Completing the Transaction

BioAlliance Pharma and Topotarget Enter into Cross-Border Merger Agreement

LM speaks to Jean-Nicolas Soret, partner, and Fabien Pouchot, senior associate, from Altana about their involvement in the BioAlliance Pharma and Topotarget Corporate Cross-Border Merger.

Please introduce yourself and your firm.

Altana is a French business law firm with 60 lawyers, offering tailor-made legal assistance in high level cross-border and domestic transactions and litigations.

Our M&A team has a very strong international focus and several of our attorneys are admitted both to the Paris Bar and to the NY Bar. We advise on public and private mergers, acquisitions, divestiture, joint venture and carve out transactions, as well as group reorganizations. My own core practice is advising on cross-border mergers and acquisitions.

Please tell us about your involvement in the cross-border merger between BioAlliance Pharma and Topotarget.

Our client, BioAlliance Pharma, being the absorbing entity, we have been fully involved throughout the whole transaction, from the structuring of the deal until its final completion.

Our involvement was at a maximum for the main reason that this transaction was, to our knowledge, the first cross-border merger between two listed companies under the 2005 Directive on cross-border mergers. (Directive 2005/56/EC - A previous cross-border merger between two listed companies had been completed in 2013 under directive 2001/86/EC on European company).

On this transaction, we worked hand in hand with our top-tier Danish colleagues at Bech-Bruun, advising BioAlliance Pharma on the Danish aspects' side. Topotarget was advised by Kromann Reumert and Dechert.

Why is this cross-border merger a good deal for all parties involved?

The corporate cross-border merger transaction structure enables achieving certain objectives that usual securities law transactions are rarely able to achieve.

A cash for share or a share for share tender offer, for example, will almost never lead to obtaining 100% of the share capital and voting rights of the target company. Conversely and by definition, the merger will lead to the full and complete absorption of the target company by the absorbing company.

Therefore, corporate mergers represent a true combination for the creation of a single legal entity, whereas tender offers lead -in case of success- to the acquisition of the target's control by the initiator, the target becoming a subsidiary of the initiator.

Moreover, in the tender offer scheme, the target company, as a subsidiary will, just like its parent company, remain listed, unless the threshold allowing for buyout offer with squeeze-out is crossed (which, under French law, implies holding a minimum of 95% of the share capital and voting rights), which can never be taken for granted, in particular where the free float is substantial.

It is true that corporate mergers require the approval of the shareholders' meeting of each of the two merging entities, both deciding at a qualified majority for the extraordinary meetings . However, in practice, the support from the main shareholders of the merging entities through the undertaking to vote in favor of the merger, and a communication for the public's information, is a key success factor for the completion of the merger.

The board of directors of both entities must in the course of the preparation of the transaction ensure that the terms and conditions proposed to the respective shareholders are attractive for the two sides, fair and reasonable. As long as the "price" proposed for the merger is nothing but the result of a comparative value appraisal of both companies (through the exchange ratio), a natural balance must be found to ensure that no shareholders' group is felt adversely affected.

In any case, the shareholders' vote is secured by a set of strict and protective rules. As a matter of

fact, the valuation of both companies is validated by one or more independent experts. Moreover, as far as listed companies are concerned, public information is ensured by means of a very detailed prospectus, including inter alia the pro forma accounts of the combined entity which are reviewed by the statutory auditors.

In addition, the possibility of a dual listing for the combined entity, both in Paris and in the original place of business of the absorbed entity, is another reassuring element for the shareholders.

In terms of communication, mergers also have the clear advantage to be the result of a joint and thoughtful decision of the two companies' boards leading to the creation of a combined entity. Whereas, conversely, takeover bids will usually be viewed as the consequence of a unilateral decision intended for the acquisition of a "target".

What were the main challenges that arose? How did you overcome them?

Needless to say, valuation is fundamental in order to convince the shareholders on both sides of the merits and balance of the transaction. As regards listed companies, the market price and the comparables methods may serve as indicators, along with other valuation methods recommended by the AMF.

In a cross-border merger scheme, management of legal timing constraints is a critical success factor. One should mention the overall timeframe, which is inherently lengthy and imposed by the applicable rules: in particular, as far as listed companies are concerned, the General Regulations of the AMF provide for a minimum time period of 2 months between filing and registration of the prospectus. Likewise, the overall merger timeframe will be extended if the companies are due to set up a "special negotiation body" in order to define the terms and conditions of the employees' participation in the management body of the combined entity, if they must submit the merger to the approval of the relevant antitrust authorities, or obtain tax rulings.

Great challenges were also the combination of all applicable rules and regulation (namely, EU and national corporate, securities, accounting, employment, antitrust and tax rules, as well as stock exchange requirements and local regulators' guidelines) and the preparation and the "passporting" of the merger prospectus.

An example of complexity is the right for minority shareholders of the absorbed entity to require a cash payment if they oppose the merger. Although a corporate merger normally means "paying" in shares, not in cash, the 2005 Merger Directive offered the Member States the possibility to grant such a cash-exit right to the minority shareholders, which Denmark did. There was therefore a cash risk to the transaction. However, the conditions enabling such a repurchase are much more restrictive than for a squeeze-out, in the context of a tender offer. To such extent that in the case of Onxeo, none of the 8,000 Topotarget shareholders did request such a cash payment.

Choosing the right drafting language was also crucial. If English was obviously used as the common working language, the full prospectus had to be translated into French in order to be registered by the French regulator and the summary of the prospectus also had to be translated in Danish. The merger agreement was executed in a trilingual format, too.

Is there any need for legislative change in your opinion that would help these types of deals?

Although of course perfectible, the set of European and national rules and regulations now in place for cross-border mergers is well-developed and structured.

However, the complexity of this type of transactions must not be underestimated, and the EU and national parliaments should work at further harmonizing the existing tax rules and simplifying the overly burdensome employee protection rules.

Is there anything else you would like to add?

The corporate cross-border merger transaction structure must undeniably be added to the toolbox for the creation of European champions. It is a major implementation of the principle of free movement of capital since the transfer of the registered office from one country to another is now possible without a unanimous vote of the shareholders being required.

The Onxeo corporate merger demonstrates that this type of transaction is not only possible but also constitutes a real alternative to the usual acquisition schemes, while enabling the formation of European leaders, creating high value for their shareholders. **LM**

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