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European Law

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I. France

Significant legislative developments during the year 2000 included in particular (1) the reorganization of French criminal procedure; (2) the new rules on the liability of Internet access and service providers; (3) the recognition of electronic evidence and signatures; (4) the codification of various legislative texts, including the Commercial Code; and (5) the reduction of a presidential term to five years.

A. REORGANIZATION OF THE CODE OF CRIMINAL PROCEDURE

The law of June 15, 2000, is one of the most important reforms of criminal procedure since the adoption of the 1958 Code of Criminal Procedure. The code attempts to reconcile citizens' need for security while reinforcing the presumption of innocence and bolstering victims' rights. To achieve this goal, the code's preliminary article pulls together certain general principles applicable to criminal procedure, which appear in disparate texts such as the French Constitution or international conventions or which result from the case law of the *Conseil constitutionnel* (constitutional court), *Cour de cassation* (the highest court of ordinary jurisdiction), and international courts. Relying on these general principles (due process, presumption of innocence, defendant's rights, and so on), the new law modifies certain

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legal provisions relating to preliminary investigation, provides for appeals from decisions of the *Cour d'assises* (criminal courts of original and appellate jurisdiction), and reinforces victims' protection and the public's right to information. Most provisions of this law became effective on January 1, 2001.

Concerning an initial inquiry (an inquiry that precedes the appointment of an examining magistrate and the issuance of an indictment), a state prosecutor must now set a time limit within which police must complete their investigation. Furthermore, police have the obligation to inform the prosecutor about all the inquiries they have initiated and to advise the prosecutor as soon as they identify a suspect during an investigation. One of the most important modifications is the ability of counsel to see detained clients as early as the first hour of the *garde à vue* (that is, the detention of suspects by police during an inquiry) whereas counsel was previously allowed to meet with clients only after the twentieth hour of detention. Counsel may return to meet with their detained clients at the twentieth hour and at the thirty-sixth hour if the term of the *garde à vue* is extended. The law also provides that non-suspect witnesses may not be detained longer than necessary to collect their testimony and that the questioning of detained minors must be recorded on videotape. Finally, any person retained by the police during an inquiry and ultimately set free may ask a prosecutor about the outcome of the inquiry.

Regarding the phase of a preliminary investigation (by the examining magistrate), the objective of the new law is to limit pretrial detention of suspects. Jurisdiction over issues of pretrial detention lies with a new judge, the *juge des libertés et de la détention* (the judge of freedom and detention) and no longer with the examining judge (the *juge d'instruction*). The new judge will only be allowed to place a suspect in pretrial detention when in possession of corroborated facts that tend to make the guilt of the suspect probable whereas a less exacting standard had previously been sufficient. The new law also limits the resort to pretrial detention for minor offenses. In most cases, pretrial detention will now only be possible if a suspect faces at least three years imprisonment, compared with two years previously, and five years imprisonment for minor offenses committed against property.

Prior to enactment of the new law, no appeal was possible for criminal convictions rendered by the juries of the criminal courts (*Cour d'assises*). This resulted from the prevailing notion that a jury represented and expressed the will of the nation and that its decisions were sovereign and could therefore not be revised. The new law provides for an appeal of verdicts of conviction but not of acquittals. An appeal is brought before another court of assizes, appointed by the criminal section of the French Supreme Court, and composed of twelve jurors instead of nine, as in the first instance.

The new law defines and prohibits a new offense: broadcasting or publishing, without the consent of the interested party, the image of the circumstances of a crime or an offense that would seriously violate a victim's dignity. In order to further the public's access to information, district attorneys are now permitted to release official statements to the press during the inquiry or the investigation and may disclose facts and circumstances relating to the proceedings.

B. THE LAW OF AUGUST 1, 2000, ON FREEDOM OF COMMUNICATION: LIABILITY OF INTERNET ACCESS AND NETWORK SERVICE PROVIDERS

This law modifies the law of September 30, 1986, which governs freedom of communication. It deals principally with the following issues: regulations applicable to the French

audiovisual sector, liability of Internet access and network service providers, copyright, and regulations applicable to TV shopping.¹

Internet service providers may not be held liable (under tort liability or criminally) for the content they host unless they have been duly notified by a judicial authority and have not acted promptly to prevent access to the content at issue.² Importantly, the law initially provided that Internet service providers could be criminally liable if they failed to perform the appropriate "due diligence" when informed by third parties that illegal content was hosted.³ However, this provision was stricken off the final version of the law following the decision of the *Conseil constitutionnel*, which explained that the term *due diligence* was not sufficiently precise when criminal liability was at stake.⁴

Pursuant to the new law, Internet access and service providers must identify content providers.⁵ A decree will be adopted to define the nature of the relevant identifying information, and such information must be made available when requested by judicial authorities.⁶ As a result of these new provisions, content providers on French Web sites may no longer remain anonymous.⁷

C. RECOGNITION OF ELECTRONIC EVIDENCE

The French legislature modified the rules of the French Civil Code governing evidence to adapt them to new technologies. The 2000–230 law of March 13, 2000, on adaptation of the rules of evidence to information technology and on electronic signature, redefines the notion of written evidence to include electronic documents and expressly provides for the validity of electronic signatures.

Pursuant to new sections of the French Civil Code, written evidence (*preuve littérale*) may now be adduced by any sequence of letters, characters, figures, or any other signs or symbols with an intelligible meaning, whether on paper or otherwise; therefore, this includes electronic communications.⁸ Further, this law provides that electronic writings are of equal probative value to a paper document, provided the author of the electronic document may be identified and that the integrity of the evidence is assured.⁹

Regarding electronic signatures, the law provides for the following mechanism that will need to be supplemented by decree: an electronic signature will be valid provided that there is a reliable identification process establishing the link between the signature and the document to which it is attached.¹⁰

D. THE MOVE TOWARD CODIFICATION À DROIT CONSTANT OF DIFFERENT LAWS

To simplify citizens' access to the different laws and regulations, the French government submitted to Parliament a law that was adopted on December 16, 1999. The law enables

1. See Michel Bejot, *Paris Update* (Dec. 2000), available at www.marketinglaw.co.uk.

2. *Id.*

3. *Id.*

4. *Id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. See *France Now*, Issue No. 36 (Apr. 2000), available at <http://ashta.free.fr/Francenow/rough36sel.htm>.

9. See *id.*

10. See *id.*

the government to adopt by decree the legislative part of some codes. The objective of this codification is to embody in one single document the different laws and regulations governing specific fields of law to adopt a coherent and structured presentation of applicable legal rules. The objective is also to make them clearer and more accessible without modifying them except when necessary. This method of codification is called *codification à droit constant*.

Pursuant to the law of December 16, 1999, the legislative parts of the following codes were adopted during the year 2000: the code of administrative justice, the code of public health, the code of education, the rural code, the environment code, the road code, the financial and monetary code, the code of social action and family, and most importantly, the commercial code.

The publication of the Code de Commerce (commercial code) on September 21, 2000, has given rise to extensive criticism by some professionals who point out omissions of text, which are liable to engender difficulties in the future. This code embodies all legal texts relating to commercial law and in particular the texts relating to corporations, *groupements d'intérêt économique* (economic interest groupings), prices and competition, bankruptcy, commercial bills, some forms of sale and exclusivity clauses, and so on.

E. PRESIDENTIAL TERM OF OFFICE

Following the referendum held on September 24, 2000, the constitutional law of October 2, 2000 modified article 6 of the French Constitution, reducing the presidential term from seven years to five years.¹¹

II. Ireland

A. CORPORATE REGULATION

The Electronic Commerce Act was passed in Ireland during the year 2000 with the intention of removing existing legal impediments and uncertainties that arose as a result of the onset and continuing growth of e-commerce.¹² The act is founded on two basic principles: functional equivalence of electronic media and technology neutrality. Functional equivalence means that communications using electronic means should not be treated any differently under the law than communications using traditional media. The act is drafted in a technology neutral fashion and operates on the principle that Internet users should have free and open access to whatever level of security technologies with which they feel comfortable. Much of the act is based on the Electronic Signature Directive of the European Union.¹³

The Insurance Act of 2000¹⁴ was enacted to allocate regulatory responsibility for insurance intermediaries to the Central Bank of Ireland and to utilize the regulatory powers available to the bank under the Investment Intermediaries Act of 1995.

11. See ICL, *France Index*, available at www.uni-wuerzburg.de/law/fr_indx.html.

12. See Electronic Commerce Act, No. 27 (2000) (Ir.).

13. Council Directive 99/93/EC of 13 December 1999 on a Community Framework for Electronic Signatures, 2001 O.J. (L 13) 12.

