# M&A AND PRIVATE EQUITY
## SORAINEN LEGAL UPDATE

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**Sorainen – among the leaders in Europe**

On 23 January 2009 Sorainen received the Baltic Law Firm of the Year award at the PLC Which lawyer? Law Firm Awards 2009 and on 18 March 2009 was named the Baltic Law Firm of the Year 2009 at the International Financial Law Review (IFLR) European Awards 2009. Having received three prestigious international awards during the last months (in December 2008 Sorainen was awarded as the best Baltic legal advisor at the European M&A Awards organised by The Financial Times and Mergermarket), Sorainen is one of only two law firms in the whole Europe which have received all of these three awards in one regional/national category. For more details about these awards please see "News in Sorainen" below.

Dear Readers,

We would like to thank our clients and business associates for their cooperation and trust in us, without which we would not have achieved such success and international recognition. We see these three international awards as acknowledgement of our efforts to service our clients the best. The award from PLC Which lawyer? was based on votes by in-house counsel from international companies, i.e. our clients and cooperation partners. Recognition at the IFLR European Awards 2009 was even more important as we received it for advising on the most complex and innovative international transactions in the areas of M&A, restructuring, financing and capital markets.

We are very happy to see that our clients and cooperation partners appreciate the advantages of Sorainen as an integrated regional firm. These awards and your recognition combine to give us all, including the Sorainen M&A team, a strong incentive to improve further.

Yours sincerely,

Laimonas Skibarka
Partner, head of Sorainen M&A Team

## RECENT TRANSACTIONS

**Advising Tiger Global and Digital Sky Technologies**

Tallinn office advised Tiger Global and Digital Sky Technologies private equity funds regarding follow-on investments in Forticom, operator of leading Eastern European and Russian social networking websites. Transaction advice was provided by senior associate Stefano Grace and partner Toomas Prangli.

**Acquisition by a leading European vehicle inspection company**

Tallinn office advised A-Katsastus, a leading European vehicle inspection company, in its acquisition of Pelgulinna Autotehniline Katsekoda, the biggest inspection station in Estonia. Following this acquisition, A-Katsastus is the largest vehicle inspection company in Estonia. The client was advised by partner Toomas Prangli and senior associate Piret Lappert.

**Somfy acquires Baltsom in Latvia**

Riga office advised Somfy, a leading manufacturer of automatic controls of openings and closures for homes and buildings, on its acquisition of Baltsom company in Latvia. In addition to conducting legal and tax due diligence we advised the client on transaction structure, drafted and negotiated the share purchase agreement and other transaction-related documents. The client was advised by partner Eva Berlaus-Gulbe and associate Janis Bite.

**Seesam Life Insurance disposes its shareholding in DnB NORD Fondi**

Riga office assisted Seesam Life Insurance, part of the Wiener Staedtische Versicherung Vienna Insurance Group, in disposal of its minority shareholding in DnB NORD Fondi, an investment management firm in Latvia belonging to the DnB NORD banking group. The client was advised by partner Eva Berlaus-Gulbe and associate Janis Bite.

**Assisting Ruukki on strategic acquisition in Lithuania**

Vilnius office advised Ruukki Lietuva, part of the Rautaruukki group operating in 26 countries and engaged in supply of metal-based components to the construction and mechanical engineering industries, in acquiring 100% shares in Gensina. Gensina specialises in design, production, sales, and installation of metal constructions and is an active player in the Lithuanian construction market. By investing in acquisition of Gensina, Ruukki has strengthened its position in the field of production and design of metal constructions in the Baltics as well as enhanced its product supplier network

in the Baltic States. Our team was led by partner Laimonas Skibarka and senior associate Liudas Ramanauskas.

**Schibsted increases its shareholding in 15 minuciu**

Vilnius office advised Schibsted Baltics, part of the Schibsted Group, a leader in Scandinavian media sector, in buying out 34% shares in 15 minuciu from Lietuvos rytas. Following the transaction Schibsted increased its shareholding in 15 minuciu to almost 100%. 15 minuciu publishes free newspaper 15 min and administers news portal www.15min.lt. The client was advised by senior associate Raminta Karlonaite.

