International Lawyer

Volume 47
Number 0 *International Legal Developments Year in Review: 2012*

Article 6

2013

International M&A and Joint Ventures

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Recommended Citation

Duco de Boer et al., *International M&A and Joint Ventures*, 47 ABA/SIL YIR 63 (2013)
https://scholar.smu.edu/til/vol47/iss0/6

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This article reviews developments in international mergers, acquisitions, and joint ventures during the year 2012.[1] Because of space limitations, this year's article reviews only developments from the European Court of Justice (ECJ) and from nine selected jurisdictions: Denmark, Germany, Israel, Luxembourg, the Netherlands, Sweden, Turkey, Ukraine, and the United States. Additional country reports can be found on the committee's website.[2]

I. European Court of Justice

In its recent decision in *Vale*,[3] the ECJ strengthened the cross-border mobility of companies within the European Union. In *Vale*, an Italian limited liability company resolved the transfer of its registered office to Hungary. Following the resulting deletion from the commercial register in Rome and conclusion of the articles of the respective Hungarian limited liability company, the Hungarian authorities declined registration. The ECJ qual-

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1. For developments during 2011, see Phillip Johnson et al., *International M&A and Joint Ventures*, 46 Int'l Law. 63 (2012). For developments during 2010, see Saul Feilbogen et al., *International M&A and Joint Ventures*, 45 Int'l Law. 63 (2011).

2. *See International M&A and Joint Venture Committee*, Am. B. Ass'n, http://apps.americanbar.org/dch/committee.cfm?com=IC120000 (last visited Feb. 6, 2013).

3. *See* Case C-378/10, Vale Építési kft, 2012 E.C.R. 00000, ¶ 63 (2012), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=124998&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=407668.

ified the case as a cross-border conversion and applied Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU)[4] to hold that the freedom of establishment, together with the principles of equivalence and effectiveness, require an EU member state to allow for (inbound) cross-border conversions to the same extent it provides for such conversions in its own national legal forms.

The ECJ has decided a significant number of major cases on the cross-border mobility of companies. Most recently, the court held that cross-border mergers fall within the freedom of establishment.[5] With respect to cross-border conversions, it had remained unclear[6] whether the national legislature can exclude foreign legal forms—an issue now clarified by *Vale*, which obliges the member state to treat foreign legal forms at least equivalent to national entities. Various countries recognize statutory mergers, demergers, and conversions as special corporate transactions. The EU Merger Directive exclusively regulates the subject matter of cross-border *mergers* between member states.[7]

The ECJ's jurisdiction has a direct effect only on cross-border mergers within the EU. Inbound or outbound transactions, on the other hand, remain subject to applicable national laws. According to the ECJ, a conversion is not only the change of the same company's legal form to another legal form, but also the *cross-border* change from one legal form into the same legal form.

The structuring opportunities, according to *Vale*, are broad compared to certain aspects of the EU Merger Directive. First, the latter exclusively applies to limited liability companies,[8] although following the ECJ's recent case law, other legal forms must enjoy the same freedoms as well. Second, the EU Merger Directive specifically provides for employee participation,[9] which may substantially slow down the merger process. Third, real estate transfer taxes that may arise upon a merger may not apply in cases of a conversion with unchanged continuation of ownership.

Due to the lack of applicable legislation on cross-border conversions, the ECJ postulates a consecutive application of the two national laws. While this is in theory an understandable approach, in practice the resulting need to coordinate the applicable national laws causes a great potential for uncertainty. It begins with the false implication that the process can be clearly divided into two phases: that of the converting company's member state and that of the converted company's member state. Usually, however, a member state will deem the conversion to have become effective upon registration thereof with the authority competent for the converted company and will therefore not cease to be relevant at an earlier stage. Coordination issues that drive from this dilemma concern, e.g., details of applicable provisions on formation, shareholders' identity, treatment of "unknown" shareholders, capital maintenance, debtor protection, liability and (notarial or other) form.

4. Consolidated Version of the Treaty on the Functioning of the European Union arts. 49, 54, May 9, 2008, 2008 O.J. (C 115) 47.

5. Case C-411/03, Sevic Systems AG, 2005 E.C.R. I-10805, ¶¶ 17, 19.

6. *See* Case C-210/06, Cartesio Oktató és Szolgáltató bt, 2008 E.C.R. I-09641, ¶ 125.

7. Council Directive 2005/56, 2005 O.J. (L 310) 1 (EC) [hereinafter EU Merger Directive].

8. *Id.* art. 2.

9. *Id.* art 16.

II. Denmark

A. Trends in the 2012 M&A Market

M&A deal activity in Denmark has declined significantly since the financial crisis in 2008. The M&A market regained some terrain in 2010, but the latest developments in Southern Europe have created some setback in the confidence affecting Danish M&A activities. Looking at qualifying transactions in Denmark since 2005, the first three quarters of 2012 are at the lowest level of finalized transactions ever with total transactions at 259 compared to 391 transactions in 2007.[10]

Although difficult to single out any one factor causing the drop in transaction activity, the darkest shadow is being cast by the continued financial crisis and uncertainty in future economic developments. This has led to monetary restrictions, challenging debt-financing, and a significantly lower level of acquisition loans compared to the pre-crisis levels. Danish financial institutions are still reluctant to provide financing and the market is mainly focused on companies with unique business models, strong market positions, high margins, and good future growth potentials.

B. Legal Developments 2012

Legal developments and new legislation initiatives during 2012 have been limited. The implementation of the new Danish Companies Act (the Act)[11] adopted in 2009 is now almost finalized, and the Danish Business Authority has implemented all parts of the Act, except for the electronic shareholders' registry.[12] Until the system is implemented, the shareholders' registry is kept and updated by the company's central governing body (management or the board of directors).[13] The central registry should be operational by late 2013.

The Act has also loosened restrictions on acquisition financing, bringing the Danish regulation in line with the rest of the EU and in accordance with the amendment of the second company directive.[14] The change of the Act makes it possible for a target company to provide financial assistance to a buyer provided certain pre-conditions are fulfilled.[15] It is expected that this will provide new opportunities for acquisition financing.

