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International M&A and Joint Ventures

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This article reviews developments in mergers and acquisitions ("M&As") and joint ventures ("JVs") during the year 2014.

I. Brazil

Among the many functions of the Brazilian Securities and Exchange Commission ("CVM"), is the promotion of capital market expansion in Brazil. CVM has been implementing new rules to further stimulate securities public offerings in Brazil since 2009.

The first major step was the implementation of CVM Instruction No. 476[1] ("iCVM 476"), which aimed to reduce the costs of public offerings, facilitating new issuers in raising funds through the issuance of certain securities, including debentures (the Brazilian equivalent of bonds), that are exempted from registration. CVM has limited the scope of offerings exempted under iCVM 476 to investors with the ability and knowledge to evaluate these investments and who have the capacity to bear losses of part or all of their investments. These investors are refered to as qualified investors.

The registration exemption accelerated the offering process, reducing the timeframe between the decision of the issuer to raise funds and the debt issuance, thus increasing the

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1. Instruçao CVM No. 476, de 16 de Janeiro de 2009, D.O.U. de 19.01.2009 (Braz.).

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profitability rate of the security. More companies now have access to this sort of funding. Many of them end up making their first steps on the capital market. After the implementation of iCVM 476, there was a "boom" of debentures issuances. From a little more than a few dozen of debentures issuances in 2008, Brazil now has hundreds of issuances per year.

The debt market has been growing since the implementation of iCVM 476. The equity market wished for a similar regulatory modification, which would enable it to experience the same growth. These modifications were implemented with CVM Instruction No. 551/2014[2] ("iCVM 551"), which expanded the number of securities which can be offered under the scope of iCVM 476, including shares and convertible or exchangeable debentures, subscription warrants,[3] certificates of deposit of shares, and certificates of structured transactions.

To obtain a registration exemption, the offering needs to follow a series of requirements, applicable to all securities regulated by iCVM 476. For example, the limitation of the offering to qualified investors and the number of qualified investors that can participate. However, CVM decided to increase the maximum number of qualified investors who can participate in restricted offerings under iCVM 476 from twenty to fifty, and to increase the number of investors who can be consulted during the process from fifty to seventy five. Furthermore, CVM decided to exempt the ninety days restriction to trade (lock-up) that applies to securities offered under iCVM 476, if such offering concerns shares, subscription bonuses, and certificates of deposit.

Companies that already have their shares publicly traded and have plans to make a subsequent offer ("follow-on") will benefit the most from this greater flexibility in offerings. As a simple comparison, the initial review period for CVM in relation to an offering to a wider public (under CVM Instruction No. 400[4]) is twenty days, but the registration of the offering may take more or less time depending on how quickly the company is able to comply with the demands of CVM. In case of the distribution of shares under iCVM 476, the time involved with an offering may be limited to the time that the existing shareholders of a company would have to exercise their right of first refusal, (i.e. five business days). With the implementation of iCVM 551, the risk of exposure of the issuers to the volatility of the shares dramatically lowers. CVM showed it has heard the wishes of the market. The door to more investments is open.

II. Canada

The Canadian Securities Administrators (the "CSA"), recently updated the status of proposals to regulate take-over bids in a harmonized fashion across Canada (the "Pro-

2. Instruçao CVM No. 551, de 25 de Setembro de 2014, D.O.U. de 26.09.2014 (Braz.).

3. Shares, debentures convertible into shares, shares that are the object of exchangeable debentures and warrants should be issued by a issuer registered as a public company of the "A" category as defined by Instruçao CVM No. 480, de 25 de Dezembrode 2009, D.O.U. de 09.12.2009 (Braz.).

4. Instruçao CVM No. 400, de 29 de Dezembro de 2003, D.O.U. de 09.01.2004 (Braz.).

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posed Amendments")[5] that will also affect the treatment of shareholder rights plans (i.e. "poison pills").

In contrast to Delaware practice, Canadian shareholder rights plans have traditionally been strictly limited to the single purpose of helping a board of directors "buy time" to seek out improved or alternative offers (i.e., a "white knight")[6] Once that purpose has been served, Canadian securities commissions would routinely issue a "cease trade" order in respect of a pill, thereby sending whatever offer was on the table to a shareholder vote. It was widely accepted that, under such conditions, a "just say no" defense was generally unavailable in Canada.[7]

This position was consistent with the minimal guidance available under Canadian securities laws regarding defensive tactics[8] and was demonstrated in an influential Ontario Securities Commission decision over two decades ago that stated: "The time had come for the pill to go."[9] As a result, a generation of market participants has acted on the understanding that Canadian securities regulators will generally terminate pills within some fixed period after the commencement of a hostile bid. This approach has conditioned board responses to hostile bids and, in the global mergers and acquisition context, has made Canadian issuers attractive targets, setting aside the existence of a shareholder rights plan.

Notwithstanding the above, under Canada's fragmented securities regulatory regime, various jurisdictions have issued contradictory decisions, in which the Delaware-style business judgment rule was seemingly adopted and the relevant question became whether (and not when) a pill should be terminated.[10] This question of timing has recently come to the forefront as a result of the British Columbia Securities Commission's (the "BCSC") recent decision regarding Augusta Resource Corporation's shareholder rights plan during HudBay Minerals Inc.'s proposed hostile takeover bid of Augusta. In *Augusta*, the BCSC allowed the pill to survive for an unprecedented 156 days.[11] The BCSC weighed several factors, including: (a) the length of time the bid was outstanding; (b) the likelihood that a superior proposal could ultimately be found; and (c) whether the bid was coercive (the BCSC determined that all three factors supported HudBay's bid)[12] However, a fourth key factor–the approval of the rights plan by 94 percent of the votes cast by Augusta shareholders (excluding the votes of HudBay),[13] combined with the likelihood that HudBay would extend its bid–was sufficient for the BCSC to allow the pill to survive for such an extended period.

