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Corporate and Commercial Law newsletter

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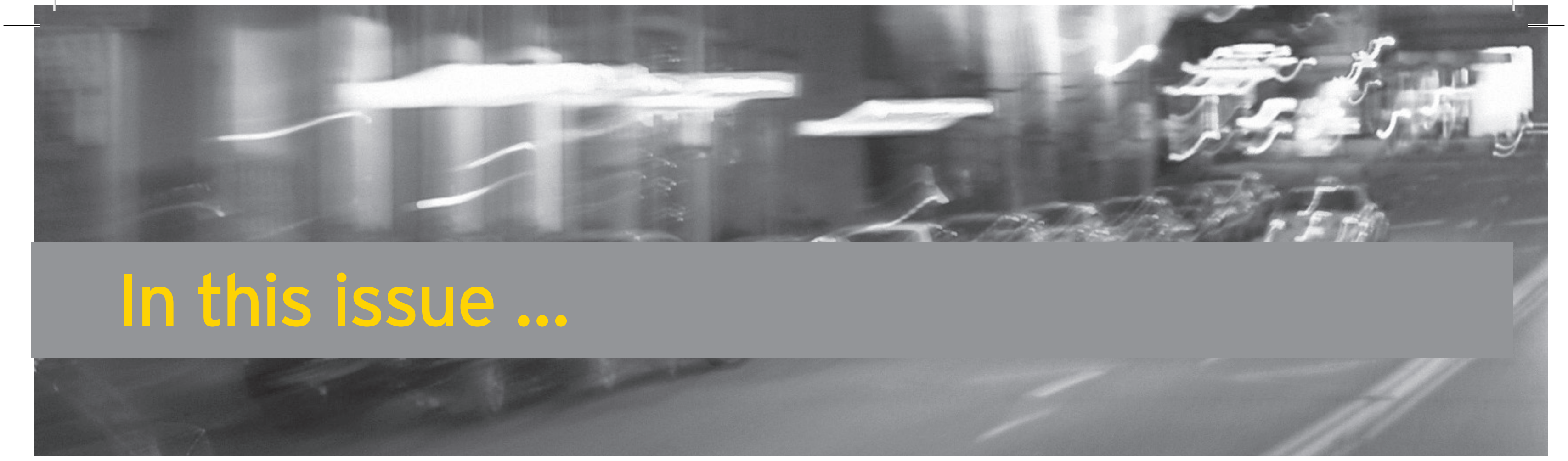

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Austria

Recent developments with respect to bearer shares

Austria has recently introduced considerable amendments with respect to the types of securities to be issued by a stock company (Aktiengesellschaft or AG) and the information to be disclosed by the shareholder to the company. Some of these rules became effective on 1 January 2013.

Following a negative assessment by the Financial Action Task Force regarding Austrian regulations on the prevention of money laundering and the financing of terrorism, Austria had already amended the rules on the types of securities to be issued by Austrian stock companies in 2011 (Corporate Law Amendment Act 2011). In order to identify stockholders in Austrian stock companies better, such companies are no longer allowed to issue bearer shares (for exemptions, see below). Newly founded stock companies may only issue registered shares. Already existing stock companies, which had issued bearer shares in accordance with the previous regulations, will have to amend their articles of association and replace their bearer shares by registered shares before 1 January 2014.

Exemptions apply for publicly listed stock companies and companies contemplating an initial public offering, which are allowed to issue bearer shares instead of registered shares and thus avoid a deterioration of their shares' marketability. This is due to the fact that specific capital market regulations require disclosure from major stakeholders in the case of listed companies. In addition, share transfers in public companies may, in principle, be tracked by book entries. These provisions are deemed sufficient to reduce significantly the risk of money laundering as regards the shares of public companies.

In the case of registered shares, each shareholder has to be registered with the companies' share register. In the absence of such registration, shareholders will not be able to exercise their shareholder rights — in particular, the right to cast a vote and the right to claim for dividends. Since 1 January 2013, each holder of a bearer share has to not only disclose their name, address, birth date, companies' register number and number of shares held, but also their bank account number (for the payment of dividends etc.). Such additional information will be accessible not only to the stock company, but also to the other shareholders. Furthermore, shareholders must disclose to the company the beneficial owner of the share (if they are a trustee). Exemptions to the latter rule apply for credit institutions, which are not obliged to disclose the (beneficial) owner of the share.

New regulations regarding disclosure of shareholdings in Austrian public companies

Since 1 January 2013, various amendments to the disclosure rules for major shareholders in public companies came into effect. These rules are aimed at avoiding an unnoticed "sneaking up" on public companies.

In general, shareholders are required to inform the regulator (the Austrian Financial Market Authority), the stock exchange and the respective issuer of shares if they meet or exceed certain shareholding thresholds. The respective company will, in turn, have to disclose such information to the public. The new bill introduces an additional threshold at 4% of the voting rights: disclosures will now be required if a shareholder reaches or exceeds 4%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 75%, and 90% of the voting rights in a public company. An additional threshold applies if the respective company lowered the threshold for triggering a mandatory offer obligation (i.e., the same threshold will apply for purposes of disclosure).

Further to this, the scope of securities to be included in the calculation of the level of control has been broadened significantly. Up to now, only derivatives providing a legal entitlement to the acquisition of shares had to be included in the calculation. Since 1 January 2013, in particular, cash-settled derivatives, i.e., derivatives which do not entitle the holder to physical delivery of shares, also need to be included. Moreover, any securities granting a right to participate in the increase of the share price in general shall be relevant. Infringements of these disclosure rules result in an automatic suspension of voting rights.

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New rules for health insurance funds in Bulgaria

New amendments of the Health Insurance Act have been in force since 7 August 2012 to ensure it is compliant with EU insurance laws. The amendments create new requirements for companies providing voluntary health insurance services.

Licensing regime

According to the new rules, the voluntary health insurance shall be provided by insurers (licensed under the Insurance Code), instead of health insurance companies (licensed under the Health Insurance Act).

