



The Issue and Transfer of Securities in Key Jurisdictions

A Guide for Clients prepared by the
Salans Global Corporate Group



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Welcome to the third edition of this publication which has been compiled by the Salans Global Corporate Group comprising experienced lawyers from each of our 18 offices. Previous editions have dealt with:

- ❖ the establishment of companies and partnerships in key jurisdictions; and
- ❖ the use of warranties in international acquisitions.

This Edition

This edition addresses the creation, issue and transfer of securities, areas on which we have advised with increasing regularity in recent years, in key jurisdictions in which we have experienced a dramatic increase in M&A and IPO activity across the globe and a keen interest from our clients in both established and developing markets to raise capital to fund their development. Drawing upon Salans' experience in such cross-border M&A transactions, this edition describes the many discrepancies in this area of the law which arise both between civil and common law systems and from one country to another.

Most jurisdictions provide for forms of legal entity that are more suited to private investment as well as forms that are more suited to investment by members of the public often through regulated markets. Many of the issues covered in this edition will primarily be relevant to issues of securities by companies that are looking to attract public investment, which are often more heavily regulated than other forms of company. Our experts also identify the 'top five tips' which clients should take into account when planning an acquisition, disposal or fund raising in their respective jurisdictions.

When acquiring or conducting due diligence on companies it is crucial to understand the processes by which shares are created or transferred. Such knowledge will enable the purchaser to determine whether there are likely to be any historic issues that may affect its ability to acquire full legal title to the company's shares. It will also enable the purchaser to organise the share structure of the company in the most efficient way post-acquisition. In most jurisdictions the shareholders of a joint venture vehicle will wish to regulate their ownership of that vehicle by incorporating, in the company's foundation documents or in a shareholders' agreement, provisions regulating the transfer, and further issues, of shares. Before entering into M&A transactions it is always important to consider what regulatory approvals may be required from the relevant merger authorities. Virtually all jurisdictions will require some form of approval if the transaction is sufficiently large.

The majority of jurisdictions in which we operate, particularly but not exclusively those jurisdictions which are member states of the EU, have seen an increase in legislation designed to provide the shareholders of public companies with greater protection and increased access to information concerning the major shareholders of a company. There have also been attempts to harmonise the laws of many jurisdictions, for example when dealing with the preparation of a



prospectus setting out details of any public offer of securities. However, most jurisdictions have retained their own interpretations of the relevant provisions based on their historic approach to the issues. This brochure attempts to highlight some of these differences in approach.

Salans Global Corporate Group

Proceeding with a merger, acquisition, disposal or IPO is a significant move for any organisation. You need to be sure that you make the right decision first time to minimise the risks. With more than 250 corporate lawyers across our global network we work to ensure that your deals, no matter how complex, are closed efficiently and successfully. We support you right from planning your strategy, through the due diligence phase all the way to post-transaction integration. Immediate access to our competition, tax, commercial, banking, employment benefits and real estate specialists rounds out the tailored service we provide. Our creativity combined with a commercial mindset and proven expertise is the recipe that gets your deals done.

Good communication is an essential part of our client relationships. Collectively, our lawyers can structure and negotiate deals in 20 languages and regularly work alongside other parties such as consultants and bankers. We are also continuously updating and improving our IT systems (this year with web-based data rooms and due diligence programs). This enables us to manage your cross-border M&A transactions seamlessly and with consistent quality control. Because we live and work in so many countries around the globe, we have learnt to adapt the most sophisticated of international standards to local needs.

Salans is a full service international law firm with offices in Almaty, Baku, Barcelona, Berlin, Bratislava, Bucharest, Budapest, Istanbul, Kyiv, London, Madrid, Moscow, New York, Paris, Prague, Shanghai, St Petersburg and Warsaw. We hope that you find this guide of interest. If you require any further information, please do not hesitate to contact any of our offices from the details shown on the preceding pages.

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The following are investment securities under Azerbaijani law:

- ❖ shares in a joint stock company; and
- ❖ bonds.

No Azerbaijani corporate entity other than a joint stock company ('**JSC**') can issue shares. Partnership interests or participatory interests in limited liability companies are not characterised as securities.

A non-Azerbaijani entity or national can freely purchase securities, including bonds, issued by any Azerbaijani company. State bonds can be purchased by a broker who is authorised by the Baku Stock Exchange and who is acting on behalf of, and pursuant to the instructions of, its client (which can be a non-Azerbaijani entity).

SHARE CAPITAL

NOMINAL VALUE

All shares in Azerbaijani JSCs must have a nominal value. This is the cash value of each share and is specified in the charter of the JSC. While shares must be denominated in the national currency of the Azerbaijan Republic, the New Manat ('**AZN**'), bonds can be denominated in any freely convertible currency.

An Azerbaijani JSC can issue ordinary or preferential shares. Ordinary shares and preferential shares of the same issue must be of equal nominal value and must grant identical rights to their holders.

AUTHORISED SHARE CAPITAL

An Azerbaijani JSC may be established as either a closed JSC or an open JSC. A closed JSC is an entity in which the shares are distributed among the founders or a defined group of shareholders. In contrast, the shares of an open JSC are more widely available. The minimum charter capital requirements for JSCs are as follows:

- ❖ closed JSC – AZN 2,000 (approximately US\$2,300); and
- ❖ open JSC – AZN 4,000 (approximately US\$4,600).

The charter capital of a JSC must be fully paid up prior to the date of its registration.

RIGHTS

The basic rights of shareholders are set out in the Civil Code and are normally included verbatim in the charter of a JSC. These include the rights of shareholders to participate in the management



of the JSC and to review its financial statements. There is no template or default charter set out under Azerbaijani legislation. As a result all JSCs must be incorporated with their own charter.

Rights of Shareholders

The following are some of the main statutory rights that shareholders of an Azerbaijani JSC acquire by virtue of holding ordinary voting shares (these rights are acquired irrespective of a shareholder's percentage holding in the JSC):

- ❖ participate in the management of the JSC, elect and be elected to the governing and management bodies;
- ❖ request information about the activity of the JSC and, once a year, review its financial statements;
- ❖ call a general meeting of shareholders;
- ❖ have an item placed on the agenda of a general meeting of shareholders;
- ❖ participate in, vote at and request a copy of the minutes of a shareholders' meeting;
- ❖ require an audit of the JSC's activities by its Audit Commission or an external auditor;
- ❖ receive dividends; and
- ❖ acquire a proportionate share of any property distributed on the JSC's dissolution.

ISSUING SHARES

AUTHORITY TO ISSUE SHARES

The shareholders of a JSC have the exclusive authority to approve any increase of the charter capital of the JSC by the issue of additional shares. The issue of new shares by an open JSC involves, among other steps, the adoption of a decision approving the issue at a general meeting of shareholders, the preparation of an issuing prospectus, the state registration of the prospectus, the disclosure of information contained in the prospectus and the allotment of the shares.

STATUTORY PRE-EMPTION RIGHTS ON ISSUE

Azerbaijani law allows an open JSC to provide in its charter for pre-emption rights that will apply to the issue of new shares by the JSC. Where included, these rights require that any new shares first be offered to the existing shareholders before the shares are offered to any outside parties.

Such pre-emption rights will not apply if the charter of the open JSC does not expressly provide for them. These rights may, however, be introduced into the JSC's charter at any time after its incorporation by a decision approved at a general meeting of shareholders.



TITLE

To be effective against third parties, a transfer of shares must be registered in the appropriate state register. Legal title to the shares is acquired from the time of the registration.

Each JSC must also maintain a shareholders' register which contains information about its shareholders. If a JSC has more than 20 shareholders, a licensed professional registrar must be engaged to maintain the shareholders' register.

TRANSFERRING SHARES

SHARE TRANSFER FORMALITIES

An agreement to acquire registered shares in a JSC must be notarized, unless a securities market professional, such as a broker or dealer, is involved. Unless the sale is to a specific purchaser or the JSC has fewer than 100 shareholders, a share acquisition agreement can only be concluded through the stock exchange. The change of ownership of the shares must be recorded in the shareholders' register of the JSC.

PRE-EMPTION RIGHTS ON TRANSFER

Azerbaijani law sets out pre-emptive rights that will operate in favour of the limited group of shareholders of a closed JSC in the event of any proposed transfer of the JSC's shares. In contrast, it would seem that pre-emptive rights on a transfer of shares cannot be imposed on the shareholders of an open JSC. However, given the small size of the market for publicly traded JSC shares, this remains untested in practice.

SHAREHOLDERS' AGREEMENTS

Where a JSC has a number of different shareholders, it is common for the shareholders to enter into a founders' agreement, which is sometimes also called a shareholders' agreement. The agreement generally sets out any arrangements between the shareholders as to, for example, voting at general meetings, the formation of the management bodies of the JSC, the rights and obligations of the shareholders vis-à-vis each other, receipt of dividends etc.

The provisions of the charter of a JSC should not conflict with the contents of any relevant shareholders' agreement. Consequently, any revision made to the shareholder's agreement should also be reflected in the charter of the JSC. Any revision of the charter of a JSC is only effective against third parties after the amended charter has been registered with the appropriate corporate registrar (currently, the Ministry of Justice). On this basis, the registered charter of a JSC (not incorporating any recently made revisions to the shareholders' agreement) would prevail over the revised shareholders' agreement vis-à-vis any third party provided, however, that the third party was unaware of the revisions.



MERGER AND INVESTMENT CONTROL

In certain situations, it is necessary to obtain anti-monopoly consent before any share transfer will become effective. A fine is payable if the parties fail to obtain this consent, and the transfer may be invalidated by the anti-monopoly authority. Among other circumstances, consent of this body must be obtained where more than 20% of the shares in a JSC are acquired if:

- ❖ the aggregate balance sheet value of the purchaser (which may be extended to the purchaser's group of companies) and seller exceeds approximately US\$2,500,000; or
- ❖ the share of the purchaser or the seller in any particular market exceeds 35%; or
- ❖ the purchaser controls the seller.

Any acquisition of 10% or more of the shares in a bank (which must, under Azerbaijani law, be incorporated in the form of a JSC) must be disclosed to the National Bank of Azerbaijan ('**NBA**').

OFFERING SECURITIES TO THE PUBLIC

Following a JSC's decision to issue investment securities, the issuer may be required to prepare an issuing prospectus before the securities can be issued. The form and content of: (i) the decision to issue new shares; and (ii) an issuing prospectus, are prescribed by law. Any issue of investment securities must be registered with the State Securities Committee.

The allotment of newly issued shares of an open JSC must be conducted through a public offering on the Baku Stock Exchange. Prior to making the offering the issuer must disclose information contained in its registered issuing prospectus. The prospectus must be available for general review free-of-charge at the address of the issuer or the place of sale of the issue. The issuer must ensure that the prospectus can be reviewed by third parties and must advertise in the press the place and time when it is possible to do so. The issuer may not start the process of making the public offering until at least 15 days have elapsed from the date of the disclosure.

An issue (other than one made at the time of establishment of a JSC) is considered successful if at least 50% of the shares have been allotted and 100% of the nominal value of such allotted shares has been paid up. If this requirement is not met, the registration of the issue will be rejected. A public offering of shares in a JSC must be completed within one year from the date of the state registration of the issue. If the prescribed percentage of shares is not allotted within this period, the issue will be considered unsuccessful.

REGISTRATION FORMALITIES

The issuer must register a subscriber as one of its shareholders within 15 days of the date on which the subscriber paid for the shares that it agreed to acquire. The subscriber must be issued with:



- ❖ a share certificate (if the shares are in documentary form); or
- ❖ an extract from a *depo* account of the issuer's depository evidencing the subscriber's ownership of the shares (if the shares are in non-documentary form).

An updated report on the offering, in a form and containing the information prescribed by law, must be prepared and submitted to the State Securities Committee every 6 months starting from the date of the state registration of the issue until the offering has been completed.

A report on the results of the subscription must be submitted to the State Securities Committee not later than 30 days from the date of completion of the allotment. Unless there are grounds to refuse the registration, the report must be registered by the Committee not later than 15 working days after the filing date. If the report is registered by the Committee its contents must be published in the press within 7 days of the report's registration date.

When is a prospectus required?

Unless an issue of shares is not being made to the public (i.e. unless it is being made to a defined group of investors, such as shareholders in a closed JSC), an issuing prospectus must be prepared prior to the issue of any new investment securities.

DISCLOSURE OF SHAREHOLDER DETAILS

A shareholder in a JSC has a legal obligation to disclose to the keeper of its shareholders' register (i.e. either the JSC itself or a licensed professional registrar if the JSC has more than 20 shareholders) any changes to the information about that shareholder contained in the register. Any change must be notified within 10 days of its occurrence.

In addition to the requirement for a bank to notify the NBA of any acquisition of 10% or more of its shares, such a notification is also required if a shareholder increases its shareholding to over 20%, 33% or 50%. Any reduction in shareholding below these thresholds must also be notified. These obligations only apply to shareholdings in JSCs that are operating as banks, and not to shareholdings in JSCs which are conducting other types of business.

TOP FIVE TIPS RELATING TO AZERBAIJANI SECURITIES

- 1 The value of shares allotted through a public offering must be contributed in cash.
- 2 The advertising, or an official offering, of newly issued shares, or the submission of the emissions prospectus, to potential investors, is prohibited until the state registration of the issue. It is unclear, however, if a subscription agreement may be concluded prior to the date of the state registration of the issue.



- 3 Subject to any applicable double tax treaty, dividends paid by a JSC are subject to a 10% withholding tax at source.
- 4 The transfer of shares in a JSC is a VAT exempt transaction. The current VAT rate is 18%.
- 5 Bonds may be issued in the following forms: (i) registered documentary; (ii) registered non-documentary; and (iii) bearer documentary. Rights in respect of registered non-documentary bonds are transferred from the account of the owner held with the depositary (called a *depo* account) to the *depo* account of the new owner. A *depo* account can be opened at the Baku Stock Exchange. Rights in respect of registered documentary bonds are transferred by delivery of the securities certificates to the new owner and registration of the transfer in the register of the bond issuer. If registered documentary bonds are maintained by a depositary their transfer is effected through the *depo* accounts. Rights in respect of bearer bonds can be transferred by the delivery of the bond certificate to the new owner. Rights in respect of bearer-form documentary bonds kept by a depositary are also transferred using *depo* accounts.



The following are common securities under the laws of the People's Republic of China (the '**PRC**');

- ❖ shares in a Joint Stock Company;
- ❖ corporate bonds;
- ❖ convertible bonds; and
- ❖ warrants and other subscription rights granting an interest in share capital.

As the issuance of corporate bonds is subject to strict legal conditions, in practice few companies choose to issue this debt instrument. At present only listed companies that have had a profit-making record for the past three consecutive financial years are allowed to issue convertible bonds.

This chapter deals only with joint stock companies ('**JSC**'), in which the registered capital is divided into distinct shares. There are other types of corporate entity in the PRC, such as State Owned Enterprises and limited liability companies in which the registered capital is not divided into distinct shares but the shareholders instead hold a percentage of the registered capital. Please refer to our brochure '*Establishing Companies and Partnerships in Key Jurisdictions*' for more information on the various types of PRC company.

SHARE CAPITAL

REGISTERED CAPITAL

Only a JSC is permitted to issue shares. There is no requirement for shares to have a minimum nominal value, but a JSC must have a minimum registered capital of 5 million RMB (approximately €450,000). For a JSC to attract foreign investment, the minimum registered capital must be 30 million RMB (approximately €2.7 million). The registered capital of a JSC can be raised:

- ❖ solely from the founding shareholders (called 'promoters') - known as 'Incorporation through Promotion'; or
- ❖ from the promoters as well as the public (for example, in the event of an IPO) - known as 'Incorporation through Offering'.

If the company is engaged in certain areas of industry or business (such as banking or insurance), the registered capital requirements will be different. Cash contributions to the registered capital must not be less than 30% of the total share capital. The value of any non-cash contributions made in exchange for shares must be verified by a qualified asset appraisal firm.

SHARE CLASSES

Unlike most other jurisdictions, shares cannot be divided into different classes. Shares are usually denominated in RMB, but it is possible to denominate the shares in another currency if the company has non-Chinese investors or is permitted to issue shares to non-Chinese investors.



Depending on where a PRC company is listed, it will have different types of shares:

- ❖ 'A Shares' are traded on stock exchanges in Mainland China; they are denominated in RMB and issued to domestic investors and QFIs (see below).
- ❖ 'B Shares' are also traded on stock exchanges in Mainland China; they are denominated in US\$ or Hong Kong dollars and must be purchased with the respective currency in which they are denominated. Non-Chinese investors (apart from QFIs) and Chinese individuals are able to purchase these shares.
- ❖ 'H/N/S Shares' are traded on stock exchanges in Hong Kong, New York or Singapore respectively and denominated in the currency of the market where they are floated. Currently, these shares are available to the general public.

QFIs (or 'qualified foreign institutional investors'), are non-Chinese fund management institutions, insurance companies, securities companies and other asset management companies that are approved by the China Securities Regulatory Commission ('**CSRC**') and granted a licence by the PRC State Administration for Foreign Exchange ('**SAFE**') to invest in China's securities markets.

AUTHORISED SHARE CAPITAL

All shares in a PRC company must be subscribed and issued - there is no concept of an authorised share capital. However, investors may pay their subscription over a prescribed period. For instance, each promoter of a company incorporated through promotion must pay 20% of the share capital upon incorporation and the remaining 80% of the share capital may be paid within a period of up to two years (or five years for an investment company). The total share capital of a JSC established through a public offering must be paid up upon incorporation.

ISSUING SHARES

AUTHORITY AND PROCEDURES

The issuance of shares (including details of the type, amount and issue price) must be approved by a shareholders' general meeting ('**SGM**'). This power cannot be delegated to the board of directors. If the new shares are available to the general public, or to more than 200 specific persons, the offering is regarded as a public offering and is subject to the approval of the CSRC.

To make a public offering a JSC must have recorded a profit for the previous three consecutive financial years and must not have made any false statements in its financial records for the previous three financial years. There are a number of other detailed requirements and conditions imposed by the CSRC on the issuance of new shares by a publicly listed company. In addition, if a company intends to issue shares to non-PRC residents, then the issue will also be subject to the approval of the Ministry of Commerce ('**MOFCOM**'), the regulatory authority for foreign investment in China.



STATUTORY PRE-EMPTIVE RIGHTS ON ISSUE

Existing shareholders of a JSC have no statutory pre-emptive right to purchase newly issued shares pro-rata to their respective shareholding in the company. However, it is becoming more common for companies to include such pre-emption rights in their articles.

Rights of Shareholders of a JSC

The following are some of the more common rights that shareholders of a JSC in the PRC acquire by virtue of holding a certain percentage of the company's voting shares:

- 1% - file civil lawsuits against directors or managers who violate the laws, regulations and articles in performing their duties;
- 3% - propose a special resolution to be discussed at the annual general meeting;
- 10% - call an extraordinary general meeting;
 - propose an interim board of directors meeting;
 - convene and preside over a SGM if the board of directors and board of supervisors fail to convene such meeting;
- 33.3% - block a special resolution;
 - block a resolution of a listed JSC's SGM to purchase or sell major assets or guarantee an amount exceeding 30% of the total assets of the JSC;
- 50% - block an ordinary resolution of the SGM;
 - pass an ordinary resolution of the SGM (just over 50% required);
 - appoint and remove directors of the company (just over 50% required); and
- 66.6% - pass a special resolution (just over two thirds required).

TITLE

Shareholders of a JSC must have their names and addresses (for holders of registered shares) or stock numbers and issue dates (for holders of bearer shares) recorded in the company's shareholder register as well as with the corporate registration authority in China, the Administration for Industry and Commerce ('AIC').

The ownership of shares is confirmed by the records in the company's shareholder register on file with the AIC. The holders of A Shares and B Shares of a listed JSC will also be registered with the China Securities Registration and Settlement Company.

Nominal shareholding on behalf of others is possible through trust agreements between the nominal shareholder and the actual investor. However, this kind of share holding arrangement may not be used to bypass statutory restrictions or regulatory obligations. For example, a Chinese national may not hold shares for the benefit of a non-Chinese person or entity in a company in which foreign investment is restricted or prohibited.

TRANSFERRING SHARES

Registered shares can be transferred through endorsement or by signing a share transfer



agreement. The transfer usually takes effect when the new shareholder is registered in the company's shareholder register, but it is also advisable to register the share transfer with the AIC in order to ensure that the transfer is notified to third parties. Bearer shares are transferred upon delivery of the relevant share documentation to the purchaser. The transfer of shares of companies listed on a PRC stock exchange is currently subject to a stamp duty of 0.3% of the value of the consideration paid for the shares.

RESTRICTIONS ON TRANSFER

Under PRC law there are no statutory pre-emptive rights on transfer, or tag-along or drag-along rights, benefiting the existing shareholders of a JSC. However, it is becoming more common for shareholders to include a pre-emptive right mechanism, or drag-along and tag-along rights, in the articles or in a shareholders' agreement. There are certain other restrictions on the transfer of shares that shareholders should be aware of, including that:

- ❖ A transfer of shares will not be recorded in time for the new shareholder to exercise its rights if it is transacted less than 20 days before the SGM, or less than five days before the dividend day (although these periods may vary depending on the company and where it is listed).
- ❖ In general, promoters' shares may not be transferred until the first anniversary of the date of establishment of a company, and shares issued prior to an IPO may not be transferred until the first anniversary of the date on which the shares commence trading on the stock exchange (the lock-up period for A Shares and B Shares held by a controlling shareholder is three years according to the listing rules of the Shanghai and Shenzhen stock exchanges).
- ❖ A director and certain other members of senior management may only transfer up to 25% per year of their total shareholdings in the company during their term of office, and will be subject to a one year lock-up period on a listing. Furthermore, they may not transfer their shares in the company within six months of leaving their post in the company, or (where they hold 5% or more of the shares) within six months of acquiring such shares.

There are also restrictions on companies acquiring their own shares.

TRANSFER OF STATE-OWNED SHARES

Shares in some Chinese companies are held by entities that are authorised by the government to make investments and hold shares (for example, the State-Owned Assets Supervisory and Management Commission). Such shares are classified as 'State Assets', the transfer of which (with the exception of listed shares traded on the stock exchange) is generally subject to additional procedures.

Generally the transfer of shares of a listed JSC held for the account of the State must be transacted through a Property and Equity Exchange (designated by local/national government),



whereby the shares in question are first offered to the general public for bidding, tender or auction for a certain period of time. The purpose of this procedure is to ensure that the shares are not sold at a price below their fair market value. These requirements make it difficult to sell State owned shares to a specific purchaser. The seller may impose certain conditions on any potential bidders which are favourable to one specific purchaser, although not if these conditions prevent fair market competition.

MERGER AND INVESTMENT CONTROL

Although China has been a member of the WTO for five years foreign investment in China, including the purchase of shares of a PRC company, is still subject to a number of restrictions including the approval of MOFCOM or its designated local branches. Non-Chinese investors are generally not allowed to directly buy the A shares of a PRC listed company unless they qualify as 'strategic investors' of the PRC listed company. QFII are allowed to trade stocks directly on the stock exchanges.

Non-Chinese investors may purchase the shares of an unlisted JSC, or the non-tradable shares of a listed JSC (for historical reasons, some listed JSCs have shares that are not allowed to be traded on the stock exchange), with the approval of MOFCOM and other competent authorities. When transferring shares to a non-Chinese investor, the parties are not completely free to determine the price of the shares. The transfer price must be no less than the fair market value as determined by a qualified asset appraisal firm.

Non-Chinese buyers are normally required to pay the transfer price within three months of their registration as a new shareholder of the target company. In exceptional circumstances, and subject to the approval of MOFCOM, non-Chinese buyers can pay 60% of the consideration within six months of their registration as a shareholder with the remaining amount being paid within one year. Due to these restrictions it is difficult to structure earn-out or other deferred payment mechanisms of the type often adopted in international transactions.

If the transfer of shares to a non-Chinese company occurs under any of the following circumstances then the prior approval of the appropriate PRC authorities to the merger will be required:

- ❖ any party to the transfer has turnover in China in excess of RMB 1.5 billion;
- ❖ the non-Chinese company has acquired or merged with more than 10 enterprises in related industries in China;
- ❖ the market share of any party to the transaction is 20% or more; or
- ❖ as a result of the transfer of shares, a party to the transaction has a market share of 25% or more of the relevant Chinese market.



OFFERING SECURITIES TO PRC RESIDENTS

PRIVATE PLACEMENTS

PRC law generally does not regulate the private placement by a PRC company of its shares with PRC residents, regardless of whether they are individuals or legal entities. However, offering shares in any of the following circumstances constitutes a public offer and is subject to the prior approval of the CSRC:

- ❖ issuing securities to unspecified individuals or entities; or
- ❖ issuing securities to 200 or more specific individuals or entities.

To date there have been no public offerings of the shares of non-Chinese companies to the Chinese public.

A private placement of a non-Chinese company's shares with PRC residents is subject to different approvals depending on whether the PRC resident is a PRC registered entity or an individual. In the former case, the PRC registered entity must first obtain approval from MOFCOM for investment abroad and then register with the relevant local branch of SAFE. In the latter case, the PRC individual will be required to register with the relevant local branch of SAFE.

PRC law prohibits the use of a private placement as a means of making a public offer for a company's shares (for example, by advertising the placement, or providing inducements to participate in the placement, to the public). Any person that publicly offers securities without the requisite approvals will be required to cancel the offering and refund the proceeds of the offer together with interest for the relevant period. They may also be fined between 1% and 5% of the proceeds raised in the illegal offering. A company that is established by an unapproved public offer of securities will be dissolved by the authorities.

PUBLIC OFFERINGS

There are two major stock exchanges in China, the Shanghai Stock Exchange ('**SHSE**') and the Shenzhen Stock Exchange ('**SZSE**'). Both markets require an issuer in an IPO to satisfy the following criteria:

- ❖ the total share capital of the issuer must not be less than RMB 50 million;
- ❖ the listed shares must exceed 25% of the total share capital of the issuer or, if its total share capital is more than RMB 400 million, 10% of the total share capital of the issuer; and
- ❖ in the past three years, the issuer must not have made any material breach of the law or made false statements in a financial report.

Since 2000 the Chinese government has been considering setting up a secondary board to be



known as the growth enterprise market ('**GEM**' - this is different from the GEM in Hong Kong). This would be intended to assist small growth companies with public capital financing.

As an intermediate step, in 2004 the SZSE established a specific board for small and medium size enterprises ('**SMEB**'). However listings on the SMEB are still subject to the same thresholds and supervisory rules as those of the main boards and the SMEB exchange is still a part of the main exchanges. It has been reported that the authorities are now preparing to establish the GEM in 2008 under the SZSE and that it will be subject to lower thresholds and different supervisory rules for listings of growth companies with a technological background.

On an IPO the issuer must submit a prospectus, articles of association, and financial reports for the past three financial years, as well as other relevant documents, to the CSRC and the relevant stock exchange for approval. In the prospectus, the issuer must disclose any information which may materially affect the investment decision of an investor. The issuer and all of its directors and other senior managements must sign the prospectus to warrant that the contents of the prospectus are true, correct and complete.

If the IPO is approved by the CSRC the issuer must publish the prospectus in at least one newspaper and on a website designated by the CSRC. It must also make the prospectus available to the public at the issuer's registered address, the intended stock exchange of the listing and the registered addresses of its sponsor and underwriter.

When is a prospectus required?

A prospectus must be prepared for every issue of shares:

- ❖ to unspecified individuals or entities; or
- ❖ to 200 or more specific individuals or entities.

DISCLOSURES OF SHAREHOLDER INFORMATION

A shareholder is required to disclose its interests (including shares registered under its name and shares not registered under its name but the voting rights of which are under its control) in a listed company if such interests whether owned by itself or by person(s) acting in concert reach or exceed 5% of the issued shares of the listed company. The shareholder and its concert parties must also make such a disclosure whenever there is a 5% increase or reduction in the proportion of the interests owned by them in the issued share capital of the listed company.

If the shareholder and its concert parties own between 5% and 20% of the issued share capital of a listed company, they must prepare a short report on any change of their interests. If their interests amount to between 20% and 30% of the issued share capital of a listed company, they must prepare a more detailed report on any change in their interests. If their interests exceed 30% or more of the issued share capital and the shareholder intends to acquire more shares, it must make an offer to all of the other shareholders of the company. Certain details of the offer must be published by the shareholder. A shareholder can apply for an exemption from the takeover offer requirement if it can prove to the CSRC that:



- ❖ the proposed transfer of shares will not result in a change in the control of the listed company;
- ❖ the listed company is in financial difficulty, the restructuring plan proposed by the purchaser has been approved by the SGM of the company in question, and the purchaser undertakes not to transfer its interests in the company within the next three years; or
- ❖ the interests owned by the purchaser which exceed 30% of the issued shares of the listed company originate from a new placement of shares by the listed company, the purchaser undertakes not to transfer its interests in the company within the next three years, and the shareholders' general meeting has agreed to exempt the purchaser from issuing a takeover offer.

TOP FIVE TIPS RELATING TO PRC SHARES

- 1 QFIs are allowed to buy A Shares directly in the stock exchanges. If a non-Chinese investor qualifies as a 'strategic investor' it may acquire A Shares of a PRC company by way of transfer or private placement. Other non-Chinese investors are not allowed to directly buy A Shares of a PRC company.
- 2 In general, the shares held by a promoter of a JSC cannot be transferred until the expiry of one year from the date of establishment of the JSC, and shares issued prior to an IPO may not be transferred until the expiry of one year from the date of the shares becoming eligible for trading on the stock exchange.
- 3 Non-Chinese registered companies may only make private placements with PRC entities with the approval of the relevant authorities. Due to foreign exchange controls PRC individuals need to register with local branches of SAFE in order to make investments in a non-Chinese registered company.
- 4 A listed company cannot buy back its own shares, except in the following circumstances: (i) the purchase is being made to reduce the company's registered capital; (ii) as part of a merger with other companies who hold the company's shares; (iii) as a reward to the staff of the company; or (vi) at the request of a shareholder who opposes a resolution of a shareholders' general meeting to merge or split the company.
- 5 The acquisition of any PRC company requires the purchaser to perform thorough due diligence, including legal due diligence, financial due diligence and in some cases, environmental due diligence. One of the most challenging areas of practicing law in the PRC is undertaking this due diligence process, particularly where the target enterprise is a state owned enterprise ('SOE'). Nowadays, access to an SOE's documents is less of an issue, however the reliability of available information is still a significant problem. There are particular areas to be cautious of, especially governmental approvals and tax, employment and accounting issues.



