PRACTICAL LAW COMPANY®

South Africa

Tim Sukazi and Rudolph du Plessis
Bowman Gilfillan Inc

www.practicallaw.com/0-501-9725

M&A ACTIVITY

1. Please give a brief overview of the public M&A market in your jurisdiction.

The M&A market was fairly active in 2010 as part of global recovery from the economic downturn and deal volumes were fairly high in 2010 in comparison to the previous year. However, despite the improvement in market conditions, one of the potential mega deals of the year failed due to the collapse of negotiations between the relevant parties (*see below*). Black Economic Empowerment (BEE) transactions (the acquisition by previously disadvantaged people of direct ownership in an existing or new entity in any sector of the economy) continued to play an important role in the M&A market.

Some of the most significant non-BEE transactions included:

- The merger between FirstRand, Metropolitan and Momentum at an estimated deal value of ZAR30 billion. (As at 1 March 2011, US$1 was about ZAR7.)
- The acquisition by Nippon Telegraph and Telephone of the entire issued ordinary share capital of Dimension Data at an estimated deal value of ZAR24 billion.
- The merger between Gold Reef and Tsogo at an estimated deal value of ZAR21 billion.
- The acquisition by Eurasian Natural Resources Corporation of a 12.21% stake in Northam at an estimated deal value of ZAR2.2 billion.
- The acquisition by Net 1 UEPS Technologies of a 98.73% stake in KSNet at an estimated deal value of ZAR1.63 billion.

In addition, HSBC and Nedbank terminated their discussions concerning an acquisition by HSBC of a majority stake in Nedbank. The transaction would have been the largest M&A transaction in South Africa in 2010. The deal was valued at ZAR50 billion.

The largest BEE transactions during 2010 were:

- ArcelorMittal's BEE transaction, valued at approximately ZAR9.075 billion. A BEE Consortium and a black employees trust acquired a 21% and 5% stake respectively in ArcelorMittal's South African operations.
- Assore's BEE transaction, valued at approximately ZAR2.1 billion, under which Bokamoso Trust (comprising black beneficiaries who reside in communities in which Assore's business operates) acquired a 11.01% stake in Assore.
- Adcock's BEE transaction, valued at approximately ZAR1.3 billion, under which various black consortia and special purpose vehicles subscribed for a 13% stake in Adcock.
- MTN's BEE transaction, valued at approximately ZAR8.1 billion, under which black members of the public acquired a 4% stake in MTN.
- Goldfields' BEE transaction, valued at approximately ZAR1.4 billion, under which a BEE consortium acquired a 10% stake in South Deep Gold Mine.

2. What are the main means of obtaining control of a public company?

There are currently three ways of obtaining control of a public company under the South African Companies Act No. 61 of 1973 (Companies Act). These are:

- **Scheme of arrangement (*section 311, Companies Act*).** This is the most commonly used method of obtaining control in a recommended offer. A scheme of arrangement is a statutory procedure under which a company makes an arrangement or compromise with its members or creditors (or any class of them). It can be about anything on which the company and its creditors or members can properly agree. A company can bring about almost any kind of internal reorganisation, merger or demerger using a scheme, provided that the necessary approvals have been obtained (court approval of the subject matter is required). A scheme of arrangement requires the consent of shareholders holding at least 75% of the shares of the company represented at the meeting convened to consider the scheme.
- **Takeover offer (*section 440A to 440N, Companies Act*).** This method is most commonly used where the offer is not recommended (that is, in a hostile bid situation). To acquire all the shares for which the offer is made (compulsory acquisition), the offer must be accepted by shareholders holding at least 90% of the shares which are the subject of the offer (*see Question 20*).
- **Sale of business (*section 228, Companies Act*).** This is where control of a public company is obtained by the bidder, or a vehicle set up for that purpose, by purchasing the whole or greater part of the business or assets of the target. The target must approve this type of transaction through a special resolution. A special resolution must be passed by 75% of the shareholders entitled to vote, present in person or represented by proxy. A special resolution must be registered with the office of the Registrar of Companies. There are imminent major reforms in this area (*see Question 29*).

HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Hostile bids are allowed but are not common. This is probably due to the relatively small size of the market rather than because of any legal, regulatory, political or cultural obstacles.

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated and by whom?

Takeovers and mergers are governed by the Securities Regulation Panel (Panel) (*see box, The regulatory authorities*) under the Securities Regulation Code on Takeovers and Mergers (Code) and the Rules of the Panel.

The Code applies to all transactions:

- Which result in a change of control in a company (affected transaction). Control is deemed to be acquired when a person (or a group of persons acting together) holds shares entitling the holder to exercise 35% of the voting rights of a company.
- Where one shareholder (or a group acting together) increases its holdings to 100% (affected transactions).
- By public companies and by private companies where the shareholders' interest in the company exceeds ZAR5 million and where there are more than ten beneficial shareholders.

