Fall 2011

Corporate
& commercial
law in EMEIA

Multi-jurisdictional legal update

International legal developments

Business law as a key issue

This publication is intended to highlight a variety of international business law matters (e.g., corporate, contractual, competition, distribution) and also to indicate recent developments in specific countries on a quarterly basis.

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Belgium

New corporate legislation: gender quota on the board of directors

Both genders, male and female, now need to be represented on the board of directors of listed companies. The Law of 28 July 2011 (Law) amending the Belgian Companies Code (BCC) requires a minimum of one-third of the board members to be of the "other" gender (new article 518 bis, § 1 BCC).

In practice, this requirement means that all listed companies will have to bring changes to the composition of their board of directors, and appoint a number of female directors.

Appointing the board members remains one of the exclusive powers of the general shareholders' meeting, but subject to a restriction. Indeed, if the number of board members of the "other" gender is below a third, the very first general shareholders' meeting to be held after the change into law has come into force should arrange for the gender quota to be met. As long as the quota is not met, the Law suspends all of the directors' financial and other advantages.

Moreover, as long as the quota is not met, in order for the appointment not to be null and void, the next director to be appointed should be of the minority gender. In addition, any appointment that reduces the minority gender below the minimum quota is considered null and void.

Listed companies are granted a term of five years to comply with the new provisions (according to the terms of the Law: "as from the first day of the sixth following accounting year"). For certain companies, such as relatively small listed companies, this term is extended up to seven years.

As from the first new accounting year, however, the listed companies are to report on the efforts made to reach the target quota. This report is to be integrated in the listed companies' corporate governance statement, which is included in their annual report.

Important case law – Supreme Court

The Law of 31 January 2009 introduced the new framework for the continuity of companies and business enterprises in distress.

Under the previous legislation dated 1997, the claims and receivables of the tax authorities (i.e., the Belgian State) qualified as extraordinary claims and would remain untouched by the deal the debtor would make with its creditors.

There is no similar provision in the current legislation. Hence, the Brussels Court of Appeals decided on 11 March 2010 that the tax authorities no longer benefit from a favorable regime and approved a debtor's reorganization plan that provided for a reduction of the principal amount of the Belgian State's tax claims. The Belgian State attacked this decision before the Supreme Court, claiming that even though, in the context of this legislation, it qualifies as an ordinary creditor, such a reduction of its claims would be contrary to article 172 of the Constitution (whereby any tax exemption or tax reduction must be provided by statute). Lacking any explicit provision allowing for such a reduction of tax claims, any such reduction would be unenforceable.

In a judgment of 30 June 2011 (published on the Supreme Court's website: www.cassonline.be), the Belgian Supreme Court rejected the State's opinion and approved the Court of Appeals' decision. Under the Law of 31 January 2009, the tax authorities (Belgian State) qualify as an ordinary creditor and are subject to the same rules as any other creditor. The Supreme Court ruled that, by qualifying the tax authorities as an ordinary creditor, the law-makers implicitly decided to provide for an exemption to the principle of article 172 of the Constitution. Hence, the debtor's reorganization plan can indeed provide for a reduction of the tax claims, just as with any other of the debtor's debts.

The Supreme Court's judgment is extremely important and is expected to give a real boost to rescue and reorganization initiatives. The judgment increases hope that the new reorganization regime will prove to be more successful than the 1997 legislation.

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Finland

New Water Act simplifies initiation of hydraulic projects

A new Finnish Water Act (new Act no. 587/2011) has entered into force in May 2011. The new Act has replaced the former Water Act that has been partially amended several times in recent years. Consequently, both the former Water Act and its interpretation became fairly complicated. The new Act aims at enhancing the handling of water resources permits and clarifies the coexistence between the new Act and other regulation on the use of environment.

Along with the new Act, inspections, which in some cases have been a part of the handling of water permits, are no longer required. The goal of this amendment has been to speed up the handling of water permits. Also, the order of priority concerning abstracting of water has been clarified. However, in the reform, the main principles of the former Water Act have remained unchanged. For example, the general rights of use, such as the right to use the water areas for passage and floating timber, have not changed, and hydropower projects still always require permission, regardless of their size or effect.

A Supreme Court ruling clarified the possibility of using comparative market studies in marketing

Competing Finnish teleoperators have recently been arguing about marketing methods. The Finnish Supreme Court gave a ruling (no. 2011:42, record no. S2009/860) regarding the comparative advertising between the teleoperators. The claimant demanded that two other operators should stop using expressions “the most extensive 3G network in Finland” and “the most wide-ranging 3G network in Finland” in their marketing.

According to the claimant, in the comparative advertising, the features of the products were not compared impartially. The expressions were based on the results of the survey, which was ordered by the defendant (and could thus not be considered to be objective). In addition, the claimant argued that the survey method was wrong as only the signal level was measured. Therefore, results of the comparison were untruthful and misleading. The defendants demanded that the petition be rejected as the signal level is, in practice, the most substantial factor in the quality and scope of 3G services. The chosen method of survey was the most reliable way to measure the aforementioned qualities.

In the survey, the signal level, i.e., field strength, was measured in certain places. The field strength can be used in the assessment of 3G network coverage, but it is not the only factor, if voice and data services functionality of the 3G network is estimated. However, it was established that the signal strength measurement is generally used to determine the 3G network coverage area. Thus, the field strength was, according to the Supreme Court, an essential and significant feature for comparison. The Supreme Court stated that the comparison had been based on an unbiased survey, which compared one of the 3G network’s essential, significant, demonstrable and prominent features. Consequently, per the Supreme Court, the expressions “the most extensive” and “the most wide-ranging” were not untruthful and misleading.

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Latest amendments to the Finnish Limited Liability Companies Act (FCA) lessen bureaucracy for companies

Various sections regarding the availability and delivery of documents for shareholders’ meetings and mergers, as well as demergers, have been amended as from 1 September 2011 (the amendment). The amendment implemented the European Directive dated 16 September 2009 no. 2009/109/EC. This Directive has recently been implemented in France, Luxembourg and Poland as well. Further details on these jurisdictions can be found in the relevant articles in this newsletter.

