Corporate and Commercial Law – global update

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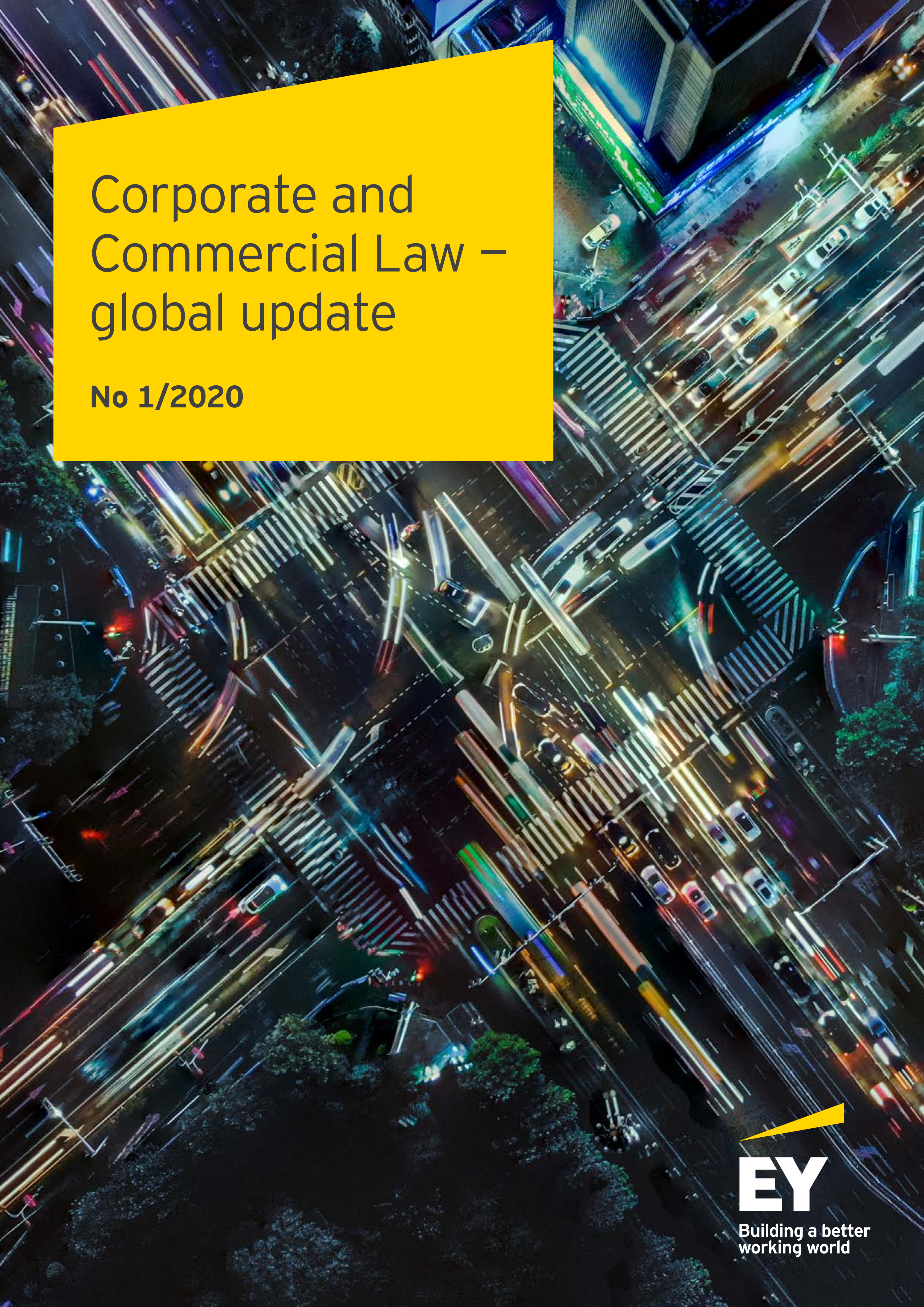

Building a better working world

Editorial

Dear reader,

We are pleased to present the latest edition of EY Corporate and Commercial Law global update, the purpose of which is to inform EY clients and colleagues of the noteworthy and most recent legal news across a number of jurisdictions.

In this issue, we have articles from a total of 26 jurisdictions on current legal affairs around the globe, covering Western Europe, South America, Central and Eastern Europe and Asia-Pacific.

The articles in this global update reflect the global reach and diversity of EY Law services, from corporate law to civil law and commercial law to regulatory aspects. If you wish to receive more detailed information on Law services from the global EY network or on the topics discussed in this issue, please feel free to reach out to us. You will find contact details for each of the countries where EY member firms offer Law services at the back of this publication.

Across the global network of EY member firms today, there are more than 3,500 qualified professionals providing services for the legal function within 86 jurisdictions. Apart from offering specific tailor-made legal advice for a number of business needs, we also cover a wide range of sectors: automotive and transportation, banking and capital markets, consumer products and retail, government and public sector, health, insurance, life sciences, media and entertainment, oil and gas, power and utilities, private equity, real estate and hospitality, technology and telecommunications. EY lawyers work closely alongside professionals in Assurance, Tax, Transactions and Advisory. Working across borders, the sector-focused, multidisciplinary approach means EY member firms offer highly integrated and broad pertinent advice across the globe.

Kind regards,

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In this issue

This bi-annual publication highlights a range of international corporate law matters and covers recent law developments in specific countries.

Australia

Australian Securities and Investments Commission (ASIC) considers formalizing grant relief rules for transactions under deeds of company arrangement

In Australia, section 444GA of the Corporations Act 2001 generally permits share transfers under a deed of company arrangement (DOCA). However, certain transactions are prohibited under section 606 of the act, including transfers under a DOCA that result in a shareholder's voting power in the company increasing above 20% or any transaction involving shareholders that hold an existing 20% but less than 90%. This is for listed entities, nonlisted entities with more than 50 shareholders, listed registered management investment schemes and other listed entities formed in Australia. Shareholders can apply for ASIC relief from this prohibition.