The Code is largely based on the UK City Code on Takeovers and Mergers. However, unlike the UK City Code, the Code is statutory and is enforced by the courts rather than through self-regulation.

In addition to the Code, there are other regulations which apply to public takeovers (that is, the types of transactions set out in *Question 2*), including:

- The Companies Act, which governs:
  - the compulsory acquisition of minority shareholdings when the bidder acquires 90% of the shares in the target (*see Question 20*); and
  - disposals by a company in a sale of business.
- The Securities Services Act No. 36 of 2004 (*Securities Services Act*) which, among other things, contains the South African insider trading and market manipulation legislation.
- The Listings Requirements of the JSE Limited (JSE) (Listings Requirements) (*see box, The regulatory authorities*), which apply if:
  - the bidder's or target's shares are listed on the JSE. Under the Listings Requirements, the bidder's shareholders must approve an acquisition if the offer consideration is larger than 25% of the market capitalisation of the bidder; or
  - any new shares being offered as part of the bid consideration are to be listed on the JSE.
- The Competition Act No. 89 of 1998 as amended (Competition Act), which requires mergers of a certain size to be approved by the Competition Commission or the Competition Tribunal (*see box, The regulatory authorities*) before they can be implemented (*see Question 25*).

This area is subject to imminent reform (*see Question 29*).

PRE-BID

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

The scope of the due diligence enquiry usually depends on the time available to conduct the investigation and the need to preserve secrecy and prevent leaks about the proposed transaction. It is also subject to insider trading legislation but there is a limited exception related to the affected transactions. It ranges from limited to comprehensive. A comprehensive due diligence includes a legal and financial investigation into:

- Significant contracts.
- Employment and pensions.
- Litigation.
- Environmental and regulatory issues.

Hostile bid

Due diligence investigations are usually very limited as there is no obligation on the target to allow a bidder to conduct a due diligence investigation. Due diligence information invariably only comprises information which is in the public domain. The Code, however, provides that all information given to a preferred or potential bidder must, on request, be provided equally to a less welcome bidder.

Public domain

The following information is publicly available:

- The company's memorandum and articles of association.
- The company's share register, which is kept at its registered office and includes details of the company's issued share capital and shareholders.
- Details of the company's directors.
- Accounts, and directors' and auditors' reports.
- Any prospectus or circular which the company has published.
- Research published by investment banking analysts.

If the target is a listed company, it also has a continuing obligation under the Listings Requirements to disclose:

- Anything likely to have a significant financial effect on the company.
- Any new developments which are not public knowledge and which will lead to significant movements in the company's share price.

Any significant acquisitions or disposals must therefore be disclosed. The company must also publish its interim report and its financial results.

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

Secrecy must be observed before the announcement of a firm intention to make an offer (*Code*). Any person aware of confidential information (price sensitive or otherwise) concerning an offer or potential offer must:

- Treat that information as secret.
- Act in a way that minimises the chances of any information being leaked.

If secrecy cannot be maintained, a cautionary announcement must be published (*see Question 12*).

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

It is common for the bidder to seek irrevocable undertakings of acceptance from the target's major shareholders and, in a recommended bid, from directors who hold shares. The undertakings generally require the acceptance of the offer and a prohibition against taking any action that could prejudice its success. They are generally subject to both:

- The offer being made within a certain period.
- A more favourable offer not being received.

Undertakings to vote for, accept, or otherwise support the bid must be disclosed in the announcement of an offer and in the offer documents.

Key shareholders are likely to become subject to insider trading legislation on receiving the information or giving the undertaking.

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there circumstances in which shareholdings, or derivative holdings, of associates could be aggregated for these purposes?

There are no thresholds which trigger the compulsory disclosure of acquisitions of shares. However, a listed company must disclose shareholdings of more than 5% in its annual reports and its shareholders' circulars (*Companies Act and Listings Requirements*).

In addition, a nominee shareholder (a registered holder of shares in a listed company held on behalf of another person (beneficial holder)) must disclose to the company the identity of the beneficial holder every three months (*Companies Act*). The company can also compel the nominee shareholder to disclose the identity of the beneficial holder at any time.

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

Merger agreements are becoming more commonly used. The merger agreement usually provides for a period of exclusivity during which the target undertakes not to solicit a competing offer. Where the merger is implemented by a scheme of arrangement, the merger agreement also usually sets out how the target will pursue the scheme (in other words, make the necessary court applications and hold the scheme meeting).

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable and any restrictions on the size of the payment.

The Panel has indicated that it does not prohibit break fees and they are becoming increasingly popular in large transactions.

