

International M&A and Joint Ventures Committee Newsletter

February 8, 2017

Editor's Note:

2017 will undoubtedly bring our world of international legal transactions many changes, challenges and developments. Trump, Brexit, the rise of populism around the world will dominate the headlines, and will most certainly have an impact on our practices. As I reflect on the six years that I have been the editor of our Committee's newsletter, I can't help but think of the changes we have all seen. However, as I hand over the reins of the newsletter to our new editor, Eric Kuhn, I am confident somethings won't change: our Committee will continue to grow, our Spring Meetings will alternate between New York and DC like clockwork, and Herman will enthusiastically attend all the meetings he can!

It has been a pleasure serving as your editor. Thank you to all who have contributed over the years to the newsletter. There is nothing as satisfying as getting 10 emails with offers of articles within hours of sending out the call for submissions. Please keep contributing as your enthusiasm for your countries and the world of international transactions is what binds this Committee together. A special thank you to the staff and associates in the New York office of Stikeman Elliott who have assisted me over the years.

Good luck, Eric...I look forward to sending you articles as a contributor very soon!

Best Regards,

Gordon Cameron

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COUNTRY UPDATE ON CANADA

A Court Review of a Plan of Arrangement Can be Like a Box of Chocolates – You Cannot Always be Sure What You Will Get

by Jason Saltzman Partner in Securities and Capital Markets at Borden Ladner Gervais LLP.

The vast majority of friendly acquisitions of public companies in Canada are completed by way of a statutory plan of arrangement (a “**Plan**”)¹. A Plan is often the favored approach as it provides a flexible and permissive structure to complete an acquisition in a single step. One potential risk of a Plan is the requirement for court approval as this gives shareholders and other stakeholders a forum to raise concerns or complaints. This was highlighted in the 2016 decision in *InterOil Corporation v. Mulacek* (“**InterOil**”)² in which, as discussed below, the Yukon Court of Appeal refused to approve a Plan despite 80% of InterOil’s shareholders having voted in favor of it.

Background

InterOil entered into an arrangement agreement with Exxon Mobil Inc. (“**Exxon**”) pursuant to which Exxon agreed to acquire InterOil for Exxon shares plus a capped “contingent resource payment”. InterOil’s Board retained Morgan Stanley as its financial advisor and received a fairness opinion from Morgan Stanley. A large portion of Morgan Stanley’s fee was contingent on the success of the Plan, which was a significant issue for the Court of Appeal.

The fairness opinion was attached to InterOil’s management information circular that was sent to shareholders in connection with the special shareholder meeting at which the Plan was approved by 80% of shareholders. Philippe E. Mulacek (“**Mulacek**”), a 10% shareholder, founder and former chairman/director of InterOil voted against the Plan and opposed the Plan before the Yukon Court.

Yukon Court Decisions

Mulacek argued that the Morgan Stanley fairness opinion was seriously deficient and received two expert opinions (including an “unfairness” opinion from Paradigm Capital) to rebut the fairness opinion. One opinion claimed that the process undertaken by the InterOil Board was deficient and failed to meet best governance practices to ensure adequate safeguards of shareholder interests. The Paradigm opinion concluded that, from a financial point of view, the consideration contemplated by the Plan was inadequate to InterOil shareholders. Although the judge at the Yukon Supreme Court accepted that there may have been deficiencies in the Morgan Stanley opinion and the Board process, he approved the Plan relying primarily on the fact that 80% of InterOil’s shareholders voted in its favour.

The Yukon Court of Appeal, however, overturned the Supreme Court decision and found that, while it is for the shareholders to decide whether to approve a transaction, their decision must be fully informed. The Court stated, “Clearly, it *was* the shareholders’ decision to make, but court approval was *also* required by the Act to ensure the decision was fair and reasonable in the sense of being based on information and advice that was adequate, objective and not undermined by conflicts of interest.”

¹ In a 2015 study of deal points in Canadian public M&A transactions by the M&A Market Trends Subcommittee of the M&A Committee of the ABA, 81 of 88 transactions completed in 2013 & 2014 were structured as Plans.

² 2016 YKCA 14

In rejecting the Plan, the Court held that the Morgan Stanley opinion was deficient in its substantive analysis of the transaction and provided reasons why there should have been a second fairness opinion. For example, the Court stated that since management would realize significant compensation from the transaction, it was incumbent on the Board to ensure the deal reflected fair value although the Court did not appear to examine whether the compensation arrangements incentivized management to get the best possible price. Finally, the Court expressed the view that the special committee had not done enough to act independently of management in its negotiations.

