International M&A and Joint Ventures

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This article reviews developments during 2009 in international mergers and acquisitions (M&As) and joint ventures in Argentina, Belgium, Brazil, Canada, China, Germany, India, Italy, the Netherlands, the United Kingdom, and the United States. Because of space limitations this year, this article could not include nineteen other jurisdictions for which the committee prepared reports: Australia, Austria, Chile, Costa Rica, Croatia, Denmark, the European Union, Greece, Israel, Luxembourg, New Zealand, Portugal, Singapore, South Africa, Spain, Sweden, Switzerland, Ukraine, and Vietnam. Reports for those countries are available on the committee's website.[1]

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** Member, Womble Carlyle Sandridge & Rice, PLLC, Greensboro, North Carolina, also served as committee editor. The three committee editors wish to acknowledge the editorial assistance of Katherine H. Woodcock, an associate at Lorenz.

1. For the full article, *see* http://meetings.abanet.org/webupload/commupload/IC120000/newsletterpubs/M&AYIR2009-masterdraftv7.pdf. The full article includes the following jurisdictions: 1) Australia, by Ezekiel Solomon and Andrew Finch of Allens Arthur Robinson; 2) Austria, by Paul Luiki, Maria Thierrichter, and Patrick Maydell of Fellner Wratzfeld & Partner Rechtsanwälte GmbH; 3) Chile, by Francisco Ugarte and Macarena Vargas of Carey y Cia. Ltda; 4) Costa Rica, by David Gutiérrez and Carolina Trejos of BLP Abogados; 5) Croatia, by Miroljub Macešic from the Law Offices of Miroljub Macešic; 6) Denmark, by Anders M. Hansen of Danders & More; 7) European Union, by Mattia Colonnelli de Gasperis of Colonnelli de Gasperis; 8) Greece, by Harry Stamelos; 9) Israel, by Ronald Lehmann of Fischer Behar Chen Well Orion & Co.; 10) Luxembourg, by Carine Feipel and Bob Calmes of Arendt & Medernach; 11) New Zealand, by David Quigg, John Horner, and Asha Stewart of Quigg Partners; 12) Portugal, by Diogo Leónidas Rocha and Bruno Ferreira of Garrigues LLP; 13) Singapore, by Mark Oakley of Duane Morris, LLP; 14) South Africa, by Michael Judin of Goldman Judin Inc, and Penny Bosman, Advocate of the High Court; 15) Spain–part I, by Alessandra de Magalhaes of Garrigues LLP; 16) Spain–part II, by Albert Garrofé and Idoya Fernández of Cuatrecasas, Gonçalves Pereira; 17) Sweden, by Carl Westerberg, Fredrik Palm and Leo Lee of Gernandt & Danielsson Advokatbyrå KB; 18) Switzerland, by Florian S. Jörg and Marc Ryser of Bratschi, Wiederkehr & Buob; 19) Ukraine, by Peter Z. Teluk and Volodymyr Smelik of Squire, Sanders & Dempsey LLP; and 20) Vietnam, by Oliver Massmann, Giles Cooper and Mark Oakley of Duane Morris LLP.

I. Argentina*

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

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

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

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

- Argentine businessman Marcelo Mindlin bought Orígenes Retiro, a pension fund, through Dolphin Investment Fund ($25 million);[2]
- Eduardo Eurnekian purchased fifty percent of the share package of Bodegas del Fin del Mundo S.A., a wine producer owned by the Viola family ($50 million);[3]
- Banco de Galicia y Buenos Aires S.A. bought eighty percent of AIG Universal Processing Center S.A. and an investment group arranged by Grupo Pegasus purchased the remaining twenty percent of AIG Universal Processing Center S.A. for $45 million;[4]
- American Plast y Dixie Toga S.A. purchased Huhtamaki Argentina ($43 million);[5]
- Ledesma, a cane sugar producer, purchased seventy percent of the assets of Los Balcanes (at $23.9 million) to get into La Florida, a cane sugar mill producer in the Province of Tucumán;[6] and
- Chevron sold its facilities in the Province of Santa Cruz (together with an American partner) to Roch.[7]

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

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* This section was authored by Saul Feilbogen and Vanesa Balda, Vitale, Manoff & Feilbogen, Buenos Aires, Argentina.

2. Cecelia Valleboni, *M&A: Argentine Domain*, APTERTURA.COM (Arg.), July 14, 2009, http://www.apertura.com/notas/196048-ma-dominio-argentino.

3. *Id.*

4. *Id.*

5. *Mergers and Acquisitions of the Month*, 11:4 MERGER NEWS (Arg.), July 2009, http://www.mergersnews.com.ar/n47/fusiones.htm.

6. Valleboni, *supra* note 2.

7. Mergers and Acquisitions of the Month, *supra* note 5.

As to the origin of the funds, local investors continued their strong presence, accounting for over eighty percent of the transactions. The number of transactions performed by foreign buyers has fallen, however, representing about twenty percent of the M&A transactions denominated in U.S. currency, as opposed to fifty percent during the last half of 2008.

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

After the 2001 crisis, Argentine companies have again dared to enter long-term investments in the M&A market, but only in the last two years. Local actors have emerged as the strongest investors in this region, consolidating a trend that started in the last quarter of 2008. In fact, in the 1990s investment funds and large international companies came to Argentina in search of local companies, but this trend reversed following the 2001crisis. Argentine companies saw good opportunities to buy competitors' or supplementary businesses in order to mitigate the post-crisis effects.

Last, we should mention the situation created as a result of the enactment of Statute 26.425, which took effect in December 2008.[8] This statute changed the national pension system, transferring all the resources from pension contributions that were previously owned by private pension funds (*Administradoras de Fondos de Jubilaciones y Pensiones* or "AFJP") and are now transferred to the government. Thus, the Argentine Government has now become a shareholder in those public companies (quoting in the Stock Exchange) where private pension fund companies had previously invested.

