

Deals and developments

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Contents

Fortune Brands – Participation in Pernod Ricard's £7.4 billion takeover of Allied Domecq	page 3
Insurance tie-up shows way forward for M&A under new Listing Rules	page 4
Returns of value – pensions clearance in practice more than six months on	page 6
Alliance steers TomTom to largest European technology IPO since 2000	page 8
Dual acquisition for Renewable Energy Holdings	page 9
London and Paris advise on LogicaCMG's €903 million acquisition of Unilog	page 10
TIW's \$3.5 billion sale of two mobile phone operators to Vodafone	page 12
VSNL's acquisition of the Tycos Global Network and Teleglobe	page 14

Editorial

In this issue of *deals and developments* we focus on some of the major matters on which our Alliance has been advising in Europe over the last few months. From advice on one of the most high-profile cross-border consortium bids of 2005, to the largest technology IPO in Europe since 2000, the transactions on which we have advised have never been far from the headlines.

Henry Raine

Fortune Brands – Participation in Pernod Ricard’s £7.4 billion takeover of Allied Domecq

On 26 July 2005 the takeover of Allied Domecq by Pernod Ricard was completed. Our Alliance firms advised Fortune Brands on its participation in this consortium break-up bid and its acquisition of certain Allied Domecq brands.

Since the creation of Diageo through the merger of Grand Metropolitan and Guinness in 1997 and the acquisition and break-up of Seagram’s wine & spirits division in 2001 by Pernod Ricard and Diageo, significant M&A activity has been anticipated in the spirits and wine sector. In July 2005 Pernod Ricard and Fortune Brands (Fortune) successfully completed the £7.4 billion takeover of Allied Domecq plc (Allied).

This was our first instruction from the US conglomerate, Fortune, who prior to the Allied takeover was already the seventh biggest spirits and wine player and owner of Jim Beam bourbon. Fortune was keen to strengthen and expand its spirits and wine portfolio and to develop its European business. Pernod Ricard was also looking to gain ground on the drinks giant, Diageo, but for funding and competition reasons a takeover offer for Allied on its own would have been challenging.

Structure

Fortune and Pernod Ricard therefore joined forces to seek to effect a takeover of Allied. At the beginning of 2005 detailed talks and negotiations between Fortune and Pernod Ricard began to structure a framework which would enable the two companies to launch a bid.

Fortune and Pernod agreed that the takeover was to be structured as a break-up bid, with a subsequent back-to-back disposal of certain brands and assets to Fortune. Pernod Ricard would take responsibility for the conduct of the offer and compliance with the Takeover Code. Fortune was to acquire certain specified brands from the Allied/Pernod Ricard group, including Maker’s Mark, Canadian Club, Sauza tequila, Courvoisier and Laphroaig.

Fortune and Pernod Ricard agreed that the price Fortune would pay would be based on an earnings-multiple related to the value of each brand it was to acquire (direct brand contribution). Based on the information available to the parties before approaching Allied, the price payable by Fortune was agreed at £2.7 billion, which would be subject to a post-closing audit. As Pernod Ricard’s takeover offer was for a combination of cash and Pernod Ricard shares, Fortune’s contribution represented a high proportion of the total cash offered.

Pre-notification discussions with competition regulators were undertaken to clarify how merger control laws would apply to the deal. The EU Commission confirmed that in the EU the deal should be treated as two separate transactions for merger control purposes. The US Federal Trade Commission and most other regulators adopted the same approach.

A significant amount of due diligence was undertaken on the Allied group by Fortune prior to approaching the board of Allied. As a public company with shares listed in London and ADRs traded in New York, there was a significant amount of information on the Allied group which was publicly available. This enabled Fortune to target those parts of the Allied group in which it had ascertained that the value of the brands and assets it was to acquire lay. Fortune then focused its rights on those parts of the group.

The board of Allied was approached in April and on 21 April 2005 a recommended takeover offer by way of scheme of arrangement was announced.

Consideration

Fortune paid £2.7 billion on the date the takeover became effective, the scheme effective date (26 July 2005), but agreed with Pernod Ricard that the assets and brands it was to acquire would be transferred to it within six months of the scheme of arrangement (ie, before 26 January 2006). Fortune therefore required protections to mitigate against any insolvency risks or risks to the assets and brands that were to transfer to Fortune during that period. As well as contractual rights to manage its brands, Fortune also agreed to take tracker shares in the bid vehicle (giving it rights to the profits attributable to the assets it had bought), B shares in certain of the key Allied companies, security over certain IP and Allied group company shares and the right to appoint directors to the boards of some of the key Allied companies.

The process for separating and transferring legal title to the assets to Fortune Brands is underway and is due to be completed by 26 January 2006.

Please contact corporate partners Richard Lewis (+44 20 7466 2029) or Malcolm Lombers (+44 20 7466 2823) if you require further details in relation to this transaction or any of the issues discussed above.

