International M&A and Joint Ventures

PHILLIP JOHNSON, BEN FRIIS-O'TOOLE, EZEKIEL SOLOMON, ANDREW FINCH, VAGN THORUP, JACOB HØEG MADSEN, WILLIAM KANTA, THOMAS JAHN, HARTMUT KRAUSE, DUCO DE BOER, ANNE-MIJKE WESSELING, DANIEL L. GOTTFRIED, AND DAVID J. BUCKLEY*

This article reviews developments in international mergers, acquisitions, and joint ventures during the year 2011.[1] Because of space limitations, this year's article reviews only six selected jurisdictions: Australia, Denmark, France, Germany, the Netherlands, and the United States. Additional country reports for 2011 are available on the committee's website.

I. Australia

A. M&A ACTIVITY AND MARKET DEVELOPMENTS

Notwithstanding uncertainty associated with the European debt crisis, the Australian Mergers and Acquisitions (M&A) market was strong during the first three quarters of 2011, with M&A activity up 73.7% from last year to US$146.3 billion.[2] Cross-border transactions, totaling US$77.1 billion, accounted for a significant proportion of overall Australian M&A activity, with inbound investment reaching a record high of US$47.63 billion.[3] The majority of inbound activity occurred in the materials and consumer staples

* Phil Johnson and Duco de Boer served as the committee editors for this report. Ben Friis-O'Toole, Ezekiel Solomon, and Andrew Finch of Allens Arthur Robinson authored the Australian submission. The section on Denmark was authored by Vagn Thorup, partner, Jacob Høeg Madsen, senior associate, and William Kanta, senior associate, Kromann Reumert, Copenhagen, Denmark. Thomas Jahn authored the section on France. Hartmut Krause of Allen & Overy, LLP, Frankfurt, authored the section on Germany. Duco de Boer and Anne-Mijke Wesseling, Stibbe, New York, authored the section on the Netherlands. Daniel L. Gottfried and David J. Buckley of Rogin Nassau LLC, Hartford, Connecticut authored the section on the United States.

1. For developments during 2010, *see* Saul Feilbogen et al., *International M&A and Joint Ventures*, 45 INT'L LAW. 63 (2011). For developments during 2009, *see* Mattia Colonelli de Gasperis et al., *International M&A and Joint Ventures*, 44 INT'L LAW. 71 (2010).

2. THOMSON REUTERS, MERGERS & ACQUISITIONS REVIEW, FINANCIAL ADVISORS: FIRST NINE MONTHS 2011 15 (2011), *available at* http://dmi.thomsonreuters.com/Content/Files/3Q11_MA_Financial_Advisory_Review.pdf.

3. *Id.*

sectors,[4] while overall activity was focused on the resources, real estate, and food & beverage sectors.[5] Australian Private Equity (PE) activity was also strong, particularly in relation to PE exits, with the dominance of sponsor-to-sponsor transactions reflecting the fact that Initial Public Offerings (IPO) markets remained difficult throughout the year.[6]

Key transactions announced during 2011 included:

1. SAB Miller's proposed US$12.4 billion takeover of Foster's Group;[7]
2. Barrick Gold's US$7.7 billion acquisition of Equinox Minerals;[8]
3. Peabody and ArcelorMittal's proposed US$4.7 billion acquisition of Macarthur Coal;[9]
4. West Australian Newspapers' US$4.1 billion merger with Seven Media Group;[10] and
5. FOXTEL's proposed US$2.7 billion acquisition of Austar.[11]

B. New Securities Market Competitor

In October 2011, Chi-X Australia commenced operations, providing the first alternative trading market to securities listed on the Australian Securities Exchange (ASX).[12] While Chi-X will not have any listing function, over time it is expected to account for a substantial amount of trading volume. The increase in market competition should facilitate capital-raising in Australia, by making Australian markets more attractive to international investors, and therefore ultimately deeper and more liquid. The Australian Securities and Investments Commission (ASIC) reported that increased market competition should also lead to the development of innovative new order types, more efficient ways to trade, and lower transaction costs.[13]

---

4. *Id.*

5. Anthony MacDonald, *Getting Together for the Price Reasons*, Austl. Fin. Review (Sept. 28, 2011), http://afr.com/p/personal_finance/portfolio/getting_together_for_the_price_reasons_AvbSz2v37r1ODf3C6hZw8L.

6. For example, Archer Capital and HarbourVest Partners'A$1.2 billion sale of MYOB Ltd. to Bain Capital; Archer Capital's A$474 million acquisition of Quick Service Restaurant from Quadrant Private Equity; Pacific Equity Partners' A$463 million sale of Tegel Foods to Affinity Equity Partners; and Archer Capital's A$240 million acquisition of Healthe Care from Champ Ventures.

7. *India-Targeted M&A Deals Worth $39 Bn So Far This Year: Dealogic*, The Econ. Times (Sept. 27, 2011), http://articles.economictimes.indiatimes.com/2011-09-27/news/30208446_1_m-a-deals-dealogic-usd.

8. Daniel Hayden, IV, *Trading on Barrick Gold's $7.7 Billion Takeover of Equinox Minerals*, Bus. Insider (Apr. 26, 2011), http://articles.businessinsider.com/2011-04-26/markets/30056717_1_copper-mining-shares.

9. *ArcelorMittal and Peabody Energy Submit Indicative Proposal to Acquire Macarthur Coal*, MFR Tech (July 11, 2011), http://www.mfrtech.com/articles/16087.html.

10. Anthony MacDonald, *Clayton Utz, Freehills Vie for Supremacy*, Austl. Fin. Review (May 2, 2011), http://www.afr.com/p/markets/dealbook/clayton_utz_freehills_vie_for_supremacy_AstwiBKgxUwKHQKVcwsPGM.

11. Ross Kelly, Gavin Lower & David Fickling, *Australian Regulator Stalls Foxtel Bid for Austar*, Total Telecom (July 22, 2011), http://www.totaltele.com/view.aspx?ID=466470.

12. *How Will Chi-X's Commencement of Operations Affect Listed Entities, Trading Processes and Market Supervision?*, Chartered Sec'ys Austl., at 1 (Feb. 7, 2012), http://www.csaust.com/AM/Template.cfm?Section=Australian_information_pdf_files_cont&Template=/CM/ContentDisplay.cfm&ContentID=19573.

13. *Id.* at 2.

