

Advertising, Media and Brands Global Compliance Challenges

The M&A Landscape, Post-COVID-19 Transaction Trends and Top Due Diligence Tips

Strategic Global Legal and Regulatory Issues Facing the Advertising, Media and Brands Industry

Introduction

2021 has provided unique challenges for businesses operating across the advertising, media and brands industry. Aside from the impact of the pandemic, we are seeing a changing and challenging landscape due to increasing economic, consumer, regulatory and compliance pressures.

With increased exposure as a result of these pressures, we have partnered with BDO on this Global Compliance Challenge to bring you a series of webinars, podcasts and articles to help your business navigate this new complex compliance landscape.

Below, our legal experts summarise the M&A landscape, post-COVID-19 transaction trends, and top due diligence tips for the sector, as well as present upcoming challenges and important considerations for businesses. You can watch the full webinar [here](#).



The M&A Landscape

M&A Market Overview

The M&A market has experienced some turbulence of late. Figure 1 neatly summarises the volume of deals transacted from Q4 2017 to Q3 2021 in the UK. Prior to 2020, the M&A landscape was steady, but the impact on the pandemic on M&A activity is clearly evidenced by the significant drop in M&A activity in Q2 2020. M&A does not work well against a backdrop of uncertainty, hence, during this period, a lot of deals collapsed or were put on hold.

Nevertheless, by Q3 2020, M&A activity was on the rebound, largely driven by activity in the US where buyers returned to the market much faster and with more certainty than in the UK. Since this time, M&A activity has continued to grow, reaching a higher volume of deals than pre-COVID-19 in Q4 2020, for both trade deals and private equity deals.

Figure 2 details the fluctuations in price over the same period, although in recent days, following the emergence of Omicron, the FTSE price has declined slightly. However, it should be noted that the multiples on figure 2 understate M&A activity in the advertising media and brands sector, which is currently a very hot market – as we will discuss in due course.

How Do We Rationalise This Data in a World Where Everything Remains so Uncertain?

For trade buyers, organic growth is difficult to come by but M&A can provide an easier route to growth. At present, the UK is relatively cheap compared to the US, which is attracting overseas buyers, and there is plenty of money available. So, with the current low interest rates meaning the cost of money is almost nil, almost all asset prices are inflating, and the volume of M&A activity reflects that.

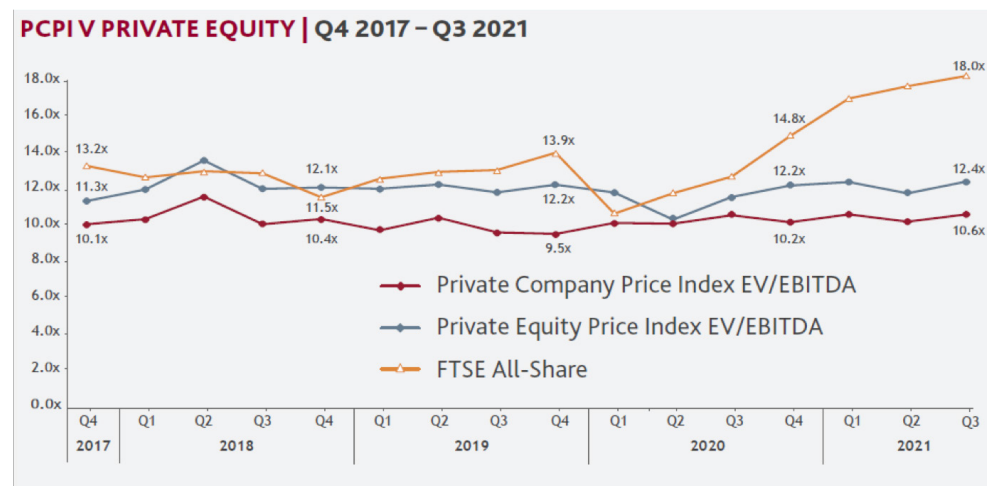
Similarly, for private equity (PE), there are currently healthy funds available and ready for investment. The typical private equity structure consists of five years selling and five years buying. Due to the lack of M&A activity in Q2 of 2020, PE houses now have some catching up to do, and this activity is driving a the high volume of M&A activity that we are currently experiencing.

