Multi-jurisdictional Corporate and Commercial Law newsletter
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This quarterly publication highlights a range of international corporate law matters and covers recent law developments in specific countries.

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Belgium

New corporate legislation

New legislation on mergers and demergers
A Bill of 8 January 2012 (published in the Official Journal on 18 January 2012) enacts new rules on reporting and documentation requirements in mergers and demergers. This results from the transposition of Directive 2009/109/EC of 16 September 2009, which aims to reduce the administrative burden relating, in particular, to publication and documentation obligations of public limited liability companies in the framework of mergers and demergers.

The new rules reduce paperwork by allowing companies involved in a merger or demerger to use modern technology. The merger proposal can be communicated by publishing an extract of the proposal or a simple notice containing a hyperlink to the company’s website. The merger documents can be made available to shareholders by posting them on the company’s website.

The new rules simplify the merger and demerger process. For instance, they allow for a waiver of some of the required reports, of information on material changes and of the requirement for an interim financial statement. Each of these waivers requires the explicit unanimous consent of all shareholders (and holders of other securities conferring the right to vote) of each of the companies involved in the merger or demerger.

As a result, the reporting requirements can be reduced to:

- A board and an expert report on the merger proposal issued for each of the companies involved in the merger or demerger
- Reports issued on the contribution in kind by the management body and by the expert of the acquiring company

Moreover, in some situations, subject to a number of conditions being met, the approval of a general shareholders’ meeting is no longer required in a public limited liability company (“NV/SA”).

The new rules came into force on 28 January 2012 and apply to all mergers and demergers for which a proposal is filed with the Commercial Court as from that date.

New legislation on company liquidations
On 17 May 2012, a new liquidation legislation (the 2012 Act) entered into force.

The 2012 Act simplifies formalities and brings clarifications and corrections to the law amendments made in 2006.

The liquidator’s appointment still needs to be confirmed or ratified, as the case may be, henceforth by the President of the Commercial Court (instead of the full Commercial Court). It is no longer required to join a statement of assets and liabilities to the petition.

If the President does not pass judgment within five days, ratification is considered to have been granted.

Acts performed by the liquidator prior to the confirmation are presumed valid and lawful. Their explicit court confirmation is no longer required. However, the liquidator’s acts can be declared null and void by the President if they obviously harm the rights of third parties.

The reporting requirements on the liquidation process have been clarified. The liquidator is to report on the first 6 and 12 months of the liquidation and then on every consecutive year. Court approval of the liquidator’s distribution plan is still needed in order to be able to close the liquidation.

Most importantly, the 2012 Act reinstates or reconfirms the lawfulness of the “turbo liquidation,” i.e., a liquidation opened and closed in one day or even in one deed (article 184, §5 of the Belgian Commercial Code).

To this end, a number of conditions should be met:

- No appointment of a liquidator
- No debts outstanding, as shown by a recent statement of assets and liabilities
- Unanimous consent of all shareholders
- The remaining assets are to be “taken back” by the shareholders

The turbo liquidation neither requires confirmation of the liquidator, nor reporting on the liquidation, nor approval of a distribution plan.

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Amendments on the Energy from Renewable Sources Act

The Act on Energy from Renewable Sources took effect on 3 May 2011, establishing more predictability in the market. Less than a year later, on 10 April 2012, the first significant amendments to the Energy from Renewable Sources Act were enacted. These amendments are as follows:

New requirements for projects with valid preliminary connection agreements

Grid operators need to have prepared schedules for connection to the grid by 10 July 2012. Project developers should accept or reject these schedules within a month after receipt thereof. Should the project developers reject the proposed schedules or not respond to them, their preliminary connection agreements with the grid operators will be terminated. Advance payments or bank guarantees provided by the project developers will be refunded or released within one month of the termination. These rules will not apply to biomass projects.

Determining renewable energy electricity purchase price

The purchase price of renewable energy will be determined at the following stages:

- Upon entry into exploitation of the project rather than completion of the construction works. This will also apply where a preliminary or final connection agreement is signed and the project had not been entered into exploitation as at 10 April 2012.

- Upon completion of each stage, based on the tariffs applicable before entry into exploitation of the respective part and as at the moment of commissioning.

Buyout of renewable energy

- Shorter terms for mandatory buyout of renewable energy will apply for projects completed at stages and will start running upon entry into exploitation of the first stage.