Insurance tie-up shows way forward for M&A under new listing rules

On 1 July 2005 the new Prospectus and Listing Rules came into force. On the same day, Britannic Group posted to its shareholders the public documents in connection with its proposed merger with Resolution Life Group Limited, the first such transaction under the new regime. A number of issues arose during the transaction, particularly the extent to which the public documents prepared by Britannic were regarded by the United Kingdom Listing Authority (UKLA) as setting a precedent.

Britannic and Resolution both specialised in the ownership and administration of closed life funds, a sector that has seen much activity in the past few years. Britannic, which also had an asset management business, was a long established listed company, which had, before a change of strategy, also operated other lines of financial services business, such as Britannic Money. By contrast, Resolution was only incorporated in 2002 and its business was formed from the acquisitions of the Phoenix Group from Royal & Sun Alliance in 2004 and of the Swiss Life (UK) Group in 2005. The combined market value of the merged group is about £2 billion (\$3.48 billion), with 54.5% of the enlarged issued ordinary share capital held by the existing Britannic shareholders and the balance by the former Resolution shareholders.

Deal structure

Resolution was a private company to which the City Code on Takeovers and Mergers does not apply. The obvious method for acquiring the holdings of the 40 or so Resolution shareholders would have been a scheme of arrangement under section 425 Companies Act 1985. A scheme, once effective, binds all of the shareholders of the company concerned, whether or not they voted in favour of the scheme resolution, and has the additional benefit that, if appropriately structured, no liability to stamp duty or stamp duty reserve tax arises. However, Resolution's shareholders had agreed between them certain pre-emption rights and restrictions on transfer of shares, as well as so-called tag and drag along rights, which had been incorporated not only into Resolution's articles of association (which could have been overcome by means of a scheme), but also in a shareholders' agreement. Without the approval of each one of the Resolution shareholders, there was no alternative but to comply with these restrictions. It is relatively unusual for such a large transaction to have to be structured in such a manner.

Accordingly, on 8 June, the day immediately before the announcement of the proposed merger, Resolution entered into commitment deeds with enough Resolution

shareholders to be able to trigger a drag along offer for the minority. These participating Resolution shareholders gave authority to Resolution conditionally to sell their Resolution shares to Britannic under the terms of the merger agreement entered into on the same date, in consideration of the issue by Britannic of new ordinary shares. Next, Resolution notified its remaining, non-participating Resolution shareholders that, subject to the pre-emption rights, a drag along offer was being made. All of the non-participating Resolution Shareholders then in fact agreed to participate in the merger voluntarily so that, assuming the conditions were all satisfied or waived, the shares of all Resolution Shareholders were acquired by Britannic. This took place in September.

Application of the new Prospectus and Listing Rules

Even though Britannic was the larger of the two companies in terms of value, on certain other criteria the opposite was the case. As a result, the merger was treated by the UKLA as a reverse takeover, not simply a class 1 acquisition. This difference has various implications, one of which is that, under the Listing Rules (both pre- and post-July 1 2005, termed in this article the old Listing Rules and new Listing Rules respectively), trading in the shares of the quoted issuer is suspended from the time of announcement of the proposed transaction if it is a reverse takeover. The suspension is only lifted once the UKLA is satisfied that enough information is available in the market for investors to be properly informed. In practice, this is achieved only once a prospectus has been issued.

Under sections 85 and 86 of the Financial Services and Market Act (the FSMA) (repeated in Prospectus Rule 1.2), a prospectus is required post-1 July 2005 if either:

- an offer is made to the public of transferable securities; or
- an application is made for admission to listing of transferable securities.

This is the case unless certain exemptions apply. One of these, contained in section 85(5)(b) of the FSMA (and also set out in Prospectus Rule 1.2.2), provides that no prospectus is required in relation to transferable securities offered in connection with a takeover by means of an exchange offer or a merger “if a document is available containing information which is regarded by the FSA (Financial Services Authority) as being equivalent to that of a prospectus”. The document produced by Britannic was not strictly a prospectus but the UKLA appeared to regard “equivalent” as meaning identical and Britannic was required to ensure that all of the relevant requirements of the new Listing Rules and the Prospectus Rules were satisfied.

Unfortunately, the combined requirements of the new Listing Rules and Prospectus Rules for the merger exceeded those of the old Listing Rules in a number of respects. The first of these was in relation to what financial information was required and in what form. Under either regime, a comparative table comprising three years of financial information on Britannic was required (with the last year stated both in UK GAAP and also under International Financial Reporting Standards (IFRS)). But, in respect of Resolution there was a difference between the two regimes. Under the old Listing Rules it would have been enough to have an accountants’ report on Resolution and its group of companies. However, under the new Listing Rules, any transaction by the target that would have been considered a class 1 transaction for the listed company at the relevant time, must also be the subject of an accountants’ report. As a result, there were three separate reports on Resolution, the Phoenix Group and the Swiss Life (UK) Group. In addition, although commonplace to include (but not actually required under the old Listing Rules), the Prospectus Rules require that pro forma financial information be included if the transaction represents a “significant gross change” and be reported upon.

