INTERNATIONAL LEGAL DEVELOPMENTS IN REVIEW: 2009
INTERNATIONAL M&A AND JOINT VENTURES COMMITTEE

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1. Argentina

Authors: Saul Feilbogen and Vanesa Balda, Vitale, Manoff & Feilbogen, Buenos Aires, Argentina.

Argentina's M&A market has been running parallel to the tendencies of the international markets. The first half of 2009 has shown a drastic drop – 50% – in the number of transactions in comparison to the same period last year. This drop is only 10% less with respect to the total investment for the rest of South America. Investment continues to be the strongest in energy and financial services companies.

Again this year, M&A transactions were mainly performed by small and medium-sized enterprises (SMEs). In effect, about 60% of the transactions amounted to less than USD 100 million. Loans have been difficult to obtain and SMEs had to find other sources of financing to face the reduction in sales and difficulty of finding funds to expand their businesses.

Strategic transactions have been characteristic of this year. Both domestic and foreign companies with more liquidity have had the opportunity to acquire undervalued companies with whom they can create synergies. On the other hand, risk capital funds are facing a drop in the value of their portfolios and difficulties in selling certain investments and are forced to sell other assets at any price. Another important aspect that is menacing the attractiveness of investing in Argentina is the continuous regulation of the markets and the increasing state involvement in the economy.

The following transactions were performed during the first half of 2009:

- The sale by the Dutch company ING of its banking and insurance arm, which opened a path for the Argentine businessman Marcelo Mindlin to buy Orígenes Retiro – a pension fund - through Dolphin Investment Fund (USD 25 million);

- The purchase by Eduardo Eurnekian of 50% of the share package of Bodegas del Fin del Mundo S.A., a wine producer owned by the Viola family (USD 50 million);

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[4] The editors wish to acknowledge the assistance of Katherine H. Woodcock, an associate at Lorenz, in editing this article.

- The sale of AIG Universal Processing Center S.A. to Banco de Galicia y Buenos Aires S.A. (80%) and an investment group arranged by Grupo Pegasus (20%) (USD 45 million);

- The sale of Huhtamaki Argentina to American Plast y Dixie Toga S.A. (USD 43 million);

- The purchase of 70% of the assets of Los Balcanes (at USD 23,9 million) by Ledesma, a cane sugar producer, to get into La Florida, a cane sugar mill producer in the Province of Tucumán; and

- The sale by Chevron to Roch of its facilities in the Province of Santa Cruz (together with an American partner).

The sectors where the largest number of transactions took place were manufacturing, food and drinks, financial services and retail.

As to the origin of the funds, the trend continues to be the strong presence of local investors in over 80% of the transactions. There has been a fall in the number of transactions performed by foreign buyers. These represented about 20% of the M&A transactions denominated in US currency, as opposed to 50% during the last half of 2008.

As far as foreign investments are concerned, the United States and Europe (except for Spain), which historically have dominated the purchase of companies in this region, have gradually lost their leading position among foreign investors. In fact, the main investors during the first semester of 2009 were from Japan and Spain.

After the 2001 crisis, Argentine companies have restarted daring to enter long-term investments in the M&A market, but only in the last two years. The local actors have emerged as the strongest investors in this region, consolidating a trend that started in the last quarter of 2008. In fact, in the 1990´s the investment funds and the large international companies had disembarked in Argentina in search of local companies, and ever since the 2001 crisis this tendency seemed to take the opposite direction. Argentine companies saw good opportunities to buy competitors' or supplementary businesses in order to mitigate the post-crisis effects.

Last, we should mention the situation created as a result of the enactment of Statute 26.425, which became applicable in December 2008. This statute changed the national pension system, in that all the resources from pension contributions that were previously owned by private pension funds (AFJP) have been and are now transferred to the Government. Thus, the Argentine Government has now become a shareholder in those public companies (quoting in the Stock Exchange) where private pension fund companies had previously invested.

2. Australia

Authors: Ezekiel Solomon and Andrew Finch, Allens Arthur Robinson, Sydney, Australia.[5]

I. Market Trends

The Australian M&A market slowed down considerably in 2009, with Australian corporates more concerned with shoring up their balance sheets than acquiring businesses or assets. As a result, the volume of completed M&A deals in the first nine months of the year was down 45.3% to AUD 30.9 billion,[6] whereas equity capital markets transactions were up 74.1% to AUD 43.5 billion.[7]

With the market trend toward equity capital market transactions, one related key area of M&A activity in 2009 was investors taking cornerstone investments in publicly listed entities. Key transactions include China Investment Corporation's AUD 500 million investment in Goodman Group and Colonial First State and Capital Research and Management's AUD 400 and AUD 500 million investments, respectively, in Wesfarmers.

II. Regulation of Foreign Investment

Foreign investment in Australia is regulated under the *Foreign Acquisitions and Takeovers Act 1975* (*FATA*), which gives the Australian Treasurer (finance minister) the power to prohibit proposed foreign investments in Australian companies and assets that are contrary to the national interest.

In February 2009, the Australian government extended the reach of the FATA to cover a greater range of foreign investment transactions, including transactions made by way of convertible notes and other more sophisticated financing instruments or structures.[8]

These amendments are designed to ensure that the FATA applies to any investment by foreign investors where there is a possibility the investment structure being used will deliver, either currently or at some time in the future, influence or control over an Australian company.

In addition, 2009 also saw increased Australian government scrutiny of investments by Chinese State-owned entities in the resources sector, with a number of M&A transactions needing to be restructured before regulatory approval could be obtained. For example, in March 2009, the Treasurer required China Minmetals Non-Ferrous Metals Co's takeover of Oz Minerals to exclude mining operations situated within a government weapons testing range.[9]

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[5] The authors would like to acknowledge the assistance of James Clifford, a lawyer at Allens Arthur Robinson, in preparing this article.

[6] Thomson Reuters, *Mergers and Acquisitions Review*, Third Quarter 2009.

[7] Thomson Reuters, *Equity Capital Markets Review*, Third Quarter 2009.

[8] Treasurer Wayne Swan, 'Amendments to Foreign Acquisitions and Takeovers Act' (Press Release 12 February 2009) available at http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/017.htm&pageID=003&min=wms&Year=&DocType=0.

[9] Treasurer Wayne Swan, 'Foreign Investment' (Press Release, 27 March 2009) available at http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/029.htm&pageID=003&min=wms&Year=&DocType=.

III. Takeovers Panel

The Takeovers Panel is an administrative body that acts as the main forum for resolving disputes about takeover bids until the relevant bid period has ended.

The Takeovers Panel issued a number of decisions throughout 2009 that provide further guidance on the regulation of M&A transactions in Australia. One key decision was *International All Sports,*[10] where the Takeovers Panel held that standstills are a legitimate tool for use by a target board to facilitate a sale process. Accordingly, the Takeovers Panel refused to release a bidder from a standstill even though the information the bidder had been provided with ceased to be price sensitive.

In October 2009, the Takeovers Panel also announced a set of draft changes to its Procedural Rules for Proceedings. One of the proposed rule changes purports to exclude the usual rights of parties to claim privilege over communications with their legal advisers. If adopted, the proposed amendments could result in a party being compelled to disclose privileged communications and advice between it and its lawyers to the Takeovers Panel, the other parties to the dispute and, ultimately, the public.

3. Austria

Authors: Paul Luiki, Maria Thierrichter, and Patrick Maydell, Fellner Wratzfeld & Partner Rechtsanwälte GmbH, Vienna, Austria.

I. Financial Market Stabilization Package

The Austrian government was forced to react quickly to the financial crisis in the fall of 2008. Providing support to banks was a central component of the legislative measures on financial market stabilization that were adopted in late October 2008. The core pillars of the legislative efforts to strengthen the Austrian financial system consist of four areas: (i) stimulation of the interbank market; (ii) providing equity support measures to individual banks; (iii) restoring depositor confidence in financial markets; and (iv) strengthening supervision of banks. Pursuant to the Inter-Bank Market Enhancement Act (IBSG) passed in late October 2008, a clearing bank (Österreichische Clearingbank) was established to assist the refinancing of banks on the inter-bank market. The primary function of this new clearing bank is to borrow and lend short-term and medium-term funds to banks and insurance companies, which must be in line with market conditions and provided on arm's length terms. Another important instrument under the IBSG is to support individual banks by having the Austrian State guarantee bond issues of individual banks. As part of the financial market stabilization package, Austria passed the Financial Market Stabilization Act (Finanzmarktstabilitätsgesetz or FMSA) in late October 2008 to set out the parameters for the recapitalization of Austrian banks in need of financial assistance. For this purpose, Austria established Fimbag (Finanzmarktbeteiligung AG des Bundes) in November 2008 to implement recapitalization measures in line with the Austrian Banking Act.

[10] *International All Sports Limited 01* [2009] ATP 4 and *International All Sports Limited 01R* [2009] ATP 5.

The financial market stabilization measures adopted by Austria can be generally viewed as a success. As noted by the OECD in their July 2009 report, these measures have helped alleviate the strongest sources of tension in the financial system between October 2008 and April 2009.

II. Austrian Stock Corporation Amendment Act

On August 1, 2009, the Austrian Stock Corporation Amendment Act,[11] which implements the EC Directive on the exercise of certain rights of shareholders in listed companies, entered into force. Austria not only included new provisions concerning listed companies, but also changed some regulations on companies that are not listed on the stock exchange. The most significant change was the amendment of the rules for general meetings under the Austrian Stock Corporation Act (Sections 102 – 136 of the Austrian Stock Corporation Act) where – *inter alia* – participation and voting rights by electronic means were introduced. Section 102 (2) expressly stipulates the requirement that the general meeting has to take place in Austria, so shareholders have the right to participate in person and exercise their participation and voting rights in the presence of the chairman and the notary. This right cannot be excluded, so that Austrian law does not allow a solely virtual general meeting. In order to avoid unnecessary travel costs, new electronic forms of participation and voting in the general meeting have been passed. In addition, participating and voting via postal voting has also become possible. According to the EC Directive, a new "record date" system for bearer shares has been implemented – so that member states need to provide that the rights of a shareholder to participate in a general meeting and vote its shares shall be determined by the shares held by that shareholder on a specified date prior to the general meeting (the record date). This record date system for listed companies was introduced in Section 111 (1) of the Austrian Stock Corporation Act, which provides that proof of qualification as a shareholder has to refer to the tenth day prior to the general meeting (record date). Furthermore, it is no longer required that shares have to be deposited (and could not be traded) in order to qualify as a shareholder, but it is sufficient to submit a deposit confirmation issued by a custodian bank.

4. Belgium

Authors: Steven De Schrijver and Jeroen Mues, Lorenz, Brussels, Belgium.

I. Overview

Contrary to other euro area countries, Belgium has performed relatively well during the crisis thanks to its tendency towards smaller deals and traditionally less aggressive approach to leverage. Notwithstanding the fact that the number of M&A deals in 2009 dropped significantly compared to 2008, a steady recovery of the Belgian M&A market is expected near the end of 2009, due to an increase in liquidity and attractive valuations.

Furthermore, Belgium remains attractive as a result of government incentives, including direct aid, employment and training incentives and tax measures. Some of the more stimulating tax incentives are: (i) the so-called "*notional interest deduction*", which allows all companies subject to the Belgian corporate tax to deduct from their taxable income an amount equal to the interest they would have paid on their capital had it been subject to long-term debt financing,

[11] Austrian Stock Corporation Amendment Act, BGBl I 71/2009, issued on July 31, 2009.

and (ii) the "*patent income deduction"*, pursuant to which companies are able to deduct 80% of the income of newly registered patents from their taxable income.

II. Major Transactions

In Belgium:

- the acquisition of some assets from UCB SA, a leading Belgian biopharma company by GlaxoSmithKline (EUR 515 million);
- the acquisition by ENI, an Italian energy group, of a 57% stake in Distrigaz, the Belgian natural gas distribution company (EUR 1.99 billion); and
- the acquisition for approximately EUR 5.2 billion by Abbott, a global, broad-based health care company devoted to the discovery, development, manufacture and marketing of pharmaceuticals and medical products of the entire pharmaceutical business of Solvay, an international chemical and pharmaceutical group with headquarters in Brussels and listed on Euronext Brussels.

By Belgian Companies:

- the acquisition by Publigas, the natural gas holding of the Belgian municipalities, of a 6% stake in Fluxys, the Belgian independent operator of the natural gas transmission system, for (EUR 114 million);
- the acquisition by Delhaize, a company active in the field of food distribution through supermarkets, of all shares of the Greek distributor Koryfi through its subsidiary Alfa-Beta Vassilopoulos for the amount of EUR 7.0 million (plus EUR 1.8 million financial debt); and
- the acquisition for an amount of EUR 925 million by Sandoz, a division of the Belgian Novartis group, the fourth biggest Belgian player in the innovative pharmaceuticals sector, of the Austria-based EBEWE Pharma's generic injectables business.

III. Legislative Developments: The New Rules on Financial Assistance

In 2006, the European Parliament issued Directive 2006/68/EC (the Directive), providing the Member States with an opportunity to ease some of the capital protective measures, as set out in Directive 77/91/EEC, regarding the formation of public limited liability companies and the maintenance and alteration of their capital. In Belgium, the Directive was implemented by the Royal Decree of 8 October 2008,[12] which has amended the rules on financial assistance in the Belgian Companies Code (BCC). These new rules entered into force on 1 January 2009 and

[12] Royal Decree of 8 October 2008 amending the Companies Code in accordance with Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital (*M.B./B.S.* 30 October 2008).

allow a company, under certain strict conditions, to provide financial assistance to a third party willing to acquire its shares.

Although the scope of the Directive was, in principle, limited to rules regarding public limited liability companies (NV/SA), the Belgian legislator has extended the application of the new capital rules to private limited liability companies (BVBA/SPRL) and cooperative companies with limited liability (CVBA/SCRL).

(a) The Former Prohibition on Financial Assistance

Under the former wording of Article 629 BCC, a NV/SA was prohibited from advancing funds, granting loans or giving guarantees intended for the acquisition or the subscription of its shares or profit sharing certificates by a third party.

