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I. Introduction

The past year was a very exciting and dynamic time for the European Union (EU). In May 2004, ten countries formally joined the EU, marking the largest expansion in EU history.[1] This development was historic particularly because eight of the new members are former communist countries: the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia.[2] The remaining two countries to join the EU were the Mediterranean island nations of Cyprus and Malta.[3] The EU will likely expand further if Bulgaria and Romania join in 2007 and with Turkish and Croatian membership on the horizon.[4] EU member expansion is particularly relevant in light of several legal developments that occurred in 2004.

This survey of recent developments in Europe addresses a number of key areas likely to be of significance to professional legal advisors with clients active in Europe, including the regulation of competition, intellectual property rights, and environmental law. The survey also includes a more in-depth examination into legal developments in three significant

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1. *See* Press Release, European Parliament, A Bigger and Stronger Union (Apr. 2, 2004), *available at* http://www.elections2004.eu.int/highlights/en/301.html.

2. *Id.*

3. *Id.*

4. Anthony Browne, *Croatia Jumps Queue to Join EU; EU Summit*, Times (UK), June 19, 2004.

European countries: Spain, Switzerland and Greece. It does not discuss any developments occurring after December 31, 2004.

II. European Community Law

A. Competition Law

May 2004 marked a significant reform of European Community (EC) competition law with the passing of a new European Council regulation.[5] The regulation provides for a new "modernization" package that aims to both establish a system of decentralized enforcement of competition law and ensure that the law is applied consistently throughout the expanded European Union.[6] The new regulation replaces the notification system and individual exemption under article 81(3) of the Treaty Establishing the EC with a form of self-assessment concerning the requirements of articles 81 and 82.[7] Arguably, the assessment of risk has now been shifted away from the European Commission toward individual parties. Additionally, by decentralizing most enforcement to member states, the Commission's efforts, which have been strengthened by increased powers of investigation and enforcement, will be directed toward enforcing more serious infringements and abuses of market power. The regulation also creates a European competition network between the EC and national competition authorities located in all member states.[8]

The past year also marked the emergence of the new EC merger regulation. The package introduced a new substantive test to assess compatibility with EC competition rules, a more efficient referral system, and also more flexible deadlines.[9] The Merger Regulation includes an effects-based substantive test whereby the Commission may prohibit mergers that "significantly impede effective competition in the common market or in a substantial part of it."[10] Concentrations that result in a change of control as a result of either the merger of previously independent companies, or the acquisition of control within another undertaking

5. Council Regulation 1/2003 of 16 December 2002, 2003 O.J. (L 1) 1, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf [hereinafter Council Regulation 1/2003]. The implementation of the rules in articles 81 and 82 of the EC Treaty became effective on May 1, 2004.

6. Dechert, *EU Approves Radical Modernization of its Competition Rules*, Antitrust (Dec. 2004), *available at* http://www.dechert.com/library/antitrust%2012-02.pdf.

7. Council Regulation 1/2003, *supra* note 5; *see also* Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3 1997, pt. 3, tit. VI, ch. 1 (Rules on Competition), *available at* http://europa.eu.int/eur-lex/en/treaties/selected/livre2_c.html [hereinafter EC Treaty]. An exemption can only be granted pursuant to article 81(3) if the agreement

> contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EC Treaty, art. 81(3). Article 82 lists elements of abuse by one or more undertakings of a dominant position within the common market. *Id.* art. 82.

8. Council Regulation 1/2003, *supra* note 5.

9. *See* Council Regulation 139/2004 of 20 January 2004, 2004 O.J. (L 24) 1, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf [hereinafter Merger Regulation], and Commission Regulation 802/2004 of 7 April 2004, 2004 O.J. (L 133) 1, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_133/l_13320040430en00010039.pdf[hereinafter the Implementing Regulation].

10. Merger Regulation, *supra* note 9, ¶ 5.

are particularly at issue in the Merger Regulation. The referral system has also been modified such that if no member objects to the referral request, the transaction will be deemed to have a community dimension, and the Commission will have exclusive jurisdiction.[11] This "one stop shop" represents a major change because prior to this, several state competition authorities could review transactions. Additionally, the new referral system allows merging parties to initiate a referral process prior to any formal notification.[12] Finally, the Regulation introduces a degree of flexibility in the timeframe for merger investigations and also more flexible provisions concerning notifications. There is no requirement for a triggering event for notifying a merger; rather it will be possible to notify before the conclusion of an agreement.[13]

III. European Court Of Justice & Tax Systems

Discussions concerning tax harmonization were at the forefront in 2004, particularly in light of the accession and several European Court of Justice (ECJ) opinions relating to potential tax discrimination.

