2006

International Mergers and Acquisitions

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Recommended Citation
Marcelo Bombau et al., International Mergers and Acquisitions, 40 Int’l L. 311 (2006)
https://scholar.smu.edu/till/vol40/iss2/10

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This report summarizes the most significant Mergers and Acquisitions (M&A) developments in 2005 in the United States and in the following jurisdictions (in alphabetical order): Argentina, Australia, Brazil, Canada, Colombia, France, Germany, India, Ireland, Italy, Japan, Mexico, Poland, Russia, Spain, Sweden, Switzerland, the United Kingdom, and Venezuela.

I. United States*

The year 2005 was another extremely strong year for M&A activity in the United States. The first six months of 2005 had the highest level of announced M&A activity—both in the United States and worldwide—since the second half of 2000. Announced U.S. M&A volume in the first nine months of 2005 exceeded $785 billion, representing a 37 percent increase over last year’s nine-month figure. Marquee transactions of 2005 include the pending takeover of MBNA Corp. by Bank of America Corp. ($36 billion); Procter & Gamble Co.’s completed acquisition of Gillette Co. ($55 billion); and SBC Communications Inc.’s completed acquisition of AT&T Corp. ($15 billion). Some of the significant developments seen in U.S. M&A activity are outlined below.

*This summary was compiled and coordinated by Lennaert Posch, Partner of Stibbe, New York office and Marcelo Bombau, Partner of M.&M. Bomchil, Buenos Aires office. Mr. Posch is a Vice-Chair of the M&A and Joint Venture Committee of the International Section of the American Bar Association. Individual contributors will be referred to at the discussion of each relevant jurisdiction.

a. Contributed by Joshua Cammaker, Partner of Wachtell, Lipton, Rosen & Katz. Mr. Cammaker is the Co-Chair of the M&A and Joint Venture Committee of the International Section of the American Bar Association.
A. The Catalyst Investors

Hedge funds are playing an increasingly important role in today’s M&A transactions, sharpening their attacks on takeover defenses and what they see as failings in companies’ corporate governance structures. Increasingly, they have been adopting the corporate raider strategies of years past, agitating in favor of, or even against, transactions, with mixed results.¹

B. Private Equity Consortium Deals

2005 saw a continuing surge in private equity activity in the United States. The coffers of private equity funds continue to swell. New funds are being formed with little trouble raising capital. With so many private equity funds out chasing deals, consortium or club deals are becoming ever more popular. These are transactions in which a group of private equity firms join together (occasionally also teaming with strategic buyers) to undertake acquisitions.² Despite the difficulty in putting together and holding together a consortium, these deals are becoming a common structuring strategy, allowing private equity firms to play a role in deals of all sizes and to allocate risk in a way that is conducive to successful completion of a transaction.

C. Stock Exchanges Themselves Engage in M&A

The year 2005 also witnessed trading exchanges becoming a focus of M&A activity. In April, the New York Stock Exchange (NYSE) signed an agreement to merge with Archipelago Holdings, Inc., a public company with an all-electronic stock market and a trading platform. In the transaction, which is currently pending shareholder approval, the NYSE will become a publicly traded company and will keep its regulatory arm separate as a not-for-profit entity. Only two days after the NYSE signed its agreement with Archipelago, NASDAQ teamed up with private equity firm Silver Lake to acquire the trading platform company Instinet Group, Inc. for $1.88 billion. These transactions continued into the fall, with private equity firm General Atlantic agreeing to invest $135 million in the New York Mercantile Exchange for a 10 percent interest in the exchange. The Chicago Board of Trade took a different route, going public in October.

¹. Examples are Carl Icahn’s battle with Time Warner Inc., pushing to spin off Time Warner’s cable business entirely and not just the minority piece the company contemplates divesting (as well as substantially increasing its contemplated share buyback); his role in the scuttling of Mylan Laboratories Inc.’s proposed acquisition of King Pharmaceuticals, Inc. earlier this year; Highfields Capital Management’s relatively brief but unsuccessful bid for Circuit City Stores, Inc.; Pershing Square Capital Management which agitated for Wendy’s International, Inc. to spin off one of its chains, refinance a significant number of its owned restaurants and use the proceeds for share buybacks.

². Recent examples include the $8 billion buyout of Toys ‘R Us, Inc. by Bain Capital Partners and Kohlberg Kravis Roberts & Co. teaming up with Vornado Realty L.P.; the $15 billion buyout of The Hertz Corporation, the rental car company, by a group comprised of Clayton Dubilier & Rice, Merrill Lynch Global Private Equity and The Carlyle Group; and the $12 billion SunGard Data Systems Inc. takeover by a consortium of Goldman Sachs, Silver Lake Partners, Bain, The Blackstone Group, KKR, Providence Equity Partners and Texas Pacific Group.
D. Directors' Roles and Duties in M&A Transactions

Delaware courts gave some much desired comfort and assurances to directors in 2005 regarding their discharge of duties, including in the context of takeover transactions. Significant concern followed the Delaware Supreme Court's 2003 Omnicare decision regarding the extent to which deal protection mechanisms, such as lock-up agreements with significant shareholders to support the transaction and the absence of a so-called fiduciary out provision, would be upheld as permissible, particularly where the target is controlled by the shareholder signing the lock-up agreement.

In June 2005, the Delaware Chancery Court, in its Toys 'R Us opinion, strongly supported the principle that well-advised boards of directors have wide latitude in structuring a sale process. The case gave important guidance on a host of deal-related issues, including deal protection. A few months prior to the Toys 'R Us decision, the Delaware Chancery Court dismissed a shareholder claim alleging that JPMorganChase unnecessarily paid a premium in stock for its acquisition of Bank One, based on media reports that a no-premium deal had been possible. The decision centered on whether the claim was derivative in nature (found not to be derivative) and whether the majority of the board was independent (found to be the case). The court did not find anything in the record of the negotiations that made the board's exercise of its business judgment in approving the deal suspect. This case provided comfort that the Delaware courts will not allow shareholder plaintiffs to rely on press and media speculation in raising spurious claims in the context of a transaction. Finally, in August, the Delaware Chancery Court, in the context of an executive compensation matter, reaffirmed that the bedrock principle of the business judgment rule is alive and well. The Disney decision alleviated concerns that the new Sarbanes-Oxley environment would diminish the protections afforded by the business judgment rule and create new bases for director liability, particularly personal liability.

These Delaware cases, coupled with the developments mentioned above, helped to propel the volume of M&A transactions in 2005. These forces—reaffirmation of the traditional deference accorded to the role and judgment of boards in deals; the prominent role of the catalyst investor; and the consortium deal—show no signs of waning. It can be expected that 2006 will be another very active year for M&A in the United States.

II. Argentina

M&A in Argentina are still influenced by the crisis affecting the country from 2001 through 2002. Although there were not many relevant deals during 2005, those that closed focused on a cherry picking strategy, where buyers carefully screened opportunities and selected those representing clear advantages, with a trend in purchasing valuable assets belonging to distressed companies at devaluated prices. Among the bigger deals closed

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7. Id.

b. Contributed by Marcelo Eduardo Bombau, Partner of M.&M. Bomchil. Mr. Bombau is a Vice-Chair of the M&A and Joint Venture Committee of the International Section of the American Bar Association.
during 2005, we find the sale of cement company Loma Negra to the brazilian group Camargo Correa for over US$1 billion, and the above US$2.2 billion purchase by Organización Techint of the mexican steel company Hylsamex.

