The Year in Review

Volume 53 International Legal Developments
Year in Review: 2018

Article 37

January 2019

European Law

James Henry Bergeron
Matthew Soper
Isabel Montojo
Shekinah Apedo
Marc Weitz

See next page for additional authors

Recommended Citation
James Henry Bergeron et al., European Law, 53 ABA/SIL YIR 517 (2019)

This Regional and Comparative Law is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in The Year in Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
European Law

Authors
James Henry Bergeron, Matthew Soper, Isabel Montojo, Shekinah Apedo, Marc Weitz, Konstantinos Tsimaras, Henry Stamelos, Angelique Devaux, Jörg Rehder, and Elisabet Rojano-Vendrell

This regional and comparative law is available in The Year in Review: https://scholar.smu.edu/yearinreview/vol53/iss1/37
European Law Committee

JAMES HENRY BERGERON, MATTHEW SOPER, ISABEL MONTOJO, SHEKINAH APEDO, MARC WEITZ, KONSTANTINOS TSIMARAS AND HARRY STAMELOS, ANGÉLIQUE DEVAUX, JÖRG REHDER, ELISABET ROJANO-VENDRELL

This Article updates selected international legal developments in 2018 in European Law.

I. Brexit Developments

The United Kingdom (UK) Parliament is expected to vote on the European Union (EU) (Withdrawal Agreement) Bill on December 12, 2018, with no guarantees of adoption. In December 2017, the UK and EU issued a Joint Report on the progress of Phase I of negotiating a Withdrawal Agreement, which stated principles important to the parties. The process for the UK's withdrawal is defined in Article 50 of the Treaty of the EU, which also provides that a withdrawal agreement will set out the arrangements for a Member State withdrawing from the Union. Such an agreement will also take into account the Political Declaration on the future relationship between the parties.

On March 19, 2018, the UK and EU published draft elements of a Withdrawal Agreement in which the Joint Report's acknowledged principles were transformed into a legal text, which included provisions for citizens' rights, financial settlement, and the Irish backstop. The UK and EU published a Joint Statement on June 19, which revised the March draft. On

---

* James Henry Bergeron, Matthew Soper (Brexit developments), James Henry Bergeron (Major Decisions of the European Court of Justice), Isabel Montojo (EU-Turkey Statement on Irregular Migration), Shekinah Apedo (Developments in Migrant Protection at Sea), Mark Weitz (European attempts to Tackle Fake News), Konstantinos Tsimaras and Harry Stamelos (Cyprus and Greece Legal Developments), Angélique Devaux (French Wealth Tax developments), Jörg Rehder (German Developments in Personal Liability of Managing Directors of a GMBH), Elisabet Rojano-Vendrell (Spanish Legal Developments in Corporate Governance).

3. Id. at 3-4.
4. Id. at 3-4.
July 24, the Cabinet published a White Paper setting out the “Government’s plans for legislating for the withdrawal agreement and implementation period.” Several Cabinet ministers quit their posts in the lead-up to the Government’s announcement on November 14 that a draft withdrawal deal had been reached with EU negotiators and agreed to by the Cabinet.

At a special meeting of the European Council in Brussels on November 25, 2018, the UK and EU agreed to the terms of a 599-page Withdrawal Agreement. Under section 13, EU (Withdrawal) Act 2018, the House of Commons must vote to approve the Withdrawal Agreement and Political Declaration before the “Brexit deal” can be ratified and enter into force. The EU (Withdrawal Agreement) Bill must receive Royal Assent before the UK leaves the EU on March 29, 2018, in order to have domestic legal effect. The UK’s future relationship with the EU will not be finalized until after the withdrawal has occurred.

A major legal challenge is how to ensure no hard border divides Northern Ireland from the Republic, which would otherwise undermine the peace process or de-stabilize the EU’s Single Market. The guarantee of no hard border is referred to as the “backstop,” intended to hedge against a political stalemate on future trading relations. Regardless of whether the EU (Withdrawal Agreement) Bill is adopted and ratified or not, or if a post-Brexit economic association proves elusive, “the backstop would remain in force indefinitely.”