Break fees are not yet regulated, but it is likely that the Panel will set a limit of 1% of the value of the transaction. However, as the imposition of a limit seems closely related to the reasonable costs of the bid (including professional and other advisers' fees), this figure could be lower, as these fees are often comparatively lower in South Africa than in the US or Europe.

Ultimately, the level and incidence of break fees will be determined by the courts, which will decide in the best interests of the shareholders as a whole.

Committed funding

11. Is committed funding required before announcing an offer?

When an offer is wholly or partially for cash, the offer document must state both that:

- An irrevocable guarantee or other proof by an appropriate third party (for example, the bidder's bank or financial adviser) has been given in favour of the relevant target's shareholders.
- Sufficient resources are available to the bidder to satisfy full acceptance of the offer.

In practice, the Panel must be satisfied with the guarantee or other proof (*see Question 12*).

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements), and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

The approach

The bid must be notified in writing to the target's board or its advisers (*Code*). There is no requirement for earlier notification to the Panel. The Panel is only required to be notified when a cautionary announcement (*see below, Cautionary announcement*) or a firm intention announcement (*see below, Firm intention announcement*) is made, although it encourages the parties to consult with it before then. However, the offer document must be approved by the Panel before it is posted to the target's shareholders.

The identity of the bidder must be revealed where the offer is made by its representative. The target's board is entitled to be reasonably satisfied that the bidder is, or will be, in a position to implement the offer in full. The Panel must also be satisfied that the bidder has sufficient resources before approving the offer document.

Cautionary announcement

A cautionary announcement is a brief statement published in the press and on the JSE news service. Its aim is to preserve the integrity of trading in a company's shares on the JSE, both before and during negotiations concerning an offer. It usually only states that either:

- Talks are taking place and that a potential bidder is considering making an offer.
- An announcement is pending which could have a material effect on the price of the bidder's or the target's shares.

A cautionary announcement must be made by the bidder or the target (depending on the circumstances) when either:

- An offer is under discussion and:
  - the target is the subject of rumour and speculation; or
  - there is an abnormal movement in the price of the target's shares on the JSE.
- A company acquires knowledge of any material price sensitive information and:
  - the necessary degree of confidentiality of the information cannot be maintained; or
  - the company suspects that confidentiality has been breached.

The name of the bidder must be disclosed in the cautionary announcement. However, the Panel ordinarily dispenses with this requirement.

Firm intention announcement

An announcement of a firm intention to make an offer must be made when the target's board has been notified, in writing, of a firm intention to make an offer from a serious source. The target is responsible for making the announcement. It is published in the press and on the JSE news service and must contain:

- The terms of the offer.
- The identity of the bidder.
- The details of any existing holders of shares in the target.
- All material conditions to which the offer is subject.
- The details of any arrangements which exist between the bidder and the target or any concert party of the bidder or the target.

Following the announcement, the bidder must proceed with the offer in 30 days, unless the posting of the offer is subject to a condition which has not been fulfilled (for example, approval of the bid by the bidder's shareholders or the competition authorities). Therefore, an offer should not be announced until the bidder has resources available to satisfy all acceptances.

Timetable for takeover offers

There is a strict timetable for takeover offers, both recommended and hostile, as follows (*Code*):

- The timetable begins when the firm intention announcement is published.
- After publication of the firm intention announcement, the bidder has 30 days to post the offer document to the target's shareholders. The Code sets out the information which must be contained in the offer document (*see Question 14*).
- The offer must initially be open for acceptance for at least 21 days after the offer document is posted.
- The target's board must advise its shareholders of their views of the offer within 14 days of the posting of the offer document.
- The offer must be declared unconditional as to acceptances (that is, that all the necessary acceptances have been received) within 60 days from the posting of the offer document, or the offer will lapse.
- Once the offer has been declared unconditional as to acceptances, the offer must remain open for a further 14 days.
- The consideration for the offer must be posted to the target's shareholders who have accepted the offer within seven days of the offer becoming or being declared unconditional, or the offer being accepted, whichever is the later.
- If an offer is revised, it must remain open for a further 21 days following the posting of the revised offer document. The consent of the Panel is required to revise an offer and it usually does not allow offers on less favourable grounds (for example, an additional condition to the offer). Shareholders who have accepted the original offer must receive the revised offer terms.

If a competing offer is announced in respect of the target, both bidders will usually be bound by the timetable established by the competing offer.

Timetable for schemes of arrangement

The timing set out in the Code also largely applies to a scheme of arrangement, in particular:

- The scheme document convening the scheme meeting must be posted within 30 days of the firm intention announcement being published.
- 14 days' notice must be given for the scheme meeting.
- Once the statutory majority (that is, 75%) is obtained at the scheme meeting and all other conditions are met, an application to court can be made to approve the scheme (which takes about two weeks).
- The court order approving the scheme must then be registered.
- Consideration is paid to the scheme members after the court order is registered.