II. Belgium*

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

Furthermore, Belgium remains attractive to investors as a result of government incentives, including direct aid, employment and training incentives, and tax measures. Some of the more stimulating tax incentives are: (i) the so-called "notional interest deduction," which allows all companies subject to the Belgian corporate tax to deduct from their taxable income an amount equal to the interest they would have paid on their capital had it been subject to long-term debt financing,[9] and (ii) the "patent income deduction," pursu-

8. Law 26425, Dec. 9, 2009, [31548] B.O. 1-2.

* This section was authored by Steven De Schrijver and Jeroen Mues, Lorenz, Brussels, Belgium.

9. Dirk Van Stappen, *Belgium: Notional Interest Deduction Remains an Attractive Tax Feature*, INT'L TAX REV., Feb. 2009, http://www.internationaltaxreview.com/?Page=10&PUBID=35&ISS=25283&SID=716794&TYPE=20.

ant to which companies are able to deduct eighty percent of the income of newly registered patents from their taxable income.[10]

A. MAJOR TRANSACTIONS

In Belgium:

- GlaxoSmithKline acquired some assets from UCB SA, a leading Belgian biopharma company (€515 million);[11]
- ENI, an Italian energy group, acquired a fifty-seven percent stake in Distrigaz, the Belgian natural gas distribution company (€1.99 billion);[12] and
- Abbott, a global, broad-based health care company devoted to the discovery, development, manufacture, and marketing of pharmaceuticals and medical products of the entire pharmaceutical business, acquired Solvay, an international chemical and pharmaceutical group with headquarters in Brussels and listed on Euronext Brussels (€5.2 billion).[13]

By Belgian Companies:

- Publigas, the natural gas holding of the Belgian municipalities, acquired a six percent stake in Fluxys, the Belgian independent operator of the natural gas transmission system, for (€114 million);[14]
- Delhaize, a company active in the field of food distribution through supermarkets, acquired all shares of the Greek distributor Koryfi through its subsidiary Alfa-Beta Vassilopoulos for €7 million (plus €1.8 million financial debt);[15] and
- Sandoz, a division of the Belgian Novartis group, the fourth biggest Belgian player in the innovative pharmaceuticals sector, acquired the Austria-based EBEWE Pharma's generic injectables business, for €925 million.[16]

B. LEGISLATIVE DEVELOPMENTS: THE NEW RULES ON FINANCIAL ASSISTANCE

In 2006, the European Parliament issued Directive 2006/68/EC (the Directive), providing the Member States with an opportunity to ease some of the capital protective measures, as set out in Directive 77/91/EEC, regarding the formation of public limited

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10. Eric Warson & Manuella Foriers, *Belgium: Deduction for Patent Income: A New Measure in Favour of Innovation*, INT'L TAX REV., May 2007, http://www.internationaltaxreview.com/?Page=10&PUBID=35&ISS=23798&SID=685116&TYPE=20.

11. *Glaxo Buys UCB Patents*, DOMAIN-B.COM, Jan. 24, 2009, http://www.domain-b.com/companies/companies_g/GlaxoSmithKline/20090124_ucb_patents.html.

12. Philip Blenkinsop & Julien Ponthus, *Eni buys Suez's Distrigas Stake*, REUTERS, May 29, 2008, http://www.reuters.com/article/idUSL2979933620080529.

13. Val Brickates Kennedy & Simon Kennedy, *Abbott to Buy Solvay Drug Business for up to $7 Billion*, WALL ST. J., Sept. 28, 2009, http://www.marketwatch.com/story/abbott-to-pay-up-to-7-billion-for-solvay-division-2009-09-28.

14. Press Release, Fluxys, Results for the First Half of 2009 (Aug. 28, 2009), *available at* http://www.fluxys.com/en/NewsAndPress/090828_Half-Yearly%20Results%202009.aspx.

15. *Delhaize Group's Alfa-Beta Acquires Greek Retailer Koryfi*, FLEXNEWS, Feb. 14, 2010, http://www.flexnews-food.com.

16. Press Release, Sandoz, Sandoz Completes Acquisition of EBEWE Pharma (Sept. 24, 2009), *available at* http://www.sandoz.com/site/en/media_room/press_releases_news/090924.shtml.

liability companies and the maintenance and alteration of their capital.[17] In Belgium, the Directive was implemented by a Royal Decree that amended the rules on financial assistance in the Belgian Companies Code (BCC).[18] These new rules entered into force on January 1, 2009, and allow a company, under certain strict conditions, to provide financial assistance to a third party willing to acquire its shares.

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

1. *The Former Prohibition on Financial Assistance*

Under the former wording of Article 629 BCC, "a NV/SA was prohibited from advancing funds, granting loans, or giving guarantees" intended for the acquisition or the subscription of its shares or profit sharing certificates by a third party.[19]

2. *A Summary of the New Rules on Financial Assistance*

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

- The transaction must take place under the responsibility of the company's board of directors at fair market conditions (*i.e.*, taking into account the usual market interest rate and the usual collaterals for similar types of financing, as well as the third party's credit standing);
- The transaction is subject to prior approval by the general shareholders' meeting (with the same quorum and majority requirements as for an amendment to the Articles of Association);
- The Board of Directors must draft a special report, explaining (i) the reasons for such transaction, (ii) the company's interest to enter into such transaction, (iii) the conditions of the transaction, (iv) the liquidity and solvency risks involved, and (v) the price at which the shares will be sold. This report is published pursuant to Article 74 BCC (in the Annexes to the Belgian Official Journal). In addition, if a director of the parent company or the parent company itself benefits from the transaction, the report of the board must explicitly justify such a decision taking into account the capacity of the beneficiary and the consequences for the assets of the company;
- The assistance must be paid out of and cannot exceed the amount of distributable profits (within the meaning of Article 617 BCC). For that purpose, the company

17. Bulletin, European Commission, Company Law, Corporate Governance and the Fight Against Financial Crime (Jan. 2, 2009), *available at* http://europa.eu/bulletin/en/200901/p111016.htm.

18. Royal Decree (Belg.) of Oct. 8, 2008 (amending the Companies Code in accordance with Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital).