Other Cases

The *InterOil* decision shows how unpredictable outcomes for Plans can be once things get into court. This was also evident in the November 2016 decision in *Marquee Energy Ltd (Re)*³ in which, to the surprise of most securities law market participants, the lower court rejected a Plan, in large part, as a result of the acquiror shareholders not having been given the right to vote on the Plan despite the fact that there was no legal requirement to do so. The Court of Appeal did, however, reverse this decision on the basis that only shareholders whose shares are being arranged are entitled to approve a Plan.

With regard to fairness opinions, two 2014 Ontario cases provided diverging commentary showing again the uncertainty that can arise once before a court. In *Champion Iron Mines Limited*,⁴ the Court rejected a fairness opinion and commented that companies should tender strong, robust fairness opinions when applying to the Court with a Plan. Despite this commentary, the Court approved the Plan on the basis that there was a high level of shareholder approval (over 99%) and the Board and Special Committee had determined it was in the best interests of the company and its shareholders. On the other hand, in *Bear Lake Gold Ltd. (Re)*,⁵ the Court held that a fairness opinion is not intended to be expert evidence but is to be used by the court as a factor in determining whether a Plan is fair and reasonable to shareholders.

Conclusion

It is difficult to know what the impact of the *InterOil* decision will be. Certainly, it reinforces what has always been the case — if a transaction is implemented by way of a Plan, one must be prepared for disgruntled stakeholders to use the platform it provides to oppose the transaction. With regard to fairness opinions, boards should consider whether a second, independent opinion is necessary, in particular if the fees of their advisor are largely contingent.

COUNTRY UPDATE ON FINLAND

A look back at the 2016 Nordic M&A and IPO markets

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³ 2016 ABQB 563

⁴ 2014 ONSC 1988

⁵ 2014 ONSC 3428

Year 2016 saw a steady continuation of the generally healthy 2015 M&A and IPO markets for the Nordics (Denmark, Finland, Sweden and Norway), data of which supported each Nordic country's unique qualities.

Generally, Denmark has fewer large market players but when they do deals, the deals tend to be significant in size. Despite the fewest number of new listings among the Nordics in 2016, Denmark's IPO market accounted for over 70 percent of the aggregate offering size among the top 10 Nordic IPOs. This was primarily accomplished by way of Denmark having three of the four largest Nordic IPOs in 2016:

- Goldman Sachs USD 2.6bln exit from energy company DONG Energy – the largest Nordic IPO in 2016;
- Bain Capital LLC, among others, USD 2.4bln exit of digital payment provider Nets; and
- cigar and pipe tobacco manufacturer Scandinavian Tobacco Group USD 540mln listing.

In M&A, the Danish deals were also some of the biggest on the Nordic market:

- wind turbine rotor blade supplier LM Wind Power's USD 1.7bln sale to GE;
- software company Sitecore's USD 1.1bln sale to Swedish private equity fund EQT VII; and
- roofing company Icopal's USD 1.1bln sale to competitor GAF.

Finland's market is still somewhat dominated by its TMT and Industrials sectors. The largest IPO by offering size and M&A by closed deal value were both in Finland's TMT sector:

- telecomms provider DNA USD 501mln offering on Nasdaq Helsinki's main market; and
- gaming developer Supercell USD 8.6bln 84.3% ownership sale to Chinese Tencent - the biggest ever deal in gaming M&A and second largest among the Nordics in 2016.

Despite the Supercell/Tencent deal, Finland's M&A market was the smallest by number of closed deals and aggregate closed deal value among the Nordics in 2016. Rounding off Finland's top three M&A deals by closed deal value in 2016 were fiber-based materials manufacturer Ahlström's USD 893mln announced merger with Mukjsö, and environmental management service provider Ekokem's USD 782mln sale to Fortum, both of which were in the Industrials sector.

Nonetheless, Finland's number of new listings in 2016 was second only to Sweden, and notably only included one completed private equity IPO-exit, Nordic Capital's exit from consumer goods Tokmanni Group. This leaves room for more PE IPO-exits in 2017.

Sweden's M&A and IPO markets are largely driven by its significant private equity market. Using 2015 numbers, the new funds raised in Sweden were roughly 14 times larger than the second largest Nordic country.⁶ The 2016 Swedish deal volumes and sizes reflect the strong private equity industry:

- the most closed M&A deals – 253, compared to Denmark's 214, Finland's 109 and Norway's 163;
- significantly higher aggregate closed deal value in M&A 2016 – USD 21.9bln, compared to Denmark's 5.4bln, Finland's 3.5bln and Norway's 6.3bln;
- the highest closed deal value average for M&A deals - USD 86mln, compared to Denmark's 25mln, Finland's 32mln and Norway's 38mln;
- significantly higher aggregate number of new IPOs in the regulated markets (the main market)- 75, compared to Denmark's 6, Finland's 11 and Norway's 10; and

⁶ Sweden private equity amounts sourced from Invest Europe's European Private Equity Activity Data 2007-2015. All other data sourced from Mergermarket, Nasdaq, Oslo Borse and named companies' websites.