5. *See* CSA Notice 62-306-Update on Proposed National Instrument 62-105 Security Holder Rights Plans and AMF Consultation Paper An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics (2014), 37 O.S.C. Bull. 8229 (Can.).
6. Phillip Martinius, M&A: Protecting the Purchaser, 155, (2005).
7. *See* In the Matter of Baffinland Iron Mines Corporation et al. (2010), 33 O.S.C. Bull. 11385 (Can.).
8. *See* National Policy 62-202–Take-Over Bids–Defensive Tactics (1997), 20 O.S.C. Bull. 3525 (Can.).
9. *See* Re Canadian Jorex Limited and Mannville Oil & Gas Ltd. (1992), 15 O.S.C. Bull. 257 (Can.).
10. *See*, *e.g.* Neo Material Technologies inc., (Re) (2009), *available at* https://www.osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20090901_neo-material.pdf.; Pulse Data Inc., (Re) (2007), 2007 A.S.C. Bull. (Can. Alta. Sec. Com.). .
11. HudBay Minerals Inc. and Augusta Resource Corporation. (2014), 2014 BSECCOM 154 ¶79 (Can. B.C. Sec. Com.).
12. *Id.* at ¶¶46, 51, 59.
13. *Id.* at ¶ 21.

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The Proposed Amendments, once adopted, should buttress the traditional Canadian position–that a pill has a definitive shelf-life notwithstanding the target board's judgment or machinations. Furthermore, the Proposed Amendments, in an effort to harmonize and codify the takeover bid rules in Canada as they relate to hostile bids and shareholder rights plans, would require all formal bids for Canadian public targets to, among other things, include a minimum bid period of 120 days.[14]

With the stated objective of rebalancing the current dynamics between hostile bidders and target boards, the Proposed Amendments aim to make it easier for shareholders to make voluntary, informed, and coordinated tender decisions, while giving target boards more time to respond to hostile bids.

Presumably, as the Proposed Amendments will remove some of the coercive features of the current regime, target boards can likely expect to have a more difficult time defending a poison pill that goes beyond the protections of the Proposed Amendments. However, depending on how the Proposed Amendments are implemented, the CSA may leave open the possibility for regulatory intervention in appropriate circumstances, which could continue to conflict on a case-by-case and jurisdiction-to-jurisdiction basis.

III. Chile

A number of relevant legal developments have taken place in the Corporate and M&A field in Chile in 2014. The most important is Law 20,720[15] on Reorganization and Liquidation, which came into force on October 10, 2014, replacing the previous bankruptcy regime with a new reorganization and liquidation system.

This law provides a new paradigm in the Chilean bankruptcy field, moving from a system focused on asset liquidation to a system aimed at pursuing a balance between liquidation and reorganization. This new system also seeks to maximize the asset value, preserve the insolvency estate to allow for a fair distribution among the creditors, and promote a fast and efficient termination of the insolvency process.

Under Law 20,720, the protection given to the debtor has been significantly strengthened. For example, upon filing the reorganization form, the competent court will grant financial bankruptcy protection to the debtor for a period of 30 to 90 days (depending on the creditors' support).[16] During this period, all contracts to which the debtor is a party remain in force, and their payment terms and conditions cannot be modified.

Furthermore, the body of creditors may now challenge contracts that the company entered into before the reorganization or liquidation. The challenges happen through revocatory actions if the relevant contract caused damages to the body of creditors and the party executing the contract had actual knowledge of the bad economic condition of the company.

Another element of Law 20,720 that will likely improve the process of reorganization, liquidation, and bankruptcy is that insolvency proceedings will be subject to the jurisdiction of specialized courts rather than ordinary civil courts.

14. *See* CSA Notice 62-306, *supra* note 5.
15. *See* Law No. 20720, Diciembre 30, 2013, Diario Oficial [D.O.] (Chile).
16. *Id.*

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In an effort to simplify the Chilean corporate regulations, Law 20,712[17] on Funds and Portfolio Management (also known as "Single Funds Act?) entered into force on May 1, 2014. This law consolidates the regulations applicable to private equity and venture capital investment funds in one single bill. Its main purpose is to unify and simplify the legal bodies governing the management of funds in a common and orderly legal framework and to incorporate certain basic regulations on management of individual portfolios. The old regulations that governed mutual funds, investment funds, foreign capital investment funds, and real estate funds were repealed.

The Single Funds Act distinguishes between three types of funds: (i) mutual funds, which allow full and permanent recovery of shares with the redemption payment being made within 10 days; (ii) public investment funds, which are those funds that are not mutual funds, and that can be divided into funds that do not allow redemption and funds that permit it with the redemption payment being made in 180 days or more; and (iii) private investment funds, which are investment funds with fewer than fifty investors.[18] While public mutual funds and investment funds are subject to the supervision of the Securities and Insurance Authority, private investment funds are not.

Finally, the scope of Law 20,659[19] (also known as the "One-Day Companies Act?), which simplifies the incorporation, amendment and dissolution of Chilean companies, has continued to expand, as it is now applicable not only to limited liability companies (*sociedades de responsabilidad limitada*), but also to single-owner limited liability enterprises (*empresas individuales de responsabilidad limitada*) and, most interestingly, to companies limited by shares (*sociedades por acciones*).

Pursuant to the One-Day Companies Act, a special electronic platform was created on which the Enterprises and Companies Register administers the registrations of companies under the supervision of the Ministry of Economy, Development and Tourism. Companies can be registered by uploading a form available for any person on the website, while the taxpayer number and an authorization to start business activities are simultaneously granted by the Tax Authority.