It is not usually appropriate to continue with a scheme of arrangement if a competing offer is announced.

Offer conditions

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

Takeover offers and schemes of arrangement must be approved by certain regulatory bodies. These approvals can operate as conditions to the offer, the most common being approval from the:

- Relevant competition authorities (*see Question 25*).
- Exchange Control Department of the South African Reserve Bank (SARB) (*see box, The regulatory authorities*), where the transaction requires exchange control approval.

In addition to these conditions, takeover offers are usually subject to the condition that either:

- 90% of the target's shareholders accept the offer, where the bidder intends to obtain 100% of the target's shares (*see Question 20*).
- More than 50% of the target's shareholders accept the offer, where the bidder only intends to obtain control of the target.

Takeover offers can also be subject to the bidder obtaining the necessary shareholder approval to make the offer.

Takeover offers cannot be made subject to conditions which are deemed to have been satisfied (or not) at the discretion of the bidder (*Code*). However, offers can be made subject to the fulfilment of certain pre-conditions, the most common being completion of a satisfactory due diligence investigation (*see Question 5*).

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

Takeover offer

In both recommended and hostile takeover offers, the bidder must post the offer document to the target's shareholders. This document must state, among other things (*Code*):

- The reasons for the offer, and the intentions of the bidder in relation to the continuation of the business and the continuation in office of the target's directors.
- Financial and other information on the target and the bidder.
- The bidder's holdings in the target.
- Whether directors' remuneration will be affected by the acquisition of the target or by any other associated transaction.
- The terms and mechanics of the takeover offer.
- The ultimate owner of the shares to be acquired.
- Arrangements, undertakings or agreements between the bidder and the target in relation to the takeover offer.

In the 14 days following the posting of the offer document, the target's board must circulate its views on the takeover offer (and make any alternative offers known) to the target's shareholders. The target's board document must set out (*Code*):

- Any external advice given to the target's board.
- The board's comments on the statements in the offer document in relation to the bidder's intentions for the target and its directors.
- The holding of any shares in the bidder by the target.
- Whether the target's directors intend to accept or reject the offer in respect of their own holdings.
- Material particulars of the service contracts of the directors.
- Disclosures of any arrangements, undertakings or agreements between the bidder and the target.

In practice, in a recommended bid, all this information will be in the offer document prepared jointly by the bidder and the target.

The offer document and the target's board document must satisfy the highest standards of accuracy and the information given must be adequately and fairly presented. In all cases, the documents must be approved by the Panel before posting.

If the offer is revised, an updated offer document must be sent to the target's shareholders. This document must contain details of any material changes in information previously published by, or on behalf of, the parties during the offer period (takeover offer) and the information required by the Companies Act.

Scheme of arrangement

The scheme document convening a scheme meeting must be posted to the target's shareholders by the target's board. This document must set out all the information required in an offer document and the target's board document in a takeover offer (*Code*) (*see above, Takeover offer*).

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

The Competition Act requires both the bidder and the target to provide a copy of the notice (which is submitted to the Competition Commission) in relation to the takeover, to either:

- Any registered trade union that represents a substantial number of the target's employees.
- The target's employees concerned or their representatives.

If the implementation of the takeover includes a sale of the target's business as a going concern, then there are no adverse consequences to employees resulting from that sale as the bidder automatically assumes all obligations of the target in relation to employees. However, if the takeover involves reducing the number of employees, then the employees must be consulted either directly or indirectly through appropriate forums.

Mandatory offers

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

A mandatory offer must be made for the rest of the target's shares if a bidder's holding (or its combined holding with any concert party) increases:

- To 35% or more of the voting rights of the target.
- By 5% or more of the voting rights of the target during any 12-month period when the bidder or any concert party (or both) already have control of between 35% and 50% of the voting rights of the target.

Mandatory offers must be made at the highest price paid for the relevant shares in the three months preceding the offer.

The Panel can waive the requirement to make a mandatory offer if the holders of a majority of the independent shares of the target (in other words, excluding shares held by the bidder and its concert parties) agree.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

A bidder can offer cash, shares or other securities, or a mixture of any of these, as consideration for a bid. However, where the bidder, or its concert parties, acquires shares in the target carrying 10% or more of the voting rights in the three-month period before the offer is made, the offer must be in cash (or accompanied by a cash alternative) at not less than the highest price paid by the bidder in that three-month period.

18. Are there any regulations that provide for a minimum level of consideration?

The offer price cannot be lower than the price paid by the bidder or its concert party for any shares in the three months leading up to the beginning of the offer period (*see Question 17*).

