Europe*

I. European Union—Consumer Law

A. Review Of Consumer Acquis

On February 8, 2007, the Directorate General of Health and Consumer Protection of the European Commission (DG SANCO) issued a Green Paper on the Review of the Consumer Acquis (the "Review"),[1] seeking comment on eight consumer protection directives: 1) sale of consumer goods and associated guarantees;[2] 2) timeshares;[3] 3) price indication;[4] 4) unfair contract terms;[5] 5) injunctions;[6] 6) package travel;[7] 7) distance selling;[8]

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1. *Commission Green Paper on the Review of the Consumer Acquis*, COM (2006) 744 final (Aug. 2, 2007).
2. Council Directive 99/44, 199 O.J. (L 171/12) 12-16 (EC).
3. Council Directive 94/47, 1994 O.J. (L 280) 83-87 (EC).
4. Council Directive 98/6, 1998 O.J. (L 80) 27-31 (EC).
5. Council Directive 93/13, 1993 O.J. (L 95) 29-34 (EEC).
6. Council Directive 98/27, 1998 O.J. (L 166/51) 51-55 (EC).
7. Council Directive 90/314, 1990 O.J. (L 158) 59-64 (EEC).
8. Council Directive 97/7, 1997 O.J. (L 144) 19-27 (EC).

and 8) doorstep selling.[9] The goal of the review is to ensure consistency among these directives, as well as to update them for the digital age. The minimum harmonization approach taken to date has allowed certain Member States to offer greater consumer protections to its residents; however, this has come at the cost of patchwork regulation.

The most significant development in the Review is the possibility of implementing certain horizontal definitions as well as guidelines common to multiple consumer directives.[10] This development has the potential to create an analog to the Uniform Commercial Code for E.U. consumer legislation with standard definitions and terms applicable to multiple issues. For example, at present, Directives differ on the definition of consumer.[11] The Review may result in standardization and broadening of this term by defining it as "natural persons acting *primarily* outside. . . their trade, business, and profession."[12] This would enable a professional to qualify for consumer protection on his car, for example, if he used it primarily for home use but occasionally for work.

The Review also contemplates a general right to damages for breach of a consumer contract.[13] This right would be a significant development because, to date, the only provision for damages in E.U. consumer law has been in the Package Travel Directive. The Commission has also suggested that damages could conceivably include not just economic costs, but also "moral losses."[14]

In order to extend E.U. consumer law to the digital age, the Review proposes extending the Directive on Consumer Sales to digital goods, such as software and data.[15] But because such goods are often licensed rather than sold, the special remedies and restrictions may need to be custom-tailored for them.

Some significant changes proposed in the review should already be familiar to U.S. companies: direct liability of manufacturers throughout the E.U. for non-conforming goods;[16] and placing the burden of proof on the seller of a product to prove that it was not defective at the time of delivery under the rationale that the seller is more likely to possess the relevant information to make such a showing.[17]

B. Consumer Redress

On April 4, 2007, the Commission published the results of a year-long study on "[a]n analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings,"[18] which reviewed the means available in each E.U. member state to resolve consumer disputes, including collective action proceedings. This fact-finding is likely a precursor to a White or Green Paper seeking comment on potential

9. Council Directive 85/577, 1985 O.J. (L 372) 31-33 (EEC).
10. *See, e.g.*, COM (2006) 744 at 9.
11. *See id.* at 11.
12. *Id.* at 15.
13. *Id.* at 23.
14. *Id.* at 21.
15. *Id.* at 24.
16. *Id.* at 30.
17. *Id.* at 28.
18. *See* Prof. Dr. Jules Stuyck et al., A Study for the European Commission, Health and Consumer Protection Directorate-General, June 2006, Tender: SANCO/2005/B5/010, *available at* http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf.

new rules in this area. As a follow-up, on June 29, 2007, DG SANCO Commissioner Meglena Kuneva told a conference in Leuven, Belgium, that the Commission is seeking to identify an "adequate and proportionate" means for collectively addressing consumer disputes that may otherwise be neglected due to their high cost or lengthy time commitment.[19] There is no doubt that DG SANCO is also closely watching the experience of the Commission's Directorate General of Competition, which has already sought comment on allowing collective actions for certain competition law violations.[20] The Regulation on European Small Claims Procedure[21] for cross-border disputes, effective January 2009, will also offer a simpler and lower-cost method of consumer redress than many existing national systems.

C. Consumer Credit

After more than four years of discussions, the E.U. Competitiveness Council announced in May 2007 that the draft of a new Consumer Credit Directive and harmonized rules will move forward.[22] A standardized format for pre-contractual and contractual information to enable comparisons of consumer credit products and increase market transparency has been developed. The draft Directive also provides for a fourteen-day right of withdrawal for the consumer and the possibility of compensation to the lender for early repayment under some circumstances and rate caps.[23] Because financial products are intangible and capable of being quantitatively compared, one would imagine them to be ideal products for cross-border sales. But some critics, such as the European Credit Research Institute (ECRI), feel that the Directive likely will be insufficient to overcome the localizing pressure of language, distance, and strong incumbents, which hinders the purchase of cross-border credit.[24]

D. Direct Price-Fixing: Mobile Telephone Roaming Tariffs

In an unprecedented step, the Commission directly intervened in the mobile telephone market and set fixed price caps on cross-border roaming calls by mobile telephones. Pursuant to the E.U. Regulation on Roaming,[25] mobile telephone service operators are obliged to offer a Eurotariff to all of their customers by July 30, 2007, limiting roaming charges to €0.49 per minute for making a call abroad and €0.29 to receive a wireless call from abroad. Additionally, inter-operator wholesale prices were capped at €0.30 for the first twelve months after implementation of the Regulation.

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19. *See* Meglena Kuneva, Comm'r for Consumer Prot., European Union, Keynote Address at the Leuven Brainstorming Event for Collective Redress (June 29, 2007).

20. *See Commission Green Paper on Damages Actions for Breach of the E.C. Treaty Anti-trust Rules* COM (2005) 672 final (Dec. 19, 2005).

21. *See*, *e.g.*, Commission Regulation 861/2007, Establishing a European Small Claims Procedure, 2007 O.J. (L 199).

22. Press Release, E.U. Competitiveness Council, Political Agreement on Consumer Credit Directive (May 21, 2007), *available at* http://www.eu2007.de/en/News/Press_Releases/index.html#May.

23. *Id*.

24. *See* Nicola Jentzsch & Karel Lannoo, *Much Ado About Little? Agreement on the Consumer Credit Directive Reached*, ECRI Comment. No. 2, May 23, 2007, *available at* http://www.euractiv.com/29/images/1499_tcm29-165634.pdf.

25. Council Regulation 717/2007, 2002 O.J. (L 171/32).

It is unclear what legal basis enables the Commission to delve so deeply into retail and wholesale pricing, beyond possibly mandating equal treatment between domestic and international customers and charges. It is reported, however, that more than 400 million E.U. consumers will be protected by the Eurotariff by September 2007,[26] so there may be scant political will to challenge the Regulation in the courts. The Commission will reassess the regulation in eighteen months to determine whether to prolong it and/or further intervene to extend the Eurotariff to SMS and data roaming.

II. European Union—New Rights for Air Passengers in Europe

Regulation 261/2004 EC,[27] establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long flight delays (the "Regulation"), entered into force on February 17, 2005. This section examines some of the most recent important developments pertaining to the Regulation.

A. Communication of the Commission of 4th of April 2007

On April 4, 2007, the European Commission issued a Communication[28] on the application of the Regulation granting air passengers a right to compensation and assistance in the event of denied boarding, flight cancellations, or long delays. In particular, the Commission identified several areas of concerns, such as airlines not always offering passengers a choice between a refund or re-routing.[29] This is particularly true for certain low-cost airlines, not least because they do not have any reciprocal agreements enabling them, if necessary, to re-route passengers via other carriers at a reasonable price. Further, it has been reported that airlines even seek to rely on extraordinary circumstances, although such circumstances may never be invoked, to deprive passengers of their right to assistance.[30]

Airlines may be also reclassifying cancellations as long delays.[31] The distinction is significant, insofar as airlines only have to pay compensation to passengers in case of flight cancellation, but not in case of flight delay.

The Commission also noted that passengers are faced with inconsistent application and enforcement of their rights due to the significant differences in the process amongst Member States. There is substantial variation in the level of resources that National Enforcement Bodies (NEB) have at their disposal, which explains why some NEB investigate complaints in more detail than others.[32] There are also important differences between the

26. Kevin J. O'Brien, *European Parliament, in Near-Unanimous Vote, Passes Caps on Roaming Fees*, Int'l Herald Trib., May 23, 2007, *available at* http://www.iht.com/articles/2007/05/23/business/roam.php.

27. Council Regulation 261/2004, 2004 O.J. (L 46).

28. *Commission Communication on the Operation and the Results of this Regulation Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights*, COM (2007) 168 final (Apr. 4, 2007).

29. *Id.* at 7.

30. *Id.* at 6-7.

31. *Id.* at 5.

32. *Id.* at 8-9.

types of sanctions that can be applied in Member States, ranging from administrative penalties to criminal sanctions.[33]

The Commission has given airlines and Member States six months to comply fully with the Regulation, during which time it will intensify its cooperation with these organizations to support them in that process.[34] If by the end of this time the outcome is unsatisfactory, the Commission has explicitly warned that it will initiate legal proceedings against Member States.[35] It has also stated that it would amend the current Regulation if necessary.

B. Interpretation of Regulation 261/2004 by the European Court of Justice

In 2006, the European Commission started proceedings before the European Court of Justice (ECJ) against multiple Member States on grounds they violated their obligations under Article 16 of Regulation 261/2004. On April 19, 2007 and June 14, 2007 the Court ruled against Luxembourg[36] and Sweden,[37] respectively, for such violations. If Sweden and Luxembourg persist in failing to ensure the proper application of Article 16, the Commission may bring new proceedings against them, and the Court is empowered to either impose a lump sum payment, a penalty payment, or both on them for failing to abide by the Court's ruling.[38]

III. European Union – Changes In European Legislation Relating to Share Buy-Backs and Financial Assistance

A. Introduction

On September 6, 2006, the European Parliament and the European Council adopted Directive 2006/68/EC[39] amending Council Directive 77/91/EEC[40] as it regards the formation of public limited liability companies and the maintenance and alteration of their capital, which is also known as the "Second Company Law Directive (SCLD)."

The SCLD's main objectives were to ensure a minimum level of protection for both shareholders and creditors of public limited liability companies by regulating the formation of these companies, as well as the maintenance, increase or reduction of their capital. SCLD imposed, *inter alia*, strict limitations on share buy-backs and prohibited a company from giving "financial assistance" to third parties in connection with the purchase of, or subscription for, shares in the company's capital.

In September 1999, following (persistent) criticism of the restrictiveness of the rules concerning share buy-backs and the prohibition on financial assistance, the European Commission issued a report on the simplification of the First and Second Company Law

33. *Id.*
34. *Id.* at 11-12.
35. *Id.*
36. Case C-264/06, Comm'n v. Luxembourg, 2007 O.J. (C 190).
37. Case C-333/06, Comm'n v. Sweden, 2007 O.J. (C 182/23).
38. Article 228 of the E.C. Treaty provides for the possibility of such financial sanctions.
39. See http://eu-rex.europa.eu/LexUriServ/site/en/oj/2006/l_264/l_26420060925en00320036.pdf
40. See http://eu-rlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31977L0091:EN:HTML.

Directives. The main recommendations relating to the SCLD referred to the need to relax the rules on share buy-backs and to permit financial assistance to potential subscribers. Unfortunately, Directive 2006/68/EC only addresses these concerns to a limited extent and since most of its provisions are "optional" (meaning that Member States may choose whether or not to implement them) the Directive will have limited, if no, effect.

B. Share Buy-Backs

Both in Europe and the United States, share buy-backs have always been considered a "suspicious transaction," because they may undermine creditors' positions (since "hard" assets (often cash) are being replaced by potentially worthless treasury shares) and be used for illegitimate purposes (*e.g.*, to channel funds to directors in exchange for their shares). However, it is also recognized that share buy-backs can be used to "support" the market price of the company's shares, to fend off a hostile takeover or for other legitimate purposes (*e.g.*, employee benefit schemes). Therefore, EU law never put an absolute ban on share buy-backs.

Directive 2006/68/EC allows Member States to relax some of the requirements imposed by the SCLD. Whereas under the SCLD, companies could repurchase shares representing only a maximum of 10 percent of the subscribed capital, under Directive 2006/68/EC, Member States may set a higher or no limit, thus permitting share buy-backs up to the full amount of the company's distributable net assets. In addition, whereas under the SCLD, a company could only be authorized by its shareholders to carry out share buy-backs for a maximum of eighteen months, under Directive 2006/68/EC the maximum period (to be set by the Member State) may be five years. Of course, incumbent management may prefer to have an authorization that is not restricted to the 10 percent limit and that is valid for a period of more than eighteen months, thus permitting the company to engage in share buy-backs over an extended period of time or with respect to a large(r) part of its outstanding share capital, to fend off hostile bids and/or keep shareholders "happy."

At the same time, as under the SCLD, Member State law must continue to provide that companies cannot vote their repurchased shares and must create a non-distributable reserve for an amount equal to the purchase price. Consequently, even though the rules are significantly relaxed at some points, they remain strict on other points. In addition, since the rules are optional, it to be seen whether Member States will allow companies governed by their laws to benefit from the "relaxed" provisions.

C. Financial Assistance

Under the SCLD, financial assistance is defined as the granting of funds, guarantees and/or security by a company to third parties in connection with such parties' acquisition of, or subscription for, the company's shares. Prior to Directive 2006/68/EC, financial assistance was, in principle, prohibited. This approach, which is unknown under, for example, Delaware corporate law, has been widely criticized since it restricts transactions, such as leveraged buy-outs, that are clearly defensible from an economic perspective. As has been argued, the permissibility of some form of financial assistance by a company should not be evaluated on the basis of its purpose but on the position (*i.e.*, solvency) of both the borrower and the company engaging in the grant of such loan.

Directive 2006/68/EC makes it possible for Member States to relax or abolish the prohibition on financial assistance. Under the new rules, financial assistance by a company will be permitted provided its board of directors (BOD) submits a written report to the general meeting of shareholders (GM) specifying conditions of the transaction, the business interest of the company, risks in terms of liquidity and solvency, and the acquisition price of the shares; its GM grants prior approval to the transaction; its BOD is held responsible for ensuring fair market conditions (with respect to the compensation/security received by the company and financial assistance extended by the company) and has properly investigated the credit standing of the borrower; the transaction is limited to the amount of the company's non-distributable net assets; and the company creates a reserve unavailable for distribution for an amount equal to the loan.