The backstop is incorporated under Article 185 of the Agreement on the Withdrawal of the UK from the EU and the Protocol on Ireland/Northern Ireland. The Protocol effectively makes Northern Ireland part of the UK’s internal market and the EU’s single market. The Union Customs Code...
will remain applicable in Northern Ireland after March 29, 2019. Because the UCC covers all provisions for a good to be released onto the single market, once a good has completed these formalities it can be released into the EU’s single market.

II. European Union Law Developments

A. Major Decisions of the Court of Justice of the European Union

In a busy year for the Court of Justice of the European Union (CJEU), the following landmark judgements stand out:

On March 6, the CJEU issued an important judgement in *Slowakische Republik (Slovak Republic) v. Achmea BV*, holding that a Netherlands-Slovakia bilateral investment treaty was in violation of EU Law where an investment tribunal (Investor-State Dispute Settlement or ISDS) established under the agreement was capable of interpreting EU Law in a dispute between the Member State and investors. Such an arrangement would disrupt the EU legal order by removing the CJEU’s ability to rule on the interpretation of EU Law. The *Achmea* judgement is expected to have a significant impact on the Belgian reference pending before the CJEU on the compatibility of the Investor Court System in the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

A landmark judgement on gender equality was issued on June 5, when the CJEU in *Coman v. Inspectoratul General pentru Imigrari* declared that where an EU citizen had exercised rights of free movement in another EU Member State, the same-sex spouse of that EU citizen is to be considered a “spouse” under EU law relating to family reunification rights. This holds even where the recipient Member State does not recognize same-sex unions. This also serves to overturn the Court’s 2001 judgement in *D v. Council* where it held that “marriage” implied a union of opposite sex couples.

On October 8, the Court issued another landmark judgement, on the obligation of a Member State court to refer a question of EU law to the CJEU under the Preliminary Reference procedure of Article 267(3). *C-416/17 Commission v. France* involved a decision of the French Counsel d’Etat relating to measures to prevent double taxation of dividends. In 2009, the Counsel made a Preliminary Reference on the compatibility of French rules

16. Id. at 4, 303.
17. Case C-284/16, Slowakische Republik (Slovak Republic) v. Achmea BV, 2018 ECLI:EU:C:2018:158.
with EU Law.\(^{22}\) In its response in *Ministre du Budget v. Accor SA*, the CJEU held that the national rules infringed Articles 49 and 63 of the Treaty of the Functioning of the European Union (TFEU) and laid out principles for reimbursement of payments made contrary to EU Law.\(^{23}\) In 2012, the Counsel applied these principles in two cases that also raised an issue not raised in *Accor*, but which had been addressed by the CJEU in another case, *Test Claimants in the FII Group Litigation v. Commissioner of Inland Revenue*.\(^{24}\) In *Commission v. France*, the Court held that the Counsel’s lack of a Preliminary Reference on the issue, where there was reasonable doubt of compatibility with EU Law, constituted breach of Article 267(3) TFEU, requiring a Preliminary Reference from the Counsel where a question of compatibility with EU Law was raised.\(^{25}\)

Finally, in late November, the CJEU heard arguments in *Wightman v. Secretary of State for Exiting the EU*, in what might be a last legal throw of the Brexit dice.\(^{26}\) On September 21, the Court of Session in Scotland made a preliminary reference to the CJEU asking:

Where, in accordance with Article 50 of the TFEU, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the EU?\(^{27}\)

The judgement of the CJEU was expected on December 10.

B. IMPLEMENTATION OF THE EU-TURKEY STATEMENT ON IRREGULAR MIGRATION

As of November 2018, Turkey hosts 3,954,638 registered refugees.\(^{28}\) The number of Syrian refugees living in Turkey is assessed at 3,597,938, while 170,000 came from Afghanistan, 142,000 from Iraq, 39,000 from Iran, and 5,700 arrived from Somalia.\(^{29}\)

On October 15, 2015, the European Union and Turkey adopted a joint action plan aiming to address the migration crisis prompted by the situation in Syria.\(^{30}\) As a result, on March 18, 2016, the European Council and


\(^{23}\) Id.

\(^{24}\) Case C-35/11, Test Claimants in the FII Group Litig. v. Comm’r of Inland Revenue, 2012 ECLI:EU:C:707.

