



NEWSLETTER OF THE  
INTERNATIONAL MERGERS, ACQUISITIONS  
AND JOINT VENTURES COMMITTEE

Issue 8 - December 2008

**2009 Spring Meeting—Save the Date**

Please mark your calendars for the Section's Spring meeting in Washington D.C. April 14-18, 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 Kees Koetsier ([kees.koetsier@nautadutilh.com](mailto:kees.koetsier@nautadutilh.com)). The next issue of the newsletter is planned for March 2009. The deadline for submissions is March 15, 2009.

We are still looking for more content for the Committee's website and whoever has something suitable in relation to International M&A and JV, please get in touch with him (tel. + 32 2 6477350; [sdeschrijver@vanbaelbellis.com](mailto:sdeschrijver@vanbaelbellis.com)).

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## **Country Update on Brazil**

### **MERGER OF BRAZILIAN PUBLICLY-HELD CORPORATIONS WITHOUT THE NEED OF A PUBLIC OFFER**

On October 6, 2008, the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* – CVM) published in its webpage ([www.cvm.gov.br](http://www.cvm.gov.br)) a recent opinion of the Superintendency of Securities' Registry (*Superintendência de Registro de Valores Mobiliários* – SRE) confirming that a public offer for acquisition of shares is not required in the case of three important corporate restructure transactions announced during the months of August and September of 2008, involving the merger of Brazilian publicly-held corporations without the transfer of shares from the former shareholders to the new controlling shareholders. This opinion is very important because clarifies the position of the regulatory authority about this type of transaction; The lack of public offer to consummate this transactions was questioned by the local press.

The public offer is required by force of the provisions of Article 254-A of the Brazilian corporation law, and has been introduced in our legislation to protect the minority shareholders in the event of transfer of control of the company (tag along provisions). Pursuant to this article, the direct or indirect transfer of control of a publicly-held corporation can only be effected under the condition that the purchaser agrees to conduct a public offer to acquire the voting shares owned by the remaining shareholders and the offer price for such shares shall be at least 80% of the amount paid for the voting shares comprising the controlling block. In this context, "transfer of control" means the transfer, whether direct or indirect, of shares comprising the controlling block, of shares bound by shareholders' agreements and of securities convertible into voting shares, assignment of share subscription rights and other rights related to securities convertible into shares which may result in the transfer of corporate control. The transfer of control shall be approved by CVM as long as the conditions of the public offer comply with the applicable legal requirements. Alternatively, the purchaser of control may offer the minority shareholders the option to keep their holding in the company in exchange for payment of a premium equivalent to the difference between the market value of the shares and the amount paid for shares comprising the controlling block.

Pursuant to Article 227 of the Brazilian corporation law, merger is an operation whereby one or more companies are absorbed by another, which succeeds to all their rights and obligations. All the three cases under analysis were structured as a merger and complied with all the legal requirements.

The first case is related to Datasul S.A. (Datasul) and Totvs S.A. (Totvs), two publicly-held corporations which decided to merge their integrated enterprise management software (Enterprise Resource Planning - ERP) operations in Brazil. The transaction consisted in the unification of both companies in one sole group, by means of the merger of the shares of Datasul by Makira do Brasil S.A. (Makira), a wholly-owned subsidiary of Totvs, and the subsequent merger of Makira by Totvs, in order to consolidate the shareholders of Datasul and Totvs into the surviving company (Totvs). Therefore, all the shareholders of Datasul became shareholders of Totvs, with the issue of new common shares by Totvs, representing 14.3% of the capital stock. In addition, the shareholders of Datasul received the total

amount of R\$ 480 million, part as dividends and part as payment for the redemption of preferred shares of Makira pursuant to the approval of the shareholders of Datasul.

