for the merger consideration with either:

- Available cash of the Target.
- Equity financing provided by the Buyout Group.

For smaller deals (less than US\$50 million), which were mostly 100% equity-financed or financed using available cash of the Target or its parent, the merger process from the Initial Take-

---

Private Offer and up to the extraordinary general meeting (EGM) approval typically lasted between six and nine months. However, larger deals (more than US\$300 million), which were financed by a combination of cash, equity and debt financing, required about 11 to 20 months to complete.

### **Regulatory clearances and other authorisations**

---

#### **5. Please briefly outline the approach of the competition regulator(s) in the past 12 months. Were any public M&A transactions blocked by a regulator, or cleared subject to specific remedies, conditions or restrictions?**

---

There is no anti-trust legislation in the Cayman Islands. However, there are change-of-control rules for companies operating in regulated sectors (such as those regulated by the Cayman Islands Monetary Authority under the Banks and Trust Companies Law (2013 Revision), the Insurance Law 2010 (as amended) or the Mutual Funds Law (2015 Revision)).

In addition, ownership and control restrictions apply to entities regulated by the Information & Communications Technology Authority Law (2016 Revision).

#### **Blocked transactions**

Not applicable.

#### **Cleared subject to remedies, conditions or restrictions**

Not applicable.

#### **Future developments**

---

#### **6. What will be the main factors affecting the public M&A market over the next 12 months, and how do you expect the market to develop?**

---

In 2015 the Cayman Islands Grand Court (Grand Court) for the first time issued guidance on the determination of "fair value" in the

context of a claim by dissenting shareholders under the Cayman Merger Law in *Re: Integra Group* [FSD 92 of 2014].

First, when a dissenting shareholder triggers the court process for determining "fair value" under the Cayman Merger Law (under section 238 of the Companies Law), the Court can make such award as is just and equitable in relation to the parties' legal costs. In *Integra Group*, the Grand Court provided guidance on how such discretion might be exercised in the context of fair value assessments under the Cayman statutory merger regime.

Secondly, the Grand Court took into account fair value cases from Delaware and Canada to reach its conclusions on the determination of "fair value" in *Integra Group* and established the following principles:

- Fair value is the value to the shareholder of his proportionate share of the business as a going concern: it is a value that is "just and equitable" and provides adequate compensation consistent with the requirements of justice and equity.
- Fair value does not include any premium for forcible taking of shares and it does not include a minority discount for being a minority shareholder. In determining fair value neither the upside nor downside of the transaction being dissented from should be taken into account (such as any costs or savings obtained by a company going private).
- Assessing fair value is a fact-based exercise, which requires an important element of judgment by the court.
- Where a company's shares are listed on a major stock exchange, this does not mean that a valuation methodology based upon its publicly traded prices is necessarily the most reliable. Whether this valuation methodology is appropriate will depend on whether there is a well informed and liquid market with a large, widely held, free float.

## ONLINE RESOURCES

### **Cayman Islands judicial and legal information**

W [www.judicial.ky/](http://www.judicial.ky/)

**Description.** This is an official website of the Cayman Islands Judicial and Legal Administration, providing access to Cayman Islands laws, court judgments and information on the legal system. Certain information is restricted to subscribers.

### **Cayman Islands Monetary Authority**

W [www.cimoney.com.ky/](http://www.cimoney.com.ky/)

**Description.** This is an official website of the Cayman Islands Monetary Authority (CIMA), which also includes links to the most important laws and regulations.

---

## Practical Law Contributor profiles

---

### Gary Smith, Partner

---

Loeb Smith Attorneys  
**T** +1 (345) 749 7590  
**E** gary.smith@loebsmith.com  
**W** www.loebsmith.com/

### Ramona Tudorancea, Corporate/M&A Specialist

---

Loeb Smith Attorneys  
**T** +1 (345) 749 7494  
**E** ramona.tudorancea@loebsmith.com  
**W** www.loebsmith.com/

**Professional qualifications.** Solicitor of Supreme Court of England and Wales (non-practising); Cayman Islands Attorney

**Areas of practice.** Investment funds; M&A; corporate finance.

**Professional qualifications.** New York Bar, US; Paris Bar, France

**Areas of practice.** M&A and corporate finance.