- Certificates of origin are no longer required for buyout of renewable energy. Such certificates should be obtained for sale of energy and should be transferred to public suppliers. Non-compliance may trigger administrative penalties of up to BGN10,000.

Final connection

- An extended term (from two to three years) for final connection applies to one-stage projects only.

- Where projects are carried out at stages, the first stage has to be entered into exploitation within three years as of concluding the final connection agreement.

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Bulgaria
Likely investigation of the Finnish Competition Authority

A study carried out by the Finnish Competition Authority (FCA) concludes that large grocery retailers use their buying power in questionable ways for competition. The FCA has confirmed that there is a clear need for additional investigations into these practices.

According to the study, examples of the grocery retailers’ conduct include the use of gratuitous marketing allowances and the transfer of risks to suppliers. Effects that harm competition may also be related to the increasing number of the retailers’ own brands (private label products), combined with the strong position of retailers in management of product categories.

According to the FCA:

▶ The majority of the suppliers consider that they do not obtain any value for the marketing allowance they have paid, other than the opportunity to be included in the retailer’s product categories.

▶ The study explored several ways (such as long terms of payment and sanctions in connection with delivery liability) in which retailers transfer their own risk to suppliers. The most common way is the repurchase requirements for unsold products. With such a transfer of risk, the increased uncertainty typically results in production cuts and pressure to increase prices. The suppliers’ willingness to innovate may also decrease.

▶ The increase in the number of private label products benefits consumers because it enhances product variety and lowers prices. However, problems may occur in the long run, as the retailers have such a strong position in category management and pricing.

According to the FCA, the highlighted practices between retail and the suppliers lie in a “gray area” when it comes to the application of competition law.

The buying power of retail does not in itself automatically mean the lack or distortion of competition. According to the FCA, the nature of the detected phenomena and their apparent prevalence, does, however, clearly show that further measures need to be taken.

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Changes for health care companies

A law concerning health safety of medicinal products and health care products was voted on 29 December 2011. It is known as “Law Bertrand”, after the name of the minister of health who initiated the Law. Law Bertrand triggers several changes for companies that manufacture or market health care products, including medicinal products and medical devices, in France. It applies not only to companies incorporated in France but also to companies incorporated abroad to the extent that they either manufacture or market health care products intended for the French market.

Some of the provisions of Law Bertrand already entered into force. Others, such as the so-called French sunshine requirement (as detailed below) will enter into force on 31 December 2012.

The key aspects of Law Bertrand are as follows:

- Prohibition of donations. To the extent that the cost of their products are repaid by the French social security system, the companies affected are prevented from making any grants or donations to charitable organizations that represent health care professionals, subject to criminal sanctions.

French sunshine requirement

- Following the model of the US Sunshine Act but with a broader scope, the companies affected shall publish on their website all the business relationships they have with health care professionals; private and public hospitals; organizations of users of the health care system; charitable organizations; consultants and the press. The “business relationship” in the case at hand is being defined as any agreement, as well as any direct and indirect advantages, beyond €10 per advantage.

New advertising regulations

- Since 1 June 2012, a pre-approval of advertising documents applies for medicinal products, not only for direct-to-consumer advertising but also for any advertising toward health care professionals. The same rule will apply to medical devices from 1 January 2013. In both cases, failure to comply with the rules triggers criminal sanctions and fines of up to 10% of the turnover of the product advertised.

New pharmaco vigilance rules

- The changes include a new obligation for health care companies to closely follow any off-label use of medicinal products and report it to the French health care agency – as well as to take any reasonable steps with health care professionals. Failure to comply with the rules triggers fines of up to 10% of the turnover of the product in question.

The above is only a high-level summary of key aspects of Law Bertrand, which provides for broader changes. Any company acting in this sector – be it a holding company of a French subsidiary or a foreign company with operations in France – should pay close attention to this new law in order to make sure they put in place the necessary steps and procedures to comply with the requirements.

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Expansion of ad hoc publicity in Germany by the Court of Justice of the European Union?

The Court of Justice of the European Union (CJEU) is currently deliberating a court case submitted by the German Federal Supreme Court concerning actions for damages brought by investors on the grounds of an allegedly late ad hoc disclosure by an exchange-listed stock corporation. After the Advocate General’s closing arguments on 21 March 2012, it is foreseeable that the pending decision by the CJEU (Case C-19/11) could have a significant impact on the current corporate practice of publicizing ad hoc announcements.