These rules make financial assistance burdensome, costly and, , unattractive. The obligation to create non-distributable reserves for the amount of the loan will require companies to double the funds used for financial assistance (*i.e.*, for every dollar loaned, the company will have to put one in a non-distributable reserve), which appears excessive since it ignores the fact that the company still has a claim (*i.e.*, an asset) for repayment of the loan. Also, the need for shareholder approval may in practice be unworkable, especially for listed companies. Further, the requirement that "*the transactions shall take place under the responsibility of [the board of directors]*" (Article 23(1)) even following shareholder approval, may make the board of directors reluctant to grant financial assistance. Finally, as these rules are optional, it is up to the Member States to decide whether they allow financial assistance at least under these conditions.

IV. Austria - New Rules on Cross-Border Mergers

On December 15, 2007, a new Statute on Cross-Border Mergers, the so-called "EU Merger Statute,"[41] which transposes Directive 2005/56/EC,[42] will enter into force in Austria. The EU Merger Statute, for the first time, explicitly regulates the legal framework of cross-border mergers of corporations within the EU and facilitates their implementation. In the past, cross-border mergers have only been possible in certain constellations, such as in the foundation of a Societas Europaea ("SE") by a merger of two stock corporations from two different European countries or in an inbound merger (ECJ, C-411/03, SEVIC Systems AG).

By eliminating legislative and administrative difficulties for cross-border mergers, small and medium-sized enterprises also can now make use of a restructuring measure that until now has not been attractive for them. The SE, for which cross-border mergers already have been allowed since 2004, has not proved to be a popular instrument for small companies. Large companies also will profit from a faster and more efficient restructuring op-

41. Bundesgesetz über die grenzüberschreitende Verschmelzung von Kapitalgesellschaften in der Europäischen Union (EU-Verschmelzungsgesetz – EU-VerschG); published in the Official Journal of Austria BGBl. I Nr. 72/2007.

42. Directive 2005/56/EC. of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, published in the Official Journal of the European Union, L 310/9.

tion. Importantly, the EU Merger Statute also introduces specific regulations with regard to creditors' rights and employee participation.

A. How Did the Legislation Transpose the EC Directive into Austrian Law?

The legislature decided to enact a new Statute regulating the principles set forth in Directive 2005/56/EC with various references to the Stock Corporation Act and the Act on Limited Liability Companies rather than to amend the existing corporate statutes. Two basic principles set forth in the Directive to be considered in the implementation process were the following: (i) the existing possibilities for mergers under national law should not be extended; and (ii) the law applicable to national mergers should apply to cross-border mergers as well.

As a result, the EU Merger Statute allows cross-border mergers for Austrian limited liability companies ("LLC"), stock corporations and the SE with corporations in the sense of Article 1 of Council Directive 68/151/EEC, which have their corporate seat, administration or permanent establishment in an EU member state or are the product of a merger of corporations founded in accordance with the laws of an EU member state. LLCs can be merged with another LLC or a stock corporation, and stock corporations also can now for the first time be merged with stock corporations *and* LLCs. The merger of stock corporations with LLCs as the surviving company has not been possible thus far, but will now be introduced into the Stock Corporation Act (new § 234a). The EU Merger Statute is not applicable to trusts, savings banks, cooperatives, UCITS and to the cross-border foundation of SEs.

B. How Do Cross-Border Mergers Work?

Two Stage System - In a first stage, the intention of the cross-border merger needs to be registered with the Commercial Register of the transferring company. After fulfilment of the required formalities, the Commercial Court issues a confirmation. The managing directors of both the transferring and the surviving company must then apply for the registration of the cross-border merger with the Commercial Register of the surviving company. In this application, they must attach the above-mentioned confirmation. The Commercial Court of the surviving company registers the merger and notifies the Commercial Court responsible for the transferring company thereof. In a second step the managing directors apply for a registration of the deletion of the transferring company from the registry, which then ceases to exist.

C. Steps Involved in the Implementation of Cross-Border Mergers

(i) Merger Plan - The managing directors of the merging companies have to adopt a notarized merger plan (§ 5 para 1 of the EU Merger Statute). The minimum content requirements set forth in § 5 para 2 include legal form, name and business seat of the surviving company, exchange value between the shares, details regarding the issuance of shares in the surviving company, impact on the employment conditions of the employees of both companies, effective date of the merger, articles of association of the surviving company and information on employee participation rights.

(ii) Compliance with Procedures regarding Employee Participation - A novelty of the EU Merger Statute is the link of the permissibility of the merger to an agreement on employee participation: Only if the procedure set out in the Labour Relations Act is complied with can the merger be entered into the Commercial Register.

A new chapter regulating the participation rights of employees regarding cross-border mergers will be introduced into the Labour Relations Act on 15 December 2007. The provisions included therein will be very similar to those applicable to employee participation in SEs, namely a special negotiating committee with representatives of all employees of the involved companies, subsidiaries and businesses enters into negotiations with the managing directors regarding their participation in the supervisory board.

The participation rights concept will apply to the merger of Austrian corporations with foreign companies if the transferring company has its business seat in Austria. If both the transferring and the surviving company, however, have neither employees nor subsidiaries, no employee participation is required. In case of a foreign company without employees being merged with an Austrian company with employees, which is the surviving company, compliance with the participation rights rules is mandatory.

(iii) Merger Report of the Managing Directors - In addition to the information required in § 220a of the Austrian Stock Corporation Act (e.g., consequences of the merger, draft merger agreement, exchange value of shares) the merger report regarding cross-border mergers also shall contain details on the effects of the merger on creditors and employees. The merger report is to be delivered to the responsible representative of the employees, or if no workers council exists, to the employees at least one month before the shareholder assembly takes place. At such assembly the shareholders will be asked to consent to the merger. In case of an outbound merger the managing directors also have to deliver a declaration on the amount of the share capital and the accrued reserves to the Commercial Register. This is designed to support the Commercial Register in examining compliance with capital maintenance rules.

(iv) Merger Audit - A merger audit must be completed by an auditing company. The substantive requirements are comparable with the respective provisions regarding Austrian stock corporations under the Stock Corporation Act, with one major supplement: the merger audit must assess the fairness of the cash consideration offered for dissenting shareholders (see (vi) below).

(v) Adoption of Resolutions by Shareholders in General Assemblies - The managing directors must deliver the draft merger plan after its approval by the supervisory board to the Commercial Register and publish a notice regarding the general assembly and creditors' rights one month before the general assembly is to take place. The majority requirements and further details regarding the adoption of the required shareholders' resolutions follow the relevant provisions of the Stock Corporation Act and the Act on Limited Liability Companies.

(vi) Cash Consideration for Dissenting Shareholders - In case of an outbound merger the shareholders of the company transferring its assets to a company with its business seat in another EU member state are entitled to an adequate cash consideration in return for their shares. A shareholder making use of this exit right must have dissented to the shareholders' resolution and have been a shareholder of the company during the period between the general assembly and the exercise of the exit right. Such shareholders further can request an examination of the cash consideration by the Commercial Court. Dissenting shareholders also have the right to sell their shares even where the articles of the company otherwise prohibit such a sale.

(vii) Protection of Creditors - Creditors of the companies must be informed if a cross-border merger is envisaged. This is important since enforcing their rights might become more difficult if the company moves its business seat to a different jurisdiction.

Therefore, an Austrian company (as the transferring company) merging with a foreign company must provide sureties to its creditors which prove that the enforcement of their rights otherwise might be endangered. When precisely the cross-border merger becomes effective is to be assessed under the law of the country in which the surviving company has its business seat.

D. Will Cross-Border Mergers Become More Frequent?

There are various ways of achieving a cross-border merger under Austrian law. The cross-border merger of corporations as transposed into Austrian law by the EU Merger Statute presents a new alternative that likely will entail lower costs than other alternatives while at the same time providing a higher degree of legal certainty. In addition, since this alternative also will be incorporated into the other EU member states, courts in those other member states will be familiar with the process. This should lead to a more expedited process in implementing a cross-border merger.

V. Belgium

A. A New Legal Framework for Public Takeover Bids

In implementing European Takeover Directive 2004/25/EC,[43] the Law on Public Take-over Bids of 1 April 2007 (the "Law"),[44] together with two implementing Royal Decrees of April 27, 2007,[45] sets out a new legal framework for public takeover bids. The Law not only transposes the Directive but also consolidates the existing regulations on both voluntary and mandatory take over bids, taking into account the practices established by the Belgian supervisory authority, the Banking, Finance and Insurance Commission (CBFA).

The Law entered into force on September 1, 2007, and applies to all public takeover bids on Belgian territory. A takeover bid is public if there is diffusion of communication concerning the bid presenting sufficient information to holders of securities to enable them to decide whether to transfer them or where there is publicity in Belgium aimed at announcing or recommending the bid.[46] As an exception to this general rule, however, a bid will not be considered public if: (i) the bid is addressed to qualified investors only; (ii) the bid is addressed to less than 100 natural persons or legal entities that are not qualified investors; or (iii) the bid relates to securities with a nominal value of at least €50,000.[47] As

43. Council Directive 2004/25, 2004 O.J. (L 142) (EC).

44. Moniteur Belge, No. 124 (Belg.), Apr. 26, 2007, *available at* http://www.ejustice.just.fgov.be/mopdf/2007/04/26_2.pdf

45. Moniteur Belge, No. 153 (Belg.), May 23, 2007, *available at* http://www.ejustice.just.fgov.be/mopdf/2007/05/23_1.pdf.

46. Moniteur Belge, No. 124, *supra* note 40, at art. 6.

47. *Id.*

a result of this scope, the Law may be relevant to foreign bidders for a target company not listed in Belgium.

B. Innovations Resulting from the Law of April 1, 2007

The most important change resulting from the Law undoubtedly relates to the rules on mandatory takeover bids. Previously, Belgian legislation provided for a mandatory takeover bid if, as a result of securities transactions, a direct or indirect change of control over a listed Belgian company occurred. The person, or persons acting in concert, acquiring control was then under the obligation to launch an offer on all other shares of the listed company.

The Law has now introduced a more objective threshold: when a person, acting alone or in concert, acquires voting securities of a company that has its registered office in Belgium and is listed on (i) a regulated market in the European Economic Area, (ii) Alternext, or (iii) the Marché Libre of Euronext, and as a result crosses the threshold of 30 percent of the voting securities, that person must launch a bid for all the securities of the listed company.[48] Subject to a number of exceptions explicitly mentioned in the Law, the obligation to launch a public takeover bid will only apply if the 30 percent threshold is crossed as a result of the acquisition of voting securities. Hence, there will be no obligation to launch a takeover bid if the 30 percent threshold is crossed without acquisition of voting securities.[49]

Belgian-listed companies are often controlled by intermediate holding companies. The Law, therefore, explicitly provides that a mandatory bid obligation will apply in case a person, through an acquisition of securities, directly or indirectly acquires control over an intermediate holding or when persons, acting in concert through an acquisition of securities, acquire more than 50 percent of the voting securities in an intermediate holding or in a person exercising direct or indirect control de jure over an intermediate holding.[50] This new legislation confirms an existing practice established by the CBFA.

Under the Law, the mandatory bid must be launched at an equitable price, *i.e.*, a price the higher of either the average trading price on the most liquid market during the thirty calendar days preceding the date when the obligation to bid came into existence or the highest price paid by the bidder(s).[51]

The law further provides for important transitional measures in this respect. Indeed, in order to avoid having the enactment of the Law itself trigger mandatory takeover bids, an important exception applies: shareholders who, on September 1, 2007, held alone, or together with persons acting in concert with them, more than 30 percent of the voting securities of a Belgian company subject to the new rules on mandatory takeover bids, are exempted from the obligation to launch a mandatory bid on the remaining securities, provided they properly notify both the company and the CBFA within 120 business days (as of September 1, 2007).[52] Provided such proper notification is made, the beneficiaries

48. Moniteur Belge, No. 153, *supra* note 41, at art. 49-50.
49. *Id.*
50. *Id.* at art. 51.
51. *Id.* at art. 53-54.
52. *Id.* at art. 53.

of the exemption will furthermore be authorized to certain additional share transactions without a mandatory bid becoming required.

C. Introduction of the "Put Up Or Shut Up" Rule in the Case of Voluntary Takeover Bids

The Law grants the CBFA the power to require a relevant party to disclose its intention as to whether it will make a voluntary takeover bid. This creates a powerful tool for the CBFA towards any person who, through his own statements, creates the impression in the market that he may make an offer on a listed company. If the relevant person does not confirm his intention to launch an offer within the time limits provided for by the CBFA, he will not be allowed to launch an offer on the target company within the next six months other than in unusual circumstances, such as significant changes in the circumstances, the target's situation, or the shareholding of persons involved in a potential bid.[53]

D. Increase in Obligations of the Board of Directors of the Target Company

The Law obliges the Board of Directors (the "BoD") of a Belgian target to publish a memorandum ("*mémoire en réponse*" or "*memorie van antwoord*"). This memorandum should contain the opinion of the BoD on the bid as well as its views on the bidder's strategic plans in respect of the target and the expected consequences of these strategic plans on the target's results, employment, and activities as set out in the bidder's prospectus.[54] Like the bidder's prospectus, the *mémoire en réponse* will need to be approved by the CBFA and published.

The Law furthermore provides for a special liability regime with respect to this *mémoire en réponse*, comparable to the prospectus liability. Compared with the opinion of the BoD required under the previous legislation, the Law significantly increases the obligations of the BoD of the target company.

E. Additional Obligations to Consult Employees

In addition to already existing rules on information and consultation obligations toward employees and their representatives, the Law provides for a number of additional obligations. The most important is the right of the target's works council to convene a meeting with the bidder.[55] The works council may only waive this right by unanimous decision. During this meeting, the bidder will present its commercial and financial policy as well as its strategic plans for the target and their possible consequences on the employees and activities of the target. The bidder should take note of any comments made by the works council. If the bidder does not attend the meeting, he will not be allowed to exercise the voting rights attached to the securities tendered under the takeover bid until he does so.[56]

53. *Id.* at art. 8.
54. *Id.* at art. 28.
55. Moniteur Belge, No. 124, *supra* note 40, at art. 42-45.
56. *Id.* at art. 45.