The following are common securities under Czech law:

- ❖ shares in a joint stock company;
- ❖ bonds (pure debt instruments);
- ❖ debt instruments granting an interest in the share capital (for example, priority bonds with an attached right to subscribe for shares);
- ❖ warrants with an attached right to purchase an investment instrument; and
- ❖ participation certificates in collective investment schemes.

The following do not qualify as securities: equity interests in a general partnership (*veřejná obchodní společnost*), a limited partnership (*komanditní společnost*) and a limited liability company (*společnost s ručením omezeným*).

SHARES AND DEBT SECURITIES

SHARE CAPITAL

The nominal value of a company's shares is determined by the general shareholders' meeting. However, the registered capital of a joint stock company may not be lower than CZK2 million or, in the case of a company established through a public offer, lower than CZK20 million. Shares must be denominated in Czech Crowns. Shares can be issued as bearer shares or registered shares and can either be in certificated or book-entry form.

Shares can be issued as ordinary shares or priority shares. Priority shares have a right to receive a dividend or liquidation distribution before the holders of shares of other classes. The issuance of shares of a particular class requires the approval of two thirds of the votes of shareholders present at a general shareholders' meeting. Changing the class of existing shares requires the approval of three quarters of the votes of shareholders holding shares of that class who are present at a general shareholders' meeting.

DEBT SECURITIES

Unlike shareholders, holders of any class of debt security generally have no right to be involved in the decision making process of the company. The only exception is bondholders, who participate in the decision making process through bondholder meetings. Certain decisions, such as a reorganisation of the company (for example, on a merger) or conducting a business sale, are subject to the prior approval of the bondholders. If such approval is not granted and the company nevertheless proceeds with the matter then the bondholders may each ask for a repayment of their bonds.

Czech law recognises only a few debt instruments granting an interest in the company's share capital. These include: (i) bonds that are convertible into shares (*konvertibilní dluhopisy*); and (ii) priority bonds with a connected right to subscribe for new shares (*prioritní dluhopisy*). Holders of such securities have certain rights similar to those of bondholders described above. The issuance of convertible or priority bonds is subject to the approval of at least two thirds of those voting shares that are represented at a general shareholders' meeting.



ISSUING SECURITIES

STATUTORY PRE-EMPTION RIGHTS ON ISSUE

Any shareholder of the company has a right to subscribe for new shares, and convertible or priority bonds, issued by the company before such securities are issued to third parties. The shares will be allocated in proportion to the percentage of existing shares that the shareholder owns.

The issuance of shares and convertible and priority bonds must be approved by a general shareholders' meeting. Other securities may be issued by the board of directors. The general shareholders' meeting may delegate the power to issue new shares to the board of directors.

RIGHTS OF ORDINARY SHAREHOLDERS

Basic shareholder rights are set out in the Czech Commercial Code and most may not be restricted in the company's statutes or otherwise. Basic rights include: (i) participation in the company's management, in particular through participation at shareholders' meetings; (ii) sharing in the company's profit; (iii) sharing in any liquidation distribution; and (iv) having a first right to subscribe for newly issued shares and convertible and priority bonds.

Rights of Shareholders

The following are the most important rights that shareholders of Czech joint stock companies acquire by virtue of holding a certain percentage of the company's voting shares:

- 1 share - challenge a decision of the general shareholders' meeting at court;
- 3%
 - ask the board of directors to call an extraordinary general meeting;
 - ask for a matter to be included on the agenda of the general shareholders' meeting;
 - ask the supervisory board for a review of the board's execution of its powers;
 - ask the supervisory board to claim damages from a director;
- 10%
 - block decisions of general shareholders' meetings which require 90% majority of votes, such as a squeeze out of minority shareholders (just over 10% required);
- 25%
 - block most decisions of general shareholders' meetings which require a three quarter majority of votes (just over 25% required);
- 50%
 - block most decisions of general shareholders' meetings (just over 50% is required to pass decisions); and
- 75%
 - pass decisions of general shareholders' meetings which require a three quarter majority of votes.

Certain decisions of a general shareholders' meeting require a two thirds majority of votes in order to be passed. Depending on the amount of a company's registered capital the rights listed above as being acquired by a 3% shareholder may not be conferred until the shareholder has 5% of the votes.



There are provisions in Czech law preventing minority shareholders from abusing their rights and preventing majority shareholders from seeking to override the minority shareholders' rights.

TITLE

Title to certificated bearer shares is evidenced by the possession of the share certificate. Title to registered shares (whether in certificated or book-entry form) is evidenced: (i) with regard to the company, by an entry in the register of shareholders maintained by the company; and (ii) with regard to a third party, by the production of a share certificate, or an excerpt from the Securities Centre in the case of book-entry shares. Title to book-entry bearer shares is proved by the production of an excerpt from the Securities Centre.

The '**Securities Centre**' is a Czech national registration authority that is responsible for registering the ownership of book-entry and dematerialized securities. Similar rules to those set out above apply to evidencing the ownership of bonds.

TRANSFERRING SECURITIES

Most of the provisions governing the transfer of securities are set out in the Commercial Code, Securities Act and Act on Bonds. Many of these provisions cannot be contracted out of, although certain transfer conditions can be agreed by the parties.

Unless otherwise agreed, securities are transferred together with all rights attached to them. It is possible to separate from shares: (i) the right to receive dividends; (ii) the right to receive a liquidation distribution; and (iii) the pre-emptive right to subscribe for new shares, convertible bonds and priority bonds. The right to receive interest can be separated from bonds.

PRE-EMPTION RIGHTS ON TRANSFER

Restrictions on share transfers may be imposed either by the statutes of the company or as contractual obligations set out in an agreement between the relevant parties. Under Czech law only transfers of registered shares may be restricted by the company's statutes. Restrictions can also be approved by three quarters of the votes of those shareholders present at a general shareholders' meeting owning the shares whose transferability is to be restricted. Transfers of registered shares can be restricted but not totally prevented.

The most common restriction placed on the transfer of shares is to require the prior approval of the board of directors or other corporate body of the company. Where such a restriction has been imposed the approval of the same corporate body is required to create any pledge over the shares.

Other common restrictions include pre-emptive rights on transfer allowing shareholders to



control share transfers to third parties, or tag-along and drag-along rights (respectively, requiring a shareholder to sell its shares if another shareholder sells, or requiring a selling shareholder to include another shareholder's shares in the sale). These rights are usually found in a shareholders' agreement and not in the company's statutes.

SHARE TRANSFER FORMALITIES

Certificated shares are transferred by handing over possession of the certificate to the purchaser. A transfer of registered certificated shares also requires a written agreement between the parties and an endorsement of the shares to the purchaser. Book-entry shares are transferred by registering the transfer with the Securities Centre.

Transfers of registered shares are effective against the company from the moment that the transfer is entered in the register of shareholders maintained by the company. Transfers of listed shares are effected by registering the transfer with the Securities Centre. Similar rules apply to transfers of other types of securities.

CHANGE OF CONTROL

If a party is proposing to acquire control over a company through an acquisition of shares it should first check whether such change in control will affect the validity of any agreements entered into by the company. In particular, a target company may be obliged to repay its borrowings if any change of control is not agreed with a creditor in advance. A change of control of a company whose shares are listed on a public market triggers an obligation for the purchaser to make a mandatory offer to acquire all of the issued shares in the target company.

SHAREHOLDERS' AGREEMENTS

With the exception of agreements relating to the execution of voting rights, Czech law does not regulate shareholders' agreements. Amongst other matters, agreements on the execution of voting rights may not include a right for the shareholder to receive any benefit from the target company in exchange for voting in a pre-agreed way.

Shareholders' agreements usually contain contractual pre-emptive rights, tag along and drag along rights, and provisions regulating the election of new members of the company's various corporate bodies. Czech law does not allow some of the standard provisions found in shareholders' agreements relating to non-Czech companies to be implemented in the statutes of a Czech company. Therefore, parties entering into a shareholders' agreement should carefully review any conflict between the agreement and the statutes and seek advice on how this conflict would be viewed under Czech law.

It is easier to enforce the provisions of the statutes as they are automatically binding on all shareholders and any agreement entered into, or action taken, in breach of the statutes may be



held to be invalid. However, shareholders may prefer the flexibility of a shareholders' agreement as: (i) the statutes are publicly available documents; and (ii) it is more difficult for the shareholders to change provisions in the statutes than those in a shareholders' agreement.

MERGER AND INVESTMENT CONTROL

ANTITRUST AUTHORITIES

Share transfers will be subject to the prior approval of the Czech Office for the Protection of Economic Competition if:

- ❖ the total net turnover of all undertakings involved, achieved in the Czech Republic in the last accounting period, exceeded CZK1.5 billion and each of at least two of the undertakings concerned achieved, in the Czech Republic in the last accounting period, a net turnover exceeding CZK250 million; or
- ❖ the total net turnover of all undertakings involved, achieved in the Czech Republic in the last accounting period, exceeded CZK1.5 billion and the worldwide net turnover achieved, in the last accounting period, by one of the undertakings concerned exceeded CZK1.5 billion.

The approval is not required if the acquisition falls within the scope of the European Merger Control regulations, which apply if certain thresholds higher than those described above are met. The approval of the EU Commission will instead be required.

Specific authorisations and regulations apply to certain areas of business. For example, transfers of certain numbers of shares in banks, securities dealers, investments funds and asset management companies must be authorised by the relevant supervisory body.

INVESTMENT CONTROL

Investments made into the Czech Republic from another jurisdiction do not generally require any prior authorisation. However, in certain cases an official post-closing report may be required to be filed with the relevant authority. For example, foreign investments and loans must be notified to the Czech National Bank (*Česká národní banka* or '**CNB**') for statistical purposes.

Companies operating lotteries and gaming are prohibited from receiving foreign investment. Permission to trade in military materials will only be provided to a company if its registered capital is at least 51% owned by Czech persons or companies. In addition, permission to operate airports can only be granted to Czech companies or individuals.

OFFERING SECURITIES

PUBLIC OFFERS

Securities can only be offered to a wide group of persons through a public offer, unless certain exemptions apply. A public offer is an announcement or communication to a broad group of



persons which contains specified information on the offered securities, and the terms of their acquisition, which is sufficient to enable an investor to make an informed decision on the acquisition of the securities.

The person making the public offer must first publish a prospectus approved by the CNB or by an equivalent regulatory body of another EU member state. The CNB regulates the Czech capital markets. Where a prospectus has been approved by the regulatory body of another EU member state then that regulatory body must provide the CNB with a certificate of approval of the prospectus (under the EU prospectus passporting procedure).

PRIVATE PLACEMENTS

Private placements, the offer of securities to a small group of selected investors, are not specifically regulated under Czech law. The marketing and advertising of securities in the Czech Republic does not require any specific approval or the preparation and publication of a prospectus, provided that:

- ❖ the offer is made to less than 100 persons, other than any qualified investors, per EEA state;
- ❖ the minimum consideration that can be paid by an investor is at least €50,000; or
- ❖ the securities being offered are denominated in amounts of at least €50,000.

However, it is advisable to include in any offer document a statement that the company is not carrying out any public offer of its securities in the Czech Republic and that only limited investors may act on the offer.

When a prospectus is required?

The general rule is that a prospectus must be prepared and approved by the CNB for any public offer of securities in the Czech Republic or on any application for listing shares, bonds or other investment securities on a Czech regulated market. However, a prospectus is not required in certain circumstances which include where an offer:

- ❖ relates only to debt securities issued by an EU member state or by the central bank of an EU state, where the securities are issued by non-profit organisations, or if the total purchase or issue price of the securities does not reach €200,000;
- ❖ falls into one of the categories set out in the section headed 'Private Placements' above; or
- ❖ relates to securities offered: (i) in connection with a take-over bid (as part of a share exchange); (ii) as part of a reorganisation of a company; or (iii) free of charge to the current shareholders or (in the case of shares) as dividends, if a document containing similar information to that in a prospectus is delivered to the CNB and is available at the registered office of the issuer.



DISCLOSURES OF SHAREHOLDER DETAILS

Only shareholders of a public company can be required to disclose their interests in that company's securities. Under Czech law a public company is a joint stock company whose shares are listed on an official securities market in the Czech Republic (i.e. the Prague Stock Exchange or the secondary public securities market known as RM-SYSTEM) or on an official stock exchange in another EU member state.

Where a purchaser acquires voting shares in a listed Czech joint stock company which total more than 3% (where the registered capital of the company exceeds CZK100 million), 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50% or 75% of the voting rights, then the purchaser is obliged to notify the company and the CNB. The same obligation applies to a shareholder which decreases its interest in the voting rights such that the above-mentioned thresholds are crossed and to a person who owns at least 5% of the voting rights in a company that is newly listed on a public market. These notifications must be made in writing within three business days of the day on which the purchaser learnt, or could have learnt, of the completion of the acquisition.

Where a shareholder fails to make a notification that shareholder may not, until a notification is made, execute the voting rights connected to those shares that exceed the relevant threshold. In addition, the CNB may impose a penalty of up to CZK5 million for any failure to make the required notification.

TOP FIVE TIPS RELATING TO CZECH SECURITIES

- 1 The transferability of shares can be restricted but not completely prohibited. A restriction may be imposed only on transfers of registered shares and must be set out in the statutes of the company if it is intended to have the effect of invalidating transfers made contrary to the restriction.
- 2 The Czech Republic does not have a national central depository for evidencing dematerialised securities. The current registration authority, the Securities Centre, does not have the ability to undertake a number of processes commonly undertaken in respect of shares listed on other European markets and this may complicate certain transactions, such as IPOs of Czech companies. It is possible that this position will be change in the near future.
- 3 Payments of dividends by a Czech company to Czech tax residents who are legal entities or individuals are subject to a 15% Czech withholding tax. Payments of dividends by a Czech company to a Czech tax non-resident (whether a legal entity or an individual) are generally also subject to a 15% Czech withholding tax. No withholding needs to be made where the dividend is paid out to, and beneficially received by, a Czech tax non-resident entitled to protection under a relevant tax treaty. In such event (and subject to the receipt of sufficient evidence on the status of the recipient) the Czech company must apply any reduced withholding tax rate set out in the relevant tax treaty.



- 4 Payments of dividends by a Czech company to a Czech tax non-resident that: (i) exists as a certain form of legal entity specified by European law; (ii) is considered tax resident in any EU member state or Switzerland; and (iii) is subject to certain specified types of income tax, are exempt from any Czech withholding tax. Such exemption is only applicable if the Czech tax non-resident has held at least 15% of the share capital of the Czech company for an uninterrupted period of twelve months. This 15% threshold will decrease to 10% after 1 January 2009.
- 5 If it is intended to incorporate pre-emption, tag along or drag along rights into a company's statutes it is advisable to authorise the board of directors to oversee the compliance of the shareholders with these rights. This can be achieved by making share transfers conditional on the prior approval of the board of directors.

A share or bond is a security under French law if: (i) it is negotiable (i.e. transferable by book entry or delivery); (ii) confers the same rights per category of holder; and (iii) provides either a direct or an indirect interest in the issuer's capital or a general creditor's right over the issuer's assets. The following are common securities under French law:

- ❖ equity interests such as shares of a *société anonyme* (corporation), *société par actions simplifiée* (simplified corporation), a European corporation and participations of limited liability partners in a *société en commandite par actions* (limited partnership with shares);
- ❖ bonds (i.e. pure debt instruments);
- ❖ debt instruments granting an interest in the share capital (for example, bonds with warrants, bonds convertible into shares, and bonds redeemable into shares); and
- ❖ warrants and other subscription rights granting an interest in the share capital.

The following do not qualify as securities: equity interests in a *société civile* (civil partnership), *société en nom collectif* (commercial partnership), *société à responsabilité limitée* (limited liability companies), *société en commandite simple* (limited partnership), and a general partner's equity interests in a limited partnership with shares. Please refer to our brochure 'Establishing Companies and Partnerships in Key Jurisdictions' for more information on the various types of French legal entities.

EQUITY AND DEBT SECURITIES

EQUITY SECURITIES

In France, the nominal value of shares is freely determined by the shareholders and there is no obligation to provide for it in the by-laws. Shares must be denominated in Euros. If certain shareholders are to be given specific rights then different classes of share must be created.

Creating these share classes requires a decision of the shareholders and, in most cases, the appointment of a special auditor by the relevant commercial court. Preferred shares can confer enhanced voting rights, rights to appoint managers, vetoes on certain decisions and rights to receive preferential monetary distributions and/or management information. Any change in the rights attached to a class of share requires the prior approval of a majority of the holders of that class.

DEBT SECURITIES

Unlike shareholders, holders of any class of debt securities cannot participate in the decision making process of the company. However, bondholders are represented by a body whose operations are similar to those of the shareholders' meeting. Management must obtain the prior approval of a majority of the holders of a class of debt securities prior to any transaction that may affect their rights. To avoid conflicts of interest, bondholders owning more than 10% of a company's share capital cannot vote at such bondholders' meetings.



A range of hybrid securities providing a direct interest in a company's share capital is available in France. These include: (i) bonds with warrants attached (*obligations à bons de souscription d'actions*); (ii) bonds that are convertible into shares (*obligations convertibles en actions*); and (iii) bonds that are redeemable into shares (*obligations remboursables en actions*). Holders of such securities have similar rights to those benefiting bondholders described above.

WARRANTS

Warrant holders (*Bons de souscription d'actions*) are given similar corporate rights to those benefiting bondholders (described above) whether the warrants are issued on a stand-alone basis or attached to equity or debt securities.

EMPLOYEE SHAREHOLDING SCHEMES

French law promotes employee participation in the equity and debt securities of the company that employs them (for example, through stock options or free shares). It should be noted that:

- ❖ employees and management holding more than 10% of the company's shares cannot receive stock options or free shares, (in any event, in recent years the tax regime applicable to stock options has made them less attractive); and
- ❖ free shares vest after at least two years and benefit from a favorable tax treatment if they are not transferred within four years following the date of their grant.

Start-up companies that have been incorporated for less than fifteen years can issue specific warrants (*Bons de souscription de parts de créateur d'entreprise*). The tax treatment of these warrants is often attractive to their holders.

ISSUING SECURITIES

The decision to issue securities will be made by an extraordinary general meeting of the shareholders. Shareholders may delegate this decision to the company's management. A certain number of 'employee shares' must be reserved for subscription every three years and upon each share capital increase.

In order to complete a subscription, subscribers in non-listed companies will need to sign subscription forms, or terms and conditions, for the relevant class of securities. A subscription for securities issued by listed companies must be made through authorised intermediaries (i.e. banks and financial institutions).

STATUTORY PRE-EMPTION RIGHTS ON ISSUE

Any holder of a security has a preferential right to subscribe for new securities issued by the company in proportion to the percentage of existing securities that the holder owns.



AUDITOR'S REPORT

Statutory auditors are often required to issue various reports aimed at protecting creditors and minority shareholders. Such reports are required: (i) before ordinary shares can be converted into preferred shares; and (ii) before the issuance of certain types of securities (such as those granting an interest in the share capital, employee stock options or free shares issued to employees). Reports from experts appointed by the relevant commercial court must also be obtained before a non-cash contribution can be accepted, before a merger or before the issuance of different classes of share.

RIGHTS OF ORDINARY SHAREHOLDERS

Ordinary shares provide shareholders with the right to: (i) participate in general meetings; (ii) request information on the management or corporate aspects of the company; (iii) be appointed as a corporate officer; (iv) receive dividends and liquidation distributions, as well as reimbursements of contributions, if any; and (v) preferentially subscribe for newly issued shares.

Rights of Shareholders

Except with respect to simplified corporations (where the percentage vote required to pass decisions may be freely determined in the by-laws), the following are some of the most common rights that shareholders of French companies acquire by virtue of holding a certain percentage of the company's voting shares:

- 1 share - prevent the conversion of the company into a partnership;
- 5% - ask the relevant Commercial Court for the convening of a shareholders' meeting;
- ask for an audit of the activities of the management;
- 33.3% - block decisions of extraordinary shareholders' meetings (just over one third of the shares is required);
- 50% - block decisions of ordinary shareholders' meetings;
- pass decisions of ordinary shareholders' meetings (just over 50% required);
- remove a director (just over 50% required); and
- 66.6% - pass decisions of extraordinary shareholders' meetings (two thirds of the shares are required).

TITLE

Regardless of whether securities are registered (*titres nominatifs*), proof of their ownership is evidenced by: (i) production of the transfer orders signed by the previous seller; and (ii) the registration of the transfer in certain books maintained by the issuing company or an authorised intermediary. Transfers made through an authorised intermediary are usually effective three business days after the transfer order is given.



TRANSFERRING SECURITIES

GENERAL RULES ON TRANSFERS

Provisions governing the transfer of a company's securities are often set out in that company's articles of association or a shareholders' agreement. It is important for a buyer to ensure that it is acquiring both the bare ownership (*nue-propriété*) and the right of use (*usufruit*) of any shares. Where the title is split, it will be necessary for both the owner of the bare ownership and the owner of the right of use to sign the share sale agreement in order that full title to the shares is transferred.

RESTRICTIONS ON TRANSFER

The main conditions imposed on share transfers are: (i) rights of first refusal (*clauses d'agrément*), which allow shareholders to control share transfers to third parties or to modify the allocation of the shares amongst themselves; or (ii) pre-emptive rights, which allow shareholders to increase their stakes in the company if another shareholder sells its shares. Where the articles of association of a company or limited partnership provide for a transferring shareholder to first offer its shares to the other shareholders then:

- ❖ the right is not enforceable where the transfer forms part of an inheritance, is part of a settlement under a marriage contract, or is an assignment to spouses, ascendants or descendants; and
- ❖ any transfer of shares in violation of such a right is null and void if an action is brought by the company itself or the other shareholders within three years from the date of the transfer. As a result of recent case law, beneficiaries of a pre-emptive right may now, as an alternative remedy to the cancellation of the transfer or damages and provided that they can show that the third party acted in bad faith, request their substitution for the third party purchaser.

Investors wishing to avoid such complexity may prefer to include the right of first refusal in a shareholders' agreement or to use a simplified corporation (*a société par actions simplifiée*) in which share transfers can be more freely structured. Pre-emption clauses commonly provide that a shareholder acquiring shares by exercising its pre-emption rights must do so on the same terms and conditions as those agreed with the proposed third-party buyer. It is possible to provide for the appointment of an expert to determine the appropriate price.

Clauses in the articles of association of most types of company that seek to prohibit share transfers must: (i) be for a limited period as from the date that the relevant party becomes a shareholder of the company; and (ii) be justified by the company's interests. The articles of association of simplified corporations and European corporations can prohibit share transfers for a maximum period of ten years and such clauses do not have to be justified by the company's



interests. Clauses in shareholders' agreements seeking to limit share transfers must always include time limits - if they do not then the agreement could be terminated at any time by any party to it.

Other limitations that are sometimes imposed include a temporary prohibition on share transfers and mandatory drag-along and tag-along clauses. These clauses respectively oblige a shareholder to sell its shares if another shareholder sells or require a selling shareholder to include another shareholder's shares in the sale. The clauses may be included in the articles of association provided that all shareholders approve them either on the formation of the company or at an extraordinary shareholders' meeting. By law, certain restrictions apply to transfers of: (i) employee shares which were issued as benefits; (ii) manager shares of a company in bankruptcy; and (iii) in specific cases, shares that are listed on a stock market.

MANAGEMENT FIDUCIARY DUTY

According to case law, a member of the management of a company who has received an offer for the acquisition of his or her shares cannot purchase shares from other shareholders at a lower price in order to resell them for a profit without disclosing the facts to the other shareholders. Managers who have breached this fiduciary duty will be liable to pay damages to the other selling shareholders.

SHARE TRANSFER FORMALITIES

Share transfers require: (i) the execution of a share transfer order (although share purchase agreements providing for, amongst other matters, representations and warranties are generally entered into as well); and (ii) the registration of the transfer in the company's share transfer register and the amending of the relevant shareholders' accounts. A similar transfer process is used for other types of security. A transfer of securities issued by a listed company is effected through, and under the control and responsibility of, authorised intermediaries (i.e. banks and other financial institutions).

Transfers of shares of companies listed on a stock market are normally not subject to a registration duty. Transfers of shares of the following companies are subject to a 1.1% registration duty calculated by reference to the purchase price (capped at a maximum duty of €4,000):

- ❖ corporations;
- ❖ simplified corporations;
- ❖ European corporations incorporated in France;
- ❖ limited partnerships with shares not listed on a stock market; and
- ❖ companies listed on a stock market if the parties executed a written transfer deed.

If the company's activity is principally that of real estate and the company is not listed on a stock market, the registration duty is 5% of the purchase price and is not subject to a cap.



CHANGE OF CONTROL

Where a party is acquiring shares it should ensure that there are no agreements which would terminate, or impose other sanctions on the company, on a change in control. For example, a loan agreement may require the target company to repay its loan early. The company's workers council must be informed and consulted prior to any share transfer resulting in a change of control. However, the workers council does not have any right to veto the transfer.

SHAREHOLDERS' AGREEMENTS

As noted above, shareholders may regulate their relationships either through the articles of association or in a separate shareholders' agreement. It is easier to enforce provisions in the articles of association and all shareholders will be automatically bound. However, it is also easier for a shareholder to block the company's operation, although it should be noted that under French case law minority shareholders can be liable for abusing their rights.

Shareholders may prefer the flexibility of regulating their relationships through a shareholders' agreement. This option may be preferred as a company's articles of association are a public document whereas shareholders' agreements are not.

MERGER AND INVESTMENT CONTROL

ANTITRUST AUTHORITIES

If all of the following conditions are met, share transfers will be subject to the prior approval of the antitrust authorities at the French Ministry of the Economy:

- ❖ the combined aggregate worldwide turnover (after tax) of all parties involved in the acquisition (i.e. the purchaser, including all companies directly and indirectly controlling and controlled by the purchaser, and the target company, including the companies under its direct and indirect control) is higher than €150 million;
- ❖ the aggregate turnover (after tax) attributable to operations in France of at least two of the parties to the acquisition is higher than €50 million; and
- ❖ the acquisition does not already fall within the scope of the European Merger Control regulations, which apply if certain thresholds higher than those described above are met.

SPECIAL PURPOSE COMPANIES

Specific authorisations and regulations are required by companies operating in certain branches of the economy. These will vary according to the company's activity or status (i.e. public or



private). For example, transfers of the shares of companies in which the French State owns more than 50% of the share capital must be authorised by law, and transfers of shares of companies in the banking or insurance sectors must be authorised by the relevant supervisory body.

Rights of first refusal are required to be included in the articles of association of certain companies (for example, newspaper companies and statutory auditors or accountants) so that shareholders can control the entry of new shareholders.

INVESTMENT CONTROL

Investments into France are not subject to prior authorisation but, in certain cases, an official post-closing report may be required. Additionally, investments in companies operating in the following industries, amongst others, are subject to prior approval from the Ministry of Economy: gaming; private security; specific cases of research; security of IT systems used for national defence; and any other industry where the company is benefiting from information classified as secret for national defence purposes.

OFFERING SECURITIES

PUBLIC OFFERINGS

A public offering is an offering of securities either: (i) on a regulated stock market; or (ii) to the public by way of promotion, advertising or the use of financial intermediaries. A prospectus which describes the issuer and the terms and conditions of the public offering must be published and filed with the French Financial Market Authority (*the Autorité des Marchés Financiers*, or '**AMF**').

The French stock market is one of the most active in the OECD. In accordance with the EU prospectus passporting regulations, an issuer incorporated in an EU member state may offer securities in France by submitting to the AMF a prospectus that has already been approved by the relevant authority in that member state.

PRIVATE PLACEMENTS

A prospectus is not required to be filed for private placements in certain situations. These include where the offer is made to entities providing asset management services on behalf of third parties as well as in certain other circumstances permitted by the Prospectus Directive outlined below, such as offers to qualified investors. 'Qualified investors' are investors that are deemed to have the expertise required to understand the risks connected with investments in financial instruments. These include, amongst others, certain banks, investment, insurance and finance companies, and certain individuals or entities that have registered themselves with the AMF.

Where an offer does not require the publication of a prospectus, the issuer must mention to potential investors that the company has not authorised any public offer of its securities in France and that no prospectus has been registered with the AMF.



When is a prospectus required?

Any company wishing to make a public offering must issue and file a prospectus with the AMF. However, no public offer occurs, and no prospectus filing is therefore required, where the offer is made to:

- ❖ asset management companies or qualified investors (as mentioned above); or
- ❖ less than 100 potential investors in France.

In addition, no public offer occurs where the consideration for the offer is:

- ❖ in total less than €100,000 (over a 12 month period);
- ❖ in total between €100,000 and €2,500,000 (over a 12 month period), provided that the issued securities represent less than 50% of the share capital of the issuer;
- ❖ at least €50,000 per investor and per transaction; or
- ❖ at least €50,000 per security.