Sweden also saw a healthy diversity in deal activity across various sectors, including:

- Pharmaceuticals - drug maker Mylan's USD 9.9bln public tender offer of Meda (the largest Nordica M&A deal in 2016);
- Real Estate - real estate firm Norrporten USD 3.1bln sale to rival Castellum;
- Industrials - plumbing and electrical tools supplier Ahlsell IPO and waterproofing supplier Nordic Waterproofing IPO with offering sizes of USD 666mln and 125mln, respectively; and
- Financials - bank Resurs Holding IPO with a USD 444mln offering size.

The Norwegian M&A and IPO markets would appear to be most affected by the price of oil, and with its recent slow recovery, we are seeing a tick-back up in market activity, at least in the M&A market. Norway's M&A market had a healthy aggregate deal value, which was only second to Sweden. Norway's top three M&A deals were:

- Debt collection agency Lindroff USD 4.4bln sale to Intrum Justitia;
- Chinese consortium's USD 1.3bln acquisition of online browser and advertising company Opera Software; and
- BP Norge's USD 1.1bln acquisition of independent exploration and production company Det Norske,

Unfortunately, this turn of activity for Norway did not extend to exchange listings. While Norway did beat out Denmark for the number of new listings, the average offering size of these Norwegian listings was last among the Nordics. It has also been argued that Norwegian companies do not use the stock market listing to raising new capital.⁷

There also are trends that cover the Nordics generally:

- Due to higher valuations, generally and higher in IPOs than in secondary deals, selectivity among deals is increasing, with Industrials dominating the largest deals.
- As reflected prominently in Sweden, a strong private equity has been good across the board.
- In these relatively volatile times, *see* Brexit and Trump in 2016, one-to-one deals have seen a preference and sale of non-core assets are more prominent, as these may indicate companies seeking both deal security and core market security.
- With this in mind, we also may be seeing bigger private equity exits across the Nordic region.

These aspects, economic and otherwise, will surely make for an interesting 2017.

COUNTRY UPDATE ON INDIA

M&A Trends in 2016

By Satyajit Gupta, Principal – Corporate/ M&A, Advaita Legal, New Delhi, India (satyajitgupta@advaitalegal.com)⁸

With the National Democratic Alliance government crossing the halfway mark in its 5 year term, 2016 was marked by significant activity both in terms of law making as well as easing regulatory hurdles. The

⁷ As reported in "Norway's oil fund warns on lack of stock market listings" (October 11, 2016) by Richard Milne for FT.com.

⁸ The author wishes to place on record his gratitude to Ms. Shradha Sachdev, Associate, Advaita Legal for her valuable assistance in preparing this update

government's aim remained making radical and positive reforms to boost foreign investment and create a business friendly climate in India. The efforts of the last 2 years or so bore fruit as the reported M&A value surged to USD 60 Billion (nearly 100% increase on FY 2015's figures). The government continues to focus on 'ease of doing business' and various growth focused initiatives – 'Start Up India' and 'Make in India'.

The latter part of the year also saw the government worked towards fulfilling election campaign promises – the war on black money was one of them and India witnessed a rare, 'once in a lifetime' demonetization measure launched on 8 November 2016 which arguably crippled the large 'black market' while also negatively affecting the demand for consumer goods of all kinds.

Company law reform

While the Companies Act, 2013 (the "Act") is being enforced in a phased manner, the year 2016 saw most significant provisions of the Act being given effect. This includes formation of the National Company Law Tribunal ("NCLT") and the National Company Law Appellate Tribunal ("NCLAT"), enforcement of provisions pertaining to scheme of arrangement, winding-up and reduction of share capital.

While the NCLT was finally formed after 14 years of ideation, the government has been simultaneously notifying relevant procedural rules for effective implementation of the provisions of the Act such as the Companies (Transfer of Pending Proceedings) Rules, 2016, which provides for transfer of pending legal proceedings in relation to schemes from the High Court to the relevant bench of the NCLT, the Companies (Mediation and Conciliation) Rules, 2016 for mediation and conciliation of matters pending before the NCLT and so on.

Significant amendments to the Act are expected in the coming year as the Companies Law Committee constituted by the government has recommended wide-ranging amendments especially to provisions applicable to private enterprises, amongst others.

