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FROM THE CO-CHAIRS

From the Co-Chairs

René Bösch

Homburger AG, Zurich
rene.boesch@homburger.ch

Philip Boeckman

Cravath Swaine & Moore LLP
pboeckman@cravath.com

Time does indeed fly fast! It was just a few months ago that we had a very successful Annual Conference in Singapore. Singapore has hit all records in terms of participating delegates from all over the world, and we had very interesting sessions with a great number of distinguished panellists in lively presentations and debates.

We have turned our focus to the 25th International Financial Law Conference in Stockholm (28–30 May 2008), which is jointly presented by the Securities Law Committee and the Banking Law Committee. The conference has been organised by Tarja Wist from the Banking Law Committee and Christian Cascante from the Securities Law Committee, and we are convinced that you will find the programme very attractive. We therefore encourage you to block the dates in your diary and to plan a visit to Stockholm in late May!

Looking beyond Stockholm, we are in the process of planning the Annual Conference in Buenos Aires (12–17 October 2008), and again are striving to put together an interesting programme. We are organising a session on the current credit crisis and its impact, as well as panels on Latin America capital markets offerings, consolidation among financial institutions, and, maybe most importantly, regulatory convergence and mutual recognition.

Last but not least, we are very happy to inform you that we have a great number of distinguished practitioners joining us as officers in the Securities Law Committee this year: Ashley Alder, Thomas Bischof, Nick Eastwell, Cecilia Maria Mairal, Philip Moore, Pit Reckinger, David Rockwell, Masayuki Watanabe and Nigel Wilson have all accepted nominations to become officers in the Securities Law Committee. You will find a list of all

Contributions to this Newsletter are always welcome and should be sent to Nigel Wilson, Vice-Chair and Newsletter Editor.

Nigel Wilson
Davis Polk & Wardwell
99 Gresham Street
London EC2V 7NG
Tel: +44 207 418 1086 • Fax: +44 207 710 4986
nigel.wilson@dpw.com

International Bar Association

10th Floor, 1 Stephen Street, London W1T 1AT, United Kingdom
Tel: +44 (0)20 7691 6868. Fax: +44 (0)20 7691 6544
www.ibanet.org

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FROM THE CO-CHAIRS

current officers with their contact addresses in this newsletter, and we encourage you to get in contact with your officers with ideas or proposals that you may have for the Committee or projects that we should pursue. When looking at the officers list, you will note that we have made great efforts at broadening the officer base geographically with the aim to better reach out to the IBA members at large as well as our Committee members in the various regions of the world.

We hope that you will enjoy this issue of the newsletter, which will be the last newsletter prepared

and coordinated under the leadership of Cecilia Carrara. We are very grateful to Cecilia for all her effort and excellent work that she put into the newsletters. We are enthusiastic that Nigel Wilson will continue Cecilia's great work as Newsletter Editor. If you have a topic that you want to have addressed in the newsletter or wish to make a contribution to the newsletter, please feel free to contact Nigel.

We hope your 2008 is off a great start (or at least a better one than the financial markets), and we look forward to seeing you in Stockholm and Buenos Aires.

COMMITTEE OFFICERS

Co-Chairs

Rene Bösch
Homburger AG
Weinbergstrasse 56/58
8006 Zürich
Switzerland
Tel: +41 43 222 15 40
Fax: +41 43 222 15 00
rene.boesch@homburger.ch

Philip Boeckman
Cravath Swaine & Moore LLP
CityPoint, One Ropemaker Street
London EC2Y 9HR
United Kingdom
Tel: +44 207 453 1020
Fax: +44 207 860 1150
pboeckman@cravath.com

Senior Vice-Chairs

Jonathan Ross
Bell Gully
Vero Centre
48 Shortland Street
PO Box 4199
Auckland 1140
New Zealand
Tel: +64 9 916 8811
Fax: + 64 9 916 8801
jonathan.ross@bellgully.com

Pere Kirchner
Cuatrecasas Abogados SRL
Velázquez 63
28001 Madrid
Spain
Tel: +34 915 247 156
Fax: +34 915 247 154
p.kirchner@cuatrecasas.com

Vice-Chair and Newsletter Editor

Nigel Wilson
Davis Polk & Wardwell
99 Gresham Street
London EC2V 7NG
England
Tel: +44 207 418 1086
Fax: +44 207 710 4986
nigel.wilson@dpw.com

Vice-Chair Publications

Florian Gibitz
Haarmann Heugel RAE OEG
ARES Tower
Donau City Str 11
A-1220 Vienna
Austria
Tel: +43 1 2 60 50 305
Fax: +43 1 2 60 50 308
florian.gibitz@bpv-huegel.com

Vice-Chair Programming

Uwe Eyles
Latham & Watkins LLP
Reuterweg 20
60323 Frankfurt am Main
Germany
Tel: +49 69 6062 6503
Fax: +49 69 6062 6060
uwe.eyles@lw.com

Secretary

Cecilia Carrara
Macchi di Cellere Gangemi
Via G Cuboni 12
00197 Rome
Italy
Tel: +39 06 362 141
Fax: +39 06 3608 4491
c.carrara@macchi-gangemi.com

Conference Coordinator (Europe)

Christian Cascante
Gleiss Lutz
Maybachstrasse 6
70469 Stuttgart
Germany
Tel: +49 711 8997 151
Fax: +49 711 855 096
christian.cascante@gleisslutz.com

Website Officer

Pit Reckinger
Elvinger Hoss & Peussen
2 Place Winston Churchill
BP 425
2014 Luxembourg
Luxembourg
Tel: +352 44 66 440
Fax: +352 44 22 55
pitreckinger@ehp.lu

CCF Liaison Officer

Thomas Bischof
UBS AG
Postfach
8098 Zürich
Switzerland
Tel: +41 44 234 11 11
Fax: +41 44 234 63 63
thomas.bischof@ubs.com

Regional Representative (Asia)

Ashley Alder
Herbert Smith
23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
Tel: +852 2101 4001
Fax: +852 2845 9099
ashley.alder@herbertsmith.com

COMMITTEE OFFICERS

Regional Representative (North America)

Philip Moore
McCarthy Tétrault LLP
Suite 4700, TD Bank Tower
Toronto Dominion Centre
Toronto, Ontario
Canada
M5K 1E6
Tel: +1 416 601 7916
Fax: +1 416 868 0673
pmoore@mccarthy.ca

Regional Representative (Latin America)

Cecilia Maria Mairal
Marval O'Farrell & Mairal
Avenue Leandro North Alem 928
Floor 7
Buenos Aires 1001
Argentina
Tel: +54 11 4310 01 00
Fax: +54 11 43 10 02 00
cmm@marval.com.ar

Chair, Mergers and Acquisitions Subcommittee

Florian Khol
Binder Grösswang Rechtsanwalte
Sterngasse 13
A-1010 Vienna
Austria
Tel: +43 1 534 80 440
Fax: +43 1 534 808
khol@bgnet.at

Vice-Chair, Mergers and Acquisitions Subcommittee

Charles Martin
Macfarlanes
10 Norwich Street
London EC4A 1BD
England
Tel: +44 20 7831 9222
Fax: +44 20 7831 9607
charles.martin@macfarlanes.com

Ricardo Veirano
Veirano Advogados
Av Presidente Wilson 231
23 Andar CEP
20030 - 021 Rio De Janeiro
Brazil
Tel: +55 21 3824 47 47
Fax: +55 21 22 62 42 47

Chair, Underwriting and Distribution Subcommittee

David Rockwell
Sullivan & Cromwell LLP
1 New Fetter Lane
EC4A 1AN London
England
Tel: +44 20 7959 8900
Fax: +44 20 7959 8950
rockwelld@sullcrom.com

Vice-Chairs, Underwriting and Distribution Subcommittee

Vince Pisano
Paul, Hastings, Janofsky & Walker LLP
Park Avenue Tower
75 E 55th Street
First Floor
New York NY 10022
United States
Tel: +1 212 318 6490
Fax: +1 212 230 5144
vincentpisano@paulhastings.com

Nick Eastwell
Linklaters
One Silk Street
London EC2Y 8HQ
England
Tel: +44 20 7456 4660
Fax: +44 20 7456 2222
nick.eastwell@linklaters.com

Chair, Public Company Practice and Regulation

Niels Walter-Rasmussen
Kroman Reumert
Sundkrogsgade 5
DK-2100 Copenhagen
Denmark
Tel: +45 70 12 12 11
Fax: +45 70 12 13 11
nwr@kromannreumert.com

Vice-Chairs, Public Company Practice and Regulation

Dorothee Fischer-Appelt
Gibson Dunn & Crutcher LLP
Telephone House
2-4 Temple Avenue
London EC4Y 0HB
Tel: +44 20 7071 4224
Fax: +44 20 7071 4244
dfischerappelt@gibsondunn.com

Alberto Saravalle
Bonelli Erede Pappalardo
Via Barozzi 1
20122 Milan
Italy
Tel: +39 02 771 131
Fax: +39 02 771 132 60/61
alberto.saravalle@beplex.com

Chair, Regulatory Affairs Subcommittee

Linda Hesse
Jones Day
120 rue du Faubourg Saint Honoré
75008 Paris
France
Tel: +33 1 56 59 39 39
Fax: +33 1 56 59 39 38
lhesse@jonesday.com

Vice-Chair, Regulatory Affairs Subcommittee

Kartik Ganapathy
Nishith Desai Associates
Prestige Loka, G01, 7/1
Brunton Road
Bangalore 560 025
India
Tel: +91 80 6693 5016
Fax: +91 80 6693 5001
kartik@nishithdesai.com

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A conference co-presented by the IBA Banking Law Committee and IBA Securities Law Committee, and supported by the IBA European Regional Forum

25th International Financial Law Conference

28 – 30 May 2008

Stockholm, Sweden

The conference will focus on the most important developments in finance, securities as well as banking law and practice. The speakers at the conference will include some of the most experienced and specialised experts in their respective fields of law.

Topics include:

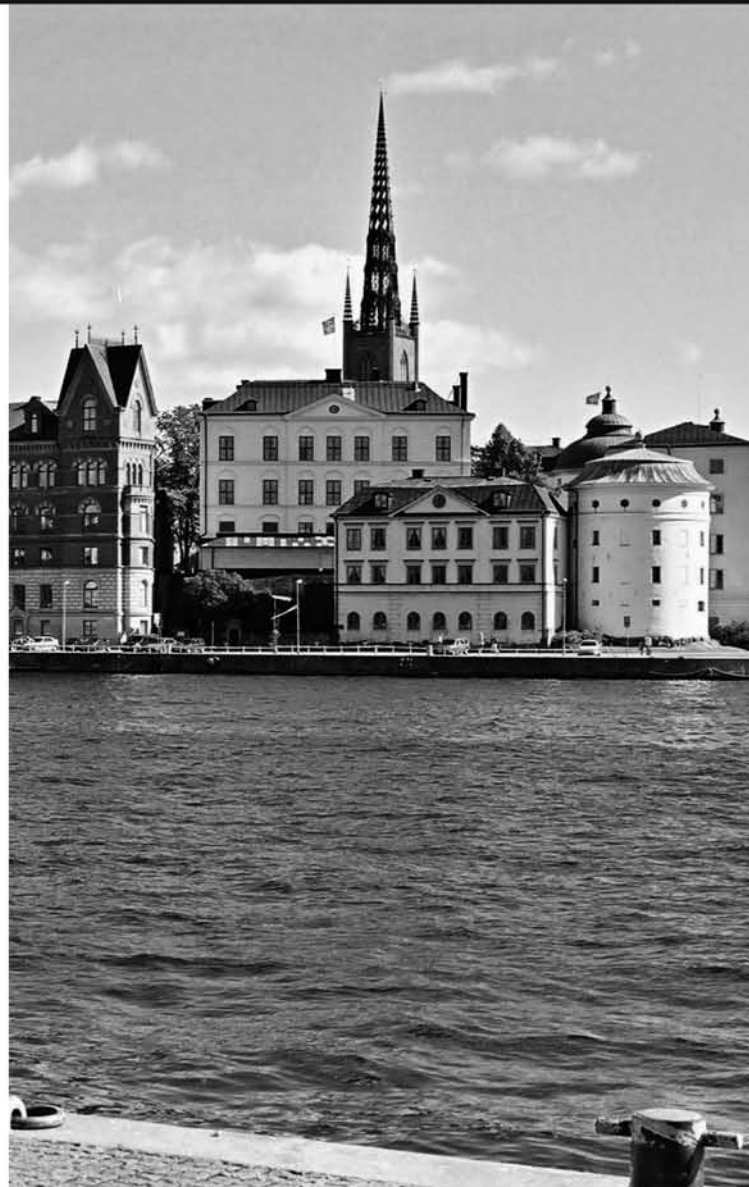
- Securities law regulatory update
- Trusts in civil law jurisdictions
- Conflicts in derivative transactions
- Financing of takeovers
- Structured products
- The subprime crisis fallout
- Prospectus liability

Please note there will be a special early bird discount rate of £250 for academics and full time lawyers with the Financial Supervisory Authority and the Ministry of Finance.

The conference will also feature a young lawyers' workshop on the afternoon of Friday 30 May. Delegates attending this will also be able to join the morning session of the conference at a reduced young lawyer fee.

Who should attend?

All finance securities and banking lawyers, whether in private practice or working in-house, and those working generally in the banking and finance industry.



For further information, please contact:

International Bar Association

10th Floor, 1 Stephen Street
London W1T 1AT
United Kingdom

Tel: +44 (0)20 7691 6868 Fax: +44 (0)20 7691 6544

E-mail: confs@int-bar.org Website: www.ibanet.org



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the legal profession

Securities Law Committee comment letters: CESR and SEC

Stefanie A Magner

Jones Day, Paris

smagner@jonesday.com

The Securities Law Committee keeps a close watch on cross-border and international regulatory developments, in particular at IOSCO, CESR, the EU, the SEC, the FSA and a range of other individual jurisdictions. Headed-up by this year by the Chair of the Subcommittee on Regulatory Affairs, Linda Hesse, the Committee has sought to improve securities regulation by commenting on three different initiatives. The members contributed their market experience in January to a call for evidence by CESR on the supervisory functioning of the Prospectus Directive and Regulation. In February, the Committee commented on the SEC's proposed rule on deregistration which was released in a final rule on 27 March 2007. Later in the year in September, the members provided input on the SEC's proposal to accept financial statements from foreign private issuers prepared in accordance with IFRS without reconciliation to US GAAP. On 21 December 2007, the SEC published the adopting release and announced that it will accept financial statements from foreign private issuers prepared in accordance with IFRS as issued by the IASB without reconciling information to US GAAP.