In March, the ECJ invalidated a French statute that taxed the unrealized appreciation in corporate stock held by French residents upon transfer of their tax residence from France to another country.[14] The court held that the exit tax restricted a resident's freedom of establishment pursuant to article 43 of the EC Treaty where the resident was an EU citizen and relocated to another EU state, in this case Belgium.[15] Under French law, the tax could be deferred and possibly waived if the taxpayer posted a security. The ECJ found this requirement too severe a restriction on the freedom of establishment and disproportionate to the state's objective.[16] Preventing a taxpayer from temporarily transferring their tax residence before selling securities in order to avoid making payments in France could be achieved, according to the Court, by measures that are less restrictive to the freedom of establishment.[17] Such a restriction is only allowable if it furthers a legitimate purpose compatible with the EC Treaty and justified by the public interest.[18] One implication of this ruling is that similar exit tax systems throughout the EU are probably invalid under article 43. Additionally, this case may have considerable impact on corporate business planning with respect to the tax consequences of corporate entity relocation and cross border mergers with taxable gain.

In another case, a Finnish resident with investments in a Swedish company did not receive credit under the Finnish system for taxes paid by the Swedish company.[19] He received a full

11. *Id.* art. 4, ¶ 5.

12. *Id.* art. 4, ¶ 4.

13. *Id.*

14. *See* Case C-9/02, Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie, 2004 O.J. (C 94) 5, *text of judgment available at* http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-9%2F02&datefs=2003-01-01&datefe=2005-01-01&nomusuel=&domaine=&mots=&resmax=100.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *See* Case C-319/02, Manninen, 2004 O.J. (C 262) 4, *text of judgment available at* http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-319%2F02&datefs=2003-01-01&datefe=2005-01-01&nomusuel=&domaine=&mots=&resmax=100.

29 percent credit, however, on dividends he received in Finnish companies because the domestic tax system imputes corporate tax paid by a resident company to a resident shareholder. The ECJ found that the Finnish tax system breached the EC Treaty because it did not impute taxes on dividends paid cross-border to Finnish shareholders by other EU companies.[20] Such provisions, according to the Court, inhibit the free movement of capital pursuant to article 56 of the EC Treaty and potentially lead to less domestic investment of EU companies in general.[21] The Court's ruling means that an EU member country may not provide its residents a credit for corporation tax paid by distributing domestic corporations, but then deny the same credit on dividends paid by foreign corporations.

IV. Intellectual Property Rights

The EU adopted a Directive on the enforcement of intellectual and industrial property (IP) rights covering copyright, trademarks, designs and patents.[22] The Directive requires all member states to introduce effective sanctions and remedies against counterfeiting and piracy and is an effort to harmonize the enforcement of IP rights.[23] The Directive is based in part on the World Trade Organization's (WTO) Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement and sets out a general obligation for member states to ensure effective enforcement through measures, procedures, and remedies that are fair, equitable and proportionate.[24]

The Directive outlines minimum powers for national courts concerning evidence gathering, orders for information, and various provisional and final corrective measures. It provides that judges will be given the power to grant provisional and precautionary measures to stop the sale of counterfeit or pirated goods, seize the assets of suspected offenders, and freeze the bank accounts of involved parties.[25] The Directive establishes the minimum requirements for implementation, but member states are free to adopt stricter provisions, including criminal sanctions, for infringement of IP rights.[26] Member states have until April 2006 to implement the Directive into national law.[27]

V. The European Union in the World Trade Organization

In 2004, the WTO ruled against EU sugar subsidies.[28] Specifically the WTO found that the EU had exceeded limits on the export of subsidized sugar.[29] Australia, Brazil, and Thai-

20. *Id.*
21. *Id.*
22. Council Directive 2004/48/EC on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 195) 16, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_195/l_19520040602en00160025.pdf [hereinafter IP Directive].
23. *Id.* ch. II, art. 3, ¶ 1.
24. *See id.*
25. *Id.* ch. II, art. 9.
26. There is also a Council agreement that provides for the establishment of a Community Patent Judiciary by 2010. *See* Council of the European Union Proposal for a Council Regulation on the Community Patent (Mar. 8, 2004), *available at* http://register.consilium.eu.int/pdf/en/04/st07/st07119.en04.pdf.
27. IP Directive, *supra* note 22, ch. V, art. 20, ¶ 1.
28. WTO Panel Report, European Communities—Export Subsidies on Sugar, WT/DS266/R (Oct. 15, 2004) (notice of appeal filed Jan. 13, 2005), *available at* http://docsonline.wto.org.
29. *Id.* at ¶ 7.336.