Changes in insolvency regime

Recognizing the need for reforms in the bankruptcy and insolvency regime, the Insolvency and Bankruptcy Code, 2015 (the "Code") was notified by the government. The Code offers a uniform, comprehensive insolvency legislation for companies, partnerships and individuals (other than financial firms). For this purpose, the Code repealed the erstwhile Presidency Town Insolvency Act 1909 and Provisional Insolvency Act 1920. It has effected amendments in as many as 11 legislation including to the CA 2013. The powers to adjudicate upon the 'insolvency resolution process' and liquidation of corporate debtors under the Code also vests with the NCLT.

Developments in anti-trust law

The Competition Commission of India ("CCI") has clarified that if the creation of a joint venture involves a transfer of 'assets', then subject to prescribed thresholds being met, prior approval of the CCI will have to be sought by making the requisite filings under the Combination Regulations. The CCI has yet not drawn any distinction between transfer of 'revenue' and 'non-revenue' generating assets, thereby removing the distinction between 'brownfield' and 'greenfield' joint ventures for the purposes of notifying the CCI.

Additionally, the merger control thresholds as prescribed under the Competition Act, 2002 have been revised which will remain valid for a period of 5 years, ending on March 04, 2021. The earlier exemption was applicable if the target enterprise whose shares, control, voting rights or assets were being acquired, had assets less than INR 250 crores (INR 2.5 billion) or turnover less than INR 750 crores (INR 7.5 billion), in India. These thresholds have now been revised to assets of INR 350 crores (INR 3.5 billion) or turnover of INR 1000 crores (INR 10 billion) in India. The combined thresholds with respect to 100% acquisitions have also been revised.

The CCI recently, while approving the acquisition of a bitumen business plant of Shell India Markets Private Limited by Hindustan Colas, took a view that part payment of consideration amount before approval of the CCI was in a violation of law. Unless the CCI has had a chance to examine the anti-competitive effects of a proposed combination before it consummated, this would lead to a scenario where an anti-competitive acquisition has already taken effect. CCI concluded that pre-payment, even in the form of a refundable deposit was a step towards eventual consummation of the transaction and hence not permissible.

FDI norms

Significant changes have been introduced in the year 2016 by the Indian Government with regard to the foreign investment norms, to attract foreign investments. A few examples are set out below:

Financial Services – Foreign investments in financial services are no longer restricted to the 18 stipulated activities but have been permitted across all regulated activities. This means as long as the entity is subject to any regulatory authority such as the Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI) etc., it is permitted to raise 100% FDI under the automatic route, irrespective of the activity it performs. Additionally, the capitalization norms pertaining to its sector is to be applied.

Civil aviation - 100% FDI has now been allowed in ‘greenfield’ projects and existing projects in the civil aviation sector. Earlier only 74% FDI was permissible under automatic route with respect to in ‘brownfield’ projects. While earlier in the case of domestic airlines, FDI of up to only 49% (under automatic route) was permitted; now, FDI up to 100% is permitted subject to government approval. Further, 100% FDI in the automatic route has been allowed for non-resident Indians (NRIs) for domestic airlines.

Broadcasting carriage services - Earlier 100% FDI was permitted with up to 49% being under automatic route and additional FDI was under the government route in Teleports (setting up of up-linking HUBs/Teleports), direct to home; cable networks; mobile TV; headend-in-the sky broadcasting service. All of these services can now avail of 100% FDI under the automatic route. However, infusion of fresh FDI beyond 49% in a company, which has not sought license/ permission from sectoral Ministry, resulting in a change in the ownership pattern or transfer of stake by existing investor to new foreign investor, will require FIPB approval.

E-commerce – Clarity has been brought about in relation to ‘marketplace model’ and FDI has been expressly allowed for such model of e-commerce.

Retail trading - Previously, at least 30% of value of goods was required to be sourced from India for investment beyond 51%. This sourcing requirement now has to be met, firstly, as an average of five years and thereafter on an annual basis.

Changes in tax laws

2016 also saw India amending its tax treaties with Mauritius, Cyprus and Singapore to gradually take away the beneficial treatment received by tax residents of these countries vis-à-vis investments in India. Further, the government issued certain clarifications on applicability of the infamous indirect transfer tax provisions; however, such clarifications were unhelpful and regressive in nature. The government also introduced the final guidelines on Place of Effective Management (“**POEM**”) - the criteria for determining tax residence of overseas companies in India. Recent clarifications have also been issued on the applicability of the General Anti Avoidance Rules (“**GAAR**”).