14. See Insurance Act, No. 42 (2000) (Ir.).

B. PUBLIC UTILITIES

Studies on electricity generation capacity requirements to 2006, carried out by the Irish Electricity Supply Board in March 2000, indicated that on the basis of forecasts for future electricity demand, an increase in power production capacity of 600 megawatts would be necessary by winter 2004. To ensure that the electricity needs of the state could be met over the next few years, it was decided that a scheme for the advance selection of power producers to whom network capacity would be allocated was necessary and that the allocation scheme should have particular regard to the need to ensure that new power plants were commissioned as soon as possible. This scheme was implemented by the Gas Act of 2000.¹⁵

C. INTELLECTUAL PROPERTY

The Copyright and Related Rights Act of 2000¹⁶ codified the legal regime applicable to copyright works in Ireland. The act updates existing rights to take account of new media and technologies and introduces a number of new rights for copyright owners, including a specific Internet exploitation right and moral rights. It also introduces extensive new rights for performers in their performances and a new database right.

D. AGRICULTURE

New legal safeguards to ensure the safety of Irish beef were created under the National Beef Assurance Scheme Act of 2000.¹⁷ Beef is a multimillion-pound industry that makes a substantial contribution to the Irish economy.¹⁸ Following the bovine spongiform encephalopathy crisis in March 1996, exports to European Union (EU) and third country markets plummeted. Some countries banned imports of Irish beef altogether, and prices realized by Irish beef producers fell. In response to the crisis, a number of initiatives were adopted at EU and national levels. A national beef assurance scheme now exists to develop common standards for the production, processing, and trade in Irish cattle and beef for human consumption and the manufacture and trade of feeding stuff. It will oversee the application of these standards through a system of registration, inspection, and approval as well as the enhancement of an animal identification and tracing system for Irish cattle.

E. ENVIRONMENTAL AND PLANNING ISSUES

The Planning and Development Act of 2000 contains a number of wide-ranging measures affecting the planning regime in Ireland.¹⁹ It consolidates, revises, and extends the

15. See Gas (Amendment) Act, No. 26 (2000) (Ir.).

16. See Copyright and Related Rights Act, No. 28 (2000) (Ir.).

17. See National Beef Assurance Scheme Act, No. 2 (2000) (Ir.).

18. In 1998, output from primary beef production, excluding direct payments, amounted to £1.1 billion (approximately 2% of GNP). Approximately 130,000 farmers are engaged in beef production in Ireland, and beef is the major enterprise in approximately 90,000 of these holdings. Approximately 10,000 persons are employed in the processing sector and in associated industries.

19. See Planning and Development Act, No. 30 (2000) (Ir.).

prevailing Planning Acts and much of the EU's Environmental Impact Assessment Regulations. It also includes measures intended to increase the supply of affordable housing.

F. SOCIAL LEGISLATION

A commission to investigate child abuse in institutions²⁰ in Ireland from 1940 to the present day was established by the government.²¹ The commission has three primary functions: (1) "to listen to victims of childhood abuse who want to recount their experiences to a sympathetic forum"; (2) "to fully investigate all allegations of abuse made to it, except where the victim does not wish for an investigation"; and (3) "to publish a report on its findings to the general public."²²

Ireland is set to experience significant aging of the population over the next half-century: "By 2016, this ratio is projected to increase to one person aged 65 or over for every [four] persons of working age."²³ Under the National Pensions Reserve Fund Act of 2000, 1 percent of gross national product will be set aside and invested annually to meet part of the cost of future pensions.²⁴

"[T]he Convention on jurisdiction, applicable law, recognition, enforcement, and co-operation in respect of parental responsibility and measures for the protection of children, signed at The Hague on the 19th day of October"²⁵ was given the force of law in Ireland.²⁶

A national training fund was established²⁷ and provides for a levy to be paid by certain employers in respect of their employees. The proceeds of the collected levy will be used to raise the skills of those in employment and to provide skills training for the unemployed.

G. IMMIGRATION

An offense of trafficking illegal immigrants was created under the Illegal Immigrants (Trafficking) Act of 2000.²⁸ Approximately 82 percent of asylum applications are made inland and not at Irish ports. The Department of Justice, Equality, and Law Reform concluded that applicants were being smuggled across the state's borders in a clandestine way. Under the act, it is an offense for a person to organize or to knowingly facilitate entry into the state of a person who he or she knows to be or has reasonable cause to believe to be an illegal immigrant or a person who intends to seek asylum.

20. *Institution* includes schools, industrial schools, reforming schools, reformatory schools, orphanages, hospitals, children's homes, and any other places where children are cared for other than as members of their families.

21. Commission to Inquire into Child Abuse Act, No. 7 (2000) (Ir.).

22. Press Release, Statutory Commission to Inquire into Child Abuse to Be Established (Feb. 4, 2000), available at www.irlgov.ie/educ/janmar2000/rel240100.htm.

23. National Pensions Reserve Fund Bill (2000) (speech by Charlie McCreevy, Minister for Finance), available at www.irlgov.ie/finance/News/october/mcc715.htm.

24. See National Pensions Reserve Fund Act, No. 33 (2000) (Ir.).

25. See Protection of Children (Hague Convention) Act, No. 37 (2000) (Ir.).

26. See *id.*

27. See National Training Fund Act, No. 41 (2000) (Ir.).

28. See Illegal Immigrants (Trafficking) Act, No. 29 (2000) (Ir.).

H. CLAIMS AGAINST THE STATE

The National Treasury Management Agency²⁹ has been empowered to manage personal injury and property damage compensation claims made against Ireland and against the emanations of the state.³⁰

I. EQUALITY

The Equal Status Act of 2000³¹ prohibits discrimination on the grounds of sex, marital or family status, religion, sexual orientation, age, disability, and race. The act also extends the law relating to sexual harassment.

A new body, the Comhairle,³² was established to ensure that individuals have access to accurate, comprehensive, and clear information; advice; and advocacy services on the full range of social services. It is intended that Comhairle will be the mainstream support agency for information services for all people, particularly those with disabilities. The proposal is one of a series of measures being undertaken by the government³³ to mainstream the provision of services for the disabled.

A Human Rights Commission has been established in the state³⁴ with the intention of strengthening the protection of human rights and to keep under review the adequacy and effectiveness of law and practice relating to human rights. The commission has its origins in the Good Friday Agreement and is similar to the Northern Ireland Commission.

J. EUROPEAN UNION, INTERNATIONAL COMMITMENTS, AND OBLIGATIONS

Ireland acceded³⁵ to the Convention on the Safety of United Nations and Associated Personnel.³⁶ The convention defines crimes against the United Nations and associated personnel. The key requirements of the convention required Ireland to create offenses relating to attacks on the person or liberty of United Nations personnel and associated personnel, attacks on property used by such personnel, and threats against such personnel.³⁷

Ireland subscribed to the 1998 capital increase of the Multilateral Investment Guarantee Agency Act of 1988. Under the capital increase, Ireland will receive additional shares involving an additional subscription of \$3 million.³⁸ Ireland made a contribution of £20 million to IDA12, the twelfth replenishment of the resources of the International Development Association.³⁹

Finally, Ireland gave effect to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment adopted by resolution of the General Assembly of the United Nations on December 10, 1984.⁴⁰ There was no statutory offense of torture in

29. Established in 1990 to borrow money for the Exchequer and to manage the national debt.

30. See National Treasury Management Agency (Amendment) Act, No. 7 (2000) (Ir.).

31. See Equal Status Act, No. 8 (2000) (Ir.).

32. See Comhairle Act, No. 1 (2000) (Ir.).

33. Approximately £91 million has been spent in the past two years in developing services for the disabled.

34. See Human Rights Commission Act, No. 9 (2000) (Ir.).

35. See Criminal Justice (Safety of United Nations Workers) Act, No. 16 (2000) (Ir.).

36. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994.

37. See *id.* art. 9.

38. See Multilateral Investment Guarantee Agency (Amendment) Act, No. 10 (2000) (Ir.).

39. See International Development Association (Amendment) Act, No. 12 (2000) (Ir.).

40. See Criminal Justice (United Nations Convention against Torture) Act, No. 11 (2000) (Ir.).

Ireland prior to the passing of the act, and it was desirable to create a specific offense of torture that included acts and omissions that inflicted both physical and mental suffering and to provide appropriate penalties in relation to them.

III. Italy

A. CORPORATE AND COMMERCIAL LAW

1. *Company Law*

The Ministerial Commission⁴¹ appointed to propose reform of the law on non-listed companies⁴² has completed its work, but the proposed legislation has yet to be enacted. In the meantime, however, the law on simplification of administrative proceedings⁴³ introduced significant changes to company law. Publication requirements of mergers and demergers have been relaxed: It is no longer necessary to publish a plan for a merger or demerger, a shareholders' approval of the merger, or a merger agreement in the Italian Official Journal (*Gazzetta Ufficiale*). This change significantly reduces the time required for such corporate transactions. The law has abolished the requirement of judicial approval (1) of incorporation of a company, (2) of amendments to the by-laws, and (3) of shareholders' resolution in relation to the issue of corporate bonds. Such approval has been delegated to the public notary who drafts the acts of incorporation and the minutes of shareholders' meetings. To ensure public notary accountability, the law has introduced a fine of up to 30 million lire and suspension from duty, for registration of a shareholder's resolution or of an act of incorporation of a company that is contrary to the law.