The Prospectus Rules also require that a summary of this financial information, in addition to the full financial information, be included in the prospectus (this is separate from the further requirement that the document includes a summary in not more than 2,500 words of its entire contents) and that there is a commentary (called the Operating and Financial Review by the Prospectus

Rules but previously known using the US terminology of the Management Discussion and Analysis) describing the relevant events and trends during the period covered by the financial information. Another new feature is the indebtedness and capitalisation statement (once required under the old Listing Rules but abolished for equity issues some years ago). The parties also discovered that the requirements in respect of the inclusion of the working capital statement had changed in a manner adverse to their interests. Under the old Listing Rules, an exemption existed for insurance and banking companies, being companies subject to statutory solvency regulation. But although it appeared that under the new Listing Rules the exemption had been carried across, though in modified wording, the view of the UKLA was that it does not enable them to dispense with the requirement for a working capital statement in a prospectus altogether, as this is required under the Prospectus Rules. Finally, there was the new requirement for a description of the capital resources of both groups, which, as well as their capital resources, requires an explanation of their cash flows, borrowing requirements and funding structure, restrictions on the use of the capital resources, and their anticipated sources of funds needed to fulfil the identified capital commitments. The final form of this wording had to be approved by a departmental meeting of the UKLA.

The parties, their advisers and the UKLA made considerable efforts to understand and reflect the requirements of the new rules and to apply the interpretation issued by the Committee of European Securities Regulators. The end result was a document that, at 370 pages, was substantially longer than corresponding documents produced under the old Listing Rules. In time, practices will become more established, the new rules will become more familiar, and the UKLA will, it is to be hoped, allow a greater degree of flexibility to re-enter the process, but it will take a number of deals like the merger of Britannic and Resolution before that position is reached.

This article was originally published in the August edition of IFLR. Please contact corporate partner Michael Shaw (+44 20 7466 2201) if you require further details in relation to this transaction or any of the issues discussed above.

Returns of value – pensions clearance in practice more than six months on

The financial press has reported widely on the impact of the Pensions Act 2004 and the broad powers of the Pensions Regulator, which took effect in April this year. One area of focus is the impact of the new regime on the ability of a listed company with a pension scheme deficit to return cash to shareholders.

The Pensions Act 2004

Under the Act, the Regulator has the power to force a company and its associated or connected persons, including individual directors, to make a contribution to the company's scheme. In particular, this power arises where the Regulator is of the opinion that one of the main purposes of an act was to avoid or reduce a liability to the pension scheme which would arise on the winding up of the scheme and certain other situations – this could potentially include returns of value. To give some certainty to companies and their directors, the Act provides a framework for clearance to be sought from the Regulator. The clearance procedure is voluntary but if a clearance statement is obtained, it provides the company and its directors with assurance that the particular act for which clearance is sought will not give rise to a liability to contribute to the scheme.

“Type A events”

It is highly unlikely that in deciding to return cash, a company will be motivated by a wish to avoid a liability to its pension scheme. However, the Regulator may look beyond the subjective views of the directors. The guidance issued by the Regulator on the clearance procedure introduces the concept of a “Type A” event for which, in the Regulator's view, it may be appropriate to seek clearance. The guidance states that a return of capital involving a reduction in the assets of the company which could be used to fund a pension deficit is potentially a Type A event. Whilst the guidance refers to a return of capital, it does not do so in a technical sense and, in the eyes of the Regulator, any action which involves a return of value to shareholders is potentially a Type A event. Significant share buybacks, special dividends and B share schemes and similar arrangements are therefore caught. The Regulator does, however, appreciate the need to strike a balance between identifying significant returns of value and hindering reasonable dividend payments. The guidance also helpfully states that if the employing company would not have negative distributable reserves after reflecting the deficit in its balance sheet or after making the return of capital, the return would not be a Type A event.

The steps to returning value

So where does this leave a listed company wishing to return a significant amount of cash to its shareholders?

- The first question to ask is whether the group has a pension scheme in deficit. Here the Regulator has said that, at least for the time being, it will use FRS 17 as a test for determining whether there is a deficit.
- If the employer company within the group would have negative distributable reserves after reflecting the deficit or after making the return, the return will be a Type A event and the company will need to consider seriously whether clearance should be sought.
- If clearance is sought, full details of the proposed transaction and the relevant pension scheme and its deficit will need to be provided to the Regulator.
- The Regulator appreciates the need for clearance applications to be dealt with promptly but, realistically, the company should allow at least two to four weeks for the process.
- The Regulator encourages scheme trustees to take a pro-active stance in negotiating their position when discussing scheme funding with the employer. In particular, the Regulator expects a company considering a Type A event to enter into discussions with the trustees at an early point and consider what can be done to minimise or eliminate any impact on the pension creditor. Submitting an application for clearance without having discussed the proposed return with the scheme trustees will, inevitably, delay the clearance process.
- The Regulator will consider each application on its facts, taking into account the size of the deficit, the assumptions used in applying FRS 17, the company's plans for eliminating the deficit, the source of the cash to be returned, the impact of the return of value on the company's credit rating, gearing and balance sheet strength generally and the views of the trustees.
- The Regulator will expect to see positive action being taken by the company with a view to eliminating the deficit over a period of two to five years. Depending on the circumstances, the Regulator may, as a condition to giving clearance, require a one-off