The second case was the combination of Fit Residencial Empreendimentos Imobiliários Ltda. (Fit), a wholly-owned subsidiary of Gafisa S.A. (Gafisa), a publicly-held corporation which is deemed to be one of Brazil's leading diversified national homebuilder, and Construtora Tenda S.A. (Tenda), a publicly-held corporation exclusively dedicated to the low income homebuilding segment, by means of the merger of Fit by Tenda. As a result of the merger, Gafisa owns now 60% of the total and voting capital stock of Tenda, and the former control group HPJO holds 20% of the shares of Tenda which will continue to be traded as a separate company on the New Market (*Novo Mercado*) of the São Paulo Stock Exchange (Bovespa). Gafisa invested R\$ 438 million in Fit prior to its incorporation into Tenda. With the conclusion of the transaction, Tenda will have the strongest balance sheet among dedicated lower income homebuilders, with over R\$ 1 billion in equity.

The third case is similar to the first one and involves the combination of the operations of Brascan Residential Properties S.A. (BRP), one of the largest developers in Brazil, operating in the residential development business, and Company S.A., one of the largest developers and construction companies of medium and upper class residential projects in the State of São Paulo. Both are closely-held corporations and decided to create a Top-3 player in the Brazilian real estate market, by means of a merger of Company's shares into Brascan SPE SP-3 S.A., a subsidiary of BRP (Subsidiary), and subsequently a merger of the Subsidiary into BRP, so that the share base of Company is unified to the share base of BRP. As a result of this transaction, Company's shareholders will receive 76,978,000 newly issued shares of BRP or 1.0690 BRP share per one share of Company plus R\$ 200 million cash payment (equivalent to R\$ 2.7775 per share of Company). After the consummation, BRP will have a total number of 262,006,474 common shares where approximately 42.7% will be free-float and Company's shares will be delisted.

After a careful review of the three cases, the SRE concluded that: (i) the merger was used as permitted by the Brazilian corporate law, to enable the acquisition of the control of the companies involved (Datasul, Tenda and Company); (ii) there was no transfer of securities between the former shareholders to the new controlling shareholders; (iii) according to the disclosure of the material fact to the market, all the shareholders received equal treatment. Based on the foregoing, no public offer is required in any such case.

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## **GOVERNMENT MEASURE INCREASES M&A TRANSACTIONS IN THE BRAZILIAN FINANCIAL SECTOR**

As several countries around the world, Brazilian government is also exerting its best efforts in order to avoid or, at least, reduce the effects of the current financial crisis generated by the credit crunch worldwide. In this regard, Brazilian Government, directly or by Central Bank, is shoring up Brazilian financial and credit market.

Most recent Government measures allowed Brazilian Central Bank to influence directly on the volume of funds available for financial institutions to provide credit for the financial and consumer markets. First changes were made directly on the reserve requirements of financial institutions, such as those related to reserve ratios.

Therefore, other measures enacted or conducted by Brazilian Central Bank made possible for some financial institutions – specially large banks - to buy credit portfolios from other institutions – medium and small size institutions specialized in consumer credit (CDC) - increasing the liquidity among Brazilian financial institutions.

Moreover, Provisional Measure (“MP”) No. 442/08 has also allowed Brazilian Central Bank to acquire credit portfolio of national financial institutions which are facing cash shortages, as well as to grant foreign currency loans to them.

The credit crunch has accelerated the new consolidation process of this sector in Brazil. Since last year’s acquisition of Banco Real ABN Amro by Santander, the top Brazilian financial institutions – Banco do Brasil, Bradesco, Itaú, Unibanco and Santander itself – were studying how to assume or guarantee its leadership position in this important market.

In this regard, in order to reduce crisis effects on Brazilian financial market, as well as to guarantee the leadership position of Banco do Brasil in this sector, MP No. 443/08, enacted by President Luis Inácio Lula da Silva, authorized Banco do Brasil and Caixa Econômica Federal (Brazilian Federal Savings Bank) to, directly or through their subsidiaries, acquire equity stake on private and public financial institutions in Brazil – including insurance companies, social welfare institutions and capitalization companies – irrespective of the acquisition of the controllership of those companies.

