International Lawyer

Volume 40
Number 2 *International Legal Developments in Review: 2005*

Article 28

2006

Europe

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I. Introduction

This survey of recent developments in Europe addresses a number of key areas likely to be of significance to professional legal advisors with clients active in Europe, including new directives concerning cross-border mergers, the regulation of professional qualifications, and a new directive designed to prevent money laundering and terrorism. The survey also includes a more in-depth examination into the European Union (EU) Prospectus Directive on employee incentive plans and recent developments in Switzerland. It does not, however, discuss any developments occurring after November 30, 2005.

A. Cross-Border Mergers Of Limited Liability Companies: New Directive[a]

The differences between the national laws of certain EU Member States governing companies with share capital are notorious. This results in complex and costly legal arrangements in case of cross-border mergers. With the goal to facilitate mergers on a cross border basis, the European Institutions enacted Directive 2005/56/EC[1] (the new Directive) on November 25, 2005.

The new Directive provides a way for small and medium-sized companies to merge without the need to create a European company under the European Company Statute.[2] The European Company Statute was established by two pieces of legislation: Regulation EC 2157/2001[3] (establishing the company law rules) and Directive 2001/86[4] (worker involvement).

*This summary was compiled and coordinated by Ann Marie Neir, a third year law student from the University of Kansas where she is studying international corporate law and finance. Individual contributors will be referred to at the discussion of each relevant section.

a. Contributed by Anna García, Gómez-Acebo & Pombo.

1. Council Directive 2005/56, Cross-Border Mergers of Limited Liability Companies, 2005 O.J. (L 310) 1 (EC).

2. Adopted on October 8, 2001.

3. Council Regulation 2157/2001, the Statute for a European Company (SE), 2001 O.J. (L 294) 1 (EC).

4. Council Directive 2001/86, Supplementing the Statute for a European Company with regard to the Involvement of Employees, 2001 O.J. (L 294) 22 (EC).

The new Directive creates a new legal framework applicable to cross-border mergers of all limited-liability companies, with the exception of undertakings for collective investment in transferable securities. Specific provisions govern cooperative societies. They set forth a simplified framework permitting the indentification of the law applicable to each of the merging companies in case of cross-border merger. The general rule is that during the course of the pre-merger procedures each company remains subject to its national law on domestic mergers. After completion, only the law of the country where the resulting entity is established will be applicable.

The main issues at stake during the adoption process relate to employee participation rights and how to deal with cross-border mergers implicating a loss or reduction of employee participation. The general principle laid down by the new Directive is that employee participation schemes should apply to cross-border mergers where at least one of the participating companies operates under such a scheme. If the merged company establishes its head office in a Member State where rules on employee participation do not apply, the company must hold negotiations on an employee participation system based on the model of the above-mentioned European Company Statute. Finally, Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with the new Directive by December 15, 2007.

B. Recognition Of Professional Qualifications Within the EU: New Directive

European citizens benefit from the right to freely provide services in any country of the EU, which includes, in particular, the right to pursue a profession in a self-employed or employed capacity in a Member State other than the one in which they have obtained their professional qualifications. The system in force for recognition of qualifications, however, raises some barriers that limit professionals' rights.

Directive 2005/36/EC of September 7, 2005, on the recognition of professional qualifications,[5] simplifies the existing system and makes recognition of qualifications obtained in another Member State more automatic. This Directive replaces fifteen existing Directives in the field of recognition of professional qualifications. The proposal constitutes the first comprehensive modernization of the community system since it was conceived forty years ago.

The Directive complements the initiatives undertaken by the European competition authorities in order to prevent competition restrictions arising from restrictive rules and regulations in the professions. In its recently published Commission Proposal on Professional Services—Scope for more reform and Follow-up to the Report on Competition in Professional Services,[6] the European Commission highlights the anti-competitive nature of certain professional regulations and rules in force in the Member States (e.g., advertisement and pricing of legal services, reservation of certain activities to specific categories of professionals, etc.).