The deadline for complying with the amendments is 7 August 2013. By the deadline, companies shall:

- Be registered as insurance companies
- Apply for, and obtain, a license from the Financial Supervision Commission (the Commission)

Before the deadline, companies providing voluntary health insurance services can still operate under the old regime. If they do not succeed in obtaining the license from the Commission, they shall apply to:

- Restructure their business by a merger with an insurance company that already has a license

  or

- Transfer their insurance contracts to such company

  or

- Terminate their business

Contracts for additional health insurance services that are already concluded will be valid until 7 August 2013, after which such contracts could be renewed only if the companies providing additional health insurance services obtain a license from the Commission. The new contracts for additional health insurance services should be concluded in the form of medical insurance contracts.

The health insurance policies

Parallel amendments to the Insurance Code create a new "Health (medical) insurance" section. It requires medical insurance agreements to cover risks resulting from sickness or accident (i.e., the expenses for specified medical products and services). The medical insurance agreements may also provide for coverage of expenses for preventative measures, pregnancy and birth, transport, specialized or palliative care etc. This insurance product can be structured as unlimited in term, in which case, the rising of the premium to reflect the aging and declining health of the insured is not allowed.

Permanent voluntary health insurance, covering loss of income due to sickness or accidental injury, continues to exist either as a stand-alone policy or as part of the health (medical) insurance cover.

Insurers providing insurance for sickness and/or accident (general insurance product) can be licensed for life insurance as well. Only insurers licensed to provide insurance for sickness (or sickness and/or accident) can include in their company names all or some of the words "voluntary," "health" and "insurance" ("осигуряване" in Bulgarian) or derivatives thereof in Bulgarian or in another language.

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Finland

A recent ruling of the Supreme Court provides better possibilities to restrict the seller's liability in real estate transactions

According to the Real Estate Code, the rights and obligations of the seller and the purchaser regarding the liability for defect may be derogated from by agreement, only if the agreement indicates in detail how the status of the purchaser differs from what is provided by law. Previously, this has been interpreted in a way that such restrictions of liability that were on a very general level, were not deemed to be effective. The Supreme Court has previously ruled (rulings KKO 2004:78 and KKO 2009:31) that a restriction clause according to which the real estate had been sold "as is," i.e., in the present condition, and the purchaser had waived its rights to claim damages for eventual defects, was not sufficiently detailed in order to restrict the seller's liability. According to the legislative history (government proposal 120/1994) a limitation clause must be accurately drafted, so that the purchaser knows what the seller is not liable for and can evaluate the significance of the clause when negotiating the purchase price.

Supreme Court's recent ruling

In a ruling dated 16 August 2012 (KKO 2012:72), the Supreme Court, however, approved an agreement restricting the seller's liability, even though the restriction of liability was on a quite general level.

The parties to the real estate transaction concerned had agreed that the purchaser accepted all liability regarding any measures required in connection to repairing or demolishing the purchased building, as well as costs related thereto, regardless of whether: i) they had been taken into account in a cost estimate that had been made in connection with the transaction, ii) they were hidden or not, or iii) they had adverse health or environmental effects. The purchaser had further acknowledged that he did not have any claims toward the seller regarding the purchased building. The parties had agreed that the seller was liable (merely) for the quality of the soil.

Notwithstanding the limitation of liability, the purchaser made a claim toward the seller after the transaction, stating that the real estate had a material defect in quality, as there had been considerable damages in the construction. According to the purchaser, the agreed limitation of liability was not valid as: i) the defects had not been mentioned in the condition report or cost estimate presented by the seller and relied upon by the purchaser in connection to the transaction, ii) the limitation clause had been based on incorrect and misleading information provided by the seller, and iii) the limitation clause was unreasonable and had not been sufficiently detailed as required in the Real Estate Code. Furthermore, the purchaser claimed that knowledge of the actual condition of the real estate would have affected the purchase price materially.

The Supreme Court ruled that the clause had been sufficiently detailed. The Supreme Court pointed out that the purchaser (a legal entity) was a legal person and that the purchaser had elected not to examine the condition of the real estate further, even though the condition report had given reason for doing so. The Supreme Court noted that the purchaser had been a tenant in part of said premises since 1992. Furthermore, the purchaser had used a technical consultant in preparation of the transaction, and the chairman of the purchaser who had signed the transfer deed had had legal training. The Supreme Court concluded that the purchaser had undertaken a business risk by accepting the limitation clause, and that the clause was not unreasonable. Therefore, the purchaser's claim was ruled to be unfounded.

Conclusion

The new ruling allows for better possibilities to restrict the seller's liability, even in cases of hidden defects, at least in situations in which the purchaser is a legal entity (as opposed to a private person). Even though the ruling was given in a slightly uncommon situation, in which the purchaser had been a tenant in the premises at stake, it does indicate that the use of carefully drafted liability clauses will offer sellers enhanced possibilities to restrict their liability in real estate transactions. Taking in consideration the above ruling, it is, however, of utmost importance for the restriction clauses to be carefully drafted in each individual case.

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France

The democratization of company share repurchases

French law, dated 14 March 2012, created article L.225-209-2 of the French trade code, which lays out the provisions for the repurchase of their own shares by non-listed French corporations.

Until this provision was enacted, share repurchases were only authorized for non-listed corporations in a limited number of situations:

- For the implementation of decreases in capital not grounded by losses, subject to the shares repurchased being immediately cancelled
- For the attribution of shares to employees or management of the company within the framework of employee profit sharing or the free attribution of shares and stock options or, if applicable, as part of a company savings plan by means of a share purchase program, and within certain fixed limits (the shares held must correspond at the most to 10% of the total number of issued shares)

However, although new article L.225-209-2 offers unlisted companies new possibilities as far as repurchasing their shares is concerned, it does not go as far as aligning them with the system applicable to listed companies.