Provided here are excerpts of the three letters submitted on behalf of the Committee. You may view the full text of the letters on the Securities Law Committee's IBA website, located at www.ibanet.org/legalpractice/Issues_and_Trading_in_Securities.cfm. The Subcommittee on Regulatory Affairs is always looking for new opportunities to comment on regulatory initiatives and invites all members to contact Linda Hesse at lhesse@jonesday.com if they would like to comment on a specific topic.

CESR comment letter

29 January 2007

The International Bar Association is pleased to respond to your Call for Evidence dated 13 November 2006, on the Supervisory Functioning of the Directive 2003/71/EC (the "Prospectus Directive") and Commission Regulation 809/2004 (the "Regulation").

Our main observations relate to the first point raised by the Call for Evidence.

Obstacles to the fluid functioning of the passport and/or divergent practices in Member States that pose a risk for the proper functioning of the single market

One obstacle to the fluid functioning of the passport process results from the uncertainty with respect to reporting obligations imposed on issuers by certain Member States into which such issuers passport a prospectus. The legal risk inherent in such uncertainty and the burden of ultimate compliance are often seen as sufficient reasons to forego passporting and the related extension of securities offerings in other Member States.

Another obstacle to the efficacy of the passporting process is the uncertainty that may arise as to whether a prospectus passported to one or more host Member States has in fact been received by the host regulator. A uniform practice ensuring quick confirmation of passporting should be agreed by all regulators.

With respect to the disclosure requirements of the Prospectus Directive, certain IBA members have encountered issues related to the requirements for the prospectus summary. Our experience with implementing these requirements has shown that the combination of (i) the required disclosures and (ii) the 2,500 word limit that is sometimes very strictly enforced generally makes the summary difficult to read and unhelpful to investors. We believe a more "principles based" approach would be better suited for the prospectus summary requirements.

In addition, there is uncertainty as to the requirements of publication of the translation of the summary. Since the Prospectus Directive and Regulation are largely silent on this point, harmonization through CESR would be welcome, which would also further enhance the efficiency of the passporting process.

Finally, it would be useful for CESR to continue monitoring the implementation in Member States of Article 4.2(g) of the Prospectus Directive, providing an exemption for issuers from the requirement to publish a prospectus for shares resulting from the conversion of other securities, provided that the shares are of the same class as the shares already admitted to trading. Although CESR's 18 July 2006 Q&A help by clarifying, in Item 16, that the exemption should apply even if the shares intended to be exempt represent more than 10% of the total number of shares, it may be necessary

for CESR to provide formal guidance on this point.

Range of investment opportunities and level of disclosure and protection that the Prospectus regime is providing to investors

IBA members have noted some difficulties relating to diverging interpretations of the level of disclosure and the exact meaning of specific information requirements included in the annexes of the Regulation. IBA members would also like to suggest that CESR work to adopt specific, limited exemptions to the requirement to provide such information similar to the one that exists in the United States for certain significant acquisitions. We would also like to encourage CESR to consider other types of exemptions, such as in the case of an acquisition of particular types of businesses for which certain financial information is either not regularly produced and/or is not considered relevant to investors.

Usefulness of CESR's Q&A on prospectuses dated 18 July 2006 ("Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members")

It is the experience of IBA members that both issuers and their advisors refer to the Q&A, and that both have found the Q&A useful. The IBA encourages CESR to continue providing informal guidance in this manner. Ambiguity remains, however, with respect to the inclusion of interim financial information in a prospectus. CESR should make it clear that half-year information should only be included where the third quarter financial information is limited to a three-month period or where it is clearly insufficient to a proper understanding of the issuer's business.

In closing, we would like to express our strong support for CESR's work to harmonize the supervisory functioning of the Prospectus Directive and hope that our comments will be helpful in attaining the objectives set by the Prospectus Directive. We would also like to express our support for further steps to be taken to promote regulatory convergence with other large markets outside Europe and most particularly with the United States.

SEC comment letters

12 February 2007

The International Bar Association is pleased to comment on the SEC's proposal to simplify the termination for foreign private issuers of the reporting and registration requirements of the U.S. securities laws through Reproposed Exchange Act Rule 12h-6 and other related rule changes (the "Proposed Rules").

While the IBA applauds the SEC's efforts to facilitate deregistration for foreign private issuers, we would also like to take this occasion to urge the Commissioners and the SEC staff to put a broader move to reform high

on their strategic agenda. The major themes that we believe should guide both revisions to the Proposed Rules and further reform are set forth below.

Simplifying and modernizing the U.S. regulatory context

In order to address foreign private issuers' perceptions that the SEC imposes on them unduly complicated reporting or other obligations, the SEC must adopt rules which are simple, consistent, easy to understand and, most importantly, easy to implement.

- **Worldwide trading volume.** We support the SEC's move towards the use of a straightforward, quantitative threshold of average daily trading volume ("ADTV"). However, we also believe that the SEC should take further steps, such as revising the Proposed Rules to refer to worldwide trading volume instead of the "primary trading market" volume as a proper basis for measuring relative U.S. interest.
- **300-holder thresholds.** As further steps toward modernizing its rules, we believe that the SEC can and should increase the alternative record holder threshold of the Proposed Rules and the threshold for debt securities holders from 300 to a number that is more in line with modern market conditions.

Meeting the needs of foreign private issuers

The SEC should continue to review the challenges that foreign private issuers face in complying with U.S. securities laws and look to innovative solutions that accommodate issuers while continuing to protect investors.

- **Move from paper to electronic submissions.** Our members would like to see the SEC continue to take steps proactively to move from paper-based, physical mailing to an Internet and webdelivery format, as many of the SEC's international peers have already done. We would like to see the SEC take the lead in removing remaining barriers to information by promoting the use of information technology generally, including the use of interactive data, which will open new areas of opportunity for the investment community.
- **Reform the rules relating to employee share plans.** Many foreign private issuers are large multinational companies who have significant numbers of U.S.-based employees to whom they may offer shares or stock options. The desire to initiate or maintain such plans can be in conflict with the objective of avoiding U.S. registration or being able to deregister. To respond to this conflict, the relevant exemptions (including in Rule 701) for employee share plans and stock options should be modernized.
- **Fix the exemption for rights offerings.** The timing of the announcement of rights offerings in multiple jurisdictions and the 30-day look-back provisions of the U.S. rules, as well as the difficulty of measuring

U.S. investor free float, make the exemption extremely difficult to implement. As a result, U.S. investors, and in particular U.S. retail investors, are excluded from rights offerings. We urge the Commission to consider using the trading volume test for the rights offering exemption, about which there is no policy disagreement, or modernize it otherwise, so that it can function as intended.

- **Correct the problems in the cross-border M&A rules.** Specifically, we urge the SEC to modify the 30-day look-back requirement and the requirement for broker searches currently embedded in the cross-border rules. The SEC may choose to move to a trading volume test in this area as well.

Next steps: protecting investors within the context of a rapidly evolving regulatory climate and worldwide market for securities.

The IBA believes that the SEC should be leading regulatory reform in coordination with the other main securities regulators, so that the regulatory landscape becomes over time more coherent, with a simple set of rules serving capital formation and protecting investors' interests worldwide. By leading the way, the SEC can better protect U.S. investors and the U.S. capital markets. One way to make this happen is for is for the high-level task force we suggest above to study and formulate suggestions to achieve mutual recognition, substituted compliance and regulatory convergence (including recognition of IFRS by 2009, as planned) so that market participants can concentrate their resources on best practices of compliance under a uniform set of rules rather than disperse their resources in an attempt to comply with multiple regulatory regimes.

25 September 2007

The International Bar Association is pleased to comment on the Commission's proposal to accept from foreign private issuers financial statements prepared in accordance with International Financial Reporting Standards ("IFRS"), without reconciliation to generally accepted accounting principles as used in the United States ("U.S. GAAP"), as set forth in Release No. 33-8818, 34-55998; International Series Release No. 1302; File No. S7-13-07 (the "Release").

We welcome and strongly support the SEC's proposal to allow foreign private issuers to submit financial statements prepared in accordance with IFRS without reconciliation to U.S. GAAP. We have reviewed the letters prepared by the European organizations and generally support the specific comments and suggestions made in those letters.

We encourage the Commission to take into consideration the following suggestions in order to more proposals do not directly support its goals of integrated disclosure and the movement towards a single set of

high-quality, globally accepted accounting standards:

- Foreign private issuers should be able to file financial statements in compliance with IFRS as adopted by a regional regulatory body rather than requiring that financial statements comply with IFRS as published by the IASB. To this end, we believe that the Commission could establish a list of designated IFRS variants that comply with specific criteria.
- Foreign private issuers should be able to refer to their home country language version of the IFRS to avoid confusion and possible misinterpretation.
- We encourage the Commission to act without waiting until full convergence with IFRS is completed and to continue working towards a rule that would take effect in 2009 (for the 2008 calendar year annual reports).
- We encourage the Commission to adopt the proposed rule with respect to all foreign private issuers, irrespective of their public float or status as well-known seasoned issuers or first-time filers.
- We support the Commission's proposal to allow a foreign private issuer that conducts an offering under Rule 701 to present its financial statements in IFRS without reconciliation to U.S. GAAP.

In conclusion, we would like to emphasize our support for the Commission's proposed reform in this area. As we have stated previously, we believe that the SEC should be leading regulatory reform in coordination with the other main securities regulators in order to create a regulatory landscape that becomes over time more coherent. Such initiatives to remove regulatory roadblocks are an example of the type of regulatory innovation necessary to make the U.S. markets more attractive to foreign issuers without compromising investor protection.

The 2007 Spanish regulations on takeover bids after transposition of Directive 2005/25/EC

Ramon Girbau and Javier Ybáñez

Garrigues, Barcelona and Madrid

ramon.girbau@garrigues.com • javier.ybanez@garrigues.com

This article intends to present a summary overview of the main features of the new regulations on takeover bids (*ofertas públicas de adquisición*, OPA) in force in Spain after transposition of Directive 2005/25/EC through a restatement of Articles 60–61 of the 1988 Spanish Securities Market Act, as amended by Act 6/2007, of 12 April and Royal Decree 1066/2007, of 27 July, on the regime governing takeover bids (*Real Decreto sobre el regimen de las ofertas públicas de adquisición de valores*).

Changes introduced in the Spanish legal system as a result may be qualified of essence, as the former legal regime for compulsory takeovers:

- (i) was based on an *a posteriori* bid requirement;
- (ii) could result in certain circumstances in a bid for less than the whole stock capital of the target;
- (iii) did not imply in most of the cases a control by the Spanish Stock Exchange Commission (*Comisión Nacional del Mercado de Valores*, CNMV) of the consideration offered by the bidder; and
- (iv) did not foresee any corporate squeeze out and sell out mechanisms.

Compulsory takeover bid

A takeover bid will be mandatory for any person obtaining control of a listed company, regardless of whether control is achieved by:

- (i) acquiring shares or other securities which directly or indirectly confer voting rights in the target company; or
- (ii) reaching agreements other than those provided for in the by-laws, entered into with other shareholders, for the purpose of obtaining control of the concerned company. Concert is presumed to exist when the such agreement affects voting rights or restricts the free transferability of shares (*pactos parasociales*), and has the purpose of establishing a common policy in relation to the management of the company or is aimed at having a relevant influence thereon, and any other which, for the same purpose, regulates voting rights on the Board of Directors or Executive Committee of the

company (*Comisión Ejecutiva o Delegada*); or
(iii) as a result of an indirect acquisition of control (mergers, indirect acquisitions, capital reductions and relevant variation of the company's own share portfolio, among others).

A person (individual, corporation or entity) is considered to have control of a company, either individually or jointly with those persons with whom it is acting in concert:

- (i) where it comes to hold, directly or indirectly, a percentage of voting rights in its share capital of 30 per cent or more;
- (ii) when it attains, directly or indirectly, a lower percentage of voting rights and within the 24 months following the date of acquisition of that lower percentage appoints a number of directors who, together as the case may be with those whom the same has already appointed, represent more than one half of the members of the management body of the company.

Notwithstanding, a mandatory bid would not be required, among other circumstances, when control has been attained after a voluntary bid for all of the securities in any of the following circumstances:

- (i) the bid has been made at an equitable price (*precio equitativo*); or
- (ii) it has been accepted by holders of securities representing at least 50 per cent of the targeted voting rights, excluding from the computation those which were already in the possession of the offeror and those belonging to shareholders who have reached an agreement with the offeror in relation to the bid.

The 2007 Royal Decree, contains an additional provision according to which any person that, on entry into force of Act 6/2007 (13 August 2007), directly or indirectly, held a percentage of voting rights in a listed company equal to or exceeding 30 per cent and lower than 50 per cent, shall be under the obligation to make a mandatory bid when, after entry into force of the said Act, any of the following circumstances concur:

- (i) it acquires, in a single act or in successive acts, shares in the company so as to increase its holding

- by at least five per cent in a period of 12 months;
- (ii) it attains a percentage of voting rights equal to or exceeding 50 per cent; or
- (iii) it acquires an additional holding and appoints, in the 24 months following the acquisition or acquisitions, a number of directors which, combined, as the case may be, with those already appointed, represent more than one half of the members of the management body of the company.

Full takeover bid

Compulsory takeover bids should be launched over 100 per cent of the capital. The bid must be addressed to:

- (i) all holders of shares in the listed company, including holders of non-voting shares who, at the time of applying for authorisation of the bid, hold voting rights in accordance with the provisions of current legislation; and, whenever they exist,
- (ii) to all holders of share subscription rights and to holders of convertible or exchangeable bonds.

The bid may or may not be addressed to all holders of warrants or other securities or financial instruments which grant an option to acquire or subscribe for shares, except for those referred to in (ii) above, whether already issued or to be issued. If the bid is addressed to them, the bid must be addressed to all those persons who hold such warrants, securities or financial instruments.

Consideration

The consideration offered in a mandatory takeover bid must be equitable, as required by the EU Takeover Directive. It will be considered such, under the supervision of the CNMV, where it is equal to the highest price that the party required to launch a takeover bid (or those persons acting in concert with it) has paid for the same securities during the 12 months prior to announcement of the bid.