In the Commission's view, such rules and regulations may eliminate or limit competition between service providers and thus reduce the incentives for professionals to work cost-

5. Council Directive 2005/36, 2005 on the Recognition of Professional Qualifications, 2005 O.J. (L 255) 22 (EC).

6. *Commission Proposal on Professional Services - Scope for more reform and Follow-up to the Report on Competition in Professional Services*, at 83, COM (2004) 405 final (Feb. 9, 2004).

efficiently, to lower prices, to increase quality, or to offer innovative services. In this respect, apart from the revision of the scheme of recognition of professional qualifications, the Commission proposes that Member States apply a proportionality test to assess to what extent anti-competitive professional regulations and rules in force in their respective countries truly serve the public interest and can be objectively justified.

In cases where, for instance, unjustified restrictions on the number of professionals allowed to practice amount to special or exclusive rights, the European Commission could intervene by applying competition rules not only against undertakings and professional associations but also against Member States enacting or maintaining in force restrictive legislative measures.

C. Prevention of Money Laundering and Terrorism Financing: New Directive

The Third Directive on the prevention of money laundering,[7] adopted in October 2005, repeals the Directive 91/308/EEC, as amended by the Directive 2001/97/EC. The scope of the Third Directive has been extended to include the prevention of terrorism financing. It shall be implemented into Member States' legal orders by 2007 at the latest.

The new legal instrument applies to the financial sector, lawyers, notaries, auditors, accountants, tax advisors, real estate agents, casinos, trust and company service providers, and, in general, to all providers of goods when payments in cash exceed 15.000 Euros. Pursuant to the provisions contained in the Third Directive, the following obligations should be imposed on these persons and institutions by way of national legislation:

(a) to identify and verify the identity of their customer and of its beneficial owner, and to supervise the business relationship with the customer;
(b) to report suspicions of money laundering or terrorist financing to the public authorities (a financial intelligence unit (FIU) shall be created for these purposes by Member States);
(c) to take supportive measures, such as ensuring training of the personnel and the establishment of appropriate internal preventive policies and procedures; and
(d) to prohibit credit and financial institutions from keeping anonymous accounts or anonymous passbooks.

The Third Directive incorporates into EU law the June 2003 revision of the Forty Recommendations of the Financial Action Task Force—an international body established by the G7 and aimed at combating money laundering and the financing of terrorism. In addition, the Commission has participated in negotiations for the endorsement of the new Council of Europe Convention on money laundering, search, seizure, and confiscation of the proceeds from crime, and on the financing of terrorism.[8] The European Commission has ensured that there will be consistency between current European legislation and the provisions in this Convention and has submitted some proposals, such as the creation of a FIU, that have been adopted by the Council of Europe.

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7. Council Directive 2005/60, the Prevention of the Use of the Financial System for the Purpose of Money Laundering or Terrorist Financing, 2005 O.J. (L 309) 15 (EC).

8. *See* Press Release, Council of Europe, Three Major Conventions Adopted by the Council of Europe (Mar. 5, 2005), *available at* http://press.coe.int/cp/2005/245a(2005).htm.

D. Communication of the European Commission on the Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust Between Member States

On May 19, 2005, the European Commission adopted a communication[9] aimed at predicting, for the next five years, the legal steps necessary to grant full effectiveness to the mutual recognition (MR) principle with regard to criminal justice. These proposals shall, however, be initially negotiated and adopted by Member states within the Council, which holds exclusive legislative competence on justice and home affairs.

The new communication states that after the adoption and implementation of the European arrest warrant and the surrender procedures,[10] additional measures are required with a view toward reinforcing the mutual trust between Member States and, therefore, enhancing the function of the MR principle in criminal matters both at the pretrial stage and after the final judgment.

For these purposes the developments intended by the European Commission are twofold. First, a series of legislative measures directed to harmonize the law of criminal procedure in Member States is proposed. These measures would encompass the establishment of a common scope of individual rights (presumption of innocence, gathering of evidence, judgments in absentia, and transparency in the choice of court where the courts of several Member States might have jurisdiction over the same case).

The second package of measures anticipated by the European Commission, which take a more practical approach, foresees the development of networks of judicial organizations and institutions (such as the European Network of Supreme Courts, the Network of Councils for the Judiciary, or the European Judicial Training Network). The promotion of contacts and exchanges between practitioners is also one of the objectives of the European Commission.