Indeed, non-listed corporations will be entitled, in certain conditions, to repurchase their own shares in order to offer or attribute them:

- To employees, as part of free stock attribution plans, stock options or company savings plans, within a period of one year starting from the repurchase
- Within a period of five years of their repurchase, to shareholders willing to purchase them as part of a sales procedure organized by the company
- Or within two years of their repurchase, in payment or in exchange for assets acquired by the company as part of an external growth operation, a merger, demerger or contribution

The number of shares acquired by the company may nonetheless not exceed 10% of the capital of the company in the first two cases, or 5% of the capital in the third case.

The shares repurchased but not used may, following a decision by the ordinary general meeting, be used for a purpose other than specified by the above-mentioned article.

Although these new provisions allow for greater fluidity in the capital of non-listed corporations, their implementation comes with specific conditions:

- The repurchase authorization given by the ordinary general meeting is valid for a maximum period of 12 months.
- As the corporation's shares are not listed, there are strict guidelines governing the repurchase price. The general meeting authorizes the repurchase price based on a report drawn up by an independent expert (in relation to which a decree is expected to provide some clarifications) and based on the special report by the statutory auditors, who provide their assessment of the conditions in which the repurchase price is fixed. Although the general meeting fixes the repurchase price itself, this price must be within the upper and lower limits proposed by the expert, under penalty of the invalidity of the general meeting's decision.

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Germany

The German squeeze-out merger

With the latest amendment of the German Law of Reorganizations (Umwandlungsgesetz or UmwG) as of mid 2011, a third option for compulsory exclusion of minority shareholders from a corporation (squeeze-out) was introduced.

Existing squeeze-out provisions

In a squeeze-out pursuant to the German Stock Corporation Act (Aktiengesetz or AktG), the general meeting can, at the request of a shareholder holding a stake of at least 95%, pass a transfer resolution pursuant to which the minority shareholders transfer their shares to the majority shareholder in return for a fair cash consideration. The Federal Constitutional Court considers this exclusion procedure, which can take place against the will of the minority shareholders, to be justified by the fact that minority shareholders' investment activities generally focus on asset value interests and they cannot have any relevant influence on business policy. The administrative membership rights of the minority shareholders are generally subordinated to the majority shareholder's interest in simplifying the group structure.

A squeeze-out pursuant to the German Securities Acquisition and Takeover Act (WpÜG) pertains to the exclusion of minority shareholders in the course of the takeover of a listed corporation. While the exclusion procedure differs from that of a squeeze-out under corporation law, it also requires the existing or future majority shareholder to hold a stake of at least 95%.

Basic prerequisites of the new squeeze-out merger

- The squeeze-out merger requires both the transferring and the acquiring legal entity to be stock corporations (AG) or entities to which the provisions for corporations are applicable, i.e., a partnership limited by shares (KGaA) or a German Societas Europaea (SE).
- Probably the most important innovation is that the otherwise applicable hurdle of a 95% shareholding for the majority shareholder has been reduced to 90%. It needs to be held directly. In contrast to a squeeze-out under stock corporation law, no shares held by dependent entities are allocated to its parent. Thus, only upstream mergers can be implemented as a squeeze-out merger.

Procedure for squeeze-outs pursuant to Sec. 62 (5) UmwG

The squeeze-out under reorganization law precedes the merger (pre-merger squeeze-out). At the same time, the merger is a condition for the effectiveness of the squeeze-out. Technically, this is achieved by adding a note to the entry on the squeeze-out in the commercial register of the transferring entity stating that the squeeze-out will take effect only when the merger has been entered in the commercial register of the acquiring entity. A squeeze-out under reorganization law thus requires the conclusion of a notarized merger agreement. The merger agreement must include the information that the minority shareholders are to be excluded in connection with the merger.

As for other squeeze-outs, a transfer resolution is required for the squeeze-out under reorganization law. After the merger agreement has been concluded, the general meeting of the transferring corporation has three months to pass the transfer resolution for the squeeze-out.

The actual squeeze-out procedure is based on the provisions for squeeze-outs under stock corporation law. Thus, the merger agreement has to be displayed to the shareholders of the transferring entity, the majority shareholder needs to issue a transfer report and, finally, a court-appointed independent expert needs to confirm, in an audit report, the reasonableness of the cash consideration offered. In addition, the legal entities involved must present to their respective works' council the (draft) merger agreements.

Advantages and structuring possibilities

In practice, the squeeze-out merger will considerably simplify situations where minority shareholders previously attempted to obstruct the streamlining of group structures. The new provisions create additional scope for action in cases where external shareholders hold between 5% and 10% of the shares. To date, merging an entity of this kind into its majority shareholder required costly and time-consuming valuation reports, both for the transferring and for the acquiring entity, in order to determine the exchange ratio for the shares in the acquiring entity to be issued to the minority shareholders of the transferring entity in exchange for their participation in the latter. The new squeeze-out merger now makes it possible to compensate external shareholders in advance so that only the transferring entity has to be valued.

Summary

The new squeeze-out merger offers interesting additional options for designing group structures. In particular, minorities with a stake of up to 10% of the shares can now, for the first time, be squeezed out of a corporation. Especially as a result of the limitation to entities incorporated as an AG, SE and KGaA as suitable vehicles, prior reorganizational measures can be expected in many cases, in order to create the basic prerequisites for the squeeze-out merger. As this is generally associated with significant cost and effort, it remains to be seen whether this instrument will be used frequently.

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Greece

Amendment to the law on general and limited partnerships

Law 4072/2012 (the law), published in the Government Gazette on 11 April 2012, codified the provisions concerning general and limited partnerships, but also amended them. Some of the basic amendments relate to the trade name, the grounds for dissolution and the representation powers of the limited partners.

According to the previously applicable law, the trade name of the company had to be formed by the names of the partners only. Other details could be included in the trade name provided that they were not misleading. Pursuant to article 250 of the law, the trade name of the general partnership is formed either from the names of one or more of the partners, or from the scope of business, or from other indicators, followed by the words "general partnership."