land, who brought the case in 2002, complained that excess subsidies allow European producers to lower costs and undermine world prices.[30] The complainants pointed out that, while the EU is one of the world's highest cost producers, it is also the second largest sugar exporter. The panel found that surplus EU production, called "C" sugar because it is produced in excess of internal quotas, is subsidized in excess of WTO rules.[31] They also held that nearly 1.6 million tons of sugar the EU buys from African, Caribbean, and Pacific (ACP) producers at higher prices, which it subsequently re-exports, had to be included in the total amount of subsidized exports.[32] The EU filed an appeal in January 2005.[33]

In another case, the WTO confirmed that the EU may differentiate among developing countries in structuring trade preferences.[34] A WTO Appellate Body report released in April reversed the finding of the panel and rejected India's claim that WTO rules do not allow developed-country members to differentiate between developing countries.[35] India had challenged the EU's system of trade preferences for seriously drug-affected countries as contrary to the WTO's "Enabling Clause," which allows preferential and more favorable treatment to all developing countries.[36] While the WTO Appellate Body ruled that the Granting of Tariff Preference (GSP) schemes may discriminate among beneficiaries, they nevertheless found that the EU's current GSP drug regime is not based on objective and transparent criteria.[37] The EU must now examine the report and consider its practical implications for trade legislation.

For now, the EU has avoided dispute settlement in the WTO concerning challenges over aircraft subsidies. The trade dispute between Boeing and Airbus over aircraft manufacturing subsidies escalated in the fall of 2004 when the United States and the EU both filed complaints with the WTO.[38] The United States is critical of "launch aid" to Airbus that has been provided for several years by European governments.[39] The EU filed a similar complaint arguing that incentives to Boeing to assemble the 7E7 in Washington state, in addition to other subsidies since 1992, amount to excessive governmental aid.[40] In early 2005, both parties agreed to seek a settlement within three months through bilateral talks and

30. *Id.* at ¶ 1.1.

31. *Id.* at ¶ 7.183.

32. *Id.* at ¶ 7.184.

33. WTO, European Communities—Export Subsidies on Sugar: Notification of Appeal by the European Communities WT/DS265/25 WT/DS266/25 WT/DS283/6 (Jan. 13, 2005), *available at*http://docsonline.wto.org.

34. *See* WTO, Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries* WT/DS246/AB/R (Apr. 23, 2004), *available at* http://docsonline.wto.org. Currently, the EU's Granting of Tariff Preferences (GSP) drug preferences are granted to twelve countries—Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Nicaragua, Honduras, Pakistan, Panama, Peru and Venezuela.

35. *Id.* at ¶ 190.

36. *Id.* at ¶¶ 35-37.

37. *Id.* at ¶¶ 185-87.

38. *See* WTO, Request for Consultations by the United States, *European Commununities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/1 (Oct. 12, 3004), *available at* http://docs online.wto.org [hereinafter US Aircraft Complaint]; WTO, Request for Consultations by the European Communities, *United States—Measuring Affecting Trade in Large Civil Aircraft* WT/DS317/1 (Oct. 12, 2004), *available at* http://docsonline.wto.org [hereinafter EU Aircraft Complaint].

39. US Aircraft Complaint, *supra* note 38, at 1.

40. EU Aircraft Complaint, *supra* note 38, at 1.

the freezing of all new subsidies and litigation.[41] The new talks will try to renegotiate a 1992 accord that foresaw a gradual reduction in subsidies for aircraft makers.[42]

VI. Environmental Law

A. Background

It is estimated that there are currently 300,000 polluted sites in the EU, and current clean-up costs approximately €106 billion.[43] As the EU has recently expanded from 15 to 25 Member States, this expansion may significantly add to the number of EU polluted sites.[44] Against this backdrop, EU governments have recently agreed on legislation in the form of the Directive on Environmental Liability (Clean-up Directive) to compel polluting companies to cover the full costs of environmental clean-ups.[45] The adoption of the Clean-Up Directive on March 10, 2004, marked a significant departure from pre-existing legal norms in Europe, where polluters were generally not liable at an EU or Member-State level for the full costs of pollution damage to water, soil, and bio-diversity.[46]

As the Clean-Up Directive must be implemented in national legislation in all EU Member States within three years from adoption,[47] international counsel and companies operating in the EU should be aware of the new regime in order to gauge and minimize costs of (non) compliance.