contribution to be made to the scheme or an enhanced contribution schedule or a combination of the two. It may also require additional group companies to support the employer covenant, particularly where the parent company is not currently a principal or participating employer in the scheme.

- Companies seeking clearance should expect there to be an element of negotiation in the clearance process. We have found the Regulator to be receptive to commercial, legal and financial arguments but, at the end of the day, the Regulator will expect to see a notable improvement in the position of the pension creditor.
- It is worth remembering that applying for clearance is voluntary. Failure to apply for clearance does not necessarily mean that the Regulator will use its enforcement powers. As well as assessing whether a transaction is a Type A event, companies should also assess the real risk of enforcement action. This risk should then be balanced against the price demanded by the Regulator for clearance and a commercial view taken.

Early action

We have advised a number of companies with pension scheme deficits wishing to return value to shareholders and, in our experience, the new regime should not be seen as a barrier to returning cash to shareholders. However, it is extremely important that the Act and the guidance are considered at an early stage. Trustees may need to be consulted and the company will need to be pro-active in considering whether clearance should be sought and, if so, what might need to be done to obtain clearance. The timetable for the return will also need to take into account the clearance process.

If you have any further queries relating to returning value to shareholders and/or the Pensions Act 2004, please contact corporate partner Ben Ward (+44 20 7466 2093) or pensions partner Alison Brown (+44 20 7466 2427)



Alliance steers TomTom to largest European technology IPO since 2000

Our advice to personal navigation specialist TomTom on its €540 million IPO – the largest technology IPO in Europe and the largest IPO in the Netherlands since 2000 – is recent evidence of the pick-up in Dutch capital markets activity. This transaction is just one in a series of Dutch capital markets mandates for Herbert Smith and Stibbe. The two firms have subsequently advised Tele Atlas on its €537 million Global Offer and Euronext Amsterdam Listing and Goldman Sachs International and ABN AMRO Rothschild as joint global co-ordinators and joint bookrunners on a €550 million accelerated bookbuilt offering of new shares by Royal Numico.

TomTom

TomTom is a leading provider of personal navigation products and services, founded in 1991 in Amsterdam. Today, it has offices in the Netherlands, the United Kingdom, the United States and Taiwan and its products are sold across Europe, Central and North America and online.

TomTom's products include all-in-one car navigation devices, including the award-winning TomTom GO family of integrated navigation devices, as well as navigation software products which integrate with third party devices such as PDAs and smartphones.

The largest European technology IPO since 2000

The IPO was structured as a global offer of existing and new ordinary shares in TomTom to the public and institutional investors in The Netherlands and to certain institutional investors internationally. As part of the IPO, there was a preferential allotment to members of the management board of TomTom and to its employees in The Netherlands, the United Kingdom, France and Germany. Following the IPO, TomTom had a free float of 28.8%.

The offer price of €17.50 was determined on the basis of a book-building process and was at the higher end of the price range, producing an offer value of €540 million. This made it the largest technology IPO in Europe and the largest IPO in The Netherlands since 2000. Its initial market capitalisation following the IPO was €1.9 billion.

The IPO was underwritten by a consortium of banks with Goldman Sachs International and Lehman Brothers as joint bookrunners.

The Alliance working together

Stibbe advised TomTom on all aspects of Dutch corporate and securities law, including the rules and regulations of Euronext Amsterdam. Herbert Smith provided advice on United States and English corporate and securities law in respect of the securities offering into those jurisdictions. The expertise demonstrated advising TomTom on this transaction was instrumental in our Alliance being instructed by Tele Atlas on its €537 million Global Offer and Euronext Amsterdam Listing. Tele Atlas, whose largest customer is TomTom, is a leading provider of digital maps for use in a wide range of navigation, mapping and geography-related applications. The same cross-border alliance team that advised TomTom acted for Tele Atlas. Tele Atlas was the second largest equity offering by a European technology company since 2000.

For further information please contact Stibbe corporate partners Derk Lemstra (+44 20 7466 6301) or Heleen Kersten (+31 20 546 03 70), or Herbert Smith corporate partner Alex Bafi (+44 20 7466 2557).



Dual acquisition for Renewable Energy Holdings

In the summer of 2005 Herbert Smith and Gleiss Lutz advised Renewable Energy Holdings plc (REH) on its dual acquisition of Windpark Kesfeld-Heckhuscheid GmbH & Co KG (Kesfeld) and Windpark Kirf GmbH & Co KG (Kirf) both subsidiaries of EDF Energies Nouvelles (EDF).