F. Changes to "Simplified Squeeze Out" and Introduction of a "Sell-Out Right"

Previously, Belgian legislation allowed a bidder possessing 95 percent of the shares after completion of its takeover bid to launch a "simplified squeeze out," *i.e.*, reopening the bid without having to comply with rules for ordinary squeeze outs, provided the bidder had acquired, in the initial bid, at least 66 percent of the shares that it did not own prior to the takeover bid.

Under the new Law on voluntary takeover bids, and in addition to some technical changes, the bidder must have acquired at least 90 percent of the shares not owned at the beginning of the voluntary bid in order to be allowed to proceed with a simplified squeeze out.[57] The Law furthermore grants the minority shareholders a "sell-out right," allowing them to demand a bidder owning at least 95 percent of the shares after completion of its takeover bid to buy their shares at the price offered in the voluntary takeover bid.[58] The sell-out right must be exercised within three months of the closing of the acceptance period of the initial voluntary bid.[59]

G. Impact of the Law on Existing Preventive and Defensive Mechanisms

Belgium has chosen to opt out of the Takeover Directive's provisions on preventive and defensive mechanisms. Accordingly, the Law does not change the existing Belgian rules on preventive and defensive mechanisms, which, among other things, places important restrictions on the powers of the target's Board of Directors once a takeover bid has been announced—but without going as far as imposing the strict "neutrality principle" provided for by the Directive. In principle, Belgian companies may voluntarily apply the more stringent provisions of the Directive, but it is highly unlikely that many companies will do so.

VI. England and Wales

A. Regulation of Solicitors' Practices

The Solicitors Regulation Authority introduced new rules, effective July 1, 2007,[60] regulating the conduct of Solicitors, registered European Lawyers, registered Foreign Lawyers, and recognized bodies in the Solicitor's Code of Conduct 2007.[61] One of the principal changes relates to business management and imposes express obligations for

57. Moniteur Belge, No. 153, *supra* note 41, at art. 42-44.
58. *Id.*
59. *Id.* at art. 44.
60. Solicitors Act, 1974, c. 47, pt. 2 (Eng.); Administration of Justice Act, 1985, c. 61, §9 (Eng.).
61. The Solicitors' Code of Conduct 2007 is available at http://www.sra.org.uk/documents/code/solicitors-code-of-conduct-full.pdf. The new Code replaces the Guide to the Professional Conduct of Solicitors (1999) and a number of other rules and brings together in one place most of the ethical rules to which those practicing as English solicitors both in the United Kingdom and overseas are bound—including conflicts and confidentiality rules as well as rules relating to client relations, publicity, and business management and sector-specific guidance.

principals in firms to make arrangements for effective management of the firm as a whole, including the management of risk.[62]

Regulations enacted to implement the European Third Money Laundering Directive[63] came into force on December 15, 2007.[64] The new regulations aim to limit the use of professional and other services for money laundering by requiring that certain categories of persons engaging in certain types of activities carry out customer due diligence and monitor the ongoing use of their services by clients.[65] The Regulations expressly allow a risk-based approach to the task of identifying and verifying clients and ongoing monitoring.[66] The regime in England and Wales—unlike most continental jurisdictions—imposes criminal sanctions in the event of breach.[67]

The new Legal Services Act 2007 will allow new kinds of legal practices to be developed and licensed in which solicitors may join with other kinds of lawyers and non-lawyers to form legal practices (legal disciplinary practices).[68] These changes have been introduced by the Government to improve competition, flexibility, and choice for consumers. The Act also creates a new independent supervisory body, the Legal Services Board, to supervise the regulation of lawyers of all disciplines[69] and an independent ombudsman, the Office of Legal Complaints,[70] to deal with consumer complaints arising from legal services and to provide redress.

B. Finance

Following negative publicity related to a growing number of public companies being acquired by private equity funds, a working group led by Sir David Walker undertook a review of disclosure and transparency in the private equity industry, publishing its guidelines and recommendations in November 2007.[71] A new monitoring and review body set up by the British Venture Capital Association oversees compliance by private equity firms with the new guidelines.

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62. *See id.* at Rule 5.

63. Council Directive 2005/60, 2005 O.J. (L 309) 15-36 (EC).

64. The Money Laundering Regulations, No. 3299 (2007) (U.K.), *available at* http://www.legislation.gov.uk/si/si200732. The new regulations repeal and replace the Money Laundering Regulations 2003.

65. *Id.* § 3. The professionals covered include independent legal professionals as well as credit and financial institutions, auditors and accountants, estate agents, casinos, and trust or company service providers. The work types caught by the regulations include the buying or selling of real property or business entities, managing client monies, the opening and management of bank accounts, and the creation, operation, and management of trusts, companies, or similar structures. *Id.*

66. *Id.* §§ 13-14. The regulations impose requirements for regulated entities to maintain records, appoint a Money Laundering Officer, promulgate policies and procedures, and train relevant employees. *Id.* at pt. III.

67. *See, e.g.*, *id.* § 45.

68. Legal Services Act, 2007, c. 29 (U.K.). In the longer term, alternative business structures (ABSs) will allow lawyers to go into multidisciplinary practices with other kinds of professionals and allow non-lawyers—including commercial organizations such as supermarkets or high street banks—to own firms that provide legal services or to provide outside investment through equity interests to firms providing legal services. *Id.* at pt. V.

69. *Id.* at pt. II.

70. *Id.* at pt. VI.

71. Walker Working Group, http://www.walkerworkinggroup.com/ (last visited Mar. 23, 2008).

In 2007, the Court of Appeal decided two noteworthy cases on the law relating to guarantees. In one case,[72] it held that the variation of an underlying contract to a guarantee to include new obligations does not automatically discharge the guarantee, although the new obligations would not be covered. Earlier in the year, the Court of Appeal[73] upheld guarantees that did not on their face list the obligations guaranteed on the basis that the documents relating to the negotiation between the parties provided sufficient evidence of the obligations.

The Islamic Finance Experts Group has been set up to consult with HM Treasury and the Financial Services Authority (FSA) on Islamic finance. In particular, the group is considering the Government's feasibility study on the possibility of the Government issuing sukuk, a Shari'a-compliant equivalent of a bond.[74]

C. Financial Services

The Markets in Financial Instruments Directive[75] (MiFID) was transposed into law in England and Wales in January 2007, replacing the Investment Services Directive.[76] MiFID regulates investment services and activities on a pan-European basis in defined financial instruments.[77] The Capital Requirements Directive (CRD)[78] gives effect to the Basel II Accord on capital adequacy for regulated firms. The CRD took effect from January 2007 in respect of some of its provisions, and others will be compulsory from January 2008. The FSA has placed greater emphasis in 2007 on principles-based regulation—involving less prescriptive rules and more high-level principles—complemented by greater senior management accountability for regulatory compliance.

D. Financial Restructuring and Insolvency

The House of Lords[79] provided significant clarification on the law of wrongful interference with contractual relations, confirming that it comprises two causes of action: 1) inducing or procuring a breach of contract in a way that creates accessory liability on the defendant's part; and 2) causing loss by unlawful means. The Lords rejected a claim for

72. Wittman (UK) Ltd. v Willdav Eng'g S.A., [2007] EWCA (Civ) 824. The Court ruled that where the Guarantor was involved in the original negotiations between the Creditor and the Debtor where the new obligations were explicitly contemplated, it would be inequitable for the Guarantor to argue that its existing obligations had been discharged. The new obligations, however, would not be covered by the guarantee.

73. Caterpillar Fin. Serv. Ltd. v Goldcrest Plant & Groundworks Ltd., [2007] EWCA (Civ 272) (Eng.).

74. Michael Ainley et. al., Fin. Serv. Auth., Islamic Finance in the UK: Regulation and Challenges (2007), *available at* http://www.fsa.gov.uk/Pages/Library/Publications_by_date/2007/index.shtml.

75. Council Directive 2004/39, 2004 O.J. (L 145) 1-44 (EC). *See also* Corrigendum to Directive 2004/39, 2005 O.J. (L 45) *18* (EC).

76. Implementing rules became effective on November 1, 2007.

77. This includes transferable securities, money-market instruments, units in collective investment undertakings, and various derivatives.

78. Council Directive 2006/48, 2006 O.J. (L 177/1) (EC); Council Directive 2006/49, 2006 O.J. (L177/201) (EC).

79. OBG Ltd. v. Allan [2007] UKHL 21 (Eng.), one of three overlapping appeals, principally concerned claims in tort for economic loss caused by intentional acts. The case concerned a claim against invalidly appointed administrative receivers.

conversion in relation to dealings with the company's contractual claims;[80] however, their comments refer to, and invite, reform in the area of conversion.

In a decision of general importance in the commercial property market, the High Court held that, pursuant to the terms of a company voluntary arrangement proposed by an insolvent tenant company, the landlords were obliged to treat as released guarantees given by the solvent parent company.[81]

E. Corporate

In November 2006, after eight years in the making, the Companies Act 2006 (the "Act") was enacted.[82] It is the largest single piece of legislation ever passed in England and Wales. Implementation of the Act is being staggered,[83] with about a third of its provisions implemented on various dates in 2007, including:

- a new statutory statement of directors' duties[84]—some of which started to apply on October 1, 2007;
- a new statutory procedure allowing a company's members to bring derivative claims in the company's name against the company's directors;[85]
- new provisions enabling indirect investors to receive information that a company registered in England and Wales whose shares are admitted to trading on a regulated market, such as the London Stock Exchange's main market but not AIM, sends to its members; and
- various changes affecting the way private and public companies make or disclose shareholders' decisions.[86]

In addition, the Corporate Manslaughter and Homicide Act 2007[87] introduces a new offense of corporate manslaughter where there has been a gross failing throughout an organization in the management of health and safety with fatal consequences. The Act applies to companies, various government, departments and other organizations.[88]

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80. They rejected it on the basis that, historically, the tort of conversion is concerned with chattels and not with intangible assets.

81. Prudential Assurance Co. Ltd. v PRG Powerhouse Ltd., [2007] EWHC 1002 (Ch) (Eng.). Although the Court went on to find that the terms of this CVA unfairly prejudiced the interests of the landlords, its decision confirms that CVAs may be used in certain circumstances to indirectly discharge the liabilities of solvent third parties.

82. Companies Act, 2006, c. 46 (U.K.). The Act consolidates most of the company law currently contained in various statutes, including the Companies Act 1985.

83. The first sections came into force on November 8, 2006, and the whole Act is expected to be in force by October 1, 2009.

84. Companies Act §§ 170-77.

85. *Id.* §§ 260-69.

86. *See generally*, *id.* at pt. 13. For instance, a private company will not be required to hold an annual general meeting, and it will be easier for private companies to pass members' written resolutions, but public companies will no longer be able to do so. *Id.* §§ 3336; 288.

87. Corporate Manslaughter and Corporate Homicide Act, 2007, c. 19 (U.K).

88. It was introduced following lengthy debate and concern over the difficulties in bringing prosecutions against large organizations under previous legislation and will take effect beginning April 6, 2008.

F. E.U. and U.K. Competition Law

Both E.U. and U.K. competition law apply in the U.K. A key policy issue in each jurisdiction is whether to increase private enforcement of competition law, particularly damages actions. The European Commission's White Paper on the issue is expected in early 2008, and the Office of Fair Trading (OFT) has published U.K.-specific recommendations.[89]

In 2007, the first representative action was brought before the Competition Appeal Tribunal (CAT) by the Consumers' Association against JJB Sports.[90] In addition, the CAT issued its first-ever order for interim damages in late 2006[91] and also determined that damages claimants need its permission before suing a successful leniency applicant.[92] Further, the High Court decided that damages awarded for competition law infringement will be compensatory only.[93]

Eliminating cartels is a priority in the E.U. and U.K. In 2007, the European Commission imposed its biggest-ever cartel fine, €992 million, on members of a lifts cartel.[94] The OFT signaled an increase in the level of its fines with a £121 million fine of British Airways.[95] The OFT is currently investigating alleged bid-rigging in the construction industry, using a fast-track procedure for businesses admitting their involvement early; the European Commission is consulting on a similar settlement procedure.[96] The European Commission and OFT cooperate with other competition authorities in cartel cases; for example, the OFT is investigating an international criminal cartel in the market for marine hoses used to transfer oil.[97]

The European Commission's success in the *Microsoft* appeal to the CFI[98] may encourage it to take a bold position on abuse of dominance issues in the ongoing review of Article 82, the Commission's guidelines on exclusionary abuses are still to be formalized.

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89. *See* Office of Fair Trading, Private Actions in Competition Law: Effective Redress for Consumers and Business (2007), *available at* http://www.oft.gov.uk/advice_and_resources/publications/reports/competition-policy/.

90. Notice of a claim for damages was submitted on March 5, 2007.

91. Healthcare at Home Ltd. v Genzyme Ltd. [2006] CAT 29. The CAT ruled in November 2007 that a damages claim could proceed against Morgan Crucible while other alleged cartelists' appeals against the underlying infringement decision were continuing. The cartelist in question, Morgan Crucible, had admitted participating in a graphite products cartel, in return for complete immunity from fines from the European Commission.

92. Emerson Elec. Co. v. Morgan Crucible Plc, [2007] CAT 30.

93. Devenish Nutrition Ltd. v. Sanofi-Aventis SA (France), [2007] EWHC 2394 (Ch).

94. Press Release, EUROPA, Commission Fines Members of Lifts and Escalators Cartels over €990 Million, IP/07/209 (Feb. 21, 2007).

95. Press Release, Office of Fair Trading, British Airways to Pay Record £121.5m Penalty in Price Fixing Investigation, 113/07 (Aug. 1, 2007). Virgin Atlantic obtained immunity from penalties by confessing collusion with BA over long-haul passenger fuel surcharges. *Id*. BA admitted its involvement later and was fined £121.5m, the highest ever penalty imposed by the OFT. *Id*.

96. Press Release, EUROPA, Antitrust: Commission Calls for Comments on a Draft Legislative Package to Introduce Settlement Procedure for Cartels, IP/07/1608 (Oct. 26, 2007).

97. Press Release, Office of Fair Trading, OFT Launches Criminal Investigation into Alleged International Bid Rigging, Price Fixing and Market Allocation Cartel, 70/07 (May 3, 2007).

98. Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.J. CELEX LEXIS 554 (Sept. 17, 2007).