B. Objectives

The fundamental principle of the Clean-Up Directive is to hold financially liable any company or individual ("operator") whose activity has caused environmental damage, or an imminent threat of such damage.[48] According to this "polluter-pays" principle, an offending operator will bear the cost of the necessary preventive or remedial cleanup measures, unless valid exemptions or defenses apply.[49] The Clean-Up Directive establishes an EU liability regime which allows Member States to hold parties liable for environmental damages they have caused, but does not establish a comprehensive clean-up plan. As a result, there is no mandated commitment to cleaning up sites if the courts do not rule in favor of the plaintiffs.[50]

41. Charles Pope, *U.S., EU to negotiate on Airbus, Boeing Subsidies*, Seattle Post-Intelligencer, Jan. 12, 2005, *available* at http://seattlepi.nwsource.com/business/207500_boeingeu12.html.

42. *Id.*

43. BBC, *Business Slams EU Pollution Law*, BBC News, Apr. 1, 2004, *available at* http://news.bbc.co.uk/2/hi/business/3591335.stm.

44. *See infra*, Part I.

45. Council Directive 2004/35/CE of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, 2004 (L 143) 56, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_143/l_14320040430en00560075.pdf[hereinafter Clean-up Directive].

46. *See* Constant Brand, *EU Parliament Backs Tough New Polluter-Pays Rules Proposal*, Climate Ark (May 15, 2003), *available at* http://www.climateark.org/articles/print.asp?linkid = 22584.

47. Clean-up Directive, *supra* note 45, art. 19.

48. *See id.* ¶¶ (1)-(3).

49. *See id.* arts. 1-4.

50. *See* Janet Stone McGuigan, The Potential Economic Impact of Environmental Liability: The American and European Contexts 23 (Dec. 2000), *available at* http://europa.eu.int/comm/environment/liability/competitiveness_finalrep.pdf.

C. Scope of Liability

The emphasis of the scope of liability in the Clean-Up Directive is on the operator in control of the activity that caused the damage.[51] The operator of the dangerous or potentially dangerous activities listed in annex III of the Clean-Up Directive may be held strictly liable for the costs of preventing or remedying environmental damage.[52] These include, inter alia, releasing restricted substances into surface/ground water or into the air, operating installations producing dangerous chemicals, operating waste management facilities, and operating landfill sites and incineration plants.[53] Operators of activities outside annex III may also be liable under the Clean-Up Directive for the costs of preventing or remedying bio-diversity damage, but only in the event they are found to be negligent or otherwise at fault.[54]

Whether liability under the Clean-Up Directive will be proportional or joint and several is unclear. It is up to the Member States to establish national rules covering cost allocation in cases of multiple-party causation.[55] Member States are also to take into account, "in particular, the specific situation of users of products who might not be held responsible for environmental damage in the same conditions as those producing such products."[56] In that case, apportionment of liability will be determined in accordance with national law.[57] Under the Clean-up Directive, "Member States may provide for flat rate calculation of administrative, legal, enforcement, and other general costs to be recovered."[58]

It is also noteworthy that the Clean-Up Directive does not prevent Member States from maintaining or enacting more stringent provisions in relation to the prevention and remediation of environmental damage; nor does it "prevent the adoption by Member States of appropriate measures in relation to situations where double recovery of costs could occur as a result of concurrent action by a competent authority under the Clean-Up Directive and by a person whose property is affected by the environmental damage."[59] Accordingly, national legislation must always be consulted.

D. Enforcement Procedure

The Member State governments ("competent authority") will have primary responsibility for bringing cases to court. If the competent authority is negligent in fulfilling this responsibility, qualified public entities (e.g., public interest groups, including NGOs) and persons who have a sufficient interest (i.e. who have suffered damages) may request the competent authority to take action and may challenge the competent authority's action or inaction.[60]

The competent authority may require the operator to take necessary preventive or remedial measures, in which case the operator will finance such measures.[61] Alternatively, the

51. *See* Clean-up Directive, *supra* note 45.
52. *Id.* arts. 3(1), 8.
53. *Id.* annex II.
54. *Id.* ¶ (9).
55. *Id.* ¶ (22).
56. *Id.*
57. Clean-up Directive, *supra* note 45, ¶ (22).
58. *Id.* ¶ (19).
59. *Id.* ¶ (29).
60. *Id.* ¶¶ (24)-(26).
61. *Id.* art. 8, ¶¶ 1-2.

competent authority may implement the measures itself or have them implemented by a third party.[62] The operators will also "ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring."[63]

In the event that restoration or prevention measures are implemented by the competent authority or by a third party on its behalf, instead of by the responsible operator, that authority will then recover the cost incurred by it from the operator within a reasonable period of time from the date on which those measures were completed.[64]

E. Exemptions

The Clean-Up Directive does provide noteworthy exemptions and defenses to liability claims brought by competent authorities. For example, the Clean-Up Directive, once implemented in the Member States, will have no retroactive effect. Damage caused before the expiration of the implementation deadline will not be covered by its provisions.[65]