The amendment allows companies to communicate with the shareholders more flexibly and, since September 2011, the company can hold the material of the shareholders’ meetings only available on the company’s website before the meeting.

The procedure and decision-making in subsidiary mergers (i.e., mergers where the acquiring company owns all the shares of the merging company) are simplified, and the publication burden of limited liability companies is lightened. In subsidiary mergers, the resolution to accept the merger is now always made in the board of the absorbing company.

The demerger plan does not have to include reasons for the demerger or grounds according to which the demerger contribution is distributed especially where the shareholders of the demerging company unanimously agree, or where the shares issued as demerger contribution are distributed to the shareholders of the demerging company pro rata to their shareholdings.

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France

New French Law providing for a mandatory bonus for employees in case of dividend increase

The Law no. 2011-894 dated 28 July 2011 set up the payment of bonuses to employees, retroactively as from 1 January 2011, should their employer decide on a dividend distribution.

The new rules apply to commercial companies (i) with 50 employees or more, (ii) at least 50% of whose share capital is owned by the State or its French public establishments and (iii) to those with under 50 employees, on a voluntary basis.

The bonus has to be paid to all the employees when the dividend per share distributed to the shareholders is higher than the average of the dividends per share distributed during the two previous fiscal years.

Nevertheless, when a company belongs to a group (the definition of which is the one used for the setting up of a group committee under article L.2331-1 of the French Employment Code), the amount of dividends that triggers the bonus payment will be the one distributed by the controlling company. In such a case, the companies of the group with 50 employees or more will be required to pay the bonus. Companies of the group, under 50 employees, will be able to pay the bonus on a voluntary basis.

The new rules apply to distributions made under article L.232-12 of the French Commercial Code, i.e., distributions decided by the ordinary general meeting of shareholders (including interim dividends). On the contrary, distributions of reserves decided by another shareholders' meeting shall not trigger the bonus payment.

As far as the amount of the bonus to be paid is concerned, an agreement between the company and the workforce will have to be entered into within three months starting from the decision to distribute the dividends made by the ordinary general shareholders' meeting (or before 31 October 2011 when companies already allocated dividends before the Law no. 2011-894 entered into force). The agreement has to be filed with the administrative authorities.

Failure to start the negotiations would risk penalties of one year's imprisonment and a fine of EUR3,750.

French Law on simplification and improvement of the Law: changes for French Corporate Law

French Law no. 2011-525 of 17 May 2011 (Law) simplified certain legal provisions and transposed the European Directive dated 16 September 2009 (no. 2009/109/EC), which reduces the information obligations in relation to mergers and divisions. This Directive has recently been implemented in Finland, Luxembourg and Poland as well. Further details on these jurisdictions can be found in the relevant articles in this newsletter.

The provisions relating to mergers and divisions came into force on 31 August 2011 but will require a decree to be implemented, the date of which is uncertain at the moment. The other provisions came into force on the date of the publication of the Law, i.e., on 18 May 2011.

As far as simplifications are concerned:

The obligations in terms of informing the governing bodies (board of directors or supervisory board, chairman of a simplified joint stock company (SAS), as applicable) and the statutory auditors with respect to transactions concluded at arms' length between the company and its management or shareholders ("self-dealing transactions") have been abolished for all types of French corporations (SA, SCA, SAS) . As such, the list of self-dealing transactions no longer needs to be sent to the statutory auditors or to any shareholders who ask for it.

In addition, the obligation to place the inventory at the disposal of the shareholders prior to the annual

ordinary general meeting has been abolished. Listed companies should be particularly pleased with this modification as it means that they will merely have to put on their website the items that shareholders are entitled to obtain prior to the general meeting.

As far as mergers and divisions are concerned:

Shareholders of corporations (SA), may now, by unanimous decision, exempt the board from having to draw up or make available to the shareholders a written report on the operation.

Moreover, in the event of the absorption of a 100% subsidiary, the general meeting of the absorbing company no longer has to approve the operation. Nevertheless, the shareholders of the absorbing company representing at least 5% of the capital may petition the Courts to appoint a representative in charge of calling a meeting to approve the merger.

The Law has also introduced simplified provisions into French law when the absorbing company permanently holds, from the time of the filing of the merger agreement at the Court clerk's office until the effective completion of the operation, at least 90% of the voting rights at the level of the absorbed company. There is no longer approval by the general meeting of the absorbing company (except in the case of a request by the minority shareholders as explained above). In addition, it is no longer necessary to have a report drawn up by a merger auditor, so long as the minority shareholders of the absorbed company were offered the possibility, prior to the merger, of having their shares purchased by the absorbing company.

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Germany

Insolvency Law reform 2012 – new possibilities for reorganization?

On 17 May 2011, the Federal Government submitted the draft Act on further simplification of business reorganization (ESUG) to the lower house of the German Parliament (*Bundestag*). Since then, the Act has been subject to reviews by various committees and commented on by the upper house of the German Parliament (*Bundesrat*), as well as the associations and federations concerned.

Background to the draft Act

The fact that a large number of businesses had relocated their registered offices to England in the course of the economic crisis, in order to make use of the advantages of English insolvency, triggered an intense debate on the weaknesses of German insolvency law. The weaknesses cited included arguments that: (i) the course of German insolvency proceedings is unpredictable, especially as German Court practice permits hardly any influence on the choice of insolvency administrator; (ii) the conversion of receivables into shares (debt equity swaps) often fails on account of the unwillingness of the (former) shareholders; (iii) the duration of German insolvency proceedings with the aim of reorganizing the business structure is very unpredictable; and lastly (iv) that German Courts almost never consider the possibility of self-administration by the debtor.

All these factors lead to a situation where it is currently a rare exception that applications for insolvency with the aim of reorganizing the company are filed at an early stage.