The One-Day Companies Act should become applicable to all types of companies in the next couple of years, except for listed stock corporations.

IV. China

Chinese legislators adopted important regulations in 2013 and 2014. A primary policy drive is to streamline burdensome regulatory approval requirements and administration practices, in the context of a slower export-based economic growth in China.

17. *See* Law No. 20712, Diciembre 24, 2013, Diario Oficial [D.O.] (Chile).
18. *Id.*
19. *See* Law No. 20659, Enero 31, 2013, Diario Oficial [D.O.] (Chile).

A. Continued Lifting of Foreign Investment Market Entry Restrictions

Following the launch of the China (Shanghai) Pilot Free Trade Zone in September 2013, the Chinese government updated the Negative Approval List in June 2014.[20] With the exception of 139 specific industries listed in the Negative Approval List, foreign direct investments are exempt from foreign investment approval, which would require a filing with the authorities.[21]

In November 2014, the National Development and Reform Commission released the revised draft of the Catalogue of Industries for Guiding Foreign Investment (the "Catalogue") for consultation with the public.[22] The revised Catalogue will likely come into effect by the end of 2014. Pursuant to the draft, many industries are to be removed from the "Restricted Category," such as online distribution, development of land, trust companies, insurance brokerage companies, real estate brokerage and the operation of high-class hotels, office buildings, and movie theaters. Pursuant to the revised Catalogue in certain industries, such as the development of new technologies for oil exploration and exploitation and the design and manufacture of airborne equipment for civil aviation, foreign investors may set up wholly-owned subsidiaries to structure their investment. In other industries, such as the maintenance of railway infrastructures and international marine transportation services, foreign investors may set up a joint venture company, with the foreign investor owning the majority interest.

B. Revisions to the Company Law and Change of Company Registration Rules

The equity capital contribution rules were extensively liberalised by revisions to the Company Law adopted at end of 2013 and certain follow-on regulations of the State Council.[23] The main changes include the transition of the registered capital payment system from a mandatory full amount contribution to a voluntary subscription, the removal of requirements of minimum equity capital, the removal of the time limit of the actual payment of the registered capital, and the removal of the minimum percentage of cash contribution.[24] However, such changes do not apply to a list of twenty seven industries, including insurance companies, banks, securities houses, and trust companies.[25] The

20. Special Management Measures for the Market Entry of Foreign Investment in the China (Shanghai) Pilot Free Trade Zone (Negative List) (2014 Revision), (promulgated by the Standing Comm. People's Cong. Shanghai Municipality, June 30, 2014, effective Oct. 1, 2014) (Westlaw China).

21. *Id.*

22. *National Development and Reform Commission on the "Catalogue for the Guidance of Foreign Investment Industries" revised public comment*, Nat'l Dev. & Reform Comm'n, http://www.ndrc.gov.cn/xwzx/xwfb/201411/t20141104_647350.html (last visited Nov. 18, 2014).

23. The Registered Capital of the State Council on the Issuance of a Registration System Reform Program Notice, Guo Fa [2014] on the 7th, *available at* http://www.gov.cn/zwgk/2014-02/18/content_2611545.htm; George Qi & Dawn Zhang, China Publishes Administrative Provisions on the Registration of the Registered Capital of Companies, Nat'l L. Rev. (Aug. 15, 2014), http://www.natlawreview.com/article/china-publishes-administrative-provisions-registrationregistered-capital-companies.

24. Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 23, 2013, effective Mar. 1, 2014), arts. 23, 26, 27, 29, 80; Reform Plan, *supra* note 22, art. 2 (1).

25. Reform Plan, *supra* note 22, Appendix.

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changes apply to enterprises in China that have foreign investments. However, the total investment in a company by a foreign investor is still subject to limitations.[26]

C. Chinese Outbound Investment–Lifting of Governmental Approval Requirements

Both the National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOFCOM") issued new regulations that substantially delegated approval powers for Chinese outbound investment projects ("OIPs") to lower-level authorities. Only OIPs in "sensitive countries or regions" or "sensitive industries" are to be approved by NDRC and MOFCOM.[27] Furthermore, OIPs with a proposed Chinese investment exceeding RMB 1 billion must be approved by NDRC.[28] Other OIPs are to be approved by provincial-level authorities.

V. Colombia

A. Tax Reform

In 2012, an innovative tax reform was approved in Colombia by means of Law 1607[29] The tax reform became effective in 2013 and has significantly modified the landscape of transactions in Colombia. Likewise, after the reelection of President Juan Manuel Santos, the government is planning an additional tax reform, aiming to raise over US$26.5 billion in the next four years. With this reform, the government seeks not only the creation and expansion of several taxes in Colombia, but also the implementation of an adequate mechanism to fight tax evasion.

The draft tax reform is mostly focused on high net worth individuals.[30] As many Colombian companies are family owned, this reform may have an impact on M&A activity as such companies will likely reorganize assets in Colombia in order to mitigate the effects of the tax reform.

B. Private Equity and Venture Capital Increasing Investment in Colombia

Large high profile transactions were common in Colombia during 2014, but in particular private equity and venture capital transactions significantly increased in volume. Private equity transactions increased in volume due to the changes in the economic environment and the broadening of private equity platforms. The latest Latin American

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26. *See* Jiamu Sun, *MOFCOM to Confirm Relaxation of Registered Capital Contribution Requirements for FIEs*, China Law Update Blog (July 8, 2014), http://www.chinalawupdate.cn/2014/07/articles/foreign-direct-investment/mofcom-to-confirm-relaxation-of-registered-capital-contribution-requirements-for-fies/.
27. *See* Laney Zhang, *China: Rules Revised to Facilitate Overseas Investments*, Libr Congress (Oct. 31, 2014), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404181_text.
28. *Id.*
29. L. 1607, diciembre 26, 2012, Diario Oficial [D.O.] (Colom.).
30. *See* Oscar Medina, *Colombia Follows Piketty Plan in Raising Tax on Largest Fortunes*, Bloomberg (Sept. 9, 2014),http://www.bloomberg.com/news/2014-09-09/colombia-follows-piketty-plan-in-raising-tax-on-largest-fortunes.html.