When the mandatory bid must be made without any prior acquisition of shares in the company having taken place by the offeror or persons acting in concert within the period of 12 months previously referred to, the equitable price may not be less than that calculated in accordance with the valuation rules applicable to delisting bids, which are based on the results obtained from applying the following methods:

- (i) net book value of the company and, as the case may be, of its consolidated group, calculated on the basis of the most recent audited annual financial statements and, if subsequent thereto, on the basis of the most recent financial statements;
- (ii) liquidation value of the company and, as the case may be, of its consolidated group;
- (iii) weighted average listing price (*cotización media ponderada*) of the securities during the half-year

immediately prior to the announcement of the delisting proposal, which the number of sessions in which they have been traded in;

- (iv) value of the consideration previously offered in the event that any other bid has been made within the year prior to the date of the resolution to apply for delisting, and
- (v) other valuation methods applicable to the specific case and generally accepted by the international financial community, such as discounted cash flow, multiples of comparable transactions and companies, or others. The CNMV is entitled to modify the equitable price in some limited circumstances (corporate transactions, dividends, price manipulations, immaterial volumes and financial difficulties of the company, among others).

Takeover bids may be formalised as a purchase, or as an exchange of securities, or both at the same time. However, in case of a mandatory takeover bid, it must include, at least as an alternative, a consideration or price in cash financially equivalent at least to the exchange offered:

- (i) when the offeror, or persons with whom the same acts in concert, have in the 12 months prior to announcement of the bid acquired securities in cash granting five per cent or more of the voting rights of the company concerned, and
- (ii) in the case of an exchange of securities, unless securities admitted to trading on an official Spanish secondary market or other regulated market of a European Union Member State or securities to be issued by the offeror company itself, are offered, provided that in the latter case the capital thereof is wholly or partially admitted to trading on any of the said markets and the offeror enters into an express commitment to apply for admission to trading of the new securities within a maximum of three months from publication of the results of the bid.

Regarding guarantees, when the consideration offered consists in whole or in part of cash, the offeror must provide a guarantee from a credit institution, guaranteeing payment in full of the consideration in cash to market members or the settlement system and those accepting the bid.

***A posteriori* bid and indirect acquisitions**

The mandatory takeover bid should be publicly announced as soon as control has been reached and should be submitted for approval to the CNMV, within a month after control is reached. In the case of merger with or acquisition of control of another company or entity which has a direct or indirect holding in the capital of the listed company, the following rules shall apply:

- (i) a bid must be filed when, as a result of the merger

or the acquisition of control, a 30 per cent of the voting rights in the listed company is reached, directly or indirectly; and

- (ii) the bid must be filed within the three months following the date of merger or acquisition of control at an equitable price. However, the bid shall not be mandatory when within the said three months, a number of securities are sold, so that the exceeding voting rights over the percentages indicated are transferred and in the meanwhile the corresponding voting rights in excess are not exercised.

Voluntary takeovers

Voluntary takeover bids are allowed when dealing with listed securities, subject to the CNMV's authorisation, and may be launched over any percentage of capital the offeror intends to acquire. The voluntary takeover bid should be announced, as soon as the decision has been taken to make the bid and provided that it is ensured that any consideration in cash can be settled in full or all reasonable measures have been taken to guarantee compliance with any other type of consideration. There are no restrictions on the consideration offered in a voluntary takeover. Takeover bids may be made as a purchase, exchange of securities, or both at the same time, as mentioned for mandatory takeovers.

Passivity rule

Article 60 *bis* LMV and article 28 RD 1066/2007 closely follow the Directive in its regulation of the duties of the board of the target company. The legal regime is based on the following principles: the mandatory prior authorisation of the target's general shareholders' meeting for 'any action that may prevent the success of the offer, with the exception of the search of other offers, and particularly before launching any issuance of securities that may prevent the offeror from obtaining control over the target company' (ex Article 9.2 EU Takeover Directive). The restriction is applicable during the period going from the public announcement of the takeover bid until the publication of its results and includes all securities, issuances or transactions, sale or encumbrance of corporate assets and payment of extraordinary dividends. Any decision passed before the beginning of the passivity rule period, where 'not being within the normal course of business' of the target (*curso normal de actividades*) and the execution of which may cause the bid to fail (ex Article 9.3 of the EU Takeover Directive) requires the mandatory prior approval or confirmation by the target's general shareholders' meeting.

Breakthrough rule and reciprocity exceptions

The Directive allows EU Member States to exempt the companies within their jurisdiction from applying both the *passivity rule* as established in its Article 9 (paragraphs 2 and 3) and the *breakthrough rule* (Article 11, according to which and subject to some limitations, any restrictions in effect in the target on the free transferability of securities and on the voting right will not apply at the general shareholders' meeting deciding on anti-takeover measures or during the acceptance period of the offer, or at any moment afterwards whenever the offeror has achieved 75 per cent or more of the voting rights in the target). This exemption may be applied by the EU Member States in case the target company is the object of a takeover bid by a third company (or a company controlled by it) to which its own national regulations do not impose the *passivity* and the *breakthrough rules*. In accordance with the above, Article 60 *ter* of the LMV as amended do allow Spanish targets to escape from both rules whenever the offeror does not apply or is subject to 'equivalent rules'. Any decision in that respect by the target must be passed by its general shareholders' meeting within the 18-month period prior to publication of the offer, and the target company has to provide for an adequate compensation in the benefit of the holders of the voting and free transfer rights affected by the application of the *breakthrough rule*.

Spain, like most EU Member States, has made use of the opt-out right set out in Article 12.1 of the EU Takeover Directive. This allows Member States not to require companies with their registered offices within their jurisdiction to apply Articles 9 (paragraphs 2 and 3) and 11. The Spanish regulations also adopt the requirement that the target company must have the reversible right to opt in (ex Article 12.2 of the Directive), in which case the decision has to be passed by the general shareholders' meeting with the same voting quorum as required on the occasion of the previous opt-out.

Competing bids

Competing bids (*ofertas competidoras*) are any bids aimed at acquiring any securities for which a takeover bid has already been filed with the CNMV, whenever they fulfil the following requirements:

- (i) they must have been filed after the filing date of the initial bid, and until the last calendar five days of its acceptance period;
- (ii) they must be aimed at a number of securities that are at least equal to the number for which the immediately previous bid was made (either the initial offer or a previous competing offer);
- (iii) they must better the terms of the initial bid (or, if applicable, of the last competing bid filed), by aiming at a higher number of securities and/

or offering a price higher than that of the last previous offer. When the immediately preceding bid is improved in terms not corresponding to a higher number of securities and/or consideration the improvement must be assessed by an independent expert; (iv) they cannot be submitted by any party related to the offeror (in terms of concert), belonging to the same group of companies, or directly or indirectly acting on the bidder's behalf, and

(iv) their acceptance periods have to be of 30 calendar days.

Any competing bid and any improvement of any competing bid are subject to the authorisation of the CNMV. The approval of a competing bid implies:

- (i) that any securities tendered to prior bids may be withdrawn; and
- (ii) that all acceptance periods of all preceding offers are extended to match the acceptance period of the last competing bid.

The filing of a competing offer allows all previous offerors to withdraw from their own bids, in which case they must immediately inform the CNMV and the market. All other offerors (including the initial offeror) that have not withdrawn their bids may improve them until the fifth trading day following the time limit for filing a competitive bid in terms of:

- (i) extending the bid to a higher number of securities;
- (ii) improving the consideration initially offered; or
- (iii) reducing or eliminating any conditions to which their offer was subject to. Any improvement has to be authorised by the CNMV.

In any event, on said fifth trading day following the time limit for filing a competitive bid all bidders must file with the CNMV in a sealed envelope (*sobre cerrado*) their eventual final improvements to their respective offers. The initial bidder alone is afforded the right to additionally modify its own offer within the next five trading days following CNMV's making public said improvements, whenever:

- (i) its consideration is not a two per cent lower than the highest offered by the competing bidders; and
- (ii) it improves the conditions of the competing offers in that either improves their best consideration in a one per cent or extends its initial offer to a number of securities a five per cent higher than the highest offered by the competing bidders.

Once the CNMV has authorised the improved offers, any complementary guarantees necessary are posted by the bidders and the terms of the relevant improvements are made public simultaneously, and the common acceptance period is extended for 15 additional calendar days during which all declarations of acceptance for any securities previously tendered may be withdrawn.

Squeeze-out and sell out

The new Spanish regulation on takeover bids include now provisions on the squeeze out (*venta forzosa*) and sell out (*compra forzosa*) that respectively assist the successful bidder and the minority shareholders when, after settlement of the offer, the bidder holds securities representing not less than 90 per cent of the capital carrying voting rights in the target company and the preceding offer has been accepted by owners of securities representing not less than 90 per cent of the voting rights it was aimed to. Closely following the terms of Articles 15 and 16 of the EU Directive, the exercise of squeeze out and sell out rights has to be communicated within three months following the end of the acceptance period. The corresponding procedure, which is run under the supervision of the CNMV, requires in the case of the squeeze out the posting of a guarantee by the offeror, and will make the object of further detailed development by the Spanish supervisor.

First cases

Practice in the first months after entering into force of the new Spanish regulations show, in a rather hectic market as the Spanish one has proved to be in the last years, a somehow unsettled path yet, with a mix of cases which include either:

- (i) offers filed as *voluntary* bids escaping to administrative control over the 'equitable' character of the consideration (*Imperial Tobacco over Altadis*);
- (ii) *a posteriori* takeover bids (*Criteria / Suez Environnement over Aguas de Barcelona*); or
- (iii) others still based in the former *a priori* schemes. The months to come will certainly clear out the ways ahead.

Latest developments in Italian takeover law

Emanuela Di Muzio and Cristina Pellegrino

Macchi di Cellere Gangemi, Rome

c.pellegrino@macchi-gangemi.com

In recent months there have been some developments in the Italian takeover law which should favour foreign investments in Italy, going in the direction of a progressive liberalisation of the Italian market. In particular, we will address below under section 1 the 'implementation in Italy of the European Directive 2004/25/EC', and section 2 the 'decision of the European Court of Justice of 6 December 2007' which held that some national provisions in connection with the bylaws of a company under way of privatisation granting a golden share to the public shareholder violated the rules of the EC Treaty on the freedom of movement of capital.

1. The implementation of the European Directive 2004/25/EC in Italy

By Legislative Decree No 229/20071 (the Decree), the European Directive on takeover bids² was implemented in Italy. The Legislative Decree entered into force on 28 December 2007.

The Decree has introduced new rules in the Italian Consolidated Law on Finance (TUF)³. In particular, the Italian rules on takeover bids are currently set forth by Articles 101 bis – 112 TUF.

Upon implementation of the Directive the Italian legislator adopted a liberal approach, profiting from the optional regimes provided for by the European Directive.

In particular, the main novelties introduced by the Decree are the following:

(a) Mandatory bid

According to Article 106 (1) TUF, as amended by the Decree, whoever, further to onerous acquisitions, holds a participation exceeding the threshold of 30 per cent shall launch a takeover bid on the totality of the securities traded on regulated markets.

The Decree has extended the scope of the application of Article 106 TUF, since the amended provision contains a wide notion of 'securities', now defined as 'financial instruments carrying voting rights, also in order to some specific issues, in the ordinary and extra-ordinary shareholders meeting in a company' (Article 101-bis TUF).

As a consequence, for example, should a company

hold unlisted common shares and preferred shares listed in a regulated market, the bid shall be launched on the totality of the securities traded, also in case the participation exceeding the threshold of 30 per cent concerns the unlisted common shares. This represents a difference with regard to the previous rule according to which the basis of calculation to determine whether the obligation to launch a bid was triggered only concerned the listed common shares.

(b) Passivity rule

The Decree confirmed the rule already provided in Article 104 TUF, according to which the board of the target company shall obtain a prior specific authorisation of the general shareholders meeting before taking any action which may result in the frustration of the bid. The resolution authorising defensive measures needs to be passed, as a rule, with at least a 30 per cent majority, also in second and third call; this threshold is calculated having regard to the share capital.

However, the Decree has amended Article 104 TUF specifying that:

- (i) said authorisation is required also with respect to all resolutions adopted before the passivity period, not yet executed, and that may result in the frustration of the bid;
- (ii) the passivity period runs from the date on which the board of the target company becomes aware of the bid – after the communication provided according to Article 102 (1) TUF – to the date on which the bid expires; and
- (iii) the mere research of further offers may not be considered as activity carried out in frustration of the bid.

(c) Breakthrough rule

The Decree has introduced Article 104-bis TUF providing for the so called 'breakthrough rule'. Article 104-bis TUF sets forth that:

- (i) any restrictions on the transfer of securities provided for by the by-laws of the target company; and
- (ii) any restriction to the voting rights in the shareholders meeting mentioned sub paragraph

(b) provided for by the by-laws or by the shareholders agreements of the target company, shall not apply *vis-à-vis* the bidder during the period allowed for the acceptance of the bid. The bidder benefiting of the breakthrough rule must indemnify the holder of the right that cannot be exercised in compliance with said rule.

(d) Reciprocity rule

The Decree has introduced Article 104-ter TUF providing for the application of the reciprocity principle to the passivity and breakthrough rules. As a consequence, the Italian companies which are subject to the rules above are exempted from applying them if the bidder is not bound by them. Alternatively, the bidder or the target may file to the CONSOB, the Italian Supervisory Authority, a request of opinion on the comparison of the applicable rules. CONSOB must respond in the following 20 days.

Furthermore, Article 104-ter TUF specifies that all decisions of an Italian target company to invoke or not the application of the reciprocity rule in case of a bid must be adopted by the shareholders meeting during the 18 months preceding the communication of the bid (in accordance with Article 102 TUF).

2. ECJ rules against the golden shares in favour of the Municipality of Milan in the AEM S.p.A. case

National governments have long held special rights allowing them to block takeovers of state-favoured companies. Recent rulings from the ECJ could make such holdings illegal. Indeed, EU Member States will have to rethink the way they have reserved themselves special rights to intervene in or run certain businesses. Sectors such as energy, transport, telecommunications and defence are all up for reappraisal. The recent developments of the European case law on the issue of golden shares is likely to change the way the entities concerned are run and leaving them open to takeover where takeovers were previously thought impossible.

A 'golden share' can be described as an exceptional share of a privatised company retained by the state and entitling the state, in addition to regular shareholders' rights, to a range of special rights of control over certain decisions of the company or its shareholders. Golden shares may aim at 'anchoring' a privatised company in the national economy and shield off foreign influence over that company. However, a golden share may also constitute a practical alternative to the fully-fledged regulation of a privatised company's activities, as it ensures a certain administrative control over the company's decisions. National provisions that restrict the ability of foreign investors to establish themselves in a Member State by acquiring control over a company may violate Article 56 of the EC Treaty, if

such restrictions discriminate against foreigners.