Similarly, the trade name of the limited partnership is composed either from the names of one or more of the general partners, or from the scope of business, or from other indicators, followed by the words "limited partnership," which was not mandatory before the law came into force. The law also states that, if the name of a limited partner is included in the trade name, the latter is regarded by bona fide third parties as a general partner.

Both general and limited partnerships are dissolved a) at their term, b) after they are declared bankrupt and c) by virtue of a judicial decision following a petition of one of the partners. The articles of association may provide for additional grounds for dissolution, which may also be facts relating to the change of partners (e.g., death or insolvency) or the decision of the partners to terminate the company.

Furthermore, in an effort to "save" the business of general and limited partnerships, the new law provides for the possibility of continuance of the business after the bankruptcy of the company. Precondition for the continuance is the unanimous decision of the partners.

Finally, and in relation to the representation powers of the limited partnership, the law states, for the first time, that the limited partner does not have representation powers in the company, making it clear that such powers are only granted to the general partners, unless the articles of association provide that the limited partner also has representation powers. In this case, the limited partner will be liable in exactly the same way as the general partner. However, such a strict rule will only apply to third parties being in good faith and not to a third party who was aware that such partner was a limited partner.

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Hungary

Amended corporate legislation

In 2012, several amendments to Act IV of 2006 on business associations (Companies Act) and to Act V of 2006 on public company information, company registration and winding-up proceedings (Companies Registration Act) were enacted. Please find a summary of the major amendments below:

Tax registration procedure

- Since 2012, companies must undergo the tax registration procedure before they can be registered in the companies register.
- Prior to issuing a tax number, the tax authority examines the Hungarian tax records of those shareholders that have majority control and of the individuals appointed as executive officers. If certain conditions are not met (including, among other things, significant public debt of the shareholders or the executive officers) the company registration may be refused.
- As a general rule, the tax registration procedure is performed in one business day.
- Existing companies will undergo the same procedure in the case of change in ownership or if the executive officers change. If any obstacles to issuing a tax number exist and these grounds for refusal are not resolved by the company, the tax number of the company in question will be canceled and the court of registry will initiate a compulsory winding-up procedure.
- After performing the tax registration procedure, the tax authority may request that a company fills out a questionnaire. If the company fails to submit the answers to the tax authority by a given deadline, the tax authority may cancel its tax number.
- According to a statement from the tax authority, in 2012, the tax registration of approximately 700 newly established companies has been refused and the tax numbers of approximately 2,000 registered companies have been canceled as a result of the tax registration procedure.

Compulsory winding-up procedure

- This is a new procedure that can be initiated by the Court of Registry and used as a sanction against companies that have failed to comply with mandatory rules. A compulsory winding-up procedure may be initiated under the following circumstances:
  - If the company fails to publish its financial statements by the legal deadline
  - If the company's registered seat is unknown
  - If any voluntary winding-up procedure has not been completed within three years of commencing
  - If the court decides to terminate the company due to non-compliance with mandatory rules
- If any debts of a company that has been terminated remain unsettled, under certain circumstances, either the former shareholders that held majority control in the three years preceding the compulsory winding-up procedure, or private individuals that held executive positions, may be held liable for the unsettled debts.
- Any person who was the executive officer or held a share of exclusive or majority control in a company that is terminated by way of a compulsory winding-up procedure, may not hold a share of exclusive or majority control in another company, and may not be a member of a general partnership or the general partner of a limited partnership for a period of five years after the termination of the company.

Miscellaneous

- Private individuals and corporate entities that are not resident in Hungary, but are registered with the companies register as shareholders or executive officers, shall appoint a Hungarian delivery agent.
- Every company is obliged to prove their right to use the real estate serving as their registered seat, branch or business site, by submitting a declaration signed by the owner (lessor) to the court of registry.
- All the types of business activities of the company need to be indicated in the articles of association and in the companies register. Changes to the activities have to be reported to the tax authority by also indicating the European industrial activity classification codes (NACE Rev.2). The tax authority will forward the changes to the court of registry, which will update the list of activities indicated in the companies register based on the tax authority's report.
- The above obligations must be fulfilled by 1 February 2013 at the latest.

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Italy

Merger and demerger simplification in Italy

On 18 August 2012, simplifications for merger and demerger procedures entered into force in Italy after publication in the Italian Gazzetta Ufficiale of the Legislative Decree no. 123 of 22 June 2012 (the decree), implementing EU Directive 2009/109 in Italy.

The decree amends and modifies articles of the Italian Civil Code concerning the merger and demerger procedures (articles from 2501 to 2506), with the aim of simplifying the formalities and related documentation.

In particular, the main simplifications relate to the following aspects:

Publication of merger and demerger plan

Under the previous rules, the merger or demerger plan had to be filed with the Register of Companies.

According to the decree, it is now possible, as an alternative to the filing, to publish the merger or demerger plan on the website of the companies involved in the operation.

As per the decree, publication on the website shall, however, take place "in a manner so as to ensure the safety of the site, the authenticity of the documents and the certainty of the date of publication."

The above-mentioned requirements generated discussions in the legal community as to the actual terms of application of this specific new rule.

Interim balance sheets

According to previous rules that were applicable to mergers, it was necessary to base the merger plan on the last approved financial statements, or, in case they were older than six months at the date of the merger plan, on the basis of specific interim balance sheets of the companies involved.

The decree states that, with the unanimous consent of the shareholders of all the companies involved in the merger, it is now possible to waive the preparation of said interim balance sheets. The decree has, therefore, aligned the merger procedure with the demerger procedure, for which the second option already existed.

This is, indeed, an extremely useful and time-efficient simplification that has been introduced by the decree.

Shareholders' information via web

Under the previous rules, some merger or demerger documents (for example, the financial statements of the last three years, the merger or demerger plan) had to be made available at the registered offices of the companies involved in the operation, for the shareholders to become familiar with their contents.

The decree exempts companies from this obligation, if the documents have been published on the website of the companies involved in the operation.

