

2012

Europe

Marie Tedesco Scott

Vos Andrea De

Brian M. Bowman

Leonie Reins

Anders Etgen Reitz

See next page for additional authors

Recommended Citation

Marie Tedesco Scott et al., *Europe*, 46 INT'L L. 537 (2012)
<https://scholar.smu.edu/til/vol46/iss1/38>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Europe

Authors

Marie Tedesco Scott, Vos Andrea De, Brian M. Bowman, Leonie Reins, Anders Etgen Reitz, Julie Lindberg, Manning Gilbert Warren III, Bradley P. Opfermann, Elena Sabkova, Harry Stamelos, Athena Moraiti, Pat English, Emma Doherty, Stefano Viola, Michal Bernaczyk, Anne Wagner-Findeisen, Agnieszka Jasiorkowska, Wojciech Baginski, Richard Silberstein, Irene Siurana Sieiro, Florian S. Jörg, and Larry D. White

Europe

MARIE TEDESCO SCOTT, ANDREA DE VOS, BRIAN M. BOWMAN, LEONIE REINS, ANDERS ETGEN REITZ, JULIE LINDBERG, MANNING GILBERT WARREN III, BRADLEY P. OPFERMANN, ELENA SABKOVA, HARRY STAMELOS, ATHENA MORAITI, PAT ENGLISH, EMMA DOHERTY, STEFANO VIOLA, MICHAL BERNACZYK, ANNE WAGNER-FINDEISEN, AGNIESZKA JASIORKOWSKA, WOJCIECH BAGINSKI, RICHARD SILBERSTEIN, IRENE SIURANA SIEIRO, FLORIAN S. JÖRG, AND LARRY D. WHITE*

I. Introduction

The article surveys important legal developments in the European Union and in specific European countries during 2011.¹

* The 2011 Year in Review of the Europe Committee of the ABA Section of International Law was coordinated and edited by Marie Tedesco Scott, student at Saint Louis University School of Law. The following authors submitted contributions: EU-Access to Leniency Application Materials After *Pfleiderer* - Andrea de Vos, Associate at Cleary Gottlieb Steen & Hamilton, LLP in Brussels, Belgium; EU Unbundling Requirements - Brian M. Bowman, LL.M. KU Leuven, Belgium; EU - External Energy Policy - Leonie Reins, LL.M., Ph.D. candidate KU Leuven, Belgium; EU- Collective Redress - Manning Gilbert Warren III, Brandeis School of Law, University of Louisville; Austria - Bradley P. Opfermann, LL.M. candidate, The John Marshall Law School, Chicago, IL; Bulgaria - Elena Sabkova, U.S. Counsel for Moneybookers USA, New York, NY; Denmark - Anders Etgen Reitz, Partner and Julie Lindberg, HR law specialist, both with IUNO; Greece - Dr. Harry Stamelos and Athena Moraiti; Ireland - Pat English, Partner and Emma Doherty, Associate, both with Matheson Ormsby Prentice in Dublin, Ireland; Italy - Stefano Viola, partner with Balla e Ciapponi in Chicago, IL; Poland - Information Law - Michal Bernaczyk, Attorney at Law, Associate Professor, University of Wroclaw, and Anne Wagner-Findeisen; Poland - The Amendment of the Act on Maintaining Cleanliness and Order in Municipalities - Agnieszka Jasiorkowska, Associate at Siemiatkowski & Davies in Warsaw, Poland; Poland - Mining Law - Wojciech Baginski, LL. M., Registered Foreign Attorney with Siemiatkowski & Davies in Warsaw, Poland; Spain - Richard Silberstein, Partner with Gómez-Acebo & Pombo Abogados, S.L., and Irene Siurana Sieiro with Gómez-Acebo & Pombo Abogados, S.L.; Switzerland - Dr. Florian S. Jörg, Partner with Bratschi Wiederkehr & Buoh, in Zurich, Switzerland; Turkey - Larry D. White, TOBB ETU School of Law, Ankara, Turkey.

1. For developments in 2010, see Elena Sabkova et al., *Europe*, 45 INT'L LAW. 505 (2011). For developments in 2009, see Madeline Giansanti Çag et al., *Europe*, 44 INT'L LAW. 645 (2010).

II. The European Union

A. ACCESS TO LENIENCY APPLICATION MATERIALS AFTER *Pfleiderer*

On June 14, 2011, the European Court of Justice (ECJ) delivered judgment in *Pfleiderer AG v. Commission*.² The decision was expected to provide guidance in cases where tension existed between the public enforcement of European Union (EU) competition law and private enforcement through private damages claims. Unfortunately, the ECJ did not provide guidance on issues affecting the enforcement of EU competition law or the uniform application thereof, nor did it provide legal certainty.

Under the EU leniency program, a successful leniency applicant may have fines waived or reduced. The applicant must cooperate with the Commission so that the Commission can make its case against the other cartelists. The leniency applicant, however, is not protected against private damages claims.³ The effectiveness of EU competition law could be reduced if leniency applicants are deterred from coming forward and cooperating with the Commission.

In contrast, third parties allegedly injured by illegal cartel practices have a right to claim damages for harm. A finding of infringement by the EU Commission is binding for national courts,⁴ rendering access to the information in the case files unnecessary for that purpose. There is no express equivalent that applies to national competition authority (NCA) decisions for the above rule. However, the doctrine of *effet utile* arguably requires the national courts to avoid conflicting findings. Leniency applications may (although this is often questioned) contain information on the effect of the cartel, such as causality and the amount of damages that is a key issue in such actions.

In January 2008, following a national leniency application, the German Federal Cartel Office (Bundeskartellamt) fined members of the “decoration paper cartel” €62 million.⁵ The Bundeskartellamt denied *Pfleiderer AG* (*Pfleiderer*), a German design company, access to the full case file held by the Bundeskartellamt (including leniency materials) that *Pfleiderer* had requested to pursue a private damages claim. *Pfleiderer* subsequently petitioned the district court in Bonn to order access to the full file. The district court held that *Pfleiderer* was an aggrieved party with a legitimate interest to access the complete file, but stayed its decision ordering access in anticipation of ECJ guidance. The preliminary question put to the ECJ was whether EU law precludes a NCA from disclosing information voluntarily communicated to it by leniency applicants pursuant to a national leniency program.