The European Commission has long opposed to golden shares, arguing that they violate the rules and regulations on the free movement of capital: golden shares provide governments with veto powers over changes to a company's charter, and are used to block transactions that may be regarded as contrary to public policy.

The recent ECJ judgment on the Volkswagen law (C-112/04), is one of the most significant decisions on this issue. This case is focused on whether maintaining in force the provisions concerning the capping of voting rights at 20 per cent and the fixing of the blocking minority at 20 per cent, and the right of the Federal State and the Land of Lower Saxony each to appoint two representatives to the supervisory board, may prevent or make less attractive any capital investment. According to the ECJ opinion, the mentioned provisions, taken together, enable the Federal State and the Land of Lower Saxony to exercise considerable influence over the affairs of Volkswagen on the basis of a lower level of investment than the one that would be required under general law. This situation is likely to deter direct investors from other Member States. Moreover, as far as the right to appoint two representatives to the supervisory board is concerned, this possibility places the public shareholders in a privileged position. It is thus possible for the Federal State and the Land of Lower Saxony to exercise influence which exceeds their levels of investment and thus to reduce the influence of the other shareholders to a level below that commensurate with those shareholders' own levels of investment.

The ECJ has recently rendered a new decision on the golden share concerning an Italian company, AEM S.p.A., a company operating in the public utilities sector as distributor of natural gas and electricity and whose majority shareholder is the Municipality of Milan.

Further to the privatisation process of AEM, the Municipality of Milan reduced its participation in the company's capital from 51–33.4 per cent and was granted in the by-laws the right to directly appoint up to one quarter of the directors; in addition, the Municipality was granted the right to participate in the election of further directors on the basis of a voting list system. The joined effect of these provisions enables the Municipality of Milan to retain an absolute majority in appointing the AEM's board of directors, even though it currently holds only the relative majority of its capital.

The above-mentioned provisions of AEM's by-laws are grounded both on Article 2449 of the Italian Civil Code which provides that the by-laws of a company limited by shares may confer on a public shareholder the right to directly appoint one or more directors, and on Law 474/1994 on privatisations, according to which public shareholders may participate in the election

of the members of the board of directors on the basis of voting list systems. The main issue of the ECJ decision is whether Article 56 of the EC Treaty must be interpreted as precluding a national provision from enabling a state to obtain a power of control which is disproportionate to its shareholding, as it is the case with Article 2449 of the Italian Civil Code, on its own or in conjunction with the provision of Article 4 of Law No 474/1994.

According to settled case law, Article 56(1) of the EC Treaty lays down a general prohibition on restrictions on movements of capital between Member States. According to Council Directive 88/361/EEC of 24 June 1988 and the ECJ case law, the notion of 'movements of capital' includes direct investments intended as investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the person providing the capital and the undertaking to which that capital is made available in order to carry on an economic activity. Therefore, as regards shareholdings in new or existing undertakings, the aim of establishing or maintaining lasting economic links is grounded on the fact that the shares held by company capital enable the shareholders to effectively participate in the management of that company or in its control. In this light, the ECJ stated that national measures must be regarded as 'restrictions' within the meaning of Article 56(1) of the EC Treaty, if they are eligible to prevent or limit the acquisition of shares in the undertakings concerned, or to inhibit, the investors of other Member States from investing in their capital. Therefore, the ECJ concludes that Article 2449 of the Italian Civil Code, on its own or in conjunction with Article 4 of Law No 474/1994, enabling the Municipality of Milan to have the absolute majority to appoint the members of the board of directors of AEM even if it holds only a relative majority of the shares, and allowing it to exercise an influence exceeding its levels of investment, can be deemed as a national provision that has the effect of deterring investors from other Member States from investing in the Italian company's capital.

The ECJ also recalled a well-settled principle according to which free movement of capital may be restricted by national measures only if such restrictions are justified on the grounds set out in Article 58 the EC Treaty or by overriding reasons in the 'general interest'. Nevertheless, Member States must observe the principle of proportionality, which requires that the measures adopted be appropriate to secure the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it. Under this test, requirements of the 'general interest' may be invoked by a Member State to justify non-discriminatory restrictions if four conditions are satisfied:

- (i) the restriction must be applied in a non-discriminatory manner;
- (ii) it must be justified by imperative requirements in the general interest;
- (iii) it must be suitable for securing the attainment of the objective that it pursues; and
- (iv) it must not go beyond what is necessary in order to attain that objective'.

This means that certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services (Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraph 66, and the case law cited).

Notwithstanding the above, in the AEM case the ECJ held that the special rights of the Municipality of Milan were not made subject to any specific condition that can justify the retention by the Member States of a degree of influence within the undertaking that was initially public and subsequently privatised.

Finally, it can be noted that while the proceedings were pending before the ECJ, there was a merger by incorporation of AMSA S.p.A. and ASM into AEM (held by the Municipality of Brescia) that changed its company name to into A2A S.p.A. from 1 January 2008. The Municipality of Brescia and the Municipality of Milan jointly hold a total participation equal to 54.8 per cent in the company capital of A2A S.p.A.. According to the judgment of the ECJ, on 28 December 2007 the two Municipalities had to issue an update of the prospectus already published on 11 October 2007, as per Article 70(4), of CONSOB Regulation No 11971 dated 14 May 1999 and further amendments. This update amended and integrated the previous content of the prospectus by introducing in the A2A S.p.A.'s by-laws, the provision according to which, should the Municipality of Brescia and the Municipality of Milan hold together a shareholding lower than 50 per cent of the company's capital, Article 2449 of the Italian Civil Code would not apply.

Notes

- 1 Legislative Decree No 229 of 19 November 2007, in Official Gazette of Italy No 289 of 13 December 2007, available at www.gazzettaufficiale.it/gurifulcrum/dispatcher?service=1&datagu=2007-12-13&task=sommario&numgu=289&tmstp=1197647611402.
- 2 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.
- 3 Legislative Decree No. 58 of February 24, 1998, in Official Gazette of Italy No 71 of 26 March 1998, available at www.consob.it/main/documenti/Regolamentazione/normativa/dlgs58_2004.htm.

Reporting requirements and investment limits in Greece

John G Mazarakos

Elias Paraskevas Attorneys 1933

jmazarakos@paraskevaslaw.com

Greece has not been very successful in building a strong name for itself as an attractive jurisdiction for foreign direct investment. However, it is not infrequently that international legal entities or high net worth individuals find themselves embroiled in the intricacies of the Greek securities system. Below you will find a brief overview of the most significant restrictions associated with participations in Greek companies, as well as the reporting requirements facing shareholders in this jurisdiction.

Investment limits/general restrictions and obligations

Particular industries and types of companies

NEWLY-LISTED COMPANIES

Shareholders of a company whose shares are admitted to the Stock Exchange holding more than five per cent of its share capital at the moment of approval of listing may not transfer more than 25 per cent of their shareholding during the first year of listing. This restriction does not apply to transfer through hereditary succession, transfer between shareholders subject to the restriction, transfer of share block to strategic investors, or transfer to an exchange member acting as market maker.

OFFSHORE COMPANIES

Offshore companies may not hold more than one per cent of the share capital of undertakings that enter into public contract agreements. The same applies to offshore companies participating in legal entities that are shareholders of undertakings that enter into public contract agreements (or shareholders of such shareholders etc.) with respect to the ultimate shareholding of such companies in said contracting undertakings (which should not ultimately exceed one per cent).

COMPANIES OWNING NEWSPAPERS OR MAGAZINES

Shares must be registered shares and must be held by natural persons. In case such shares are held by a legal entity, then the shares of the latter must in turn be registered shares down to natural person level.

This requirement applies to both EU and non-EU companies, but it does not apply to companies listed on the stock exchanges of the EU Member States or the OECD states.

COMPANIES PROVIDING SUBSCRIBER RADIO AND TELEVISION SERVICES

Shares must be registered shares and must be held by natural persons. In case such shares are held by a legal entity, then the shares of the latter must in turn be registered shares down to natural person level. This requirement does not apply to high solvency foreign companies which can demonstrate a minimum three-year activity in the radio and television services industry lawfully operating in their state of origin. It also does not apply to companies listed on the stock exchanges of the EU Member States or the OECD states.

SHIPPING COMPANIES

Natural or legal persons from non-Member States of the European Union or the European Economic Area are allowed to acquire a share capital participation up to 50 per cent in shipping companies, provided the company's articles of association allow such acquisition. Such restriction does not apply to acquisitions of shares on the basis of hereditary succession, parental grants, or enforcement of claims, or to the creation of pledge over such shares.

TV AND RADIO BROADCASTING COMPANIES

Non-EU participation in TV and radio broadcasting companies may not exceed 25 per cent of the company's share capital. The same applies to participation in a company that in turn participates in the share capital of a TV and radio broadcasting company. Additionally, the capital of participating companies must be divided into registered shares down to natural person level; this requirement does not apply to companies listed on the stock exchanges of the EU Member States or the OECD states.

COMPANIES OF 'NATIONAL STRATEGIC INTEREST'

Recently enacted legislation (December 2007) has imposed a ceiling on free participation in listed *sociétés anonymes* of 'national strategic interest', that have or have had a monopoly character (in particular companies owning, exploiting or managing national utilities networks). Any existing or prospective shareholder of such a company other than the Greek State (whether it is a natural or legal person or affiliated companies or shareholders acting in a concerted manner) aiming at a holding of voting rights equal to or greater than 20 per cent of such company's total share capital must seek prior approval of the acquisition from the Interministerial Committee for Denationalisations. Although the term 'national strategic interest' is not specifically defined, the description contemplates companies where the State remains a major shareholder.

Takeover thresholds

The acquisition of 33 per cent of the share capital in a listed company triggers a takeover proceeding. A takeover proceeding is also triggered when a shareholder holding more than one-third (1/3) but not exceeding half (1/2) of the total of the voting rights of the target company acquires within a time period of 12 months more than three per cent of the total of the voting rights of the target company. This obligation does not apply if the offeror has already made a compulsory public bid.

Prior notice/consent requirements

General thresholds

Although there is no specific legal provision, it is customary that, at the stage of approving an IPO prospectus, the HCMC requests shareholders of five per cent of the share capital of a company within one year of its IPO to make a binding declaration of their intentions and to include a pre-announcement as to any possible sale of shares.

Particular industries

BANKS/CREDIT INSTITUTIONS

Every person who intends to acquire or cease to hold a participation representing, directly or indirectly, at least five per cent of the share capital or voting rights of a credit institution must notify the resulting participation in advance to the Bank of Greece to obtain consent. The same requirement applies when an existing shareholder acquires or ceases to hold five per cent, ten per cent, 20 per cent, 33 per cent or 50 per cent of the total voting rights in the credit institution or acquires or ceases to have control of the credit institution.

INVESTMENT FIRMS

Prior consent by the HCMC is required before acquiring or disposing of a 'special participation' in the share capital of an investment firm. A special participation is a holding of at least ten per cent of share capital or voting rights. Specifically, every person who intends, individually or in concert with others, to directly or indirectly acquire or increase a special participation in an investment firm so that its voting rights reach or exceed a threshold of 20 per cent, 1/3 or 50 per cent, must notify the HCMC in writing of the participation resulting from the intended transaction to obtain consent. The same requirement applies to every person who intends, individually or in concert with others, to cease to directly or indirectly hold a special participation so that its share of voting rights falls below the above thresholds.

'INVESTMENT INTERMEDIATION S.A.' (A.E.E.D.)

Every person who intends to acquire or increase a participation in an A.E.E.D. so that its share of capital or voting rights reaches or exceeds a threshold of 20 per cent, 1/3 or 50 per cent or the A.E.E.D. is about to become its subsidiary, must notify the HCMC in writing of the participation resulting from the intended transaction at least one month in advance to obtain consent. The same requirement applies to every person who intends to dispose of a participation such that its share of capital or voting rights falls below the above thresholds or the A.E.E.D. ceases to be its subsidiary.

MINING COMPANIES

Prior consent by the Ministry of Development is required for the off-market acquisition of shares by foreign companies in local companies holding mining rights (eg S & B Industrial Minerals).

Disclosure/notice requirements

General disclosure requirements

Any holding that reaches, exceeds or falls to five per cent, ten per cent, 15 per cent, 20 per cent, 25 per cent, 1/3, 50 per cent and 2/3 of the voting rights of an issuer with listed securities in an organised market triggers a requirement to report such change to the issuer and the Capital Market Commission.

Further, shareholders holding voting rights representing more than ten per cent of a listed company's share capital must report any change of that holding equal to or greater than three per cent.

The above reporting requirements apply also:

- (a) when the change of the number of voting rights occurs due to a corporate event altering the allocation of voting rights. Such notification must be effected on the basis of information published

by the issuer (the issuer is obliged to publish information on the total number of the voting rights and the total of the share capital at the end of each calendar month in which the increase or decrease of the total number occurred);

- (b) in the case of direct or indirect acquisition or disposal of financial instruments (including conversion of convertible bonds), provided that:
- such instruments grant a right for the acquisition of voting shares;
 - such shares have already been issued and admitted to trading on a regulated market; and
 - the acquisition right can be exercised at the exclusive initiative of the holder of the instruments pursuant to a formal agreement.

The law imposes the reporting obligations on the legal (registered) owner, the beneficial owner, and the entity controlling the voting rights, as applicable. This is an isolated instance where the Greek jurisdiction indirectly recognises the distinction between legal and beneficial ownership, which is otherwise not observed. The law provides several exemptions from the reporting obligations, e.g. a legal entity is released from the required reporting if the reporting is made by the holding company, or the holding company is in its turn controlled by another holding company which effects the relevant reporting.

Disclosure of interest during takeover period

Commencing with the publication of a takeover bid and until the expiry of the period for its acceptance, acquisition of at least 0.5 per cent of the voting rights in either:

- (i) the offeree company; or
- (ii) the bidder company; or
- (iii) any other company whose shares are offered as consideration in the context of a takeover bid; triggers a reporting obligation with respect to the said acquisition.

Further, with respect to already existing shareholders holding 5 per cent or more of the voting rights in the offeree company, a reporting obligation is triggered while the bid is pending for any further acquisition in the offeree company or in the company whose shares are offered as consideration in the context of a takeover bid.

Insider trading disclosure

Persons exercising management duties in a company listed in Greece, or their close relatives, or entities controlled directly or indirectly by such persons or incorporated for the benefit of such persons, or entities whose financial interests are essentially the same as those of such persons, must notify the listed company in writing of all transactions relating to the listed company's shares (including derivative products or other securities connected with the shares) carried out for their account.