Conclusion

2016 saw significantly high levels of M&A activity in India, however the year ended with the demonetization exercise (which hit the common people) and roll-backs from favorable tax treaties. As part of the global project to prevent Base Erosion and Profit Sharing, more than 100 countries (including India) are expected to formally sign the multilateral instrument in June 2017 for amending all the existing tax treaties. The combined effect of these developments may impact M&As/ JVs in India.

The changes to corporate and insolvency regimes will need to be implemented pragmatically. The government will also have its hand full with the proposed Goods and Services Tax (“GST”) proposed to be introduced in 2017 as well as implementation of GAAR and POEM.

COUNTRY UPDATE ON THE NETHERLANDS

Corporate Governance Update

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Amended Dutch Corporate Governance Code

On December 8, 2016 the Monitoring Committee Corporate Governance Code (the "Committee") published the amended Corporate Governance Code (the "2016 Code"). The 2016 Code holds a number of changes compared to the Corporate Governance Code 2008 ("2008 Code"), which was the last time the code was revised. The most important changes to the 2008 Code are the focus on long-term value creation and the introduction of 'culture' as an element of good corporate governance. The unofficial translation of the 2016 Code can be found [here](#).

Please find below an overview of the most important changes.

Scope of the Code

The Corporate Governance Code comprises principles and best practice provisions that regulate the relations between the management board, supervisory board (if any) and shareholders of Dutch listed companies, based on the 'comply or explain' principle.

The Code applies to Dutch listed companies, i.e. (i) companies that have their corporate seat in the Netherlands and are listed on a regulated market or (ii) large companies (> € 500 mio balance sheet total) that have their corporate seat in the Netherlands and are listed on a multilateral trading facility.

Main differences between the 2016 Code and the 2008 Code

1. Long-term value creation

Long-term value creation by the company is considered a guiding principle for the management board. When developing such a long term value creating strategy, the management board shall take the interests of all stakeholders into account.

2. Addressing culture and conduct

In light of long term value creation, the management board is also responsible for creating a company culture. The management board should formulate and adopt values that align with the view and strategy of the company.

Furthermore, the management board is responsible for the implementation and maintenance of these values within the company and its affiliated business, and must report hereon in the management report.

3. Reinforcement of risk management

Adequate internal risk management and control systems are considered key aspects for the realization of long-term value creation. The management board is responsible for identifying and managing the risks associated with the company's strategy and activities. Under the 2016 Code, the internal audit function plays an important role in the assessment of internal risk management and control systems. Also, the scope of the 'in-control statement' by the management board is broader in comparison to the 2008 Code, and the requirements for the content of such statement have been amended in certain respects.

4. Executive Committee

The 2016 Code includes certain provisions that cover the situation in which a company has established an executive committee. The management board should take account of the checks and balances that are part of the two-tier system, meaning that its expertise and responsibilities are safeguarded and the supervisory board is informed adequately. The management board should report on the reasons for installing an executive committee, and a description of its role, duty, composition and the contact arrangements between the supervisory board and the executive committee.

5. Diversity policy

The 2016 Code provides that the supervisory board should draw up a diversity policy for the composition of the management board, the supervisory board and, the executive committee (if applicable). This policy should include targets with respect to nationality, age, gender, and educational and professional background. The management report should explain the diversity policy, addressing the objectives of the policy, how the policy has been implemented and the results of the policy in the past financial year.

6. Supervisory board

Under the 2008 Code, a member of the supervisory board could be appointed for a maximum of three four-year terms. The 2016 Code has reduced this to a maximum of two four-year terms. A reappointment after this eight-year period is only permitted for a period of two years with a possible extension of another two years. In addition, any member of the supervisory board who has a direct shareholding in the company of at least 10% or is a representative of a shareholder who has a direct or indirect shareholding of at least 10%, will not be considered independent, but, contrary to the 2008 Code, the supervisory board may be composed of more than one of such shareholder representatives, provided that such shareholder representatives make up less than half of the total number of members of the supervisory board. The chairman of the supervisory board should be independent.

7. Remuneration

The remuneration chapter in the 2016 Code is less detailed than the one in the 2008 Code. The 2016 Code includes new provisions regarding (i) the disclosure of pay ratios between members of the management board and employees, and (ii) taking into account the management board members' views on their own remuneration when drafting the proposal for the remuneration of such members.

Entering into force

The 2016 Code enters into force for the financial year starting on or after 1 January 2017. Consequently, the management report in connection with the annual accounts over the financial year 2017 must include an explanation for deviations from the provisions of the 2016 Code.