In *Pfleiderer*, the ECJ noted that there is no binding EU regulation dealing with access to documents voluntarily submitted to a NCA pursuant to a national leniency program. The ECJ concluded that EU law cannot preclude “a person who has been adversely affected by an infringement of [EU] competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpe-

2. Case C-360/09, *Pfleider AG v. Comm'n*, 2011 EUR-Lex LEXIS 908 (June 14, 2011).

3. Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases 298/11, 2006 O.J. (C 298) 17.

4. Council Regulation 1/2003, art. 16, 2002 O.J. (L 1) 13.

5. *Pfleiderer AG*, C-360/09, ¶ 9.

trator of that infringement.”⁶ It held, however, that national courts should balance the interests protected by EU law on a case-by-case basis, according to national law, and take into account all relevant factors of the case.⁷

B. UNBUNDLING REQUIREMENTS IN THE NATURAL GAS SECTOR

In 2007, the European Commission found that the legal and functional unbundling requirements of Directive 2003/55/EC (the Second Gas Directive)⁸ were insufficient. In response, Directive 2009/73/EC (the Third Gas Directive), which entered into force in March 2011, required member states to implement rules that aim to effectively unbundle ownership of gas networks from entities engaged in production and supply activities through: (i) ownership unbundling; (ii) independent system operator (ISO); or (iii) independent transmission operator (TTO).⁹

The Commission has recognized ownership unbundling as the most effective method of liberalizing the market.¹⁰ Article 9(1) of the Third Gas Directive requires that (i) each natural gas undertaking that owns a natural gas transmission system must act as a transmission system operator (TSO); (ii) the same person(s) is not entitled to directly or indirectly (a) exercise control over an undertaking performing any of the functions of natural gas production or supply and directly or indirectly exercise control or exercise any right over a TSO or over a natural gas transmission system, or (b) exercise control over a TSO or over a natural gas transmission system and directly or indirectly exercise control or exercise any right over an undertaking performing any of the functions of natural gas production or supply; (iii) the same person(s) is not entitled to appoint a member of a board or other body with the authority to legally represent the TSO and directly or indirectly “exercise control or exercise any right over an undertaking performing any of the functions of production or supply;” and (iv) the same person(s) is not entitled to be a member of a board or other body with the authority to represent both an undertaking performing any of the functions of natural gas production or supply and a TSO or a transmission system.¹¹ However, any common control or right of the types described above will be permitted to the extent such shareholding provides only “financial rights” and does not confer “voting rights, no matter how limited, including voting rights that do not amount to control.”¹²

6. *Id.* ¶ 33.

7. *Id.* ¶ 31.

8. Council Directive 2003/55, 2003 O.J. (L 176) 57.

9. *Commission Staff Working Paper, Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas, The Unbundling Regime*, at 4, (Jan. 22, 2010), available at http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_unbundling_regime.pdf [hereinafter *Commission Note on Unbundling—Third Gas Directive*].

10. *Communication from the Commission to the Council and the European Parliament, Prospects for the Internal Gas and Electricity Market*, at 3, COM (2006) 842 final (Oct. 1, 2007).

11. Council Directive 2009/73, art. 9, 2009 O.J. (L 211) 106. The definition of “control” in the Third Gas Directive is identical to the definition of such term in the Second Gas Directive. See Council Regulation 139/2004, art. 3, 2004 O.J. (L 24) 7.

12. *Commission Note on Unbundling – Third Gas Directive*, *supra* note 9, at 9.

If, as of September 3, 2009, a natural gas transmission system belonged to a vertically integrated undertaking (VIU),¹³ a member state is entitled by virtue of Article 9(8) of the Third Gas Directive to “decide not to apply” the full ownership unbundling requirements described above.¹⁴ Instead, it may designate an Independent System Operator if the transmission system owner submits an acceptable proposal for such designation to the national regulatory authority.¹⁵

The final alternative to unbundling under the Third Gas Directive is the use of an Independent Transmission Operator. This option is available to a member state when, as of September 3, 2009, the natural gas transmission system belonged to a VIU.¹⁶ Articles 17–23 of the Third Gas Directive specify “numerous detailed rules” to which an ITO will be subject to in order to “ensure effective unbundling.”¹⁷

C. EU EXTERNAL COMPETENCE IN REGARD TO ENSURING ENERGY SUPPLY SECURITY

In the EU, the competence for the external dimensions of energy supply security has been changed following the conclusion of the Lisbon Treaty in 2009.¹⁸

1. *The Energy Title XXI in the Treaty on the Functioning of the European Union*¹⁹

The Lisbon Treaty introduced a separate competence for a “Union policy on energy” in Article 194 of the Treaty on the Functioning of the European Union (TFEU). It enables the Union to ensure (a) “the functioning of the energy market” and (b) “the security of energy supply[.]”²⁰ Paragraph 1 starts by limiting “the establishment and functioning of the internal market” and notes “the need to preserve and improve the environment[.]”²¹ Complying with the objectives seems to be limited to the internal market and environmental perspective. Thus, the Article provides a legal basis for only internal security of supply measures and not for external ones.²²

13. Council Directive 2009/73, *supra* note 11, at art. 2(20). A VIU is defined in the Third Gas Directive.

14. *Id.* art. 9(8).

15. See *Commission Note on Unbundling – Third Gas Directive*, *supra* note 9, at 10–12 (any ISO designation is subject to Commission approval). See also Council Directive 2009/73, *supra* note 11, at art. 14(1).

16. *Commission Note on Unbundling – Third Gas Directive*, *supra* note 9, at 10.

