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607 – Post-Merger Integration of American and European Companies

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Faculty Biographies

Fernando Bazán

Fernando Bazán is a partner of the employment law department at CMS Albiñana & Suárez de Lezo. He is specialized in advising clients on: preventive advocacy and litigation; technical assistance in collective bargaining, employment records regulation, collective agreements: file processing, trading strategies, institutional contacts; resolution of legal disputes including SMAC assistance and legal assistance and representation of the Company in all spheres of social courts; due diligence; advice on the labor implications of purchase, merger and acquisition, business succession; contract drafting, negotiating conditions; team building and staff; recruitment and retention business.

He previously worked at Sanofi-Aventis in downsizing the sales network, Tyco Electronics in closure of plants in Valls and Montcada, L'Oreal in closure of the plant in San Agustín de Guadalix, Teletch in restructuring the company premises in Toledo, Oviedo, Madrid and Barcelona, and Holcim in collective bargaining agreements for plants in Jerez, Gador, Carboneras.

He holds a master in business law by Centro de Estudios Europeos y Formación Empresarial Garrigues & Andersen and is a graduate of law (Licenciatura) by the Complutense University of Madrid.

Sarah Hilty

Sarah Kinnick Hilty is chief counsel, corporate transactions for CH2M HILL Companies, Ltd., a Fortune 500 global consulting, design, design-build, operations, and program management company. Ms. Hilty is responsible for providing legal support for mergers and acquisitions, divestitures, equity investments, treasury and finance activities, real estate, and other general corporate matters. She has supported CH2M HILL in its acquisition of Lockwood Greene (over 2,000 employees) and VECO Corporation (over 4,000 employees), and in the divestiture of a CH2M HILL business group to a private equity firm. Most recently she has supported the acquisition of Halcrow Holdings Limited (a UK based company with over 6,000 employees operating in over 70 countries) and the refinancing of CH2M HILL's \$900 million senior unsecured credit facility.

Prior to joining CH2M HILL, Ms. Hilty was a partner with Hogan & Hartson (now Hogan Lovells) practicing in the finance and business group with a focus on private company mergers, acquisitions and divestitures.

Ms. Hilty holds a JD with distinction from Stanford Law School and a BS, business administration (summa cum laude) from the University of Colorado-Boulder.

Christopher J. Kearns

Christopher Kearns is deputy general counsel for the ACE Group (NYSE: ACE), one of the world's largest insurance companies. He is chief lawyer for global corporate/securities, capital markets, M&A, asset management and intellectual property matters. He works closely with ACE Limited's board of directors and advises ACE's Corporate Development, Treasury, HR and Communications functions on various matters.

Prior to joining ACE, Mr. Kearns was general counsel at Hot Topic, Inc. (Nasdaq: HOTT), a nationwide retailer with multiple e-commerce sites. He spent more than a decade in private practice, most recently as Partner at Cooley LLP, where he represented technology and other high-growth companies and specialized in corporate, securities and M&A.

Mr. Kearns is a graduate of UCLA and University of California, Hastings College of Law (with honors).

Sandra Rafferty

Sandra Rafferty is a partner in CMS's London corporate team and is an active member of CMS's lifesciences, and infrastructure and project finance sector groups. She advises a mixture of public and private sector organizations. Her particular experience includes mergers and acquisitions (including cross-border transactions), post-merger integration (most recently advising Takeda on its post-merger integration following its €9.6 billion acquisition of Swiss drug company Nycomed A/S, where she was the lead transaction partner), corporate finance (including public company takeovers), private equity, joint ventures, outsourcing, corporate restructurings, corporate governance and establishing limited partnerships. She is recommended by Legal 500 (2011) for corporate/M&A and attracts high praise, being described as "excellent" and "energetic" and Legal 500 (2008) for energy, projects and infrastructure transactions. She also led the CMS team shortlisted for Corporate Team of the Year by both The Lawyer (2012) and the Legal Business Awards (2011/12), and the team was highly commended by the latter.

She has previously spent 12 months in CMS's Moscow office where she was involved in a mix of corporate transactions, in particular acting for the private equity arm of a state backed Russian bank.

Ms. Rafferty received a BA (honors) in Law from Durham University.

Thomas Sabatino

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David H. Weiser

David H. Weiser is senior vice president and assistant general counsel for Ameriprise Financial, Inc., where he is responsible for leading support of the firm's enterprise functions and retail retirement business, and for oversight of legal and compliance technology. He is a member of the company's M&A Steering Committee and its Enterprise Risk Management Committee, and co-chairs the firm's Disclosure Committees.