A company can be listed on a non-regulated market (i.e. Alternext or *Marché Libre*) through a private placement. Where this is the case, the listing does not require a prospectus to be approved by the AMF. The following table summarises when a prospectus is required in relation to public and private offerings made on certain markets:

French Financial Market	Public offering	Private placement
Euronext Paris (regulated market)	Prospectus required to be approved by the AMF	Prospectus required to be approved by the AMF
Alternext (non-regulated market / organised market)	Prospectus required to be approved by the AMF	Prospectus not required to be approved by the AMF
Marché Libre (non-regulated market)	Prospectus required to be approved by the AMF	Prospectus not required to be approved by the AMF

DISCLOSURES OF SHAREHOLDER DETAILS

Any person, acting on its own or jointly with any person, which crosses certain ownership thresholds (either as a result of an increase or decrease of its holding) of the share capital or the voting rights of a French company listed on Euronext Paris, must disclose the crossing of such thresholds to the company and the AMF. The thresholds are 5%, 10%, 15%, 20%, 25%, 1/3, 50%, 2/3, 90% and 95%. The AMF will publish such information.



The AMF can request similar disclosure obligations in respect of non-French companies whose securities are listed in France. If the company is listed on Alternext, the above information must be disclosed to the company. However, the company is only required to disclose any crossing of the 50% and 95% thresholds. An additional notification threshold can also be imposed on shareholders through a company's articles of association (subject to a minimum threshold of 0.5%).

TOP FIVE TIPS RELATING TO FRENCH SECURITIES

- 1 Although French companies legally belong to their shareholders, they are in certain regards distinct from them and owe duties to, amongst others, their employees, their clients and suppliers and the environment. For this reason, the French courts may not enforce provisions in shareholders' agreements which they consider are contrary to the corporate interest. This limitation often affects clauses requiring the management disclose specific information to the shareholders or granting special rights in the decision making process (such as veto rights or rights to appoint managers).
- 2 It is generally considered that, to ensure enforceability, certain shareholders' rights must be set out in the articles of association rather than in a shareholders' agreement. Alternatively, the rights can be included in a shareholders' agreement with the shareholders' agreement being referred to in the articles. The shareholders and the company will need to consider the best solution for their specific circumstances. It is difficult and expensive to amend rights set out in the articles. Also, if the articles are not strictly complied with then shareholders can block an agreement between other shareholders that breaches the articles. Rights granted at one point in time may prove to be a hindrance at a later date and disagreements between shareholders in interpreting the articles can take much time for the CEO to resolve. For this reason, it is common to incorporate specific shareholder rights in a shareholders' agreement.
- 3 Certain securities issued in non-EU countries cannot be marketed in France unless their marketing has been authorised by the AMF. This authorisation can be difficult to obtain.
- 4 When issuing securities, it is advisable to check whether the law requires the issuance of any statutory reports. Such reports are required, for example, where ordinary shares are being converted into preferred shares, where shareholders' preferential subscription rights are being revoked, where non-cash consideration is being paid for shares and where a merger is occurring.
- 5 The French system offers a wide range of mechanisms by which companies can issue or list securities (such as private placements or public offerings on Euronext Paris or Alternext). Companies wishing to raise share capital in France can benefit from several exemptions allowing them to avoid the burden of documentation necessary for public offerings.



In Germany securities are generally defined as certified rights which are eligible to be traded on a relevant exchange. The following are common securities under German law:

- ❖ shares in a private or public stock corporation (*Aktiengesellschaft* or '**AG**');
- ❖ bonds (such as covered bonds (*Pfandbriefe*) or profit-participation certificates); and
- ❖ equity and dividend warrants relating to share capital.

The following equity interests are not considered as securities under German law: shares in a limited liability company (*Gesellschaft mit beschränkter Haftung* or '**GmbH**'), a civil law partnership (*Gesellschaft bürgerlichen Rechts* or '**GbR**'), a general partnership (*offene Handelsgesellschaft* or '**OHG**') or a limited partnership (*Kommanditgesellschaft*).

For an overview of the different types of legal entity named above, please refer to our brochure '*Establishing Companies and Partnerships in Key Jurisdictions*'. This chapter concentrates on the most common type of security in Germany - shares in an AG.

SHARE CAPITAL

NOMINAL VALUE

The capital of an AG is divided into shares. The minimum share capital of an AG is set at €50,000. The share capital is divided into shares which either have a par value or can be of no par value. Before the currency changeover from Deutsche Marks to Euros in 1999 it was only possible to issue par value shares. However, in order to simplify the currency changeover proceedings and the associated problems with re-denominating existing shares, German legislation introduced shares of no par value.

For par value shares, the minimum value is €1.00 per share and the value must be a round sum denominated in Euros. Where an AG has shares of no par value, the shares simply entitle the holder to an amount of the total capital of the AG proportionate to the number of shares held. All shares of no par value must entitle the holders to the same proportionate amounts of capital.

Shares in an AG may take the form of bearer shares (*Inhaberaktien*) or registered shares (*Namensaktien*). Until the mid-1990s, bearer shares were the preferred type of share in a large stock corporation. Since this date, largely due to changes in the relevant legislation, registered shares are now more common.

RIGHTS

Ownership of an AG's shares will entitle the holder to be a member of the AG. The individual rights of shareholders resulting from such membership can be categorised as 'administrative rights' and 'monetary rights'. Administrative rights include: (i) the right to participate in the



shareholders' meeting; (ii) the right to request certain corporate information relating to the AG; (iii) the right to vote; (iv) the right to bring an action to set aside a shareholders' resolution; and (v) the right to bring an action against members of the corporate bodies (management board/supervisory board) for any illegal actions that they may have taken.

Monetary rights include: (i) the right to participate in profits in proportion to the number of shares held; (ii) the right to participate in any distribution made on the liquidation of the AG; and (iii) the right to subscribe for additional shares in any capital increase undertaken by the AG. A company may exclude the right to vote from any cumulative preference shares (*Vorzugsaktien*) that it issues. These shares entitle their holders to a preferential participation in the profits of the company.

ISSUING SHARES

The membership rights of the initial shareholders are gained by subscribing for shares in the AG. The shares are issued either during the incorporation of the AG or during a subsequent capital increase.

An AG is established once the founders have subscribed for all of the shares that are to be issued in the course of the incorporation. The subscription must follow the provisions of the AG's memorandum of association (*Gruendungsprotokoll*), which includes, besides the articles of association (*Satzung*), details of the par value or the numbers of shares, information on the founders and the amount of paid-in capital. However, recognition of an AG as a legal entity does not occur until it has been registered with the commercial register.

In order to improve its capitalisation, an AG is entitled to increase its share capital, during which additional shares are issued. A capital increase can take the form of: (i) a capital increase in return for contributions (in cash or for non-cash consideration); (ii) a conditional capital increase; (iii) an authorised capital increase; and (iv) a capital increase funded from the AG's financial reserves. A capital increase generally requires a corresponding shareholders' resolution approved by a qualified majority of the votes, and details of the increase must be registered with the commercial register.

PRE-EMPTION RIGHTS ON ISSUE

With respect to capital increases in return for contributions (the most common form of a capital increase) and authorised capital increases, German law provides for pre-emption rights that apply directly to the issue of new shares. Under these provisions, the existing shareholders of the AG are entitled to subscribe for newly issued shares pro-rata to the percentage of shares already held by them. Only after the expiry of an offer by the AG to its existing shareholders may the newly issued shares be offered to third parties. These pre-emption rights cannot be generally excluded by the articles of association, and may only be excluded for good cause if this exclusion is described in the shareholders' resolution approving the capital increase.



Rights of Shareholders

The following are some of the more common rights that shareholders of an AG acquire by virtue of holding a certain percentage of the company's voting shares:

- 5% - call an extraordinary general meeting;
- have an item placed on the agenda for an annual general meeting;
- 25% - block a special resolution, such as capital increase or decrease (just over 25% required);
- 50% - block an ordinary resolution;
- pass an ordinary resolution (just over 50% required);
- 75% - pass a special resolution; and
- 95% - 'squeeze out' any remaining minority shareholders.

TITLE

German law stipulates that where an AG issues registered shares, it must keep a register of shareholders. A registration in the register of shareholders grants the holder legal title to the relevant shares as regards the AG. The register of shareholders lists the name, date of birth and address of each shareholder as well as the amount, the number and, in the case of par value shares, the value of the relevant shares.

This registration requirement does not apply to bearer shares. It is common that a stock corporation will maintain a list of the bearer shares that it has issued. Such a list is comparable to the register of shareholders, but it does not provide any legal evidence of title to the bearer shares.

TRANSFERRING SHARES

SHARE TRANSFER FORMALITIES

In contrast to the legislation in other many other jurisdictions, a transfer of title to shares in an AG does not require any standardised transfer document or other formalities under German law. The transfer formalities depend on the category of share that is being transferred. As regards registered shares whose creation has not been certified by deed, an assignment of the membership rights embodied by the shares is sufficient to effect a transfer of title.

As regards bearer shares, a transfer requires a documented agreement between the parties and the transfer of possession of the deeds constituting the shares. Registered shares are transferred by a documented agreement and the transfer of possession or reassignment by endorsement of the share certificates. A transfer by way of an assignment of membership rights is also possible. As certified shares are generally deposited at a bank or comparable institute there is an implied legal transfer of possession in all transfer agreements, thus making a physical transfer unnecessary.



RESTRICTIONS ON TRANSFER

The general position under German law is that shares are freely transferable. Only in respect of registered shares may the articles of association contain provisions requiring the prior approval of the company before any transfer of such shares. It is not permitted to set out any further transfer restrictions or pre-emption rights in the articles of association.

Shareholders may contractually agree to restrictions on the transfer of their shares. However, such restrictions would not invalidate a completed transfer of shares to a third party.

POOL AGREEMENTS

As restrictions on the transferability of shares may not be imposed in the articles of association of an AG, it is common for a group of shareholders with similar or identical interests in the AG (for example family members or those using the company for a common purpose) to enter into a 'pool' agreement. Under such an agreement the members of the 'pool' agree to abide by certain restrictions on any transfers of shares held by members of the 'pool'.

Such restrictions may include a requirement for the prior approval by, or pre-emption rights in favour of, the remaining members of the 'pool'. By entering into a 'pool' agreement the members aim to avoid any change in the identities or structure of shareholders in the AG which goes against the group's particular interests.

MERGER AND INVESTMENT CONTROL

Under German antitrust law, an acquisition of a controlling interest in a company or group by another company may be subject to the approval of the Federal Cartel Office (*Bundeskartellamt* or '**FCO**'). Such approval will be required if:

- ❖ at least one of the companies' revenue within Germany during the last financial year exceeded €25 million; and
- ❖ the combined worldwide revenues of the parties during the last financial year exceed €500 million.

A controlling interest is acquired where, amongst other circumstances, either 25% or 50% (depending on certain factors) of the voting shares of a company are acquired. If this is the case, the FCO is entitled to impose conditions on or even veto any transfer of shares if the merger would lead to the creation or strengthening of a market dominant position. It is therefore necessary to approach the FCO prior to the closing of any acquisition of 25% or more of the shares of an AG if the above mentioned revenue thresholds would be met. If this is not done the share transfer may be ineffective and the parties may be subject to penalties.



OFFERING SECURITIES

PUBLIC OFFERINGS

The most common market in Germany on which shares are listed is the Frankfurt Stock Exchange (*Frankfurter Wertpapierboerse*), which is operated by the stock corporation Deutsche Boerse AG. Around 90% of all trading of shares within Germany is conducted at the Frankfurt Stock Exchange using its electronic trading system, Xetra. In addition, there are seven regional stock exchanges which focus on particular types of securities, such as profit-participation certificates.

Companies listing their shares or similar securities on the above mentioned stock exchanges are required, on any public offering, to produce and publish a prospectus containing specified details of the securities and the company issuing them. Prior to its publication, the prospectus requires the approval of the German federal financial supervisory authority (*Bundesanstalt fuer Finanzdienstleistungsaufsicht* or '**BaFin**').

Once this approval has been granted, the company is required to publish the prospectus by a variety of means, such as publication in at least one supra-regional newspaper authorised by the German stock exchanges, on the internet sites of the issuer and the relevant stock exchange and by making free copies available through the relevant stock exchange and the issuer.

When is a prospectus required?

In general, a prospectus must be produced by a company whenever it intends to publicly offer its securities, irrespective of whether it intends to list its securities on a stock exchange. However, a prospectus is not required where:

- ❖ the offer is made to less than 100 persons, other than any qualified investors, per EEA state;
- ❖ the minimum consideration that can be paid by an investor is at least €50,000;
- ❖ the shares being offered are denominated in amounts of at least €50,000; or
- ❖ the total consideration for all shares being offered does not exceed €1,000,000.

German case law has established that a company issuing a prospectus may be held liable for any inaccuracies or misleading statements contained in the prospectus. As a result, every potential investor is entitled to assume that the contents of a prospectus are accurate, and the issuer must take steps to ensure that this is the case.

DISCLOSURES OF SHAREHOLDER DETAILS

In order to ensure that there is a suitable level of transparency for the public when trading in securities, German legislation places a variety of obligations on both issuers and purchasers of



securities to publish information relevant to the public market. Any company issuing securities publicly is obliged, amongst other matters, to publish details of:

- ❖ any 'insider information' relating to the issuer or the relevant securities which is not in the public domain but which is likely to affect the market value of the securities if published;
- ❖ any disposals or acquisitions of securities by directors of the company or persons of similar employment and their personal affiliates; and
- ❖ any acquisition of shares granting voting rights in a company, if the acquisition results in any of the following thresholds being crossed: 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. Please note that, for these purposes, where the acquirer has entered into a 'pool' agreement the acquirer's shareholding will be deemed to include total number of shares held by the 'pool', and all other members of the 'pool' would also have to publish this information.

Where any of the above matters are relevant, the information must be disclosed to both the issuer and the BaFin within four or five business days (insider information has to be published as soon as possible). The information must subsequently be published in printed media and on the internet, under similar requirements to those applying to the publication of a prospectus. The BaFin is entitled to impose sanctions and obligations on parties in order to regulate these requirements. Moreover, a company (and its management) may be held liable to pay damages to investors where any insider information has been inadequately or falsely published.

A shareholder who fails to inform the AG that their shareholding has crossed a relevant threshold may lose the rights attached to all of their shares. Any notification seeking to correct a historic failure to comply with this obligation will not be effective. However, such loss of rights only affects the shareholder who fails to notify. The loss of rights is not transferred to a new owner of the shares.

MANDATORY OFFERS

Where a party acquires control (i.e. directly or indirectly acquires 30% or more of the voting share) of a target company, the purchaser is obliged to make a mandatory offer for all of the shares of all of the remaining shareholders. Such an offer requires the prior approval of the BaFin. Details of the acquisition of control and the submission of the mandatory offer must be published in printed media and on the internet under similar requirements to those governing the publication of a prospectus. Upon application, the BaFin may release a purchaser from this obligation in certain circumstances (for example, where there is a passive acquisition of control such as where the shares have been inherited).

Where such an offer is made, the remaining shareholders must decide within a specified period of time whether to accept the offer or not. The consideration payable for the shares must be the average price of the shares of the target company during the three months prior to the acquisition of control occurring.



If the acquirer has entered into a 'pool' agreement the acquirer's shareholding will be deemed to include the total number of shares held by the 'pool', and vice-versa. As a result all 'pool' members may be under an obligation to each submit an offer to the remaining shareholders. Any shareholders party to a 'pool' agreement therefore need to be particularly aware of the percentage holdings of all other members of the 'pool'.

TOP FIVE TIPS RELATING TO GERMAN SECURITIES

- 1 Under German law, shareholders and management and supervisory board members have to observe many rules regulating the adoption of resolutions, especially with respect to capital increases, to avoid such resolutions being declared void or being obstructed by minority shareholders. As a public company, the laws applying to an AG are much more formal than the rules applying to other types of company in Germany.
- 2 An AG can have an authorised share capital (which is limited to an amount equivalent to 10% of its existing share capital). This allows the company to issue new shares up to this limit in a flexible and quick manner without the need for a meeting of the shareholders. In specific cases, the management board can be empowered to exclude the pre-emption rights of the existing shareholders on new share issues.
- 3 The articles of association should stipulate that the management board must have one or more members. Usually, the management board of an AG has more than one member. However, if only one member remains (due to the resignation of the other members for whatever reason) the remaining member would no longer be in a position to represent the AG if more than one member is required by the articles of association. In this scenario, the AG would become unable to act until the correct number of members has been appointed.
- 4 Shareholders aiming to align their interests (even without entering into a 'pool' agreement) should be careful as such an alignment could cause the shareholders in question to be regarded as 'acting in concert'. This may trigger disclosure obligations or even an obligation to submit a mandatory offer for all of the AG's shares.
- 5 An AG must have a supervisory board. If the AG has more than 500 employees, representatives of the employees will be elected as members of the supervisory board (to hold up to 50% of the seats). This may affect the ability of shareholders' representatives on the supervisory board to pass resolutions. As a result, and before an AG finds itself in this position, it may be worth considering whether a legal restructuring is possible to avoid this scenario.



The following are common securities under Hungarian law:

- ❖ equity interests, such as shares of a private or public company limited by shares (*zártkörűen működő részvénytársaság* or *nyilvánosan működő részvénytársaság*), regulated by Act IV of 2006 on Business Associations (the '**Companies Act**') and Act CXX of 2001 on Capital Markets (the '**Capital Market Act**');
- ❖ bonds as pure debt instruments, primarily regulated by Government Regulation no. 285/2001 (XII.26); and
- ❖ debt instruments granting an interest in share capital, such as convertible bonds or bonds granting a subscription right, which are governed by the Companies Act.

Companies limited by shares are business associations founded with a share capital. They can either take the form of a private company whose shares are not offered to the public, or a public company whose shares are traded publicly. This chapter focuses on the laws applying to companies limited by shares.

SHARE CAPITAL

TYPES OF SHARE

The Companies Act sets out five main types of share which may be issued by a company limited by shares. These are:

- ❖ ordinary shares;
- ❖ preference shares;
- ❖ employee shares;
- ❖ interest-bearing shares; and
- ❖ redeemable shares.

The terms applying to all types of shares should be set out in the company's deed of foundation. Preference shares may be divided into different share classes. The legislation sets out specific corporate rights that attach to the various types and classes of shares, but does not detail the full extent of these rights. As a result, shares of the same type and class may still have different rights attached and these groups of shares would be issued as separate 'series' of shares. Within a series all shares must entitle the holders to the same rights. The nominal value and the form (i.e. whether certificated or dematerialised) of shares issued in one series must be identical.

ORDINARY SHARES

Ordinary shares are the basic type of share, conferring membership rights on their holders that



are set out in the Companies Act and in the deed of foundation of the company. The total nominal value of a company's ordinary shares must not be less than 50% of the company's registered capital.

PREFERENCE SHARES

The total nominal value of a company's preference shares must not exceed 50% of the company's registered capital. There are five different permitted classes of preference share:

- ❖ shares granting a preferential right to a dividend (either in terms of the time of payment or the amount of the dividend paid on the shares);
- ❖ shares granting a preferential right to receive a liquidation distribution of assets;
- ❖ shares granting preferential voting rights;
- ❖ shares granting a priority right to appoint directors or members of the supervisory board (may only be issued by a private company); or
- ❖ shares granting pre-emption rights (may only be issued by a private company).

EMPLOYEE SHARES

Employee shares may be issued by a company free of charge, or at a reduced price, to its full-time or part-time employees during the term of their employment. Companies may also decide to issue shares entitling employees to receive dividends from the net profit available for distribution after any preferential dividends but prior to a dividend being paid to other shareholders. Employee shares may also include certain rights to appoint directors. Employee shares may be issued as part of an increase in the registered capital of the company. They may account for a maximum of 15% of the company's registered capital.

INTEREST-BEARING SHARES

A company may issue shares granting the holders rights to receive a previously determined amount of interest, paid from the net profits of the company. These may account for a maximum of 10% of the company's registered capital. In addition to the right to receive interest, the owners of interest-bearing shares are entitled to all other rights attached to the shares including the right to receive dividends.

REDEEMABLE SHARES

Redeemable shares may account for a maximum of 10% of the company's registered capital. The shares may either grant the company a right to repurchase them from their holders (a call option) or grant their holders a right to sell the shares back to the company (a put option), or both. The conditions for exercising the relevant put or call options must be set out in the statutes of the company before the shares are issued.



ISSUING SHARES

Under the Companies Act, in order for a private company to issue shares it must increase its registered capital. As a result the approval of the shareholders at a general meeting is required. The shareholders of a private company may, by a resolution passed at a general meeting, grant to the management board the authority to increase the registered capital and issue shares up to a certain threshold. This threshold must be specified in the resolution, as must the duration of the authority which can last for a maximum period of five years.

Where a company has issued shares of different types or classes, the deed of foundation of a private company may contain provisions requiring that the consent of the holders of the type or class in question be obtained before the increase of the registered capital can take effect. Such consent is always a requirement for public companies. A company's deed of foundation may contain pre-emptive subscription rights in favour of the shareholders or the holders of convertible, or other, bonds. If such pre-emption rights are provided for then, where the registered capital is increased by way of a cash contribution, the holders of these rights will have a first right to acquire any newly issued shares.

Rights of Shareholders

The following are some of the most common rights that shareholders of Hungarian companies acquire by virtue of controlling a certain percentage of the company's voting rights:

- 5%
 - request that the board of directors convene a general meeting;
 - request an audit of the company's latest annual financial report or of an event which occurred no more than two years before the date of the request;
 - request the inclusion of items on the agenda of a private company's general meeting;
 - request that an independent expert investigate the legality of payments made to a shareholder (may be exercised by holders of 1% of the votes of public companies);
- 50%
 - block an ordinary resolution of a general meeting, for example to increase the share capital (just over 50% is required to pass an ordinary resolution);
 - elect and remove members of the board of directors, members of the supervisory board and the auditor, and establish their remuneration (just over 50% required);
- 75%
 - amend the deed of foundation or the rights attached to a series of share;
 - convert a private company to a public company, and vice versa;
 - approve a decrease of the registered capital or the dissolution of the company;
 - approve measures designed to protect a public company against a takeover offer (such as increasing the company's registered capital or acquiring its own shares).

In certain circumstances the deed of foundation may grant some of these rights to shareholders holding a lower percentage of the votes than specified above.



TITLE

Title to shares is evidenced by the entries in the company's register of shareholders. The register of shareholders contains certain details of the company's shareholders and is used to calculate the number of shareholders entitled to vote at a general meeting as well as the voting rights of individual shareholders.

The register of shareholders is usually kept by the board of directors. However, companies may appoint external service providers to carry out this function. The appointment of a service provider, and details of the person in charge of performing these services, must be announced in the Official Gazette. Public companies must also disclose details of the service provider in the company's official journal and on its official website. The register of shareholders is a public document and may be accessed by third parties.

TRANSFERRING SHARES

Certificated shares are transferred by endorsement (in full or in blank) on the reverse side of the share certificate or on a document attached to the share. A transfer is only effective against the company, and the acquiring shareholder may only exercise its shareholder rights, if the shareholder has been registered in the register of shareholders.

If a party is contractually entitled to a pre-emptive right or repurchase right in respect of a certificated share, this right will only prevent third parties acquiring good title to the share if these rights were indicated on the share by marking the certificate accordingly. The transfer of dematerialized shares takes place by crediting and debiting the securities accounts of the relevant parties. In the absence of evidence to the contrary, the owner of the share is the person holding the securities account in which the share is registered.

RESTRICTIONS ON TRANSFER

The general rule is that shares may be freely transferred. Restrictions on transfers of shares to third parties are only effective if permitted by law. There are certain restrictions applying to the transfer of shares set out by law. For example, the acquisition of shares above a certain threshold in a financial institution may be prohibited by the Hungarian Financial Supervisory Authority. This is likely to be the case if the acquirer's (or its owner's or executive officer's) activities, or influence over the financial institution, endanger its ability to be managed prudently to maintain effective, reliable and independent operations.

In respect of private companies, in addition to any statutory limitations on share transfers that may be applicable, the deed of foundation may contain further restrictions. A common example is a requirement to obtain the prior consent of the company. Where the board has the power to refuse to register a transfer it may only refuse to do so if it has good reason, such as if a competitor of the company intends to acquire the shares or if there is a specific reason for refusal permitted by the deed of foundation. If the board of directors does not make a declaration within



thirty days of receiving notice in writing of the intention to transfer the shares its consent will be deemed to have been given.

PUBLIC COMPANIES

The restrictions applicable to transfers of the shares of private companies do not apply to public companies. The law provides, however, that where a public company acquires control of 25% or more of the voting rights in another company limited by shares or in a private limited liability company, this controlled company: (i) may not acquire any further shares of the public company; and (ii) will be required to sell any shares in the public company obtained within the previous sixty days.

BONDS

Bonds are debt securities evidencing the indebtedness of the issuer (in this case, the company) to the holder and the issuer's commitment to repay the face value of the bond along with any specified interest and other returns. The marketing of bonds may be prohibited or restricted by law or by the issuer. Any issue or transfer of bonds in violation of these restrictions will be ineffectual. There is no period of limitation that applies to claims relating to a bond made against the issuer of that bond.

SPECIAL TYPES OF BOND

A company may issue registered bonds, convertible into shares, with a maximum aggregate value of 50% of the value of its registered capital. A company may also decide to issue registered bonds which, upon the occurrence of a specified event (such as an increase of share capital), entitle the holders to subscribe for the new shares after any pre-emption rights have been exercised by the shareholders. A general meeting of shareholders must approve the issue of these types of bond and the provisions regulating them will be set out in the deed of foundation.

MERGER AND INVESTMENT CONTROL

Hungarian merger control regulations have been harmonized with EU regulations. The regulations state that the acquisition of control (whether direct or indirect) of a previously independent undertaking will require the prior approval of the Hungarian Competition Office where:

- ❖ the undertakings concerned had an aggregate turnover that exceeded HUF 15 billion (approximately €60 million) in the previous financial year; and
- ❖ at least two of the undertakings, or the groups of which they are part, each had a turnover in excess of HUF 500 million (approximately €2 million) in the previous financial year.

The definition of control includes the holding of equity interests granting more than 50% of the votes, the ability to elect the governing body of the undertaking in question and the contractual right and/or the actual ability to assert a major influence over the decision making process of the



undertaking in question. The turnover of the undertaking ceasing to have control (i.e. the seller and its group) will not be included when calculating the threshold.

Turnover is calculated net of sales tax as well as 'intra-group' transactions between the undertakings concerned (i.e. between the buyer's group and the target or between members of the buyer's group). Where one of the undertakings is registered abroad, only its net turnover derived from its activities in Hungary will be included in the calculation. However, Hungarian entities with a worldwide presence must include their worldwide turnover in the calculation.

OFFERING SECURITIES

PRIVATE PLACEMENTS

Under the Capital Market Act securities may be issued either by way of a private or a public offering. The Capital Market Act identifies two circumstances in which offers may qualify as a private placement of securities. The first concerns the offering of securities that have not previously been issued. The second concerns securities that have already been issued in the course of a private placement. As regards the first category, the Capital Market Act states that an offer of securities will qualify as a private placement where:

- ❖ it is addressed solely to qualified investors;
- ❖ it is addressed to fewer than 100 natural and legal persons per EU member state, other than qualified investors;
- ❖ the minimum consideration that can be paid by an investor is at least €50,000;
- ❖ the securities being offered are denominated in amounts of at least €50,000;
- ❖ the total consideration for all securities being offered (including any offered during the last 12 months) does not exceed €100,000;
- ❖ a cooperative is converted into a public limited liability company and its shares are offered only to the members and shareholders of the cooperative.

As regards the second category, the Capital Market Act states that issues of securities in the following circumstances will qualify as a private placement:

- ❖ where shares are issued in substitution for shares of the same type and class, if the new issue of shares does not involve any increase in the registered capital;
- ❖ where securities are offered as consideration on a public takeover or a merger;
- ❖ where shares are offered free of charge to existing shareholders paid for from the company's distributable reserves; or
- ❖ where securities are offered, sold or allotted by the issuer or by an affiliated company of the issuer to existing or former employees, executive officers or supervisory board members of the issuer (provided that the issuer already has its securities admitted to trading on a regulated market).



PUBLIC OFFERS

Any marketing of securities other than by a private offering will be deemed to be a public offer and will be subject to the public offer regulations. Public offerings of securities may take place either on the Budapest Stock Exchange ('**BSE**') or outside the stock exchange on a market known as the Over the Counter market (or '**OTC**'). The OTC market is subject to less rigorous statutory regulation than the BSE. The BSE is the operator of Hungary's regulated securities market and thus, the exclusive official trading platform for publicly listed securities in Hungary. Admission to the BSE requires the prior approval of the Hungarian Financial Supervisory Authority ('**HFS**A') followed by a resolution confirming the listing issued by the CEO of the BSE.

An issuer seeking a listing on the BSE must, amongst other requirements, issue a prospectus which meets the requirements for admission to a regulated market of the EU. The prospectus must be approved for public disclosure by the HFS A. The prospectus must be drawn up in accordance with: (i) the relevant EU regulations, with special regard to regulations regarding the information that must be contained in a prospectus; and/or (ii) the relevant international standards including the IOSCO (International Organisation of Securities Commissions) disclosure standards. The information contained in the prospectus must also be equivalent to that required under the provisions of the Capital Market Act.

When is a prospectus required?

The general rule is that a prospectus must be prepared and filed with the HFS A before any offer of shares or similar securities is made to the Hungarian public. However, a prospectus is not required where the offer is deemed a private placement, for example where:

- ❖ the offer is made to less than 100 persons, other than any qualified investors, per EEA state;
- ❖ the minimum consideration that can be paid by an investor is at least €50,000;
- ❖ the shares being offered are denominated in amounts of at least €50,000; or
- ❖ the total consideration for all shares being offered does not exceed €1,000,000.

DISCLOSURES OF SHAREHOLDER DETAILS

There have been recent changes to Hungarian legislation regulating the disclosure of shareholder details as a result of the adoption of EU legislation. The 'Transparency Directive', on the harmonization of the rules relating to the provision of information on issuers whose securities are admitted to trading on a regulated market of the EU, was adopted by the Parliament of the Republic of Hungary on 19 November 2007.

In certain circumstances a party must now disclose its acquisition or disposal of a participating interest in a public company limited by shares. The notification is required whenever a shareholder's aggregate holding exceeds or falls below 5%, 10%, 15%, 20%, 25%, 30%, 50%, 75%, 80%, 85%, 90% and any additional 1% thereafter of the company's registered capital. The change



must be notified within two calendar days to the HFSA and to the board of directors of the relevant company.