Underwriters' liability on account of false or misleading prospectus disclosure under new Italian securities laws: a comparative prospective

Giancarlo D'Ambrosio

Cleary Gottlieb Steen & Hamilton LLP, Rome
gdambrosio@cgsh.com

On 7 March 2007, the Italian Parliament passed Legislative Decree No 42/2007 (the 'New Decree') in order to implement the principles of European Directive No 2003/71 (the 'Prospectus Directive') into Italian securities law.

One of the major innovations of the New Decree is the introduction into Italian law of a complete system providing for civil liability on the basis of

false or misleading statements (or similar omissions) made in a prospectus. This new regime is aimed at implementing Article 6 ('Responsibility attaching to the prospectus') of the Prospectus Directive, according to which 'Member States shall ensure that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking

for the admission to trading on a regulated market or the guarantor, as the case may be.' Having previously lacked a specific statutory regime with respect to this area of securities law (prior to these amendments civil liability for false or misleading prospectuses was regulated by general principles of contract or tort law) the introduction of a new system was needed. As a result, Article 94, Section 8, of the Italian Legislative Decree No 58 of 24 February 1998 (hereinafter, the 'Italian Securities Law'), was amended to provide that:

The issuer, offeror and any guarantor, depending on the case, as well as the person responsible for the information contained in the prospectus answer, each in relation to the parts of pertinence, for damages endured by the investor who has reasonably relied on the truthful and complete nature of the information contained in the prospectus, unless he is able to present proof that he took every precaution to ensure that the information in question was conformant with the facts and there were no omissions such as to alter the meaning.¹¹

In addition, Article 94, Section 9, of the Italian Securities Law introduces the principle of concurrent liability for underwriters, as well as a due diligence defence:

The responsibility for false information or for omissions such as to influence the decisions of a reasonable investor is held by the intermediary responsible for placement, unless he is able to present proof that he took every precaution, as indicated in the previous Clause.¹²

While it is undisputable that the new statutory regime will likely have the general effect of increasing the importance of private litigation for the enforcement of Italian securities law with respect to false or misleading prospectuses, the broad and relatively imprecise language of the new provisions have left Italian scholars, courts and regulators with many open issues to address. For the purpose of this Article, I will limit my analysis to the issues of the scope of underwriters' liability and of the elements of their due diligence defence under the new Italian regime. Upon a prima facie analysis of the relevant provisions, it appears that in implementing the new system the Italian legislature borrowed significantly from United States securities laws and this Article will therefore look to the US experience with the view of shedding some light on concepts that are partially new to the Italian system.³

The old Italian regime

Prior to the introduction of the New Decree, Italian courts and scholars struggled to identify the elements underlying civil liability for false or misleading prospectus on the basis of the general principles of Italian civil law. While part of the academic community believed that such liability was best grounded in general principles of contract law, another part asserted

that the source of such liability had to be found within the general principles of tort law.

Since the application of either of the two theories implied different results in term of the burden of proof, statute of limitations and the required mental state of the defendant, the choice between the two regimes resulted in important differences in the substantive treatment of the aggrieved investors. In particular, while a regime grounded in contract, with a relaxed burden of proof and longer statute of limitations favoured the investors, imposing harsher burdens on the defendants, one based in tort resulted in a more favourable treatment of the defendant, thanks to the shorter statutes of limitations and the necessity to show negligence.

More specifically, in order to trigger a contract law liability based in the absence of a contract⁴ solely on the publication of the prospectus, the majority of the scholars applied the principles of *responsabilità precontrattuale* (ie pre-contractual liability), which is based on the existence of a 'contact' between the subjects responsible for the publication of the prospectus and the investors who relied on the correctness and truthfulness of the information contained therein. The existence of such contact would have justified the assumption that the investors relied on the completeness and truthfulness of the prospectus.

With respect to the specific issue of underwriters' liability, a contract based liability was complicated by the fact that it was not simple to elevate the relatively limited involvement of the intermediaries in the process of drafting the prospectus to that of contact sufficient for the purpose of establishing such liability.

In the few cases in which they had to face these issues, Italian courts leaned toward basing prospectus liability in contract rather than tort. However, it should be noted that some courts defined the pre-contractual liability as a particular form of tort, thus increasing uncertainty. In light of the foregoing, it is clear that prior to the recent reform the Italian system was characterised by a high level of uncertainty. Moreover, given their peculiar position (underwriters are technically neither the issuer nor the sellers of the securities) in the process of solicitation, the status of underwriters' liability was particularly unclear.

In addition to reducing the level of uncertainty, the introduction of a clear statutory regime might be viewed as a signal to the market of a shift from a regime based on an *ex ante* form of investors' protection, through administrative regulation, to an *ex post* form of protection through private litigation. However, the mere introduction of a statutory regime would unlikely suffice for such a fundamental change. In fact, the limited role played by private litigation in the enforcement of securities regulation in Italy has been due not only to the uncertain legal framework but also to the absence of adequate procedural means.

In particular, the Italian civil justice system did not traditionally provide for class action litigation or for a contingency fee system with respect to plaintiff's lawyers compensation, two procedural devices that played a key role in the development of private enforcement of securities regulation in the United States. However, as discussed in 'Where is the Italian system going? A proposal' below, recent changes in Italian procedure (ie the enactment of a new law on class action and the introduction of some sort of contingency fees) might suggest an enhancement of the private enforcement of securities regulation in Italy (see Section C below).

The US Regime⁵ and the Current Debate in the US

Section 11(a) of the Securities Act provides that any purchaser of a security whose registration statement contains an untrue statement of a material fact or [omits] to state a material fact required to be stated therein or necessary to make the statements therein not misleading' may sue every underwriter of the security for damages. To avoid liability, the underwriter must show that 'he had, after reasonable investigation, reasonable ground to believe and did believe' that the registration statement did not contain such an untrue statement or omission'. Where entitled to rely upon the opinion of an expert (as in the case of 'expertised' financial statements), there will be no liability if the underwriter 'had no reasonable ground to believe, and did not believe ... that the statements [in the registration statement] were untrue or that there was an omission to state a material fact required to be stated therein'.

In defining the requisite 'reasonable investigation', Section 11(c) provides that 'the standard of reasonableness required is that of a prudent man in the management of his own property.' Moreover, Section 12(a) (2) of the Securities Act proscribes any person who offers or sells a security by means of a prospectus or oral communication which includes a material misrepresentation or material omission. Section 12(a) (2) also provides a 'reasonable care' defence for a defendant who can sustain the burden of proof 'that he did not know, and in the existence of reasonable care could not have known' of a material misrepresentation or omission. When the seller of a security is the issuer or an underwriter, a plaintiff may be able to bring a claim either under Section 11 or 12(a) (2).⁶

In recent years, there have been two main positions in the scholarly debate on intermediaries' liability. On the one side, the speed and flexibility for capital raising under the SEC's program of 'integrated disclosure' raised significant doubts with respect to the underwriter's effective ability to properly perform due diligence, giving rise to a debate on the opportunity to relax their due diligence obligations under Sections

11 and 12(a) (2). The weakening of underwriters' due diligence ability was due, among other things, to the greatly abbreviated period between the moment in which an issuer indicates its intent to make an offering and the time the offering commences.⁷ On the other side, recent corporate scandals, most notably the collapse of Enron and Worldcom, have directed the attention of legal academics, regulators and courts on the importance of underwriters' – and other gatekeepers' – role in protecting investors and on their responsibility with respect to false or misleading corporate disclosure.

Before analysing in more detail the different proposals that have been developed in order to strike a balance between these two points of view, it is necessary to outline the current positions of courts and regulators in the United States in the interpretation of the rules governing underwriters' liability and the scope of their due diligence defence.

In 1992, after the seminal case *BarChris*,⁸ where the court stressed the importance of underwriters' role in securities offering for effective investors' protection and defined the basic obligations that they are required to fulfil for the purpose of establishing a due diligence defence, the SEC attempted – also in light of the recent reforms of the securities offering process - to provide guidance on the factors that shall be considered in assessing underwriters' due diligence. In adopting Rule 176, the SEC listed the following factors:

- (i) the type of issuer, security and underwriter arrangement;
- (ii) whether or not the person conducting the investigation has some relationship with the issuer other than as underwriter;
- (iii) reasonable reliance on officers and employees of the issuer and others who should have knowledge of the particular facts relied upon;
- (iv) the availability of information regarding the issuer; and
- (v) whether, when a fact or document is incorporated by reference into the registration statement, the person investigating had any responsibility for that fact or document at the time of the filing of the document for which it is incorporated. With respect to this last factor, the initial interpretation given by the SEC seemed to suggest that Section 11 liability for underwriters could be relaxed when abbreviated registration statement forms and/or shelf registration were used. By contrast, in *Shaw v Digital Equip. Corp.*, a case involving a shelf registration on a truncated Form S-3 registration statement, the United States Court of Appeals for the First Circuit took the opposite approach, focusing on the importance of underwriters' obligation under Section 11(a) also with respect to the disclosure of 'any and all material changes

in the registrant's affairs' since the completion of the form 10-K annual report and other forms incorporated by reference.⁹

Finally, the *Worldcom* case has recently addressed the issue of intermediaries' liability and underwriters' due diligence. With this decision, the court has made clear that Rule 176 does not constitute a safe harbour and, under the current regime as interpreted by the SEC and the case law of US courts, 'the Underwriter Defendants have not shown that the prudent man standard in Section 11 has been diluted by any regulatory changes. The processes through which and the timing in which due diligence is performed have changed, but the ultimate test of reasonable conduct in the specific circumstances of an offering remains unchanged'.¹⁰

Even though the *Worldcom* decision seems to have clarified that under the existing legislation there is no room for asserting a relaxed interpretation of the underwriters' due diligence obligations in light of the integrated disclosure system, it is important to briefly analyse the lively scholarly and practitioners debate on these issues. In analysing the changes of the systems in which the underwriters operate and the regime of liability under § 11 of the Securities Act of 1933, US scholars have repeatedly asserted the necessity of reforms. For the purpose of this Article, it is important to focus on the two possible main reforms identified by the most prominent US scholars.

In particular, some scholars have argued that serious due diligence efforts are simply not feasible within the time constraints of integrated disclosure and, therefore, they have proposed to downsize (through a cap on the amount of potential damages that they may face) or, more drastically, to remove the underwriters' liability under Section 11 entirely.¹¹

Some other scholars, instead, took a different approach, suggesting to intervene on the quality of the periodic disclosure under the Securities Exchange Act of 1934, rather than on the liability regime. More specifically, considering that high quality disclosure has always a substantial value, whether or not the issuer is selling securities, it has been argued that it would be desirable to improve the quality of periodic disclosure also through the involvement of an investment bank in the process of drafting the annual periodic disclosure filings. Thus, imposing liability on investment banks in connection with periodic disclosure would have the effect to give them the same incentive, as in the traditional registered offering, to make the filing free from disclosure violations.

Where is the Italian system going? A proposal

The US experience and academic debate with respect to underwriters' liability and the scope of their due diligence defence may be taken into account in order

to foresee and direct future developments in the Italian system.

While the introduction in the Italian securities law system of a statutory regime of civil liability for false or misleading prospectuses may have the effect of enhancing the possibility of enforcement through private litigation, the new provisions appear prima facie too imprecise to solve the uncertainty of the previous regime. Without a specification of the elements constituting 'reasonable investigation' pursuant to the new Italian provisions, it will be very hard to determine whether the underwriters have met the standard imposed by the new rules. It will be left to the wide discretion of the courts to determine the standard of liability, with potential disruptive effects on certainty and consistency in the application of the new provisions.

Should courts interpret the 'reasonable diligence' standard under Article 94, Section 8, of the Italian Securities Law rigorously, thereby limiting the scope of the due diligence defence, the standard of liability of the intermediaries will move in the direction of almost strict liability. Should they interpret such requisite in a relaxed way, expanding the scope of protection provided by the due diligence defence, the applicable standard of liability will move in the direction of a negligence based standard.

In addition, it should be noted that – as requested by EU regulations – Italian securities laws provide mechanisms for incorporation by reference and the equivalent of shelf registration designed to establish a flexible system for capital raising, similar to the US system of integrated disclosure. Accordingly, the same issues and problems that have been discussed in Section B above are likely to arise in the future debate in Italy.

In light of the foregoing, CONSOB (the Italian regulator) should take the necessary steps to fill the gaps remaining in the language of the new provisions in an effort to either define guidelines on the elements necessary to establish a due diligence defence under the new Italian Securities Law or even establish a clear safe harbour rule. A specific CONSOB's regulation (for which the US experience and debate could provide invaluable guidance) should find a proper balance between:

- (i) the rigour (and the 'costs') associated with a new statutory regime of intermediaries' liability providing for a shift of the burden of proof to the defendant; and
- (ii) the risks arising from a potential relaxed interpretation of the due diligence defence.

Finally, the introduction of a statutory regime of civil liability can only effectively enhance private enforcement of securities regulation if proper procedural means exist to make the threat of private litigation an effective deterrent. As already mentioned

above, in December 2007 the Italian Parliament introduced class actions into the Italian civil justice system, giving consumers' associations the right to file claims on behalf of groups of consumers (including investors) in order to obtain damages or judicial orders (such as injunctions) against legal entities breaching consumers' rights. In addition, by eliminating the traditional prohibition on lawyers conditioning their compensation upon a positive outcome, a recent reform of the Italian regulation on lawyers' ethical conduct may also play a role in increasing the importance of private enforcement of securities regulation in Italy. Should this reform be interpreted as having introduced in the Italian system a contingency fee mechanism similar to the US one, it will likely have the effect of encouraging private litigation in the securities law field.