In addition to that, the referred MP also provides for the creation of Caixa – Banco de Investimentos S.A., a wholly-owned subsidiary of Caixa Econômica Federal, with the purpose of conducting investment bank activities, as well as an arm for Caixa Econômica which will invest in homebuilders and construction sector in general.

Despite of the discussion regarding the nationalization of financial institutions in Brazilian economy, this measure allowed Banco do Brasil and Caixa Econômica Federal to buy private and state-owned banks on the open market, just as other players can acquire other private bank.

The first deal announced under the plan is the acquisitions of Nossa Caixa, owned by the state of São Paulo, which were sold to Banco do Brasil. Banco do Brasil is also on negotiation to takeover some other State-controlled financial institutions as well as to acquire a minority stake at Banco Votorantim - financial arm of Votorantim Group.

In a quickly response to the financial market crisis worldwide and to the increase of Banco do Brasil appetite for new acquisitions, Itaú merged with Unibanco creating the Brazilian major financial player. The market is awaiting other moves from this new consolidation process.

It is important to notice that MP 443/08 also allowed Brazilian Central Bank to perform exchange swap transactions with Central Banks from of other countries. Brazilian Central

Bank is carrying out this measure and the selling of USD from Brazilian international reserves transactions in order to stop United States dollar devaluation.

## **REAL ESTATE INVESTMENT FUNDS – M&A IN BRAZILIAN REAL ESTATE MARKET**

On October 31, Brazilian Securities Exchange Commission – CVM (*Comissão de Valores Mobiliários*) has issued CVM Rule No. 472 (“Instrução CVM nº 472/08”), which provides new rules for the existing Real Estate Investment Funds – FII (“CVM Rule 472”).

CVM’s main purpose by enacting CVM Rule 472 was to adopt those funds in accordance to most recent principles and rules that are already applicable to other kind of funds. Prior to CVM Rule 472, Rules Nos. 205 and 206, issued by CVM on 1994, regulated FII.

In this regard, CVM Rule 472 comprises several new provisions concerning the incorporation, management, functioning, public offering for distribution of FIIs’ shares and the disclosure of their information, most of them similar to provisions already set forth by CVM Rule Nos. 400 (Securities Public Offerings) and 409 (Investment Funds).

Notwithstanding all innovations provided for in CVM Rule 472, the most relevant provision set forth by this rule is the possibility for FIIs to acquire several kinds of assets related to the real estate sector. The revoked CVM Rule No. 205 allowed FIIs only to acquire, directly or indirectly, real estate endeavors or constructions in progress and, temporarily, 25% of its heritage on fixed income investments.

As from CVM Rule 472, it becomes possible for FIIs to invest in equity and/or securities issued by companies (public or private) which develop real estate enterprises and other activities in this sector, derivatives (for hedge purpose), others funds’ shares, certificates of real estate receivables (CRI), credit receivable funds (FIDC), real estate credit letters (LCI), among other assets.

Although the use of FIIs may be limited in view of some tax benefits already existing – such as FIP (Brazilian Private Equity Investment Funds)’s benefit for foreign investors - as well as the worldwide financial crisis effects, FIIs may be surely appointed as a new player in Brazilian mergers and acquisitions market.

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## **Country Update on Belgium, the Netherlands and Luxembourg**

### **IMPLEMENTATION OF THE CROSS-BORDER MERGER DIRECTIVE IN THE BENELUX**

In both Belgium and the Netherlands, legislation has recently entered into effect implementing Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies (the "Merger Directive"). In Luxembourg, the implementation process is underway; a bill for this purpose is currently before the Luxembourg Parliament.

The Merger Directive is intended to facilitate cross-border mergers in the EU by laying down common rules for mergers between limited liability companies from different Member States.

A cross-border merger under the Merger Directive can take the form of a merger by absorption or by the formation of a new company and - by operation of law - results in the following:

- the transfer of all of the assets and liabilities of the absorbed company/companies to the surviving company or, where a new company is formed, the transfer of all of the assets and liabilities of each of the merging companies to the new company;
- the shareholders of the absorbed company/companies becoming shareholders of the surviving company or, where a new company is formed, the shareholders of each of the merging companies becoming shareholders of the new company;
- the absorbed company/companies ceasing to exist or, where a new company is formed, each of the merging companies ceasing to exist.