19. Steven De Schrijver & Jeroen Mues, *Lorenz on the New Rules on Financial Assistance in Belgium*, HG.ORG, Feb. 2, 2010, http://www.hg.org/article.asp?id=7396.

must set up a non-distributable reserve on the liabilities' side of its balance sheet equal to the total amount of the financial assistance; and

- When a third party acquires shares from the company, or through a subscription by the beneficiary to a capital increase, with the financial assistance of the company, the acquisition of the company's shares must occur at a fair price.[20]

The same conditions apply to the BVBA/SPRL and CVBA/SCRL, as well as to the partnerships limited by shares (SCA/Comm. VA).[21] Except for the requirement of sufficient distributable profits, the abovementioned conditions do not apply when financial assistance is granted to members of the personnel or to affiliate companies controlled by the personnel.[22] Thus, more flexibility is allowed in parent and subsidiary transactions and employee and management transactions.

3. *General Observations*

The new rules facilitate the granting of financial assistance by a company in view of the acquisition of its shares by a third party.[23] But the question remains whether companies will be deterred from applying the procedure for financial assistance in acquisitions because of its strict conditions.[24] Indeed, the new Article 629 BCC imposes on the company the obligation to publish the entire report, as drafted by the board of directors, including details of the conditions of the transaction, in the Annexes to the Belgian Official Journal.[25] Certain companies will be reluctant to disclose such sensitive information to the public. Under these new rules, the board of directors is responsible for the financial assistance to the extent it has to investigate whether the assistance is given under fair market conditions and whether the purchaser of the shares is creditworthy.[26] Pursuant to the BCC, the directors of the target company can be held jointly and severally liable towards the company and third parties for any damages resulting from any breaches to the rules.[27] They can also be held criminally liable for any such breach. Such liabilities may dissuade directors when confronted with the possibility to apply the financial assistance rules in less clear-cut cases.[28]

III. Brazil*

The most important development in M&A transactions in Brazil during 2009 is the change of accounting standards used for audited financial statements of the target company, which is evidenced by the transition of the Brazilian generally accepted accounting

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20. *Id.* (as pursuant to article 622, §2 BCC).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

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principles (GAAP) towards the international financial reporting standards (IFRS),[29] especially with regard to goodwill paid under acquisition structures. The application of these new accounting rules for M&A transactions involving the payment of goodwill is regulated by CVM Deliberation No. 580, of July 31, 2009, which approved the Technical Pronouncement CPC 15 of the Accounting Pronouncements Committee (*Comitê de Pronunciamentos Contábeis*–CPC) that deals with business combinations (*combinação de negócios*).[30]

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

The main change, already in full force and effect since January 2009, is that the goodwill paid on the acquisition of Brazilian target companies is subject to annual impairment testing.[32] This means that goodwill is no longer amortized at the level of the Brazilian acquiring company.[33] The impairment, if it occurs, cannot be reversed in the future and it is not deductible for local tax purposes.[34] Therefore, the impairment can affect the acquiring company's net equity and, consequently, the outflow of dividends arising from the target company (the acquired operating company).[35] These implications are only valid for accounting purposes. For tax purposes, the current Brazilian legislation establishes that the new accounting rules shall not increase the company's tax burden and responsibilities.[36] The tax benefits derived from the payment of goodwill for the acquisition of Brazilian target companies are still in force. In most cases, the purchase premium (sales proceeds exceeding book value of the target company) can be recovered (amortized) over a five-year term, *i.e.*, 1/60 each month during the period.[37]

After the merger between the acquiring company and the target company, and provided relevant conditions are met, the goodwill amount may continue to be deducted for local tax purposes.[38] One mandatory condition is to provide evidence that the acquisition structure has been established with consistent business purposes and not with the sole purpose of avoiding taxation in Brazil.[39] Acquisition structures, where the merger has

29. Lei No. 11.638, de 28 dezembro de 2007, D.O.U. de 28.12.2007. (Braz.) (this is the main goal of Lei No. 11.638, which amended the Corporation Law).

30. Deliberação 580, Comissão de Valores Mobiliários, Superintendência-Geral (July 31, 2009) (Braz.).

31. *Id.*

32. Walter Stuber & Adriana Maria Gödel Stuber, *Brazil: Developments in M&A Transactions in Brazil In 2009*, MONDAQ, Oct. 26, 2009, http://www.mondaq.com/article.asp?articleid=88192.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

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

already been carried out, would be more protected in the event of any future changes in the local tax rules, disallowing or reducing the ability to deduct the goodwill.[40]

IV. Canada*

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

A. Amendments to *Investment Canada Act*

The Investment Canada Act (Act) was amended in 2009 to lower obstacles to foreign investment by focusing net benefit reviews on larger transactions. The amended legislation raised the general review threshold from C$ 312 million to C$ 1 billion in gross assets.[41] The Act was also amended to allow the Canadian government to review investments on national security grounds.[42] The amendments to the Act came into effect on March 12, 2009, except the increase in the general review threshold, which will be implemented gradually over the next four years.[43]

B. Stock Exchange Merger Rule Change

On September 25, 2009, the Toronto Stock Exchange (TSX) adopted amendments to its rules requiring listed issuers to obtain security holder approval where they propose to issue securities in connection with an acquisition, where the securities to be issued exceed twenty-five percent of the listed issuer's outstanding securities.[44] The new rule is effective on November 24, 2009, but will not apply to transactions for which the TSX has already been notified before that date. The change was a response by the TSX to a decision of securities regulators in the Province of Ontario, who reversed a prior approval of the TSX on a proposed merger transaction.

C. Amendments to the Competition Act

On March 12, 2009, the Federal Government enacted far-reaching amendments to the Competition Act that fundamentally altered antitrust enforcement in Canada.[45] The

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

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41. Investment Canada Act, R.S.C., ch. 28 (1985) (1st Supp.), amended by 2009 S.C., ch. 16 (Can.).

42. *Id.*

43. *Id.*

44. Paul A. Dempsey, *Canada: TSX Proposes Amendments to Investment Fund Acquisition Rules*, MONDAQ, Dec. 21, 2009, http://www.mondaq.com/canada/article.asp?articleid=91000.