(b) A Summary of the New Rules on Financial Assistance

Under the amended version of Article 629 BCC, a company will be entitled to provide financial assistance for the acquisition of its shares by a third party, provided the following conditions are met:

1. the transaction must take place under the responsibility of the company's board of directors at fair market conditions (*i.e.*, taking into account the usual market interest rate and the usual collaterals for similar types of financing, as well as the third party's credit standing);
2. the transaction is subject to prior approval by the general shareholders' meeting (with the same quorum *and* majority requirements as for an amendment to the Articles of Association);
3. the board of directors must draft a special report, explaining (i) the reasons for such transaction, (ii) the company's interest to enter into such transaction, (iii) the conditions of the transaction, (iv) the liquidity and solvency risks involved, and (v) the price at which the shares will be sold. This report is published pursuant to Article 74 BCC (in the *Annexes to the Belgian Official Journal*). In addition, if a director of the parent company or the parent company itself benefits from the transaction, the report of the board must explicitly justify such a decision taking into account the capacity of the beneficiary and the consequences for the assets of the company;
4. the assistance must be paid out of and cannot exceed the amount of distributable profits (within the meaning of Article 617 BCC). For that purpose, the company must set up a non-distributable reserve on the liabilities' side of its balance sheet equal to the total amount of the financial assistance; and
5. when a third party acquires shares from the company,[13] or through a subscription by the beneficiary to a capital increase, with the financial assistance of the company, the acquisition of the company's shares must occur at a fair price.

The same conditions apply to the BVBA/SPRL and CVBA/SCRL, as well as to the partnerships limited by shares (SCA/Comm. VA). Except for the requirement of sufficient distributable profits,

[13] Pursuant to Article 622, §2 BCC.

the abovementioned conditions do not apply when financial assistance is granted to members of the personnel or to affiliate companies controlled by the personnel. Thus, allowing for more flexibility in parent and subsidiary transactions and employee and management transactions.

(c) General Observations

The new rules, as set out above, facilitate without any doubt the granting of financial assistance by a company in view of the acquisition of its shares by a third party. However, the question remains whether in practice companies will not be deterred to apply the procedure for financial assistance in acquisitions because of its strict conditions.

Indeed, the new Article 629 BCC imposes on the company the obligation to publish the report, as drafted by the board of directors, in its whole, containing, *e.g.,* the details of the conditions of the transaction, in the Annexes to the Belgian Official Journal. Certain companies will of course be reluctant to disclose such sensitive information to the public.

Pursuant to these new rules, the board of directors is responsible for the financial assistance to the extent it has to investigate whether the assistance is given under fair market conditions or not and whether the purchaser of the shares is creditworthy or not. Pursuant to the BCC, the directors of the target company can be held jointly and severally liable towards the company and third parties for any damages resulting from any breaches to the rules and they can also be held criminally liable for any such breach. Such liabilities will of course have a dissuasive effect on the directors when confronted with the possibility to apply the financial assistance rules in less clear-cut cases.

5. Brazil

Authors: Walter Stuber and Adriana Maria Gödel Stuber, Walter Stuber Consultoria Jurídica, São Paulo, Brazil.

The most important development in M&A transactions in Brazil during 2009 is the change of the accounting standards used for the audited financial statements of the target company, which is evidenced by the transition of the Brazilian generally accepted accounting principles (GAAP) towards the international financial reporting standards (IFRS),[14] especially with regard to goodwill paid under acquisition structures. The application of these new accounting rules for M&A transactions involving the payment of goodwill is regulated by CVM Deliberation No. 580, of July 31, 2009, which approved the Technical Pronouncement CPC 15 of the Accounting Pronouncements Committee (*Comitê de Pronunciamentos Contábeis* – CPC) that deals with business combinations (*combinação de negócios*).[15]

According to this CVM Deliberation, the amount paid for the acquisition of Brazilian target companies should be allocated, at the level of the acquiring company, to the fair market value

[14] This is the main goal of Law No. 11.638, of December 18, 2007, published in the DOU (Brazil) on December 28, 2007, which amended the Corporation Law.

[15] CVM Deliberation 580 was published in the DOU (Brazil) on August 3, 2009.

of the assets (tangible or intangible) or liabilities for which the purchase price was paid. The difference between such allocation and the total amount paid for the acquisition of an equity participation in the Brazilian target company should be classified, for accounting purposes, as goodwill. This accounting rule will be implemented on January 1, 2011 and applies to the financial statements closed on December 31, 2010.

The main change, which is already in full force and effect, is that the goodwill paid on the acquisition of Brazilian target companies is subject to annual impairment testing since January 2009. This means that goodwill is no longer amortized at the level of the Brazilian acquiring company. The impairment, if it occurs, cannot be reversed in the future and it is not deductible for local tax purposes. Therefore, the impairment can affect the acquiring company´s net equity and, consequently, the outflow of dividends arising from the target company (the acquired operating company). These implications are only valid for accounting purposes. For tax purposes, the current Brazilian legislation establishes that the new accounting rules shall not increase the company´s tax burden and responsibilities. The tax benefits derived from the payment of goodwill for the acquisition of Brazilian target companies are still in force. In most cases, the purchase premium (sales proceeds exceeding book value of the target company) can be recovered (amortized) over a five-year term, *i.e.*, 1/60 each month during the period.

After the merger between the acquiring company and the target company and provided that some relevant conditions are met, the goodwill amount may continue to be deducted for local tax purposes. One of these conditions is to provide evidence that the acquisition structure has been established with consistent business purposes and not with the sole purpose of avoiding taxation in Brazil.[16] Acquisition structures, where the merger has already been carried out, would be more protected in the event of any future changes in the local tax rules, disallowing or reducing the ability to deduct the goodwill.[17]

6. Canada

Authors: Sean P. O'Neill and Mark Neighbor, Lang Michener LLP, Vancouver, Canada.

Persevering through the 2009 global economic crisis, Canadian mergers and acquisitions were stimulated on their own by necessity due to lack of available debt and equity financing from the capital markets. At the same time, Canadian regulators stepped up their regulatory initiatives and oversight, presenting a number of noteworthy developments:

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[16] The Brazilian tax authorities are already discussing potential changes in regard to the tax treatment related to tax deductions arising from goodwill paid in acquisition structures. In the near future the tax legislation may be changed and the tax benefits may be reduced, as a result of the adoption of the IFRS methodology, or even eliminated. It is unlikely, however, that any change will be valid for 2010.

[17] In any case, in principle, the potential reduction in the tax benefits arising from goodwill deductions would correspond to lower purchase prices to be paid for Brazilian assets. Consequently, this will represent less capital gain to be earned by the seller and taxed upfront in Brazil. Other than income tax rate differences and timing issues, any tax impact of the goodwill legislation, in general, would not affect future tax revenues.

I. Amendments to *Investment Canada Act*

The *Investment Canada Act* (*Act*) was amended in 2009 to lower obstacles to foreign investment by focusing net benefit reviews on larger transactions. The amended legislation raised the general review threshold from CAD 312 million to CAD 1 billion in gross assets. The *Act* was also amended to allow the Government of Canada to review investments on national security grounds. The amendments to the *Act* came into effect on March 12, 2009, except the increase in the general review threshold, which will be implemented gradually over the next four years.

II. Stock Exchange Merger Rule Change

On September 25, 2009, the Toronto Stock Exchange (TSX) adopted amendments to its rules requiring listed issuers to obtain securityholder approval where they propose to issue securities in connection with an acquisition, where the securities to be issued exceed 25% of the listed issuer's outstanding securities. The new rule is effective on November 24, 2009, but will not apply to transactions which the TSX has already been notified before that date. The change was a response by the TSX to a decision of securities regulators in the Province of Ontario, who reversed a prior approval of the TSX on a proposed merger transaction.

III. Amendments to the Competition Act

On March 12, 2009, the Federal Government enacted far-reaching amendments to the *Competition Act* that fundamentally altered antitrust enforcement in Canada. The amendments included, among other things, changes to conspiracy/cartel provisions, advertising and marketing provisions and repeal of price discrimination, price maintenance and predatory pricing provisions. Significantly, the changes introduced an entirely new process for merger review in Canada which is more similar to the U.S. second review procedure. Under the new procedure, if the Competition Bureau has concerns with respect to a proposed merger it can make a demand for documents to the merging parties and the time for review will be extended until the parties fulfill the production requirement. The Commissioner will now have one year, rather than three years, after the transaction closes to challenge it. The introduction of these changes in Canada represents a wholesale change to merger review timing.

IV. Changes to Investment Dealer, Advisor and Investment Fund Registration Requirements

National Instrument 31-103 Registration Requirements and Exemptions came into effect on September 28, 2009 to harmonize registration requirements across Canada for investment dealers, advisors and fund managers. However, exemptions are still available for international dealers engaged in dealer activities in Canada with "*permitted clients*", which only includes certain institutional and government investor clients. While such exemptions are similar to the previous Provincial patchwork, the new national exemption regime is slightly narrower in scope and certain new pre-conditions also now apply.

7. Chile

Authors: Francisco Ugarte and Macarena Vargas, Carey y Cia. Ltda, Santiago, Chile.

I. Latest Developments in Corporate Governance

After several years of discussion, Chile's Congress finally ratified a new law on corporate governance. The law was enacted on October 13, 2009 and introduces significant changes to the Corporations and the Securities Market Acts.

II. Independent Directors

Listed corporations meeting certain market capitalization and ownership dispersion thresholds must appoint an independent member to the Board of Directors and set up a Directors' Committee, which will need to be comprised by a majority of independent directors if certain additional requirements are met. The law also established stricter criteria for determining directors' independence.

III. Squeeze–Out

The new law provides for limited squeeze–out rights. Under the law, minority shareholders will have redemption rights in case the majority shareholder acquires more than 95% of the outstanding shares of a listed corporation. Additionally, if such majority shareholder acquired said percentage by means of a tender offer for all the outstanding shares of the corporation or of the applicable series of shares, it will have the right to force all shareholders who did not exercise redemption rights, as described above, to sell their shares at the same price of the above tender offer adjusted by inflation plus interest, provided that at least 15% of the tendered shares belonged to shareholders unaffiliated to the offeror and the bylaws of the corporation contemplate a squeeze-out provision.

IV. Related Party Transactions

The new law expands the definition of related parties, and includes new procedures and quorums for the approval of such transactions. It clearly prohibits the taking of corporate opportunities by any director, chief officer, manager, key executive or controlling shareholder, including also any of their related persons. Transactions with related parties must fulfill the following requirements: (a) if any director, chief officer, manager or key executive has an interest or is involved in prospective negotiations with a related party, they must immediately report this circumstance to the Board of Directors or the person specially designated by the Board for this purpose (in case of breach of this reporting obligation, the breaching person will be jointly liable for all damages caused to the corporation and its shareholders); (b) any transaction with a related party must be approved by the absolute majority of the Board of Directors' members, with the exclusion of the directors involved in such transaction, and the excluded directors must record their opinion on the transaction in the minutes of the relevant Board meeting, if so requested; (c) the minutes should detail the reasons for approving the transaction and the reasons that explain the exclusion of conflicted directors; (d) all transactions with related parties approved by the Board along with the name of the directors that voted in favor must be informed in the next shareholders meeting, and such notice to the

shareholders meeting must include a specific reference to this matter; (e) if the absolute majority of the Board is conflicted from voting on a given transaction with a related party, the transaction can then only be approved by either the unanimous vote of the remaining members of the Board or by 2/3 of the outstanding voting shares at an extraordinary shareholders meeting; and (f) in case the transaction is subject to shareholders' approval, the Board of Directors must nominate, at least, one independent evaluator to inform the shareholders on the conditions, effects and potential impact to the corporation of the proposed transaction. The report of the independent evaluator must also address any other matter that the Directors' Committee may have requested to be examined.

8. China

Author: Mei Gechlik**,** MBA, JSD, Lecturer in Law and Microsoft Rule of Law Fellow, Stanford Law School, Stanford University.[18]

During the first three quarters of 2009, the volume of M&A in China declined by 34.5% to USD 102 billion, compared with the same period in 2008.[19] Some explained that China's improving capital markets, as well as its aggressive monetary policies and approximately USD 600 billion in stimulus packages helped many Chinese companies survive the financial crisis and fend off takeover attempts.[20]

Others attributed the decline to companies' concerns over the world economic outlook and regulatory changes in China that led to Beijing's disapproval of Coca-Cola Co.'s USD 2.4 billion bid for China Huiyuan Juice Group Ltd. on questionable anti-monopoly grounds in March 2009.[21] International companies did not seem to be much affected by such concerns, as their deals involving purchasing Chinese firms fell only 0.7% to USD 15.9 billion during the first nine months of 2009.[22] Having achieved a strong GDP growth of 7.1% in the first half of 2009 and being expected to be the first of the world's largest economies emerging from the global economic slowdown,[23] China outperformed the United States, India, Russia and Brazil to be the most attractive investment destination.[24]

During the first nine months of 2009, the value of deals involving Chinese companies buying overseas firms dropped 46% to USD 9.8 billion.[25] This was partly because government-owned

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[18] Dr. Gechlik teaches Chinese law and business.

[19] Naomi Rovnick, *Value of Asian Buyouts Falls to 3-year Low; Economic Fears, Trade Barriers blamed,* SOUTH CHINA MORNING POST, Oct. 3, 2009.

[20] Nick Westra and Tim LeeMaster, *Mainland Leads Slowdown in M&A Activity,* SOUTH CHINA MORNING POST, July 3, 2009.

[21] See Rovnick, *supra* note 1; Suzanne Stevens, *Coca-Cola, TPG and China's M&A Climate,* DAILY DEAL/THE DEAL, July 7, 2009; and Zhan Hao, *Coca-Cola and Huiyuan: Explanation, Theory, An Attempt to Rationalise?*, CHINA LAW & PRACTICE, May 2009.

[22] See Rovnick, *supra* note 1.

[23] Cary Huang, *Mainland Economy Tipped to Grow 9pc; Recovery Picking Up Pace, Says Think Tank*, SOUTH CHINA MORNING POST, Oct. 13, 2009 and *China's GDP May Grow More Than 8 pct in 2009*, XINHUA ECONOMIC NEWS SERVICE, Oct. 12, 2009.