COUNTRY UPDATE ON SLOVAKIA

A New Player in Town: Slovakia Introduces a Modern Company Form

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Amid a general EU-wide trend in championing initiatives intended to support startups and growth in small and medium enterprises, a new company form, the simple joint stock company (“SJSC”), was introduced into the Slovak company legal regime effective as of January 1, 2017. A welcomed introduction to Slovakia’s otherwise comparatively rigid company law, the new company form aims to provide a structure suitable for facilitating modern investment and operations.

Until the start of 2017, aspiring business owners had little choice in realistically choosing a suitable Slovak business organization, typically choosing between a limited liability company or (traditional) joint stock company. However, each of these company forms can be characterized as having rather onerous capital requirements, inflexible share ownership, and arduous corporate governance requirements. To establish the operational framework international investors joint venture partners or sophisticated owners are accustomed to companies have been compelled to utilize lawyer workarounds, including foreign holding structuring and other ad-hoc adjustments, which do not always offer a cure-all and can simply increase complexity. The SJSC is hoped to offer a solution to many of these problems.

The SJSC contains key characteristics conducive for investment. Shareholder liability is limited to the shareholder’s investment and the SJSC’s liability is limited to the amount of its assets. The SJSC may be established by 1 or more natural or legal persons. SJSC corporate governance rules require two mandatory bodies: the shareholders meeting and board of directors (consisting of the appointment of at least 1 executive). A supervisory board may also be established but it is not mandatory.

Stepping closer to jurisdictions favorably viewed for company flexibility and SPV establishment, the SJSC minimum capital requirement is a mere EUR 1. The SJSC’s registered capital is divided into shares which may have a nominal value in Euro(s), Eurocents, or any combination thereof. The SJSC may only issue book-entry shares which must be registered with the Slovak central securities depository. Shares may be ordinary or preferential. Preferential rights may include (i) the right to a different profit share, (ii) more, less, or no voting rights, and/or (iii) special information rights, and any such rights must be specified in the SJSC’s bylaws.

Also, for the first time under the Slovak legal regime, provisions typically contained in shareholders’ agreements are expressly incorporated into law. Tag-along, drag-along, and shoot-out deadlock provisions are expressly recognized with regard to the new SJSC form. Overall, the combination of substantial equity holding flexibility and express recognition of shareholders’ agreement provisions offer the greatest likelihood for startups to actually receive equity funding.

The SJSC may only convert itself into a (traditional) joint stock company. The SJSC may merge with a joint stock company as long as the joint stock company is the successor. Notably however, the SJSC cannot publicly offer a subscription of its shares or go public without prior conversion into a joint stock company.

The new SJSC form contains basic characteristics required for facilitating startup investments. The SJSC has minimal capital requirements, offers flexibility in establishing the company's bodies, enables diversified equity holdings, and expressly recognizes shareholder relationship rights. Consequently, the SJSC appears better positioned to avail itself of wider and more diversified funding possibilities compared to its peer company forms. Altogether, the SJSC may offer the greatest chance of Slovak company vehicles to qualify for receiving foreign private equity, venture capital, or growth equity funds based on fund investment strategy or placement requirements.

Nevertheless, the SJSC form is new and Slovak courts do not have a long-standing track record of adjudicating complex corporate or equity disputes. Also, many new and young prospective business owners are only beginning to understand the terms and potential benefits the SJSC may offer. While there is optimism about the SJSC, it is currently unclear whether the SJSC will be commonly utilized in bespoke structuring arrangements often effective in assisting new companies receive and retain capital, including lawyer equity and rate deferral arrangements where permissible. It remains to be seen whether the SJSC will prove a popular company vehicle and help enable companies procure funding as intended.

COUNTRY UPDATE ON SPAIN

New doctrine on valuation in respect of rights of first refusal in Spain

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The Spanish Directorate-General for Registers and Notaries (“DGRN”) has recently passed a controversial resolution accepting, under certain circumstances that will be explained below, the validity of a clause in a company’s by-laws providing for the exercise of a right of first refusal at book value in the following terms: *“The right of first refusal shall be exercised taking the shares subject to transfer at their fair value, which will be the lower of the following: the price notified to the company by the transferor shareholder, or the book value resulting from the last balance sheet approved by the General Meeting of Shareholders. Where the proposed transfer is for consideration other than the sale and purchase or for no consideration, the fair value will be the same as the book value resulting from the last balance sheet approved by the General Meeting”*.

This resolution dated November 15, 2016 (Official Journal of Spain no. 291 of December 2) is very relevant as it: (i) enables investors to agree on an easily obtainable value for these kind of events; and (ii) separates from the previous doctrine of the DGRN and specially that set in the decision of August 20, 1993 that denied the right of the shareholders of a company to arrange an exercise price below real value, alleging that *“the right of a company and its shareholders to prevent the entry of new unwanted shareholders cannot be recognized to the detriment of the no less legitimate right of a shareholder to obtain the real value of the shares he or she intends to dispose of”*.