While the act proscribes specific exemptions to the prohibition, ASIC has general discretionary power to consider applications on a case-by-case basis to grant exemptions. There has been no formalized policy establishing a framework for such relief. However, under a consultation paper issued in January 2020, ASIC is proposing to formalize a policy on relief from the prohibition.

Since 2004, ASIC has been involved in 11 matters involving DOCA transfers. As shareholders are having their shares expropriated, often for no consideration, some of these matters have been highly public, controversial transactions, where shareholders have exerted their rights to object in court.

The focus of ASIC in exercising its discretionary power is to prohibit prejudicing shareholders. By formalizing this policy, ASIC believes it will"provide certainty for all stakeholders and ensure that shareholders receive information equivalent to a standard control transaction."[1]

The policy proposed indicates that ASIC will only grant relief under section 606 in the following circumstances:

- An independent expert report (IER) is delivered to shareholders with an explanatory memorandum setting out the nature of the application and their rights to object.
- The IER is only required to be prepared with the inclusion of a liquidation valuation; an IER is not required to include an ongoing concern valuation.
- The IER must be prepared by an author who is not the appointed administrator to avoid a heightened perception of a lack of independence.

This proposal formalizes the existing approach adopted by ASIC to consider granting relief from the prohibition under section 606 and allow section 444GA DOCA transfers.

The consultation period ended on 28 February 2020, and ASIC will seek to formalize its policy on the basis of submissions received as part of the consultation process.

[1] Source: ASIC media release – accessible at https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-009mr-asic-consults-on-s444ga-share-transfers-under-a-deed-of-company-arrangement/

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Austria

New rules on say on pay and related-party transactions

The EU Shareholders' Rights Directive (2017/828/EU) regards the encouragement of long-term shareholder engagement and has been implemented in the Austrian Act on Stock Corporations and the Austrian Stock Exchange Act:

1. Say on pay

Listed companies have to set up a remuneration policy describing the different components of fixed and variable remunerations for the board of directors and the supervisory board. The remuneration policy has to be submitted to vote at the annual general meeting in 2020 for the first time. Such vote is only advisory, and the right to challenge a shareholders' resolution on the remuneration policy has been explicitly excluded in the Austrian Act on Stock Corporations. If the general meeting rejects the proposed policy, a revised policy must be presented at the next general meeting.

A remuneration report providing a comprehensive overview of the actual remuneration, including all benefits in whatever form — paid, awarded or due — to the individual directors and supervisory board mem-bers must be presented to the annual general meeting each year, as of 2021 onward. The requirements on reporting obligations and transparency exceed the current reporting requirements related to remuneration in the corporate governance report under Austrian law.

2. Related-party transactions

Material related-party transactions of listed companies require the approval of the supervisory board prior to the execution of the transaction. However, approval of the general meeting to related-party transactions in not required in Austria.

A transaction is considered material if the transaction value exceeds 5% of the balance sheet total or 10% of the consolidated balance sheet total for a group company, which has to draw up consolidated financial statements. Related-party transactions with a value exceeding 10% of the balance sheet total must be published by the company at the time of their execution. Austria used all exceptions available in the shareholder directive when implementing rules on related-party transactions to limit approval and publish-ing requirements to a minimum.

3. Outlook

Rules on the identification of shareholders and new obligations of intermediaries as outlined in the shareholder directive have been implemented in the Austrian Stock Exchange Act. These provisions will enter into force on 3 September 2020.

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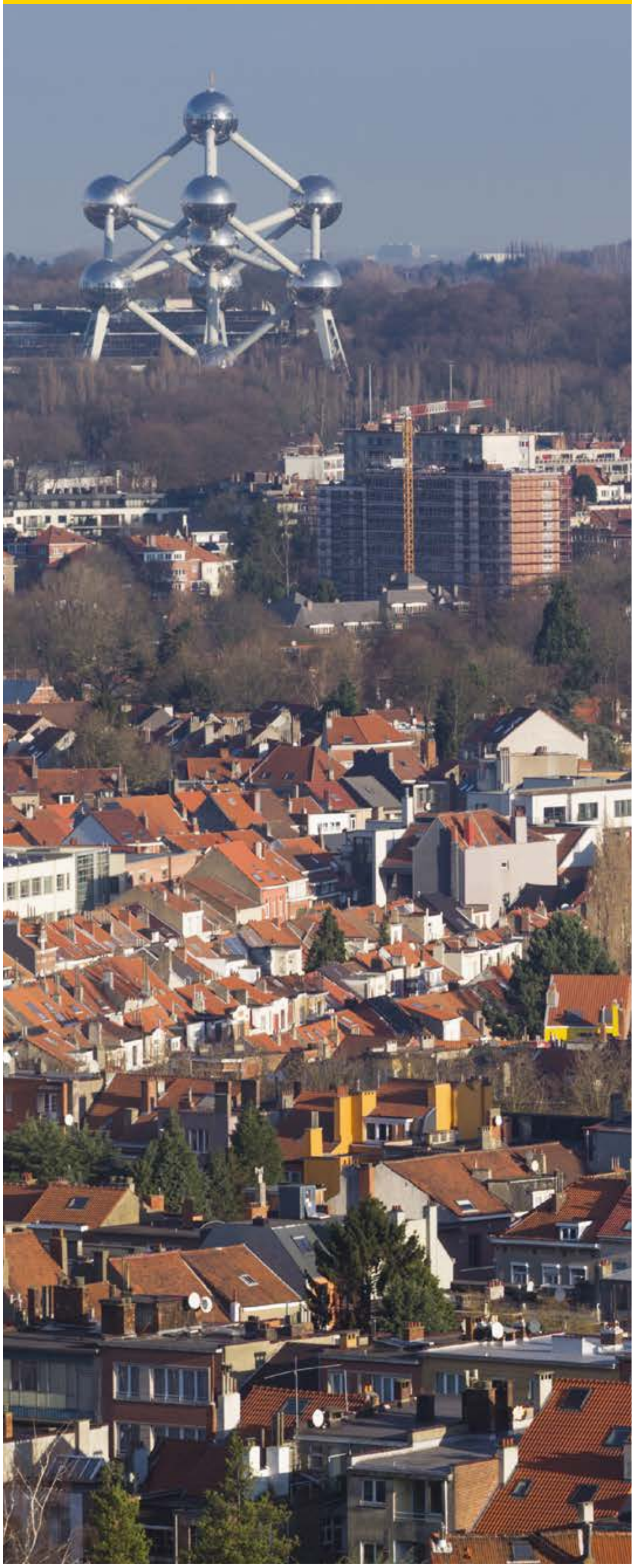

From the real seat theory to the statutory seat theory

According to the new Belgian Code on Companies and Associations, the Belgian legislator recently decided to change the real seat theory into a statutory seat theory. This new principle entered into force with immediate effect on 1 May 2019, for both newly incorporated and existing companies. This has direct implications on the nationality of companies and the applicable laws.