The Public Registry of Commerce of the City of Buenos Aires has passed several resolutions increasing the requirements for a foreign company to become a shareholder of a local company. These requirements imply that many companies, especially off-shore ones, will find it more difficult to acquire shares or organize companies in Argentina. A decree passed in 2005 established that any transfer of funds from foreign entities to Argentina in order to acquire financial assets of any kind (excluding, in general terms, direct foreign investments) cannot be transferred outside Argentina during a term of 365 calendar days from the transfer of funds into Argentina. The foreign entity transferring funds to Argentina must constitute a 365 calendar-day, registered, non-transferable, interest-free deposit equal to 30 percent of the funds transferred into Argentina.

III. Australia

The Australian M&A market remained buoyant in 2005, although down from 2004. Significant transactions included the acquisition of WMC Resources Ltd. by BHP Billiton Ltd.; the proposed acquisition of Patrick Corporation Ltd. by Toll Holdings Ltd.; the acquisition of Southcorp Ltd. by Fosters Group, Ltd.; the acquisition of Hills Motorway Group by Transurban Group; and the acquisition of Dyno Nobel ASA by a consortium of investors led by Macquarie Bank Ltd.\(^{10}\)

A. Regulatory Developments

The most significant regulatory issue to arise was a judicial challenge to a decision of the Takeovers Panel in July—the first such challenge in the five years since the Panel was reconstituted in 2000. Modeled on the U.K. Panel on Takeovers and Mergers, the Panel is an administrative body that acts as the primary forum for resolving disputes about a takeover bid until the bid period has ended.\(^{11}\) The Panel is empowered to make a declaration of Unacceptable Circumstances\(^{12}\) when circumstances in relation to the affairs of a company are unacceptable because of the effect on the control of the target or the acquisition of a substantial interest in the target or because there has been a breach of the takeover provisions of the Corporations Act.

The judicial challenge arose in the context of a seminal decision by the Panel on the use and disclosure of synthetic equity instruments in takeovers. The Panel made a declaration of unacceptable circumstances in \(Re\) Austral Coal Ltd No. 2\(^{13}\) due to the failure of Glencore International AG promptly to disclose the fact that it held cash-settled equity swaps over shares in the target company (Austral Coal) until such time as Glencore was compelled to

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9. Id.
C. Contributed by Zeke Solomon and Andrew Finch, Partners of Allens Arthur Robinson.
10. Id. § 657A.
11. Id. § 657A.
12. Id. § 659AA-659C (Austl.).

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disclose its physical holding. In determining that unacceptable circumstances existed (in the form of a materially uninformed market for control), the Panel made no determination as to the effect of the non-disclosure on control or the acquisition. The declaration was subsequently upheld by a Review Panel that similarly made no determination on the effect of non-disclosure.\textsuperscript{14}

Although parties are prohibited from commencing court proceedings in respect of a takeover bid during the bid period,\textsuperscript{15} Glencore enlivened the jurisdiction of the High Court of Australia under section 75(v) of the Australian Constitution\textsuperscript{16} claiming, among other things, that the powers exercised by the Panel were unconstitutional. The matter was remitted to the Federal Court of Australia that found the powers to be valid, but that in failing to determine the effect of non-disclosure on the market, both the Panel and the Review Panel had made declarations based on jurisdictional error. The proceedings were remitted back to the Panel for reconsideration.

The newly constituted Panel again found unacceptable circumstances and made consequential orders against Glencore that promptly made yet another application for judicial review to the Federal Court (which is outstanding as of the date of this article). The Austral Coal proceedings are significant for two reasons. First, like the U.K. Panel on Takeovers and Mergers, the Australian Takeovers Panel is extending the scope of takeovers regulation to synthetic equity instruments, such as cash settled equity swaps. Second, the viability of the Australian Takeovers Panel as a forum for expedited resolution of takeover disputes is now in serious question, as reference to the courts for judicial review of Panel decisions once more raises the prospect of protracted tactical litigation.

B. Rights Issues

There has long been concern about the potential for rights (or entitlement) issues by listed and large non-listed companies to be structured so as to effect a change of control in a company without needing to comply with the control provisions of the Corporations Act. Specifically, there has been concern that a rights issue may be structured so as to ensure limited acceptances, increasing the voting power of those who do accept in the context of a non-underwritten issue or the voting power of the underwriter in underwritten issues. The Panel has issued draft guidance on the point,\textsuperscript{17} indicating that it will consider each rights issue on its merits to determine whether it gives rise to unacceptable circumstances, rather than setting out a safe harbor for structuring a compliant rights issue. Some of the factors that will be considered by the Panel include whether the company needs funds, the steps taken by the board to avoid an unnecessary change of control, how the issue is priced, whether the issue is renounceable, and whether adequate disclosure of the possible change of control impact has been made to shareholders.

\textsuperscript{14} Austral Coal Ltd. (R) (2005) A.T.P. 16 (Austl.).
\textsuperscript{15} Corporations Act § 659B.
\textsuperscript{16} Commonwealth of Australia Constitution Act 1900 (Cth) § 75(V). Section 75(V) gives the Court jurisdiction to review the actions of public officials.
IV. Brazil

A. PUBLIC-PRIVATE PARTNERSHIP

Rules for public-private partnerships (PPP) in Brazil came into effect in 2005, introducing a new way to approach the relationship between the government and the private sector. These are supplementary to the existing public bidding and concession rules. The PPP is defined as a concession agreement and includes compensation by the public partner to the private partner and sharing of risks between the parties, as well as solid public payment guarantees, thus making it possible to attract new investments from the private sector. As a result, it enables the government to transfer economically unsustainable essential infrastructure projects to the private sector.

B. DECISION OF THE SUPERIOR COURT OF JUSTICE

On October 4, 2005, the Superior Court of Justice of Brazil unanimously upheld the decision that authorized the sale of Banco Real S.A., a major Brazilian bank, to the Dutch group ABN Amro. Minority shareholders that felt jeopardized by the sale made an attempt to suspend the transaction. The shareholders questioned the controlling interest held by the former controlling shareholder in relation to the possibility of conducting a transaction of such nature and also challenged the spin-offs carried out by the former controlling shareholder that resulted in divesting the previously consolidated assets.

C. NEW FOREIGN EXCHANGE RULES

In early 2005 a new regulation came into effect allowing more flexibility to deal with foreign exchange transactions. It also eliminated certain burdensome restrictions on the foreign exchange market. The general rule of the new regulation is that any person or entity is allowed to buy and sell foreign currency or carry out an international transfer of Brazilian currency without any limit of value, provided that the transaction is legal, in compliance with tax regulations, and is based on economic grounds with its liabilities defined in the proper transaction’s documents.

V. Canada

Certain Canadian legal developments during 2005 resulted in some noteworthy issues that impact M&A activity in Canada and transactions involving Canadian companies.

A. HARMONIZATION OF PRIVATE PLACEMENT RULES

Canadian provincial securities regulators took a significant step towards the consolidation and harmonization of the various prospectus and dealer registration exemptions that existed

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d. Contributed by Marcelo Freitas Pereira, Partner of Castro, Barros, Sobral, Gomes.


e. Contributed by Ken Ottenbreit, Partner, and Kruti Patel, Associate, of Stikeman Elliott, New York office. Mr. Ottenbreit is the Co-Chair of the M&A and Joint Venture Committee of the International Section of the American Bar Association.
in their respective provinces by implementing National Instrument 45-106—Prospectus and Registration Exemptions. Of particular relevance in the M&A context is the transaction exemption for business combinations and reorganizations. Pursuant to this exemption, securities can be issued and traded on an exempt basis with respect to (1) an amalgamation, a merger, a reorganization, or an arrangement that is carried out under a statutory procedure or approved by the security holders; or (2) a dissolution or winding up of the issuer. Also relevant is the transaction exemption for certain asset acquisitions in which shares are issued as consideration for the purchase of assets. In addition, trades in, or a distribution of, the securities of private issuers are exempt provided that certain conditions are satisfied.

