ABA Section of International Law
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International M&A and Joint Ventures Committee Newsletter

June 2010

Foreword

Dear Committee Members,

It's my pleasure to present to you this second committee newsletter for 2010, with a record number of 14 Country Updates.

As always many thanks to all committee members that contributed to this newsletter.

Hope to see you all in California this summer.

On behalf of the committee leadership,
Kees Koetsier

Annual Meeting

If you have not done so already, it is now time to register for the 2010 ABA Annual Meeting that will be held August 5-10 in San Francisco

For up to date information about the meeting please see the website: http://www.abanet.org/annual/2010. We hope to see you all there.

Newsletter Contributions

The next issue of the newsletter is planned for September 2010. The deadline for submissions will be confirmed later this summer. If you would like to contribute a Country Update for the next newsletter, please contact Kees Koetsier (kees.koetsier@nautadutilh.com).

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Country update on Austria

Transfer of shares from one shareholder to the other upon the opening of insolvency proceedings of a shareholder

By Paul Luiki & Maria Thierrichter, Fellner Wratzfeld & Partners, Vienna, Austria (Paul.luiki@fwp.at)

On July 1, 2010 a new Insolvency Act (Insolvenzordnung) will enter into effect in Austria. The new Insolvency Act will substantially alter the insolvency law presently in force. Among many other changes such as the abolishment of the Settlement and Recomposition of Debts Act (Ausgleichsordnung) and the establishing of a uniform insolvency law the Insolvency Act contains a new provision in section 25a relating to the termination of agreements by contracting parties of the debtor. Below we outline how this provision may have a decisive effect upon joint venture transactions to which Austrian law applies and/or to which an Austrian company is a party.

Section 25a of the New Insolvency Act provides that agreements, the termination of which could endanger the company's continuation of its business, may not be terminated within a period of six months starting with the opening of the insolvency proceedings against the company other than for major cause. The deterioration of the economic situation of the debtor does not constitute an important reason entitling the contracting party to a termination of the agreement. The provision aims at providing insolvent companies with a "safety net" in that agreements that are vital for the insolvent company's business need to remain in place for a minimum period of six months. This should enable the insolvent party to continue its business. Thus, the termination of an agreement with a contracting party because of the commencing of insolvency proceedings against it will become impermissible. Furthermore, pursuant to section 25b of the new Insolvency Act agreements entered into before the insolvency of a contracting party that run counter to section 25a of the new Insolvency Act are void. Thus, a termination right triggered by the insolvency of a party will become impermissible.

Since section 25a does not distinguish between two party agreements and multi-party agreements, some legal scholars assume that this provision will apply also to articles of association and shareholders' agreements. This would materially influence the insolvent shareholder's exiting from the company and associated transfer rights contained in shareholders' agreements that are triggered upon the opening of insolvency proceedings over a shareholder. Such rights would become unenforceable since the other shareholders would not be entitled to terminate the shareholders' agreement within the blocking period of six months. Of course, the above-said only applies if the shareholders' agreement is held to be vital for the continuation of the insolvent company's business. This, however, often will be the case since the success of the joint venture often will play a major role in the company's dealings. As a consequence, the shareholders would be obliged to continue the joint venture with the insolvent shareholder's receiver (Masseverwalter).

Because of this uncertainty commercial registers may refuse the registration of articles of association containing an automatic transfer of shares of the insolvent shareholder to the other shareholders. It is still unclear what would happen to all the existing articles of associations containing such right if case law confirms the applicability. Would the mentioned transfer provisions become void? Would the existing articles of association need to be amended and brought into line with the new Insolvency Act?

A solution to the risk of transfer rights triggered upon insolvency becoming void would be as follows: The shareholders could upon foundation of the joint venture enter into separate notarial deeds providing for the transfer of their shares to the others in case of the opening of insolvency proceedings against them. Such notarial deeds would need to specify the purchase price to be paid for such shares (either by fixing a price

or setting forth a price formula), determine that the transfer occurs on the day of the opening of the insolvency proceedings and name a trustee with whom the purchase price is to be deposited. In order to avoid the receiver being entitled to terminate the transfer agreement due to its not being fulfilled, the other shareholders should aim at depositing the purchase price with the trustee before the actual opening of the insolvency proceedings. From the viewpoint of the receiver this option would have the benefit that the estate of the insolvent party immediately receives assets. The remaining shareholders would be entitled to continue the joint venture's company's business without the receiver, who might have very different ideas of how to steer the joint venture.

Under the present Bankruptcy Code the enforceability of the exiting of the insolvent shareholder combined with a transfer of the insolvent shareholder's shares to the other shareholders is not entirely confirmed. The Austrian Supreme Court has not expressed a clear opinion on the permissibility of such an agreement. Legal scholars both argue in favor of the enforceability and against it, whereby the majority confirms the permissibility of transfer rights triggered by the insolvency of a shareholder. Under the present legal framework very good reasons speak in favour of the enforceability of a transfer right in case of the insolvency of a shareholder as long as the remuneration that the shareholder's receiver obtains is not lower than in other transfer scenarios provided for in the articles of association or the shareholders' agreement.

Summing up, section 25a of the new Insolvency Act, if interpreted as outlined above, could lead to the impermissibility of a shareholder's right to take over the insolvent shareholder's shares. One will have to wait for relevant case law and commentary as well as for the commercial registers' actions after the new Insolvency Act has entered into force in order to determine the exact consequences of section 25a of the new Insolvency Act.

Country update on Brazil

Trends of Mergers and Acquisitions in Brazil

By Ricardo Thomazinho da Cunha, Höfling, Thomazinho Advocacia, Sao Paulo, Brazil (rthomazinho@hkt.com.br)

The first semester of 2010 marked the return of mergers and acquisitions to normal levels in the Brazilian market. Not being severely victimized by the global financial crisis that affected developed economies in the recent past, Brazil saw just a minor decline in the number of such transactions during the last year, in part due to the drop of investments coming from the rich world. Recovery worldwide and local circumstances explain why the pace of business this year, so far, has been satisfactory, and why the following years are so promising.

Statistics show a decline of 643 transactions in 2008 to 630 in 2009. Major transactions that occurred recently include the merger of Sadia and Perdigão, two of the biggest food companies in the country, which resulted in the formation of Brazil Foods, one of the largest companies in Latin America, and the purchase of large retail companies Ponto Frio and Casas Bahia by Pão de Açúcar, a major supermarket chain. It is likely that new mergers and acquisitions occur in retail, considering that Pão de Açúcar competitors such as Walmart and Carrefour will probably try to expand their own networks in order to maintain their share of the market, especially in a scenario of less unemployment, rising income and ease to obtain credit, which benefits a whole new portion of the population who are entering middle class at this point.