There are several important U.K. abuse of dominance cases before the CAT, including refusals to supply,[99] excessive pricing, and margin squeezing.[100]

G. Intellectual property

From October 1, 2007, the U.K. Intellectual Property Office, while still searching for earlier trade marks registered in the U.K. or as a Community trade mark, will no longer refuse to register a trade mark on the basis of earlier conflicting marks.[101] The onus passes to any owner of earlier conflicting rights to oppose the application after advertisement in the Trade Mark Journal.

In 2007, the ECJ clarified the law in favor of trade mark owners in the pharmaceutical industry, affirming the trade mark owner's right to prevent parallel importation of repackaged pharmaceutical products within the E.U.[102] Also in 2007, the first appellate decision in the United Kingdom was given on the protection available to Community designs.[103] Under Community law principles,[104] the scope of design right protection includes any design not producing on the informed user a different overall effect. Hence, in an infringement action, the informed user must be identified. The Court of Appeal clarified that the informed user is not the same as the patent "skilled in the art" person but is someone better informed than the average consumer in trade mark law. Therefore, actions that may infringe a registered trade mark may not infringe a corresponding registered design.

In February 2007, the European Parliament Legal Service issued an interim ruling on the proposed European Patent Litigation Agreement (EPLA) initiative, stating that it is illegal and E.U. Member States are not entitled to conclude the EPLA on their own.[105] The EPLA aims to establish a central patent litigation system abolishing the need for parallel claims in individual E.U. Member States and envisaging the creation of a Euro-

99. VIP Commc'n Ltd. v. Office of Commc'n (T-Mobile (UK) Ltd. intervening), [2007] CAT 3 (involving the disconnection of VIP's services by T-Mobile Limited).

100. Albion Water Ltd. v. Water Services Regulation Authority, Case No. 1046/2/4/04. The Court of Appeal has granted Dwr Cymru permission to appeal in respect of two points: (i) whether the CAT applied the correct test in finding a margin squeeze; and (ii) whether the CAT had the jurisdiction to decide the issue of dominance.

101. The Trade Marks (Amendment) Rules 2007, No. 2076 (U.K), *available at* http://www.legislation.gov.uk/si/si200720.

102. Case C-348/04, Boehringer Ingelheim KG v. Swingward Ltd., 2007 ECJ CELEX LEXIS 251 (Apr. 26, 2007). Under Community Law principles, a trade mark owner's rights in relation to relevant goods are exhausted once the goods have been put on the E.U. market by the proprietor or with his consent. Council Directive 89/104l, art. 7(1), 1989 O.J. (L 40) 1 (EEC). Quantitative restrictions on imports and all measures having equivalent effect are prohibited between E.U. Member States. Treaty Establishing the European Community, art. 28, Nov. 10, 1997, 1997 O.J. (C 340). But a trade mark owner may rely on its trade mark rights to prevent the parallel importation of repackaged products unless certain conditions exist: the exercise of the rights contributes to the artificial partitioning of the E.U. markets; the original condition of the goods are not affected; clear identification on the goods of the manufacturer and the importer; non-damaging presentation of the trade mark and of its proprietor; and prior notice is given to the trade mark owner.

103. Procter & Gamble Co. v. Reckitt Benckiser (UK) Ltd., [2007] EWCA (Civ) 936.

104. Council Regulation 6/2002, art. 10, 2002 O.J. (L 003).

105. The document, which does not appear to have been intended for public dissemination, is available at http://www.ipeg.com/_UPLOAD%20BLOG/Interim%20Legal%20Opinions%20Legal%20Service%20EP%20Feb%201%202007.pdf.

pean Patent Court and an Administrative Committee. In October 2007, the E.U. Presidency proposed a compromise, a single European patent litigation system to apply to all national patents.[106]

The test for the patentability of software and business methods continues to be the subject of debate in Europe. In 2006, the Court of Appeal sought to clarify the approach for determining whether relevant subject matter falls within the exclusions in Article 52(2) and (3) of the European Patent Convention (EPC)[107] and, in connection with the exclusions, set out a four-stage approach.[108] In a decision made available in 2007, the European Patent Office (EPO) Technical Board of Appeal severely criticized the approach of the Court of Appeal, considering the approach to have no basis in the EPC and contravening conventional patentability criteria.[109] This decision leaves the law of England and Wales at odds with EPO case law, as the decisions of the EPO Technical Board of Appeal are not binding on the Courts of England and Wales whilst those of the Court of Appeal are.

H. Litigation and Arbitration

The Court of First Instance (CFI) handed down its eagerly awaited judgment in the *Azko Nobel* case on September 17, 2007,[110] clarifying the rules on legal professional privilege in E.U. competition law. The CFI rejected Akzo's arguments that such privilege should be extended to cover communications with in-house counsel in the context of E.U. competition law, resulting in a continuing divergence between E.U. and national law. The judgment also provides clarification on the procedure to be followed where a document's privileged status is unclear.

In the landmark decision of *Sempra Metals*,[111] the House of Lords considered the question of whether compound interest may be awarded on a restitution, or unjust enrichment, claim and held that Sempra could recover compound interest from the Inland Revenue.[112] Their Lordships also took the opportunity to examine generally the law in this area; consequently, it appears that parties will be able to recover compound interest in a variety of circumstances in the future.

106. Council Working Document 14492/07, Towards an EU Patent Jurisdiction—Points for Discussion, Annex.

107. In Aerotel Ltd. v. Telco Holdings Ltd., [2006] EWCA (Civ) 1371, [1], [7], the Court of Appeal considered the application of Articles 52(2) and (3) of the European Patent Convention (EPC). Article 52(2) excludes from what is to be considered an invention certain subject matter and activities, including "schemes, rules and methods for . . . doing business, and programs for computers," but only, according to Article 52(3), if the patent or patent application "relates to such subject-matter or activities as such."

108. *Id.* ¶ 40. "(1) properly construe the claim; (2) identify the actual contribution" of that claimed to the state of the art; "(3) ask whether the contribution falls solely within the excluded subject matter; [and] (4) check whether the actual or alleged contribution is actually technical in nature."

109. *See* Letter from Alain Pompidou, President, European Patent Office, to Jacob, Lord Justice.

110. Joined Cases T-125 & 253/03, Akzo Nobel Chemicals Ltd. v. Comm'n, 2007 ECJ CELEX LEXIS 555 (Sept. 17, 2007).

111. Sempra Metals Ltd. (formerly Metallgesellschaft Ltd.) v. HM Comm'rs of IRC, [2007] UKHL 34 (Eng.); Case C-397/98, Metallgesellschaft Ltd. v Comm'rs of IRC, 2001 E.C.R. I-177.

112. "In the course of his judgment, Lord Nicholls observed that the restrictive rule which had prevented recovery on a compound basis had been out of kilter with 'the present day economic reality' in which money is not lent on a simple interest basis." *Compound Interest Awarded on Restitution*, Practical Law Comp., July 18, 2007, http://dispute.practicallaw.com/6-372-8981.

Following the ECJ ruling in *Turner v Grovit*,[113] the question of whether an anti-suit injunction could be granted by the Courts of England and Wales in support of arbitration proceedings arose in the recent case of *West Tankers*.[114] The House of Lords referred to the ECJ the question of whether granting such an injunction is compatible with the principle of comity enshrined in Council Regulation 44/2001, the E.U. legislation concerning jurisdiction and judgments. The House of Lords is currently awaiting the ECJ's determination on this important issue.[115]

I. Insurance and Reinsurance

The English and Scottish Law Commissions published a Consultation Paper on insurance contract law reform in July 2007, which proposes a new statute creating two separate regimes for consumer and business insurance.[116] Overall, the proposals, if adopted, would result in a more consumer-friendly approach. A second Consultation Paper is planned for 2008; it will cover post-contractual good faith, insurable interest, and damages for late payment of claims.

The European Commission published its final report on business insurance on September 25, 2007.[117] It identifies potential anti-competitive practices in the co-insurance and reinsurance markets.[118] The Commission intends to look at the issues raised in the context of its review of the Insurance Mediation Directive.[119] The report also indicates that the Commission currently sees no compelling reason to extend the Block Exemption Regulation when it expires in 2010; however, a further report is expected in 2009.

J. Construction and Engineering

On April 6, 2007, new regulations governing health and safety in the construction industry came into force. The Construction (Design and Management) Regulations 2007,[120] accompanied by a new Approved Code of Practice, replaced the 1994 Regulations

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113. Case C-159/02, Turner v. Grovit, [2004] ECR I-3565. The ECJ ruled that the grant of an anti-suit injunction to restrain court proceedings brought in breach of an exclusive jurisdiction agreement is incompatible with E.U. law and comity.

114. W. Tankers Inc. v RAS Riunione Adriatica di Sicurta SpA, [2007] UKHL 4.

115. The House of Lords signaled that its own view was that the restrictions on the grant of anti-suit injunctions imposed on competing court proceedings by the ECJ and the Regulation should not apply to anti-suit injunctions granted to protect arbitration agreements. *See id*.

116. The Law Comm'n & The Scottish Law Comm'n, Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (2007), *available at* http://www.lawcom.gov.uk/docs/cp182.pdf. Proposals to date cover the duty of good faith, misrepresentation and non-disclosure, insurance warranties and intermediaries, and pre-contract information.

117. Commission Staff Working Document, SEC (2007) 1231, Accompanying the Communication for the Commission: Sector Inquiry under Article 17 of Regulation (EC) No. 1/2003 on Business Insurance (Sep. 25, 2007), *available at* http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/final_report_annex.pdf

118. In particular, the use of "best terms and conditions" in co-reinsurance, the practice of brokers proposing to following (re)insurers that they should write the risk on the same terms and conditions as those agreed by the lead (re)insurer and the exchange of pricing information, either via the broker or lead (re)insurer. *Id*. at 36-37.

119. Council Directive 2002/92, 2003 O.J. (L 9) 3, 3-10 (EC).

120. The Construction (Design and Management) Regulations, 2007, S.I. 2007/320 (U.K.).

and aim to reduce bureaucracy. Key changes are an enhanced duty on clients in respect to construction projects (and removal of the client's ability to transfer their criminal liabilities to an agent), a new duty holder (the CDM coordinator, replacing the previous planning supervisor), and improved guidance for those assessing the competence of prospective duty holders under the regulations before they are appointed.

New tax regulations also came into force in 2007 dealing with the deduction of income tax on payments made under construction contracts. The Income Tax (Construction Industry Scheme) Regulations 2005[121] replace the previous system of registration cards, certificates, and vouchers with electronic registration of sub-contractors and are intended to reduce the regulatory burden on the construction industry, improve compliance with tax obligations, and help construction businesses to get the employment status of their workers right. It is also hoped that instances of fraud will be reduced under the new regime.

K. Environment

National Grid[122] was the first case to reach the House of Lords under the contaminated land regime set out in Part 2A of the Environmental Protection Act 1990.[123] The House of Lords considered the scope of the phrase "appropriate person" in the context of companies that have undergone statutory reconstruction, such as privatized entities in the utilities sector, and overturned an earlier High Court ruling that National Grid was responsible for part of costly clean-up works carried out by the Environment Agency at a former gasworks site.

The area of climate change was a significant focus for legislative activities in 2007, including:

- Introduction of the Climate Change Bill to Parliament on November 14, 2007, which would embody in statute the U.K.'s targets to reduce carbon dioxide emissions;[124]
- Proposals for the Carbon Reduction Commitment, a new mandatory emissions trading scheme for large, non-energy intensive users of electricity in the commercial and public sectors, due to commence in January 2010;[125] and
- The Renewable Transport Fuel Obligations Order, which came into force on October 26, 2007[126] and requires suppliers of road transport fuels to sell a specified proportion of renewable transport fuels—primarily biofuels.

121. The Income Tax (Construction Industry Scheme) Regulations, 2005, S.I. 2005/2045 (U.K.).
122. R. v Env't Agency, [2007] UKHL 30.
123. Environment Protection Act, 1990, c. 43 (U.K.).
124. A summary of the introduction of the bill is included in the Parliamentary Debates, 696 Parl. Deb. H.L. (5th ser.) (2007) 473, *available at* http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/71114-0002.htm#07111435000003. It will create mechanisms aimed at achieving this, including the establishment of an independent Committee on Climate Change, legally binding five-year carbon budgets, reporting requirements, and enabling powers. Department for Environment Food and Rural Affairs, *UK Legislation: Taking the Climate Change Bill Forward—Progress*, http://www.defra.gov.uk/environment/climatechange/uk/legislation/index/htm (last visited Mar. 24, 2008).
125. *See* Department of Trade and Industry, Meeting the Energy challenge: A White Paper on Energy, 2007, Cm. 7124.
126. The Renewable Transport Fuel Obligations Order, 2007, S.I. 2007/3072.

REACH, the new E.U. legislation on Registration, Evaluation, and Authorization of Chemicals, came into force on June 1, 2007.[127] REACH covers both new and existing substances and requires that all chemicals produced or imported into the E.U. in quantities above 1 metric ton per year will have to be registered in a central database administered by the newly created European Chemicals Agency.

VII. Germany

A. Corporate Law

In May 2007, the federal government (*Bundeskabinett*) adopted the Government Bill on an Act to Modernize the Law on Limited Liability Companies (*GmbH*) and to Modernize the Law Governing Private Limited Companies and to Combat Abuses (*MoMiG*).[128] It is expected that the statute will enter into force in the first half of 2008.[129] The legal form of the *GmbH* plays a substantial role in Germany's economic life. The statute is intended to enhance the competitiveness of the *GmbH* compared to equivalent legal forms in other E.U. Member States.[130] To this end, it will simplify the incorporation of a GmbH, *inter alia*, by reducing the required minimum capital from EUR 25,000 to EUR 10,000 and by abolishing the requirement of notarization of the articles of association in certain cases.[131] In accordance with decisions of the ECJ,[132] the statute will permit the *GmbH* to choose its administrative domicile outside of Germany. Further, the statute will create legal certainty in relation to the admissibility of cash pooling and so-called upstream loans.[133]

The Act relating to German Property Companies with Listed Shares (REIT Act) of May 28, 2007,[134] introduces the real estate investment trust (REIT) to German law. The German REIT has the legal form of a listed public limited company. The minimum nominal capital has been set at €15 million. A REIT meeting the requirements as set out by the REIT Act is exempted from the corporate tax and industrial tax.

127. Commission Regulation 1907/2006, Concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), 2006 O.J. (L 396) 1 (EC).