B. ALBERTA UNLIMITED LIABILITY CORPORATIONS

On May 17, 2005, the Province of Alberta amended its Business Corporations Act to make the statute more attractive from a corporate tax perspective and became the second jurisdiction in Canada to allow for the incorporation of an unlimited liability corporation (ULC). ULC’s are often used in U.S.-Canadian cross-border M&A transactions due to the tax advantage, including the ULC’s hybrid treatment as a corporation for Canadian tax purposes and as a tax flow-through vehicle for U.S. tax purposes, under the so-called U.S. check the box regulations for international entity classification. This structure permits certain deductions for the ULC, including interest expenses, to be treated as having been incurred by the U.S. parent. A ULC is used also for U.S. group foreign credit tax planning.

VI. Colombia

The most important M&A related development in Colombia during 2005 was the amendment of the legal framework of securities regulation. Major changes that may affect the M&A regulatory environment include: (1) regulation—primary regulatory role was given to the central government; (2) supervision—the creation of the Finance Superintendence; (3) stock issues and reacquisition—the maximum acceptance period for subscribers was extended from three months to one year, and the subscription price is to be determined by a technical study applying recognized valuation methods; (4) corporate governance—the presence of independent directors on the boards, the creation of board audit committees, and the establishment of financial information control and disclosure systems were introduced; and (5) disclosure—shareholder agreements in listed companies must be disclosed immediately after its execution.

In addition, the Central Bank reviewed foreign exchange regulations and added some provisions to facilitate acquisitions through tender offers. Banking accounts in Colombian pesos for acquiring shares were provided and the Central Bank authorized non-residents to hold banking accounts in Colombian pesos if they intend to participate in an acquisition
of stock through the stock exchange or the securities market that qualifies as a foreign direct investment (FDI). The government issued Decree 4474 of 2005 amending the foreign investment regime so as to allow foreign investors to borrow funds from local financial institutions and use the proceeds to invest in domestic companies through the stock exchange. The relevant investment will be treated as a foreign investment and therefore the investor will have foreign exchange rights to take dividends and proceeds from the eventual investment liquidation out of the country.

VII. France

In addition to the ongoing legislative and regulatory developments regarding the implementation of the EU Directive on Takeover Bids that was adopted on April 21, 2004, the passing of the Loi Breton, and the amendment to the Autorité des marchés financiers (AMF) General Regulation, the French M &A market has witnessed noteworthy developments in the area of hedge fund activity.

A. Legislative and Regulatory Developments

1. Transposition of the Directive

On September 21, 2005, France introduced its Draft Law implementing the Directive. Having received Senate approval, the Draft Law is scheduled to pass sometime before the end of 2005 and to come into effect in the first half of 2006. Some of the salient features of the Draft Law include:

(1) retaining the concept of an equitable price found in the Directive and defined as the highest price paid for the same securities by the bidder (or persons acting in concert) over a period of twelve months prior to the bid, with limited exception to this rule to be defined by the AMF;

(2) transposing the Directive's requirement that any governing body of a target seeking to implement frustrating action first obtain shareholder approval. Any delegation of the power to take frustrating action by the shareholders to another corporate body will be temporarily suspended and any decision to implement frustrating action taken prior to the bid, but that has either not been implemented or has been partially implemented at the time of the bid, must receive shareholder approval;

(3) transposing the Directive's reciprocity principle enabling a target not to adhere to the above requirement when the company launching the takeover, either alone or in concert, does not apply the above rules or rules equivalent or is controlled by entities that do not apply these rules or their equivalent. In this event, however, any frus-
trating action must first have been authorized by the shareholders in the eighteen months leading up to the action;

(4) transposing the Directive's suspension of any limitation of voting rights attached to shares in a company's by-laws during the first general shareholders' meeting following a takeover bid if the bidder, acting alone or in concert, has acquired a certain percentage of the target's share capital, such percentage to be further established in an AMF regulation;28

(5) failing to transpose the Directive's provision for a freeze of extraordinary rights (such as multiple voting rights, appointment rights, and the restriction on the transfer of securities) during a bid. Instead, the Draft Law leaves it up to the company to decide whether to freeze such rights and allows a company having done so to opt out where a bidder has not implemented such a freeze;

(6) maintaining, at its present level of 95 percent of share capital and voting rights, the threshold at which a squeeze out becomes possible instead of the 90 percent level that is more in line with other European member states such as England;

(7) including the Senate's Danone29 amendment, according to which any person or entity reasonably suspected of launching a takeover may be obliged to declare its intentions to the AMF30 following terms and conditions to be further established in its General Regulation. The AMF will have to disclose this information to the public and determine the conditions according to which a bid may be rejected if the bidder has failed to comply with its intentions not to launch a bid within a given period, also to be determined in its General Regulation.

2. The Loi Breton

On July 26, 2005, France passed a law known as the Loi Breton,31 the three most relevant features of which are:

(1) the extension of the concept of control to any company that is either a partner or a shareholder of a company in which it has the power to nominate or remove a majority of the governing body's members;

(2) the obligation of any person to declare the crossing or falling below the additional thresholds of 15 percent, 25 percent, and 90 percent of capital or voting rights32 of a company.33 The obligation is not incumbent on a person who is controlled by another person that has made such a declaration. This obligation applies not only

28. This article is merely a reiteration of the well-established AMF doctrine whereby the by-laws of a company should include a provision according to which they may be amended if the bidder crosses a predetermined (generally 2/3) threshold.

29. This amendment was a response to the rumored takeover bid during summer 2005 by Pepsico for Danone.

30. This is the same as in the United Kingdom where any rumored takeover bidder must disclose its intention to the Takeover Panel.

31. The law is named after the Minister of the Economy, Thierry Breton, who was also the former CEO of France Telecom.

32. These thresholds are now the following: 5%, 10%, 15%, 20%, 25%, 33%, 50%, 66%, 90%, and 95%

33. It being specified that a person holding a usufruct right in a share, a person temporarily holding shares on behalf of someone else, and a depository or representative pursuant to a power of attorney—provided such person may exercise the voting right attached to the share—will be deemed to be a shareholder.

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to shares that are traded on a regulated market but not to shares registered with an intermediary;

(3) the obligation, in the case of a takeover of a target listed on a regulated market in France, to make a firm takeover bid on all companies (i) in which the target holds a third of the capital or voting rights (the shares of which are traded on a regulated market) and (ii) which constitute an essential asset of the target. 34

3. Amendment to the AMF General Regulation regarding conditionality in deals

There are very limited conditions under which a takeover bid may be launched in France. Material adverse change clauses are not allowed. As far as antitrust regulations are concerned, the AMF General Regulation provides that a bid can be made on the condition that the transaction contemplated by the bid will be approved in Phase I by certain competition authorities 35 (namely the EC, the competition authority of each EU Member State, or the Federal Trade Commission or Department of Justice in the United States). The AMF General Regulation specifies that should the Phase I investigation period be extended, the bid will lapse.

On April 15, 2005, the AMF modified its General Regulation to make it clear that mere referral letters to the competent competition authorities are sufficient for filing validly and conditioning a bid upon the approval of antitrust authorities. Official notification to the competent competition authorities opening the Phase I investigation period may then be made and delivered to the AMF at a later stage. This modification clarified the fact that a bidder may file a bid and give notice to the competent competition authorities only after it has obtained their assurance that they will grant clearance to the transaction before the lapse of the Phase I investigation period.