C. Foreign Investment

1. *Australian Securities Exchange Merger*

In a highly public and controversial decision, on the recommendation of the Foreign Investment Review Board (FIRB), the Federal Treasurer rejected the proposed US$8.4 billion merger of the ASX with Singapore Exchange Ltd., on the basis that the merger was contrary to Australia's national interest.[14] The decision indicates that, in addition to foreign state-owned acquirer and national security considerations, FIRB will likely scrutinize foreign persons' acquisitions of businesses that, in the Australian government's view, provide some function critical to the Australian economy.

2. *Australian Securities and Investments Commission*

The ASIC is Australia's corporate, markets, and financial services regulator. Newly appointed Chairman, former banker Greg Medcraft, has stated that under his chairmanship, ASIC will have three key priorities: (a) promoting confident and informed investors and financial consumers; (b) facilitating fair and efficient financial markets; and (c) ensuring efficient registration and licensing of stakeholders.[15] To achieve these priorities, ASIC will focus on engagement with industry, surveillance and deterrence,[16] with large-scale litigation likely. ASIC will also continue its policy of requiring clear, concise, and effective disclosure, and has recently released guidance aimed at making prospectuses more useful for retail investors.

a. Schemes of Arrangement

ASIC has updated its guidance in relation to change of control transactions effected by way of scheme of arrangement, which is a court-approved arrangement between a target company and its security holders made pursuant to the Corporations Act 2001, under which the bidder may acquire control of the target. Schemes of arrangement are the most common structure used in Australia to implement friendly mergers and takeovers. In particular, ASIC has stated that it will:

(a) consider any objections to a scheme when determining whether it will give a statement to the court that it has no objection to the scheme;
(b) closely consider schemes that offer collateral benefits (*i.e.*, benefits given to some, but not all security holders for the purpose of inducing acceptance of the scheme) or unequal consideration; and
(c) examine schemes that result in a reverse takeover on a case-by-case basis.[17]

---

14. Press Release, The Hon. Wayne Swan MP, Deputy Prime Minister and Treasurer, Foreign Investment Decision No. 030 (Apr. 8, 2011), http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2011/030.htm&pageID=003&min=wms&Year=&DocType=0.

15. Greg Medcraft, Chairman, Austl. Sec. and Inv. Comm'n, Speech to FOS National Conference 2011: News from the Regulator, at 2 (June 2, 2011), *available at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/News-from-the-regulator-FOS-speech-2-June-2011.pdf/$file/News-from-the-regulator-FOS-speech-2-June-2011.pdf.

16. *Id.*

17. Austl. Sec. & Inv. Comm'n, Regulatory Guide 60: Schemes of Arrangement 9, 12, 25 (Sept. 2011), *available at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg60-published-22-September-2011.pdf/$file/rg60-published-22-September-2011.pdf.

b. Takeovers

ASIC has also updated its guidance in relation to takeovers approved by members. Under the Corporations Act, a bidder may acquire more than twenty percent of a target if members approve the acquisition.[18] ASIC has stated that members need to be fully informed when deciding whether to give approval to acquisitions, and as such it has provided more specific disclosure requirements.[19] ASIC has also extended the guidance to cover listed managed investment schemes.[20]

3. *Australian Competition and Consumer Commission*

The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing Australia's antitrust laws in relation to M&A transactions under the Competition and Consumer Act 2010 (formerly the Trade Practices Act 1974). Following the appointment of new Chairman Rod Sims this year, the ACCC has stated that it will pursue greater transparency in relation to its merger review process, with the aim of better assessing and deterring potentially anti-competitive mergers.[21] It has also stated that it will encourage notification of potentially anti-competitive mergers to the ACCC before they are effected, and take action to address substantial competition concerns arising from mergers where competition may be affected.[22]

4. *Takeovers Panel*

The Takeovers Panel (the Panel) is the main forum for resolving disputes about a takeover bid until the bid period has ended. In May 2011, the Panel published revised guidance on (a) minimum bid price, (b) frustrating action, and (c) trust schemes.[23]

a. Minimum Bid Price

Under the Corporations Act, consideration offered for target company securities under a takeover bid must be at least as much as that provided, or agreed, by a bidder (or associate of the bidder) for the securities in the four months preceding the bid.

The Panel stated that it will continue with its policy in relation to minimum bid price, including that it is likely to treat foreign money offered as consideration under a takeover bid as non-cash consideration, on the basis that foreign money must be exchanged before

18. *See* AUSTL. SEC. & INV. COMM'N, REGULATORY GUIDE 74: ACQUISITIONS APPROVED BY MEMBERS 24 (Dec. 2011), *available at* http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG74-Published-21-December-2011.pdf/$file/RG74-Published-21-December-2011.pdf.

19. *See id.* at 4–5.

20. *Id.* at 17.

21. AUSTL. COMPETITION & CONSUMER COMM'N, ACCC CORPORATE PLAN 2011-12 2 (2011), *available at* http://www.accc.gov.au/content/item.phtml?itemId=987399&nodeId=409941989f0b876f342dcff886509d6b&fn=ACCC%20Corporate%20Plan%202011-12.pdf.

22. *Id.*

23. Press Release, Australian Government Takeovers Panel, Panel Publishes Revised Guidance Notes 6, 12, 13 and 15, No. 33/2011 1 (May 6, 2011), http://www.takeovers.gov.au/content/Media_Releases/2011/downloads/MR11-33.pdf.

Australian shareholders are able to spend it, and its value varies over time.[24] As such, if the bid consideration is foreign money and the bidder treats the bid as a cash bid, this may constitute "unacceptable circumstances." For example, if a bidder offers U.S. dollars, and then buys target securities on-market on the ASX in Australian dollars at a higher price (according to exchange rates prevailing during the bid), but does not increase its price under the bid, the bidder may be in breach of the Panel's policy.

b. Frustrating Action

The Panel clarified its approach to actions of a target (or potential target) company that may lead to an offer lapsing, being withdrawn, or not proceeding. In particular, the Panel stated that its frustrating action policy does not apply to schemes of arrangement.[25] The Panel also stated that a target might be able to proceed with a potential frustrating action, following a private approach by a bidder, by putting the bidder on notice.[26] That is, where a target notifies a potential bidder, before taking a corporate action, that it intends to undertake that action if the potential bidder fails to either make its bid or formally announce its proposed bid within a reasonable time (usually two weeks), circumstances may not be unacceptable.