Previously, Mr. Weiser was senior vice president – law and human resources and corporate secretary for a NYSE-listed consumer products maker and retailer. Prior thereto, he worked in mergers & acquisitions, corporate governance, securities and finance with the New York office of Fried, Frank, Harris, Shriver & Jacobson.

Mr. Weiser is admitted to the bar in Connecticut, New York and Minnesota.

C/M/S/
Law, Tax

**Post-merger integration on international mergers
involving US and European businesses**

8/31/12

C/M/S/
Law, Tax

Identification of strategic and key objectives

- synergies?
- access to new markets?
- acquisition of new products/IP for existing markets?

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Deal to completion

- DD - impact on integration
- "gun-jumping "
- no sharing of commercially sensitive information
- confidentiality rules
- internal protocols for contractual decision-making
- HR issues

Right advisory team

- integration specialists/management consultants
- tax specialists
- legal advisers
- other specialists ie regulatory
- integration costs not to be under-estimated

Developing and implementing a plan

- business continuity
- leadership and management teams
- country teams
- communication structure - how the teams communicate progress with one another
- differences amongst the industry sectors
- sequencing across jurisdictions
- timing of business handover from integration team

HR issues

- HR plan
- communication
- retaining talent
- cultural issues
- redundancy/works council

Legal issues

- merger, share or asset sale
- compliance and reporting/disclosure requirements
- corporate reorganisation(s)
- timing of legal integration (including impact of group functions, ie Treasury and IT)
- need for valuations and timing impact
- need for a TSA for an interim period?
- insurance and litigation considerations

Third party consents

- internal contract review to identify transferability of contracts
- novation of key contracts
- regulators?
- possible co-shareholders
- data protection consultation /regulatory requirements
- post-completion competition clearance or notifications

Tax issues

- who has the stronger brand and where
- historic tax losses and how these can be transferred
- location of sites/real estate
- do transfer taxes apply to the transfer of real estate or other transferring assets

Real estate issues

- ability to lease/sub-let
- timing to sell and realise value
- linkage to HR issues/works council
- relocation

Concluding comments/top tips

- business continuity
- timing
- communication

Post-Merger Integration Checklist

1. Preparation is Key – Info Gathering and Key Objectives

- 1.1 Do not under-estimate either the importance of business continuity post acquisition when designing the integration plan or the costs involved in implementing the integration plan.
- 1.2 Which territories does the business operate in? Where are its tangible and intangible assets held? Which are the material tax attributes of the group?
- 1.3 Which territories are the revenues and the profits being generated in?
- 1.4 Is the rationale of the transaction to enter new markets or to acquire new products/IP for existing markets? How will the integration support this rationale?
- 1.5 Which entities will be integrated and which shall be wound down? What are the timing and sequencing pressures across the jurisdictions?

2. Implementation

- 2.1 Adhere to the integration timeline. Be sure to prioritise those jurisdictions especially important to the group and those that are time critical.
- 2.2 Identify the internal personnel and external advisers responsible for implementing the integration plan in each jurisdiction.
- 2.3 Make sure everyone in the integration team is aware of the anticipated timings for key phases in the integration sequence.
- 2.4 When will the group companies in each jurisdiction be handed over from the integration team to the local business teams?

3. Regulatory and Antitrust Issues

- 3.1 If the acquisition itself involved merger control notification and/or approval, does the integration require further notifications to be made to the relevant authority? In the event further regulatory approvals are required, beware of gun jumping risks.
- 3.2 If merger control approval was obtained, was this conditional and if so how and when will these conditions be complied with as part of the integration?
- 3.3 What is the current regulatory structure of the group and how will the integration impact this? Will any locally held regulatory permits currently held within the group be restructured into centrally held permits to cover multiple EU member states? Will this be managed internally or externally via third party consultants?

4. Compliance

- 4.1 Review and update both the purchaser and target group's compliance programmes with regard to the key pieces of legislation (e.g. Sarbanes-Oxley, the Foreign Corrupt Practices Act and the Bribery Act 2010).
- 4.2 The purchaser should pay close attention to the standard of existing compliance programmes within the target group in respect of territories the purchaser has not operated in. If these are not

sufficiently robust, consider including the design of a new compliance structure in the integration plan.