[24] *China Maintains Position of World's Most Attractive Investment IPR*, STRATEGIC BUSINESS INFORMATION DATABASE, Sept. 10, 2009.

[25] See Rovnick, *supra* note 1.

businesses were wary of making mistakes.[26] According to a survey conducted by the China Council for the Promotion of International Trade, only a third of overseas M&A transactions by Chinese companies were successful.[27]

An important cause for the decline was foreign resistance to China's outbound investment. China, which has a strong demand for oil and minerals to fuel its economic development, is keen on pursuing M&A abroad to convert its more than USD 2 trillion reserve into these strategic resource assets.[28] In fact, the energy, mining and utilities sector represented 95% of China's outbound deal value in the first half of 2009.[29] China's overseas investments have been seen as a threat, thus resisted by foreign governments and businesses. Two examples are illustrative. In June 2009, Chinalco's plan to invest USD 19.5 billion in Australia's Rio Tinto, the world's third-largest mining company, failed. The Australian government was reportedly concerned that Chinalco, the world's largest steel producer, would manipulate the price of iron ore.[30] In July 2009, Beijing Automotive Industry Holding Co (BAIC) was excluded from bidding for General Motor's Opel unit because GM reportedly feared BAIC's possible direct competition with GM's business in China.[31]

9. Costa Rica

Authors: David Gutiérrez and Carolina Trejos, BLP Abogados, San José, Costa Rica.

I. Overview

In the international financial crisis, M&A activity in Costa Rica slowed in 2009 due to the lack of bank credit, risk-averse local market and the fact that companies focused in internal reorganizations.

Several transactions took place in the food market, for example, the acquisition by a Taco Bell franchise of a local restaurant and cafeteria chain and the acquisition by a local group in the food industry (Restaurantes As) of the Domino´s Pizza franchise.

II. Legislation in Process

A recent bill (Files No. 17.348 and 16.434), which provides for the amendment to the current Law for the Promotion of Competition and Effective Consumer Defense, Law No. 7472, of December 20th, 1994 and its amendments (the Law), is currently under discussion for approval.

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[26] See *id.*

[27] Ding Qingfen, *Looking for ODI Success Stories*, BUSINESS DAILY UPDATE, Aug. 3, 2009.

[28] See *e.g., Six Characteristics of China's Balance of Payments in H1*, XINHUA ECONOMIC NEWS SERVICE, Oct. 16, 2009; *Foreign Banks Benefit from Chinese Investors' Overseas M&As*, SINOCAST, Sept. 15, 2009; and Mike Balaban, *China's M&A Challenge*, BUSINESS DAILY UPDATE, July 7, 2009.

[29] *M&A Deals in the BRIC Countries Drop in First Half,* HEDGEWEEK, July 10, 2009.

[30] See Ding, *supra* note 9.

[31] See *id.*

According to the Law, concentrations are not subject to an *a-priori* review by the Governmental Authorities.

In this sense, Costa Rican legislation differs from that of other countries, such as the United States and Mexico, since it does not have a preventive policy for mergers and acquisition of companies. As a consequence, the Commission for the Promotion of Competition (*Comisión para Promover Competencia*) makes an *ex-post* review. Therefore, this can lead to the difficult situation of having to order an *ex-post* break-up (once the merger has been carried out). Once the concentration is completed, if it is considered illegal, the Commission may enforce sanctions, pursuant to article 28 of the Law, such as fines, termination, correction or the suppression of the merger/acquisition; and/or a partial or complete break-up of the part of the merger /acquisition.

With the new bill, the definition of concentration is amended to broaden the scope of regulation.[32] In addition, certain concentrations are subject to an *a-priori* control by the Commission; specifically: (a) those in which the productive assets of the economic agents involved, or of their holding companies, exceed the amount of thirty thousand base salaries in the national territory,[33] and (b) those in which the total income generated in the national territory during the last fiscal period by the economic agents involved exceeds the amount of thirty thousand base salaries. Accordingly, a procedure is implemented to perform the *a-priori* review, and the project of concentration (including the specific transaction, the economic agents involved, financial statements, an analysis of the relevant markets and the substantial power in such markets, and the antitrust effects that such concentration could have in the market along with a plan to mitigate such effects, among others) shall be filed before the Commission. The Commission may order the publication of a notice in a national newspaper to grant a period of opposition by third parties, and it shall require that within thirty days as of the date that all complete information is filed. Furthermore, the Commission may impose conditions to effect the concentration, if required, or impose sanctions to those economic agents involved should the concentration suggest anticompetitive effects or if it was performed without prior authorization, where applicable; otherwise, the concentration shall be authorized by the Commission.

[32] A concentration is deemed as the merger, the purchase and sale of a commercial establishment, or any other act or contract by virtue of which companies, associations, shares, capital stock, trusts, management powers, or assets in general are concentrated; which are performed between competitors, providers, clients or other economic agents that have been independent amongst themselves, resulting in the acquisition of the economic control by one of them over the other or others, or the formation of a new economic agent under the joint control of two or more competitors. Also, any transaction by which any individual or legal entity, public or private, acquires the control of two or more economic agents that have been independent amongst themselves and which are current or potential competitors until that moment.

[33] Currently, the base salary is approximately the amount of CRC 270.000 per month, which amounts approximately to USD 483.00.

10. Croatia

Author: Miroljub Maćešić, Law Offices of Miroljub Maćešić, Rijeka, Croatia.

During 2009, the Croatian M&A market followed the world's downward trend and slowed due to financial crisis. Nonetheless, because of Croatia's accession into EU, some significant legal and political developments, particularly with regard to the privatization, occurred in M&A activity.

I. New Competition Act

The new Competition Act (*Official Gazette No.* 79/09) (CA) was adopted in June 2009 and is effective as of 1 January 2010. The previous 2003 CA (*Official Gazette No.* 122/03) had to be amended in line with the European Union *acquis,* especially regarding imposing fines for breach of the CA. Namely, breaches of the 2003 CA were considered misdemeanors and were sanctioned before the Misdemeanor Courts. This proved to be inefficient as misdemeanor proceedings are quite slow and judges lacked expertise in this branch of law. Therefore, the new CA empowers the Croatian Competition Agency (CCA) to impose fines and enforce the Act, in line with the adopted solutions in other EU members. This may be considered as a precedent in Croatian legislation, since up until the new CA, government's agencies did not have the power to impose sanctions.

The new CA also empowers the CCA to conduct a leniency program; it strengthens the parties' right of defense by introducing obligation for the CCA to submit statements of objection to the parties and makes CCA decisions subject to review by the High Administrative Court of Croatia.

II. Privatization of Shipyards

As in 2008, the privatization of six state-owned shipyards (Uljanik Pula, 3 Maj Rijeka, Brodosplit Split, Brodosplit – Brodogradilište specijalnih objekata Split (BSO), Brodogradilište Kraljevica) is still a hot topic in the Croatian M&A market. The international privatization tender was launched in August 2009, but turned out to be unsuccessful. In fact, the first round of privatization was closed with only two bids although as many as 33 candidates purchased the bidding documentation. The starting price for four shipyards was only one kuna (EUR 0.15), as a result of the shipyard's restructuring programme approved by the European Commission. The buyer of those shipyards should implement the shipyard's restructuring program which, *inter alia*, includes reduction of new building production capacities, modernization, preserving worker's jobs, continuation with the shipbuilding activity for several years, and cover of losses from previous years. The shares of the profitable shipyard, Uljanik Pula, are partially reserved for its employees (25% shares) and for 59.25% of the shares, the starting bid was their estimated market value. BSO shipyard was also offered at estimated market value.

The failure of the first round of privatization proved that problems of Croatian shipbuilding are greater than the Government initially estimated. The Government is currently negotiating with the European Commission for different conditions that are more favorable for potential buyers for second round of privatization. It is expected that the second tender will be announced by the end of the year.

If the privatization process fails, it is likely that some Croatian shipyards might be declared bankrupt, which will have a deep impact on the Croatian economy, especially considering that shipbuilding is one of the six main branches of the economy in Croatia.

III. Other Interesting Takeovers

During the second half of 2009, the world crisis has hit one of the biggest Croatian retail chains, Pevec Group. Great debts towards suppliers and banks have forced the company into restructuring. The restructuring program has still not been made public, but the media speculates that several daughter companies will either be liquidated or merged, and that the creditors will take over the restructured Pevec Group shares, as a settlement of debts.

It is expected that during 2010 the Government will continue with the privatization of the state owned companies, especially the national electricity company, HEP Group or insurance company Croatia osiguranje d.d.

Liberalization of the Croatian electricity market has begun and HEP Group has already partially lost its protected position. Thus, generation and supply (including sale) of electricity to eligible customers, as well as trading on the electricity market, are now performed as market activities (where the price and quantity of delivered power is freely negotiated). This means that, besides HEP Group, interested third-parties may perform aforementioned activities. On the other hand, generation of electricity for tariff customers, transmission and distribution of electricity, electricity market organization and supply for tariff customers are regulated activities and are preformed as public service. These activities are still performed exclusively by HEP Group.

11. Denmark

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Through the unique combination of a liberalized Companies Act and a substantial state-backed capital infusion to the venture capital market, the legal climate for joint ventures is looking good and Denmark is poised for a rebound from the current financial crisis.

The Danish market was not insulated from the ripples following the default of Lehman last year, and the LBO markets have effectively been closed since September 2008. In the first half of 2009, the activity in the Danish market has been focused on smaller M&A deals and/or deals pertaining to distressed assets. Thus, there have been a significant number of deals involving assets previously acquired by Icelandic investors, which are now struggling from the meltdown in the Icelandic economy. Considering the wide variety of sectors favored by the Icelandic investors, the deal activity has been seen across the board, although property investment companies have represented the bulk of the deals in terms of transaction volumes.

By the end of August 2009, more M&A deals (albeit still comparatively smaller ones) have been closed and the consensus in the marketplace is that the worst is now behind us. Also, the Danish parliament has, amongst other stimuli, focused its initiatives on making it easier to do business in Denmark rather than merely ensuring credit availability. The legislative initiatives have focused on the introduction of a significantly liberalized company regime, and additional venture capital more readily available to the less mature business segments.

On May 29 2009, the Danish Parliament passed the most significant revision of company law in more than a generation. Combining existing legislation governing private and public limited companies into one unitary act, the Danish legislators have, *inter alia*, reduced the requirements for minimum share capital of limited companies, significantly expanded the range of governance

options available to companies, and liberalized the formalities concerning mergers and demergers. And perhaps most importantly, payment of 75% of the subscribed share capital of a new company may now be deferred to a later date. However, for companies with a share capital of less than DKK 320,000, at least DKK 80,000 must be paid in at all times.

Furthermore, the Danish government is making DKK 500 million available to local venture investment funds through the auspices of "Vaekstfonden", a state-backed investment fund. Private venture funds need to demonstrate an ability to raise funds on the capital markets in order to qualify for a share of the government cash infusion. Vaekstfonden will also issue guarantees for loans to companies up to DKK 750 million, and provide DKK 50 million in so-called "get started" loans, aimed at new entrepreneurs. The reason for the increase in available venture capital is to help remedy the frozen financial markets, where banks are currently less than willing to lend to more "risky" projects.

Under Danish law, joint ventures acquire no legal personality *sui generis*; a new limited company must be incorporated for this to occur. The tradition is to enter into written short form agreements, such as shareholders' agreements setting out the specific obligations and rights of the parties engaging in joint venture matters: ranging from the day-to-day administration of the joint venture to rules governing its potential liquidation. By incorporating the joint venture in the form of a new jointly owned company rather than a co-operation contract, the regulation of the joint venture and its parties will be supported by an extensive company law regime in addition to any contractual terms agreed for the joint venture parties. The possibility for two firms to more easily incorporate a new company as a vehicle for a common venture, with all the legal and goodwill-related benefits that ensue from such a Danish limited company, while deferring payment of the majority of the share capital to a later date, makes Danish-incorporated joint ventures appear increasingly attractive.

Traditionally, a significant number of international companies have registered holding companies under Danish law for tax purposes. In 1999, Denmark introduced changes to its company law that provided outstanding opportunities for the international investor.

The new measures may prove to be of special importance to the establishment of joint ventures in Denmark. With the new legislative measures, particularly those allowing for more flexibility concerning governance structures and deferred payments of capital, Denmark's liberal tradition is upheld, and there are still no formal requirements to the agreements of the parties to be in writing or formatted in any particular way.

The effects of the new legislative measures, including the significant revision of the Danish company law and the initiatives introduced by the Danish parliament, are yet to be seen but the fact that many companies in the Danish market are reporting still more sound results are encouraging signs that Denmark is still open for business.

12. European Union

Author: Mattia Colonnelli de Gasperis, Colonnelli de Gasperis, Milan, Italy.

In Audiolux v. Groupe Bruxelles Lambert, Bertelsmann *et alteros*, C 101/08, dated 15 October 2009, the European Court of Justice held that no European Union law provides for a principle of

equality of treatment of shareholders entailing the obligation of the shareholder acquiring, or holding, a controlling stake of a company to offer to the minority shareholders the purchase of their respective stakes at the same terms and conditions of the purchase of the controlling stake (or a stake consolidating the control).

That was an eagerly expected decision, since, for the first time the European Court of Justice has been called upon to acknowledge whether there does exist a general principle of equal treatment of shareholders or not, and whether such a principle, if it exists, should be considered a general principle of law under Community law.

13. Germany

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M&A activity in Germany dropped significantly in early 2009. The first half-year was characterized by transactions induced by distressed situations. The market came back in the second half-year after a few successful equity raisings.

I. Foreign Investment Control

The "Thirteenth Act for the Amendment of the Foreign Trade Act and the Foreign Trade Regulation"[34] introduces new review and veto powers for the German Federal Ministry of Economic Affairs (the Ministry). The Ministry is enabled, only if there is a substantial threat to a fundamental interest of the state and its population[35], to prohibit or restrict investments in German companies of all industries by investors from outside the European Union and the European Free Trade Association to "*secure the public order or safety of the Federal Republic of Germany*"[36]. "*Public order or safety*" must be construed to comply with the freedom of establishment and the freedom of capital movement pursuant to Art. 46 and 58(1) EC Treaty[37].