The explicit aim of the ESUG is to make it attractive for businesses to enter into insolvency proceedings at an early stage and eliminate the stigma attached to the term "insolvency." This is to be primarily achieved by creditors and debtors being actively involved in the choice of insolvency administrator, making the course of proceedings more predictable for all parties and reducing the possibilities for blocking them. Furthermore, the intention is to improve the possibility of reorganizing the business structure.

The amendments brought about by the ESUG may result in considerable changes to insolvency proceedings

Specifically, the draft ESUG provides for the following:

Strengthening of the position of creditors: provisional creditor committee

In principle, Courts have to appoint a provisional creditor committee immediately upon receipt of an application for insolvency proceedings once certain size criteria are met by the debtor. This committee may nominate, by unanimous resolution, a specific person as (preliminary) insolvency administrator or as receiver, and the Court must, in principle,

appoint that person as administrator.

Reinforcing self-administration by the debtor

Self-administration by the debtor upon its application will be the rule in future. This means that the management will, in principle, remain authorized to act and entitled to conclude on behalf of the debtor agreements to the benefit or at the expense of the assets subject to insolvency proceedings. Under self-administration, the management will not be supervised by the supervisory bodies originally responsible (e.g., shareholders meeting) but by a receiver appointed by the Court. In principle, the preliminary receiver can be appointed by the debtor, which *de facto* gives the debtor the possibility to influence the appointment of the (final) receiver in the ruling opening the insolvency proceedings.

Introduction of a protective screen ("Chapter 11")

An additional incentive to file for insolvency proceedings early on comes from the possibility of drafting a reorganization plan under a "protective screen" at the business's own responsibility (similar to Chapter 11 proceedings in the US). If a business files for insolvency protection or self-administration in the face of impending insolvency or over-indebtedness, the business may, in future, draft an insolvency plan over a period of up to three months under the supervision of the preliminary receiver (chosen by the business) and may have enforcement measures prohibited by the insolvency Court (protective screen).

Extension of the insolvency plan proceedings

In addition to the protective screen proceedings, simplified intervention into the rights of shareholders (of the debtor) is one of the main factors making it easier to draft an insolvency plan.

Up to now, the main hurdle to the successful conclusion of insolvency plan proceedings is that intervention into the rights of shareholders is only possible with the consent of those shareholders. Under the present draft Act, it is permissible to provide for capital measures in the insolvency plan that are deemed to have been passed – without any further shareholder resolutions – once the insolvency plan becomes legally binding. Such capital measures are capital reductions, capital increases or debt equity swaps.

A debt equity swap can, for example, take the form of creditors contributing receivables to the company by way of a non-cash contribution, thus making them shareholders in the debtor (it still remains unclear how receivables contributed are to be valued). This "dilutes" the equity interest of the former shareholder(s), which may mean a total loss in the event of a capital reduction having been performed beforehand.

However, the shareholders do participate in the changes to their rights under insolvency plan proceedings: in principle, acceptance of the insolvency plan does require the consent of the majority of shareholders (their consent being assumed under certain circumstances).

Extended duties for management

Greater demands are put on management duties in particular, due to the fact that, in the future, a list of creditors and their claims will be attached to the application for insolvency proceedings, and balance sheet total, revenue and number of employees will have to be stated. This is of relevance because, among other things, the application will be deemed "not filed" if it is filed incorrectly, which, in the event of over-indebtedness or insolvency, will lead to the criteria for a criminal delay in filing for insolvency being met with the corresponding consequences under civil and criminal law.

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Greece

New Greek Competition Law

On 20 April 2011, the Greek Law no. 3959/2011 relating to protection of free competition (Law) was reformed to a great extent. The Law integrates into Greek legal order the Greek, European and international experience in the field of competition law.

Some of the most important changes introduced by the Law are as follows:

- The conclusion of agreements between companies, the adoption of decisions by associations of companies and concerted practices, whose object or effect is the prevention, restriction or

distortion of competition within the internal market of Greece may induce penalties amounting to a percentage of 10% of the total turnover of the financial year in which the violation ceased.

- Any abuse by one or more companies of a dominant position within the internal market, or in a substantial part of it, may induce penalties amounting to a percentage of 10% of the total turnover of the financial year in which the violation ceased.
- For the calculation of the amount of penalties, the Law adds to the pre-existing criteria (gravity and duration of the violation) the following ones: the geographical location, the duration and kind of participation in the violation and the financial benefit deriving from the violation.
- The Law provides for significant fines for natural persons participating in the preparatory acts in the organization or in the performance of an illegal action by a company. Indeed, the Hellenic Competition Commission (HCC) may condemn the breaching natural person to administrative fines of EUR200,000 to EUR2 million (as well as being liable with their personal property). For the calculation of the amount of the penalty, the position of the individual in the company, as well as the extent of their participation in the illegal action, shall be taken into consideration.
- More severe sanctions are imposed on companies participating in cartels. In particular, in the event that the violation concerns competitors or potential competitors, imprisonment of at least two years and a fine of EUR100,000 to EUR1 million are imposed (a six-month imprisonment and a fine of EUR15,000 to EUR150,000 was provided by the preceding regulation).
- Less severe are the sanctions provided by the Law in the event of an abuse of dominant position. This violation is punished by a financial penalty of EUR30,000 to EUR300,000 (EUR15,000 to EUR150,000 was provided by the preceding regulation).
- The violations are time-barred five years after they have taken place.
- In the event of an appeal against a decision by the HCC to impose a fine, and following a petition by the person appealing, the Administrative Court of Appeals of Athens is granted, by virtue of the Law, the ability to order the suspension of part of the penalty, which may, however, not exceed 80% of the initial penalty. If the Court of Appeals estimates that the appeal is lawful, it may accept, following a justified decision, the petition of suspension of the penalty for the whole amount.
- The deadline for the notification of an economic concentration to the HCC is extended to 30 days (the deadline provided by the preceding regulation was 10 days) after the execution of the agreement leading to control of the company.
- The fines imposed in case of willful infringement of the notification obligation are increased and range from EUR30,000 and up to 10% of the violator's annual worldwide turnover (EUR15,000 and up to 7% respectively, was provided by the preceding regulation).
- The Law abolishes the stamp duty amounting to 20% of the imposed penalty, which was a precondition for the admission of an appeal before the Administrative Court of Appeals of Athens.
- Finally, the Law brings amendments in the structure, organization and day-to-day functioning of the HCC.