Some traditional areas of PE investment (hospitality and leisure) are currently difficult to invest in due to the impact of the pandemic on these sectors. In turn, PE houses have turned their attention to tech, marketing, brands and life sciences, which are also popular areas for investment. However, M&A opportunities in these sectors are currently scarce, hence sellers in these sectors are commanding higher prices.

Figure 1



Figure 2



This newfound PE attention in the advertising media and brands sector is largely the result of the sector's resilience during the pandemic, but also because:

- (i) Many businesses in the sector are starting to look more like tech businesses, introducing new technologies with scalable capabilities
- (ii) These businesses are increasingly less reliant on people, a factor that has made the advertising media and brands sector difficult to invest in in the past
- (iii) There is strong organic growth in the sector, with opportunities to expand into new geographies or add specialisms
- (iv) Businesses in the sector are increasingly using data, which is a highly valuable commodity

Given the Backdrop of Deal Activity, How Are These Trends Manifesting in Deal Structures?

- There is a big disparity between the different sectors in terms of activity and price. Hospitality and leisure are an obvious target for reduced activity compared to the advertising media and brands sector. Within the advertising media and brands sector, there is a disparity between the businesses that are more digitally focussed, and, therefore, insulated from the effects of the pandemic, versus those businesses that are more traditional. Digitally focussed businesses are achieving higher prices than we have experienced previously, and fortunately, we see this price increase as sustainable where transactions are commanding higher prices repeatedly, rather than for one-off transactions.
- We are also seeing a huge increase in warranty and indemnity insurance being utilised, significantly more so than we have in the last four to five years. Of late, warranty and indemnity insurance is a common feature in deals of all sizes. Furthermore, insurers are more willing to insure known risks, where this was previously a challenge.
- The M&A process is becoming shorter in length, most especially for hot assets. A few years ago, businesses came to markets with the intention of getting a deal done in six to eight weeks. It is not uncommon now for businesses to try to complete in two to three weeks. This is a reflection of humanity evolving and wanting to do things quicker but it is also to reduce due diligence risks, and to get a deal struck commercially so they move on with finalising the due diligence, finalising legal terms and getting the document signed as soon as possible.
- Private equity is readily available and currently dominating the M&A landscape. Prior to the pandemic, 70-80% of PE houses involved in deals were household names. Today, there is an increased number of PE funds that are able to raise significant amounts of capital and they are all competing with each other for the hottest assets.
- The pandemic forced many businesses to reassess their risk registers, as it was unlikely that any had considered the impact of a global pandemic prior to 2020. Today, businesses are considering what other risks they may have failed to anticipate, and in order to reduce some of these risks, they are looking to sell as a means of taking their own money off the table, hence the increase in M&A activity.

The US Perspective

On the whole, the M&A trends that we are seeing in the UK align with the trends that are emerging in the US market.

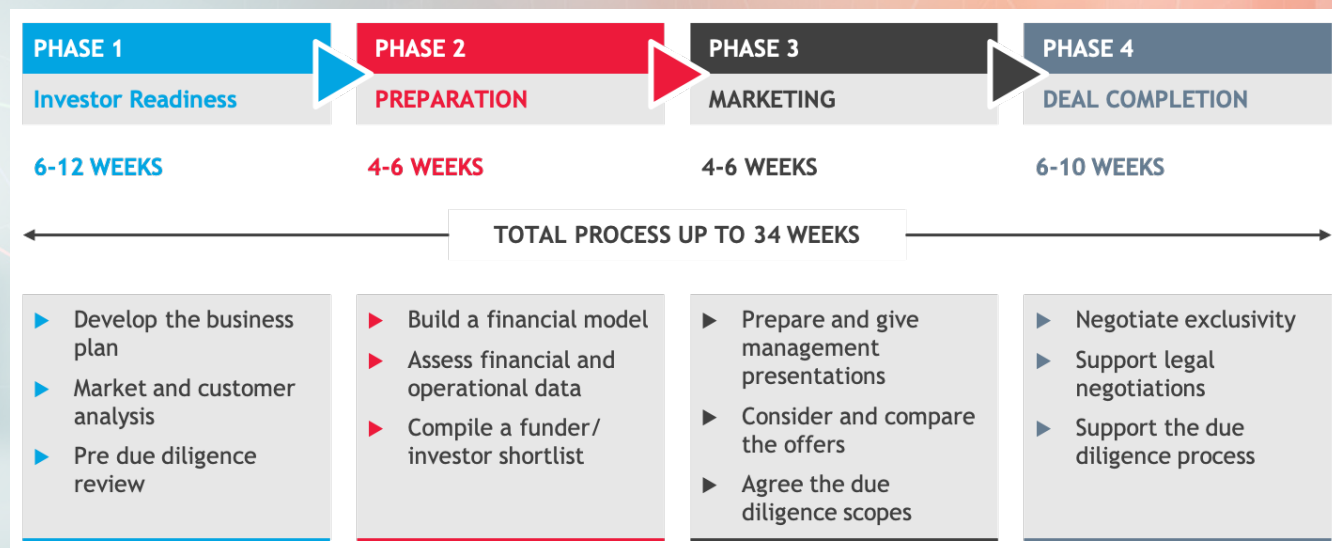
- The US continues to be a very active and friendly M&A market. Corporates increased their liquidity in 2020 and investors are now pushing companies to look for acquisitions where there are significant growth opportunities. PE funds continue to remain active in the market both as a buyer and a seller. When you couple that with the aggressive strategic buyers, it leads to a competitive market and seller-favourable terms.
- The representation of warranty and indemnity insurance remains a heavily used tool. Sellers are retaining little to no liability and this has created a greater need to perform adequate and robust due diligence that confirms the value of the transaction. Although insurers are willing to insure areas of risk that they have not been willing to insure in the past, it still requires the buyer to demonstrate thorough due diligence. If they are not able to do so, the underwriter will not provide a meaningful insurance policy, and this leads to the deal falling apart or significant exclusions from the policy, and the buyers taking on unknown risk.