This traditional doctrine was based on the interpretation of arts. 107(d)(2) of the Spanish Companies Act and 123(6) and 175(2) of the Spanish Register of Companies’ Rules in the sense that the right of

shareholders to obtain the fair value of their shares in these kind of circumstances was an essential feature of Spanish companies. The main principle behind this idea was the fact that an exercise price below fair value could lead to a de facto limitation of the right of shareholders to transfer their shares.

This argument is refuted by the new resolution of the DGRN under discussion by stating that “*an article such as that rejected in the contested examination report cannot be regarded as an indirect prohibition of disposition, since it does not prevent, ex ante and objectively, the obtainment of fair value, or value more or less close to such according to the company’s circumstances, profit or loss and retained earnings*”.

However, the resolution itself also specifies certain limitations to this new doctrine that will need to be analyzed on a case-by-case basis and which could potentially determine the unenforceability thereof. The most relevant ones are:

- (i) The exercise of a right of first refusal at book value would not be acceptable if carried out by the company itself, as it would not respond to the principles of unbiasedness and objectivity that shall govern said right of the company.
- (ii) It is unclear whether this alternative would also be enforceable if not unanimously approved by the General Meeting of Shareholders. The resolution only points out as an additional argument the fact that in the case at issue the provision was unanimously approved by the shareholders, but does not specify if it is a requirement.
- (iii) The exercise of a right of first refusal at par value remains unlawful, except where there is just cause.
- (iv) The application of the valuation mechanism mentioned in the DGRN resolution remains subject to review by the Courts if it entails prejudice to third parties or makes divestment too burdensome for the shareholders.

COUNTRY UPDATE ON UKRAINE

Brief Insight into Current M&A Environment and High Expectations for Significant Changes: focus on bringing foreign investors at the Ukrainian market

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Three steps towards corporate law reform

Ukrainian corporate legislation is continuing movement towards its further liberalization. At the end of 2016/beginning of 2017 three draft laws of utmost importance (Draft Law and On Amending of Certain Legislative Acts of Ukraine Regarding Increasing of Corporate Governance Level in Joint Stock Companies, Draft Law on Corporate Agreements and Draft Law on Limited Liability and Additional Liability Companies) were adopted at their first reading. The draft laws bundle is expected to promote the de-offshorization, as well as to enhance investment inflow to Ukraine through instruments being used in the business-friendly jurisdictions.

New Rules for private companies

The Draft Law on Limited Liability and Additional Liability Companies presents the totally new approach towards regulation of the companies' activities by seeking to develop more comfort and viable rules for the companies and to increase the level of discretion of shareholders related to issues of corporate governance.

The Draft Law offers the possibility to conclude agreement amongst the shareholders (corporate agreement) enabling its parties to agree on voting at the shareholders meeting, as well as on procedure of realization of the pre-emptive right and share transfer, etc.

As another essential novelty introduced by the Draft Law should be mentioned the cancellation of existing prohibition to exchange debt for the shares of the LLC (debt-to-equity swap mechanism), which is perceived to become effective tool for securing interests of the creditors.

Among other key novelties of the Draft Law:

- introduction of statutory regulation of material and interested party transactions;
- determining that the company's participant expulsion should be conducted only through court procedure;
- elimination of legislative provisions enabling mala fide participants to block actions of the company;
- introduction of the possibility to establish supervisory board within the companies;
- elimination of the requirement on the participants' maximum number.

Corporate Agreements

The Draft Law on Corporate Agreements also establishes the long-awaited corporate agreements mechanism aimed at maximizing the flexibility of the corporate governance. However, regulation provided by this Draft Law is more detailed and applies both to the limited liability and joint stock companies.

The Draft Law stipulates typical set of issues that may be regulated by the corporate agreement, including issues related to voting at the shareholders meeting, approval of sale or purchase of shares at the agreed price or under agreed conditions, as well as management related matters.

Under the said Draft Law, the information on the existence of the corporate agreement should be disclosed. However, its content will remain confidential.

The Draft Law also introduces such new instruments ensuring efficiency of corporate agreements mechanism as option agreement and irrevocable power of attorney.

Squeeze-out and Sell-out Procedures

The Draft Law on Amending of Certain Legislative Acts of Ukraine Regarding Increasing of Corporate Governance Level in Joint Stock Companies introduces, *inter alia*, the possibility for majority shareholder of the public joint stock company to exclude its minority shareholders through squeeze-out procedure. It is expected that implementation of such mechanism will result in reduction of operating costs and scope of reporting, better protection of minority shareholders, as well as in increasing of investment attractiveness of privatized joint stock companies.