B. Impact of Hedge Funds on French M&A Activity

As in North America and England, hedge funds are becoming very active on the French M&A market where they are increasingly involved in arbitrage dealings. The effect of this increased importance is that recently, they have begun to thwart takeovers.

One of the first examples in France of a failed takeover resulting from interference by a hedge fund occurred in March 2005. 36 Financière Addax held 39.8 percent of the capital and 55.1 percent of the voting rights in Camaieu that it had acquired on January 31, 2005, at a price of eighty-five euros a share. It filed a bid with the AMF on the remaining shares on February 1, 2005 at the same price. The bid opened on February 23 and closed on March 31, 2005. On March 18, 2005, Sandell Asset Management Europe Ltd, acting on behalf of Castlerigg Investment Ltd, announced that it had crossed the 5 percent threshold of capital and voting rights in Camaieu respectively on March 16 and March 17, 2005. On April 1, Sandell announced that, as of March 30, 2005, it held 10.43 percent of the capital

34. This amendment is said to have initially been intended to protect Renault and Nissan from foreign takeovers. Its application, however, has inspired much criticism as a result of the technical difficulties it presents and possible conflicts with other stock market regulations.


and 8.45 percent of the voting rights of Camaieu. The effect of Sandell’s acquisition on the market during the bid period was to maintain the listed price above the bid price of eighty-five euros and left the bidder with 40.06 percent of the capital and 55.32 percent of the voting rights of Camaieu at closing, thereby making it impossible for Financière Addax to perform a squeeze out and to benefit from the tax integration regime (that allows the bidder to offset its financial losses with the profits of the target).

VIII. Germany

The German M&A market was very active throughout 2005. It started with the closing of BorgWarner’s acquisition of a majority stake in automobile supplier Beru AG on January 3, 2005, followed by public offering to outside shareholders. It generated the biggest European bank merger, with Italian Unicredito taking over German Hypovereinsbank with a total deal value arriving at fifteen to sixteen billion euros. But the activity in the M&A market was topped by the activity of the German legislature.

Although the German Chancellor, Gerhard Schröder, announced in early summer that he would seek elections in September 2005 (which indeed happened and ended up with Schröder’s replacement by Christian Democrat Angela Merkel—though in a grand coalition with the Social Democrats), this did not stop the legislature from bringing about numerous changes, including the introduction of the new European company Societas Europaea (SE):

A. European Company

As a starter for the new year, the German Act on the Introduction of the SE entered into force on December 29, 2004. It was enacted against the background of European Regulation No. 2157/2001, on the statute for a European company (SE-Regulation), as well as EU Directive 2001/86, regarding the participation of employees. While the SE-Regulation is directly applicable in all Member States, the EU Directive on employee participation needed special implementation legislation. But given that the directly applicable SE-Regulation did not sufficiently deal with all issues in need of statutory coverage, the purpose of the new German law on the SE is twofold. It supplements the SE-Regulation with respect to the general rules on the formation of an SE and its corporate governance (such part of the new German law is commonly referred to as the SE-AG), while at the same time it implements the rules on participation of employees (referred to as the SE-BG). While some legal writers have predicted that the SE may not become a very popular form of legal entity, practice may show the opposite.

As the first German Dax-30 company, insurer Allianz AG, decided to use the takeover of an Italian insurance subsidiary and create an SE by way of merger of the Italian subsidiary

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h. Contributed by Dr. Joachim Rosengarten, Partner Hengeler Mueller, Frankfurt am Main. Mr. Rosengarten is a Vice-Chair of the M&A and Joint Venture Committee of the International Section of the American Bar Association.

into Allianz AG. It appears that this decision has caused many other companies to consider reorganization of their legal status. It is reported by many legal advisors and bankers that several SE-projects are in the pipeline, ranging from big companies to German Mittelstand companies repositioning themselves in Europe. Such activity should not really come as a surprise, given that a merger of two stock corporations from different European jurisdictions into an SE on the basis of the SE-Regulation is currently the only way of implementing a cross-border merger in the true sense under German law. Also, it is only possible in the form of an SE for a German stock corporation to elect a one-tier board as its appropriate form of corporate governance—the German Stock Corporation Act (Aktiengesetz) traditionally provides for a two-tier board consisting of a board of management and a supervisory board. It will be interesting to see if and how a one-tier board may be combined with the German form of co-determination (Mitbestimmung) of employees.

IX. India

India’s commitment to the World Trade Organization means that significant steps have been taken and further steps planned towards dismantling commercial barriers in terms of FDI. In addition, there has been a move to embrace higher standards of corporate governance reflecting aversion among investors to accept opaque management practices and the government’s growing recognition that poor corporate governance will restrict its ability to do business on the world stage. Shifts in corporate attitude and mindset among family-owned businesses have a great impact on businesses where organizations have increasingly come to accept the need for transparency in their management and business dealings. Although it may be too early to say, all of these changes have in fact helped to put a solid base in place for a soundly based and sustainable upturn in Indian M&A.

Next to Japan, India had the highest growth rate in M&A activities across the globe in 2005. The total numbers of M&A deals in the first half of 2005 were up 80 percent compared with the global average of 5.40 percent and the Asia-Pacific (excluding Japan) average of 6.57 percent. According to M&A data available from Bloomberg, Japan topped the table with a higher growth in deal count at 84.7 percent. In terms of volume, despite the subcontinent lagging behind the global average, it was better off than the rest of Asia, as M&A volumes were up 34.23 percent from 2004 at $5.974 billion.

Among the important legal developments that affected M&A directly or indirectly include the following:

i. Contributed by Kamal Sultanpuri and Naila Jung, Associates of Fox Mandal.


44. Indo British Partnership, supra note 42, at 1.
(1) As per changes in Foreign Exchange Management Authority, the permission of RBI/Government of India is not required in respect of transfer of shares and convertible debentures by a person resident in India to a person resident outside India and vice-versa on fulfillment of certain conditions specified in said notification.45

(2) The current Indian M&A landscape is a reflection of a sound approach of the legislature to assimilate India into the global village. Investment by non-resident Indians made in foreign exchange on a non-repatriable basis has been allowed to be made fully repatriable, whereas investment made in Indian rupees through rupee accounts continued to remain non-repatriable.46

(3) New proposals for foreign investment and technical collaboration would henceforth be allowed under the automatic route, subject to sectoral policies, as per the liberalized guidelines.47

(4) Enhancement of FDI ceilings in various sectors (e.g., telecom, terrestrial broadcasting FM, etc.).48

(5) Proposals for opening up more sectors for investment such as retail are on the anvil.49

X. Ireland

There has been a significant level of activity in the areas of M&A and joint ventures in Ireland in 2005. Key reasons for this include low interest rates and a high level of market confidence. Indeed, the first nine months of 2005 exceeded 2004 in total value terms. There have been takeovers by Irish companies at home and in the United Kingdom, particularly in the areas of property, telecoms, food, and the media.

A key deal that took place in 2005—and probably the one that attracted the most public interest—was the takeover battle for the Jurys Doyle Hotels Group, which essentially was an MBO that lasted six months. As part of the process, several key assets were spun off. The Jurys Hotel, Ballsbridge site was sold to Sean Dunne, who paid €260 million for the 4.8 acre site and the Jurys Berkeley Court Hotel site went to a private consortium (including members of the Doyle family) for €114 million for the 2.2 acres.

The Alternative Investment Market (AIM) in London is becoming increasingly popular with a growing number of Irish companies listed in order to take advantage of lower costs and less stringent regulations involved in raising capital in this manner.50 Thus, the Irish Enterprise Exchange (IEX)51 was introduced in April 2005, which provides a similar service with largely the same rules, in order to encourage Irish companies to join IEX rather than AIM in the future. Newcourt is an example of a large Irish company that is listed on both exchanges.