In both Belgium and the Netherlands, the legislation implementing the Merger Directive includes provisions laying down the following rules:

- rules on the protection of employee co-determination rights. Such protection is, in principle, similar to that afforded under the SE Employee Directive in relation to European companies (SEs);
- a rule preventing cross-border mergers from being declared null and void once they have taken effect. This is in contrast to mergers between Belgian companies or mergers between Dutch companies, which may be declared null and void under certain conditions.

It is likely that similar rules will apply in Luxembourg once the Merger Directive is implemented there.

Since December 2005, when the European Court of Justice rendered its important judgment in the SEVIC case, several cross-border mergers between companies from different EU Member States have been effected in all three Benelux countries, even without the Merger Directive having been implemented in local legislation. Based upon this judgment, NautaDutilh has helped a number of Dutch, Belgian and Luxembourg companies carry out such mergers, including one of the first in the Netherlands.

## Belgian implementation of the Merger Directive

On 8 June 2008, the Merger Directive was implemented in Belgian law by means of the addition to the Belgian Companies Code of new provisions (section Vbis in chapter XI), which entered into effect on 26 June 2008. It is therefore now possible for Belgian companies to merge with companies from other Member States (whether by absorption or by the formation of a new company) based on these provisions.

### *Corporate*

In accordance with the Merger Directive, the new provisions apply to all limited liability companies under Belgian law, i.e. public limited liability companies (*naamloze vennootschappen / sociétés anonymes*), private limited liability companies (*besloten vennootschappen met beperkte aansprakelijkheid / sociétés privées à responsabilité limitée*) and cooperative limited liability companies (*coöperatieve vennootschappen met beperkte aansprakelijkheid / sociétés cooperatives à responsabilité limitée*), as well as European companies (SEs) and European cooperative companies (SCEs) having their corporate seat in Belgium. In addition, cross-border mergers under the new provisions may be entered into by an entity without limited liability as long as it has legal personality, e.g. a general partnership (*vennootschap onder firma / société en nom collectif*).

The following are excluded: (i) companies in liquidation and (ii) public open-ended collective investment funds organised in the form of either a public limited liability company or a limited partnership with shares (*commanditaire vennootschap op aandelen / société en commandite par actions*).

In addition to the previously mentioned rules on employee co-determination rights and the impossibility of cross-border mergers being declared null and void, the new Belgian provisions also lay down the following rules:

- for each of the merging companies, an auditor must draw up a report on the proposed terms of the merger. This is not required if all shareholders agree to the merger or in the event of a merger by which a wholly-owned subsidiary is to be absorbed by its parent;
- the merger must be approved by the general meeting of shareholders of each merging company that has its corporate seat in Belgium. However, where a wholly-owned subsidiary is to be absorbed by its parent, no such approval is required at the level of the subsidiary.

### *Tax*

Despite having been formally requested to do so by the European Commission, Belgium has not yet begun implementing the Merger Taxation Directive of 23 July 1990 (as amended on 17 February 2005) (the "Merger Taxation Directive"). The government is currently preparing a text, which has not yet been made public and is still subject to modifications. However, it appears that the relevant legislation will provide for tax neutrality in the same way as already applies to purely national operations, subject to the explicit condition that the main purpose of the operation in question should not be tax fraud or tax evasion. In addition, a clear-cut, widely applicable taxation system is to be

introduced for transfers of a corporate seat (to or from Belgium in the case of SEs and SCEs, and to Belgium in the case of other corporate forms).

### **Dutch implementation of the Merger Directive**

On 15 July 2008, Dutch legislation implementing the Merger Directive came into force. From this date and based on the new provisions, a Dutch company may opt to merge with a company from another Member State (whether by absorption or by the formation of a new company).