**MAI Lietuva acquires Lithuanian insurance broker**

Vilnius office advised MAI Lietuva, part of MAI Central Eastern Europe Ltd, the largest independent insurance and reinsurance brokerage network in CEE, in acquisition of 100% shares in the insurance brokerage company Draudimo efektas, based in Kaunas, Lithuania. With this transaction MAI Lietuva has expanded its activities in Lithuania and in addition to its office in Vilnius will now have an office in Kaunas, Lithuania's second largest city. The client was advised by partner Tomas Kontautas and senior associate Raminta Karlonaite.

## EU NEWS

**ECJ issues clarification as to persons entitled to pre-emptive subscription for newly-issued shares**

In its ruling in Case C-338/06 dated 18 December 2008, the European Court of Justice (ECJ) declared that Spain had infringed Article 29 of the Second Council Directive 77/91/EEC of 13 December 1976 (the Second Directive) by:

- granting the right to pre-emptive subscription of shares in the event of a capital increase by consideration in cash, not only to shareholders, but also to holders of bonds convertible into shares; and
- by granting the right to pre-emptive subscription rights for bonds convertible into shares not only to shareholders, but also to holders of bonds convertible into shares pertaining to earlier issues.

The ECJ reasoned that one of the aims of the Second Directive was to afford shareholders more effective protection, by enabling them – in the event of an increase in capital – to avoid dilution of their stake in the capital represented by their shareholding. In order to avoid such a risk, the Second Directive gave priority precisely to shareholders over all other potential purchasers of new shares or of bonds convertible into shares.

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## ESTONIA

**Changes in VAT Act simplify transfer of business as a going concern**

Under recent changes to the VAT Act, transfer of a business as a going concern is not considered a taxable turnover and thus does not attract VAT regardless of whether the business is used for VAT-taxable purposes after the transfer. Prior to this change, transfer of a business as a going concern was considered a taxable turnover except if the business was used for taxable turnover after the transfer. This created irrecoverable input VAT for buyers of businesses such as schools, and certain finance and insurance services.

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**Bonus payments related to financial results clarified**

The increasing number of bonuses based on financial results has encouraged the legislator to regulate bonus payment terms. In order to incentivise employees, their bonuses are often tied either to the number of transactions entered into by the employer, or the financial results of the employer. As of 1 July 2009, bonus payment terms are regulated by the new Employment Contracts Act. Thus, in acquisitions it is now important to establish exact agreement regarding bonuses or their absence, as the financial consequences may be quite different from mid-summer 2009.

If an employee has a contractual right to receive a bonus based on the profit or other financial result of the company, the bonus is presumed to be calculated based on the annual report of the respective year. The employee may claim payment of bonus one month after approval of the annual report and the bonus must be paid out within six months after the end of the respective financial year. Employees and employers may agree on a different period and payment terms by the agreement.

Generally, if an employee is entitled to a bonus based on transactions between the employer and a third person, the employee, as a rule, is entitled to the bonus after the employer has fulfilled its obligations towards the third party. The parties may postpone payment by agreement; however, in that case the employee may request an advance payment. Regardless of any other agreement, the employee is in any case entitled to receive a bonus immediately after the third party has fulfilled its obligations. The employee is also entitled to a bonus if the employer decides not to conclude the transaction with a third party. The regulation is based on the terms of agency fee.

The new regulation should decrease unnecessary disputes over bonus payments. It will also simplify assessing financial risks or expenses related to bonuses prior to acquisitions.

**Changes to confidentiality obligation and prohibition of competition**

The confidentiality obligation and competition prohibition both during employment and after termination have always been a concern for new owners on acquisitions. The new Employment Contracts Act, entering into force on 1 July 2009, introduces major changes to current regulation of the employee confidentiality obligation and prohibition of competition.

Currently, the confidentiality obligation is valid during employment only if specifically agreed between the parties and after termination only if the employee has received special remuneration for adhering to this obligation. The new regulation makes enforcement much easier. A separate agreement on confidentiality will not be necessary, nor will payment of separate amounts for adhering to the obligation be necessary neither during nor after the employment relationship. However, the employer must have a legitimate interest in keeping important information confidential. Thus, it is in the interests of the employer to adequately determine what kind of information is considered confidential and agree on a penalty for violation of the obligation.

In contrast to the confidentiality obligation, prohibition of competition will be more strictly regulated. A number of prerequisites have to be met for a competition prohibition to be valid. For example, during employment, prohibition of competition is valid only if it is necessary to protect a special financial interest of the employer. In order to be valid after termination of employment, the agreement on competition prohibition must be in writing, and the employer must pay reasonable compensation for every month of the prohibition after the employment relationship has ended.