Moreover, the companies are no longer required to provide the shareholders with copies of the mentioned documents if they are available on the companies' website and can be freely downloaded.

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Luxembourg

A new legal form comparable to the English Limited Partnership: the société en commandite spéciale

On 24 August 2012, a Luxembourg bill of law (the bill) implementing the EU Directive 2011/61/EU of 8 June 2011 on alternative fund managers was submitted to the Luxembourg Parliament for approval.

The bill, which is expected to be adopted early 2013, introduces a new type of limited partnership, the "special limited partnership" (société en commandite spéciale or SCSp), thereby enhancing Luxembourg's legal toolbox.

The SCSp is a partnership entered into by one or more general partners with unlimited and joint liability for all the SCSp's obligations, with one or more limited partners contributing only a specific amount pursuant to the limited partnership agreement.

The draft law also modernizes the legal framework applicable to "common limited partnerships" (SCS), as well as making some technical adjustments to the well-established partnership limited by shares (SCA) regime.

Leveraging upon the well-established English Limited Partnership regime, the new SCSp regime includes the following key provisions:

- The SCSp does not have legal personality.
- It is governed by a limited partnership agreement, which may be drafted in a flexible manner in terms of interests, governance, distribution, etc.
- It may be managed either by the general partner(s) or by the limited partner(s) if appointed as manager.
- It is available to regulated (SIF, SICAR) and non-regulated entities (SOPARFI).
- Information to be lodged in the trade register does not include information on limited partners.
- SCSp may be transformed into an SCA or SCS; correlatively, existing SCA or SCS may be transformed into SCSp.

Squeeze-out and sellout of securities admitted to trading on a regulated market

On 21 July 2012, the Luxembourg Parliament adopted a new law relating to the squeeze-out and sellout of securities admitted to trading on a regulated market (the new law).

The new law provides the possibility, outside the context of a takeover bid:

- For majority shareholders, to exercise squeeze-out rights by which they may compulsorily acquire the securities of all the remaining holders
- For minority shareholders, to exercise sellout rights by which they may require the majority shareholder to acquire their securities

The new law defines the majority shareholder(s) as any person who holds, alone or in concert with others, directly or indirectly, at least 95% of the voting rights of a Luxembourg company.

The majority shareholder(s) must ensure that they can provide the entire consideration for such squeeze-out in cash and must also undertake to bring the squeeze-out to a close. The squeeze-out must be exercised at a fair price on the basis of objective and adequate methods applied in the case of transfer of assets.

Dematerialized securities admitted to trading on a regulated market

The Luxembourg Parliament is currently examining a bill of law dated 7 October 2011 introducing a general regime for the dematerialization of securities. The aim of this bill is to modernize Luxembourg securities law by introducing the possibility for a Luxembourg company to issue dematerialized equity or debt securities governed by Luxembourg law.

The bill proposes a comprehensive legal framework applicable to securities issued in dematerialized form and will not affect existing de facto dematerialization practices, such as the issuing of temporary global certificates in bearer form deposited physically with a depository and representing securities transferrable by way of book entry.

In addition, the bill does not impose a mandatory dematerialization of the securities, but provides certain procedural rules and requirements for a conversion, should the issuer decide to dematerialize its securities. Such conversion would need to be foreseen and added in the articles of association or management regulations of the issuer.

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The Netherlands

New act on management and supervision in force since 1 January 2013 (bill nr. 31763)

The act on management and supervision creates the possibility for public limited liability companies (NV) and private limited liability companies (BV) to opt for a one-tier board model, in addition to the already existing two-tier board model consisting of a board of directors **(raad van bestuur)** and a separate board of supervisory directors **(raad van commissarissen)**. In a one-tier board, the position of a supervisory director is abandoned and the supervisory tasks will be executed by non-executives forming part of the board of directors. The choice for a one-tier board requires a basis in the articles of association, as does the establishment of a board of supervisory directors.

The general meeting of shareholders determines whether a director will be a non-executive or an executive director. Management tasks may be allocated to specific persons, but the tasks not allocated in any way are vested in both the executive and the non-executive directors. However, tasks such as the supervision of the performance of duties by a director, the chairmanship and the determination of the remuneration of the executive directors can only be fulfilled by non-executives. All directors remain jointly responsible for proper management. Thus, all directors are jointly liable should there be any improper management. A division of tasks does not detract from this principle, unless the director concerned cannot be blamed in any way and he has not been negligent in taking measures in order to avert the consequences of improper management.

Other amendments

The rules on conflicts of interest change. A conflict of interest of a director does not lead to a change of authority to represent the company. The rules now concern the decision-making process and do not regard third parties. A member of the board of supervisory directors or the board of directors who has a conflict of interest must refrain from the decision-making process. If all directors or supervisory directors have a conflict of interest, the authority to make the decision passes to the next higher corporate body: with regard to the board of directors to the board of supervisory directors, and with regard to the latter board, to the general meeting of shareholders.

Further, the act introduces a quota regime for women (and men, each gender at least 30%) in the board of directors and the board of supervisory directors, as well as a limitation on the number of positions as director or supervisory director that one person may fulfil.

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Norway

Information related to the Norwegian Code of Practice for Corporate Governance

Background

The Norwegian Code of Practice for Corporate Governance (the code) is issued by the Norwegian Corporate Governance Board (NCGB). Although the NCGB is a national organization, it also takes into account international practice and changes in this area.

Objective

The objective of the code is that companies listed on regulated markets in Norway will practice corporate governance that regulates the division of roles between shareholders, the board of directors and executive management more comprehensively than is required by legislation. The code also applies to savings banks with listed equity certificates to the extent that it is appropriate.

The code is addressed in the first instance to the board of directors of the company. It is their responsibility to consider each section of the code and decide how the company will meet the requirements. Each year, the board must issue a comprehensive corporate governance report.