Due Diligence UK

Preparing for M&A

Typically, preparation for a deal can take approximately six months, but for a smooth and efficient M&A process, we recommend starting earlier, especially for tax. Below, we detail the due diligence factors that should be top of your agenda.



Information Management

Due diligence is about using evidence to demonstrate your key value drivers. Prior to embarking on the M&A process, identify what your key value drivers are, and implement monitoring and reporting processes to ensure you can demonstrate a track record of the value that these drivers provide.

An emerging due diligence trend that is increasingly popular in the market is the production of an information pack that can be presented to potential vendors. There are several benefits to producing this due diligence pack, including:

- (i) An ability to conduct due diligence in a sheltered and controlled way and on your own terms.
- (ii) You only need to complete the process once rather than repeating the process with multiple bidders.
- (iii) Potential vendors will not endure the expense of due diligence costs and it speeds up the M&A process, in turn, more vendors will stay in the M&A process for longer, thereby increasing the competitive nature of the process and driving price increases.
- (iv) If any due diligence issues were to arise, then you have the opportunity to address these discreetly, or disclose the issue in an honest and upfront matter.
- (X) Finally, it makes you look good because it demonstrates your awareness of the business and your honesty, which helps to build confidence and trust.

Financial Due Diligence

Financial due diligence is a common concern among businesses going through an M&A transaction. However, our experience tells us that financial due diligence will rarely end a deal. Honest financial disclosures may affect the price, but an attempt to disguise financial histories or failure to disclose will have a far more detrimental effect on the erosion of confidence and trust from the vendor, and this is more likely to temper the success of the deal.

Similarly, an inability to achieve budgets and targets can be a red flag for vendors. If you are planning to go through the M&A process, it is important to monitor your financial targets and ensure these are achieved because it demonstrates the management team's ability to deliver. So, set yourself realistic goals and monitor delivery of these goals.

Due Diligence Tips

Data Privacy

Given the increasingly stringent regulation of data, many buyers are interested in how a business manages personal data and evidence of compliance. In the UK and EU, the relatively straightforward statute of GDPR applies across the board, but data compliance in the US can be more complex where each state has its own guidelines for data protection.

For the advertising media and brands sector, navigating multiple compliance regimes poses a significant challenge. Not only are you required to assess which regulations apply to your business, you must also stay compliant with the regulations of 49 other states. Adding to this complexity is the speed at which data privacy laws are rapidly evolving. To avoid risk, stay abreast of policy developments, review your data management processes regularly and act quickly to maintain compliance across all jurisdictions in which you operate.

Intellectual Property (IP)

Intellectual property is a key due diligence risk for advertising media and brands industries, and there are lots of different aspects to consider.