In addition, activities and emissions that are believed to be safe for the environment, according to the state of scientific and technical knowledge at the time of occurrence, are also exempt.[66] Furthermore, if the potential for damage could not have been known when the event or emission took place, there is no liability.[67] Likewise, emissions that have been authorized by the relevant EU government are not actionable.[68] The Clean-Up Directive also does not apply to activities the main purpose of which is to serve national defense or international security.[69]

The Clean-Up Directive does not apply to cases of personal injury, damage to private property, or any economic loss.[70] However, the Clean-Up Directive does not take away any rights of compensation for traditional damages granted under any relevant laws or international agreement regulating civil liability.[71]

The following prerequisites must be in place to establish a prima facie case against an operator: (1) one or more polluters must be identifiable, (2) the damage should be concrete and quantifiable, and (3) a causal link must be established between the damage and the identified polluter(s).[72]

Defenses to liability claims primarily include force majeure, contribution to the damage or consent by the plaintiff, and intervention by a third party. Any costs incurred by an operator who is able to successfully invoke such defenses are recoverable from the Member State involved.[73]

Insolvency *per se* is not a defense to liability, but it may hinder cost recovery. The Clean-up Directive encourages Member States to allow for insurance and proper financial security

62. *Id.*
63. Clean-up Directive, *supra* note 45, ¶ (18).
64. *Id.* ¶¶ (18), (23).
65. *Id.* ¶ (30).
66. *Id.* art. 8, ¶ 4(b).
67. *Id.* ¶ (20).
68. *Id.* art. 8, ¶ 4(a).
69. Clean-up Directive, *supra* note 45, art. 4, ¶ 6.
70. *Id.* ¶ (14).
71. *Id.* ¶ (12).
72. *Id.* ¶ (13).
73. *Id.* ¶ (20).

arrangements during the Clean-Up Directive implementation process to minimize the impact of insolvency.[74] Such measures are voluntary for at least six years, after which the EU will again consider a mandatory scheme.[75]

F. Conclusion

It is possible that a strict liability standard for damage to health and environment caused by inherently dangerous occupational activities, and fault-based liability for damage to biodiversity caused by non-dangerous activity, may cause confusion and lessen the availability of exemptions. Defenses may lower the number of cases ruled in favor of plaintiffs. However, it may be the case that the inclusion of damages caused by non-hazardous substances could lead to a higher number of cases than if the Clean-Up Directive covered only damages caused by hazardous substances. Counsel to companies operating in the EU should advise clients to (a) implement pollution prevention measures to obviate the need to concern over untold liability and (b) carry appropriate insurance to cover the costs of unexpected clean-up bills.

VII. European Company Statute

A. Overview

On October 8, 2004, the European Company Statute (Company Statute) entered into force. Companies organized in the EU that meet certain tests of trans-European activity now have the option to reorganize under a new corporate format—the European Company or *Societas Europeae* (SE)—governed by European corporate law rules, as well as to form an SE through a merger, the creation of a holding company, or a joint subsidiary. The Company Statute also makes it possible for an SE to create wholly-owned subsidiaries in the form of an SE and to transfer its registered and principal office to another Member State.

Initially conceived as a comprehensive company code, the Company Statute quickly encountered strong opposition from many Member States against adopting the German corporate model, by which the Company Statute was largely inspired. The German corporate model is based on a two-tier board structure, with a supervisory board that includes elected employee representatives (the co-determination model). Attempts to resolve this issue by making the co-determination model optional in turn led to objections from Germany which feared that the SE could be used as a means to avoid the co-determination model.

An elaborate system was eventually found to address these concerns. The type of labor involvement that will be applicable to an SE is left to negotiations between the management and the employee representatives of the companies founding the SE, provided that: (1) if the parties fail to agree, standard rules, to be adopted by each Member State, will be applicable; and (2) if co-determination is applicable to a significant number of employees of

74. *Id.* art. 14, ¶ 1.

75. Clean-up Directive, *supra* note 45, ¶ (27).

the founding companies, a weaker form of employee involvement cannot be adopted without the consent of a qualified majority of the employee representatives.[76]

This method to determine applicable rules on employee involvement, while creative, has made the SE formation process quite complex and lengthy. In addition, the Company Statute leaves significant aspects of an SE's organization and governance to the national laws of the Member State where the SE has its registered office. As a result, the initial goal of having a single uniform body of rules governing all European companies independently from the jurisdiction in which they are registered has not been fully achieved.

The Company Statute has been adopted through a regulation[77] containing directly-applicable rules on the organization and governance of the SE, and has been supplemented by a directive[78] that sets the rules that Member States must adopt regarding employee involvement in the SE. Each Member State should have implemented the Directive by October 8, 2004, when the Regulation became effective.