The new statutory seat theory means that the location of a company's principal establishment determines its nationality, but only if the company's country of residence is designated in its articles of association. This allows companies to develop their activities abroad while retaining their legal personality and functioning bodies, regardless of whether there is a commercial link between the nondomestic company and the host state.

However, as a consequence of adopting the statutory seat theory, companies may lose their Belgian nationality while other companies may suddenly, involuntarily, acquire Belgian nationality or a dual nationality — or worse, become stateless. This is why it is essential to be aware of the implications of the statutory seat doctrine.

For example, companies with their real seat in Luxembourg and their statutory seat in Belgium had the Luxembourg nationality until 30 April 2019. After this date, these companies obtained the dual nationality of Belgium and Luxembourg. Consequently, these companies must comply with the laws of both countries, which is time-consuming and entails extra costs.

As each country is free to opt for the statutory seat doctrine or the real seat doctrine, an examination of the possible implications for each Member State is necessary. In addition, each country can apply for either doctrine in a reduced or stricter form, though the result of this impact may differ from country to country.

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Brazil

Sanctioned law allows the existence of limited liability companies with only one shareholder

On 20 September 2019, Brazil enacted Law 13,874, which amended the Brazilian Civil Code to allow limited liability companies (LLCs) to be incorporated with a single shareholder, now known as a sole shareholder LLC. The law applies to new and existing LLCs.

In this sense, a new LLC may be incorporated with a single shareholder, and existing ones, when and if they wish to, may continue their activities as a sole shareholder LLC. The sole ownership of a company may result from a corporate reorganization event (e.g., spin-off), and there is no impediment for a foreign legal entity, for example, to be a sole shareholder, subject to the limitations already imposed by law for certain activities.

For existing LLCs wishing to continue their activities with only one shareholder, it will be necessary to "convert" to a sole shareholder LLC and amend their articles of association. The conversion will not affect the company's registration number with the Brazilian Federal Revenue (the CNPJ).

The sole shareholder LLC should not to be confused with the EIRELI (which is a type of individual LLC), as the EIRELI requires a minimum share capital of at least 100 times the value of the current minimum wage and limits the number of companies held by the individual shareholder.

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Bulgaria

Unfair competition infringements in Bulgaria triggers more frequent and significant fines

Generally, any economic activity that does not conform to good-faith commercial practices and distorts competitors' interests in Bulgaria is prohibited, including the distortion of competitors' reputations, misleading and prohibited comparative advertising, the imitation of trademarks or domains, and unfair customer enticement by offering free gifts or prizes.

The Bulgarian Competition Authority regularly performs compliance investigations of advertising and promotion activities. Sanctions for an offending company may reach up to 8% of the total turnover for its previous financial year.

The Bulgarian Competition Authority is not limited to imposing sanctions only on entities established and operating on Bulgarian territory; it can also impose sanctions on foreign entities and advertising agencies that create advertising materials broadcasted in the country, even if they are provided worldwide and compliant with regulations of the other countries. Many practices considered worldwide as compliant — such as offering free gifts in beauty magazines, continuous discounts, etc., remain sanctioned because of the peculiarities of Bulgarian law.

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Mainland China

Mainland China seeks to significantly revise its antitrust law

The development of China's economy has led to new risks of anti-competitive behaviors not substantially addressed by China's 2008 Antitrust Law. On 2 January 2020, the State Administration for Market Regulation (SAMR) published a draft revision of the Antitrust Law for public comment. There are significant changes in the draft compared with the 2008 Antitrust Law, which requires further analysis. The changes include:

1. Introducing criminal liabilities for monopolistic behaviors

For the first time, the draft makes it clear that monopolistic behaviors, including monopoly agreements and abuse of dominance, would now trigger criminal liabilities. This would leave space for amendments to criminal laws in the future.

2. Regulating the organizers and facilitators of monopoly agreements

The draft also explicitly prohibits parties from organizing or facilitating a monopoly agreement; the same penalties apply to all parties of the monopoly agreement.

3. Significantly increasing fines for certain unlawful acts

Another important modification is a notable increase in penalties. Penalties would not only be increased by a factor of 10 to 100, but for some types of unlawful acts, there would be no fixed penalties, which would instead be calculated by the previous year's turnover.

4. Clarification on the periodical adjustment of the merger filing threshold

The 2008 Antitrust Law provides for specific thresholds for merger filings:

- For the global standard: the total global turnover of all operators exceeds RMB 10 billion in China with at least two of them each having a turnover exceeding RMB 400 million in Mainland China.
- For the China standard: the total turnover of all operators exceeds RMB 2 billion in China with at least two of them each having a turnover exceeding RMB 400 million in Mainland China.

As the above thresholds are relatively low, it is much easier for many large companies to trigger filings in Mainland China when doing some mergers.

For companies doing business in Mainland China, the draft is a solid basis for them to put more emphasis on antitrust-law compliance within Mainland China by evaluating legal risks from both daily operations (e.g., whether any monopoly behavior is involved) and investment projects (e.g., whether any merger filing obligation is triggered).

In this issue, similar topics are covered in the sections dedicated to France and Russia.

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Colombia

Special advantages granted to collective interest companies

The Decree 2046, issued on 12 November 2019, regulates the *Sociedades de Beneficio e Interés Colectivo*, also known as BICs.