The main areas covered by the code are guidelines for corporate governance, shareholders meetings, equal treatment of shareholders, composition and independence of the board and internal control. Adherence to the code is based on a "comply or explain" principle.

Key updates to the code of practice

Here are some of the key updates in the most recent version of the code, published in October 2012:

- The board should give a reason for any decision to waive pre-emption rights in the event of an increase in share capital, and the stock exchange announcement of such share issues should include the reason for this decision.
- The recommendation that the board of directors should not hinder or obstruct takeover bids has now been made unconditional.

Ground leases – Norway in violation of the Convention for the Protection of Human Rights

By virtue of section 33 of the current Norwegian Ground Lease Act, anyone holding a long lease of land for use as a permanent or holiday home is entitled, at the expiry of the contractual term, to claim an extension of the lease on the same conditions as those applicable under the original lease and without limitation in time.

In a recent case brought to court, the applicants owned plots of land and, in their applications to the court, they complained that by virtue of the legislation, their lessees had been able to demand an indefinite extension of their leases on the same conditions as before.

The court stated that the interference with the applicants' possessions resulting from the application of section 33 was lawful and constituted "control [of] the use of property" for the purposes of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights. Furthermore, there was a legitimate need for the Norwegian Parliament, on grounds of social policy, to protect the interests of leaseholders who were financially unable to exercise their statutory right of redemption. The interference could therefore be deemed to be "in accordance with the general interest."

Turning to the proportionality of the measure ("enforce such laws as it deems necessary"), the court noted that the Norwegian Parliament had been confronted with the particularly complex task of trying to reconcile competing interests that were markedly different in nature: on the one hand, the lessor's interest in negotiating rent that reflected market values and, on the other, the lessee's interest in continuing the lease at the end of the term in view of their financial investment in the constructions on the land. The court was not satisfied that the respondent state, notwithstanding its wide margin of appreciation, had struck a fair balance between the general interest of the community and the applicants' property rights.

After having identified several shortcomings regarding section 33, the court concluded that a disproportionate burden had been placed on the applicant lessors. The judgment is final (case 13221/08).

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Amendments to the antimonopoly law are imminent

The Office of Competition and Consumer Protection (the office) has finished works on draft assumptions for amendments to the act on competition and consumer protection (the draft) which was announced by the office on 16 May 2012. The main advantages of proposed amendments to the act are improvement of the merger control system, effective detection of prohibited agreements and modification of the leniency program.

According to the office, the main objective of the amendments is enforcement of instruments strengthening the Polish system of competition and consumer protection.

The office highlighted that works on the amendment to the antimonopoly law were inspired by previous experience of its cooperation with business entities within antimonopoly proceedings. The market analyses, as well as the practice of foreign authorities, have also had an impact on commencing works on the amendments.

The draft amendment to the act presents new solutions and improvements of current antimonopoly procedure, for instance:

- **Cutting the time limits for proceedings in merger control cases:** it is suggested that, for easier cases, the procedure time should be shortened, whereas more complex cases would be reviewed within a two-phase procedure. Transactions raising no doubts from the office regarding the potential restriction of competition should be concluded within 30 days, whereas more complex cases would be reviewed within four months. Currently, the act states a procedure time of two months for both easier and more complex cases.
- **Modification of provisions concerning the control and searching procedure:** proposed amendments should make control and searching performed by the office more effective, as well as clarifying interpretational discrepancies raised in the past.
- **Increasing the efficiency of eliminating prohibited agreements:** numerous proposals presented by the office aim at increasing the efficiency of eliminating prohibited agreements. For instance, the concept of settlements and remedies should allow for certain measures to be taken to eliminate the impact of infringement or discontinue the prohibited practice.
- **Voluntary submission to penalty:** introduction of a voluntary submission to penalty aims at accelerating the proceedings and decreasing the number of appeals against decisions issued by the President of the office.
- **Raising interest of the leniency program:** The new institution called ''leniency plus'' should enable parties to obtain even more significant fine reductions for participating in anti-competitive agreements, as long as they provide the authority with information on other undetected agreements.
- **Natural persons' liability:** the office introduced natural persons' liability in the event of them infringing antimonopoly law. These sanctions will perform both repressive and preventative functions.
- **Modification of the financial penalties:** proposal of clarifying current provisions concerning financial penalties.

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Romania

Overcompensation of renewable energy

As a result of the enactment of Law 134/2012 approving the Government Ordinance no. 88/2011 (the law), the concept of "overcompensation" of renewable energy projects has been introduced in the Romanian legal system.

Concept

Overcompensation represents the situation when the internal rate of return (IRR) of a certain renewable energy project is 10% higher than the value considered by the Romanian state for the respective technology within the notification of the promotion system of the European Commission.

Implications

The implications of overcompensation are relevant, inter alia, for producers of electricity from renewable energy sources (E-RES), which have applied for other state aid schemes and/or EU grants. Given the state aid nature of green certificates (GCs), investors in E-RES projects awarded with EU grants or other state aid would register a significantly increased IRR.

As per the law, E-RES producers registering overcompensation of their projects shall receive a lower number of GCs in view of maintaining their IRR to the level approved by the European Commission.

As provided by the Regulation for the accreditation of the E-RES producers (the regulation), the reduced number of GCs ensures the maintenance of the same IRR level as if the respective E-RES producer had not received any investment state aid.

Summary

Further to the introduction of the "overcompensation" concept, the main dilemma of E-RES producers that would be eligible for being awarded EU grants, is whether they should accept the grants, or decline such financial support in view of receiving the full number of GCs provided by the law.

The dilemma itself illustrates the high profitability of the E-RES sector in Romania. Since Romania implemented one of the most beneficial compensation schemes, the E-RES sector retains its position as a very dynamic area of foreign interest.