This year the chemical company Braskem has acquired Quattor, another petrochemical company, in an important move foreseeing the exploration of the so-called pre-salt oil reserves, a massive layer of oil recently discovered on the Brazilian shores and which is expected to generate enormous revenue. This acquisition forms one of the largest companies of its kind in the world, a potential contractor for Petrobras and the Brazilian Government.

Private Equity funds are expected to play a big role in the market along 2010 and beyond. This is the case of the Carlyle group. It is estimated that this group will invest over 1 billion dollars in several businesses in Latin America in the near future. Carlyle has already purchased two thirds of the biggest travel agency in Brazil, CVC Turismo, which is expected to double its size within the next four years. Other Private Equity funds, based outside the United States and Europe – especially from India and China – have also begun to make purchases in Brazil.

Some capital for new acquisitions is expected to come from the stocks market. BOVESPA, the São Paulo stocks exchange, has had very positive results in recent past and as of June 2010 it has returned to pre-crisis levels. Important IPO's and openings of capital are under way at BOVESPA, which should lead to new mergers and acquisitions and a strengthening of the companies involved when they participate in consolidation processes.

The optimism that reigns in Brazil at the moment is due to a combination of factors. These include the abovementioned fact that the country emerged in good standing from the worldwide financial crisis. But it can also be explained by the great perspectives for investment in infrastructure created by the two sports events that will take place in Brazil on this decade: the World Cup in 2014 and the Olympic Games in 2016. While development relies on overcoming structural deficiencies, especially in transportation of industrial products and supplies, the circumstance of hosting important international events may lead the government to finally create the conditions and effectively work in order to modernize infrastructure. It is therefore expected that considerable investments be made in road construction, ports and airports expansion and modernization, bus and subway networks growth, proliferation of new housing and accommodation facilities in major cities.

For a developing country, these perspectives and the steady pace of growth of merger and acquisition transactions hint to a maturity of the nation's market, with local companies consolidating their positions in a global dimension and competing with large, established foreign conglomerates that are welcome to do business within Brazil.

Country update on Canada

Country update on Canada

By Jeffery A. Barnes, Heenan Blaikie LLP, Toronto, Canada (JBarnes@heenan.ca)

Familiarity often breeds confusion. Takeover bid advisers, especially those accustomed to US rules, are sometimes puzzled by the use of the same terminology in Canada to describe very different concepts. In the area of tender offers, this issue is very stark in the context of poison pills or shareholder rights plans.

A recent decision of the British Columbia Securities Commission ("BCSC") in respect of Lions Gate Entertainment, an issuer incorporated in British Columbia, Canada, illustrates the jurisdictional, enforcement and structural differences which are peculiar to Canadian market regulation.

Jurisdiction if Provincial Commissions
Currently, Canadian securities laws are enacted by 10 provinces and 3 territories. There is no Federal securities regulator. The current Federal government is actively pursuing the creation of a single Federal commission. The 13 regulators have, by and large, put into place uniform rules governing many situations, which minimizes variations between Commissions.

Generally speaking, a provincial securities regulator will assume jurisdiction over a tender offer if it is "made to one or more persons..., any of whom is in [the province] or where the last address on the books of the Company is in [the Province]".

Generally, Canadian Securities Commissions will assert jurisdiction over issues of shares to persons within their province or territory and would not, for example, require registration with respect to issue which are made outside of Canada and have adequate flow-back protection. The BCSC takes the view that any issue of securities by a BC incorporated entity has sufficient nexus to British Columbia that it will exercise jurisdiction over the issue.

Review of Board Decisions for Public Companies in Canada
In many non-Canadian jurisdictions, questions with respect to the duties of a board of directors in a tender offer will be dealt with by the courts of the jurisdiction of incorporation. In Canada, although the courts are not disenfranchised, the custom is to go to securities regulators, which have broad discretionary powers to deal with issues which affect public trading markets..

"Poison Pills" in Canada
Canadian securities laws and regulators are negative toward strong defensive tactics. The overriding policy objective is to ensure that the shareholders make the ultimate sale decision.

Poison pills, or shareholder rights plans ("SRPs"), in Canada are different from their U.S. counterparts. Canadian rules encouraged SRPs which would, at the end of the day, allow the shareholders to decide whether or not to tender into an offer. SRPs specify a Permitted Bid, which would not trigger the SRP. Generally speaking, a Permitted Bid would be made to all shareholders and would be open for acceptance for at least 60 days. The minimum Canadian tender offer period is 35 calendar days.

Canadian regulators have made a series of decisions that stated that the question was not "whether the pill should go" but rather "when the pill should go". If an active auction was going on, they would permit the Board to retain the SRP as an auctioneer's gavel.

Beginning in 2007, exceptions to this rule began to develop. In decisions before the Alberta and Ontario Commissions, regulators permitted SRPs with specific characteristics which had been put into place in particular circumstances to stand.

These cases involved an SRP enacted when a tender offer was announced or outstanding, which contained a definition of a Permitted Bid which required a bid for all and a tender of a majority of the shares not already owned by the bidder and a requirement for a 10 day extension after take up to allow others to tender and which had received overwhelming ratification by shareholders, other than the bidder, voting with complete information.

Lions Gate
Lions Gate was the subject of a tender offer by a number of entities managed by Carl Icahn. Because Lions Gate was incorporated in British Columbia, the BCSC took the view that any issue of securities by Lions Gate was subject to BC jurisdiction.

Lions Gate put into place an SRP which was on substantially the same terms as the SRP which had been considered by the Ontario Securities Commission and permitted to stand..

The BCSC was asked to exercise its public interest jurisdiction to make a cease trade order against the issue of shares pursuant to the Lions Gate SRP The hearing took place a few days before the scheduled expiry of the tender offer, which in turn was 2 business days before the date set for a shareholders' meeting to approve the SRP.

The BCSC issued an order which effectively terminated the SRP. It has issued only a summary of its reasons, but that summary indicates that the BCSC doubts the correctness of the decisions made by the Alberta and Ontario Commissions, and has determined that they should not be followed.

Conclusions
It is not possible to say that the evolution of SRPs in Canada is over. We may see future cases which bear upon different types of SRPs in different circumstances, although for now there is some uncertainty of the overall position.