BICs are companies whose corporate purpose consists of activities of collective interest. Therefore, this category is acquired by amending the company bylaws in both, the corporate name and the corporate purpose. In general, these types of companies should act for the benefit of the general interest and the environment, and beyond the shareholder's interest, but they remain for-profit companies. Therefore, BICs generate a triple impact: financial, social and environmental.

Among the main mandates of BICs are to: pay reasonable salaries for its employees; grant subsidies for professional development of its employees; promote the participation of minorities in the board of directors; perform environmental audits regarding the efficient use of energy, water and waste; divulge financial statements to its employees; grant stock options to its employees; and implement fair trade practices.

Decree 2046 also details that the management report should be prepared to demonstrate, both from a qualitative and quantitative manner, the impact of activities developed through the business model, corporate governance and labor, environmental and social practices.

Special advantages are granted to BICs and should be deployed by the Colombian Government in the next months. They include the following: preferential access to special credit lines, to be created by the Government; tax-free treatment for dividends distributed by the BICs to their employees; and a preferential portfolio of intellectual property services. These incentives are aimed to promote adoption of the BIC status, as part of the Colombian Government's aim to boost creative industries, or the so-called "orange economy."

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Estonia

Disproportional dividends in Estonia

The Estonian Commercial Code requires all shareholders of a private limited company to be treated equally under equal circumstances. The distribution of profits usually follows the general principle that dividends should be proportionate to the respective share held by the shareholder. This, however, does not rule out the possibility of unequal dividend distributions.

A company's articles of association may prescribe specific rights related to a share or a shareholder and can therefore be used to set rules for distributing profits that are not in proportion to the shares of the company's shareholders. While the votes of at least two-thirds of the shareholders are usually required to amend the articles of association, creating inequality among shareholders requires the additional approval of the very shareholders affected by the amendment.

The shareholders can shape the specific rights related to dividend distribution depending on the situation at hand, e.g., to tie them to a specific deadline, distribute dividends disproportionately or not distribute dividends to specific shareholders. For example, a shareholder may have periods where their ability to contribute to the activities of the company may be limited, which would make it only fair to modify the distribution of profits for that period. Where investors are involved, dividend limits on shareholders may be a good way to speed up the repayment process.

Why not change the shareholdings, then? This would enable dividends to be distributed in proportion to the shareholdings. Such temporary change of ownership, however, is risky. How can it be assured that the shareholding is later transferred back to the original owner and that the change of ownership is only temporary? These risks can be easily avoided by regulating the distribution of profits in the company's articles of association to achieve the desired unequal distribution.

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Finland

Annual compliance — a tool rather than an obstacle

In Finland, both public and private limited lability companies have an obligation to file their financial statements to the trade register within two months of the annual shareholders' meeting. If the company does not file its financial statements despite notifications from the trade register authority, the company may be taken off the trade register if they are not filed within a year after the end of the financial period. A company that has been removed from the trade register is not permitted to handle any business in Finland.

While statutory compliance is usually properly complied with by Finnish companies, internal compliance and governance may be followed less frequently.

The Supreme Court's ruling in 2016 recalls the importance of internal compliance. According to the referred case, the Supreme Court held that there was no internal documentation relating to the delegation of specific responsibilities to the managing director or named members of the board of directors. As a consequence, the members of the board, who considered themselves as external specialist members, were held liable for the environmental breach caused by the company.

It is important to note that delegation based on practice is not valid proof when estimating the liability of company directors from a legal point of view. Therefore, if there is any delegation of responsibilities from the board or within the board, it is crucial that this be properly documented.

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France

New law enables French companies to define a purpose beyond profits

On 22 May 2019, France enacted a new law to promote the growth and transformation of businesses, known as the PACTE law.

This new regulation appears to contain an underlying incentive for French companies to consider their impact on society and define a purpose that goes beyond profits.

This new law enshrines corporate interest as a condition for the proper management of a company.

The law does not set out a definition of corporate interest, but it is now clearly stated in Article 1833 of the French Civil Code that French companies must be managed in their interest while considering the social and environmental impact of their activity.

In practice, social and environmental matters will have to be taken into account for the decision-making process, and this will have to be documented.

In addition, Article 1835 of the French Civil Code provides that any company may specify in its articles of association a rationale: a purpose consisting of the driving principles the company has adopted that guide its resource allocation and activities.

Further, while it is still on a purely voluntary basis, French commercial companies can now become benefit corporations. A benefit corporation's articles of association must:

- Provide a rationale.
- Set out one or more social and environmental purposes.
- Set forth the conditions for monitoring these purposes; a specific corporate body will be responsible for carrying out any control deemed appropriate. In addition, benefit corporations must be audited by an independent third party.

Finally, companies providing a rationale or companies becoming benefit corporations must lay down principles in their articles of association, which must be respected. Failure to do so could open the way to new disputes, notably in respect to corporate officers' civil liability, particularly if the company suffers damage.

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Gabon

Data protection legislation in Gabon

The Gabon General Personal Data Protection Law (Law No. 001/2011) was published on 2011 but not enforced.

However, given the many issues surrounding the processing of personal data and the confidentiality that this may require, the application of this law is now strictly followed by the authorities.

As such, the law establishes the obligation for any natural or legal person who collects and processes personal data in Gabon to obtain prior authorization from the national data protection authority, called the National Commission for the Protection of Personal Data (CNPDCP).

The CNPDCP is organized as a regulatory, supervisory, judicial and enforcement authority.

According to the law, personal data means any information relating to an identified or identifiable natural person directly or indirectly by reference to an identification number or to one or more elements specific to his or her physical, physiological, genetic, mental, cultural, social or economic identity.

Thus, before carrying out the collection and automated processing of personal data, users are required to send a request to the CNPDCP.

Users who process personal data are subject to the payment of fees, the amounts of which vary depending on the type of processing carried out.

Noncompliance with the law may result in fines that are solely determined by the CNPDCP.

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Georgia

Mediation: a way to resolve disputes effectively

Georgia has signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention) on 7 August 2019 and adopted the Law of Georgia on Mediation on 27 September 2019.

