



NEWSLETTER OF THE
INTERNATIONAL MERGERS, ACQUISITIONS
AND JOINT VENTURES COMMITTEE

Issue 8 – September 2008

2008 Fall Meeting

The MA&JV Committee has sponsored a number of programs at the upcoming Section meeting in Brussels that will take place between September 23 and September 27. Look for us on the agenda! Our Committee is sponsoring and co-sponsoring a number of panels including the following:

- Showcase Program: Protecting the Deal: Making the Cross-Border Merger Bulletproof (Wednesday, September 24, 9:00 – 10:30 am)
- The Impact of Data Protection Laws on M&A Transactions and Joint Ventures (Friday, September 16, 2:30 - 4:00 pm)

Our **Committee breakfast** is planned to be held on Thursday, September 25, 2008 (8:00 – 9:00 am). As in the past, we use this forum for brainstorming on topics for new panels and welcome all to bring fresh ideas to the table. Please sign up at the Brussels Hilton Hotel meeting registration desk. All Committee members are welcome.

2009 Spring Meeting—Save the Date

Please mark your calendars for the Section's Spring meeting in Washington, DC, April 14 to 18, 2009. The planning committee promises a strong line-up of programs and our Committee plans to sponsor and co-sponsor programs. Details will follow as the programs develop.

Get Involved with your Committee!

The Committee leadership values and encourages your participation in activities of the Committee.

If you would like to contribute a Country Update for the next newsletter, please contact Paul Luiki (paul.luiki@fwp.at), Junnaid Javed (jjaved@law.gwu.edu) or Young-Cheol Jeong (ycjeong@yonsei.ac.kr). The next issue of the newsletter is planned for December 2008. The deadline for submissions is December 10, 2008.

We now also have successfully launched the Committee's website. We are still looking for more content and whoever has something suitable in relation to International M&A and JV, please get in touch with Steven De Schrijver (tel. +32 2 6477350; e-mail: sdeschrijver@vanbaelbellis.com).

COUNTRY UPDATES

Country Update on Brazil

NEW RECOMMENDATIONS FOR BRAZILIAN PUBLIC COMPANY MANAGERS ON UPSTREAM MERGERS AND MERGERS OF COMPANIES UNDER THE SAME CONTROL

The Brazilian Securities Exchange Commission (“CVM”) issued the draft of the Official Practice Bulletin No. 35 (“*Parecer de Orientação CVM nº 35*”) on September 1, 2008. By doing so, CVM intends to recommend to the managers of public companies (“Managers”) some procedures that must be observed and carried out on upstream merger or merger of companies under the same control.

The Brazilian Corporation Law (Law No. 6,404/76, as amended), in its Article 264, provides that the Managers of corporations under the same control that intend to enter into a merger transaction must negotiate a merger protocol, which the shareholders meeting must previously approve in order to be effective. During the negotiation period, according to the same Law, Managers must comply with their duties and act in the best interests of the corporation and its shareholders, especially regarding the valuation of a fair share exchange rate on the stocks.

In this regard, CVM outlines several procedures in transactions involving upstream mergers, such as the following:

- (i) the equity trade and other terms and conditions of the transaction must be effectively negotiated between the parties involved and in the best interest of the corporations’ shareholders (CVM understands that such negotiation could be jeopardized by the interests of the controlling shareholder or eventually the Managers themselves, causing possible losses to the minority shareholders);
- (ii) the beginning of negotiations must be notified to the market as a material fact regulated by CVM Instruction No. 358;
- (iii) the Managers must obtain all necessary data, information and have sufficient time to perform the transaction’s negotiations and must determine and define all the terms and conditions of the transaction in proper documents;
- (iv) the Managers may consider the need or convenience to hire legal and financial advisors, assuring that they are truly independent in relation to the controlling company.

In addition, CVM also recommends some less enforceable procedures – already existing in international practice – such as: (i) the creation of an independent special committee to negotiate the transaction and to submit its recommendations to the board of directors

("Special Committee"); and (ii) the approval of non-controlling shareholders, including the nonvoting capital's shareholders or the shareholders with restricted voting rights.