Notes

- 1 CONSOB's translation. A translation of the full text of the law is available on the CONSOB's website www.consob.it.
- 2 CONSOB's translation. A translation of the full text of the law is available on the CONSOB's website www.consob.it.
- 3 Before starting this analysis, it should also be noted that the total number of cases with respect to liability for false or misleading prospectuses brought in Italy since the enactment of the Italian Securities Law has been an extremely small fraction of the average annual number of cases brought in the United States.
- 4 The information included in the prospectus was not deemed to be

- part of the contract for the purchase of securities.
- 5 Since the main purpose of this article is only to briefly compare the intermediaries' liability regime for misleading and false statements or omissions in prospectuses under the new Italian Securities Law and the US Securities Act of 1933, the civil liability regime under Rule 10b-5 (Fraud in Connection With a Purchase or Sale of a Security) of the US Exchange Act of 1934 is not included in the perimeter of analysis.
 - 6 In a brief filed with the Court of Appeals [at 69, Sanders III, 554 F.2d 790 (1997)], the SEC has stated that the standard of care under §12(a) (2) is less demanding than that prescribed by § 11 (ie §11 requires a more diligent investigation than §12(a) (2)) and that any practices or factors that would be considered favourably under §11 also would be considered favourably under the reasonable care standard of §12(a) (2).
 - 7 See Report of the Advisory Committee on the Capital Formation and Regulatory Process pt 4, at 53-66 (SEC 1996) (separate statement of John C. Coffee, Jr, Edward F. Greene, and Lawrence Sonsini); Merritt B. Fox, Shelf Registration, Integrated Disclosure, and Underwriter Due Diligence: an Economic Analysis, 70 Va. L. Rev. 1005, 1025-1028 (1984); Merritt B. Fox, Rethinking Disclosure Liability in the Modern Era, 75 Wash. U. L.Q. 903 (1997).
 - 8 283 F.Supp. 643, (D.C.N.Y. 1968).
 - 9 Sec. Act Rels. 6335, 23 SEC Dock. 401, 406 (1981) (proposal), 6383, 24 SEC Dock. 1262, 1296-1297 (1982) (adoption). See generally, 2 Louis Loss & Joel Seligman, Securities Regulation 623 (3d edn rev 1999) and John C. Coffee, Jr and Joel Seligman, Securities Regulation 913 (9d edn 1998).
 - 10 346 F. Supp. 2d 628, (S.D.N.Y.2004).
 - 11 It should also be noted that – given the impact of securities litigation on the competitiveness of the US market – the issue of underwriters' liability should be analysed in view of the recent political and economic debate on tort reform.

Broader acceptance of IFRS in US capital markets: implications for attorneys

Barry Jay Epstein and Susan Cheng^{1*}

Russell Novak & Company, LLP, Chicago

bepstein@rnco.com

Recent development in financial reporting

On 15 November 2007, after considerable deliberation and public comments, the Securities and Exchange Commission (SEC) voted unanimously to approve rule amendments (Amendment) that will allow foreign private issuers in the US to file financial statements without reconciliation to US Generally Accepted Accounting Principles (GAAP) if those financial statements are prepared using International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). It is

widely expected that this will enhance the attractiveness of filing in the US, and thus boost activity in US capital markets. This, in turn, should provide opportunities to international and US-based attorneys, accountants, and finance professionals – but only if they are conversant with IFRS.

Presently, the SEC is continuing its focus on the August 2007 Concept Release, in which it sought comments regarding allowing US domestic issuers the same option that foreign issuers have in the US markets to use either US GAAP or IFRS. Certainly,

this is good news for US-listed companies seeking reporting parity with foreign peers and competitors. The fact that SEC Chairman Christopher Cox called this 'a significant next step on the road to a single set of globally accepted accounting standards' clearly signals the SEC's desire to bring about an end to the era of multiple sets of financial reporting regimes.

While it may be some time before we know of the final outcome, whether US domestic issuers will have a 'free choice' between US GAAP and IFRS, what is certain is that this is a positive step towards the ongoing alignment of US and international accounting standards. It certainly must now be seen as a real possibility that in the not-too-distant future the SEC may mandate IFRS as the single set of accounting standards used in the US capital markets, thereby anointing IFRS as the global standard for accounting and financial reporting, for publicly held and private companies alike.

Given what has unfolded to date, and what seems likely to follow, accounting and finance professionals clearly have an urgent need to be trained in IFRS. Furthermore, attorneys and their clients should note– and address the implications of – these recent developments. In the following paragraphs, certain of these matters are addressed.

Implications for securities and corporate lawyers

Securities and corporate lawyers will benefit from increased knowledge about international legal and financial reporting issues. This is crucial since attorneys often play a key advisory role in structuring contractual relationships on behalf of clients with foreign-based entities. Oftentimes, the risks and rewards of the contracts are closely linked to the counterparties' reported financial performance. Thus financial and other impacts that stem from converting to another financial reporting basis could have a deleterious outcome on the relationships.

Both US and non-US lawyers will have to develop a more in-depth understanding of the differences between current US GAAP and IFRS, so as to better service corporate clients. Having this enhanced understanding should present these attorneys with an opportunity to educate and, more importantly, to add value for their existing clients, as well as to more effectively market their capabilities to prospective clients. Counsel, together with accounting advisors, might offer clients and prospects aids such as 'accounting convergence checklists' to further assist them in this process.

Opportunities for US securities lawyers

This Amendment may also provide opportunities for domestic law firms. The waiving of the former reconciliation requirements, to the extent foreign

private issuers file financial statements that fully comply with IFRS, reduces compliance costs, improves efficiencies, and most importantly, facilitates cross-border capital formation. While there may be some lost business for accounting firms, this improved access to the US capital markets should (if basic economic theory holds true) result in expanded business opportunities for law firms in that US-based securities lawyers would be called upon to advise an expanded number of foreign registrants in completing their securities offerings in US capital markets.

Potential litigation risks?

Clearly, any changes to reporting standards (even routine changes to US GAAP) can engender disputes that may evolve into securities litigation. A change from US GAAP to IFRS reporting standards would create a much greater risk of misunderstandings, and of improper application of unfamiliar rules by preparers and even by auditors. Thus, the change could exacerbate the already serious litigation risks, where investors or other users of financial statements claim harm flowing from reliance on improperly prepared or inadequately explained financial reports. In the authors' opinion, taking into account one author's experience with securities litigation, the expanded use of IFRS-based reporting will, in the near term at least, create expanded litigation risk. Therefore, having an awareness that these risks exist should stimulate the exercise of greater care and caution, which would, to a degree, ameliorate the dangers.

Are there governance implications for the board and/or audit committee?

Corporate directors, and in particular, audit committee members, need to be mindful in the selection and application of financial reporting standards. Specifically, the risks of 'opportunistic behavior' by management, or 'accounting principles shopping' in choosing between US GAAP or IFRS adoption in order to affect key financial ratios and other performance measures, potentially affecting bonus awards and option grants, may demand greater board scrutiny. This is another area where consulting with special counsel or outside accountants – explicitly authorised under the Sarbanes-Oxley Act (Section 301) – is warranted.

Concluding thoughts

The next few years will be a time of challenges and opportunities – with major changes in financial reporting regimes, particularly in the US, being extremely likely. Securities and corporate counsel, supported by accounting experts, can provide valuable services to their clients. Litigation counsel will be faced with complex but significant opportunities to

assist securities litigation plaintiffs and companies sort through the changing financial reporting landscape. Gaining a good knowledge base of IFRS and how they will affect various segments of the financial reporting communities should be seen as a priority activity for each of these sections of the bar.

Notes

1 * Barry Jay Epstein, Ph.D., CPA, is Partner in the Chicago, Illinois firm, Russell Novak & Company, LLP, where his practice is concentrated on technical consultations on GAAP and IFRS, and as a consulting and testifying expert on civil and white collar criminal litigation matters. Dr Epstein is the co-author of Wiley GAAP 08, Wiley IFRS 07, Wiley IFRS Policies and Procedures, and other books. Susan Cheng is a senior manager with Russell Novak & Company, LLP, specialising in international accounting matters and litigation consulting.

New CVM regulations on anti-money laundering in Brazil

Walter Stuber and Adriana Maria Gödel Stuber

Walter Stuber Consultoria Jurídica, São Paulo

walter.stuber@stuberlaw.com.br

The Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários – CVM*) issued CVM Instruction No 463 on 8 January 2008, which amends the rules dealing with crimes on money laundering or concealment of assets, rights and valuables, originally established by CVM Instruction No 301, of 16 April 1999, and sets forth the procedures to be observed for the follow-up of transactions entered into by people politically exposed.

The purpose of the new provisions is to incorporate in the Brazilian regulations the FATF recommendations¹ designed to counter the use of the financial system by criminals and prevent terrorist financing and enable the supervision of the financial transactions made by people politically exposed. The definition of ‘people politically exposed’ includes anyone who had a relevant public position, job or function within the last five years in Brazil or in another country, foreign territory and dependence, as well as his/her representatives, family members and other persons of close relationship and comprises heads of state or of the government, high-level politicians, public servants, judges or militaries and leaders of state-owned companies or of political parties, their first degree direct relatives and the spouse, companion or stepson or stepdaughter.

In Brazil, this definition is applied to:

- (i) the holders of elective mandates of the Federal Executive and Legislative Branches;
- (ii) those who hold in the Federal Executive Branch the position of Ministry of the State or compared status; of special or equivalent nature; of President, Vice-President and director, or similar function, in instrumentalities (*autarquias*), public foundations

(*fundações públicas*), public companies (*empresas públicas*) or mixed-capital companies (*sociedades de economia mista*); or of the superior management and advisory group (*grupo Direção e Assessoramento Superiores – DAS*), level 6, and equivalent;

- (iii) the members of the National Council of Justice, the Federal Supreme Court or upper courts;
- (iv) the members of the National Council of the Public Prosecution Service, the Attorney-General of the Republic, the Vice-Attorney-General of the Republic, the Labour Attorney-General, the Attorney-General of the Military Justice, any Delegate-Attorney-General of the Republic and any Attorney-General of Justice of the States and of the Federal District;
- (v) the members of the Federal Accounts Tribunal and of the Attorney-General of the Public Prosecution Service at the Federal Accounts Tribunal;
- (vi) the Governors of the States and of the Federal District, the Presidents of the Court of Appeals, of the State Legislature and of the District Chamber and the Presidents of the Accounts Tribunal and Council of the States, Municipalities and Federal District; and
- (vii) the Mayors and Presidents of the Municipal Chamber of the capitals of the States.

The main changes introduced by CVM are related to the new obligations to be performed by the legal entities whose activity is the custody, issuance, distribution, settlement, negotiation, intermediation or administration of securities, i.e. banks, brokerage house companies, funds’ managers and the like, as well as the entities which administrate exchanges and the organised over-the-counter market.

These entities must keep registry of every transaction

involving securities, regardless of its value, in order to permit the verification of the financial movement of each client, based on the defined criteria adopted by the institution in its control procedures, regarding the assets and financial situation shown in the client's registration form, considering:

- (a) the amounts paid to settle these transactions;
- (b) the amounts or assets deposited as collateral in transactions carried out in future settlement markets; and
- (c) the transfer of securities for the client's custody account.

The registration forms of the active clients must be updated by the institution every 24 months. All the relevant information (the registration form, the registries and the documentation) must be maintained by the institution at the disposal of CVM for a minimum term of five years as of the date the account is closed or of the latest transaction made in the name of the respective client. This term may be extended for an undetermined period of time in the event that there is an investigation conducted by CVM and provided that this fact is formally notified to the person or institution.

Among the deals with securities which deserve special attention on the part of the institutions, the following have now been included:

- transactions made between the same parties or having as beneficiaries the same parties, in which there is a repeated gain or lost with respect to any of the involved persons;
- transactions made with the purpose of producing a lost or gain and for which there is no an objective economic substance;
- transactions with individuals resident or companies incorporated in countries and territories identified as non-cooperative in the circular-letters issued by the Council of Control of Financial Activities (*Conselho de Controle de Atividades Financeiras – COAF*);
- transactions settled in cash, if and when permitted;
- private transfers of funds and securities, without any apparent motivation;
- transactions whose degree of complexity and risk seem incompatible with the technical qualification of the client or of his/her representative;
- deposits or transfers made by third parties, for the settlement of transactions of the client, or for the rendering of guarantees in transactions carried out in future settlement markets;
- any payment to third parties, under any form whatsoever, to settle transactions or redeem amounts deposited as collateral, registered in the name of the client.

In addition, an additional care is specially required in the case of certain clients, namely:

- (i) non-resident investors, mainly when it is a trust or incorporated as a company with bearer shares;

- (ii) private banking clients; and
- (iii) people politically exposed.

The transactions must be analysed together with other connected operations and which may be part of the same group of transactions or have any type of relationship between them.

Any suspect transaction or proposal thereof will have to be reported by the institution to CVM within 24 hours of the date it happens. Whenever the client is included in the definition of 'people politically exposed', this must be highlighted in the communication made to CVM. There are deemed to be serious circumstantial evidences of crimes on money laundering or concealment of assets, rights and valuables, including terrorism or its financing, or of illicit acts related to such crimes, if it is possible to verify in any such transaction or proposal exceptional characteristics regarding the involved parties, the form of performance or the instruments used therein, or it objectively lacks economic or legal grounds to justify it.

The transactions are considered to be related to terrorism or its financing when they are performed by individuals who practice or plan to practice terrorist acts, or who participate therein or facilitate their practice, as well as by entities owned or controlled, directly or indirectly, by any such individuals and the individuals and entities who/which operate under their command.

Any financial institution or similar entity mentioned above shall develop and implement a manual of control procedures to comply with the requirements of the CVM Instruction and maintain a continuous training program for its employees, aimed to divulgate the control and anti-money laundering procedures adopted by the institution. The institution must also have a director in charge of the performance of such obligations, who shall have access to all the registration forms and data of all the clients, and to the information of any and all transactions made by the clients.

Notes

- 1 These recommendations have been made by the Financial Action Task Force on Money Laundering (FATF), which was established by the G-7 Summit in Paris in 1989 to develop a coordinated international response to set out the measures national governments should take to implement effective anti-money laundering programmes, and have been recognised, endorsed or adopted by many international bodies.

Ruling in the *Realkredit Danmark* case – disclosure of inside information

Dan Moalem and Trine Bogelund

Lett Law Firm, Copenhagen

dmo@lett.dk • trb@lett.dk

On 15 January 2008, the Danish Eastern High Court ruled in the *Realkredit Danmark* case regarding disclosure of inside information. The court affirmed the judgment of the Copenhagen City Court, in which both of the accused were convicted of having violated the prohibition to disclose inside information.

Introduction

On 22 August 2000, Realdanmark's Board of Directors discussed the plans for a merger with Danske Bank. Knud Grøngaard, who was the staff representative on the Board of Directors, participated in these discussions.

