

# M&A AND PRIVATE EQUITY SORAINEN LEGAL UPDATE

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## SORAINEN

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#### Sorainen awarded as the best Baltic law firm by Financial Times and Mergermarket

On 10 December 2008 Sorainen received the Baltic Legal Advisor of 2008 award from Financial Times and Mergermarket at the European M&A Awards ceremony. The annual European M&A Awards aim to recognise the leading law firms and financial advisors in Europe, and this is the first time that awards were also granted for the Baltic States. Sorainen was recognised as the best Baltic law firm for advising on the largest number of M&A transactions and for the largest total value in the Baltics. The European M&A Awards are unique in utilising both empirical M&A transaction data and independent expert opinion to identify the winners of each award. The selection process involves three stages designed to select the winner in the most objective, comprehensive and equitable way. The judging panel includes senior representatives from Financial Times, The Banker, Mergermarket, major private equity funds and international law firms.

It is a great honour and recognition for us to receive this prestigious award. We would like to thank our clients and business associates for their trust in us, without which we would have not achieved this.

Dear Readers,

We are pleased to deliver to you this M&A and Private Equity Legal Update reporting on the latest legal developments in the Baltic States and Belarus.

The continuing slowdown of the Baltic economies has been deepened by the global financial crisis. Banks are now much more conservative in acquisition financing, which significantly affects M&A activity in the Baltic States, as elsewhere. On the other hand, difficulties with financing, decreasing company valuations, and the increasing number of distressed sales create very good opportunities for strategic buyers as well as for turnaround and venture capital investors to invest in Baltic companies. We also observe a growing number of consolidations of Baltic businesses, which somewhat compensates for the decrease of leveraged buyouts. Meanwhile, in Belarus large-scale privatisations are under preparation and are expected to start next year.

This Legal Update presents the main legal initiatives by our governments, some of which aim at assisting local companies in the current market situation. The Estonian Parliament is discussing the long-awaited Reorganisations Act, which should allow restructuring of distressed companies facing the threat of insolvency and avoidance of undesirable bankruptcy proceedings. The Lithuanian Parliament is considering a proposal to facilitate procedures related to company mergers. In Latvia, relaxations to merger notification will apply to small companies, thus reducing transaction costs. Belarus has revised regulation of transactions in securities and is further opening up its banking system for foreign investment.

The Sorainen M&A team will keep you informed about further developments. We are also always ready to assist our clients with transactions in a changing economic environment, whether a usual M&A deal, a distressed buyout, or a complex restructuring.

Yours sincerely,

Sorainen M&A Team

### RECENT DEALS

#### Representing Latvian state in the bailout of AS Parex banka

Sorainen Riga Office team is representing the State Joint Stock Company Latvijas Hipoteku un zemes banka (Mortgage and Land Bank) and its shareholder, Latvian state, in the bailout of AS Parex banka, which is the first government bailout case in Latvia resulting from the current global financial crisis. The Investment Agreement signed with the majority shareholders of Parex banka, Mr. Kargins and Mr. Krasovickis, provides for purchase of 51% stake of Parex banka shares by Mortgage and Land Bank for a symbolic price of two Latvian lats (approximately EUR 2.84) and the government's undertaking to issue state guarantees for refinancing

of the bank's syndicated loans in amount of EUR 775 million, as well as to invest up to 200 million lats (ca EUR 284 million) in the subordinated capital of the bank. We were advising the client on the structure of the transaction, including advice on state aid and regulatory matters, drafted the Investment Agreement and all other transaction related documents, as well as provided assistance to the client in the negotiations of the Investment Agreement. Currently we are working on preparation of the closing of the transaction. In this assignment Sorainen Riga Office team is led by partners Agris Repšs, Girts Ruda and Eva Berlaus-Gulbe.