Renewable energies

With around 80% of the world's energy requirements being satisfied by non-renewable energy sources, the search for effective renewable alternatives to alleviate reliance on depleting fossil fuel reserves is becoming increasingly important. These long-term supply considerations are set against a backdrop of mounting energy costs which have in turn also prompted greater interest in renewable energy.

Environmental concerns are an additional and inevitable key factor in the development of renewable energies. The need for further emission cuts and the possibilities for renewable energy are firmly on the world's agenda: despite the numerous difficulties and disagreements, the Kyoto protocol came into force in mid-February 2005 and over 150 nations met in Montreal in late November to discuss possible agreements on post-Kyoto reductions in greenhouse gas emissions.

The opportunities these drivers are providing for investment and growth in the renewable energy sector are illustrated by projects and acquisitions such as Kesfeld and Kirf. The acquirer REH, an Isle of Man based investor, was admitted to AIM in February 2005

and has been actively pursuing investment and operational opportunities in various proven and innovative renewable energy technologies. The vendor, EDF, is also a specialist in renewable and alternative energies.

Kesfeld and Kirf

Kesfeld and Kirf were set up by EDF to build and operate windfarms in separate areas of the Rheinland-Pfalz area of Germany. Kesfeld will have an initial capacity of 27.9MW, with a further 4.65MW expansion scheduled to be operational by the end of July 2006. Kirf has a 9.2MW capacity and will be operational by the end of July 2006. When fully operational, Kesfeld and Kirf are anticipated to produce 95,000MW hours of electricity annually for a lifespan of 20 years. All electricity produced by Kesfeld and Kirf will be supplied and sold to the regional grid operator RWE.

The deal and the future

The cost of the Kesfeld and Kirf acquisitions is expected to be £33 million with 80% of this total being funded through a non-recourse loan entered into with HVB Bank Munich. The project financing is supported by a complex security package for the benefit of the lenders, including a share pledge over the shares of the project company, security assignments of the project revenues, direct agreements relating to all major project documents and easements securing future step-in-rights. The remainder is being supplied through REH's existing cash reserves.

Subsequent to the acquisition, Kesfeld has entered into and Kirf will enter into separate turnkey construction contracts with enXco GmbH, another subsidiary of EDF, for the construction of the two windfarms. Specialist sub-contractors have also been appointed, including Siemens Wind Power AS who will supply, erect and service the wind turbines. enXco has also entered into Operation and Maintenance Agreements with Kesfeld and Kirf and so shall be responsible for the day-to-day operation and administration of the windfarms.

For further information on this article and the issues raised in it please contact Herbert Smith corporate partner Henry Davey (+44 20 7466 2018) or Gleiss Lutz corporate partner Kilian Bälz (+49 69 955 14 541).

London and Paris advise on LogicaCMG's €930 million takeover of Unilog

On 19 September 2005, LogicaCMG announced that it had agreed to acquire approximately 32% of the issued share capital of Unilog and subject to the completion of the acquisition of this block of shares, it intended to acquire the remaining shares in Unilog by way of a public tender offer, to be funded by a combination of a one for two rights issue to raise £389 million and a new committed acquisition facility.

A cross-border team from Herbert Smith in London and Paris is advising LogicaCMG.

The parties

LogicaCMG, listed on the London Stock Exchange and Euronext Amsterdam, is an international provider of management and IT consultancy, systems integration and outsourcing services. It was formed in December 2002 by the merger of Logica with CMG. Unilog, listed on Euronext Paris, is a mid-cap IT services provider with a particularly strong presence in the French IT market. The combination of LogicaCMG and Unilog will create an enlarged group that is ranked amongst the top ten IT services providers by revenue in Europe and continues the consolidation that is taking place in the European IT services market.

Two-stage acquisition structure

In line with market practice in France, the proposed acquisition of Unilog was structured as a two-stage process: the acquisition of a block of shares followed by a public tender offer for the remaining shares in Unilog. This is because, under French law, any undertakings given by target shareholders, regardless of intention, will not be irrevocable and so a bidder commonly acquires a block of shares from one or more target shareholders before proceeding with a full public tender offer for the remaining shares in the target. Consequently LogicaCMG entered into an agreement with a group of Unilog's senior management to acquire their 32% shareholding for a mixture of cash and new LogicaCMG shares. Whilst LogicaCMG could have sought to acquire more than 32% of Unilog as part of the block trade, a holding of 33% would have required LogicaCMG to launch a mandatory takeover offer in accordance with the AMF's General Regulations governing the conduct of tender offers. On 25 October 2005, LogicaCMG completed the acquisition of the 32% stake and filed the terms of a tender offer for the remaining shares in Unilog with the AMF.