c. Trust Schemes

The Panel clarified its approach to mergers by listed trusts and managed investment schemes. In particular, the Panel stated that disclosure and approval is required for a responsible entity of the target (or a related party) giving up management rights over the target only if it is a related party transaction.[27] Also, in relation to its requirement that the scheme notice contain an independent expert's report, the Panel stated that the report should say whether, in the expert's opinion, the terms of the trust scheme are fair and reasonable for the holders of the target (other than the acquirer and its associates), and further that it is not uncommon for the expert to also opine on whether the transaction is in the best interests of holders.[28]

II. Denmark

The Danish M&A market is still recovering from consequences of the global financial crisis and recession that followed. The number of large company transactions taking place was markedly lower in 2011, and the European Union sovereign debt crisis during 2011 negatively influenced buyers' access to acquisition financing. Transactions were still being completed, however, including a higher number of smaller transactions than in previous years. Significant transactions during 2011 included:

24. *Id.* at 1–2; TAKEOVERS PANEL, GUIDANCE NOTE 6—MINIMUM BID PRICE 3 (May 6, 2011), *available at* http://www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN06_2011.pdf.

25. Revised Guidance Notes, *supra* note 23, at 1–2; TAKEOVERS PANEL, GUIDANCE NOTE 12—FRUSTRATING ACTION 2-3 (May 6, 2011), *available at* http://www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN12_2011.pdf.

26. Revised Guidance Notes, *supra* note 23, at 2.

27. *Id.*; TAKEOVERS PANEL, GUIDANCE NOTE 15—TRUST SCHEME MERGERS 4–5 (May 6, 2011), *available at* http://www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN15_2011.pdf.

28. Revised Guidance Notes, *supra* note 23, at 1–2; GUIDANCE NOTE 15, *supra* note 27, at 4.

- Danisco A/S' voluntarily recommended public offer for all shares of Danisco A/S announced by DuPont on January 21, 2011.[29] Valuing Danisco at approximately EUR 4.8 billion, the transaction was the second largest public M&A transaction ever in Denmark.[30]
- DONG Energy A/S' DKK 6 billion sale to pension funds PensionDanmark and PKA of a fifty percent equity interest in the 400 MW Anholt offshore wind farm, which once constructed will become Denmark's largest offshore wind farm.[31]
- Gjensidige Forsikring's DKK 2.5 billion acquisition of all shares in Nykredit Forsikring.[32] This transaction is one of the latest examples of consolidation in the Nordic insurance business.
- Kaupthing Bank/Iceland Central Bank's sale of FIH Erhvervsbank to a Consortium primarily consisting of Danish and Swedish pensions funds for a purchase price of up to DKK 5 billion.[33]
- Scandinavian Tobacco Group's agreement to combine its global cigar and pipe tobacco business with Swedish Match's cigar and other tobacco businesses. This agreement is global in scope.

Furthermore, the market in 2011 was characterized by a number of transfers of assets and liabilities of financially struggling Danish banks to the Financial Stability Company (established by the Danish State and the Danish financial sector) from 2008 to 2011 as part of the Danish government's scheme to secure financial stability in Denmark.

III. France

A. Legislative Developments During 2011

1. *Exemption of Capital Gain on Participation Interest*

Capital gains are, under certain conditions, tax-exempted after deduction of a portion of costs and expenses.[34] This previously taxable portion amounted to five percent and was

29. *Notice of Redemption of Minority Shareholders of Danisco A/S*, Danisco (May 19, 2011), http://www.danisco.com/media/news/company_news/2011/notice_of_redemption_of_minority_shareholders_of_danisco_as/.

30. Caroline Scott-Thomas, *Danisco Boosts Cultures Capacity as Probotics Market Swells*, Food Navigator (Aug. 18, 2009), http://www.foodnavigator.com/Financial-Industry/Danisco-boosts-cultures-capacity-as-probiotics-market-swells.

31. *Divestment of Stakes in Anholt Offshore Wind Farm Has Been Approved*, DONG Energy (Oct. 20, 2011), http://www.dongenergy.co.uk/News/company_announcements/Pages/SER_details_page.aspx?omxid=578967; *840,000 Pension Savers to Become Co-owners of Denmark's Largest Offshore Wind Farm*, DONG Energy (Mar. 28, 2011), http://www.dongenergy.de/DE/Uber_uns/News_und_Media/Pressemitteilungen_International/Pages/Pressemitteilungen_details.aspx?cisionid=557485.

32. *Gjensidige Acquires Nykredit Forsikring—Forms Strategic Alliance with Nykredit*, Nykredit (Mar. 8, 2010), http://www.nykredit.com/aboutnykredit/ressourcer/dokumenter/pdf/_stock_exchange_2010/realkredit/gjensidige-acquires-nykredit-forsikring.pdf.

33. Press Release, Central Bank of Iceland, FIH to be Sold to a Consortium of ATP, PFA, Folksam and CPDyvig (Sept. 19, 2010), http://sedlabanki.is/?PageID=287&NewsID=2592.

34. Code General des Impots [CGI] art. 219 quinquies (Fr.), *available at* http://lexinter.net/CGI/article_219_quinquies.htm.

later increased to ten percent.[35] Eligible capital gains are now exempted for ninety percent of their amount. The taxable share is subject to corporate tax at the normal rate of 33.33%.[36] This measure is effective for financial years opened after January 1, 2011.[37]

2. *Limitation of Tax Loss Set-Off*

A loss may be carried forward for an unlimited time against the profit of periods following the period in which the loss was booked. Optionally, and under certain conditions, losses can be carried back against the profits of preceding periods, in which they will generate a credit chargeable against tax in the following five years and refundable at the end of the five-year period.

The second rectifying tax act for 2011 introduced a so-called "minimum taxation" under which tax losses carried forward can be set off against the profits of a given year only up to €1 million.[38] The amount exceeding that ceiling can only be set off up to sixty percent of the profit of the year.[39] Companies holding substantial tax losses carried forward may now become liable for corporate tax on forty percent of their profits. In the same way, losses of a given year can now be carried back only to €1 million.[40] These measures are effective for financial years opened since January 1, 2011.