45. Bill C-10, Budget Implementation Act, 2009, 2d Sess. 40th Parl. (2009) (Can.).

amendments included, among other things, changes to conspiracy/cartel provisions, advertising and marketing provisions and repeal of price discrimination, price maintenance, and predatory pricing provisions.[46] Significantly, the changes introduced an entirely new process for merger review in Canada that is more similar to the U.S. second review procedure.[47] Under the new procedure, if the Competition Bureau has concerns with respect to a proposed merger, it can make a demand for documents to the merging parties and the time for review will be extended until the parties fulfill the production requirement.[48] The Commissioner will now have one year, rather than three years, after the transaction closes to challenge it.[49] The introduction of these changes in Canada represents a wholesale change to merger review timing.

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

National Instrument 31-103 Registration Requirements and Exemptions came into effect on September 28, 2009, to harmonize registration requirements across Canada for investment dealers, advisors, and fund managers.[50] But exemptions are still available for international dealers engaged in dealer activities in Canada with "permitted clients," which only includes certain institutional and government investor clients.[51] While such exemptions are similar to the previous Provincial patchwork, the new national exemption regime is slightly narrower in scope and certain new pre-conditions also now apply.[52]

V. China*

During the first three quarters of 2009, the volume of M&A in China declined by 34.5% to $102 billion, compared with the same period in 2008.[53] Some explained that China's improving capital markets, as well as its aggressive monetary policies and approximately $600 billion in stimulus packages helped many Chinese companies survive the financial crisis and fend off takeover attempts.[54]

Others attributed the decline to companies' concerns over the world economic outlook and regulatory changes in China that led to Beijing's disapproval of Coca-Cola Co.'s $2.4 billion bid for China Huiyuan Juice Group Ltd. on questionable anti-monopoly grounds

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Charles R. Spector, et al., *Canada: National Instrument 31-103: Registration Requirements And Exemptions*, Mondaq, Aug. 19, 2009, http://www.mondaq.com/canada/article.asp?articleid=84650.
51. *Id.*
52. *Id.*
* This section was authored by Mei Gechlik, MBA, J.S.D., Lecturer in Law and Microsoft Rule of Law Fellow, Stanford Law School, Stanford University.
53. Naomi Rovnick, Value of Asian Buyouts Falls to 3-year Low; Economic Fears, Trade Barriers Blamed, S. China Morning Post, Oct. 3, 2009.
54. Nick Westra & Tim LeeMaster, Mainland Leads Slowdown in M&A Activity, S. China Morning Post, July 3, 2009.

in March 2009.[55] International companies did not seem to be much affected by such concerns, as their deals involving purchasing Chinese firms fell only 0.7% to $15.9 billion during the first nine months of 2009.[56] Having achieved a strong GDP growth of 7.1% in the first half of 2009 and expected to be the first of the world's largest economies emerging from the global economic slowdown,[57] China outperformed the United States, India, Russia, and Brazil to be the most attractive investment destination.[58]

During the first nine months of 2009, the value of deals involving Chinese companies buying overseas firms dropped forty-six percent to $9.8 billion.[59] This was partly because "government-owned businesses [were] wary of making mistakes."[60] "According to one survey [conducted] by the China Council for the Promotion of International Trade . . . only a third of [overseas M&A transactions] by Chinese companies were considered successful."[61]

An important cause for the decline was foreign resistance to China's outbound investment. China, which has a strong demand for oil and minerals to fuel its economic development, is keen on pursuing M&A abroad to convert its more than $2 trillion reserve into these strategic resource assets.[62] In fact, the energy, mining, and utilities sectors represented ninety-five percent of China's outbound deal value in the first half of 2009.[63] China's overseas investments have been seen as a threat, thus resisted by foreign governments and businesses. Two examples are illustrative. In June 2009, Chinalco's plan to invest $19.5 billion in Australia's Rio Tinto, the world's third-largest mining company, failed. The Australian government was reportedly concerned that "Chinalco, the world's largest steel producer[,] would manipulate the price of iron ore."[64] In July 2009, "Beijing Automotive Industry Holding Co (BAIC) was excluded from bidding for General Motor's Opel unit . . . [because] GM reportedly was worried about the possible direct competition [with GM's] business in China."[65]

55. *See* Rovnick, *supra* note 53; Zhan Hao, *Coca-Cola and Huiyuan: Explanation, Theory, An Attempt to Rationalise?*, CHINA L. & PRAC., May 2009, http://www.chinalawandpractice.com/Article/2194893/Channel/16143/Coca-Cola-and-Huiyuan-Explanation-theory-an-attempt-to-rationalise.html; Suzanne Stevens, *Coca-Cola, TPG and China's M&A Climate*, THE DEAL, July 7, 2009, http://www.thedeal.com/corporatedealmaker/2009/07/getting_deals_done_in_china.php.

56. *See* Rovnick, supra *note 53*.

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

58. *China: China Maintains Position of World's Most Attractive Investment*, IPR STRATEGIC BUS. INFO. DATABASE, Sept. 10, 2009.

59. *See* Rovnick, *supra* note 53.

60. *See id.*

61. Ding Qingfen, *Looking for ODI Success Stories*, CHINA DAILY, Aug. 3, 2009, http://www.chinadaily.com.cn/bizchina/2009-08/03/content_8507476.htm.

62. *See, e.g.*, *Six Characteristics of China's Balance of Payments in H1*, XINHUA ECON. NEWS SERVICE, Oct. 16, 2009; Mike Balaban, *China's M&A Challenge*, CHINA DAILY, July 6, 2009, http://204.232.161.74/2009/july/6/chinas-ma-challenge.html; *Foreign Banks Benefit from Chinese Investors' Overseas M&As*, SINOCAST DAILY BUS. BEAT, Sept. 15, 2009.

63. M&A Deals in the BRIC Countries Drop in First Half, HEDGEWEEK, July 10, 2009.

64. *See* Ding, *supra* note 61.