The announcement at stake at that time concerned the fact that the Chairman of the Board of a listed German company resigned prematurely. The disclosure triggered a considerable stock price movement. It was announced after the company’s supervisory board meeting on 28 July 2005, at which the amicable withdrawal of the Chairman of the Board and appointment of his successor was resolved.

Some investors, who had sold their shares before this announcement was made, raised the accusation that the notice had been publicized late and initiated a case against the company. So far, they have remained unsuccessful. During the course of the court proceedings, various interim steps (informing the supervisory board chairman, discussions between the latter and other supervisory board members and the agreement to convene a supervisory board meeting to appoint a successor) were established that led to the decision of the supervisory board.

The Federal Supreme Court brought the question to the CJEU as to whether, in a procedure staggered over time, individual interim steps (e.g., informing the supervisory board chairman) can be independently significant in themselves and thus subject to mandatory disclosure, or are only then so if occurrence of the future event becomes sufficiently probable with realization of such an interim step.

In his closing argument on 21 March 2012, the Advocate General explained that interim steps of a process bringing about the realization of future circumstances or occurrences could be regarded as insider information. In the case of highly significant occurrences, even a minor probability that the final event occurs would, under certain circumstances, suffice for an ad hoc announcement.

The proceedings have considerable significance for the practice of disclosing information relevant for the capital market by exchange-listed companies. There is a strong likelihood that the CJEU will follow the opinion of the Advocate General. In this case, as opposed to current practice, ad hoc announcements would have to be issued earlier and more often in procedures staggered over time. The changes could be especially relevant in the areas of corporate acquisitions, structuring measures and personnel changes in key positions at exchange-listed stock corporations. Significant measures would then need to be segmented into individual interim steps that would, as the case may be, have to be publicized separately as an ad hoc announcement.

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Introduction of a new company form: the private company

Law 4072/2012 (the law), which was published in the Government Gazette with n. 86/11.04.2012, introduced into the Greek legal system a private company form, namely, the private company. The introduction of the new company type aims to address the need of the Greek economy for a company form accessible to small and medium-sized businesses.

The minimum capital required for the incorporation of the private company is €1, an amount considerably lower than the capital required for a limited liability company in Greece, which is €4,500. The rationale behind the “€1 capital” is a) that the capital of the company is not the sole indicator of its credibility; and b) that there are alternative mechanisms for the protection of the creditors. This is achieved to a large extent by the introduction of the “engagement contributions” pursuant to article 79 of the law.

The capital parts of the private company correspond not only to its capital but to its total contributions, which, according to article 76 par. 2 of the law, may be “capital contributions,” “non-capital contributions” and “engagement contributions.”

Article 77 par. 1 of the law provides that the capital contributions constitute monetary or contributions in kind that comprise the capital of the company while, pursuant to article 78 of the law, the provision of work and services to the private company are accepted as non-capital contributions. Finally, according to article 79 of the law, engagement contributions are characterized as assumptions of responsibilities for the debts of the company, up to an amount determined in the Articles of Association of the company, by a partner.

As a consequence, each partner of the private company is an owner of capital parts deriving from their contribution to the company irrespective of whether such contribution constitutes part of the capital or not. All capital parts are thus equal and provide to the partners the same rights, notwithstanding any different provision in the articles of association of the company.

Another innovation of the new company form is the broad flexibility that it offers. Among other measures, the new law provides for the following opportunities: to draft the articles of association and the minutes of the private company in a foreign language; to have the actual registered seat abroad; to specify the rights and obligations of the partners in the articles of association and to transfer the registered offices of the company in another country of the European Economic Area.

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Capital increases in the presence of losses

The opinion of scholars and courts was divided on the question of whether an increase in corporate capital in the presence of losses is permitted. However, as a general rule, a precautionary approach prevailed. It was indeed not possible to proceed with an increase of the corporate capital without having duly covered such losses (i) in case of losses not exceeding one-third of the corporate capital or (ii) exceeding one-third of the corporate capital, but not reducing it under the threshold provided by law, as well as (iii) in case of losses exceeding one-third of the corporate capital and reducing it under the threshold provided by law.