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Italy

Replacement of a board member – recent decision of the Court of Milan

Under Italian laws, the managing director (MD) of a company is a member of the board of directors having managing powers (i.e., is allowed to act on behalf of the company). By contrast, a member of the board of directors without managing powers is a mere board member (the Board Member). The customary procedures to be implemented in Italy to ensure that (i) a Board Member steps out from the board of directors, and (ii) the MD be revoked from their managing powers so that they

remain a mere Board Member, can be summarized as follows:

Voluntary resignation from office as Board Member or MD

In practice, the easiest, quickest and least risky way is to obtain the Board Member or MD's voluntary resignation from their office.

Once their resignation letter is obtained, the board of directors can directly appoint a new Board Member (in corporations (SPA) or, in limited liability companies (SRL), if so allowed by the bylaws) or shall call a shareholders' meeting of the company, in order to replace the resigning Board Member or MD, where applicable.

Revocation from office as Board Member and MD

If it is not possible to obtain a resignation letter from the Board Member or MD, where applicable, the shareholders' meeting of the company can revoke the Board Member or MD from office at any time.

However, according to article 2383 subsection 3 of the Italian Civil Code, the revoked Board Member or MD is "entitled to compensation for damages, if the revocation occurs without a fair cause." According to case law, the revoked Board Member or MD has to give proper evidence of the damage they actually incurred.

Usually, such damage is equal to the compensation the Board Member or MD was entitled to, until the expiry term of their office set at their appointment.

Moreover, in case of revocation, in principle, the revoked Board Member or MD might claim for further damages (e.g., damage to image). The likelihood of being awarded such damages depends on the case-by-case basis and on the ability of the revoked Board Member or MD to bring evidence of the existence of the damage and to quantify it properly.

Revocation of the powers granted to an MD, keeping them as a mere Board Member.

The board of directors could also just revoke the managing powers of the MD. In such a case, the MD would remain on the board as a mere Board Member until the natural expiry term of the whole board of directors.

If, however, the MD was remunerated for their office as managing director, they could ask for damages, should the revocation of managing powers of the MD have occurred without a fair cause.

Application of the "*simul stabunt simul cadent*" clause and recent decision of the Court of Milan.

According to customary practice, the bylaws of many corporations and limited liability companies contain a "*simul stabunt simul cadent*" clause. Such a clause provides that, if a Board Member ceases, for whatever reason (resignation, revocation, etc.), to be in office, the whole board of directors is immediately terminated and needs to be replaced.

This clause has often been used in order to terminate indirectly the office of a Board Member not willing to resign voluntarily, so as to try and avoid the adverse effects of a formal revocation, as described above. According to such practice, another Board Member, following the instructions of the shareholder(s), resigns, triggering the "*simul stabunt simul cadent*" clause and causing also all the other Board Members to have their offices immediately revoked.

Case law in respect of this "*simul stabunt simul cadent*" clause recently changed. Indeed, according to a decision of the Court of Milan dated 28 July 2010 (published in legal gazette *Le Società*, Ipsoa - Wolters Kluwer editor, no. 2/2011, pages 149 and seq.), using such a clause just to fire a Board Member not willing to resign voluntarily from their position is against the general principle of good faith and, therefore, its application is unlawful. Accordingly, the Board Member who has been indirectly revoked is entitled to claim for damages, as if they were revoked without a fair cause.

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Luxembourg

Merger and demerger – new rules

A Law dated 3 August 2011 transposing the European Directive no. 2009/109/EC dated 16 September 2009 has introduced new provisions in the Law dated 10 August 1915 on commercial companies (Law) regarding the formalities to be undertaken in the framework of mergers or demergers of Luxembourg commercial companies. This Directive has recently been implemented in Finland, France and Poland as well. Further details on these jurisdictions can be found in the relevant articles in this newsletter.

With a view to reducing the costs to be paid by the companies involved in a merger or demerger process, Luxembourg commercial companies will now be entitled to:

- Publish the draft merger or demerger terms on their own website
- Publish the documents that could be inspected by the shareholders of the merging or demerging companies on their own website
- Be exempted to draw up a detailed written report explaining the draft merger terms and setting out the legal and economic grounds, provided that all the members and holders of other securities conferring voting rights in each of the companies involved in the merger or demerger process have agreed to do so

Introduction of international accounting standards

The Law of 10 December 2010 on the introduction of international accounting standards for undertakings has made several amendments to the Law and the Law of 19 December 2002 on the Luxembourg trade and companies register, as well as the accounting and the annual accounts of undertakings. Notably, Luxembourg commercial companies subject to the compulsory setting-up of annual accounts in accordance with article 8 of the Luxembourg Commercial Code:

- Have the option to prepare their annual accounts and, for not listed company, their consolidated accounts, in accordance with the international accounting standards as adopted by the European Union (EU).
- May value, for those preparing their annual or consolidated accounts in accordance with Luxembourg's generally accepted accounting practices, the financial instruments and other assets at "fair value" instead of "acquisition value" or "historical value."

In addition, the thresholds implying the appointment of a qualified auditor (*réviseur d'entreprise agréé*) in a corporation (SA) and a private limited liability company (SÀRL) have been increased. The thresholds are now the following:

- Total balance sheet:................ EUR4,400,000
- Net turnover:..... EUR8,800,000
- Average number of full-time staff:.................... 50

Voting rights of shareholders in listed companies

By a Law dated 24 May 2011, the Grand Duchy of Luxembourg implemented the European Directive no. 2007/36/EC of 11 July 2007 regarding the exercise of certain rights of shareholders in listed companies. This Directive has recently been implemented in Spain as well. Further details can be found in the Spanish article in this newsletter.

This law applies to companies governed by Luxembourg law listed on regulated markets in the EU and aims to promote the effective exercise of voting rights of shareholders in listed companies.