65. *See id.*

VI. Germany*

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

A. Foreign Investment Control

The "Thirteenth Act for the Amendment of the Foreign Trade Act and the Foreign Trade Regulation"[66] introduces new review and veto powers for the German Federal Ministry of Economic Affairs (the Ministry). The Ministry is enabled, only if there is a substantial threat to a fundamental interest of the state and its population,[67] to prohibit or restrict investments in German companies of all industries by investors from outside the European Union and the European Free Trade Association to "secure the public order or safety of the Federal Republic of Germany."[68] "[P]ublic order or safety" must be construed to comply with the freedom of establishment and the freedom of capital movement pursuant to Article 46 and 58(1) EC Treaty.[69]

The new review and veto powers apply to acquisitions of German businesses and direct and indirect shareholdings in German businesses, unless the purchasers' direct or indirect voting share remains below twenty-five percent.[70] Investors are not required to make a filing with the Ministry on their own initiative. But investors who wish to obtain transaction certainty may want to seek a no-action letter from the Ministry.[71] If the Ministry does not react within one month after such filing, the transaction is deemed approved.[72] If a purchaser elects not to seek a no-action letter, the Ministry enjoys three months after the signing of the transaction to decide whether to start a review,[73] and two months after receipt of the complete documentation to decide whether it wants to prohibit the acquisition.[74] A prohibition or restriction order requires approval by the full Federal Government.[75]

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* This section was authored by Dr. Hartmut Krause, Allen & Overy LLP, Frankfurt, Germany.

66. Dreizehntes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung [Thirteenth Act for the Amendment of the Foreign Trade Act and the Foreign Trade Regulation], Apr. 18, 2009, BGBl. I at 770 (F.R.G.) (amending the Foreign Trade Act ("AWG") and the Foreign Trade Regulation ("AWV")).

67. Außenwirtschaftsgesetz [Foreign Trade Law], May 27, 2009, BGBI. I, at 1150, § 7(2) no. 6, as amended by the Decree of 17 December 2009, BAnz 2009, 4573, *available at* http://translate.google.com/translate?hl=en&sl=de&tl=en&u=http%3A%2F%2Fwww.gesetze-im-internet.de%2Fawg%2Findex.html.

68. *Id.*; Außenwirtschaftsverordnung [Foreign Trade Regulation], Nov. 22, 1993, BGBI. I, at 1934, § 53 (2)4, as modified by the Decree of 17 Dec. 2009, BAnz. 2009 Nr. 195, 4432, *available at* http://translate.google.com/translate?js=y&prev=_t&hl=en&ie=UTF-8&layout=1&eotf=1&u=http%3A%2F%2Fwww.gesetze-im-internet.de%2Fawv_1986%2Findex.html&sl=de&tl=en.

69. Foreign Trade Law, § 7(1) no. 4 AWG.

70. Foreign Trade Regulation, § 53(1) AWV.

71. *Id.* § 53(3)1 AWV.

72. *Id.* § 53(3)2 AWV.

73. *Id.* § 53(1)1 AWV.

74. *Id.* § 53(2)4 AWV.

75. *Id.* § 53(2)5 AWV.

The new regime is not stricter than the foreign investment control laws of other developed countries[76] and offers foreign investors more legal certainty than the regime under the U.S. Foreign Investment and National Security Act of 2007 (FINSA).[77] Furthermore, the Ministry has repeatedly stated that it intends to apply the new powers only in exceptional cases.[78] First experiences with the new rules have shown that the Ministry is self-confident, but also pragmatic and solution-oriented, provided that the purchaser is carefully prepared and manages the proceedings professionally.

B. Post-Merger Integration

After a successful bid for a German listed company, the bidder tends to face the challenge to subject the target company to full control while the requisite transactions require a resolution by the shareholder meeting.[79] Some professional shareholders have emerged who are used to challenging shareholder resolutions in court with the objective to hold up the underlying transactions until reaching a favorable settlement. To overcome these roadblocks, target companies can start expedited proceedings under which the court can order that nevertheless the transaction may proceed.[80] Target companies can complete these proceedings successfully within several months, provided that the shareholder meeting is diligently prepared.

With the implementation of the Act for the Transformation of the Shareholder Rights Directive,[81] it has become more difficult for minority shareholders to unfold nuisance value. Where they hold less than €1,000 in the target share capital, they will no longer be able to block the implementation of shareholder resolutions.[82] Furthermore, expedited proceedings in the future will be decided by the Court of Appeals rather than the District Courts, and an appeal will no longer be possible,[83] thus shortening the proceedings to a period of three to four months, so that there is less pressure on the company to settle the cases.[84]

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76. Dr. Hartmut Krause, *Die Novellierung des Außenwirtschaftsgesetzes und ihre Auswirkungen auf M&A-Transaktionen mit ausländischen Investoren*, DER BETRIEBS-BERATER, 64, No. 21, 1082 (2009).

77. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (2007). One of the main reasons is that the transaction is deemed approved if the Ministry has not started a review within three months (§ 53(1)1 AWV), whilst the Committee on Foreign Investment in the U.S. (CFIUS) has authority, even many years after completion of a transaction, to review it again and potentially even prohibit the acquisition; *see* Defense Production Act, 50 U.S.C. App. 2170 (1950).

78. *See, e.g.*, Press Release, Federal Ministry of Economic Affairs (Aug. 20, 2008); Drucksache 16/10730-12-Deutscher Bundestag-16, Sept. 30, 2008, *available at* http://dip21.bundestag.de/dip21/btd/16/107/1610730.pdf.

79. Such as a domination agreement. Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBl. I at 1089 §§ 291-292, 327 as amended Oct. 16, 2009 (F.R.G.).

80. *Id.* §§ 246(a), 327e(2), 319(6).

81. Gesetz zur Umsetzung der Aktionärsrichtlinie (ARUG), July 30, 2009, BGBl. I at 2479 (F.R.G.).

82. AktG §§ 246(a)(2), 327e(2), 319(6)(3).

83. *Id.* §246(a)(1),(3).

84. Press Release, Federal Ministry of Justice, German Bundestag Passes the Act Implementing the Shareholders' Rights Directive: Good News for Online Shareholders, Bad News for Vexatious Litigants (May 29, 2009).