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10. Ernst & Young Transaction Advisory Services, Transaktionsbarometret [Transaction Barometer] 3 (Nov. 2012) (on file with author). The analysis considered five search criteria: (1) at least 30 percent of the share capital was acquired; (2) at least one of the involved parties was Danish; (3) the transaction was announced during the analysis period; (4) the transaction was not cancelled or based on a rumor; and (5) the transaction was not an IPO, carve-out, or repurchase of a company's own shares. *Id.* at 2.

11. Lov. No. 470 af 12 Juni 2009, Lov om aktie- og anpartsselskaber (selskabsloven) [Danish Act on Public and Private Limited Companies (the Danish Companies Act)], pmbl. [hereinafter Danish Companies Act], *available at* http://www.dcca.dk/graphics/_ny%20eogs/English%20version/Legislation/The%20Danish%20 Companies%20Act%20-%2006122010.pdf.

12. *See id.* pt. 3 (holding that once an electronic shareholder's registry is implemented this will mean that no central registration of shareholders in unquoted companies will exist).

13. *See id.* pt. 4.

14. Council Directive 2006/68, 2006 O.J. (L 264) 32, ¶ 1 (EC) (amending Council Directive 77/91/EEC on the formation of public limited liability companies and the maintenance and alteration of their capital).

15. *See id.*

At the time of writing, the Danish parliament was debating the abolishment of taxation on unquoted share capital (the so-called entrepreneur-taxation).[16] Abolishing the entrepreneur-taxation[17] may facilitate smaller companies' access to risk or venture capital.

III. Germany

A. Legislation Affecting M&A Transactions

1. *Investor Protection*

The Act for the Strengthening of Investor Protection and the Improvement of Capital Market Efficiency[18] aims to enhance the disclosure of equity derivatives relating to shares of listed companies and impedes hidden stake-building in listed companies.[19] The new rules have introduced disclosure of instruments that make it possible for their holder to acquire shares,[20] of return claims under securities loans, and of repurchase claims under repo transactions.[21] In the first months after the new rules have taken effect, disclosure notifications have spiked considerably.

2. *Corporate Acquisitions Via "Loan To Own" Strategies*

The Act for the Further Facilitation of the Restructuring of Businesses[22] took effect on March 1, 2012. It aims at providing easier access to debt-to-equity swaps in insolvency plan proceedings and should facilitate this type of transaction even before the debtor must file for insolvency. Now, a debt-to-equity swap as part of an insolvency plan can be implemented regardless of supporting or opposing incumbent shareholders.[23]

Incumbent shareholders who know they can be overruled in an insolvency plan will likely factor this in when negotiating a debt-to-equity swap pre-insolvency. The impairment of incumbent shareholders should be an incentive for hedge funds and other investors to purchase corporate debt below par value and then push for the conversion of their debt into equity.

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16. Lov. No. 470 af 1 Nov. 2012, Lov om ændring af aktieavancebeskatningsloven, ligningsloven, lønsumsafgiftsloven og forskellige andre love [Act amending the Capital Gains Tax Act, the Assessment Act, Payroll Tax Act and various other Acts] (changing the taxation of shares, etc. submitted to the Danish Parliament), *available at* http://www.folketingstidende.dk/RIpdf/samling/20121/lovforslag/L49/20121_L49_som_fremsat.pdf

17. *See id.*

18. Gesetz zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarkts [Act to Strengthen Investor Protection and Improve the Functioning of the Capital Market], Apr. 7, 2011, Bundesgesetzblatt, Teil I [BGBl. I] at 538 (Ger.).

19. Hartmut Krause, *Die erweiterte Beteiligungstransparenz bei börsennotierten Aktiengesellschaften* [*The Extended Participation of Transparency in Listed Companies*], 56 Die Aktiengesellschaft 469, 484 (2011) (Ger.)

20. Gesetz über den Wertpapierhandel/ Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBl. I at 2708, § 25(a) (Ger.).

21. *See* Deutscher Bundestag: Anlegerschutz-und Funktionsverbesserungsgesetz [BT] 17/3628, at 19 (Ger.); *see also* Krause, *supra* note 19, at 475.

22. *See* Deutscher Bundestag: Beschlussempfehlung und Bericht des Rechtsausschusses [BT] 17/7511 (Ger.).

23. *See* Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994, BGBl. I at 2688, § 225a(2) (Ger.).

3. *Impediments on "Asset Stripping"*

On July 21, 2011, the European Directive on Alternative Investment Fund Managers (the Directive)[24] took effect. In relation to European M&A, the Directive imposes restrictions on distributions, capital reductions, share redemptions, or purchases of a company's own shares by controlled portfolio companies during the first two years of an ownership by an Alternative Investment Fund, which in particular includes private equity.[25]

B. CASE LAW AFFECTING M&A TRANSACTIONS

1. *Business Combination Agreements*

In preparing a public takeover offer, Business Combination Agreements are used by bidders to secure the future cooperation of the target's executive management. The Munich District Court invalidated certain provisions of a Business Combination Agreement that contradicted mandatory provisions of the German Stock Corporation Act.[26]

2. *Takeover of Postbank by Deutsche Bank*

The strategy of a no-premium tender offer ("creeping in" or "low ball offer") aimed at acquiring a shareholding just above the mandatory bid threshold (i.e., 30 percent of the voting rights) is quite a new phenomenon. Among others, Deutsche Bank applied it when bidding for Deutsche Postbank in 2010. Upon a shareholder lawsuit, the Frankfurt Court of Appeals held, in line with its previous rulings, that individual shareholders have no grounds to challenge the approval of the offer document by *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin) since the underlying section of the takeover code is intended to protect the public, not individual shareholders.[27] In civil litigation for a higher consideration, the Cologne District Court and the Cologne Court of Appeals analyzed the transaction in detail and dismissed the case.[28] It may be expected that the Federal Supreme Court will hand down a final ruling.