17. *Id.* at 14–15.

18. Treaty of Lisbon Amending the European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O. J. (C 306) 1 [hereinafter Lisbon Treaty].

19. For more information see Hans Fedder, *The Treaty of Lisbon and European Environmental Law and Policy*, 22 J. ENVTL. L. 285 (2010).

20. Consolidated Version of the Treaty on the Functioning of the European Union, art. 194, Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

21. *Id.*

22. SANAM S. HAGIGHI, ENERGY SECURITY: THE EXTERNAL LEGAL RELATIONS OF THE EUROPEAN UNION WITH MAJOR OIL-AND GAS-SUPPLYING COUNTRIES 83f (2007).

2. Article 122 of TFEU

The external dimension is provided by Article 122(1) of the TFEU, “notably in the area of energy” to the economic cooperation clause.²³ This reflects the EU’s concern about dependence on external suppliers for energy.

3. Internal and External Competences

The Lisbon Treaty abolished the distinction between the EU and the European Community, integrating them into one entity. The unified legal personality of the Union²⁴ strengthens its negotiating power. However, there are still multiple actors on an international level: the EU and the member states. The question of the delimitation of competences is crucial when it comes to external actions.

The TFEU provides new bases to deduce a competence for the external dimension, for example: in the “neighborhood policy” (Article 8 of the TFEU), for external actions relating to humanitarian aid (Article 214 of the TFEU); and the solidarity clause in Article 222 of the TFEU, where the EU and its member states act jointly in solidarity in case of a natural or man-made disaster. In addition, an implied external competence can be seen in article 216(1) TFEU, where “the Treaties so provide” (expressed external competence) or “where the conclusion of an agreement is necessary in order to achieve . . . one of the objectives referred to in the Treaties[.]”²⁵ Further, the EU can use the provision in Article 352 of the TFEU to extend EU legislation to harmonize measures with no specific legal basis, as it did before the Lisbon Treaty.²⁶

4. Common Foreign and Security Policy (CFSP)

The CFSP competence in Article 2 paragraph 4 of the TFEU is a competence *sui generis*, being a shared competence without pre-emption. By strengthening the loyalty and mutual solidarity obligation in the new Article 24 paragraph 3, member states must actively support the EU’s external actions and are not allowed to act contrary to the EU’s interest. Thus, a stronger basis has been established for the EU to enforce a common, coherent approach towards third countries. The relevant treaty provisions demonstrate that there is no clear, explicit, exclusive competence established for the Commission concerning the external dimension of energy supply security. To establish a common voice and effective energy supply policy within the Union, an agreement is needed to create legal certainty about the nature of the external competences.

D. COLLECTIVE REDRESS IN THE EUROPEAN UNION

During the past fifteen years, the European Commission has advanced initiatives designed to improve collective redress for group actions for residents of member states. In early 2011, the European Commission submitted for public comment a working docu-

23. TFEU, *supra* note 20, at art. 122(1).

24. *Id.* art. 47. The Union shall have legal personality.

25. *Id.* art. 216(1).

26. See HAGIGHI, *supra* note 22, at 73.

ment titled, *Towards a Coherent European Approach to Collective Redress*.²⁷ The consultation sought to determine how common legal principles would fit into existing legal orders of member states and procedural remedies already available to enforce EU law.²⁸

While promoting development of more effective class remedies, the Commission emphasized the necessity of avoiding certain features of the U.S. legal tradition, such as the use of contingency fees, expensive discovery procedures, and punitive damage awards. In its working document, the Commission suggested that some features of the U.S. litigation system are anathema to litigation in the EU. It identified contingency fees, the absence of the “loser pays” system, punitive damages, and liberal discovery procedures as factors that collectively “increase the risk of abusive litigation to an extent which is not compatible with the European legal tradition.”²⁹

The Commission’s public consultation process concluded on April 30, 2011.³⁰ Most institutional responses rejected contingency fees, supported the loser pays rule, objected to any liberalization of civil discovery, opposed punitive damages, and overwhelmingly favored “opt-in” versus “opt-out” class determination procedures. The comments suggest it is unlikely that a U.S.-style class action model will be emulated by collective redress schemes in the EU.

III. European Countries

A. AUSTRIA

On July 1, 2011, a Serbian national named Dejan Karabasevic was arrested in Klagenfurt, Austria for attempting to sell American technology to a Chinese firm.³¹ He was convicted of industrial espionage on September 23, 2011 and sentenced to a year in prison and two years of probation.³² American Superconductor (AMSC) is a green-energy engineering firm located in Massachusetts. In 2007, AMSC entered into a \$70 million contract with Sinovel, a Chinese wind turbine manufacturer, to supply electrical components.³³ When Sinovel refused delivery of a required component, AMSC investigated and found that turbines at the company that should have been shut down were instead running.³⁴ AMSC discovered that its control system code had been copied. This code had been the only way for Sinovel to upgrade the turbines to comply with Chinese power grid regulations.³⁵ AMSC traced the information leak to Windtec GmbH, its sub-

27. *Public Consultation: Towards a Coherent Approach to Collective Redress*, SEC (2011) 173 final (Feb. 4, 2011).

28. *Id.* at 5.

29. *Id.* at 9.

30. *See id.* at 5.

31. Herman K. Trabish, *Wind Power: AMSC Employee Pleads Guilty to Passing Code to Sinovel*, GREEN-TECHMEIDA (Sept. 26, 2011), <http://www.greentechmedia.com/articles/read/amsc-employee-pleads-guilty-to-passing-code-to-sinovel/>.

32. William Pentland, *Clean Energy, China-Style: Sex, Cash and Stolen Technology*, FORBES (Sept. 23, 2011), <http://www.forbes.com/sites/williampentland/2011/09/23/clean-energy-china-style-sex-cash-and-stolen-technology/>.

