



# M&A under the spotlight

Why law firms need to change

Bird & Bird

**RSE**  
CONSULTING

# Contents

Introduction and Methodology .....	02
Executive summary .....	03
Findings .....	05
A new legal landscape.....	05
Resourcing .....	08
Fees and constraints to value .....	12
Due diligence and post-deal integration planning.....	15
Regulation, compliance and managing risk .....	18
A new kind of international service .....	21

# Introduction and Methodology

## Introduction

### Is M&A getting easier or harder?

Transactions themselves are becoming more complex, costlier, riskier and are taking longer to complete – if indeed they do complete. However, there is a tension between these developments and the fact that in many deals much of the process of doing them remains fairly straightforward.

Against this backdrop, the way in which in-house lawyers work on M&A transactions is undergoing radical change. Not surprisingly, their expectations concerning how they want to work with external law firms have changed as well. In particular, today's in-house legal counsel are expected to take a more strategic lead on the M&A transactions their companies do, not least to help ensure that deals deliver the promised value to the business.

### What do companies want from their external M&A counsel? And what must law firms do to rise to the challenge?

These are amongst the questions explored in our survey, the findings of which are included in this report. As to be expected in a qualitative survey of this type, the findings reflect a range of opinions from around the world and cover a wide variety of topics and issues associated with working on M&A transactions. Some of the views expressed by GCs were contradictory. Nevertheless the study provides valuable insight into the changes happening now and what can be expected in future. Within these there are many common threads that reinforce the notion that law firms need to change in order to meet the needs of their clients in advising on M&A transactions.

## Research methodology

- Interviews were conducted with 25 general counsel or senior M&A counsel on international M&A transactions.
- Participating companies were based in Europe (including Belgium, Finland, France, Germany, Italy, Switzerland and the UK), the US and the Asia-Pacific region (China and Australia).
- The companies represented in the survey count amongst the leaders in their field and represent a wide range of industry sectors, including financial services, life sciences, telecommunications, information technology, media, energy, food and beverage, retail and manufacturing.
- Over the past five years, companies in the survey executed nearly 400 acquisitions and disposals. For 203 of these deals, for which the purchase prices were disclosed, these totalled well over EUR 150bn.
- Interviews were conducted in person or by phone by senior consultants at RSG Consulting, between May and July 2013.

# Executive Summary

## M&A under the spotlight

### Why law firms need to change

From interviews with general counsel from leading companies in Europe, the US and Asia-Pacific, it is clear that the way in which lawyers work on M&A deals is undergoing radical change. Some of these changes are already being felt, some are on the verge of a tipping point and others are waiting in the wings. We have highlighted eight areas which general counsel predict will most impact how M&A deals are done over the next five years.

#### A change in mindset is required

Law firms have to change their attitudes, behaviours and skill sets to meet the new demands of general counsel on M&A deals. So far that change has not taken place across the market but it is happening in pockets. General counsel were frequently critical of the value delivered by external lawyers. Increasingly, general counsel want to buy experience and judgement rather than armies of junior lawyers.

#### M&A lawyers must be more strategic and more focused on integration

With the increasing demands of due diligence and the realisation that many acquisitions do not deliver the value promised, in-house lawyers are placing greater focus on the planning and integration phases of an M&A transaction. This is driving a different requirement from external lawyers who are now required to be more strategic in the due diligence process and pay greater consideration to integration from the outset.

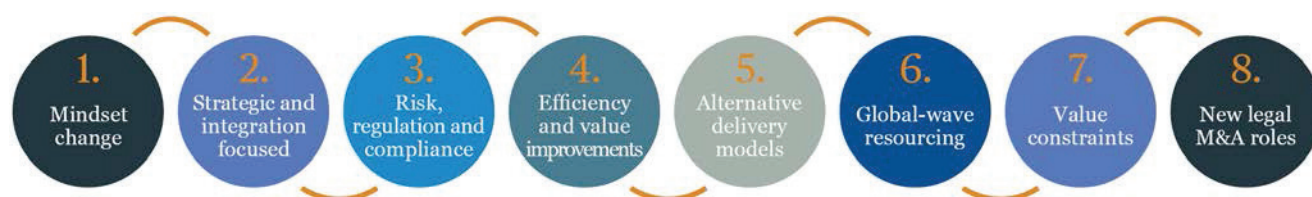
#### Risk, regulation and compliance are propelling in-house lawyers to the centre stage

In response to increasing regulation and compliance across industries and jurisdictions, the general counsel is required to play a strategic and risk-advisory role when leading M&A deals. Legal departments are recruiting top M&A specialists in-house to lead on transactions, and in-house lawyers are increasing their focus on managing compliance risk. Frequently, in-house lawyers' roles are expanding to work with communications and government affairs departments to manage reputation risk and lobbying. Their task is to see around corners and deliver a new kind of value to the business.

#### Improvement in delivering efficiency and value

While a small percentage of M&A remains highly complex and high-value work where fee rates are not an issue, clients say the majority of deals are now relatively standard and straightforward. Clients feel that there is a great deal of scope for improvement in how they work with external advisers on more "plain vanilla" deals. The starting point for driving change is how the work is charged. Respondents in our survey expect to use more fee arrangements which incentivise efficiency, share and reduce risk and drive greater value from their outside lawyers.

## M&A impact areas



### A tipping point for using alternative delivery models

LPOs, near shoring and improvements in technology, are reaching a tipping point which could significantly change how M&A deals are done. Almost all the interviewees want different resourcing options and expect changes in technology to transform the way in which they handle M&A deals in the future. Many already use tracking technologies and electronic data rooms are now standard. Many also hope that “thinking software” and semantic search will revolutionise the way in which due diligence is done.

### Global-wave resourcing

M&A deals are becoming more global and companies increasingly see the range of options for external legal advice expanding globally. Advice can be delivered from lower-cost jurisdictions, for example a UK deal can be led from another European office, or an Indian law firm could advise on Asian aspects of a deal run from the US.