IV. Israel

The Promotion of Competition and Reduction of Concentration Bill 2012 (the Bill)[29] making its way through the Israeli Parliament may lead to significant restructuring in the Israeli economy. Significantly, the breakup of the country's large multi-layered concerns that may take place if the Bill is enacted is likely to present opportunities for foreign investors in the Israeli market.

24. Council Directive 2011/61, Alternative Investment Fund Managers, 2011 O.J. (L 174) 1 (EU).

25. *See id.* art. 30(1).

26. Landgericht München [Munich Regional Court] Apr. 5, 2012, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1 (Ger).

27. Oberlandesgericht Frankfurt [High Regional Court of Frankfurt] Dec. 5, 2011, 2012, NEUE FÜR WIRTSCHAFTSRECHT [NZW] 270 (Ger.).

28. Landgericht Köln [Regional Court of Köln] July 29, 2011, 2012 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [NZW] 229 (Ger.); Oberlandesgericht Köln [High Regional Court of Köln] Oct. 31, 2012 (Ger.).

29. Draft Bill for the Promotion of Competition and Reduction of Concentration, 5772-2012, http://www.knesset.gov.il/laws/data/BillGovernment/706/706.pdf.

A key aspect of the Bill addresses pyramid companies, which are two or more companies that issue bonds or shares to the public and that are held through a chain of companies with the same ultimate owner.[30] The Bill limits the number of layers of pyramid companies to two, in the case of new companies, or three, in the case of existing companies. The Bill generally provides for a six-year implementation period.[31]

To comply with these restrictions, pyramid companies with more than three layers can: (1) sell their holdings in the bottom-most layer; (2) make a purchase offer to remove the publicly held company in the structure from public listings; or (3) merge one or more companies in the pyramid with its parent company. While continuing to permit a triple-layer pyramid structure for existing companies, the Bill also requires the boards of directors of public companies at level two of the pyramid to be comprised, in certain cases, of at least one-third of the external directors appointed by a majority of the public shareholders and for the boards of companies at level three of the pyramid to be comprised of a majority (minus one) of external directors.[32]

Another element of the Bill is preventing significant non-finance companies (including real estate, communications, and energy companies), or their controlling shareholders, from holding significant finance companies (including banks, insurance companies, and investment houses).[33] This issue reflects the concern that cross-ownership of finance and non-finance assets, particularly in pyramid holding structures, creates systematic risks for the Israeli economy, as the controlling shareholders of many highly leveraged, significant non-finance companies also control financial institutions. For this purpose, the Bill defines a significant finance company as a finance company with more than NIS 40 billion in assets (or NIS 60 billion if it became significant before enactment).[34] A significant non-finance company has sales exceeding NIS 6 billion (or NIS 7.5 billion, if it became significant before enactment); or has credit in Israel (from a bank or non-bank institution) exceeding NIS 6 billion (or NIS 7.5 billion, if it became significant before enactment).[35]

Consequently, a holder of both significant finance and non-finance companies will be forced to sell its holdings in one of the two. Such holders, however, may maintain a minority stake in the significant finance company so long as the stake does not exceed 10 percent of the company's share capital (or 5 percent in a company that does not have a controlling shareholder).[36]

If the Bill passes into law in its present form, many companies are likely to be available for public purchase, either because they are the prohibited fourth or fifth layer of a chain of companies controlled by one owner, or because they are a significant finance or non-finance company held by a shareholder that cannot continue to hold both. Because potential acquirers of these companies also will have to comply with these provisions — for instance, a significant non-finance company will not be permitted to purchase the shares of a significant finance company—the number of potential acquirers in the Israeli market

30. *See id.* pt. III, §§ 18-27.
31. *Id.* § 39(e)(1).
32. *See id.* § 19.
33. *See id.* pt. IV, §§ 28-41.
34. *Id.* § 29.
35. *Id.* § 30.
36. *Id.* § 32A(b).

will be limited. Therefore, the Bill, if passed, is likely to open an important window of opportunity to foreign investors wishing to invest in established Israeli companies.

The Israeli Parliament did not consider the Bill before the elections that took place in January 2013. Hence, the Bill will be considered only if it is resubmitted following the elections. Whether the Bill becomes law, and in what form, remains to be seen.

V. Luxembourg

A. The Law of July 21, 2012 on the Mandatory Squeeze-Out and Sell-Out

A new law introduced in July 2012[37] applies to securities[38] that: (i) are admitted to trading on a regulated market in one or more European member states; (ii) have been, but are no longer, admitted to trading on a regulated market in one or more member states; or (iii) have been the subject of a public offering which gave rise to the obligation to publish a prospectus in accordance with Article 3 of the Prospectus Directive,[39] and provided that certain conditions are met (the Securities).[40]

The new law grants a squeeze-out right (*retrait obligatoire*) in favor of the majority shareholders, whereby such majority shareholders may require holders of remaining Securities to sell to them those Securities following a bid.[41] The majority shareholders must first inform the Luxembourg regulator, the *Commission de Surveillance du Secteur Financier* (CSSF) of their intention to exercise their right to squeeze-out and shall commit to performing the transaction until completion. The majority shareholders shall also ensure that they are in a position to provide the entire consideration in cash. The right to squeeze-out must be exercised at a fair price based on a report drawn up by an independent expert. Within one month following the publication of the proposed price, each holder of the remaining Securities may object to the squeeze-out.

The new law also grants a sell-out right (*rachat obligatoire*) in favor of the minority shareholders whereby such minority shareholders have the right to force the majority shareholders to purchase their shares.[42] Such rights require that a notification is addressed to the CSSF with respect to the exercise of the sell-out right on a date when:

(1) the conditions stipulated in Article 2(1)(i)-(iii) for the exercise of the sell-out right are fulfilled;
(2) the acquisition of the Securities by the majority shareholders has been published within the last three months;

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37. The law entered into force on October 1, 2012 and was published in the Luxembourg Official Gazette. *Retrait Obligatoire et Rachat Obligatoire de Titres de Sociétés* [*Squeeze and Mandatory Redemption of Securities of Companies*], 152 MEMORIAL: JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG 1859 (2012) [hereinafter *Luxembourg Securities Law*].