45. Id. at 11.
46. Id.
47. Id. at 16.
48. Id. at 28.
49. Id. at 33.
There has also been a significant development from a legislative perspective, particularly with the implementation of the Prospectus Directive,\textsuperscript{52} by way of the introduction of the Prospectus (Directive 2003/71/EC) Regulations 2005\textsuperscript{53} on July 1, 2005. These regulations lay down principles in relation to the drawing up, approval, and distribution of prospectuses when securities are offered to the public or admitted for trading on a regulated market. The objective is to enhance investor protection through the production of high quality prospectuses and to improve the efficiency of raising capital through the issue of a single approved prospectus that will be valid for use across the EU.

XI. Italy\textsuperscript{k}

A. Failure to Launch a Mandatory Tender Offer and Monetary Damages

In a recent and controversial decision,\textsuperscript{54} the Milan Tribunal held SAI-Fondiaria and Mediobanca liable for damages for failure to launch a mandatory bid over the shares of La Fondiaria, when the former companies had exceeded the relevant threshold for the purposes of the mandatory bid (30 percent of voting stock),\textsuperscript{55} through a concealed, concerted action in 2001 that was finally ascertained by CONSOB (i.e., the Italian stock market regulator) at the end of 2002. The importance of this decision stems from the fact that, for the first time, an Italian court has awarded damages in favor of shareholders that were not given the opportunity to tender their shares in a mandatory bid.

Administrative sanctions aside, Italian law provides for two express remedies for failure to launch a mandatory bid: (1) the acquirer cannot vote any of its shares and (2) the acquirer is compelled to sell the shares it holds above the 30 percent threshold.\textsuperscript{56} By requiring the sale of the shares exceeding the 30 percent threshold, the law aims at reestablishing a situation in which there is no dominant shareholder, and thus the target can still be theoretically subject to potential bids in the market for corporate control, though the acquirer may nevertheless retain a 30 percent participation interest and still maintain a non-trivial influence. The law says nothing, however, regarding whether investors may also have a cause of action for damages vis-à-vis the person(s) or entity(ies) who failed to launch a mandatory bid. While the majority of legal commentators argue that monetary damages may be awarded pursuant to general principles of contract law (or tort law, depending on the authors), according to other commentators and, most importantly, previous decisions by Italian Courts (that actually applied an older legal regime), the law provides for no remedies other than the express sanctions, and hence investors are not permitted to seek further protection. The argument is that once the acquirer has fulfilled the duty to sell the stake in excess of the permissible threshold, there is no justification for imposing damages, as such a shareholder's influence should no longer be relevant and the target can be taken over by other parties.

\textsuperscript{k} Contributed by Robero Casati, Partner, and Matteo Montanaro, Associate, of Cleary Gottlieb Steen & Hamilton LLP. Mr. Casati is a Vice-Chair of the M&A and Joint Venture Committee of the International Section of the American Bar Association.
\textsuperscript{56} Id. at art. 110.
The Milan Tribunal held SAI-Fondiaria and Mediobanca liable on the theory that the express sanctions provided for by the law do not prevent shareholders from obtaining monetary damages in all those circumstances in which such sanctions would result in being ineffective. In the specific case, the sale of the stake exceeding the 30 percent threshold proved to be an ineffective remedy as it was made on a pro-rata basis only after the target La Fondiaria had been merged into SAI, which in turn had a controlling shareholder and thus could not be subject to unsolicited takeovers in the future. The amount of the damages awarded by the Tribunal was equal to the difference between the hypothetical price at which the mandatory bid should have been launched and the market price on the day following the violation, multiplied by the number of shares held by the plaintiff on such a date.

XII. Japan

In terms of M&A developments, the year 2005 was a momentous one for Japan, both from a market and legal perspective. The M&A market continued to show record double-digit growth in terms of the number of deals announced, and Japan's judiciary began enunciating principles for ameliorating corporate takeover defenses, including poison pills, which were employed in several sensational cases marking the long awaited emergence of Japan’s fledgling market for corporate control. A sweeping new Companies Law was passed in June 2005, augmenting the ability of Japanese corporations to engage in cross-border mergers, but also enhancing corporate boards' powers to fend off hostile takeovers. One development that is sure to foster a higher level of cross-border investment in Japan is the new Japan-U.S. income tax treaty that became fully effective on January 1, 2005.

A. Market Developments

The robust growth in Japan’s M&A market during 2005 surpassed that of the world’s major M&A markets, including those of the U.S., the U.K., and Australia. For the year, a record 2552 deals involving Japanese companies were announced, representing a 23 percent increase over 2004’s deal volume, and the fourth straight year of double-digit growth. Moreover, total deal value for the year 2005 stood at $167.6 billion—a more than doubling of the previous year’s deal value. A few mega-deals contributed to these records. For example, on October 1, 2005, the world’s largest bank by asset values was created when Mitsubishi Tokyo Financial Group formally acquired UFJ Holdings, Inc. for $41.4 billion. The second largest all-Japanese deal in 2005 was department store giant ItoYokado’s absorption of its subsidiary, Seven-Eleven Japan Co., for $12.5 billion. The large increase

1. Contributed by Pamela Ann Fuller, an American lawyer specializing in international taxation and cross-border investments.


59. Almost all of Japan's M&A activity in 2005 was comprised of domestic deals. In fact, the value of transactions involving the acquisition of a Japanese entity by a foreign-based company dropped 55% from the year 2004. *See id.* The drop may be due to the fact that in 2004 many foreign deals involved private equity funds looking for faltering Japanese companies they could turn around. By 2005, there were fewer such Japanese companies available. *See Andrew Morse, M&A Activity in Japan Surges to Record Level, WALL ST. J., July 5, 2005, at C4.*
in M&A activity appears attributable to companies' efforts to streamline their operations through strategic reorganizations, and not to mere disposals of distressed assets.

The hostile activity that occurred in Japan’s M&A market in 2005 may seem unremarkable by Western standards. But in Japan, the very fact that hostile takeovers were being staged at all was earthshaking news since, until recently, such tactics were considered taboo and practically impossible to execute as the control of postwar Japanese corporations had long been ensconced in the hands of stable shareholders and affiliated banks loyal to incumbent management. One of the most dramatic corporate takeovers in Japanese business history was staged in 2005, when a young internet startup firm—Livedoor—gained a controlling interest in Nippon Broadcasting System (NBS)—the largest shareholder of the old-line media conglomerate, Fuji Television Network. Livedoor amassed its stake in NBS by taking advantage of a loophole in Japan’s Securities and Exchange Law that allowed it to buy NBS shares electronically, after the trading floors had closed and without ever announcing a tender offer. When Livedoor announced that it held more than 30 percent of NBS’s voting power, NBS and Fuji launched a series of defensive measures, including a plan by NBS to issue equity warrants to Fuji in order to dilute Livedoor’s stake in NBS. The Tokyo District Court upheld Livedoor’s injunction, holding that NBS had failed to show that irreparable damage would definitely result if Livedoor gained management control. The Livedoor-Fuji battle for control of NBS convinced lawmakers to close the loophole in the SEL, and also prompted many Japanese corporations to institute potent takeover defenses. The NBS takeover contest was settled in April 2005, when Livedoor agreed to sell to Fuji the 50 percent stake it had by then acquired in NBS in exchange for Fuji’s agreement to buy a 12.75 percent stake in Livedoor for forty-four billion yen and to enter into a business alliance with Livedoor.