The new review and veto powers apply to acquisitions of German businesses and direct and indirect shareholdings in German businesses, unless the purchasers' direct or indirect voting share remains below 25%.[38]

Investors are not required to make a filing with the Ministry on their own initiative. However, investors who wish to obtain transaction certainty may want to seek a no-action letter from the Ministry.[39] If the Ministry does not react within one month after such filing, the transaction is

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[34] *Dreizehntes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung* of April 18, 2009, BGBl. I at 770, amending the Foreign Trade Act ("AWG") and the Foreign Trade Regulation ("AWV").

[35] § 7(2) no. 6 AWG.

[36] § 7(2) no. 6 AWG, § 53 (2)4 AWV.

[37] § 7(1) no. 4 AWG.

[38] § 53(1) AWV.

[39] § 53(3)1 AWV.

deemed approved.[40] If a purchaser elects not to seek a no-action letter, the Ministry enjoys three months after the signing of the transaction to decide whether to start a review,[41] and two months after receipt of the complete documentation to decide whether it wants to prohibit the acquisition.[42] A prohibition or restriction order requires approval by the full Federal Government.[43]

The new regime is not stricter than the foreign investment control laws of other developed countries[44] and offers foreign investors more legal certainty than the regime under the US Foreign Investment and National Security Act of 2007 (FINSA).[45] Furthermore, the Ministry has repeatedly stated that it intends to apply the new powers only in exceptional cases.[46] First experiences with the new rules have shown that the Ministry is self-confident, but also pragmatic and solution-oriented, provided that the purchaser is carefully prepared and manages the proceedings professionally.

II. Post-Merger Integration

After a successful bid for a German listed company, the bidder tends to face the challenge to subject the target company to full control while the requisite transactions[47] require a resolution by the shareholder meeting. Some professional shareholders have emerged who are used to challenging shareholder resolutions in court with the objective to hold up the underlying transactions until reaching a favorable settlement. To overcome these roadblocks, target companies can start expedited proceedings under which the court can order that nevertheless the transaction may proceed.[48] Target companies can complete these proceedings successfully within several months, provided that the shareholder meeting is diligently prepared.

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[40] § 53(3)2 AWV.

[41] § 53(1)1 AWV.

[42] § 53(2)4 AWV.

[43] § 53(2)5 AWV.

[44] *Kern*, SWFs and foreign policies – an investment update, db-research, p. 33 *et seq*. (Oct. 22, 2008); *Krause*, Die Novellierung des Außenwirtschaftsgesetzes und ihre Auswirkungen auf M&A-Transaktionen mit ausländischen Investoren, Betriebs-Berater, p. 1082 (2009).

[45] Public Law 110-49, 121 Stat. 246 (July 26, 2007). One of the main reasons is that the transaction is deemed approved if the Ministry has not started a review within three months (§ 53(1)1 AWV), whilst the Committee on Foreign Investment in the U.S. (CFIUS) has authority, even many years after completion of a transaction, to review it again and potentially even prohibit the acquisition; see § 721(b)(1)(C)-(E) Defense Production Act (50 U.S.C. App. 2170).

[46] See e.g. Press Release of the Federal Ministry of Economic Affairs (Aug. 20, 2008); Government Bill ("*Regierungsentwurf*"), BT-Drucksache 16/10730, p. 12 *et seq.*, 18 (Sept. 30, 2008).

[47] Such as a domination agreement (§§ 291 et seq. *Aktiengesetz* of Sept. 6, 1965, BGBl. I at 1089, as amended – "AktG") or the squeeze-out (§§ 327a et seq. AktG).

[48] § 246a AktG; §§ 327e(2), 319(6) AktG.

With the implementation of the Act for the Transformation of the Shareholder Rights Directive,[49] it has become more difficult for minority shareholders to unfold nuisance value. Where they hold less than EUR 1,000 in the target share capital, they will no longer be able to block the implementation of shareholder resolutions.[50] Furthermore, expedited proceedings in the future will be decided by the Court of Appeals rather than the District Courts, and an appeal will no longer be possible,[51] thus, shortening the proceedings to a period of three to four months, so that there is less pressure on the company to settle the cases.[52]

14. Greece

Author: Harry Stamelos, Athens, Greece.

I. Major Transactions in 2009

- the privatization of the national air carrier by the acquisition of both Olympic Airlines and Olympic Airways Services by MIG Investment Group (EUR 177 million);
- the acquisition of British Petroleum Hellas by Hellenic Petroleum (EUR 360 million for 1.200 stations, plus warehouses, excluding lubricants and air fuels);
- the acquisition of Shell Hellas and Shell Gas AEBE by Motor Oil Hellas (EUR 245. 6 million (EUR 219.1 plus EUR 26.5 million) for 700 stations, plus warehouses, plus the 49% of air fuels, excluding lubricants and the 51% of air fuels);
- the merger between Hellenic Seaways absorbing Easy Service Ltd;
- the acquisition of Vivodi Telecommunications by On Telecoms (EUR 50 million);
- the acquisition of Bathrelos by Hatkar AEE (dealing with spare parts of Mercedes in Greece);
- the acquisition of City FM by DOL / Mega Channel;
- the acquisition of 20% of OTE (telecommunications) by Deutsche Telekom;
- the acquisition of Aioliko Voskerou SA and Aioliko Kouloukonas SA by Enel Green Power (Italy), acquiring two wind power parks in Crete island; and
- the privatization of a part of the port of Piraeus by the Chinese coliseum company Cosco (despite a recent twenty-days strike of dock workers).

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[49] *Gesetz zur Umsetzung der Aktionärsrichtlinie (ARUG)* of July 30, 2009, BGBl. I at 2479.

[50] § 246a(2) no. 2 AktG; §§ 327e(2), 319(6)3 no. 2 AktG.

[51] § 246a(1)3 and (3)4 AktG; §§ 327e(2), 319(6)7 and 9 AktG.

[52] See Press Release of the Federal Ministry of Justice (May 29, 2009).

II. Legal Response to the Major Transactions

All these major transactions have been approved by the authorities. The only pending transaction is the acquisition of Shell by Motor Oil.

Specifically, the privatization of Olympic Airlines has been approved by the Greek administration and the Commission of the EU (IP/09/374, Brussels, 10 March 2009). The EU Commission endorsed the revised privatization plan of Olympic Airlines and Olympic Airways Services.[53]

The acquisition of British Petroleum Hellas by Hellenic Petroleum has been approved by the Hellenic Competition Commission (Decision of October 22, 2009), subject to commitments by Hellenic Petroleum in the prefectures of Heraklion, Rethymno, Lasithi, Chania (all four on Crete island), Dodecanese (twelve islands of South-East Aegean Sea) and Lesbos (island of North-East Aegean Sea).[54]

The acquisition of Shell Hellas and Shell Gas AEBE by Motor Oil Hellas is likely to be approved, provided that the acquisition of BP Hellas by Hellenic Petroleum has already been approved.

The privatization - assignment of the port of Piraeus concerns containers' Docks II and III and their exploitation by Cosco for fifty years. The public contract (2,500 pages) between the Hellenic administration (Organism of Port of Piraeus SA, Containers Station of Piraeus SA) and Cosco Pacific Limited (China) has been enforced by Law 3755/2009.[55] Article 1 of the Law was signed by the President of the Hellenic Republic, and the Ministers of Internal Affairs, Economy, Environment, Employment, Health, Justice and Admiralty.

III. Significant Amendment to Greek Competition Law

Law 3784/200956 amended Law 703/1977. The main amendments are:

1. New sub-paragraph of article 4b provides that "*any interested party may file comments or give evidence relating to a notified merger. The Hellenic Competition Commission takes into consideration the reasonable legitimate interest of companies in order to respect the business secrecy*".
2. The criteria for the assessment of whether a notified merger or acquisition would distort competition are, according to new article 4c paragraph 2, the following:
    a. the structure of the relevant market,
    b. the actual or potential competition existing between companies founded in or outside Greece in the relevant market,
    c. the legal or real existing barriers to entry into the relevant market,
    d. the position of the firms in the relevant market,

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[53] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/374&format=HTML, available in English, last visited on 28.10.09.

[54] www.epant.gr/news_details.php?Lang=en&id=89&nid=211, available in English, last visited on 28.10.09.

[55] *Official Gazette of the Government* (*FEK*), Issue A, Number 52, March 30, 2009.

[56] *Official Gazette of the Government* (*FEK*), Issue A, Number 137, August 7, 2009.

e. the financial and economic power of the interested companies,
f. their power to select suppliers and consumers,
g. their access to sources of supply or markets of distribution,
h. the evolution of offer and demand of the relevant products or services,
i. the interests of the intermediates,
j. the interests of the consumers,
k. the contribution of merger to evolution of technical progress, and
l. the contribution of merger to evolution of economic progress (subject (the same for (k)) to the interests of consumers and without impairing or distorting competition).

3. If the Competition Commission does not issue a decision after the lapse of 90 days after the notification, there is a presumption that the merger has been approved. Then the Commission must issue a typical approval of the merger (article 4d paragraph 6).

4. In case of investigation, the time limit for the Commission to issue a decision cannot exceed eight months, but it may issue an interim decision until its final decision (article 4e paragraph 5).

IV. Future

The new administration is in negotiations with Deutsche Telekom (Germany) for the acquisition of 5-10% of OTE in 2010. It has also announced its efforts for a re-negotiation regarding the agreement with the Chinese (Cosco). Meanwhile, Wind Hellas (mobile telecommunications) has announced that, in the context of crisis, its debts are EUR 3.2 billion and two groups have already expressed their interest for the future acquisition of Wind Hellas.

15. India

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In 2009 there was a significant slow-down in the Indian M&A activity, including acquisitions by private equity funds. However, after the general elections in May won by the Congress Party, the M&A and JV activity started to increase.

I. Downstream Acquisitions and Joint Ventures

Thus far, if an Indian company having a non-resident/foreign shareholder desired to make any downstream investment by way of an acquisition, joint venture and/or setting-up a subsidiary – it required the prior permission of the Government of India in order to do so.

Pursuant to the new regulations issued in February this year, such requirement of seeking prior permission has been done away with. However, in those cases where the Indian company making the downstream investment is either owned[57] or controlled[58] by a non-resident/foreign

[57] If more than 50% of the equity interest is owned by non-residents/foreign shareholders.

shareholder, the downstream investment may be made in a sector in which foreign investment is permitted, provided that the Indian company: (a) notifies prescribed authorities within 30 days of the investment having been made irrespective of whether shares have been allotted to it or not; (b) ensures that the downstream investment is made in accordance with the pricing guidelines for purchase of shares; and (c) brings in funds from overseas for the purposes of downstream investments and does not borrow funds from the Indian market.

II. Calculation of Indirect Foreign Ownership

The Government also issued guidelines to calculate indirect foreign investment in Indian companies, and in relation to the transfer of ownership and/or control of Indian companies (operating in sectors where limits on foreign ownership exist) from resident Indian citizens to non-resident entities.

The key provisions are:

- Where an Indian company having foreign investment (the Foreign Invested Company) invests into another Indian company (the Indian Investee Company) the entire investment made by the Foreign Invested Company would be treated as foreign investment in the Indian Investee Company if the Foreign Invested Company is not owned and controlled by resident Indian citizens and/or by Indian companies owned and controlled by such residents.

- In all sectors where the Government's approval for foreign investment is required: all shareholders agreements relating to constitution of the board of directors, exercise of voting rights, grant of disproportionate voting rights and/or incidental matters will need to be notified to the Government for their scrutiny and approval.

- In all sectors where limits on foreign investment have been prescribed, the balance shareholding must be beneficially owned by resident Indian citizens and/or by Indian companies owned and controlled by such residents.

- In all sectors where limits on foreign investment have been prescribed, transfer of shares from resident Indian citizens to non-resident entities would need the prior approval of the Government if (a) the control or ownership of an existing Indian company is being transferred from Indian residents to non-residents, and/or if (b) an Indian company being established is to be owned or controlled by a non-resident entity.

[58] If the non-resident/foreign shareholders have the power to appoint a majority of directors on the board of the company.

16. Israel

Author: Ronald Lehmann, Fischer Behar Chen Well Orion & Co., Tel-Aviv, Israel.

Continued expansion of corporate debt restructuring arrangements, which in many cases have had the effect of corporate acquisitions as corporate creditors acquire equity stakes in distressed companies, occurred.

Institutional investment firms increasingly have assumed the management of Israeli provident, insurance and pension funds; replacing the traditional role of Israeli banks. The expansion of the non-bank credit market was not accompanied, however, by parallel extensions of regulatory mechanisms for oversight and credit risk assessment. The increase in demand of non-bank institutions for investment opportunities in corporate debt led to a general weakening of provisions protective of creditors' rights in debt instruments. Consequently, in the wake of the global economic downturn, Israeli institutional investors found themselves holding significant accumulations of distressed corporate debt, often with more limited contractual protection than might have been available to creditors in other circumstances and without the experience or regulatory framework that would set relatively clear parameters for restructuring. The end result was that when the global crisis struck Israel, the regulating bodies and the market had not had time or the proper experience to develop safeguards to soften the blow to debenture holders.

During late 2008 and 2009, a key regulatory component to enable successful debt restructurings was the focus on facilitation of bondholder cooperation.[59]

The Israel Security Authority (ISA) faced two primary issues: (a) disclosure concerns, and (b) insider trading concerns. Revealing ongoing negotiations between the company and its bondholders could lead to the company's undoing by other creditors. Such disclosure could also signal general instability and lead to collapse of the debtor company. In addition, concern regarding insider trading complicated negotiations towards debt restructuring, as bondholders were prohibited from being made privy to necessary information. The ISA mandated that the trustee may appoint the three largest bondholders to a representative committee.[60] The committee can then appoint a credit officer charged with managing the negotiations between the bondholders and the company.[61] The committee members and credit officer are prohibited from dealing in the company's securities so long as they are privy to insider information. The

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[59] According to the Ministry of Finance, as of September 2009 approximately twenty seven companies were in the process of debt restructure and the forecast is for that number to significantly increase. http://www.finance.gov.il/hon/2001/general/memos/gen_pres200910.pps#268,12הסדרי חוב בפועל,

[60] http://www.isa.gov.il/Download/IsaFile_3283.pdf. Since the representatives are not appointed by the general bondholders meeting, no disclosure is required. For the same reason, it is officially representative only of its members. However, due to its composition it may be reasonably assumed that its decisions will be acceptable to all the bondholders.