38. The law refers to securities of a company to which voting rights are attached, including certificates representing shares to which the possibility to give voting instructions is attached. *Id.* art. 1(5).

39. Directive 2003/71, of the European Parliament and of the Council of 4 November 2003 on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC, 2003 O.J. (L 345) 64, 71 (EC).

40. *Luxembourg Securities Law*, *supra* note 37, art. 2(1)(i)-(iii).

41. *Id.* art. 4(1).

42. *Id.* art. 5.

(3) the latest sell-out procedure was launched at least two years before the publication of the CSSF's decision with respect to the fair price. The determination of the proposed fair price and the opposition procedure are similar to those described above for the squeeze-out procedure; and
(4) some obligations in terms of notifications and publishing information have been met for companies having their registered office in Luxembourg.[43]

The law grants the CSSF authority to ensure that the provisions of the law are observed.[44] The CSSF shall publish on its website, for a minimum period of twelve months, a list of companies for which information has been validly notified.[45]

B. Implementing the Prospectus and Transparency Directives

Luxembourg published on July 3, 2012[46] a law implementing Directive 2010/73/EC[47] and modifying the 2005 Luxembourg Law implementing the Prospectus Directive as well as the 2008 Transparency Directive. Directive 2010/73/EC aims at simplifying the rules on prospectuses for securities and on information about issuers of transferable securities on financial markets, as well as upgrading investor protection. The main changes contained in the new Luxembourg law mainly relate to the Prospectus Law and include the following features:

(1) Enhancement of the requirements for the prospectus summary;
(2) Introduction of the concept of "Key information";
(3) Clarification of the prospectus use in "retail cascades";
(4) Modification of the "qualified investors" definition;
(5) Amendments to the exemption thresholds (i) whereby an offer is within or outside the scope of the Prospectus Directive (i.e., Part II of the Prospectus Law) and (ii) relating to the existing exemptions to publish a prospectus;
(6) Clarification of the use of the prospectus by financial intermediaries;
(7) Investors withdrawal rights in case of public offers;
(8) Abolition of the requirement to prepare an annual document summarizing all publications made in the course of the previous year;
(9) The requirement to have an electronic publication of the approved prospectus;
(10) Larger exemptions for employee participation schemes; and
(11) Clarification of the validity period of a prospectus.

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43. *See id.* art. 5(1)-(2).

44. On October 1, 2012, the CSSF released its circular 12/545 to provide guidance on the scope of application of the law, the implementation of the squeeze-out and sell-out procedures, and the reporting and disclosure obligations deriving from the law. Commission de Surveillance du Secteur Financier [CSSF], *Circulaire CSSF 12/545*, Oct. 1, 2012 (Lux.).

45. *Luxembourg Securities Law*, *supra* note 37, art. 10(3).

46. Loi du 3 Juillet 2012 portant transposition de la directive 2010/73/UE [Law of July 3, 2012 Transposing Directive 2010/73/EU], 136 Memorial: Journal Officiel du Grand-Duché de Luxembourg [Official Gazette of Luxembourg] 1725 (2012).

47. Directive 2010/73/EC, of the European Parliament and of the Council of Nov. 24, 2010 Amending Directives 2003/71/EC on the Prospectus to Be Published when Securities Are Offered to the Public or Admitted to Trading and 2004/109/EC on the Harmonization of Transparency Requirements in Relation to Information About Issuers Whose Securities Are Admitted to Trading on a Regulated Market, 2010 O.J. (L 327) 1, 1 (EC).

C. Modernizing the Law on Commercial Companies

The draft Bill 5730 (originally filed with the Chamber of Deputies on May 15, 2007) will have a substantial impact on Luxembourg corporate practice as it "relates to the different legal forms of companies and to the various aspects of their corporate life."[48] Bill 5730 provides for, inter alia, (i) the creation of a new form of company (the simplified public limited company), which is inspired by French corporate law (S.A.S.) and whose main original feature is the devolution to a chairman of the management powers that are normally those of the board of directors; (ii) the possibility for public and private limited liability companies to set up an executive committee as part of their management board; (iii) new provisions regarding the possibility for minority shareholders to commence court proceedings on behalf of the company, against the management of the company (compared with derivative action); (iv) a judicial share redemption procedure; (v) the express recognition of the validity voting arrangements between shareholders that was, until now, never entirely certain; (vi) the possibility to issue bonds by way of private or public issues, and (vii) as far as public limited liability companies (S.A.s) are concerned, (a) a squeeze-out procedure, (b) new provisions with regard to a conflict of interest, and (c) the possibility to issue shares at different par values as well as the possibility to award multiple voting rights to shares in registered form.[49] Bill 5730 will continue to be debated in 2013.

D. Draft Bill Implementing the Alternative Investment Fund Managers Directive

Draft Bill 6471,[50] which was submitted to the Luxembourg Parliament on August 24, 2012, purports to transpose faithfully the provisions of the Alternative Investment Fund Managers Directive (AIFMD) while also introducing a number of innovations to strengthen Luxembourg as an alternative investment fund center.[51] The bill is expected to be enacted by the Luxembourg Parliament before the end of 2012.

Pursuant to the regime introduced already by the AIFMD, managers managing or acting as management companies (AIFM) to alternative investment funds (AIFs) with assets exceeding the specific thresholds introduced by Bill 6471 need to be authorized as AIFM. Bill 6471 sets out the detailed requirements governing the authorization and supervision as well the ongoing organizational requirements for the AIFM, including the details relating to the European Passport. Further, Bill 6471 provides that non-credit institutions may act as depositaries for AIFs provided certain conditions are met.

Besides the proposed implementation of AIFMD, Bill 6471 also modernizes the existing common limited partnership (*société en commandite simple*) regime in order to attract investors who are familiar to the Anglo-Saxon limited liability partnership model. The Bill also proposes the creation of a new vehicle, the special limited partnership (*société en com-*

48. Dirk Leermakers & Gérald Origer, *Luxembourg: Modernising Company Law*, Int'l Fin. L. Rev. (June 1, 2009), http://www.iflr.com/Article/2239290/Luxembourg-Modernising-company-law.html.