2. *Comparative Advertisements*

Pursuant to Legislative Decree No. 267⁴⁴ implementing the 1997 EC Directive⁴⁵ on comparative advertising, such advertisements are now permitted under Italian law. The EC Directive aimed to remedy market distortions caused by differing rules on comparative advertising in the member states. The new provisions on comparative advertising have been inserted into the Italian Act on Misleading Advertisements.⁴⁶ Accordingly, the Italian Competition Authority will henceforth consider actions in relation to comparative advertisements under the jurisprudence already established for misleading advertisements. The decree states the conditions under which comparative advertisements may be considered lawful, reflecting the conditions dictated by the EC Directive. As a general principle, comparative advertisements should not be misleading. Only comparison between competing goods and services meeting the same consumers' needs is permitted. Moreover, the advertisements must not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of competitors. The decree has, however, been criticized. Commentators have observed that the Italian legislator missed the opportunity to give a practical meaning to the term *discredit*. The controversial issue is whether

41. *Commissione Mironi*.

42. The guidelines of the proposal are the enhancement of the shareholders autonomy in designing the structure of their company and diminution of imperative provisions of law.

43. See Gazz. Uff., No. 275, Nov. 24, 2000 (Italy).

44. See Legislative Decree, No. 267, Feb. 25, 2000 (Italy).

45. See Council Directive 97/55/EC, 1997 O.J. (L 290) 18.

46. See Legislative Decree, No. 74, Jan. 25, 1992 (Italy).

advertisements that make negative reference to an indisputably true characteristic of the goods (or services) of a competitor should be permitted. It should be noted that past case law considered even the publication of true facts regarding a competitor as unlawful competition. This attitude should nevertheless change since the rationale behind the new law is the protection of consumers' interests and their right to correct and truthful information.

B. INTERNET LAW: THE PROBLEM OF DOMAIN NAMES

New juridical problems have been created by the increased use of computer technologies in business and law practice and by the emergence of new phenomena such as *cybersquatting* and *domain grabbing*. In particular, the legal status of domain names has not yet been clarified in the Italian legal system.⁴⁷ Recent case law has, however, shed some light on the issue. In controversies involving domain names, courts generally tend to apply trademark law, rules on unfair competition, and jurisprudence on the right to a name.⁴⁸ An important case was *Bancalavoro.com s.r.l. v. Jobber s.r.l.*, wherein the Court of First Instance in Milan held that article 1 of the Law on the Protection of Trademarks⁴⁹ could also be applied to domain names.⁵⁰ Moreover, that court stated that a mere difference in the top level domain extension is not sufficient to distinguish the domain name (Bancalavoro.net) from the registered trademark (Bancalavoro). Similarly, in March 2000, the Rome Court of First Instance issued an injunction against Microsoft Corporation, which had used the previously registered trademark of *Budetta Carpoint s.p.a.* as a domain name.⁵¹ In May 2000, a new law on the registration of domain names was proposed (known as the Passigli proposal).⁵² The proposal introduced a National Registry Office for Domain Names and provided rules for their use. In particular, the proposal would prohibit the use of names that are identical or similar to those already registered as trademarks or names that identify other individuals or legal persons. Although not welcomed by many associations dealing with the Internet, it is very likely that the proposal will soon become law.

C. LIBERALIZATION OF THE NATURAL GAS MARKET

Italy, one of the largest natural gas markets in Europe, has recently implemented the EU Gas Directive⁵³ with the adoption of Legislative Decree No. 164.⁵⁴ This legislative decree is crucial for the achievement of a competitive market in natural gas because it liberalizes

47. The top level domain (e.g., .com, .net, .org, .it, .nl, etc.) and the second level domain constitute the domain name; only the latter (second level domain) is considered to have an inherent distinctive capacity.

48. In this section, attention will only be paid to the most recent rulings that deal with controversies involving domain name registrations and use that infringe trademarks.

49. See Royal Decree No. 929, June 21, 1942 (Italy) (Trademark Law). The Italian Trademark Law establishes the right to the exclusive use of trademark.

50. See Order of the Civil Court of Milan, sez. 1, Feb. 3, 2000, for the case *Bancalavoro.com s.r.l. / Jobber s.r.l.*

51. See Order of the Civil Court of Rome, sez. 1, Mar. 9, 2000, for the case *Carpoint S.p.a. v. Microsoft Corporation*.

52. See Acts of Senate, No. 4594 (approved slightly amended by the Senate Committee of Justice on Jan. 31, 2001).

53. See Council Directive 98/30/EC of 22 June 1998 Concerning Common Rules for the Internal Market in Natural Gas, 1998 O.J. (L 204) 1.

54. See Legislative Decree No. 164, May 23, 2000, Gazz. Uff. No. 142, June 20, 2000 (Italy).

the import, export, transmission, distribution, and supply of natural gas. An authorization (that is, concession) is still required for natural gas storage and production. An authorization granted by the Ministry of Industry, Trade, and Craft is also required for imports from non-European countries. The transmission activity is intended to be the transmission through the national pipeline grid⁵⁵ and is considered of public interest. Thus, article 8 of the decree requires transmission undertakings to grant access to their grids, within the limits of their capacity, to users who request it. In case of refusal, users may inform the Italian Regulatory Authority for Electricity and Gas,⁵⁶ which has the responsibility to ensure the uniform availability of access to the system. A regional authorization system has been established for the supply of gas through direct lines (that is, pipelines) supplying a consumer center in a way that is complementary to the interconnected system. Since natural gas distribution activity is considered a public service, article 14 requires a system of competitive bidding to choose providers. In addition, article 19(1) provides that Italian Competition Law applies to the natural gas market.⁵⁷

D. ADMINISTRATIVE LAW

1. *Administrative Procedural Law*

The rules relating to judgments by the administrative courts have been reformed.⁵⁸ The key points of the reform are (1) expansion of the powers of the judge in the procedural phase of trial, (2) general simplification and acceleration of judgments, and (3) clarification of the criteria to determining administrative court jurisdiction. The law introduces a procedural-phase petition to the president of the regional administrative court, who may decide on the procedural issue without hearing the defendant (*inaudita altera parte*). Moreover, administrative judges have been authorized to issue a variety of orders in the procedural phase, mirroring the powers given to ordinary judges by the Code of Civil Law Judgments. It should be noted that this increased power of the judge is compensated by the requirement that the aforementioned order must include an adequate explanation of judicial reasons. Such orders are open to appeal.

2. *Local Authorities*

After ten years of debate, a Local Authorities Code has been produced. Legislative Decree No. 267⁵⁹ consolidates into one act numerous legislative provisions on local authorities. The work required to produce the act has been considerable (more than 700 provisions have been reviewed for incorporation), but it is thought that the new act will have lasting effect. The legislature established that subsequent legislation might not implicitly repeal or derogate from the provisions of the decree. One of the fundamental principles established by the decree is the separation between the political and administrative functions of local government, with the political functions being vested in the local governmental assembly

55. The national pipeline grid has been individuated by Ministerial Decree, Dec. 22, 2000, Gazz. Uff. No. 18, Jan. 23, 2001 (Italy).

56. The Italian Regulatory Authority for Electricity and Gas is an independent body established under Law No. 481, Nov. 14, 1995 (Italy) (to regulate and control the electricity and gas sectors).

57. See Law No. 287, Oct. 10, 1990, Gazz. Uff. No. 240, Oct. 13, 1990 (Italy).

58. See Law No. 205, July 21 2000, Gazz. Uff. No. 173, July 26, 2000 (Italy).

59. See Legislative Decree No. 267, Aug. 18, 2000, Gazz. Uff. No. 227, Sept. 28, 2000 (Italy).

(the council). The mayor and the president of the province have paramount authority (including authority over the council). They are elected directly by the citizens and accordingly have strong powers. The governmental form adopted by local authorities has been defined by the commentators as *quasi-presidential*. The role of the ombudsman has become increasingly important within local government bodies, and although an optional appointment, ombudsmen are increasingly entrusted with significant functions.

IV. Norway

A. OVERVIEW

The Labour Administration's efforts to achieve a budget compromise with center and left-wing parties in the Norwegian Parliament during the fall of 2000 resulted in several pieces of legislation designed to raise additional revenues through higher corporate taxes. These measures include raising the level of value-added tax (VAT) in Norway and expanding the tax to cover most services as well as higher taxes on dividend income for shareholders. Other important developments include the liberalization of rules for the registration of domain names under the top domain for Norway (.no), the clarification of certain rights of employees who are terminated during the course of their trial employment period, and a new privacy law governing the storage and use of personal information by companies and organizations.