The tender offer was launched in late November 2005, is unconditional and for cash only at a price of €73 per Unilog share. Under the AMF's General Regulations, there is no equivalent to Rule 11 of the UK Takeover

Code (requiring target shareholders to be offered bidder shares where the bidder has acquired target shares carrying 10% or more of the voting rights in exchange for bidder shares in the three months prior to or during the offer period) and accordingly, although the majority of the 32% shareholding was acquired from senior management for a mixture of cash and new LogicaCMG shares, LogicaCMG will be permitted to offer cash only consideration under the terms of the tender offer. The absence of any conditions (and in particular an acceptance condition) leaves open the possibility that, on conclusion of the tender offer, LogicaCMG may be left with a minority stake in Unilog or, more realistically, that it may not be able to exercise the minority squeeze-out provisions which require a bidder to have acquired 95% of the share capital and voting rights of a target before it can compulsorily squeeze-out minority target shareholders. At the date of this publication, LogicaCMG's holding had increased to approximately 45% after making a number of market acquisitions.

The block trade also required the approval of LogicaCMG's shareholders as a class 1 transaction under Listing Rule 10.

Rights issue prospectus and supplementary prospectus

The rights issue involved an offer to subscribe for one new share for every two existing shares held at a price of 107 pence per share, representing a discount of approximately 36.3% to the market price prior to announcement. Notwithstanding this "deep discount", in order to guarantee that sufficient funding was available in order to complete the acquisition of Unilog, the issue was fully underwritten by a syndicate of banks.

Under the new Prospectus Directive regime which came into force in the UK on 1 July 2005, a rights issue constitutes an offer to the public of transferable securities for the purposes of section 85 of the Financial Services and Markets Act 2000 (the FSMA) and accordingly requires the preparation and publication of a

LogicaCMG

full prospectus, including the inclusion in the document of a prospectus summary (of no more than 2,500 words), full risk factors and an Operating and Financial Review. The prospectus content requirements represent a significant increase in disclosures compared to pre-1 July right issue listing particulars. Given LogicaCMG was also required to prepare and publish a class 1 circular in accordance with Listing Rules 10 and 13, it took the decision to combine the required content of the circular with that of a prospectus in one document.

As well as preparing a prospectus under the new regime, LogicaCMG was in the unusual position of knowing at the date that the prospectus was published that it would be required to publish a supplementary prospectus shortly thereafter as a result of the subsequent publication of Unilog's interim results. Under section 87G of the FSMA and Prospectus Rule 3.4.1, where there arises a "significant new factor, material mistake or material inaccuracy" following publication of a prospectus and prior to the later of closing of the offering and admission, there is an obligation on the company to prepare and submit for approval a supplementary prospectus. In this case the significant new matter triggering the obligation was the publication of Unilog's interim results. As the supplementary prospectus was published on 13 October 2005, the day immediately prior to the commencement of the rights issue, it did not trigger the new right introduced by the Prospectus Directive and implemented in the UK by section 87Q of the FSMA, for investors to have two working days after the publication of a supplementary prospectus to withdraw their acceptance of an offer. This situation has not yet arisen on an offer in the UK.

Accessing European investors

One of the principal aims of the regime implemented by the Prospectus Directive is to facilitate the pan-European offering of securities by permitting a prospectus approved by a company's home regulator to be "passport" to investors in other EEA jurisdictions without substantive review by the regulators in those

other states. LogicaCMG's prospectus was the first such document to be passported out of the UK and into France, Germany and the Netherlands and it was also passported into Ireland. A translation of the summary of the prospectus was required by both the French and German regulators in accordance with section 87I(1)(c) of the FSMA and, whilst not required by the AFM in the Netherlands, LogicaCMG elected to make a Dutch translation of the summary available having regard to its large number of Dutch shareholders. Accordingly, LogicaCMG shareholders in France, Germany, the Netherlands and Ireland (as well as in those other EEA states in which no public offer for the purposes of the Prospectus Directive was being made as LogicaCMG had less than 100 shareholders resident there) are able to participate fully in the rights issue.

In connection with the merger of Logica and CMG in December 2002, LogicaCMG had obtained a secondary listing on Euronext Amsterdam and settlement arrangements with Euroclear under which Euroclear acts as the registered holder on LogicaCMG's register of members on behalf of the underlying Dutch resident investors. Accordingly, at the same time as nil paid rights were admitted to the Official List of the UK Listing Authority and to trading on the London Stock Exchange, Dutch resident investors holding their shares through Euroclear were credited with one Euroclear subscription right, representing half a nil paid right, for every share held and the Euroclear subscription rights were listed on Euronext Amsterdam. This added to the complexity of the mechanics, particularly as regards settlement, and is the first time a UK company has carried out a rights issue in this way.

Please contact corporate partner Michael Shaw (+44 20 7466 2201) or senior associate Will Pearce (+44 20 7466 2622) in London or corporate partner Frederic Grillier (+33 1 53 57 65 44) in Paris if you require further details in relation to this transaction or any of the issues discussed above.