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Russia

Russian strategic enterprises are prohibited to adhere to requests of foreign authorities without permission of national control bodies

On 11 September 2012, the Russian President signed a decree stipulating that open joint-stock companies, included in the list of strategic enterprises (such as Gazprom, RZD and Aeroflot), and their subsidiaries may (i) provide foreign authorities with information concerning their business activities, (ii) amend contracts with foreign partners, and other documents, relating to their price policy in other countries, and (iii) alienate shares in foreign companies, and real estate situated in the territory of a foreign state – only upon the prior consent of an authorized body determined by the Government. If such actions may jeopardize Russia's economic interests, such consent will not be given.

The decree followed in reaction to the EU Commission's investigation into Gazprom's allegedly anti-competitive practices in the Central European gas markets.

The Supreme Arbitrage Court has clarified the application of the Law on Advertising

The Supreme Arbitrage Court of the Russian Federation issued a resolution "On Certain Issues Related to the Application of the Federal law 'On Advertising' by the Arbitrage Courts." The court has underlined that the information that must be published in accordance with the legislation or business customs is not regarded as advertising. The placement of an entity's title or trade name in its location cannot be considered as advertising either.

The court has also underlined that the use of such terms as "best," "first," "No. 1," and similar is only acceptable if the criteria for such comparison are given.

The resolution also draws the line between the grounds for administrative liability for breach of the advertising law, and for unfair competition practices, and contains specific clarifications concerning advertising in the health care and insurance sectors.

Conflict between arbitration clause and jurisdiction clause: Supreme Arbitrage Court Ruling

On 19 June 2012, the Supreme Arbitrage Court of the Russian Federation issued a ruling addressing the problem of conflict between arbitration and jurisdiction clauses.

The court canceled the decisions of the lower courts and sent the case to the first instance court for a new hearing because the lower courts had ignored the fact that the provisions of the parties' agreement (namely, the provisions regulating resolution of disputes) included both the elements of an arbitration and a jurisdiction clause. The contract entitled one of the parties the right to choose between an arbitration court and a state court jurisdiction, while the other party was only entitled to submit claims to an arbitration court.

The Supreme Arbitrage Court estimated such provision as putting one of the parties into a dominant position in relation to the other (because of the opportunity to choose between arbitration and state courts, while the other party was deprived of such a right) and questioned the validity of this provision.

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Spain

Limitations on cash payment for the prevention of fraud in Spain

A new law (Law 7/2012, dated 29 October 2012) has been approved to modify the tax and budget regulations in order to intensify the procedures for the prevention of fraud. The main aspects introduced by this law are as follows:

Limitations on cash payments

A limitation on payments in cash (paper money, national and international currency, cash checks in any currency and any other payment method, even electronic, that can be used as a bearer payment) has been established by this law for those transactions of an amount equal to or exceeding €2,500 (or its value in foreign currency) in which any of the parties act as an entrepreneur or professional. In transactions where the payer does not act as such, and does not have a tax domicile in Spain, this amount is raised to €15,000.

This limitation applies to all payments made since 19 November 2012, even though they relate to transactions agreed previously. Nonetheless, this measure does not apply to payments to, and deposits in, banks or credit institutions.

Reporting requirements concerning goods and rights located abroad

Any taxpayer shall inform the tax authorities about any properties and rights located abroad, such as bank accounts, securities and real estate.

This obligation extends to those who are regarded as "beneficial owners" in accordance with the Law 10/2010, of 28 April 2010, about the prevention of money laundering.

Failure to comply with this obligation or to file this information in time, or where the filing is incomplete, inaccurate or false, will constitute a very serious tax offense and can lead to high penalties.

Simplification of the information obligations regarding mergers and demergers of Spanish companies

On 24 June 2012, Law 1/2012 came into force and, inter alia, simplified the information and documentation obligations concerning mergers and demergers:

- All types of companies can benefit from the merger and demerger simplified procedure if the transaction is unanimously approved by all the shareholders of the merged and demerged entities.
- Companies with a website can publish the merger or demerger plan online, instead of filing the plan with the commercial registry.
- The independent expert report is mandatory if any of the merged or demerged entities is a sociedad anónima (corporation) or a sociedad comanditaria por acciones (similar to a limited partnership).
- Exceptionally, the independent expert report for a merger or demerger is no longer required if the transaction is unanimously approved by all the shareholders of the merged or demerged entities.
- The balance sheet for the merger or demerger of a listed corporation can be replaced by its semiannual financial report, provided that certain conditions are fulfilled.
- The opposition regime for creditors in cases where the merger or demerger has been carried out without the legal guarantees in their favor is modified to give more possibility of action to those creditors.
- In the event of a cross-border merger or the international transfer of a registered office, the shareholders have the right to withdraw from the company.
- The requirements in the event of a demerger by means of the formation of a new company have been simplified if the shares of each of the new companies are assigned to the shareholders of the demerged company pro rata to the rights that the shareholders had in the capital of the demerged company.
- In the event that the acquiring company directly holds 90% of the shares of the target entities, if the shareholders of the target entities do not agree with the valuation assigned to their shares in the merger plan, they can request the commercial registry to appoint an independent expert (other than the company's auditor) to assess the fair market value of their shares.
- Article 348 bis, which establishes an exit right for shareholders of unlisted companies if a minimum dividend is not distributed, is put on hold up to 31 December 2014. This article was inserted in the Spanish Companies Act in August 2011 and its interpretation and implementation had been very controversial.

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Ukraine

Amendments to production sharing agreement (PSA) regulation and taxation

On 2 October 2012, the Ukrainian Parliament passed two laws (the laws) aiming at improving production sharing agreement (PSA) regulation and taxation:

- Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding Performance of Production Sharing Agreements" No. 5406-VI
- Law of Ukraine "On Amendments to the Tax Code of Ukraine to Regulate Certain Tax Issues" No. 5412-VI

The laws took force, respectively, on 7 November and 4 November 2012.

Although the laws have not cleared up all the uncertainties and issues pertaining to PSAs in Ukraine, they have solved many important problems. In particular, they intend to address a number of crucial practical matters. For instance, the laws have exempted PSA investors from a number of currency control requirements and eased the procedure for the purchase and exchange of foreign currency under a PSA. Extending the list of non-taxable events under a PSA, confirming PSA investors' right to VAT credit and cash refund, as well as introducing a VAT zero rate for the export of production distributed under a PSA are among the most important changes in taxation.