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Private Equity & Venture Capital Association ("LAVCA") reports highlighted Colombia's efforts to promote its regulation and improve its status on the scorecard.[31] Moreover, Colombian Association of Private Equity Funds ("ColCapital") has been very active during 2014, evaluating the increasing investments and exits of private equity funds in Colombia.[32] At a more general level, private equity in the Latin-American region is expected to further increase its investment during 2015.[33] Although the venture capital industry has been slowly growing during the past years, during 2014 it captured an important portion of the M&A market in Colombia. With the consolidation of government sponsored entities such as Innpulsa, Corporación Ventures and Bancoldex, the Colombian government has attracted more investors interested in startups. Additionally, the number of angel investors has increased during the past years. Recently, local angel networks such as the Bavaria Foundation, the Bolívar-Davivienda Foundation, and Capitalia have been very successful in attracting more investment to the industry.

C. Highlighted Transactions

Although 2014 has not been an outstanding year in M&A activity, some of the most important deals in the history of Colombia came through. The most relevant event of the year was the closing of the merger between Millicom Spain Cable S.L. and state-owned fixed services provider UNE EPM Telecomunicaciones S.A. The US$4.4 billion purchase price was one of the most relevant characteristics of the transaction. The deal required multiple and rigorous approvals and included a bond offering for an aggregate amount of US$800 million.[34]

In the financial industry, Banco Itaú acquired a controlling stake in Corpbanca. The deal included a merger of the Colombian and Chilean subsidiaries of Corpbanca and an injection of US$652 million in the resulting entity. The overall transaction had an approximate value of US$2.2 billion and is subject to regulatory approvals. With this deal, Banco Itaú will enter the retail banking industry, resulting in a breakthrough transaction for the Colombian banking industry.

VI. Germany

"Paper is patient"–a common saying in Germany. Even if something is put on paper, it certainly does not mean that it is already effective. This is presumably what Chancellor Merkel's right-of-center CDU party had in mind when it publicly supported a statutory quota for women on the supervisory boards of Germany's largest corporations. This provision was part of the coalition agreement entered into by the CDU and the left-of-center

31. *See 2014 Scorecard Update*, LAVCA (May 29, 2014), http://lavca.org/2014/05/29/2013-lavca-scorecard-2014-update/.
32. *See* Janette Recarte, *"La industria de private equity en Colombia vive un momento clave"*, Funds People (May 29, 2014, 9:00 AM), http://www.fundspeople.com/noticias/la-industria-de-private-equity-en-colombia-vive-un-momento-clave.
33. *See* Thomas Muskett-Ford, *LatAm private equity to deploy funds and diversify in 2015*, Latin Lawyer (Sept. 15, 2014), http://latinlawyer.com/news/article/47234/latam-private-equity-deploy-funds-diversify-2015/.
34. *See* Lulu Rumsey, *Millicom Moves to Medellín*, Latin Lawyer (Oct. 17, 2014), http://latinlawyer.com/news/article/47375/millicom-moves-medellin/.

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SPD party on November 27, 2013 (the "Coalition Agreement").[35] Specifically, the Coalition Agreement sets forth that the CDU/SPD coalition government will enact legislation requiring Germany's largest corporations to have supervisory boards that consist of at least thirty percent women.[36] German statutory law provides for a two-tier board: large German corporations must have both an executive board and a supervisory board. A supervisory board, as the name would indicate, monitors and advises the executive board.

In July 2001, the German government issued the "Agreement Between the Federal Government and the Primary Trade Associations of German Business to Promote Equal Treatment for Women and Men in the Private Company."[37] The purpose of this agreement, which in itself was a political compromise as there was not enough political support for a statute promoting gender diversity at the workplace, was to establish concrete goals for equal treatment of women in the workplace, including instituting flex time and telecommuting and promoting mentoring in the workplace for women. Not much has happened since then as women currently hold slightly less than six percent of the executive board positions and approximately only nineteen percent of the supervisory board positions in Germany.[38] Nor has much happened since November 27, 2013, in terms of introducing specific legislation to promote women on corporate boards—until now.

Manuela Schwesig, Germany's Minister of Families, Senior Citizens, Women and Youth, and Heiko Maas, the Minister of Justice, both cabinet members and SPD party members, presented a joint draft statute earlier this year. Under the proposal, thirty percent of supervisory board positions of companies that are publicly listed and that have more than 2,000 employees (just over 100 companies) are to be held by women.[39] Companies that satisfy only one of these thresholds (approximately 3,500 companies) would be subject to less stringent thresholds, but would also be required to increase the number of female supervisory board members and executive board members.[40]

Despite the clear wording of last year's Coalition Agreement, a number of influential CDU cabinet members have raised concerns about the draft statute stating that it would not pass constitutional muster. One not very politically savvy politician noted that it would be in Germany's best interest to delay the implementation of the statute because of Europe's current weak economy (apparently meaning that adding women as executive and supervisory board members would be an unnecessary risk to an already fragile economy).

Other European countries have introduced legislation setting forth quotas for women at the board level, most notably Norway, France, Spain, Iceland, Belgium, the Netherlands,

35. Deutschlands Zukunft Gestalten [Shaping Germany's Future], Nov. 27, 2013, *available at* https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf.