Listed companies have now several new obligations such as:

- Authorizing shareholders with a combined total of at least 5% of the share capital of said listed company to include specific items on the agenda to be discussed during the general meeting of the shareholders and to file draft resolutions for all these items
- Publishing notices of the general meeting of the shareholders at least 30 days prior to such a meeting in the *Mémorial* (Official Gazette of Luxembourg) in a Luxembourg newspaper and in a media ensuring a large diffusion to the public throughout the EU. If the quorum is not reached at a first meeting, the notice period for a second meeting is reduced to at least 17 days
- Establishing a record system to compute the votes
- Establishing and publishing the results of the votes

Adoption of a Code of Consumer Protection

By a Law dated 8 April 2011, the Grand Duchy of Luxembourg codified the existing laws relating to consumer protection and implemented the European Directives no. 2008/48/EC of 23 April 2008 on credit agreements for consumers and no. 2008/122/EC of the European Parliament and of 14 January 2009 on the protection of consumers in respect of various aspects of timeshare, long-term holiday product, re-sale and exchange agreements.

The Code of Consumer Protection also codifies the rules relating to abusive clauses, legal guarantee of conformity and commercial guarantee due by a professional to a consumer, as well as unfair commercial practices.

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The Netherlands

Changes in monitoring system

Abolishment of the declaration of no-objection

As of 1 July 2011, new legislation came into effect abolishing the declaration of no-objection. This will facilitate the incorporation of a Dutch private limited liability company (BV), a public limited liability company (NV) or a European company (SE) in the Netherlands.

Previously, the incorporation of a BV, NV and SE in the Netherlands required a declaration of no-objection issued by the Dutch Ministry of Security and Justice (the Ministry). This was due to mandatory preventive governmental supervision rules. In connection herewith, the Ministry needed to be provided with detailed information on the incorporators, its directors and the final policy-maker. This was often a cumbersome process.

The declaration of no-objection was also required for an amendment of the articles of association of a BV, NV or Dutch SE.

As a result of the new legislation the declaration of no-objection is no longer needed.

New monitoring system

The mandatory preventive supervision rules have been replaced by a new system of continuous monitoring during the existence of the legal entity. The new continuous monitoring also covers - besides (private) limited liability companies – foundations (*stichtingen*), associations with full legal authority (formal associations – *verenigingen met volledige rechtsbevoegdheid*), cooperations (*coöperaties*), mutual insurance associations (*onderlinge waarborgmaatschappijen*), European companies (SE), European Cooperative Societies (SCE) and European Economic Interest Groupings (EESV), provided that these legal entities have their statutory seat in the Netherlands.

Purpose of the new system of supervision

The new system of continuous governmental supervision intends to prevent and to counter misuse of legal entities. Furthermore, the system intends to facilitate investigation and prosecution of offenses that have been committed or will be committed by the legal entity.

Screening of data

The Ministry will compile all relevant data from publicly and non-publicly accessible sources of information. The compilation of data will relate to legal entities as well as individuals. Not only will incorporators, shareholders, managing directors, supervisory directors, representatives and policy-makers be monitored, but also their family members and household members.

Withdrawal of proposed bill concerning new Dutch Partnership Act

As per the letter of 5 September 2011, the Minister of Security and Justice informed the Upper Chamber of Parliament of his intention to withdraw the proposed bill for a new Partnership Act. One of the reasons to have the bill abolished is the expected administrative burden for companies.

For many years, a new Partnership Act has been pending with the Dutch Parliament. Despite the fact that the proposal was aimed at modernizing and facilitating the legislation on partnerships, it received a lot of criticism and opposition.

One of the key features of the new proposal was the possibility of opting for legal personality and of converting a partnership to a private limited liability company (BV).

Bill on the management and supervision of the NV/BV

On 31 May 2011, the Upper Chamber of Parliament adopted the Bill on Management and Supervision of an NV and a BV. This bill creates the possibility for BVs and NVs to make a choice for a one-tier board model, in addition to the already existing two-tier board model consisting of a board of directors and a separate board of supervisory directors. In a one-tier board, the position of a supervisory director is abandoned and the supervisory tasks will be executed by persons forming part of the management board of directors, in which case the bylaws shall be amended. In this case, the

board of the NV/BV recognizes both executive and non-executive directors. The Dutch Government expects the bill to enter into force on 1 January 2012. However, the actual date will ensue from a Royal Decree that has not yet been prepared at this time.

Conflicts of interest

The bill also provides for new conflict of interest provisions. Currently, a director is, in principle, not authorized to represent the NV/BV externally in matters in which he has a direct or indirect personal interest that conflicts with the interest of the NV/BV. Under the proposed legislation, such conflict of interest will be considered an internal matter for the NV/BV. As a result, the external authority of a director to represent the NV/BV will no longer be affected when a conflict of interest is held to exist between the NV/BV and its director(s). The new conflict of interest provisions do not have retroactive effect.

Diversification and limitation of tasks

Furthermore, the new bill includes an arrangement for middle sized NVs/BVs in order to promote the participation of women in boards of directors and supervisory boards.

Moreover, the bill limits the number of positions to be occupied by (supervisory) directors. A director may not occupy more than two supervisory positions at other legal entities, and a supervisory director may take a seat on, at most, five supervisory boards; a chairmanship is considered to be equal to two seats.

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Poland

Simplification of company law: merger and division procedures

The Act of 28 July 2011 amending the Commercial Companies Code (Amendment Act) provides for liberalization of the responsibilities associated with the procedures for mergers and divisions of companies. At the present date, the Amendment Act is awaiting the President's signature in order to be promulgated, i.e., published in the *Official Journal*. It will come into force 30 days from the date of its promulgation.

The Amendment Act implemented the European Directive no. 2009/109/EC dated 16 September 2009 on reporting and documentation requirements for mergers and divisions of companies. This Directive has recently been implemented in Finland, France and Luxembourg as well. Further details on these jurisdictions can be found in the relevant articles in this newsletter.

