

International M&A and Joint Ventures

MATTIA COLONNELLI DE GASPERIS,¹ CHRISTIAN LUNDGREN,² SAÚL RICARDO FEILBOGEN, ZEKE SOLOMON, ANDREW FINCH, TIM CARDIFF, PAUL LUIKI, MARIA THIERRICHTER, NICOLE VAN RANST, NICOLAS CLAERHOUT, CRISTIANE BORGES DA COSTA, MÓNICA ASSUMPÇÃO PIMENTEL DE MELLO, MARINA AMARAL EGYDIO DE CARVALHO, MARIA CECILIA ANDRADE, ADRIANNA FRANCO GIANNINI, JOÃO OTÁVIO PINHEIRO OLIVERIO, KEN OTTENBREIT, GORDON CAMERON, FRANCISCO UGARTE, CRISTIÁN EYZAGUIRRE, FELIPE MORO, MEI Y. GECHLIK, MIRO LJUB MACEŠIĆ, SUSANNA FUCHSBRUNNER, ANAND S. DAYAL, JONATHAN ACHIRON, MATTIA COLONNELLI DE GASPERIS, FABIO ALBERTO REGOLI, PAMELA A. FULLER, TON SCHUTTE, CHRISTOPHER KING, NANCY A. MATOS, DAVID QUIGG, C. DAVID DEBENEDETTI, JAKUB PITERA, DIOGO LEÓNIDAS ROCHA, BRUNO FERREIRA, TOMÁS PEREIRA DA SILVA, J. MICHAEL JUDIN, DIRK RICHARD VAN ZYL, ALESSANDRA DE MAGALHAES, FERRÁN ESCAYOLA, PER HEDMAN, MICHAEL NYMAN, MALCOLM WIBERG, MARTIN LIEBI, FLORIAN S. JÖRG, AND CAGATAY YILMAZ

I. Introduction

The 2008 international merger and acquisition/joint venture (M&A/JV) markets can be described in two words: “credit crunch.” After years of continual growth, 2008 has been a completely new experience for many companies and lawyers operating in the M&A markets. The number of deals decreased dramatically, and those that do take place often concern companies in financial distress. The M&A markets face a lack of financing. Leveraged buyouts (LBOs), at least on a larger scale, have more or less disappeared for the moment. Equity funds have come under pressure and have lost some ground to the industrial buyers.

The financial sector has been the sector hardest hit by the prevailing market conditions, and almost all governments in the world (including major European countries and the United States) have been forced to intervene in the markets with major rescue packages.

1. Mattia Colonnelli de Gasperis of Lombardi Molinari e Associati, Studio Legale, Milano, Italy, served as a committee editor of this article.

2. Christian Lundgren of Kromann Reumert, Copenhagen, Denmark, was also a committee editor of this article.

loss of liquidity of traded securities or monetary market instruments or any new circumstances that took place when making the contribution in-kind. Moreover, shareholders representing at least twenty percent of the share capital have the right to demand from the management board to have the said assets assessed by an auditor.

Another important change of the CCC provides for the possibility of directly or indirectly financing by the company the acquisition or takeover of its shares from its own funds. The funds to finance the takeover or acquisition of shares should be derived from net profit and form part of the company's reserve capital. The requirements also involve adopting a resolution by the shareholders' meeting as well as a report of the management board. A loan, an advance payment or collateral may be used as a source of financing in accordance with market terms and conditions, in particular as regards the interest rate due to the company as well as collateral established to the benefit of the company. A company may finance the acquisition or takeover exclusively upon examining the debtor's solvency.

Moreover, the amendments resulting from the Act of June 13, 2008 on Change of the Commercial Company Code¹²⁷ made the buy-back procedure more liberal. According to new regulations, any company can acquire its own shares, and the time when the company may lawfully hold its own shares has been extended to five years. However, resolution of the shareholders' meeting is still required.

Pursuant to the Act of June 13, 2008 on Change of the Commercial Company Code¹²⁸ while decreasing the company's share capital, only creditors, whose claims are due and payable, can seek that their claims be satisfied by the company. Creditors, whose claims are not due and payable, can demand that their claims be secured (by placing them with the court deposit) if the said creditors can justify that the satisfaction of the said claims is threatened through decreasing the share capital, and that the company has failed to pay the outstanding amounts due to them.

XIX. Portugal¹²⁹

The international turmoil in the financial markets has left its mark on the Portuguese market. The overall local scenario was depressed and high profile M&A activity was reduced. As an example, there was a single initial public offering, with a disappointing after market.

Apart from the nationalization of a local credit institution (Banco Português de Negócios), which appears to have been brought about mostly due to director fraud but may have been accelerated by the financial turmoil, no relevant insolvencies or individual rescues have occurred due to the financial crisis.

There are, however, some relevant expectations of a slight M&A activity pickup because of the financial crisis and subsequent general economic crisis.

Due to the close interconnection between the Portuguese and Spanish economies, insolvencies or pre-insolvencies of major Spanish players, especially construction companies, may result in a need for these companies to divest their local Portuguese subsidiaries.