[61] Generally, under Section 35H of the Securities Law, 1968, the trustee is required to disclose to the bondholders any information regarding potential default and the measures taken in response. In order to facilitate the committee's activity, the ISA resolved that the trustee may withhold information regarding the negotiations, the credit officer and the formation of the committee from the general bondholders, if (a) the company has informed the trustee that it intends to postpone disclosure through Section 36(b) to the Securities Regulations (Periodic and Immediate Disclosure), 1970, (b) the information has not been made public, and (c) the issuance terms do not necessitate an immediate redemption of the bond issue.

ISA has anyway provided guidelines to allow such trading so as not to put the institutional investor at an acute disadvantage.[62]

Cooperation between institutional investors can lead to antitrust violations prohibited under Section 2 of the Antitrust Law, 1988. In response to the economic crisis, the IAA allowed conditional cooperation, provided principally that: (a) cooperation is limited to debt restructuring and to three institutional investors, (b) cooperation was initiated by the trustee, (c) all three representatives are present at committee meetings.[63] Failure to comply with these guidelines renders any exemption from antitrust regulations unavailable.

17. Italy

Author: Mattia Colonnelli de Gasperis, Colonnelli de Gasperis, Milan, Italy.

M&A activity in Italy dropped during the first-half 2009. However, the M&A market never came to a complete stop. Domestic and non-domestic industrial players, especially those with some cash available in their treasuries, closed a various array of deals at bargain prices. To the contrary, private equity houses, which by definition need bank financing to carry out their acquisitions, were almost inactive from the buy side.

The market came back in the second-half of the year, especially in the energy (both traditional and renewable), food, textile, fashion, luxury, and yacht industries. A significant part of the activity resulted from restructuring processes (run also by Italian conglomerates redefining the scope of their core businesses in light of the financial and economic turmoil), both in the context of bankruptcy proceedings managed by courts and pre-bankruptcy agreements negotiated between shareholders and creditors.

As for the near future, the market will be probably characterized by small and medium size transactions, in particular affecting the bank and real estate industries. Very likely, big size deals (just delayed for the moment) will be back when physiological general economic and financial conditions will be restored.

I. Mergers and De-Mergers Without a Mandatory Expert's Evaluation.

As implementation of EU Directive no. 63/2007 and Law no. 88/2009, pursuant to the new art. 2501-*sexies* of the Italian civil code, the expert's opinion (containing the methods of the enterprise value's evaluation used and their outcomes) on the fairness of the exchange *ratio* in the context of corporate merger and de-merger is no longer mandatory, but only optional. In particular, all the involved shareholders may resolve to waive the expert's evaluation. Such new rule is aimed at reducing the administrative burden to be borne by the companies (and their shareholders) involved in mergers and de-mergers.

[62] http://www.isa.gov.il/Download/IsaFile_3417.pdf. The primary guidelines are: (i) the credit officer may not engage in trading; (ii) the institutional investor must prevent its investment division from accessing information available to its debt arrangement division; (iii) a supervisor must be appointed to oversee the separation between divisions.

[63] archive.antitrust.gov.il/ANTGetItemHtml.aspx?type=doc&ID=9675.

II. Shareholders' Rights

As implementation of EU Directive no. 36/2007, a new statute is on its way to being enacted, aimed at enhancing the exercise by the shareholders of their administrative rights, by simplifying the exercise of the voting rights and bettering the disclosure to the shareholders. In particular, the major novelties, effective as of 31 October 2010, are:

(a) to grant attending and voting rights during a shareholders' meeting, the Chairman of the meeting shall take into consideration the ownership structure of the company as of the date which is 5 days prior to the meeting itself (the so called "record date rule"). The record date rule replaces the previous mechanism providing for the obligation to file with the company the voting shares in a period starting from various days before the meeting up to the meeting itself, so called "file rule". The new rule is in line with the requests of the institutional investors, which were disappointed by the file rule since, *inter alia*, it had the effect of excluding, during the whole filing period, transactions (including exits) involving the shares to be voted and discouraging the attendance of, and the exercising of the voting rights at, the shareholders' meeting;

(b) the company by-laws may provide that the shareholders holding continuously shares (representing in aggregate less than 2% of the share capital) for at least 12 months are entitled to receive higher dividends, amounting to no more than 10% of the ordinary dividends;

(c) art. 2370 of the Italian civil code is amended, allowing the attendance of, and the exercise of voting rights in, the shareholders meeting by electronic means (and no longer only physical means); and

(d) voting proxies may be granted electronically and the solicitation of voting proxies may be carried out using electron means.

18. Luxembourg

Authors: Carine Feipel and Bob Calmes, Arendt & Medernach, New York, NY, U.S.A.

In 2009, various changes to Luxembourg company and tax laws were primarily aiming at further enhancing the flexibility of Luxembourg corporate M&A structuring. Some other changes were required, in view of the implementation of various EU directives.

I. Capital Duty Abolition

New rules implementing the provisions of the EU Council Directive 2008/7/EC have abolished the Luxembourg capital duty of 0.5% on capital contributions to Luxembourg companies. Henceforth, the incorporation of civil and commercial companies are subject to a fixed registration duty of EUR 75.

II. Extension of Dividend Withholding Tax Exemption

The list of eligible parents which may benefit from the participation exemption of the Luxembourg dividend withholding tax (currently 15%) has been extended to companies that are established in a State that has concluded a double tax treaty with Luxembourg, provided that the parent is subject to a "*tax corresponding to the Luxembourg corporate income tax*" (a foreign tax is considered corresponding to the Luxembourg CIT if it is levied at an effective rate of at least 11%).

III. Alleviation of Capital Protection Rules

New rules have lightened the financial assistance regime, the conditions for share redemptions and have authorized, in specific circumstances, capital contributions in kind without the need for an independent auditor's report.

(a) Lightening of Financial Assistance Regime

Luxembourg corporate law formerly did not allow companies to provide for financial assistance (a company directly or indirectly advances funds or grants loans or provides security or uses any other mechanisms, which would reduce the net assets of that company for a third party to acquire its shares).

The prohibition of financial assistance has been lifted and made way for a more flexible regime, better suited for typical cross-border investment structures. Henceforth, a statutory clearance procedure shall be followed in order for the target company to give financial assistance. Some safeguards are (i) the operation shall take place under the responsibility of the board of directors which is to deliver a written report to the general meeting of shareholders explaining the rationale and terms behind the operation, the risks for the company's solvency and liquidity, the price for which the shares are to be acquired (which must be at arm's-length) and the corporate interest therein; and (ii) the amount of the aggregate financial assistance to be granted to third parties must not result in reducing the net assets of the company below specific thresholds and a non-distributable reserve corresponding to the amount of the aggregate financial assistance shall be reflected in the liabilities of the company's balance sheet.

(b) Relaxation of Conditions for Share Buybacks

The maximum number of shares to be redeemed by a company is no longer limited to 10% of a company's share capital and the maximum duration of the period for which an authorization to repurchase can be granted to management by the general meeting of shareholders has been extended from 18 months to five years.

(c) *Extension of Exemptions of Valuation Report for Certain Contributions In Kind*

Prior to the new legislation, any capital contribution in kind to public limited companies and partnerships, at the time of the incorporation or of a capital increase, required a valuation report from an independent auditor confirming that the value of the contribution is at least equivalent to the nominal value of the shares to be issued plus the share premium. Under the

new rules, this valuation report is no longer required where the contribution is made up of (i) transferable securities or money-market instruments valuated at the weighted average price at which they have been traded on one or more regulated market(s) during a period of six months preceding the effective date of such contribution, (ii) assets which have already been subject to a fair value opinion by an independent auditor not more than six months before the effective date of the contribution, or (iii) assets whose fair value is derived for each individual asset from the statutory accounts of the previous financial year, provided that the statutory accounts have been duly audited.

IV. Cross-Border Merger Harmonization

The law of 9 June 2009 implements the EU Directive 2005/56/CE relating to cross-border mergers into Luxembourg law, facilitating European cross border M&A transactions by bringing an end to legal uncertainties existing in other jurisdictions, which did not allow for cross-border mergers.

19. New Zealand

Authors: David Quigg, John Horner, and Asha Stewart, Quigg Partners, Wellington, New Zealand.

I. M&A and JV Activity in 2009

2009 has seen a drop-off in New Zealand M&A activity as a result of the continued global economic turbulence. However, Joint Ventures have been seen moving back into favor, as investors look to embrace opportunities while keeping exposure limited.

II. Review of the Overseas Investment Act 2005

Under current New Zealand law, in certain circumstances international mergers, acquisitions, or joint ventures may require consent from the New Zealand Overseas Investment Office where there is a New Zealand business operated by the "target". This can have an impact on the timing of the transaction, as consent applications can take some time to be processed.

On 17 March 2009, the new National government announced a review of the overseas investment rules. The review aimed to make foreign investment in New Zealand simpler and more attractive, while at the same time protecting sensitive land, assets, and resources.

On 23 July 2009, Minister of Finance Bill English announced, as a result of the first part of the review, changes to the Overseas Investment Procedure, by delegating greater decision-making powers to the Overseas Investment Office. The Overseas Investment Office is now able to decide all applications apart from those relating to rural sensitive land, or land adjoining waterways, without reference to the Minister. Mr. English said:

> "*At present 98 per cent of all applications are approved. That is why we have cut red tape for overseas investors. This will make the process simpler, faster and cheaper, meaning more local firms get the investment they need when they need it….This move alone is expected to reduce the number of ministerial*

> *decisions by 40 per cent and cut about two weeks off application assessment times.*" [64]

In addition, several types of transactions of a minor, technical or temporary nature have now been exempted from the Act. Examples include some underwriting transactions and sales within a group of companies with shared ownership. These transactions result in little or no change to the overseas ownership of sensitive assets.

The Government is now looking to consider the second part of the review, aimed at simplifying the screening process, providing greater certainty, and reassessing the screening thresholds.

Though there will likely still be circumstances in which New Zealand's overseas investment laws act as something of a "roadblock" to international transactions, it can be hoped that the amendments to date and any future changes will clear the way for others, or at the least ensure that there is a faster detour.

20. Portugal

Authors: Diogo Leónidas Rocha and Bruno Ferreira, Garrigues LLP, Lisbon, Portugal.

Depressive economic conditions have continued to take its toll on the deal environment in Portugal. No initial public offerings have been launched and there have been an insignificant number of takeovers.

Public investments are once again expected to serve as a driving force for economic recovery, especially in relation to the two main public infrastructure investments: the new Lisbon international airport and the high-speed train links.

I. Amendments to the Portuguese Companies Code and to the Portuguese Securities Code

Decree-Law no. 185/2009, of August 12, introduced some material amendments to the Portuguese Companies Code (CSC) and to the Portuguese Securities Code (CVM), including certain material modifications resulting from the implementation of Directive no. 2006/46 CE, of the European Parliament and of the Counsel, of July 14, that amends four community directives regarding the individual and consolidated accountability of some companies, banks, insurance companies and other financial institutions. Said amendments, namely, (a) simplify the legal regime applicable to mergers and split-offs, (b) provide new regulation of distribution of assets to shareholders, (c) establish mandatory content for companies' accounting documents, and (d) provide new disclosure obligations for listed companies.

[64] http://www.beehive.govt.nz/release/government+simplifies+overseas+investment.

(a) Merger and Split-Off of Commercial Companies

The new measures introduced not only decrease the time required for completion of the relevant legal procedures, but also reduce administrative costs related to such procedures.

This statutory amendment allows for simultaneous occurrence of several preliminary formalities (*i.e.*, registration of the merger or split-off plan, publication of the plan's registration, publication of the notice to creditors and of the notice for the general meeting), thus significantly reducing the time expended in execution of these procedures.

The boards of the companies involved will also now be able to file the registration of the merger or split-off plan electronically through a standardized form. Companies that use this form will save 50% of the administrative costs related to the registration.

Furthermore, the simplified merger regime is now also applicable to the merger of companies controlled by at least 90%. This simplified procedure was previously only applicable to mergers with wholly owned affiliates.

(b) Companies Accounting Rules

New transparency rules and rules related to the disclosure of off-balance arrangements, as well as new disclosure obligations on transactions with related parties have been introduced. In the appendixes to the annual accounts, individual or consolidated, companies must disclose (i) the nature and commercial purpose of certain relevant transactions not included in the balance sheet, and their financial impact, and, separately, (ii) the total fees invoiced during the financial year by the statutory auditors relating to the statutory audit of annual accounts, as well as fees paid for other services other than audit services (including tax consultancy).

Moreover, companies that do not prepare accounts in accordance with International Accounting Standards will have to disclose arrangements that may involve related parties – including, key management members, spouses of board members, minority shareholders – that are material and not carried out under normal market conditions.

These rules will be mandatory for companies going forward, for the financial years beginning on or after 1 January 2010.

(c) Listed Companies

Listed companies must disclose in their annual corporate governance report a specific and clearly identifiable section containing, amongst other things, information related to (i) internal management control and risk control systems regarding the preparation of financial information, (ii) statements of compliance with the corporate governance code to which the company is legally subject or has voluntarily adhered, and (iii) description of the operating mechanisms of the company's corporate bodies and relevant commissions.

Additionally, there has also been an extension of the supervisory board's duties regarding the verification of compliance with the relevant information duties for listed companies.

These rules will be mandatory for companies with respect to their financial years beginning on or after January 1, 2010.

21. Singapore

Authors: Mark Oakley, Duane Morris, LLP, Ho Chi Minh City, Vietnam.

Although Singapore's economy has proved resilient to the turbulent global markets, 2009 M&A deal activity in Singapore was severely affected. Total deals in the first half of 2009 were down around 60% from the second half of 2008.