B. HIGHER TAXES ON DIVIDENDS

To cover planned additional spending needs without dipping into the growing revenues generated by the oil fund, as part of the National Budget 2001, the current labour government initially proposed measures⁶⁰ to increase taxes on dividends by reducing shareholders' deduction from 28 percent to 14 percent. A compromise with the center coalition parties led to a slight adjustment in the deduction to 17 percent with a standard deduction of NOK 10,000 (approximately US\$1,200). The result is that dividends in the hands of shareholders will be taxed at an approximate rate of 11 percent after already having been taxed as income to companies at a rate of 28 percent, making for a total tax burden of 39 percent on income to companies.

The increased tax on dividend income applies to dividends distributed by private and public share companies, savings banks, cooperatives, and several others types of companies. Compared with the taxation of income from certain types of partnerships, business entities organized as share companies are subject to an 11-percent higher tax rate on distributed income. It is therefore probable that there will be an increase in the number of newly established partnership entities in the coming years.

To prevent attempts to evade the higher taxation rate on dividends, authorities have also proposed changes in the taxation of capital gains applicable to the redemption of shares, the liquidation of a company, and any shareholder's sale of shares back to the company.

The new higher tax on dividends, effective for all dividends adopted and approved after September 4, 2000, is expected to lead to many new companies being established with a minimum of capital primarily financed by loans. Repayment of loan capital will not be

60. See Act of March 3, 1999, No. 14, §§ 10–12 (Taxation of Assets and Income) (Nor.).

subject to the double taxation that will apply to dividends, and companies will retain the right to deduct interest paid on the loans.

The aforementioned tax is meant to be temporary since the administration expects to propose major tax reform legislation for businesses in conjunction with its 2002 budget. The pronounced goal of the tax reform legislation will be to introduce a progressive taxation of capital in which normal capital income is shielded from the stiffer tax rates that will be applied to higher rates of capital income. However, most insiders are skeptical of the idea that such comprehensive tax reform measures can be worked out during fall 2001 in time for the presentation of the proposed 2002 budget as planned.

C. REFORM IN THE RATES AND APPLICABILITY OF VALUE-ADDED TAX

During the course of 2000, the Norwegian Parliament adopted changes in the rates and the scope of application of VAT.⁶¹ Effective as of January 1, 2001, the VAT rate increased from 23 percent to 24 percent. In addition, as of July 1, 2001, services as well as goods are subject to VAT.

The rate increase from 23 percent to 24 percent was expected for budgetary reasons. On the other hand, the application of VAT to services was in response to general international trends to put the taxation of goods and services in advanced economies on equal footing. For example, banking services, health services, and financial services, which collectively make up a significant proportion of many European national economies, will now be taxed on the same basis as the sale of goods.

The new VAT on services, which was expected for some time, is not anticipated to have a dramatic effect on most businesses. As a rule, business customers can deduct the increased cost of the VAT they pay from their own taxes. However, service industries directed at consumers, including many accounting law practices, health studios, and some financial services, will definitely feel the pinch since they were forced to increase their prices by 24 percent after July 1, 2001.

D. NEW DATA PRIVACY LEGISLATION

Norway has a tradition of protecting data privacy, and the Norwegian Data Inspectorate has been an influential body in focusing attention on problems and issues regarding the use of personal information in a constantly changing commercial environment. Recent legislation,⁶² however, has somewhat eased the rules for the use of private consumer information. Where previously companies had to obtain a permit from the Data Inspectorate, as of January 1, 2001, it is the customer who has to formally grant permission before information about him can be used for commercial purposes.

The regulations for implementation of the new Personal Data Act first became available in early February 2001 and are based on the principle that databases with customer information are exempt from registration with the Data Inspectorate. However, this exemption only applies when such information is used for the administration and fulfillment of contract obligations. This means that customer information must be destroyed after invoicing and

61. See resolution concerning the value-added tax and tax on investments for the 2001 budget period, adopted by the Norwegian Parliament on Nov. 28, 2000.

62. See Norwegian Personal Data Act, No. 31 (2000) (Nor.).

payment are complete. If customer information is to be used later for marketing or other purposes, the customer must usually give explicit consent.

Other types of databases (for example, those that store information on consumers for potential sales and marketing measures) must be reported and registered with the Data Inspectorate. This means that most customer relationship management databases must be registered because they generally store information on potential customers in the same database that contains information concerning previous customers and customer transactions.

Under the new act, the distinction between business-to-business and business-to-consumer transactional activities will be particularly important. The new law applies only to information relating to physical persons whereas previous legislation also applied to legal persons and entities. The result is that databases containing information about companies and businesses now fall clear of the law. Direct mail advertising to businesses will therefore be subject to fewer regulations while such advertising to consumers will be dependent upon prior consumer consent.

The Data Inspectorate has warned that it will be watching developments in the practice of the new law and regulations closely and threatens to clamp down hard on offenders. For businesses, the challenge will be to respect the intentions of the new act so that consumer confidence will increase and consumers will trust commercial businesses to use rather than abuse personal information.

E. LIBERALIZATION OF DOMAIN NAME REGISTRATION FOR .NO

Liberalization of the strict rules governing the registration of domain names under the Norwegian top domain (.no) had been signaled for some time, but it was not until late fall 2000 that the details of all liberalization measures were approved.⁶³ The liberalization began in May 2000 when the prohibition against registering generic names was lifted, but further measures were delayed by continued debate.

One important change is that companies are now allowed to register more than one domain name—generally up to fifteen names. This will be particularly useful for companies who wish to protect product names and trademarks and who previously had to resort to establishing subsidiaries for every separate name the parent company wished to register. One drawback of the new rules is that the required connection between a company and the name to be registered has been dropped, and competition for the registration of popular names will be done by lottery. The domain name register is administered by the organization NORID, accessible at www.norid.no.

F. SUPREME COURT DECISION REGARDING CERTAIN RIGHTS OF NEW EMPLOYEES

In Norway, if a permanent employee is terminated and a conflict arises between the employer and that employee, the employee generally has the right to continue in his position until either the conflict is resolved by the courts or until a court has issued a ruling requiring the employee to relinquish his position. While this right is an advantage for the employee, the employer has the burden of continuing to pay the salary of an employee

63. For a description of the present policy for the processing of domain name applications, see NORID's Web site at www.norid.no/navnepolitik.html.

whom the employer wishes to have removed or for whom the employer has no relevant work due to cutbacks or downsizing.

In Norway, many employees are initially hired on a trial basis with full employment rights first vesting upon employers' granting hirees permanent employment positions at the end of a trial employment period (usually six months). The rights of trial employees who are terminated during the course of their trial period have always been more limited than the rights of permanent employees in the same situation. For example, trial employees who are terminated due to their inability to properly execute their duties do not have the right to a hearing prior to termination. However, the right of such trial employees to remain in their positions when terminated due to cutbacks and downsizing is unclear. In fact, many have believed that their rights were stronger in such cases.

A recent unpublished ruling by the special appeals board of the Norwegian Supreme Court has clarified the rights of trial employees who were terminated due to downsizing. The *Kjæremålsutvalg* ruled that such trial employees do not in fact have any automatic right to remain in their position while conflicts about their termination is being resolved, thus confirming the weaker status of trial employees.

V. Spain

A. THE NEW CIVIL PROCEDURE ACT

On January 7, 2000, the Civil Procedure Act 1/2000 was enacted.⁶⁴ The new law aims to establish a faster and more effective civil process. Among the most remarkable features of this law is its emphasis on oral process. The law provides the possibility of interim injunctions at the first instance level without the necessity of a judicial bond. Other important new features are the simplification of common procedures, the introduction of the so-called admonitory process, and the use of technological evidence and materials within that process.

The admonitory process relates to debts of fewer than 5 million pesetas. It is a formal process controlled by the court, evidencing the debt of the defendant to the plaintiff and requiring the enforcement of the judgment. The creditor shall provide any documentation (including electronic documents) evidencing the debt owed to him by the debtor. The law also establishes the option for courts to serve notice via facsimile or e-mail and to allow the videotaping of hearings.

B. INTELLECTUAL PROPERTY

1. *Plant Varieties*

On January 7, 2000, the Act for the Regulation of Plant Varieties was enacted.⁶⁵ It establishes a legal framework for intellectual property rights in plant varieties. The law implements the UPOV International Convention and Regulation 2100/94/EC on Plant Varieties.⁶⁶ Its effect is to strengthen plant breeder's rights. Plant variety components and harvested material of the protected variety require the authorization of the holder of the

64. See Civil Procedure Act (B.O.E., 2000, 7) (Spain).

65. See Act for the Regulation of Plant Varieties (B.O.E., 2000, 8) (Spain).

66. See *id.*

rights for production and reproduction, conditioning for propagation, offering for sale, selling or marketing, and importing from or exporting to the European Community.