128. Gesetzentwurfder Bundesregierung. Entwurf eines Gesetzes zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG) [Act to Modernize the Law Governing Private Limited Companies and to Combat Abuses] (May 23, 2007), *available at* http://www.bmj.bund.de/files/-/2109/MoMiG-RegE%2023%2005%2007.pdf

129. *See* Press Release, Federal Ministry of Justice, Reforms for Those Starting Up- the MoMiG (May 23, 2007).

130. *See* Press Release, Federal Ministry of Justice, Zeit für Gründer—die GmbH-Reform (May 29, 2006).

131. *Id.*

132. Case C-208/00, Überseering BV v. Nordic Constr. Co. Baumanagement GmbH, 2002 E.C.R. I-09919; Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. 2003 E.C.R. I-10155.

133. These are loans given to shareholders by the GmbH.

134. Gesetz zur Schaffung Deutscher Immobilien-Aktiengesellschaften mit Börsennotierten Anteilen, May 28, 2007, BGBl. I at 914.

B. Commercial Law

The Act relating to Electronic Commercial Registers, Cooperative Society Registers and the Company Register (EHUG) of November 10, 2006,[135] imposes the obligation to file documents with these registers only by way of electronic communication beginning January 1, 2007. Further, it establishes a company register,[136] which allows online access to the essential information that a company has to report. Additionally, the act provides for new rules regarding the publication of annual accounts.

The Act on the Simplification of Insolvency Proceedings of April 13, 2007,[137] encourages commercial activities in the case of insolvency: the continuation and financial restructuring of the business is given priority over its liquidation. In order to encourage self-employed activities of the debtor during the proceedings, the insolvency administrator may declare that earnings from this activity are not part of the insolvency assets. Furthermore, the statute provides for more transparency in the appointment of the insolvency administrator.

On October 23, 2007, the ECJ held that the so-called German Volkswagen Act,[138] which limited the possibility for shareholders to participate in Volkswagen by capping the voting rights at 20 percent and fixing the blocking minority at 20 percent, infringed the free movement of capital protected by the E.C. Treaty.[139] The ECJ held that direct investors from other E.U. Member States could be deterred by the Volkswagen Act. The Court decided that Germany failed to put forward legitimate interests for the restrictions on the free movement of capital.

C. Employment Law

The Act on the Adjustment of the General Retirement Age due to the Demographic Development and on the Strengthening of the Financial Resources of the Statutory Pension Insurance of April 20, 2007,[140] most notably provides for the gradual increase of the general retirement age to sixty-seven.

In April 2007, the German legislature extended the scope of the Act on the Posting of Workers (*Arbeitnehmer-Entsendegesetz*) to the building cleaning guild.[141] The Act declares the wages agreed upon between the trade union and the employers' association to be binding for all workers posted to Germany from a foreign country who work in the building cleaning guild and effectively establishes a minimum wage.

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135. Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (EHUG), Nov. 10, 2006, BGBl. I at 2553.

136. Unternehmensregister, http://www.unternehmensregister.de/urge/?submitaction=startpage&session.sessionid (last visited Mar. 24, 2008).

137. Gesetz zur Vereinfachung des Insolvenzverfahrens, Apr. 13, 2007, BGBl. I at 509.

138. Gesetz über die Überführung der Anteilsrechte an der Volkswagenwerk Gesellschaft mit Beschränkter Haftung in Private Hand, July 21, 1960, BGBl. I at 585, last amended by Gesetz, July 31, 1970, BGBl. I at 1149.

139. Case C-112/05, Comm'n v. Germany, 2007 ECJ CELEX LEXIS 701 (Oct. 23, 2007).

140. Gesetz zur Anpassung der Regelaltersgrenze an die Demografische Entwicklung und zur Stärkung der Finanzierungsgrundlagen der Gesetzlichen Rentenversicherung (RV-Altersgrenzenanpassungsgesetz), Apr. 30, 2007, BGBl. I, at 554.

141. Erstes Gesetz zur Änderung des Arbeitnehmer-Entsendegesetzes, Apr. 25, 2007, BGBl. I, at 576.

D. Capital Markets

The Transparency Directive Implementation Act of January 5, 2007, (TUG)[142] implements the provisions of the E.U. Transparency Directive[143] into German law. The Act amends existing capital market acts in order to enhance transparency in the capital markets. Due to these amendments, capital market-oriented companies have to meet, *inter alia*, extended statutory reporting requirements.

Through the Financial Market Directive Implementation Act of July 16, 2007,[144] the German legislature implemented the E.U. Directives on markets in financial instruments[145] into German law. The statute brings numerous changes to financial laws, such as the Securities Trading Act (Wertpapierhandelsgesetz), the Banking Act (Kreditwesengesetz), and the Stock Exchange Act (Börsengesetz).

E. Tax Law

The Act on the Reform of Company Taxes of August 14, 2007, (Unternehmenssteuerreformgesetz 2008)[146] aims to enhance the competitiveness of Germany as a business location. To this end, the tax burden of companies will be reduced effective January 1, 2008, under the reformed law. In particular, the corporate income tax will be reduced from 25 percent to 15 percent. Furthermore, the industrial tax will also be reduced. The Act also aims at the approximation of the tax burden for partnerships and corporate entities, respectively. Effective January 1, 2009, private investment income, such as interests, dividends, and gains realized by the sale of securities, will be charged with a tax of 25 percent (*Abgeltungssteuer*).

F. Telecommunications

The Act relating to Amendments of Telecommunication Laws of February 18, 2007,[147] notably exempts new markets from regulation by the Federal Network Agency (*Bundesnetzagentur*). Because this Act would effectively exempt Deutsche Telekom AG's fast Internet access network (VDSL) from competition, the E.U. Commission has launched an infringement proceeding against Germany before the ECJ.[148]

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142. Gesetz zur Umsetzung der Richtlinie 2004/109/EG des Europäischen Parlaments und des Rates vom 15. Dezember 2004 zur Harmonisierung der Transparenzanforderung in Bezug auf Informationen über Emittenten, deren Wertpapiere zum Handel auf einem Geregelten Markt Zugelassen sind, und zur Änderung der Richtlinie 2001/34/EG (Transparenzrichtlinie-Umsetzungsgesetz—TUG), Jan. 5, 2007, BGBl. I at 10.
143. Council Directive 2004/109, 2004 O.J. (L 390) 38 (EC).
144. Gesetz zur Umsetzung der Richtlinie über Märkte für Finanzinstrumente und der Durchführungsrichtlinie der Kommission (Finanzmarktrichtlinie-Umsetzungsgesetz), July 16, 2007, BGBl. I at 1330, BGBl. I at 1330.
145. Council Directive 2004/39, O.J. 2004 (L 145) 1 (EC); Council Directive 2006/31, O.J. 2006 (L 114) 60 (EC); Council Directive 2006/49, O.J. 2006 (L 177) 201 (EC); Commission Directive 2006/73, O.J. 2006 (L 241) 26 (EC).
146. Unternehmensteuerreformgesetz 2008, Aug. 14, 2007, BGBl. I at 1912.
147. Gesetz zur Änderung Telekommunikationsrechtlicher Vorschriften, Feb. 18, 2007, BGBl. I at 106.
148. Pending Case C-424/07, Comm'n v. Germany, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:283:0019:0020:EN:PDF.

G. Intellectual Property

The Second Act on the Regulation of Copyright in the Information Society of October 26, 2007,[149] (*Zweiter Korb*) is designed to adjust the copyright law in Germany to address the challenges of the digital era and new technical developments. In particular, it maintains the right to produce private copies of works protected by copyright unless the manufacturer has protected the original against copying or unless the original itself obviously was created unlawfully. In return for the right to produce private copies, the law grants the copyright owner lump compensation to be paid by a collecting society, which will collect charges on devices that enable copying.

H. Professional Law Of Lawyers

The Act relating to the Strengthening of the Self-Administration of Lawyers of March 26, 2007,[150] brought several changes relating to the German professional law of lawyers (BRAO). Most notably, foreign lawyers are allowed to establish branch offices in Germany under the new law. Additionally, the procedure for admission to the bar is now operated by the local chamber instead of the local courts.

In February 2007, the German Constitutional Court decided that a provision of the Act on Lawyers' Fees (RVG), which caps statutory lawyers' fees if the value of the claim exceeds €30 million, does not infringe the German constitution.[151] The Court argued, *inter alia*, that the statutory cap did not restrict a lawyer from concluding a fee agreement with a client providing for higher fees than the statutory fees.

In another case, the German Constitutional Court decided that a provision of the professional law of lawyers (BRAO), which prohibits lawyers from concluding an agreement with a client providing for success fees, does not infringe the German constitution in principle.[152] The Court held, however, that in order for the law to pass constitutional muster, the German legislature must provide for exceptions to this blanket prohibition by June 30, 2008.

VIII. Italy

A. Banking

In December 2006,[153] the government amended the banking code[154] only a year after the last reform. Under the new revision, only the Bank of Italy can authorize the establishment of the first branch of a foreign bank in Italy. Foreign banks must satisfy several conditions in order to qualify. In order to improve transparency, the amendment requires

149. Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft, Oct. 26, 2007, BGBl. I at 2513.
150. Gesetz zur Stärkung der Selbstverwaltung der Rechtsanwaltschaft, Mar. 26, 2007, BGBl. I at 358.
151. Bundesverfassungsgericht [BVerfG] [federal constitutional court] Feb. 13, 2007, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 910 (F.R.G.).
152. Bundesverfassungsgericht [BVerfG] [federal constitutional court] Dec. 12, 2006, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 2576 (F.R.G.).
153. Presidential Decree No. 303, Dec. 27, supp. ord. Gazz. Uff. No. 7, Jan. 10, 2007.
154. Presidential Decree No. 385, Sept. 1, supp. ord. Gazz. Uff. No. 230, Sept. 30, 1993.

banks to publish interest rates, prices, and fees charged. Banks must also publish fees relating to the financial products and interest rates they charge on defaulting loans. The amendment imposes new lending rules, pursuant to which banks must clearly publish the effective overall average interest rate. In addition, banks can now agree to settle disputes with customers using alternative methods.

B. Consumer

In January 2007, Italy enacted urgent measures aimed at protecting consumers and promoting competition, development of economic activities, and the creation of new enterprises.[155] With respect to the protection of consumers, the new regulations: (a) outlaw fees that the telephone companies had been charging each time a customer topped-up his or her prepaid cards; (b) make it easier for consumers to rescind contracts entered into with a telecommunication provider; (c) require airlines to indicate clearly in their advertisements the taxes and other fees or charges applied on the price of the airfare; (d) mandate new labeling requirements for food products; and (e) implement new rules that ease and expedite the proceedings to redeem a mortgage. In addition, the decree simplifies the administrative requirements necessary to start a business and eliminates existing limitations for certain type of professions. Thus, for example, to become a hair stylist, a person now only needs to declare his or her intention to open a salon. Restrictions on the minimum distance from a business of the same kind, or with respect to a set day off each week, no longer apply.

C. Immigration

In February, Italy adopted[156] the Directive[157] concerning the right of the citizens of the Union and their relatives—even if they are non-E.U. citizens—to move without restrictions in the territories of the Member States. Under the new rules, E.U. citizens can reside in other Member States for a period of three months. An E.U. citizen can reside in another Member State for a longer period of time if he or she is working in the State, is a student in the State, or has enough economic resources to do so.

A new law[158] allows all foreigners to enter Italy for purposes of visiting, tourism, business, and study without any permits, provided the stay does not exceed three months. The foreigners, however, must declare their presence in the territory of Italy to an officer. Violators are subject to expulsion.

155. Decree-Law No. 7, Jan. 312007, Gazz. Uff. No. 26, Feb. 1, 2007.

156. Presidential Decree No. 30, Feb. 6, 2007, Gazz. Uff. No. 72, Mar. 27,2007.

157. Council Directive 2004/38, 2004 O.J. (L 158) 77-123 (EC).

158. Disciplina dei Soggiorni di Breve Durata Degli Stranieri per Visite, Affair, Turismo e Studio, Discipline of the Short Stay of Foreigners for Visits, Business, Tourism and Study, Law No. 68, May 28, 2007, Gazz. Uff. No. 126, June 1, 2007.

D. Antitrust Law

1. *Leniency program*

In February 2007, the Italian Competition Authority (IAA), after public consultation, adopted a leniency program (the "Program") under which the IAA may now waive or reduce fines for companies involved in anti-competitive agreements when these companies self-report anticompetitive conduct and hand over relevant evidence.[159]

The Program was applied for the first time on May 17, 2007, in a case involving, *inter alia*, the Trombini Group.[160] In determining the applicable fines, the IAA took into account not only the gravity of the offense and the economic situation of the relevant market but also the degree of cooperation offered by the companies subject to the investigation. The Trombini Group, which had first applied for leniency and cooperated substantially and continuously during the course of the proceeding, was granted immunity from fines while eight other companies that had also collaborated with the IAA were granted a 30 percent reduction of the fines that would have been otherwise imposed.

2. *Business Law: Takeovers*

Italy implemented the E.U. Takeover Directive[161] by means of a Legislative Decree dated November 9, 2007.[162] The main changes introduced by the decree are: 1) increased transparency; 2) determination of the offer price according to the Directive with possible supervision by the National Commission for Companies and the Stock Exchange (CONSOB); 3) introduction of a reciprocity clause opposable to the existing passivity and neutrality rules for companies not subject to those rules; 4) reduction of the squeeze-out threshold to 95 percent, rather than the previous 98 percent; and 5) empowerment of CONSOB to adopt further implementing regulations.