TOP FIVE TIPS RELATING TO HUNGARIAN SECURITIES

- 1 As a result of recent changes to Hungarian company law being introduced by Act LXI of 2007 (the '**Amendment**'), Hungarian companies are advised to review their constitutional documents and management practices to ensure compliance and to take full advantage of the changes. This is particularly true for private companies limited by shares as the statutory minimum level of subscribed capital has been significantly reduced from HUF 20 million (approximately €80,000) to HUF 5 million (approximately €20,000). The main aim of the Amendment is to reduce the administrative burden placed on companies and to ensure compliance with European legislation.
- 2 Companies limited by shares can achieve a conditional capital increase by issuing convertible bonds up to an amount of not more than 50% of the registered capital of the company. Upon the written request of their holders, convertible bonds may be converted into the specified series of shares. The Companies Act provides that where the convertible bond was subscribed for at a value lower than the nominal or subscription value of the share to which the bond can be converted, then the bond holder is required to pay the difference to the company at the time of exercising the conversion right. Thus, convertible bonds enable both the company and the bond holders to structure their capitalisation in a more flexible way.
- 3 Companies limited by shares may not provide any loan or suretyship (guarantee), or pay any financial liability prematurely, if the sole purpose of this action is to assist any acquisition of any of the company's shares by any party.
- 4 Certain restrictions on the takeover of strategic public utility companies have recently come into effect. These restrictions include, among others, that in relation to such companies: (i) a 75% majority is required to remove members of the board of directors and the supervisory board, unless they have been appointed for an indefinite period or for a period exceeding five years or the deed of foundation provides otherwise; (ii) the deed of foundation of a public company limited by shares may prescribe voting thresholds for certain groups of shareholders (meaning that the votes of such a group of shareholders would only count for a certain maximum percentage even if they hold more shares); and (iii) a person making a public takeover bid and its related parties may not submit a second offer within six months of the first.
- 5 The approval of a prospectus for publication by the HFSA enables the company, under the EU prospectus passporting provisions, to offer its securities to the public or to have them admitted to trading on a regulated market in any EU member state. For the securities to be offered to the public or admitted to trading on a regulated market in another member state the HFSA must send an official certificate to the competent supervisory authority of that other member state. The same rules apply for passporting into Hungary a prospectus that has been approved in another EU member state.



The following are securities under Kazakh law:

- ❖ shares in a joint stock company;
- ❖ bonds; and
- ❖ derivative securities (for example, options, swaps, futures and depositary receipts).

Under Kazakh law the principal difference between a joint stock company ('**JSC**') and a partnership is that the ownership of a JSC is reflected by the issuance of shares to its shareholders, whereas the ownership of a partnership is reflected by participation interests that are held by its members. Only a JSC is entitled to issue shares. Please see our brochure '*Establishing Companies and Partnerships in Key Jurisdictions*' for more information on the various types of Kazakh entity.

A JSC may issue bonds, which may be traded (by auction or subscription) through an over the counter securities market or through a regulated market in accordance with the relevant market regulations.

SHARE CAPITAL

NOMINAL VALUE

All shares issued by JSC are required to have a nominal value. This is the basic value of shares distributed between the founders and will be set out in the JSC's foundation agreement. Shares must be denominated in the Kazakh national currency (Tenge) while bonds may be denominated in any currency. A JSC can issue both ordinary and preferred shares that will have an equal nominal value at the moment of the JSC's establishment.

AUTHORISED SHARE CAPITAL

The consideration received by a JSC for the shares issued by it on incorporation must not be less than the minimum charter capital that the JSC is required to have by law. The consideration must be fully paid, in Tenge, within thirty days of the date of registration of the JSC with the Ministry of Justice of the Republic of Kazakhstan.

As a minimum a JSC must have an authorised capital equivalent to the sum of the 'monthly calculated index' ('**MCI**') multiplied by 50,000 (approximately US\$ 485,776). The MCI is a figure calculated by reference to the budget of the Republic of Kazakhstan for the year in question (currently the MCI is set at a figure of 1,168 Tenge). For comparison, the minimum charter capital of a Kazakh LLP is equivalent to the sum of the MCI multiplied by 100 (currently approximately US\$ 973).



RIGHTS

The holders of ordinary shares in a JSC are entitled to participate in the management of its affairs, whereas the holders of preferred shares are not. Where a JSC has issued ordinary and preferred shares, dividends (including distributions of the proceeds of any winding-up) must first be paid to the holders of the preferred shares. Once these holders have received their full entitlements the holders of the ordinary shares will then receive their distributions.

Rights of Shareholders

A significant shareholder in a Kazakh JSC (i.e. a shareholder who owns or controls 10% or more of the JSC's voting shares) is entitled to:

- ❖ request the convocation of an extraordinary general meeting of shareholders or, if the board of directors refuses to convene such a general meeting, submit a claim to the court requesting that such a meeting be convened;
- ❖ request that the board of directors include certain matters in the agenda of a general meeting of shareholders;
- ❖ request that a meeting of the board of directors be convened; and
- ❖ request that an audit be carried out on the JSC by an appropriate audit firm (at that shareholder's expense).

ISSUING SHARES

AUTHORITY TO ISSUE SHARES

Under Kazakh law a JSC's decision to issue its initial shares must be taken at the first founders' meeting, held on incorporation of the JSC. Within one month of the registration of the JSC with the Ministry of Justice, it must procure the registration of the share issue with the Agency for Regulation and Supervision of the Financial Market and Financial Organisations (the '**Financial Agency**'). If this registration is not made within one year of the registration of the JSC the Financial Agency can apply to a court and request the liquidation or reorganisation of the JSC.

Any further issue of shares, or any changes to the class of existing shares, must be approved at a general meeting of shareholders.

STATUTORY PRE-EMPTION RIGHTS ON ISSUE

Shareholders in a JSC have a pre-emptive right to acquire any new shares that the JSC decides to issue. Each shareholder is entitled to purchase the newly issued shares pro rata to the amount and class of the shares currently held by that shareholder. The rule is intended to prevent the dilution of minority shareholders.



TITLE

Generally, transfers of a JSC's shares must be registered by making records in the relevant shareholder accounts of the parties to the transaction. Such accounts are often held with the JSC's corporate Registrar (whose responsibility is to maintain the shareholder records of the JSC). On receiving a request from a shareholder, the Registrar is obliged to confirm that shareholder's title to its securities, and the rights of any nominal holder of the shares, by providing the shareholder with excerpts from the relevant account. Such evidence must be provided by the Registrar within a reasonable timeframe.

Transactions involving securities that are made through a regulated securities market (e.g. the Kazakhstan Stock Exchange) must be registered with the stock exchange. On registration an 'exchange certificate' will be issued verifying the occurrence of the transaction and its registration with the stock exchange. Under Kazakh law transactions which are subject to this registration requirement are only deemed to be completed once the certificate has been issued. The certificate can be relied on as evidence of the acquirer's title.

NOMINAL HOLDERS

A shareholder may indirectly own shares through a nominal holder, who will hold the shares on behalf of that shareholder. Only certain entities (such as the Central Securities Depository, banks and brokers) may, if licensed, act as nominal holders. If a shareholder intends to hold shares in this way it must conclude a 'delegation contract' with the nominal holder and open a securities account in which the ownership of dematerialised securities can be registered. The 'delegation contract' must comply with certain formalities set out under Kazakh law. At the same time as the securities account is opened with the nominal holder, a related account will be opened with the Central Securities Depository.

TRANSFERRING SHARES

SHARE TRANSFER FORMALITIES

In order to transfer a JSC's shares the relevant parties are required to enter into share transfer documentation. As stated above, the transfer must be registered by making records in the shareholder accounts of the relevant parties. If the ownership of the shares is recorded in an account held with a nominal holder then the transfer will be complete either:

- ❖ if the buyer and seller are both clients of the same nominal holder, once that nominal holder has updated its records to show the transfer between accounts; or
- ❖ if the buyer and seller are not clients of the same nominal holder, once the transaction has been registered in their related accounts with the Central Securities Depository.



PRE-EMPTION RIGHTS ON TRANSFER

There are no pre-emption rights set out by law that apply to a transfer of shares. It should be noted that a person who, either alone or together with its affiliates, purchases 30% or more of the shares of a JSC, is required to publish an offer to acquire all of the shares of that JSC. Such an offer must be published in the appropriate media within thirty days of the relevant acquisition.

The other shareholders are entitled to accept the offer within thirty days from the date of its publication. Where the offer has been accepted, the shares must be paid for within a further thirty days. A person who has purchased 30% or more of a JSC's shares but fails to make, or honour, the above offer may be required to sell that part of its shareholding that exceeds the 29% ownership threshold to non-affiliates.

SHAREHOLDERS' AGREEMENTS

There is no requirement under Kazakh law for shareholders to execute a shareholders' agreement. There is a requirement to prepare a foundation agreement, in addition to the charter, in order to create a JSC. A JSC's charter regulates the relationships between the JSC and third parties, whereas the foundation agreement regulates the relations between the founding shareholders of the JSC. The foundation agreement becomes ineffective upon the registration of the JSC's initial issue of shares. As a result, shareholders will sometimes enter into a shareholder's agreement to regulate their relationships.

The Republic of Kazakhstan's Civil Code allows contracting parties to choose the governing law of their contract. Therefore, shareholders have the right to make their shareholders' agreement subject to the laws of a non-Kazakh jurisdiction. However, there are certain matters (such as the mechanics of share transfers or constitution of a JSC) that will be governed exclusively by Kazakh law irrespective of the choice of law set out in any shareholders' agreement.

MERGER AND INVESTMENT CONTROL

Under Kazakh antimonopoly legislation the prior consent of the Republic of Kazakhstan's Committee for the Protection of Competition (the '**Antimonopoly Body**') is required before the following acquisitions by a person or entity (or group of connected persons or entities) can be completed:

- ❖ an acquisition of more than 25% of the voting shares (or participatory interests) in the charter capital of a 'market entity'; or
- ❖ an acquisition that enables the acquirer to control the business activities of a company.



The above transactions are only subject to prior consent of the Antimonopoly Body where: (i) the aggregate book value of the assets of the parties to the transaction; or (ii) the aggregate volume of sales of goods or services by the relevant parties for the last financial year, exceeds approximately US\$ 14,573,282. If the parties fail to comply with the requirement for consent then the acquisition may be invalidated following a legal action brought by the Antimonopoly Body or a prosecutor.

OFFERING SHARES IN KAZAKHSTAN

Securities can be traded in the Republic of Kazakhstan either through a regulated or an unregulated securities market.

REGULATED SECURITIES MARKETS

Any transactions involving securities and other financial instruments made through a regulated securities' market must comply with the requirements set out by the Kazakhstan Stock Exchange ('**KASE**'). KASE is the only stock exchange in the Republic of Kazakhstan.

KASE has issued the Securities Exchange Trade Rules (the '**Exchange Rules**') which set out the requirements that must be followed to complete transactions involving securities that are traded on KASE. Under the Exchange Rules, relevant transactions (including the acquisition and sale of securities) must be concluded between 'participants of trading' (i.e. members of KASE or their authorised representatives) and must be registered in the KASE Trade System.

All disputes between participants of trading which relate to exchange transactions are resolved by KASE's Arbitration Committee. Any failure of a party to follow a decision of the Arbitration Committee can lead to that party losing its status as a person authorised to trade through KASE until the relevant decision has been complied with in full.

The requirements of membership of KASE include that the relevant party must have a licence for the broker-dealer activities that it will be undertaking, or a licence allowing it to conduct banking operations with national and foreign currencies. Non-Kazakh companies may be admitted to membership of KASE if they comply with one of the following requirements, either:

- ❖ the company is listed on a stock exchange which is part of the World Federation of Exchanges; or
- ❖ the company holds the relevant licences for the broker-dealer activity in question issued by an authorised body of its country of residence. In this case it is also necessary for there to be an international treaty under which the relevant authorised bodies agree to co-operate on the supervision of such activities and mutually recognise the licences of each jurisdiction.



UNREGULATED SECURITIES MARKETS

Transactions involving securities that are listed on an unregulated market (i.e. an over the counter market) do not need to conform to the Exchange Rules. These transactions simply need to be recorded in the records of the relevant company as noted above.

REGIONAL FINANCIAL CENTRE OF ALMATY

The Regional Financial Centre of Almaty (**'RFCA'**) is a special regime established in order to encourage the development of the Kazakh securities' market and to introduce the Kazakh capital to foreign securities markets. The KASE trading platform includes a special trade area for securities transactions carried out through the RFCA. Participants in the RFCA can simultaneously execute securities transactions on the stock exchange and the RFCA's trade area. The process of participating in trades on the RFCA, and their completion, is regulated by the Exchange Rules.

A participant in the RFCA must be a professional participant of the securities market and a licensed and registered Kazakh legal entity. Although the general rule is that legal entity must be registered with the Ministry of Justice, participants of the RFCA can also be registered with the Agency for Regulating the Activities of the RFCA (the **'RFCA Agency'**). The purpose of this is to reduce the registration formalities for legal entities wishing to become participants in the RFCA. The registration process should be completed within three business days of the date on which the required documentation is filed with the RFCA Agency. To be successfully registered a participant of the RFCA must have its executive body located in Almaty.

SECURITIES ISSUANCE REPORTS

Securities cannot be the subject of a sale in the Republic of Kazakhstan unless their issuance has been registered with the Financial Agency. In order to register an issue of securities a Securities Issuance Report and other documents must be submitted to the Financial Agency. The Financial Agency will consider these documents and issue a 'Certificate of State Registration of Securities Issuance' to the issuer.

There is no distinction under Kazakh legislation between 'public' and 'private' offers of securities. Accordingly an issuer will always be required to produce a Securities Issuance Report before offering its securities within the Republic of Kazakhstan. If an issuer wishes, or is required, to make amendments to the information in a Securities Issuance Report then it must register such amendments with the Financial Agency within fifteen days of the amendment being made.

An issuer must, on request, provide a person intending to purchase its securities with a copy of the Securities Issuance Report. The acquirer is able to apply to the Financial Agency to check that the version of the Securities Issuance Report that it has received from the issuer is the same as the version registered with the Financial Agency.



Requirements of a Securities Issuance Report

Amongst other matters, a Securities Issuance Report must contain information on:

- ❖ the issuer and its activities;
- ❖ any of the issuer's shareholders who own 10% or more of its shares;
- ❖ the issuer's management structure; and
- ❖ the securities on offer, their types, the method of payment, the calculation of income arising from them and the terms of their circulation.

The annual financial statements of the issuer, supported by audit reports, constitute an integral part of the Securities Issuance Report.

DISCLOSURES OF SHAREHOLDER DETAILS

UNDER THE SECURITIES LAW

The Kazakh Securities Law imposes certain disclosure obligations on 'registered persons'. These are any persons that are registered as the holders of securities with a JSC's corporate Registrar or who have opened securities accounts with a nominal holder. A registered person is obliged to inform the Registrar or nominal holder of any change to its personal details which were previously submitted to such Registrar or nominal holder within ten days of the change. Where the registered person fails to do this the Registrar or nominal holder will not bear any responsibility for any losses caused to others.

Nominal holders are under an obligation to disclose, if requested, information about their clients and the securities held on behalf of such clients to the corporate Registrar, the Central Securities Depository and the issuer of the securities. The Agency and the National Bank of the Republic of Kazakhstan are authorised to request any kind of information (including information that constitutes a commercial secret) from any issuer of securities and licensed 'professional participant' of KASE. Effectively, as a result of this statutory provision, Kazakh regulators are authorised to demand the disclosure of any information held by local custodians and broker and dealer companies.

UNDER THE JSC LAW

Under the Republic of Kazakhstan's Law on Joint-Stock Companies dated 13 May 2003 (the '**JSC Law**') a shareholder is obliged to provide certain information to a JSC to which that shareholder is affiliated within seven days of them becoming affiliated. The information includes details of that shareholder's holding and details of any other persons with which that shareholder is affiliated. The JSC Law expressly states that information about a JSC's affiliated persons does not constitute a commercial secret and is not legally protected information. Amongst other circumstances, a



shareholder will become affiliated with a JSC if it:

- ❖ becomes a major shareholder of such JSC (i.e. a holder of more than 10% of the total shares in the JSC);
- ❖ independently or together with its affiliates, can control 10% or more of the voting shares of the JSC;
- ❖ is an individual who is related to a major shareholder or an official of the JSC;
- ❖ is controlled by a major shareholder of the JSC or by one of its officials;
- ❖ is a legal entity which, together with a JSC, is under the control of a third party; or
- ❖ has the ability to control the decisions made by the JSC.

Every JSC is obliged to maintain a record of the details of its affiliated persons and submit this information to the Financial Agency on a quarterly basis. Any person who, together with its affiliated persons, intends to acquire 30% or more of the shares of a JSC must notify that JSC and the Financial Agency of such intention. The notice must specify the number and price of the shares that are intended to be purchased.

TOP FIVE TIPS RELATING TO KAZAKH SHARES

- 1 As a JSC's shares exist in non-documentary form (i.e. a share certificate does not need to be physically issued), a record of their issue and transfer is kept by the Registrar of the company.
- 2 Before acquiring equity interests in a Kazakh entity, it is important to assess the legal form and type of the entity in question. If buying shares in a Kazakh JSC, antimonopoly, currency control and corporate requirements will be applicable. There may also be certain other relevant requirements. For example, acquiring a stake in a Kazakh bank may trigger a requirement to first apply for the consent of the Financial Agency as well as other notification requirements.
- 3 Any transactions with securities on unregulated securities markets must be registered by the Registrar of a relevant company or a nominal holder by making records in the relevant shareholder accounts of the parties to such transaction.
- 4 Shareholders of a JSC do not have a pre-emptive right set out in the law to buy the shares of a selling shareholder.
- 5 Dividends received by Kazakh shareholders are exempt from taxation. As a general rule the income received by a non-Kazakh shareholder from investments in Kazakh companies is subject to an income withholding tax at a rate of 15%. However, this rate may be reduced if a bilateral double tax avoidance treaty applies between the Republic of Kazakhstan and the jurisdiction in which that non-Kazakh shareholder is resident.



The most common types of securities in Poland are:

- ❖ shares in a company;
- ❖ bonds; and
- ❖ warrants and other subscription rights granting an interest in share capital.

TYPES OF SHARE

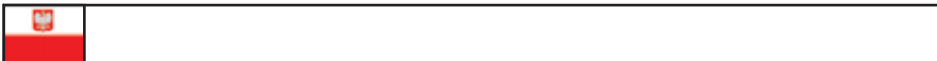
Under Polish law shares can be categorised as bearer, registered or dematerialised shares having the following characteristics:

- ❖ An owner of bearer shares is not mentioned in the share document or in any share register. Thus, under Polish law, the holder of the document constituting a bearer share will be recognised by the company as the person/entity authorised to exercise the rights vested in that share. A transfer of bearer shares requires very few formalities and may be effected by simply handing over the share document. A company therefore has a very limited ability to monitor trade in its bearer shares.
- ❖ In the case of registered shares, the owner of the shares is named in the share document. To dispose of registered shares, apart from a release of the shares, a written agreement (or at least a written note of the disposal on the document constituting the registered share) is required. Moreover, only the person/entity named as the owner in the share register kept by the management board of the stock company is recognised by the company as being authorised to exercise the rights attached to the share.
- ❖ Shares traded on regulated markets in Poland have no documentary form. Share certificates, if issued, lose their validity after the registration of the shares with the National Depository for Securities. The rights to publicly traded shares are created when the shares are registered in a securities account for the first time. The ownership of listed securities is evidenced by the entries made in the holder's securities account. A transfer of any publicly traded shares only becomes effective once the appropriate record has been made in the relevant securities accounts.

SHARE CAPITAL

NOMINAL VALUE

All shares in a Polish company must have a nominal value - the minimum amount the company must receive for any shares that it is to issue. The nominal value for all shares in a company must be the same. Shares must be denominated in Polish Zloty.



RIGHTS

The basic rights of shareholders are set out in the template articles included in the Polish Commercial Company Code (the '**Code**'). These entitle shareholders to, amongst other matters, participate in a company's profits and receive notice of, attend and vote at shareholder meetings. These articles automatically apply to all companies. However, any company may, and usually will, adopt its own articles which may override the provisions of the template articles to the extent allowed by the law.

Companies may create different shares or classes of share which grant different rights to their holders. In order to introduce special rights attached to one class of share, a resolution amending the company's articles to include details of the different rights attached to each class of share must be adopted.

ISSUING SHARES

Shares are issued following the adoption of an appropriate resolution at a shareholders' meeting. Share certificates are required to contain:

- ❖ the name, seat and address of the company;
- ❖ the registry court and the number under which the company is registered;
- ❖ the date of the company's registration and of the share issue;
- ❖ the nominal value, number, series and class of the share;
- ❖ in the case of registered shares, the amount paid in;
- ❖ limitations concerning the transferability of the share; and
- ❖ details of any obligations towards the company attached to the share.

STATUTORY PRE-EMPTION RIGHTS ON ISSUE

The Code contains pre-emption rights that will apply to any issues of new shares by a company. These rights require that, before any new shares are offered to any outside parties, a company must first offer them to its existing shareholders. The shareholders are entitled to acquire the shares pro-rata to the percentage of shares that they currently hold.

These statutory pre-emption rights may be waived by a resolution of the company's shareholders. In certain circumstances (for example where a company is making a public offering of its shares) it is common for such a resolution to be passed. Where the statutory pre-emption rights have been waived, a new resolution to waive the pre-emption rights must be adopted every time the share capital is raised.

Rights of Shareholders

The following are some of the more common rights that shareholders of Polish companies acquire by virtue of holding a certain percentage of the company's voting shares:

- 10% - call an extraordinary general meeting;
- have an item placed on the agenda for an annual general meeting;
- 25/33% - depending on the circumstances, block a special resolution (just over 25% or 33% is required);
- 50% - block an ordinary resolution;
- pass an ordinary resolution (just over 50% is required);
- remove a director of the company (just over 50% required);
- 66/75% - depending on the circumstances, pass a special resolution;
- 90% - squeeze out minority shareholders in public companies; and
- 95% - squeeze out minority shareholders in other companies.

TITLE

Ownership of a company's shares is not formally recorded in any public record, unless there is only one shareholder in the company. If this is the case then details of the sole shareholder need to be registered with the National Court Register.

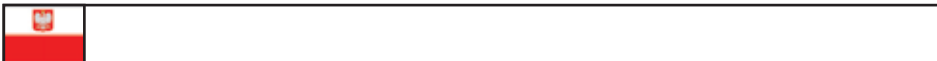
Details of the owners of registered shares are recorded in register of shares kept by company's management board. Details of the owners of bearer shares are not kept in any register. However, if a holder of bearer shares wants to exercise its right to vote at a shareholders' meeting it must register itself with the company as the holder of the shares in advance of the meeting.

TRANSFERRING SECURITIES

SHARE TRANSFER FORMALITIES

To transfer the ownership of registered shares in a Polish company possession of the share must be given to the new owner. This is effected by entering a written declaration of the transfer either on the share certificate or in a separate transfer instrument. At the request of the transferee of the share the board will make the appropriate changes to the company's register of shares.

To transfer the ownership of bearer shares it is sufficient to hand over the documents constituting the shares to the new owner. However, for evidential purposes it is always advisable to conclude a written agreement setting out the transfer of ownership of the shares.



LIMITATIONS ON TRANSFERS

It is common for a company's articles to contain provisions limiting the transfer of its shares. Under these provisions the consent of the company is necessary before any transfer of registered shares can be effected. Where such consent is required it must be given by the management board in writing.

If the company refuses to give its consent to the transfer, the provisions commonly state that it must designate another transferee within a period of not more than two months from the date on which the company is notified of the proposed transfer. The consent of the company is not required to effect a transfer of shares under any enforcement proceedings, irrespective of whether the articles contain provisions requiring that consent be obtained.

MERGER AND INVESTMENT CONTROL

In addition to EU merger control legislation, the Polish Office of Competition and Consumer Protection will investigate the acquisition of one company or group by another if the acquisition may have the effect of substantially limiting competition in the market.

The Office has the power to veto or impose conditions on any transaction which it feels may have such an impact on the market. It is therefore advisable to approach the Office in advance of any transaction which could meet this test.

When is a prospectus required?

The general rule is that a prospectus must be prepared and filed with the PFSA before any offer of shares or similar securities is made to the public. However, a prospectus is not required where:

- ❖ the offer is made to less than 100 persons, other than any qualified investors;
- ❖ the minimum consideration that can be paid by an investor is at least €50,000 or the zloty equivalent thereof;
- ❖ the shares being offered are denominated in amounts of at least €50,000 or the zloty equivalent thereof; or
- ❖ the offer concerns securities whose total value, calculated on the basis of the issue price, does not exceed, over a period of consecutive 12 months, €100,000 or the zloty equivalent thereof.



OFFERING SECURITIES ON POLISH REGULATED MARKETS

The market on which shares are most commonly listed in Poland is the Warsaw Stock Exchange ('**WSE**'). The market does not stipulate any minimum admission requirements with respect to factors such as either the company's size or its market capitalisation.

Companies listing their shares or similar securities on the WSE are required to produce a prospectus that is compliant with the Public Offering Law. A prospectus must be submitted to the Polish Financial Supervision Authority ('**PFSA**') for approval before it can be issued to investors.

DISCLOSURES OF SHAREHOLDER DETAILS

Under the Public Offering Law, in the following circumstances a shareholder must notify the PFSA and the relevant publicly traded company of any purchase or sale of that company's shares:

- ❖ if, as a result of purchasing shares in a publicly traded company, a shareholder reaches or exceeds a threshold of 5%, 10%, 20%, 25%, 33%, 50% or 75% of the overall number of votes at a shareholders' meeting;
- ❖ if, prior to a sale of shares in a publicly traded company, a shareholder owned shares entitling him to at least 5%, 10%, 20%, 25%, 33%, 50% or 75% of the overall number of votes at a shareholders' meeting and, as a result of the sale, the entitlement fell to or below one of these threshold amounts;
- ❖ if shares of a company traded on the Official Exchange Market representing at least 2% of the overall number of votes at a shareholders' meeting are purchased or sold by any shareholder who already owns shares representing more than 10% of the votes at a shareholders' meeting; or
- ❖ if any person who holds shares representing more than 33% of the votes at a shareholders' meeting purchases or sells shares of the company representing at least 1% of the overall number of votes at a shareholders' meeting.

The notification must be made within four days of: (i) the date on which the relevant shareholder's percentage ownership changed as indicated above; or (ii) the date on which the shareholder learned or, provided that he acted with due care, could have learned about any such change. The duty to notify applies regardless of whether the sale or purchase was effected through a single transaction or through a series of transactions.



TOP FIVE TIPS RELATING TO POLISH SECURITIES

- 1 Polish tax resident shareholders are required to pay Polish income tax on dividends that they receive from a company at a rate of 19%.
- 2 Shares of Polish listed companies on the WSE are traded in dematerialised form (there is no documentary form for listed shares). The securities registration system is managed by the National Depository for Securities. Under the depository-settlement model adopted in Poland securities are registered as electronic book entries in deposit accounts managed for the relevant holders. The National Depository for Securities is responsible for the clearing and settlement of transactions carried out on the WSE.
- 3 An increase of share capital requires an amendment to the articles of the company and can be effected by way of an issue of new shares. The new shares may be taken up by way of:
 - ❖ an offer being made by the company and its acceptance by a specified offeree (private subscription);
 - ❖ an offering of the shares solely to the shareholders who have pre-emptive rights (closed subscription); or
 - ❖ an offering of the shares by way of an announcement addressed to persons who do not hold a pre-emptive right to acquire them (open subscription).
- 4 Where it is in the best interests of the company, the general meeting of shareholders may resolve to deprive shareholders, in whole or in part, of their pre-emptive right to acquire new shares. In order to be approved the resolution must be passed by a majority of at least 80% of the votes. The management board must present to the meeting an opinion justifying the reasons for the exclusion or limitation of the pre-emptive rights.
- 5 Certain basic details of any pledge taken over shares in a Polish company should be registered in the company's share register. The registration should include details of any authority granted to the holder of the pledge to exercise the voting rights attached to the shares that are the subject of the pledge in the circumstances set out in the pledge document. It is important for this registration to be made as without it the pledge holder may not be able to vote the shares when required.



Under Romanian law, only joint stock companies are entitled to issue securities for listing on the stock exchange market. The following are common securities under Romanian law:

- ❖ shares – equity interests of equal value issued by a company as consideration for the participation of the shareholders in its registered capital;
- ❖ bonds – negotiable instruments representing a long term debt with each individual bond unit conferring equal rights on the holder (pure debt security);
- ❖ preference shares – confer all the rights of a shareholder, save for the right to vote at a General Shareholder Meeting ('**GSM**'); and
- ❖ convertible bonds – bonds that can be converted into shares if certain conditions are met.

Equity interests in the following entities do not qualify as securities under Romanian law: a civil partnership (*societate civila*); a commercial partnership (*societate in nume colectiva*); a limited liability company (*societate cu raspundere limitata*); and a limited partnership (*societate in comandita simpla*).

The Romanian National Securities Commission ('**CNVM**') is the authority in charge of overseeing the Romanian markets. The CNVM is an autonomous administrative authority, acting under the supervision of the Parliament.

EQUITY AND DEBT SECURITIES

EQUITY SECURITIES

Subject to certain basic limitations, shareholders are free to determine the nominal value of a company's shares. The law states that shares must have a minimum value of RON 0.1 (approximately €0.03). Shares cannot be issued on a market for less than their nominal value. Ordinary shares provide shareholders with the right to: (i) attend general shareholder meetings; (ii) request information on the management or corporate aspects of the company; (iii) convene a GSM (subject to the shareholder holding a certain percentage); (iv) receive dividends and distributions on liquidation, as well as any reimbursements of the shareholder's contribution, if any; and (v) subscribe for any newly issued shares in preference to any outside parties.