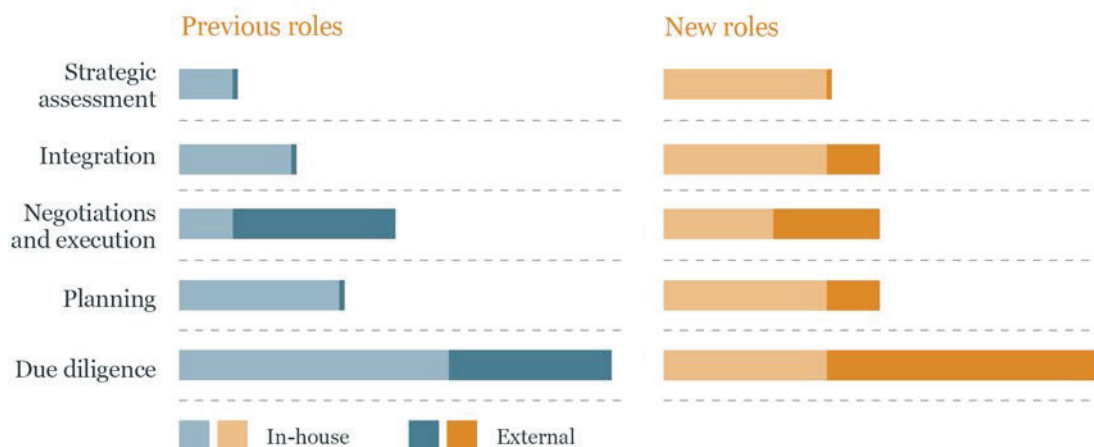
### The constraints to value

In-house lawyers feel that structural problems within law firms and the legal sector are limiting the value they can derive. Interviewees mentioned the following as obstacles: remuneration structures which don’t encourage sharing work between offices or practice areas, and leverage models with too few lawyers with the requisite experience.

### New legal M&A roles

The key trends highlighted above are driving a transformation of both in-house and external legal roles on M&A transactions. In-house lawyers will play a greater strategic and risk management role from the outset and as in-house teams upskill, they are more likely to be involved in the complex aspects of deal negotiations and execution. In turn, external counsel will need to broaden the scope of their roles and deliver more value during the planning and integration phases of the transaction. Across the board, risk-management imperatives mean there is a greater focus on due diligence.

## Where do lawyers deliver value on M&A deals?



# Findings

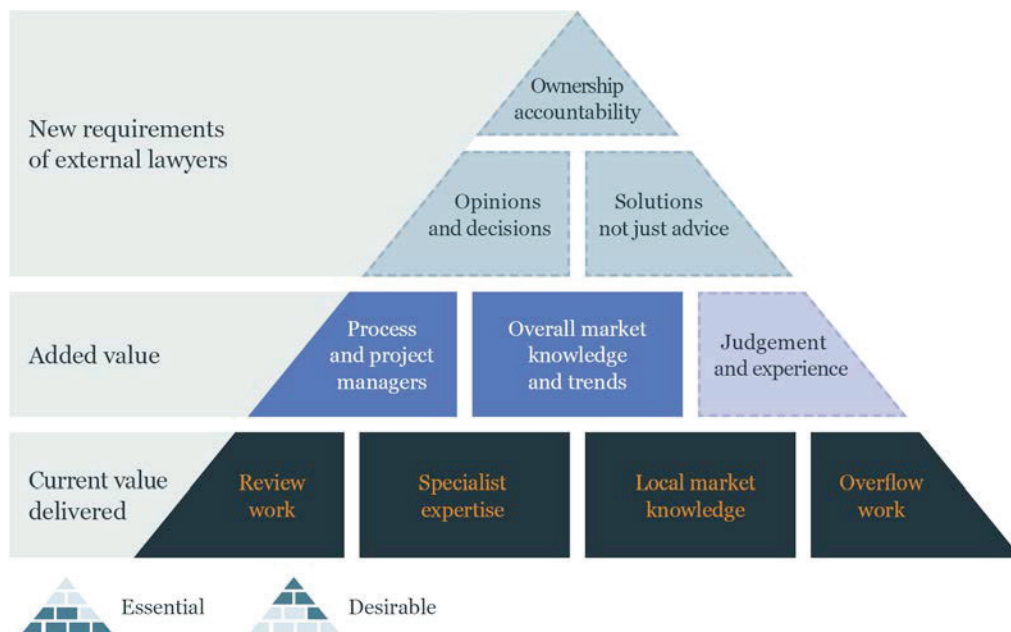
## A new legal landscape

### What do GCs want from their external M&A counsel?

The in-house role has rapidly changed over the past three years but it would appear from the general counsel in this study that law firms have lagged behind these changes. Nearly all made a critique of external law firms. One general counsel from a major conglomerate said, *"I am speaking on behalf of the CLO community when I say that top lawyers need to improve their game."*

What is behind this disgruntlement with private practice? In this section, we examine where general counsel say they currently use external lawyers in M&A transactions and where they most value their contributions. We then turn to what general counsel would like their external lawyers to deliver and what they feel is missing.

### Where do GCs want their external lawyers to deliver more value?



## Current usage and value of external lawyers

Over the past few years there has been a change in the role of external counsel on M&A deals. Most general counsel in the study said that they used external lawyers in the following capacities rather than for a head-to-tail service:

- Specialist expertise
- Review work
- Overflow work
- Local market knowledge
- Overall market knowledge and trends (more on the wish list)
- Process and project managers (more on the wish list)

The last two elements on the list are particularly valued by general counsel but are perceived to be less available from the law firms or are newer skill sets. Law firms are only now becoming sophisticated at delivering market trends intelligence and performing the role of project manager. On project management, it should be noted that some general counsel did not wish their expensive partners to play the part of process manager whilst others valued the coordination role.