The breeder's rights shall run until the end of the twenty-fifth calendar year or, in the case of vine and tree species, until the end of the thirtieth calendar year following the year of grant. The law specifies exceptions to breeder's rights, allowing, for example, certain acts done for the purpose of breeding other varieties. The law also allows breeders, within some time constraints, to sell new varieties even earlier than the application date for protection without prejudice to the legal requirement of novelty. Finally, the law implements article 12 of European Directive 98/44/EC on biotechnological inventions concerning the regulation of cross licenses between plant varieties and patents.⁶⁷

2. *Substantive Examination for Patents Related to Food Industries*

On May 19, 2000, Royal Decree 812/2000 was enacted.⁶⁸ This regulation develops Patents Act 11/1986, which concerns procedures for the granting of patents.⁶⁹ In particular, this regulation establishes the rules for patent examinations in the field of foodstuffs. Once an application for a patent has been submitted, the applicant may opt for a substantive examination of his application. The application will then be referred to an expert examiner who will review the application to ensure that it conforms to all aspects of patent law. The examiner will consider whether the invention is novel and involves a creative act in the light of relevant documents and references that were published before the application was filed.

3. *Domain Names*

On March 21, 2000, a regulation on domain names of .es was enacted.⁷⁰ The main features of this regulation are that (1) it is no longer necessary to have a Spanish company in order to obtain an .es domain name, (2) a domain name may be granted to an individual, and (3) a single entity may be granted several domain names. A .es domain name should be granted to an applicant if it holds a registered trademark or registered trade name (covering the Spanish territory) that coincides with the requested domain name or if its corporate name coincides with the requested domain name.

C. DATA PROTECTION: INTERNATIONAL TRANSFER OF PERSONAL DATA

On December 1, 2000, Guidelines 1/2000 on International Transfer of Personal Data were enacted.⁷¹ These guidelines provide the official interpretation of the Agency for the Protection of Personal Data with respect to articles 33 and 34 of the Spanish Personal Data Protection Law (Organic Law 15/1999 of Personal Data Protection).⁷²

The agency understands that an international transfer of data is any kind of data transmission abroad. This includes both the transfer of data to third parties and the mere transmission of personal data to a third party in order for said third party to perform a service for the title-holder of a file. The guidelines also develop the process of notification to the Agency for the Protection of Personal Data.

67. *See id.*

68. *See* Royal Decree (B.O.E., 2000, 137) (Spain).

69. *See id.*

70. *See* Regulation (B.O.E., 2000, 77) (Spain).

71. *See* Guidelines on International Transfer of Personal Data (B.O.E., 2000, 301) (Spain).

72. *See id.*

The guidelines distinguish between three types of international transfers of data: (1) transfers of data to European Union member states or to third countries with a level of protection comparable to that in Spain, (2) transfers of data to third countries with a non-comparable level of protection, and (3) transfers of data consisting of the treatment of data by a third party located abroad. In these cases, said treatment shall be established in a contract. The guidelines establish the clauses that parties must include them in contracts.

D. COMPETITION LAW AND MERGER CONTROL

The Competition Law Act (Law 16/1989 of July 17) has been amended by Royal Decree Law 6/2000 of June 23.⁷³ Recent amendments to the Competition Law Act were made approximately one year after the Spanish government introduced the requirement of mandatory notification for mergers meeting any alternative thresholds. The amendment now being introduced concerns a standstill obligation from the date of filing until a decision has been adopted unless implicit authorization is given. Mergers that do not have community dimension but meet the Spanish thresholds and that are subject to notification duty before the Spanish competition authorities must be provided to the Spanish Competition Defense Service prior to their consummation and cannot be implemented prior to the express or implied consent of the government.

This amendment also affects merger transactions carried out via a takeover bid. After the Stock Exchange Commission approves a bid, the publication of announcements and period of acceptance will be suspended until express or implicit merger authorization has been granted. Nevertheless, a waiver on the standstill obligation may be obtained, provided that a reasoned request is made by the notifying party at the time of filing and the Competition Defense Service supports the waiver. The Spanish Competition Law Act further provides that any implementation of the transaction that contravenes the standstill obligation may be subject to fines up to 10 percent of the party or parties' turnover in Spain.

The amendment has also reduced the time periods involved in the regulatory process for reviewing merger transactions. Reviews of merger transactions are still managed by a three-tiered process. A merger is first scrutinized by the Competition Defense Service, which has one month to issue a decision. The Competition Defence Service may then choose to ask the Ministry of Economy to submit the matter to the Competition Defense Tribunal. Previously, the Competition Defense Tribunal had up to three months to analyze the matter. This period has now been shortened to two months by the amendment of June 23, 2000. Finally, the Council of Ministers is granted one month (down from three months) to give final approval to a matter that has been referred to the Competition Defense Tribunal. A notified transaction is granted implicit approval if government regulators do not deliver a response within the specified time period.

E. CAPITAL MARKETS

1. *Communication of Significant Shareholding*

Developing Law 55/99 of December 29, 1999, on Tax, Administrative and Social Measures, Royal Decree 1370/2000 of July 19, 2000,⁷⁴ has amended Royal Decree 377/1991 of

73. See Competition Law Act (B.O.E., 1989) (codified as amended by B.O.E., 2000, 151) (Spain).

74. See Tax, Administrative, and Social Measures (B.O.E. 1991) (codified as amended by B.O.E., 2000, 177) (Spain).

March 15, 2000. Pursuant to the new rules, any director of a listed company must report to the National Commission of the Stock Markets (CNMV), to the Spanish Stock Exchange where the company is quoted, and to the listed company itself any number of stock options, warrants, or any negotiable instruments that grant the right to acquire shares of the company, held directly or indirectly at the time of becoming a director, and any acquisition or sale made later on. Any granting of stock options to officers or directors of a listed company as well as any repurchase plan subject to the quotation of the stock of the listed company must be published. Royal Decree 1370/2000 establishes the procedure, content, and legal terms of the aforementioned communication of stock options, warrants, or any negotiable instruments that grant the right to acquire shares. Circular 4/2000 of the CNMV (August 2) governs communication of stock options and retribution plans. The communication must be made within seven business days after the appointment, sale, purchase, or any exercise of stock options, warrants, or any negotiable instruments that grant the right to acquire shares.

2. *The Stock Exchanges' New Market Initiative*

Developing Order of December 22, 1999, Circular 1/2000 of the CNMV (February 17) establishes the admission requirements for companies to be listed in the *new market*, a special trading segment for the trading of securities issued by new technology and high-risk companies. Apart from the usual requirements for companies in order to be listed in Spanish stock exchanges, a non-binding report made by the stock exchanges on the suitability of the company is required for admittance in the new market. Circular 1/2000 of the CNMV also establishes certain information that has to be included in the prospectus of these companies and specific trading conditions and operating rules for the new market, taking into account the high volatility of the prices of the quoted shares.

Circular 7/2000 of the Stock Exchanges Company (December 12) establishes the operation regime for market members obliged to promote the liquidity of the securities traded in the new market.

3. *Spanish Stock Exchanges Membership*

Law 24/1988 has been amended by Law 14/2000 Tax, Administrative, and Social Measures of December 29.⁷⁵ The new regulation eliminates the principle that in order to become a member of a Spanish stock exchange, it is necessary to be a shareholder in the company that manages and supervises the relevant Spanish stock exchange. The regulation also removes the requirement that only members of the stock exchange can be shareholders in the company that manages and supervises the relevant Spanish stock exchange.

F. TAX LAW

1. *General*

Apart from the usual yearly modifications introduced by the General State Budget Act 13/2000 for the year 2001 and by the Tax, Administrative, and Social Measures Act 14/2000, a Royal Decree Law 3/2000 of June 23 concerning several urgent tax measures related to families and to reduced-size companies was enacted.⁷⁶ More specifically, the measures

75. See Tax, Administrative, and Social Measures (B.O.E. 1989) (codified as amended by B.O.E., 2000, 313) (Spain).

76. See General State Budget Act (B.O.E., 2000, 151) (Spain).

were devoted to ease the taxation of the reduced-size companies (by increasing the amount of the turnover under which a company is considered to be of small size, up to 3,000,000 euros), to increase the amount of deductible contributions to Pension schemes, to modify the capital gains regime in personal income tax (allowing the application of a flat 18-percent rate to gains obtained after a one-year holding period), and to encourage the internationalisation of the Spanish economy through new double-tax relief measures and a modification in the Spanish holdings regime (ETVE).

During the last quarter of the year 2000, the said royal decree was ratified by Law 6/2000⁷⁷ of December 12, 2000, and, together with the aforementioned laws, has consolidated, among others, the following modifications in corporate income tax, personal income tax and nonresident income tax.

2. *Corporate Income Tax*

A new deduction regarding the promotion of information technology to medium-sized companies has been established.

A new exemption regime for relieving double taxation in dividends and capital gains deriving from the participation held in nonresident entities has been established, provided several conditions are met: minimum 5-percent holding and one-year holding period, nature of the income of the subsidiaries, and effective taxation of the subsidiaries. This new exemption method replaces the previous regime that was based on the deduction of foreign-source income.