49. *See id.*

50. *See generally* Project de Loi 6471 relative aux gestionnaires de fonds d'investissement alternatifs [Bill 6471 on Managers of Alternative Investment Funds], 2011-2012 Chambre des Deputes [Chamber of Deputies], Nov. 22, 2012 (Lux.).

51. *Bill of Law Implementing the AIFMD into Luxembourg Law Submitted to the Parliament*, KPMG (Sept. 2012), http://www.kpmg.co.uk/email/09Sep12/274342/story03.html.

mandite spéciale). For both such special limited partnerships, the Bill contains a limited number of de minimis rules offering great flexibility to the partners in terms of organization of their partnership. In addition, Bill 6471 introduces a specific tax treatment of the carried interests received by individual employed by an AIFM (under some restrictive conditions) and clarifies the scope of VAT exemption of management services supplied to certain types of fund vehicles.

VI. The Netherlands

A. New Legislation

On October 1, 2012, new legislation with respect to Dutch private limited liability companies (BVs) went into effect.[52] The new legislation applies to already existing and newly formed BVs and supersedes any contradictory clauses in the current articles in existing BVs.[53] The new legislation is in reaction to criticisms of rigidity in Dutch corporate law and for the need to remain competitive with other European countries who have simpler and more flexible corporate laws.[54] The new laws create more flexibility when incorporating BVs and setting up governance structures.[55] Many restrictive laws geared to protect shareholders (such as the capital protection laws) were repealed and replaced with laws which place the onus on the board of directors to protect the BV.[56] A failure to do so will expose directors to liability.[57]

B. New Options When Incorporating a BV

There is no longer a required minimum capital of €18,000 to incorporate a BV.[58] Also repealed are the requirements to have a Dutch bank account or an auditor's statement for in-kind contributions.[59] These changes have significantly streamlined the process and allow for quicker incorporations.[60] In addition, shares are now allowed to be denominated in currencies other than Euros.[61] This change is useful for joint ventures and those structuring their activities through the Netherlands as it will allow for the use of one currency throughout the group.

Shares without voting rights are now allowed,[62] as are shares without rights to profits.[63] This is useful for joint ventures or transactions that need to be structured to match investment profiles. In addition, shareholding in a BV may now be subject to certain compul-

52. *See Wet vereenvoudiging en flexibilisering bv-recht* [*Act on Simpler and More Flexible Laws of Private Limited Liability Companies*], Stb. 2012, p. 299 (Neth.).

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. This requirement was removed from Article 2:178 of the Dutch Civil Code. *See id.*

59. This requirement was removed from Article 2:203a of the Dutch Civil Code. *See id.*

60. Under the old system incorporations could take upwards of several weeks, as many of the incorporation requirements were often time consuming and difficult for foreign nationals to comply with.

61. Burgerlijk Wetboek [BW] [Civil Code] art. 2:178(2) (Neth.).

62. *Id.* art. 2:228(4)-(5).

sory requirements[64] and non-compliance may lead to sanctions (i.e., voting restrictions, profit sharing, or an obligation to sell shares).[65] The new laws also allow shareholders to appoint their own board members.[66] Previously, shareholders needed to create a workaround so that they could include many of these commonly used governance structures in their ventures. This would be typically done in a separate shareholders agreement. The trouble with this approach is that because these obligations were not legally recognized, specific performance to enforce a breach was not available.

C. Changes to Existing BVs

Under the old law, the payment of dividends was subject to an equity preservation test and could only be distributed if there were sufficient reserves to do so. Because most of the capital protection laws[67] were abolished this has resulted in a new test which requires the board to approve all dividends, unless the board knows or reasonably could foresee that the BV will not be able to continue paying its debts within twelve months of payment of the dividend.[68] A failure to comply with this requirement will result in joint and several liability for the BV's board.[69]

Also simplified are the formal rules for shareholder meetings. Notice periods for shareholder meetings have been shortened from fifteen to eight days,[70] and meetings may now be held outside of the Netherlands.[71] Shareholders of specific classes may now be given certain exclusive rights (such as voting, board appointment, or profits),[72] which, under the old system, could only be given to all shareholders collectively.

VII. Sweden

A. New Take-Over Rules

On February 13, 2012, the Swedish Corporate Governance Board (the SCGB), which forms part of the self-regulation system on the Swedish securities market, published a proposal for revised takeover rules for stock exchanges (the Takeover Rules).[73] Under the Securities Markets Act, a stock exchange (*börs*) shall have rules regarding takeover offers

63. *Id.* art. 2:216(1)-(2). Even though the new law is flexible on this point, the law does require that at all times at least one voting share should be held by a party other than the BV or one of its subsidiaries. *See id.* art. 2:175(1).

64. *Id.* art. 2:192.

65. *Id.*

66. *Id.* art. 2:242(1).

67. Examples are laws prohibiting financial assistance or limiting share buy-backs and capital reductions. *See id.* arts. 2:203-2:216 (before Oct. 1, 2012).

68. *Id.* art. 2:216(3).

69. *Id.*

70. *Id.* art. 2:225.

71. *Id.* art. 2:226(1).

72. *Id.* art. 2:227(2).