\(^{25}\) 18(a): Case C-416/17, Comm’n v. Fr., 2018 ECLI:EU:C:2018:811.

\(^{26}\) Wightman v. Sec’y of State for Exiting the EU [2018] CSIH 62 (Scot.).

\(^{27}\) Wightman v. Sec’y of State for Exiting the EU [2018] CSIH 62 (Scot.), app. at 3.


\(^{29}\) Id.

Turkey reached an agreement directed at stopping the influx of irregular migrants to Europe via Turkey and creating legal channels of resettlement of Syrian refugees to the European Union. In this so-called “EU-Turkey Statement,” both parties agreed: (1) to return to Turkey new migrants or asylum seekers crossing from Turkey to the Greek islands whose applications were declared inadmissible; (2) to resettle directly to the EU from Turkey one Syrian for every Syrian being returned to Turkey from the Greek islands; (3) for Turkey to take the required steps to prevent new sea or land routes for irregular migration to the EU; (4) to activate a “Voluntary Humanitarian Scheme”; (5) to fulfill the visa liberalization process for Turkish citizens; and (6) to accelerate the disbursement of €3 billion under the “Facility for Refugees in Turkey” and mobilize additional funding once these resources are about to be used.

The European Commission claims that the EU-Turkey Statement has delivered tangible results. As of April 2018, irregular arrivals remain ninety-seven percent lower than the period before the enforcement of the Statement, and the number of lives lost in the Aegean Sea has dropped significantly. The Commission states that over 12,476 persons have been resettled from Turkey to EU Member States.

Greek authorities have improved migration management procedures and reception conditions with support received from the Commission and the EU Member States, with the reception capacity in the Greek islands rising from 2,000 in October 2015 to 49,349 in April 2018. But the pace of returns from the Greek islands to Turkey has not improved, due mainly to the slow pace of processing asylum applications.

The Commission has pressed Member States to implement the pledges that they have made to support the essential work of the European Border and Coast Guard Agency at the external border, increase the effective rate of return, make progress on migrant protection, and the fight against smuggling along the Central Mediterranean Route. At the end of June 2018, an estimated 62,938 migrants and refugees were stranded in Greece.

32. Id.
35. See id.
36. See id.
meaning that there is still need for improvement in the Statement's implementation.38

C. DEVELOPMENTS IN MIGRANT RESCUE AT SEA: A LEGAL GAP IN PROTECTION

The human rights of migrants escaping war and poverty to Europe has triggered a major debate over national responsibility. In 2018, the most contentious dispute surrounds the subject of illegal immigration and the criminalization of Non-Governmental Organizations (NGOs) for aiding asylum-seekers. In Hungary, the parliament passed anti-immigration legislation, subjecting any individual or group found helping migrants on asylum claims to fines and incarceration.39

A number of EU coastal states have worked to block refugee arrivals by outlawing NGO rescue operations. In April, Italy's Supreme Court rejected the appeal of German charity Jugend Rettet to release the Juventa rescue ship seized in Sicily.40 This decision was delivered a week after a lower court in Ragusa released a Spanish ship, stating the rescue was justified because of human rights violations in Libya.41

In June, the Italian and Maltese governments closed their ports to NGO and merchant ships,42 attempting to offload hundreds of migrants. Despite deals struck between EU states to distribute the rescued,43 Malta impounded three NGO ships44 and grounded a rescue plane.45 Amongst the seized

41. Steve Scherer, Italy Court Releases Migrant Rescue Ship Seized Last Month, REUTERS (Apr. 16, 2018), https://af.reuters.com/article/africaTech/idAFL8N1RT4FQ.

PUBLISHED IN COOPERATION WITH SMU DEDMAN SCHOOL OF LAW
ships, the captain of a German ship was arrested and charged with illegally entering Maltese territorial waters without proper registration.47

The closing of ports and criminalization of rescue challenges the current interpretation of longstanding maritime law. A legal gap arises where there is no positive obligation on states to accept a rescued person. While Hungary’s “Stop Soros” law is considered to violate fundamental rights,48 Italy and Malta’s port closures are not necessarily illegal. The International Convention on Maritime Search and Rescue stipulates that coastal states have a duty to help regardless of the rescued person’s intent to illegally enter.49 For a ship master to complete a rescue, the rescued person must be delivered to a safe place.50 This duty is stalled where the law does not provide a definition for place of safety. The place of safety could be the nearest port, the rescue ship’s home port, a port in the rescued person’s home country, or the next port of call.51 If a receiving state denies entry, the rescuing ship is not allowed to return the asylum-seekers to their home country. Here, maritime law and the law on refugees create a conflict over who is responsible for accepting migrants rescued at sea.