Although Romanian capital markets legislation refers to 'classes of shares', for the time being different classes of share are not permitted under Romanian law. The only exception is the distinction between ordinary shares and preference shares. Preference shares may only be issued if specifically permitted by the company's statutes. Preference shareholders benefit from all of the rights usually attached to ordinary shares, save for the right to vote – they only have voting rights at special meetings of the preference shareholders. Preference shareholders may attend the GSM but are not allowed to vote. However, preference shareholders have a right to receive a dividend before the holders of the ordinary shares. Preference shares cannot account for more than a quarter of the registered capital of a company.



DEBT SECURITIES

Bonds may be issued for a value of no less than RON 2.5 (approximately €0.07). The value of any subscribed bonds must be fully paid on issue. Each unit of every bond must have the same value and must grant their owners equal rights. Unlike shareholders, holders of debt securities have no right to participate in the decision making process of the company. However, bondholders often hold bondholders' meetings which are operated in a similar way to shareholders' meetings. The holders of debt securities are entitled to oppose any transaction that may affect their rights, including the issuance of new bonds or the amendment of the terms and conditions attaching to the bonds.

PRE-EMPTIVE RIGHTS

Pre-emptive rights to capital securities can themselves constitute securities that can be traded on the stock exchange market. In order for this to happen an extraordinary GSM must issue a decision allowing the trading of such rights. A registration document is then drawn up by the issuer and submitted to both the CNVM (in order to register the rights as securities) and the regulated market operator. The registration document must also be published in a national daily newspaper and on the market operator's website.

CONVERTIBLE BONDS

Convertible bonds may be admitted to trading on a regulated market only if the related shares are already admitted on the same market. Before the bonds will be admitted the CNVM must agree that investors have at their disposal all of the information necessary to form an opinion on the value of the shares to which the convertible bonds relate. When bonds are convertible into shares, the prospectus must provide information on the period of time in which the conversion option may be exercised as well as details of the conversion mechanism. Where conversion of a bond is not possible, the holder will retain all of its rights as a bondholder.

ISSUING SECURITIES

PROCEDURE FOR ISSUE

The decision to issue securities (whether by a listed or non-listed company) is generally made by a company's shareholders at an extraordinary GSM. The GSM may delegate to the company's management the power to decide whether to issue securities and any applicable terms.

Companies registered with the CNVM may increase their share capital by issuing shares, which must be fully paid on subscription, subject to certain specific legal conditions. The company will need to produce public offering documentation containing information required by the CNVM. From the date of submission of the required documents to the CNVM until the date of commencement of the public offer the intermediary, issuer and any persons acting jointly with them cannot deal with any securities issued by the target company.



As in many jurisdictions, any holder of securities has a pre-emptive right to subscribe for new securities issued by the company in preference to any outside parties and pro rata to the percentage of securities that the holder currently owns.

SUBSCRIPTION FOR SECURITIES

Subscribers for the securities of non-listed companies must sign the company's register and, if applicable, complete certain subscription forms. A subscription for securities issued by listed companies must be completed through authorised intermediaries. The settlement of transfers, registration of the change of ownership of securities and other financial instruments, the payment and clearing operations, as well as any other related operations must be carried out by entities that hold an appropriate authorisation from the CNVM.

A company cannot subscribe for its own shares except where such a subscription has been approved by an extraordinary GSM. The subscription will be subject to certain restrictive conditions. For example, the value of the shares subscribed for by the company cannot exceed 10% of the company's registered share capital. Where the shares are being acquired in order to distribute them to the company's employees then the shares must be so distributed within twelve months of the subscription date. If any of the applicable conditions are not met then the company must sell the relevant shares within twelve months of their acquisition.

Rights of Shareholders

The following are some of the common rights that shareholders of Romanian companies are entitled to exercise by virtue of holding a certain percentage of the company's voting shares:

- 1 share - prevent any merger of the company, if such merger would result in increased obligations applying to the shareholders;
- 5% - request that a GSM be convened;
- propose new items for inclusion on the agenda of the GSM;
- 10% - request an audit of the activities of the company's management;
- 33.3% - block decisions of an extraordinary GSM (just over one third is required);
- 50% - block decisions at an ordinary GSM;
- pass decisions at an ordinary GSM (just over 50% is required); and
- 66.6% - pass decisions of extraordinary GSM (two thirds is required).

TITLE

In a Romanian company, legal title to nominal shares is granted by the registration of the name of the holder in the company's Register of Shareholders. In addition, in the case of documentary shares (which may be issued by unlisted companies), the share certificate will include the name of the owner. However, the issuance of share certificates is becoming increasingly rare as even unlisted companies often issue shares in dematerialized form. There are specialised companies



that maintain the shareholder registers of listed companies.

Legal title to bearer shares is held by the person with possession of the shares. Unlike common law jurisdictions, under Romanian law there is no concept of splitting the 'legal' and 'beneficial' title to a share. 'Trust' structures are also not recognised.

TRANSFERRING SECURITIES

GENERAL RULES

The procedures for transferring the ownership of shares differ depending on whether the shares are in registered or bearer form. Registered shares are transferred by noting the transfer in the company's shareholders' register and, where the shares are constituted by a physical document, by the transferor and transferee signing a note of the transfer on the relevant document. Agreements for the purchase of shares of unlisted companies and, consequently, the associated changes to the shareholding structure must be registered with the Trade Registry. Only the person registered as the holder of registered shares will be recognised by the company as being entitled to exercise the rights attached to those shares. If the company is listed on the stock exchange market there will be additional market rules that must also be followed.

The transfer of the ownership of bearer shares is achieved by handing over the documents constituting the shares to the transferee. Detailed provisions governing the transfer of a company's securities may be set out in its articles of association or any shareholders' agreement. As a result it is important to check these before completing any transfer.

RESTRICTIONS ON TRANSFER

The main restrictions that are usually imposed on transfers of the shares of Romanian companies are: (i) rights of first refusal which must be set out in the company's articles of association in order to be enforceable, which allow shareholders to control any transfers to third parties; or (ii) pre-emptive rights provided directly by law in relation to a share capital increase only, which allow shareholders to avoid being diluted.

Generally, pre-emption clauses provide that a shareholder acquiring shares by exercising its pre-emption rights, must do so on the same terms and conditions as those agreed with the proposed third-party buyer. It is possible to provide for the appointment of an expert to determine the appropriate price of shares.

Clauses prohibiting share transfers must be expressly set out in the company's constitutional documents. As mentioned above certain restrictions apply to the acquisition by a company of its own shares. Where securities are listed, a person who has knowledge of 'inside information' relating to a company is prohibited from using that information to acquire or dispose of, for his own account or for the account of a third party, the securities of the company to which the information relates.



CHANGE OF CONTROL

Where a party is acquiring shares it should ensure that there are no agreements that would terminate, or which may impose sanctions on the target company, as a result of the change of ownership. Such clauses are often found in, for example, leasing and loan agreements. In the latter case, the target company may be obliged to repay its borrowings on a change of control.

MERGER AND INVESTMENT CONTROL

MERGER CONTROL

In certain circumstances, mergers between parties that are not caught by the EU Merger Control Regulation may still be subject to approval by the Romanian Competition Council. The requirement to obtain this approval will apply if the following conditions are both met:

- ❖ the combined worldwide turnover of the undertakings concerned (and their groups) in the financial year preceding the date of the transaction is in excess of €10 million; and
- ❖ the turnover in Romania of each of at least two of the undertakings concerned in the financial year preceding the date of the transaction is in excess of €4 million.

Any failure to notify the Competition Council of an appropriate transaction, or any provision of incorrect or incomplete information during the approval process, will expose the relevant party to a fine of up to 1% of that party's total turnover in the financial year preceding the date on which the penalty is imposed. In addition, if the merger is completed before the Competition Council issues its approval then the relevant parties could be fined up to 10% of their total turnover in the financial year preceding the date on which the penalty is imposed. The Competition Council may impose the fines at any time within five years of the date of the infringement.

SPECIAL PURPOSE COMPANIES

Specific authorisations and regulations are required for a company to undertake certain activities. These will vary depending on the company's purpose or status (i.e. whether it is a public or private company). For example, transfers of the shares of banking or insurance companies must be authorised by the relevant supervisory body (respectively, the National Bank of Romania or the Insurance Supervisory Commission).

INVESTMENT CONTROL

Investments into Romania by non-Romanian persons or entities are generally not subject to any prior approval by a public authority. There are certain exceptions to this rule, for example investments in companies operating in industries such as gaming, security, specific areas of research, security of IT systems used for national defence and any other industry where the



company is benefiting from information classified as secret for national defence purposes.

In addition, no consents or approvals are generally required for the flow of funds out of the jurisdiction. A new foreign investment law is currently being drafted and is expected to be debated in Parliament during the first quarter of 2008.

OFFERING SECURITIES

PRIVATE PLACEMENTS

Until recently Romanian legislation described private placements as offers to invest in securities that are made to a small group of not more than 35 investors, and such offers were regulated by the CNVM accordingly. However, in early 2004, these regulations were repealed.

Currently, the term 'private placements' refers in Romania to a transfer of securities conducted using the so-called 'alternative trading system'. These are transactions involving securities that are completed in a regulated environment but outside of the stock exchange market. Such transfers are governed by new regulations approved by the CNVM.

PUBLIC OFFERS

A public offer is an offer of securities either: (i) on a regulated stock market; or (ii) to the public by way of promotion, advertising or the use of financial intermediaries. To make a public offer an issuer must produce a prospectus and submit it with the necessary application form to the CNVM for approval. The application must also be accompanied by the draft announcement of the public offer and details of the price for which the securities will be offered.

The prospectus must contain information on the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of any guarantor of the issuer's obligations as well as details of the rights attached to the securities on offer. In addition, the prospectus must also contain a summary of the risks associated with the issuer, any guarantor of the issuer and the securities on offer. In accordance with the EU's prospectus passporting regulations, an issuer incorporated in the EU may submit a prospectus that has already been approved by the relevant authority in another EU member state accompanied by the required certificate from that relevant authority.

The CNVM must decide whether to approve the prospectus within ten business days from the registration of the request. This time limit will be extended to twenty business days if the securities are issued by an issuer which is applying for its securities to be admitted to trading on a regulated market for the first time or which has not previously offered securities to the public. If any request is made by the CNVM for additional information, or if the issuer wishes to make amendments to the information already contained in the prospectus, then the above time limits for approval will start to run again from the date on which the information or amendments are provided.



During the period of time between the submission of the application and the approval of the prospectus, the issuer and any intermediary involved are forbidden: (i) to make any offer to the public of the securities that are the subject of the offer; (ii) to accept full or partial payments for the securities that are the subject of the offer; or (iii) to deal with the securities that are the subject of the offer in any other way. Once approved by the CNVM the prospectus will be valid for twelve months after its publication, and may be used for several securities issues during this time period, provided that the information it contains is updated each time.

When is a prospectus required?

The general rule is that a prospectus must be prepared and filed with the CNVM before any offer of securities is made to the public. A simplified form prospectus is required where:

- ❖ the offer is addressed to less than 100 investors, other than qualified investors;
- ❖ the minimum consideration that can be paid by an investor is at least €50,000;
- ❖ the securities being offered are denominated in amounts of at least €50,000; or
- ❖ the total consideration for all securities being offered, including any offered in the last 12 months, does not exceed €100,000.

Amongst other circumstances, no prospectus is required where:

- ❖ the offer is addressed solely to qualified investors;
- ❖ the securities are to be allotted in connection with a merger;
- ❖ the securities are to be allotted as part of a bonus issue free of charge to existing shareholders;
- ❖ shares are issued in substitution for previously issued shares of the same class and the issue does not involve any increase in the share capital; or
- ❖ the securities are offered as consideration for the acquisition other securities under a takeover offer.

DISCLOSURES OF SHAREHOLDER DETAILS

Where, following the acquisition or sale of securities issued by a company admitted to trading on a regulated market, the proportion of voting rights held by a person reaches, exceeds or falls below 5%, 10%, 20%, 33%, 50%, 75% or 90% of the total voting rights of the company then that person must notify the company, the CNVM and the regulated market on which the securities are listed. The notification must be made within a maximum of three business days from the date on which the relevant threshold was crossed.



In addition, any person who as a result of a purchase of any number of shares holds 33% or more of the voting rights in a listed company must make an offer to all of the company's other shareholders to acquire all of their holdings. The offer must be made no later than two months from the date on which this threshold is reached or crossed. Until the public offer has been made all of the rights attached to those securities that exceed the 33% threshold, including the right to vote, are suspended.

TOP FIVE TIPS RELATING TO ROMANIAN SECURITIES

- 1 It is forbidden for a Romanian company to provide any loans, issue any security or otherwise provide financial assistance in connection with the purchase of its shares by a third party.
- 2 Commonly investors will invest in the securities of listed Romanian companies through a broker. When contracting with a broker it is important to ensure that the brokers' fees are made subject to the broker achieving a minimum return on the investment for the investor. Investment funds could be a better alternative for investing in securities. Such funds are regulated by the CNVM. Compared with a direct investment, the return achieved by investing through an investment fund may be lower but the risk to the investor will also be lower.
- 3 Where an owner of registered shares has pledged them to another party, only the owner may exercise the voting rights attached to those shares. However, where an owner has granted an 'usufruct' over shares, the owner will be entitled to vote at any extraordinary shareholders meetings of the relevant company but the holder of the 'usufruct' will be entitled to vote at any ordinary shareholders meetings.
- 4 It is possible for pre-emptive rights in favour of a shareholder to be separated from the shares held by that shareholder that give rise to the rights and independently transferred. Since 2004 a special regulation of the Bucharest Stock Exchange has set out the terms and conditions on which pre-emptive rights may be traded.
- 5 Romanian joint stock companies have three component bodies, namely the shareholders, the administrators and the auditors. Only joint stock companies can issue bearer shares and thereby enable investors to hold shares anonymously, although (particularly where their shares are listed) they are subject to greater levels of regulation than other types of Romanian company.



The following are common securities under Russian law:

- ❖ shares;
- ❖ debt securities (corporate bonds, state bonds and municipal bonds);
- ❖ Russian depositary receipts;
- ❖ mortgage securities;
- ❖ negotiable instruments of title; and
- ❖ derivative securities.

Partnership interests do not qualify as securities.

SHARE CAPITAL

NOMINAL VALUE

All shares in Russian companies are required to have a nominal value. This is the minimum amount that the company must receive for any shares that it is to issue. Capital contribution to the share capital (known as charter capital) is a common way of financing Russian companies. Such contributions may be made either for cash or non-cash consideration. Additional capital contributions (i.e. a capital increase) may only be made upon full payment of the initial charter capital.

Russian civil law requires that the value of a company's net assets must not be less than the value of its charter capital at the end of its second, and each subsequent, financial year. If the value of the net assets becomes lower than that of the charter capital then the charter capital must be decreased. The greater the charter capital is the more difficult it becomes to meet this requirement. One solution is to allocate the major part of any contribution as a share premium with only a small part constituting a payment towards the charter capital – this results in the charter capital being kept to a minimum.

If the value of the net assets drops below the required minimum value of charter capital that companies are required to have, or becomes a negative figure, then the company must put itself into liquidation. If the company does not do this, then an authorised government body may seek the liquidation of the company pursuant to a court decision. Such a risk is, however, limited under current practice.

AUTHORISED SHARE CAPITAL

A Russian company is required to state its authorised share capital on registration. The authorised share capital is the maximum amount that the nominal value of all of the company's issued shares may add up to. Once the company has issued such number of shares as is equal to the number allowed by the authorised share capital then the company may not issue any further



shares unless the shareholders amend the charter of the company to increase the amount of the authorised share capital. In the interests of time, the decisions to increase the charter capital and issue new shares can be taken together.

ISSUING SHARES

PROCEDURE FOR ISSUING SHARES

The issue of shares by a Russian joint-stock company is a time-consuming process even where the shares are sold in a private placement or as consideration for the capitalisation of a wholly-owned subsidiary by its parent company. The procedure involves the following main steps:

- ❖ Decision to increase charter capital. The company's shareholders (or, in limited circumstances, the Board of Directors) must resolve to increase the company's charter capital by way of an issue of new shares. The resolution must include details of the main terms of the proposed share issue.
- ❖ Decision to issue new shares. The resolution to issue new shares is normally prepared by the Board of Directors and must be approved no later than six months from the date of the shareholders' resolution to increase the charter capital. This board resolution will largely reiterate the contents of the shareholders' resolution. Where the number of purchasers exceeds 500 persons, the company must also prepare a securities prospectus.
- ❖ State registration of the issue. The resolution to issue new shares must be registered with the Russian Federal Service for the Financial Markets ('**FSFM**'). The statutory period in which the FSFM should complete the registration is one month, but in practice it may take three or more months. The list of documents that must accompany the submission is extensive. In addition, the company must pay the applicable securities issuance state duties established by the Tax Code. As of the end November 2007 the maximum amount of this duty was RUR 100,000.
- ❖ Placement of shares. The placement of the new shares must be made within the subscription period set out in the resolution to issue new shares (and the securities prospectus if applicable). This period may not be longer than one year from the date of the state registration of the share issue.
- ❖ State registration of a report on the results of the share issue. Within thirty days from the expiration of the subscription period (or, if all shares are placed prior to the expiration of this period, within thirty days from the date of placement of the last share) the company must file with the FSFM a report on the results of the placement. By statute the FSFM has fourteen days from the date of receiving the report to complete its registration, but in practice it may take two or more months. Where an underwriter is involved in the issue



process, the company will be able to send a notification to the FSFM in lieu of submitting the report.

- ❖ Registration of amendments to the charter. Finally, the company must approve and register an amendment to its charter reflecting the increase of its charter capital.

STATUTORY PRE-EMPTION RIGHTS ON ISSUE

Russian legislation contains pre-emption rights that will apply to the issue of shares by a company. These rights require that, before any new shares are offered to any outside parties, the company must first offer them to its existing shareholders pro-rata to the percentage of shares that they hold. These rights will apply to both open subscriptions (i.e. where the shares are offered for subscription to an unlimited group of persons) and closed subscriptions (i.e. where the new shares are distributed among a defined group of purchasers), but in the latter case the rights only apply to those shareholders who did not vote in favour of, or abstained from voting on, the share issue. These rights cannot be disapplied by the company's charter.

Rights of Shareholders

The following are some of the most common rights that shareholders of Russian companies acquire by virtue of holding a certain percentage of the company's voting shares:

- 1% - obtain information from the shareholders' register about the identity of shareholders and their shareholdings;
- 2% - have an item placed on the agenda for an annual general meeting;
- 10% - call an extraordinary general meeting;
- 25% - veto resolutions that require 75% of the votes for approval (just over 25% is required);
- 50% - veto resolutions that require over 50% of the votes for approval;
- pass resolutions approving such matters as decreasing the charter capital, appointing the general director and other officers, distributing dividends and approving annual accounts (just over 50% is required);
- remove a director from office (just over 50% is required); and
- 75% - pass resolutions approving such matters as amendments to the charter, reorganisation and redemption of the company's shares.

TITLE

Title to the shares of a Russian company, as well as the absence of any encumbrances over such shares, is confirmed by entries in the securities account of the shareholder in the company's shareholders' register. The register is either maintained by the company itself or by a professional licensed registrar (in either case, the '**registrar**'). A company with more than 50 shareholders is obliged to engage an independent registrar.



Russian law does not recognise a distinction between legal and beneficial ownership. Although a shareholder may transfer its shareholding to a 'nominee holder', whose name will be recorded in the register of shareholders, this will not help to protect the identity of the 'beneficial' owner. By law only a licensed custodian may act as a nominee holder and the identity of the 'beneficial' owner will need to be disclosed before each shareholders' meeting. As a result, non-Russian entities are sometimes used as the owners of Russian securities and the identities of the true owners are hidden behind such entities.

TRANSFERRING SHARES

The only way to transfer title to shares in a Russian company is for the seller to execute a 'transfer order' – a short standardised transfer document. Once this form has been executed the company's register of shareholders is then updated to record the change of ownership. In addition, the buyer will need to pay a fee to the company's registrar (i.e. the company itself or the independent registrar). The amount of this fee will be determined by the relevant registrar. Although the law expressly prohibits this amount being calculated as a percentage of the value of the shares, in practice, the amount will most likely be influenced by the value of the consideration paid for the shares.

A share purchase agreement by itself will not be sufficient to transfer title to shares in Russian companies. However, such an agreement is always necessary as there must be a transaction documented in writing underlying the transfer order. The transfer order will usually refer to the consideration payable to the seller under the share purchase agreement.

The mechanism for completing share transfers used in jurisdictions such as the United Kingdom, i.e. by way of an exchange of solicitor's undertakings, is not recognised in Russia. Usually relatively complex completion mechanisms are adopted which require the shares to be placed with a depositary prior to completion. As a result, a number of depositaries have created 'completion products' that are designed to assist parties who are keen to have a transfer of shares and payment of the purchase price taking place simultaneously or within the shortest possible time gap.

PRE-EMPTION RIGHTS ON TRANSFER

The position regarding pre-emption rights on share transfers is different for closed joint stock companies and open joint stock companies. The law expressly prohibits the imposition of pre-emption rights on any transfers of shares of open joint stock companies.

A shareholder of a closed joint stock company wishing to transfer its shares will be required by law to offer the shares to the existing shareholders before they can be transferred to an outside party. This right may not be disapplied by the company's charter. In addition, the company's charter may contain a pre-emption right entitling the company to acquire its shares in the event that the existing shareholders choose not to exercise their pre-emption rights. Therefore, when acquiring shares in a closed joint stock company the buyer should first review any pre-emption



provisions in the company's charter and obtain waivers from the existing shareholders and, if necessary, from the company.

SHAREHOLDERS' AGREEMENTS

It remains largely uncertain whether a shareholders' agreement relating to a Russian company would be enforced by a Russian court. Recent court decisions have confirmed this risk. A ruling in 2006 on the infamous MEGAFON case (on the issue of the enforceability of a shareholders' agreement) declared that shareholders' agreements relating to Russian companies must be subject to Russian law. In addition nothing may be contained in such an agreement that is not already set out under Russian company law.

This decision is very controversial as it directly conflicts with the clearly defined principle of the freedom of contract in the Russian Civil Code. It also seems to prevent one of the main purposes of a shareholders' agreement, which is to regulate matters between the parties that are not clearly spelled out in the relevant law. It is possible that this ruling may be overturned by further decision of the courts in the future.

Nevertheless, at present investors prefer to move their joint venture structures into jurisdictions with more flexible corporate legislation. This is achieved by creating a joint venture company in another jurisdiction (commonly in Cyprus) and by entering into shareholders' agreements at this level. The joint venture company then acts as the sole shareholder in any Russian operating subsidiaries.

MERGER AND INVESTMENT CONTROL

Assuming no party has been officially identified as potentially holding a monopoly over a certain market, the consent of the Federal Antimonopoly Service ('**FAS**') is only required for a purchase of the shares of a Russian company if the total assets of the parties exceed RUR 3 billion or their total revenue exceeds RUR 6 billion. A post-transaction notification is required if the total assets exceed RUR 200 million. The valuation of the assets or revenues will include not only those of the purchaser and target, but also those of their respective groups.

The consent or notification requirements will equally apply to direct acquisitions of the shares of Russian companies as well as acquisitions that have the effect of causing a change of control of a Russian company (for example, by the acquisition of the shares of a non-Russian holding company of a Russian subsidiary). Transactions occurring within a group (for example as part of a corporate reorganisation) that would otherwise trigger the need for FAS consent will, assuming certain conditions are met, only need to be subsequently notified to the FAS. The conditions are that the structure of the group must have been disclosed to FAS and posted on its website at least one month prior to the transaction taking place, and that there must not have been any subsequent changes to the structure.



An acquisition of the shares of Russian companies that operate in certain regulated industries (such as banking, insurance, aviation, mass media and national defence) may be subject to additional government approvals.

OFFERING SHARES TO RUSSIAN RESIDENTS

PUBLIC LISTINGS

Generally, in order to list shares on a Russian stock exchange, an open joint stock company must meet a number of minimum requirements for the admission of its securities to trading and certain other specific requirements depending on the type of listing that is being sought. Such requirements address, amongst other matters, the level of capitalisation of the shares, the size of the free-float, the company's financial performance and the company's corporate governance structure. Additionally, each Russian stock exchange operates under its own set of listing rules which must include a basic set of rules established by the FSFM but which may also contain additional requirements.

When is a prospectus required?

A prospectus must be prepared and filed with the FSFM where the shares are issued:

- ❖ as part of an open subscription (i.e. where the shares are offered for subscription to an unlimited group of persons);
- ❖ as part of a closed subscription, but the number of purchasers will exceed 500 persons; or
- ❖ as part of a closed subscription and more than 500 shareholders are entitled to exercise pre-emption rights in respect of the share issue (i.e. those shareholders who did not vote in favour of, or abstained from voting on, the share issue).

OFF-SHORE LISTINGS

Many issuers choose to list their shares in the UK (on the Main Market of the London Stock Exchange or the AIM Market) in parallel with a domestic listing. Commonly, a listing outside Russia will take place using a Global Depositary Receipt programme which requires the prior approval of FSFM. A Russian issuer may not designate for placement and/or circulation outside Russia more than 35% of its total issued shares of the same class. Thus, a Russian issuer must place and/or circulate within Russia at least 65% of the total issued shares of that class. In addition, and subject to the above, no more than 70% of the total shares being placed under a single issue may be placed outside Russia.

To avoid these restrictions, some Russian issuers have preferred to use non-Russian holding companies as the entities whose shares or depositary receipts will be listed on a non-Russian



stock exchange. The FSFM views such practice as a mechanism for avoiding the provisions of Russian law and is also concerned that it diverts potentially tradable assets away from listing on Russian trade systems and distorts the price of any shares listed in Russia. The FSFM has highlighted its concerns to non-Russian investment banks that may advocate such listing structures. However, proposed amendments to the securities law that would effectively have extended the jurisdiction of the FSFM were not supported within the Russian Parliament and were subsequently revoked. As a result the position of the FSFM has not become law.

DISCLOSURES OF SHAREHOLDER DETAILS

Purchasers of ordinary shares in Russian joint stock companies are required to disclose certain information within five days from the date on which the shares are credited to their shareholder accounts. This disclosure requirement applies to:

- ❖ acquisitions of 5% or more of the company's total issued shares; and
- ❖ any changes to a shareholder's total percentage interest in the company which cause this interest to exceed or fall below certain percentage thresholds (i.e. 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%) of the company's total issued shares.

TAKEOVER RULES

A purchaser who, following an acquisition, holds more than 30% of the shares in an open joint stock company must comply with a set of detailed statutory requirements governing the acquisition of various levels of corporate control. These rules are fairly recent and the exact interpretation of some of them is yet to be clarified by the FSFM and the courts.

In general, these rules allow the purchaser to make a public offer to purchase the shares of other shareholders (a voluntary offer) and, conversely, obligate the purchaser to make an offer to acquire all of the remaining shares (a mandatory offer) if the purchaser has acquired more than 30%, 50% or 75% of the shares. If, after acquiring shares on the basis of a voluntary or a mandatory offer, the purchaser holds more than 95% of the voting shares, then either: (i) the remaining shareholders may require the purchaser to purchase their shares; or (ii) the purchaser may require that the remaining shareholders sell their shares to it.

TOP FIVE TIPS RELATING TO RUSSIAN SHARES

- I As a result of the new Russian takeover rules there is a risk that a purchaser taking over a Russian open joint stock company may end up paying an inflated price for the shares. This risk arises if the market learns of the proposed takeover (which may happen when certain regulatory filings are made) before the purchaser submits the offer to the FSFM. The price of the offer must not be less than the average market price of the shares for the six months



prior to the date on which the mandatory offer is submitted to the FSFM. If the market price increases (for example, as a result of a leak of the intention to make an offer when making a regulatory filing) on anticipation of a takeover before the offer is made then the increase will be automatically factored into the calculation of the six month average price. This problem should be reduced once the law is amended to make an offer subject to the obtaining of regulatory consents.

- 2 As mentioned above, it is difficult to make equity investments into joint stock companies as the process for issuing shares can be lengthy. It is therefore not common to incorporate a wholly owned subsidiary in the form of a joint stock company. Limited liability companies are better suited for this purpose. On the other hand, there is no public registry system for participatory interests in limited liability companies. This makes it difficult to assess whether unencumbered title to such interests can be transferred and it is therefore preferable for corporate entities into which external investors are to invest to take the form of joint stock companies.
- 3 It is unusual for investments in, and acquisitions of, Russian companies to exchange and complete on the same day. This often leads to a need for complicated completion mechanics to deal with the transfer or issue of shares against the payment of the consideration.
- 4 Unlike certain other jurisdictions, any shares in an open joint stock company held by the affiliates of another shareholder in that company are not added together when calculating the total number of shares held by a party for the purposes of determining whether a notification of a major shareholding must be made (i.e. there is no concept of 'concert parties' in this scenario). As a result it is possible for a shareholder to control a large number of a company's shares by holding shares through affiliates without having to disclose its identity. However, in the context of mandatory offers shares held by affiliates will be counted towards the threshold.
- 5 The law is unclear how many steps or 'generations' away from the target company must be considered within a group when calculating whether the merger control thresholds have been exceeded (i.e. whether FAS consent is required for an acquisition). There are two main approaches to interpreting the legislation. The first is to adopt a wide interpretation whereby the parent companies and direct and indirect subsidiaries of the relevant parties and all other companies in their group are counted when calculating the valuation. The second is to adopt a more restrictive interpretation whereby only the immediate parent, its immediate parent, the immediate subsidiaries and their immediate subsidiaries of those involved are counted. There are arguments in favour of both approaches but to date neither has prevailed. The FAS appears to favour the wider interpretation, as the model form of disclosure posted on its website shows a group of persons five generations removed from the company at the centre. However, the FAS has not formally confirmed this approach. Similar issues arise when determining whether there has been a change of control, for FAS approval purposes, of a Russian subsidiary on the acquisition of the shares of its indirect parent a number of levels further up the corporate structure.