127. Journal of Laws of 2008 No. 118, item 747.

128. *Id.*

129. Diogo Leónidas Rocha, Bruno Ferreira, and Tomás Pereira da Silva authored this section on Portugal.

Furthermore, some consolidation or divestment involving credit institutions is also expected, mostly due to the need to comply with capital requirements.

On a different note, public investments are also expected to serve as a driving force for economic recovery, especially in relation to the two main public infrastructure investments: the new Lisbon international airport and the high-speed train links.

A. LOCAL RESPONSES TO THE FINANCIAL CRISIS

Both the Portuguese government and the Portuguese Securities Commission (CMVM) have approved legislation in order to complement and intensify the international efforts to control the financial crisis. These regulatory measures appear to be the beginning of an intense supervisory activity that may change the current balance between the financial markets and the financial regulation.

B. GRANTING OF STATE GUARANTEES FOR INTER-BANK LENDING

On October 24, 2008, Law no. 60-A/2008 was approved, which established the framework for the granting of personal guarantees by the Portuguese state in favor of credit institutions having their head office in Portugal for the purposes of inter-bank financing and refinancing up to the amount of €20 billion.

Should the guarantees be enforced, the Portuguese state is entitled to: (i) convert the credit over the credit institution into share capital, notably through the issuance of preferred shares; (ii) decide the adoption of principles of corporate governance, establish dividend distribution policies and director, officer and other corporate body remuneration policies; and (iii) appoint one or more interim directors.

C. LIMITATION ON SHORT SELLING

The CMVM approved certain regulatory measures that constrain or limit short selling activities. In addition to regulations pursuant to which short selling transactions must be disclosed by market members to the CMVM, this regulatory authority has also approved Instruction no. 2/2008, of September 22, 2008, which prohibited short selling transactions over the securities of certain financial institutions listed in the Portuguese market. Furthermore, the CMVM approved the Instruction no. 4/2008 on September 22, 2008, under which investors must disclose uncovered short positions in securities.

The following transactions or instruments are deemed to create an uncovered short position: (i) utilized loans relating to shares and securities that give the right to their subscription, acquisition, or conversion; (ii) derivatives dealt in markets; and (iii) OTC derivatives, particularly, swaps.

The adoption of this instruction is the result of the exchange of information between supervisory authorities within the context of the Committee of European Securities Regulators (CESR), considering the current market instability and the need for regulatory intervention.

D. TEMPORARY INCREASE OF THE MINIMUM DEPOSIT GUARANTEE AND
REINFORCEMENT OF INFORMATION AND TRANSPARENCY IN THE
FINANCIAL SYSTEM

On November 3, 2008, the Portuguese government approved Decree-law no. 211-A/2008, which reinforces disclosure and transparency duties in the financial system and temporarily increased the minimum deposit guarantee by the Portuguese Deposit Guarantee Fund. The minimum deposit guarantee by the Deposit Guarantee Fund was temporarily increased from €25,000.00 to €100,000.00. Moreover, the reimbursement term was considerably reduced to seven days for deposits up to €10,000.00 and one month for deposits up to €100,000.00.

With specific relevance for the M&A activity, shareholding disclosure obligations were imposed on listed companies and financial intermediaries in relation to the acquisition of qualifying holdings that they acquire in companies having their head office outside the European Union.

From a supervisory point of view, the CMVM was granted additional supervisory powers in order to enable it to enforce compliance with certain financial information disclosure obligations.

XX. South Africa¹³⁰

On September 21, 2008, a day after accepting a call by the governing African National Congress (ANC) to quit and in contrast to the precedent in many other African countries, Mr. Thabo Mbeki resigned as the president of South Africa.¹³¹ Mr. Kgalema Motlanthe, the deputy leader of the ANC, was sworn in as South Africa's new president pending presidential elections in 2009.

The International Monetary Fund released its Financial System Stability Assessment on South Africa.¹³² The joint IMF-World Bank Financial Assessment Programme (FSAP) mission's main findings were, inter alia, that: South Africa's sophisticated financial system was financially sound; banks and insurance companies have enjoyed good profitability, capitalization levels and reserves; the financial sector's regulatory framework is modern and generally effective; and stress tests suggest that capital and reserve cushions at banks and insurance companies are sufficient to absorb large shocks. The IMF also published its regional economic outlook for Sub-Saharan Africa (2008).¹³³ Sub-Saharan African growth is expected to slow to about six percent in 2008 and 2009, down from 6.5% in 2007. Meanwhile, inflation is projected to increase to twelve percent in 2008 and ten percent in

130. This section on South Africa was authored by J Michael Judin of Attorneys Goldman Judin Inc. of Johannesburg and Advocate Dirk Richard Van Zyl of the Sandton Bar, South Africa.

131. *South Africa (sic) president steps down*, BBC, Sept. 21, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7627957.stm>.

132. IMF Country Report No. 08/349, International Monetary Fund, Oct. 2008, available at www.imf.org/external/pubs/ft/scr/2008/cr08349.pdf.

133. *Regional Economic Outlook: Saharan Africa*, International Monetary Fund, Oct. 2008, ISBN 978-1-58906-763-9, available at <http://www.imf.org/external/pubs/ft/reo/2008/af/eng/sreo1008.htm>.