73. Swedish Corporate Governance Bd. [SCGB], Proposed revised Rules concerning Takeover Bids on NASDAQ OMX Stockholm and Nordic Growth Market NGM (Feb. 9, 2012), *available at* http://www.corporategovernanceboard.se/media/59426/takeover%20rules%202012.pdf.

for shares admitted to trading on the exchange's regulated markets.[74] Such rules shall fulfill the requirements laid down in the EC Takeover Directive 2004/25/EC[75] and be appropriate.[76] The SCGB's revised rules, effective July 1, 2012, have been implemented by Sweden's two stock exchanges, the NASDAQ OMX Stockholm AB[77] and the Nordic Growth Market NGM AB.[78] The changes include:

(a) Emphasis that deal protection agreements (*e.g.*, no-shop provisions and break fees) should be entered into only if deemed justified for special reasons;[79]

(b) Introduction of an information requirement regarding any holdings of financial instruments which give the offeror financial exposure equivalent to a shareholding in the offeree, such as cash-settled equity swaps;[80] and

(c) A requirement that bonus arrangements offered to employees of the offeree require prior approval of the board of the offeree and disclosure to shareholders.[81]

B. Prospectus Directive

On July 1, 2012, amendments to the Swedish Financial Instruments Trading Act[82] entered into force.[83] The amendments were made to implement directives 2010/73/EU and 2003/71/EC. The main amendments are:

(a) Exceptions from the duty to publish a prospectus when offering transferable securities to the public has been *increased* by raising certain thresholds;[84]

(b) Some types of securities issues will be subject to less comprehensive disclosure requirements (*e.g.*, applicable to small companies, small lenders, rights issues and government guarantee schemes);[85]

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74. *See* 13 ch. 8 § Lag om värdepappersmarknaden [Securities Market Act] (Svenskforfattningssamling [SFS] 2007:528) (Swed.).

75. Directive 2004/25/EC, of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, 2004 O.J. (L 142) 25 (EC).

76. *See* 13 ch. 8 § Lag om värdepappersmarknaden [Securities Market Act] (SFS 2007:528) (Swed.).

77. NASDAQ OMX, The Rules Concerning Takeover Bids on the Stock Market (July 1, 2012) [hereinafter Takeover Rules], *available at* www.nasdaqomx.com/digitalAssets/80/80374_takeover_rules_2012_07_01.pdf.

78. Nordic Growth Market [NGM], Rules Concerning Takeover Bids on NGM Equity (July 1, 2012), *available at* http://www.ngm.se/doc-archive/NGM-C3%B6rsen/Marknads%C3%B6vervakning/Takeover_regler/Takeover%20Rules%20for%20NGM%20Equity%20applicable%20from%201%20July%202012.pdf.

79. *See* Takeover Rules, *supra* note 77, at 43-44.

80. *Id.* at 14, 63.

81. *Id.* at 12, 14, 43, 63.

82. Lag om handel med finansiella instrument [Act on Trading in Financial Instruments] (Svensk författningssamling [SFS] 1991:980) (Swed.).

83. Lag om ändring i lagen (1991:980) om handel med finansiella instrument [Act Amending the Act (1991:980) on Financial Instruments Trading] (Svensk författningssamling [SFS] 2012:378) (Swed.).

84. *Id.* 2 ch. 3 §.

85. *See* Commission Regulation 486/2012, of 30 March 2012 Amending Regulation 809/2004 as Regards the Format and the Content of the Prospectus, the Base Prospectus, the Summary and the Final Terms and as Regards the Disclosure, 2012 O.J. (L 150) 7 (EU).

(c) The format and content of the prospectus summary have been improved;[86]

(d) Disclosure requirements that overlapped with the Transparency Directive 2004/109/EC have been repealed;[87] and

(e) The definition of "qualified investors" is now aligned with that of "professional clients" as defined in the directive 2004/39/EC.[88]

C. Tax

Interest deductions have historically been used, through intra-group loans and often in connection with M&A transactions, to move taxable profits out of Sweden.[89] For this reason, restrictions on interest deductions were implemented in Sweden in 2009. These restrictions prevented tax deductions for interest payments on intra-group loans to the extent attributable to acquisitions of shares from affiliated companies. To prevent aggressive debt financing and debt push-down transactions, Sweden has, effective January 1, 2013, introduced additional restrictions on interest deductions.[90]

The new restrictions on interest deductions generally cover all debts to affiliated companies, regardless of the purpose of the loan.[91] As a result, external acquisitions of shares and regular financing for acquisitions of businesses or assets will fall within the scope.[92] An exemption from the general rule applies if tax is levied with at least 10 percent on the interest, and the main reason behind the debt structuring is other than to achieve considerable tax benefits for the affiliated companies.[93] As the new restriction will apply for interest accruing in 2013 and forward, this will also affect existing loans.[94]

VIII. Turkey

Turkey has become a prominent environment for investments. In 2011, M&A transactions reached a peak of 241 deals corresponding to a volume of US $15 billion,[95] whereas the expected value for 2012 is US $20 billion. Key sectors attracting investors are listed as

86. 1 ch. 1 §, 2 ch. 14 § LAG OM ÄNDRING I LAGEN (1991:980) OM HANDEL MED FINANSIELLA INSTRUMENT [ACT ON TRADING IN FINANCIAL INSTRUMENTS] (SFS 2012:378) (Swed.).

87. *Id.* 1 ch. 8 §, 6 ch. 16 §, 2 ch. 20 §, 4 ch. 20 §, 6 ch. 1 §; LAG OM ANMÄLNINGSSKYLDIGHET FÖR VISSA INNEHAV AV FINANSIELLA INSTRUMENT [LAW ON OBLIGATIONS FOR CERTAIN HOLDINGS OF FINANCIAL INSTRUMENTS] (Svensk författningssamling [SFS] 2000:1087) (Swed.).

88. 1 ch. 1 § LAG OM ÄNDRING I LAGEN (1991:980) OM HANDEL MED FINANSIELLA INSTRUMENT [ACT ON TRADING IN FINANCIAL INSTRUMENTS] (SFS 2012:378) (Swed.).

89. Sweden has no thin capitalization rules.

90. The formal bill covering new restrictions for interest deductions passed the Swedish Parliament on November 21, 2012. *See* Finansutskottets betänkande 2012/2013:FiU1 [Finance Committee Report] (Swed.).

91. INKOMSTSKATTELAGEN [INCOME TAX ACT] (Svensk författningssamling [SFS] 1999:1229) 24 ch. 10(a)-(b) ¶ (Swed.).

92. *Id.*

93. *Id.* 24 ch. 10(d) ¶.

94. *See* 2012/13:FiU1.