#### Nordzucker's acquisition of Danisco Sugar

Vilnius, Riga, and Tallinn offices are advising Nordzucker AG in relation to its acquisition of

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Danisco Sugar A/S from Danisco A/S for a total consideration of EUR 750.5 million. Nordzucker AG is one of the leading sugar producers, owning 15 sugar factories in Europe. Danisco Sugar A/S is also a major player in the European sugar market, with leading positions in the Nordic countries and the Baltic States. Sorainen has been advising Nordzucker AG on various transactional issues related to Danisco Sugar's Lithuanian, Latvian, and Estonian operations, including legal due diligence, advice on transaction documentation and financing, as well as merger control issues. Our team in this project involved partners Laimonas Skibarka and Toomas Prangli, senior associates Dr Lauras Butkevicius, Agne Jonaityte, Raminta Karlonaite, Ivar Kurvits, Rudolfs Engelis, and others.

#### **Cross-border merger of If's Baltic companies**

We are representing If, a leading property and casualty insurance company in the Nordic region, in a landmark transaction involving the cross-border merger of its Baltic group companies based on the EU cross-border merger directive. This is a groundbreaking transaction because it is the first cross-border merger of regulated financial market participants in the Baltics based on the EU directive, and one of the very first in Europe. We advised on the legal structuring of the project and are currently working on implementing this pan-Baltic transaction. In addition to carrying out a cross-border merger based on the EU directive, the assignment includes extensive pre-merger corporate restructuring (conversion and share transfers of insurance companies and establishing their foreign branches), negotiating with supervisory authorities in all three countries, and managing the legal side of the project. Our team in the project is led by partners Eva Berlaus-Gulbe, Karin Madisson, and Dr Tomas Kontautas.

#### **The largest M&A transaction in the real estate sector in the Baltics**

Vilnius office advised Akropolis Group, the largest shopping centre developer and operator in Lithuania, on sale of its 100% shareholding in the company holding and operating Kaunas Akropolis shopping centre to a German fund represented by Dekka Immobilien.

Kaunas Akropolis shopping centre is situated in Kaunas city centre and is one of the newest and largest shopping centres in Lithuania, comprising approximately 60,000 sq. m gross lettable area with more than 260 different operators. The transaction, completed in September 2008, is the largest M&A transaction in the real estate sector in Lithuania and the Baltics to date. Our team in the project was led by partner Kestutis Adamonis and associate Indre Jonaityte.

#### **Iberdrola Renovables enters into joint venture with EBRD**

Tallinn office advised Iberdrola Renovables, the largest global wind power company, on issuing equity in its Estonian subsidiary Raisner OU to the European Bank for Reconstruction and Development (EBRD). Raisner OU is developing a wind farm, now in its final stages of development, at Lügänuise in North-East Estonia. Once complete, the 150 MW wind farm will be the largest in Estonia. The aim of the EBRD investment is to provide financing for development of the wind farm. Our project team was led by Toomas Prangli, Paul Kunnap, and Luis Felipe Mohando.

#### **Disposal of Armila in Lithuania**

Vilnius office advised UAB Armila and its shareholders on disposal of a 92% shareholding in the company to Andrea-Noris Zahn (ANZAG), one of Germany's leading pharmaceutical wholesalers. With a market share of 13%, Armila is one of Lithuania's largest pharmaceutical wholesalers and in 2007 recorded sales of over EUR 62 million. This is one of the largest transactions in the pharmaceutical sector in the Baltics this year. Our team in this project was led by partner Laimonas Skibarka and senior associate Mantas Petkevicius.

#### **Complex merger of Bureau Veritas Group companies in Latvia**

Riga office assisted Bureau Veritas Latvia SIA, a company in the Bureau Veritas Group, a market leader in provision of inspection, testing, auditing, certification, ship classification and related services, through a highly complex and extended reorganisation when a local company working in the same sphere of business was merged with Bureau Veritas Latvia SIA. Within the merger process, we carried out a detailed analysis of issues related to transfer of permits for provision of services in the regulated sphere in order to avoid interruption of business. The client was advised by partner Eva Berlaus-Gulbe and associate Zane Paeglite.

#### **ESCO Marginalen acquires well-known Latvian leasing company**

Riga office assisted the client, a full service accounting and finance company operating in Sweden, the Netherlands and Lithuania, in purchasing a major Latvian leasing company Nelss lizings SIA. Our team was led by partner Eva Berlaus-Gulbe and senior associate Renate Purvinska.