New Leniency Regulation

On 5 October 2012, a new Leniency Regulation adopted by the Ukrainian Antimonopoly Committee (AMCU) entered into force.

The AMCU's right to offer exemption from liability for anti-competitive concerted practices has long existed according to the law of Ukraine "On Protection of Economic Competition" and only now has the AMCU issued a comprehensive regulation on this procedure.

The fine for concerted practices may reach up to 10% of the parties' revenue for the previous financial year (reportedly, the actual penalties have mostly been significantly lower than this threshold, but there has been a noticeable tendency for fines to increase). For the purposes of the penalty, a party includes all persons connected by reasons of control.

However, a participant in concerted practices may be exempted from liability provided that the two following conditions are satisfied:

- The participant is the first to declare its role in the concerted practices voluntarily
- This information is material for the decision in the case, i.e., it has sufficient evidentiary force

The applicant must take effective actions to ensure that it ceases to participate in the concerted practices, unless the AMCU approves further participation to procure more information for the investigation. The exemption will not be granted to initiators of concerted practices, to the participants who initiate, direct, guide or control anti-competitive actions or coerce others, or to those who fail to provide to the AMCU all available, or potentially available, relevant information.

The Leniency Regulation sets out the requirements for the application and the supporting documents to be filed with the AMCU. Should the applicant lack sufficient information, but expect to obtain it at a later stage, the applicant can separately apply for a marker letter that will confirm that it was the first to contact the AMCU. In this case, the deadline for submission of the additional information is 30 days from the date of issuance of the marker letter. The application for exemption or the request for a marker letter must be submitted before the AMCU has issued the preliminary conclusions in the investigation.

Notably, neither the law of Ukraine "On Protection of Economic Competition" nor the Leniency Regulation provide for the possibility of reducing the penalties for concerted practices, which could incentivize the participants to help the AMCU in its investigations.

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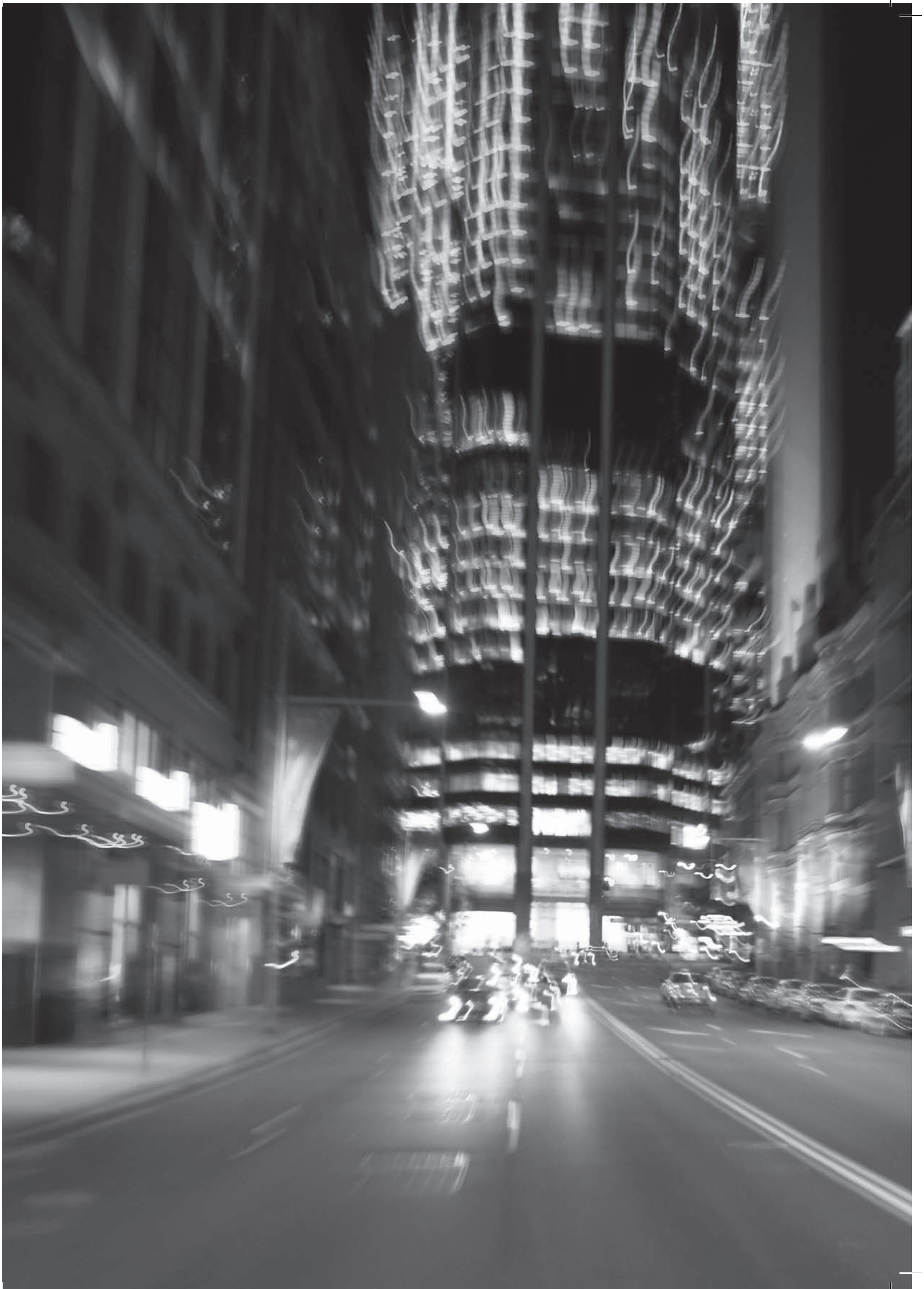

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