E. The Commission Endorses IAS 39 Fair Value Option (November 15, 2005)

The European Commission adopted a Regulation[11] on November 15, 2005, endorsing the fair value option contained in the amended International Accounting Standard No. 39 on Financial Instruments: Recognition and Measurement (IAS 39). This Regulation, which had been previously supported by the European Parliament, as well as by Member States at the Accounting Regulatory Committee held on July 8, 2005, removes one of the two carve-out provisions (certain provisions relating to hedge accounting had been also carved out) that the European Commission had imposed when endorsing IAS 39 for use in Europe in November 2004.[12]

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9. *Commission Communication on the Mutual Recognition of Judicial Decisions in Criminal Matters and the Strengthening of Mutual Trust between Member States*, COM (2005) 195 final (May 19, 2005).

10. Council Framework Decision 2002/584, the European Arrest Warrant and the Surrender Procedures between Member States, 2002 O.J. (L 190) 1 (JHA).

11. Commission Regulation 1864/2005, Amending Regulation (EC) No. 1725/2003 Adopting Certain International Accounting Standards in accordance with Regulation (EC) No. 1606/2002 of the European Parliament and of the Council, as regards International Financial Reporting Standard No. 1 and International Accounting Standards Nos. 32 and 39, 2005 O.J. (L 299) 45 (EC).

12. Commission Regulation 2086/2004, Amending Regulation (EC) No. 1725/2003 on the Adoption of Certain International Accounting Standards in accordance with Regulation (EC) No. 1606/2002 of the European Parliament and of the Council as regards the Insertion of IAS 39, 2004 O.J. (L 363) 1 (EC).

The original IAS 39 included an option that allowed entities to designate irrevocably, on initial recognition, any financial assets or financial liability as ones to be measured at fair value with gains and losses recognized in profit or loss (the fair value option). The purpose of this option was to simplify the application of the standard and to tackle certain practical troubles stemming from the application of the IAS 39's mixed measurement model. Notwithstanding this, the European Commission decided to exclude the provisions relating to the full fair value option due to concerns raised by some main European economic actors, particularly the European Central Bank and prudential supervisors represented in the Basel Committee of banking supervisors. These parties were indeed concerned about potential problems associated with inappropriate application of the fair value option.

Having recognized these concerns, on June 16, 2005,[13] the International Accounting Standards Board published an amended version of the IAS 39, including a restricted principles-based fair value option whose application, being combined with extensive disclosure requirements, is limited to those financial instruments that meet certain particular conditions. The improved standard was supported by both Member States and the European Parliament and subsequently was adopted by the European Commission on November 15, 2005 by means of the Fair Value Option Regulation. In this latter respect, in order to enable companies to apply the amended standard for their 2005 financial statements, the European Commission gave retroactive effect to the provisions contained in the Fair Value Option Regulation—the provisions went into effect, retroactively, on January 1, 2005.

F. Criminal Sanctions for Maritime Polluters in the EU

On July 12, 2005, the Council of Ministers formally adopted both a directive[14] and a framework decision[15] aimed at enhancing protection of the maritime environment and combating ship-source pollution through a system of penalties, including criminal sanctions for the most serious pollution offenses.

This legislation, proposed in 2003 by the European Commission as a reaction to the 2002 accident when the oil tanker Prestige ran aground outside La Coruña harbor, will incorporate into EU law international standards for ship-source pollution, ensuring that persons responsible for discharges will be subject to adequate penalties. By means of this legislation, effective sanctions against ship-source pollution are to be put in place all over Europe. Indeed, the Directive establishes that marine pollution by ships is an infringement and consequently provides sanctions that will be applicable to any party, including the master, the owner, the operator, the charterer of a ship, or the classification society, being found guilty of having caused or contributed to illegal pollution, if the party acted intentionally or by means of serious negligence.

The Directive is supplemented by detailed rules on criminal offenses and penalties as well as other provisions set out in the Framework. The whole regime introduced is en-

13. *See* Press Release, International Accounting Standards Board, IASB Issues Amendment to the Fair Value Option in Financial Instruments Standard (June 16, 2005), *available at* http://www.iasplus.com/pressrel/0506prfairvalueoption.pdf.