Under Slovak law a security is defined as an instrument or record with a determinable financial value in a form specified by the law which has certain rights attached to it (for example, the right to demand certain assets or exercise certain rights against certain persons). The following are common types of security:

- ❖ shares in a Slovak company;
- ❖ interim certificates (see below);
- ❖ shares in mutual funds;
- ❖ bonds;
- ❖ bills of exchange;
- ❖ warehouse and goods warrants; and
- ❖ shares in co-operatives.

As shares are the most frequently issued securities in the Slovak Republic this chapter mainly focuses on issues relating to shares.

SHARE CAPITAL

Shares can only be issued by a joint stock company: (i) on its incorporation; or (ii) as part of an increase of its registered capital. Please refer to our brochure '*Establishing Companies and Partnerships in Key Jurisdictions*' for more information on the various types of Slovak company.

Slovak law does not set out any minimum or maximum nominal value for shares. However, all shares must have a nominal value which must be a positive whole number. The aggregate nominal values of all of the issued shares of a joint stock company must be at least SKK 1,000,000 (or €25,000).

ISSUING SECURITIES

Securities can be issued in certificated form (*listinné*) or book-entry form (*zaknihované*) and can be either registered securities (*na meno*), 'ordre securities' (*na rad*) or bearer securities (*na doručiteľ'a*). An 'ordre security' is a security on which the name of the owner is always listed (i.e. only securities constituted in certificated form can be 'ordre securities'). Upon their transfer an endorsement is marked on the certificate which will include the names of all previous owners of the security.

Usually the issuer can decide on the form and type of its issued securities. However, certain securities (for example, bearer shares, bonds and treasury bills) can only exist in book-entry form. In addition, a registered share may be issued in certificated or book-entry form but a bearer share may only be issued in book-entry form.



ISSUE OF SHARES

An issuer can decide to issue shares through a public or private offer. The procedures involved in the issue of shares vary according to the type of increase of the registered capital. The basic steps involved are:

- ❖ General Meeting - the company must hold a general meeting to approve the issue. To issue bearer shares, a company must publish an announcement of the meeting and its agenda in accordance with the provisions of the Commercial Code and the company's articles of association. To issue registered shares, the company must send notice of the meeting to the addresses of the shareholders specified in the company's list of shareholders. The relevant announcement must be given at least thirty days before the meeting.
- ❖ Subscription - a share is subscribed for by entering details of the subscriber in the subscribers' list or by the delivery by the subscriber of a letter confirming its intention to subscribe. As a general rule the subscriber is obliged to pay, within the time limit specified by the general meeting, at least 30% of the nominal value of the relevant shares (or such other percentage as is specified by the general meeting) and, if applicable, any additional share premium payable on the shares.
- ❖ Registration - once all shares have been subscribed for and the necessary amounts have been paid, the board of directors must apply for the increase of the company's registered capital to be registered in the Commercial Register.

PAYMENT OF THE SUBSCRIPTION PRICE

If a subscriber does not pay its subscription price in full before the capital increase is registered with the Commercial Register, the company will issue an interim certificate to the shareholder immediately after the registration has been made. The interim certificate is a registered security to which the rights arising from the shares that it substitutes and the obligation to pay all outstanding amounts of their issue price are attached. The provisions relating to the transfer of registered shares apply equally to a transfer of an interim certificate. The company will exchange an interim certificate for shares after the nominal value of the shares has been fully paid.

The subscriber must pay the required proportion of the subscription price within the earlier of: (i) the period stipulated by the articles of association; or (ii) one year from the date of the general meeting. If the subscriber defaults the company is entitled to claim interest at the rate set out in its articles of association or, if none is stated, 20% per annum. The subscriber may lose its shareholder rights if the required amount is not paid. If the subscriber still fails to pay within sixty days then the company may expel the subscriber and take back its shares. If this occurs within ninety days of the date on which full subscription was achieved, the subscription will be deemed ineffective, the rights of all subscribers will lapse and the company must refund all subscription payments plus 'common' interest (i.e. interest at a rate offered by banks in the location of the



company's registered office on current accounts as of the day on which the obligation to return the subscription amounts arose).

ISSUE OF BONDS

Many of the steps involved in an issue of bonds are similar to those involved in an issue of shares. For example, the issue must be approved at a general meeting of the company and, where the issue is by way of a public offer, a prospectus must be prepared and approved by the National Bank of Slovakia. It is also possible to issue bonds by way of a 'private' offer (i.e. an issue to a limited group of investors). Please see the section headed 'Offering Securities in the Slovak Republic' below.

Rights of Shareholders

The following are some of the more common rights that shareholders of Slovak companies acquire by virtue of holding a certain percentage of the company's voting shares:

- 1 share - receive a dividend or liquidation distribution;
 - attend and vote at general meetings;
 - participate in the management of the company;
 - petition the court to nullify a resolution that is contrary to the law and/or the company's articles of association;
- 5%
 - convene a general meeting;
 - request the directors include a matter on the agenda of a general meeting;
 - request that the supervisory board pursues any claim for damages which the company has against a member of the board of directors;
 - request the directors file a complaint (with the competent court) concerning any outstanding subscription payments against defaulting shareholders;
- 33.3% - block a special resolution (just over two thirds required);
- 50%
 - pass an ordinary resolution (just over 50% required);
 - block an ordinary resolution; and
- 66.6% - pass a special resolution.

PRE-EMPTION RIGHTS ON ISSUE

All shareholders of a joint stock company have a pre-emptive right to acquire shares that are to be newly issued by the company as well as convertible bonds or bonds with attached warrants. This right applies where a joint stock company increases its registered capital through monetary contributions. The right can be separately transferred, from the day that the general meeting resolves to increase the registered capital, by entering into a written assignment of the receivable.

Pre-emption rights may not be restricted or excluded in the articles of association. However, the rights can be restricted or excluded by a resolution passed at a general meeting called to increase the registered capital, but only if the company has good reason for doing so. At the general



meeting the board of directors must present a written report stating the reasons for excluding or restricting the rights as well as certain other information. Any restriction must apply equally to all shareholders.

TITLE

An issue of shares by a joint stock company (whether on incorporation or as part of a capital increase) must be registered in the Slovak Commercial Register. It is this registration that gives the subscriber the rights of a shareholder. Details of the individual shares also need to be registered in a specific register held by the Central Securities Depository of the Slovak Republic ('**CDCP**'), or in the securities account of another entity that is registered with the CDCP in which the shares will be held on behalf of the shareholder. The types of account in which a registration can be made are:

- ❖ An owner's account – the owner's account primarily contains data on the account owner and on securities kept in this account. The account owner is the owner of securities registered in the account. Members of the CDCP will open such accounts in the name of their clients. In this way a client and its shareholdings will be directly registered with the CDCP.
- ❖ A member's client account – a member of the CDCP can also open an account in its own name in which it will register securities that it holds on behalf of its clients. The member will not be the owner of the securities registered in this account.
- ❖ An account of a foreign central depository – the CDCP registers data on the securities of Slovak companies that are listed on non-Slovak stock exchanges. In this case details of the owners are registered in an account of the relevant foreign central depository held with the CDCP.

All types of security can be registered with the CDCP. When a company makes its first issue of securities, the CDCP will open a register for the company that contains information on both the company and its registered securities. Where a company has issued registered certificated shares it will need to engage the CDCP to maintain a list of the holders of these shares.

TRANSFERRING SHARES

SHARE TRANSFER FORMALITIES

Registered certificated shares are transferable by the endorsement and delivery of the certificate to the new owner. A transfer of registered shares is not effective against the company until it has been registered in the company's list of shareholders maintained by the CDCP. A transfer of a security that exists in book-entry form is completed by registering the transfer with the CDCP.



The CDCP will remove the transferred security from the account of the transferor and, on the same day, enter the security in the account of the transferee. This registration is carried out on the joint instruction of the transferee and transferor and the transfer is effective on the date of the registration.

The general rule under Slovak law is that a person will acquire good title to a security even if the transferor did not have the right to transfer the security. However, this principle will not apply where the buyer knew, or ought to have known, at the time of the transfer that the seller did not have the right to transfer the security. Transfers of registered shares may be subject to restrictions (such as pre-emption rights) set out in the company's articles of association. Transfers of bearer shares may not be restricted.

SQUEEZE-OUT PROCEDURE

A majority shareholder can buy out the minority shareholders of a listed Slovak company provided that the majority shareholder:

- ❖ has announced an unconditional mandatory or voluntary take-over offer for the whole of the issued share capital of the listed company; and
- ❖ holds at least 95% of the issued shares (which carry at least 95% of the voting rights) of the listed company. The majority shareholder's share will be deemed to include any voting rights attached to shares held by a third person where there is a written agreement governing the exercise of voting rights between the majority shareholder and that third person.

SHAREHOLDERS' AGREEMENTS

Even though it is not a common practice in the Slovak Republic, shareholders can enter into a shareholders' agreement. The agreement will set out any arrangements between the shareholders, for example as to the management of the company or more precise details of their rights and obligations. There are no special requirements for the form or content of such an agreement. However, it cannot contain provisions that contradict or circumvent the law or the company's articles of association.

Slovak law does not allow a shareholder to enter into an agreement with a company, its bodies or members of its bodies: (i) to obey instructions from the company or its bodies on how to vote; (ii) to vote for a proposal presented by bodies of the company; or (iii) to exercise its voting rights in a predetermined manner, in consideration for advantages provided by the company.

MERGER AND INVESTMENT CONTROL

In certain circumstances the Antimonopoly Authority of the Slovak Republic will investigate the acquisition of control of one company or group by another. This procedure will be triggered where:



- ❖ the combined global turnover of the parties to the merger was at least SKK 1.2 billion (approximately €36 million) for the last full accounting period preceding the establishment of the merged group and at least two of the parties to the merger achieved a turnover of at least SKK 360 million (approximately €10.8 million) each in the Slovak Republic for the last full accounting period preceding the establishment of the merged group; or
- ❖ at least one of the parties to the merger achieved a total turnover of at least SKK 500 million (approximately €15 million) in the Slovak Republic for the last full accounting period preceding the establishment of the merged group and at least one other party to the merger achieved a total global turnover of at least SKK 1.2 billion (approximately €36 million) for the last full accounting period preceding the establishment of the merged group.

The combined turnover of a party to the merger will be deemed to include, amongst other matters, the turnovers of all undertakings in which the relevant party directly or indirectly:

- ❖ holds more than half of share capital;
- ❖ is entitled to exercise more than half of the voting rights;
- ❖ may appoint more than half of the members of the undertaking's bodies; or
- ❖ has the right to manage the undertaking concerned.

OFFERING SECURITIES IN THE SLOVAK REPUBLIC

OFFERING SHARES

Where new shares are being issued as part of a public offer the issuer must prepare a prospectus that meets the minimum requirements set out in the 2001 Act on Securities and Financial Services. The prospectus must be approved by the National Bank of Slovakia and this will usually happen within ten working days of the date on which the draft prospectus is submitted for approval. This period will be extended to twenty working days if the public offering is made by an issuer whose securities have not before been admitted to trading on a regulated market and who has not publicly offered securities before. Any failure by the bank to meet these deadlines is not deemed to be an approval of the prospectus.

After the approval of the prospectus by the bank, the issuer must advertise its publication (which must reference where the prospectus is available for review) in at least one daily nationwide newspaper. This notification must be made before or at the same time as the public offer of shares. There are no special rules, such as prohibitions on financial promotions, applicable to an offer of shares to residents or non-residents of the Slovak Republic.



When is a prospectus required?

Amongst other circumstances, a prospectus is not required where:

- ❖ the offer is only made to qualified investors;
- ❖ the offer is made to less than 100 persons, other than any qualified investors, per EEA state;
- ❖ the minimum consideration that can be paid by an investor is at least €50,000;
- ❖ the securities being offered are denominated in amounts of at least €50,000;
- ❖ the total consideration for all securities being offered does not exceed €100,000 (taking into account all issuances in the prior 12 month period);
- ❖ shares are issued as a substitute for issued shares of the same type and issue of new shares is not related to an increase of the registered capital of the issuer; and
- ❖ the securities are offered as consideration for other securities, or as part of a merger or reorganisation, and a document containing equivalent information to that in a prospectus is published.

OFFERING BONDS

If a company decides to issue bonds through a public offer, it must publish the terms of the offer and certain other information, which will primarily contain details of:

- ❖ the issuer;
- ❖ the name of the bond and its nominal value;
- ❖ the method of income calculation (for example whether a fixed or variable interest rate) and dates of its payment;
- ❖ the date by which the nominal value is due;
- ❖ whether an application for admission of the bonds to one of the Stock Exchange markets will be submitted; and
- ❖ if applicable, the conditions for early redemption of the bond's nominal value.

The terms must be published in an appropriate daily nationwide newspaper no later than one week before, and also in the Commercial Bulletin no later than two months after, the start of the issue process. Any changes in the bonds' issue terms must be published in the same newspaper within ten days of the changes coming into effect. Except in respect of certain limited terms, the issuer cannot change the terms of bonds that have already been issued. If the final price and the number of offered securities cannot be stated the issuer must detail how this information will be calculated or, in the case of the price, must state the maximum price. As soon as this information



is known, the issuer is required to report it to the National Bank of Slovakia and also to publish it in an appropriate newspaper.

There are similar rules that apply where bonds are offered through a private offer. The issuer is obliged to publish details of the terms of the offer at least three weeks before the first bond is issued. The details must be published in an appropriate daily nationwide newspaper. The issuer is also obliged to publish any changes in the bond's terms within ten days of the changes coming into effect.

DISCLOSURES OF SHAREHOLDER DETAILS

As mentioned above, details of issued shares need to be registered with the CDCP in an appropriate register. These registers are not public and the information on shareholders contained in them can only be provided to entities that are expressly allowed by law to receive the information. A person who acquired or intends to acquire shares of a listed Slovakian company, in circumstances where such acquisition would result in the person gaining control over more than 33% of the voting rights, must disclose its interest to the company and publish it in an appropriate daily nationwide newspaper.

TOP FIVE TIPS RELATING TO SLOVAKIAN SECURITIES

- 1 A company is only allowed to subscribe for its own shares in exceptional circumstances set out by law. Where a company acquires its own shares in one of the permitted circumstances, it is obligated to dispose of them within a three year period. In all other cases it must dispose of them within a one year period. Should the shares not be disposed of within the relevant period, a court may dissolve the company. In addition, during any period in which a company holds its own shares or a controlled company holds the shares of its controlling company, the voting rights attached to those shares are suspended.
- 2 A company's articles of association may provide for the issue of a class of share with a preferential right to receive a dividend. The aggregate nominal value of all such shares must not exceed 50% of the company's registered capital. The articles of association may also provide for the issue of preference shares which do not entitle the shareholder to vote at general meetings. Holders of these shares will have the benefit of all of the other rights attached to the company's shares.
- 3 In order to increase the speed and flexibility of the process for increasing a company's registered capital, a company will often delegate a power to increase the share capital by issuing shares to the board of directors. The amount of shares that the directors can issue will be limited by law and by the company's articles of association. The authorisation may only be delegated for a maximum period of five years, after which it must be renewed.



- 4 The registration of shares in an account with the CDCP held by a foreign central depository is relatively new under Slovak law. Through these accounts the CDCP keeps a register of the owners of listed securities issued by a Slovak company that are listed on a non-Slovak market. This process enables Slovak companies to achieve a listing on non-Slovak stock markets provided that the relevant non-Slovak depository has opened an appropriate account with the CDCP.
- 5 Details of any restrictions on an owner's ability to sell a security, as well as details of any pledges over various types of security, must be registered with the CDCP. As a result of recent changes to the CDCP's operational rules, in order to register a contractual pledge over a security it is necessary to submit to the CDCP a document containing a summary of the pledge rather than the pledge agreement itself. This document must be signed by the pledgor and the pledgee and the signature of the pledgee must be certified by a notary public.



The following are common securities under Spanish law:

- ❖ shares in a company;
- ❖ bonds;
- ❖ debt instruments with an associated interest in share capital (for example, convertible bonds); and
- ❖ warrants and other subscription rights granting an interest in share capital.

Partnership interests, or 'parts' in a Sociedad Limitada, do not qualify as securities.

SHARE CAPITAL

The most common types of company in Spain are the '*Sociedad Anónima*' ('**SA**') and the '*Sociedad Limitada*' ('**SL**'). There is separate legislation governing each of the SA and the SL.

The capital of an SA is divided into shares, whereas the capital of an SL is divided into 'parts'. Shares may be represented by certificates or by book-entries in an electronic register - either way they are regarded as negotiable securities. Shares may be in registered or bearer form. Shares must take the form of registered shares if they are not to be fully paid-up, when their transfer is subject to restrictions or when ancillary obligations are attached to them. 'Parts' are indivisible and cumulative. 'Parts' may not be represented by means of certificates nor are they regarded as negotiable securities. 'Parts' must always be in registered form.

MINIMUM SHARE CAPITAL REQUIREMENTS

The minimum share capital of an SA is €60,101.21. This amount must be fully subscribed and at least 25% of it must be paid-up. The minimum share capital of an SL is €3,005.06. This amount must be fully subscribed and fully paid-up. It is compulsory for companies operating in certain specific sectors (for example, insurance and banking) to be in the form of an SA, and the minimum share capital for such companies is often set at a higher level.

Shares can be subscribed for with cash or with some form of non-cash consideration. Payment with non-cash consideration is subject, when dealing with an SA, to an expert's report confirming that the value of the non-cash assets is equal to or higher than the aggregate nominal value of the shares proposed to be issued. When dealing with 'parts' in an SL, an expert's report is not necessary. With respect to capital increases, the partners and directors of an SL will be liable for any difference between the value of any non-cash contribution and that of the subscribed 'parts'.



ISSUING SHARES OR PARTS

As a general rule, it is the shareholders of an SA, or the partners of an SL, who decide: (i) upon the issuance of new shares or 'parts' and their number, nominal value and total subscription value (including any premium); (ii) whether to accept cash or non-cash consideration; and (iii) in the case of shares, whether or not they should be fully paid-up (bearing in mind the 25% minimum requirement). For the decision to be valid, and unless the by-laws of the company impose a higher threshold:

- ❖ in a SA it must be taken by a 50% majority of those attending the meeting (if more than 50% of the capital is represented at the meeting) or by a two-third majority of those attending the meeting (if more than 25% but less than 50% of the capital is represented at the meeting); and
- ❖ in an SL it must be taken by those representing more than 50% of the total share capital.

In an SA, the shareholders can authorise the directors to take decisions relating to the issuance of new shares. However, the authority can only allow the directors to issue such number of shares as is equal to 50% of the share capital of the SA at the time that the authority is given. Once this limit is reached the directors must seek a new authority from the shareholders.

PRE-EMPTION RIGHTS ON ISSUE

Usually, when a company is issuing new shares or 'parts', each shareholder or partner has the right to subscribe for such proportion of the new shares or 'parts' as is equal to the existing proportion of its shares or 'parts' in the company's capital. In an SA this pre-emptive right can be excluded in certain circumstances by a decision of the shareholders provided that:

- ❖ at the time the shareholders' meeting is called the directors provide a report setting out the reasons for the proposed issuance of shares on a non pre-emptive basis, as well as the issuance price;
- ❖ the shareholders also receive a report issued by an independent auditor, appointed by the Commercial Registry and different from that of the company, stating the reasonable value of the shares, the theoretical value of the preferential subscription rights that are being excluded, and the reasonableness of the data reflected by the directors in their report; and
- ❖ the price for the new shares is at least equal to the value of the shares as set out in the independent auditor's report.

The pre-emptive rights applicable to the issue of 'parts' of an SL can also be excluded. However, unlike an SA, no auditors' report is required to achieve such an exclusion.



RIGHTS

The basic rights of shareholders of an SA and partners of an SL are set out in the laws regulating the respective types of companies. Additional rights can be set out in the company's by-laws. As a minimum, shareholders (or partners) will have the following rights:

- ❖ to decide on the distribution of dividends and to participate in any liquidation distribution;
- ❖ to subscribe for new issued shares or convertible debt instruments;
- ❖ to attend meetings, vote and to challenge the decisions adopted; and
- ❖ to obtain certain information on the company.

An SA may have different classes of shares which grant different rights to their holders.

Rights of Shareholders

The following are some of the more common rights that shareholders and partners of an SA or an SL acquire by virtue of holding a certain percentage of the company's voting shares or 'parts':

- 5%
 - request the calling of a shareholders' meeting at any time;
 - file a claim against the directors if such claim has not been filed by the company itself;
 - oppose the extrajudicial settlement of a claim filed by the company against directors;
 - contest any resolution adopted by the board of directors;
 - (for an SA) include one or more matters on the agenda for a shareholders' meeting; and
- 25%
 - request that any information regarding the company be disclosed at a shareholders' meeting.

The by-laws of a company will set out the percentage votes required to pass resolutions and these will be automatically binding on all shareholders or partners of the company. There are no basic thresholds set out by law that are required to be met to pass shareholder decisions. Therefore, it is important to ensure that the company's by-laws properly set out all of the relevant percentages.

TITLE

In general, shares may either be represented by a physical certificate or recorded as a book-entry in an electronic registry system. Except where the shares are issued in bearer form, the company will keep a record of its shareholders or partners. Any transfer of registered shares must be notified to the directors in order for it to be registered. In general terms, the company will only recognise as a shareholder or partner the person noted in its Register of Shareholders (or Partners).



An entry in the Register of Shareholders (or Partners) is not legal evidence of title. Legal title (*erga omnes*) to shares or 'parts' is evidenced by the publicly executed deed of transfer or deed of share capital increase (depending on the circumstances in which the shares are acquired) which is then recorded in the company's register. The register acts as an internal informative record and provides the shareholder or partner with legitimacy before the company.

TRANSFERS OF SHARES OR PARTS

SHARE TRANSFER FORMALITIES

Transfers of 'parts' in an SL must be executed before a public notary by means of a public deed. The transfer has to be notified to the directors of the SL for registration in the Register of Partners. Transfers of shares in an SA, even if they are bearer shares, must be completed before a public notary or a Securities Company. When dealing with registered shares, the transfer must also be notified to the company for registration.

The ownership of shares is not recorded at the Commercial Registry. As a result share ownership information is not, in principle, publicly available. However, as certain resolutions (for example, those to increase the share capital) must be recorded at the Commercial Registry certain limited information regarding the ownership of shares or 'parts' is often available.

Transfers of shares or 'parts' are usually exempt from indirect taxes (such as VAT or Transfer Tax - called *Impuesto sobre Transmisiones Patrimoniales*). However, where the assets of the target company mainly consist of real estate then a transfer of control of the company will attract Transfer Tax. The tax is calculated at a rate of 7% of the 'real value' of the assets with this value usually being estimated by the Tax Administration as close to the market value as possible. A transfer of control will include the transfer of over 50% of the shares of the company, or of any parent of the company.

PRE-EMPTION RIGHTS ON TRANSFER

Shares in an SA are freely transferable unless otherwise stated in the company's by-laws. 'Parts' in an SL are not freely transferable but may be transferred to: (i) another partner; (ii) ascendants or descendants of the transferor; or (iii) companies within the same group as the transferor.

The procedure that must be followed in order to transfer shares or 'parts' will be set out in the company's by-laws, and it usually consists of either an 'authorisation clause' (stating that any transfer is subject to the prior consent of the company) or pre-emptive rights in favour of the other shareholders or partners. Transfers of shares or 'parts' cannot be totally restricted. However, the law allows the by-laws of an SL to prohibit the transfer of its 'parts' for a maximum period of five years from the date of either: (i) its incorporation; or (ii) any capital increase in the SL.



A company will not recognise as a shareholder or partner any person that has acquired its shares or 'parts' without complying with the procedure stated in its by-laws. It is therefore necessary to check such procedure before entering into any agreement to acquire shares or 'parts'. The by-laws of all companies are publicly available at the Commercial Registry.

SHAREHOLDERS' AGREEMENTS

Where a company has a number of different shareholders, it is common for the shareholders to enter into a shareholders' agreement. The agreement will set out any arrangements between the shareholders as to the management of the company, for example, their ability to appoint directors and receive dividends. The agreement will usually also contain pre-emption provisions on the issue and transfer of the company's shares.

The pre-emption provisions may equally be inserted into the company's by-laws. The advantage of placing them in the by-laws is that the provisions will be automatically binding on all shareholders of the company. If the provisions are in a shareholders' agreement then any new shareholders will need to specifically sign up to them before they are binding on those new shareholders. Shareholders' agreements relating to holdings in companies listed in Spain must be publicly disclosed to the company and to the Stock Exchange Regulator when they concern voting rights or the transfer of shares.

MERGER CONTROL

In addition to EU merger control legislation, the Spanish Competition Authority will sometimes investigate the acquisition of control over one company or group by another. A new Competition Law has been passed that requires a party to any merger to seek prior authorisation from the Spanish Competition Authority if:

- ❖ as a result of the acquisition the combined group will have a market share of 30% or more in Spain (or a substantial part of Spain), or an existing market share of 30% or more will be enlarged; or
- ❖ the Spanish turnover of the business being acquired exceeds €240 million, provided that at least two of the companies participating in the transaction have a turnover in Spain of more than €60 million each.

The Spanish Competition Authority has the power to authorise, with or without conditions, or prohibit a merger. However, should the Spanish Competition Authority prohibit, or impose conditions on, a transaction the Spanish Government may still authorise the transaction in certain circumstances. These circumstances include where the relevant companies are involved in matters such as national defence, the protection of public security or health, free movement of goods or services within the national market and the protection of the environment.



Foreign investments and divestments in Spanish companies are required to be registered with the Foreign Investment General Directorate. This registration has no other effect than to keep a record of foreign investment into Spain. However, there are special rules for investments in a company whose activities are linked to gaming, national defence, radio and television and air transportation. In addition, certain sectors (for example, energy and telecommunications) are subject to particular regulation. The prior authorisation of the Regulatory Authority may have to be sought when investing in such sectors.

OFFERING SHARES

In order to offer shares publicly in Spain, it is necessary to submit a prospectus for approval to the *Comisión Nacional del Mercado de Valores* (the Spanish Securities Market Commission or '**CNMV**'). The purpose of the prospectus is to provide information to potential investors about the terms and conditions of the offer and details of the securities in order to allow investors to decide whether to acquire or subscribe for those securities.

The Ministry of Economy and Treasury, through ministerial orders, sets out the forms and regulates the content of the different types of prospectus that can be used. It also specifies any exemptions from the requirements to include certain information in a prospectus. Generally, a prospectus must contain details of the issuer, any guarantor and the securities on offer as well as details of any risks associated with the offer.

When is a prospectus required?

A prospectus is generally required whenever an offer of securities is made to the Spanish public. According to the Securities Market Law, a prospectus is not required where:

- ❖ the offer is made only to qualified investors,
- ❖ the offer is made to less than 100 persons, other than any qualified investors, per EEA state;
- ❖ the minimum consideration that can be paid by an investor is at least €50,000;
- ❖ the shares being offered are denominated in amounts of at least €50,000; or
- ❖ the total consideration for all shares being offered does not exceed €2,500,000 (taking into account all issuances in a 12 month period).



TOP FIVE TIPS RELATING TO SPANISH SHARES

- 1 Incorporating an SL can be more appealing due to the lower minimum capital required and other flexible features that this form of legal entity offers. For example, unlike an SA, no independent expert's report on the value of non-cash contributions is required. Where a capital increase has been funded with non-cash consideration, the directors must issue a report on the value of this consideration. The directors will be liable for any difference between the value stated in their report and the real value of the consideration.
- 2 Transfers of shares can be restricted but not prohibited. Any restrictions can only apply to registered shares and must be specifically stated in the by-laws. Transfers can also be made subject to the company's prior approval but the by-laws must set out the circumstances in which any approval may be withheld. An SL is intended to be a more closely held entity, therefore the by-laws may restrict the transfer of 'parts' for a maximum period of five years from the date of its incorporation or from a capital increase.
- 3 A company may issue non-voting shares. The total par value of all non-voting shares may not exceed one half of the company's total paid-in capital. Non-voting shares have preferential rights in a liquidation and in a capital reduction.
- 4 'Ancillary obligations' (an obligation to perform certain acts or to refrain from performing certain acts) can be attached to shares or 'parts'. 'Ancillary obligations' are often attached to shares that are issued to employees and thereby are useful in providing a link between the employee relationship and ownership of the company. The transfer of any such shares or 'parts' will always be subject to the company's prior approval.
- 5 Preferred shares may be created as a separate share class. Commonly, preferred shares entitle the holder to a preferential dividend. In the case of listed companies: (i) where a holder of preferred shares has the right to obtain a preferential dividend, the company is obliged to make a dividend when sufficient profits exist to do so; and (ii) preferred shares benefit from a higher priority ranking - a dividend of profits to ordinary shareholders is not allowed until the preferential dividend for the same year has been paid up. In the case of a non-listed company, the company's by-laws can provide alternative rights attaching to its preferred shares to those set out above.



A security is defined under the Capital Markets Law ('**CML**') as a negotiable instrument which: (i) provides a right of partnership, or grants creditor status, to its owner; (ii) represents an interest in an amount of capital; (iii) is used as a means of investment; and (iv) entitles its owner to receive revenue deriving from it on a periodical basis. Common types of security under Turkish law include:

- ❖ shares in joint stock company;
- ❖ bonds;
- ❖ bonds that are convertible to securities; and
- ❖ asset backed securities.

Ordinary bills, bills of exchange, cheques and deposit certificates do not qualify as securities. This chapter focuses on matters relating to shares in joint stock companies. Please refer to our brochure '*Establishing Companies and Partnerships in Key Jurisdictions*' for more information on the various types of Turkish company.