#### *Corporate*

The new provisions are incorporated in Book 2 of the Dutch Civil Code and are applicable to public limited liability companies (*naamloze vennootschappen*) and private limited liability companies (*besloten vennootschappen met beperkte aansprakelijkheid*), as well as SEs and SCEs having their corporate seat in the Netherlands.

As stated earlier, the Dutch provisions introduce rules on employee co-determination rights and preclude a cross-border merger being declared null and void once it has taken effect. In addition, minority shareholders in a Dutch company that is to be the absorbed company in a cross-border merger have the right to initiate proceedings to claim adequate cash compensation for their shares, provided that they voted against the proposal to effectuate the merger.

#### *Tax*

Pursuant to the Merger Taxation Directive, as well as rollover provisions in Dutch national tax laws in effect since 1 January 2001, cross-border mergers can, as a general rule, take place without adverse tax consequences.

### **Luxembourg implementation of the Merger Directive**

#### *Corporate*

On 21 January 2008, a bill for the implementation in Luxembourg law of the Merger Directive was submitted to the Luxembourg Parliament.

However, in most respects it is already possible to carry out a cross-border merger as contemplated by the Merger Directive. In March 2007, the Luxembourg Companies Act was amended to include new provisions under which, among other things, it is possible to effectuate a merger between (or a division involving) a Luxembourg company and a foreign company, provided that the latter's national law does not prohibit the relevant merger (or division). As a result of the amendments, the Act also facilitates transfers of assets (both in connection with mergers and divisions or otherwise). A merger with a foreign company can take the form of a merger by absorption or by the formation of a new company and must be approved by the general meeting of shareholders of each of the merging companies, under the same conditions as for a domestic merger.

The bill for the implementation of the Merger Directive contains rules specific to mergers between Luxembourg companies and companies from other EU Member States in relation to, among other things, the protection of employee co-determination rights and the prohibition on cross-border mergers being declared null and void. In the event of a cross-border merger by which a new Luxembourg company is to be formed, the scrutiny by a Luxembourg civil law notary of the validity of the documents submitted and the proper compliance with the applicable formalities will also extend to the procedure for the incorporation of the new company.

### *Tax*

The Merger Taxation Directive was implemented in Luxembourg law on 21 December 2007. As a result, the Luxembourg tax provisions applicable to mergers, divisions, transfers of assets and exchanges of shares now cover SEs, SCEs and certain other entities which are corporate taxpayers in their home country (i.e. certain tax transparent entities and hybrid entities). In addition, the benefits of these provisions also extend to certain type of companies resident in Iceland, Norway and Liechtenstein.

In the event of a merger by absorption, the surviving company can benefit from the exemption from capital gains tax in respect of the cancellation of its holding in the absorbed company if it had a shareholding of at least 10%. Previously, the minimum threshold was 25%.

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## **Country Update on Canada**

### **ARE CHANGES TO CANADA'S MERGER REVIEW LAW ON THE HORIZON?**

Given all of the attention paid to the U.S. election in November 2008, it may have escaped the notice of all but the most devoted observers of North American politics that Canada also went to the polls on October 14, 2008, electing a minority Conservative government. Even more noteworthy is the fact that the election may herald significant changes to the laws governing merger review in Canada.

### **Competition Law**

Turning to competition law issues first, it appears that the Conservatives may be planning a wholesale transformation of the process pursuant to which the Competition Bureau reviews mergers under the *Competition Act*.

Under Canada's current merger review process, transactions that exceed certain financial thresholds and, in the case of share acquisitions, that exceed an additional voting interest threshold, cannot be completed before the expiration of a statutory waiting period of either 14 or 42 days following the filing of a notification containing certain prescribed information. The duration of the statutory waiting period depends on whether the acquiror

elects to make a short form filing (14 day waiting period) or a long form filing (42 day waiting period). The Competition Bureau's substantive review of transactions, however, runs on a different non-statutory timetable, based on the complexity of the transaction. According to the Bureau's non-binding "service standard" periods, it will aim to complete its substantive review of "non-complex" transactions within two weeks; within 10 weeks for "complex" transactions; and within five months for "very complex" transactions.