33. *Former Windtec worker accused of selling secrets to Sinovel*, WINDPOWER MONTHLY (Sept. 21, 2011), <http://www.windpowermonthly.com/news/1093868/Former-Windtec-worker-accused-selling-secrets-Sinovel/>.

34. *Id.*

35. Trabish, *supra* note 31.

sidiary in Klagenfurt, Austria, and a disgruntled employee named Dejan Karabasevic. The employee was arrested for selling AMSC's source code to Sinovel for €15,000.³⁶ The trial testimony indicated that Sinovel offered Karabasevic a \$1.7 million employment contract, a car, and an apartment in exchange for the technology.³⁷ Sinovel denied any wrongdoing, blamed AMSC for failing to make timely technology upgrades to the systems, and claimed AMSC's failures had forced Sinovel to develop its own upgrades, which it did successfully over five years with 800 Chinese engineers. Sinovel also claimed Karabasevic and AMSC had damaged Sinovel's image and reputation. The guilty plea and conviction of Karabasevic in Austria should work to AMSC's advantage in any future litigation.

B. BULGARIA

The new Bulgarian Law on Energy from Renewable Sources was promulgated on April 21, 2011.³⁸ As an EU member state, Bulgaria must implement EU Directive 2009/28/EC, which requires increased consumption of energy from renewable sources. Bulgaria's commitment is to ensure that, by 2020, sixteen percent of its energy will come from renewable sources. To reach this goal, the Bulgarian legislature enacted the new Law on Energy from Renewable Sources, which implements the country's National Action Plan.³⁹ The new law introduces the "feed-in tariff," which obliges utility companies to buy renewable energy from producers at a premium rate and make payments per kilowatt-hour for a guaranteed period.⁴⁰ The price at which energy is sold to the grid can be an all-inclusive rate or a fixed premium payment on top of the prevailing spot-market price for power.⁴¹ Advantages of the feed-in tariff include guaranteed grid connection, long-term purchase contracts for electricity and fixed prices sufficient to create a reasonable return on investment. The feed-in tariff differs considerably from the "net-metering" approach for connecting energy from renewables to the grid. The latter is more popular in the United States, where some states allow the electricity meters to spin backwards when energy from a renewable source is consumed by the end-user and excess energy is returned to the grid.⁴² Unlike net-metering, the feed-in tariff requires those who have implemented it to "export" all of their electricity to the grid.⁴³ Regardless of anticipated revenue predictability and expected increase in consumption of energy from renewable sources targeted by

36. Ellie Zolfagharifard, *AMSC man 'admits selling wind secrets to Sinovel for \$20,500'*, RECHARGE NEWS (Sept. 20, 2011), <http://www.rechargenews.com/energy/wind/article278982.ece>.

37. Pentland, *supra* note 32.

38. УКАЗ № 92, Закон за енергията от възобновяеми източници [Decree No. 92, Law on Renewable Energy], Mar. 5, 2011, *available at* <http://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=48899>.

39. *Id.*

40. *Feed-In Tariffs—Boosting Energy for Our Future*, WORLD FUTURE COUNCIL, http://www.worldfuturecouncil.org/fileadmin/user_upload/Maja/Feed-in_Tariffs_WFC.pdf (last visited Mar. 5, 2012).

41. *2008 Integrated Energy Policy Report Update 23*, CAL. ENERGY COMM'N, <http://www.energy.ca.gov/2008publications/CEC-100-2008-008/CEC-100-2008-008-CMF.pdf> (last visited Mar. 5, 2012).

42. *Net Metering*, LONG ISLAND POWER AUTH., <http://www.lipower.org/residential/efficiency/renewables/solar-metering.html> (last visited Mar. 4, 2012).

43. CAL. ENERGY COMM'N, *supra* note 41.

the new Bulgarian Law, there have been concerns regarding the difficulties in the access of funding for new market players.⁴⁴

C. DENMARK

Increased use of social media such as Facebook and LinkedIn by company employees has led to several Danish cases setting boundaries for employee conduct on social media and implementing a duty of loyalty.⁴⁵ In one case, a sales representative was given a staff manual stating that mail sent to the company and the employee's work e-mail were the company's property. In 2009, the employee was dismissed and put on leave. The company forbade the employee from contacting or discussing the company with the company's employees or customers. Following termination of the employee, the director opened e-mails sent to the employee's work e-mail address, including e-mails sent on the employee's private LinkedIn account. The employee had listed his work e-mail as a contact address on his LinkedIn account and had failed to change it after the termination. The employer found a LinkedIn message to one of the company's customers. The employee had made derogatory remarks about the company, which constituted a material breach of the employment agreement. The employee claimed that the correspondence with the customer was of a private nature because it was conducted on his private LinkedIn account. The court found that, because of the customer's business relationship with the company and the nature of the correspondence, the correspondence was not of a private nature. The court found that the correspondence constituted a violation of the employee's duty of loyalty and that the dismissal was lawful.

D. GREECE

The Hellenic Parliament passed 121 new laws from January 1, 2011 through October 29, 2011.⁴⁶ Many of those laws reflected attempts to reverse Greece's negative market performance and reputation. A selection of the laws is described below.

- Law 3959/2011 encourages mergers, mainly of banks, and aims to stop cartels.
- Law 3908/2011 encourages private investment to stimulate economic growth. The law grants three kinds of incentives: (a) tax exemptions for business profits; (b) state aid for investment plans; and (c) state aid for leasing contracts for starting a new business under a well-known brand name.
- Law 3910/2011 regulates the National School of Judges. Article 7 provides for a specialist counsel for legal issues of European law. The law aims to increase enforcement of EU legislation and jurisprudence.

44. Георги Жечев [George Zhechev] and Калина Горанова [Kalina Goranova], *Страната на залязващото слънце [Land of the Setting Sun]*, Капитал [CAPITAL], (Apr. 21, 2011), http://www.capital.bg/politika_i_ikonomika/bulgaria/2011/04/21/1079190_stranata_na_zaliazvashtoto_slunce/.