But the envisioned synergistic alliance between Livedoor—the emblematic leader of Japan’s new generation of flashy startup companies—and Fuji—an old-line, rather stodgy, Japanese media conglomerate—was illusory. Not only was there a lot of bitter resentment within Fuji’s management ranks over Livedoor’s unconventional business tactics, but in the autumn of 2005, Japan’s Securities and Exchange Surveillance Commission began secretly investigating Livedoor for suspected securities law violations, resulting in the arrests and indictments of Livedoor’s top executives in early 2006, a free fall in Livedoor’s stock price, the scheduled delisting of Livedoor from the Tokyo Stock Exchange on April 14, 2006, and the sale by Fuji of its 12.75 percent interest in Livedoor to another corpora-

60. The Tokyo District Public Prosecutors’ Office is charging that Livedoor’s former president, Takaful Horie, and several other top Livedoor executives, conspired to funnel proceeds of Livedoor’s own group stock sales through several off-balance-sheet investment partnerships and foreign bank accounts in order to illegally inflate Livedoor’s pre-tax income and the value of the affiliated group’s stock. Prosecutors believe Livedoor fraudulently reported a consolidated pretax profit of 5.03 billion yen in the year ended September 2004 by booking fictitious sales, although it actually incurred a pretax loss of 312.78 million yen.

61. Livedoor lost nearly 90% of its trading value in the two months following the January indictments of its executives. Meanwhile, the Nikkei 225 Stock Average tumbled 5.7% in just two days of the Livedoor sell-off, prompting the TSE to suspend all trading on January 18, 2006—the first early close in the TSE’s 57-year history.

62. On March 13, 2006, the TSE announced it would delist the Livedoor and Livedoor Marketing stocks after the Securities and Exchange Surveillance Commission filed a criminal complaint against Livedoor and five of its former and current executives on charges of falsifying financial statements.
tion. The spectacular rise and fall of Livedoor will not likely stifle the future growth of Japan's promising M&A market. But it will undoubtedly leave a legacy. The seeming ease with which Livedoor acquired NBS without the consent of the target's management has already put lax Japanese corporate managers on their toes, and the securities scandal that subsequently sent Livedoor's stock plummeting highlights the need for Japan to reform its insular corporate governance system in which truly independent directors are now rarely employed, and to revamp its financial accounting rules, especially with respect to the treatment of off-balance-sheet special-purpose entities.

B. Statutory and Regulatory Developments

On June 29, 2005, Japan's Diet passed the 2005 Companies Law that broadly amends and integrates old business codes into one streamlined, principles-based statute. The Companies Law, most provisions of which take effect on May 1, 2006, repeals the old yugen kaisa form for closely held companies and replaces it with two modern business entities—a limited liability company (LLC) and a limited liability partnership (LLP)—both of which are patterned on American models. The new Companies Law also expands the categories of permissible consideration in indirect cross-border mergers to include cash, bonds, and shares of foreign corporations. This controversial amendment will make it easier for a foreign company to acquire a Japanese target and to cash out any dissenting shareholders. But amidst the widespread fears of a sudden surge in foreign takeovers of Japanese companies, lawmakers deferred the effective date of this particular amendment to 2007—a move that has been heavily criticized by foreign business interests as too protective.

Another highly controversial provision in the new Companies Law is article 821, which has the potential to substantially restrict the ability of foreign corporations to conduct business in Japan through unincorporated branches. Although article 821 ostensibly applies only to foreign entities seeking to evade Japanese business regulation through the use of off-shore companies, critics argue the provision is drafted too broadly and will catch many conventional off-shore structures with legitimate business purposes. Some foreign firms are considering reorganizing their operations in Japan to avoid the potential application of article 821 which, when it applies, could pierce the foreign corporate veil and impose personal liability on individuals.

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63. On March 16, 2006, Fuji sold its entire 12.75% stake in Livedoor to the president of Usen Corporation—a major cable broadcaster with a reputation for buying and reviving distressed companies. For its 2005 fiscal year, Fuji will claim a 34.5 billion yen loss on the sale, and has also announced that it plans to sue Livedoor for damages.

64. Kaisha Ho [Companies Law], Law No. 86 of 2005.

65. The Companies Law also relaxes rules applicable to Japan's joint stock companies (kabushiki kaisa or KKs). For example, the minimum initial capitalization requirements for new KKs is being reduced from the current ten million yen to just one yen under the new law in order to encourage the incorporation of new businesses. See id.

66. Lawmakers apparently likened a negotiated triangular merger to an unsolicited takeover bid, which is an unfounded analogy. A triangular merger is an extraordinary transaction under Japanese law, requiring a two-thirds majority vote of the merging company's shareholders. While it is theoretically possible to get this level of approval without management's consent, it is highly unlikely, even in a U.S. corporation, much less in a Japanese one. Even when the foreign triangular merger transaction becomes legally available in 2007, it is not likely to be utilized unless it is also made tax free to the Japanese target's shareholders.
When the new Companies Law becomes effective in 2006, Japanese firms will have more choices in crafting defenses against hostile takeovers, including golden shares with special veto rights. Many of these newly sanctioned takeover defenses have a distinctly poison pill character, in that they can effectively dilute the voting power of an unwanted suitor if activated. In November 2005, the Ministry of Economy, Trade, and Industry and the Ministry of Justice jointly issued final Takeover Guidelines that appear to incorporate, to a high degree, twenty years of American takeover jurisprudence as they set forth a fair and reasonable standard for takeover defenses, with the ultimate test of reasonableness being whether the defenses enhance corporate value. Although not legally binding, the ministry-sponsored Takeover Guidelines clearly influenced the Tokyo District Court in upholding Livedoor's temporary injunction against NBS, and are widely expected to play an influential role in shaping Japan's regulation of hostile takeovers in the future.

XIII. Mexico


The FCC also cleared the acquisition of the capital stock of a publicly held steel company named Hylsamex, S.A. de C.V., a company with significant participation in the steel industry in Mexico and Latin America. In turn, Industrial Investments Inc. and Siderar SAIC acquired Hylsamex for a total of approximately US$2.095 billion, probably the largest transaction in Mexico this year.

Another interesting concentration, after a long road of financial burdens faced by the government owned companies, finalized this year with the sale of Mexicana through a public auction. CINTRA, owner of virtually all capital stock of two major airlines in Mexico, namely Mexicana and Aeromexico, notified the FCC to clear the sale by public auction of those two groups. The FCC cleared the sale in two blocks, namely Aeromexico and a subsidiary as the first block and Mexicana and a subsidiary as second block. The only attractive tender offer was made by Grupo Posadas, S.A. de C.V., who in turn adjudicated Mexicana at US$165.5 million, which included net liabilities up to US$1.456 billion. On the other hand, the sale of Aeromexico was set off for a future proceeding.

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XIV. Poland

A. Market Developments

In the first half of 2005, the value of the M&A market in Poland equaled 843 million euros, which is a 16 percent growth compared with the same period last year. Although the number of such deals decreased significantly when compared with those for the same period of 2004, the total value of these transactions grew (approx. US$1.4 million).

One of the most significant transactions involving Polish capital in 2005 was PKN ORLEN's acquisition of a 62.99 percent majority stake in UNIPETROL on May 24, 2005. The purchase of Unipetrol shares is the biggest Polish foreign investment ever. The above transaction is one example of Polish companies expanding their businesses abroad, maintaining their position in new markets such as Romania or Ukraine, and trying to gain access to these markets for their products.

In the first half of 2005, there were seventy transactions concluded, which is 30 percent less than last year. Polish investors participated in thirty-seven of these transactions. The apparent growth of Polish investment activity is the result of the continuing process of consolidation. In the preceding year, foreign investors were more likely to invest in markets in other countries in the region.