SHARE CAPITAL

NOMINAL VALUE

All shares in Turkish joint stock companies are required to have a nominal value. Shares must be denominated in New Turkish Lira (TRY). Under the Turkish Commercial Code ('**TCC**'), the nominal value of a share in a Turkish company cannot be less than TRY 0.01. Joint stock companies are required to have a minimum issued share capital of TRY 50,000. However companies offering shares to public must have an issued share capital of at least TRY 3,158,909.11 before the offer can be made.

RIGHTS

The TCC does not require that a share is represented by a share certificate, and the right of ownership and other rights attached to the share exist even if a share certificate has not been issued. There is a formal process required to issue share certificates which requires the input of an outside party. As a result, Turkish companies commonly issue temporary share certificates in substitution for formal share certificates. Following the establishment of the Central Registration Agency – an administrative body established under the CML to operate under the Capital Markets Board ('**CMB**') – shares in public companies are now electronically traded and any printed share certificates will be dematerialised.

The basic statutory rights of a shareholder in a joint stock company include: (i) the right to vote; (ii) the right to receive dividends; (iii) a pre-emption right in respect of any new issue of shares; (iv) a right to receive a proportionate share of the proceeds of the company's liquidation; and (v) the right to receive information and to audit the company's books and records.



ISSUING SHARES

A joint stock company may not increase its capital and issue new shares unless the existing share capital of the company is fully paid-up. Under the TCC, the issue of new shares is a matter that requires the approval of the company's general assembly. Only public companies which have adopted the 'registered capital system' may issue new shares by a decision of the board of directors. Under this system a general meeting of shareholders will grant the directors the authority to issue a certain maximum number of shares (that is also approved by the CMB) without further recourse to the shareholders.

PRE-EMPTION RIGHTS ON ISSUE

Unless otherwise provided for in the company's articles of association, shareholders of a Turkish joint stock company have pre-emption rights that apply in the event of an issue of new shares by the company. Under these rights a joint stock company must offer new shares to its existing shareholders pro-rata to the percentage of shares held by each shareholder before the shares are offered to any third parties.

The shareholders of a joint stock company must be given at least fifteen days to exercise their pre-emption rights and apply for the new shares. The pre-emption rights of the shareholders may be disapplied by a shareholders' resolution passed at a general meeting (generally this will happen at the general meeting at which the capital increase is being approved). Alternatively, the rights may be disapplied by a resolution of the board of directors if sufficient authority is given to the board in the articles of association.

Rights of Shareholders

In relation to Turkish joint stock companies:

- ❖ Owning 50% plus one share is sufficient to control the company for most purposes unless a higher quorum is specified or affirmative vote of a class is required at the articles of association.
- ❖ To approve almost all decisions of the general assembly meeting a simple majority of votes must be in favour. However, minimum quorum requirements are imposed on general assembly meetings at which certain matters are to be approved. For example, to change the form of a company those holding two thirds of the share capital must attend or be represented at the initial meeting. The TCC contains a limited number of super majority requirements for general assembly meetings.



TITLE

Turkish joint stock companies may issue two types of shares, namely bearer shares and registered shares. There are different formalities required to transfer the two types of shares.

The names and addresses of the holders of registered shares must be recorded in the company's share ledger. The company will only recognise those shareholders who are registered in the share ledger as having legal title to the shares. Physical possession of bearer shares is all that is required to evidence legal title to these shares.

TRANSFERRING SHARES

SHARE TRANSFER FORMALITIES

The transfer of a bearer share is effected by the delivery of its share certificate. Registered shares, on the other hand, must be endorsed and delivered to the transferee and both the transfer and its registration in the company's share ledger book must be approved by a resolution of the board of directors. If there are no printed share certificates or temporary share certificates then the bearer or registered shares may be transferred by way of an assignment - the parties will enter into a transfer and assignment agreement and the transfer will then be registered in the share ledger.

Limited liability companies do not have share certificates representing their ownership interests. As a result the parties to a transfer of interests in this type of company will sign a share transfer agreement and must have their signatures verified by a public notary. The company must also pass a shareholders' resolution which must be approved by at least 75% of the shareholders owning at least 75% of the capital. The share transfer procedure is completed after the transfer has then been registered in the company's share ledger.

PRE-EMPTION RIGHTS ON TRANSFER

Under Turkish law there is no statutory right of first refusal that applies to share transfers. However, shareholders may decide to include rights of first refusal on the transfer of a company's shares in that company's articles of association. Under these provisions a shareholder who wishes to transfer its shares will be required to offer the shares to the existing shareholders before transferring them to any third parties.



SHAREHOLDERS' AGREEMENTS

The relationship between the shareholders will mainly be regulated by the TCC and the provisions of the company's articles of association. The shareholders may choose to supplement the articles with a separate shareholders' agreement. This is especially common for joint venture companies. It is easier to amend a shareholders' agreement than it is to amend a company's articles. However, amendments to a shareholders' agreement will require the consent of all of its parties, whereas changes to the articles only require the necessary percentage approval set out in the TCC.

The main concern relating to a shareholders' agreement is that, unlike the articles, it may not always be binding on third parties. In the event of a breach of a shareholders' agreement (for example, a breach of any share transfer restrictions), enforcing specific performance under Turkish law will be difficult and a claim for damages may be the only successful remedy.

It is advisable, to the extent legally possible, to include the main rules governing the relationship of the shareholders in the company's articles of association. The articles are a public document and the initial text and any subsequent amendments to it are published in the Trade Gazette and available at the relevant trade registry office. Consequently, the shareholders may prefer to deal with certain issues in a shareholders' agreement for reasons of privacy.

MERGER AND INVESTMENT CONTROL

INVESTMENT CONTROL

Under the previous foreign investment regime, the sale and purchase of shares of a company by non-Turkish persons was subject to the approval of the General Directorate of Foreign Investment. However, with the enactment of the Foreign Direct Investment Law in 2003, this requirement for approval has been abolished. Presently, the company that is the subject of the transfer is only required to make a notification after the transfer has completed. Non-Turkish investors are subject to same rules and principles as Turkish citizens as regards the sale and purchase of shares in a Turkish company.

COMPETITION CONTROL

The Competition Law prohibits a merger or acquisition if the transaction creates or strengthens the dominant position of one of the parties and distorts fair competition in the relevant market.



A merger or an acquisition will be subject to the prior approval of the Competition Board if:

- ❖ the parties' annual turnover in the relevant market exceeds TRY25 million; or
- ❖ even if this threshold is not exceeded, the total market share of the parties in the relevant market exceeds 25%.

The turnover of an entity that is generated outside the Republic of Turkey is not taken into account when calculating whether these thresholds have been met. Even if the above thresholds are not exceeded the Competition Board still has the authority to impose restrictions and conditions on the transaction.

REGULATED SECTORS

An acquisition of shares in companies that operate in certain regulated sectors (such as energy, telecommunications, aviation, capital markets or banking) is subject to the prior consent of the relevant governmental authority or autonomous regulatory body. For example, in order to acquire shares in a bank, whether the shares are listed or not, the approval of the Banking Regulatory and Supervisory Authority must first be obtained.

OFFERING SECURITIES

The CMB is the authority responsible for the regulation and supervision of the Turkish securities markets. The CMB also regulates the private placement of non-Turkish securities and capital market instruments.

PRIVATE PLACEMENTS

Before securities issued by non-Turkish companies can be privately placed with investors, the instruments must be registered with the CMB and a registration fee must be paid. However, the CMB does not require the preparation of complex documentation in connection with the private placement. In particular, a prospectus is not required for the private placement of securities (whether the securities are those of a Turkish or non-Turkish issuer).

The CMB requires that the application for the private placement of foreign securities is made by an authorised intermediary institution. The application must be supported by: (i) documents certifying that the issuer is in good standing; (ii) information regarding the activities and board of directors of the issuer; (iii) the articles of association of the issuer; (iv) a document certifying that there are no restrictions in the issuer's country of incorporation as to the transfer of the instruments; and (v) copies of the agreements executed between the issuer and the persons to whom the instruments are to be sold via the private placement.



PUBLIC OFFERINGS

Currently, the Istanbul Stock Exchange ('**ISE**') is the only securities exchange in Turkey that provides trading in securities. The operations of the ISE are supervised by the CMB. Before securities can be offered to the Turkish public a prospectus (izahname) must be filed with the CMB. Private placements are not common in Turkey and therefore most offers will require the preparation of a prospectus.

The information required to be disclosed in a Turkish prospectus is considerably less detailed than disclosure requirements in many other jurisdictions. The prospectus must include all information relating to the securities and the issuer that would be necessary for a prospective investor to assess all of the benefits and risks of the proposed investment. The CMB may refuse to register a prospectus if it is not satisfied that its contents meet the relevant requirements.

OFFERS OF NON-TURKISH SECURITIES

No public offer of the securities of a non-Turkish issuer can be made to Turkish residents without first registering the instruments with the CMB. A public offering must be carried out through a Turkish intermediary institution that is authorised and licensed by the CMB.

With the exception of shares in non-Turkish mutual funds shares, all non-Turkish securities that are offered to the Turkish public must first be listed on a stock exchange in another jurisdiction that is approved by the CMB. The public offering of non-Turkish shares must be carried out using depository receipts. The issuer must have been incorporated for at least two years prior to the date of the application for registration with the CMB and its latest audited financial statements must show a profit. In addition, any shares previously issued by the issuer must have been listed on a stock exchange at least one year prior to the date of the application to the CMB and must have been trading for at least one hundred days.

Once the CMB has approved the application and registered the securities the intermediary must make an application to the relevant Turkish stock exchange, supported by the required documents (including the prospectus), to have the securities listed.

When is a prospectus required?

Under Turkish law, a prospectus must be prepared and filed with the CMB before any offer of shares or similar securities is made to the public.



DISCLOSURES OF SHAREHOLDER DETAILS

The CMB requires companies whose shares are in public hands to disclose any information that may affect an investor's decisions or the market value of the shares, as well as all material issues relating to the company, its operations, subsidiaries, and managers. In addition, changes in the shareholding structure and management of the company, its financial status and assets, voting rights or other rights indicated in articles of association of the company need to be disclosed.

In particular, in relation to changes in the share capital, any direct or indirect acquisition of 5%, 10%, 15%, 20%, 25%, one-third, 50%, two-thirds or 75% of the share capital or voting rights of a publicly held company must be disclosed to the public. If a shareholder's percentage holding falls below these thresholds then this fact must also be disclosed to the public. However, due to certain ambiguities in interpreting the relevant regulation it is advisable to disclose any acquisition or disposal of 1% or more of the shares if a shareholder's current holding is above 5%.

Companies whose securities are listed both in Turkey and elsewhere are required to disclose to Turkish investors the same information that they may be required to provide to investors under the rules of such other relevant stock exchanges.

TOP FIVE TIPS RELATING TO TURKISH SECURITIES

- 1 The parties to a transaction involving a substantial share acquisition should notify the Competition Board one month prior to the closing of the deal as the Board must issue an opinion on whether the deal will have any anti-competitive effect. The Board must issue this opinion within one month of the notification. However, this period can be extended by the Board if it requires additional information or documentation in respect of the transaction.
- 2 Investors proposing to acquire shares in a Turkish company should first investigate any transfer restrictions relating to the target shares and, if necessary, require the target company to amend its articles of association prior to the transaction. If there are any pre-emption rights that apply to the acquisition, a prospective investor should try to get, with the help of the seller, waivers of these rights from the current shareholders.
- 3 There are mandatory tender offer provisions that apply when acquiring shares in Turkish listed companies. Under these regulations, if any party (or parties acting together) acquires, directly or indirectly, 25% or more of the capital and voting rights of a listed company then the relevant party must make an offer to buy all of the issued shares of the company. This



applies whether the threshold is crossed as a result of a single sale, a series of related sales, or by any other means. If any party (or parties acting together) owning between 25% and 50% of the capital and voting rights of the company increases its shareholding by 10% or more in any twelve month period then such party must also make an offer for all of the remaining shares. The CMB may only grant an exemption from these requirements in certain exceptional circumstances.

- 4 A non-Turkish jurisdiction and a non-Turkish governing law may be chosen to apply to a share purchase agreement, provided that the share transfer formalities are conducted in accordance with Turkish law. Turkish courts may intervene to vary the substance of a non-Turkish court judgment or arbitral award if it violates Turkish public order considerations or a mandatory provision of Turkish law.
- 5 Stamp duty will be applied to any transfer of shares at a rate of 0.75% of the consideration. The parties to a share transfer agreement are severally liable to pay the stamp duty to the Tax Office. The maximum amount of stamp duty payable on any one transfer is TRY 946,915.20 (approximately €560,000).



On 23 February 2006, the Ukrainian parliament passed the law 'On Securities and the Stock Market' (the '**Securities Law**'). This is now, along with the law 'On State Regulation of the Securities Market in Ukraine' (passed on 30 October 1996), one of the principal statutes governing the issuance of, and trading in, securities in Ukraine and the operation of stock exchanges and OTC electronic systems. The following are common securities in Ukraine:

- ❖ equity interest securities (shares and investment certificates);
- ❖ debt securities (corporate bonds, state bonds, municipal bonds, treasury bonds, saving bonds and promissory notes);
- ❖ mortgage securities (mortgage bonds, mortgage certificates and certificates of Real Estate Funds);
- ❖ negotiable instruments of title; and
- ❖ derivative securities.

CHARTER CAPITAL

Under Ukrainian law, a joint stock company ('**JSC**') is a company whose charter capital is divided into a certain number of shares each with an equal nominal value. Such a company is liable for its obligations only to the extent of its assets. Shareholders are liable for the obligations of the company only to the extent of their respective contributions to the charter capital. JSCs may either be 'open' (i.e. publicly listed) or 'closed' (i.e. the shares are distributed amongst the founders). JSCs are subject to fairly detailed securities and corporate regulations.

Please refer to our brochure '*Establishing Companies and Partnerships in Key Jurisdictions*' for more information on the various types of Ukrainian entities. However, as these other entities do not issue shares they are not subject to securities regulation under Ukrainian law and are not the focus of this chapter.

NOMINAL VALUE

A Ukrainian JSC may issue common shares and may also issue preference shares (which may account for up to 25% of the issued capital). Ukrainian law does not allow for different classes of common shares with different voting rights attached.

All shares of a JSC must have the same nominal value and must be denominated in the Ukrainian currency (*Hryvnia*). The minimum nominal value is at least one kopeck. A share's nominal value can only be changed if a shareholders' meeting of the JSC resolves to increase or decrease it. Shares of a JSC may be subscribed for at the nominal value or at a market value which includes a share premium. Any share premium paid by a subscriber in a JSC is not subject to taxation in Ukraine.



AUTHORISED CHARTER CAPITAL

All of the authorised charter capital of a JSC must be paid up prior to the state registration of the JSC. The JSC may not issue any further shares unless the initial capital is fully subscribed and the shareholders then agree at a shareholders' meeting to approve a resolution to increase the authorised charter capital.

Shareholders of a JSC may contribute cash, securities, immovable property or other property rights to the JSC's authorised charter capital. Where a subscriber in a JSC is proposing to pay for shares with non-cash consideration, the JSC must file an evaluation of the non-cash contribution with the Ukrainian State Commission for Securities and the Stock Market (the '**Securities Commission**'). The evaluation must confirm the value of the non-cash assets contributed to the charter capital of the JSC.

As of 1 November 2007, a JSC must have a minimum authorised charter capital of UAH 575,000 (equivalent to approximately €85,000). This minimum capitalisation is regularly increased by law - in the last few years there have been an average of at least three increases a year.

If, after the end of the second and each successive financial year of a JSC's existence, the value of its net assets is less than the amount of its authorised charter capital, then the JSC is required to declare a reduction of its authorised charter capital and register the necessary amendments to the JSC's charter. Where the value of a JSC's net assets becomes less than the minimum amount of the authorised charter capital required by law as noted above then the JSC may face liquidation.

SHAREHOLDERS' RIGHTS

The rights of the shareholders of a JSC are provided by Ukrainian law and are also set out in the charter of the JSC. The shareholders of the JSC have certain basic rights, which include the right to:

- ❖ participate in the management of the JSC (specifically shareholders of the JSC may vote and participate at shareholder meetings and adopt resolutions to increase the charter capital);
- ❖ participate in any distributions of the JSC's profits (including distributions of assets made on a liquidation) in portion to the number of shares held; and
- ❖ receive certain information on the activities of the JSC (for example, annual balances, statements on financial and business operations of the JSC, minutes of the Audit Commission, minutes of the general shareholders' meetings and certain other materials connected with the operation of the JSC).



Shareholders of a JSC also have a pre-emptive right to acquire any newly issued shares of the JSC pro rata to their existing shareholding (see below).

Rights of Shareholders

The following are some of the more common rights that shareholders of JSCs acquire by virtue of holding a certain percentage of the company's voting shares:

- 1 share - attend a shareholders' meeting;
 - propose topics for inclusion on the agenda of a shareholders' meeting;
- 10% - call an extraordinary shareholders' meeting;
 - require topics be included in the agenda of a shareholders' meeting;
- 25% - block a resolution: (i) amending a JSC's charter; and (ii) deciding to terminate the JSC's activities (just over 25% required);
- 50% - block an ordinary resolution;
 - pass an ordinary resolution (just over 50% required);
 - remove a director of the company (just over 50% required); and
- 75% - pass a resolution: (i) amending a JSC's charter; and (ii) deciding to terminate the JSC's activities.

It is necessary to amend a JSC's charter in order to effect capital increases, capital decreases, and changes in the number and types of shares.

ISSUING SHARES

AUTHORITY TO ISSUE SHARES

Under Ukrainian law, only a shareholders' meeting of a JSC has the authority to adopt a resolution to issue shares. After the relevant resolution has been approved, the JSC registers the new issue with the Securities Commission. On registration, the subscribers make their respective payments for the shares. For a JSC that is being newly incorporated, the registration process involves three steps: (i) the initial registration of the shares of the JSC and receipt of a temporary share registration certificate; (ii) the payment of capital contributions and incorporation of the JSC; and (iii) the registration of the results of the share issue and the receipt of a permanent share registration certificate.

Open JSCs are prohibited from providing any benefits to, or setting any different terms applicable to, specific subscribers – the terms of any subscription must be the same for all parties. The only exception is that the existing shareholders of an open JSC have statutory pre-emption rights that will not apply to outside investors.



STATUTORY PRE-EMPTION RIGHTS ON ISSUE

The shareholders of a JSC have pre-emptive rights under which they may subscribe for any newly issued shares of the JSC pro-rata to their existing shareholdings before such shares are issued to third parties. Newly issued shares of a JSC are subscribed for under a two stage process.

In the first stage, the existing shareholders exercise their pre-emptive rights and subscribe for new shares pro rata to their respective shareholdings. During the second stage, the existing shareholders of the JSC and other persons and entities, if the shareholder resolution approving the share issuance so provides, may subscribe for any of the newly issued shares that have not been subscribed for during the first stage. During the second stage, the existing shareholders of the JSC may subscribe for more shares than they were entitled to receive when exercising their pre-emption rights during the first stage.

TITLE

Shares of a JSC may be issued in documentary form as 'share certificates' or in non-documentary form as electronic records reflected on a shareholder's securities account opened with a licensed Ukrainian custodian. Documentary shares may be dematerialised by depositing the share certificates with a local licensed custodian or a licensed depository. The shares will then be reflected as electronic records on the securities account of their owner with the local custodian.

Title to documentary shares is evidenced by a share certificate, which must be in the possession of the shareholder or its authorised representative. Title to non-documentary shares, or to documentary shares that have been dematerialised, is evidenced by an extract from the securities account of their owner with the local custodian. Ukrainian companies are required to maintain a record of their shareholders and shares issued for corporate governance purposes. For non-documentary shares, it is the depository that prepares the list of shareholders (the '**Combined Shareholder Register**'), based on information provided by the local custodians that keep securities accounts for the shareholders.

Where shares are issued by a JSC in documentary form, a shareholder register must be maintained by a licensed Ukrainian registrar engaged by the relevant company. The shareholder register contains a list of the owners and nominal holders ('**nominees**') of the shares. Nominees are recorded in the shareholder register where a shareholder has dematerialised its shares by depositing them with a local custodian – the custodian will be recorded as the nominee. Nominees have no right of ownership of the shares. Only custodians and depositories may be recorded as nominees.

Neither the shareholder register nor the Combined Shareholder Register serve as legal evidence of the title of the shareholders registered in them to their shares. These registers are for information purposes only.



TRANSFERRING SHARES

SHARE TRANSFER FORMALITIES

In order to transfer title to shares in a JSC, the seller and the buyer enter into a share sale agreement. The transaction must be carried out through a licensed Ukrainian broker who must act for at least one of the parties either as agent or as a commission agent. There is no stamp duty payable, and notarization is optional.

The transfer is completed by the issue of a new share certificate, in the case of documentary shares, and by updating the securities accounts of the buyer and the seller opened with a licensed Ukrainian custodian, in the case of non-documentary shares.

LEGAL AND BENEFICIAL TITLE

Ukrainian law does not yet recognise the concept of beneficial ownership. Accordingly, if an entity or individual holds shares in its own securities account with a local custodian, it is this entity or individual that will be regarded as the owner of the shares. Non-Ukrainian purchasers sometime try to hold shares under an off-shore custody arrangement. However, under such an arrangement they will not be regarded, as a matter of Ukrainian law, as the owner of the shares.

PRE-EMPTION RIGHTS ON TRANSFER

Shareholders of a closed JSC have a pre-emptive right to acquire any shares that are proposed to be sold to a third party. These pre-emptive rights are exercised pro rata to a shareholder's existing shareholding in the closed JSC. Ukrainian law does not allow for pre-emption rights on the transfer of shares in an open JSC.

Where a shareholder of a closed JSC wishes to sell its shares to a third party with the consent of the existing shareholders, it will need to obtain, through the closed JSC, written waivers from those shareholders of their pre-emption rights. If a shareholder fails to provide a notification of its wish to exercise its pre-emptive right to purchase shares within a period specified in the JSC's charter then such shareholder is deemed to have waived its right.

SHAREHOLDERS' AGREEMENTS

Shareholders of a JSC may enter into an agreement for the establishment of the JSC (a 'founding agreement'), setting out the procedures under which they will jointly carry out certain activities to establish the JSC. Aside from this, Ukrainian law provides little guidance on the status of, requirements for, and enforceability of agreements between shareholders in respect to a JSC. However, it is not unusual for shareholders of a JSC, especially where non-Ukrainian shareholders are involved, to enter into a shareholders' agreement. Such agreements are often not governed by Ukrainian law.



Shareholders' agreements commonly set out such matters as the rights and obligations of the shareholders, voting rules and procedures and the appointment of members of the company's governing bodies. The provisions of a shareholders' agreement cannot contradict the provisions of any Ukrainian corporate law. Pre-emption provisions are also often included in the shareholders' agreement. It should be noted that put and call options and certain deadlock provisions are difficult to enforce under Ukrainian law.

MERGER AND INVESTMENT CONTROL

Generally, there are no limits on investments by non-Ukrainian entities into Ukraine. However, the preliminary approval of the Anti-Monopoly Committee of Ukraine (the '**AMC**') may be required before any acquisition of Ukrainian shares, if the following economic thresholds apply:

- ❖ if the combined value of the assets or combined turnover of the participants, whether in Ukraine or abroad, as shown in their latest accounts, exceeds €12 million at the official exchange rate of the National Bank of Ukraine and at the same time: (i) the combined value of the assets or turnover, whether in Ukraine or abroad, of not fewer than two of the participants exceeds €1 million at the official exchange rate of the National Bank of Ukraine; and (ii) the combined value of the assets or combined turnover within Ukraine of at least one of the participants exceeds €1 million at the official exchange rate of the National Bank of Ukraine; or
- ❖ regardless of the combined value of the assets or combined turnover of the participants, if the market share of any of the participants or the combined market share of all or any group of the participants in relation to any market in the relevant goods or services exceeds 35% of that market.

OFFERING SECURITIES TO RESIDENTS OF UKRAINE

PRIVATE AND PUBLIC OFFERINGS

The Securities Law introduced new concepts of 'private offerings' and 'public offerings' of shares of JSCs, and lays down new procedures for the issue of shares by both open and closed JSCs. Notably, the Securities Law allows open JSCs to carry out 'private offerings' of their shares to a limited number of buyers (for example, only to the existing shareholders or specified third party investors).

A private offering of a JSC's shares must be made to less than 100 investors. If the shares are offered to a greater number of investors then the offer will be a public offering. A public offering requires the JSC to prepare a prospectus and file it with the Securities Commission. Closed JSCs may only carry out private offerings.



Once the shares have been issued, an application must be made to the Securities Commission containing a report on the results of the offering. The Securities Commission must either register the report and issue a permanent share registration certificate or reject the registration within fourteen days after the receipt of the application and all documents required for the registration of the report.

OFFERING NON-UKRAINIAN SHARES

Non-Ukrainian entities may only offer their shares to Ukrainian nationals and legal entities if such shares have been registered with the Securities Commission. The shares must be registered at a stock exchange or with an OTC system in the country of their origin and must be listed on one of the following stock exchanges:

- ❖ the New York Stock Exchange;
- ❖ the American Stock Exchange;
- ❖ the Tokyo Stock Exchange;
- ❖ the Hong Kong Stock Exchange;
- ❖ the Frankfurt Stock Exchange; or
- ❖ the London Stock Exchange.

Ukrainian securities regulations provide little guidance on how and under what conditions other foreign securities may be traded in Ukraine.

When is a prospectus required?

A prospectus must be prepared and filed with the Securities Commission where a JSC is making a public offering of securities. The prospectus must be registered with the Securities Commission and published in official printed media not later than ten days before the date on which the public offering is being made. A public offering is not made if securities are offered to less than 100 investors.

DISCLOSURES OF SHAREHOLDER DETAILS

Under regulations passed by the Securities Commission, certain shareholder information is required to be disclosed by a JSC in the press and on the internet. This information includes a notification of any change of shareholders who own 3% or more of the voting shares of the JSC, as well as:

- ❖ the adoption of a decision to place with investors securities exceeding 25% of the charter capital of the JSC;
- ❖ the adoption of a decision to redeem its shares;
- ❖ any listing or delisting of its shares on a stock exchange;



- ❖ obtaining credit in an amount exceeding 25% of the value of the assets of the JSC;
- ❖ changes to the JSC's officials;
- ❖ the adoption of a decision to decrease the charter capital of the JSC; and
- ❖ the adoption of a decision on the bankruptcy or termination of the JSC.

The notification on the internet must be made within two business days, and in the press within five business days, following the date of the relevant event. Where a JSC is undertaking a private or public placement, it must publish a notice to the shareholders and investors of the JSC in the press that includes the following information:

- ❖ the total number and nominal value of the shares proposed to be placed;
- ❖ details of how shareholders exercise or waive their pre-emptive rights; and
- ❖ the date of commencement and end of the relevant offer period.

TOP FIVE TIPS RELATING TO SECURITIES IN UKRAINE

- 1 A JSC that intends to pay a dividend is obliged to pay a corporate profit tax calculated at a rate of 25% of the gross amount of the dividend intended for payment. The company should pay this tax to the State budget of Ukraine before or together with the payment of dividends to the JSC's shareholders. Dividends paid to individuals by a JSC are taxed at a rate of 15%.
- 2 The purchase of a JSC's shares must be carried out through a licensed Ukrainian broker. No stamp duty is paid on the transaction.
- 3 Most shares of Ukrainian listed companies are traded in dematerialised form through the Stock Exchange or OTC electronic systems. To trade shares through the Stock Exchange or OTC a non-Ukrainian investor will need to open a securities account with a licensed Ukrainian custodian.
- 4 Shareholder agreements can be concluded but certain put and call and deadlock provisions that are common in agreements relating to non-Ukrainian companies are not enforceable in relation to Ukrainian companies.
- 5 The Securities Law aims to provide a unifying framework for the securities laws in force in Ukraine to date, as well as regulating areas not covered by previous legislation (for example, the disclosure of information to securities markets and execution of pre-emptive rights by shareholders of a JSC). It has made important modifications to the Ukrainian stock market, significantly widening the scope of information available to investors. The new law constitutes a significant improvement compared to the earlier legislation, providing rules which will be clearer to investors, and bringing Ukraine's securities and capital markets regulation more in line with EU legislation.



The following are common securities under English law:

- ❖ shares in a company;
- ❖ bonds;
- ❖ debt instruments granting an associated interest in share capital (for example, convertible bonds); and
- ❖ warrants and other subscription rights granting an interest in share capital.

Partnership interests do not qualify as securities. Eurobonds are specialist debt securities and are offered to institutional investors. By having debt securities traded on a visible and liquid market, such as the Main Market of the London Stock Exchange, and by complying with the market's regulatory standards an international company can enhance its standing within the global investment community. An issuer will use authorised advisors to identify potential investors in the Eurobonds.

SHARE CAPITAL

NOMINAL VALUE

All shares in UK companies are required to have a nominal value. This is the minimum amount that the company must receive for any shares that it is to issue. Shares may be denominated in any currency and it is possible for a company to have different classes of share each denominated in a different currency.

There are certain additional rules that apply to public companies but not to private companies. For example, public companies are required to have a minimum issued share capital of £50,000 (which must be at least 25% paid-up) before they are able to commence trading. In addition, if a public company is to receive non-cash consideration in exchange for its shares then an auditor's report must first be obtained by the company confirming that the value of the non-cash assets is higher than the aggregate nominal value of the shares proposed to be issued.

AUTHORISED SHARE CAPITAL

At present a UK company is required to state its authorised share capital on incorporation. The authorised share capital is the maximum value that the nominal value of all of the company's issued shares may add up to. Once the company has issued such number of shares as is equal to the number allowed by the authorised share capital then the company may not issue any further shares unless the shareholders agree to pass a special resolution to increase the authorised share capital. There is no requirement that all, or any minimum percentage, of a private company's authorised share capital be issued.

It should be noted that English company law is undergoing a period of change with the



introduction of the Companies Act 2006 (the '**2006 Act**'). The majority of the provisions of the 2006 Act will come into force by October 2009, although certain sections are coming into force at various stages before this date and some are already in force. The 2006 Act removes the requirement for UK companies to have an authorised share capital.