3. *Extension of Thin Cap Regulations to Third Party Loans*

Thin cap regulations had been reviewed and deadlines extended with effect on January 1, 2007.[41] Interest paid on loans granted by related parties became only deductible up to the following amounts:

(1) Interest computed on a loan amount equal to 1.5x the net equity;
(2) Twenty-five percent of the profits before interest on intercompany loans, before depreciation and before deduction of certain leasing installments; or
(3) The amount of interest income received on loans to related parties.

Article 12 of the Finance Bill for 2011[42] extended the measure to third-party loans as far as these benefit from the guarantee of a related party. In practice, this measure has a particularly strong impact on portfolio financing, where usually all group companies counter-guarantee the debt of the other companies of the pool.

35. Loi 2011-1117 du 19 septembre 2011 de finances rectificative pour 2011 [Law 2011-1117 of Sept. 19, 2008 on Supplementary Budget for 2011], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 20, 2011, art. 4, p. 15688, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024574328&fastPos=2&fastReqId=959995754&categorieLien=id&oldAction=rechTexte.

36. *France Tax Rates*, TAXRATES.CC, http://www.taxrates.cc/html/france-tax-rates.html (last visited Feb. 7, 2012).

37. Law 2011-1117, art. 4 (Fr.).

38. *Id.* art. 2.

39. CGI, art. 209 I (Fr.).

40. CGI, art. 220 I (Fr.).

41. *Taxable Result*, ALTEXIS, http://www.tax-in-france.com/xws127_corporations-doing-business-taxable-result.asp (last visited Feb. 7, 2012).

42. Loi 2010-1657 du 29 décembre 2010 de finances pour 2011 (1) [Law No. 2010-1657 of Dec. 29, 2010 on Finances for 2011 (1)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 30, 2010, art. 12, p. 23033, *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023314376&fastPos=1&fastReqId=240566924&categorieLien=id&oldAction=rechTexte.

4. *Mandatory Takeover Bids and Disclosure Obligations for Investments in Listed Companies Exceeding Certain Thresholds*

To comply with European law,[43] a new thirty percent threshold was introduced in 2010[44] in the French Commercial Code,[45] which requires the shareholder not only to notify the company, but also to launch a takeover bid unless exempted by regulation or decision of the market authorities.[46] The previous threshold had been 33.33%. Those shareholders, which, on January 1, 2010, held between thirty percent and 33.33% of the capital or voting rights of a listed company, are "grandfathered" provided they do not acquire any new shares. Those who increased their stake since January 1, 2010 and February 1, 2011 to a percentage between thirty percent and 33.33% have until February 1, 2012 to reduce their stake below thirty percent or launch a takeover bid.[47]

Rules introduced in 2009[48] requiring the disclosure of certain derivative rights, in particular equity swaps, held by a shareholder have not been amended. Thus, cash-settled derivatives only have to be disclosed when one of the thresholds is passed for other reasons.[49] These rules were criticized as being inefficient, particularly when LVMH, on October 23, 2010, unexpectedly announced having acquired a 17.1% stake[50] in Hermes International after exercising its rights under equity swap agreements not previously disclosed. A draft bill was introduced in the French Senate in June 2011[51] to introduce more severe disclosure rules regarding derivatives, but has apparently not had much progress.

---

43. *See* Council Directive 2004/25, 2004 O.J. (L 142) (EC).

44. *See* Loi 2010-1249 du 22 octobre 2010 de régulation bancaire et financière [Law No. 2010-1249 of Oct. 22, 2010 on Banking and Financial Regulation], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 23, 2010, arts. 48–55, p. 18984, *available at* http://www.loc.gov/law-web/servlet/lloc_news?disp0_l205402384_searchA&20395&1.

45. CODE DE COMMERCE [C. COM.] art. L233-7 (Fr.), *available at* http://www.legifrance.gouv.fr/affichCode Article.do?idArticle=LEGIARTI000022963037&cidTexte=LEGITEXT000005634379&dateTexte =20120208&oldAction=rechCodeArticle.

46. CODE MONÉTAIRE ET FINANCIER [MONETARY AND FINANCIAL CODE] art. L433-3 (Fr.), *available at* http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000022963056&cidTexte=LEGI TEXT000006072026&dateTexte=20120208&oldAction=rechCodeArticle.

47. General Regulation of the Autorite des Marches Financiers [General Regulation of the AMF], Jan. 31, 2011, art. 234-11, *available at* http://www.amf-france.org/documents/general/7552_1.pdf.

48. Ordonnance 2009-105 du 30 janvier 2009 relative aux rachats d'actions, aux déclarations de franchissement de seuils et aux déclarations d'intentions [Order No. 2009-105 of 30 January 2009 on Share Buybacks, the Statements of Thresholds and Declarations of Intent], Jan. 31, 2009, p. 1835, *ratified by* Loi 2009-1255 du 19 octobre 2009 tendant à favoriser l'accès au crédit des petites et moyennes entreprises et à améliorer le fonctionnement des marchés financiers (1) [Law No. 2009-1255 of 19 October 2009 on Promoting Access to Credit for Small and Medium Enterprises and to Improve the Functioning of Financial Markets (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 20, 2009, art. 15 I(2), p. 17410.

49. C. COM., art. L233-7 II (Fr.).

50. Press Release, LVMH, LVMH Becomes a Shareholder of Hermes International (Oct. 23, 2010), http://www.lvmh.com/investor-relations/press-releases?date=2010. LMVH's stake subsequently increased to 20.2%. *See* Draft Law 695, *infra* note 51.

51. Proposition de Loi 695 conçu pour améliorer l'information du marché financier en termes de franchissements de seuils dans droit des valeurs mobilières [Draft Law 695 Designed to Improve the Information of the Financial Market in Terms of Crossings of Thresholds in Securities Law], by Sen. Philippe Marini (June 29, 2011).

5. *Simplification of Merger Rules*

Law Number 2011-525 of May 17, 2011[52] introduced several measures simplifying mergers, lightening necessary paperwork where the absorbing company held the vast majority of shares in the absorbed company.

The most significant measure is probably the creation of a "simplified" merger for ninety percent subsidiaries,[53] giving the parent company a right to force minority shareholders to either accept a buy-out offer or see their shares transferred into the parent company.

B. OTHER DEVELOPMENTS

1. *French Government Barring Foreign Investment*

Foreign investment control regulations had been reduced to the military and the gaming sectors. Nevertheless, when the U.S. group Danaher initiated a friendly takeover bid for high-tech engineering company Ingenico in December 2010, the French government exercised hard pressure on Ingenico through one of its publicly controlled shareholders to reject the bid, indicating it would veto the bid relating to a company of strategic importance in France.[54] It is not known whether this will remain an isolated case or whether it should be seen as a path to higher protectionism.