The Singapore Convention has more than 45 signatories and creates a common platform for its members to become attractive forums for dispute settlements through mediation. One of the aims of the Singapore Convention is to facilitate international trade and commerce by enabling disputing parties to easily enforce and invoke settlement agreements across borders. More precisely, Article 3(1) of the convention obliges each signatory state to enforce international mediation settlement agreements, thus creating a direct enforcement mechanism. By signing the convention, Georgia made an important step to make itself available as a respectable forum for dispute resolutions through alternative means.

Georgia's newly adopted law on mediation, on the other hand, supports alternative means for dispute resolution on a national level. According to the explanatory note accompanying the bill, the law is designed to support the accessibility and efficiency of justice and to discharge courts from disputes, which has the prospect for resolutions by mutual agreements to a maximum extent.

The law on mediation supports the implementation of a mediation institute within the alternative dispute resolution system of Georgia. The law presents contemporary standards of the mediation process, implements most of the accepted model for institutional mediation, and pushes its development without any obstruction.

In conclusion, signing the Singapore Convention and adopting the law on mediation have introduced Georgia to new opportunities in the field of alternative dispute resolution, both on international and national levels.

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Germany

Social security obligations for board members of monistic European companies

The discussion on the assessment under social security law for Societas Europaea (SE) companies is in full swing. Two recent judgments from social courts deal with the social security obligation of board members of an SE.

The legal foundations of SEs can be found in the Council Regulation on the Statute for a European Company and the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees. The SE regulation deals with the framework conditions under company law and additionally refers to laws of the state in which the SE has its registered office. Consequently, the provisions of the German Social Code apply to an SE with its registered office in Germany. The SE regulation is concretized by the act implementing Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the statute for a European company.

Both decisions contain good news for board members of monistic SEs. The judges affirm in all cases the employment of dependent members on the board of directors. However, the prerequisites for exemption from the statutory social insurance obligation are ultimately met by both the pure member of the administrative board and the executive director working in the administrative board. The court decision does not affect executive directors that are also members of the administrative board.

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Greece

Rules related to the General Commercial Registry have been simplified

The newly published incentive law 4635/2019 Invest in Greece and Other Provisions features a number of reforms, including those related to the operation of the General Commercial Registry (GEMI), which in the past had been regarded as bureaucratic and inflexible.

The purpose of the law is to harmonize GEMI with recent amendments on corporate legislation for public limited companies (SAs), limited liability companies (LLCs) and company transformations. The law also promotes the modernization, digital integration and simplification of GEMI's operation.

One of the basic changes introduced by the law is to allow automated electronic procedures, not only for businesses but also with the public sector through GEMI's information system.

Another novelty of the law is the introduction of the Good Standing Certificate, which addresses the need for a consolidated certificate similar to the one issued in other European Union jurisdictions.

Moreover, the framework of administrative penalties and fines is set (from EUR 500 to EUR 100,000) in proportion to the severity of the violation. In this regard, a joint ministerial decision of the competent Ministers of Finance and Development and Investments is anticipated to regulate certain related, pending issues. This includes identifying the criteria for the imposition of fines, the exact amount of the fines, the procedure for the imposition and the collection of the fines.

The law's application for GEMI went into effect February 2020. Undoubtedly, it is expected to contribute positively to the modernization of GEMI's operational framework and simplify the procedures of registered persons and any interested third party. However, there are not enough details in the above provisions; this lack will be remedied by future ministerial decisions and practices to be established by GEMI.

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Hong Kong

Biotechnology company listings in Hong Kong

The Hong Kong Stock Exchange introduced a listing regime in 2018 to allow "pre-revenue" biotech companies to list in Hong Kong. A number of biotech companies were listed in 2018 and 2019 under the new regime. Such listings demonstrated how the new requirements and the regulator's guidance were applied in practice.

A biotech listing applicant must have been in operation in its current line of business for at least two financial years prior to listing under substantially the same management. It also must have at least one core product beyond the concept stage (i.e., it has met the relevant developmental milestones). The core products may be pharmaceutical (small molecule drugs), biologics, medical devices or other biotech products.

The applicant must have been primarily engaged in research and development (R&D) for its core products for at least 12 months prior to listing. It must also have registered patents, patent applications or intellectual property related to its core products. The applicant's primary reason for fundraising in the IPO should be to finance R&D to bring its core products to commercialization.

The applicant must have received meaningful investment from at least one sophisticated investor at least six months before the IPO (which must remain at IPO). This is to demonstrate a reasonable degree of market acceptance for the applicant's R&D and biotech products. Whether an investor is sophisticated is assessed on a case-by-case basis by referring to factors such as assets under management, relevant investment experience, and the investor's knowledge and expertise.

Upon listing, the biotech applicant must have an initial market capitalization of at least HK$1.5 billion (about US$192 million), out of which at least HK$375 million (about US$48 million) is held by the public at the IPO. The applicant must have sufficient working capital available to cover at least 125% of its costs for at least 12 months following the publication of its prospectus.

The new regime also allows dual primary listing. The first biotech company that did so was listed in Hong Kong in August 2018, and its American depository shares were listed on Nasdaq.

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India

Prohibition on outbound cross-border demergers

In a landmark judgment, the National Company Law Tribunal, Ahmedabad (NCLT) bench has held that the Companies Act, 2013 does not permit outbound cross-border demergers.

In this particular case, an Indian company filed a petition seeking sanction from the NCLT for a demerger and transfer of two of its undertakings to two overseas companies.

While considering the petition, the NCLT distinguished between the provisions of the Companies Act applicable to Indian companies and those applicable to foreign companies as follows:

i) The provisions applicable to Indian companies contain the terms “compromise” and “arrangement,” which are inclusive of the concept of a demerger.

ii) On the other hand, the provisions applicable to foreign companies are limited to “merger” and “amalgamation,” and do not provide for the demergers of Indian companies with foreign companies.

The NCLT further noted that while the draft of the Foreign Exchange Management (Cross-Border Merger) Regulations, 2018 contained the provisions for a “demerger,” the same were expressly excluded from the notified regulations.