Canadian provincial securities regulators have made great strides in achieving uniformity of their policies, but there are differences, especially when discretion is being exercised. When planning a transaction that has Canadian components it is vital to ensure that you are advised of the impact of these nuances and the differences in the approach toward defensive tactics.

Country Update Germany

Second domestic turnover threshold introduced in German Merger Control

By Ronald J. Meissner, Stephan Müller & Dr. Maxim Kleine, Oppenhoff & Partner, Cologne, Germany
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Effective as of March 25, 2009, the German merger control regime has been amended by the introduction a second domestic turnover threshold by the new section 35 para. 1 no. 2 of the German Act against Restraints on Competition.

Under the previous German merger regime, a transaction had be notified to and cleared by the German Federal Cartel Office prior to closing if the parties had combined global revenues of more than EUR 500,000,000 in the last completed financial year and at least one of the parties had more than EUR 25,000,000 in revenues in Germany. Until the amendment, a second threshold of another party to the transaction having revenues exceeding a certain amount in Germany was not provided for. As a result, a significant number of transactions required notification and clearance despite having only very minimal impact on the German market.

Following the amendment, there is the requirement that a second party must also generate revenues of more than EUR 5,000,000 in Germany. This additional threshold has come as a relief to buyers who often met the German merger threshold on their own in the past. The German government estimates that this change has reduced the number of merger notifications by about one third.

Limitations on acquisitions by non-EU persons

Under amendments to the Foreign Trade Act (FTA) and the Foreign Trade Ordinance (FTO) which became effective as of April 24, 2009, the FME, the Federal Ministry of Economic Affairs and Technology, has been granted the authority to review and potentially prohibit the acquisition of interests in companies in Germany by non-EU individuals.

Even prior to the amendment, the acquisition of interests in companies in specifically sensitive industries, such as e.g. the defence industry, triggered a reporting obligation to the FME where a foreign investor intended to acquire an interest of at least 25% in such a company.

While these provisions will remain in effect, the new section 7 para. 1 and 2 no. 6 FTA in conjunction with section 53 para. 1 FTO now subjects an acquisition that results in a non-EU person holding a direct or indirect voting share of at least 25% of a German company to the review of the FME, regardless of the industry. A shareholder will be considered a 'non-EU person' if it has no domicile, registered seat, administrative headquarters, main office or permanent subsidiary in the European Union or the European Free Trade Association. The FME may prohibit or impose conditions on such acquisition if such acquisition results in an actual and manifest risk to public safety and order (as defined in Articles 46 and 58(1) of the EC Treaty).

The FME may initiate an investigation of an acquisition by informing the acquirer within three months from the execution of a binding agreement on the acquisition or, in the event of a public tender offer, the publication of the offer or the publication of the acquisition of control. In the event of an investigation, the FME has a further period of two months to collect the relevant information and to render its decision. The acquirer will be required to comply with information requests of the FME for purposes of the review.

In contrast to German merger control requirements, neither the lapse of the review period nor a clearing decision of the FME will constitute a statutory condition precedent for completion of the acquisition, however, a prohibition by the FME will result in a mandatory unwinding of the transaction. In order to avoid this potentially detrimental result, an acquirer may apply for a clearing certificate from the FME prior to completing a transaction.

The experience over the twelve months since the implementation of these provisions shows that the FME has initiated a very limited number of investigations and no prohibitions or conditional clearances have been issued so far. Nonetheless, these regulations will have to be taken into account and addressed in acquisitions of stakes in companies in sensitive industries such as telecommunications or energy by non-EU persons.

Country update on India

The foreign direct investment policy update

By Vineet Aneja, Partner, Luthra & Luthra Law Offices, New Delhi, India (VAneja@luthra.com)

Consolidated FDI Policy

The new financial year saw the issuance of the consolidated Foreign Direct Investment Policy (“**Consolidated Policy**”) by the Department of Industrial Policy and Promotion (“DIPP”), Ministry of Commerce and Industry, Government of India which became effective from April 1, 2010. The

Consolidated Policy is a comprehensive document which takes into account all foreign investment policies/regulations contained in the Foreign Exchange Management Act, 1999 (“FEMA”) issued by the Reserve Bank of India and the press notes, press releases and clarifications issues by the DIPP.

Some of the key features of the Consolidated Policy are:

FII Limits:
An FII is permitted to invested in the capital of an Indian company either under the FDI scheme/policy or the Portfolio Investment Scheme. The 10% individual limit and the 24% aggregate limit for investment by an FII would be applicable in cases where the FII invests under the FDI policy as well.

Downstream Investment:
Under Press Notes 2, 3 and 4 of 2009, the ownership test for foreign holding was computed on the basis of the equity interest, however, under the Consolidated Policy the same has been replaced with ‘capital’. “Capital” has been defined to “mean equity shares; fully, compulsory and mandatorily convertible preference shares; fully, compulsory and mandatorily convertible debentures.

Further, the restriction on investing companies to leverage funds from the domestic market for the purposes of downstream investment shall now also be applicable operating-cum-investing companies.

Sectoral Policies:
FDI is allowed in private sector banks up to 49% under the automatic route and up to 74% under the approval route.

FDI in non-scheduled air transport services / non-scheduled airlines, chartered airlines and cargo airlines is allowed up to 49% under the automatic route and up to 74% under the approval route.

FDI in ISPs without gateways has been capped at 74% (49% under the automatic route and 74% under the approval route).

It has been clarified that foreign investment is any form and foreign collaborations in any form including licensing for franchise, trademark, brand name, management contract is also completely prohibited for lottery business and gambling and betting activities. Further pursuant to Press Note 2 of 2010, issued post the Consolidated Policy, foreign direct investment has been prohibited in manufacture of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes and the same has been included in the prohibited list.

Cash and Carry Wholesale Trading:
The term “Cash and Carry Wholesale trading / Wholesale trading has been defined to mean the sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users or to other wholesalers and related subordinated services provides. Wholesale trading would be sales for the purpose of trade, business and profession as opposed to sales for the purpose of personal consumption.

Except in the case of sales to Government, sales made by the wholesaler would be considered as ‘cash & carry wholesale trading / wholesale trading’ with valid business customers, subject to such customers having one of the prescribed registrations/licenses.

Wholesale trading to group companies should not exceed 25% of the total turnover of the wholesale venture and further the sale made to the group companies should be for their internal use.