The Panel can also require the offer price to be no lower than the price paid by the bidder or its concert party for any shares bought before this time, if it considers this necessary to ensure all the target's shareholders are treated equally. Also, if the bidder, or a concert party of the bidder, buys shares above the offer price during the bid, it must increase its offer price to all shareholders.

A mandatory offer must be made in cash or include a full cash alternative. The price offered must be equivalent to the highest price paid for any shares in the three months before the mandatory offer (see *Question 16*).

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

A bidder must not offer shares in a foreign company which is not listed on the JSE as consideration, without the approval of the Exchange Control Department of SARB (*Exchange Control Regulations 1961 (Regulations)*). The Exchange Control Department is unlikely to allow this form of consideration and, if it did, strict conditions would be imposed governing the sale of the shares and the repatriation of the proceeds of the sale.

Foreign companies can list their shares on the JSE. South African private individuals and institutional investors can invest in these shares using their existing foreign investment allowances. South African shareholders can accept these shares as acquisition consideration and exercise their rights in terms of a rights' offer (that is, an offer to all existing shareholders entitling them to subscribe for additional shares pro rata to their existing shareholdings). If this results in a shareholder exceeding its foreign investment allowance, it has 12 months in which to re-align its portfolios.

The cash consideration paid to shareholders residing in South Africa must be paid in South African rand. Therefore, if the consideration is offered in any other currency, it must first be converted into South African rand.

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

Where a takeover offer is made and 90% of the target's shareholders accept the offer, the bidder can compulsorily purchase the shares of the non-accepting shareholders (*section 440K, Companies Act*).

A non-accepting shareholder can apply to court within six weeks of the posting of the compulsory acquisition notice for an order to prohibit it or make it subject to certain conditions. The shareholder can prevent the compulsory acquisition by convincing the court that, on the balance of probabilities, the offer is unfair or that there are special circumstances that require the court to make an order.

The offer document must state whether the bidder intends to invoke the compulsory acquisition. Where the compulsory acquisition is not invoked by the bidder, a shareholder who did not accept the offer can force the bidder to acquire its shares in the target.

Where a scheme of arrangement is proposed, once the scheme of arrangement has been approved by a court all the shares (including the shares of those shareholders who voted against it at the scheme meeting) are compulsorily acquired by the bidder. Dissenting shareholders are entitled to attend or be represented at the court hearing in order to argue against this.

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

Where an offer has not become or been declared unconditional, and has then been withdrawn or has lapsed, neither the bidder nor its concert parties can, for 12 months following the date on which the offer is withdrawn or lapses (except with the consent of the Panel):

- Make an offer for the target.
- Acquire any shares of the target which will result in a mandatory offer being required (*see Question 16*).

De-listing

22. What action is required to de-list a company?

For a listed company to de-list its shares it must do both of the following (*Listing Requirements*):

- Submit an application to the JSE stating the time and date when the de-listing will be effective.
- Send a circular to all shareholders containing the details and reasons for the de-listing.

The Committee of the JSE will approve the de-listing if both:

- A general meeting of shareholders approved the decision before the application was made. The decision must be approved by more than 50% of the votes of all shareholders present in person or by proxy, excluding any controlling shareholder.
- The company states the reasons for de-listing in its written application.

The requirements of shareholder approval and the circular are not necessary in either of the following situations:

- Following a takeover offer, where the bidder gave notice in the initial offer document, or in any subsequent circular, of its intention to de-list.
- Where a transaction has been completed, and a circular has been sent to shareholders notifying them of the bidder's intention to de-list the shares and requiring them to vote on the issue. The date for de-listing must be at least 21 business days after the relevant circular is issued.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Once a target's board receives a genuine offer or believes that a genuine offer may be imminent, its actions are restricted. Company decisions, which could result in any genuine offer being frustrated or the target's shareholders being denied an opportunity to decide on its merits, must be approved by the holders of the relevant shares in a general meeting.

Examples of situations where the approval of the target's shareholders must be obtained (except where carrying out a contract entered into earlier by the company) include:

- Issuing any authorised but unissued shares.
- Issuing or granting options in respect of any unissued shares.
- Creating or issuing any shares carrying rights of conversion into, or subscription for, other shares (or allowing others to do the same).
- Selling, disposing or acquiring assets of a material amount.
- Entering into contracts other than in the ordinary course of business.
- Paying a dividend that is abnormal as to timing and amount.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in your jurisdiction? Can payment of transfer duties be avoided?