95. DELOITTE, ANNUAL TURKISH M&A REVIEW 2011, at 2 (2011), *available at* http://www.deloitte.com/assets/Dcom-Turkey/Local%20Assets/Documents/turkey_tr_corporatefinance_Annual%20Turkish%20M&A%20Review%202011_0207122.pdf.

food and beverages, banking and financial services, and energy and mining for the first half of 2012, in light of the total number of deals.[96]

Although the center of business attention from a M&A perspective, an exclusive legislation regulating M&A activities does not exist in Turkey. Accordingly, different laws and regulations should be taken into consideration when determining the applicable rules in this respect. A significant development that is noteworthy enough to mention is the new Turkish Commercial Code (TCC) and the new Turkish Code of Obligations (TCO), both of which came into force on July 1, 2012.[97] In addition to amending implementations in Turkish law, the TCC and TCO, respectively, also brought certain changes to M&A applications.

A. Mergers

Per the TCC, a merger may be effected by either (i) an acquisition of a company by another (a merger in the form of acquisition) or (ii) a merger of more than one company under a newly established company (a new formation). Further, contrary to the former commercial code, the TCC allows mergers between different types of companies. Merger in cases of liquidation, insolvency, or equalization benefits the other newly introduced applications under the TCC.

Another issue that the TCC addresses is employees in case of a merger. Certain discrepancies exist between the labor law and the TCC. The TCC appears to be more employee-friendly because it grants employees a right of objection and introduces joint liability for former and current employers. Relevant provisions of the TCC also provide employees with a right to request security with respect to their receivables. When the will of the legislative authority is considered, in case of a conflict, the provisions of the TCC prevail.[98]

B. Acquisitions

Acquisitions may either be structured as share transfers or asset transfers. Both forms of transactions, from a buyer's perspective, should be handled diligently to prevent future problems. In addition to tax and finance related matters, labor law considerations should also be observed in an acquisition deal.

In accordance with the TCO, in the case of an asset transfer, the transferee will be held liable to the creditors for the debts thereof when it has notified them of the transfer, or announced the same in the trade registry gazette, or one of the national newspapers, accordingly. The transferor will remain jointly liable with the transferee for two years starting from the (i) date of notification or announcement (for the debts due), or (ii) the date of maturity. A notable amendment to the TCO is that the two-year joint liability period

96. *Turkey Leads the Way in Region for Mergers and Acquisition*, PORTTURKEY (Nov. 5, 1012, 3:20 PM), http://www.portturkey.com/enterprise/3535-turkey-leads-the-way-in-region-for-mergers-and-acquisition.

97. Mustafa Alp, *Yeni Turk Ticaret Kanunu'na Göre Bölünme, Birleşme ve Tür Degistirme'nin İş İlişkilerine Etkisi* [*According to the New Turkish Commercial Code Division, Impact of Mergers and Type Switching Business Relations*], ÇALIŞMA VE TOPLUM 51 (Jan. 2012), *available at* http://calismatoplum.org/sayi32/alp.pdf.

98. *Id.* at 54.

does not commence unless the notification or announcement obligation of the transferee is fulfilled.

C. Competition Board Approval

M&A transactions, depending on certain criteria determined under Communiqué No. 2012/43, may be subject to the approval of the Competition Board (CB). From January until October 2012, the CB concluded 227 decisions in respect of M&A and joint venture applications. While approving 204 of them, the CB decided that 23 applications were not subject to approval, which, in other words, means that there were no disapprovals or conditioned approvals. According to the records of the CB, it is understood that no merger applications were made, since 150 of the applications were listed as acquisitions and 77 of them were joint ventures.[99]

IX. Ukraine

A. Shareholders' Agreements in Ukraine

Due to the conservatism of Ukrainian legislation and existing court practice, the shareholders' agreements may not be yet fully applied and enforced in Ukraine.[100] Particularly, existing court practice tends to substantially limit the scope of contractual regulation by saying that most of the corporate issues fall under imperative norms of the law — a decision that may not be changed by the parties' agreement. The existing court practice expressly forbids regulating the following issues by means of any contract whatsoever:

(1) relations between the shareholders in respect of corporate governance matters;
(2) divergent voting procedure at the General Meeting and other corporate bodies (BoD, supervisory board);
(3) divergent procedure of appointment of members of BoD or supervisory board; and
(4) in general, the shareholders' agreement may not amend or somehow substitute the law.

In addition, foreign law may not govern the shareholders' agreements, and disputes may not be transferred to an arbitration court.

B. New Perspectives in Regulation of LLCs

2012 brought new hopes for crucial change in legal regulation of limited liability companies (LLCs). This year, the new Draft Law on Limited Liability Companies and Additional Liability Companies was expanded.[101] The draft law contains the following positive

99. *Current Decision Statistics for the Year 2012*, Rekabet Kurumu [Turkish Competition Authority], http://www.rekabet.gov.tr/default.aspx?nsw=j6VYScQKgFGNstJ2P1j39g==-SgKWD+pQItw=&nm=321 (last visited Mar. 2, 2013) (listing links to Current Decision Statistics for each month of 2012).

100. *See Shareholders' Agreements: Theory and Practical Application in Ukraine*, Pravova Dopomoga (July 12, 2012), http://pravdop.com/en/publications/kommentarii_zakonodatelstva/akcionernie_soglasheniya_teoriya_i_praktika_primeneniya_v_ukraine/.

101. Commercial Law Ctr., Draft Law "On Limited Liability Companies and Additional Liability Companies" 35 (June 18, 2012), *available at* http://www.commerciallaw.com.ua/en/law-about/low-projects.

novelties. First, the participants are entitled to enter into agreement, a concept similar to Shareholders' Agreements, namely, the agreement may provide for additional obligations imposed on the company's participants and liability for breach. Second, the procedure of exclusion of participants who ignore the management of the company or breach their statutory obligations, and the procedure for subsequent settlements therewith, became more clear and transparent. Finally, the draft law legitimizes the so called derivative claims, i.e., claims filed with a court by any participant on behalf of the company against an officer of company who breached his obligations or abused his powers, or applications for invalidation of the agreement concluded by the company.