Other updates

Defense Industry Sector:
Recently, DIPP has released a discussion paper on FDI in Defense Sector inviting views and suggestions on the whole gamut of issues related to the defense sector. As per the suggested policy in the discussion paper, the cap on FDI should be increased to 74% (from the existing 26%) under the Government Route subject to certain conditions. The paper also points out that the government can always reject any proposal as licensing requirements for the sector will continue to be in place.

Multi Brand Retail Sector:
Presently, FDI is prohibited in multi brand retail sector. However, as per latest news reports, Ministry of Commerce and Industry is likely to propose 100% FDI in multi-brand retail and is preparing a discussion paper in this regard that would be placed for public debate in sometime. But mindful of the intense debate such a plan could trigger, the discussion paper is likely to suggest stiff local sourcing requirements. As per reports, the paper will contain a provision that could make it mandatory for big multi-brand foreign retailers to create back-end wholesale cash-and-carry for small shopkeepers and MNC retailers will be allowed to set up stores only in cities with population upwards of one million and minimum built-up area for stores would also need to be adhered to.

Country update on Italy

Recent developments

By Fabio Alberto Regoli, Studio Legale Jacobacci, Sterpi, Francetti, Regoli, de Haas & Associati, Milan, Italy (faregoli@jacobacci-law.com)

I. New thresholds for share buy back
The rules on share buy back in Italy have been recently amended. Article 2357 of the Italian Civil Code provides the general frame of the new discipline.

For listed companies, the nominal value of own shares purchasable must not exceed one fifth of the company share capital. Before the reform, the threshold was equal to one tenth of the share capital.

As to non listed companies, all thresholds in terms of ration between the amount of the share capital and the percentage of shares purchasable have been removed, while, prior to the reform, even for non listed companies the limit was of one tenth of the share capital.

II. Contribution in kind: simplified rules
Italian Law Decree n. 142/2008 has implemented EU Directive 2006/68/CE concerning joint stock companies incorporation, contributions and share capital preservation.

The above mentioned Decree has particularly modified the provisions with respect to the joint stock companies contributions regulation.

Pursuant to said Decree, a new Article, 2343-ter, has been inserted in the Italian Civil Code.

According to Article 2343-ter, in case of particular form of contributions expressly listed and detailed therein, it is not necessary for the contributor to provide a certified expert's estimate report in relation to

the description and the value of such contributions, which is, on the contrary, normally required by Italian law in case of contribution in kind.

In particular, the expert's report is not necessary when the contribution consists of:

i) securities or equity contributions in the event their estimated value is equal to or lower than their average value in one or more regulated market during the six month period preceding the contribution;

ii) contributions, including receivables, but other than securities and financial instruments, whose estimated value is equal to: (a) the value arising out of financial statements duly approved no longer than one year before the contribution itself, provided that such financial statements are subject to legal review and provided that the auditor does not dispute the estimated value; (b) the certified value resulting from an independent expert's report dated no more than six months before the date of the contribution.

The reform introduced by the above mentioned Law Decree n. 142/2008 appears to favour the joint stock companies' incorporation procedure and considerably reduces the timing for the said procedure, thus positively affecting the companies' activity and, in particular, facilitating, among the rest, the opportunities for the incorporation of joint venture companies which, as a result, will be less time-consuming and consequently more efficient in terms of costs.

Country update on Luxembourg

Legal developments in the area of M&A and Joint Ventures

by Carine Feipel & Bob Calmes, Arendt & Medernach, Luxembourg (Carine.Feipel@arendt.com)

The amendments to Luxembourg company and tax laws in 2009 and 2010 were particularly aiming at further enhancing the efficiency and flexibility of Luxembourg corporate M&A structuring. Moreover, some additional changes have been made to the Luxembourg law governing commercial companies in view of the implementation of various EU directives.

A) Consolidation exemption for unregulated private equity investment vehicles
The Luxembourg Accounting Standards Commission issued on 18 December 2009 a clarification letter on the exemption from preparing consolidated financial statements for Luxembourg unregulated venture capital and private equity (PE) vehicles under certain conditions, thereby responding to a key concern of the PE industry and strengthening the possibility for PE funds to do business in a more efficient and adequate environment.

B) Alleviation of capital protection rules
New rules have modified the financial assistance regime, the conditions for share redemptions and have authorized, in specific circumstances, capital contributions in kind without the need for an independent auditor's report.

(i) Less stringent financial assistance regime
Luxembourg corporate law formerly did not allow companies to provide for financial assistance where such concept means that a company directly or indirectly advances funds, grants loans, provides security or uses any other mechanisms which would reduce the net assets of that company for a third party to acquire its shares.

The prohibition of financial assistance has been lifted and made way for a more flexible regime better suited for typical cross-border investment structures. Henceforth, a statutory clearance procedure shall be followed in order for the target company to give financial assistance. Some safeguards are nevertheless foreseen: (i) the operation shall take place under the responsibility of the board of directors which is to deliver a written report to the general meeting of shareholders explaining the rationale and terms behind the operation, the risks for the company's solvency and liquidity, the price for which the shares are to be acquired (which must be at arm's-length) and the corporate interest in the proposed transaction for the target; (ii) the amount of the aggregate financial assistance to be granted to third parties must not result in reducing the net assets of the company below specific thresholds and a non-distributable reserve corresponding to the amount of the aggregate financial assistance shall be reflected in the liabilities of the company's balance sheet.

(ii) Relaxation of conditions for share buybacks

The maximum number of shares to be redeemed by a company is no longer limited to 10% of the company's share capital. In addition the maximum duration of the period for which an authorization to repurchase own shares can be granted by the general meeting of shareholders has been extended from 18 months to 5 years.

(iii) Extension of exemptions to the need of a valuation report for certain contributions in kind to Luxembourg companies

Prior to the new legislation, any capital contribution in kind to public limited companies and partnerships, at the time of the incorporation or of a capital increase, required a valuation report from an independent auditor confirming that the value of the contribution is at least equivalent to the nominal value of the shares to be issued plus the share premium. Under the new rules, this valuation report is no longer required where the assets contributed are (a) transferable securities or money-market instruments valuated at the weighted average price at which they have been traded on one or more regulated market(s) during a period of 6 months preceding the effective date of such contribution, (b) assets which have already been subject to a fair value opinion by an independent auditor not more than 6 months before the effective date of the contribution, or (c) assets whose fair value is derived for each individual asset from the statutory accounts of the previous financial year, provided that the statutory accounts have been duly audited.