On its Official Practice Bulletin No. 35, CVM reduced the importance of the Special Committee, differently from what was provided for in the original minutes. The Special Committee would solve the transaction negotiation problem, as it would be a neutral unit, working for the best interests of the whole group without favoring or disregarding any species or classes of shareholders or the Managers.

Nevertheless, the majority of the Special Committee members must comprise corporate independent managers, with a demonstrated technical capacity, whose members must be elected as follows: (i) one by the majority of the Board of Directors; (ii) one by the non-controlling shareholders; and (iii) one chosen by the other two members.

Finally, it is important to note that the recommendations of the Official Practice Bulletin No. 35's are not exclusive, but provide guidelines for Managers' procedures on this kind of transaction or corporate reorganization.

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Country Update on Canada

CHANGES TO TAX TREATMENT AND PROPOSED CONVERSION RULES FOR CANADIAN INCOME TRUSTS

Over the last number of years, income trusts have played a unique role in Canadian capital markets. Recent changes to their tax treatment, and newly proposed "conversion" rules which will facilitate their acquisition by third parties, means they are likely to do so for at least another few years.

The original advantage of the income trust structure stemmed from its ability to allow all or most of the available cash flow of the underlying business to pass into the hands of the trust unitholders without taxation at the corporate level. This resulted in an increased amount of cash available to unitholders as compared to the same business operating in a corporate structure. The tax and yield advantages of the income trust structure became very popular in Canadian capital markets as investors were willing to pay a substantial premium, relative to share equity values, to purchase trust units.

On October 31, 2006, the Canadian Minister of Finance announced a change to the tax treatment of income trusts, with the aim of taxing most trusts at corporate tax rates in respect of certain distributions made to unitholders. For new income trusts, the tax would commence immediately. For trusts that were publicly traded as of October 31, 2006, the new tax is to be deferred until 2011, provided that the trust does not engage in "undue

expansion" before then. The tax changes essentially eliminated the comparative advantage of the income trust structure. Following the announcement of the October 2006 tax rules the reaction of many income trusts was to complete a sale to third parties. Over 30 Canadian business trusts have been involved in merger/acquisition transactions since October 2006 but the recent challenges facing the debt markets have reduced the attractiveness of this alternative for most trusts.

Only a handful of public income trusts have converted into corporate form. This is likely due to the absence of tax rules that would allow such a conversion in a tax-efficient manner. However, on July 14, 2008 the Canadian Minister of Finance released draft legislative proposals that contain rules for allowing a specified investment flow-through ("SIFT") trust to convert into a publicly traded corporation without adverse consequences for the trust or its unitholders.

The SIFT conversion rules generally allow the unitholders of a SIFT trust to transfer their units of the trust to a corporation in exchange for shares of the corporation on a tax deferred basis. While such a transfer is possible under the current rules in the *Income Tax Act* (Canada), the new rules allow this tax deferred transfer to be effected without the need for a joint election to be filed by the unitholder and the corporation. In addition, the new rules will allow the trust and its subsidiary trusts to be subsequently wound up into the corporation without adverse tax consequences and will permit the flow-through of certain tax attributes of the trust and its subsidiary trusts to the corporation. Alternatively, a SIFT trust (or a subsidiary trust of a SIFT trust) whose only asset is shares of a taxable Canadian corporation may wind-up and distribute the shares of the corporation to its beneficiaries on a tax deferred basis.

The SIFT conversion rules will apply to conversions that are effected after July 14, 2008 and before 2013 and, on election, may also apply to conversions occurring after December 20, 2007 and prior to July 14, 2008.

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Country Update on Germany

MORE STRINGENT DISCLOSURE AND NOTIFICATION REQUIREMENTS FOR INVESTORS IN GERMAN LISTED COMPANIES

Recently, the German legislature adopted the Risk Limitation Act (*Risikobegrenzungsgesetz* – “the Act”) aimed at limiting perceived risks deriving from domestic and foreign financial investors.

The Act that went – for its most part – into force on August 19, 2008 brings about increased notification requirements and, in particular, a duty to disclose the intentions pursued by the accumulation of a stake of 10 percent or more as well as tougher sanctions for grossly negligent or intentional violations of notification requirements; it also introduces a new definition of acting in concert.