2. *Piercing the Corporate Veil*

French labor courts created a new way to "pierce the corporate veil" by holding parent companies as "co-employers" of their subsidiaries' employees. In two decisions in 2011,[55] the Cour de Cassation held parent companies to be co-employers with their subsidiaries, and consequently responsible for dismissal indemnities that the subsidiaries failed to pay. Such decisions were grounded in the fact that the parent companies had a community of interests with their subsidiaries, evidenced by common management policies and regular interference in the subsidiary's activities by direct supervision of the subsidiary's executives by employees of the parent. The parent company was held liable for indemnities not only to the executives of the subsidiary, but also to all employees of the subsidiary.

---

52. Loi 2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit (1) [Law 2011-525 of May 17, 2011 on the Simplification and Improvement of Quality of Law (1)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], May 18, 2011, p. 8537, *supplemented by* Décret 2011-1473 du 9 novembre 2011 relatif aux formalités de communication en matière de droit des sociétés [Decree No. 2011-1473 of November 9, 2011 Relating to the Formalities of Communication in Company Law], JOURNAL OFFICIEL DE LA REPULIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 10, 2011, p. 188993.

53. C. COM. art. L236-11-1 (Fr.), *available at* http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000024028817&cidTexte=LEGITEXT000005634379&dateTexte=20120208&oldAction=rechCodeArticle.

54. Ben Hall, *Danaher Move for Ingenico Blocked*, FINANCIAL TIMES (Dec. 21, 2010), http://www.ft.com/cms/s/2/0bfaefbe-0bc7-11e0-a313-00144feabdc0.html#axzz1nnmoXg3p.

55. Cour de Cassation [Cass.] [Supreme Court for Judicial Matters], soc., Jan. 18, 2011, Bull. civ. V, No. 09-69199 (Fr.); Cour de Cassation [Cass.] [Supreme Court for Judicial Matters], soc., Sept. 28, 2011, Bull. civ. V, No. 10-12279 (Fr.).

IV. Germany

A. Legislation Affecting M&A Transactions

1. *Disclosure of Cash-Settled Equity Derivatives*

The Act for the Strengthening of Investor Protection and the Improvement of Capital Market Efficiency[56] will enhance the disclosure of equity derivatives relating to shares of listed companies and is expected to make secret stake-building in listed companies more difficult.[57] The new law takes effect on February 1, 2012 and will introduce disclosure (i) of instruments "making it possible" for their holder to acquire shares,[58] and (ii) of return claims under securities loans and repurchase claims under repossession transactions.[59] Therefore, disclosure will extend to (i) cash-settled instruments if the counterparty can hedge its risks under the instruments by holding the relevant shares,[60] and (ii) instruments providing for physical settlement even if they do not confer the right to acquire shares unilaterally.[61] The latter include physical call options subject to a condition beyond the control of the holder of the instrument, or physical put options.

Disclosure is required if the underlying reaches or exceeds (or falls below) five, ten, fifteen, twenty, twenty-five, thirty, fifty, or seventy-five percent of the share capital. The percentage will be determined based on the number of voting shares that the counterparty would hold at the time of the acquisition of the instrument to fully hedge its position. The hypothetical voting rights under such instruments shall be aggregated with the voting rights that are disclosable under current legislation.[62]

As a counterweight to the broad, sweeping disclosure requirements, the Federal Ministry of Finance was given authority to decree exceptions necessary to eliminate irrelevant disclosures resulting from derivatives on baskets and indices,[63] or from hedging transactions incurred by financial service providers when closing open positions incurred for their customers' benefit.[64] As the Ministry has not made use of such authority, it remains to be seen whether the rules in the statute master the challenge to bring hidden ownership to light and filter away irrelevant disclosures.

---

56. Gesetz zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarkts [Act for the Strengthening of Investor Protection and the Improvement of Capital Market Efficiency], Apr. 7, 2011, Bundesgesetzblatt, Teil I [BGBl. I] at art. 1. (Ger.).

57. Hartmut Krause, *Die Erweiterte Beteiligungstransparenz Bei Börsennotierten Aktiengesellschaften: Neue Mitteilungspflichten für Eigenkapitalderivate und Andere Instrumente Aufgrund des Anlegerschutzund Funktionsverbesserungsgesetzes* [The Enhanced Participation of Transparency in Listed Companies: New Disclosure Requirements for Equity Derivatives and Other Instruments on the Basis of the Anlegerschutzund Improvement Act], 56 Die Aktiengesellschaft [The Corporation] 469, 484 (2011).

58. Gesetz über den Wertpapierhandel [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBl. I at para. 25a (Ger.).

59. *See* Gesetzesentwurf [Bill], Nov. 8, 2010, BT 17/3628 at 19 (Ger.), *available at* http://dipbt.bundestag.de/dip21/btd/17/036/1703628.pdf; *see generally* Krause, *supra* note 57.

60. Securities Trading Act, BGBl. I at 1842, § 25a (Ger.).

61. *Id.* § 25a(1), sentence 2 (Ger.).

62. *Id.* § 25a(4), sentence 6 (Ger.).

63. *Id.* § 25a(4), sentence 1 (Ger.).

64. *Id.* § 25a (Ger.).

2. *Squeeze-Out of Minority Shareholders in the Context of Upstream Merger*

The Third Act for the Amendment of the Transformation Act[65] introduced a new procedure for the squeeze-out of minority shareholders, which is available to shareholders owning ninety percent or more of the share capital of a stock corporation.[66] German law features three different squeeze-out procedures: (i) squeeze-out by shareholder resolution pursuant to the Stock Corporation Act, available to a ninety-five percent shareholder in a stock corporation;[67] (ii) squeeze-out by court ruling pursuant to the Takeover Act, available only to a bidder of a takeover or mandatory bid during a three-month period after the end of the offer period, provided such bidder has received acceptances of ninety percent or more of the share capital to which the offer was addressed, and further provided that such bidder owns ninety-five percent or more of the share capital of the target company when the court filing is made;[68] and (iii) the new procedure under the Transformation Act.