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## LATVIA

**Significant developments regarding transfer of banking business**

On 19 February 2009, amendments to the Law on Credit Institutions came into force under the fast-track procedure. Under the amendments, from now on a credit institution must obtain consent of the Financial and Capital Market Commission (FCMC) to transfer its business to the ownership or use of another person. In particular, transfer of business includes transfer of an undertaking or an independent part of it (including a branch), transfer of separable aggregate property, transfer of assets, transfer of liabilities and transfer of standard agreements concluded between credit institution and its clients.

To obtain consent, the credit institution must file with the FCMC a proposal for transfer of business and a valuation of the credit institution's assets and liabilities included in the business to be transferred.

No other approval (including approval of creditors or any other person) is needed after obtaining FCMC consent. Any transfer of business by a credit institution without prior FCMC consent will be treated as invalid.

The scope of transactions potentially subject to this requirement is extremely broad, including even insignificant transactions such as transfer of one or several agreements, or sale of fixed assets like used office equipment. It is therefore likely that this requirement will soon be qualified by a specific threshold set by the FCMC.

Besides, if the FCMC establishes that:

- credit institution does not comply with the Law on Credit Institutions, EU law, or FCMC resolutions and regulations; or

- activities of a credit institution endanger its stability or solvency, or the stability of the entire Latvian banking sector; or
- activities of a credit institution might cause substantial losses to the State; or
- an excessive outflow of deposits or other attracted funds occurs,

the FCMC may resolve, among other things, to authorise one or several persons as agents of the FCMC to manage the credit institution. The general purpose of the agent would be to maintain control over a credit institution that has landed in financial difficulties. In this case, the decision to file a proposal for transfer of the business of the credit institution can be taken only by the agent or other authorised person. The usual practice when an undertaking or an independent part of it is transferred is that the acquirer of the undertaking and the seller of the undertaking are jointly and severally liable for obligations that arose before transfer and come into effect five years after the transfer. However, if the agent or authorised person proposes approval of the transfer of business of the credit institution to the FCMC, no joint and several liability arises. In addition, the FCMC will allow transfer of the business of a credit institution only if the transaction is performed for the stability and safety of the State national economy, the banking sector, and depositors.

Transfer of the business of a credit institution on the basis of a decision of a person authorised by the FCMC cannot be claimed to be invalid.

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## LITHUANIA

**Shareholders in limited liability companies to enjoy wider participation**

Draft amendments to the Law on Companies published by the Ministry of Economy on 17 February 2008 aim to implement Directive 2007/36/EC of 11 November 2007. The amendments, if passed, will ensure more efficient participation of shareholders of listed companies at general meetings. Considering opportunities proposed by modern technologies, shareholders will be allowed to vote electronically, and access to relevant information at the company internet site will be promoted. Further, shareholders' rights to participate at general meetings by proxy will be freed from unreasonable limitations. For example, a proxy executed in written form even by a natural person (shareholder), and notice by the shareholder of the proxy sent to the company in electronic form will suffice. With some variations, the changes would also apply to participation at general meetings in private companies. The amendments will enable shareholders to participate more pro-actively in company decision-making and ensure substantive access to all necessary information related to the meeting. During the unstable economic situation and enhanced attention of investors towards target companies, these legal instruments should be willingly employed by companies.

The proposed amendments yet have to be approved by the Parliament and thus might change.

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**Not all minority shareholders should be allowed to respond to a takeover bid**

In a press release of 18 December 2008, the Securities Commission publicised its claim filed with the court requesting that persons who pass the 40% threshold in one of the listed Lithuanian companies should be obliged to announce a takeover bid. At the same time, the Commission emphasised that not all minority shareholders would be entitled to respond to a takeover bid. The Commission stated that only those minority shareholders that held shareholdings at the moment the information regarding passed threshold came into the public domain would be entitled to make a takeover bid. The Commission justified its position by explaining that minority shareholders who acquired shares in the company being aware of the change of control, accepted the change of controlling shareholder and therefore are not entitled to benefit from a takeover bid.