VII. India*

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

A. Downstream Acquisitions and Joint Ventures

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

Pursuant to the new regulations issued in February of this year, such requirement of seeking prior permission has been done away with.[85] But in those cases where the Indian company making the downstream investment is either owned[86] or controlled[87] by a non-resident/foreign shareholder, the downstream investment may be made in a sector in which foreign investment is permitted, provided that the Indian company: (a) notifies prescribed authorities within thirty days of the investment having been made irrespective of whether shares have been allotted to it or not; (b) ensures that the downstream investment is made in accordance with the pricing guidelines for purchase of shares; and (c) brings in funds from overseas for the purposes of downstream investments and does not borrow funds from the Indian market.[88]

B. Calculation of Indirect Foreign Ownership

The Government also issued guidelines to calculate indirect foreign investment in Indian companies, and in relation to the transfer of ownership and/or control of Indian companies (operating in sectors where limits on foreign ownership exist) from resident Indian citizens to non-resident entities.[89]

The key provisions are:

- Where an Indian company having foreign investment (the Foreign Invested Company) invests into another Indian company (the Indian Investee Company) the entire investment made by the Foreign Invested Company would be treated as foreign investment in the Indian Investee Company if the Foreign Invested Company is not owned and controlled by resident Indian citizens and/or by Indian companies owned and controlled by such residents.[90]

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* This section was authored by Jayesh Prajapati and Vishal Gandhi, Gandhi & Associates, Mumbai, India.

85. Rajat Sethi, *India: Regulating Inbound Investment*, IFLR, June 1, 2009, http://www.iflr.com/Article/2239267/India-Regulating-inbound-investment.html.

86. *Id.* If more than fifty percent of the equity interest is owned by non-residents/foreign shareholders.

87. *Id.* If the non-resident/foreign shareholders have the power to appoint a majority of directors on the board of the company.

88. *Id.*

89. Press Release, Note No. 2, Government of India, Ministry of Commerce & Industry, Guidelines for Calculation of Total Foreign Investment i.e. Direct and Indirect Foreign Investment in Indian Companies (Feb. 13, 2009), *available at* http://siadipp.nic.in/policy/changes/pn2_2009.pdf.

90. *Id.*

- In all sectors where the Government's approval for foreign investment is required: all shareholders agreements relating to constitution of the board of directors, exercise of voting rights, grant of disproportionate voting rights, and/or incidental matters will need to be notified to the Government for their scrutiny and approval.[91]
- In all sectors where limits on foreign investment have been prescribed, the balance of shareholding must be beneficially owned by resident Indian citizens and/or by Indian companies owned and controlled by such residents.[92]
- In all sectors where limits on foreign investment have been prescribed, transfer of shares from resident Indian citizens to non-resident entities would need the prior approval of the Government if (a) the control or ownership of an existing Indian company is being transferred from Indian residents to non-residents, and/or if (b) an Indian company being established is to be owned or controlled by a non-resident entity.[93]

VIII. Italy*

M&A activity in Italy dropped during the first-half of 2009, but the M&A market never came to a complete stop. Domestic and non-domestic industrial players, especially those with some cash available in their treasuries, closed a various array of deals at bargain prices. To the contrary, private equity houses, which by definition need bank financing to carry out their acquisitions, were almost inactive from the buy side.[94]

The market came back in the second half of the year, especially in the energy (both traditional and renewable), food, textile, fashion, luxury, and yacht industries. A significant part of the activity resulted from restructuring processes (run also by Italian conglomerates redefining the scope of their core businesses in light of the financial and economic turmoil), both in the context of bankruptcy proceedings managed by courts and pre-bankruptcy agreements negotiated between shareholders and creditors.[95]

As for the near future, the market will probably be characterized by small and medium size transactions, particularly affecting the bank and real estate industries. The larger deals, just delayed for the moment, will most likely resume when general economic and financial conditions are restored.

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91. *Id.*

92. *Id.*

93. *Id.*

* This section was authored by Mattia Colonnelli de Gasperis, Colonnelli de Gasperis, Milan, Italy.

94. Press Release, PricewaterhouseCoopers, Forum Italian M&A, Sotto le ceneri della crisi, i corporates raccolgono finanza e fanno operazioni miste, mentre i private equity si ristrutturano per tornare protagonisti con la liquidita di sistema [Forum Italian M&A, Under the ashes of the crisis, corporations collect financing and carry out mix transactions, while private equity houses restructure themselves to come back as leaders with liquidity] (Oct. 6, 2009), *available at* http://www.pwc.com/it/it/publications/press-rm/docs/pr-Forum-Italia.pdf.

95. Press Release, Mergermarket, Italian M&A forum: Seizing opportunities beyond the financial crisis, Post-event briefing (Nov. 27, 2009), *available at* http://www.mergermarket.com/PDF/Italian-post-event-report.pdf.

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

In accordance with E.U. Directive no. 63/2007 and Law no. 88/2009, pursuant to the new Art. 2501-*sexies* of the Italian civil code, the expert's opinion (containing the methods of the enterprise value's evaluation used and their outcomes) on the fairness of the exchange ratio in the context of corporate merger and de-merger is no longer mandatory, but only optional.[96] In particular, all the involved shareholders may resolve to waive the expert's evaluation. The new rule is aimed at reducing the administrative burden to be borne by the companies (and their shareholders) involved in mergers and de-mergers.

B. Shareholders' Rights

In accordance with E.U. Directive no. 36/2007, Legislative Decree No. 27/2010 aims to enhance the exercise by the shareholders of their administrative rights by simplifying the exercise of the voting rights and bettering the disclosure to the shareholders. In particular, the major novelties, effective as of October 31, 2010, are:[97]

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

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

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

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

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96. C.c. art. 2501-*sexies* (Italy), *available at* http://www.jus.unitn.it/cardozo/Obiter_dictum/codciv/Lib5.htm.