Disclosing intentions

With the US-Example of section 13 (d) of the Securities Exchange Act in mind, the German legislators aimed at increasing market transparency by forcing investors to disclose their investment objectives. Other than its US role model, however, the German law does not provide for exceptions for passive investors, i.e. those who do not intend to take over a target company, resulting in increased notification duties for all investors reaching a significant number of voting rights.

Already previously, a shareholder in a German listed company had to make a notification once his voting rights have exceeded (or fallen below) certain thresholds (3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%).

Independently from and in addition to these notifications, the Act now requires the shareholder to disclose its intentions with respect to the acquired shares in the company once reaching the limit of 10% of voting rights or any higher of the above thresholds. Such disclosure of intentions must be made within 20 trading days to the company and the company will then, in turn, be required to publish this information. An exemption applies, however, if the shareholders' meeting of the company has opted for a waiver of this notification requirement by amending the articles of association of the company accordingly.

“Notification of intentions” means in particular that the investor needs to disclose (i) whether the investment serves the implementation of strategic objectives or whether it just aims to achieve trading profits, (ii) whether it plans to acquire further voting rights within the next year, (iii) whether it intends to change members of the corporate bodies of the company, and (iv) whether it intends to implement substantial changes of the capital structure of the company. Further, the source of the funds used to purchase the shares, i.e. whether and to what extent the investor has used equity or debt, need to be disclosed. Likewise, any future change of intentions needs to be notified in the same manner. When determining whether an investor reaches a specific threshold of voting rights, not only its own voting rights will be taken into account, but also those of third parties that are attributed to it due to a controlling influence over (another) direct shareholder or holding shares of a third party in trust or an acting in concert.

This rule, now implemented in Sec. 27 a of the German Securities Trading Act (*Wertpapierhandelsgesetz –WpHG*), will become effective on May 31, 2009. This delay is intended to give the general meetings of each listed German stock corporation the chance

to amend its articles of association in order to waive the investors' duty to disclose their intentions.

Modification of notification requirements and toughening of sanctions

Another change implemented by the Act is the treatment of an accumulation of options to acquire shares and actual shareholdings. Both will now be taken into account when calculating the thresholds for notification requirements and offer duties, resulting in these thresholds potentially being passed earlier than under the previous regime. This new method of calculation, however, will not apply retroactively, i.e. it will only apply to options acquired on or after August 19, 2008. Still, sanctions will be imposed if an investor has not complied with its notification duties prior to the Act becoming effective.

Furthermore, tougher sanctions are being imposed, if a shareholders fails to comply with the notification requirements. Until now, a suspension of voting rights as a result of a failure to file proper notifications would be lifted as soon as the notification had been made. Now, the voting rights will be suspended for the full period of six months regardless of the investor trying to make up for his earlier default.

Acting in concert

The Act also modifies the existing rules on "acting in concert". Previously, shareholders coordinating their voting rights would be considered a group, resulting in mutual aggregation of their voting rights with each of them being subject to notification and mandatory offer requirements if the aggregate of their shareholdings reached, exceeded or fell short of one of the relevant thresholds. Under the Act, acting in concert is not only defined as the coordination of voting rights but also as any coordinated action between an investor (or its affiliate) and a third party in a way which is intended to permanently and significantly change the target company's business.

The risk limitation act is aimed at increasing transparency in the German market. Still, the new rules leave ample room for interpretation by the courts as it is, for instance, not yet defined what any coordinated action would mean in terms of acting in concert. Investors should be aware of the new notification requirements and other amendments and act accordingly in order to avoid the risk of a suspension of voting rights acquired in a German listed company.

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Country Update on Italy

FINANCIAL ASSISTANCE AND OWNS SHARES: RECENT AMENDMENTS OF THE ITALIAN CIVIL CODE

Directive 2006/68/EC of the European Parliament and of the Council amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital (hereinafter the “**Directive**”) has been implemented in Italy by the Legislative Decree 4 August 2008 n.142¹ (hereinafter the “**Bill**”).

The Bill – which will become effective as of September 30, 2008 - introduces new provisions affecting, among the others, the discipline of financial assistance and own shares.