TIW's \$3.5 billion sale of two mobile phone operators to Vodafone

Herbert Smith and Stibbe, together with Canadian law firm Fasken Martineau Dumoulin LLP, advised Montreal-based Telesystems International Wireless Inc. (TIW) on a recommended \$3.5 billion cash sale of its interests in two mobile phone operators, MobiFon and Oskar Mobil, to Vodafone International Holdings B.V., a wholly-owned subsidiary of Vodafone Group (Vodafone). TIW was introduced to Herbert Smith by Stibbe partner Derk Lemstra, who has advised the NASDAQ and Toronto-listed telecommunications company for a number of years.

The parties

TIW was a leading provider of wireless voice, data and short messaging services in Eastern Europe with over 6.7 million subscribers as at December 2004. It operated in Romania through MobiFon S.A. under the brand name Connex and in the Czech Republic through Oskar Mobil a.s. under the brand name Oskar. TIW shares were listed on NASDAQ and on the Toronto Stock Exchange (the shares were subsequently delisted from both exchanges on 27 September 2005).

MobiFon is a leader in the mobile telecommunication market and one of the strongest in Romania. Oskar is the biggest mobile phone operator in the Czech Republic.

The framework and structure of the transaction

TIW sold 100% of Oskar Mobil and 80% of MobiFon through the sale of its indirect 99.9% subsidiary Clearwave N.V. (Clearwave). Vodafone already held 20% of MobiFon. The sale and purchase agreement was under English law.

On 15 March 2005 TIW announced that it had entered into definitive agreements with Vodafone for the sale of MobiFon and Oskar Mobil. The \$3.5 billion cash consideration had assumed approximately \$950 million of net debt. Closing of the sale was subject to (i) court approval of the Canadian scheme of arrangement (the plan of arrangement, described further below); (ii) TIW shareholder approval of the sale; and (iii) customary conditions, including the necessary regulatory approvals under relevant competition legislation (EU and Romanian). The sale was to take place after such regulatory approvals were obtained.

Shareholders of TIW representing 33.6% of the outstanding share capital of TIW agreed to support the transaction and not to solicit any competing transaction.

The board of directors of TIW approved the sale transaction and recommended shareholders of TIW vote in favour of the sale. The Board received opinions from Lazard Frères & Co. LLC (financial adviser to the company) and Lehman Brothers Inc. (financial adviser to the Board of Directors) as to the fairness to TIW's selling subsidiaries of the sale consideration.

The agreements between TIW and Vodafone contained customary provisions prohibiting soliciting any other acquisition proposal but allowing termination in certain circumstances, including receipt by TIW of an unsolicited superior proposal from a third party. A termination fee to Vodafone of approximately \$10 million (representing 2.5% of the transaction value) was also agreed. The shareholder undertakings referred to above would also terminate in such circumstances. In addition, Vodafone agreed to a standstill provision.

This deal comprised the sale of the last remaining businesses of TIW, following which the proceeds were to be distributed to the stockholders. Accordingly, the parties agreed a sharing of risk more analogous to a public offer, as the distribution could have been obstructed by any remaining contingent liabilities (such as warranties or indemnities) post-closing. Liability therefore ceased on closing.

Canadian plan of arrangement

The transaction was carried out as part of a statutory plan of arrangement under the Canadian Business Corporations Act. The arrangement provided for a shareholder vote, the distribution of the proceeds of the sale to TIW's shareholders and the eventual liquidation of TIW. Concurrently with the approval of the arrangement by the Superior Court of Québec, TIW sought Court authorisation to initiate a creditor claims process. The distribution involved Dutch as well as Canadian law, as there were Netherlands and Netherlands Antilles companies in the chain.

Under the arrangement, the distribution to TIW's shareholders was to be completed in stages up to a maximum amount of \$16 per TIW share, plus investment income, if any, earned following closing of the sale to Vodafone so that:

- upon closing of the sale, TIW would distribute the amount permitted by the Court (the First Distribution).
- upon completion of the creditor claims process, TIW would distribute all remaining cash, except for appropriate reserves (the Second Distribution).
- upon liquidation of TIW, shareholders would receive any residual value to the extent of US\$16 per share (plus investment income), and any excess would be returned to Vodafone as an adjustment to the consideration.

The plan of arrangement required approval of at least two-thirds of the votes cast by shareholders and

approval was obtained on 19 May 2005. The Superior Court of Montreal issued a final approval order on 20 May 2005. The sale closed on 31 May 2005.

Please contact Herbert Smith corporate partners Gareth Roberts (+44 20 7466 2322) or Alex Kay (+44 20 7466 2447) or Stibbe's Derk Lemstra (+44 20 7466 6301) or Hans Witteveen (+1 212 972 4000) should you require any further information about this transaction.