14. Council Directive 2005/35, Ship-Source Pollution and on the Introduction of Penalties for Infringements, 2005 O.J. (L 255) 11 (EC).

15. Council Framework Decision 2005/667, to Strengthen the Criminal-Law Framework for the Enforcement of the Law Against Ship-Source Pollution, 2005 O.J. (L 255) 164 (JHA).

forceable for all ships calling in EU ports independent of their flag. Moreover, these two pieces of legislation address the need for further effective cooperation among Member States to ensure that discharges of polluting substances from ships are detected in time and that the offenders are identified. To that end, the European Maritime Safety Agency, set up in 2002, is called upon, along with Member States, to play a key role in developing technical solutions and in providing relevant assistance relating to the implementation of this legislation. In this respect, the Framework decision provides for an information exchange mechanism between Member States to be used in case one of these countries is aware of the risk of a criminal offense in another's territory.

II. EU Prospectus Directive: Impact on Employee Incentive Plans[b]

A. Introduction

The EU Prospectus Directive[16] was supposed to be implemented into the national laws of the twenty-five member states of the EU by July 1, 2005. Only a few Member States complied with this deadline. It is expected that the Prospectus Directive ultimately will be implemented in all Member States around the middle of 2006. The intention of the Prospectus Directive is to harmonize key aspects of the Member States' securities laws and to allow companies to offer securities across the EU on the basis of a single prospectus approved by one Member State, thus avoiding the need to have the offer cleared in each relevant Member State.

In addition, the Prospectus Directive has far-reaching consequences, inter alia, for employee incentive programs that have been quite common components of compensation schemes for multinational enterprises operating in Europe. Certain types of employee offerings are no longer exempt or, due to conflicting interpretations, are probably no longer exempt in certain Member States, unless the issuer has securities admitted to trading on an EU regulated market. As a result, a number of blue-chip U.S. issuers, with a significant employee base in the EU, have decided to terminate or suspend their EU employee incentive programs. The costs of preparing and refreshing an EU-approved prospectus solely for their EU employee incentive plans appear simply too high to be justified.

Finally, this note briefly describes the available exemptions and their bottlenecks. It does not attempt to provide a complete overview. It aims to create an awareness of the issues, in particular, for public companies incorporated outside the EU.

B. Scope of the Prospectus Directive

The Prospectus Directive applies to any offer of securities to the public. The concept of an offer is broadly defined. Any communication to one or more persons presenting sufficient information on the terms of the offer and the securities to be offered may constitute an offer. The term securities effectively covers all transferable securities, with the exception of

b. Contributed by George L. Bustin & Peter Werdmuller, Cleary Gottlieb Steen & Hamilton LLP.

16. Council Directive 2003/71, the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC, 2003 O.J. (L 345) 64 (EC) [hereinafter Prospectus Directive].

money market instruments with a maturity of less than twelve months. This means that an offer to participate in an employee stock purchase plan or a restricted stock purchase plan involves an offer of securities to the public.

The situation is less clear with respect to the grant of non-transferable stock options or non-transferable stock awards (e.g., restricted stock units). The European Commission and national regulators in Belgium, France, Spain, and the United Kingdom, for example, have taken the view that both the grant and the exercise of such options are outside the Prospectus Directive. This may mean, however, that such an offer is still subject to residual national securities laws.

In Germany, the regulator takes the view that a grant is outside the scope of the Prospectus Directive, while the exercise of the option (including the subsequent delivery of the shares) may constitute an offer of securities to the public.[17] This means that the availability of any exemptions under the Prospectus Directive should be analyzed. The German regulator has not yet adopted a view on whether such an exemption must be available at the time of the grant, at the time of the exercise, or both.

Finally, there is a risk that some Member States may extend the national law implementation of the Prospectus Directive to non-transferable securities, thereby including non-transferable stock options.[18]

C. Exemptions for Employee Incentive Plans

Four exemptions are of particular relevance to offerings of Prospectus Directive securities to employees.[19] They will each be discussed separately in the following sections.