5. Statutory Merger, Share Transfer and Asset Sale

- 5.1 Before deciding on the integration method in each jurisdiction, the purchaser must consider key priorities such as the preservation of tax attributes, the potential impact of any employee representative bodies, internal operational considerations and the existing and likely future liabilities of the entities involved.
- 5.2 Do contracts to certain assets contain change of control clauses where the necessary consent may not be forthcoming? Where local laws allow, statutory merger will often be more preferable to an asset sale primarily because title to both contracts and assets transfers automatically, meaning there is no need for change of control consents. In addition, transfers under statutory mergers are often tax free.
- 5.3 Where share transfers are necessary to effect the integration, what documentation will need to be produced (e.g. stock transfer forms, notarial deeds, applications to register with any applicable commercial registry or regulatory body)?
- 5.4 How will the shares or assets be valued? Do local laws require the value of the transfer or sale to be calculated on a particular basis in order to benefit from beneficial tax treatment? When will any necessary independent valuations be obtained?
- 5.5 Will the constitutional documents of any group company need to be amended in advance of the share transfer or asset sale?
- 5.6 Consider which shareholder and board resolutions are needed for the various transactions within the integration plan. When will each of these be obtained?
- 5.7 How will each of the management accounts and the statutory accounts in each jurisdiction treat the integration transactions?

6. Transferring Asset Considerations

- 6.1 Understand the different requirements under local laws involved when transferring different categories of assets. For example, certain assets such as real property could require separate documentation in order to effect a change of ownership.
- 6.2 Will cash or non-cash consideration be used to finance any share or asset transfers and how will these be treated in the relevant company accounts? Ensure the internal treasury function is closely involved in this process.
- 6.3 The transfer of particular assets could give rise to a tax charge under local laws. The integration budget must account for the payment of such charges.
- 6.4 Are there any works councils or trade and regulatory bodies in any of the jurisdictions that need to approve the integration method in advance? Who will prepare the applications to obtain these consents?
- 6.5 Ensure a thorough contract review has been performed to identify all counterparties that will need to consent to any asset sale or change of control. Where the surviving entity belongs to the acquired group, be aware that any contract review from the due diligence phase will need to be updated.

7. Intellectual Property

- 7.1 Will the current intellectual property ownership and licensing structure survive post-integration? Which entity or entities will the trademarks and licences held by non-surviving entities be transferred to?
- 7.2 Do current intellectual property licensing or other contractual arrangements require third party consents to be obtained prior to any scheduled integration?
- 7.3 Is the intention to seek Europe-wide trademarks for any existing trademarks that are limited to particular member states? If so, which entity or entities will act as licensor and what will the tax treatment of any licensing revenues received by the licensor be?

8. Technology

- 8.1 Audit current IT systems and consider whether these are adequate for the group's business functions such as R&D, the supply chain and sales and marketing?
- 8.2 Will the IT systems within the purchaser group and target group be integrated or remain standalone? Are these systems also separated by territory (e.g. US, Europe)?
- 8.3 Ensure that those IT functions critical to business continuity of the group immediately following the acquisition are prepared and properly updated. Critical areas to focus on here are likely to relate to order processing, sales, payroll and customer invoicing.

9. Banking and Finance

- 9.1 Ensure the integration plan incorporates the dates of repayment for sums borrowed under lending facilities that will survive the acquisition.
- 9.2 Where lending facilities will survive, notify the relevant agent of changes to details of the borrowing group.
- 9.3 Does security need to be released under current lending arrangements or put in place in respect of any acquisition finance used? Where in the integration sequence will this take place?
- 9.4 Will the integration require updates to surviving security arrangements with the registrar of companies under local laws?

10. Data Protection

- 10.1 Will personal data held by the surviving or non-surviving entities be processed as part of the integration? Where such processing of personal data occurs, the relevant individuals must receive notification informing them of any new uses or disclosures to comply with EU data protection laws.
- 10.2 Where personal consents have been obtained in respect of processed personal information, this consent broadly covers the processing by those entities and in those locations that the subject could reasonably expect. If the purchasing group has territories outside the EU and personal data will be processed there, consider whether new consents from the relevant subjects are required.
- 10.3 In order to remain compliant with existing local data protection registrations held within the purchaser and target group, notification of any new entities processing relevant personal data should be made to the appropriate regulator.

- 10.4 Consider reviewing and updating current internal data protection compliance systems as part of the integration.