C. Anti-Monopoly Clearance for M&A Transactions

A key problem in enhancing Ukraine's investment attractiveness is the extremely low thresholds of financial performance of the parties to the M&A deals, which require obtaining merger clearance. The Law provides for the need to obtain a merger clearance, if the aggregate sales turnover or the value of all participants' assets exceeds €12 million.[102] And simultaneously:

(1) aggregate value of assets or sales turnover, including those abroad, by at least two participants to the transaction exceeds €1 million for the preceding financial year; and
(2) aggregate value of assets or sales turnover in the territory of Ukraine by at least one participant to the transaction exceeds €1 million for the preceding financial year.

Therefore, almost every transaction requires approval with Ukrainian antitrust authorities. Furthermore, it also concerns foreign-to-foreign deals that also require preliminary merger clearance.

Covering the question on recent tendencies of legislation in this area, Draft Law 3436 increases the threshold up to €50 million for all participants of a deal and up to €4 million for at least two of them.

The other issue that is not clearly regulated by Ukrainian legislation is the distinction between mergers and concerted practices. Under the law, concerted practices are, in particular, the establishment of a joint venture by undertakings, which may result in the coordination of their competitive behavior.[103] In practice, ambiguity may result in the need to obtain clearance for concerted practices while establishing a JV between the competing undertakings. Taking into account growing fines for failure to obtain merger clearance, this clearance procedure is the priority.

102. Про захист економічної конкуренції [Competition Law of Ukraine], Український парламент (Verkhovna Rada) [Ukrainian Parliament], Jan. 11, 2001, No. 2210-III, art. 24 (Ukr.), *available at* http://zakon2.rada.gov.ua/laws/show/2210-14/print1350370660600469.

103. *Id.* art. 5.

X. United States

A. Non-Disclosure Agreements and Interested Party Transactions

Two Delaware Supreme Court decisions, *Martin Marietta Materials, Inc. v. Vulcan Materials Company* and *RAA Management, LLC v. Savage Sports Holdings, Inc.*,[104] underscore the importance of non-disclosure agreements (NDAs) to the M&A process. The *Marietta* decision addressed whether an NDA without an explicit standstill provision may nonetheless prohibit a party receiving confidential information from engaging in a hostile takeover. The parties entered into an NDA and a separate joint defense agreement that, collectively, limited use of confidential information to evaluating a transaction "between" the parties and prohibited Marietta from disclosing confidential information except where such disclosure would be required by law. Affirming the Chancery Court's decision to enjoin Marietta's exchange offer and proxy contest, the Delaware Supreme Court held that Marietta breached the use and disclosure restrictions because the parties appeared to have contemplated using the confidential information only in connection with a friendly transaction and Marietta voluntarily disclosed the information to third parties.[105]

The *RAA Management* decision addressed whether a disclaimer of reliance clause in an NDA can defeat claims based on fraudulent misstatements made by the seller during the due diligence phase of a transaction. The non-reliance provision disclaimed "any" representation or warranty as to the accuracy of the evaluation material and a waiver by RAA of "any" claims in connection with the transaction unless a definitive agreement was signed.[106] Relying on the plain language of the provisions, as well as prior case law, the Court held that the NDA barred RAA's claim, even if Savage Sports knowingly made material fraudulent misrepresentations.[107] The Court noted that the efficient functioning of M&A markets favors allowing sophisticated actors to allocate risk by disclaiming reliance on representations made outside a definitive agreement.

Another significant Delaware Supreme Court case, *Americas Mining Corp. v. Theriault*,[108] affirmed the Chancery Court's record-setting damages award of more than US $2 billion and US $304 million in attorneys' fees.[109] Applying the entire fairness standard of review, the court held that the controlling stockholder and affiliated directors of the acquiring company breached their fiduciary duties by approving an interested transaction at a price that was unfair to the minority stockholders.[110] Rejecting an argument that the Chancery Court erred in refusing to allocate the burden of proof before trial, the Supreme Court held that the burden of proof to demonstrate the entire fairness of an interested transaction remains with defendants throughout trial if the record does not permit a pre-trial determination.[111] Furthermore, the court determined that the damages award and

104. *See* Martin Marietta Materials, Inc. v. Vulcan Materials Co., — A.2d ——, No. 254, 2012, 2012 WL 2783101 (Del. 2012); RAA Mgmt., LLC v. Savage Sports Holdings, Inc., 45 A.3d 107 (Del. 2012).

105. *Marietta*, 2012 WL 2783101, at *9-14.

106. *RAA Mgmt.*, 45 A.3d at 110-11.

107. *Id.* at 112-15.

108. 51 A.3d 1213 (Del. 2012).

109. *Id.* at 1262-63.

110. *Id.* at 1218.

111. *Id.* at 1243.

attorneys' fees were the product of an orderly and logical process well supported by the record.[112]

B. Pre-Merger Notification Rules

On September 25, 2012, the U.S. Department of Justice announced[113] that Biglari Holdings Inc. agreed to an US $850,000 civil penalty to settle claims that Biglari violated the premerger notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act when Biglari acquired shares of Cracker Barrel Old Country Store, Inc. in 2011.[114] The HSR Act and HSR rules provide a filing exemption for stock acquisitions made "solely for the purpose of investment," as long as the acquirer does not hold over 10 percent of the issuer's voting securities as a result of the acquisition.[115] The FTC concluded that Biglari's acquisitions of Cracker Barrel shares did not qualify for the investment only exemption based on evidence that Biglari intended to become actively involved in the management and direction of Cracker Barrel's business. This proceeding sends a message to the investment community that claims of exemptions from the HSR Act will be closely scrutinized.

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112. *Id.* at 1249-62.
113. Press Release, Dep't of Justice, Biglari Holdings Inc. to Pay $850,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements (Sept. 25, 2012), http://www.justice.gov/opa/pr/2012/September/12-at-1152.html.
114. *See* Complaint, United States v. Biglari Holdings, Inc., No. 1:12-cv-01586, 2012 WL 4364416 (D.D.C. Sept. 25, 2012), *available at* http://www.justice.gov/atr/cases/f287300/287335.pdf.
115. 16 C.F.R. § 802.9 (2005).