1. *The EUR 2.5 million exemption*[20]

This is not a real exemption—the Prospectus Directive does not apply in the case of offers for total consideration of less than EUR 2.5 million (aggregated over a period of twelve months). There is some uncertainty as to whether this threshold applies for the entire EU (Denmark takes this view) or for each Member State, a more liberal approach (e.g., the view of France). In addition, some Member States (again Denmark) have further limited this exemption to offers below EUR 100,000 by subjecting certain types of offers above that amount but below EUR 2.5 million to their residual securities laws. Finally, in Germany, the EUR 2.5 million exemption is only available if the issuer is a German or other EU deposit-taking credit institution, or if the shares of the issuer are already admitted to trading on an EU regulated market.

2. *The fewer-than-100-offerees exemption*

An offer to fewer than 100 persons (other than qualified investors) per Member State is exempt from the obligation to publish a prospectus.[21] Certain Member States (e.g., Ger-

17. *Id.*

18. In Italy, the Prospectus Directive has not yet been implemented. The Italian regulator has recently published a draft of proposed amendments to its secondary legislation that should apply until the Prospectus Directive will have been implemented. Under the proposed amendments, any offer of securities in Italy, including any offer of non-transferable stock options or non-transferable stock awards, is subject to the Italian securities laws.

19. In addition, exemptions are available for offers to qualified investors, which mainly includes professional investors, or offers for a minimum consideration or denomination of EUR 50,000.

20. Prospectus Directive, *supra* note 16, at art. 1(2)(h).

21. *Id.* at art. 3(2)(b).

many) require, in order to qualify for this exemption, that the offer be extended to fewer than 100 persons (other than qualified investors) in each Member State, for purposes of reliance on this exemption in their own Member State. In addition, it is unclear to what extent offers need to be aggregated—it appears, however, that (near-simultaneous) offers under different plans need not be aggregated.

3. *The EUR 100,000 exemption*

An offer of securities for a total consideration of no more than EUR 100,000 (aggregated over a period of twelve months) is similarly exempt.[22] It is generally understood that the EUR 100,000 threshold applies on a Member State basis. A separate question is whether offers for no consideration, other than continued employment, would be able to benefit from that exemption. Member States, again, appear to take different views by, for example, looking at the value offered to, as opposed to the consideration paid by, the employees (e.g., Germany).

4. *The EU-listed company exemption*

Those companies that cannot benefit from any of the exemptions described above with respect to a given offering, but that have securities admitted to trading on an EU regulated market, may be able to rely on the EU-listed company exemption.[23] This exemption is unlimited with respect to the amount or value of the securities, or the number of offerees, involved. Offers made based on this exemption are permitted if a summary document containing information on the number and nature of the securities and the reasons for and detail of the offer is made available to the employee. In addition, this exemption has given rise to different interpretations.

In certain Member States (e.g., Spain), there is a requirement that the awarded securities must be of the same class as the securities that are admitted to trading on an EU regulated market. Other Member States (e.g., Denmark, Ireland, the Netherlands, and the United Kingdom) take a less stringent approach. These Member States permit issuers to use this exemption to offer equity securities to employees even if they only have debt admitted to trading on an EU regulated market. The first reading is particularly relevant to non-EU issuers, as they often do not have stock listed on an exchange in the EU.

Finally, the requisite summary document is, unfortunately, not passportable across the EU, and there is not (yet) EU-wide agreement on exactly what information that document should contain. Accordingly, issuers may be required to produce a summary document (in the local language) for each separate Member State.

D. Conclusion

The regulatory landscape has changed significantly following the introduction of the Prospectus Directive. Employee incentive programs are either no longer exempt or the exemptions have become narrower. Moreover, the interpretative issues created by the Prospectus Directive have caused divergent implementation among the Member States and urgently require clarification or remedial action.

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22. *Id.* at art. 3(2)(e).
23. *Id.* at art. 4(1)(e).

Issuers with a listing outside the EU (e.g., on NASDAQ or the NYSE) and with a significant EU-based work force are at a particular disadvantage. Unless these issuers are able and willing to prepare and keep evergreen an EU-approved prospectus, they may only be able to extend their stock purchase plans to fewer than 100 employees per Member State. With respect to non-transferable stock options and awards, these issuers may, in certain Member States, be required to limit the offer to fewer than 100 employees; to comply with residual securities laws that may be less, equally, or more stringent than the Prospectus Directive regime; or both.