The new rules now allow the merger plan to be published on the company's website. The merger plan should be published in such a way no later than one month before the start date of a shareholders' meeting or a general meeting where the merger resolution is adopted, and remain on the website continuously until the end of the relevant meeting. The same applies to cross-border mergers. Similarly, the division plan can be announced on the company's website. Nevertheless, the publication period required for divisions is different: the division plan must indeed be announced on the company's website not later than six weeks prior to the day of adoption of the first resolution concerning the division and should remain on the website until its completion.

Another change introduced by the Amendment Act concerns online disclosure to the shareholders of documents required, as part of the merger or division process (such as financial statements). The shareholders should, however, agree to use the company's electronic means for conveying such information. The company will not have the obligation to prepare a report justifying the merger or division, where applicable, should the shareholders unanimously agree.

Before the adoption of the Amendment Act, listed companies were obliged to prepare specific financial statements containing information on the company for the purpose of implementing mergers or divisions. This requirement has been abolished, as long as the listed companies disclose their financial statements to the shareholders (once every six months) in accordance with the relevant rules on the stock exchange and listed companies. Non-listed companies still need to prepare such statements for the purpose of merger or division.

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Romania

New amendments to Competition Law no. 21/1996 (Competition Law) and secondary legislation

At the beginning of August 2011, the Romanian Competition Council (RCC) has launched the online public consultation on several drafts of secondary legislation, regulations and guidelines, inter alia*:*

- Draft regulation on amending and completing the regulation on analysis and resolution of complaints referring to the infringement of articles 5, 6 and 9 of Competition Law and of articles 101 and 102 of the Treaty on the Functioning of the European Union (applicable to horizontal and vertical restraints and abuse of dominance)
- Draft regulation on amending and completing the regulation on economic concentrations
- Draft guidelines amending the guidelines on the rules of access to RCC's file in cases related to articles 5, 6 and 9 of Competition Law and articles 101 and 102 of the Treaty on the Functioning of the European Union.

This secondary legislation will be enacted as a consequence of passing the Law no. 149/2011, in July 2011, that introduces several amendments to competition law, previously amended by the emergency government ordinance no. 75/2010 (EGO no. 75) in order to align Competition Law with European legislation and with the practice of the European Courts in this area.

The most important amendments introduced by EGO no. 75 and by Law no. 149 include:

- The compatibility test of the economic concentration with a normal competitive environment has been changed from a "dominance test" to a substantial impediment of effective competition test. The new rules focus on the effects of economic concentration on the competitive environment, the creation or strengthening of a dominant position being deemed no longer as an automatic restriction of competition.
- Parties to an economic concentration are now have the obliged to notify the concentration prior to any implementation measures of the same (e.g., amendments to the scope of business of the acquired company; sale of assets of the acquired company; exercising acquired voting rights to appoint members of the managing bodies of the company).
- The RCC is entitled to accept commitments from the investigated companies during an investigation regarding anticompetitive practices.
- Companies with a market share in excess of 40% are now presumed dominant, although this is a reversible legal presumption. This new provision shifts the burden of proof on companies under investigation. Therefore, in case of an investigation for abuse of dominance, the investigated companies have to bring evidence that they are not dominant, despite their market share or cumulated market shares exceeding 40%.
- The ceiling for the clearance fee in economic concentrations control cases was set at EUR25,000 starting from a minimum threshold of EUR10,000 (before the amendment, the authorization tax for economic concentrations was established at 0.04% of the total turnover achieved by the companies at stake in Romania, capped at EUR100,000).
- Where a decision of the RCC triggered fines, and where such a decision was challenged by the condemned party, a bail equal to 30% of the fine had to be posted by said party. The new rule provides that the bail is to be decided by the Court, which, in any event, shall be only up to 20% of the fine.
- The level of the fine is decreased, on a sliding scale, from 10% up to 30% (prior to this amendment, the maximum reduction achievable was 25%) for companies admitting the violation of the Competition Law provisions, after communication of the investigation report. In order to benefit from the reduction of the fine, it is mandatory for the respective undertaking to propose remedies and remove the consequences of the infringements sanctioned by the RCC's investigation.
- The information obtained during an investigation may be used not only for the purpose of such investigation, but for the purpose of investigating all violations of Competition Law. Moreover, other authorities may

be informed by the RCC insofar as issues falling within their competence are discovered during an investigation.

- Oral hearings before the RCC in case of investigation are no longer mandatory in all circumstances. This means that the investigated companies no longer have a guaranteed right to appear before the RCC and plead against the investigation report's conclusions. They still have the right to submit a reply to the RCC's findings and to request a hearing, which may be granted to them at the Council's discretion.

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Russia

New Russian transfer pricing Law comes into force from 1 January 2012

The most significant piece of Russian commercial and tax legislation in many years – the Law on transfer pricing (Law) – will come into force from 1 January 2012. The Law amends the Russian Tax Code by supplementing it with a new section devoted to related parties, transfer pricing principles, tax control over transactions between related parties and advance pricing agreements.

The Law will reduce the types of transactions subject to transfer pricing control by focusing more on related-party transactions, and will include only certain types of third-party transactions.

Scope of application

According to the Law, both domestic and cross-border transactions will now be subject to transfer pricing control.

In relation to cross-border transactions, the following will be subject to transfer pricing control:

- All related-party transactions (no threshold)
- Third-party transactions involving goods traded on global commodity exchanges that fall within commodity groups such as oil and oil products, ferrous metals, non-ferrous metals, fertilizers, precious metals and precious stones if the aggregate annual amount of income as a result of all transactions between such parties exceeds RUB60m (approximately EUR1.4m)
- Third-party transactions where the counterparty is located in a blacklisted jurisdiction, if the aggregate annual amount of income as a result of all transactions between such parties exceeds RUB60m (approximately EUR1.4m)

In the domestic context, only related party transactions can be subject to transfer pricing control. For the following transactions, a RUB60m (approximately EUR1.4m) threshold applies:

- The object of the transaction involves payment of a mineral extraction tax
- One of the parties to the controlled transaction is exempt from paying profits tax or benefits from certain profits tax exemptions
- One of the parties to the controlled transaction is registered in a special economic zone (such transactions will be controlled starting from 2014)

The definition of related parties is broadened and the Law includes a list of criteria defining how companies and individuals might be declared related parties. The main criterion defining the relationship remains the same – the ownership threshold (i.e., if one party directly or indirectly controls more than 25% (the current threshold is 20%) of another party). The Law does, however, make it clear that transactions between Russian state-owned companies will not, by default, be deemed to be subject to transfer pricing control by virtue of the Russian state having ownership in each of the parties.