B. Key Characteristics of the European Company Statute[79]

- An SE is defined as a public limited liability company, having a minimum capital of €120,000 represented by shares, which operates, through subsidiaries or branches, in more than one EU Member State.[80]
- It is managed by a single or two-tier board (the latter involving a management board and a supervisory board), depending on the options available in the jurisdiction where the SE has its registered office.[81]
- It must provide for employee involvement in the SE's management, which must take one of two forms: (1) the right for employee representatives to be informed on questions that concern the SE and its subsidiaries and to be consulted on management decisions that are being contemplated (the Works Council Concept), or (2) the right for such representatives to elect or appoint (or oppose the appointment of) some of the members of the single board of directors or the supervisory board of the SE (as may be applicable). As previously noted, the form of employee involvement that is applicable will depend on the outcome of a complicated negotiation process set out in the Company Statute.[82]
- The SE must, in principle, have its registered and principal office in the same Member State. A Member State may, however, require that an SE registered in its jurisdiction should have its registered and principal office at the same location. Conversely, Member States may provide that a registered SE may have its principal office outside of the EU,

76. *See* Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European company (SE), 2001 O.J. (L 294) 1, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_294/l_29420011110en00010021.pdf [hereinafter Council Regulation 2157/2001]; *see also* Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, 2001 O.J. (L 294) 22, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_294/l_29420011110en00220032.pdf [hereinafter Council Directive 2001/86/EC].

77. *See* Council Regulation 2157/2001, *supra* note 76.

78. *See* Council Directive 2001/86/EC, *supra* note 76.

79. *See* Council Regulation 2157/2001, *supra* note 76; Council Directive 2001/86/EC, *supra* note 76.

80. Council Regulation 2157/2001, *supra* note 76, ¶ (8), art. 4.

81. *Id.* art. 38.

82. *Id.* art. 12.

provided that it is organized under the laws of a Member State and has a real and continuous link with the Community (e.g., a branch through which it effectively carries out its business).[83]

- The organization and operation of an SE is governed by various bodies of rules that are applicable in the following hierarchical order: (1) the Company Statute itself, which provides for the essential characteristics of the SE, as well as general rules regarding the methods of SE creation, organization, and governance, (2) the laws adopted pursuant to the Company Statute regulation and its supplemental directive by the Member State where the SE's registered office is located that specifically regulate SE's established in its jurisdiction, (3) the laws of such jurisdiction applicable to public limited liability companies in general, and (4) the SE's organizational documents, to the extent they are not inconsistent with any of the preceding rules that are mandatory.[84]
- The SE must be treated as if it were a public limited liability company founded in accordance with the laws of the Member State in which it has its registered office.[85]

C. Formation of an SE[86]

The creation of an SE is governed by two key principles: (1) it can be created only through restructuring an existing company (except if created as a wholly-owned subsidiary of an SE), and (2) only companies whose registered and principal offices are located within the EU may participate in its formation. A non-EU company, therefore, could not directly participate in the formation of an SE, but could do so through one or more of its EU subsidiaries.

Additionally, there are five alternative ways to create an SE:[87]

(1) By merging two or more public limited liability companies formed under the laws of at least two different Member States and having their registered and principal offices within the EU;

(2) By creating a holding company, by a process in which the shareholders of two or more public or private limited liability companies formed under the laws of two different Member States and having their registered and principal offices within the EU are invited to exchange their shares for shares of the SE, subject to the condition that more than half of the shares (or such higher percentage as the founders may determine) in such companies are tendered;

(3) By creating a joint subsidiary of two or more corporate bodies governed by private or public law (e.g., partnerships, state-owned companies) governed by the laws of at least two different Member States, meeting the criteria specified in the preceding paragraph;

(4) By transforming an SE of a public limited liability company that is founded under the laws of a Member State, having its registered and principal offices within the EU, and having had during the preceding two years at least one subsidiary in another Member State; or

83. *Id.* arts. 7-8.
84. *Id.* art. 9.
85. *Id.* art. 3.
86. *See* Council Regulation 2157/2001, *supra* note 76; Council Directive 2001/86/EC, *supra* note 76.
87. Council Regulation 2157/2001, *supra* note 76, art. 2.

(5) By creating an SE of a wholly-owned single shareholder subsidiary.

D. Taxation

A major weakness of the Company Statute is that it does not address the tax implications resulting from the types of corporate reorganization—including a transfer of the corporate seat—which the formation of an SE makes possible. Thus, the initially-announced objective that an SE and its subsidiaries would be taxed as a single entity has not been achieved.