#### **Acquisition in Lithuanian IT sector**

Vilnius office advised UAB Baltnetos komunikacijos, provider of complex IT and data communication solutions, in its acquisition of UAB Norby Networks from Martinson Trigon Venture Partners. UAB Norby Networks was formed recently on the basis of the internet service, data communication and telephony unit of former UAB MicroLink Lietuva. As a result of the acquisition, UAB Baltnetos komunikacijos became the second largest supplier of internet services to corporate clients in Lithuania. Our team in this project included partner Laimonas Skibarka, senior associate Raminta Karlonaite and specialist counsel Paulius Koverovas.

## EU NEWS

#### **Proposals to increase cost-efficiency of mergers and divisions**

Promoting the idea of cost-efficient mergers and acquisitions, the Commission presented a proposal for a Directive amending the Second, Third, and Sixth Company Law Directives and the Cross-Border Mergers Directive as regards reporting and documentation requirements for mergers and divisions (the **Proposal Directive**) on 24 September 2008. The Proposal Directive addresses the following facilitations:

1. A management report on reorganisation of public companies will not be required if a unanimous waiver is obtained from all shareholders of the companies participating in the merger/division.
2. The announcement on draft merger/division terms under the procedure set out in the laws of Member

States (e.g. announcement in the daily press and written notification of creditors via registered mail in Lithuania) may be dispensed with by making the draft merger/division terms available at the internet site of the company or other internet site. However, the central database storing data on companies should also include a reference that gives access to that internet site. The same applies to all other reorganisation documents which might be made available at the internet site of the company, instead of placing them at the seat of the company in hard copy.

3. When the date of the merger or division is later than six months after the end of the financial year of the company under reorganisation, an interim accounting statement will not be required if the company is an issuer and publishes a half-yearly financial report in accordance with Transparency Directive requirements.

4. An exemption to the obligation to hold a general shareholders' meeting to decide on a merger or division should apply in certain cases, when the merger or division takes place between parent and subsidiary companies.

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#### **Uniform private company throughout EU under consideration**

At the end of June 2008, the European Commission presented a proposal for a Statute for a European Private Company (Societas Privata Europaea; SPE). This new company form would be identical for all Member States, with the SPE able to operate across the EU, no matter where set up. In this respect, an SPE would be similar to the SE (Societas Europaea) – a European Public Company form available since 2001 under the SE Statute. The SPE is rather aimed at promoting businesses of small- and medium-sized undertakings. Thus, the proposal does not impose burdensome capital requirements (the minimum share capital is EUR 1), provides for a flexible establishment and corporate governance system as well as minimal requirements for asset distribution to SPE shareholders (balance sheet test applied only). For private companies operating in several EU countries, the SPE may be a way to reduce legal, management, and administrative costs. However, it may take some time until the proposed statute is adopted and becomes effective.

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#### **Merger control regulations clarified**

In order to clarify certain procedures related to notifying concentrations and to make control of concentrations between undertakings more efficient, on 20 October 2008 the Commission adopted certain amendments to the Regulation implementing the Council Regulation on control of concentrations between undertakings.

The amendments not only (a) establish a requirement to file more detailed information concerning commitments offered, but also clarify (b) when statements or documents filed by persons, undertakings, or associations of undertakings are considered as containing no confidential information, and (c) the role of the trustee in relation

to implementing remedies. The amendments are in force as of 22 October 2008.

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## ESTONIA

### Distressed buyouts on the horizon

As a revolutionary development on the Estonian corporate bankruptcy and reorganisation regulation scene, the draft Reorganisations Act (the **Draft Law**) passed its first reading in the Parliament on 8 October 2008. The main aim of the Draft Law is to enable distressed companies on the verge of insolvency to restructure themselves and avoid bankruptcy. The new regulation, once passed by the Parliament, may also be of interest to turnaround investors and venture capitalists.