Finally, the Courts will be able to deem companies and/or individuals related on any other reasonable grounds, if it is demonstrated that the relationship between the parties influenced the terms and the results of the transactions.

Documentation requirements

Another aspect of the Law that will significantly impact Russian businesses is the obligation of companies to document specifically and, in some instances, notify the tax authorities regarding their controlled transactions. This obligation consists in a general duty for taxpayers to prepare and submit documentation justifying the price applied in all controlled transactions.

The detailed documentation on the transactions may not be demanded by the tax authorities before 1 June of the year following

the year of the transaction, which practically means – for transactions concluded in 2012 – not before 1 June 2013.

Control and sanctions

In terms of control, due to the relative complexity and amount of work required from companies to align transfer pricing policies, the legislator introduced specific transitional rules for 2012 and 2013, whereby the general rules (three-year controlling period) will apply only starting from 1 January 2014. Ultimately, if the Russian tax authorities reveal that a price applied in a transaction does not correspond to the market price, the Russian tax authorities are entitled to recalculate the amount of taxes due and apply penalties for the late payment of tax and fines equal to 20% from 2014 and 40% from 2017.

Advanced pricing agreements (APAs)

The Law provides an opportunity for Russian companies from 1 January 2012 to conclude APAs with the tax authorities for a three-year period with possible extension for two more years, which will enter into force from 1 January of the calendar year following the year of the relevant APA conclusion. Therefore, the first APAs should come into force from 1 January 2013.

The Law also permits Russian taxpayers – in domestic transactions only – to obtain corresponding adjustments in case the tax base of one party to the transaction is adjusted as a result of a transfer pricing control.

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Spain

New changes to the Spanish Corporate Enterprises Act

The recent Spanish Corporate Enterprises Act, in force since 1 September 2010, ruling limited liability companies (SL), corporations (SA) and limited partnerships (LP), has been amended by the Act no. 25/2011 dated 1 August 2011 that took effect on 2 October 2011.

The main goals of this modification according to the preamble of the Act no. 25/2011, are as follows:

(i) Reducing operational expenses of the companies and differences between SA and SRL

(ii) Modernization mostly related to internet sites and procedures on corporate decisions

(iii) Incorporation into national law of the European Directive no. 2007/36/EC dated 11 July 2007 on the exercise of certain rights of shareholders in listed companies. This Directive has recently been implemented in Luxembourg as well. Further details can be found in the Luxembourg article in this newsletter.

In addition, the Act no. 25/2011 introduces a new rule, relating to the shareholders' right to exit if a minimum dividend is not distributed by the ordinary general shareholders' meeting.

Decrease of operational expenses and simplification

Publications and modernization

The convening of shareholders to general shareholders' meetings can now be published on the companies' websites. Therefore, it is now optional to publish such convening in the daily newspapers and official journal of the mercantile registry, with the exception of bearer shares and listed companies. The bylaws of the companies at stake need to be amended to elect for this new convening method.

Simplification

SL, SA and LP are now able to include in their bylaws an alternative system for the administration of the company, upon election of the general shareholders' meeting, without amendment of the bylaws.

The bylaws of SA and LP can now include a clause providing for the exclusion of the company's shareholders (which was previously regulated only for SLs). Such amendment of the bylaws is permitted only upon a unanimous shareholders' decision.

Rights of shareholders in listed companies

The incorporation of the Directive no. 2007/36/EC has two main purposes: (i) the guarantee that general shareholders' meetings for listed companies will be correctly convened; (ii) the availability of the documents related to the general shareholders' meeting to all shareholders, regardless of where they are. Electronic procedures to vote and obtain information are recognized.

Financial intermediaries will have to disclose to the company, seven days before the general shareholders' meeting, who they are representing, number of shares and their voting instructions in the general shareholders'

meeting if they are representing several shareholders.

Shareholders' exit right when dividends are not distributed

The most significant innovation of Act no. 25/2011 is the shareholders' exit right.

This new right applies from the fifth year after registration of the company with the Mercantile Registry. The new right does not apply to listed companies.

This right can be used when at least one-third of the ordinary profits of the previous financial year are not distributed by the ordinary shareholders' meeting. In addition, this right only applies to shareholders who have voted in favor of the distribution.

The exit right shall be exercised within a month from the general shareholders' meeting.

The valuation of the shares to be paid to the shareholder who exercises the right to exit shall be agreed. In absence of agreement to the value or the identity of the appraisers to calculate the value, the fair value will be fixed by an expert designated by the Mercantile Registry.

This new right has economic consequences on the freedom of the shareholders' meeting to decide on the destination of benefits, since the decision not to distribute this minimum could lead to the obligation to acquire the stake of the shareholder voting in favor of the distribution. Therefore, it opens a door for the minority shareholders to obtain a minimum dividend or to recover the investment at its fair value.

Other innovations

- Non-business activity of a company for more than one year becomes a cause for dissolution
- Listed companies must guarantee equal rights to information for all shareholders with the same type of shares

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Turkey

Board of directors under the new Turkish Commercial Code

The new Turkish Commercial Code no. 6102 (the new TCC) entering into force on 1 July 2012 and replacing the current Turkish Commercial Code (the current TCC) introduces significant changes related to joint stock companies (JSC) and board of directors.

The most important innovations and developments concerning the board of directors include:

Board of directors with a single director

The minimum requirement of at least three members at a board of directors is abolished and a single member board of directors is allowed.