As the due diligence and integration aspects of deals begin to outweigh the negotiation phase in importance, general counsel are voicing frustration with their private-practice firms for not keeping up with what they now require.

## What general counsel want and what is missing

Participants in our study say that there is a whole different set of skills and behaviours that they would like to see from external lawyers but which to date remain undelivered. Essentially, they would like to see far more than technical expertise from their external lawyers. They would like their external lawyers to change their mindsets to become business partners rather than legal advisers. This is at heart an attitudinal change.

They want their legal advisers to deliver to them:

- Judgement and experience
- Opinions and decisions
- Solutions and not just advice
- Ownership and accountability

## Top firms need to change

External lawyers can no longer act as pure “technicians”

They need to be broader business advisers. Clients expect lead partners to offer an overview and more strategic advice, earlier input into the transaction and more continued support throughout the transaction through to the integration phase. The focus on the negotiation phase when an M&A lawyer could just be a transactional lawyer is past. The requirements are now longer and more holistic.

### Experience is the name of the game

Nearly all the interviewees mentioned this one word closely followed by judgement when describing what they wanted from their external lawyers.

### A new mindset

One general counsel said that *"lawyers need to make decisions and have more confidence. They have to change their mindset."* Another felt that the technical approach was largely the preserve of the "Anglo" M&A lawyers who would do well to take a leaf out of the books of the M&A lawyers from other markets who were more used to occupying the broader role of business adviser.

## Cooperation, collaboration and speaking with different perspectives in one voice

### The new M&A partner

The role of the M&A partner is changing whether the top law firms realise it or not. Clients expect them to offer more than just access to specialists. As one general counsel from a major pharma says, *"An M&A lawyer should never say, 'I'll talk to my IP guy'! You've got to have a basic understanding of it yourself and then you know when to go to the IP guys for the complex part."*

*"Lawyers need to make decisions and have more confidence. They have to change their mindset."*

### Shooting from the hip

This sentiment was echoed by several clients: *"I want a cowboy lawyer who shoots from the hip. He doesn't have to get a pen out, but he has to shoot in the general area and be 80-90% accurate. He can say, I'll ask my colleagues and if it's very different, I'll come back to you. The good law firms are very good at coordinating themselves in this way."*

### The single point of contact

Increasingly the role of the M&A partner is to coordinate across different practice areas, offices and associated law firms to produce a single point of contact for the client. He or she has to combine the perspectives and synthesise opinions so that the general counsel has a view that is enhanced both broadly and deeply.

## Understanding why the business is doing the deal

### More than sector knowledge

Many firms have acquired sector experience. When asked, however, the general counsel felt that it was not necessarily a sole differentiator. The key requirement they have of their external lawyers is for them to understand the business and why it is doing the deal.

*"An M&A lawyer should never say, 'I'll talk to my IP guy'! You've got to have a basic understanding of it yourself and then you know when to go to the IP guys for the complex part."*



# Resourcing

The way in which M&A transactions are being resourced is going through a fundamental shift. Driven by the increased burden of compliance and regulation, globalisation, technologies and cost pressures, interviewees report changes to the way in which M&A transactions are being handled and predict more radical ones to come. Although some

commentators have said that these changes will be a temporary reflection of market conditions, general counsel have become used to the new efficiencies and say they are unlikely to return to the old status quo.

The changes cover every aspect of resourcing on M&A deals. They include the trends in the diagram below.

## M&A resourcing trends



## Internal resourcing: bringing it in-house

General counsel at companies that handle a large volume of transactions all say they have brought more work in-house in previous years. Most don't expect this to reverse with a change in market conditions. *"Everywhere there is an instinct to add value and to make sure we're doing things efficiently."*

### External advisers brought in later

As deals are more likely to be abandoned in the current climate, interviewees say that external lawyers are now engaged later with much of the initial screening and key due diligence questions handled by internal lawyers. *"We use internal resources where possible as I don't want to spend on external advice if it's not going to happen. Also, it gives us a competitive advantage, as we can pull out of the deal. We can get a long way through the process without having spent any real money, while the other side has spent a lot of money on lawyers, bankers, so they don't want to pull away. So we have the upper hand in the negotiations."* While there is a confidentiality aspect to this shift, the main driver has been to minimise costs.

### In-house M&A experts and centres of competence

Larger or more active companies are continuing to invest in transactional experts in-house. As the M&A process has become more complex and professionalised, large companies have built in-house competency centres to handle M&A deals at the global level. A more recent trend, and one which is expected to continue, is significant investment by legal departments in recruiting corporate M&A partners from top-tier law firms.

### Changing division of responsibilities

The trend reflects the business' understanding and willingness to make a considerable investment in the legal function and the growing attraction of a specialist in-house legal career. As a result, it is no longer the case that these companies need to turn to outside lawyers to handle the most complex legal aspects of an M&A deal. This in turn has changed the relationship and respective responsibilities of internal and external lawyers on a deal. The key trend according to one GC is that *"You now have that competence as companies are hiring in partner-level people from firms. It goes back to the quality of life firms are struggling to provide. It's now an opportunity to go in-house; it's not a step-down as it used to be. That means it's more difficult for the firms to add value as they are speaking to a peer, to someone with M&A experience."*

### In-house legal teams delivering more value

The trend to bring in transactional expertise at a high level combined with the insourcing of due diligence oversight work is a reflection of the increased value that in-house legal functions can deliver to their businesses. Whilst many smaller in-house teams will continue to rely on external legal suppliers to a greater degree, it is interesting to note the direction some of the big volume M&A businesses are taking.