Transfer tax

Securities transfer tax is levied on the transfer of any security (excluding the debt portion in respect of a share linked to a debenture) issued by either:

- A close corporation or company incorporated, established or formed in South Africa. A close corporation is a type of legal entity, the formation of which is simple and inexpensive when compared to that of a company. Close corporations are established under the Close Corporations Act 1984 and are meant to promote small businesses. They do not have directors and are managed and owned by their members, who can only be natural persons.
- A company incorporated, established or formed outside South Africa and listed on an exchange.

The transfer of beneficial ownership of securities is subject to securities transfer tax, at a rate of 0.25% on the taxable amount of the transfer of the security. For listed securities, the taxable amount is the greater of the consideration for the security declared by the transferee or the closing price of that security. For unlisted securities, the taxable amount is the greater of the consideration given for the security or the market value of that unlisted security. Transfer is defined broadly to include the transfer, sale, assignment or cession or disposal in any other manner of a security. The issue of a security does not amount to a transfer and therefore does not attract securities transfer tax. For details of recent reforms in this area, see *Question 29*.

Payment of transfer tax

It is generally impossible to avoid payment of transfer tax. For listed securities, the stock exchange member or Central Securities Depository who effects the transaction is responsible for the payment of the transfer tax. The tax must be paid by the 14th day of the month following the one in which the transfer occurred. For unlisted securities, the company that issued the securities must pay the securities transfer tax within two months from the end of the month in which the security was transferred. The company that issued the unlisted security can recover the tax paid by it from the recipient of that security (*STT Act*).

Exemptions exist for the payment of transfer tax in certain specific circumstances involving corporate restructuring.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

Intermediate and large mergers

Large and intermediate mergers must obtain prior merger approval from the South African competition authorities before they can be implemented.

A transaction must be notified as an intermediate merger if both:

- The parties to the merger have combined assets or annual turnover of ZAR560 million.
- The target firm has assets or turnover of ZAR80 million.

A transaction must be notified as a large merger if both:

- The parties to the merger have combined assets or annual turnover of ZAR6.6 billion.
- The target firm has assets or turnover of ZAR190 million.

The filing fees payable to the Competition Commission are:

- ZAR100,000 for intermediate mergers.
- ZAR350,000 for large mergers.

Small mergers

Small mergers are those that fall below the prescribed thresholds and can be implemented without competition approval. However, if the competition authorities consider that a small merger might substantially prevent or lessen competition or cannot be justified on public interest grounds, they can investigate that small merger within six months of implementation, but this is unusual.

In 2009 the competition authorities issued a guideline for small mergers. This states that the Competition Commission will evaluate whether a small merger requires notification on its merits, but also states that it will require notification of all small mergers which involve any firm or firms within the merging parties groups which are:

- The subject of an investigation by the Competition Commission.
- At the time of entering into the transaction are party to pending proceedings referred by the Competition Commission to the Competition Tribunal under Chapter 2 of the Competition Act. Chapter 2 deals with prohibited practices, which include:
  - horizontal agreements, concerted practices and decisions of associations among competitors which substantially prevent or lessen competition in the market;
  - agreements between parties in a vertical relationship which substantially prevent or lessen competition in the market; and
  - abuses of dominance, such as exclusionary and exploitative conduct.

Announcing the offer

Due to the need to preserve secrecy and prevent leaks about the proposed transaction, the offer is usually announced subject to merger approval being obtained. In a scheme of arrangement, court sanctioning of the merger is usually postponed until merger approval has been obtained.

Certain industries have statutory restrictions on the percentage of foreign shareholdings, and certain exchange control approvals might be required (*see Question 26*).

26. Are there restrictions on foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

In general, there are no restrictions on foreign ownership of shares. However, certain industries (including banking, insurance and broadcasting) have specific statutory restrictions on the percentage of holdings that a foreign shareholder can hold in a South African company.

In addition, all dealings in, and registration of, shares in which non-residents of South Africa are involved are governed by the Regulations.

A person cannot transfer any shares to a non-resident without the approval of the Exchange Control Department of the SARB, which must be obtained through an authorised bank. An authorised bank is a bank in South Africa specifically authorised by the SARB for the purposes of regulating foreign-owned shares. Approval is usually given, provided that the Exchange Control Department is satisfied that fair consideration for the shares has been received in South Africa.

The consideration for the shares must be channelled through an authorised bank, and the share certificate must be endorsed "non-resident" by an authorised bank. If the share certificate is not endorsed "non-resident" by an authorised bank, the shares must not be registered in the name of a non-resident and dividends cannot be paid to a non-resident (*see Question 27*).

THE REGULATORY AUTHORITIES

Securities Regulation Panel (Panel)

Address. 1st Floor, Block B
Sunnyside Office Park
32 Princess of Wales Terrace
Parktown 2193
PO Box 91833
Auckland Park 2006
South Africa
T +27 11 642 1301
F +27 11 642 9284/086 541 2243
E *luckyp@srpanel.co.za*
W *www.srpanel.co.za*

Main area of responsibility. The Panel is responsible for, among other things, the regulation of takeovers and mergers in South Africa.