In connection with this exemption method, the ETVE has been modified. Significantly, the minimum 5-percent participation in nonresident companies does not need to be met if total investment exceeds 6,000,000 euros. In addition, the holding activity does not have to be the essential purpose of the company to benefit from the special withholding regime as long as the activity is included within the company's statement of purpose.

As of January 1, 2001, several modifications on the special tax-free regime for corporate reorganizations have been established. The most relevant changes are the non-application of the regime to subjective spin-offs regime except in the case in which the different assets attributed to each of the shareholders can be considered as a branch of activity; the new requirements for stock-for-stock transactions to qualify as tax-free operations as well as the taxation of the acquiring company and the depreciation of the goodwill arising from them; and extension of the formal requirements. This obliges intervening parties not only to communicate the operation to the Tax Administration prior to its registration before the Mercantile Registry but also to include within the relevant documentation (agreements, contracts, or official merger projects) their intention of applying the special tax-free regime.

3. *Personal Income Tax*

The tax scale in force for fiscal year 2000 has been maintained for fiscal year 2001. The same applies to the general limit under which a person is not obliged to file his personal income tax return (ESP 3,500,000), although minor changes have been introduced. The average annual salary for the purpose of computation of the limit of the 30-percent reduction applicable to irregular earned income has been fixed at ESP 2,600,000. Capital gains derived from the transfer of assets that have been held for more than one year are taxed at an 18-percent flat rate. This modification applies after June 25, 2000.

77. See Law (B.O.E., 2000, 299) (Spain).

4. *Nonresident Income Tax*

The most relevant change in nonresident income tax affects the tax rate applicable to dividends, interests, and capital gains deriving from the transfer of the participation in investment funds and similar entities. The rate has been fixed at a flat 18-percent rate.

VI. Sweden

A. SECURITIES LAW

1. *New Insider Trading Act*

New legislation concerning insider trading has been passed. The former Insider Trading Act has been replaced by three pieces of legislation. One act contains criminal regulation while the obligation to report certain holdings of securities to the Swedish Financial Supervisory Authority is regulated by one act and one regulation. The new legislation reflects a stricter view on insider trading and related issues. The sanctions for violations of insider trading rules have become more stringent. The opportunity to impose a fine on a person for violation of the insider trading regulations has been reduced and is now only available if the violation is deemed immaterial. Consequently, the sanction for violation of an insider trading regulation shall normally be imprisonment. The former insider trading regulation contained grounds for complete exemption from sanctions. For example, if a use of information could be assumed to have had no effect on public confidence in the securities market, then no sanctions would be imposed. This exemption, however, is no longer available.

2. *Extended Deposit Guarantee*

A deposit in a branch of a Swedish bank or securities company within the EEA is now covered by the Swedish deposit guarantee without limitation to the level guaranteed in the foreign country.

B. EMPLOYMENT LAW

A new authority has been established: the Mediation Institute (*Sw. medlingsinstitutet*). Its task is to mediate in cases of conflict between an employer or the employer's central organization and an employee or the employee's organization. Its main purpose is to further a balanced wage structure, and it shall advise the parties on the labor market about negotiations and collective agreements. If the parties, during negotiation of a collective agreement, give their consent thereto, the Mediation Institute shall designate a mediator. If the Mediation Institute believes that there is a risk of strike or lockout action, the institute can designate a mediator without the parties' consent.

C. COMPANY LAW

The OM Stockholm Stock Exchange and the Stock Market Company's Association (*Sw. Aktiemarknadsbolagens förening*) have agreed on a new listing contract for all companies listed on the Stockholm Stock Exchange to be applied from March 1, 2001. According to the new contract, all stock market companies must have on the Internet a homepage that discloses information from the company to the market. Regulations regarding transfer of

shares in a subsidiary to an official in the selling company are now included in the actual listing contract itself instead of mentioned only in an enclosure.

New legislation became effective on March 10, 2000, based on Directive 77/91/EEC, which gives Swedish companies listed on a stock exchange the right to purchase their own shares up to an aggregate holding of 10 percent of the outstanding shares in the company.

New legislation entered into force on March 1, 2000, allowing for a company to keep its accounts in euros. If a company keeps its account in euros, its share capital must also be expressed in euros.

D. TAX LAW

1. *New Income Tax Act*

A new Income Tax Act entered into force on January 1, 2000. The new act replaced thirty-five previous acts of legislation with the purpose of modernizing the language of Swedish tax legislation to improve clarity. The new act will be applied as from assessment year 2002.

2. *Taxation Issues Concerning a Company's Acquisitions of Its Own Shares*

If a company that has purchased its own shares disposes of the shares and a capital gain arises, no taxation shall take place. If a capital loss arises, no deduction shall be admitted.

E. REAL ESTATE LAW

The act that required a person domiciled abroad to apply for permission to acquire agricultural property or small self-contained houses in Sweden has been abolished. Sweden was required to abolish the act in fulfillment of the requirements of the Treaty of Rome, which concerns free capital movement.

F. CONSUMER LAW

A new act based on Directive 97/7/EEC replaces the former Door-to-Door Sales Act. The new act purports to protect consumer's rights in connection with door-to-door sales and agreements entered into when both parties are not physically present at the same time, such as distance agreements. This makes the act applicable on agreements entered into over the Internet or over the telephone.

G. COMPETITION LAW

The Swedish Competition Act has been adjusted to harmonize with European Community Law. The adjustments imply that a notification must be sent to the Swedish Competition Authority if a high degree of business concentration occurs irrespective of the way in which that concentration has occurred; beforehand, a notification was required only if an acquisition had taken place. The definition of a concentration corresponds to the definition in the EC Merger Regulation,⁷⁸ and consistent herewith a concentration in the mean-

78. See Council Regulation 4064/89, 1989 O.J. (L 395) 1 (corrected by 1990 O.J. (L 257) 13).

ing of the Competition Act will only arise if a permanent change in the structure of the undertakings occurs.

Following the amendments, a concentration shall be notified to the Swedish Competition Authority when the total turnover of all concerned undertakings exceeded SEK 4 billion during the previous financial year, provided that the turnover in Sweden of each of at least two of the concerned undertakings exceeded SEK 100 million during the previous financial year.

Under the amended act, a decision prohibiting a harmful concentration may be withheld only on grounds of essential interests of national security or security of supply. Consequently, the scope for refraining from prohibiting concentrations has been reduced.

Before the amendments, a decision to prohibit an acquisition meant that the whole transaction became invalid. According to the new regulation, only legal acts that constitute a part of the prohibited concentration itself will be invalid whereas, for example, provisions on damages will not be affected by a prohibition.

To ensure that a concentration is not completed while the Competition Authority conducts its investigation, a right for the authority to prohibit such completion and make such a decision subject to a fine has been introduced.

VII. United Kingdom

A. CRIMINAL LAW DEVELOPMENTS

1. *Right to Trial by Jury*

The modern system of English law began with Henry II and his establishment of local governments to administer justice. His son, King John, was forced to seal the Magna Carta to establish the sacred right to a trial by jury.⁷⁹ After almost 800 years, the home secretary proposed legislation in the House of Commons to curtail the jury trial system for crimes such as burglary, theft, assault, unlawful wounding, and criminal damage.

At present, England and Wales have a three-tier system of justice. For serious crimes such as murder, rape, blackmail, and those crimes in which life is threatened during robbery, assault, and theft, cases are heard in Crown Court with the option of a jury trial.⁸⁰ In cases of no threat to life, a trial is held summarily before three magistrate judges.⁸¹ The third tier of crimes are called *triable either way* (TEW), in which it is to the defendant's discretion to select a summary trial in magistrates' court or a jury trial in Crown Court.⁸²

79. See Magna Carter, 1297, 25 Edw. 1, § 29 (Eng.), which states, "No Freeman shall be taken, or imprisoned, or be disseised if his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right."

80. See FIRST DAVIES ET AL., CRIMINAL JUSTICE: AN INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM IN ENGLAND AND WALES 158 (1995).

81. See *id.*; see also www.open.gov.uk/lcd/magist/mag2.htm (explaining that magistrates are lay people who live within 15 miles of a boundary they wish to serve, have satisfactory sight and hearing, may or may not be a British citizen, and after legal training agree to sit on the bench between 26 to 35 half-days a year to judge criminal matters, Family Court, and council tax non-payment); see also BRYAN GIBSON, INTRODUCTION TO THE MAGISTRATES' COURT 26 (1995).

82. See *id.*; see also PAUL SILK & RHODRI WALTERS, HOW PARLIAMENT WORKS 143 (1998) (statutes define which offenses are designated for summary trial, TEW, or indictment in Crown Court).