D. EUROPE ATTEMPTS TO TACKLE “FAKE NEWS” WITH NEW LAWS AND APPROACHES

As a response to the influence of disinformation in the U.S. elections and Brexit vote in 2016, the EU and its Member States are attempting to rein in “fake news” through a series of news laws and approaches while balancing rights of free speech and freedom of the press. A healthy democracy requires a voting population that is well informed by correct information.52 Fake news and other disinformation spread through social media has been used by political groups, both domestic and foreign, to improperly influence voters and is seen as a threat to democratic elections.53

Earlier this year, the European Commission set up a High-Level Expert Group to study the problem by defining what is fake news and discussing

50. Id. at ch. 5.
53. Id.
different approaches.54 As a result, the EU adopted a voluntary “code of practice,” encouraging social media platforms to close fake accounts, flag sponsored content, and work with independent fact checkers.55 This is a first step that could lead to actual regulation if the voluntary system proves ineffective.56

Certain EU Member States have taken their own approaches. In July, France passed a law allowing courts to review “manipulative content” during election periods to determine whether it is credible or should be taken down.57 But the law is subject to review of France’s Constitutional Council to determine if it violates rights of free speech or freedom of the press.58

Italy has taken a different approach, putting the onus on social media platforms to work with fact checkers and flag potentially false information.59 Furthermore, it has implemented a program to educate readers on how to determine for themselves the credibility of information.60

Germany, last year, instituted a law requiring social media platforms to take down, within twenty-four hours, “manifestly unlawful” content, considered “everything from hate speech and propaganda to incitement.”61

In January, the UK set up a task force to define and tackle fake news, viewing it as a threat to national security.62

The Czech Republic has taken a similar strategy. The Centre Against Terrorism and Hybrid Threats works with twenty specialists to identify disinformation and counter it via social media.63 The Czech Republic also views this a national security threat by actors such as the Russian Federation in Czech elections.64

These new laws and task forces raise questions about limiting free speech and freedom of the press. While the initial intention is to fight false information with truth, there is the opposite worry of abuse, that these new rules and approaches might also be used to quiet truth and push the government’s agenda.

56. Kahn, supra note 55.
57. Zachary Young, French Parliament Passes Law Against ‘fake news,’ POLITICO (July 4, 2018), https://politico.eu/2K0wDwG.
58. Id.
59. Serhan, supra note 52.
60. Id.
61. Id.
64. Id.
III. National Legal Developments

A. CYPRUS: MAIN LEGAL DEVELOPMENTS

Cyprus is a small islandic state in the southeastern Mediterranean Sea, and has been a Member State of the EU since 2004. Its capital, Nicosia, is the last divided capital in Europe, due to the 1974 invasion of Cyprus by Turkey that established The Turkish Republic of Northern Cyprus covering forty-two percent of the island, a state recognized only by Turkey.65 UN Resolutions legally recognize the sovereignty of the Republic of Cyprus on the entire territory of Cyprus.66 This survey analyzes the legal developments of the Republic of Cyprus.

Cyprus is no longer obligated under any mandatory program of financially-related legal reforms imposed by the EU or the IMF. But Cyprus still reforms its laws rapidly and nowadays has a steady rate of economic development.

The international relations of Cyprus have seen significant developments. The signing of three parties’ agreements with Greece and Israel (Cyprus-Greece-Israel) and with Greece and Egypt (Cyprus-Greece-Egypt) aimed at energy cooperation will boost the economy of the island.67 At the same time, US, European, and Israeli companies are ready to start searching and drilling for oil and gas in the sea areas agreed by the parties in relation to the arrangement of their Exclusive Economic Zones. Turkey, however, has unsuccessfully challenged the legality of these arrangements.