- (i) Define what the intellectual property of the business is. It is often difficult for buyers to explain and vendors to understand the distinguishable IP of the transaction.
- (ii) Identify how the IP is protected, including whether it has been registered, how it has been registered, where it has been registered, what class it is registered to, and whether there are any historical claims or IP conflicts with competitors.
- (iii) Establish how the IP was created. The contractual position from a legal perspective is that if you are an employee that has created IP during your employment, then the IP is automatically owned by the company. This applies across most jurisdictions. If the IP was created by a consultant, then the starting position is that the IP is owned by the individual consultant, unless they have formally assigned the IP to the company.

IP issues typically arise where there is no contract, the existing contract does not include assignment of IP language, or the IP language is not sufficient to assign IP ownership. Such issues can lead to delays where third-party involvement is required for to assign IP, and also infers additional cost.

The Grant of Options and Shares

Wherever there has been a relatively complicated movement in the shareholding of a business, it is not surprising that issues can arise. Typically, these relate to the incorrect transfer of shares, lack of compliance with pre-emption provisions, or the buyback of shares. If you plan to start the M&A process, assessing your share options and historical buybacks should be near the top of the agenda, as where issues crop up they can take four to six months to resolve in court.

Environmental, Social and Governance (ESG) Factors

ESG is an area of increasing focus for buyers. They will want to know what actions the business is taking towards fighting climate change and neutralising the carbon footprint, as well as whether any policies are in place relating to modern slavery and tax evasion, etc. Expecting warranty and indemnity insurance to cover you for these risks is no longer acceptable, and instead businesses should actively demonstrate what steps they have taken toward achieving ESG criteria. In doing so, you demonstrate awareness to potential vendors, which helps to create an open and trustworthy transaction process.

Tax Due Diligence

Tax is one of most important areas of due diligence, as on most transactions there will inevitably be a tax issue raised during the process. Tax due diligence requires a considerable amount of forward planning. We break the planning process down into four key areas of focus when preparing to sell:

- **Tax hygiene** – You need to ensure there is a tax payment record, and all your filings are up to date. Whenever a business has taken tax advice, it should be documented and there should be an audit trail for the due diligence process.
- **Optimising assets** – Similar to managing the message around due diligence issues, it is important to manage the message around tax assets within the business. The business may have tax valuable assets that should be included in transactions. These assets should be identified upfront and you should understand how they can be utilised and drive value for the business.
- **Incentivising management** – This refers to the key individuals that need to be retained in the business post transaction. Incentivising management can be quite difficult to do in a tax efficient way, so consider what options you have to ensure you retain these individuals in the business.
- **Business structure** – When thinking about what your transaction event looks like, consider if the business is structured in the right way, and whether you need to make any changes before you go through the process.

The Top Five Tax Due Diligence Risks

The following are a sample of tax due diligence risks commonly identified in recent projects.

Risk	
Share Schemes and Equity Awards	Employment tax risks can arise when share schemes/equity awards have been entered into, for example: <ul style="list-style-type: none">• When no valuation support was obtained.• When schemes were implemented without tax advice, or were not implemented in accordance with advice received.
Payments to Consultants	Employment tax risks commonly exist where businesses make payments to individuals (including directors) without the deduction of PAYE/NIC. What support is available for the position taken?
Permeant Establishment	Businesses that expand overseas rapidly can crystallise a taxable presence overseas (in terms of tax payments and filings) without realising. People have also been displaced as a result of COVID-19. This can result in missing corporate, employment or sales tax registrations/filings/payments either nationally or locally (e.g. US states taxes).
Transfer Pricing	A common area of risk with international groups where policies are out of date (e.g. more than five years old), absent, or have not kept pace with the growth/change in the business.
Pricing related deals	Have tax issues related to financing been considered? e.g. timing and availability of tax deduction and withholding taxes. Has consideration been given to the tax implications of upstream loans?

Audience Q&A

How Are You Expecting the M&A Landscape to Look Next Year?

This is a difficult question to answer in light of the newly emerging Omicron variant of COVID-19. However, we do not expect the fundamentals of the M&A landscape to change. We predict 2022 to be another very strong year, with a healthy monetary supply and plenty of deals. There is a risk of inflation, which will likely cause issues, but this will likely be a temporary readjustment to COVID-19. Alongside volume, we expect pricing to be resilient. We anticipate a greater focus on ESG, with ESG criteria forming a significant part of due diligence surveys. Companies are not expected to have all the answers to ESG-related matters, but it helps to demonstrate the company is thinking about how to mitigate these risks.