Under art. 2358 of the Italian Civil Code, companies cannot make loans and/or grant securities in connection with the purchase or the underwriting of their own shares.

This provision – which bans financial assistance – was originally introduced as a safeguard “*in respect of the formation of public limited liability companies and the maintenance and alteration of their capital*”²: Based thereon a few LBOs have been challenged in the past in front of Italian Courts.

The 2003 reform of Company Law (Legislative Decree 17 January 2003, n. 6) has introduced a new set of rules according to which LBOs are now considered legitimate under certain conditions.

As a further step forward, the Bill amends art. 2358 of the Italian Civil Code and sets the terms and conditions according to which financial assistance is now admitted.

First of all an EGM resolution is needed: this is to comply with the 2/3 majority requirement set by the Directive.

The directors must then submit a report which shall illustrate from a juridical and economical perspective the transaction, describing the conditions and highlighting the business grounds and aims, as well as the interest that the transaction produces vis-à-vis the company, its risks for the liquidity and the solvency of the company, and indicating the price at which the third party will purchase the shares. In the said report the directors must also state that the transaction corresponds to the market conditions (with specific regards to the guarantees granted and to the interest rate applicable to refund the loan) and to the credit merit.

¹ Italian Official Journal, no. 216 of 15th September 2008.

² Directive 2006/68/EC, 1st Whereas.

The resolution and the report have to be filed with the Companies' registry within 30 days.

When financial assistance is aimed at the purchase of own shares the EGM resolution authorises the directors to dispose thereof. The purchase price of the share shall be determined according the same rules applicable in case of withdrawal from the company. If the shares are traded in regulated markets the purchase price will correspond at least to the weighted average price at which they have been negotiated in the 6 preceding months.

If the company grants financial assistance to the purchase of own shares by directors (of the company itself or of the controlling company) or by the controlling company or by third parties, acting on behalf of the previous subjects, the directors' report shall also state that the transaction improves the company's interest.

In any case the level of financial assistance cannot exceed the amount of the distributable profits and reserves.

Under a different, although related, perspective, the law states that companies are entitled to purchase their own shares up to a maximum of 10% of their share capital. The Bill has amended art. 2357 of the Italian Civil Code in the sense that such limit no longer applies to private limited liability companies (while it still applies to public companies).

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Country Update on The Netherlands

PROPOSED CHANGES IN NV CORPORATE GOVERNANCE AND IN THE CORPORATE GOVERNANCE CODE

In 2004, besides adopting the Netherlands Corporate Governance Code, the Netherlands Commission on Corporate Governance also proposed that the legislature amend Boek 2 BW to allow for a one tier structure for a Dutch NV. A number of large publicly traded companies in The Netherlands are incorporated in foreign countries, most notably England and the Netherlands Antilles, both of which permit a publicly listed company to have a one-tier board, and the Commission had suggested allowing to a one-tier structure to make Dutch NV more attractive compared with alternative regimes. Legislation that has been introduced³ by the Justice Minister has been sent by the Council of Ministers to the Upper House would introduce for the first time the possibility for a Dutch NV with a one tier board, so long as the structure regime (since 2004, a worker's co-participation regime) did not apply, as it frequently does not to holding companies by reason of the number of employees these companies have in The Netherlands. A new BW 2:129a would distinguish between executive and non-executive (in American parlance, independent or outside)

³ http://www.justitie.nl/images/bestuur%20en%20toezicht%20wetsvoorstel%20maart08%20schoon_tcm34-104336.pdf

directors. Under that provision, all executive directors as a group would not be allowed to have more votes than all non-executive directors (as a group).

In June 2008, the Monitoring Commission Corporate Governance Code put out a report⁴ which addressed changes in corporate governance since 2004 as well as investor's preferences in corporate governance. The Monitoring Commission Corporate Governance has proposed in amending the Corporate Governance Code in particular in respect of takeover bids, including going private transactions. The new proposal calls for a heightened role of the Supervisory Board (RvC), which would require the Supervisory Board to take a public position on any bid and in particular on any fairness opinion obtained by the target in respect of the bid. Interestingly, the investors polled by the Commission did not place high importance on the possibility of a one-tier board but rather on corporate measures regarding takeovers, for example, a "put up or shut up" rule which would allow a listed company to require a potential bidder either to make a public bid before a specified deadline or refrain from doing so for a lengthy period.