*"You now have that competence as companies are hiring in partner-level people from firms. It goes back to the quality of life firms are struggling to provide. It's now an opportunity to go in-house; it's not a step-down as it used to be. That means it's more difficult for the firms to add value as they are speaking to a peer, to someone with M&A experience."*

## External resourcing: leaner and more expert legal teams

### Different role for external lawyers

Growing in-house capacity means a different role for external lawyers. Private practice will continue to fill resourcing gaps for smaller in-house teams or on larger deals, but will be increasingly relied on for more specialist or specific advice. In some cases M&A documents may be drafted in-house to company templates, with the role of external lawyers limited to reviewing or advising on the most complex areas of regulation and law and providing specialist and local knowledge.

### Leaner teams

Clients want law firms to deleverage and staff transactions with leaner and more expert teams. As clients become more cost conscious they are resistant to pay for junior lawyers if they feel transactions are used as a training ground. On the other hand they are willing to pay top fees for experience and expertise when in a "bet-the-company" deal situation.

### Continuity

A core team or key individual who provides continuity across the lifecycle of the deal ensure efficient knowledge transfer. *"We want to know they're not spending a great deal of time to transfer knowledge. I am happy to pay to train juniors. But we're clear that we don't pay for knowledge transfer. So I don't want someone to move out of the deal, I want a continuous team."*

### Improving the process

General counsel interviewed felt that law firms could add more value through better process as opposed to better advice. Efficiency on the routine aspects of M&A is likely to be driven by greater standardisation and quality control, through use of templates, consistent process and mapped workflows, supported by professional project management practices. One general counsel suggested something as simple as producing a detailed timeline of a transaction, highlighting key milestones and dependencies at the outset would be highly valued.

## Different law firm leverage

### Pyramids to rectangles

Many general counsel observed that the change they desired from their external law firms might only come with a change to the law firm model. In particular, general counsel felt that the pyramid structure of staffing had to change. They felt that the model should become more rectangular, with a narrow base of junior lawyers, to enable law firms to field senior partners on their work. No longer, they said, do we require armies of junior lawyers on our transactions.

In the words of one GC: *"You get outrageous fees these days, but 10 minutes with a partner at \$1000 per hour is better than 10 hours with a senior associate who needs to go away and look everything up, and then you still possibly get the wrong answer. I think that will be the development of the future in the law firms. Previously you had these pyramids with attrition every year and after 8 years you've pushed out around 90% of juniors. But the complexity of today's work with regulation means that the pyramid becomes more rectangular."*

## Global wave resourcing: low-cost jurisdictions, centrally managed

### Mexican wave

One of the trends reported by clients is in taking the "Mexican wave" approach across borders. This means using a major international law firm to then coordinate advice from a series of local firms in different jurisdictions. Transactions do not need to be led from the law firm's HQ or from where the company is based. Clients say they would often prefer to use a regional office as the lead where it makes sense from a relationship or cost perspective. Due diligence can be done at the most efficient location (irrespective of deal jurisdictions).

Clients reported success arrangements using a London based law firm for the high-end aspects of an M&A deal, while farming out commercial contract review to a regional UK firm for instance. While this "Mexican wave" approach is not new, as deals globalise, so too does the opportunity to use a variety of legal providers in different countries. Clients say they are increasingly willing to do an English law transaction through a lead law firm based in Continental Europe for example.

## Alternative suppliers: LPOs and near-shoring

### LPOs

Although the majority of general counsel interviewed for this study say they are yet to use alternative providers in an M&A transaction, they do expect to use more cost-efficient options for routine work in the future. The general counsel who have heavy M&A volumes are already using legal process outsourcing for M&A work, or have set up their own captives to benefit from the cost efficiencies of either lower-cost locations, economies of scale or more process.

### Near-shoring

A development that is exciting general counsel is the establishment of low-cost locations that are owned and managed by major law firms. *"A lot of firms have set up relationships or have set up offices in low-cost locations and that's very exciting. That's largely a reaction to their own needs, as their associates don't want to do due diligence anymore, while also addressing the client's need to do due diligence more cheaply. But it's not really been tested yet, so I'd want reassurance that someone with experience was overseeing it. I think it is very exciting though."*

## Use of technologies: a ground-swell

### A dramatic reinvention

As companies want to dig deeper to understand potential targets or new business partners, the M&A process is in need of a dramatic reinvention. Interviewees point to an increase in the complexity of transaction structures, bidding processes, due diligence, compliance issues, tax, IP rights and pensions considerations. They feel that technology is and will play a crucial role in reducing the time taken for these tasks and reducing the complexity.

Our survey respondents said they expect to make more use of technology over the next five years.

### Data rooms

Data rooms have already made their impact as have simple technologies to track document changes. For many general counsel, while these technologies have been used for a number of years, they mark the most significant change to the way they do M&A deals. *"You can see who and what time someone went and reviewed a document, exactly who is looking at documents, which buyers are just window-shopping and which are serious."*

### Thinking software

The algorithms behind 'thinking software' such as predictive coding or semantic search programmes are also developing a pace. General counsel feel that this could be the game changer but the question remains as to who is going to invest in them. The private-practice law firm or the company legal team? *"Another trend is to make use of artificial technologies that learn after a person has identified 20 emails. It gets the hang of it and takes it from there. It's just like in manufacturing – you look to either technology (capital) or labour to bring down that cost."*

### Impact on due diligence

Most general counsel feel that technologies will have the most impact in the due diligence part of a transaction. *"Technology is going to change legal services. It's just a matter of time. It's already happened in the tax base. To the extent that workflows do have routines in them, technology will replace them. In the M&A world, it's in the diligence part of the deal where they will play out."*

### An alternative solution

Technology solutions will eventually replace outsourcing and off-shoring solutions for most of the work that can be standardised and turned into a process. *"Semantic search technology could crawl through the documents in the data room and search for clauses. Anything you're sending offshore, ultimately could be done by a computer. I would expect that to happen within the next five years. Any law firm would need to invest in that kind of technology to be cost-competitive."*

*"A lot of firms have set up relationships or have set up offices in low-cost locations and that's very exciting. That's largely a reaction to their own needs, as their associates don't want to do due diligence anymore, while also addressing the client's need to do due diligence more cheaply."*

## Fees and constraints to value

While a small percentage of M&A remains highly complex and high-value work where fee rates are not an issue, clients say the majority of deals are now relatively standard and straightforward. Clients feel that there is a great deal of scope for improvement in how they work with external advisers on more “plain vanilla” deals, and the starting point for driving change is how they are charged.