Why do we need this new law, and how might it be of interest to turnaround investors and venture capitalists? The Bankruptcy Act has not justified expectations with regard to restoring the activities of insolvent companies. Although a possibility exists for compromise with creditors, this was applied only five times in 2006 and 2007. One of the reasons for such low usage is that creditors are simply not interested in it. Creditors can recover their secured loans to a substantial extent and are unwilling to waste time and money on reorganising insolvent companies. It is also difficult for third persons not involved in the bankruptcy procedure to take over such companies. As a result, insolvent companies are usually liquidated by the end of the proceedings.

In contrast to the Bankruptcy Act, the new Draft Law provides for more debtor-centred regulation. It enables, among other things, approval of a reorganisation plan without creditors' consent. The debtor should propose a reorganisation plan for approval by the court in order to justify being subject to the future Reorganisation Act, as opposed to being declared bankrupt. This is when strategic investors and venture capitalists can come into play. Strategic investors might be interested in taking over their troubled debtors or competitors. Venture capitalists may, on the other hand, be interested in acquiring debt-ridden companies for a fraction of their face value, restoring the profitability of troubled companies by injecting new capital and improving their management.

Given the current worldwide economic situation, the regulation will most likely improve the playing field for distressed companies and their buyers.

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## LATVIA

### New merger control thresholds in pipeline

The Ministry of Economics has prepared a draft of amendments to the Law on Competition (the **Competition Law**). According to the proposal, a merger notification will need to be filed with the

Latvian Competition Board if the turnover of one of the merger participants is less than LVL 1 million for the previous financial year. Thus the Latvian Competition Board will have a competence to only clear mergers of larger companies, as the Ministry of Economics is of the opinion that the merger of smaller companies will not have a material impact on competition. If the proposed amendments are adopted, it will be possible to undertake mergers of such smaller companies without requesting the consent of the Latvian Competition Board, which currently sometimes takes four months.

The proposed amendments have only been submitted for their first reading in the Parliament. However, the intention is that they could enter into force on 1 January 2009.

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### Introduction of simplified merger notification

The Latvian Cabinet of Ministers has introduced simplified merger notification from the beginning of October 2008. In certain situations, market participants are now allowed to file a shortened merger notification by providing materially less information than required for complete notifications. A shortened merger notification may be filed if either (a) none of the merging parties operates in the same relevant market or in a market vertically connected to it; or (b) their combined market shares do not exceed 15%. If these conditions are not met, a full-scope merger notification is still required.

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## LITHUANIA

### Mergers and divisions to be facilitated

In implementation of Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007, amendments to the Law on Companies were presented to the Parliament on 15 September 2008. The amendments, if passed, will allow companies to avoid preparing an audit report on merger or division terms which have been unanimously approved by shareholders of all companies concerned in the merger or division.

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## RECENT COURT PRACTICE

### Lithuanian Supreme Administrative Court sets out formal interpretation of persons acting in concert in relation to takeover bids

The Lithuanian Supreme Administrative Court has laid down simplified criteria for assessing a group of persons as acting in concert. In *L.L. vs. Securities Commission of the Republic of Lithuania* (Lithuanian Supreme Administrative Court Decision No. A-261-1740/2008 dated 20 October 2008) the Supreme Administrative Court ruled that only two circumstances should be ascertained: (a) the

fact of cooperation between the persons and the offeror or the offeree company on the basis of an agreement, either express or tacit, and (b) the aim either of acquiring control of the offeree company or of frustrating the successful outcome of a bid. Effectively, this rules out performing overt actions resulting in gaining control over the offeree company, e.g. concerted voting at the general meeting of shareholders, affecting decisions favourable to such a group of persons. The mere fact of gaining control by cooperating parties triggers a mandatory takeover bid and all related consequences.