However, the few existing directives in the corporate tax field either currently apply or will apply shortly. The Council has adopted a directive extending to an SE the benefits of the EU Parent-Subsidiary Directive, which abolishes withholding taxes on dividends flowing between associated companies of different Member States and prevents a parent and its subsidiary from both being taxed on the profits of the subsidiary.[88] The same will be true once the Council adopts the Commission's proposal to amend the EU Interest and Royalties Directive.

The anticipated applicability of the EU Mergers Directive will avoid gain recognition and taxation upon the creation of an SE.[89] In addition, modification to the Mergers Directive will enable an SE, under certain conditions, to transfer its seat from one Member State to another without triggering liquidation taxes.[90]

E. A Brief Assessment

A significant benefit of the Company Statute is that it will enable cross-border mergers between public limited liability companies within the EU under a tax-neutral regime if, as expected, the Mergers Directive will be amended to that effect. In the absence of an appropriate EU-wide legal framework, such mergers are currently either impossible or extremely complex. Another potential benefit is that, following the amendments to the Mergers Directive, an SE would be able to transfer its registered and principal office to another Member State, which is not possible currently, because such a transfer would be treated as a liquidation under applicable corporate law, tax law, or both.

The complexity and length of the formation process may, however, severely complicate the use of the Company Statute for those purposes, particularly for listed public companies. This is because of the interaction between the rules on the formation of an SE and the public offering and/or take-over rules that would need to be followed, often in at least two jurisdictions.

Moreover, because of the compulsory employee involvement rules (as set out in the Company Statute's supplemental directive), the use of the SE format in restructuring ex-

88. *See* Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, 1990 O.J. (L 225) 6, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri = CELEX:31990L0435:EN:HTML.

89. *See* Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, 1990 O.J. (L 225) 1, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri = CELEX:31990L0434:EN:HTML.

90. *See* Council of the European Union, Proposal for a Council Directive amending Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, Doc. No. 16276/7/04 (Feb. 3, 2005), *available at* http://register.consilium.eu.int/pdf/en/04/st16/st16276-re07.en04.pdf.

isting corporate groups is likely to be attractive only when the same form of employee involvement exists at the level of the participating companies, or if the participating companies have only a limited number of employees, as it would be the case for holding companies.

Finally, as noted above, because SEs will in significant measure be governed by the corporate laws of the Member State in which they have their registered office, the Company Statute will create opportunities for forum shopping. Over time, this may lead to particular Member States emerging as the jurisdiction of choice to establish European companies, as Delaware has become in the United States.

VIII. Specific National Developments

A. Spain

1. *Trade and Commerce*

In order to implement EU Directive 2000/35 on combating late payments in commercial transactions, Spain enacted Law 3/2004 on December 29, 2004.[91] Measures against late payment regulated by this law consist of establishing (1) a term in which to claim interest on late payment, (2) the automatic accrual of such interest, (3) the interest rates applicable to late payments, and (4) a creditor's right to claim reasonable compensation from the debtor for the recovery costs incurred.[92] Moreover, the parties can agree to a retention-of-title clause allowing the seller to maintain the property of the goods until total payment of the debt is effected.[93]

2. *Subsidies*

On November 17, 2003, Law 38/2003, General of Subsidies was enacted.[94] This Law entered into force on February 19, 2004, and is intended to improve subsidy management and monitoring, as well as the control and prevention of fraudulent conduct. For these purposes, the General Law on Subsidies establishes (1) general principles governing the subsidizing activity (i.e. equality, publicity, transparency, objectivity, and efficiency); (2) granting proceedings; (3) consequences resulting from the breach of the commitments assumed by the beneficiary; (4) financial control of the subsidies; and (5) a penalty regime, establishing penalties that discourage the performance of fraudulent conduct.[95]

Law 38/2003 also establishes a monitoring system through the control and evaluation of objectives, which will entail that those subsidies that do not achieve foreseen or appropriate levels of objectives in comparison with the amount of investments performed may be modified, substituted or eliminated.[96]

91. *See* Ley 3/2004 (B.O.E., 2004, 314) (Spain), *available at* http://www.boe.es/boe/dias/2004-12-30/pdfs/A42334-42338.pdf.

92. *Id.*

93. *Id.*

94. *See* Ley 38/2003 (B.O.E., 2003, 276) (Spain), *available at* http://www.boe.es/boe/dias/2003-11-18/pdfs/A40505-40532.pdf.