On March 7, 2018, the European Commission published a Country Report for Cyprus, including an in-depth review on the prevention and correction of macroeconomic imbalances.68 Accompanying this document is the Commission Communication “2018 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011.”69

According to the Communication, efficient public administration in Cyprus remains a challenge. To address this, efforts are being made to improve and broaden Cyprus’ digital public services (e-government). In

---

2017, there were about 38,000 users in the government gateway portal “Ariadni” and over 300,000 users in “TaxisNet,” the electronic income tax returns system (the same name is also used in Greece).70 “Sixty-eight e-services have been developed in Cyprus in line with the “once-only” principle and thirty more are expected to be made available in the course of 2018.”71

Digitalization of justice is a very important issue in the EU and Cyprus. E-government and e-justice may evolve in the next few years to improve system interoperability and provide better services. But the justice system continues to face serious challenges in regard to its efficiency.72 There is a large backlog of pending cases and the digitalization of courts remains at a low level.

One serious problem is the lack of formal, life-long training of judges. The Supreme Court intends to create a special section in charge of life-long training for judges to become fully operational in 2018-2019.73 Also, “the establishment of a commercial court is envisaged in 2018,” which “will be responsible for cases involving amounts of over two million EUR.”74 New rules of procedure shall be drafted in 2018-2019.75 It is also expected that a Court of Appeals will be created in 2018/2019 to rule on civil, criminal, and administrative cases at second instance. Further, “a bill has been submitted to the House of Representatives for the establishment of an administrative court of international protection” of asylum seekers, as the Syria conflict goes on and refugees struggle to enter Cyprus to get access to the EU.76

Two major judgments of the General Court of the EU were issued in July 2018 relating to Cyprus, T-680/13, Chrysostomides v. Council, and T-786/14, Bordouvali v. Council.77 These cases involved companies and citizens as depositors and shareholders or bondholders of Laiki Bank and Bank of Cyprus who suffered financial losses due to “haircuts” following measures to deal with the financial crisis. Under the European Financial Stabilisation Mechanism procedure, financial assistance was granted to Cyprus in return of reforms and procedures to impose specific measures, including mandatory losses on investments. The CJEU said that the EU was not contractually liable to the companies and citizens as there was no unlawful conduct of an EU institution (Cyprus had applied for financial assistance voluntarily) and, as a result, the CJEU rejected the claims for compensation.

71. Id.
72. Id. at 2.
Provisions of the EU Directive 2014/104 on private enforcement of EU competition law have been implemented in Cyprus, which allow private parties to sue other companies for infringement of EU and/or Cypriot competition law.78

B. FRANCE: 2018 WEALTH TAX REFORM

There are only a few countries in the world that levy direct wealth taxes. But in recent times more countries have shown an interest in them as a means to raise state revenue and address wealth inequality.79 France has applied a wealth tax since 1982 to rebalance and redistribute wealth.

The tax has long been criticized for moral, tax, and economic reasons reflecting political and ideological divisions.

In 2017, President Emmanuel Macron decided to modify the wealth taxation, introducing a taxation based on real estate wealth only on January 2018.80 The 2018 reform applies to French and non-French residents, limited to those who own—directly or indirectly—real estate in France whose net value is greater than €1,300,000 on January 1st of the tax year. The new article 965 of the French tax code states that the tax base is constituted by the net value of (a) All property and property rights and (b) Units or shares of companies and organizations established in France or outside France, for the fraction of their value representing real estate assets or rights held directly or indirectly by the company or body.

Taxation is thus no longer limited to securities of companies with a predominance of real estate. Subject to bilateral tax treaties, the new French tax applies to all securities of companies, whether listed or not, whatever the social form, the tax regime, and the place of establishment (in France or abroad). Assets placed in a trust are also included in the patrimony of the settlor or in that of the beneficiary who is deemed to be a settlor.

Nevertheless, some properties are excluded from the wealth tax, such as properties and immovable rights held by the individual and assigned to his professional activity, or properties and immovable rights held by the directors of companies’ subject to corporation tax, held directly or indirectly. The exclusion is only applicable to the fraction of the value of the securities of companies representing property and real estate rights assigned by the owner company to its own operational activity.