Canada's merger review process has been criticized for creating uncertainty for merging parties at various levels. For one, parties must themselves elect whether to file a short form or long form notification, assuming the risk that if they file a short form, the Bureau may require them to re-submit a long form, thereby stopping the waiting period until the long form filing is made. In addition, because the statutory waiting periods and the Bureau's "service standard" review periods are not correlated, merging parties can find themselves in a position where the waiting period has expired (legally entitling them to close) without the Bureau having completed its substantive review. Parties must then decide whether to wait until the Bureau is done or proceed to closing subject to the risk that the Bureau may seek an injunction to stop them. From an enforcement perspective, the Bureau believes that the statutory 42 day waiting period does not give it sufficient time to review complex transactions (although, in practice, most parties simply agree to allow the Bureau to go beyond this 42 day limit).

The uncertainties in the Canadian merger system have led to the suggestion that the process be amended by establishing a clearer series of deadlines, with an initial review period of set duration followed by a longer second phase of investigation for mergers that raise substantive issues. In particular, a federal advisory panel (the "Panel") recommended in June 2008 that the merger review process in Canada be aligned with the U.S. *Hart-Scott-Rodino Antitrust Improvements Act* ("HSR") procedure. The HSR process involves an initial 30-day waiting period in which a notified merger may not be completed and the government can assess the likely competitive effects of the proposed transaction. Before that 30-day period expires, the government may choose to issue a "second request" for information and documents, in which case the proposed transaction may not be completed until 30 days after the parties substantially comply with the request. There is also only a single form of filing form (i.e., no short form/long form dichotomy).

It appears that the Conservatives are seriously considering reforming the *Competition Act's* merger review process along these lines. While perhaps a step in the right direction in some respects, the wholesale adoption of the U.S. merger system – including the open ended and onerous "second request" process – could actually create inefficiencies by significantly raising the costs and lengthening the potential delays for merger review in Canada. If the goal is really to reduce the time, complexity and cost of the Canadian merger review process, any reform should at least adopt a workable deadline within which a second stage review would have to be concluded (as is done in many other jurisdictions).

## **Foreign Investment**

The Conservatives also have promised to enact very significant reforms to the *Investment Canada Act* ("ICA"), which governs foreign investment in Canadian businesses. Among other things, they propose to:

- amend the ICA to increase the threshold for foreign investment reviews from the current level of CDN \$295 million in gross asset value to CDN \$1 billion in "enterprise value", with the increase to be phased in over four years; and
- establish a new national security review mechanism in the ICA to ensure that foreign investments cannot jeopardize Canada's national security.

Again, many of these proposals were first made by the Panel in its June 2008 report. The gist of the proposals is that Canada's foreign investment rules should be pared back. In particular, if adopted, the ICA's application will be restricted to very limited circumstances, principally where "national security" interests may be implicated.

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## **Country Update on India**

### **MERGERS, ACQUISITIONS AND JOINT VENTURES SIGNIFICANT LEGAL DEVELOPMENTS IN 2008**

#### **Growth in Foreign Investment**

India continued to receive significant attention and investment from the international business community in 2008. Foreign direct investment (“**FDI**”) grew by over 100% and stood at US\$ 29 Billion<sup>1</sup>. Keeping pace with the expectation of the international and domestic entrepreneurs and at times in its attempt to plug loopholes, the Government of India (the “**Government**”) made amendments to several laws. Some of the amendments are set-out hereunder.

#### **Amendments Relating to Foreign Investments in India:**

- FDI has been permitted in credit information companies up to 49% with the prior approval of the Government and of the Reserve Bank of India subject to certain conditions such as no single foreign entity holding more than 10% of the equity capital.
- FDI has been permitted in commodity exchanges up to 49% subject to prior approval of the Government and meeting conditions such as no single foreign entity holding more than 5% of the equity capital of such exchanges.
- 100% FDI has been permitted in industrial park projects<sup>2</sup> without having to seek any prior approval of the Government and without having to comply with certain restrictive conditions applicable to certain real estate projects. However, such investment has been allowed to be made on conditions such as the industrial park

<sup>1</sup> Data is as of September, 2008 and the figures are approximate.