JSE Limited (JSE)

Address. One Exchange Square
Gwen Lane
Sandown 2196
South Africa
T +27 11 520 7777/7799
F +27 11 520 8592
E *corpcomm@jse.co.za*
W *www.jse.co.za*

Main area of responsibility. The JSE functions as a primary exchange for the raising of new capital by business and as a secondary exchange for the subsequent trading of those shares.

Competition Commission (Commission)

Address. DTI Campus
Block C (Mulayo)
77 Meintjies Street
Sunnyside Pretoria
South Africa
T +27 12 394 3200
F +27 12 394 4200
E *ccsa@compcom.co.za*
W *www.compcom.co.za*

Main area of responsibility. The Commission's main responsibilities include:

- Implementing measures to increase market transparency and develop public awareness of the provisions of the Competition Act.
- Investigating and evaluating alleged horizontal or vertical restrictive practices or abuses of dominance.
- Granting or refusing applications for exemption.
- Authorising (with or without conditions), prohibiting or referring to the Competition Tribunal mergers of which it receives notice.

Competition Tribunal (Tribunal)

Address. DTI Campus
Block C (Mulayo)
77 Meintjies Street
Sunnyside Pretoria
South Africa
T +27 12 394 3355
F +27 12 394 4300
E *ctsa@comptrib.co.za*
W *www.comptrib.co.za*

Main area of responsibility. The Tribunal is the adjudicator and court of first instance for large mergers, restrictive horizontal and vertical practices and abuses of dominance.

The South African Reserve Bank (SARB)

Address. 370 Church Street
Pretoria 0002
South Africa
T +27 12 313 3911
F +27 12 313 3197/3929
W *www.reservebank.co.za*

Main area of responsibility. The SARB is the central bank of the Republic of South Africa. Its primary goal is the achievement and maintenance of financial stability.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

Dividends declared by South African companies are remittable to a non-resident shareholder in proportion to the non-resident's percentage shareholding, provided that the share certificate has been endorsed as "non-resident" (*see Question 26*).

To transfer the dividend to the non-resident shareholder, the company must produce an auditor's report to an authorised bank (*see Question 26*) confirming that the amount to be transferred arises from realised or earned profits on investments owned by the non-resident shareholder.

Either to improve access to domestic credit in the financing of bona fide foreign direct investments in South Africa or for domestic working capital requirements, the Reserve Bank recently relaxed its general restrictions in relation to the granting of local financial assistance to affected persons and non-residents. An affected person is a body corporate, foundation, trust or partnership operating in South Africa in which either:

- 75% or more of the capital, assets or earnings can be used for payment to, or for the benefit of, a non-resident.
- 75% or more of the voting shares, voting power, power of control, capital, assets or earnings are directly or indirectly controlled by a non-resident.

Before the recent relaxation, the restrictions on local financial assistance prohibited non-residents from borrowing more than 100% of the SAR value of funds introduced into South Africa from abroad. In the case of an affected person, the permitted local financial assistance ratio was calculated by a formula which took into account the percentage of the non-resident's interest in the affected person and expressed the permitted borrowings as a percentage of the "effective capital" of the affected person.

However, the borrowing restrictions still apply to affected persons and non-residents who wish to borrow local funds to acquire residential property or for certain other financial transactions (such as portfolio investments, securities lending, hedging, and repurchase agreements).

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

The Code requires that:

- The bidder and its concert parties cannot sell any shares in the target without the Panel's consent.
- The acquisition of shares in the target by the bidder and its concert parties must be disclosed and, if any acquisition of shares is at a price in excess of the offer price, the offer price must be increased by the bidder accordingly.
- All dealings in the bidder's shares or the target's shares by either the bidder or the target (or any of their concert parties) for their own account, or on behalf of clients, must be disclosed.

The restrictions in the Securities Services Act relating to insider trading apply and prohibit persons with inside information from trading.

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

Withholding tax

The Revenue Laws Amendment Bill No. 80 of 2008 sets out the framework in which the current Secondary Tax on Companies (STC), a tax on dividends at a company level, is to be replaced by a withholding tax on dividends at shareholder level. The proposed new tax will be a final withholding tax of 10%, payable by the company on behalf of the shareholder. The liability for the withholding tax will be triggered by the payment of the dividend and not the declaration of the dividend.