The new procedure is available only in context of an upstream merger. It requires that both parent and subsidiary are incorporated either as stock corporation (AG), as partnership limited by shares (KGaA) or as European Company (SE).[69] It further requires the squeeze-out to be agreed in the merger agreement, and the shareholder vote of the subsidiary to be taken within three months after notarization of the agreement.[70] The squeeze-out becomes effective when the merger is recorded in the commercial register of the parent company.[71]

3. *Corporate Acquisitions Via "Loan to Own" Strategies*

The Act for the Further Facilitation of the Restructuring of Businesses[72] will provide easier access to debt-to-equity swaps in insolvency plan proceedings and should facilitate this type of transaction even before the debtor goes insolvent. Currently it is de facto impossible to implement a debt-to-equity swap not supported by current shareholders. Their votes are required to adopt the necessary shareholder resolutions on a simplified share capital reduction[73] and an immediate share capital increase[74] against contribution in kind under which creditors who choose to become shareholders contribute their payment claims towards new shares.

65. Drittes Gesetz zur Änderung des Umwandlungsgesetzes [Third Amendment to the Transformation Act], July 11, 2011, BGBL. I at 1338 (Ger.).

66. Umwandlungsgesetz [UmgW] [Transformation Act], Oct. 28, 1994, BGBL. I at 3044, § 62(5) (Ger.).

67. Aktiengesetz [AktG] [Stock Options Act], Sept. 6, 1965, BGBL. I at 1089, § 327a (Ger.).

68. Wertpapiererwerbs- und Ubernahmegesetz [WpÜG] [Takeover Act], Dec. 22, 2011, BGBL. I at 3044, § 39a–39b (Ger.).

69. Transformation Act, BGBL. I at 3044 (Ger.).

70. *Id.* § 62(5).

71. *Id.* § 62(5), sentence 7.

72. Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen [BR] [Act to Further Facilitate the Restructuring of Companies], Oct. 27, 2011, 17/551 (Ger.) (adopted by the German Federal Parliament on October 27, 2011, effective enforcement Mar. 1, 2012).

73. Stock Corporation Act, BGBL I at 1089, §§ 222(1), 229 (Ger.); Gesetz betreffend die Gesellschaften mit beschränkter Haftung [GmbHG] [Limited Liability Company Act], Dec. 22, 2011, BGBL I at 3044, § 58(a) (Ger.).

74. Stock Corporation Act, BGBL I at 1089, § 182(1) (Ger.); Limited Liability Company Act, BGBL I at 3044, §§ 53(1), 3(1) (Ger.).

Under the new rules, it will be possible to implement a debt-to-equity swap as part of an insolvency plan, regardless of supporting or opposing incumbent shareholders,[75] so long as the insolvency plan receives the necessary majority approvals from the relevant stakeholder groups.[76] Furthermore, the new rules eliminate liability risks for the new shareholders that may materialize if the value of the contribution falls short of the value of the new shares; such claims will be barred after the insolvency plan has been confirmed by the insolvency court.[77]

The impact of the new rules will reach far beyond insolvency plan proceedings. Incumbent shareholders who know they can be overruled in an insolvency plan will likely factor this in when negotiating debt-to-equity swap pre-insolvency. The impairment of incumbent shareholders should be an incentive for hedge funds and other investors to purchase corporate debt below par value and then push for conversion of their debt into equity. It appears that "loan to own" strategies will have tailwind once the new rules have become effective.

V. The Netherlands

A. Act on Management and Supervision

The First Chamber of the Dutch Parliament adopted a new act on management and supervision on May 31, 2011.[78] This Act is expected to enter into force on July 1, 2012, and introduces various statutory provisions that will affect the composition of Dutch company boards. First, the Act provides a statutory basis for the "one-tier board system" within Dutch companies by creating a board comprising of both executive and non-executive members.[79] This structure is an alternative to the existing two-tier system of management and supervisory boards.

The Act also contains statutory provisions to maximize the number of supervisory or non-executive positions that a member of a management or supervisory board of a "large" private liability company (a B.V.), public liability company (a N.V.) or a Foundation (stichting) can hold. A company is considered "large" if two of the following three criteria are met: (i) the value of its assets exceeds EUR 17.5 million; (ii) its net turnover exceeds EUR 35 million; or (iii) its average number of employees equals or exceeds 250. Under these statutory provisions, a person may not be appointed as managing director in a large company if he or she has two or more supervisory positions with other large companies, or if he or she is a chair of a supervisory board or a one-tier board of another large company. Supervisory directors will be prohibited from holding more than five supervisory or non-executive positions. Chairing a supervisory board or a one-tier board will count as two supervisory positions.[80] By introducing these statutory provisions, the legislator intends

75. Insolvenzordnung [InsO] [Insolvency Code], BGBL I at 1885, § 225(2), sentence 1.

76. *Id.* §§ 243–51.

77. *Id.* § 254(4).

78. Wet van 6 juni 2011 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen [Law of 6 June 2011 Amending Book 2 of the Civil Code in Connection with the Adjustment of Rules on Management and Control in Public and Private Companies], Stb. 2011 (Neth.).

79. Burgerlijk Wetboek [BW] [Civil Code] arts. 2:129a, 2:239a (Neth.).

80. *Id.* arts. 2:132a, 2:142a, 2:242a, 2:252a, 2:297a, 2:297b.

to prevent a dilution of responsibilities with respect to members of company boards. However, the number of supervisory positions held by members of company boards with foreign companies or with group companies of large companies will not be counted.

In an attempt to increase the participation of women on the boards of large B.V.'s and N.V.'s, the Act introduces a rule that at least thirty percent of the positions on the management and supervisory boards of these large companies are held by women and at least thirty percent by men.[81] There is no legal sanction for non-compliance with this gender diversity rule, although non-compliance must be explained in the annual report.

B. Easier Incorporation Process for Dutch B.V.'s and N.V.'s

Legislation that came into force on July 1, 2011 introduced a new system to supervise companies relating to the prevention of the improper use of legal entities.[82] The old system required prior approval from the Ministry of Justice to incorporate certain legal entities. The new system involves the screening of legal entities on a continuous basis. The incorporation of a B.V. or N.V., or the amendment of the articles of association of such companies, no longer requires the so-called statement of no objection from the Ministry of Justice. In international transactions or restructurings that involve the incorporation of a Dutch holding company, it will no longer be necessary to complete cumbersome questionnaires and provide financial information on the shareholders and managing directors of such companies to the Ministry of Justice.