In a more competitive market, general counsel have more leverage to draw on longer-term relationships with their law firms and demand fee models which share risk and incentivise efficiency. Clients are more interested in looking “under the hood” to know how and where legal work will be done by their law firms. The conversation has already moved on from a discussion about fee rates and discounts, to one about “total cost” to “efficiency” and “value”.

General counsel are increasingly interested in the following aspects of law firm fee arrangements:

- Risk sharing
- Control
- Efficiency
- Fixed fees that drive efficiency
- Better reporting and benchmarking data
- A menu of fee arrangements
- Project costing models

### Headline fee rates are not the issue

*"It should be about value. If you treat your private-practice law firms well, they are going to want to deliver value to you."*

As in other areas of legal work, the discussion around M&A fees is evolving as shown in the diagram below.

### M&A fee evolution



“*It should  
be about  
value.*”

Clients want to pay their law firms fair rates, otherwise the proposition is not sustainable. What they say they want are:

#### Risk-sharing

Fee models which align incentives and include some degree of risk sharing between the law firm and client, particularly in cases where transactions are likely to be aborted or where other business outcomes are uncertain. One GC proposed, *"What I would really like to see is a risk-reward structure. That would be a real end-to-end service, so you don't have to worry about whether you can get hold of a partner or an associate, because you are working on the same basis as them. I would like to see the big firms following what is more or less the in-house model. I'm paid by targets and deliverables, and that model has got to be applied in law firms."*

#### Control

Clients continue to want greater certainty or predictability of costs, although a majority accept that fees can't be completely fixed or capped in an M&A transaction. One GC felt that lawyers *"become infatuated with the intricacies of their fee deals, but that in the end they will charge you what they want."* The ability to control costs had more to do with relationships of trust and a mentality of aligned interests than complex fee arrangements.

#### Efficiency

Fee models which incentivise law firms to resource their teams in the most efficient manner. Senior associate rates are not materially different from partner rates, but in certain aspects of the transaction, additional experience might mean partner hours are more efficient. Clients want the ability to tap into a more flexible resource base to ensure work is done as cost-effectively as possible.

#### Fixed fees that drive efficiency

Fixed fees are now commonly used for whole transactions or for more predictable stages like due diligence. But while they continue to be shadow billed in hours by law firms, clients believe that over time they do not necessarily drive efficiency. In these cases, clients feel they are paying the same rate for the same number of hours only with the added benefit of cost certainty. More radical legal service models do away with shadow billing entirely, costing on a value or project basis where the onus is on the provider to ensure work is resourced as efficiently as possible.

#### Better reporting and benchmarking data

Clients say they would like to see budget accounting of costs and more frequent reporting. Many also want the ability, either internally or externally, to benchmark expected transaction costs by stage, against previous or similar transactions. There is an understanding from GCs, that transaction costs are not related to the purchase price, however they say this is not always understood by their business or finance function. Benchmarking data allows the legal team to give a better expectation of total costs and demonstrate where legal resources have been used efficiently and have delivered additional value.

#### A menu of fee arrangements

While some GCs are happy to pay hourly rates on certain deals, others want to be able to choose from a menu of more capped fees, cap and collar, discounts or write-offs if the transaction is aborted, staged fee structures to accommodate abandoned deals or additional work components such as restructurings.

## Due diligence and post-deal integration planning

Due diligence has changed. But external lawyers have not caught up with the change – yet. When asked what was tangibly changing for them in terms of doing M&A deals, most general counsel in the study said it was the way in which they approached due diligence. Equally, due diligence is an area in which they would like to see more change, particularly more cost efficiency and more expertise brought to bear.

Changes to how due diligence is done on M&A deals has implications for the way in which the deals are resourced both in terms of personnel and use of technology. It also reflects the changing landscape from a regulatory, compliance and global perspectives.

- Due diligence has increased and become a value drain
- Due diligence has become an art: on a par with the negotiation phase of M&A deals and a strategic exercise key to successful integration
- Due diligence changes legal resourcing, driving work in-house and demanding different requirements from external lawyers
- Due diligence is driving the use of new technologies

*"Young lawyers are doing it and they miss things. We like to have senior lawyers on deals and do not want to pay for knowledge transfer."*

### Due diligence has increased and become a value drain

Nearly all general counsel in the study agreed, whether they were in heavily regulated sectors or not, that the volume of due diligence has increased. Several remarked that due diligence had become a “drain” or a constraint to value. They felt that in practical terms this is where the M&A process had most changed over the past three years and where it is likely to continue evolving at the greatest pace. In particular, getting regulatory approvals and trying to get external law firms up to speed has made the whole due diligence process a headache.

One general counsel at an energy company says due diligence has become a drain because *"young lawyers are doing it and they miss things. We like to have senior lawyers on deals and do not want to pay for knowledge transfer."*

### Post-deal integration planning considered from the outset

Many general counsel commented that the due diligence report, far from gathering dust on a shelf once the deal has moved onto the next stage, is a live document throughout the integration phases of the transaction. *"Due diligence reports have to be structured as an integration tool. They will often be the sole document on which the divisional manager will rely and will need to include post-closing obligations. External counsel have to be more thoughtful about these."*



### Greater strategic focus on integration

Against a backdrop of greater compliance risk, steps the legal team take in the days and weeks after an acquisition can be just as important as the due diligence. *“Gone are the days of focusing on doing the deal then handing it over to the business and seeing what they make of it.”*

The risk of failed integration and not achieving planned synergies is now higher on the agenda of senior management and the board. Likewise, general counsel are required to take bolder calls and not hide behind external advisor opinion if the integration risks are too high. This means integration planning is starting earlier in the process. *“As soon as you get beyond the initial terms sheet or indicative offer stage, you would have an integration plan in place. And you need to have this plan if you want to get approval.”*

### An expanded role for external counsel

General counsel want external lawyers to be more actively engaged in the integration planning process, working more closely with the business to identify areas of risk or where the gaps might be in integration. However, it was felt that currently *“law firms shy away from that, because they don’t feel it’s their role.”* During due diligence process, clients say that lawyers should be looking at the red flags and advising on how integration relates to those areas.