E. Banking and Finance

Through Legislative Decree No. 164/2007,[163] amending the Italian Consolidated Law on Finance,[164] Directive 2004/39/EC[165] on Markets in Financial Instruments was incorporated into Italian law. With the entry into force of the Decree,[166] CONSOB[167] has had

159. Italian Competition Auth., Measure No. 16,472, Resolution on the Non-Imposition and Reduction of Sanctions Under Article 15 of Law No. 287 of October 10, 1990 (Feb. 15, 2007).
160. Press Release, Antitrust Authority, Antitrust Authority Levies 31 Million Euros in Fines on Eight Companies for Anti-Competitive Conduct in the Manufacture of Particleboard: First Ever Application of the Clemency Rules (May 30, 2007).
161. Council Directive 2004/25, 2004 O. J. (L 142) 12-23 (EC).
162. Legislative Decree, Nov. 9, 2007 (not yet published).
163. Presidential Decree No. 164, Sept. 17, 2007, Gazz. Uff. No. 234, Oct. 8, 2007, *available at* http://www.camera.it/parlam/leggi/deleghe/testi/07164dl.htm.
164. Legislative Decree No. 58, Feb. 24, 1998, Gazz. Uff. No. 71, Mar. 26, 1998, *available at* http://www.bancaditalia.it/vigilanza/intermediari/normativa/leggi/dl58/dl_58_98_it.pdf.
165. Council Directive 2004/39, 2004 O.J. (L 145) 1-*44* (EC).
166. The Decree entered into force on November 1, 2007.
167. CONSOB is the National Commission for the Italian companies and the securities market.

to amend the regulations governing intermediaries and market regulation.[168] In addition, CONSOB and the Bank of Italy have issued joint rules of conduct concerning collective asset management services.[169]

F. Insurance Law

In 2007, pursuant to the mandate given to it in Legislative Decree No. 209/2005,[170] *Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo* (ISVAP)[171] has published a number of regulations in the insurance sector. Among the most significant of these regulations are those concerning the compulsory administrative liquidation of insurance companies,[172] the layout of the financial statements that companies must adopt in line with the International Accounting Standards,[173] the procedure for the application of disciplinary sanctions,[174] and the insurance and reinsurance intermediation activity.[175]

IX. Netherlands—New Arbitration Case Law

One of arbitration's advantages over ordinary court proceedings is that an arbitral award is usually not subject to appeal proceedings. A rendered arbitral award can, however, be subjected to scrutiny from a court in annulment proceedings. Under Article 1065 of the Dutch Code of Civil Procedure, one of the limited circumstances in which an arbitral award may be set aside is where the award is rendered without reasoning.[176]

168. CONSOB Regulation No. 16190, Oct. 29, 2007, Implementing regulation of Legislative No. 58, Feb. 24, 1998; CONSOB Regulation No. 16191, Oct. 29, 2007, Implementing the provisions on markets of Legislative Decree No. 58, Feb. 24, 1998, Gazz. Uff. No. 255, Nov. 2, 2007, *available at* http://www.consob.it/main/aree/novita/consultazioni_int_mer_MIFID_esiti.htm. Both Regulations entered into force on November 2, 2007. For some of the new regulatory provisions, however, there is a transitional period which will expire on June 30, 2008.

169. CONSOB and Bank of Italy Regulation, Oct. 30, 2007, On Organization and Procedures that shall be respected by the intermediaries in collective asset management services management, Gazz. Uff. No. 255, Nov. 2, 2007, *available at* http://www.consob.it/main/aree/novita/consultazioni_consob_bitalia_esiti.htm. The new rules introduce: (a) new investment services; (b) new types of securities; and (c) new duties regarding, *inter alia*, (i) the authorization procedure for non-E.U. investment companies, (ii) the deposit and subdeposit of clients' assets in connection with the provision of investment services, (iii) the offer of securities by means of distance promotion techniques, (iv) "know your clients" policies, (v) "best execution", (vi) the management of clients' orders, and (vii) the admissibility of placement fees.

170. Legislative Decree No. 209, Sept. 7, 2005, Gazz. Uff. No. 239, Oct. 13, 2005, *available at* http://www.isvap.it/isvap_cms/docs/F28691/decreto_7_settembre_2005.pdf. Under this legislation, ISVAP is given authority to issue regulations for the various areas of the insurance industry.

171. ISVAP is the Supervisory Authority for Private Insurance Undertakings and Insurance Undertakings of Public Interest.

172. ISVAP Regulation No. 8, Nov. 13, 2007, Gazz. Uff. No.275, Nov. 26, 2007, *available at* http://www.isvap.it/isvap/imprese_jsp/PageGenerica.jsp?nomeSezioneNºRMATIVA&ObjId=220097.

173. ISVAP Regulation No. 7, July 13, 2007, Gazz. Uff. No. 175, July 30, 2007, *available at* http://www.isvap.it/isvap/imprese_jsp/PageGenerica.jsp?nomeSezioneNºRMATIVA&ObjId=220097.

174. ISVAP Regulation No. 6, Oct. 20, 2006, Gazz. Uff. No. 254, Oct. 31, 2006, *available at* http://www.isvap.it/isvap/imprese_jsp/PageGenerica.jsp?nomeSezioneNºRMATIVA&ObjId=220097.

175. ISVAP Regulation No. 5, Oct. 16, 2006, Gazz. Uff No. 247, Oct. 23, 2006, *available at* http://www.isvap.it/isvap/imprese_jsp/PageGenerica.jsp?nomeSezioneNºRMATIVA&ObjId=220097.

176. Article 1065 (1)(a)-(e) of the Dutch Code of Civil Procedure sets out the complete range of grounds for setting aside an arbitral award.

On December 22, 2006, the Dutch Supreme Court (*Hoge Raad*) handed down a landmark decision in *Kers v. Rijpma*, narrowing the situations where it will be appropriate for a court to set aside an arbitral award on the ground of insufficient reasoning.[177] In so doing, the Supreme Court seems to have addressed doubts about the standard of review raised by its earlier decision in *Nannini vs. SFT Bank NV*.[178]

In *Kers*, the Supreme Court considered whether the Court of Appeal had properly set aside an arbitral award under Article 1065(1)(d). In reaching its decision, the Court observed that a judge must show restraint in deciding whether to interfere with an arbitral award. Under Article 1065(1)(d), an arbitral award may only be set aside in exceptional cases where the reasoning is so unsound that it should be equated with an arbitral award that lacks reasoning altogether. With the *Kers* decision, the Supreme Court has done much to reverse a trend whereby the courts in the Netherlands had taken a broadening view towards reviewing arbitral awards on the merits. This is a salutary development for the predictability of arbitration in the Netherlands, and parties entering into arbitration agreements covered by Dutch procedure should consider this new opinion's effect on their chances of having an award reviewed by the Dutch courts.

X. Poland: Shedding a European Light on Poland's "Lustration" Laws, K 2/07—Decision of the Polish Constitutional Tribunal of May 11, 2007

A. Introduction

Along with other post-communist states, Poland sought to reconcile its new democracy with mechanisms for de-communizing the ranks of political power or influence in the early 1990s. Poland joined the Council of Europe[179] (COE) and lined up for admission to the E.U.[180] A new Constitution was adopted in 1997,[181] as was a "lustration" law, mandating that persons performing certain public functions file a declaration as to whether they had collaborated with the *ancien regime* (the "1997 Act").[182] It also established a specialized administrative judiciary for dealing with untruthful declarations and soon created a Commission for the Prosecution of Crimes against the Polish Nation, tasked, *inter alia*, with storing and researching any surviving documents of the Communist State security agencies (the "IPN").[183] In order to provide guidance to central and eastern countries,

177. Kers/Rijpma, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], 22 december 2006, RvdW 2007, 27 (Neth.).

178. Nannini/SFT Bank, Hoge Raad der Nederland [HR] [Supreme Court of the Netherlands], 9 januari 2004, NJ 2005, 190 (Neth.).

179. Poland joined the Council of Europe in 1991 and ratified the European Convention on Human Rights in 1993. The Declaration of the Polish Government of Mar. 1, 1993 Dziennik Ustaw–[Journal of Laws], Item No. 284 (No. 61 1993).

180. Poland acceded to the E.U. in 2004.

181. The Constitution of Poland was adopted April 2, 1997, and was confirmed by referendum in October 1997.

182. Act on Disclosure of Documents of the State Security Organs from 1944-1990, Dziennik Ustaw [Journal of Laws], Item No. 1592 (No. 218 2006).

183. Act on the Commission for the Prosecution of Crimes Against the Polish Nation Dziennik Ustaw [Journal of Laws], Item No. 1016 (No. 155 1998). *See generally* The Institute of National Remembrance, http://www.ipn.gov.pl/portal/en (last visited Mar. 24, 2008).

such as Poland, grappling with such lustration processes, the COE's Parliamentary Assembly adopted Resolution 1096 (PA Resolution 1096) in 1996 along with Guidelines establishing a rule of law framework.[184]

B. Lustration Issues Addressed by the Constitutional Court Of Poland

A number of unsuccessful challenges to the 1997 Act were lodged with Poland's Constitutional Court[185] on the grounds that it violated, *inter alia*, various binding international conventions. In 1998, the Constitutional Court ruled, in Judgment K 39/97,[186] that the mandatory submission of individual lustration declarations did not encroach upon the protection against self-incrimination of Article 14(3) of the International Covenant on Civil and Political Rights[187] because the 1997 Act was not "penal in character," instead directed primarily at eliciting the veracity of the individual making the declaration rather than punishment for serving the communist regime. Stressing that the Act targeted only those persons who filed untruthful declarations, the Court stated that any "lustration liar" would be entitled to due process of law under the Polish Criminal Procedure Code.[188] Turning to the lustration criteria spelled out in PA Resolution 1096, the Court found the 1997 Act complied with each. In subsequent rulings, challenges to the 1997 Act based on international law failed as the Constitutional Court continued to insist on the non-criminal nature of lustration and repeatedly upheld the overall process while gradually building a jurisprudential base of elements required for legitimate lustration.[189]

184. Eur. Parl. Ass'n, *Resolution 1096 on Measures to Dismantle the Heritage of Former Communist Totalitarian Systems*, (1996) Doc. No. 7568, *available at* http://assembly.coe.int/Documents/AdoptedText/TA96/ERES1096.htm; Eur. Parl. Ass'n, *Guidelines to Resolution*, Doc. No. 7608 (1996), *available at* http://assembly.coe.int/Documents/WorkingDocs/doc96/EDOC7568.htm.

185. For a discussion of the Court's review of normative acts, see Marek Safjan, Constitutional Tribunal, Report to the Venice Commission: Examining of Facts in Cases Involving Abstract Control of Normative Facts, CDL-JU(2005) 027 (Sept. 5, 2005), *available at* http://www.venice.coe.int/docs/2005/CDL-JU(2005)027-e.asp.

186. Decisions of the Constitutional Tribunal, Judgment K 39/97, Nov.10, 1998, Item 99 (No. 6 Nov. 10, 1998).

187. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. Poland ratified the Covenant in 1977.

188. The Constitutional Court here laid down five criteria indispensable to any finding that an individual had "collaborated" with the communist regime.

189. The Constitutional Court did periodically invalidate specific provisions of the 1997 Act and the IPN Act. *See* Decisions of the Constitutional Court, Amendment to the Definition of "Co-Operation" within the Lustration Act, Judgment K 44/02, Item 44 (No. 4 May 28, 2003) May 28, 2003, *available at* http://www.trybunal.gov.pl/eng/summaries/K_44_02_Gb.pdf; Decisions of the Constitutional Court, Judgment K 7/01, Item 47 (No. 5 Mar. 14, 2001); Decisions of the Constitutional Court, Judgment K 24/98, Item 97 (No. 6 Oct. 21, 1998); Decisions of the Constitutional Court, Judgment U 6/92, Item 27 (No. 2 Dec. 15, 1992). An early attempt at lustration, well before the adoption of the 1997 Constitution, was a 1992 Parliamentary Resolution requiring the compilation of information as to whether various political office holders had been employed by communist secret services. It was invalidated by the Constitutional Court—as then constituted—on the grounds, *inter alia*, that it violated Article 17 (arbitrary or unlawful interference with reputation) of the International Covenant on Civil and Political Rights. The text of the Covenant is available at http://www.unhchr.org/english/law/ccpr.htm. Poland ratified the Covenant in 1977.

A very different result as to the penal character of the 1997 Act was reached in 2007 by the European Court of Human Rights (ECHR) in *Matyjek v Poland*,[190] a case of first impression with regard to Polish lustration.[191] Tadeusz Matyjek, an elected Deputy to Parliament who was ousted from office and prohibited from performing public functions for ten years for filing an untruthful lustration declaration, complained that he had been deprived of a fair trial in violation of Article 6 of the Convention.[192] In its initial ruling on admissibility, the ECHR looked beyond the Polish Constitutional Court's characterization of the lustration laws in K 39/97 and other rulings. Parsing the elements of the lustration process developed in PA Resolution 1096 as well its own jurisprudence, the ECHR found the 1997 Act to be undeniably penal in nature.[193] In its later judgment on the merits, the ECHR ruled that the lustration proceedings, taken as whole, failed to provide Matyjek with the safeguards of Article 6.

C. The 2006 Lustration Law & Judgment K 2/07

On the heels of *Matyjek*, the Constitutional Court, in Judgment K 2/07, grappled with a broad challenge to a new lustration law adopted in late 2006[194] (the "2006 Act") and further amended in early 2007.[195] That decision exponentially expanded the definition of persons "performing a public function" who were thus required to file the prescribed form of declaration[196] between March 15 and May 15, 2007. The new Act was also aimed at identifying persons who had served as secret informants during the communist regime, by now defunct for eighteen years. Under penalty of immediate dismissal for failure to comply in a timely manner were, *inter alia*, journalists, editors, university professors, tax advisors, and managers of state-owned enterprises. Once the new declarations were submitted, they were to be compared to the contents of the IPN's files. Penalties of a ten-year ban on performing public functions could be imposed for late as well as untruthful filings. The individual declarations were also to be posted online for public perusal.

Concerns about witch-hunting voiced by eminent lawyers, political activists, and journalists appeared in the international[197] and U.S. press.[198] In March 2007, the COE's Commissioner of Human Rights questioned whether the nearly 700,000 affected persons "really pose a significant danger to human rights or democracy, especially given the time

190. Matyjek v. Poland, App. No. 38184/03, § 4 (2007)., *available at* http://www.echr.coe.int/eng.

191. *Cf.* Ivan Turek v. Slovakia, No. 57986/00, § 115, (2006) *available at* http://www.echr.coe.int/eng.

192. Matyjek complained that he had been unable to defend himself adequately as he had been prevented from taking notes from the secret state files.

193. Matyjek v. Poland, No. 38184/03.

194. Act on Disclosure of Documents of the State Security Organs from 1944-1990, Dziennik Ustaw [Journal of Laws], Item No. 1592 (No. 218 Oct. 18 2006).

195. Act Amending the Act of October 18, 2006, Dziennik Ustaw [Journal of Laws], Item No. 162 (No. 26 Feb. 14, 2007). The Amendments also made changes to the IPN statute. The 1997 Act expired on March 15, 2007.

196. *Id*. app. No. 1 ("Zalacznik").

197. Adam Michnik, *Waiting for Freedom, Messing It Up*, Int'l Herald Trib., Mar. 25, 2007, *available at* http://www.iht.com/articles/2007/03/25/opinion/edmichnick.php#; Thomas Urban, *Blind Exorcism in Poland*, Suddeutsche Zeiting, May 24, 2007, *available at* http://www.signandsight.com/features/1364.html.