In light of the above, the NCLT concluded that the intention of the legislature was to disallow cross-border demergers. Accordingly, the NCLT held that while outbound mergers and amalgamations are allowed under Indian laws, outbound demergers are not permitted.

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Ivory Coast

Criminal liability of company officers

The Organization for the Harmonization of Business law in Africa (OHADA) treaty's purpose is to foster economic development, the integration of African countries' economies and legal stability. It aims to;

- Ensure that all Member States have the same harmonized business law
- Promote arbitration as a means of settling contractual disputes
- Improve the education and skills of judges and officers of the courts

To date, 17 countries in Africa are members of the treaty: Benin, Burkina Faso, Cameroon, the Central African Republic, the Comoros, Ivory Coast, Gabon, Guinea, Senegal, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Chad, Togo, Congo and Congo DRC.

The OHADA Uniform Act on the law of commercial companies and the Economic Interest Group (GIE) establishes the principle of criminal liability for corporate officers.

As such, the law at the moment does not provide any provision regarding the liability of legal persons. Only company officers (directors, managers, etc.) — those who direct these legal persons — can be sought for offenses committed within the company.

Thus, under OHADA law, the criminal responsibility of social leaders is engaged even if they ignore the offenses for which they are being accused because these offenses cannot be endorsed by the legal person.

For example, officers are liable in the following circumstances:

- In the absence of inventory or by means of fraudulent inventory, they have knowingly distributed fictious dividends to shareholders.
- They have published or presented to shareholders information that hides the true financial situation of the company; their summary financial statements do not reflect each financial year or give the true picture of the compay's financials.
- In bad faith, they use the goods or credit of the company contrary to its interest for personal reasons or in favor of another company in which they have their own interests, directly or indirectly.

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Japan

Japan tightens rules on foreign investment

On 22 November 2019, the Japanese National Diet approved a package of amendments to the Foreign Exchange and Foreign Trade Act, which sets out rules on foreign investments. The amendments will lower the threshold for pre-transaction approval from the current 10% to 1% for a foreign investor to acquire shares in Japanese listed companies in sensitive sectors. The amendments are expected to come into force in spring 2020 after the Ministry of Finance finalizes the rules in the subordinate regulations.

Consistent with the global trend by several countries, such as the US and UK, in restricting foreign direct investments in a range of sectors on national security grounds, these amendments follow earlier amendments from August 2019, which broadened the scope of sensitive sectors (for both listed and unlisted companies) to include products and software that pose cybersecurity risk. Examples of other sensitive sectors covered by the rules include weapons production, aerospace, power and utility, telecoms, broadcasting, railways and biological products.

The amendments are attracting a lot of attention from investors. To avoid deterring portfolio investments by foreign asset managers, the latest amendments include an exemption for passive investments under certain conditions. This will include not exercising material influence over the management of the company or having access to technology relevant to national security. The exemption will not be available to investments in companies in highly sensitive industries. The Ministry of Finance also intends to publish a roster of all listed companies, classifying each as either subject to the pre-transaction review and clearance and those that are not.

The rules require legal practitioners to undertake a careful analysis to determine whether an investment in a wide range of businesses, whether listed or unlisted (including even an intra-group restructuring transaction), will trigger the preclearance requirement.

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Luxembourg

Inactive entities to be removed from the Luxembourg Register of Commerce and Companies

The Luxembourg Business Registers, which manages the Luxembourg Register of Commerce and Companies (RCS), issued a notice on 13 January 2020 that it will start removing inactive entities in accordance with articles 18 and 19 of the Grand-Ducal Regulation of 23 January 2003.

To be considered "inactive," the relevant entity must have failed to make any filing with the RCS in the past 10 years.

The concerned entities will be informed by mail ahead of time and will have 30 days to submit comments or regularize their situation with the RCS.

The strike-off will not apply to natural persons carrying out an activity in their own name, nor to civil companies and public entities.

The procedure will be as follows:

- Any company that has not made a filing with the RCS for 10 years will receive a notice of striking-off by mail.
- The company will have the opportunity to react within a month to present observations or to regularize its situation.
- If no response is received by the RCS within one month, the words "automatically struck off" will be published in the RCS file for the company.

The procedure is not a sanction per se, but it is a means for the RCS to find out which companies have indeed ceased to exist.

If an automatic striking off is pronounced by the RCS, the company, despite being struck off, will continue to legally exist since the automatic strike-off will not lead to the dissolution of the company.

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Netherlands

The Dutch Act on Shareholders' Rights

A Dutch act to implement the revised EU Shareholders' Rights Directive (2017/828/EU) was adopted by the Dutch Parliament on 5 November 2019 and went into immediate effect on 1 December 2019. The purpose of the act is to further promote active and transparent shareholder engagement in listed companies for the long term. The Dutch implementation is a rather "light" one, apart from some aspects related to the remuneration of directors. We provide an overview of changes regarding remuneration as contained in two new articles in the Dutch Civil Code.

A company's remuneration policy and report must be clear and easy to understand. The act contains a list of subjects that must be reflected in both, and it must cover the management board or executive directors as well as the supervisory board or non-executive directors.

Remuneration policy

At least once every four years, the remuneration policy must be approved by the general meeting. A three-quarters majority of votes is required, unless the articles of association explicitly allow for a lower majority.

Under the current legislation, the works council (if applicable) already has the right to give its views on a new remuneration policy. This right has thus been expanded by converting it into a right of "advice," and this advice also needs to be submitted with the revised remuneration policy to the general meeting.

A temporary deviation from the remuneration policy is possible in cases of "exceptional circumstances." This means circumstances in which the deviation is necessary to serve the long-term interest and sustainability of the company or to ensure its viability.

Remuneration report

Annually, a remuneration report must be submitted to the general meeting for its nonbinding, advisory vote. The remuneration report must set out how the company has taken into account the advisory vote of the general meeting with respect to the previous remuneration report.

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New Zealand

Changes to the Overseas Investment Act announced

The New Zealand Government has announced substantial changes to the Overseas Investment Act 2005 (OIA), which governs foreign investment in certain classes of New Zealand assets.