The 2018 reform also introduced declarative obligations on taxpayers, companies, or organizations that are direct or indirect owners of real estate in France. The declarative obligations include revealing the identity of shareholders, such as Delaware companies. Opacity is over. This new law creates fiscal transparency between the owner of the shares and the property located in France.

C. Germany: Developments in Personal Liability of Managing Directors of a GmbH

A German privately-held entity in the form of a GmbH (Gesellschaft mit beschränkter Haftung or Company with Limited Liability) is represented by one or more managing directors who are appointed by the company’s shareholders. Managing directors must be natural persons. A GmbH may hold a managing director personally liable for failing to observe any number of statutory obligations, including the duty to act in the best interests of the company, the duty to arrange for the payment of the GmbH’s social security obligations, or the duty to file for bankruptcy on behalf of the GmbH in a timely manner if it is bankrupt. The managing director may be subject to other obligations if set forth in the GmbH’s articles of association or shareholders’ resolutions. Finally, the GmbH often enters into an individual service agreement with a managing director. This contract may also prohibit the managing director from entering into certain actions without first obtaining the shareholder’s approval. Breaching any of these obligations may lead to personal liability.

A 2018 opinion by the Munich Court of Appeals further crystalized a managing director’s potential personal liability. In that case, a managing director represented a GmbH (GmbH 1) that brokered investment real estate. GmbH 1 had concluded a framework agreement with a second GmbH (GmbH 2) permitting GmbH 1 to offer to sell real estate listed by GmbH 2 to GmbH’s own customer base. If a sale came to fruition, GmbH 1 would earn a twelve percent commission from GmbH 2. The framework agreement also included a customer protection clause prohibiting GmbH 2 from directly contacting GmbH 1’s customer base; the purpose of this clause was to ensure that GmbH 1 would earn a commission if a sale was made to any of its customers.

GmbH 1 and GmbH 2 eventually amended the framework agreement. In the amended amendment, the parties not only reduced the commission from twelve percent to eleven percent, but they also removed the customer protection clause. The 2018 reform also introduced declarative obligations on taxpayers, companies, or organizations that are direct or indirect owners of real estate in France. The declarative obligations include revealing the identity of shareholders, such as Delaware companies. Opacity is over. This new law creates fiscal transparency between the owner of the shares and the property located in France.

---

83. Id. In Germany, the courts do not disclose the names of the parties. This is the reason for using “GmbH 1” and “GmbH 2” in the case description.
protection clause. Upon learning of these amendments, GmbH 1’s shareholder filed an action against the managing director of GmbH 1 seeking to hold him personally liable for breaching his statutory duty of acting in the best interests of the company. The shareholder argued that failing to include the customer protection clause in the amended agreement gave GmbH 2 free access to GmbH 1’s trade secret—its customer list—resulting in significant financial damages to GmbH 1. This should have been clear to the managing director when he entered into the amended framework agreement. The defendant argued that he was not personally liable because his actions were protected by the business judgment rule, i.e., the decision to enter into the amended framework agreement was within his authority as a managing director and he entered into the revised agreement in good faith in the best interests of GmbH 1.84

The Munich Court of Appeals first addressed whether the decision to enter into the revised framework agreement without obtaining the shareholder’s prior approval was within the managing director’s authority.85 If not, then the court did not need to address the follow-up issue of immunity from personal liability under the business judgment rule. The court held that, because the managing director breached his duty of acting in the best interests of the company, he did not act within his authority. Accordingly, there was no need to review the business judgment rule issue. The court cited German Federal Supreme Court precedent, which held that if it is unavoidable that an entity will suffer damages as a result of a managing director’s actions, and there is no reasonable business interest for taking such actions, then the managing director cannot be deemed to have acted within his authority.86 This was precisely the situation in the instant case, because entering into the revised framework agreement exposed GmbH 1 to damages; there was no upside for GmbH 1 to enter into such a transaction.

This opinion illustrates the importance of documenting a managing director’s decision-making process, in case an entity subsequently files a claim. This problem is exacerbated if the managing director has since been terminated and is, therefore, without access to corporate documentation that can provide evidence of his decision-making. As a result, when negotiating an individual service agreement, a managing director should insist on a right to such corporate documentation, even after leaving the company. Too often, the consequences for failing to include such a clause become clear only after the agreement has been concluded and the managing director is no longer with the company, i.e., too late.