45. Michael Elof Nielsen, *Summarily Dismissed Because of LinkedIn*, NORRBOM VINDING NEWS (Mar. 8, 2011), <http://norrbovinding.com/UK/News/Sider/Detail.aspx?ID=489> (explaining the Danish LinkedIn Case); *Jorgensen v. Sentry DK*, Case FV2010.129, (2010) (Den.).

46. *Greek Parliament Approves Austerity Law*, RTE NEWS (Oct. 20, 2011), <http://www.rte.ie/news/2011/1020/greece.html>.

- Law 3918/2011 creates a new system of supply for public hospitals and health institutions to fight hospital debts, overcharging practices, and uncontrolled consumption of materials and medicines.
- Law 3919/2011 liberalizes and “opens” the “closed” professions. Such deregulation of the relevant laws of EU member states is a priority for free competition as the European Commission has reported⁴⁷ and the European Court of Justice has ruled.⁴⁸
- Law 3932/2011 establishes an independent governmental agency to fight money laundering and terrorist financing. The agency has access to any public file or file of the united system of banks (Teiresias) and may exchange information with investigative authorities.
- Law 3948/2011 adjusts the Code of Criminal Law and the Code of Military Criminal Law to conform to the provisions of the Statute of the International Criminal Court.
- Law 3959/2011 adopts EU and international standards to maximize the effectiveness of antitrust enforcement. Articles 4a and 21 of Law 703/1977 have been repealed.
- Law 3961/2011 amends Law 3126/2003 on matters relating to criminal liability of ministers.
- Law 3979/2001 establishes electronic files and protocols for public services, allows the acceptance of electronic documents carrying an electronic signature from public authorities, and facilitates electronic communication of public services with natural persons and legal entities.
- Law 3986/2011 provides for emergency measures for public economics and finance strategy for 2012 through 2015, such as tax reforms and the use of public lands and assets.
- Law 3994/2011 abolishes habeas corpus for commercial debts and makes discretionary the formerly mandatory hearing to attempt to settle a dispute before the court for cases valued at more than 120,000 Euros.⁴⁹ The new law also establishes one-judge courts of appeals, amends the Code of Civil Procedure, and permits electronic court documents.
- Law 4021/2011 provides for supervision of credit institutions and ratifies the European Financial Stability Facility Framework Agreement of June 16, 2010, and its amendments of June 20 and September 1, 2011.⁵⁰

47. *Communication From the Commission to the Council and the European Parliament: An Internal Market Strategy for Services*, at 2, COM (2000) 888 final (Dec. 29, 2000); *Communication From the Commission: Report on Competition in Professional Services*, at 3, COM (2004) 83 final (Sept. 2, 2004); *Communication From the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Professional Services – Scope For More Reform*, at 2-3 COM (2005) 405 final (Mar. 9, 2005).

48. C-309/99, *Wouters v. Gen. Council Dutch Bar Ass'n*, 2002 E.C.R. I-1577.

49. Nomos (2011:3994) Εξορθολογισμός και βελτίωση στην απονομή της πολιτικής δικαιοσύνης και άλλες διατάξεις {Στρεαμλινινγ ανθ ιμροσινγ τηε αδμινιστρατιον οφ φυστιχε ανθ οτηερ πολιχη προσι-σιονος} (Γρεεχη).

50. *Metadata in Euro-SDMX Format (ESMS)*, HELLENIC STATISTICAL AUTH. (Nov. 11, 2011), http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A0508/Other/A0508_DKT39_MT_MM_01_2011_12_2099_03_F_EN.pdf.

E. IRELAND

Ireland's continued commitment to the international investor community and its resilience in the face of significant domestic and international economic challenges saw a year of recovery and resurgence in 2011. Ireland's robust export sector and its consistent pattern of winning high-profile foreign direct investment projects evidenced this resurgence clearly. Additionally, the American Chamber of Commerce celebrated fifty years in Ireland during 2011, which provided an opportunity to highlight the unique trading and economic relationship between the United States and Ireland.

1. *Stabilizing Measures*

Significant policy responses were undertaken to stabilize public finances, ensure banking stability, improve Ireland's competitiveness, and support job creation. In 2010, a €85 billion financial assistance program was established between the Irish Government, the International Monetary Fund (IMF), and the European Commission.⁵¹ Progress reviews were conducted by the IMF during 2011 and the results confirmed that the Irish Government had consistently met its fiscal targets.⁵² The Irish Government also announced a Jobs Initiative in May 2011.⁵³

2. *Tax*

The Irish Government has continually reaffirmed its commitment to maintaining Ireland's corporate tax rate at 12.5% and has confirmed that low corporate taxes are the bedrock of Ireland's industrial policy.⁵⁴ Comments from the Irish Government recognize that an export-led recovery is vital to economic growth, hence the continued emphasis on encouraging foreign direct investment in Ireland. This pro-business attitude is evident in a recent administrative practice published by the Irish Revenue Commissioners, which allows for a form of exemption from withholding tax on patent royalty payments to companies resident outside Ireland, provided certain conditions are satisfied. Ireland has also entered into a number of new tax treaties.⁵⁵

51. Government Statement, An Roinn Airgeadais Department of Finance, Announcement of Joint EU-IMF Programme for Ireland, <http://www.finance.gov.ie/viewdoc.asp?DocID=6600>.

52. See AN ROINN AIRGEADAIS DEPARTMENT OF FINANCE, <http://www.finance.gov.ie>; see also INTERNATIONAL MONETARY FUND, <http://www.imf.org>.

53. See *Jobs Initiative*, IRISH TIMES (May 2011), <http://www.irishtimes.com/focus/2011/jobsinitiative/index.pdf>.

54. Robert O'Shea, *Ireland: Foreign Direct Investment-Ireland Increases its Competitive Edge*, MONDAQ (Dec. 2, 2011), <http://www.mondaq.com/x/156020/Investment/Foreign+Direct+Investment+Ireland+Increases+Its+Competitive+Edge>.