On the next day, 23 August 2000, the staff representative on the Board of Directors, Knud Grøngaard, informed the Chairman of the Financial Services Union, Allan Bang, of the merger plan. Subsequently, Allan Bang informed his two vice-chairmen and two trusted employees, Knud Christensen and deputy director Jørgen Borre Larsen. The latter two shortly hereafter purchased shares in Realdanmark. On 2 October 2000, the merger between Realdanmark and Danske Bank was made public, and the price of Realdanmark's shares increased with 71 per cent. Shortly after the merger, the Public Prosecutions Department for Special Economic Crime filed a suit against Allan Bang and Knud Grøngaard for disclosing inside information pursuant to Section 36 of the Danish Securities Trading Act. Concurrently, Knud Christensen and Jørgen Borre Larsen were charged with insider trading. In February 2002, Knud Christensen was sentenced to six months in prison for insider trading, while the Public Prosecutions Department for Special Economic Crime back in May 2001 dropped the suit against Jørgen Borre Larsen. Following this event, Jørgen Borre Larsen brought an action against the Financial Services Union for wrongful dismissal but lost the case in February 2004 in the Danish Supreme Court. In September 2001, the Financial Services Union requested to have the question of disclosing inside information propounded to the European Court of Justice, since Section 36 is rooted in the insider directive (today the directive on

insider dealing and market manipulation) applying at the time, and since there was no case law on the subject neither in Denmark nor other EU countries at the time. In November 2005, The European Court of Justice established that one may disclose inside information if absolutely necessary as part of performing one's job, business or functions. The European Court of Justice never made a decision on the specifically presented case since it was a matter of reference of a preliminary question.

On 23 November 2006, the Copenhagen City Court found Allan Bang and Knud Grøngaard guilty of disclosing inside information. They were both imposed a fine of DKK 5,000. The Financial Services Union appealed the ruling to the Danish Eastern High Court on their behalf. On 15 January 2008, the court affirmed the ruling of the city court with four judges against two.

Assessment

The ruling of the Danish Eastern High Court adopts three principles:

1. The Danish Eastern High Court follows the European Court of Justice's instructions and, uncontroversially, holds that the disclosure of inside information is not necessarily precluded.
2. The group of recipients must be limited.
3. More specifically, the selective disclosure happened prematurely and the disclosure went beyond the necessary.

Regarding the first principle, this is uncontroversial and in compliance with the ruling of the European Court of Justice. The relevant criterion in this connection is to specifically qualify/determine when it is absolutely necessary to disclose inside information, eg as with the case in point, from a board member to a trade union.

As regards the second principle, it is not entirely clear from the judgment whether the group of recipients must be subject to a duty of confidentiality in order to receive such inside information. In the judgment, the majority of Supreme Court judges point

to the fact that the legislative history mentions a limited group of recipients.

However, there is, in our opinion, no foundation for reading into this reference that this means that the majority thus believes that one may only disclose information to people subject to a duty of confidentiality.

Such an interpretation was, in our opinion, abandoned by the advocate-general in connection with his recommendation to the European Court of Justice in connection with the preliminary presentation, but it is stressed that the European Court of Justice by its ruling refrained from making a decision on this. Supporting such an interpretation - that disclosing inside information cannot only be done to persons bound by a duty of confidentiality – is the Danish Supreme Court's ruling in the so-called *Vase* case, where the Supreme Court, in our opinion, accepted selective disclosure to shareholders, who were not bound by a duty of confidentiality. In conclusion, it is our opinion that the Danish Eastern High Court's reference to legislative history must be seen solely as an enjoinment of the fact that selective disclosure must only take place to a limited group of people.

With respect to the third principle, this concerns a rather interesting criterion, since the Danish Eastern High Court is choosing to find that disclosure must not take place before the information in question has acquired a certain solidity and, moreover, that there are limits as to the degree of detail that the disclosed

information must have. Firstly, this means that disclosure may only take place fairly late in the process. The solidity criterion is known from other parts of capital marked law, not least the continuing duty to disclose and an utilisation in conjunction with the disclosure prohibition is quite natural. Secondly, the Danish Eastern High Court stipulates a limit as to how detailed the information disclosed can be (specifically the terms of trade). This is ostensibly motivated in a consideration that only the merger itself was inside information in the sense of the Danish Securities Trading Act, which is why the terms of trade did not constitute such information as was absolutely necessary to disclose. Of course, such ruling which distinguishes between lawful disclosure of inside information and unlawful and unnecessary disclosure of inside information leaves room for interpretation and thus uncertainty for Boards of Directors in companies with listed securities. On the other hand, the ruling is positive because it established that inside information, under the circumstances described, can be disclosed by a staff representative to, eg a limited group in the management in a trade union.

After the judgment was delivered, the Financial Services Union informed the media that a petition will be filed with the Danish Court Appeals Tribunal regarding third instance permission, in order for the case to be tried by the Supreme Court. We will follow the case as it develops and will examine the judgment in more detail in articles in relevant legal journals.

The new Belgian takeover rules – an introduction

Hans Kets, Tom Van Gelder and Quinten Helsen

Allen & Overy, Brussels

hans.kets@allenovery.com • vangelder@allenovery.com • quinten.helsen@antwerp.allenovery.com

New Belgian takeover rules came into force on 1 September 2007.¹ While the primary purpose of this new legislation is to implement the provisions of the Thirteenth Directive,² the new legislation is also a codification of former guidance and viewpoints taken by the Belgian regulator and the Banking, Finance and Insurance Commission (the BFIC).

This article does not purport to give an exhaustive overview of the new regulations, but aims to provide a brief overview of how public takeovers are managed in Belgium.

Getting the structure right

Mandatory takeover bids

An acquisition resulting in exceeding ownership of 30 per cent of the securities carrying voting rights in a listed company having its registered office in Belgium – either alone or together with one or more persons acting in concert³ – triggers the obligation to launch an unconditional (save for competition clearance – see below) takeover bid on the remaining voting securities (and all securities which can be converted into, or

exchanged for such securities) of that listed company for an ‘equitable price’. Only Belgian companies listed on a regulated market in Belgium⁴ or another Member State of the European Union fall within the scope of this legislation.

Belgian takeover rules now contain detailed procedures on how to calculate this 30 per cent threshold (including a clarification on the concept of acting in concert)⁵ and provide for a limited number of (temporary) exceptions to the takeover bid obligation upon surpassing the 30 per cent threshold.⁶

Belgian takeover rules not only envisage direct ownership in a listed company, but also indirect ownership by acquiring control through a holding company.⁷

The ‘equitable price’ is the higher of:⁸

- (i) the average stock exchange price (on the most liquid market where the securities are listed, as the case may be) for 30 calendar days preceding the day on which the obligation to launch a mandatory bid was triggered; or
- (ii) the highest price paid during the last 12 months by the bidder or persons acting in concert with the bidder.

If the bid is triggered due to an indirect surpassing of the 30 per cent threshold through a holding company, the equitable price referred to under (ii) is the ‘implicit’ price paid for the securities that the holding company owns in the listed company.⁹ The BFIC has the authority to review the bid price should this price for any reason not be relevant.

Voluntary takeover bids

A takeover bid on securities which have a ‘public character’ within the Belgian territory and which is not a mandatory takeover bid, is considered to be a voluntary takeover bid (eg a takeover bid launched by the target company on its own voting securities is included). The Belgian takeover rules contain detailed provisions in respect of the public character of a bid.

Contrary to mandatory takeover bids, voluntary takeover bids can be made conditional to ‘realistic conditions’ (eg acceptance threshold, MAC – see below), subject to the approval of the BFIC.¹⁰ The price of a voluntary takeover bid is not the ‘equitable’ price, but rather a ‘realistic price’: the threshold that applies for a mandatory bid does not apply in case of a voluntary bid and there is considerably less room for the BFIC to intervene in the pricing of a voluntary takeover bid.

Tactics

The choice of structuring a public M&A transaction as either a private transfer of a stake resulting in the obligation to launch a mandatory takeover bid or a

voluntary bid is a tactical matter and may be key to the success of the transaction. Unless a counter-bid is expected, a bidder will most likely prefer to launch a voluntary bid, as it can be made conditional and there are less regulatory restrictions concerning the pricing of the bid. Parties on the sell-side in a public M&A transaction, who do not expect a counter bid and do not want to be confronted with the execution risk of a voluntary bid, may prefer the structure of a mandatory bid, as this will allow them to sell their shares in a private transaction before the actual mandatory takeover bid.

Squeeze-out and sell-out

Another important element in structuring the transaction is taking into account the possibility of a squeeze-out. A shareholder (together with the persons acting in concert and/or the target company) owning 95 per cent of the shares in a listed entity may initiate a squeeze-out pursuant to which such shareholder will be deemed to own all the shares of the listed company.¹¹ Squeeze-outs are very important in Belgian public M&A transactions as they may be the only realistic way to obtain a delisting. Squeeze-outs are also very important if post-transaction debt-push-down scenario’s have to be considered: subject to a number of other legal restrictions and considerations, a debt-push-down scenario always entails some form of corporate interest test which will evidently be tougher if minority interests also have to be taken into account.

Belgian takeover rules also provide for a ‘simplified’ squeeze-out procedure:¹² if a bidder owns at least 95 per cent of the capital to which voting rights are attached and 95 per cent of the voting securities in a listed company after a public takeover bid, then a squeeze-out can be realised simply by reopening the bid term by minimum 15 business days in a period of three months following the end of the acceptance period of a bid.¹³ This right only applies following a voluntary public takeover bid and if 90 per cent of the shares that were not owned at the start of the bid have been acquired through the bid.¹⁴ Please note that in this case, minority interests have a corresponding sell-out right for a period of up to three months after the public bid.¹⁵ Alongside this ‘automatic’ squeeze-out procedure there is also a ‘naked’ squeeze-out procedure that can be initiated outside the context of a public bid. This ‘naked’ squeeze-out procedure is more onerous than the ‘automatic’ squeeze-out procedure as it involves obtaining a fairness opinion from an independent expert¹⁶ and the possibility of the minority interests challenging the bid price.¹⁷

Terms and conditions of the bid

Full bid

The takeover bid must pertain¹⁸ to:

- (i) all securities carrying voting rights (*effecten met stemrecht/ titres avec droit de vote*); and
- (ii) all securities that can be converted into or exchanged against newly issued voting shares, provided that these securities have been issued by the target company, and which are not held by the bidder or by persons acting in concert with the bidder.

This means that the bid will also have to include warrants issued by the target company. Stock options generally cover existing shares and can in principle be excluded from the bid. However, from a practical point of view, most bidders will also decide to include options in their bid.

Bid price

As mentioned above, there is at least a theoretical difference between the bid price in a voluntary takeover bid (launched at a ‘realistic price’)¹⁹ and a mandatory takeover bid (launched at an ‘equitable price’)²⁰. The new Belgian takeover rules have introduced an additional obligation following the end of a voluntary takeover bid, ie, the obligation for a bidder acquiring shares in the target (which were included in the takeover bid) within 12 months after the bid for a price higher than the bid price, to pay the difference to all shareholders.²¹

Exchange bid

Exchange bids are possible under Belgian law. In a number of circumstances there is an obligation to provide for a cash alternative. This is the case if it is a mandatory bid²² or voluntary bid initiated by a bidder who already controls the target company,²³ and if:

- (i) the securities offered in exchange are not listed; or
- (ii) the bidder (or a person acting in concert with the bidder) has acquired securities (representing more than one per cent of the total number of voting securities in case of a voluntary takeover bid) in the listed company for cash during a 12-month period before the bid.

Conditions: acceptance thresholds

Acceptance thresholds are a popular and accepted condition in Belgian voluntary takeover bids. The BFIC will only accept ‘realistic’ acceptance thresholds: eg a 95 per cent acceptance threshold will only be considered realistic if the bidder has obtained tender commitments from all + five per cent shareholders.

Conditions: competition approval

New Belgian takeover rules state that conditions relating to competition approvals can only relate to so-called ‘phase 1’ procedures.²⁴ This means that a bidder who faces a ‘phase 2’ investigation either has to cancel its bid (as the condition will not have been fulfilled) or will have to assume the risk of not obtaining competition approval (and having to divest shares acquired through the bid). Contrary to the old Belgian takeover rules, it is no longer possible to structure competition approval as a condition subsequent to the bid. This new rule is actually a good example of former guidance given by the BFIC finding its way into the new takeover rules. It also highlights the disadvantage of its transition from soft law into hard law, as the new takeover rules no longer leave room for discussion with BFIC on the exact scope of the competition condition.

Conditions: MAC clause

It is also market practice in Belgian to use MAC clauses in voluntary takeover bids, however, it is understood that the BFIC will only consider that MAC clauses are acceptable if they refer to exact facts and figures (eg a general reference to a stock market plunge is not acceptable, but a precise reference to a drop in the target’s stock exchange price or a drop in an official index is considered acceptable).

Bid cannot be subject to financing

Bidders must be aware that a bid cannot be conditional on financing. In this respect, bidders will have to submit a certain fund letter at the time of filing of the bid (see below).²⁵

Employee consultation

Employee representatives of both the bidder and the target company must be informed immediately after the BFIC’s announcement of the bid.²⁶

Pre-bid phase

Secret pre-bid phase

While the actual execution phase of a public takeover bid is described in every detail in the Belgian takeover rules, the rules on the pre-bid phase are less clear. The most important rule governing the pre-bid phase is the fact that an upcoming bid has to remain confidential and may not be disclosed before it has been filed with and announced by the BFIC. In principle, the BFIC will announce the bid to the market immediately after filing.²⁷ The BFIC can also require any person involved in a public takeover bid to make a public statement.

This non-disclosure obligation often conflicts with the obligation of the listed target company to

immediately announce price-sensitive information to the market.²⁸ This can be a tricky point in approaching a target company, but there are ways to work around this. Reference shareholders for example do not have an obligation to immediately announce price-sensitive information (unless this reference shareholder is also a listed company). In addition, Belgian law allows a listed company to delay the disclosure of price-sensitive information when the listed company deems disclosure prejudicial to its legitimate interests (at the responsibility of the listed company concerned, provided that measures preventing accidental disclosure have been taken and the decision to postpone has to be communicated to the BFIC).²⁹

Put up or shut up' rule

New Belgian takeover rules have introduced a Belgian 'put up or shut up' rule:³⁰ if a potential bidder has made statements or declarations in the market that may give rise to speculation concerning a potential takeover bid, the BFIC may require this potential bidder to clarify its position in a public announcement within a maximum of 10 business days after being asked to do so.³¹ If the potential bidder denies that it has the intention to make a takeover bid, this potential bidder may no longer launch a bid for six months from the date of its announcement (unless there is a significant change in circumstances, in either the target's situation or the ownership structure).³²

Due diligence

Due diligence requires a specific resolution of the target's board of directors. In taking this decision, conflict of interest procedures may have to be applied. A data room can in principle omit any price sensitive information (as there is an obligation to share this information immediately with the market).³³ The fact that a due diligence is taking place will however constitute price sensitive information and all parties should carefully consider the timing of the due diligence in the M&A process and the disclosure to the market (see above). The Bidders and the target should be aware that certain information concerning the due diligence findings may have to be disclosed in the prospectus. This is particularly the case if certain due diligence findings negatively impact on the bid price.