The changes announced include introducing a new "national interest" test for certain categories of assets.

- The test is aimed at assets such as ports, airports, telecommunication infrastructure, electricity and other critical infrastructure.
- The criteria have not yet been defined, but the test is expected to result in increased scrutiny and compliance obligations for overseas investors in critical New Zealand infrastructure.

It is also expected that the Government will introduce a right to call-in investments that pose a significant risk to national security or public order but do not meet the criteria for a consent application under the OIA. It is expected that this would be used only rarely and in relation to strategically important assets, such as military technology and direct suppliers to New Zealand defense and security agencies.

Other changes signaled include:

- A significant increase in the maximum penalties for noncompliance
- A statutory time frame for decisions by the Overseas Investment Office
- Exemptions for a range of low-risk transactions, including:
  - Leases of less than 10 years
  - Land classified as "sensitive" only because it adjoins "sensitive land"
  - Listed companies that are majority-owned and wholly controlled by New Zealanders

Overall the changes appear to give a more targeted focus to the regime, allowing tighter controls on investments in certain critical assets while reducing the red tape associated with overseas investment in lower-risk assets.

Legislation implementing the changes is expected to be introduced in the next months and is eagerly anticipated. As always, much will turn on how the details of how these changes are implemented in practice.

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Poland

Poland requires the dematerialization of paper shares in Polish joint-stock companies

In 2020, all joint-stock companies and limited joint-stock partnerships are required to eliminate (i.e., dematerialize) their paper shares.

Dematerialization also applies to wholly owned joint-stock companies.

To comply with this new requirement, management boards must sign agreements for maintaining their shareholders register by 30 June 2020 with a brokerage house or a deposit agreement from the Central Securities Depository of Poland (KDPW). They must also summon their shareholders to return any existing paper shares.

On 1 January 2021, all paper shares not returned to the company will expire.

Since 1 January 2020, all joint-stock companies and limited joint-stock partnerships are also required to register their company's website address in the court register.

Dematerialization triggers additional obligations for management boards and shareholders.

As an alternative to dematerialization, private joint-stock companies and limited joint-stock partnerships may want to consider their transformation into a limited liability company, especially if the release of funds accumulated at the compulsory reserve fund (up to one-third of the share capital) is an additional benefit of such transformation.

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Portugal

New law approves the creation of loan funds

In 2017, the Portuguese Securities Market Commission (CMVM) issued a public consultation on the possibility of creating a framework for loan funds, with the purpose of "lending directly from the funds to borrowers," "participating in credit granting consortia," and "acquiring loans from banks or other entities by way of credit assignment."

In September 2019, a decree was finally published that approved the creation of specialized alternative investment undertakings focused on loan origination and participation (called Credit SAIF), which entered into force on 1 January 2020.

Credit SAIF is a financing alternative for Portuguese companies aimed at reducing excessive dependence on bank funding (particularly for small and medium-sized companies), both directly through the granting of loans to companies and indirectly through the acquisition of credits, including defaulted credits, held by banks.

Under the newly approved regime, these entities — which may take the form of loan companies or loan funds — are prevented from undertaking a number of operations, including:

- Short selling and financing securities operations, including securities lending, and the use of derivative financial instruments, except for hedging purposes
- Lending to natural persons, credit institutions, parties related to the Credit SAIF and other collective investment undertakings

Credit SAIF must be managed by collective investment management or venture capital fund management companies, with the exception of loan companies that choose to be self-managed.

Credit SAIF may finance activities by taking out loans, provided that the maturity of those loans extends beyond the duration of the assets they intend to finance. Their leveraging is capped at 60% of their total assets.

The remaining rules for the incorporation, operation and activity of Credit SAIF will be set out in CMVM regulations, which are expected to be published in the next few months.

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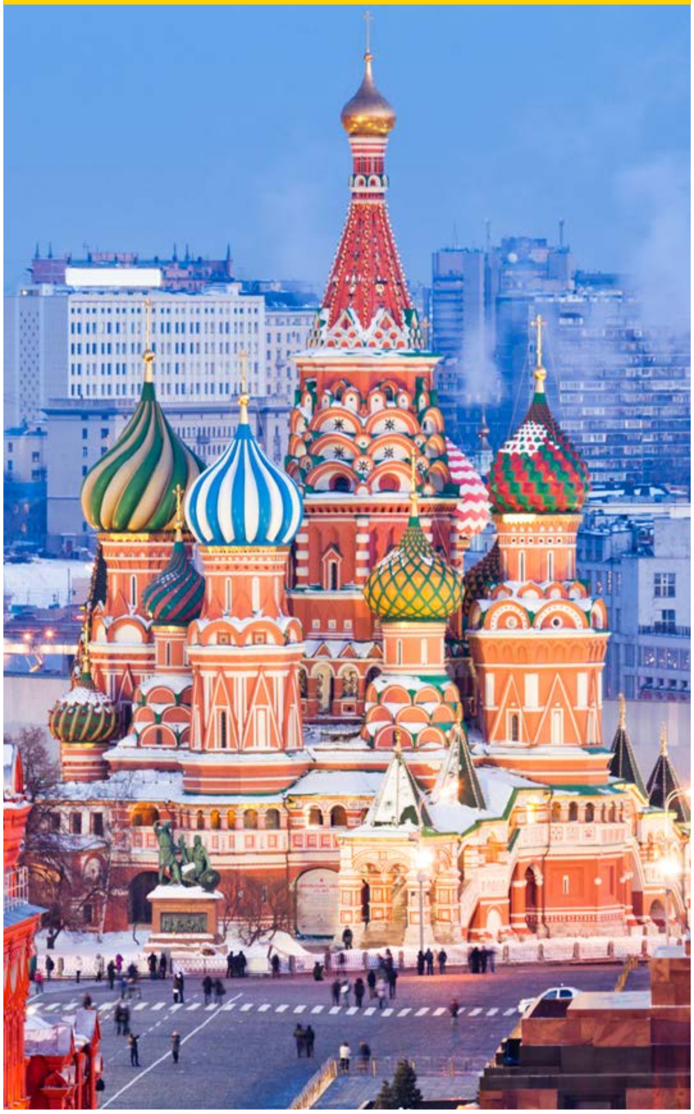

Amendments to the Russian law on investment funds

On 26 July 2019, a law envisaging significant amendments to the legislation on unit investment funds (UIF) and investment funds for qualified investors was adopted in Russia.