55. See REVENUE-IRISH TAX & CUSTOMS, <http://www.revenue.ie> (last visited Feb. 8, 2012).

F. ITALY

1. *Civil Procedure*

In March 2011, Article 5 of Italy's Legislative Decree 28/2010⁵⁶ became effective, requiring certain litigants to pursue mediation or conciliation before an action in court.⁵⁷ Examples of such actions include residential and commercial leases, insurance, banking, contracts, medical negligence, and defamation. The mediation process is a condition for admissibility of the proceedings in court.

The other provisions of Legislative Decree 28/2010 governing the mediation process became effective on March 20, 2010.⁵⁸ This law requires lawyers to inform clients of alternative dispute resolution for any dispute. Any violation of this disclosure requirement voids the contract between the lawyer and the client.⁵⁹ Mediation must be completed in four months.⁶⁰ If the parties reach an agreement, the mediator drafts an official record. Otherwise, the mediator can formulate a conciliation proposal that the parties can accept or reject.⁶¹ The record becomes an enforcement order for compulsory expropriation, for specific performance, and for registration of mortgages.⁶² All documents related to the mediation process are tax exempt.⁶³ A subsequent law⁶⁴ instituted the registration of entities authorized to carry out mediations.⁶⁵ Although some objected to the new laws requiring mediation, the regulatory framework remains unchanged.

2. *Legal Profession*

On October 18, 2010, the ECJ dismissed the application of the European Commission against Italy on the subject of maximum fee tariffs for lawyers.⁶⁶ The Commission had accused Italy of violating Articles 43 and 49 of the EU Treaty by requiring lawyers to comply with maximum tariffs. Every two years, Italy determines the fees and emoluments payable to lawyers based on the monetary value of the dispute, the level of the court resorted to, and, in criminal proceedings, the duration of the trial. For each procedural series of steps, a maximum and minimum fee limit must be set. The Commission argued that the complex Italian fee system was a burden for lawyers from other member states who are unfamiliar with the Italian system and who were accustomed to absolute freedom in contracting with clients. The ECJ, however, held that the Commission failed to demonstrate that the Italian system was designed to prevent market access by lawyers from other member states. Accordingly, the ECJ dismissed the action.

56. D.Lgs. 4 marcia 2010, n. 28, in G.U. 5 marcia 2010, n. 53 (It.).

57. *Id.* art. 5.

58. *Id.* art. 4.

59. *Id.*

60. *Id.* art. 6.

61. *Id.* art. 11.

62. *Id.* art. 12.

63. *Id.* art. 17.

64. D.M. 18 ottobre 2010, n. 180, in O.J. 4 novembre 2010, n. 258 (It.).

65. *Id.* art. 3.

66. Case C-565/08, European Comm'n v. Italy Rep., 2011 E.C.R. I-0000.

G. POLAND

1. *Information Law*

In 2011, Parliament amended⁶⁷ the Act on Public Access to Information.⁶⁸ Although the stated objective of the bill is to implement the EU's Directive⁶⁹ on "re-use" of public sector information, many provisions had little relation to the Directive. The right of access to information⁷⁰ is henceforth "restricted for the protection of important economic interests of the State" if disclosure would limit the "negotiating capacity" of the State when entering into international agreements with the EU.⁷¹

The amendments strip the Common Courts of jurisdiction to review denials of access to information, vesting jurisdiction in the Administrative Courts instead.⁷² According to the National Council of the Judiciary, this will decrease judicial protection of access to information.⁷³ President Komorowski did not veto the bill,⁷⁴ but sought the Constitutional Tribunal's review. This review is limited to the procedure by which certain changes were introduced and does not raise the validity of the amendments themselves.⁷⁵

Applications for re-use must be responded to within twenty days. In the event of a denial, the applicant's sole recourse is a complex administrative process in the Administrative Courts. Although the default rule is that access for re-use is to be free of charge and unconditional, payment may be required for "additional costs" in preparing the information for re-use.⁷⁶ No access for re-use needs to be granted if the effort involved in preparing the information is "disproportionate" and requires an "act beyond the simple steps."⁷⁷ This could cause discrimination between users.⁷⁸ The new rules governing re-use are not intended to affect access to public information but the demarcation between them is not clear.⁷⁹

67. Dziennik Ustaw [Journal of Laws] [Dz. U.] No. 204, item 1195 [hereinafter Amendments].

68. Ustawa o dostępie do informacji publicznej [Public Access to Information Act], Dz. U. No. 112, item 1198 [hereinafter the Act].

69. Council Directive 2003/98, 2003 O.J. (L 345) 90 (EU) [hereinafter PSI Directive].

70. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, art. 61 (Pol.).

71. Amendments, *supra* note 67, art. 5(1)(a)(1). The same limitation applies where the "important economic interest" of the State or its Treasury before any courts or tribunals could be materially hindered. *Id.*

72. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION], art. 184 (Pol.).

73. Article 186 of the Polish Constitution charges the National Council of the Judiciary with safeguarding the independence of the national judiciary. *Id.* at 186. The Council's opinion of July 22, 2011, is available at http://www.informacjapubliczna.org.pl/wwwdane/files/opinia_krs_029z.pdf.

74. See *Legendy "S": Zawetowac ograniczenie dostępu do informacji publicznej. "Argumenty jak z Orwella"*, POLSKA TIMES (Sept. 20, 2011), <http://www.polskatimes.pl/artykul/452757,legendy-s-zawetowac-ograniczenie-dostepu-do-informacji,id,t.html?cookie=1> (illustrating the push from Solidarity activist to veto the bill).

75. Wniosek [The Proposal], http://www.informacjapubliczna.org.pl/wwwdane/files/nowelizacja/wniosek_prezydent_do_tk_k_33_11_5w7i.pdf.

76. Amendments, *supra* note 67, art. 23c(1).

77. *Id.* art. 23(f).

78. *Id.* art. 23(e).