36. *Id.*

37. Vereinbarung zwischen der Bundesregierung und den Spitzenverbänden der deutschen Wirtschaft zur Förderung der Chancengleichheit von Frauen und Männern in der Privatwirtschaft [Agreement Between the Federal Government and the Primary Trade Associations of German Business to Promote Equal Treatment for Women and Men in the Private Company], July 2, 2001, *available at* www.dihk.de/ressourcen/downloads/chancengleichheit.pdf.

38. *Id.*

39. Harriet Torry, *30% Female Quota for German Boards Proposed*, WALL ST. J., Nov. 18, 2013, *available at* http://www.wsj.com/articles/SB10001424052702303531204579205452997816042.

40. *Id.*

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and Italy. The European Parliament proposed a draft directive in 2012[41] calling for publicly held companies to have at least forty percent female non-executive directors by January 2018.[42] At this point, it is doubtful that the European Parliament's proposal will be implemented. In Germany, however, Chancellor Merkel's government will approve the women's quota for Germany on December 11, 2014.[43] As of January 1, 2016, Germany will require publicly listed companies, as well as companies with more than 2,000 employees, to have their supervisory boards comprise of at least thirty percent women.[44] Surprisingly, this requirement will also apply to European companies (*Societas Europaea*) with German headquarters (currently seven companies). Companies will have three years as of 2016 to satisfy this statutory requirement.

VII. India

The year 2014 witnessed certain Indian competition law developments that are notable for their implications on international mergers & acquisitions (M&A). The Indian Competition Act, 2002[45] (Competition Act) regulates both domestic and international M&A that have bearing on the Indian market. In case of international M&A having local nexus, the parties are required to notify the Competition Commission of India (CCI) about the nexus within thirty days of board approval or of executing an agreement.[46] Under the Competition Act, the term "Combinations" includes M&A, taking place within or outside the territory of India. Even for overseas Combinations, the Competition Act has prescribed "Threshold" limits.[47] The parties must notify CCI of any Combination that meets the threshold. As per its "Exempted Threshold Notification[48]," CCI has exempted companies from notification until March 2016 if the target company in India has assets less than INR 2.50 billion and turnover less than INR 7.50 billion. But, when an Indian target company crosses the "Exempted Threshold," then the overall deal is subjected to the "Test of Threshold." If that is also met, then notification to CCI becomes mandatory. The procedural aspects of notification have been provided under CCI Combination Regulations, 2011.[49] The parties can notify CCI in various prescribed forms. Once the notifi-

41. *Proposal for a Directive of the European Parliament and of The Council on Improving the Gender Balance Among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures* (Nov. 14, 2012), *available at* http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf.

42. Press Release, European Commission Justice, Women on Boards: Commission proposes 40% objective (Nov. 14, 2012) *available at* http://ec.europa.eu/justice/newsroom/gender-equality/news/121114_en.htm.

43. Gleichberechtigung: Koalition einigt sich auf Frauenquote in Aufsichtsräten [Equal Rights: Coalition Reaches Agreement on Women's Quota for Supervisory Boards], SPIEGEL ONLINE (Nov. 26, 2014), *available at* http://www.spiegel.de/politik/deutschland/frauenquote-in-aufsichtsraeten-koalition-einigt-sich-auf-30-prozent-a-1005033.html.

44. *Id.*

45. Competition Act, 2002, No. 12 of 2003, INDIA CODE (2007) *as amended* by the Competition (Amendment) Act, No. 39 of 2007 INDIA CODE (2007).

46. *Id.* at § 6.

47. *Id.* at § 5.

48. Lex Mundi Publication, PRE-MERGER NOTIFICATION GUIDE, INDIA 1 (2012), *available at* www.lexmundi.com/Document.asp?DocID=961.

49. CCI Procedure in regard to the transaction of business relating to combinations Regulations, (May 11, 2009), *available at* http://cci.gov.in/May2011/Home/regulation/Combination%20Regulations%20as%20at%2028-3-14%20(2).pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00.

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cation is received by CCI, CCI will express its prima facie view within thirty days, and within 210 days either rejects the deal or clears the deal with or without modifications.[50]

A. Amendment Combination Regulations, 2014[51]

On March 28, 2014, the Combination Regulations were amended and a new Regulation 9(5) was added empowering CCI to look into the substance of the deal by looking through the structures. This effectively means that CCI can make the companies notify even if they are not crossing the "Threshold." Regulation 9(4) requires a "Consolidated Notification" if a business transaction involves series of interdependent steps where one or two can be classified as Combination. This could be the reason for the amendment. It eases the compliance on the part of the companies as they are not required to notify at each step. It is still to be understood and clarified what would be considered as "substance of the transaction." In absence of any clarification from CCI, companies should consider applying both the tests of "Threshold" and "Substance" while structuring any M&A deal. It is important to look at the transaction in a holistic way rather than in parts.

B. M&A deal of Sun Pharmaceuticals Industries Limited (Sun Pharma) and Ranbaxy Laboratories Limited (Ranbaxy)[52]

Sun Pharma and Ranbaxy notified CCI of their Combination proposal on May 6, 2014. CCI started its investigation and framed its prima facie view that this Combination will have an appreciable "adverse effect.[53]" This is the first time CCI has invoked the second level investigation in any Combination. It has asked parties to publish details of the Combination and has sought public comments. Based on the comments, CCI may ask parties for further information. After receiving further clarifications, CCI may reject the deal, pass it, or pass it with certain modifications. In this case, CCI made combined market shares of the companies in various categories of drugs the basis of its prima facie view. Clearly the parties need to consider the factors of nature of business and combined market shares while structuring a deal, as these may be decisive in determining the timeframe and outcome of CCI's imperative approval process.