11. Litigation

- 11.1 The legal due diligence report should have identified both threatened and ongoing litigation. The purchaser must consider whether these liabilities will affect the planned integration.
- 11.2 The integration of any entity currently party to litigation will inevitably require the timely notification of this to the other parties to that litigation, their legal advisers and to the relevant court, arbitrator or mediator.
- 11.3 Consider the service agent provisions contained in those contracts to which any target group entity is a party (revealed during the due diligence phase). Where service agents are changing as a result of the integration, the purchaser group must ensure counterparties are informed and, where necessary, contracts updated.

12. Real Estate

- 12.1 Will the integration involve the physical relocation of personnel belonging to either the surviving or non-surviving company?
- 12.2 If the relocation of certain functions is involved, consider the notice periods and payments that will be required to terminate the unwanted leases.
- 12.3 Ensure the due diligence process is updated so that all change of control and assignment clauses have been identified prior to the integration and are then complied with. Failure to do this could give rise to an event of default allowing a landlord to terminate the relevant lease.
- 12.4 Do any leases require landlord consent prior to a change of control? Consider how long this will take to obtain and what, if any, payment the landlord will expect to receive.

13. Voluntary liquidations

- 13.1 The integration plan must identify those entities that are either already dormant or that will become surplus to the purchaser's requirements following the integration. Make sure a schedule for the dissolution of these companies is incorporated into the integration timeline.
- 13.2 Certain jurisdictions may require waiting periods between the shareholder and board resolutions to dissolve an entity and the effective time of the dissolution. Consider the impact such time periods may have on related actions in the integration sequence.

Integration Checklist Employment Issues

1. Preparation is Key Info Gathering and Key Objectives

- 1.1 Identify the target form of business structure and the related staffing requirements. Identify areas of workforce synergies across businesses.
- 1.2 Formulate strategy for achieving proposed business structure and areas of impact on current staffing arrangements.
- 1.3 Assess workforce structure and identify different categories of staff members, e.g. employees/contractors/ agency workers and factor into strategy.
- 1.4 Carry out due diligence to identify employer of relevant employees and relevant entity on which legal obligations fall.
- 1.5 Review employment terms, policies and working conditions and identify areas for harmonisation.
- 1.6 Analyse costs and possible risk exposure to employment liabilities arising from any proposed workforce changes.
- 1.7 Consider timing and order of workforce changes, taking into account general employee relations issues.
- 1.8 Review contractual terms of employment of affected employees, in particular contractual entitlements on termination.

2. Implementation

- 2.1 Identify employee representative bodies, including works councils, trade unions and staff consultative bodies and assess associated obligations.
- 2.2 Consider form of integration and relevant legal requirements impacting on proposals, in particular:
 - 2.2.1 if employees are to transfer from one corporate entity to another on what basis does such a transfer take place. Is there an automatic transfer by law or is employee consent required?
 - 2.2.2 information and consultation obligations;
 - 2.2.3 government notification/ consent requirements;
 - 2.2.4 notice and other entitlements on termination of employment;
 - 2.2.5 employee rights/ claims and associated risk.
- 2.3 Assess process for harmonisation of employment terms and conditions, policies and benefit plans, including:
 - 2.3.1 legal status of terms and conditions/ policies/ benefit plans and whether employee consent necessary for changes;

- 2.3.2 do the proposed changes trigger any payouts under incentive arrangements and what financial liability does this involve;
- 2.3.3 what incentives are to be offered/ steps to be taken to obtain employees' consent;
- 2.3.4 what is strategy if changes rejected or challenged.

3. Director Officer and Other Management Positions

- 3.1 What resignations or new appointments will be necessary. Confirm requirements and any appropriate documents that need to be prepared.
- 3.2 Do any of the officers or directors holds executive positions and what is the impact on the proposals to their employment rights.
- 3.3 What are entitlements on termination of any director or officer and are their any procedural requirements relating to such termination, including notice entitlements.
- 3.4 What are the risk associated, if any, with changes to management positions and how will these be mitigated.
- 3.5 What changes to D&O or other company documents is necessary as a result of management changes.

4. Pensions

- 4.1 What pension arrangements exist in the businesses to be integrated and what are the proposals for future pension provision.
- 4.2 Will the integration proposals trigger any funding obligations.
- 4.3 Is the closure or amendment of any pension arrangements proposed and what steps are necessary to achieve this.
- 4.4 Are there any relevant employee information and consultation obligations and what are the implications of failure to comply with such obligations.