79. *Id.* art. 2a (2).

2. *Cleanliness and Order in Municipalities*

The Act on Maintaining Cleanliness and Order in Municipalities (the MCOM Act)⁸⁰ was recently amended.⁸¹ The amended act conformed Polish law to EU environmental standards,⁸² which, together with the Waste Act of April 27, 2001,⁸³ constitute a legal framework for maintaining cleanliness and waste disposal in Polish municipalities. Under amended Article 3 of the MCOM Act, municipalities must: 1) provide construction, maintenance and operation of regional municipal waste-processing plants, catchment stations, installations, and facilities to collect, transport and dispose of animal carcasses and public toilets; 2) create centers of selective collection of municipal waste, enabling easy disposal of waste; and 3) ensure proper levels of recycling.⁸⁴ Municipalities must reduce the total weight of biodegradable waste for storage. Municipalities must appoint an entity to build, maintain, and operate a regional municipal waste-processing plant. If the appointed entity does not produce a satisfactory result, the municipality may carry out these tasks itself.

3. *Geological and Mining Act*

The Polish Parliament revised laws as a result of increased interest in Polish shale gas, which was triggered by the discovery of potentially large quantities of this hydrocarbon. The revised Geological and Mining Act⁸⁵ became effective on January 1, 2012, and implemented the Hydrocarbons Directive 94/92/EC.⁸⁶ Some of the significant changes are:

- (1) The reorganization of the ownership model for resources. The State Treasury remains the owner of listed strategic resources, including hydrocarbons. Other mineral deposits are property of the landowner.
- (2) Simplification of procedures and facilitation of the operation of businesses in the mining and geology field. Currently, as a rule, concessions related to hydrocarbons may only be granted as a result of a tender proceeding.
- (3) Implementation of measures intended to increase safety within the mining industry.

80. Ustawa z dnia 13 września 1996 r. o utrzymaniu czystości i porządku w gminach, [Act of 13th of September 1996 on Maintaining Cleanliness and Order in Municipalities], Dz. U. No. 236, item 2008.

81. Ustawa z dnia 1 lipca 2011 r. o zmianie ustawy o utrzymaniu czystości i porządku w gminach oraz niektórych innych ustaw [Act of 1st of July 2011 Amending Act on Maintaining Cleanliness and Order in Municipalities and some other Acts], Dz. U. No. 152, item 897.

82. The Amending Act implements the provisions of the Directive 97/271/EEG of 21st of May 1991, Directive 1999/31/WE of 26th of April 1999, and Directive 2008/98/WE of 19 November 2008. See generally Council Directive 91/271, 1991 O.J. (L 135) 40; Council Directive 1999/31, 1999 O.J. (L 182) 1; Council Directive 2008/98, 2008 (L 312) 3.

83. Ustawa z dnia 27 kwietnia 2001 r. o odpadach [Act of 27th April 2001 on Waste], Dz. U. No. 62, item 628.

84. See Act of 1st of July 2011 Amending Act on Maintaining Cleanliness and Order in Municipalities and some other Acts, art. 3 (Pol.). Up to December 31, 2020 municipalities must achieve: a) at least 50%-of-weight standard of recycling and processing for reuse of paper, metal, glass and plastic; b) at least 70%-of-weight standard of recycling and processing for reuse of other than dangerous building and construction waste.

85. Ustawa z dnia 9 June 2011 r. – Prawo geologiczne i górnicze [Act of June 2011, Geological and Mining Law] Dz. U. No. 163, item 981.

86. Council Directive 94/22, 1994 O.J. (L 164) 3 (EU).

- (4) Altered rules regarding redress of damages caused by the geological and mining activities.

H. SPAIN

1. *Corporate*

The Royal Legislative Decree 1/2010⁸⁷ of July 2, 2010, combined the two laws that governed the *Sociedades Anónimas* and the *Sociedades Limitadas*. A year later, it was amended by Law 25/2011⁸⁸ on August 1, 2011. This amendment includes the right of separation if dividends are not distributed in certain cases. The new Article 348 bis will free minorities from being held captive by majorities in privately held companies. The regulation has been criticized for being too brief.

The aim was to reduce the costs of organizing and operating companies. It also reduces publication requirements for companies. If a company has a website, it is no longer necessary that the announcement of a general shareholders' meeting be published in a newspaper; it may simply be published in the Boletín Oficial del Registro Mercantil (Official Gazette of the Mercantile Registry) (BORME)⁸⁹ and on the company's website.

2. *Bankruptcy Proceedings*

The objective of Law 38/2011⁹⁰ of October 10, 2011, is improvement of the previous reform of the Spanish Insolvency Law⁹¹ implemented by the Royal-Decree 3/2009 of March. The law addresses new refinancing agreements. Those are extrajudicial, based on the agreement of the parties, and the aim is to avoid insolvency proceedings. This reform, however, is likely not definitive. Existing loopholes suggest that a "reform of the reform" may be created in the future."

3. *New Constitutional Article*

On September 27, 2011, a new amendment modified Article 135, making budgetary stability a new constitutional principle.⁹² A new basic law will establish the maximum structural deficit the State and the Autonomous Communities are allowed to have and must be adopted before June 30, 2012.⁹³ Article 135 also states that both the State and the Autonomous Communities need legal authorization to issue public debt, and the volume of public debt cannot be higher than the reference value laid down in the Treaty on the TFEU. Exceptions are available and the budget limit will not apply until 2020.