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Country Update on New Zealand

COMPETITION CASE TO GO ALL THE WAY

The Court of Appeal overturned the High Court and stopped the proposed acquisition by Woolworths/Foodstuffs acquiring The Warehouse. The case sparked a lot of interest involving the importance of "future competition". Woolworths has filed to appeal the decision to New Zealand's highest Court (the Supreme Court).

SCHEMES OF ARRANGEMENT/AMALGAMATIONS: DISCUSSION PAPER

The New Zealand Takeovers Panel has issued a discussion paper in respect of proposals to reform the law involving schemes of arrangement and amalgamations. The recommendations involve closing a "loophole" using amalgamations (which would be restricted for Code Companies) and introducing more prescriptive guidelines for schemes of arrangement.

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⁴ http://www.commissiecorporategovernance.nl/page/downloads/review_rapport_0107.pdf

Country Update on Turkey

M&A PRACTICES IN TURKEY

1. Scope

Share Purchase of Private Companies

2. Legal Perspective

There is no specific law regulating the mergers and acquisitions in Turkey. When it comes to mergers and acquisitions, many different regulations are involved in the process, mainly Turkish Commercial Code, Turkish Code of Obligations, Law on Protection of Competition, Labour Law.

3. The Procedure

a. Letter of intent

It is common in practice that the parties sign a letter of intent or a similar pre-agreement (Letter of understanding, term sheet, etc.) in which they state their will and intention with regard to the prospective transaction. The letter of intent may be “binding” or “non-binding” according to the conditions set forth in the letter however even a “non-binding” letter of intent shall be a strong source when it comes to resolving the disputes and/or misunderstandings that may appear during the negotiations.

b. Due Diligence

The purchaser conducts the legal, financial and if appropriate the environmental due diligence. During the due diligence phase team of experts of the purchaser not only examines the documents that are provided in the data room but also makes searches in the trade and land registry and visits the site.

c. Negotiations

Since the process is mainly regulated by Contracts Law within the Code of Obligations, the parties may freely determine the structure in the contract. Generally it is the Share Purchase Agreement and the Shareholders Agreement signed between the parties.

d. Conditions Precedent

Some approvals and/or licenses may needed to be obtained prior to closing. For example according to the Communiqué on Mergers and Acquisitions “As a result of

the merger or acquisition if, regarding the relevant product market in all parts or a part of the country, the total market shares of the merging or acquiring undertakings exceed 25% of the market, or their total turnover exceeds twenty-five million Turkish Liras (approximately 20 million USD) , even though the total market shares do not exceed this rate, it is compulsory for them to receive the authorization of the Competition Board.” In addition to the Competition Board, the approval of some other governmental authorities (such as Banking Regulatory and Supervisory Authority, Telecommunications Authority, Energy Market Regulatory, Undersecretary of Treasury) may also be required within specific sectors.

In addition to the regulatory pre-approval consents parties may set forth other special conditions to be met prior to closing.

e. Closing

Once all the regulatory and contractual condition precedents are fulfilled the transfer of the ownership of the shares take place on the closing date.

4. Culture Difference

As seen above the procedure is very much similar to the Continental European system; however there appear some differences in practice. M&A started booming with foreigners’ mergers and acquisitions in Banking, Telecommunications and Energy sectors in 2005. Since 2007 the movement is continuing with the foreigners’ mergers and acquisitions of middle sized corporations especially in the retail sector. A great deal of the medium and small sized corporations are family owned businesses and they are not familiar with such complex legal procedures and some are even not familiar with working with specialized law firms. They very often feel “offended” when asked to negotiate the terms and conditions of a 50 page SPA or when they are asked to sign a Shareholders Agreement. Very often the negotiations are blocked only because of the approach of the purchaser. Therefore it is strongly recommended to the foreign investors to cooperate with local law firms at the very beginning even before signing the letter of intent. Because although the local firm is representing and acting on behalf of the foreign purchaser they may be the one building a communication bridge and helping to overcome misunderstandings between the parties.

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