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## RECENT COURT PRACTICE

**Lithuanian Supreme Court promotes possibilities to access confidential information of limited companies**

The Lithuanian Supreme Court has set forth possibilities to agree in articles of association on a larger circle of shareholders entitled to access confidential company information. In K.V. vs. UAB Bioprocesas (Supreme Court of Lithuania decision No 3K-3-607/2008 dated 23 December 2008) the Court stated that a shareholder should be able to obtain confidential information from the company when its shareholdings amount to at least half the share capital + 1 share, which under the Law on Companies constitutes the minimum threshold. The articles of association may not increase the size of shareholdings that entitle access to confidential information; however, they may establish lower thresholds for such information. This interpretation might have a positive effect in promoting a wider circle of shareholders to become more closely acquainted with company affairs.

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## BELARUS

**Abolition of preferential terms for share acquisitions**

One of the proclaimed principles of privatisation in Belarus is granting social guarantees to employees of privatised enterprises in the privatisation process. Based on this principle, state-owned shares of companies established as a result of privatisation should be sold to company employees at a preferential price. Moreover, employees may acquire shares in exchange for privatisation vouchers "Imuschestvo" (Eng. "Property") which were distributed among the residents of Belarus in the early nineties under a special procedure. Other Belarus citizens may also acquire shares in exchange for privatisation vouchers.

Certain exceptions to the rule were established. State-owned shares in companies established as a result of privatisation of certain enterprises may not be sold on preferential terms and may not be exchanged for privatisation vouchers, as established by Decree of the President of the Republic of Belarus of 10 November 2008.

The decree lists 151 such enterprises, operating primarily in pharma, telecommunications, trade, heavy industry, and energy. The largest of these enterprises are Belorusskij Avtomobilnyj Zavod (Belarusian Automobile Plant), Minskij Zavod Koljosnyh Tjagachej (Minsk Wheel Tractor Plant), Minskij Zavod Termoplast, Minskij Avtomobilnyj Zavod (Minsk Automobile Plant).

**Approval of list of corporations still under moratorium on transfer of shares**

The Government of Belarus has approved a list of public corporations that ensure functioning of strategically important sectors of the economy. This resolution clarifies issues related to lifting the moratorium on free circulation of shares acquired in the process of voucher privatisation.

Since 1 June 2008 a gradual lifting started in respect of the moratorium on transfer of shares in public corporations created in the course of privatisation. The moratorium, which actually froze much of the Belarusian stock market, has been in existence since 1998.

From 1 June 2008 the moratorium was abolished with regard to shares of public corporations without government capital and corporations with a government share in their capital of 75% and over. From 1 January 2009 the moratorium was lifted with regard to public corporations in which the government holds 50% of the shares and over. However, until 1 January 2011, restrictions will remain effective with regard to public corporations that ensure functioning of strategically important sectors of the economy. As by 15 December 2008 a list of these corporations had not been approved, transactions with shares gained during voucher privatisation could not be executed.

As a result of adoption of the list, the moratorium was lifted with regard to shares of 1,114 public corporations. In January 2009, trade on the Belarusian Currency-Stock Exchange increased notably. Shares of 21 public corporations from the "strategic" list were also traded.

**Changes to privatisation plans**

Several amendments were introduced to the privatisation plan for 2008–2010 and the list of public corporations in which government-owned shares are subject to sale in 2008–2010 (the List). Eleven unitary enterprises operating in the spheres of utility services, industry, and construction were excluded from the privatisation plan, and one industrial public corporation was excluded from the List. The amendments were made by Resolution of the Council of Ministers of 15 December 2008.

**Report: current trends in the economy and M&A activity in Belarus**

Belarus now has to combat negative economic trends, after earlier hopes to avoid the most severe effects of the global crisis: a visible decrease of foreign direct investment (by roughly 35% in the 4th (compared to the 3rd) quarter of 2008), a

decrease in strategic exports (especially machinery, equipment, trucks, and fertilizers), the consequent rise in unemployment, and a liquidity crunch. The Belarusian Government has undertaken various measures to counter these problems, which include steep devaluation of the national currency, cutting costs, and freezing or decreasing salaries in the public sector, providing tax and other incentives to exporting companies, and borrowing from the International Monetary Fund and Russia.

Strategies of the Belarusian Government include deregulation of business, adoption of an ambitious three year privatisation plan, and active promotion of Belarus as an attractive investment destination. The deregulation campaign has been criticised by independent experts for its inconsistency and lack of public discussion. On the other hand, it has already eased business activities in Belarus. The largest progress has been made in the areas of real estate registration and incorporation of companies (today in Minsk it takes only five to six days to establish a company, while several years ago a minimum five to six weeks was needed at best).