The Milan Notaries’ Council, which is a leading source of opinions in the field of company law in Italy, rendered an opinion n.122 on 18 October 2011, stating that: “The presence of losses even higher than one-third of the corporate capital and even if they reduce the net equity below the minimum set by the law, does not prevent the possibility to resolve a capital increase, without covering said losses. However, the increase in capital must be sufficient to reduce the losses to an amount lower than one-third of the corporate capital and, as the case may be, to restore the corporate capital to an amount higher than the minimum set by the law.”

The increase of capital in this situation will therefore cause:

- The amount of the corporate capital to be increased
- The net equity of the company to be increased accordingly
- The losses to be left as they are (i.e., they will not be covered)

However, according to the opinion, the resolution to increase the capital should fulfill at least the following requirements:

- A very short term to subscribe for the capital increase
- Not to allow the increase to be only partially subscribed for (to be at least up to the amount necessary to have the capital above the minimum set by the law and the losses not exceeding one-third of the capital)
- Set out measures to be taken in case the increase is not entirely subscribed within the set term

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Reform of the business license in Luxembourg

If entrepreneurial freedom is provided for in the Constitution of the Grand Duchy of Luxembourg, the access to certain professions is subject to the prior obtaining of a business license.

The law on the business license has been reformed by a law dated 2 September 2011 (the law) in order to ease the access to the professions of craftsman, tradesman and manufacturer in Luxembourg.

In order to develop entrepreneurship in the Grand Duchy of Luxembourg, it was necessary to remodel the law on business license entirely and adapt it to current economic realities by easing access to the aforementioned professions.

The law, which repealed the former law of 1988 on the business license, is in accordance with EU directives known as “Qualification” and “Services” and simplifies the administrative procedure for obtaining a business license.

Criteria to qualify

Good standing and professional qualifications

> Be responsible for the daily management of the company
> Have a direct link to the company, such as being an owner, partner, shareholder or employee
> Have never avoided payments of taxes or social security contributions

Strengthening the requirement of the substance in Luxembourg

Pursuant to the law, the company conducting the activity for which the executive requests a business license must have a fixed place of business in the Grand Duchy of Luxembourg. The law provides, among other things, that the executive has to be present at the fixed place of business on a regular basis.

In addition, the law excludes intragroup activities from its scope. It is not required for a company that provides commercial and/or industrial services to another group company, to obtain a business license.

Clarification of the administrative procedure

Examination by the Ministry of Middle Classes

The process of instruction and authorization by the Ministry of Middle Classes is limited to three months, unless exceptionally extended for one extra month. The law has also included tacit authorization in the absence of a decision within the allotted time period.

Infraction or absence of business license

Luxembourg law provides that any company in violation of the business license regulation could be dissolved and liquidated. Criminal liability may result from the exercise of any business, craft or industrial activities without prior authorization. The court may order a temporary or permanent closure of the business and/or a ban of two months to five years from the professional practice.

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Remuneration of supervisory board members

In its judgment of 6 January 2012, the Dutch Supreme Court ruled that the remuneration of members of the supervisory board who perform certain managerial acts should be separated from the remuneration granted to members of the management board and, thus, needs to be determined by the corporate body that determines the remuneration of (ordinary) supervisory board members.

Case

In the specific case at hand, the articles of association of a Dutch public limited liability company (“NV”) named Imeko Holding NV (Imeko) deviated from the general rule and stipulated that the supervisory board determines the remuneration of the members of the management board rather than the general meeting of shareholders. The remuneration of the members of the supervisory board was determined by the general meeting of shareholders.

As a result of the resignation of the sole director of Imeko, a member of the supervisory board, “Z” was delegated to perform certain acts within the Imeko Group that were originally assigned to the management board. Z claimed from Imeko an additional management fee that had been resolved by the supervisory board. He argued that, taking into account the specific managerial acts that were performed, the supervisory board members should be remunerated in accordance with the remuneration of members of the management board.

The District Court denied Z’s claim to the additional management fee, stating that the general meeting of shareholders and not the supervisory board itself is the correct body to determine any (additional) fees for supervisory board members. However, the Court of Appeal granted the claim, stating that the additional management fee applies to Z, since this fee relates to the specific managerial tasks that Z had performed for Imeko.