Stake building

There are no clear rules on stake building under Belgian law, and it remains a debated topic, as it is not clear whether the bidders own intention to make a bid constitutes price sensitive information. However, market disclosure (transparency) rules (five per cent or three per cent, and in the near future probably one per cent ownership) limit the strategic value of stake building.

Tender commitment with reference shareholders

All sorts of tender commitments are possible under Belgian law. Typically, a distinction is made between 'hard commitments' (not subject to release in the case of a counter offer) and 'soft commitments' (subject to release in the case of a counter-offer), but there are endless variations on this. There is ongoing litigation on the question whether such hard commitments are legally enforceable or only constitute a gentlemen's agreement.

Agreements with target

A bidder will probably seek support from the target's board and it is possible to enter into an agreement with the target in this respect. Contrary to reference shareholders, a target board is bound by fiduciary duties and will therefore have to make its support subject to:

- (i) a release in the case of a counter-offer;
- (ii) a review of the prospectus; and
- (iii) an opinion from the target's works council.

Break fees

Although practices concerning break fees are not as established as eg in the UK, there are a number of transactions in Belgium involving break fees. In most of these cases, break fees are arranged at shareholder level (as break fees at the level of the target company may trigger a number of additional legal constraints).

Bid filing

Filing with BFIC

As set out above, a public takeover bid must be filed with the BFIC before any announcement of the bid is made.³⁴

The following documents have to be filed with the BFIC (together with the notification of the takeover bid):

- (i) a document setting out the price and the terms and conditions of the offer;
- (ii) a copy of the corporate decision making by the bidder;
- (iii) a draft prospectus;
- (iv) a certain fund letter;
- (v) a copy of all relevant pre-bid agreements; and
- (vi) a document evidencing the appointment of a collecting agency.

A number of these documents will be discussed further below. In the event of a mandatory takeover bid, the acquisition of securities resulting in the breach of the 30 per cent threshold must be notified to the BFIC within two working days following this acquisition.³⁵

Certain fund letter

This is a letter issued by a ‘Belgian’³⁶ bank addressed to the BFIC confirming that the necessary funds for completing the bid are either available on a blocked account or are guaranteed pursuant to an irrevocable and unconditional credit facility. Belgian takeover rules are not clear on whether the certain fund letter merely confirms to the BFIC that the funds are available or whether this letter also constitutes some sort of a payment guarantee by the bank.

Prospectus

After filing the bid, the BFIC will send the draft prospectus to the target company who has five business days to comment.³⁷ In general, the time needed to obtain approval of the prospectus by the BFIC takes four–six weeks. If circumstances require, a bidder must update the prospectus during the bid execution phase.

Bid execution

Target’s response/memorandum

In addition to reviewing the draft prospectus, the target’s board of directors must also prepare an opinion on the (consequences of the) takeover bid, taking into account the interests of all shareholders, employees and creditors of the company.³⁸ A draft must be submitted to the BFIC within five days after receiving the prospectus which has been approved by the BFIC.³⁹ The opinion must include the view of the board of directors on the bidder’s strategic plans, including impact on the target’s results, company headquarters and employment within the target. The target’s response must also state the tender intentions of board members and of shareholders represented by board members. Finally, the target board must also indicate whether it will apply any approval rights contained in the target’s articles of association or whether it will request the application of any pre-emptive rights. The board also has the possibility to reserve its right to refuse the transfer approval or the pre-emptive right application. The fact that the target’s response has to be approved by the BFIC is something new under Belgian takeover rules. Also new is the concept of a directors liability with respect to the target’s response, which is similar to the principles of prospectus liability. The target’s response has to be published and updated in the same way as a prospectus. It is possible to publish the target’s response together with the prospectus.

Fairness opinions

Although fairness opinions are in most cases not legally required, they have become market practice. For a limited number of public M&A transactions,

such as a naked squeeze-out⁴⁰ or a voluntary takeover bid made by a bidder already controlling the target⁴¹ (*OPA de ramassage/ OPA de nettoyage*), there is a legal obligation to provide a fairness opinion issued by an ‘independent’ expert:

- (i) in respect of the valuation of the securities envisaged by the takeover bid, and
- (ii) in the event of an exchange bid, in respect of the securities which are offered in exchange.

Opinion by works council and organisation of a hearing⁴²

The target’s works council also has to give an opinion on the takeover bid. The new takeover rules have introduced the possibility for the target’s works council to organise a hearing in which the bidder has to explain its strategic plans for the target company (this hearing must take place within ten days after the start of the bid’s acceptance period).⁴³ Where possible, the work’s council opinion must be attached to the target’s response.

Advertisements and announcements

Advertisements and announcements on the takeover bid that are distributed on Belgian territory must be pre-approved by the BFIC.⁴⁴ They do not only have to be in line with the information contained in the prospectus and the target’s response (see below), but also have to indicate that the prospectus and the target’s response are/will be available and give details.⁴⁵ Advertisements must be clearly identified as advertisements.

Initial bid term

The initial bid term⁴⁶ can only start after approval of the prospectus and the target’s memorandum (in principle five working days after the earlier of the approval of the prospectus or the approval of the memorandum and, if applicable, in any event not later than 40 working days after the event that triggered the mandatory takeover bid obligation).⁴⁷ The initial bid term will be between two and ten weeks at the option of the bidder. In certain circumstances, the offer period can be extended. Within five business days after the expiry of the initial bid term, the bidder has to publish the results of the bid.⁴⁸ At this time, the bidder must also confirm whether or not any condition attached to the bid (if any) has been fulfilled or will be waived. Settlement takes place within ten business days after the expiry of the initial bid term.⁴⁹

Mandatory reopening of the bid term

There is an obligation to reopen the bid⁵⁰ if the bidder owns more than 90 per cent of the shares or securities granting access to voting rights after the bid. This

obligation also exists if the bidder:

- (i) proceeds with a delisting within three months after the expiry of the bid (although this delisting realistically requires a squeeze-out); or
- (ii) if the bidder announces a price-increase on a date later than five business days before closing of the initial bid term.

The mandatory reopening has to take place within ten business days after the publication of the results of the bid or the day after it has been determined that the bid should be reopened and this is for a period between 5 and 15 working days.⁵¹

Voluntary reopening of the bid term

Belgian takeover rules do not provide the possibility to voluntarily reopening of the (initial) bid term. A similar result could be (and has been) achieved by launching a new voluntary offer instead of simply reopening the bid term. The launch of a new bid is of course more cumbersome than a simply reopening it, and in a precedent the BFIC has granted the bidder a number of derogations from the takeover rules to facilitate the reopening of its bid.

Defensive measures and disclosure of certain agreements

Defensive measures remain possible under the new Belgian takeover rules. The Thirteenth Directive has introduced an optional regime of neutralisation of the pre-bid defensive measures and of passivity with respect to the post-bid defensive mechanisms.⁵² Belgian takeover rules allow each individual listed company to stipulate in its articles of association whether or not it will opt-in, as the case may be under the condition of reciprocity. Please note that there is also a general obligation for target companies to disclose to the bidder and to the BFIC the defensive measures taken during the bid (other than initiating a white knight strategy).⁵³ There is also a general obligation to disclose to the BFIC all relevant clauses of agreements that can have a significant impact on the bid assessment, the bid conduct or the outcome of the bid. It is up to the BFIC to decide whether or not these agreements will have to be disclosed.

Disclosure of securities transactions⁵⁴

The bidder, the target, the target's and bidder's boards, all persons and entities acting in concert with the foregoing and all persons holding one per cent of the target shares must report all securities transactions to the BFIC, who will publish these transactions on its website.

Price increases

A bidder may increase its bid during the course of the bid, but the increased price of the bid will have to be

paid to all shareholders who tender their shares in the bid.⁵⁵ The increased price must also be at least five per cent higher than the highest bid price made (this is especially important in the framework of counter-bids).⁵⁶ As indicated above, there are certain rules relating to an extension of the bid term if the bid price increases near the end of the bid term.⁵⁷

Counter bids

The counter-bid price must be at least five per cent higher than the highest bid made so far and cannot include more stringent conditions than such highest bid (in the event of a voluntary takeover bid).⁵⁸ A counter bid must also be made public at least two business days before the end of the initial bid term (most likely requiring the filing of the counter-bid with the BFIC at least three business days before the end of the initial bid term).⁵⁹ Shareholders are no longer automatically released from their acceptance of an earlier bid in case of a counter-bid and they will now have to explicitly withdraw their acceptance, which will necessitate inclusion in the prospectus of a procedure with which the shareholder that withdraws its acceptance must comply.⁶⁰ The target company will have to respect equal information rights for both bidder and counter-bidder. In addition, the target's board will have to make a comparison between both bids in the framework of its (the target's) response.⁶¹

Bid modification and withdrawal

As a general rule, a bid can only be modified if this results in more favourable conditions for the target's shareholders.⁶² The circumstances under which a (voluntary) bid can be withdrawn (save for non-fulfilment of the conditions in case of conditional takeover bid) are also limited.⁶³ The most obvious circumstance will be a counter-bid. Another example is not obtaining regulatory authorisation (although not obtaining competition approval can no longer be invoked – see above). Other circumstances require prior approval by the BFIC. The BFIC can approve the withdrawal of the bid in the case where the target executes certain poison pill structures (eg in case of capital increase, sale of crown jewels). Besides these specific circumstances, Belgian takeover rules also provide that the BFIC can grant approval to the bidder for withdrawal of the bid in a situation that constitutes *force majeure* on behalf of the bidder.⁶⁴

Notes

1 Belgian takeover rules are incorporated in the Law of 1 April 2007 on public takeover bids (Belgian Official Gazette of 26 April 2007) and two implementing Royal Decrees:

- (i) the Royal Decree on Public Takeover Bids of 27 April 2007 (Belgian Official Gazette 23 May 2007); and
- (ii) the Royal Decree on public squeeze-out bids (Belgian Official Gazette of 23 May 2007).

- 2 European Parliament and Council Directive 2004/25/EC of 21 April 2004 on takeover bids (Official Journal L142, 30 April 2004).
- 3 Article 50, §2 Royal Decree on Public Takeover Bids.
- 4 Article 49 Royal Decree on Public Takeover Bids: apart from Eurolist by Euronext or the Trading Facility of Euronext, it also applies to companies listed on the Free Market of Euronext or on Alternext (which are not 'regulated' markets).
- 5 Article 3, §1, (Law on Public Takeover Bids: Parties are acting in concert if natural or legal persons:
 - (i) are co-operating with the bidder on the basis of an explicit or tacit oral or written agreement with the view of securing control of the target company, frustrating another bid on the target company or maintaining control of the target company; or
 - (ii) have entered into an agreement establishing the concerted exercise of their voting rights in order to pursue a sustainable joint policy in respect of the target company.
- 6 Royal Decree on Public Takeover Bids, Article 52.
- 7 *Ibid.*, Article 51.
- 8 *Ibid.*, Article 53.
- 9 *Ibid.*, Article 55.
- 10 *Ibid.*, Article 3, § 4.
- 11 *Ibid.*, Article 2, §2.
- 12 *Ibid.*, Articles 42 and 57 Royal Decree on Public Takeover Bids.
- 13 *Ibid.*, Articles 43 and 57.
- 14 *Ibid.*, Articles 42 and 57.
- 15 *Ibid.*, Article 44.
- 16 Royal Decree on Public Squeeze-out Bids, Article 4, §6°.
- 17 *Ibid.*, Article 10.
- 18 *Ibid.*, Articles 3, §1° and 50.
- 19 *Ibid.*, Article 3, §4°.
- 20 *Ibid.*, Article 53.
- 21 *Ibid.*, Article 45.
- 22 *Ibid.*, Article 54.
- 23 *Ibid.*, Article 23, §3.
- 24 *Ibid.*, Article 4 and 57.
- 25 *Ibid.*, Articles 3, [?] §2° and 57.
- 26 Article 42 Law on Public Takeover Bids.
- 27 Royal Decree on Public Takeover Bids, Articles 5 and 57.
- 28 Law of 2 August 2002 concerning the Supervision on the Financial Sector and Financial Services, Article 10 (Belgian Official Gazette 4 September 2002).
- 29 Royal Decree of the Obligation of Issuers admitted to Trading on a Regulated Market, Article 32 (Belgian Official Gazette 3 December 2007).
- 30 Royal Decree on Public Takeover Bids, Article 8, §1.
- 31 *Ibid.*, Article 8, §2.
- 32 *Ibid.*, Article 8, §2, (3).
- 33 Law concerning the Supervision of the Financial Sector and the Financial Markets, Article 10.
- 34 Royal Decree on Public Takeover Bids, Articles 5 and 6.
- 35 *Ibid.*, Article 56.
- 36 Article 1, § 2° Royal Decree on Public Takeover Bids refers to the law of 22 March 1993 on the Rules and Supervision of Credit Institutions. A list of these credit institutions is to be found at www.cbfa.be.
- 37 Royal Decree on Public Takeover Bids, Article 26.
- 38 *Ibid.*, Article 28.
- 39 *Ibid.*, Article 27.
- 40 Royal Decree on Public Squeeze-out Bids, Article 4, § 6°.
- 41 Royal Decree on Public Takeover Bids, Article 21.
- 42 Law on Public Takeover Bids, Article 42
- 43 *Ibid.*, Article 45.
- 44 *Ibid.*, Article 33.
- 45 *Ibid.*, Article 31, §1.
- 46 Royal Decree on Public Takeover Bids, Article 30.
- 47 *Ibid.*, Article 56.
- 48 *Ibid.*, Article 32.
- 49 *Ibid.*, Article 34.
- 50 *Ibid.*, Article 35.
- 51 *Ibid.*, Article 36.
- 52 Law on Public Takeover Bids, Articles 46 and 47
- 53 Royal Decree on Public Takeover Bids, Article 11.
- 54 Royal Decree on Public Takeover Bids, Article 12.
- 55 *Ibid.*, Articles 15, §2 and 25.
- 56 *Ibid.*, Article 37.
- 57 *Ibid.*, Article 35.
- 58 *Ibid.*, Article 37.
- 59 *Ibid.*, Article 39.
- 60 *Ibid.*, Article 25.
- 61 *Ibid.*, Article 40.
- 62 *Ibid.*, Article 15, §1.
- 63 *Ibid.*, Articles 16 and 17.
- 64 *Ibid.*, Article 17, §4°.