87. Law 1/2010, (B.O.E. 2010, 161) (Spain).

88. Law 25/2011, (B.O.E. 2011, 184) (Spain).

89. De la declaración del concurso [The declaration of insolvency] (B.O.E. 2011, 245) (Spain).

90. Law 38/2011 (B.O.E. 2011, 245) (Spain).

91. Law 22/2003 (B.O.E. 2003, 164) (Spain).

92. C.E. B.O.E. n. 233, Sept. 27, 2011 (Spain).

93. *Id.*

I. SWITZERLAND

1. *Tax Law*

The Corporate Tax Reform II became effective on January 1, 2011.⁹⁴ The introduction of the capital contribution principle was discussed in last year's Year-in-Review. The following revisions representing relaxation of the previously applicable tax regime are now in effect.⁹⁵

First, entrepreneurs who retire from self-employment after age fifty-five will now benefit from liquidation profits that are taxed separately from other income without an impact on tax brackets.⁹⁶ In addition, the entrepreneur and his or her heirs can be granted a deferment of tax liabilities arising from previously unrealized gains when property is transferred from the business to the entrepreneur's personal assets.⁹⁷ In regard to procurements that are made to replace company assets, the unrealized gains associated with the replaced asset unit may be first transferred to the replacement asset when it no longer fulfills the same business function. This also applies to the shareholding's replacement.⁹⁸ Finally, shareholding allowances for corporations are now granted at a shareholder stake of ten percent or shareholder interest with a fair market value of CHF 1 million.⁹⁹

2. *Procedural Law*

New Swiss Rules of Civil Procedure (RCP) became effective on January 1, 2011, replacing the twenty-six cantonal civil procedural laws.¹⁰⁰ The RCP governs procedures for civil actions before the cantonal authorities and domestic arbitral jurisdiction.¹⁰¹ However, the cantons still retain regulatory authority in some areas such as court organization.¹⁰² Additionally, the cantons must designate a court that serves as a single cantonal venue of adjudication for actions concerning the areas of intellectual property and anti-trust disputes under the Federal Act against Unfair Competition (UWG), the Federal Act Concerning Collective Capital Investments (KAG), the Federal Act concerning the Stock Exchanges and Securities Trading (BEHG), and petitions to appoint a special auditor.¹⁰³ The cantons are free to stipulate a commercial court for such disputes or to retain them where they already exist.¹⁰⁴

94. *Recent Tax Reforms boost Switzerland's Attractiveness as a Business Location*, SWISS-AMERICAN CHAMBER OF COMMERCE (2008), http://www.amcham.ch/publications/downloads/2008/corporate_tax_reform.pdf.

95. See *Press Releases from 2005*, SWISS FED. DEP'T OF FIN. (FDF), <http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=de&msgid=18876> (last visited Feb. 14, 2012).

96. BUNDESGESETZ ÜBER DIE DIREKTE BUNDESSTEUER [DGB] [FEDERAL DIRECT TAX LAW], Dec. 14, 1990, 642.11, art. 37b (Switz).

97. *Id.* art. 18a.

98. *Id.* arts. 30, 64.

99. *Id.* art. 69.

100. SCHWEIZERISCHE ZIVILPROZESSORDNUNG VOM [ZPO] [CODE OF CIVIL PROCEDURE] Dec. 19, 2008, SR 272 (Switz.).

101. *Id.* art. 353.

102. *Id.* art. 3.

103. *Id.* art. 5.

104. *Id.* art. 6.

Under the new rules, the plaintiff must generally provide a deposit for administration of the petition, which could become significant when the amount in controversy is high.¹⁰⁵ Irrespective of the judgment, the court costs will initially come out of this deposit.¹⁰⁶ A victorious plaintiff can demand reimbursement, but collection risks should not be underestimated, particularly with an unwilling or insolvent defendant.

J. TURKEY

Constitutional debate overshadowed all legal developments in Turkey. The current constitution (*anayasa* or “main law”) of 1982 was last amended in 2010 to include changes that were presented as improvements to the rule of law.¹⁰⁷

The most important change in civil law is a pending change to the Turkish Code of Obligation, a comprehensive code dealing with contract and tort law. The new law was passed on January 11, 2011, and takes effect on July 1, 2012.¹⁰⁸ It is designed to be more useful because it is written in more user-friendly Turkish and incorporates other related provisions.¹⁰⁹ It also significantly amends lease contracts and employment contracts, providing greater protections to renters and workers that are consistent with other laws.¹¹⁰ The new code also provides a limitation on general liability for companies in dangerous sectors.¹¹¹

The new Turkish Commercial Code will be effective July 1, 2012.¹¹² The main purpose of this new code is to make Turkish companies more competitive and ensure that they are perceived as trustworthy actors in international trade, industry, service, and capital markets.¹¹³ To accomplish this goal, the management and auditing systems of joint stock companies and limited liability companies have been changed to improve transparency.¹¹⁴ Also, small- and medium-sized enterprises have been defined.¹¹⁵

105. *Id.* arts. 98, 101.

106. *Id.* art. 111.

107. See Ayla Jean Yackley, *Factbox: Turkey's Constitutional Amendments*, REUTERS (Sept. 12, 2010), <http://www.reuters.com/article/2010/09/12/us-turkey-referendum-articles-idUSTRE68B28B20100912>. For developments during 2010, see Elena Sabkova et al., *Europe*, 45 INT'L LAW. 505 (2011).

108. Türk Borçlar Kanunu, Nov. 1, 2011 [hereinafter Turkish Code of Obligations]; Resmi Gazete [Official Gazette], 27826, Feb. 4, 2011.

109. For example, the Law on the Protection of Consumers has been incorporated into the new Code of Obligation.

110. See, e.g., İş Kanunu [Business Law], May 22, 2003, Official Gazette 25134, June 6, 2003 (relating to labor); Gayrîmenkul Kîralari Hakkında Kanun, May 18, 1955, Official Gazette 9013, May 27, 1955 (relating to renting property).

111. Turkish Code of Obligations, *supra* note 108, art. 71.

112. Türk Ticaret Kanunu, art. 54, Jan. 13, 2011 [hereinafter Turkish Commercial Code]; Official Gazette 27846, Feb. 14, 2011.

113. *Id.* art. 54.

114. For example, the commercial register should be kept under the Uniform Financial Reporting Standards.

115. Turkish Commercial Code, *supra* note 112, art. 135.