The Labour government has legislation pending to eliminate all TEW offenses so that a layman magistrate would determine if a defendant has a judge or jury trial. The act, the Criminal Justice (Mode of Trial) (No. 2) Bill, was introduced in the House of Commons on February 22, 2000.⁸³ While the Mode of Trial Bill has passed the House of Commons in two versions, it has failed to pass the House of Lords. The stage is being set for its passage through the Parliament Acts of 1911 and 1949, for which the House of Commons does not need agreement from the House of Lords in order to attain the royal assent necessary for a bill to become a statute.⁸⁴

The Home Office wants to eliminate TEW cases to save the government an estimated £128 million.⁸⁵ A survey in 1988 estimated that cases handled in magistrates' court cost an average of £295 for a summary trial versus Crown Court expenses that are over £3,100 per jury trial.⁸⁶ While the home secretary's budget has increased for the next four years, the Lord Chancellor's office, which governs the Department of Public Prosecutions and the Crown Prosecution Service, was not given a significant increase.⁸⁷

Supporters of the Mode of Trial Bill include magistrate judges and court officials.⁸⁸ The opponents are barristers and solicitors who argue that Crown Court jury trials have a higher rate of acquittal at 43 percent whereas magistrates' court has a 26-percent or lower acquittal rate.⁸⁹ There have been suggestions that the Mode of Trial Bill would violate the Human

83. A similar version of this bill, Criminal Justice (Mode of Trial) (No. 1) Bill, was introduced the previous year and failed to pass the House of Lords. In the first version of the bill, the magistrate was to consider a defendant's reputation and livelihood before choosing between summary or jury trial. The House of Lords rejected this bill because of the delineation that only titled gentry, clergy, or professionals would be granted a jury trial. For the full text of the second proposed Mode of Trial Bill, see Criminal Justice (Mode of Trial) (No. 2) Bill, 2000, available at www.publications.parliament.uk/pa/cm199900/cmbills/073/2000073.htm. The second version of the bill was withdrawn from the House of Lords before it could be rejected. In the Queen's speech before Parliament on December 6, 2000, she mentioned that this bill is still on the Labour government agenda. The Mode of Trial Bill originated in conception with the Tory government.

84. SILK & WALTERS, *supra* note 82, at 142. These acts allow the Commons to present a bill for royal assent without the agreement of the House of Lords, provided that "there has been a minimum period of one year between the Commons giving [a bill] a second reading for the first time and a third reading for the second time, and that the Lords have received the bill at least one month before the end of each of the two sessions." *Id.*

85. This figure is currently being posted on the Home Secretary's Web page and is up from the £105 million Mr. Jack Straw previously predicted in savings. See *Straw on Trial over Jury Reform* (BBC News, Nov. 19, 1999), available at http://news.bbc.co.uk/hi/english/uk_politics/newsid_527000/527721.stm.

86. DAVIES ET AL., *supra* note 80, at 173.

87. See *How They Cashed In*, TIMES (London), July 19, 2000, at 4m. The Home Office budget for 2000–2001 is £8.1 billion, up from £7.7 billion in 1999–2000. The Lord Chancellor's office received a modest £600 million increase for 2000–2001. *Budget 2000: Total Public Spending 2000/2001*, TIMES (London), Mar. 22, 2000. The Department of Public Prosecutions' budget did not receive any part of the Lord Chancellor's budget surplus, but was cut by £12 million or 4% in the next year. See Frances Gibb & Roland Watson, *Lawyers Fear Cuts Will Aid Criminals*, TIMES (London), June 5, 2000, at 1.

88. The elimination of TEW offenses was suggested by the 1975 James Commission, *The Distribution of Criminal Business between the Crown Court and Magistrates' Court: Report of the Interdepartmental Committee*, as well as the Royal Commission of 1993 and the 1999 Narey Report. See also *Review of Delay in the Criminal Justice System*, available at www.homeoffice.gov.uk/cpd/pvu/crimrev6.htm.

89. See the home secretary's Web site at www.homeoffice.gov.uk/motbrief.htm. Crown Prosecution Services Annual Report shows the magistrates' court now has a case load of 1.4 million cases with 569,976 (40%) being for indictable or TEW offenses, this statistic is up by 1.8% from 1987–88. Of the 989,831 cases to remain in magistrates' court, 98.3% of the hearings resulted in a conviction. See *Crown Prosecution Service Annual Report, 1998–99*, at 39 (1999), available at www.homeoffice.gov.uk/motbrief.htm; see also Tim Robbins, *Acquittals by Juries Reach Record Levels*, TIMES (London), Jan. 28, 2001, at 3.

Rights Act that has governed English law since its adoption on October 2, 2000. However, defendants are still guaranteed a right to a fair trial; it would be a summary trial with three magistrate judges rather than a jury trial.⁹⁰

2. *Anti-Crime Initiatives*

There have been other legislative proposals by the government to combat crime. One modification, suggested by the metropolitan police commissioner, would be for twenty-four-hour courts in London to adjudicate street crime, drunkenness, and antisocial behavior.⁹¹ Another government initiative to decrease youth crime is to give courts power to remand repeat youth offenders to secure facilities rather than the current system of freeing youths to repeatedly offend.⁹²

The home secretary has plans to give more money to the victim support groups working independently within the magistrate courts and to the victims' compensation system.⁹³

Starting in April, the Lord Chancellor's office is piloting an American-style public defender system in Birmingham, Liverpool, Middlesbrough, and Swansea.⁹⁴ This will be a government salaried defender service to operate parallel with the current defense contracts scheme awarded to private firms. Solicitors and the Law Society voiced opposition to public defenders because such a system will undermine their ability to compete for new staff.

3. *New Criminal Law Legislation*

The Criminal Justice and Court Services Act received the royal assent on November 30, 2000. This act enables police to have full and immediate access to vehicle-licensing records and also includes a truancy measure, which raises the penalty for parents whose children fail to attend school regularly. The Criminal Justice and Court Services Act 2000 also sets up a system to prevent unsuitable people from working with children, gives police access to drivers' records, and among other issues, raises the penalty for parents whose children fail to attend school regularly.

The Race Relations (Amendment) Act 2000 includes chief officers of police in being vicariously liable for racial discrimination by their officers.

Regulation of Investigatory Powers Act 2000 combats the threat posed by the criminal use of strong encryption.

The Football (Disorder) Act 2000 enables a magistrates' court to impose a banning order to help prevent violence or disorder at certain football matches. It also allows constables to order a person to appear before a magistrate within twenty-four hours and prevent the person from leaving England and Wales for certain football matches.

90. See EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Nov. 4, 1950, art. 6, para. 1, 213 U.N.T.S. 221, 228. In November 1999, Mr. Jack Straw reiterated that the right to a jury trial is not a fundamental right. He stated, "[G]iving defendants a choice of court is not [a key freedom]. It is frankly eccentric, which is why we in England and Wales are almost alone in allowing this arrangement to continue." Mr. Straw was making reference to the fact that other European countries operate on an inquisitorial system rather than the jury system. See *Straw on Trial over Jury Reform*, *supra* note 85.

91. See Richard Ford & Stewart Tendler, *24-Hr Courts Idea to Fight Muggings*, *TIMES* (London), Feb. 16, 2001, at 1.

92. See James Landale, *Labour Offers Offensive on Youth Crime*, *TIMES* (London), Feb. 24, 2001, at 15.

93. See Greg Hurst & Roland Watson, *Straw Plans Extra Aid for Victims of Crime*, *TIMES* (London), Feb. 17, 2001, at 12.

94. See Frances Gibb, *Public Defender Scheme Attacked*, *TIMES* (London), Feb. 20, 2001, at 13.

The Youth Justice and Criminal Evidence Act 1999 provides reform of the youth juvenile system by a referral to a youth offender panel, which can set up a program of behavior for the offender to follow. The act also outlines procedures to make testimony less stressful for a youth witness.

The Terrorism Act 2000 gives a permanent basis to sections of three former temporary acts: Prevention of Terrorism Act 1989, Northern Ireland Emergency Provisions Act 1996, and Criminal Justice (Terrorism and Conspiracy) Act 1998.

4. *Pending Criminal Legislation*

The Police Bill would give police authority to close unlicensed premises and ban public drinking, make child curfews at sixteen years of age, modify police disciplinary measures, and restrict overseas travel of convicted drug traffickers.

The Sex Offenders Bill sets the minimum age of males or females to lawfully consent to buggery and homosexual acts to sixteen years of age in England, Wales, and Scotland and to seventeen years of age in Northern Ireland.

B. HUMAN RIGHTS ACT 1998

On October 2, 2000, the Human Rights Act 1998 (HRA) came into force. It serves to incorporate the rights and freedoms set out in the European Convention on Human Rights (ECHR) into law in the United Kingdom. Its impact on company/commercial law in the United Kingdom cannot be underestimated with its main feature being a new rule of statutory interpretation. In effect, this means that all legislation, regardless of when it came into force, must be interpreted so as to be compatible with the ECHR. If this is not possible, the judiciary has the power to strike down secondary legislation but not primary. When primary legislation is incompatible to ECHR, the High Court can make a declaration of incompatibility, which acts as an indicator to the Houses of Parliament to enact some change.