Supreme Court

The Supreme Court rejected the judgment of the Court of Appeal and upheld the judgment of the District Court. It argued that the remuneration of members of the supervisory board, irrespective of the type of activities performed, shall be determined by the respective authorized bodies of the NV (in this case the general meeting of shareholders). This is to avoid any conflicts of interest when allocating the specific management tasks and fees. After all, the supervisory board member does not formally become a member of the management board simply because he has performed any managerial acts. The fact that, in this case, the general meeting of shareholders had specifically requested Z to perform the managerial tasks does not change this.

Considering the above, it should be noted that, even though a member of the supervisory board performs tasks that belong to members of the management board, formally one still remains a member of the supervisory board and thus subject to the remuneration procedures of the supervisory board.

New law on simplification and increased flexibility of BV legislation

A new law on the simplification of legislation for Dutch private limited liability companies (“BV”) has become effective on 1 October 2012.

The changes include, inter alia, the abolishment of the minimum capital requirement of €18,000 when setting up a BV; the introduction of shares without voting rights and shares without profit rights; and the cancellation of the requirement of an auditor’s statement when making a contribution in kind.

There is no legal obligation to adjust the articles of association to the new law, even though it is highly recommended by practitioners. The act just stipulates that, upon the first occasion that the articles of association will be amended, they need to contain a regulation for absence of supervisory directors.

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New corporate legislation

Amendments to Norwegian Limited Liability Companies Act

Several important changes to the Norwegian Limited Liability Companies Act were made in 2011 and took effect from 1 January 2012. These changes were designed to harmonize the regulation of Norwegian limited liability companies with developments within the EU; to make limited liability companies more attractive compared to other forms of companies, and thereby to increase the number of limited liability companies; and to simplify the conditions for existing companies.

Reduced minimum share capital

The minimum share capital for a limited liability company was reduced from NOK100,000 to NOK30,000, with effect from 1 January 2012. The changes are valid for all limited liability companies and companies established before the changes were implemented. It is possible to reduce the share capital in existing companies to the new minimum and perform payback to shareholders.

For public limited liability companies, the minimum share capital remains NOK1m.

Formation expenses to be covered by the company

Also with effect from 1 January 2012, the costs connected with the establishment and registration of a company can be drawn from the share capital, in so far as the costs do not exceed the share capital contribution. Previously, such costs had to be paid as a share premium. This amendment also applies to public limited liability companies.

Confirmation of share capital payment

With effect from 1 January 2012, if the share capital contributions are to be paid solely in cash, the confirmation of payment of share capital contributions, which must be provided to the Norwegian Register of Business Enterprise, may be provided by a financial institution. Previously, confirmation from an auditor was needed. This amendment also applies to public limited liability companies. Non-cash contributions must still be confirmed by an auditor.

Changes in audit requirements

From 1 May 2011, the former obligation to have an elected state authorized or registered auditor has been amended for small companies. The general meeting may now authorize the board to decide that the company’s annual accounts are not to be audited, provided that:

- The operating revenues from the overall operations of the company are less than NOK5m
- The company’s balance sheet total is less than NOK20m
- The average number of employees does not exceed 10 full-time employees

The decision of the general meeting must be carried with the same majority as for amendments to the articles of association. The purpose of the changes is to reduce the operational costs of small companies and to simplify the day-to-day activities of such companies. The opportunity not to conduct an audit is open for both existing companies and new companies. But it does not apply to companies that are obliged to prepare consolidated accounts or to private limited companies that are parent companies. Unless the board passes a resolution dismissing the requirements to conduct an audit, the company must conduct an audit even if the three requirements listed above are satisfied.

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Portugal

Portuguese insolvency law amendments
On 20 April 2012, Portugal enacted several amendments to the Insolvency and Corporate Recovery Acts (CIRE). These included the simplification of formalities and procedures and the establishment of a special recovery procedure.

The particular amendments to insolvency legislation are as follows:

Simplification of formalities and procedures:
- The insolvency procedures shall be announced on the CITIUS internet site, which will replace the current publication in the official gazette Diário da República
- Fault-based insolvency qualification incidents shall only be initiated in cases where evidence is present in the proceedings
- Automatic suspension of proceedings within five days, in case of death of the debtor
- Insolvency administrators may not be held liable for actions performed before the declaration of insolvency
- Suspension of court enforcement proceedings brought against an insolvent debtor

This law has also reinforced the liability mechanisms of the debtor, as well as those of the legal or de facto administrators for legal persons. It sanctions all debtors who, by their fault, create insolvency situations or who do not initiate insolvency proceedings in a timely fashion. The time limit for filing voluntary insolvency is now 30 days.