### The art of due diligence

*“The art of due diligence is to pinpoint what is the important information and point it out.”*

Many general counsel say that in the future, due diligence reports would be shorter, more focused and more graphical in presentation. The art lies in not searching blindly but knowing what to search for, and this requires judgement and experience.

General counsel say that they want due diligence reports to be focused and solution-oriented so they do not only highlight risks but also provide answers. However, their gripe is that too few external law firms currently produce reports in this way. Some general counsel felt that the big change coming down the line would be in the due diligence documents which would focus on the essential risks and value propositions whilst being produced much faster than today.

The importance of the due diligence phase to concluding a deal means it is often considered on a par, if not more important than the negotiation phase for general counsel. This implies far-reaching future change for external M&A lawyers and is already leading to a shift in the way the due diligence phases of a deal are resourced.

### Due diligence changes legal resourcing

One US general counsel said the issue for a buyer from a business perspective boils down to, *“certainty, speed and certainty of execution, and protection against the unexpected.”* But in order to protect a business from the unexpected, the ways in which due diligence is conducted has had to change. In particular, this has required more senior legal and commercially-minded personnel involved in the process.

Most general counsel in the study have brought due diligence work in-house because *“it has become too mechanical and there is no incentive for law firms to do it efficiently.”* Doing it in-house both saves time and anxiety.

The other reason for bringing the work in-house is the compliance dimension now central to due diligence. As one general counsel pointed out, *“Outside law firms are not compliance experts. They do not know the rules. Law firms have specialist lawyers but whether a money laundering process is robust is not a private practice lawyer’s point.”*

The requirement for experience will mean that private-practice law firms will have to rethink the way they resource due diligence exercises. The use of more efficient or alternative suppliers alongside senior partners appears to be what the market requires, but it remains to be seen how private-practice responds to this innovation challenge.

*“Gone are the days of focusing on doing the deal then handing it over to the business and seeing what they make of it.”*

## Due diligence drives use of new technologies

Several general counsel in the study talked about the technologies they were deploying in their due diligence exercises and the future impact they are likely to have. Use of virtual/electronic data rooms has become standard, but general counsel feel that many law firms are yet to catch up with the market.

Today there are still issues with electronic data rooms. The key one cited is the lack of an ability to browse the data. *"The inability to browse openly means it is harder to spot things. It is painful at the moment but may improve in the next iteration."* The real disadvantage of this say general counsel is from a litigation perspective. Overall though, most general counsel felt that virtual data companies were improving the process.

Looking ahead, as mentioned above in the "Resourcing" section, interviewees feel that technology solutions will eventually replace outsourcing and off-shoring solutions for most of the due diligence work that can be standardised and turned into a process. Semantic search was cited in particular.

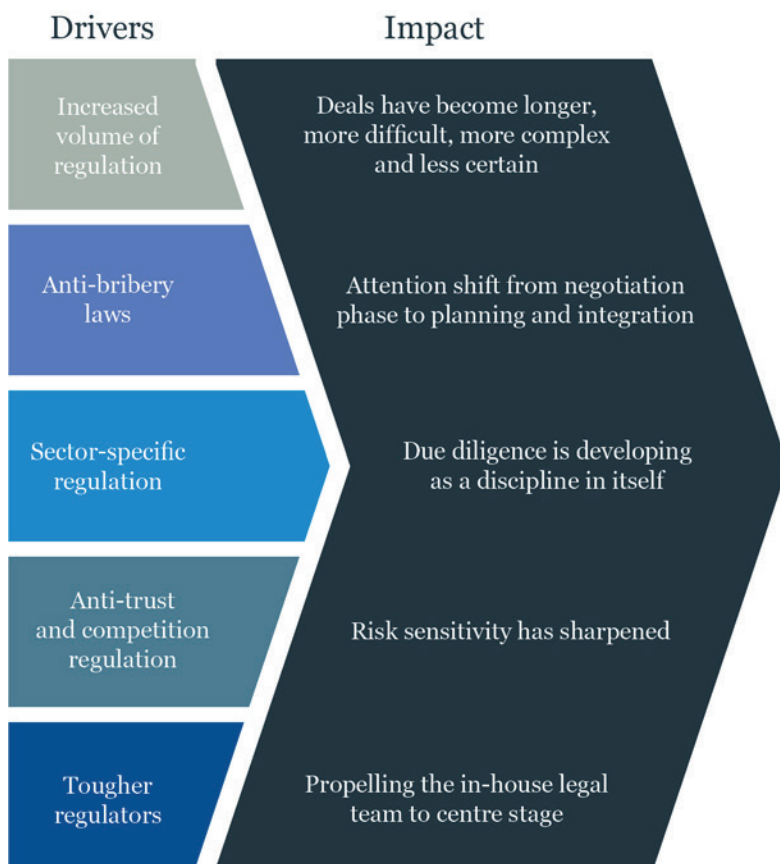
*"The inability to browse openly means it is harder to spot things. It is painful at the moment but may improve in the next iteration."*

## Regulation, compliance and managing risk

A driving force behind the changes to internal and external roles on transactions is a new approach to M&A risk management. Minding regulation and ensuring compliance are the new order of the day for most businesses. Even for general counsel outside heavily-regulated industries, such as the financial services, regulation and compliance are altering every-day working lives. As business looks for growth in emerging markets, M&A activity has stopped being straightforward because of the compliance, regulatory and reputational risks. As one general counsel said, *"It has gone from 'let's do it' to 'can we do it?'"*

Of the general counsel at some of the world's leading corporates interviewed for this study, all talked about how regulation and compliance was altering the way in which M&A deals are done. *"It's become a huge potential deal stopper as well. When our transactions go to the board, that's one of the main things they are looking at."* The tentacles and implications of a more active regulator are both overt and subtle.