C. Proposed Corporate Governance Changes

The proposed Act of 2009[83] concerning the corporate governance of listed companies was still pending before Second Chamber of the Dutch Parliament in 2011. This proposal lowers the thresholds for the disclosure of shareholders' control from five to three percent.[84] Shareholders with an interest of three percent or more must indicate whether they agree with the company's strategy. If their opinion of the company's strategy changes, they will also need to notify the company of this change. Further, the threshold for shareholders to have the right to add items to the agenda at general meetings is to be increased

81. *Id.* arts. 2:166, 2:276.

82. Wet van 7 juli 2010 tot wijziging van onder meer Boek 2 van het Burgerlijk Wetboek en de Wet documentatie vennootschappen in verband met het vervallen van de verklaring van geen bezwaar en het verbeteren en uitbreiden van de controle op rechtspersonen met het oog op de voorkoming en bestrijding van misbruik van rechtspersonen [Law of 7 July 2010 Amending Among Other Things, Book 2 of the Civil Code and the Companies Act Documentation in Connection with the Revocation of the Declaration of No Objection and to Improve and Expand the Control of Legal Persons for the Purpose of Preventing and Combating Legal Abuse], Stb. 2010 (Neth.).

83. Wetsvoorstel tot wijziging van de Wet op het financieel toezicht, de Wet giraal effectenverkeer en het Burgerlijk Wetboek naar aanleiding van het advies van de Monitoring Commissie Corporate Governance Code van 30 mei 2007 [Bill to Amend the Act on Financial Supervision, the Securities Giro Act and the Civil Code, Following the Advice of the Monitoring Committee Corporate Governance Code of 30 May 2007] (32 014), Kamerstukken II 2008/09, 32014, nr. 3 (2010).

84. Wet van 28 september 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop [Establishing Rules Relating to the Financial Markets and Supervision [Wft] [Financial Supervision Act], arts. 5:38, 5:39 (2010) (Neth.).

from one to three percent,[85] and it will be easier for listed companies in the Netherlands to obtain the identity of their shareholders in order to facilitate communicating with them. Because the proposal encountered strong criticism, it is uncertain if it will be adopted in its current form.

D. NEW "FLEX B.V."

In 2011, the Second Chamber of the Dutch Parliament adopted changes to the Act of implementation[86] of the so-called "Flex-BV" Act.[87] The First Chamber of the Dutch Parliament is expected to adopt both of these Acts in 2012. Following years of preparation and discussion on the simplification of the Dutch B.V., these Acts may then finally become effective in 2012. The Flex-BV Act intends to create more flexibility in relation to the statutory provisions that set out how private limited liability companies are organized.

The new statutory provisions will be relevant for international joint ventures organized as Dutch B.V.'s and include the following:

(i) denominations of shares either in euro or in other currencies when appropriate will become possible;[88]
(ii) it will no longer be required to include a share transfer restriction clause in the articles of association, and if included it can be tailored;[89]
(iii) there will be more possibilities for the repurchase of own shares and to make shareholder distributions;[90]
(iv) the right of appointment of one or more managing directors can be attached directly to one or more classes of shares;[91]
(v) the convocation period for shareholders meetings will be shortened from fifteen to eight days.[92]

E. DIRECTORS' LIABILITY

Under Dutch law, a legal entity can be managing director of another legal entity. In case of mismanagement, in addition to the legal entity acting as the managing director, the managing directors of such legal entity can be held jointly and severally liable. The purpose of the provision is to avoid improper use of incorporations. On March 18, 2011, the

85. BURGERLIJK WETBOEK [BW] [CIVIL CODE] art. 2:114a (Neth.).

86. Wetsvoorstel tot aanpassing van de wetgeving aan en invoering van de Wet vereenvoudiging en flexibilisering bv-recht (Invoeringswet vereenvoudiging en flexibilisering bv-recht) [Bill to Amend the Legislation and Introduction of the Act], Kamerstukken I 2011/12, 32 426, nr. A.

87. Wetsvoorstel tot Wijziging van Boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van de regeling voor besloten vennootschappen met beperkte aansprakelijkheid (Wet vereenvoudiging en flexibilisering bv-recht) [Bill to Change Book 2 of the Civil Code in Connection with the Adjustment of the Regime for Private Companies with Limited Liability (Simplification and Flexibility Law), Kamerstukken I 2009/10, 31 058, nr. A.

88. BW art. 2:178 (Neth.).

89. *Id.* art. 2:195 (Neth.).

90. *Id.* arts. 2:207, 2:216 (Neth.).

91. *Id.* art. 2:242 (Neth.).

92. *Id.* art. 2:225 (Neth.).

Dutch Supreme Court decided how this provision should be applied when foreign legal entities are involved as managing director of a Dutch company.[93]

In the case, a Belgian legal entity was head of an international group and acted as managing director of a Dutch holding company, which, in turn, was managing director of certain Dutch subsidiary companies. Three of the subsidiary companies went bankrupt, and the lower court ruled at the request of the receiver in bankruptcy that due to mismanagement, its managing director, the holding company, was liable for the deficit in the estate. Also the company that headed the group, in its capacity as managing director of the holding company, was held jointly and severally liable for the deficit; the fact that this company was a Belgian legal entity was irrelevant. The Dutch Supreme Court ruled that this was a Dutch law question because the company was incorporated in the Netherlands and went on to confirm that the Dutch statutory provision therefore also applies to foreign legal entities holding managing positions in Dutch legal entities (in the same way that it applies to Dutch legal entities). However, whether the individuals holding the position of managing director of the Belgian company heading the group can be held liable is not a matter of Dutch law, but of the law governing such company (Belgium in this case).[94]

F. Inter access case

On February 25, 2011, the Dutch Supreme Court confirmed a decision of December 31, 2009 of the Enterprise Chamber of the Amsterdam Court of Appeal that sidelined the majority shareholder of Inter Access Group N.V.[95] In confirming the decision, the Dutch Supreme Court set aside objections of the majority shareholder against the issuance of new shares to facilitate a debt/equity swap. The company was in a serious financial situation; if no action were to be taken, it was highly likely that the company would go into bankruptcy, which would impact other stakeholders, including its employees. Taking into account the financial situation of the company, the Enterprise Chamber concluded that there were well-founded reasons to doubt the correctness of the policy within the company. Consequently, the Enterprise Chamber, by way of an immediate measure, enabled the implementation of the debt/equity swap without the cooperation of the majority shareholder. This resulted in the majority shareholder being diluted from approximately sixty percent to twelve percent, notwithstanding the anti-dilution arrangements in the shareholders' agreement. According to the Dutch Supreme Court, because the company's serious financial situation required an urgent solution, the measures provided by the Enterprise Chamber were justified even if they interfered with the existing corporate governance structure and could have irreversible consequences.[96]

93. HR 18 maart 2011, NJ 2011, 132 m.nt. Prof. G. Solinge (D Group Eurpoe N.V./Schreurs) (Neth.).

94. *Id.* para. 4.