As for privatisation, Belarus is still taking a rather cautious approach. Existing privatisation procedures are relatively cumbersome and involve many decision-makers, including employees of privatised businesses, the State Property Committee, and the President of Belarus. Since the privatisation plan was adopted last year, no significant rise in the sale of government properties or companies has been observed. The Belarusian Government publicly declared that, despite the crisis, it will not lower the criteria for potential investors, which include financial obligations, maintaining and creating jobs, and taking care of the so-called social infrastructure (e.g., kindergartens, cultural centres, and corporate sports facilities). It was also declared that privatisation in Belarus will have a "focused" character, i.e. the same as during the past several years. In practice, this should mean that the Government will select potential investors for its largest companies from global leaders in respective industries and sectors (until now, this has been the case for the banking sector, the brewing industry, telecom, and construction).

The M&A market in Belarus is going through difficult times. Many transactions are delayed or cancelled due to uncertainty among investors as well as financial problems. Small and mid-scale deals do take place; foreign, especially EU and Russian-based, private investors are targeting and acquiring enterprises in food and beverages, construction, processing, and other industries. However, larger deals are also expected to be completed in 2009: sale of two or more of the six largest state-owned banks, privatisation of the largest brewing company, and closing deals with strategic investors in the automotive industry. The Belarusian Government acknowledges the need to accelerate the privatisation process and search for potential foreign investors, which may result in transactions in the future.

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# NEWS IN SORAINEN

## ■ Awards

**Sorainen named the Best Baltic Law Firm of the Year in the PLC Which lawyer? Law Firm Awards 2009**

On 23 January 2009, Sorainen received the Baltic Law Firm of the Year award in the international PLC Which lawyer? Law Firm Awards 2009. Although these awards have been presented since 2005, this is the first time that a selection has been made for an award of the best law firm in the Baltic countries.

The annual PLC Which lawyer? Law Firm Awards aim to recognise the best law firms across the world with awards in regional, national, and international categories. Award winners are selected by online voting, open to over 5,500 in-house counsel from international companies across the globe. Voters are free to pick their own winners or choose from nominees suggested by PLC Which lawyer? researchers.

Award organizers explain that Sorainen was commended by the voters for having "good people in all three countries" and for being "well-organised, timely and reasonable".

**Sorainen awarded as the best Baltic law firm in IFLR European Awards 2009**

Sorainen received the Baltic Law Firm of the Year 2009 award at the International Financial Law Review (IFLR) European Awards 2009 held in London on 18 March 2009.

The annual IFLR European Awards reward the leading law firms in Europe for advising on the most complex and innovative international transactions in the areas of M&A, restructurings, financing and capital markets. This year national awards were granted to law firms in 23 European jurisdictions. Award winners were selected following an extensive research by IFLR experts based on submissions of the firms as well as feedback from clients, in-house counsel and financing specialists at international financial institutions.

IFLR is the world's leading magazine published for more than 20 years for in-house counsels and practitioners in the financial markets. IFLR is a part of Euromoney Legal Media Group with offices in London, New York and Hong Kong, which issues a wide range of legal publications.

Following the recognition at the IFLR European Awards, Sorainen is the most awarded and internationally recognised law firm in the Baltics. Sorainen was awarded as the Baltic Legal Advisor of the Year by The Financial Times and Mergermarket in December 2008 and as the Baltic Law Firm of the Year in the international PLC Which lawyer? Law Firm Awards 2009 this January. Furthermore, Sorainen is one of only two law firms in the whole Europe which have received all of these three awards in one regional/national category.

## ■ Employees

**Partner Laimonas Skibarka appointed head of regional M&A team**

In February 2009, Laimonas Skibarka, a partner at Sorainen Vilnius office, was appointed head of Sorainen's Regional M&A Team. He specialises in M&A, private equity and restructuring transactions and is recommended as a leading M&A lawyer in Lithuania by various international directories. For example, Chambers Europe ranks Laimonas Skibarka as one of the leading M&A and private equity lawyers in Lithuania, noting that he is "a good negotiator with a clear-cut attitude who shines in M&A work" and that he is recommended "in relation to fund-raising issues and is roundly praised by market sources". The Legal 500 praise Laimonas Skibarka for having "taken the [firm's Corporate/M&A] practice to new heights". PLC Which lawyer? recommends him for "highly visible transactional practice". In recent years, Laimonas Skibarka has been involved in majority of major M&A transactions in Lithuania and the Baltics.