<sup>2</sup> Projects in which quality infrastructure facilities in the forms of plots of developed land or built up space or a combination with common facilities is developed and made available to all allottee units for the purpose of industrial activity.

comprising of at least ten units with no one unit occupying more than 50% of the total allocable area and provided at least 66% of the total allocable area is used for industrial activity.

- A new policy for foreign investment in the civil aviation sector has been announced which, *inter alia*, states that foreign airlines can own equity of Indian entities operating cargo airlines, helicopters and sea plane services.
- The Government is considering permitting issuance of call and put options by Indian entities to foreign investors without the requirement of seeking its prior approval.

### **Amendment to the Takeover Code**

The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations has been amended to permit an existing shareholder holding 55% of the share capital of a listed entity to acquire an additional 5% of the share capital of such entity without having to make an open offer to the public. However, this exemption is available subject to requirements such as the acquisition being made through open market purchases and the consolidated shareholding after such purchase not exceeding 75% of the share capital of such entity/target.

### **New Companies Bill**

The Companies Bill, 2008 has been introduced with the objective of modernizing Indian corporate law. The said Bill contains provisions for matters such as: (i) permitting single shareholder companies to be incorporated, (ii) removal of minimum capitalization requirement for companies, (iii) removal of formalities such as procuring a certificate of commencement of business etc.

### **Tax Exposure in Connection with Acquisitions**

In a significant development, the High Court of Bombay (Mumbai) has dismissed a petition seeking the quashing of a show cause notice issued by the Indian tax authorities.

The said notice sought reasons from a non-resident purchaser as to why action should not be taken against it for non-withholding of tax in connection with purchase of shares by it of a non-resident entity. One of the arguments put forth by the tax authorities was that the purchase and sale of shares in effect led to the transfer of a capital asset (controlling interest of an Indian entity) situated in India and thus the transaction was taxable in India and the said notice had been validly issued.

In light of this development and pending the decision of the Supreme Court of India in this regard, utmost care needs to be taken while structuring any Indian related acquisition or joint venture.

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## **Country Update on New Zealand**

### **TAKEOVERS**

#### **New Rule against misleading or deceptive conduct**

A new Takeovers Code rule, Rule 64, which prohibits misleading or deceptive conduct in relation to Code-regulated transactions, came into force on 29 February 2008.

Under Rule 64, the Takeovers Panel may exercise its enforcement powers for any misleading or deceptive conduct (or conduct that is likely to mislead or deceive) by *any person*:

- in relation to any transaction or event that is regulated by the Code; or
- incidental or preliminary to a transaction or event that is or is likely to be regulated by the Code.

The Rule extends to any person who engages in the above conduct – not just bidders, target companies, or major shareholders.

New sections 44B to 44E of the Takeovers Act (which also relate to misleading conduct) came into force on the same date.

New section 44C of the Takeovers Act makes it a criminal offence to make or disseminate materially false or misleading statements or information relating to Code-regulated transactions or events. The penalties for this offence are, for an individual, imprisonment for up to five years or a fine of up to \$300,000, or both. For a body corporate, a fine of up to \$1 million can be imposed.

What is ‘misleading or deceptive’ conduct? The phrase appears in both the New Fair Trading Act 1986 and the Securities Markets Act 1988, and also in various pieces of Australian legislation. It therefore has a history of judicial interpretation, which the Panel intends to follow. The Panel has stated that the words “will be given their natural and ordinary meaning of ‘to lead into error’”.

The practical effect of the new provisions means that participants in the New Zealand market should take particular care when making any representations to other parties to the transaction, to the media, or to the market. The Panel has indicated that it “will respond in an appropriate manner to protect the interests of the market”.