C) Carry forward of tax losses

According to a decision of the administrative Court of Appeal of 4 February 2010, the fact that a company undergoes significant changes does not affect its right to carry forward its losses, as long as its legal personality remains unchanged. The judgment further specifies that under the applicable article of the Luxembourg income tax law, the criteria defining the identity of the person who carries forward losses and the one who suffered these losses had to be determined from a legal point of view and not from an economic perspective. The Court of Appeal has confirmed this analysis but added that an economic analysis needs, however, to be carried out in order to determine whether the operation constitutes an abuse of right, which is the case in particular when the fiscal or legal personality of the company is used for the sole purpose of benefiting from the carry forward of the tax losses.

D) Cross-border merger harmonization

The law of 9 June 2009 implements the EU Directive 2005/56/CE relating to cross-border mergers into Luxembourg law. Prior to this Directive, Luxembourg law already allowed for cross-border mergers. The EU-wide harmonization is expected to further facilitate European cross border M&A transactions, by bringing an end to legal uncertainties existing in other jurisdictions which did not previously allow for cross-border mergers.

Adjustment and Claw-back of bonuses in the Netherlands

By Duco de Boer, Stibbe, New York, USA (Duco.deBoer@Stibbe.com)

Incentive compensation policies that encouraged excessive risk-taking in the financial services industry are generally considered to have been one of the factors contributing to the financial crisis that began in 2007. Governments and regulators around the world are therefore proposing measures to improve incentive compensation policies and practices.

In April this year, the Dutch government published an amendment to two Decrees of the Act on Financial Supervision (*Besluit beheerst beloningsbeleid Wft*) to ensure a "controlled" remuneration policy within financial undertakings (financiële ondernemingen) and the public disclosure of such policy. Furthermore, in May 2010, the government proposed amendments to the Dutch Civil Code and the Act on Financial Supervision to incorporate rules on adjustment and claw-back of bonuses and variable pay from directors and certain officers. What triggered the Dutch government to propose these amendments was the public outcry in the Netherlands over the level of certain bonuses paid and over the fact that a bank (i.e. ABN AMRO) could be contractually required to pay out a (large) bonus even though the company was in such financial distress that it had to be saved by the Dutch government's taking over the bank.

The Dutch Corporate Governance Code 2008, which only applies to Dutch listed companies, already provides for best-practice provisions allowing the supervisory board to adjust conditionally-awarded variable remuneration, and to claw-back variable remuneration that has been paid out. The Dutch Banking Code includes similar provisions for all banks that hold a banking license pursuant to the Act on Financial Supervision. However, any such adjustments or claw-backs still require a contractual basis (i.e. the consent of the director).

The Dutch government now wishes to give the supervisory board the power to adjust and claw back variable pay also in the absence of a contractual arrangement with a director. The adjustment and claw-back provisions are proposed to be included in the Dutch Civil Code and in the Act on Financial Supervision. The proposed rules are inspired in part by similar provisions in the German Aktiengesetz and initiatives at the European level.

(1) The adjustment and claw-back provisions to be included in the Dutch Civil Code will apply to bonuses of directors of Dutch public companies (naamloze vennootschappen) and Dutch banks and insurance companies, whether listed or not, and provide that:

- If payment of a bonus is unacceptable according to the standards of reasonableness and fairness (redelijkheid en billijkheid), the corporate body responsible for determining the directors' remuneration (usually the supervisory board, but it can also be the shareholders' meeting or the non-executives in case of a one-tier board) can adjust the level of the bonus to an appropriate level. The explanatory notes to the draft bill give the example of a company in distress.

- In case of a public offer, if a payment of a bonus that becomes payable as a result of such offer is unacceptable according to the standards of reasonableness and fairness, the corporate body responsible for determining the directors' remuneration shall adjust any such bonus to an appropriate level. This also applies to bonuses that are still conditional upon completion of the offer. Any such adjustment needs to occur before completion of the offer.

- The company can claw back a bonus if it was paid on the basis of incorrect information or if the bonus-related targets were not reached.

The proposal distinguishes between the right to adjust and, in case of a public offer, the obligation to do so, but in each case only if payment of the unadjusted bonus would be contrary to the standards of reasonableness and fairness. The rationale given for this obligation in case of a public offer is twofold: the conflict of interest that may arise if a bonus becomes payable as a result of the public offer, and the fact that a public offer is an extraordinary event, which may not have been fully taken into account when the remuneration policy was determined.

A company and a director may specify in which case a bonus will be adjusted, as well as the level of such adjustment, but they cannot contractually agree not to apply these rules.

(2) The adjustment and claw-back provisions to be included in the Act on Financial Supervision will be more far-reaching and have a broader scope than the above-mentioned changes to the Dutch Civil Code. They will apply to all variable pay parts of the remuneration (i.e. not only a bonus) of any person who decides the daily management (i.e. not only directors) of a financial undertaking (i.e. not only banks and insurance companies). According to the Dutch government, this is justified for the following two reasons: because the excessive bonus payments have occurred primarily in the financial industry, and because this industry has received much government support (i.e. tax payers' money).

The proposed amendment to the Act on Financial Supervision refers to a "financial undertaking". This could also include non-Dutch entities. It is unclear whether such broad scope was intended by the Dutch government when it drafted the amendments.

The Dutch government aims for the amendments to become effective as of 1 January 2011 at the latest. This seems ambitious in view of the subject-matter and the general elections that recently took place in the Netherlands. Given the public support for curbing executive pay, Parliament will probably approve the implementation of adjustment and claw-back rights into Dutch law, but further changes to the scope and wording of, and the interplay between, the draft bills are to be expected.

Country update on Russia

Overview of the public M&A market in Russia

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The volume of the Russian M&A market fell significantly in 2009 as compared to 2008, with a total of reported 265 transactions, valued at USD 42.76 billion. This is almost two times less than the volume in 2008, which saw 390 reported transactions with an aggregate value of USD 75.33 billion. Similar to previous years, most 2009 M&A transactions were primarily consisted of trade acquisitions or private equity investments.

Notable public M&A deals in 2009 included:

- Merger of Vimpelcom, a leading Russian telecom provider, and Kievstar, a Ukrainian mobile provider, valued at USD 11.74 billion;

- Reverse merger of Russneft and En+ valued at USD 2.7 billion;
- Acquisition of 30% of Russian telecom provider OAO Rostelekom by the Deposit Insurance Agency State Corporation for USD 1.58 billion; and
- Takeover of Orton Oil Company by Gazpromneft for an estimated USD 750 million.