Special recovery procedure:
The special recovery procedure is intended to enable those financially distressed debtors – and those eminently insolvent, but who may still be capable of recovery – to establish negotiations with creditors in order to enter into any agreement conducive to recovery. The main characteristics of the procedure are as follows:
- Negotiations may not exceed three months.
- During such period, all enforcement proceedings brought against the debtor shall be suspended.
- Any debtor withdrawing from the procedure may not resort to it again for a period of two years.

- The guarantees offered to investors who put their capital at the disposal of the debtor are upheld, even if the debtor becomes insolvent at the end of the process. Such a safeguarding rule prevails for a period of two years.

Finally, in accordance with best international practices in this area, the debtor has the duty to inform, in a transparent and complete way, all those involved in the procedure about its true economic situation.

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On 2 March 2012, the Romanian Government finally passed the Governmental Emergency Ordinance no. 2/1012 (GEO) for the amendment and completion of Law 31/1990 on Romanian companies.

This followed an eight month delay in transposing Directive 2009/109/CE of the European Parliament and of the Council of 16 September 2009 as regards reporting and documentation requirements in the case of mergers and divisions, and pressure from the European Commission to continue applying the infringement procedure.

With the aim of simplifying and expediting the procedural aspects of the share capital restructuring process, and in line with requirements imposed by Directive 2009/109/CE, the GEO brings the following major amendments and completions to Romanian company law:

- In case of joint-stock companies established by merger or division having a contribution in kind to the share capital, the drafting and submission with the trade register of an authorized expert’s report on the contribution in kind is no longer required if the merger or division project is examined by an independent expert.
- The authorized expert’s report on the contribution in kind for an increase in subscribed share capital of a company to pay the shareholder of the absorbed or divided company is no longer necessary, irrespective of its legal form. The expert’s report on the terms of the merger or division must be independent.
- Companies are exempt from publication of the merger or division project in the Official Gazette if, for a continuous period beginning at least one month before the day fixed for the general meetings to decide on the merger or division and ending not earlier than the conclusion of those meetings, they make the merger or division project available on their website. In such cases, companies are obliged to ensure the security of the website, the authenticity of the documents published, the continuous display of the documents on their website and proof of compliance with the above.

When companies opt out of publishing the merger or division project on their websites, the trade register where the companies are registered shall also publish, free of any charge, the relevant project on its website.
A new statement indicating the publication method, for which companies have opted, (i.e., publication in the Official Gazette or on the companies’ website) is required to be submitted to the authority. This is in addition to the already required documents to be provided to the trade register (e.g., merger or division project; statement of the company to terminate its existence on the transfer of rights and obligations, etc.).

The requirement of an administrator’s report detailing the merger or division and the communication to the general assembly of any material changes – occurring between the date of the merger and the date the merger is approved by the shareholders – have been removed. Prerequisite is that all the shareholders – and the holders of other securities conferring the right to vote – of each of the companies involved in the merger or division have agreed upon it.

The accounting statements drawn up, for information purposes, as at the date that must not be earlier than the first day of the third month preceding the date of the merger or division project, are not required if the company publishes a half-yearly financial report and makes it available to the shareholders. Also, the mentioned accounting statements are not required if all the shareholders – and the holders of other securities conferring the right to vote – of each of the companies involved in the merger or division have so agreed.

In case of a merger between group companies, special provisions have been introduced. In case of a merger by absorption, following which all rights and obligations of the absorbed company are transferred to the parent company, the approval of the general assembly of the latter is not required if:

- the merging companies fulfilled the publication requirements of the merger project
- the informational documents related to the merger could have been inspected by the shareholders of the absorbing company on its website at least a month prior to the effective date of the merger and
- one or more shareholders of the absorbing company, holding at least 5% of the share capital, may request the summoning of the general assembly to decide upon the merger.

As per the GEO, a parent company is any company that holds 90% or more of the shares and other securities conferring the right to vote at general meetings of the absorbing company.