97. Decreto Legislativo 27 gennaio 2010, n. 27, Gazz. Uff. N. 47, 5 marzo 2010, S.O. (Italy).

IX. The Netherlands*

A. Market Developments

1. *Credit Crisis*

The effects of the credit crisis continued throughout 2009 in the Netherlands. On October 19, 2009, the District Court in Amsterdam declared DSB Bank, a bank notorious for its lending practices, bankrupt,[98] after last-ditch efforts to save the bank failed to prevent its collapse.[99] Leading up to the collapse was a run on the bank, which led to more than €670 million being withdrawn from the bank.[100] The fact that the bank run could take place is a signal that public confidence in the Netherlands banking industry has not yet been restored, despite government efforts at resuscitating Dutch financial markets.

2. *Executive Remuneration and Bonuses*

On September 9, 2009, the Netherlands Bankers Association published the Bank Code, effective as of January 1, 2010, which outlines the principles for a good bonus policy.[101] The primary principle of the code is that executive bonuses are capped at one-hundred percent of their annual salary.[102] Together with recent legislation aimed at lowering severance pay[103] and taxing bonuses in excess of €500,000,[104] the Bank Code aims to serve as a model for other countries.

3. *Deal Activity*

The second half of 2009 witnessed an increase in deal volume when compared with the lows seen in the fourth quarter of 2008.[105] Due to the liberalization of the Dutch energy market, the biggest winner in terms of deal volume was the energy sector, with deals such as the acquisition of Nuon by Swedish energy concern Vattenfall and of Essent by German energy giant RWE.[106] Cross-border deals slowed in 2009 with the reversal of the growing foreign investment trend in the Netherlands, something seen prior to the cri-

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* This section was authored by Lennaert Posch, Stibbe, New York, NY, and Nancy A. Matos, Baker & McKenzie, Amsterdam, The Netherlands.

98. DSB Bank, Alkmaar, Amsterdam, Oct. 19, 2009, FT RK 09.1837 (Neth.).

99. *Plans A to Z Fail for DSB Bank*, NRC HANDELSBLAD, Oct. 19, 2009, http://www.nrc.nl/international/article2390878.ece/Plans_A_to_Z_fail_for_DSB_Bank.

100. *See id.*

101. Netherlands Bankers Association, Bank Code, *available at* http://www.nvb.nl/scrivo/asset.php?id=291 515.

102. *See id.* § 6.3.2.

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

104. Boekel De Nerée, *The Netherlands Slashes Severance Packages*, LEGAL500.COM, Mar., 2009, http://www.legal500.com/c/netherlands/developments/8018.

105. *See* OverFusies.nl, *eerste-halfjaarrapport 2009: De Nederlandse fusie- en overnamemarkt in cijfers*, KSU UITGEVERIJ, Sept. 2009.

106. *See id.* at 7. Vattenfall acquired Nuon for _10.3 billion and RWE acquired Essent for _7.3 billion. *See id.* at 16 and updated at: http://www.overfusies; *see also id.* at 7, 16 (Vattenfall acquired Nuon for _10.3 billion and RWE acquired Essent for _7.3 billion updated at: http://www.overfusies.nl).

sis.[107] Deal activity in 2009 was dominated by an increase in the amount of distressed M&A and restructuring activity.

B. Legislative/Regulatory Developments

The Dutch parliament has passed legislation to change corporate governance rules relating to listed companies.[108] The proposal is based on the recommendations in the advisory report of the Dutch Corporate Governance Monitoring Committee of May 30, 2007.[109] The proposed bill is relevant to (future) M&A transactions, takeover battles, and activist shareholders in that it:

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

The Monitoring Committee also updated the existing Dutch Corporate Governance Code (expected to replace the old Code from January 1, 2010)[110] with two new provisions relating to (public) takeover bids. These provisions provide that (a) the management board shall ensure that the supervisory board is closely and timely involved in the takeover process, and (b) a request from a competing bidder to inspect the company's records must be discussed with the supervisory board without delay.

C. Takeover Defenses

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

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107. *See id.* at 8.

108. Parliamentary Bill [Vergaderjaar] 32 014 (2008-2009).

109. Corporate Governance Code Monitoring Committee, Advisory Report on the Corporate-Shareholder Relationship and on the Scope of the Code 19-24 (2007), *available at* http://www.commissiecorporategovernance.nl/page/downloads/Monitoring_Committee_Advisory_Report_May_2007.pdf.

110. Corporate Governance Code Monitoring Committee, Dutch Corporate Governance Code Principles of Good Corporate Governance and Best Practice Provisions (2009), *available at* http://www.commissiecorporategovernance.nl/page/downloads/DEC_2008_UK_Code_DEF__uk_.pdf.

X. United Kingdom*

A. Impact of New Companies Legislation

The year 2009 saw the complete implementation of a new companies code for England and Wales, the Companies Act of 2006 (the Act).[111] The Act has been brought into force in segments since 2006 and is now fully effective. There has been an extensive revision on most areas of company law including incorporation, constitution and capacity, directors' powers and duties, share capital, and resolutions. The Act also includes substantial changes to filings and procedure. Some features for consideration include the repeal of the prohibition on giving financial assistance for private limited companies.[112] This enables leveraged buy-outs without the time-consuming and expensive "whitewashing" process in M&A transactions. Other considerations remain, including: (a) a company's obligation to maintain its capital; (b) directors' duties to ensure that the giving of assistance is in the company's best interests; and (c) ensuring that the giving of assistance is not challengeable by a liquidator or administrator of an insolvent company as a preference or a transaction at an undervalue. Public companies are still prohibited from giving financial assistance, and care needs to be taken if there is a public company within the target group.[113]

The Act has introduced a new method for private companies to reduce their share capital. Share capital reductions are used in M&A for structuring purposes: (a) in acquisitions by way of scheme of arrangement; (b) to create distributable reserves; (c) to return surplus capital; and (d) for share buybacks and redemptions.[114] Before the Act, a company needed to follow a court-based procedure to reduce its share capital, but the Act has introduced a cheaper, more straightforward procedure for private companies, which does not require court approval. Public companies are still required to follow the court-based procedure.[115]

The Act has changed the status of the Takeover Panel (the body which administers the Takeover Code relative to public companies) to comply with European law with little practical difference as the Takeover Panel's decisions were previously treated as mandatory. But the Act has introduced criminal offences for failing to comply.[116] It appears the Takeover Panel will rarely use its new powers, preferring a co-operative approach.