VIII. Netherlands

The issue of directors having sufficient time to properly fulfill their duties is increasingly becoming the subject matter of legislation, which imposes restrictions on the possibilities of board position appointment or reappointment. This year the rules that applied to listed companies and so-called "large companies" have been extended by similar new regulations for pension funds and "significant" banks and investment institutions.

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50. *Id.*
51. *See* The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2014 (March 28, 2014), *available at* http://cci.gov.in/May2011/Home/regulation/march%202014.pdf.
52. Press Release, Form IV Contained in Schedule II to the Combination Regulations Under Sec 29(2) of Competition Act, 2002 (as amended) (Sept. 4, 2014), *available at* http://www.sunpharma.com/press-releases.
53. *Id.* at § 20(4).

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The Dutch Corporate Governance Code (the "Code?)[54] was the first regulation limiting the number of board positions that managing and supervisory directors can hold within Dutch-listed companies.[55] The Code applies on a "comply or explain" basis. But, due to the mandatory nature of the Dutch Civil Code (the "Civil Code"), Dutch-listed companies that also qualify as a "large company" within the meaning of the Civil Code[56] can no longer deviate from the Code on this point. Pursuant to the Code, managing directors of Dutchlisted companies cannot hold more than two supervisory positions nor can they act as chairman of a supervisory board.[57] The maximum number of supervisory boards of Dutchlisted companies that an individual may be a member of is limited to five. But, for these purposes, the chairmanship of a supervisory board counts as double.[58] The provisions in the Code with respect to supervisory directors also apply to non-executive directors in a one-tier board.[59] The Code does not limit the number of managing or executive board positions.

The Civil Code limits the number of board positions that directors can hold within "large" companies.[60] The question whether the nominee is eligible for a position has to be assessed at the time of appointment or re-appointment.[61] The limitations set out in the Civil Code are the same as the limitations of the Code. But, contrary to the Code, an appointment in violation of the Civil Code is void, although it does not invalidate the decision-making in which the director concerned participated. If the nominee holds a position with a pension fund or "significant" bank or investment company, it is necessary to establish that the specific regulations for these sectors do not result in any additional complications.

On July 1, 2014, a limitation regulation was adopted that specifically applies to pension funds (the "pension funds regulation").[62] A pension fund cannot proceed with an appointment if the managing or supervisory director would hold more than one full-time equivalent ("FTE") in managing and supervisory board positions.[63] The regulation includes a weighing factor to determine the time involved with the position concerned.[64] As of August 1, 2014, the Financial Supervision Act includes a limitation regulation that specifically applies to banks and investment institutions that qualify as "significant" (the

54. Dutch Corporate Governance Code, Jan. 1, 2009, *available at* http://commissiecorporategovernance.nl/dutch-corporate-governance-code.

55. *Id.*

56. *See* art. 2:153 BW (Neth.); *see also* art. 2.263 BW (Neth.).

57. Dutch Corporate Governance Code, *supra* 54, at Best Practice Provision II.1.8.

58. *Id.* at III.3.4

59. Press release, The Monitoring Committee (Neth.) (Sept. 26, 2012), *available at* http://www.corpgov.nl/nieuws/1986/Code-en-non-executive-directors.

60. *See* art. 2:132a BW (Neth.); *see also* art. 2:142a BW (Neth.); *see also* art. 2:242a BW (Neth.); *see also* art. 252a (Neth.).

61. *Id.*

62. Wet versterking bestuur pensioenfondsen [Pension Fund Governance Act] July 1, 2014 (Neth.), *available at* https://zoek.officielebekendmakingen.nl/stb-2013-302.html.

63. *See* Pensioenwet [Pension Act] art. 106a (Neth.); *see also* Besluit uitvoering pensioenwet [Implementation Decree Pension Act] art. 35a (Neth.).

64. *See* Pensioenwet [Pension Act] art. 106a (Neth.); *see also* Besluit uitvoering pensioenwet [Implementation Decree Pension Act] art. 35a (Neth.).

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"CRD IV regulation").[65] The European Union (EU) directive implemented by the CRD IV regulation does not provide a specific interpretation of "significant," but describes that individual circumstances and the nature, scale, and complexity of the institution's activities need to be examined.[66] Directors of "significant" banks or investment institutions may not hold more than one management board position and two supervisory positions, or four supervisory positions at the same time, including the position with the significant bank or investment institution.[67] As the CRD IV regulation is based on an EU directive, positions outside the Netherlands also presumably count. Directors within these institutions are continuously required to observe these limitations, regardless of whether their appointment or re-appointment is at stake. An appointment in violation of these limitations is not void, but the authorities can commence an enforcement procedure.

IX. Spain

Over the last few years, the EU has considered lack of strict and mandatory corporate governance regulations as an indirect and underlying cause of the financial crisis that its economy has been and is currently suffering. As a result, the legislative powers in Spain have passed several regulations seeking to control or limit excessive and imprudent risk-taking. In addition, these regulations strive to standardize the implementation of transparent and reasonable remuneration systems for directors and top executives and the professionalization of the governing bodies of financial entities and private companies.

On May 30, 2014, the Spanish parliament passed the Draft Companies Act Amendment regarding improvements on corporate governance[68] (the "Bill"), which intends to implement amendments or include new articles regarding matters related to corporate governance. Especially relevant is the amendment related to accumulation in the same person of the positions of chairman of the board of directors and chief executive officer of companies listed on the stock exchange in Spain. If the Bill is finally approved, most of these companies will have to amend their current bylaws and internal structure.