Finally, we understand that the European Commission is sympathetic to the concerns expressed by EU and non-EU issuers about the adverse consequences and uncertainties the Prospectus Directive creates for their EU employee incentive programs. Issuers and their advisers should consider whether it is worthwhile to initiate or augment their lobbying efforts vis-à-vis the Commission. Non-EU issuers, in particular, may wish to urge the Commission to turn the EU-listed company exemption into a listed company exemption (i.e., extending it also to public companies that are listed on non-EU internationally recognized stock exchanges such as NASDAQ and NYSE).

III. Switzerland[c]

Switzerland is a federal country—legislation from the federal, cantonal (a canton is equivalent to a state), and municipal level has to be observed. All federal and most cantonal laws are available on the Internet.[24] The Federal Supreme Court publishes its recent decisions on its own web page in the respective language (alternatively in German, French, or Italian).[25]

A. Law of Nations/International Law

Two major decisions have been taken in the field of international law on a political rather than on a legal level. On June 5, 2005, the people of Switzerland decided in a public vote to join the so-called Schengen States of the EU. Consequently, border controls between Switzerland and other Schengen countries will be abolished in the future, and Switzerland will participate in the Schengen States' crime prevention programs and databases. In addition, on September 25, 2005, the Swiss people further voted to extend freedom of movement rights to the citizens of the ten new member states of the EU. Further, the federal government has ratified the Kyoto Protocol that came into force for Switzerland on February 16, 2005.

With respect to the bilateral agreements, the federal government enacted into national law a new statute transforming the agreement on taxation of interest of December 17,

c. Contributed by Dr. Florian S. Jörg, MCJ, Law firm of Froriep Renggli, Zurich, Switzerland.

24. The federal laws are provided in German, French, and Italian on the federal government's web page. *See* The Federal Authorities of the Swiss Confederation, How is a New Law Enacted?, http://www.admin.ch/ch/e/gg/index.html (last visited Mar. 24, 2006). Cantonal laws, in the respective language of the canton, are *available at* http://www.admin.ch/ch/d/schweiz/kantone/index.html (last visited Mar. 24, 2006). The government's web page is very useful and also provides some information in English. *See* Welcome to the Authorities of the Swiss Confederation, http://www.admin.ch.

25. All cited decisions are *available at* http://www.bger.ch.

2004.[26] It deals with the voluntary disclosure of payments of interest and penalties for infringement of such regulations. It also regulates the legal assistance between Switzerland and the member states of the EU.

On June 9, 2005, a new federal law on the transfer of cultural goods[27] became effective. Its aim is to regulate the import, transfer, or export of objects of cultural value into or out of Switzerland. It is intended to prevent theft, looting, and illegal trade of cultural assets.

B. Public and Criminal Law

On January 1, 2005, the new law on nuclear energy came partially into force.[28] It regulates the peaceful use of nuclear power and the protection for mankind and the environment. Further, an amendment to the federal act on health insurance[29] introduced the possibility of issuing a so-called patient card that contains all basic health information regarding the holder of such card.

With respect to criminal law, a new ordinance dealing with undercover investigation became effective on January 1, 2005.[30] In addition, Switzerland has enacted a statute on the use of DNA profiles in order to identify unknown or missing persons.[31]

C. Antitrust Law

On March 31, 2005, the grace period with respect to penalties for unlawful restrictions of competition (article 49(a) of the federal act on cartel law)[32] lapsed. An enterprise that participates in an unlawful agreement or that behaves otherwise unlawfully may be fined in an amount up to 10 percent of its turnover in Switzerland in the previous three business years. Further, the authorities may, since April 1, 2005, carry out searches on an enterprise's premises (so called dawn raids).

D. Contracts

On January 1, 2005, a new law on electronic signatures became effective in Switzerland.[33] According to the new rules, an electronic signature that fulfills certain requirements is to

26. Federal Act on the Agreement with the European Union on Taxation of Interest, Dec. 17, 2004 (Official Number 641.91) (Switz.), *available at* http://www.admin.ch/ch/d/sr/6/641.91.de.pdf.