B. Legal Developments

On October 24, 2005, the Law on the Public Trading of Securities was replaced by three new acts: the Act on Public Offer and Conditions of Introducing Financial Instruments into the Organized System of Turnover and on Public Companies, the Act on Turnover of Financial Instruments, and the Act on the Supervision of the Capital Market. All of these acts were created to comply with the EU Directive 2004/25/EC of April 21, 2004 on takeover bids that is to be adopted by Member States by May 2006.

Under the new regulations, the notification duties of public company shareholders will be extended to include legal events, other than acquisition and sale of shares, as a result of which the threshold of votes at a general meeting is exceeded. According to the new acts, the above notification is required when a 5 percent, 10 percent, 25 percent, 33 percent, 50 percent, and 75 percent threshold level of the general number of votes in a public company is reached. Furthermore, the new regulations annul the duty of acquiring the Securities Commission's permission to exceed the number of 25 percent, 33 percent, or 50 percent votes at a general meeting of a public company. Until October 24, 2005, such permission was required if the general number of votes exceeded 25 percent, 33 percent, or 50 percent. To comply with the new regulations, a shareholder will need to notify the Commission about such a fact.

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n. Contributed by Dr. Torsten Bogen, Partner of Gleiss Lutz, Warsaw office.
According to the new regulations, the majority shareholder who is the owner of at least 90 percent of voting rights, will have a squeeze-out right, enabling him to call on the remaining shareholders to sell him their securities. It should be stressed at this point that examination of the squeeze out right will not require the consent of the shareholder concerned. The squeeze-out right is associated with a sell-out right that provides the minority shareholders with right to require the majority shareholder to buy their securities.

XV. Russia

A. Significant Transactions and Market Trends

The most significant transaction during 2005, and Russia's biggest ever takeover, was Gazprom's acquisition of Millhouse Capital's (owned by Roman Abramovich and associates) 72.7 percent holding in Sibneft, Russia's fifth-biggest oil firm, for US$13.1 billion. The deal demonstrates the government's intention to reassert control over the energy sector, reversing the effects of some of the controversial privatizations of the 1990s. But the manner in which Gazprom acquired Sibneft—by paying market price—may arguably serve to reassure investors worried by the Yukos affair and the way in which Rosneft gained control of Yuganskneftegaz.71

The second largest deal of 2005 was the acquisition by OOO Ural Steel and Sitbon Investment Limited of a 97.5 percent interest in Russia's second biggest iron ore producer, Mikhailovsky, evidencing the continued strong performance of the steel sector. This strength is further evidenced by Severstal's acquisition of a 62 percent stake in Italian steel-maker Lucchini SpA for €430 million; perhaps the most significant deal for a Russian company outside Russia during 2005.

Natural resources remain the core of the Russian economy and this sector will undoubtedly continue to be a focus for investors. Gazprom's acquisition of Sibneft, however, indicates the increased sensitivity around investment in the natural resources sector and the government's desire to exert control over this area. Accordingly, opportunities for major outright acquisitions by foreign investors are likely to be limited in the future.

There has been much increased M&A activity in consumer sectors during 2005 driven by the rapid growth in the gross domestic product, increased consumer spending power, and the reduced political risk associated with these sectors.

B. Legal and Regulatory Developments

There were few developments of real significance to M&A/joint venture transactions in Russia during 2005. One key change was the significant increase in the thresholds triggering a requirement to notify, or obtain the consent of, the Federal Antimonopoly Service72 in circumstances where a significant or controlling interest in a Russia entity is, directly or indirectly, to be acquired. Prior consent is required in respect of an acquisition, where the target and the acquirer group have combined assets of approximately US$110 million (increased from US$ 700,000).

o. Contributed by Robin Wittering, Partner, Herbert Smith CIS LLP.


Another development of relevance is the reduction of the term during which a transaction may be invalidated by any interested party or the courts because it conflicted with Russian law from ten to three years following completion. This effectively validates, from a civil law perspective, the privatizations of the 1990s, thereby reducing the need for due diligence to focus upon identifying potential defects in the privatization process. This issue has been a particular concern for foreign investors.

In the energy sector, the ongoing saga of the promulgation of a new subsoil law, which may impose limitations on foreign ownership of, but a fairer process in the acquisition of, subsoil licenses, continues with no immediate prospect of the Duma adopting such legislation. The content of the law is subject to change, but the most recent draft suggested, inter alia: (a) a shift from licenses to civil law agreements; (b) a smoother transition from geological study to exploration and production; and (c) reduced administrative discretion in relation to termination, limitation, and suspension of rights.

XVI. Spain

Spain, through Law 19/2005, added a new chapter to the Spanish Public Limited Liability Company Law (Ley de Sociedades Anónimas), which is applicable to the European public limited liability company (SE) with registered office in Spain, pursuant to the provisions of European Council Regulation (EC) No 2157/2001 on the Statute for a European company (the Regulation). There are different ways of forming an SE (basically by merger, direct incorporation, and transformation). The Regulation leaves open the possibility for Member States to determine that public limited liability companies subject to their laws may not take part in the formation of an SE by merger, on grounds of public interest. This has been the position that Spain has adopted in Law 19/2005, through which opposition may occur on the grounds of public interest. An SE with a registered office in Spain will be governed by the Regulation, the provisions of the new chapter that has been added to the Spanish Public Limited Liability Company Law, and the provisions of the law to be adopted regulating the involvement of the employees in an SE with registered office in Spain. The Regulation establishes that an SE may not be registered until the involvement of the employees in an SE has been determined pursuant to Directive 2001/86/EC. Therefore, the Spanish law to be adopted, which will incorporate the provisions of said Directive, is of notable importance for the formation of an SE in Spain.

Finally, as a novelty for Spain, Law 19/2005 establishes that an SE with registered office in Spain can adopt, as its management structure, either a one-tier system, which consists of an administrative body, or a two-tier system, which includes a supervisory body and a management body. With respect to the liability regime applicable to the members of the administrative body, the supervisory body or the management body Law 19/2005 provides that the provisions of the Spanish public limited liability company regarding liability of

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74. The lower house of the Russian parliament had been scheduled to hold a first reading on November 2, 2005, but it was postponed because of a lack of clarity on how to restrict foreign involvement in mineral resources that Russia considers strategic.
directors will also apply to the members of the above mentioned bodies of an SE with registered offices in Spain.

XVII. Sweden

A. INTRODUCTION AND MARKET DEVELOPMENTS

As in much of the rest of Europe and the Americas, the twin hallmarks of the Swedish M&A market during 2005 have been the strength of private equity and the overall impression that this is a sellers’ market. On the regulatory side, there have been important developments in tax and a complete overhaul of the Swedish Companies Act,\(^76\) as well as important rulings on hostile bids.

On the market side, private equity—as well as the ever-more-visible hedge funds—is moving from strength to strength, with financial buyers still dominating the buy side and, increasingly, exiting to other financial players in the secondary market. As elsewhere, there is growing competition for viable targets still capable of generating expected returns. Particularly notable deals, in addition to the Old Mutual/Skandia struggle discussed below, have included the sale by EQT of Swedish cable operator ComHem to Carlyle and Providence and the ten billion euro leveraged buy-out of Nordic telecom TDC by Apax, Blackstone, KKR, Permira and Providence,\(^77\) as well as the private equity-led public offer for Scandinavian property services concern ISS.