The separation of the positions of chairman of the board of directors and chief executive officer of a company are organized so that these positions are held by two different people, which has always been included in the expert reports on corporate governance regarding listed companies. Particularly, in Spain, this matter has been addressed in Sec-

65. Implementatiewet richtlijn en verordening kapitaalvereisten [Implementation Act Directive and Regulation Capital Requirements (CRD IV)] Aug. 1, 2014 (Neth.), *available at* https://zoek.officielebekendmakingen.nl/stb-2014-253.html.

66. Directive on Capital Requirements 2013/36/EU PbEU (L 176) (EU), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0036.

67. *See* Wet op het financieel toezicht [Financial Supervision Act] art. 3:8 (3), (4) and art. 4:9b (Neth.); *see also* Besluit prudentiële regels Wft [Decree on Prudential Rules Financial Supervision Act] art. 17d (Neth.); *see also* Besluit gedragstoezicht financiële ondernemingen Wft [Decree on Market Conduct Supervision Financial Institutions] art. 30b (Neth.).

68. Spanish Companies Act Amendment Bill B.O.E. 2014, No. 121/000097, *available at* http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-97-1.pdf

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tion 3.2 of the so-called Olivencia Report,[69] in Section IV.4 of the Aldama Report,[70] and in Recommendation 16 of the "Unified Code of Good Corporate Governance."[71]

These reports highlight the difficulty in deciding whether it is better to separate or accumulate the positions of chairman of the board of directors and chief executive officer of a listed company. All of these reports state that there are advantages and disadvantages to each system. The reports suggest that there should not be a prohibition per se of the accumulation of positions in the same person, but when this situation occurs, a lead independent director should be appointed.

The Bill seems to have adopted this suggestion in creating a new article 529 of the Spanish Companies Act related to the separation of positions.[72] This article has two implications: on the one hand, it establishes that the post of chairman of the board of directors and chief executive officer can be held by the same person, unless otherwise provided in the bylaws of the company. On the other hand, the article requires an enhanced majority to appoint the chairman of the board. As a second safeguard, if the positions of chairman of the board of directors and chief executive officer are combined in one person, the article requires a new figure: the lead independent director. These measures–especially the second one–are intended to avoid negative consequences that may arise from the accumulation of power within one person, particularly when such person carries out activities that are subject to the control and approval of the governing body chaired and run by that same person.

If the Bill is finally passed, a time will come for the general shareholders and governing bodies of listed companies to decide whether they intend to continue with the accumulation of positions or whether they are willing to separate the positions in order to avoid the appointment of a lead independent director.

X. Ukraine

The ongoing political and economic crisis in Ukraine has significantly affected the commercial expectations of investors. Likewise, the structure, value, and size of M&A transactions have changed. The main reasons for the low M&A activity in 2014 are the lack of funds available for investments, the concentration of assets controlled by Ukrainian business groups in key sectors, and the lack of transparency in acquisition and ownership structures. These factors serve to deter foreign investors from considering projects and potential M&A transactions involving a Ukrainian target.

The areas that showed activity in 2014 are agriculture, food, and beverage, infrastructure and energy (oil and gas, electricity and renewables), pharmaceuticals, and IT. Agriculture tops the list due to its significant potential and relatively low level of asset

69. *Comisión Especial para el Estudio de un Código Ético de los Consejos de Administración de las Sociedades*, El Gobierno de las Sociedades Cotizadas–Código de Buen Gobierno (February 26, 1998) (Spain) *available at* https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/govsocot.pdf

70. *Informe de la Comisión Especial para el Fomento de la Transparencia y Seguridad en los Mercados y en las Sociedades*, Informe Aldama, (January 8, 2003) (Spain), *available at* https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/INFORMEFINAL.pdf.

71. Comisión Nacional del Mercado de Valores 2013, *Código Unificado de Buen Gobierno Corporativo available at* https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/CUBGrefundido_JUNIO2013.pdf.

72. Spanish Companies Act Amendment Bill B.O.E. 2014, No. 121/000097, *available at* http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-97-1.pdf.

consolidation. It is worth noting that there has not been much progress in financing Ukrainian businesses through IPOs in the international capital markets, although the market has seen some activity. Experts predict that IPOs are planned by several Ukrainian companies in different sectors, mainly food and agriculture. But, given the latest macroeconomic slowdown, IPOs most likely will be postponed to 2015 or 2016.

A. Non-Flexible Corporate Legislation

The Ukrainian legislative environment has not seen any significant changes in 2014. Ukrainian corporate legislation still does not recognize mechanisms such as derivative actions, squeeze-out rights, call and put options, and drag-along and tag-along rights. There is no specific act regulating public or private takeovers and mergers in Ukraine. The concept of public bids is also underdeveloped in the Ukrainian legal framework. For example, no distinction is made between hostile bids and bids that are supported by the board of the target company.

Furthermore, limited liability companies ("LLCs") are still regulated by the outdated Law on Business Companies.[73] Since 2013, the adoption of the Law on LLCs and Additional Liability Companies has been actively discussed and would be one of the most awaited changes in corporate legislation. There are two alternative proposals: No. 2011[74] and No.2011-1.[75] The main innovations of the proposals are the possibility to attend the general meeting with the use of electronic communication means, the possibility to establish a supervisory board in an LLC, and the approval rights of the shareholders in relation to the company entering into transactions that are significant or not at arm's length. The next step in the legislative process is the acceptance of one of these proposals by Verkhovna Rada for consideration and adoption.