198. Adam Michnik, *The Polish Witch Hunt*, 54 N.Y. Rev. Books 11, June 28, 2007; Wiktor Osiatynski, Op-Ed. *Poland Makes Witch Hunting Easier*, N.Y. Times, Jan. 22, 2007.

that has elapsed since the system change." He urged the Polish authorities to bear in mind PA Resolution 1096 as well as the lustration-related rulings of the ECHR.[199]

The Constitutional Court, on May 11, 2007, handed down a landmark judgment (K 2/07)[200] that significantly reduced the scope and reach of the 2006 Act, thus halting the declaration process with regards to many employees. Upon reviewing some seventy-seven challenged provisions, the Court found that seventeen of those provisions violated both the Convention and the Polish Constitution.[201] Emphasizing that although its role in the review and scrutiny of domestic normative acts is distinct from that performed by the ECHR, the Constitutional Court noted that the individual rights and freedoms safeguarded by the Convention serve to inform the Court's interpretation of rights under the Polish Constitution. Invoking PA Resolution 1096, the Court laid down thirteen mandatory standards of constitutionality against which the 2006 Act was to be measured, ten of them mirroring PA Resolution 1096 and the guidelines accompanying it.

The Court found an unacceptable shift in emphasis to branding, censuring, and punishing persons who collaborated with the *ancien regime* and held that the new act was unquestionably penal in intent, thus triggering the protections of Article 6 of the Convention. Further, the penalty imposed for failure to file a timely declaration—loss of employment—impacted rights that are protected under the Convention, namely the right and freedom to work in one's chosen profession and the right to carry on economic activity, and thus violated Article 10 of the Convention. The Act's broad re-definition of public functions that had resulted in the inclusion of journalists, professors, and academic researchers, among others, was found to infringe on Article 8, the Right to Respect for Private and Family Life, and Article 14, Protection Against Discrimination.[202]

The Court underscored that lustration may be applied exclusively against persons who actually pose a threat to the continued existence of democratic and rule of law processes. The Court was particularly troubled by the directive that the IPN publish lists naming persons who had, based solely on information extracted from the old communist-era files and without any requirement for current independent verification of accuracy, served as secret informants to the state security apparatus. The Court found that publicizing a person's name merely on the basis that it had been identified in secret files assembled in gross violation of human rights not only inflicts an irreparable stigma on that person's reputation, but the Act provided no effective mechanism for undoing the damage. The Court also found that certain provisions of Articles 6 and 14 conferring lesser privacy protection on persons who had been employees of the state, security services, and provisions precluding them from using the same lustration processes were violated.

199. Thomas Hammarberg stated, "Lustration must not turn into revenge against former collaborators." Council of Europe, *2007 Viewpoints*, http://www.coe.int/t/commissioner/Viewpoints/previous2007_en.asp (last visited Mar. 24, 2008).

200. Decisions of the Constitutional Court, Lustration, Judgment K. 2/07, Item 5 (No. 48 May 11, 2007).

201. The Court struck down another twenty-three provisions as unconstitutional under national law.

202. Other categories disallowed by the Court included accountants, members of management of certain sports associations, and other enterprises.

D. Conclusion

As of this writing, it is unclear whether Judgment K 2/07 will remain the Constitutional Court's final word in light of a request for clarification and reconsideration lodged by the Speaker of the Polish Parliament.[203] As is clear from the COE report[204] issued subsequent to the publication of K 2/07, however, it remains incumbent on the Polish Parliament to "[e]nsure that lustration procedures comply with all the guarantees of a state based on the rule of law and respect for human rights."[205]

XI. Romania

A. Company Law

The Commercial Companies Law[206] was amended in 2007[207] with a view toward facilitating the implementation of the reforms adopted in 2006 and ensuring that E.U. standards are correctly implemented. Companies and relevant institutions were asked to comply with the new law by adopting new norms and corporate structures by December 29, 2007. In addition, the 2007 amendments also address the 2005 GRECO (Group of States against Corruption) Evaluation Report on Romania[208] in relation to previous condemnations for money laundering-related crimes.

B. Environmental Law

After the revision of the entire legal framework for environmental protection in 2005, further enactments were made to further harmonize Romanian law with E. U. norms in 2007.[209] In particular, the new provisions address the introduction into the environment of genetically modified organisms/microorganisms, requiring strict record keeping and establishing bio-security measures. The new provisions further increase the sanctions for non-compliance. All operations related to genetically modified organisms/microorganisms, including their introduction into the market and the environment, labeling and packaging, import, export, and transit, require prior authorization by the National Environmental Protection Agency based on a strictly regulated procedure.

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203. Wniosek Marszalka Sejmu do Trybunalu Konstytucyjnego o Wysnienie Watpliwosci co do Orzeczenia w Sprawie Tzw Ustawy Lustracyjnej, July 17, 2007, *available at* http://parl.sejm.gov.pl/InfMarsz.nsf/0/0F241C7D6F9554C4C125733D004B199D/$file/trybunal.pdf.

204. Memorandum to the Polish Government, Assessment of the Progress Made in Implementing the 2002 Recommendations of the Council of Europe Commissioner for Human Rights, CommDH(2007)13, 25 (June 20, 2007) *available at* http://www.asylumlaw.org/docs/showDocument.cfm?documentID=5701.

205. *Id.*

206. Commercial Companies Law 31/1990.

207. Government Emergency Ordinance no. 82 [June 28, 2007], Gazz. Uff. No. 446 (June 29, 2007).

208. Group of States Against Corruption (GRECO), Second Round Evaluation Round, *Evaluation Report on Romania*, Greco Eval II Rep (2004) 1 E (Oct. 14, 2005), *available at* http://www.coe.int/t/dg1/greco/evaluations/round2/GrecoEval2(2005)1_Romania_EN.pdf.

209. Government Emergency Ordinance No. 43, May 23, 2007, Gazz. Uff. No. 435, June 28, 2007; Government Emergency Ordinance No. 44 , May 23, 2007, Gazz. Uff. No. 483, June 28, 2007.

Government Ordinance 68/2007[210] adopted the polluter pays principle, transposing E.U. Directive 2004/35/EC.[211] Under the ordinance, mandatory prevention and compensation measures may be ordered by local authorities in cases of actual damage or threatened damage to the environment. As a matter of principle, the owner of the operations negatively impacting the environment is liable for damages. In cases of damage caused to private entities, however, the common rules of civil liability continue to apply.

XII. Spain

Spain has seen a great deal of legislation this year, particularly in the energy sector,[212] but also regarding the environment, the public sector, the stock market, and not at all surprisingly, land use.

A. Financial Markets

Royal Decree 1066/2007 of July 27[213] develops the modifications of Law 6/2007 of April 12,[214] which implements Directive 2004/25/EC[215] concerning takeover bids. All phases of a public takeover, whether voluntary or obligatory, are exhaustively addressed. The general rule is that a bid for all shares must be made when control, defined as voting rights equal or greater than 30 percent, is reached. The offer must be at an equitable price, which is defined as an amount not less than the offeror or persons acting on behalf of the offeror, had paid in the twelve months prior to the offer. Takeover defenses, the bane of the Directive, are addressed. The board may not take defensive measures without the approval of the shareholders, although it may shop for other offers. If the bidder is not domiciled in Spain and not subject to the limit referred to in the previous sentence, however, the limit on defensive measures does not apply. Measures to neutralize defenses, which also must be approved by the general shareholders meeting, are also regulated. Squeeze-out operations are now permitted for the first time in Spain. The offeror must control at least 90 percent of voting rights, and the previous public offer must have obtained at least 90 percent of the voting rights of those receiving the offer.

Royal Decree 1362/2007 of October 19[216] incorporates the European transparency regime for issuers of securities traded on an official secondary market or regulated market in the E.U. Regulated information includes periodic information: 1) that must be provided according to the Stock Market Law, 2) concerning significant interests and operations over treasury stock, 3) relating to the total number of voting rights and capital at the end of each month when there has been an increase or decrease, and 4) relevant as set out in Article 82 of the Stock Market Law. The significant interests that must be notified to the issuer when going over or under the relevant figure are: 3 percent, 5 percent, 10 percent, 15 percent, 20 percent, 25 percent, 30 percent, 35 percent, 40 percent, 45 percent, 50

210. Government Emergency Ordinance No. 68, June 28, 2007, Gazz. Uff. No. 446, June 29, 2007.
211. Council Directive 2004/35, 2004 O.J. (L 143) 56-75 (EC).
212. For developments in the Spanish energy sector, see Energy and Natural Resources in this volume.
213. Law 1066/2007 (B.O.E. 2007, 14483).
214. Reforming the Stock Market Law, Law 24/1988 (B.O.E. 1988, 24).
215. Council Directive, 2004/25, 2004 O.J. (L 142) *12*-23 (EC).
216. Law 1362/2007 (B.O.E. 2007, 18305).

percent, 60 percent, 70 percent, 75 percent, 80 percent, and 90 percent. Directors, independent of the amount, must notify upon taking and leaving office and after a transaction that results in obtaining or selling securities that represent voting rights. Those domiciled in a tax haven—a place where there is zero tax or where there is no effective exchange of fiscal information—must notify upon reaching 1 percent and every multiple thereafter. Exceptions are made to the notice requirement for market makers, financial intermediaries, and for shares acquired exclusively as a result of compensation and liquidation within the short cycle of standard liquidation.

B. Environment

Article 45 of the Spanish Constitution recognizes the right of Spain's citizens to enjoy a proper environment. It also provides that those who breach the obligation to use natural resources rationally and conserve nature are obligated to repair the harm caused independent of the criminal or administrative sanctions that may also be applicable. The preamble to Law 26/2007 of October 23, 2007,[217] states that prior legislation has not been able to prevent numerous accidents of extreme gravity for the environment. The law transposes Directive 2004/35/EC,[218] establishes the obligation to prevent, avoid, and repair damage to the environment, and implements the principle that the polluter pays. It establishes strict liability for the activities listed in its Annex III for damage and imminent threats of damage to the environment—a regime of liability in the case of intentional or negligent behavior. The law also applies in any case regarding measures of prevention and avoidance. It does not apply in certain cases of *force majeure* or when specified international treaties apply.

The law has a thirty-year prescription period, but the administration has a five-year prescription period for reclaiming costs when it has taken measures to prevent, avoid, or repair. The party responsible for the imminent damage or damage is responsible for the totality of the costs; there is no limit on liability. Piercing the corporate veil and liability of the dominant company of a group of companies as defined by article 42.1 of the Commercial Code is referred to as a possibility in case of abusive use of the legal person or fraudulent use of the law. Joint liability is established for those who participated in causing the harm or imminent threat. And finally, the extinction of a legal person does not mean the liability disappears; tax collection techniques apply to the survivors.[219] Tax law is applied to determine who is jointly and severally liable.[220]

The law also sets out those who are subsidarily liable: *de jure* and *de facto* managers and directors whose conduct determined the responsibility of a legal person; managers and administrators of physical persons who have ceased operating; those who did not do enough for the company to comply or adapted resolutions or took measures that caused the breach; those that are successors by law; and those who did not do enough to comply with duties and obligations that are liquidators of companies or member of insolvency boards. The law also establishes exemptions from liability. The legislative development and execution of the law is principally in the hands of the autonomous communities.

217. Law 26/2007 (B.O.E. 2007, 18475).
218. Council Directive 2004/35, 2004 O.J. (L 143) 56-75 (EC).
219. Art. 12 Law 26/2007 (B.O.E. 2007, 18475).
220. Art. 13 Law 26/2007 (B.O.E. 2007, 18745). *See* Art. 42.2 Law 58/2003 (B.O.E. 2003, 23186).

Other relevant environmental law legislation includes Royal Decree 1367/2007 of October 19[221] concerning noise pollution that develops Law 37/2003 of November 17[222] concerning noise, regarding noise zoning, quality objectives, and noise emissions and Royal Decree 1369/2007, of October 19[223] concerning the establishment of requirements for ecological design of products that use energy.

C. Public Sector Contracting

Law 30/2007 of October 30[224] and Law 31/2007 of October 30[225] address contracting in the public sector. Law 30/2007 not only transposes Directive 2004/18/EC,[226] but also aims to effect a global reform of contracting by the public administrations. The main changes over the immediately prior law[227] include a broadening of the sphere of the law's application. New mechanisms are introduced to integrate social and environmental considerations into public contracting. There is also an effort to simplify and rationalize the management of contracts and reduce costs and charges on the parties. This has affected the classification of contractors, measures of accreditation, and procedures for procurement.

Law 31/2007 transposes Directive 2004/17/EC[228] and Directive 92/13/EEC[229] concerning, respectively, contracting in the water, energy, transport, and postal service sectors, and coordination of legal, regulatory, and administrative provisions to the application of community rules in the procurement procedures of entities operating in those sectors. Its objective is to regulate the procedure for procurement of services, supplies, and works in a non-discriminatory, transparent manner.

Several elements need to exist for the law to be applied. The law applies to procurement procedures of contracting entities, whether public or private, that are public law entities, public undertakings, or associations made up of various contracting entities or those that have special rights. The law is not applicable to contracts entered into by the Public Administration as defined in Law 30/2007. Finally, in order for Law 31/2007 to apply, the contracts must meet certain quantitative thresholds: €422,000 for supply and service contracts and €5,278,000 for works contracts.

XIII. Switzerland

A. International Law

The free movement of persons within Switzerland for citizens of the fifteen old E.U. Member States, the EFTA states, and Cyprus and Malta, became effective on June 1,

221. Law 1367/2007 (B.O.E. 2007, 18397).
222. Law 37/2003 (B.O.E. 2003, 20976).
223. Law 1369/2007 (B.O.E. 2007, 18398).
224. Law 30/2007 (B.O.E. 2007, 18874).
225. *Id.*
226. Council Directive 2004/18, 2004 O.J. (L 134) 114-240 (EC).
227. The Revised Text of the Law of Contracts of the Public Administration 13/1995 (B.O.E. 1995, 11825).
228. Council Directive 2004/17, 2004 O.J. (L 134) 1-113 (EC).
229. Council Directive 92/13, 1992 O.J. (L 76) 14-20 (EEC).