Board of directors' membership for foreigners

At least one board of directors' member authorized to represent the company must reside in Turkey and be a Turkish citizen. Therefore, if the board of directors consists of only one member, this one member must be a Turkish citizen residing in Turkey.

Education requirement

At least a quarter of the board of directors' members should have earned at least a bachelor degree. If there is only one board of directors' member, this condition will not be applied.

Abolishment of the requirement for board of directors' members to be shareholders

The precondition of being a shareholder in order to become a board of directors' member under the current TCC is eliminated, and becoming a board of directors' member without being a shareholder is allowed.

Membership of legal entities

Under the current TCC natural persons only can be board members. The new TCC allows legal entities (through a natural person delegated by the legal entity) to be a board of directors' member. Upon the election of the legal entity to the board of directors, the delegated natural person shall be registered with the relevant trade registry, together with the entity.

Online meetings

Provided that it is specifically regulated in the articles of association, meetings of the board of directors would be held online through electronic media. The principles to implement this provision will be regulated by the articles of association.

Meeting quorum of board of directors

The provision of the current TCC that enables the board of directors to meet with presence of "more than half" is repealed. Under the

new TCC, unless a higher quorum is required in the articles of association, the board of directors meets in the presence of the majority of its members, and takes its decisions with affirmative votes of the majority of its members present in the meeting.

Risk committee for the board of directors

In listed companies, the board of directors should form a committee in order to detect any risk that would put the existence of the company under threat, to manage risks and take precautions.

In any other type of company, the committee is formed if the auditor declares to the board of directors that the establishment of the committee is needed.

The committee presents a report to the board of directors every two months.

Liabilities of the board of directors

Unlike the current TCC, which only regulates the legal liabilities of board of directors' members by making a general reference to the Turkish Criminal Code, the new TCC regulates both the legal and criminal liabilities of the board of directors' members. Accordingly, severe sanctions like imprisonment and judicial fines are prescribed under the new TCC.

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Ukraine

Ukraine improves Corporate Legislation

Recently, the Ukrainian Parliament passed several legislative acts intended to improve and simplify basic corporate procedures, such as registration of a legal entity in Ukraine, amendment of its charter documents and its liquidation.

Miscellaneous changes in the first half of 2011

- Electronic state registration of legal entities and entrepreneurs is now possible.
- Simplified procedure for state registration of the liquidation of a legal entity and entrepreneurs was introduced.
- Reservation of a company name is no longer required nor available.
- A legal entity can be incorporated and act in accordance with the model charter that is to be adopted by the Cabinet of Ministers of Ukraine.
- Notarization of copies of documents for several corporate actions involving the state registrar (e.g., change of company shareholders, amendments to the charter) is no longer mandatory. Instead, simple copies of the underlying documents may be submitted.

Amendments to the limited liability companies (TOB) legislation

A new law, which came into force on 7 June 2011, introduced several significant changes to the legislation regulating TOBs:

- The requirement for the minimal statutory amount of the capital of a TOB has been canceled.
- It is no longer necessary to form at least 50% of the charter capital of a TOB before its registration; the whole amount of the capital should be formed within a year of its registration.
- If a TOB's founder fails to make its contribution within one year, the general shareholders' meeting can decide to exclude this shareholder from the TOB.

In addition, in accordance with another law, effective from 11 June 2011, the maximum number of shareholders of a TOB is increased from 10 to 100 people.

Amendments to the joint stock companies (AT) legislation

On 2 March 2011, a law introducing several substantial changes to the law of Ukraine on joint stock companies (AT Law), and a number of cosmetic changes to the AT Law, entered into force. These changes aim to remove some inconsistencies between AT Law and other Ukrainian laws:

- Formation of an audit committee is no longer mandatory.
- Legal entity shareholders of an AT may be elected as members of the supervisory board and the audit committee of the AT.
- The number of votes of the general shareholders' meeting needed to approve a material transaction, with a value of 50% or more of the value of the assets of the AT, has been decreased from 75% to 50%+1

of the total votes of all shareholders.

- Parliament canceled the provision requiring a AT to (i) decrease the amount of its capital if, by the end of the second and each following year, its net equity is less than the amount of its capital, or (ii) proceed with voluntary liquidation if the net assets amount became lower than the minimum amount of the capital for ATs for 10 months in a row.
- From 1 January 2012, a private AT will not be permitted to have a pre-emptive right to purchase its shares in case of sale of such shares by a shareholder.
- Formation of reserve capital is mandatory only for ATs that have issued both ordinary and preferred shares.
- All ATs, except for ATs with a sole shareholder, are required to make a 30-day official publication about the general shareholders' meeting.
- The list of shareholders entitled to participate in the general shareholders' meeting cannot be amended after it has been prepared.
- Notices to shareholders may now be made in writing in the manner defined in the bylaws of a AT, and not only via registered mail, as previously.

Changes to the currency control rules

In 2010, the Ukrainian Parliament adopted a Law canceling several restrictions on foreign investments into Ukraine that had been introduced during the global financial crisis. The Law came into force on 15 May 2010, but the changes described below became effective on 22 March 2011. In particular, it abolished:

- The requirement to make investments only through special investment bank accounts
- Mandatory state registration of foreign investments in cash. However, unregistered foreign investments still do not formally allow the investor to enjoy several legislative preferences and guaranties, e.g., guaranties on expropriation, for compensation of losses caused by the actions of state authorities and on repatriation of investments.

Pursuant to the Law of 15 May 2010, the National Bank of Ukraine adopted a resolution that simplified the procedure for making foreign investment into Ukraine:

- Foreign investments can be made not only in Ukrainian Hryvnia (UAH), but also in major worldwide currencies.
- Foreign investors may transfer foreign currency directly from a foreign bank account to the account of a resident without using special investment accounts.
- The list of documents required to purchase foreign currency for dividend repatriation was significantly reduced. For example, it is no longer required to provide the bank with a certificate from the tax authorities confirming the payment of withholding tax and a bank statement confirming the actual transfer of funds to Ukraine for the purpose of making a foreign investment.

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