Under squeeze-out procedure stipulated by the Draft Law majority shareholder holding more than 95% of the shares is entitled to buy-out the remaining shares of the minority shareholders on a compulsory basis. On the other hand, minority shareholders (holding 5% and less) are granted with the corresponding right to demand the purchase of their shares.

In the Draft Law was implemented the EU approach to the determination of the buy-out price (the highest price paid for the shares by the majority shareholder over the last 12 months).

As money transfer under the procedure stipulated by the Draft Law should be conducted only through escrow agreement, the Draw Law also contains issues related to the regulation of the escrow agreement.

All mentioned Draft Laws are reasonably expected to be passed in their second reading in 2017 and once in force will significantly improve the investment climate of Ukraine.

COUNTRY UPDATE ON THE UNITED STATES

Developments in Reporting Requirements for Foreign Investors in the United States

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There are two main sources of reporting requirements for foreign investors in the United States – the Internal Revenue Service and the Bureau of Economic Analysis. The IRS recently upped its game by requiring reports from wholly foreign-owned limited liability companies and other disregarded entities, which is a significant change past practice. The BEA reinstated reporting requirements for almost all foreign investment in late 2014.

IRS Requirements

Section 6038A of the Code has long required U.S. corporations that are 25 percent owned by foreign persons to furnish information, maintain records and, in some cases, appoint a U.S. agent for service of process. However, a U.S. limited liability company or other “disregarded entity” for U.S. federal income tax purposes owned by a single foreign person was not subject to those requirements. That carve-out vanished when the IRS recently amended the rules to include within the definition of “U.S. corporation” a disregarded entity that is solely owned, directly or indirectly, by one foreign person (a “covered entity”).

As a result of this change, a corporation that is 25 percent directly or indirectly foreign-owned, or a disregarded entity that is owned directly or indirectly by one foreign person, is subject to three main requirements:

1. **Obtain a U.S. Employer Identification Number (EIN).** Many foreign-owned disregarded entities obtain an EIN to do business in the United States, for example to open a U.S. bank account. However, doing so was optional under the old rules, and some entities did not obtain an EIN, thereby generally staying “below the radar” with the IRS. Under the new rules, every covered entity must obtain an EIN to file the annual report described below.

To obtain an EIN, the covered entity must disclose the name and EIN or Social Security number of a “responsible party” – that is, a person with the power to “control, manage, or direct the entity and the disposition of its funds and assets.” As a result, the foreign sole owner or its controlling person will also need a U.S. tax identification number.

2. **File annual reports.** Form 5472 requires information to be provided concerning the covered entity, its owner, and transactions between the U.S. entity and related parties.
3. **Maintain records.** The new rules extend the existing general recordkeeping requirements of Section 6001 to covered entities, and also require records for transactions with related parties in order to satisfy the documentation requirements for transfer pricing rules.

Failure to comply subjects the corporation or covered entity to sanctions, including a penalty of up to \$10,000 for failure to file Form 5472 and possible loss of deductions for failure to keep required records.

BEA Reporting

In addition to the new IRS rules, foreign investors should bear in mind the requirement to file Form BEA-13 with the Bureau of Economic Analysis of the U.S. Commerce Department, which was reinstated in November 2014. Reportable investments include:

- formation of a new U.S. legal entity;
- acquisition, by stock purchase or merger, of the voting interests of a U.S. business (or the equivalent for an unincorporated business);
- acquisition of the assets of a U.S. business;
- acquisition of land or buildings intended for lease or sale without significant added construction; and
- expansion of an existing business involving an additional facility.

A qualifying investment is reported on one of five different forms, depending on the nature and amount of the investment. The form must be filed within 45 days after making the investment. Failure to file a required report may result in an injunction, a civil penalty of \$2,500 to \$32,500, or both. In addition, a willful failure to report is a criminal offense, which can result in a fine of up to \$10,000, imprisonment for up to one year, or both. Officers, directors, employees, or agents of a corporation who knowingly participate in a violation by the company are also subject to this criminal penalty.

The BEA monitors press releases and other public sources, and has been known to call companies or their counsel to inquire whether a filing was made for an announced transaction or to ask questions about a filing that was made.

Conclusion

The new IRS reporting rule represents a significant change. Foreign-owned limited liability companies, for the first time, may be required to obtain an EIN and file annual reports with the IRS. Unfortunately, the IRS and BEA reporting requirements are easily overlooked by foreign investors, and, such an oversight could prove costly.