2007.[230] During a trial phase, the citizens of these states will be able to benefit from free movement for the first time since Switzerland and the E.U. reached an agreement in 1999.[231] The E.U. Member States that joined the E.U. in 2004, and the two newest E.U. Member States, Romania and Bulgaria, are still subject to an interim regulation. Their citizens, however, may benefit from free movement if they work on a self-employed basis. This free movement of persons is granted temporarily for one year. If high immigration results, Switzerland will be able to reintroduce immigration quotas for a period of two years from June 1, 2008, onwards.[232]

B. Trusts

The Hague Convention of the Law Applicable to Trusts and on their Recognition[233] entered into force for Switzerland on July 1, 2007. It governs the applicable law for trusts and their legal recognition by courts of the signing states. The Federal Council has enacted corresponding amendments to the Swiss Private International Law Act and the Swiss Federal Debt Enforcement and Bankruptcy Act (separation of trust and trustee assets) in the form of a Federal resolution.[234]

C. Corporate Law

New provisions of the Swiss Code of Obligations were brought into force under the heading "transparency of remuneration"[235] on January 1, 2007. According to these new provisions, a quoted company must disclose in the appendix to its balance sheet the remuneration paid to its board members and management and identify the amount of shares in the company held by these persons.[236]

The new Federal Law on the Recognition and Supervision of Auditors entered into force on September 1, 2007.[237] This law was drafted in light of tightened U.S. requirements since the enactment of the Sarbanes-Oxley Act. It primarily addresses auditors and

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230. *See, e.g.*, Federal Office of Migration, Directives et Commentaires Concernant L'introduction Progressive de la Libre circulation des Personnes Entre la Confédération Suisse et la Communauté Européenne Ainsi que ses 25 Etats Membres, June 1, 2007, *available at* http://www.bfm.admin.ch/etc/medialib/data/migration/rechtsgrundlagen/weisungen_und_kreisschreiben/weisungen_und_rundschreiben.Par.0016.File.tmp/directives_OLCP.pdf

231. Accord Entre la Confédération Suisse d'une Part, et la Communauté Européenne et ses Etats Membres, D'autre part, sur la Libre Circulation des Personnes, Recuiel Officiel des lois et Ordonnances de la Confédération Suisse [RO] June 21, 1999, 1529 (2002) *available at* http://www.admin.ch/ch/f/rs/i1/0.142.112.681.fr.pdf.

232. Additional information is available at http://www.bfm.admin.ch/bfm/en/home/themen/schweiz_-_eu.html.

233. The text of the Convention is available at www.hcch.net/index_en.php?act=conventions.text&cid=59.

234. System atische Sammlang des Bundesrechts, [SR] 0.221.371, AS 2855 (2007), (Switz.), *available at* http://www.admin.ch/ch/d/sr/c0_221_371.html. *See also*, Official Federal Dispatch 2006, 551. Generally speaking, Switzerland's federal laws are available in German, French, and Italian on the federal government's website: http://www.admin.ch.

235. Code des Obligations [Co], art. 663bbis ff.

236. System Atische Sammlang des Bundesrechts [SR] 220, AS 2629 (2006) (Switz.), *available at* http://www.admin.ch/ch/d/sr/c220.html. *See also*, Official Federal Dispatch 2004, 4471.

237. System Atische Sammlang des Bundersrechts [SR] 221.302, AS 3971 (2007) (Switz.), available at http://www.admin.ch/ch/d/sr/c221_302.html. *See* Official Federal Dispatch 2004, 3969.

auditing enterprises and regulates their admission and supervision, ensuring the proper conduct and quality of auditing services. It sets forth the requirements that a person must fulfill in order to qualify as an admitted audit expert and thus be authorized to conduct ordinary audits. The requirements for qualification as an admitted auditor are less onerous, as less practical experience is required; one year is sufficient for the conduct of a limited review.[238]

The total revision of the Swiss Limited Liability Company Law (LLC) has been concluded as well. This amendment marks a significant change in Swiss corporate law. In the course of this revision, numerous amendments were also made to the law on share corporations (SC) and the law on cooperatives as well as the provisions on commercial registries and company names. The purpose of these amendments is to harmonize equal or comparable corporate legal matters. For the LLC, the most noteworthy change are that the capital limit of two million Swiss francs will no longer apply,[239] the transfer of shares will be facilitated, and the possibility of establishing a single-person LLC, or SC, is explicitly introduced. Further, the possibilities for personalizing internal structures are increased, taking into consideration the individual-related character of the LLC. For SCs, the former provisions on the nationality and domicile of board members—presently Art. 708 CO—are to be abolished. A Swiss SC will only need one person with domicile in Switzerland with capacity to represent it. This person can be either a board member or a manager. Corresponding provisions apply to LLCs and cooperatives. Furthermore, the possibility of a single-person SC was also introduced into the law on January 1, 2008.[240]

Several amendments have been enacted in the Code of Obligations regarding the auditing duties of corporate entities.[241] A duty to audit will be established for various forms of companies, regardless of their legal classification, but will be tied to quantitative turnover thresholds. Where an ordinary audit is not required, a limited review may be sufficient, and under certain conditions there is no audit obligation at all. The ordinary audit is differentiated from a limited review in content and scope on the one hand and the required qualifications for the auditors on the other. The law distinguishes between admitted audit experts and admitted auditors and refers to their qualifications to the new law on supervision on auditors.[242] These changes became law on January 1, 2008.[243]

D. Financial Markets

The Swiss Federal Act on collective capital investments (FCCI) came into effect on January 1, 2007, replacing the former Swiss Federal Act on investment funds

238. *See* Press Release, Federal Department of Justice and Police, L'Autorité de Surveillance en Matière de Révision Entame son Activité (Aug. 22, 2007), *available at* http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2007/2007-08-22.html.
239. Code des Obligations [Co], art. 773.
240. *See* Official Federal Dispatch 2002, 3148.
241. Code des Obligations [Co], art. 727 ff.
242. Arthur Meier-Hayoz & Peter Forstmoser, Schweizerisches Gesellschaftsrecht 525 (10th ed. 2006); *see also* Federal Law on the Recognition and Supervision of Auditors (ASA), [SR] 221.302, AS 2855 (2007), *available at* http://www.admin.ch/ch/d/sr/c221_302.html.
243. Press Release, Federal Department of Justice and Police, Entrée en Vigueur de la Révision de la Convention sur le Brevet Européen (Oct. 17, 2007), *available at* http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2007/2007-10-17.html.

(FIF).[244] The previous scope of application of the FIF to contractual forms of collective investments is no longer valid; the new FCCI governs existing and future forms of collective capital investments. Investment foundations and quoted investment companies with a fixed share capital (French "SICAF"), however, are not subject to the new act. Further, the FCCI introduces new forms of legal entities, namely the investment company with a variable share capital (French "SICAV") and limited partnerships for collective investments.

The revision of the Stock Exchange Act (SESTA) implements tougher disclosure rules and addresses the regulation of certain derivative structures used by raiders to avoid early disclosure requirements. Until previous law, anyone acquiring more than 5 percent of the shares and options of a company listed on a Swiss stock exchange was required to make a public disclosure. To avoid this requirement, however, one could acquire separate blocks of shares and options—each slightly below the 5 percent threshold—simultaneously without triggering the disclosure obligations. The new amendment decreases the lowest percentage threshold, triggering a reporting requirement from 5 percent to 3 percent, and further defines the notion of an indirect transaction in order to aggregate acquisitions. In addition, the Act now includes the possibility of a temporary or permanent suspension of the voting rights of an acquirer that does not disclose properly. These changes became effective on December 1, 2007.[245]

According to the Federal Act on Supervision of the Financial Market (FINMA Act), the Swiss Federal Banking Commission (FBC), the Swiss Federal Authority for Private Insurances (FOPI), and the Money Laundering Control Authority (MCLA) will be integrated into one single authority in capital market matters, which will be called the Federal Financial Market Supervisory Authority (FINMA)—an autonomous authority under public law.[246] The FIMNA Act will enter entirely into force on January 1, 2009. Initial implementation begins in early 2008, with a partial enactment of the FINMA Act and the election of the advisory board by the Federal Council.[247] The FINMA Act effectively functions as an umbrella law covering financial market supervision and contains principles on financial market regulation, rules on liability, and harmonized supervisory instruments and sanctions.

244. System atische Sammlang des Bundesrechts [SR] 951.31, AS 5379 (2006), *available at* http://www.admin.ch/ch/d/sr/c951_31.html. *See* Official Federal Dispatch 2005, 6395.

245. *See* Bundesgestesetz über die Börsen und den Effekten handel, http://www.admin.ch/ch/d/ff/2007/4533.pdf. These amendments have also made it necessary to adopt the Ordinance of the Swiss Federal Banking Commission on Stock Exchanges (SESTO-FBC). The first amendments to the SESTO-FBC came into force on July 1, 2007, and address disclosure obligations (*e.g.*, pursuant to the revised provisions, cash-settlement options now must be disclosed and shares and options are to be considered jointly when calculating the relevant notification threshold). The SFBC is currently working on additional changes. *See* SFBC, Letter, La Commission Fédérale des Banques (CFB) met en Consultation un Projet de Révision Partielle de l'Ordonnance de la CFB sur les Bourses (OBVM-CFB) (Oct. 2, 2007), *available at* http://www.ebk.admin.ch/f/regulier/konsultationen/20071002_01_f.pdf.

246. *See* Press Release, Federal Administration, The Federal Council Adopts Dispatch on Federal Financial Market Supervision (Feb. 1, 2006), *available at* http://www.news-service.admin.ch/NSBSubscriber/message/en/2729.

247. *See* Press Release, Department of Federal Finance, Surveillance des marchés Financiers: Début de la Mise en Oeuvre (Oct. 12, 2007), *available at* http://www.efd.admin.ch/00468/index.html?lang=fr&msg-id=15132.

XIV. Turkey

A. European Union Accession

In 2007, Turkey made further progress in bringing its legislation into line with E.U. standards. The pace of the reform process, however, abated compared to the preceding year. One important reason for this may be the decision of the European Council in December 2006, in accordance with recommendations of the European Commission,[248] not to open eight of the negotiation chapters mainly due to political issues concerning Cyprus until the Commission confirms that Turkey has fulfilled its commitments in this regard.[249] Nevertheless, the chapter on "Science and Research" was provisionally closed, and at the third meeting of the Accession Conference with Turkey in June 2007, two new chapters, "Statistics" and "Financial Control," were opened, with benchmarks noted. The Conference also confirmed the commencement—at the ministerial level—of negotiations on the "Enterprise and Industrial Policy" chapter, which had previously been opened at the deputy level.[250] Enlargement remains at the top of the agenda in the Commission's 2008 policy strategy.[251]

B. Legislative Developments

The last quarter of 2006 and the first half of 2007 set the scene for a number of legislative developments. Perhaps the most important law enacted in 2007 is the long-awaited Mortgage Law,[252] which aims to: 1) satisfy the infrastructure needs for the housing-finance system, 2) enable an expansion in capital markets for Turkish and foreign investors through creation of new debt instruments, finance institutions and different types of funds, and 3) develop a full-fledged mortgage system comparable to E.U. standards. In the area of securities, the Capital Markets Board has published secondary legislation, relating to topics such as intermediary institutions, derivative transactions, and mutual

248. *See* Press Release, European Commission, Commission Presents Its Recommendation on the Continuation of Turkey's Accession Negotiations, IP/06/1652 (Nov. 29, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1652.

249. *See* Press Release, Council of the European Union, 2770th Council Meeting, General Affairs and External Relations (Dec. 11, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/06/352&format=HTML&aged=1&language=EN&guiLanguage=fr. *See*, Press Release, Council of the European Union, Presidency Conclusions: Brussels European Council (December 14-15, 2006), 16879/1/06 REV 1 (Feb. 12, 2007), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/92202.pdf

250. *See* Press Release, Council of the European Union, Third Meeting of the Accession Conference at Ministerial Level with Turkey, Brussels, (June 26, 2007), 11233/07 (Presse 154), *available at* http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/94975.pdf

251. *See* Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Annual Policy Strategy for 2008, Eur. Parl. Doc. (COM 2007) 65 final, *available at* http://ec.europa.eu/atwork/synthesis/doc/aps_2008_en.pdf.

252. Law No. 5582 on Amendments in Various Laws Related to House Financing System, (Official Gazette No. 26454, March 6 2007). For an unofficial translation of the Mortgage Law into the English language, see the Capital Markets Board website: http://www.cmb.gov.tr/housingfinance/mortgage_law.pdf. The Mortgage Law amends the provisions of several laws, such as Law of Foreclosure and Bankruptcy No. 2004, Capital Markets Law No. 2499, Consumer Protection Law No. 4077, Stamp Duty Law No. 488, Value Added Tax Law No. 3065, and Duties Law No. 49.

funds.[253] Turkey also recently ratified laws on geothermal energy and on the establishment and the operation of the first nuclear power plants in the country.[254] Certain articles of the latter, however, were vetoed by the President. In addition, there has been new legislation concerning public procurement[255] that attempts to harmonize Turkish procurement rules with E.U. legislation as well as legislation imposing restrictions with respect to online gambling and betting activities.[256] Finally, a new law,[257] commonly known as the Ombudsman Law, establishes an authority to monitor the actions and operations of governmental offices and bodies and to conduct public audits.

In the area of competition policy, a draft legislative bill to amend the Turkish competition law to enable further compatibility with EU legislation has been prepared by the Competition Authority to be presented to the parliament.

253. Communiqué Amending the Communiqué on Principles Regarding Internal Audit System to be Implemented on Intermediary Institutions (Serial V, No. 89), (Official Gazette No.26470, Mar. 22 2007; Communiqué on the Incorporation and Operation Principles of Derivative Transactions Intermediary Companies (Serial V, No. 90), (Official Gazette No. 26485, Apr. 6 2007); Communiqué on Amending the Communiqué Regarding the Principles on Mutual Funds (Serial VII, No. 33), (Official Gazette No. 26532, May 25 2007); Communiqué Amending the Communiqué on Principles Regarding Record Keeping and Documentation in Intermediary Activities (Serial V, No. 93), (Official Gazette No. 26566, June 28, 2007).

254. Law No. 5686 on Geothermal Sources and Natural Mineral Waters came into force on June 13, 2007.

255. Law No. 5680 amending Public Tender Law and Public Tender Agreements Law (Official Gazette No. 26545, June 7, 2007).

256. Law No. 7258 on Betting Activities Related to Soccer and Other Sports Matches, published in the (Official Gazette No. 26448, February 28, 2007) and (Official Gazette No. 26530, May 23, 2007.

257. Law No. 5548 on Public Auditorship Authority, published in the Official Gazette No. 26318, October 13, 2006.