84. Id. When German courts opine on the business judgment rule, they typically use the English terminology, i.e., there is no real term for “business judgment rule” in the German language.
85. Id.
86. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 21, 2005, II ZR 54/03.
D. GREECE: MAIN LEGAL DEVELOPMENTS

After a severe economic and financial crisis and three major legal reforms, Greece now seems to be recovering and on track towards economic development. Parliamentary elections will be held in 2019, which offer the prospect of four years of political stability to underpin recovery.87

The OECD cites Greece as having a well-developed framework to ensure the quality of regulation.88 The 2012 Law on Better Regulation states basic principles for regulation, such as efficiency and transparency.89 Draft regulations and laws are published on a portal (www.opengov.gr). This is a significant development toward improving the level of democracy and lawful operation of the institutions of the state.

But public consultations are not always considered to be important by the legislature. To address this, the Law of Better Regulation requires an ex ante regulatory impact assessment (RIA) for every legislative draft, or amendment to existing regulations and an ex post impact assessment. But as ex post reviews have been rare in 2017 and 2018, the Ministry of Administrative Reconstruction is beginning an extensive evaluation of existing legislation, with the goal of curtailing the large “stock” of regulations.90

The Better Regulation Office (BRO) still lacks a sufficient budget and skilled employees in 2018.91 The OECD Survey calls for simplification of the allocation of responsibilities among different agencies assessing the quality of regulation. Training civil servants on regulatory quality would build the skills of staff at the BRO. This would be crucial for the next year regarding the Greek legislation and the new laws.

Further, in 2017 and 2018, new Bankruptcy Code rules were established to form the legal framework for insolvencies and for companies to have a second chance to be reconstructed instead of being dissolved.92 Public sector reforms and the National Anti-Corruption Action Plan are being implemented through a joint project of Greece and OECD on anti-corruption. Electronic auctions, even if challenged by notaries and citizens who lose their houses, are now on track. This is controversial, and there is an effort to find solutions to strike a balance between the pending loans of

the banks and the need of the citizens to be protected, at least in regards to their own homes.

In employment law, Greek law 4554/2018, published in the Government Gazette on July 18, 2018, introduces measures aiming at enhancing the protection of outsourced employees and tackling undeclared work. The key changes introduced by the new law include: (a) measures enhancing the protection of outsourced employees; (b) an updated sanction system for undeclared work, amounting to losses for the state taxes and social contributions causing instability to the pension systems; (c) notification requirements for internships; (d) communication of administrative acts of the Labor Inspectorate by electronic means; (e) and establishing December 26th as a mandatory public holiday. Law 4554/2018 further “imposes a fine of 10,500 EUR for every employee found to be undeclared in the personnel list during an inspection by the Labor Inspection Authorities.”

Moreover, Law 4548/2018 amends the tax laws as well as the definition of Bond Loan and Ministerial Decision Pol. Law 4549/2018 introduces changes to corporate, individual, and real estate taxation and Value Added Tax. Law


95. Nomos (2018:4548) Anamórfosi tou dikaiou ton anónymon etaireiôn [Reform of the Law of Public Limited Companies], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.], 2018, A:104 (Greece); The Long-Awaited Reform of the Greek Law on Sociétés Anonymes, KYRIAKIDES GEORGOPOULOS LAW FIRM (2018), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwikqbDgpOTgAhVSRKOKHU_dCHQFjABegQJDBCAC&url=http%3A%2F%2Fwww.kglawfirm.gr%2Fdownload.php%3Furl%3D5b31e29b8f06f.pdf%26name%3DTe%2520Long-awarded%2520reform%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-%2520Anon%2520yme%2520-...
4548/2018 (article 59 par. 1) amended the Codified Law 2190/1920 for the Societes Anonymes (Limited Liability Companies). The new legislation will be effective as of January 1, 2019. It reforms the legal provisions on bonds—abolishing articles 1-9 and 12 (except for art. 2 par. 4) of Law 3156/2003. In accordance with the new provisions, an SA company may issue single-note bond loans, subscriptions to bond loans can only be made by one person, and all bonds may be held by one bondholder.