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Changes to the declaration of foreign transactions

A decision was approved by the Bank of Spain in Circular 4/2012, dated 25 April 2012, regarding regulations on declarations by Spanish residents of transactions carried out with non-residents.

This regulation represents an important change in the existing rules regarding the declaration of foreign transactions carried out by Spanish residents, (including business and transactions that imply any kind of receipt, payment or foreign wire transfers, and any variation in the accounts or debtors’ or creditors’ financial positions) or the holding of assets and liabilities vis-à-vis non-residents. This change is due, inter alia, to the modification of the regulations concerning the information to be provided by banks and financial institutions to the Bank of Spain with regard to these transactions.

The new regulation states that individuals and entities who are resident in Spain must inform the Bank of Spain of the following situations or actions:

Information to be provided:

- Transactions of any nature carried out with non-residents, by wire transfer, intercompany or bank accounting bookings, compensations or in cash
- Assets and liabilities’ balances vis-à-vis non-residents and variations to such balances in whatever form they arise (bank or financial accounts, intercompany accounts, cash or securities deposits, company holdings, debt instruments, derivative financial instruments, real estate, etc.)

Regularity of the information and any exceptions thereto:

- Monthly: the declaration must be made within 20 days after the end of each month, if the amount of the transactions carried out in the prior year, or the assets and liabilities’ balances on 31 December of the prior year, are equal to or higher than €300m.
- Quarterly: the declaration must be made within 20 days after the end of each quarter if the amount of the transactions carried out in the prior year, or the assets and liabilities balances on 31 December of the prior year, are between €100m and €300m.
- Annually: the declaration must be made before 20 January the following year, if the amount of the transactions carried out in the prior year, or the assets and liabilities’ balances on 31 December of the prior year, are lower than €100m. However, when the amount involved is less than €1m, the declaration only has to be made if the Bank of Spain has expressly required it, in which case it should be filed within two months of the notice date.

The above annual declaration can be in summarized format and include simply the opening and closing balances of foreign assets and liabilities, unless the amount of the transactions or balances is greater than €50m.

The Bank of Spain can also require more frequent or detailed declaration should it deem this to be necessary.

Any residents who are below these limits, but who exceed them during the current year, must file the relevant declarations from the moment at which they exceed the set limited amount.

Circular 4/2012 will take effect from 1 January 2013.

Spanish regulations that have until now governed these matters, (i.e., Circular 6/2000, dated 31 October 2000, Circular 2/2001, dated 18 July 2001 and Circular 3/2006, dated 28 July 2006) will be derogated as of 1 January 2014. Therefore, during 2013, Spanish residents will have to comply with the reporting obligations to the Bank of Spain set forth in both the existing rules and Circular 4/2012.

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Changes to the Act on Unfair Competition

The revised Article 8 of the Federal Act on Unfair Competition (Art. 8 UCA) governs the “use of abusive terms and conditions” anew and will therefore have an important impact on contractual relations between companies and consumers. Examples of abusive terms and conditions are typically one-sided and have extensive liability exclusions; one-sided and exorbitantly high contract penalties; one-sided possibility of amending or terminating general terms and conditions (GTCs); unjustified limitations on performance entitlements and one-sided and exorbitant consequences of default.

Art. 8 UCA affords courts the opportunity to review the contents of GTCs in business-to-customer (B2C) contracts and to rescind provisions that are particularly one-sided and unjustified, as well as disadvantageous for consumers. In practice, this specifically means that companies active on a B2C basis should subject their GTCs to review, so that these meet the legal requirements of Art. 8 UCA and would withstand a substantive review by the courts. Otherwise, such companies could run the risk of finding themselves involved in court proceedings. Art. 8 UCA entered into force on 1 July 2012.

GTCs are pre-formulated standard contract terms drawn up with a view to a large number of similar contractual relationships. Their use in day-to-day business is of great importance. GTCs can be particularly problematic in B2C contracts, where companies, experienced in business, come face-to-face with inexperienced consumers. B2C contracts often involve situations where, as a general rule, the consumer has no opportunity to negotiate with regard to these pre-drafted GTCs. Where all the companies operating in a given sector use the same GTCs, consumers have no choice but to either accept such GTCs or refrain from entering into contractual relations entirely. In practice, such power asymmetries in B2C contracts resulted in consumers and consumer advocacy groups complaining of such GTCs, because these were drawn up in a manner that one-sidedly and unjustifiably disadvantaged them. They demanded statutory rules that denied such GTCs any validity.