B. LEGAL DEVELOPMENTS

After over a decade of preparations and analysis, Sweden has finally passed an omnibus revision to the Companies Act. Although a number of the provisions were already incorporated by earlier amendments, some are entirely new and some have been clarified. Among the most important changes from an M&A perspective are the lifting of various restrictions on the capital structure of Swedish corporations (aktiebolag) that opens the door for a variety of new financing options (such as participating debentures and other hybrid instruments), as well as the liberalization of the financial assistance restrictions to allow for more flexible vendor financing and leverage opportunities.\(^78\)

Another major development was an important revision of the Swedish tax code, introducing the participation exemption (relief from tax on capital gains and dividends in certain group settings) into the Swedish tax environment. When combined with other aspects of Swedish tax law, such as no thin capitalization rules, no withholding tax on interest, and a broad tax treaty network, the new regime has prompted an increasing number of multinationals to establish Swedish holding companies for their European and other operations and to migrate debt to their Swedish holding structure. Finally, the protracted hostile bid by Old Mutual for the Skandia insurance company has not only dominated the M&A

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\(^q\). Contributed by Maria Tufvesson Shuck and Adam Green, Partners of Mannheimer Swartling, New York office.

\(^76\). Svensk Forfattningssamling (Svensk författningssamling [SFS] 2005:551) (Swed.) [hereinafter the Swedish Companies Act].

\(^77\). Both reflecting the increasing incidence of club deals, and the latter the largest private equity deal since KKR acquired RJR Nabisco back in 1989.

\(^78\). Swedish Companies Act, supra note 76.
headlines during the second half of 2005, it has also resulted in a number of rulings on important takeover issues, including board duties and takeover defences.

Overall, this has been a time of significant legislative change in Sweden. The impact will most likely play out over the next few years as the market comes to understand and capitalize on the new rules and recommendations.

XVIII. Switzerland

With respect to business activities, the number of mergers has increased in 2005 compared to previous years. In addition, some major takeover battles took place during the year. With regard to one merger, the Swiss Takeover Board ruled that agreements with board members granting them long term contracts (i.e., golden parachutes) were not in the interest of the company. Therefore, the agreements were to be qualified as a defense not permitted by law\(^7\) in that case.

In 2005, there were no significant changes to the Swiss merger and acquisition law. The new merger act\(^8\) had come into force on June 1, 2004. Although no significant judgment based on this act has been rendered yet, experience in applying the new act was gained during the year in review. Therefore it is worthwhile to outline briefly its scope.

The main purpose of the new act is to regulate all restructuring of businesses in any new form. As such, it governs mergers, demergers, conversions, and transfers of assets and liabilities. Consequently, the new law regulates all types of mergers of all company forms, associations, and foundations provided for in the Code of Obligations. Beyond the scope of pure mergers, the act also allows for the conversion of a company into another legal form and permits such company to continue to exist. The result of such conversion is a change of the legal form but it does not provide for a transfer of assets. Regarding demergers, the act distinguishes between spin-offs (formations of two or more companies while the existing company continues to exist) and a division (dissolution of the existing company and transfer of business to two or more other companies). Further, it is now possible to transfer entire businesses or parts thereof based on the new act.

With respect to taxes, the Swiss Federal Supreme Court also ruled in 2004 that a transaction might qualify as an indirect partial liquidation or a transposition in the following situation: if a seller holds shares as private assets and such shares are sold to a company or person holding the shares as business assets, the price for these shares will be indirectly financed by the target company, which will distribute profits, and the contracting parties will cooperate regarding the removal of assets from the target. In such a situation, it is highly recommended to obtain a ruling from the authorities. But in the aftermath of this decision there has been wide criticism.\(^9\) Presently, there is a draft for a regulation, not yet enacted, that would lessen the decision's consequences.

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\(^{1}\) Contributed by Florian S. Jörg, MCJ, Associate of Froriep Renggli, Zürich office.

7. Swiss Takeover Board, Empfehlung I-VIII, available at www.copa.ch/intro......en.html. This decision is in German, involving Sumida Holding Germany GmbH and Saia-Burgess Electronics Holding AG.


SUMMER 2006
XIX. United Kingdom

Between July 1, 2005 and December 31, 2005, the United Kingdom assumed the Presidency of the EU Council. The Government of the United Kingdom indicated that a key theme for its 2005 Presidency would be the continued improvement to the European Community (EC) company law framework and the continued compliance with pre-existing EC legislation. It is unsurprising therefore, that in 2005, the United Kingdom has witnessed the implementation of numerous pieces of EC company law as well as proposals for reform of national company law that will affect M&A that take place in the jurisdiction.

From July 1, 2005, the existing United Kingdom Listing Rules were replaced by a new three-part block in the Financial Services Authority (FSA) Handbook comprising the Listing Rules, Prospectus Rules and Disclosure Rules. These new rules reflect: (1) implementation of the EU Market Abuse Directive;82 (2) implementation of the EU Prospectus Directive;83 and (3) the results of a detailed review of the existing listing regime conducted by the FSA.

At the same time, the Financial Services and Markets Act 2000 (the FSMA 2000) has also been amended by the FSMA 2000 (Market Abuse) Regulations 200584 and by the EU Prospectus Regulations85 that implement the EU Market Abuse Directive and the EU Prospectus Directive and give the FSA the power to make the Disclosure Rules and Prospectus Rules.

A. Company Law Reform Bill

On November 3, 2005, the long-awaited Company Law Reform Bill86 was published. Envisaged amendments to the United Kingdom’s company law framework include, inter alia, the introduction of a new statutory regime for shareholder litigation; the introduction of a statutory statement of directors’ duties; the introduction of auditor liability limitation and amendments to shareholder communication and voting requirements. In addition, there are various deregulatory measures for private companies, including the simplification of the financial assistance rules; the abolition of the requirement for private companies to hold annual general meetings and the need for a private company secretary. The timing for the implementation of the bill is still not clear, but the Government of the United Kingdom has indicated that it will not come into force before 2007.87

B. EU Takeover Directive and its Effect on the Takeover Code

The EU Takeover Directive (the Directive) came into force on May 20, 2004, aiming to impose minimum standards for the regulation of takeovers across Europe. Member States are required to implement the Directive by May 20, 2006. From a United Kingdom per-
spective, many of the key provisions of the Directive are similar to those in the City Code on Takeovers and Mergers (the Code)88 and the provisions of the Companies Act 198589 relating to squeeze out and sell out rights. But its implementation will require some minor changes to the current regulatory system in the United Kingdom.90 The Takeover Panel, for example, will be given statutory powers to impose and enforce the Code.91 The Government of the United Kingdom's Department of Trade and Industry is not proposing, however, that the rules set out in the Code be contained in any primary legislation.

C. Rules Governing Substantial Acquisitions of Shares (The SARs)

The Takeover Panel has proposed the abolition of the SARs.92 The SARs were introduced in 1980, following concerns about market raids on the shares of listed companies prior to the launch of a bid. They limit the speed with which a person can acquire between 15 percent and 30 percent of the voting rights of a company so that all shareholders have the opportunity to sell their shares to the potential acquirer and so that target boards can advise their shareholders. The Takeover Panel pointed out that the SARs do not restrict share dealings but instead focuses on the consequences that flow from any such dealings. The Takeover Panel does, however, propose retaining the rules on tender offers (currently in SAR 4) as it believes that tender offers can be used to frustrate a Code offer. The Rules of the London Stock Exchange on the conduct of tender offers only apply to companies listed on the Official List.

XX. Venezuela

During this past calendar year there has not been any noteworthy legal development affecting M&A and joint ventures under Venezuelan jurisdiction other than the enactment of the Currency Exchange Criminal Law that limits business transactions in foreign currency and may have an impact on some.

91. Id. Such powers are outlined in the new Company Law Reform Bill.

t. Contributed by Jorge Acedo Prato, Partner of Hoet Pelaez Castillo & Duque.