### M&A risk management



## Two frequently-mentioned regulation and compliance considerations:

### 1. Anti-bribery

Now top-of-the-board agenda when considering new acquisitions, in fast-developing markets. Risk assessment and a thorough compliance due diligence are essential, but so is having an integration plan to ensure adequate procedures are introduced into acquired companies. *“Whereas 10 or 20 years ago, while you worried about what was right there on the surface, unless it was government contractor, or a company with a high risk profile, you didn’t concern yourself with it a great deal. But in today’s environment, it’s an area of increasing focus.”*

### 2. Anti-trust and competition

In fast-developing industries such as online technology services, existing competition regulation is not always keeping pace with change in business. This requires lawyers to play a different role when working with regulators and to be versed in new kinds of economic analyses for competition.

### Main impacts of international M&A

- Deals have become longer, more difficult, more complex and less certain
- Attention shift from negotiation phase to planning and integration
- Due diligence is developing as a discipline in itself
- Risk sensitivity has sharpened
- Propelling the in-house legal team to centre stage

## Deals have become longer, more difficult, more complex and less certain

Some general counsel feel that international M&A now takes longer than before because of the regulatory scrutiny between signing and closing of deals. Not only is M&A more difficult because of the red tape, it has also become more complex.

## Attention shift from negotiation phase to planning and integration

There is now far more emphasis on the front and back end of deals: the planning and the integration phases. Due diligence is now more critical to the process because of the effect of greater compliance and regulatory requirements. From the outset, due diligence will be more focused on compliance and there will be a greater focus on compliance issues when it comes to integration planning. International law firm experience dealing with regulators in riskier jurisdictions, and handling compliance due diligence is increasingly valuable.

## Risk sensitivity has sharpened

### Legal and compliance is centre stage

The need to think about regulation and compliance differently has meant that the risk sensitivity of the deal-makers has changed and internal legal and compliance teams have taken centre stage.

### Reputational risk awareness

The threat of reputation damage caused by problems in a newly-acquired target in an emerging market has meant that many deals do not go the distance. Reputation risk has in fact shot up the risk register for many corporates who now need to consider the threat of the press alongside the regulator. *“I’ve heard it said that the Financial Times is the highest court in the land,”* said the general counsel at a major US company. Being able to get a company’s messages out in not only the right way but a compelling way has risen up the agenda of the internal legal teams working on M&A deals.

### More cautious risk appetite

Several general counsel pointed to a more cautious risk appetite. FCPA and UK Bribery Act considerations are uppermost in many people’s minds and have spread decision-making in deals out across the business into legal and compliance, where the latter did not used to be involved in a transaction. *“Anti-bribery legislation has made buying companies a high-stakes game,”* said one general counsel from a major European company.

### Compliance due diligence

Law firms need to build capacity to handle compliance due diligence. There is currently a gap in the market with many companies turning to alternative advisors. However, many general counsel expect law firms handling their M&A deals to build their own expertise to keep pace. One GC said that without compliance expertise, *“either you get the corporate people who do the rest of the due diligence and who don’t have much experience in this murky world, or they bring in litigators who take a much more aggressive approach, which can upset the target.”*

US general counsel say companies who had experienced compliance issues or had brushes with the Department of Justice have altered their risk approach as a result and are now less competitive in the bidding process.

Many interviewees reported warier buyers. *“[Some] buyers out there don't have a lot of flexibility. They can raise the funds but don't have a buffer like a big company so their view on risk is very narrow.”* The prognosis is that the area of risk allocation needs to be re-thought in light of the changing nature of buyers.

Other general counsel from more traditional industries observed the lack of cash in the market continuing and a trend for companies to become less ambitious. *“There is an understanding that there has been a direct correlation between acquisitions and sufferings,”* said the general counsel from a manufacturing company.

*“There is an understanding that there has been a direct correlation between acquisitions and sufferings.”*

### Propelling in-house legal to centre stage

Compliance and regulation requirements and the need to have a realistic risk assessment of their implications when buying a target have meant internal lawyers have moved to centre stage in M&A. Their input has become increasingly valuable in deal assessments.

Some in-house legal teams find that they are best placed to run the due diligence and to assess compliance risks in a target. Says one general counsel, *“I have come to realise that due diligence is viewed as potentially a blank cheque for outside advisers. I get my transactional business lawyers to do the due diligence when acquiring an asset as it is counterproductive to get outside lawyers to do it. Our philosophy is to insource due diligence much more than to outsource it.”*

*“Some buyers out there don't have a lot of flexibility. They can raise the funds but don't have a buffer like a big company so their view on risk is very narrow.”*

## A new kind of international service

Another key trend affecting how in-house lawyers work on M&A deals is that they are increasingly global. Transactions are more likely to be cross-border and emerging market parties to the deal are as likely to be the acquirers as the sellers or target. This brings with it a range of coordination and regulatory challenges for in-house legal teams.

At the same time, a geographic shift in focus towards emerging markets, and Asia in particular, is expected to change how M&A deals are done as new cultural and market norms are accommodated. According to many of the general counsel interviewed, the next decade will be defined by deals in Asia, involving an Asian buyer, seller or target.

As a result, in-house lawyers require a different kind of local knowledge and international coordination from their external law firms. Law firms need to reposition their offering if they want to ensure they are delivering the “seamless international service” clients say they need.