New Procedures of the Transfer of Participatory Interests in Limited Liability Companies

The two most common forms of business entities used in the Russian Federation are limited liability companies and joint stock companies. One of the primary differences between them is the manner in which the interests or shares in the charter capital are issued and the way in which they maintain their corporate records. Limited liability companies do not issue share certificates, rather, participatory interest percentages were stated in the foundation documents prior to the recent changes in the law. The most widely used corporate form is a limited liability company.

Over the course of 2008 and 2009, a number of important amendments have been made to the body of Russian corporate law. The amendments to the LLC Law dramatically changed the procedure for the transfer of participatory interests in limited liability companies. All transactions involving a transfer of participatory interests need to be notarized, except for (i) a company’s purchase of its own participatory interests; (ii) sale of company-owned participatory interests; or, (iii) distribution of participatory interests to participants. Failure to comply with this requirement will void the transaction.

Participatory interests are deemed to be transferred to the purchaser upon a notary certification of the transaction, if applicable, or after an entry is made in the State Register of Legal Entities. Within three days of notary certification, the respective documents should be filed by the notary with the State Register of Legal Entities with a corresponding copy sent to the company.

The closing of a transaction now needs to take place in the presence of a notary, which may pose a logistical complication if the parties are located in different countries, leading to an increase in overall expenses (traveling expenses, issuance of powers of attorney, etc.).

The closing of the transaction requires the presence of the seller and the buyer being individuals. Legal entities may be represented by duly authorized representatives acting on the basis of a power of attorney. The notary must also certify the signature of the company’s participant (the seller), which the notary must subsequently submit to the tax authority in order to register the appropriate changes in the State Register of Legal Entities.

The procedure for notarizing transactions involving a sale or purchase of participatory interests involves numerous documents being presented to the notary for review, who, in turn, needs to conduct some limited due diligence prior to the certification of the transfer. For all documents involving a foreign individual or legal entity, both an apostille and a notarized Russian translation of the corresponding documents needs to be supplied to the notary.

It is ambiguous as to whether transactions involving the transfer of participatory interests may be governed under foreign law. According to some notaries, the provisions of the Civil Code of the Russian Federation regarding the personal law of a legal entity and other mandatory provisions of Russian law do not provide the option to conduct a transaction involving the sale and purchase of participatory interests to be governed under foreign law. However, divergent opinions are held by other notaries regarding such transactions.

Participatory interest sale agreements should be executed in Russian. Some notaries will refuse to certify agreements with parallel texts in Russian and foreign languages, even if the agreement states that the Russian text prevails.

These recent changes in regulation of transfer of participatory interests in limited liability companies may lead to some limited liability companies becoming joint stock companies or using special purpose holding companies, either joint stock companies or foreign companies, to effect a transfer of control within limited liability companies.

Country update on South Africa

Country update on South Africa

By J. Michael Judin, Goldman Judin Inc, Johannesburg, Republic of South Africa (Michael@elawnet.co.za)

Perhaps the most significant legal development in South Africa in the area of M&A and Joint Ventures is the introduction of South Africa's new Corporate Governance document entitled King III and South Africa's new Companies Act which will come into effect shortly. It has been contended in some quarters that the new Companies Act, read together with the proposed Regulations and King III, makes it increasingly unattractive to be a Director and the Regulations posed a significant threat to retaining and attracting new high-level employees. This contention impacts enormously on M&A and Joint Venture transactions and it is important, therefore, to put the position in proper perspective.

"Director" is defined in the new Companies Act (NCA) meaning "a member of the board of a company as contemplated in section 66 or an alternate director of the company and includes any person occupying the position of a director or alternate director by whatever name designated".

Sections 75, 76 and 77 set out the duties of a director, the standard of conduct expected of a director and the liabilities of a director and prescribed officer. Included in the directors referred to in these sections is a prescribed officer and a person who is a member of a committee of a board of a company or of the audit committee of a company. The reference especially to the audit committee is because in terms of the NCA, the audit committee is now a statutory body appointed by the shareholders and is no longer a sub-committee of the board. Mostly directors are members of sub-committees of the board, but when it comes to risk, for example, many of the members of the risk committee would be part of management, who may not be a director of the company. By being a member of a board committee, he/she would be deemed to be a director.

In terms of the Regulations to the NCA, which were issued on 22 December 2009 and, like the NCA, have not yet come into effect, a prescribed officer is any person who has a general executive authority over the company, whatever his title. Likewise, general responsibility for financial management, legal affairs, the operations of the company or through his employment, significantly influences the exercise of control over the general management or administration of the whole or a significant portion of the business and activities of the company, will result in the person being a prescribed officer.

To all the above must be added section 218(2) of the NCA. Section 218(2) of the NCA provides: "Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention." The word "any" is of wide import and that means that if a director or a prescribed officer as defined contravenes any part of sections 75, 76 or 77,

such as breach of the duty of care, that director or prescribed officer could be sued by any stakeholder, including the company.

The apparent onerous situation for a director or prescribed officer is, however, ameliorated by the provisions of section 76(4), which is known as the Business Judgment Rule. This provides that the obligations of a director to act in the best interests of the company and to exercise care, skill and diligence, will be satisfied if: The director has taken reasonably diligent steps to become informed about the matter; the director had no material personal or financial interest or made a full disclosure thereof in terms of section 75; and the director had a rational basis for believing and did believe that the decision was in the best interests of the company.

Probably the only cause of action which any of these stakeholders could institute under section 218(2) would be an alleged breach of care or skill on the part of the director in regard to a business judgment call. The Business Judgment Rule could be raised as a defense by the director concerned.

King III does not add anything which is onerous to a director or a board that is not contained in the Act and the whole of King III is on “apply or explain” basis. In short, in regard to recommendations in King III which are not contained in the Act a director can elect to apply another practice, but then must explain why he or the board is not applying the recommended practice. As stated in King III, the ultimate compliance officer in this situation is, in fact, the company’s stakeholders, who will very quickly let the board know whether or not they believe the adoption of an alternative practice was justifiable or not.

In summation, whilst the duties of a director have remained the same as under the common law, namely good faith, care, skill and diligence, there is an amelioration through the Business Judgment Rule where directors are mostly exposed, namely an alleged breach of the duty of care in making business decisions. The liabilities of a director as set out in section 77 really do not change anything that did not exist before the NCA, either in terms of the old Act or at common law.