Following the enactment of Law 4548/2018 and Opinion No. 43/2018 of the Legal Council of State, the Independent Authority of Public Revenues issued Pol. 1131/2018, which provides clarification on the tax exemptions relating to bond loans. Tax exemptions may apply to the following cases: (a) bond loans where all bonds are held by only one bondholder; (b) bond loans where the majority of the bonds are held by a legal person and the minority by another legal person; (c) bond loans where the bondholders are affiliate legal entities of the issuer, as defined by the Greek Accounting Principles (Law 4308/2014), Article 42e of Codified Law 2190/1920, or Article 2 of Law 4172/2013.

Obligatory mediation in trademark and other disputes under Law 4512/2018 has been suspended until September 16, 2019, following an amendment adopted on September 27, 2018. Lawyers and Bars raised a serious legal argument: mediation must be the outcome of a voluntary process, not a mandatory legal obligation. If obligatory, mediation would require a court-like procedure. Finally, Directive 2014/104 on private enforcement of competition law became Law 4529/2018 in Greece.

---

100. Ministry of Finance, supra note 96.
In the field of legal education, article 16 of the Greek Constitution forbids private universities. But law graduates from the private Cypriot European University Cyprus (EUC) Law School now have equal standing with graduates of the public Athens, Thessaloniki, and Thrace University Law Schools, based on their taking the same exams and following the same curriculum as in Greece. This decision was delivered in the judgment of the Greek Council of State (Supreme Administrative Court) 1755/2017 and a follow-on judgment in 2018.104 After these two judgments, the Greek authorities are obligated to recognize the law degrees of EUC Law School as equal to the Greek law degrees of public universities, and the Bars are obligated to accept the registration of those law degree holders to their registries to make their practice and become lawyers in Greece.

E. SPANISH LEGAL DEVELOPMENTS IN CORPORATE GOVERNANCE: NEW SUPREME COURT JUDGMENT ON DIRECTORS’ COMPENSATION

Over the past few years, several amendments have been introduced in the Spanish Corporate Enterprises Act105 for the purpose of converting EU corporate governance recommendations on directors’ compensation106 into statutory law. Law 31/2014 of December 3 for the improvement of Corporate Governance107 introduced the most significant amendments. As a result, at present, the Spanish Corporate Enterprises Acts provides that directors can only be compensated if the articles of association expressly state that directors are entitled to receive compensation for their services and

---

104. Symboulion Epikrateias [S.E.] [Supreme Administrative Court] 1755/2017 (Greece).
specifies the type of compensation. The maximum amount of compensation to be paid to all directors annually is subject to shareholder approval. In determining this amount, shareholders need to consider the current financial situation of the enterprise and the market standards applied by comparable enterprises. The board decides how the total amount is distributed among the directors, unless otherwise agreed by the shareholders.108

Regarding members of the board of directors, the Corporate Enterprises Act requires each director with executive or managing authority to enter into a services agreement with the enterprise, which, among other aspects, will regulate the compensation the director is entitled to. The services agreement must be approved by the board of directors.109

The General Directorate for Registers and Notaries (DGRN), which belongs to the Spanish Ministry of Justice, is the body that sets precedence concerning the interpretation of regulations by commercial registers when registering articles of associations. It ruled that the disclosure of information on directors’ compensation in the articles of association and the submission of the annual compensation to the approval of the shareholders were requirements applicable to directors of the board with supervisory authorities only, but not to directors with executive or managing authorities, to the extent their remuneration was already regulated under the services agreement they had to enter into with the company. This interpretation was also supported by jurisprudence.

The judgment of the Spanish Supreme Court, dated February 26, 2018110, changed the interpretation of the DGRN in the following terms: the compensation of the executive or managing directors must also be framed within the articles of association of each company and subject to shareholder approval.

The DGRN, in its interpretation of the Court’s decision, has also considered a legal and registrable clause of the articles of association, which differentiates between the total maximum compensation that may be paid to directors with supervisory authorities, and the total maximum compensation that may be paid to directors with executive or managing authorities.111

109. Id. at art. 249.
110. S.T.S., Feb. 26, 2018 (T.S. No. 98) (Spain).