In spite of the financial crisis, there were some highlights, which included inbound deals such as:

- Petrochina's USD 1 billion acquisition of 45.5% stake in Singapore Petroleum (and its intention to purchase the remaining 54.5% for USD 1.2 billion);[65]
- Chinese state-owned company Aluminium Corp of China's (Chinalco) acquisition of 5% of Shining Prospect Pte. Ltd for USD 1 billion;
- Lin Ltd's (part of Thailand's PTT International) acquisition of 53% stake in Straits Asia Resource by Lint for USD 309 million; and
- GE Aircraft Engine's acquisition of 51% of Airfoil Technologies International Singapore Pte. Ltd from Teleflex for USD 300 million.[66]

Outbound Singapore M&A deal activity for 2009 has been low in terms of volume and number, the largest being GIC Real Estate Pte. Ltd's USD 140 million acquisition of ProLogis Park Misato II.

Sovereign wealth fund activity was subdued during the first half of 2009, although there were some notable deals such as Temasek Holdings' offer to acquire a 13.8% in Singapore-based agricultural and food ingredients supply chain management company, Olam International, for USD 303 million. In addition to this, Temasek Holdings reinvested USD 671 million into one of its existing portfolio companies Neptune Orient Lines and also raised its stake in China Construction Bank from 6% to 6.5% through an investment of USD 600 million. GIC also took a 7.7% stake in UK based PE firm, APAX Partners, together with Australia's Future Fund and Management Agency for an undisclosed sum.[67]

The rest of 2009 is likely to see improved M&A activity, as the economy recovers and confidence in the banking system is restored.

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[65] Source: John Duce, '*PetroChina to Pay $2.2 Billion for Singapore Refining*', available at: http://www.bloomberg.com/apps/news"sid=aBW19iS9u5xo&pid=20601080.

[66] Source: Limerick, Pa., '*Teleflex Agrees to Sell Airfoil Technologies International Singapore Pte. Ltd. to General Electric Company',* available at: http://www.reuters.com/article/pressRelease/idUS110971+02-Mar-2009+BW20090302.

[67] Source: Chao Choon Ong, '*Asia Pacific M&A Bulletin PricewaterhouseCoopers'*, 2009.

22. South Africa

Authors: Michael Judin, Goldman Judin Inc, and Penny Bosman, Advocate of the High Court, Johannesburg, South Africa.

There are several noteworthy developments in South African company law that are set to change the landscape of corporate transactions in years to come. Among these is the promulgation of the new Companies Act 2008, which is set to come into force next year, and the publication of the King Report on Governance for South Africa (King III), which will take effect on 1 March 2010.

The new Companies Act is a tremendous improvement on the cumbersome, detailed and prescriptive Companies Act, 1973. Vaunted as a masterpiece of clear and succinct drafting, the new Companies Act is written in plain language, is flexible, simple and transparent, and is aimed at facilitating corporate efficiency and regulatory certainty.

Among some of the changes ushered in by the new Companies Act include a revised regime for "*fundamental transactions*" (transactions which fundamentally alter a company including the disposal of substantially all of its assets or undertaking a scheme of arrangement or a merger or amalgamation). The new regime revises the processes and rules in relation to the acquisition of shares, including: the compulsory acquisition of minority shares in a company in a takeover scenario; the clarification of the rules that apply to amalgamations and takeovers; requires owner approval of fundamental transactions with the right of dissenting minority shareholders to demand payment for their shares at fair value (appraisal rights); and the fact that court approval is only required when a significant minority of shareholders (at least 15%) objects to the takeover.

Another important change is in the classification of companies as either profit companies or non-profit companies: with profit companies being further classified as private companies, personal liability companies (in which the company and directors are jointly and severally liable for company debts), state owned companies and public companies.

Provisions have further been introduced to bring about stricter accountability and transparency for state-owned and public companies; a capital maintenance regime that is based on solvency and liquidity that abolishes the concept of par value shares and nominal value shares; and a business rescue regime which is largely self-administered by the company with recourse to court intervention on application by shareholders.

The new Companies Act code of conduct for directors finds resonance with the findings of King III which, although not having the status of law, provides a list of best practice principles to be followed by directors and company officers in relation to a wide range of corporate governance issues, including ethical leadership and corporate citizenship, boards and directors, audit considerations, governance of risk, compliance with laws, rules, codes and standards, internal audits, governing stakeholder relationships and integrating reporting and disclosure. Compliance with the provisions of King III will inevitably assist directors in complying with their obligations under the new Companies Act.

23. Spain – part I

Author: Alessandra de Magalhaes, Garrigues LLP, New York, NY, U.S.A.

Spain adopted Law 3/2009 of 3 April 2009, on Corporate Restructurings (Law 3/2009), which provides for, among other things, the implementation under Spanish law of Directive 2006/56/EC of the European Parliament and Council of October 26, 2005 on cross-border mergers of limited liability companies (Directive 2006/56/EC) and migration of Spanish corporate entities abroad and of foreign companies to Spain.

I. Cross-Border Mergers of Limited Liability Companies

Directive 2006/56/EC requires that EU member states must allow cross-border mergers between limited liability companies from other member states, if the national laws of the relevant member state permit mergers between limited liability companies[68]. The implementation of said directive provides under Spanish law a legal framework in which to carry out cross-border mergers within the EU, which did not exist previously (other than in the case of the European Public Limited Liability Company). While few Spanish companies carried out cross-border mergers within the EU in the past, this process required an effort of applying in a coordinated manner the corporate merger procedures of each jurisdiction involved.

The regulation of cross-border mergers is found in Title II of Law 3/2009, which is divided into two chapters. Chapter I regulates the general merger procedures between Spanish companies (which regulation has been revised by Law 3/2009), whereas chapter II regulates cross-border mergers within the EU. As chapter II only includes provisions specific to cross-border mergers, the Spanish part of the cross-border merger process must be supplemented by the provisions of the general merger process in chapter I. Likewise, the company participating in the cross-border merger subject to the laws of another member state will also generally have to comply with its national laws regarding mergers.[69] Therefore, the national laws regulating mergers of the companies involved will supplement the process and will also need to be applied in coordination.

Law 3/2009 defines a cross-border merger within the EU as a merger between (i) at least two companies incorporated in different member states of the European Economic Area (EEA), (ii) which registered office, center of administration or center of principle activity must be located within the EEA, and (iii) of which one of the companies is subject to the laws of Spain.[70] The types of Spanish entities that may qualify to participate in a cross-border merger are the Spanish corporation *(sociedad anónima)*, the Spanish limited partnership *(Sociedad Comanditaria por Acciones)* and the Spanish limited liability company *(sociedad de responsabilidad limitada).* [71]

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[68] *Id.* Whereas section (2) and art. 4.1 (a) of Directive 2005/56/EC.

[69] *Id.* Whereas section (3)and art. 4.1(b).of Directive 2005/56/EC.

[70] *Id*. Art. 54.1 of Law 3/2009.

[71] *Id*. Art. 54.2 of Law 3/2009.

Chapter I of Title II also allows for cross-border mergers with entities incorporated outside the EEA, establishing that the merger process will be governed in accordance with the laws of the respective jurisdictions involved,[72] which, again, would have to be applied in a coordinated manner, but which in practice may prove difficult due to legislative and administrative differences.

II. Migration of Spanish Corporate Entities Abroad and of Foreign Companies to Spain

Law 3/2009 regulates under Spanish law the migration of corporate entities from Spain abroad or of foreign companies into Spain.

In order to migrate a Spanish company abroad, the new home jurisdiction must permit the migration, while maintaining the legal personality of the company.[73]

For the migration of a foreign company to Spain, Law 3/2009 distinguishes between companies incorporated in an EEA member state from companies incorporated elsewhere. In moving from an EEA state, the migration of a company to Spain will not affect the legal personality of the company[74], whereas with moves from non-EEA states, the company may be migrated to Spain only if the laws of the home state permit the migration while maintaining the legal personality of the company.[75] In both instances, the migrated companies must comply with Spanish legal requirements established for the incorporation of Spanish companies for the relevant form of legal entity the migrating companies will adopt (unless international treaties provide otherwise).[76] Additionally, in the migration process of an entity incorporated in a non-EEA member state, a report prepared by an independent expert which establishes that the net equity of the company covers the share capital amount required under Spanish law will have to be provided.[77]

24. **Spain –** part II

Authors: Albert Garrofé, Cuatrecasas, Gonçalves Pereira, New York, NY, U.S.A. and Idoya Fernández, Cuatrecasas, Gonçalves Pereira, Madrid, Spain.

I. Reform on the Insolvency Act

Publication in the Spanish Official Gazette of Royal Decree Law 3/2009 on urgent measures concerning tax, finance and insolvency in view of developments in the economy ("RD Law 3/2009") has culminated one of the most anxiously awaited legal reforms in the course of the

[72] *Id*. Art. 27.2 of Law 3/2009.

[73] *Id*. Art. 93.1 of Law 3/2009.

[74] *Id*. Art. 94.1 of Law 3/2009.

[75] *Id*. Art. 94.2 of Law 3/2009.

[76] *Id*. Art. 94.1 of Law 3/2009.

[77] *Id*. Art 94.1 of Law 3/2009.

current economic situation, with the aim, as set out in the preliminary recitals for that law, of adapting certain regulations to directly impact the new business reality and to foster the resolution of the economic crisis through reinforcement of the competitive potential of our productive model.

While the government has implemented a number of measures to achieve the economic stimulus that it seeks[78], we believe that the most noteworthy are those aimed at helping businesses with financial problems and their creditors, consisting of the urgent and limited reform of Act 22/2003, of July 9, on insolvency (the "Insolvency Act"), provided for in RD Law 3/2009.

II. Refinancing Agreements

There is now express regulation of so-called "refinancing agreements" (agreements reached by the debtor with certain creditors based on a plan that is meant to allow the continuity of the debtor's business and which involves an increase in financing or a modification of other terms of the debtor's obligations). Refinancing agreements are excluded from the scope of the action for rescission provided for in article 71.1[79] of the Insolvency Act, where the following conditions are met:

(a) The agreement must be entered into with creditors representing at least three-fifths of the debtor's liabilities as of the date of the agreement;

(b) It must be accompanied by a report on certain matters by an independent expert appointed by the Commercial Registry of the place where the debtor has its registered office; and

(c) The refinancing agreement and the documents substantiating performance of conditions (a) and (b) above must be executed in a deed of record.

Only receivers have legal capacity to bring actions to challenge agreements fulfilling the above requisites. The new regulation applies to refinancing agreements meeting the above conditions and entered into prior to the enactment of RD Law 3/2009 (i.e. April 1, 2009), provided that insolvency has not been requested. Existing regulations, including the exception to the action

[78] For example, RD Law 3/2009 provides for a reduction of the legal interest rate and the default interest rate to 4% and 5%, respectively, removes the time limit for deduction of certain R&D&I activities from corporate income tax, and broadens guarantees for investors in issues by government-backed lending institutions through the grant of compensation in the event of enforcement of the security with calculation based on the time elapsed between default by the issuer and payment by the government of the secured amounts.

[79] Article 71.1 of SIA sets out the rule under which "*when bankruptcy has been declared, any acts carried out by the debtor within the preceding two years that have been detrimental to the insolvency estate may be rescinded, even in the absence of any fraudulent intent.*" Proof of such damage is favoured by the Insolvency Act, which provides for certain legal assumptions. Thus, in case of creating *in rem* guarantees for existing obligations or new obligations granted to replace pre-existing ones, it is presumed that the act is detrimental to the insolvency state, unless proof to the contrary.

for rescission provided for in article 10 of Act 2/1981, the Mortgage Market Regulation Act, will apply in any other case.[80]

III. Credit Subordination

There is a new qualification added to article 87.6 of the Insolvency Act concerning the classification of credits secured with personal guarantees. With the amendment, it has been clarified that where a creditor (e.g. a bank) holds a credit against a company that is secured by a personal guarantee granted by someone considered under the Insolvency Act to be an "especially related party of the insolvent entity" (e.g. its majority shareholder), the credit will only be classed as subordinated if the guarantor has paid on behalf of the debtor and consequently has assumed the rights of the creditor vis-à-vis the debtor. That regulation will apply to all insolvency proceedings that are under way as of the date of enactment of RD Law 3/2009.

IV. Advance Composition Proposal

With the aim of facilitating the processing of compositions, the term provided for in article 5 of the Insolvency Act for the debtor to petition for a declaration of insolvency is extended for a period of four months[81] if the debtor is involved in negotiating the requirements for admission to processing an advance composition proposal and that circumstance is reported to the court with jurisdiction.

Likewise, several of the bans on presentation of an advance composition proposal (article 105.1) in connection with the insolvent party have been eliminated, with the result that such a proposal may be presented on the condition that the insolvent party, or their directors or liquidators, in the case of an entity, have not been found guilty of certain financial or corporate offenses or failed to submit the entity's annual accounts for any of the three preceding corporate years.

In addition, the number of adherences by creditors required for admission of a composition proposal to processing has been reduced if it is presented along with the petition for voluntary declaration of insolvency (requiring adherence representing only one tenth of liabilities) and the range of creditors who may adhere to the proposal has been broadened to allow adherence by any type of creditor, including subordinated creditors.

Lastly, a procedure for written processing of compositions has been set out that does away with the need for a creditors meeting in the event that there are more than three hundred creditors.

[80] That article only allows rescission by the receivers of mortgages instituted for the benefit of banks, savings banks, credit co-operatives and lending establishments where the institution of the lien is shown to have been fraudulent, with the rights of third parties acting in good faith being safeguarded.

[81] Three months to negotiate the adherences required and one additional month to petition for a declaration of insolvency.

25. Sweden

Authors: Carl Westerberg, Fredrik Palm and Leo Lee, Gernandt & Danielsson Advokatbyrå KB, Stockholm, Sweden.

I. Deal Activity

M&A activity in Sweden remained slow in the first three quarters of 2009. According to statistics from mergermarket, Nordic M&A activity dropped by 70 percent in terms of value compared to the first three quarters of 2008. Some of the recent deals worth noting are:

- the divestment of investment bank Carnegie, which was taken over by the Swedish State under much publicized circumstances in late 2008, to private equity buyers Altor and Bure;
- state owned energy company Vattenfall's EUR 10.3 billion acquisition of Dutch energy company Nuon; and
- the ongoing privatization of state monopoly Apoteket (retailer of pharmaceuticals in Sweden).