Country update on Spain

Country update on Spain

By Albert Garrofé, New York, USA and Idoya Fernández, Madrid, Spain, Cuatrecasas, Gonçalves Pereira (albert.garrofe@cuatrecasas.com)

I. Act on combating money laundering and terrorism financing

Act 10/2010 of April 28, on combating money laundering and terrorism financing, repeals previous legislation. It transposes Directive 2005/60/EC of the European Parliament and of the Council, of October 26, 2005, on preventing the use of the financial system for money laundering and terrorist financing, into Spanish law.

The Act maintains the spirit of the Directive, making the risk-approach principle its cornerstone. It is possible to evaluate the preventive measures that operators in the affected sectors must take according to the risks associated with their business and categories of customers. There are three levels of due diligence (standard, simplified and enhanced), depending on the risk associated with the customers’ business activities.

It is also possible to outsource due diligence procedures, within certain limits, with the exception of the ongoing monitoring of business relationships.

The Act, as required by the Directive, regulates the increase of preventive measures in risk sectors in which companies carry out business with people who work in public service (politically exposed persons or PEPs, as defined in the Directive).

As regards the concept of "money laundering", the new Act states that money laundering will be considered to exist in any case of concealment of assets originating from unlawful activities, irrespective of the sentences imposed for such offences.

It consolidates the rules on the physical movement of funds, previously governed by Royal Decree 1816/1991, of December 20, 1991, on cross-border transactions, and by Order EHA/1439/2006, of May 3, 2006, on the reporting of cash payments to combat money laundering. The Order establishes thresholds regarding the obligation to declare movements of cash (€10,000 for taking cash into or out of Spain, and €100,000 for movements within Spain), and these are incorporated into the Act. The Ministry of Economy and Finance has the authority to change them.

The Act creates new categories of people and institutions bound by its provisions: in the financial sector, recently created operators that were not affected by the repealed legislation (financial advisers, individuals or corporate entities acting as lending intermediaries); and in the non-financial sector, dealers in high-value goods for cash, such goods being considered those worth over €15,000.

II. Royal Decree-Law 5/2010

Under Spanish corporate law, public limited companies and private limited companies must wind up if their losses reduce their equity to less than half their share capital, unless their share capital is increased or reduced appropriately. This provision protects the share capital's integrity and aims to avoid disproportion between the share capital and equity of companies. Thus, if accumulated or sudden losses mean a company's equity drops to less than half its share capital, the shareholders must wind up the company or increase or reduce its share capital to restore the balance.

Under Royal Decree-Law 10/2008, of December 12, for the two financial years ending after December 13, 2008, impairment loss from tangible assets, real estate investment and inventories should not be considered when deciding whether companies must wind up under Spanish corporate law. This was an exceptional and temporary rule, but Royal Decree-Law 5/2010 has extended its application for another two years (i.e., for the two accounting years ending after April 1, 2010).

Country update on Sweden

Country update on Sweden

By Michael Nyman, Per Hedman, Carl-Olof Bouveng, Lindahl, Stockholm, Sweden (Michael.Nyman@lindahl.se)

Reduced share capital in private limited companies

In line with the trend elsewhere in Europe towards reduced share capital requirements for companies, also Sweden has adopted new rules. As of 1 April 2010 the minimum share capital requirements for private limited companies are reduced from SEK 100 000 to SEK 50 000.

The background to the new legislation is that the Government is seeking to promote private enterprises as an alternative to employments and the Government therefore wants it to be easy and profitable to start and run companies.

The background to the previous minimum level of SEK 100 000 was that it was considered to provide a reasonable level of protection for the company's creditors. However, in the course of most company's businesses SEK 100 000 is fairly low and can quickly be consumed, and the minimum share capital requirement is thus in reality a weak protection for most creditors. The Government did, however, not want to totality abolish the share capital requirement as it was considered to serve as a protection against unserious enterprises. Therefore, the Government proposed that the share capital requirement was kept after all, but reduced to SEK 50 000.

Already registered limited companies with SEK 100 000 or more in share capital may reduce their share capital to SEK 50 000, provided that the Company Act's rules on the reduction of share capital are followed. In brief, the share capital may be reduced to cover losses, make provisions to a fund to be used in accordance with a general meeting resolution, and to repay the shareholders.

Thus, it may be possible for shareholders in previously registered companies to distribute, free of tax, the difference between today's share capital and the new lower share capital.

The Government proposes voluntary audit

In addition to the reduction of share capital, the Government has proposed a reform for abolition of the compulsory audit for small enterprises.

The proposal is proposed to come into force on 1 November 2010 and the new provisions may be applied as of the financial year starting after 31 October 2010. The Government proposes that only the enterprises which during each of the two most recent financial years fulfill more than one of these three criteria will need to have a qualified auditor.

• An average number of employees of more than 3 people
• A balance sheet total of more than 1.5 million Swedish kronor
• An annual net turnover of more than 3 million Swedish kronor

The companies must decide on the shareholders' meeting to refrain from having an auditor and report this to Swedish Companies Registration Office for registration. In this case the articles of association must also be altered.

Trade investment participation rights in the partnerships

Sweden has adopted new rules on participation rights which make Sweden a competitive alternative when establishing fund structures. As from January 1, 2010, participation rights in partnerships and participations owned by partnerships can be treated as business related holdings for tax purposes. The rules will also apply to legal entities taxed as partners abroad and domiciled within the EEA.

The effect of a participation right being treated as a business related holding is that dividends on the participation right, and capital gains when selling the participation right, become tax exempt.

Provisions for tax exemptions on business related shares were introduced in Sweden 2003, but at that time the government decided to refrain from introducing tax exemption for participation rights. The new legislation puts participation rights in partnerships and participation rights owned by partnerships on an equal standing with business related holdings. A participation right in a Swedish partnership is as a general rule treated as a business related holding if the owner is a Swedish limited company or a foreign

company within the EEA which corresponds to a Swedish limited company. In this is case, the capital gains are tax exempt on sale. Participation rights owned by a partnership are business related holdings if the participation right would have been a business related holding had it been owned by the partner directly. Dividends and capital gains on such participation rights are tax exempt.

Country update on the Ukraine

Regulatory and Legislative Developments

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I. Business Law

The end of 2009 marked another step in the Ukraine government's efforts to support businesses during difficult times. Effective December 30, 2009, a law amending and revising existing laws to facilitate entrepreneurship (the "Business Support Law") went into effect.