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### Interim measures during forced sale of shares may be useless if the defendant is subject to bailiff's powers

Rather surprisingly, the Lithuanian Supreme Court allowed recovery from shares under a forced sale procedure in a somewhat peculiar way (Lithuanian Supreme Court Decision No 3K-3-417/2008 dated 20 October 2008). As interim measures in the proceedings for forced sale of shares, the shares of UAB Plusta owned by the defendant were seized pending a final court decision in the proceedings. However, in another case a debt was awarded from the same defendant for the benefit of the same plaintiff and the court judgment took effect. In that case an enforcement order was issued and the bailiff decided to recover the debt from the seized shares and transfer the shares of UAB Plusta to the plaintiff. The courts of lower instance reversed this decision, asserting that a monetary debt could not be recovered from the shares until the dispute over their forced sale was resolved, so that bailiff should first have recourse to other assets of the defendant. However, the Lithuanian Supreme Court reversed these judgements, stating that interim measures in the ongoing proceedings for forced sale of shares may not prevail over a final and enforceable court decision.

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### Another court decision confirms the importance of buyer due diligence

The Lithuanian Court of Appeals (Lithuanian Court of Appeals Decision No 2A-330/2008 dated 20 October 2008) confirmed the principle that provisions regulating quality of goods may not be applied to a sale of shares when the quality of shares sold is disputed on the basis of the company's financial condition. It has been clearly laid down that a buyer of shares acquires rights attributed to the shares as established by the Law on Companies, but not to the assets of the company. A buyer of shares assumes the risk of the financial condition of the acquired company if valuation could have been established before acquisition (e.g. by due diligence). Thus a buyer may not claim damages on the basis of unfulfilled reasonable expectations. By this decision, the courts once again demonstrate the importance of due diligence of a company before acquisition and obtaining sufficient warranties in the transaction documents.

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## BELARUS

### Amendments to regulations on transactions with securities

Amendments to regulations on circulation of securities in the Republic of Belarus entered into effect on 6 October 2008. The amendments are mainly related to procedural issues of transactions with simple registered shares of public limited liability companies.

In particular, the amendments introduce definition of an offer on shares buyback, which is recognised as a public offer for purchase of all simple shares of a public limited liability company.

Under the amendments, purchase of 50% of the simple registered shares of the same issuer will no longer require involvement of a professional stock market participant. For such a purchase, a party should publicly announce the shares buyback to an indefinite circle of persons. Previously, these transactions involved the assistance of a professional participant under the respective agreement (trust, commission).

A mortgage of shares may be executed under an agreement registered by a professional stock market participant. Registration is not required solely for an agreement subject to registration by the Department of Securities or the Central Depository of Securities.

Besides, mandatory registration of an offer to purchase shares is cancelled. The issuer or parties intending to purchase more than 50% of the simple registered shares of the same issuer should provide the stock exchange and the Department of Securities with the text of the offer on purchase of stock shares.

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### National Bank of Belarus increases quota of foreign capital in the Belarusian banking system

Previously, overall contributions by foreign shareholders to the share capital of domestic banks could not exceed 25%. In September 2008, the National Bank raised this quota to 50% to accommodate more investment in the sector.

The Belarusian Government is also contemplating privatisation of the four largest government-owned banks - Belarusbank, Belagroprombank, BPS-Bank, and Belinvestbank. The sale of BPS-Bank and Belinvestbank should be accomplished by the end of 2008.

Today, foreign investors hold shares in the majority of the 30 Belarusian banks. At the same time, 76% of bank assets in Belarus belong to banks controlled by the Belarusian government.

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## NEWS IN SORAINEN

### ■ Employees

#### Sorainen M&A Team welcomes two new employees

**Kadri Kallas**, a senior associate, returned and rejoined our M&A Team after LL.M. studies at University College and practice in London. Kadri has three years experience in the London-based M&A team of US law firm Vinson & Elkins.

**Luis Felipe Mohando**, an associate, joined our M&A Team with international experience from the Tax department in Ernst & Young in Buenos Aires and after building up the M&A team and heading the corporate team at Leverone & Mihura Estrada - the fastest-growing Buenos Aires law firm.