Other deals that have gained significant coverage in the Swedish press are GM's negotiations of a reconstruction and sale of car company SAAB to Koenigsegg and the rumored auction sale of Ford's Volvo car operations.

During this period, public M&A activity on NASDAQ OMX Stockholm has been slow and characterized by small cap takeover offers (six out of eight[82]), of which the majority were mandatory. The only large cap takeover offer was Porsche's (unsuccessful) SEK 31.1 billion mandatory offer for all outstanding shares in Swedish truck manufacturer Scania.

Although the OMX Stockholm index gained about 37 percent during January through September 2009[83], there have not yet been any IPOs, but a number of large rights offerings by listed companies. In particular, the banking sector has raised significant capital to strengthen its capital positions. In the last 12 months, three of the four major Swedish banks raised, in total, SEK 69 billion.

II. New Legislation and Regulations

From 1 October 2009, new takeover rules regulating public offers on, *inter alia,* NASDAQ OMX Stockholm, the main Swedish securities market, apply. The new rules are based on the former takeover rules, however, significant amendments have been made reflecting, *inter alia,* certain recent takeover precedents on the Swedish market. Among other things, the new takeover rules provide for stricter requirements in relation to indicative offers, amended offers, withdrawals of offers and fairness opinions, as well as new rules for allowed price differences between different classes of shares.

NASDAQ OMX Stockholm has also made certain amendments to its rules for issuers listed on the exchange, in order to align Swedish corporate governance practices with the rest of Europe.

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[82] See http://www.fi.se.

[83] See http://www.nasdaqomxnordic.com.

In terms of new legislation, it may be noted that it has become mandatory for Swedish companies listed on regulated markets to have an audit committee (thereby implementing directive 2006/43/EC on statutory audit) and that there are new rules with respect to consideration and voting requirements in connection with statutory mergers and cross-border mergers of financial entities (thereby finalizing the implementation of directive 2005/56/EC on cross-border mergers of limited liability companies).

26. Switzerland

Authors: Florian S. Jörg and Marc Ryser, Bratschi, Wiederkehr & Buob, Zurich, Switzerland.

I. Takeover Legislation

Changes to the Federal Act on Stock Exchanges and Securities Trading (SESTA), which became effective 1 January 2009, provided a basis for the complete revision of the Ordinance of the Takeover Board on Public Takeover Offers (TOO). Additionally, a new set of regulations governing the Takeover Board (R-TOB) came into force. The Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading (SESTO-FINMA), which likewise contains relevant adjustments to takeover law, also became effective.

One of the most important changes in takeover law concerns the procedures for actions before the Takeover Board (TOB). These procedures are now governed by the Federal Act on Administrative Proceedings of December 20, 1968,[84] apart from a few exceptions.[85] Decisions of TOB will now be rendered as injunctions and no longer represent mere recommendations.[86] Decisions by the TOB can be challenged before the FINMA within five trading days[87]. The FINMA's decisions can be appealed to the Swiss Federal Administrative Court.[88] A further appeal to the Swiss Federal Supreme Court is, subject to certain limited exceptions, no longer possible.[89]

In procedures regarding takeover matters, shareholders holding at least two percent of the voting rights of the target company (so-called "qualified shareholders"), whether the voting rights are exercisable or not, can obtain the status of a party[90]. In the past, only the offeror, persons acting in concert with the offeror and the target had party status. Qualified

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[84] SR 172.021. Art. 33b para. 1 SESTA.

[85] These exceptions are due to the special characteristics of takeover procedures, in particular to the time pressure under which such procedures are conducted, and are contained in the following provisions of SESTO: Art. 33b para. 2-4, Art. 33c para. 1 and Art. 33d para. 2.

[86] Art. 33a para. 1 SESTA, Art. 3 para. 2 TOO.

[87] Art. 33c SESTA.

[88] Art. 33d SESTA.

[89] *Cf.* Art. 83 u Swiss Federal Supreme Court Act (FSCA) which states that decisions in takeover matters cannot be challenged by way of appeal in matters of public law in Federal Supreme Court.

[90] Art. 33b para. 3 SESTA.

shareholders must assert their party standing by making a petition to the TOB within five trading days from the date of publication of the offer prospectus or, if the first decision by the TOB on the offer is published before the offer prospectus, after publication of that decision.[91]

An exclusive share exchange offer is no longer permissible. Instead, as of January 1, 2009, bidders must offer a cash alternative for mandatory bids pursuant to Art. 43, para. 2 SESTO-FINMA. An obligation to make an alternative cash offer does not apply to voluntary offers. However, in the event that during the period stipulated in Art. 10 TOO (*i.e.*, in the period running from the publication of the offer until six months after expiry of the supplementary acceptance period) the offeror of a voluntary exchange offer acquires, against payment in cash, equity securities or financial instruments to which the offer relates, the TOB takes the view that the principle of equal treatment of all offerees[92] obliges the offeror to offer all offerees a payment in cash.[93]

Furthermore, the announcement of potential offers is, as of January 1, 2009, governed according to the "put up or shut up" rule, Art. 53 TOO. If a potential bidder announces that he is considering making a public takeover offer, the TOB may require this person within a specified period to either publish an offer for the target company or publicly declare that for six months it will neither make an offer nor exceed the shareholding threshold that entails an obligation to make an offer.

Other significant features of the new takeover legislation concern the extension of the catalogue of unlawful defensive measures, the lapse of possibilities for escaping the cooling-off period, the amendment of offers that must be generally favorable to the recipients and certain notification obligations and the publication and notice provisions. Furthermore, the provisions governing the approval of offer conditions were made more stringent.

II. Disclosure Rules in Particular

As of January 1, 2009, the rules regarding disclosure of significant shareholdings in Swiss companies listed in Switzerland were tightened considerably. Pursuant to the revised rules, all types of cash-settled equity derivatives must be reported and count towards the disclosure thresholds. A further amendment states that financial instruments, other than those mentioned, must also be reported if their structure permits an entitled person to acquire equity securities, if these are acquired, sold or granted (written) in respect to a public takeover offer.

Furthermore, the revised disclosure rules clarify the obligation to notify in relation to securities lending and comparable transactions.

III. Excerpt of the Case Law

The Swiss Federal Supreme Court broke new ground by granting party status to a company in a proceeding concerning the existence or non-existence of a shareholder's duty to disclose

[91] Art. 56 et seq. TOO.

[92] *Cf.* Art. 24 para. 2 SESTA.

[93] Communication No. 4 of the TOB on voluntary public exchange offers dated on February 9, 2009.

significant shareholdings in a company which is the object of a takeover offer.[94] In the same decision, the court also confirmed its previous decisions[95] that art. 83(u) Swiss Federal Supreme Court Act, whereby decisions in takeover matters cannot be challenged by way of appeal in matters of public law in the Federal Supreme Court, is not applicable to the rules concerning the disclosure of shareholdings in the run-up to public takeover offers ("im Vorfeld öffentlicher Kaufangebote").

27. The Netherlands

Authors: Lennaert Posch, Stibbe, New York, NY, U.S.A., and Nancy A. Matos, Baker & McKenzie, Amsterdam, the Netherlands.

I. Market Developments

(a) Credit Crisis

The effects of the credit crisis continued throughout 2009 in the Netherlands. On October 19, 2009, the District Court in Amsterdam declared DSB Bank, a bank notorious for its lending practices, bankrupt,[96] after last ditch efforts to save the bank failed to prevent its collapse.[97] Leading up to the collapse was a run on the bank, which led to more than EUR 670 million being withdrawn from the bank.[98] The fact that the bank run could take place is a signal that public confidence in the Netherlands banking industry has not yet been restored, despite government efforts at resuscitating Dutch financial markets.

(b) Executive Remuneration and Bonuses

On September 9, 2009, the Netherlands Bankers Association published the "Bank Code" effective as of January 1, 2010, which outlines the principles for a good bonus policy.[99] The primary principle of the code is that executive bonuses are capped at 100% of their annual salary.[100] Together with recent legislation aimed at lowering severance pay[101] and taxing

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[94] The Federal Supreme Court recognized the party status of the company in both the proceeding according to Art. 20 para. 1 SESTA and the proceeding according to Art. 20 para. 6 SESTA. BGer 2C_77/2009, dated June 2, 2009.

[95] Swiss Federal Supreme Court decisions BGer 2C_45/2009 and 2C_81/2009, both dated on Mai 26, 2009.

[96] *See* District Court Amsterdam, October 19, 2009, LJN BK0570.

[97] *See* NRC Handelsblad, October 19, 2009, available online at: http://www.nrc.nl/international/article2390878.ece/Plans_A_to_Z_fail_for_DSB_Bank.

[98] *See id.*

[99] *See* Netherlands Bankers Association, "Bank Code," available online at: http://www.nvb.nl/scrivo/asset.php?id=291515.

[100] *See id.*at para. 6.3.2.

[101] The Dutch Circle of Cantonal Court Judges (*Kring van Kantonrechters*) amended the "Cantonal Court Formula" (*kantonrechtersformule*) as of January 1, 2009.

bonuses in excess of EUR 500,000,[102] the Bank Code aims to serve as a model for other countries.

(c) Deal Activity

The second half of 2009 witnessed an increase in deal volume when compared with the lows seen in the fourth quarter of 2008.[103] Due to the liberalization of the Dutch energy market, by far the biggest winner in terms of deal volume was the energy sector, with deals such as the acquisition of Nuon by Swedish energy concern Vattenfall and of Essent by German energy giant RWE.[104] Cross-border deals slowed in 2009, with a reversal of the growing foreign investment trend in the Netherlands, which was seen prior to the crisis.[105] Deal activity in 2009 was dominated by an increase in the amount of distressed M&A and restructuring activity.

II. Legislative/Regulatory Developments

The Dutch parliament has passed legislation to change corporate governance rules relating to listed companies.[106] The proposal is based on the recommendations in the advisory report of the Dutch Corporate Governance Monitoring Committee of May 30, 2007.[107] The proposed bill is relevant to (future) M&A transactions, takeover battles and activist shareholders in that it:

- creates a mechanism to identify "ultimate investors" in listed companies;
- lowers the initial threshold for the disclosure of a substantial interest to 3%;
- requires holders of a substantial interest to disclose whether or not they agree with a company's published strategy; and
- creates a higher threshold for the right of shareholders to place items on the agenda of the shareholders' meeting.

The aforementioned Monitoring Committee also updated the existing Dutch Corporate Governance Code (expected to replace the old Code from January 1, 2010)[108] with two new provisions relating to (public) takeover bids, which provide that (a) the management board shall ensure that the supervisory board is closely and timely involved in the takeover process and (b)

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[102] Excessive Remuneration Components (Taxation) Act 2001, as amended on January 1, 2009.

[103] *See* OverFusies.nl eerste-halfjaarrapport 2009: De Nederlandse fusie- en overnamemarkt in cijfers, KSU Uitgeverij, September 2009, available online at: http://www.ksu.nl/cust/paper?id=747.

[104] *See id*. at 7. Vattenfall acquired Nuon for EUR 10.3 billion and RWE acquired Essent for EUR 7.3 billion. *See* id. at 16 and updated at: http://www.overfusies.nl.

[105] *See id*. at 8.

[106] Parliamentary Bill (*Wetsvoorstel*) 32 014.

[107] The Advisory Report can be downloaded at: http://www.commissiecorporategovernance.nl/page/downloads/Monitoring_Committee_Advisory_Report_May_2007.pdf

[108] The new Corporate Governance Code can be downloaded at: http://www.commissiecorporategovernance.nl/page/downloads/DEC_2008_UK_Code_DEF__uk_.pdf.

a request from a competing bidder to inspect the company's records must be discussed with the supervisory board without delay.

III. Takeover Defenses

Over 60% of listed Dutch companies employ a takeover defense mechanism in the form of a call option on newly issued preference shares granted to a "related" foundation, which can exercised in case of a hostile bid or the threat thereof. This exercise trigger event is now being formulated more broadly to include "*all situations in which the continuity of the identity or character of the company is or may be threatened*." This is done to counter activist shareholders and event driven hedge funds that, in recent shareholder meetings, have submitted proposals for the removal of the whole (supervisory and management) board or certain board members or for a change in a company's strategy.

28. Ukraine

Authors: Peter Z. Teluk and Volodymyr Smelik, Squire, Sanders & Dempsey LLP Kyiv, Ukraine.

I. Overview

After a record year in 2008 for M&A, with an estimated deal value of just over USD 9 billion, Ukraine in 2009 suffered from the world-wide financial crisis and credit crunch. As a result, transaction volumes suffered. While in 2008 deals were driven by foreign investment, deals in 2009 became more focused on acquisition of distressed companies with liquidity needs by more domestic buyers looking to pick up companies with much lower valuations. Deal size, on the whole, became much smaller with respect to sectors that still experienced some activity during 2009, including banking, retail, energy and agriculture.

II. Regulatory and Legislative Developments

(a) Corporate Law

On 29 April 2009, most provisions of Ukraine's new law "*On Joint Stock Companies*" (JSC Law) came into effect. The long-awaited JSC Law provides new rules for establishing and managing joint stock companies (JSCs) and is aimed at transforming "Soviet style" open and closed JSCs, currently existing in Ukraine, into public and private JSCs that correspond to international standards of corporate governance.

The JSC Law introduces special rules for acquiring considerable or controlling interests. A purchaser of considerable stock must notify the JSC and the State Commission on Securities and Stock Market of Ukraine at least 30 days prior to the anticipated acquisition. A purchaser of controlling stock after acquisition must make an offer to other shareholders to buy their share at a price no lower than the market price of the shares.

The JSC Law will regulate the activity of JSCs established after it was enacted, while existing JSCs may operate under the old JSC legislation during a two-year transition period. However, in certain cases, for example increase of the charter capital, JSCs will be required to transform into

public or private JSCs and operate under the JSC Law.