The Act has also introduced a number of administrative changes, which will have the effect of reducing bureaucracy and technical requirements in U.K. M&A transactions. For example, a new procedure for the execution of documents means that deeds can be executed by companies with only one director's signature in the presence of a witness.[117]

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111. *See generally* Companies Act, 2006, c. 46 (Eng.).
112. *Id.*
113. *Id.* pt. 17.
114. *Id.* pt. 4.
115. *Id.* pt. 17.
116. *Id.* pt. 28
117. *Id.* pt. 4.

B. Market Developments

The year 2009 has seen the import from the United States of "go-shop" provisions in contracts, historically rare in the U.K., which allow a seller to find other buyers for the target business for a period following signature of a deal. If the seller decides to sell the target business to an alternative buyer (terminating the original agreement) a break fee usually becomes payable to the original buyer. Such a provision was in effect when Barclays agreed to sell its iShares business to CVC Capital Partners (CVC) for approximately $4.4 billion, with U.S. fund manager BlackRock eventually agreeing to buy the entire Barclays Global Investors division (including iShares) for $3.5 billion.[118] CVC was entitled to choose to match the new offer or receive a break fee.

XI. United States*

A. Overview of M&A Activity

The collapse of the financial markets and historically high volatility in the stock markets prevailing since mid-2007 have seriously affected U.S. M&A activity, which remains well below the levels seen in the "boom years" of 2006 and 2007. According to Thomson Reuters, U.S. M&A activity for the 2008 calendar year declined thirty-seven percent over the 2007 calendar year.[119] M&A activity in the United States actually increased slightly over the first quarter of 2008,[120] but by the third quarter of 2009 deal making was down thirty-eight percent compared to the third quarter of 2008.[121] Despite the downturn, the United States continues to account for a major share of global M&A activity.

The challenging M&A environment is a product of the economic and financial difficulties that have beset the United States and the global economy since the credit crunch hit in mid-2007. Access to funds for ordinary corporate borrowing became difficult and available acquisition financing practically disappeared, as seen in the M&A sector in the steep decline of activity by private equity firms and the end of highly leveraged buyouts.[122]

In September 2008, during the crisis following the collapse of the investment bank Lehman Brothers, a series of distressed financial institutions entered into transactions seeking the protection of more robust partners, including Merrill Lynch & Co., Inc. (which sold itself to Bank of America Corporation), and Wachovia Corp., previously the fourth largest U.S. bank (which agreed to be acquired by Citigroup Inc., with significant assistance from the U.S. government, until Wells Fargo & Co. intervened with a topping bid). The U.S. government also intervened in mortgage giants Fannie Mae and Freddie

118. Dana Cimilluca & Sara Schaefer Muñoz, *And the Winner for iShares CVC?*, Wall St. J., Apr. 1, 2009, *available at* http://online.wsj.com/article/SB123849445876573277.html.

* This section was authored by Mark Greene, Cravath, Swaine & Moore LLP, New York, NY.

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

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

121. *See* Thomson Reuters M&A Review-4Q 2008, *supra* note 119.

122. *See* David Marcus, *The Year in Review: Coming to Terms With the Crash*, Corporate Control Alert, Jan./Feb. 2009.

Mac and the global insurer American International Group, Inc. In 2009, the participants in these transactions and the U.S. government continued to deal with the political, economic and market ramifications of these deals.

Over 600 financial institutions received $199 billion in funds from the U.S. government's Troubled Asset Relief Program, or TARP. By late November 2009, the Federal Deposit Insurance Corporation had closed nearly 125 U.S. banks.[123] In total, the U.S. government's response to the financial crisis has been estimated to comprise up to $12 trillion of commitments in the form of liquidity and financial measures (although the vast majority of this will likely never be paid out).[124]

B. Significant Transactions, Key Trends, and Hot Industries

1. *Litigation*-Huntsman v. Hexion

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

In June 2008, Apollo filed suit in the Delaware Court of Chancery[125] seeking a declaration that it was not obligated to complete the merger because Huntsman had suffered a material adverse change, and because the combined entity would be insolvent. The Court rejected the claim of a material adverse change without reaching the solvency issue and held that Apollo had in fact "knowingly and intentionally" breached the merger agreement.[126] But when Apollo and Huntsman sought to complete the transaction, the banks did assert the failure of a financing condition and refused to fund the transaction.

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

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

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123. Federal Deposit Insurance Corporation (FDIC), FDIC: Failed Bank List, http://www.fdic.gov/bank/individual/failed/banklist.html (last visited Feb. 2, 2010).

124. Mark Pittman & Bob Ivry, *Financial Rescue Nears GDP as Pledges Top $12.8 Trillion (Update1)*, Bloomberg, Mar. 31, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=armOzfkwtCA4.

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

126. Hexion Specialty Chemicals, Inc. v. Huntsman Corp., 965 A.2d 715, 749 (Del. Ch. 2008).

2. *Hot Industries-Biotech and Pharma*

In the United States, M&A activity throughout much of 2009 was driven by consolidation in the healthcare sector, particularly three mega-deals: Pfizer Inc.'s $64 billion agreement to acquire Wyeth, Merck & Co. Inc.'s $41 billion agreement to acquire Schering-Plough Corporation, and Roche Holding Ltd's $47.1 billion agreement to acquire the 44.1% of Genentech Inc. that it did not already own.[127] Driven by the pending expiration of valuable patents, the need to acquire new sources of revenue and an apparent emphasis on increased size, transactions are expected to continue as the largest players in the industry acquire smaller targets with attractive R&D profiles.[128]

C. OUTLOOK

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

127. MERGERMARKET, MONTHLY M&A INSIDER (May 2009), http://www.mergermarket.com/pdf/Monthly_Insider_May09_Entire.pdf.

128. *See 2009 is the Era of Merger Mania*, BIOVALLEY BASEL, June 17, 2009, http://www.biovalley.ch/content.cfm?nav=4&content=10&command=details&id=10319; *see also* Jo Kawakami, *M&As Loom as Drug Patents Expire*, NIKKEI WKLY., May 18, 2009.