What Do You Predict for the Advertising, Media and Brands Sector Beyond 2022?

The outlook for the advertising, media and brands sector is better than the outlook for the whole M&A landscape. This is particularly true at the tech-end of the sector where there is more data. The concentration of power around key market players is a growing concern and poses uncertainty to future regulation of the ad-tech market, although new regulation will not necessarily be a bad thing for the market. Overall, prospects for the M&A Landscape and the advertising, media and brands sector are promising, but it is difficult to look beyond two years in any market or sector.

How Quick and Easy Is it to Get a Warranty and Indemnity Policy in the US?

Warranty and indemnity policies are more popular today than they have been previously, thus insurers are adept at moving quickly in producing these policies. The overall process would usually take approximately two weeks, but due to their recent rise in popularity, and the influx of M&A deals at present, there can be a slight delay. This also applies to UK warranty and indemnity policies in the UK.

Are We Seeing Warranty and Indemnity Insurance Paying Out?

Yes. Initially there were concerns around the value of these policies in terms of the cost versus the likelihood of pay out, but recent activity shows insurers are reliably paying out where necessary. Furthermore, underwriters are keen to demonstrate the percentage of claims that they are paying out on, in order to build confidence and encourage businesses to purchase these policies.

Can You Signpost any Documents or Reports Relevant to the Ad-Tech Sector That Can Be Shared With Potential Shareholders or Investors?

Please follow [this link](#) to BDO's Global Media M&A Report.

Are You Seeing an Increased Focus on IR35 From Buyers?

Yes, but also people are more aware of IR35 given recent publicity about changes to the policy that came into effect in April 2021. The IR35 changes mean that there is more risk on the business, and businesses have to do more work to assess the activity of individuals and whether these individuals represent a risk to the business.

Similarly, during the height of the pandemic, many businesses utilised the furlough scheme – a scheme that saw regular changes in policy. At present, we are seeing a tightening of HMRC investigating historical claims and issuing penalties. We recommend conducting due diligence into your use of the scheme in advance of the M&A process and making voluntary disclosures.



Panellists



Mark Yeo

Partner, Corporate, London
T +44 20 7655 1038
E mark.yeo@squirepb.com

Mark Yeo's practice covers UK and cross-border mergers and acquisitions, private equity and venture capital, public equity and joint ventures. Mark acts for clients in a variety of sectors, including sports, healthcare, leisure, retail and media.

Mark previously spent eight months working in-house as UK Legal Counsel for Yum! Restaurants International (the owners of Pizza Hut, KFC and Taco Bell).



Molly McNally

Partner, Corporate, Cleveland
T +1 216 479 8053
E molly.mcnally@squirepb.com

Molly McNally counsels public and privately held companies in domestic and international mergers, acquisitions and dispositions; corporate governance matters; capital markets transactions; and securities law compliance. Molly represents companies across a broad spectrum of industries, including automotive, manufacturing, technology, insurance, food and beverage, and banking. Molly focuses her practice on transactional matters in the healthcare industry and is a member of the American Health Lawyers Association.



Derek Neil

Corporate Finance Partner – Transaction Services, London
T +44 7966 010 272
E derek.neil@bdo.co.uk

Derek Neil is a partner in the Transaction Services team, specialising in helping his clients to do better M&A and fundraising.

He has been advising on transactions since 1998, making his way south from Newcastle to Leeds and then Sydney, before returning to the northern hemisphere when England won the Rugby World Cup and settling in London.

He specialises in working with tech and media businesses and provides due diligence for corporate and financial buyers, vendor assistance and vendor due diligence.

He also spent a year at a mid-market private equity house, where he was responsible for executing investment opportunities, as well as portfolio development.



Brad Payne

Deals Tax Partner – London
T +44 7976 598087
E brad.payne@bdo.co.uk

Brad Payne is a partner in the Deals tax team based in London. Brad has over 20 years of experience in providing tax advice on a number of large and mid-market cross-border corporate and private equity-backed transactions.

Brad specialises in advising on all aspects of the transaction life cycle, including exit readiness, corporate restructuring, refinancing, flotations, due diligence (purchaser and vendor) and tax structuring assignments in the UK and cross-border.

He specialises in working with tech and media businesses, together with private equity houses looking to invest in the sector.