The intention is that companies should withhold tax at 10% on any dividend paid, unless the recipient is exempt from the tax. The following are exempt:

- South African resident companies.
- The State.
- Provincial and local authorities.
- Parastatal organisations exempt from tax (for example, the Council for Scientific and Industrial Research, the South African National Roads Agency Limited, Armaments Development and Production Corporation of South Africa Limited, and the Development Bank of Southern Africa).
- Retirement and benefit funds.
- Approved public benefit organisations.
- Mining and rehabilitation funds.

Definition of dividend

As a result of the change in dividend tax regime, the definition of dividend in the Income Tax Act No. 58 of 1952 (as amended), will change as well. The proposed definition of dividend provides that a dividend is any amount paid by a company to a shareholder in respect of a share, but does not include a payment out of a company's share capital and share premium.

STC credits

Another significant change brought about by the change in the dividend tax regime, is that companies with STC credits will be able to use these credits for a period of up to five years, after which entitlement to credit will lapse. It will be the responsibility of the company to notify the dividend recipient in writing of the extent to which the dividend is offset by STC credits. Companies will be deemed to have declared a dividend on the day before the dividend withholding tax comes into effect. The dividends tax must be paid not later than the last day of the month following the month in which the dividend has been paid.

Companies Act 2008

The Companies Act 2008 (new Companies Act), which replaces the Companies Act in its entirety, will introduce by far the most significant reforms in South African company law. The new Companies Act was promulgated in April 2009 and it is expected to come into force during the first half of 2011.

The new Companies Act introduces significant reforms, including:

- A new statutory merger method allowing for the merger or amalgamation of one entity into another and the amalgamation of two entities into a new separate entity.
- Changes to the law governing the required notification of share purchases.
- A remedy for the compulsory acquisition of dissenting minority shareholdings (appraisal rights) in the context of M&A activity (apart from takeover offers (*see Question 2*)).
- The introduction of a new M&A regulator, the Takeover Regulation Panel, to replace the Securities Regulation Panel.
- Rules relating to fundamental transactions (*see below*).

Apart from the new merger/amalgamation methods, the three available methods under the current Companies Act remain available under the new Companies Act with substantially similar requirements.

A notable change, however, is that schemes of arrangement will not automatically require court approval. Schemes of arrangement are considered fundamental transactions, and are dealt with collectively alongside other fundamental transactions, such as:

- The disposal of substantially all of a company's assets or undertakings.
- A merger or amalgamation.

Any of these fundamental transactions require court approval if either:

- There is a significant minority (at least 15%) opposed to the transaction.
- The court grants leave to a single shareholder on the grounds of procedural irregularity or a manifestly unfair result.

There are other specific requirements for fundamental transactions, including the passing of a special resolution by the company concerned (*see Question 2*).

Where a company seeks to pass a special resolution to enter into a fundamental transaction, appraisal rights may be exercised by any shareholder who:

- Notified the company of its intention to oppose the special resolution.
- Was present at the relevant shareholders' meeting and voted against the special resolution.

If the company adopts the special resolution, it must send a notice to that effect to each shareholder who filed an objection. These shareholders can then, within 20 business days after receipt of the notice, demand in writing that the company pay fair value for their shares.

Finally, the new Companies Act continues to protect the interests of minority shareholders by requiring shareholder approval for share and option issues to directors and other specified persons, or financial assistance for share purchases.

CONTRIBUTOR DETAILS

TIM SUKAZI

Bowman Gilfillan Inc
T +27 11 669 9397
F +27 11 669 9001
E *t.sukazi@bowman.co.za*
W *www.bowman.co.za*

Qualified. South Africa, 2000

Areas of practice. Capital markets and securities law; corporate and commercial; media and entertainment; M&A; mining; sport.

Recent transactions

- Advising Microsoft Inc. in the merger of its South African subsidiaries.
- Advising Ubuntu-Botho on the BEE transaction with Sanlam.
- Advising African Rainbow Minerals on its BEE structure.
- Advising Quanta Services on the establishment of a presence in South Africa.
- Advising African Rainbow Minerals Exploration Investments on various capital finance transactions.

RUDOLPH DU PLESSIS

Bowman Gilfillan Inc
T +27 11 669 9331
F +27 11 669 9001
E *r.duplessis@bowman.co.za*
W *www.bowman.co.za*

Qualified. South Africa, 1998

Areas of practice. Banking and finance; capital markets and securities law; corporate and commercial; M&A.

Recent transactions

- Advising Standard Bank on the ZAR36.7 billion transaction with Industrial and Commercial Bank of China.
- Advising Standard Bank on the offer to minority shareholders of Liberty Holdings.
- Advising on the Murray and Roberts Holdings BEE transaction.
- Advising the Tongaat Hulett BEE transaction and the unbundling and listing of Hulamin.
- Advising African Rainbow Minerals on its acquisition of an interest in Xstrata Coal.