27. Federal Act on the Transfer of Cultural Goods, June 20, 2003 (Official Number 444.1) (Switz.), *available at* http://www.admin.ch/ch/d/sr/4/444.1.de.pdf.

28. *See* International Atomic Energy Agency, IAEA Publications, Documents, and Reports, *available at* http://www.iaea.org/Publications (last visited Mar. 24, 2006).

29. Federal Act on Health Insurance, Mar. 18, 1994 (Official Number 832.10) (Switz.) (amended Oct. 8, 2004, effective Jan. 1, 2005), *available at* http://www.admin.ch/ch/d/sr/8/832.10.de.pdf.

30. Organisation for Economic Co-Operation and Development, Switzerland: Phase 2: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, *available at* www.oecd.org/dataoecd/43/16/34350161.pdf.

31. Swiss Federal Data Protection Commissioner, Law on Utilisation of the DNA Profile, http://edsb.ch/e/doku/jahresberichte/2001/dna-profile (last visited Mar. 24, 2006).

32. Federal Act on Cartels and Other Restraints of Competition, Oct. 6, 1995 (Official Number 251) (Switz.), *available at* http://www.admin.ch/ch/d/sr/2/251.de.pdf.

33. Federal Act on Certification Services in the Area of Electronic Signatures, Dec. 19, 2003 (Official Number 943.03), *available at* http://www.admin.ch/ch/d/dr/9/943.03.de.pdf.

be treated as equivalent to a hand-written signature. In principle, this would enable the conclusion over the Internet of agreements that are subject to the statute of frauds according to Swiss law.

E. Banking and Finance

On April 1, 2005, an amendment to the federal ordinance on investment funds[34] became effective. It deals with, inter alia, the use of derivates and organization, internal auditing, and compliance regarding fund management. On August 1, 2005, a new ordinance on bankruptcy of banks and securities dealers became effective.[35] The ordinance supplements articles 33–37(g) of the Swiss Banking Act[36] and deals mainly with the proceedings in case of bankruptcy of a bank or a securities dealer.

F. Company Law/Mergers and Acquisitions

On June 1, 2005, an amendment to the Swiss association law came into force.[37] If the articles of association so provide, it is possible to ask members of the association for fees. In addition, with respect to liability, the amendment states an exclusive responsibility of the association itself, not of the members, unless the articles provide otherwise.

On August 23, 2005, the Swiss Takeover Board ruled that protective measures such as a defense in an unfriendly takeover or providing golden parachutes for the board of directors are not in the interest of the company and, therefore, not permissible.[38]

G. Arbitration

On October 6, 2004 (published in 2005), the Swiss Federal Supreme Court changed its own jurisprudence and ruled that partial arbitral awards in the sense of article 188 of the Federal Statute on Private International Law (SPIL) are subject to immediate appeals in the sense of article 190 of the SPIL, as are final awards.[39] The Swiss Federal Supreme Court finally yielded to long standing criticism concerning its previous view on this point.

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34. Federal Ordinance on Investment Funds, Jan. 24, 2001 (Official Number 951.311.1) (Switz.) (attended Nov. 24, 2004), *available at* http://www.admin.ch/ch/d/sr/9/951.311.1.de.pdf; Amendment, Nov. 24, 2004.

35. Federal Banking Commission's Ordinance on the Bankruptcy of Banks and Securities Dealers, June 30, 2005 (Official Number 952.812) (Switz.) (effective as of Aug. 1, 2005).

36. Swiss Banking Act, Nov. 8, 1934 (Official Number 952.0) (Switz.), *available at* http://www.admin.ch/ch/d/sr/9/952.0.de.pdf.

37. Swiss Civil Code, Dec. 10, 1907 (Official Number 210) (Switz.), *available at* http://www.admin.ch/ch/d/sr/2/210.de.pdf; Amendment, Dec. 17, 2004 (effective as of June 1, 2005).

38. *See* Swiss Takeover Board, Recommendations, *available at* http://www.takeover.ch (decision in German involving Sumida Holding Germany GmbH and Saia-Burgess Electronics Holding AG).

39. Switzeralnd's Federal Code on Private International Law, 130 Entschieidunger des Schweizerischen Bundesgerichts [BGE] III 755 (Switz).