VSNL's acquisition of the Tyco Global Network and Teleglobe

During 2005 Herbert Smith, together with Alliance partners Gleiss Lutz and Stibbe, advised Videsh Sanchar Nigam Limited (VSNL) on two major global transactions in the telecoms sector. VSNL's acquisition of the Tyco Global Network, a global undersea cable network, closed on 30 June 2005 and less than a month later on 25 July 2005 VSNL signed a conditional agreement for the acquisition of the NASDAQ listed Teleglobe International Holdings Limited, a leading global provider of wholesale voice, data, IP and mobile signalling services.

Videsh Sanchar Nigam Limited (VSNL) is India's leading provider of International Telecommunications and Internet Services and the first telecom service provider in the world to obtain the new industry quality standard TL 9000. Since 2002 VSNL has been a member of the \$17 billion Tata Group (India's largest industrial conglomerate) and under Tata's telecoms umbrella brand of Tata Indicom.

2005 was a very strong year for VSNL and has seen VSNL post robust financial results and make two substantial acquisitions of undersea cable networks formerly controlled from the US, the Tyco Global Network and Teleglobe International Holdings Limited.

Acquisition of TGN

On 30 June 2005, VSNL closed the acquisition of the Tyco Global Network (TGN) having obtained all of the necessary international and, in particular, United States regulatory approvals. TGN, one of the world's most advanced and extensive submarine cable systems, was acquired by VSNL for \$130 million. The acquisition gives VSNL control over a network that spans 60,000 kilometres (37,208 miles) connecting North America, Europe and Asia.

For tax structuring, the transaction employed an asset acquisition, as opposed to share acquisition structure and was signed conditionally on 1 November 2004, subject to telecoms regulatory and competition approvals.

While beneficial for tax and other structuring reasons, an asset acquisition is considerably more complex than a share purchase. The additional level of complexity is particularly evident in the case of a large transaction across multiple jurisdictions in a regulated market, due to the need to identify and document the transfer of each of the assets constituting the business, as well as the preparation and filing of new applications for all necessary regulatory licences. The tight time frame within which the TGN acquisition needed to close presented a need for a closely co-ordinated process with

each interlinking step completed at the exact time required.

The achievement of the Alliance team was to complete within the timeframe the drafting and co-ordination of the entire TGN system from cables to cable stations and the applications for all of the non-US telecoms regulatory licences that needed to be made in Belgium, France, Germany, Japan, Netherlands, Portugal, Spain, Singapore and the UK.

Herbert Smith's London office orchestrated this process, co-ordinating teams at Herbert Smith's offices in Paris, Singapore and Tokyo, Alliance offices Gleiss Lutz Frankfurt, Stibbe Amsterdam, and Stibbe Brussels, as well as Cuatrecasas Madrid and PLMJ Lisbon. The US aspects of the deal were handled by Kelley Drye & Warren with whom Herbert Smith has a strong working relationship. The smooth co-ordination of this complex transaction across multiple jurisdictions made the acquisition possible despite the challenging deadlines.

Acquisition of Teleglobe

Close on the heels of the closing of the TGN acquisition, VSNL entered into an agreement to acquire Teleglobe International Holdings Limited (NASDAQ: TLGB) on 25 July 2005. The Teleglobe acquisition currently remains subject to Teleglobe shareholder approval, regulatory consents and other common closing conditions.

The \$239 million purchase price is comprised of an assumption of debt and payment of \$4.50 per share to Teleglobe shareholders. The transaction involves a simpler structure than the TGN acquisition, and will be carried out through the merger of Teleglobe with a VSNL subsidiary in Bermuda.

The transaction will give VSNL access to an extensive network that reaches more than 240 countries and territories with advanced voice, data and signalling capabilities and ownership interests or capacity in more than 80 subsea and terrestrial cables. In particular, the

acquisition gives VSNL access to more than 200 direct bilateral agreements with leading voice carriers, many of which are the incumbent carriers within their countries or large international wireless service providers.

The Teleglobe acquisition involves a slightly larger international team than the TGN acquisition. Co-ordinated again by Herbert Smith's London office, the international team was drawn from Herbert Smith's offices in Hong Kong, Paris, Singapore and Tokyo, together with Alliance offices, Gleiss Lutz Frankfurt, and Stibbe Amsterdam, as well as Cuatrecasas Madrid, the Italian firm, Gianni, Origoni, Grippo & Partners, Norwegian firm, Thommessen Krefting Greve Lund AS and Australian firm, Gilbert & Tobin.

A leading global player

VSNL intends to become a leading global player in wholesale voice, bandwidth and enterprise data services on a global end-to-end basis and to develop synergies with other companies such as Tata Consulting. These acquisitions demonstrate not only the success of VSNL in leveraging its position in the Indian market but also the growing geographical shift of power in the telecoms sector towards Asia.

For further information on these transactions please contact Nimi Patel consultant at Herbert Smith (+44 20 7466 2302), corporate partners Nick Elverston (+44 20 7466 2228) or Chris Haynes (+44 20 7466 2106)

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