B. Recent Changes

The key problem that foreign investors have faced in 2014 is the restriction on repatriation of investments in Ukrainian companies. Until December 2, 2014, the following foreign currency transactions relating to investments in Ukrainian companies are prohibited:

- repatriation of funds received by foreign investors as a result of sale of equity interests in Ukrainian companies not represented by securities (such as equity in LLCs); and
- repatriation of dividends by foreign investors, except for dividends received from securities listed at one of the local stock exchanges.[76]

In practice, this means that, at least until December 2, 2014, a foreign investor will not be able to repatriate its investments. Although these restrictions should not affect the transfer of title to shares and other equity interests as such, any proceeds from such transactions will have to remain in Ukrainian bank accounts.

73. Закон n°576-XII 1 Жовтень 1991, *available at* http://zakon4.rada.gov.ua/laws/show/1576-12.
74. Draft Law on LLCs and Additional Liability Companies No. 2011 (2013) (Ukr.) (draft revoked Nov. 11, 2014), *available at* http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=45462.
75. *Id.*
76. Resolution of the National Bank of Ukraine No. 591, September 22, 2014, *available at* http://zakon4.rada.gov.ua/laws/show/v0591500-1.

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C. Information on Beneficial Owners

All Ukrainian companies will be required to disclose information on their ultimate beneficiaries to the State Registrar by May 25, 2014. Failure to comply with the disclosure obligations may result in the director of the company being fined for 5,100 to 8,500 Ukrainian Hryvnyas (approximately USD 400 to 650).[77]

XI. United States

In 2014, Delaware courts continued to delineate directors' fiduciary duties in various M&A contexts.

Upholding last year's Court of Chancery decision in *In re MFW Shareholders Litigation*[78] (discussed in the 2013 *Year in Review*),[79] the Delaware Supreme Court, in *Kahn v. M&F Worldwide Corp.*[80] held that the deferential "business judgment" standard of review applies in cases of "go-private" mergers involving a controlling stockholder, if (i) the controlling stockholder conditions the deal at the outset on the approval of both a special committee of the target corporation's board of directors and the "majority of the minority" of the target's stockholders; (ii) the special committee is independent; (iii) the special committee is empowered to freely select its own advisors and to veto the transaction; (iv) the special committee acts with care in negotiating a fair price; (v) the minority stockholders' vote is informed; and (vi) the minority stockholders are not coerced .[81] The Supreme Court noted, however, that full trials may be necessary to determine whether special committees have met their obligations to negotiate effectively with controlling stockholders.

In *Third Point LLC v. Ruprecht*,[82] the Court of Chancery denied plaintiffs' motion to enjoin Sotheby's 2014 annual meeting. The plaintiff stockholders, led by the activist fund Third Point, alleged that the Sotheby's board breached its fiduciary duties by adopting a two-tiered stockholder rights plan (allowing passive investors to acquire up to a twenty percent interest, while restricting activist investors to a ten percent stake), and refusing to permit Third Point to acquire up to a twenty percent stake in Sotheby's.[83] In denying the preliminary injunction, the Court held that (i) Unocal's "enhanced scrutiny" provided the appropriate standard of review with respect to the adoption of the rights plan and the refusal to waive the rights plan trigger for Third Point, and (ii) the actions taken by the Sotheby's board were reasonable and proportionate in response to a legally cognizable threat posed by Third Point and other activist investors.[84] Because of the procedural posture and fact-specific nature of the Court's analysis, practitioners must be cautious in drawing broad conclusions from this decision.

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77. Закон n° 1701-VII 14 Жовтень 2014, *available at* http://zakon2.rada.gov.ua/laws/show/1701-vii.
78. *In re* MFW Shareholders Litig., 67 A.3d 496 (Del. Ch. 2013).
79. Maria Cibele Crepaldi Affonso dos Santos *et al.*, *International M&A and Joint Ventures*, 48 YEAR REVIEW. 65, 85 (2013).
80. Kahn v. M&F Worldwide Corp., No. 334, 2013, slip op., 2014 WL 99270 (Del. Mar. 14, 2014).
81. *Id.*
82. Third Point LLC v. Ruprecht, et al., C.A. No. 9469-VCP (Del. Ch. May 2, 2014).
83. *Id.*
84. *Id.*

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The Delaware Court of Chancery's opinions in *In re Rural/Metro Corporation Stockholders Litigation*[85] provided practitioners with a stern reminder of the importance of running an orderly, conflict-free sale process. In evaluating the process of Rural/Metro Corporation's 2011 sale to a Warburg Pincus LLC affiliate, the Court found various deficiencies and conflicts of interest, including: (i) an uninvolved Rural/Metro board of directors; (ii) a sale process managed by a conflicted special committee of Rural/Metro's board; (iii) the special committee's engagement of a lead financial advisor, RBC, that (unknown to Rural/Metro) prioritized a speedy sale in hopes of providing "stapled" financing to potential buyers above maximizing stockholder value; (iv) the absence of valuation analyses through the sale process, followed by RBC's "last-minute" provision of manipulated analyses designed to induce Rural/Metro's acceptance of Warburg's offer; and (v) a sale process that, at RBC's suggestion, coincided with the sale process of EMS, Rural/Metro's largest competitor, effectively disqualifying any potential bidders that were occupied pursuing EMS.[86] Plaintiffs' claims against Rural/Metro's directors were settled, but plaintiffs' actions against RBC proceeded to trial. Despite the generous premium paid by Warburg in the acquisition (and Rural/Metro's subsequent bankruptcy), the Court held that RBC aided and abetted the Rural/Metro board's breach of its fiduciary duties. In a later opinion that has ignited much debate, the Court determined that RBC was liable for $75.8 million of the $91.3 million in damages suffered by Rural/Metro's stockholders.[87]

85. *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. Ch. 2014); *in re* Rural Metro Corp. Stockholders Litig., 102 A.3d 205 (Del. Ch. 2014).
86. *Id.*
87. *Id.*

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