To navigate more complex global deals, companies and law firms are rethinking how they work together. This section covers the challenges and what clients say they want:

- The myth of the global law firm
- Clients rarely receive “seamless international service”
- What do clients want?

### The myth of the global law firm

A number of general counsel at large companies maintain that there is no such thing as a truly global law firm: *“I know what it’s like to operate globally, believe me, and when a firm comes and says they are this big global player I tend to shrug my shoulders.”* Likewise, a single brand is not a guarantee of consistent quality. Interviewees say for example that many law firms still do not take a consistent approach to due diligence or deliver diligence reports in a uniform format across offices.

### Clients rarely receive “seamless international service”

Most international law firms say they offer “seamless international service”, yet every client asked the question said they rarely receive it. At the most basic level, service is not seamless if the client acts as the hub and is the only party with full oversight across all regions or work streams, or if they receive separate invoices from different law firm offices.

### Paying a second time for coordination

International advice from loosely-networked firms can be poor value if the client is paying twice for the same service: once for the local service and again for the coordination between offices.

### Who can project-manage most effectively?

While many of the general counsel interviewed would like their law firms to take over the administrative and coordination role, others are more sceptical and feel they can manage local counsel more effectively in-house. The difference largely comes down to the size and experience of the in-house team and whether or not they have strong project-management capability.

### Law firm models are a barrier

Others felt that hourly billing and remuneration structures – particularly “eat-what-you-kill” remuneration – posed the greatest barriers to truly international service. *“It’s down to billable hours, which are not in the client’s best interests. It drives people to not share. It drives people to use their own people who may not be the best people for the project. Law firms are not good at cross-promoting and selling the capabilities of their best people in other offices.”*

*“I know what it’s like to operate globally, believe me, and when a firm comes and says they are this big global player I tend to shrug my shoulders.”*

## What do clients want?

Being able to tap into the international talent and expertise available at large law firms can make a crucial difference in an M&A transaction. In the experience of general counsel interviewed, global brands are no guarantee of global working in practice, but when they do, it adds significant value.

*"Law firms think 'seamless international service' means having an office in every jurisdiction. But that can be a bit of a red herring."*

## GCs feedback on what seamless international service looks like



## Clients' wants on international M&A transactions:

### More than just local legal knowledge

*"What I need is somebody who understands the local market, who can speak my language, who understands cultural differences, who can coordinate on a truly global basis."*

But local legal knowledge is just the starting point. In a more complex and more global deal landscape, in-house counsel also want their external lawyers to bring a pragmatic understanding of the local regulators, business culture and market practices to the table.

They also want them to be part of the bigger-picture discussion. Especially when working in new and fast-developing markets, clients say they want their lawyers to have *"the ability to be heard, the ability to anticipate the internal political dimension. Many countries are making new law with these deals, so being able to be a part of that conversation is important."*

### Culturally-aligned international teams

General counsel said the lead partner must be able to identify the right individuals in whichever practice areas or region are required to build a team which will work effectively together and be culturally aligned to the client's way of working. This requires judgement on the part of the lead lawyer and a strong understanding of both the firm's own resources and of the client's business.

*"What I need is somebody who understands the local market, who can speak my language, who understands cultural differences, who can coordinate on a truly global basis."*

The same knowledge applies to "best friend" networks of law firms. One general counsel would like law firms to invest in getting to know their best friends better, to know exactly which partners at which firms would be the best fit for the client on a particular deal. At the moment, the GC said the responsibility still largely fell to the in-house lawyers to know who was who and make that judgement.

The key to effective service across offices is felt to be strong communication and an attitude of sharing work and knowledge, whether it is between a single law firm's offices or between networked law firms.

### One to one: a single external point of contact and to be treated as a single client

*"My view is when we hire a law firm we are entitled to all the resources of that firm."*

Clients said seamless service requires a single individual point of contact on a deal who knows the business and has an overview of every piece of work being done for the client. Clients want a strategic oversight with strong supervision of the whole, not just the parts.

From the law firm's perspective, clients also want connected services which treat global corporations as a single company and firms who treat all their services they are providing to the clients as an integrated product. A GC says, *"law firms don't tend to see your overall needs as a single product, a single company. We encourage firms to look at what we need as a single company, but they tend to not want to do that."*



# Bird & Bird

Our 200 M&A lawyers across Europe, Asia and the Middle East are praised for their delivery of practical legal solutions and market knowledge.

Our philosophy is to provide cost predictability and outstanding service, whatever type of work we do.

We offer the full remit of corporate expertise to a wide range of clients from technology-focused start-ups to established multinational blue chips, on an array of domestic and international transactions. We advise on all forms of corporate finance from private and public M&A, private equity to IPOs and joint ventures together with all of the corporate governance and company advice needed. We have an integrated approach across all of our Bird & Bird offices to handle your complex multi-jurisdictional mandates and intensive due diligence exercises, smoothly and efficiently.

Our focus is always on delivering advice which is practical and commercial without sacrificing accuracy. To us, delivering projects on time and within budget form a core part of our client service offering.

[www.twobirds.com](http://www.twobirds.com)



RSG Consulting is an international ideas and strategy consultancy, established in 2001 in London. The senior RSG team has experience analysing the legal profession that stretches over two decades. Ideas and investigation underpins all the company's work, and it is known for inventing ground-breaking projects on innovation, the future of legal services and emerging legal markets. It is best known as the architect and researcher partner behind the Financial Times Innovative Lawyers programme in Europe, the US and Asia. In addition, RSG has designed, researched and produced a series of thought leadership reports and multi-media outputs including films and micro-sites on behalf of law firms, in-house legal departments and professional services clients.

[www.rsgconsulting.com](http://www.rsgconsulting.com)



# twobirds.com

Aarhus & Abu Dhabi & Beijing & Bratislava & Brussels & Budapest & Copenhagen & Dubai & Düsseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Luxembourg & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & Shanghai & Singapore & Stockholm & Sydney & Warsaw

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 15 Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.