Pursuant to the revised Art. 8 UCA, GTCs shall now be deemed to be abusive where they create a significant and unjustified disparity between contractual rights and obligations to the detriment of consumers, in a manner that breaches the principle of good faith. The allocation of contractual rights and obligations must appear balanced and fair. This affords the courts the opportunity to review the contents of GTCs in B2C contracts. The courts can deny validity to any provisions that do not meet the requirements of Art. 8 UCA, if they are one-sidedly and unjustifiably drafted to the detriment of consumers. A consumer is deemed to be any natural or legal person who obtains goods or services, provided that this is for private use and not for commercial or professional use.

A breach of Art. 8 UCA results in the corresponding provision of the GTCs being null and void. The contract as a whole, including all other provisions of the GTC, would remain intact.

On the basis of the new Art. 8 UCA and the associated expansion of consumer protection in the context of abusive GTCs, the Federal Supreme Court might afford business-to-business (B2B) contracts – i.e., contracts entered into for a commercial or professional use – a better protection against abusive GTCs. In the event that such a paradigm shift in the case law of the Federal Supreme Court should take place, users of GTCs in B2B contracts would also be well informed to review their GTCs.

Companies that enter into B2C contracts and thus make their GTCs an object of the contract will have to ensure that, in future, their GTCs are fair – i.e., are not one-sided, unjustified and not drafted in a way that is to the detriment of the consumer. With regard to B2B contracts, the future practice of the courts shall demonstrate whether an effective substantive review can take place in application of the unusual nature doctrine, thereby resulting in strengthened control against abusive terms.

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The Investment Law of Ukraine amended

The Parliament of Ukraine introduced changes to the Investment Law of Ukraine, effective from 15 January 2012, setting out the legal framework of state support to prospective investors.

Among those specified by law, the state may provide support to investors using the following means:

- State or local budgetary financing
- State or local guarantees securing the investor's performance under loan agreements
- Loans extended to the investor from state or local budget funds
- Full or partial compensation of interest accrued on the loan's principal obtained by the investor

State support may be provided to the investment projects that comply with certain requirements envisaged by the Investment Law of Ukraine.

A prospective investor should refer its investment project to a relevant state authority to obtain an expert opinion on the economic efficiency of the investment project. The next step involves registration of the investment project with the Ministry of Economic Development and Trade of Ukraine. This can only be done with the consent of the relevant state authority. State registration of the investment project itself does not bind the state to render its support to the investor. Ultimately, registered investment projects have to undergo the competitive selection to be granted state support.

Personal data protection adjusted to international standards

In a bid to comply with international standards of personal data protection, the Parliament of Ukraine adopted in 2011 the Law of Ukraine, “On protection of personal data” (the law). Certain provisions on liability for violation of the law were introduced and reinforced on 1 July 2012.

The law relates to protection of personal data, (e.g., collection, registration, storage, updating, utilization, transfer and disposal of personal data) for the purposes of business activities. The law, however, does not apply to individuals acting in a non-professional personal capacity; journalists performing their professional obligations; or liberal arts professionals for the purposes of their activity.

The law requires any person involved in activities with personal data to register a database containing the personal data with the Personal Data Protection State Service of Ukraine.

The law also requires the database holder to obtain an individual’s prior consent for processing their personal data. The individual’s consent must be duly formalized (e.g., executed in writing) and refer to a specific purpose of the processing. Should the purpose of processing personal data change, the database holder is obliged to obtain a new consent. The transfer of personal data to a third person is subject to notification of an individual whose personal data is to be transferred by the database holder, if the terms of consent require such a notification.

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Registration of personal data databases has been possible since 1 July 2011, when the State Registry of Personal Data Databases was launched. The database holder has to disclose the name and location of the database, the purpose of the personal data in the database and other persons entitled to dispose of the database.

Since 1 July 2012, administrative liability of the personal data database holder was introduced. In case of violation of the law, the Personal Data Protection State Service of Ukraine may impose an administrative fine for such violations. Additionally, criminal liability for illegal processing of confidential information regarding a particular individual was increased from 1 July 2012. In the worst case, the penalty is imprisonment for up to five years.
## Contacts

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