95. HR 2 Feb. 2011, NJ 2011, 335 m nt. P. van Schilfgaarde (Marigot Investissements N.V./Stichting Continuiteit Inter Access Groep) (Neth.); Hof's-Amsterdam 31 December 2009, JOR 2010, 60 m. nt. A. Doorman (Stichting Continuïteit Inter Access Groep/Inter Access Group BV) (Neth.) (decided in the Enterprise Chamber). The Enterprise Chamber (Ondernemingskamer) is a special branch of the Amsterdam Court of Appeal (Gerechtshof) dealing only with company disputes, not unlike the Delaware Court of Chancery in the United States.

96. Hof's-Amsterdam 31 December 2009, JOR 2010, 60 m. nt. A. Doorman (Stichting Continuïteit Inter Access Groep/Inter Access Group BV) (Neth.).

VI. United States

A. Significant Corporate Law Decisions: Poison Pills and Revlon Duties

In one of the most anticipated corporate law cases of 2011, the Delaware Chancery Court addressed the fundamental question of who (*i.e.*, the board of directors or stockholders) "gets to decide when and if the corporation is for sale" in a hostile tender offer.[97] In the case before the court, the would-be acquirer (Air Products) claimed that the maintenance of a shareholder rights plan (or poison pill) by the Airgas board of directors wrongfully precluded its shareholders from considering Air Products' tender offer. In upholding the right of the Airgas board to maintain the poison pill, Chancellor Chandler held that "as Delaware law currently stands, the answer must be that the power to defeat an inadequate hostile tender offer ultimately lies with the board of directors."[98]

Although Delaware seems to be moving towards the increasingly popular "shareholder democracy" regime in which shareholders have input in matters previously within the exclusive domain of the board of directors, it is significant that the Airgas case demonstrated the unwillingness of the Chancery Court to diminish director power in the hostile tender offer context.

Another significant Delaware Chancery Court case, *In re Smurfit-Stone Container Corp. Shareholder Litigation*, addressed the issue of whether so-called "*Revlon* duties" apply where merger consideration is split evenly between cash and stock.[99] *Revlon* duties generally require a target's board of directors to maximize shareholder value in a sale of the company (i.e., fundamental change of corporate control).[100] In past cases involving whether a change of control has occurred for purposes of invoking *Revlon* duties, the Delaware courts have held that thirty-eight percent stock (and sixty-two percent cash) constitutes a change of control,[101] but sixty-seven percent stock (and thirty-three percent cash) did not change control.[102] Although it was noted with some hesitation, the Delaware Chancery Court held that the enhanced *Revlon* duties are applicable where merger consideration is split 50/50 between cash and stock. The court reasoned that *Revlon* duties ought to apply when a transaction ends all or a substantial part of shareholder's investment in the corporation.

B. Tax Reform Proposals

Several substantial changes to the U.S. tax code were proposed in 2011 that, if enacted, would affect M&A activity. For example, there has been increased attention focused on moving the United States towards a territorial tax system. The United States currently taxes its residents (individuals and corporations) on income earned anywhere in the world. In the most comprehensive proposal, introduced by House Ways and Means Chairman Dave Camp (R-MI), there would be an exemption for ninety-five percent of the dividends

97. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 54 (Del. Ch. 2011).
98. *Id.*
99. *In re* Smurfit-Stone Container Corp. S'holder Litigation, No. 6164-VCP, 2011 WL 2028076, at *1 (Del. Ch. May 20, 2011).
100. Revlon v. MacAndrews & Forbes Holdings Inc., 506 A.2d 173, 182 (Del. 1986).
101. *In re* Lukens Inc. S'holders Litigation, 757 A.2d 720, 725 (Del. Ch. 1999).
102. *In re* Santa Fe Pacific Corp. S'holder Litigation, 669 A.2d 59, 70–71 (Del. 1995).

and capital gains from foreign operations.[103] If the United States moves to a territorial system, it may encourage U.S.-based multinationals to engage in more M&A activity by improving the return on investment from foreign acquisitions and helping to reduce the possibility of tax on transfers of capital among affiliates.

In addition, proposals continue to focus on increasing taxes with respect to the carried interest earned by many private equity and venture capital fund managers. Under current tax law, a carried interest, or the share of the profits of a partnership that is paid to the partnership's manager, is taxed based on the characterization of the partnership's underlying income, which often results in favorable capital gains tax rates (currently fifteen percent). Under the proposed legislation, income with respect to a carried interest would be taxed at the higher ordinary income tax rates (currently thirty-five percent).

As a related matter, at the end of 2012, U.S. tax rates are slated to increase significantly. Without legislative intervention, qualified dividends will no longer be taxed at preferential rates (generally fifteen percent), the top marginal income tax rate will increase from thirty-five to 39.6%, and most long-term capital gain rates will increase from fifteen to twenty percent. If these, or other income tax increases, such as the carried interest tax proposal mentioned above, become imminent, private equity and venture capital fund managers may be encouraged to liquidate many of their investments prior to the effective date of the tax increases. Developments in this regard could further increase M&A activity.

C. Changes to Hart-Scott-Rodino Pre-Merger Notification Rules

Changes to the pre-merger notification rules required under the Hart-Scott-Rodino Antitrust Improvement Act of 1976 announced by the Department of Justice and Federal Trade Commission took effect in August 2011. Although the new rules were meant to streamline the antitrust clearance process, the changes will likely increase the regulatory burden for companies seeking merger approval as they attempt to navigate new document production requirements.

103. Press Release, Chairman Dave Camp, House Ways and Means Committee, Camp Releases International Tax Reform Discussion Draft (Oct. 26, 2011), http://waysandmeans.house.gov/News/DocumentSingle.aspx?DocumentID=266168.