The Business Support Law was created to remove the bureaucratic obstacles businesses face, stimulate economic activity and minimize governmental control over entrepreneurship. The law addresses establishing a business, licensing procedures and obtaining state or municipal approvals for activities, as well as specific matters such as the leasing of state or municipal property, or the licensing of seed sales.

Some of the more important changes introduced by the Business Support Law are described below.

a. Requirements for Limited Liability Companies in Ukraine

The Business Support Law reduces the required minimum charter capital for limited liability companies (LLCs). To establish LLCs, the charter capital required must now at least equal the amount of one minimal salary (869 UAH or about US$108).

Such a small threshold will not only facilitate incorporation of LLCs, but under certain circumstances, the lower minimum may help prevent an LLC's forced liquidation. Under Ukrainian law, a company is subject to liquidation if its net assets at the end of the second and each following fiscal year are less than the required minimum charter capital.

b. Licensing Procedures and Rules for Obtaining State or Municipal Approvals

The Business Support Law introduces certain "business-friendly" regulatory changes including:

(i) Allowing an unlimited term for licenses;

(ii) Making it more difficult to have a license annulled; and

(iii) Introducing the concept of "silent consent" for obtaining state or municipal approvals or permits.

As of January 19, 2010 a five year term was established for licenses for: (i) extraction of the natural resources from the deposits of state importance; (ii) transportation of oil and gas via pipelines; (iii) supply of natural gas and gas from coal deposits; (iv) storing natural gas and gas from coal deposits in the amounts that exceed levels established by the licensing conditions; (v) development, production, testing, export and import of holographic safety elements; and (vi) other activities.

c. Support for Small Enterprises

The Business Support Law establishes certain benefits for so called "small enterprises," which Ukrainian law defines as entrepreneurs/individuals or entities with up to 50 employees and an annual income of not more than 70 million UAH (about US$8 million). Most of these benefits relate to the lease of state or municipal property. In particular, the Business Support Law:

(i) Prohibits, until January 1, 2011, the State Property Fund from increasing lease payments from small enterprises for state property under lease;

(ii) Recommends that the Supreme Council of Autonomous Republic of Crimea and municipal authorities not increase lease payments from small enterprises for municipal property and property of the autonomous Republic of Crimea until January 1, 2011; and

(iii) Establishes that lease agreements for municipal or state property entered into with small enterprises before December 30, 2009 will be extended for up to five years from the effective date of the agreements.

The Business Support Law also places a moratorium, until January 1, 2011, on inspections and other reviews of small enterprises by municipal or state authorities, except for:

(i) Inspections of high-risk enterprises, for example, heat or power generating companies. (The risk level of an enterprise is determined according to criteria approved by the Ukrainian Cabinet of ministers);

(ii) Scheduled and unscheduled field inspections by the State Tax Service of Ukraine (with certain exceptions);

(iii) Scheduled or unscheduled inspections of high-or-middle risk enterprises by the Pension Fund of Ukraine; and

(iv) Unscheduled inspections by consumers' rights agencies which were initiated pursuant to consumer complaints.

Country update on the United States

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I. Overview of 2010 M&A Activity.

M&A activity with U.S. involvement has shown some signs of strength in the first quarter of 2010, increasing 59.8% compared to the first quarter of 2009, to US$275.1 billion. Nine of the top fifteen worldwide announced deals involved a U.S. company as the acquirer or the target company. Transactions involving bankrupt U.S. companies and the energy and power sector have contributed to high deal volumes.

II. Legal Developments.

A. Revised Horizontal Merger Guidelines.

The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) recently proposed revisions to the existing Horizontal Merger Guidelines. Among other changes, the revisions would downplay the traditional method of defining a relevant market in favor of other tools in analyzing the impact of a horizontal merger, including an upward pricing pressure (UPP) test, which is designed to show how much prices would rise as a result of a merger. The revised guidelines have also generated speculation that the DOJ and FTC may investigate more proposed mergers and generally increase merger enforcement activity. Although the revised guidelines may be considered by a court in reviewing a merger transaction, courts are likely to give existing judicial precedent much greater deference.

B. Poison Pills.

In a highly anticipated decision, the Delaware Chancery Court held that a target board's adoption of a low-threshold net operating loss (NOL) poison pill was reasonable in order to protect NOLs. Under U.S. tax law, NOLs may be used to reduce future income taxes, but may become impaired if there is a change in control (as specially defined for tax purposes). A low-threshold NOL poison pill is intended to ensure that there is no such change in control.

In this case, the target company, Selectica, adopted an NOL poison pill at a time when its competitor, Trilogy, was pursuing a hostile acquisition. The court confirmed that poison pills are generally permissible under Delaware law, and held that the decision to adopt an NOL poison pill by the board of directors of Selectica was entitled to deference under the "business judgment rule" because the board reasonably believed that the NOLs were a valuable corporate asset and Trilogy's actions posed a serious impairment threat. This decision is being called a deferential view of NOL poison pills and may be used to justify lower-threshold poison pills and similar takeover defenses in the future.

III. Trends to Watch.

A. Tech Deals.

As the technology industry recovers from the recession, many large tech companies have been accumulating cash, and appear to be ready to spend it to keep up with cutting-edge technologies.

Microsoft reportedly has US$37 billion in cash and short-term investments; Cisco has almost US$40 billion; and Apple has US$23 billion. Recent technology deals include IBM's planned acquisition of Sterling Commerce for US$1.4 billion and Google's planned acquisition of AdMob for US$750 million.

B. Private Equity Deals.

As the market begins to recover, we are starting to see private equity funds actively buying and selling portfolio companies and making add-on investments. Recently announced deals include global security firm Altegrity (owned by Providence Equity Partners) agreeing to buy corporate intelligence unit Kroll from Marsh & McLennan for US$1.13 billion; and Spain's Grifols agreeing to buy a maker of plasma medicines Talecris Biotherapeutics (partially owned by Cerberus Capital Management) for US$3.4 billion. As of the date of this writing, U.S. income taxes are scheduled to increase significantly in 2011 and the U.S. Congress is actively pursuing legislation that would further increase the income tax rates paid by many private equity and venture capital fund managers. In order to lock-in gains at lower 2010 tax rates, we expect to see pressure for private equity and venture capital funds to sell mature investments before December 31, 2010. This may cause a flurry of year-end U.S. M&A activity.