(b) Stock Market Violations Liability

On 14 January 2009, the Law of Ukraine "*On Amending Certain Legislative Acts of Ukraine Concerning Liability for Committing Violations on the Stock Market*" (Stock Market Liability Act) came into force. It increases criminal and administrative liability for violations of stock market regulations and strengthens control of the Securities Commission over the stock market of Ukraine. The Stock Market Liability Act imposes financial administrative sanctions or criminal penalties on companies and on individuals (for, among other actions, illegal influence on the market value of the securities on the organized stock market, illegal use of the insider information, failure of an issuer's officer to provide an investor with necessary information or providing incorrect information).

(c) Anti-Corruption Laws

In June 2009, Ukraine took a big step in tackling corruption by adopting three new anticorruption laws (collectively, the Anticorruption Laws) which go into effect 1 January 2010. They are intended to establish the legal and organizational framework for preventing and fighting corruption and minimizing or eliminating the consequences of corruption. The Anticorruption Laws introduce, for the first time in the history of Ukraine, the responsibility of commercial legal entities for corruption offenses, such as money laundering, commercial bribery, abuse of power, etc., committed by their officials. Punishment may include financial penalties, prohibition against certain activity for a period up to three years, seizure by the state of property and income obtained as a result of corruption crimes, and liquidation of a legal entity.

Therefore, while considering acquisition of target companies in Ukraine, investors should review carefully the history of a company, its practice of operations in the Ukrainian market (including relationships with governmental and municipal authorities), and the possible existence of criminal investigations against a company's officials.

(d) Banking and Tax Law Changes

In an attempt to facilitate bank rehabilitations, on 24 July 2009 the Ukrainian Parliament passed the Law of Ukraine "*On Amendments to Certain Laws Regarding Peculiarities for Financial Recovery Measures for Banks*" (Bank Recovery Law) that went into force on 5 August 2009. Among other innovations, the Bank Recovery Law entices acquisitions of troubled banks by providing state financial assistance for such purchases. The Bank Recovery Law sets special procedures and requirements for the reorganization of a bank by a temporary administrator through divestiture. Finally, the Bank Recovery Law also amended Ukraine tax legislation by providing specific regulation of debt sale-purchase transactions that may be used in structuring M&A transactions.

29. United Kingdom

Authors: Stephen J. Nelson and Maliha Mahmood, Squire, Sanders & Dempsey, LLP, London, U.K.

I. Impact of New Companies Legislation

2009 has seen the complete implementation of a new companies code for England and Wales, the Companies Act 2006 (the Act). The Act has been brought into force in segments since 2006 and is now fully effective. There has been an extensive revision on most areas of company law including incorporation, constitution and capacity, directors' powers and duties, share capital, resolutions and the Act also includes substantial changes to filings and procedure. Some features for consideration include:-

The repeal of the prohibition on giving financial assistance for private limited companies. This enables leveraged buy-outs without the time-consuming and expensive "whitewashing" process in M&A transactions. Other considerations remain, including: (a) a company's obligation to maintain its capital; (b) directors' duties to ensure that the giving of assistance is in the company's best interests; and (c) ensuring that the giving of assistance is not challengeable by a liquidator or administrator of an insolvent company as a preference or a transaction at an undervalue. Public companies are still prohibited from giving financial assistance, and care needs to be taken if there is a public company within a target group.

The Act has introduced a new method for private companies to reduce their share capital. Share capital reductions are used in M&A for structuring purposes: (a) in acquisitions by way of scheme of arrangement; (b) to create distributable reserves; (c) to return surplus capital; and (d) for share buybacks and redemptions. Before the Act, a company needed to follow a court-based procedure to reduce its share capital, but the Act has introduced a cheaper, more straight-forward procedure for private companies which does not require court approval. Public companies are still required to follow the court-based procedure.

The Act has changed the status of the Takeover Panel (the body which administers the Takeover Code relative to public companies) to comply with European law, but with little practical difference, as the Takeover Panel's decisions were previously treated as mandatory. However, the Act has introduced criminal offences for failing to comply. It appears the Takeover Panel will rarely use its new powers, preferring a co-operative approach.

The Act has also introduced a number of administrative changes, which will have the effect of reducing bureaucracy and technical requirements in UK M&A transactions. For example, a new procedure for the execution of documents means that deeds can be executed by companies with only one director's signature in the presence of a witness.

II. Market Developments

2009 has seen the import from the United States of "go-shop" provisions in contracts, historically rare in the UK, which allow a seller to find other buyers for the target business for a period following signature of a deal. If the seller decides to sell the target business to an alternative buyer (terminating the original agreement) a break fee usually becomes payable to

the original buyer. Such a provision was in effect when Barclays agreed to sell its iShares business to CVC Capital Partners (CVC) for approximately USD 4.4 billion, with US fund manager BlackRock eventually agreeing to buy the entire Barclays Global Investors division (including iShares) for USD 13.5 billion. CVC was entitled to choose to match the new offer or receive a break fee.

30. United States

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I. Overview of 2008/2009 M&A Activity

The collapse of the financial markets and historically high volatility in the stock markets prevailing since mid-2007 have seriously affected US M&A activity, which remains well below the levels seen in the "boom years" of 2006 and 2007. According to Thomson Reuters, US M&A activity for the 2008 calendar year declined 37% over the 2007 calendar year.[109] In the first quarter of 2009, M&A activity in the US actually increased slightly over the first quarter of 2008,[110] but by the third quarter deal-making was down 38% compared to the third quarter of 2008.[111] Despite the downturn, the US continues to account for a major share of global M&A activity.

The challenging M&A environment is a product of the economic and financial difficulties that have beset the US and the global economy since the credit crunch hit in mid-2007. Access to funds for ordinary corporate borrowing became difficult and available acquisition financing practically disappeared, as seen in the M&A sector in the steep decline of activity by private equity firms and the end of highly leveraged buyouts.[112]

In September 2008, in the crisis following the collapse of the investment bank Lehman Brothers, a series of distressed financial institutions entered into transactions seeking the protection of more robust partners, including Merrill Lynch & Co., Inc. (which sold itself to Bank of America Corporation), and Wachovia Corp., previously the fourth largest US bank (which agreed to be acquired by Citigroup Inc., with significant assistance from the US government, until Wells Fargo & Co. intervened with a topping bid). The US government also intervened in mortgage giants Fannie Mae and Freddie Mac and the global insurer American International Group, Inc. In 2009, the participants in these transactions and the US government continued to deal with the political, economic and market ramifications of these deals.

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[109] *See* Thomson Reuters, Mergers & Acquisitions Review - Fourth Quarter 2008 - Legal Advisors (available at http://www.thomsonreuters.com/content/PDF/financial/league_tables/ma/2008/4Q08_ma_legal_advisory.pdf).

[110] *See* Thomson Reuters, Mergers & Acquisitions Review - First Quarter 2009 - Legal Advisors (available at http://www.thomsonreuters.com/content/PDF/financial/league_tables/ma/2009/1Q09_legal_advisory.pdf).

[111] *See* Thomson Reuters, Third Quarter 2009 Global Investment Banking Review (available at http://www.thomsonreuters.com/content/PDF/financial/league_tables/ma/2009/1Q09_legal_advisory.pdf).

[112] *See* David Marcus, *The year in review: Coming to terms with the crash*, Corporate Control Alert, January/February 2009.

Over 600 financial institutions received USD 199 billion in funds from the US government's Troubled Asset Relief Program, or "TARP". By late November, 2009, the Federal Deposit Insurance Corporation, had closed nearly 125 US banks.[113] In total, the US government's response to the financial crisis has been estimated to comprise up to USD 12 trillion of commitments in the form of liquidity and financial measures (although the vast majority of this will likely never be paid out).[114]

II. Significant Transactions, Key Trends and Hot Industries

(a) Litigation - Huntsman v Hexion

The rapidly deteriorating economic climate in 2008 led to a high rate of deal failure, which in some cases led to litigation. One of the most high profile disputes arose between Huntsman Corp., Hexion Specialty Chemicals Inc. (a unit of private equity firm Apollo Management LLP) and the various banks from which Apollo had planned to obtain financing for the deal. Apollo sought to avoid a deal to purchase Huntsman by obtaining an opinion from a third party consulting firm which opined that the combined Huntsman-Hexion entity would be insolvent as a result of the acquisition financing to be obtained to pay for the transaction. Apollo's strategy was to cause the banks to assert a failed financing condition and decline to lend the money to complete the transaction, resulting in Apollo only having to pay a contractual termination fee of USD 325 million to walk away.

In June 2008, Apollo filed suit in the Delaware Court of Chancery[115] seeking a declaration that it was not obligated to complete the merger because Huntsman had suffered a material adverse change and because the combined entity would be insolvent. The Court rejected the claim of a material adverse change without reaching the solvency issue and held that Apollo had in fact "knowingly and intentionally" breached the merger agreement.[116] However, when Apollo and Huntsman sought to complete the transaction, the banks did assert the failure of a financing condition and refused to fund the transaction.

This case is notable for two reasons: (i) the continued reluctance of Delaware courts to recognize a material adverse change and thereby permit an acquirer to walk away from a signed merger agreement; and (ii) the Court's stern disapproval of Apollo's strategy of procuring an insolvency opinion to help extricate itself from the deal, rather than, for example, engaging Huntsman in renegotiations.

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[113] *See* FDIC, "Failed Bank List" as of November 24, 2009 (available at http://www.fdic.gov/bank/individual/failed/banklist.html).

[114] *See* Mark Pittman & Bob Irvy, *Financial Rescue Nears GDP as Pledges Top $12.8 Trillion,* Bloomberg (available at http://www.bloomberg.com/apps/news?pid=20601087&sid=armOzfkwtCA4).

[115] As most corporations laws are a matter of state laws, litigation regarding M&A disputes is frequently conducted in state courts. The State of Delaware, which has a well developed body of corporate law and jurisprudence, has traditionally been the primary jurisdiction for these claims.

[116] *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, C.A. No. 3841-VCL, 2008 WL 4457544 (Del. Ch. Sept. 29, 2008).

Apollo and Huntsman eventually settled their claim for a USD 1 billion payment to Huntsman. Huntsman also pursued a separate claim against the banks which settled for a payment to Huntsman of USD 632 million in cash and USD 1.1 billion in new loans.

(b) Hot Industries - Biotech and Pharma

In the US, M&A activity throughout much of 2009 was driven by consolidation in the healthcare sector, particularly three mega-deals: Pfizer Inc.'s USD 64 billion agreement to acquire Wyeth, Merck & Co. Inc.'s USD 41 billion agreement to acquire Schering-Plough Corporation, and Roche Holding Ltd's USD 47.1 billion agreement to acquire the 44.1% of Genentech Inc. that it did not already own.[117] Driven by the pending expiration of valuable patents, the need to acquire new sources of revenue and an apparent emphasis on increased size, transactions are expected to continue as the largest players in the industry acquire smaller targets with attractive R&D profiles.[118]

III. Outlook

In the current economic climate, there is little appetite for the highly leveraged deals that characterized the M&A boom in 2006 and 2007. This is a result of both the vulnerability of financial institutions, which have retreated to more cautious lending arrangements, and also target companies, which are likely to value deal certainty in assessing a proposed transaction. These factors are not likely to change immediately and will generally disadvantage private equity firms and favor strategic acquisitions by companies with strong balance sheets and less debt.

31. Vietnam

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I. Efforts to Implement WTO Commitments to Liberalize the Vietnamese Market for Foreign Investment

Beginning in late 2008, the business community in Vietnam embraced government efforts to liberalize market access for foreign investment in accordance with its WTO commitments in the field of trade and distribution and to stimulate the economy, restore confidence, and slow the recession. Of particular significance are following measures:

- Government support for the agriculture, forestry, fisheries, and labor-intensive industries, and promotional efforts to expand new export markets and the domestic market;

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[117] *See* Mergermarket, Monthly M&A Insider - May 2009.

[118] *See* PharmaTimes, *2009 is the era of merger mania* (available at http://www.pharmatimes.com/WorldNews/article.aspx?id=16055); *see also* Jo Kawakami, *M&As (sic) loom as drug patents expire*, The Nikkei Weekly (Japan), May 18, 2009.

- To promote investments, the Government launched a plan to issue bonds to raise funds for important projects, to accelerate the disbursement of foreign direct investment (FDI) and overseas development aid (ODA), especially for infrastructure and high tech, while offering exemptions from, and reductions of, certain direct taxes for businesses and individuals;

- To stimulate consumption, the Government worked to improve the distribution system, better manage essential goods, control speculation and other market-destabilizing factors, and protect consumer rights; and

- Finally, in financial and monetary policy, the Government has been maintaining a stable exchange rate system, encouraging the extension of credit to business – especially small and medium-sized – and reducing basic interest rates to ease the burden on borrowers.

One main accomplishment of the Government of Vietnam was the amendment of the personal income tax (PIT) law on expatriate employees. These recent PIT changes compare favorably with those in neighboring regional hubs and present a positive and encouraging signal to the western business community to continue to base senior management in Vietnam and further transfer knowledge and provide needed management skills to benefit the local economy.

The Government's economic stimulus package (of USD 8 billion) was an important step to lessen the effects of the global economic crisis and counterbalance the potential slow down in FDI.

II. Specific Legal Developments in 2009

Vietnam is going through a process of several changes in laws and new regulations. Two examples are:

(a) Harmonizing the Legal System

Decree 24/2009/ND-CP dated 5 March 2009 (Decree 24), modifying the law on Promulgation of Legal Documents, has been issued to coordinate lower-level legal instruments, such as a decree or a circular, containing the details of implementation, and a law or a higher-level legal instrument, mainly comprising general principles. Decree 24 aims to harmonize the different levels of regulations in order to prevent them from conflicting with one another by establishing procedural guidelines before and after issuance.

(b) Removing Approval Requirements in the Field of Construction

Law 38-2009-QH12 enacted on 19 June 2009 brought some changes in connection with investment in "capital construction". Law 38 extended the re-registration deadline for foreign invested companies founded before 1 July 2006 until 1 July 2011. The most important impact Law 38 has on the Law on Construction is reducing or eliminating a requirement of authorization of feasibility studies and preliminary designs prior to development of an investment project.