In general, these amendments are intended to reduce the regulatory burden on UIFs. The most essential changes consist of the following:

- Assets of a UIF will now be subject to an annual audit only if this is expressly required by the management rules. However, the requirement for an annual audit of the management company itself remains in place. Previously, the UIF's assets were subject to mandatory audit, together with its management company, which was definitely an excessive requirement given that transactions involving the UIF's assets are monitored by the specialized depositary on a daily basis.
- The model rules on UIF asset management, which calls for mandatory compliance at present, will be abolished on 1 February 2022. As a result, management companies of UIFs will be able to adopt their own asset management rules that will, however, have to be in compliance with the general requirements of the Russian Central Bank.
- Starting 1 February 2021, it will be possible to specify in the management rules for open-ended and interval UIFs the types of assets that may be transferred into the management of such funds (today, only money may be transferred).
- Restrictions on the distribution of information on investment funds for qualified investors have been eliminated. This information may now be publicly distributed by posting it both on the website of the fund (or its management company or specialized depositary) and on the official website of the Russian Central Bank.
- Since 23 January 2020, some supervisory powers relating to investment funds for qualified investors will be transferred from the Russian Central Bank to specialized depositaries. In particular, instead of being registered with the Russian Central Bank, management rules will have to be agreed upon with the depositary.

The new law also provides for several other amendments aimed at the liberalization of rules regulating to the activities of UIFs as well as joint-stock investment funds. In general, the new rules are expected to increase the trust of business in investment funds in Russia.

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UK

Spotlight on subsidiary governance

UK corporate governance has undergone a comprehensive review, culminating in the implementation of the Companies (Miscellaneous Reporting) Regulations 2018 (MRR). Until relatively recently, most governance initiatives in the UK have focused on the operation of listed companies' boards. However, a number of developments have focused on the boards of large private companies, including those within corporate groups, the justification being that many of these large private companies are similar in size to listed companies but are not subject to the same governance and disclosure regimes.

Under the MRR, beginning on 1 January 2019, UK companies meeting certain size thresholds will have to report on how their directors have performed the statutory duties to promote the success of the company. This includes describing the primary methods directors have used in regards to the interests of stakeholders and how these have impacted principal decisions undertaken by the board. There is no prescribed format for the statement, and we anticipate there will be a wide degree of divergence in the early years until a common approach is established.

In the UK, directors' duties are codified in the Companies Act 2006 and, as with most other jurisdictions, include acting in the company's best interests and with due care. Directors are also required to notify their key stakeholders when discharging their duties. The duties are the same regardless of the size of the company and whether it forms part of a larger group. In most groups, however, key decisions are rarely made fully along entity lines.

The effect of the MRR is to place a greater spotlight on the operation of subsidiary boards, which may not have been directly involved in group-level key decision-making to date; the duties and responsibilities of directors; the composition of boards; the levels of training and induction; and the interface between group and entity-based decision-making.

The overall purpose of the reform is to increase transparency and public trust, and it should be a catalyst for better decision-making and management of risk. This does, however, require corporate groups to ask themselves difficult questions about their governance, especially within cross-jurisdictional, centralized organizations. It also calls for a cultural shift to allow effective decision-making at the entity level to be embedded in the values of the organization.

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Ukraine

New law on property protection

On 2 November 2019, the Law of Ukraine on Amendments to Certain Legislative Acts of Ukraine on the Protection of Property Rights came into force.

The law establishes a number of instruments aimed at ensuring better protection of property rights, including participatory interest and real estate. These instruments are purported to resist and prevent illegal takeovers and thus improve the business climate and increase investment attractiveness in Ukraine.

The law establishes the following amendments:

- Transfer and acceptance statements of participatory interest, participants' withdrawal applications and certain other documents related to the registration of shareholding changes should be prepared using notarial forms. This should prevent forgery.
- Municipal bodies would no longer have state registrars' authorities. Statistically, they violated registration regulations in most cases.
- Access for state registers to the corporate and real estate registers would be performed via a multistep authentication. This should prevent access of non-authorized persons.
- Representatives may apply for the registration of shareholding changes only based on notarized powers of attorney.
- Owners of real estate would be notified of filing registration applications regarding their real estate immediately. Users (lessees) and mortgage holders would be notified as well.
- Filing electronic documents for registration should be done using electronic identification tools with a high level of credibility.
- Extraterritoriality is being implemented for the purposes of the state registration of individuals/entrepreneurs. Now documents can be filed to any state registrar or notary in paper or electronic form. Legal entities can enjoy registration extraterritoriality only for filings in electronic form.
- Liability for violations of registration procedures would be strengthened.

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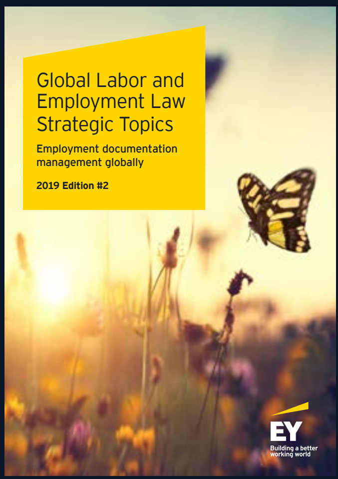

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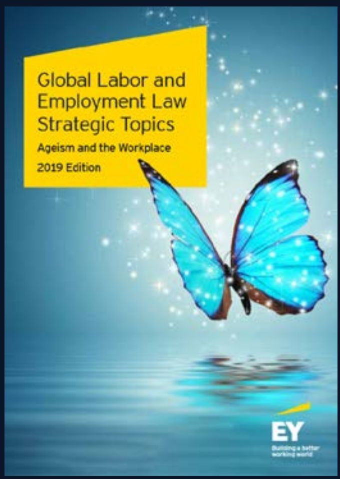

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