In particular, the Panel has indicated that it will enforce “last and final” statements as to price or period, or an intention not to accept an offer, for example, as promises, and will seek to enforce them as such. They have stated that “any later inconsistent action or statement risks breaching Rule 64...the integrity of the market requires that statements made in relation to Takeovers can be relied on.” We note however that it is possible to carefully qualify such statements, by ‘reserving the right’ to alter their stated position, for example.

## **Takeovers Panel Intervention in ‘lock-up’ agreement**

From a press release by Mr Chips Holdings Limited, the market was made aware that the Takeovers Panel was not comfortable with a ‘lock-up’ that included a provision that, if the transaction was structured requiring a shareholder vote (i.e. scheme / amalgamation), the shareholder agreed to give a commitment to vote positively for the restructured transaction.

The parties agreed to remove the provision from the lock-up.

## **Overseas Investment Approval**

Under certain circumstances international acquisitions may require consent from the New Zealand Overseas Investment Office where there is a New Zealand business operated by the “target”. This can have an impact on the timing of the transaction.

The consent process under the Overseas Investment Act had been seen as somewhat of a ‘rubber stamp’ process. However, a decision in April this year called such a view into question, when the New Zealand Government, via the Associate Minister of Finance and Minister of Land Information, declined approval for the Canadian Pension Plan Investment Board to acquire a 40% shareholding in Auckland International Airport.

The Overseas Investment Office had considered that the test for approval under the Act had been satisfied, but the Ministers disagreed on the grounds that the proposed investment did not satisfy the requirement that it would, or would be likely to, benefit New Zealand.

The decision to decline the application highlighted the political nature of the Act in New Zealand, where some see overseas investment in land and assets as ‘selling off the family silver’. The Auckland Airport decision was, however, made under the Labour government that was voted out of government on 8 November. The incoming National government is likely to be much more receptive to such international investment. The Auckland Airport decision may, therefore, stand as an aberration and not have any practical effect on overseas investment in New Zealand.

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## **Country Update on Switzerland**

The m&a-activity in the reporting period was influenced by the financial crisis unfolding worldwide. Switzerland’s financial industry did not remain unaffected by these events. Predominant globally exposed financial institutions have suffered the most. In order to strengthen their Tier-1-capital ratios and their balance sheet, the two major Swiss global players, UBS AG and Credit Suisse Group, have come up with creative m&a-transactions.

- *UBS AG:* UBS AG and Swiss National Bank (“SNB”) have reached an agreement to transfer up to USD 60 billion of currently illiquid securities and other assets consisting primarily of U.S. related structured finance products from UBS AG’s balance sheet to a

separate special purpose vehicle in the form a “Kommanditgesellschaft fuer kollektive Kapitalanlage” governed by the Swiss Capital Investment Act. UBS AG will raise USD 6 billion in the form of a convertible note placed with the Swiss Confederation.<sup>3</sup> The special purpose vehicle will be capitalized with up to USD 6 billion of equity capital provided by UBS AG and a non-recourse loan in the maximum amount of USD 54 billion provided to the special purpose vehicle by SNB. The non-recourse loan is fully secured by the special purpose vehicle’s assets which will be controlled by SNB. UBS AG will sell its equity interests to SNB for USD 1 and will have an option to repurchase the equity once the loan is fully repaid for a purchase price of USD 1 billion plus half of the equity value exceeding USD 1 billion.

- *Credit Suisse Group*: Piggy backing on the success of the UBS AG recapitalization, Credit Suisse Group has set up a special purpose vehicle on its own to alleviate its balance sheet of currently illiquid assets amounting to USD 5 billion. The units in this special purpose vehicle will be distributed to Credit Suisse Group employees as bonus payments. In addition, the Qatar Investment Authority, the Qatari sovereign wealth fund, invested USD 4,256 billion in return for 93 million shares of common stock and a mandatory convertible bond convertible into approximately 50 million shares. The conversion will automatically occur after 1 year. In addition, Korr Industries Limited, an Israeli private equity fund, bought 34 million shares of common stock in exchange for USD 1,059 billion.

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<sup>3</sup> Ordinance regarding recapitalization of UBS AG dated October 15, 2008 (SR 611.055).