### ■ Other

#### Sorainen starts blogging

Sorainen recently started legal blogging in major business media in the Baltics: on Aripaev, Dianas Bizness and Verslo Zinios respectively. Lawyers blog on topics relating to corporate matters, including M&A and private equity issues. You are welcome to visit our blogs and share your views: [www.aripaev.ee](http://www.aripaev.ee) (in Estonian), [www.db.lv](http://www.db.lv) (in Latvian) and [www.vz.lt](http://www.vz.lt) (in Lithuanian).

### ■ Seminars

Sorainen has recently organised four M&A seminars in Riga, Tallinn, Stockholm, and Vilnius:

#### Economic changes bring new challenges to M&A market

On 28 August 2008 in Riga the 2nd annual international M&A-focused conference "Successful M&A: everything about organising a sale and most recent market tendencies" was organised by the publishing house Dianas Bizness in cooperation with Sorainen Riga office. The conference was very well attended and appreciated by more than 150 participants. The aim of the conference was to provide entrepreneurs with detailed information on legal and financial aspects of an M&A transaction from the seller's point of view and the latest developments in the Baltic M&A market. Speakers at the conference included highly qualified consultants and practitioners. The conference showed that, despite negative tendencies in the Baltic economies, interest in M&A remains high, so that this market is still active. Nevertheless, the economic situation has an impact on the nature of transactions. As a result, from the last year's seller-driven M&A market we are now facing a considerable increase in buyer bargaining positions.

#### How to exploit the economic environment for your benefit in M&A transactions

On 17 September 2008 Sorainen Tallinn office and the publishing house Aripaev organised a seminar "How to exploit the economic environment for your benefit in M&A transactions". Speakers included distinguished M&A market players. The aim of the seminar was to discuss the valuation, purchase, and sale of companies. Activity in company sale and purchase transactions, likewise M&A transactions, does not necessarily go hand in

hand with macroeconomic trends. This year is marked by a come-back of strategic M&A buyers as well as "straight from a sellers' market to a buyers' market". The new trend also includes distressed buyouts and acquisitions of insolvent companies.

One of the speakers at the seminar, Sorainen Tallinn partner Toomas Prangli, pointed out that even though buying companies with distressed debt involves higher risks, it is still a good opportunity for both buyers and sellers. The seminar was well attended, with over 90 participants, and attracted good coverage in the Estonian business media.

#### Attractive business opportunities in an opening Belarus and opportunities in slowing down Baltic countries

On 30 September 2008 Sorainen together with the Swedish Trade Council organised a roundtable seminar in Stockholm titled "Attractive business opportunities in an opening Belarus and opportunities in slowing down Baltic countries". The aim was to introduce business opportunities in an opening Belarus as well as in the slowing down economies of the Baltic States. The topics discussed at the roundtable appear below.

Gunnar Tersman from Handelsbanken gave an economic overview of the Baltic countries, saying that the economy in Latvia and Estonia is now sliding very quickly and that those countries are experiencing a "hard landing", while Lithuania is doing much better. At the same time, the trade deficit is reducing in all Baltic States, which is promising.

Sorainen Minsk partner Maksim Salahub presented many new developments in Belarusian legislation aiming at facilitating investment in Belarus and carrying on business there, starting with double taxation treaties and bilateral investment protection treaties and ending with reducing dominant role in the economy of the state, which plans to privatise hundreds of companies in the near future.

Pekka Puolakka, Sorainen Riga partner, noted that fewer big transactions are taking place in the Baltic States at the moment, although industrial buyers are still active and continue acquiring local entities, while transactions and payment terms in particular are now much more complex than earlier.

Janar Sutt from the Swedish Trade Council spoke more about the Baltic countries and their attractiveness to do business in, even although labour is no longer so cheap. The region's future competitive advantage will be based on skilled labour and advanced technology.

#### How to sell a company or attract an investor

On 10 October 2008 Sorainen Vilnius office in cooperation with ICC Lithuania and Gild Bankers organised a seminar "M&A transactions: how to sell a company or attract an investor". The seminar covered recent trends in M&A activities in Lithuania and the Baltics; how to prepare for the sale of a business (shares); how to organise a full or partial sale, attracting a strategic or financial investor; how to protect sellers' interests in the sale process and in concluding share sale and shareholder agreements.