RIGHTS

The basic rights of shareholders are set out in the relevant legislation and in template articles included in this legislation. These include that shareholders are entitled to receive notice of, attend and vote at shareholder meetings. The template articles will automatically apply to all companies. However, any company may, and usually will, adopt its own articles which will override all or some of the provisions of the template articles.

Companies may create different classes of shares which grant different rights to their holders and are largely free to tailor the rights attaching to these share classes to their specific needs. In order to amend the rights attaching to one class of share a resolution approved by three quarters of the holders of that class of share is required. It is fairly common for these classes to include non-voting shares or preference shares entitling the holder to preferential dividend rights.

ISSUING SHARES

DIRECTOR'S AUTHORITY TO ISSUE SHARES

Under the current law a company's directors must be granted a specific authority by the shareholders to allow them to issue the company's shares. The authority will state the maximum number of shares that the directors are allowed to issue and the duration of the authority (which cannot be for more than five years). If the directors wish to issue additional shares, or if the authority expires, then the directors must seek a renewal of the authority from the shareholders.

The 2006 Act contains similar provisions to those mentioned above. The main change will be that the directors of a private company with a single class of share have a deemed authority to allot that company's shares. If the shareholders wish to place any restriction on this deemed authority then it will need to be contained in the company's articles.

STATUTORY PRE-EMPTION RIGHTS ON ISSUE

UK legislation contains pre-emption rights that will apply to the issue of shares by a company. These rights require the company to offer the new shares to its existing shareholders pro-rata to the percentage of shares that they hold before the shares are offered to any outside parties.

These statutory pre-emption rights may be disapplied by a company's shareholders and it is normal for most companies to do so. As with the directors' authority to issue shares, any disapplication of the statutory pre-emption rights must be renewed periodically. Where a



company will have more than one shareholder the statutory rights are often replaced by more detailed provisions in the company's articles or in a shareholders' agreement. The 2006 Act contains similar statutory pre-emption rights to those found in the current legislation.

In relation to public companies the National Association of Pension Funds, which represents the interests of many UK pension funds, has stated in its rules that the maximum amount of the shares of a public company over which pre-emption rights should be disapplied at any time is 5%. While this is not a statutory requirement, as pension funds are some of the largest institutional investors in UK public companies these rules are commonly followed. This places a limit on the company's ability to dilute its existing shareholders without first seeking their approval.

Rights of Shareholders

The following are some of the more common rights that shareholders of UK companies acquire by virtue of holding a certain percentage of the company's voting shares:

- 5% - have an item placed on the agenda for an annual general meeting;
- 10% - call a general meeting;
- require a public company to serve a notice on any person asking for details of that person's interest in the company's shares;
- 25% - block a special resolution (just over 25% is required);
- 50% - block an ordinary resolution;
- pass an ordinary resolution (just over 50% required);
- remove a director of the company (just over 50% required); and
- 75% - pass a special resolution (such as amending the articles or changing the company's name).

TITLE

The holder of shares in a UK company must have its name and address recorded in the company's Register of Shareholders. This registration gives the registered holder 'legal' title to the shares. Ownership of a company's shares is not formally recorded in any public records, although the identities of a company's shareholders are notified to Companies House (the UK's companies' registry) once a year.

The registered holder of a company's shares may own those shares on behalf of another person. That other person will have the 'beneficial' title to the shares. Such an arrangement is normally documented by the registered holder entering into a deed of trust in favour of the beneficial owner. It is common for shares of listed companies to be held by nominee companies on behalf of other beneficial owners. However, there are certain rules requiring the identities of those beneficial owners to be disclosed if that beneficial owner holds or has control of more than 3% of the company's issued shares (see below). As far as the company is concerned, only the registered holder will be entitled to attend and vote at shareholders' meetings.



TRANSFERRING SHARES

SHARE TRANSFER FORMALITIES

The only way to transfer legal title to shares in a UK company is for the seller to execute a 'stock transfer form' – a short standardised transfer document. Once such a form has been executed the buyer must pay stamp duty (at a rate of 0.5% of the value of the consideration paid for the shares) and the company's Register of Shareholders is then updated to record the change of ownership.

A share sale agreement by itself will not be sufficient to transfer the legal title to shares. However, such an agreement is always advisable as there are often terms associated with the sale that cannot be included in the stock transfer form. It is important for a buyer to ensure that it is acquiring the legal and beneficial title to any target shares. Where the title is split it will be necessary for the beneficial owners, as well as the legal owners, to sign the share sale agreement.

PRE-EMPTION RIGHTS ON TRANSFER

It is common for a company's articles or shareholders' agreement (see below) to contain pre-emption provisions on the transfer of the company's shares. Under these provisions a shareholder who wishes to transfer its shares will be required to offer the shares to the existing shareholders before they can be transferred to an outside party. These may be in addition to any pre-emption provisions applicable to the issue of new shares. Unlike share issues, there are no statutory pre-emption rights that apply to share transfers.

When acquiring shares in a company the buyer should check whether any pre-emption rights apply to the transfer. If there are such pre-emption rights then the buyer should try to obtain waivers from the existing shareholders of their pre-emption rights. If the existing shareholders are not happy to give these waivers then the buyer will only be able to acquire the shares to the extent that they are not acquired by the existing shareholders. In practice this is unlikely to be an issue where the buyer is acquiring 100% of the company's shares.

ACQUIRING SHARES IN A PUBLIC COMPANY

Where a person is acquiring shares in a UK public company (whether or not those shares are traded on a market) the provisions of the Take-over Code will apply to the acquisition. In particular the Take-over Code states that where any person acquires, whether by a series of transactions over a period of time or not, an interest in shares in a public company which carry 30% or more of the voting rights of the company then the acquirer must make an offer, on similar terms, for all of the shares of that company.

In calculating whether this rule has been triggered the shares held by the acquirer will, for the purposes of the calculation, be added together with any shares in that company in which any persons acting in concert with the acquirer hold an interest. This rule will also be triggered each



time a person, or group of connected persons, holding between 30% and 50% of the voting rights of the company acquires any further shares.

SHAREHOLDERS' AGREEMENTS

Where a company has a number of different shareholders, particularly where those shareholders are using the company as a vehicle to undertake a specific business project, it is common for the shareholders to enter into a shareholders' agreement. The agreement will set out any arrangements between the shareholders as to, for example, their ability to appoint directors and receive dividends. The agreement will usually also contain pre-emption provisions on the issue and transfer of the company's shares.

The pre-emption provisions may equally be inserted into the company's articles. The advantage of placing them in the articles is that the provisions will be automatically binding on all shareholders of the company. If the provisions are in a shareholders' agreement then any new shareholders will need to specifically sign up to them before they are binding on those new shareholders. However, for privacy reasons shareholders often prefer to place the provisions in a shareholders' agreement.

MERGER AND INVESTMENT CONTROL

In addition to EU merger control legislation, the UK's Competition Commission will investigate the acquisition of one company or group by another if:

- ❖ as a result of the acquisition the combined group will have a market share of 25% or more in the UK (or a substantial part of the UK), or an existing market share of 25% or more will be enlarged; or
- ❖ the UK turnover of the business being acquired exceeds £70 million.

The Commission has the power to veto or impose conditions on any transaction which it feels may impact on competition. It is therefore advisable to approach the Commission in advance of any transaction which meets either of the above tests. There are very limited circumstances of exceptional public interest (for example, national security) in which ministers are able to veto a merger decision.

The UK has no legislation governing investments into the country from other jurisdictions and no consents or approvals are required for the flow of funds into or out of the UK.



OFFERING SECURITIES TO UK RESIDENTS

PRIVATE PLACEMENTS

The basic rule is that a person (an **'offeror'**) must not, in the course of business, communicate an invitation or inducement to engage in investment activity. Offering shares in companies (whether UK companies or not) to investors based in the UK will constitute investment activity. However, this rule does not apply if:

- ❖ the person communicating the offer is authorised by the UK's Financial Services Authority (**'FSA'**) to make the promotion (an **'authorised person'**);
- ❖ the content of the communication is approved by an authorised person before the offer is made; or
- ❖ one or more of the exemptions set out under UK legislation applies to the transaction.

Most offerors will not be authorised persons and it is costly to have an authorised person approve the communication. As a result, if an investment opportunity is to be made to UK residents one or more of the exemptions set out under the relevant legislation must apply.

There are over 70 exemptions that may apply to allow an investment opportunity to be communicated. Generally the exemptions set out certain groups of investor to which a financial promotion may be communicated (for example 'investment professionals' and 'high net worth individuals'). More than one exemption can be relied on at a time. The circumstances in which an offer is first communicated to investors (for example whether this is by letter or telephone call) will be relevant in determining whether certain exemptions apply. Each exemption contains detailed conditions that must be met before it can be relied on which include, in most cases, various required statements that must be included in the communication.

An offeror must ensure that, if relying on exemptions, it only communicates an investment opportunity to investors that are permitted to receive it. Any agreement that is entered into as a result of an unlawful communication will not be enforceable by the offeror, and the investor will be entitled to recover any money paid out under the agreement. In addition:

- ❖ any breach of the legislation can be punishable by an unlimited fine and up to two years' imprisonment; and
- ❖ the same penalties can be applied to all officers of a company in breach of the legislation.



PUBLIC OFFERINGS

The most common markets on which shares are listed in the UK are the Main Market of the London Stock Exchange and the AIM market. AIM was set up to assist small growing companies in coming to the market. Unlike the main market it does not stipulate minimum admission requirements with respect to factors such as the company's size or market capitalisation. The fees involved in an AIM listing are generally lower than those for a listing on the Main Market.

Companies listing their shares or similar securities on the Main Market are required to produce a prospectus that is compliant with the Prospectus Rules. A prospectus must be submitted to the FSA for approval before it can be issued to investors. A company is allowed to make to investors financial promotions that are contained in a prospectus without the need to rely on the above mentioned exemptions. A prospectus must be prepared and filed for any public offering of securities, whether this is on or off market.

Companies listing their shares or similar securities on AIM usually produce an admission document compliant with the AIM Rules. The AIM Rules require that some of the same information set out under the Prospectus Rules be included in the admission document. It is not necessary for an admission document to be submitted to the FSA for approval. However, as a result the admission document must comply with one or more of the exemptions allowing a financial promotion to be made before it can be issued. Usually the exemption allowing the promotion to be made to 'investment professionals' is relied on, as the institutional investors acquiring the company's shares will usually qualify as such. The admission document, and any presentational material used to promote it, must contain any statements required to be included as a condition of the exemptions that are being relied on and care must be taken that the admission document is only distributed to investors permitted by those exemptions to receive it.

When is a prospectus required?

The general rule is that a prospectus must be prepared and filed with the FSA before any offer of shares or similar securities is made to the public. However, a prospectus is not required where:

- ❖ the offer is made to less than 100 persons, other than any qualified investors, per EEA state;
- ❖ the minimum consideration that can be paid by an investor is at least €50,000;
- ❖ the securities being offered are denominated in amounts of at least €50,000; or
- ❖ the total consideration for all securities being offered, including any of the same type offered in the last 12 months, does not exceed €2,500,000.

A prospectus must be prepared and filed where shares or similar securities are to be admitted to trading on the Main Market of the London Stock Exchange.



London's Eurobond listing rules are based on the European Union Capital Markets Directives which apply in all EU member states. A listing of Eurobonds takes place on the London Stock Exchange and is regulated by the FSA. There are a number of requirements which must be fulfilled before Eurobonds can be listed. For example, a two year trading and financial record is required and a listing document must be prepared which complies with the listing rules and with the London Stock Exchange's admission and disclosure standards. The debt security which is the subject of the listing must be freely transferable.

DISCLOSURES OF SHAREHOLDER DETAILS

As part of the implementation of the EU Transparency Directive the FSA has produced a Disclosure and Transparency Rules Sourcebook containing the Disclosure and Transparency Rules ('DTR'). The DTR state that where a company's shares are admitted to trading on certain markets (including the Main Market and AIM):

- ❖ a person who acquires or is entitled to acquire control over the voting rights of more than 3% of the shares in a UK company, whether by a single or a number of acquisitions, must usually disclose its interest to the company (and a further disclosure must usually be made for each subsequent 1% acquired); and
- ❖ the thresholds for the disclosure of holdings in a non-UK company (where its shares are admitted to trading on a UK regulated market and the UK is its home member state) are 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.

Where the shares in question are in a UK company the notification must be made within two business days of triggering the disclosure requirement and the company must then make the notification public by the end of the next business day following receipt of the notification. Where the shares are in a non-UK company the notification must be made within four business days of triggering the disclosure requirement and the company must then make the notification public by the end of the third business day following receipt of the notification.

While it is not a specific offence for a shareholder to fail to disclose an interest, the FSA is able to take enforcement action if a person breaches the DTR. The FSA also has the power to publicise information that shareholders and companies are required to publish.

COMPANIES ACT 2006 RULES

A UK public company is permitted to serve a notice on anyone that the company believes has an interest in its shares requiring that person to give details of any interest held or any person to which a historic interest has been transferred. Shareholders holding over 10% of the voting shares can require the company to serve such a notice on any other party. A person may be fined or imprisoned for up to two years for failing to respond to any such notice.



These rules, set out in the 2006 Act, are very similar to those contained in the old UK legislation and are now in force. The rules do not extend to shareholdings in private companies. As many shareholdings in UK public companies are held by nominees on behalf of a beneficial owner these rules are often used by a UK public company to determine the ultimate beneficial holders of its shares.

TOP FIVE TIPS RELATING TO UK SECURITIES

- 1 Where deferred consideration is payable for an acquisition of shares and the total amount of the consideration is not known at the time of the acquisition then the payment of stamp duty will need to be carefully considered. If it is not possible to ascertain the full amount of the consideration on the date of the transfer then no stamp duty will be payable on any unascertainable amount. However, if the total consideration payable is limited to a capped amount then stamp duty will be payable (at a rate of 0.5%) on this maximum figure irrespective of whether the maximum figure is eventually reached.
- 2 UK tax resident shareholders will be required to pay UK income tax on any dividends that they receive from a company at the rate of either 10% or 32.5% (depending on the level of the investor's income). Shareholders who are not resident in the UK will not be taxed on dividends paid outside the UK (as the UK does not charge withholding tax on dividends), however, they may be subject to their own local taxes.
- 3 Where shares of a particular class are traded on a UK market then all shares of that class, and not just the shares sold in the market, will be admitted to trading on the market. Usually a listed company will only have a single class of shares, although it is possible for a listed company to have two classes of shares, one of which is admitted to trading and one of which is not.
- 4 Most shares of UK listed companies are traded in dematerialised form (i.e. there is no paper share certificate). Instead shares are traded through the CREST electronic settlement system. To trade shares through CREST an investor will need to open a CREST account with a broker. A listed company will engage the services of a professional registrar to maintain its Register of Shareholders. The registrar will ensure that the Register records all electronic transfers of the company's shares.
- 5 As a result of the changes to UK company law being introduced by the 2006 Act UK companies are advised to review their constitutional documents and management practices to ensure compliance and to take full advantage of the changes. This is particularly true for private companies as one of the aims of the 2006 Act is to reduce the administrative burden placed on private companies by legislation.



The following are common securities under United States ('**US**') law:

- ❖ shares in a corporation, which may consist of preferred or common stock;
- ❖ equity interests in a limited liability company;
- ❖ bonds;
- ❖ debt instruments;
- ❖ debt instruments or preferred shares that are convertible into common shares; and
- ❖ warrants and other subscription rights granting an interest in a corporation's shares.

It should be noted that the laws relating to the issue and transfer of securities will vary slightly from one US State to the next.

SHARE CAPITAL

NOMINAL VALUE

Shares in US corporations are not required to have a nominal value. Shares can take the form of:

- ❖ **Par Shares:** The par value of a share of common stock is a dollar amount which is designated in the articles of incorporation. The consideration for which par shares are issued must always be equal to or greater than the par value. Usually the par value of preferred shares will be equal to the liquidation value of those shares, although this is not a requirement.
- ❖ **No Par Shares:** The consideration for which no par shares are issued may be set without reference to any minimum value.

It is more common to issue par shares than shares of no par value. One reason for this is that the mechanics associated with the issue of, and the calculation of, franchise taxes in certain jurisdictions are simpler with respect to par shares.

Generally, shares may be issued in exchange for cash, property or services. Many state statutes provide that promissory notes or the promise of future services do not constitute permissible consideration for the issuance of shares. New York law, however, provides that consideration for the issue of shares may consist of a binding obligation to pay the purchase price or subscription price in cash or property or a binding obligation to perform services that have an agreed value.

There is no minimum par value or capital requirement for equity interests in a limited liability company or limited partnership.



AUTHORISED SHARE CAPITAL

The articles of incorporation of a corporation, which is a publicly available document, must state the number of shares that the corporation is authorised to issue (known as 'authorized stock' or 'authorized capital'). There is no statutory limitation on the number of shares that may be authorised by a corporation and no requirement that all or any specific percentage of the authorised shares must actually be issued.

Most limited liability companies do not have any authorised capital. Instead, as with partnerships, the members determine, by contract, initial and additional capital contribution requirements. Further, unless otherwise provided in the limited liability company operating agreement or the partnership agreement, a limited liability company or partnership, as the case may be, has an unlimited right to issue equity interests.

ISSUING SHARES

PROCESS OF ISSUANCE

After a corporation is formed, its board of directors is responsible for making any decision to issue additional shares of authorised stock and determining the prices for which such additional shares will be issued. In limited liability companies and partnerships, the managing members or general partners, respectively, have the authority to issue equity interests. These rights are usually set out in a contract between the entity and its managers. In private corporations, a stockholder's agreement will often place limits and conditions on the corporation's ability to issue additional shares (such as a requirement that the consent of all stockholders who are parties to the agreement first be obtained).

Some states, such as Delaware, permit shares to be issued as paper certificates or in book entry form. A limited liability company's or limited partnership's governing instrument (i.e. its partnership agreement or operating agreement) will set out whether its interests will be represented by paper certificates.

PRE-EMPTION RIGHTS ON ISSUE

Pre-emptive rights allow existing shareholders of a corporation to purchase a proportionate share of any new issues of common stock in order to avoid a dilution of their ownership interest in the corporation. New York law provides that, for corporations incorporated on or after 22 February 1998, shareholders do not have pre-emptive rights unless otherwise expressly provided in the corporation's certificate of incorporation. Delaware law similarly provides that shareholders only have pre-emptive rights if such rights are granted to them by the corporation's certificate of incorporation.



SHAREHOLDER RIGHTS

Holders of common stock in a corporation have: (i) the right to vote for the election of directors and on other matters as may be provided by statute, in the corporation's by-laws or by a stockholder's agreement; (ii) the right to receive dividends of the corporation when distributions are made; and (iii) the right to receive a distribution of the net assets of the corporation upon liquidation.

Holders of preferred stock have a preference over holders of common stock in the payment of dividends and/or the receipt of assets of the corporation upon liquidation. Preferred shares may be either voting or non-voting and usually grant a right to receive a fixed dividend that is not dependent on the earnings of the corporation.

A corporation may also issue stock which has the economic characteristics of common stock but with no voting right attached (such stock is usually referred to as 'non-voting common stock').

Rights of Shareholders

Unless otherwise provided in the certificate of incorporation or by-laws of a corporation, New York and Delaware law provide as follows:

- ❖ A quorum is required for the transaction of business at a meeting of shareholders. A quorum is constituted by the holders of a majority of the shares entitled to vote. The certificate of incorporation or by-laws may provide for a lesser quorum, but such lesser amount cannot be below one-third of the shares entitled to vote.
- ❖ A plurality of the votes cast at a meeting of shareholders is required for the election of directors.
- ❖ A majority of the votes cast at a meeting of shareholders is required for any corporate action, other than election of directors.

TITLE

Each corporation is required to maintain stock transfer books or share registers which record the names of the persons who have been issued shares, referred to as 'record owners'. Every share certificate issued bears the name of the record owner. The record owner may or may not be the beneficial owner of the shares. Entries in the share register are legal evidence of the ownership of shares.



TRANSFERS OF SECURITIES

SHARE TRANSFER FORMALITIES

Shares of stock, equity interests in a limited liability company and equity interests in a limited partnership are generally freely transferable. The most common exceptions to this rule are: (i) where the entity's constitutional or other related documents specifically provide to the contrary; or (ii) as limited by US securities laws.

In order to transfer shares, the record owner must either endorse the reverse side of the certificate over to the transferee or provide a separate stock power to the same effect. The acquirer may then submit the endorsed certificate or stock power to the corporation and request that a new certificate be issued in the acquirer's name and that the corporation's records be updated.

PRE-EMPTION RIGHTS ON TRANSFER

In a privately owned corporation it is common for share transfer restrictions to be imposed by contract. These restrictions will often require the offer or sale of shares either to the corporation or to other existing shareholders upon the death of the shareholder or when the shareholder wishes to sell its interest in the corporation. Generally, shares of a corporation may be purchased or redeemed by the corporation for cash, other property, indebtedness or other securities of the corporation, unless the corporation is insolvent or would be made insolvent by the purchase or redemption.

Transfer restrictions may take the form of: (i) an option exercisable by the corporation or shareholders to purchase shares at a stated or determinable price; (ii) a mandatory buy-sell agreement obligating the corporation or shareholders to purchase the shares at a stated or determinable price; or (iii) a right of first refusal, giving the corporation or shareholders an opportunity to meet the best price that the shareholder has obtained from outside parties.

In a publicly held corporation there are usually no share transfer restrictions. Share transfer restrictions may, however, be used to prevent violations of federal or state securities acts where the corporation has issued unregistered shares or to ensure the continued availability of an exemption from registration that may be lost (please see the section headed 'Private Placement Exemptions' below). Such transfer restrictions usually prohibit transfers unless the transferor can establish that the transfer is consistent with the appropriate US securities laws.

SHAREHOLDERS' AGREEMENTS

A shareholder voting agreement is a contract between shareholders to vote their shares in a specified manner on certain matters, such as voting for the appointment of certain directors. The purpose of shareholder voting agreements may be to maintain control, maximise the voting power of the shares or ensure that some other specific objective is obtained. Shareholder voting



agreements are generally recognised as valid contracts, although some states have adopted statutes regulating such agreements by, for example, limiting the time period during which they may remain in effect.

MERGER AND INVESTMENT CONTROL

MERGERS AND ACQUISITIONS

Generally, US corporate laws enable the easy formation of legal entities and issuance of equity interests, which in turn facilitates US merger and acquisition activity. There are few formalities that are required to be complied with when completing a merger and, except as provided below, most mergers do not require government consent.

The Committee on Foreign Investments in the United States (or '**CFIUS**') gives authority to the President to suspend or prohibit any foreign acquisition, merger or takeover of a US entity that CFIUS determines may threaten the national security of the US. The President or his designee must receive written notice of an acquisition, merger or takeover of a US entity by a foreign entity and will review the transaction. In the event that an extensive investigation is required, the investigation must begin no later than thirty days after receipt of the notice, and must end within forty-five days.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 as amended ('**HSR Act**') allows the US government to consider the potential effects on competition of certain mergers, acquisitions or other consolidations. The HSR Act requires companies with a certain amount of net assets or annual total net sales that are contemplating certain types of transactions involving a consideration in excess of US\$59.8 million to make a filing with the Federal Trade Commission ('**FTC**') and the antitrust division of the Department of Justice. A filing fee of, at a minimum, US\$45,000 must be paid and there is a waiting period of thirty days before the transaction can be closed. During the waiting period, the parties must continue to operate as independent entities and may not act to effectuate the transaction. The FTC will either approve or oppose the merger based on its analysis of the competitive effect of the merger. Failure to make the filing can result in both entities becoming subject to financial penalties.

FOREIGN INVESTMENT

A non-US investor who purchases US securities in an offering registered under the US Securities Act of 1933 as amended (the '**Securities Act**') has the same protections as a US purchaser under the anti-fraud provisions of the Securities Act and the US Securities Exchange Act of 1934 as amended (the '**Exchange Act**'). These acts prohibit material misstatements or omissions in connection with the offering of securities.

An offering made overseas by a US issuer need not be registered under the Securities Act if offers are not made to persons located in the US, and no directed selling efforts are made in the US. A



non-US investor who purchases securities of a US issuer in such an offering is protected by the anti-fraud provisions of the Securities Act.

Non-US persons who engage in transactions involving the securities of US issuers may be subjected to liability under US securities laws, such as laws prohibiting insider trading.

OFFERING SECURITIES

Under the Securities Act, any offer to sell securities in the US by an issuer or an existing shareholder must either be registered with the Securities and Exchange Commission (the '**SEC**') by filing a registration statement, or must fall under an exemption from this registration requirement. One such exemption is the 'private placement' exemption which permits transactions by a corporation which do not involve any public offering.

PRIVATE PLACEMENT EXEMPTIONS

The table below sets out certain exemptions from the registration requirement with respect to the issuance and sale of securities by an issuer:

Exemption	Requirements
Regulation D (Rule 506)	<ul style="list-style-type: none">❖ No general solicitation or advertising in connection with the offering.❖ Company can raise an unlimited amount of money.❖ Company can sell its securities to an unlimited number of 'accredited investors', (which generally includes institutional investors and individuals with a net worth over US\$1 million) and up to 35 other purchasers. All non-accredited investors must be sophisticated (i.e. they must have sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment).
Regulation S	<ul style="list-style-type: none">❖ The offer, sale or resale must be made in a so called 'offshore transaction'. An offshore transaction is one in which: (i) no offers are made to persons in the US; and (ii) either (a) the buyer is offshore at the time of the buy order; or (b) the sale is made in, on or through an established foreign securities exchange, or through the facilities of one of several designated offshore securities markets.❖ No directed selling efforts may be made in the US in connection with an offer, sale or resale of the Securities.❖ The securities may not be resold in the US during a specified distribution period, and must bear a legend to that effect.



Securities sold by an issuer pursuant to an exemption from the registration requirement are deemed to be 'restricted securities' and may only be resold by their holders if registered or as part of a transaction that is exempt from registration. Restricted securities generally bear a restrictive legend to that effect.

OFFERING MEMORANDUM

To meet the requirements of Regulation D, an issuer is almost always required to make extensive disclosures regarding the nature, character and risk factors relating to an offering in an offering memorandum which the issuer, issuer's counsel, placement agent and accountants work on together to produce. The offering memorandum is a disclosure document that contains information relating to, amongst other matters, the securities being offered (including recent price and dividend data, if applicable), the use of proceeds, the issuer's business, operations, prospects, management, capital structure and financial performance (including financial statements), the issuer's business environment, and relevant risk factors (including a description of the potential risks in each relevant jurisdiction).

Although the offering memorandum is not subject to the more detailed registration requirements of US securities laws, the content of the offering memorandum will generally be dictated by anti-fraud considerations, market practice and marketing concerns. The issuer must be particularly careful to avoid making any material misstatements or material omissions. Alternatively, in the event that a non-US offering memorandum already exists in connection with the transaction but does not comply with the above US securities law requirements, a 'wrapper' can be prepared. This wrapper is a separate document that will be attached to the existing memorandum and that will include all of the information required by Regulation D.

There are no US disclosure requirements in connection with a Regulation S offering. The issuer need only ensure that it complies with Regulation S by not offering or selling its securities in the US.

BLUE SKY LAWS

While the SEC is the main enforcer of US securities laws, each individual state has its own securities laws and rules, known as 'Blue Sky Laws'. Blue Sky Laws vary from state to state and the statutes and regulations in each state in which the securities are to be offered must therefore be reviewed to determine what is required in each relevant state.

PUBLIC OFFERINGS

There are two types of markets for common stock in the US, namely exchange markets and over the counter markets (such as NASDAQ). The largest US exchange market on which common shares are traded is the New York Stock Exchange.



As explained above, under the Securities Act, an issuer may not offer or sell securities to the public unless it registers with the SEC by filing a registration statement containing the required information. The registration statement is publicly filed with, and is subject to review and comment by, the SEC. The registration statement consists of the prospectus, which is a disclosure document provided to each purchaser of securities, and information and exhibits which are not provided to each purchaser but are available for public inspection.

Public companies with shares trading on US markets are subject to the ongoing disclosure requirements of the Exchange Act (for example, quarterly and annual reports) and the Sarbanes Oxley Act. The Sarbanes Oxley Act imposes certain requirements relating to corporate governance, financial disclosure and the practice of public accounting.

DISCLOSURE OF BENEFICIAL OWNERSHIP

Any person or group that becomes the owner of more than 5% of any class of securities registered under the Exchange Act must file a statement with the issuer of the securities and the SEC. This statement must provide background information on the owner(s), the source of the funds used, the purpose of the acquisition, the total number of shares owned and any relevant contracts or arrangements.

When is a registration statement required to be filed with the SEC?

A registration statement must be filed with the SEC in connection with any offer to sell securities to US investors by an issuer unless an appropriate exemption applies.

TOP FIVE TIPS RELATING TO US SECURITIES

- 1 Pre-emptive rights on the issue or transfer of shares which operate in favour of the existing shareholders of a corporation generally do not exist as a matter of law. In many states, such as New York and Delaware, they must be expressly granted to shareholders in the corporation's certificate of incorporation.
- 2 'Securities' are broadly defined under the Securities Act. For example, securities are deemed to include guarantees. As a result a corporation should take particular care to determine whether any action that it is taking with regard to its dealings with securities needs to be registered with the SEC. An interest in a limited liability company may not be a security for purposes of the Securities Act.
- 3 Generally, publicly traded securities are not issued as paper certificates.



- 4 Usually, there are no transfer taxes payable on the transfer of securities. Corporations will be subject to a number of other federal, state and local taxes, although state and local taxes are often deductible against federal taxes.
- 5 A corporation can authorise the creation of more shares than it actually intends to issue at any given time. The remainder of the shares can be issued at a later date. Moreover, very little paid-in capital is required in connection with the issuance of securities.