Section 6 of this act states, "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."⁹⁵ The term *public authority* has been given a broad definition to encompass a non-exhaustive list of bodies that have some public and private functions. Bodies such as the BBC, utility regulators, for example, OFTEL, local authorities, privatized utility companies such as British Gas all fall under this umbrella term. In fact, this comprises any body that the courts could judicially review as being a public authority.

Section 7 allows companies to rely on a violation of their convention rights as victims. This means that companies as well as individuals will be able to protect their convention rights from the abuse/misuse of state and public authority power from any court or tribunal in addition to in any legal proceedings. However, it is still unclear to what extent this can be applicable in private law actions in situations in which one company takes action against another.

Other aspects of the HRA that are particularly relevant to company/commercial law are potentially (1) a right to a fair trial⁹⁶—this can be illustrated in the context of examination

95. "Public authority includes: (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature"; this excludes the houses of Parliament and a person exercising functions in connection with proceedings in Parliament (as defined in Section 6 (a) & (b) of the Human Rights Act 1998). Human Rights Act, 1998, ch. 42, § 6(a)–(b) (Eng.).

96. See Human Rights Act, 1998, ch. 42, sched. 1, art. 6 (Eng.).

of directors under the Insolvency Act 1986 leading to directors disqualification proceedings;⁹⁷ (2) a right to respect for private and family life⁹⁸—this is applicable in commercial situations such as employer surveillance of employee activities;⁹⁹ (3) freedom of expression¹⁰⁰—companies are entitled to freedom of speech as individuals are, and this aspect is of distinct significance to the media and Internet service providers; and (4) protection of property¹⁰¹—aiming to protect the right to undisturbed enjoyment of property. Property is generally construed to include tangible and intangible property and is likely to have a wide application to companies in areas such as planning and development where there are social policy issues. If property rights are removed this must be justified as in the public interest.

C. COMPANY LAW

In 1998, the Department of Trade and Industry (DTI) launched a long-term fundamental review of company law with the aim of developing a simpler and cost-effective framework for carrying out business activity in Britain for the twenty-first century. An independent steering group was formed; the group is comprised of those with particular knowledge and expertise in company law matters. During 2000, the steering group published a number of significant consultation documents covering a wide range of issues such as corporate governance issues,¹⁰² proposed changes to the capital maintenance regime,¹⁰³ and possible changes to the Companies Act 1985 on the subject of registration of company charges.¹⁰⁴

The review was due to have come to an end when the steering group presented its final report and recommendations to the U.K. government in spring 2001. It will be interesting to see the extent of the changes implemented as a result of these recommendations. Radical changes that will alter the dynamics of U.K. companies in the future are anticipated.

D. LIMITED LIABILITY PARTNERSHIPS

The Limited Liability Partnership Act 2000 received royal assent on July 20, 2000, and the act is effective April 6, 2001. Since this date, it has been possible to incorporate limited liability partnerships (LLPs) that allow members to limit their liability and enjoy the flexibility of a partnership. The details of the legislation are set out in draft statutory instruments, the Limited Liability Partnerships Regulations 2001.¹⁰⁵

LLPs now have a separate legal capacity from its members and are capable of entering contracts and holding property as distinct legal entities. LLP members are not liable under contract for any breaches by the partnership.

The position in tort, however, is uncertain as to the liability of a member of an LLP in relation to a client of the partnership. The explanatory notes issued by the DTI state that

97. See *Official Receiver v. (1) William George Stern (2) Mark Stephen Lawrence Stern in the matter of Westminster Property Management Ltd.* (No. 1), 1 W.L.R. 2230, C.A. 2000.

98. See Human Rights Act, 1998, ch. 42, sched. 1, art. 8 (Eng.).

99. Cf. Regulation of Investigatory Powers Act, 2000 (Eng.).

100. See Human Rights Act, 1998, ch. 42, sched. 1, art. 10 (Eng.).

101. See Human Rights Act, 1998, ch. 42, sched. 1, part 11, 1st protocol, art. 1 (Eng.).

102. See *Developing the Framework*, COMPANY L. REV., URN 00/656 (2000).

103. See *Capital Maintenance: Other Issues*, COMPANY L. REV., URN 00/880 (2000).

104. See *Registration of Company Charges*, COMPANY L. REV., URN 00/1213 (2000).

105. See Explanatory Notes to the Limited Liability Partnerships Act, ch. 12, (2000) (Eng.).

various factors will be taken into account when the courts decide whether a member is potentially liable to a client.¹⁰⁶ These factors include "whether the member of the LLP assumed personal responsibility for the advice, whether the client relied on the assumption of responsibility, and whether such reliance was reasonable."¹⁰⁷

LLPs will be incorporated similarly to U.K. companies and have much of the legislative requirements. Members must subscribe their names to an incorporation document that sets out various details about an LLP and its membership. The registrar issues a certificate once the incorporation document has been registered. This is conclusive evidence that the LLP has been incorporated.

An LLP runs essentially like a normal partnership. The role of members and directors are combined in a single function. The rights of the members both between themselves and in relation to an LLP are governed by their agreement. The accounts treatment of such partnerships will be dealt with in regulations and will be similar to that applicable to companies. In addition, members can be sued for wrongful or fraudulent trading, and members can be disqualified from membership of an LLP.

LLPs are taxed as if their members were partners in partnership. The U.K. government announced that in order to avoid LLPs being used as tax avoidance vehicles, it will introduce rules to ensure that exempt bodies are taxed on any income from property they receive in their capacity as members of an LLP; the same consequences follow for shareholders in a company that unincorporates to form an LLP as currently follow when a company unincorporates to form a partnership; and loans used to provide money to purchase an interest in an investment LLP will not qualify for tax relief.

E. ELECTRONIC COMMUNICATIONS

At the end of 2000, the U.K. Parliament approved the Electronic Communications Order and on December 22, 2000, the Companies Act 1985 (Electronic Communications) Order 2000 came into force in its entirety. This order allows communications between companies and shareholders to be electronic in addition to electronic filings at companies' houses.

The Institute of Chartered Secretaries and Administrators (ICSA) has produced a Guide to Recommended Best Practice on the implementation of the new electronic communications measures. This includes a list of twenty-five points of recommended best practices detailing points companies should consider before offering the facility to shareholders, a specimen invitation to use electronic communications, and guidance on issues such as offering the facility to shareholders and maintaining an appropriate register and security.

The Electronic Communications Act 2000 received royal assent on May 25, 2000, and the majority of the act came into force immediately upon the grant of royal assent. However, certain parts of the act were stated not to come into force until so ordered by the secretary of state for trade and industry.

A noteworthy feature of this act is the admittance of electronic signatures. Section 7 confirms the admissibility in evidence of electronic signatures in relation to questions about the authenticity or integrity of communications or data. It came into force on July 25, 2000.

106. *See id.* § 16.

107. *See id.*

F. THE DATA PROTECTION ACT 1998

The Data Protection Act 1998 (DPA) came into force in the United Kingdom on March 1, 2000, and supersedes previous legislation.¹⁰⁸ The main aim of the DPA is to protect the privacy of individuals in relation to the processing of their personal data and on the free movement of such data.¹⁰⁹ Organizations must notify the Office of the Information Commissioner at the DTI if they are processing personal data in the capacity of a data controller.

G. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

The Contracts (Rights of Third Parties) Act 1999 received royal assent on November 11, 1999. Although it came into force on November 11, 1999, its effectiveness applied only to contracts that expressly refer to it. Since May 11, 2000, it is applicable to most contracts. The significance of this act lies in its being an exception of the doctrine of privity of contract. The doctrine of privity of contract permits only the party to a contract to bring proceedings to enforce any term of that contract.

This new act allows a third party to enforce a term of the contract in his own right if the contract expressly provides that he may or if the relevant contractual term purports to confer a benefit on that third party.¹¹⁰ Where a third party does have a right to enforce a contractual term, in various circumstances the contractual parties will not be able to revoke or vary those third party rights without the third party's consent.¹¹¹

Parties to a contract can, if desirable, expressly exclude the application of the act by stating so in the contract. This may not be entirely necessary, however, since the parties could simply limit the effects of the act. For example, by specifying the means to which a third party can enforce its rights.

There are, however, some exclusions from the scope of this act. Certain contracts are excluded: for example,¹¹² contracts on bills of exchange, promissory notes, or other negotiable instruments; memoranda and articles of association that bind a company and its members; and contracts for the carriage of goods by sea or for the international carriage of goods by rail, road, or air. A third party is not able to enforce any term of employment against an employee under this act.

108. See Data Protection Act, ch. 29 (1998) (Eng.).

109. See Directive 95/46/EC of the European Parliament and Council, Official Journal of the European Communities, Nov. 23, 1995, No. L. 281, 31.

110. See Contracts (Rights of Third Parties) Act, 1999, ch. 31, § 1 (Eng.).

111. See *id.* § 2.

112. See Joanne Greeton, Contracts (Rights of Third Parties) Act 1999, *COMPUTER CONTRACTOR MAGAZINE*, May 2000.