95. *Id.*

96. *Id.*

3. *Tax Law*

a. General

The year 2003 ended with two significant pieces of legislation from a tax law perspective: (1) the new General Tax Law, Law 58/2003 (General Tax Law), which was approved on December 17 and entered into force on July 1, 2004;[97] and (2) Law 62/2003, approved on December 30, regarding tax, administrative, and labor measures, entered into force on January 1, 2004.[98]

While Law 62/2003 has introduced relevant changes in certain substantive aspects of personal income and corporate tax, the effects of the new General Tax Law have been much broader in scope since it provides the framework and main principles for the Spanish Tax Legal Regime.

In addition to trying to end the excessive dispersion of tax norms, the main objectives of the new General Tax Law are: (1) to strengthen the guaranties and rights of the taxpayer, thereby increasing legal certainty; (2) to provide incentives for the unification of criteria in administrative acts; (3) to allow the use of applicable technologies and modernize tax proceedings; (4) to establish mechanisms that help strengthen the fight against fraud, control taxes, and encourage the collection of debts; and (5) to reduce the current levels of litigation.[99] It is too soon to determine if these objectives will be fulfilled.

b. Corporate Tax

Law 2/2004 modifies the tax incentives criteria granted by the Spanish Corporate Tax Law to small-sized companies by expanding the scope of the incentives.[100] For example, the maximum net annual turnover is increased from six million to eight million euros. Likewise, the 30 percent tax base (rather than the usual 35 percent) is increased from 90,151.81 to 120,202.41 euros.[101]

c. Personal Income Tax

Law 62/2003 modifies the Spanish Personal Income Tax Law and introduces a new regime for non-resident employees coming to Spain. Such employees, provided they meet certain criteria (e.g. being a non-resident of Spain for the last ten years, or performing activities under the labor contract in Spain) can choose, as of January 1, 2004, between being taxed under the Non-residents' Personal Income Tax or the Spanish Personal Income Tax as the rest of Spanish tax resident individuals, during the year of residency change and the following five years.[102]

This option is significant because Spanish tax residents are taxed in Spain for their worldwide income, gains, assets, and rights (notwithstanding the application of existing tax treaties with other countries), whereas Spanish tax non-residents are only taxed in Spain for

97. *See* Ley 58/2003 (B.O.E., 2003, 302) (Spain), *available at* http://www.boe.es/boe/dias/2003-12-18/pdfs/A44987-45065.pdf [hereinafter Ley 58/2003].

98. Ley 62/2003 (B.O.E., 2003, 313) (Spain), *available at* http://www.boe.es/boe/dias/2003-12-31/pdfs/A46874-46992.pdf [hereinafter Ley 62/2003].

99. Ley 58/2003, *supra* note 97, art. 1.

100. Ley 2/2004 (B.O.E., 2004, 312) (Spain), *available at* http://www.boe.es/boe/dias/2004-12-28/pdfs/A41879-42020.pdf.

101. *Id.*

102. Ley 62/2003, *supra* note 98.

the income, gains, assets, and rights obtained or present in Spain.[103] Likewise, this option can be particularly beneficial for those employees with higher salaries because the maximum rate applicable under the Spanish Personal Income Tax is 45 percent, while the rate applicable under the Non-residents' Personal Income Tax is merely 25 percent.[104]

d. Tax liability of contractors and subcontractors

Under article 43 of the new General Tax Law, individuals or entities that contract or subcontract services or works that are part of their main activity from third parties will be subsidiarily liable for the amounts that should have been charged or withheld as a consequence of such works or services.[105] This new tax liability can significantly affect many commercial activities, making the legal option to avoid such liability especially convenient. This option can be utilized by requesting and obtaining from the contractor or subcontractor a tax certificate, which is issued by the tax authorities, declaring that the contractor or subcontractor has fulfilled its tax obligations. This certificate is valid for twelve months and can be renewed.[106]

4. *Litigation*

a. Incorporation of Mercantile Courts

Organic Law 19/2003, of December 23, 2003, which came into force on September 1, 2004, amended Organic Law 6/1985 by creating and introducing mercantile courts into the Spanish judicial system.[107]

Generally, mercantile courts shall have jurisdiction in the capital province in which they are located. However, the mercantile courts of Alicante shall be competent, in the first instance and exclusively, on judicial proceedings resulting from Council Regulation (EC) 40/94 on the Community Trade Mark and Council Regulation (EC) 6/2002 on Community Designs. Additionally, the competence of Alicante Mercantile Courts shall extend throughout Spain, and will be called Community Trade Mark Courts.[108]

b. Arbitration

Law 60/2003, of December 23, 2003, relates to arbitration and entered into force in March 2004.[109] The Spanish law on arbitration is based on the UNCITRAL Model Law on International Commercial Arbitration and grants ample effect to the wishes of the parties in order to establish the content of the arbitration agreement including delays, number, and appointment of arbitrators, language, place, and rules of the proceedings.[110] Regarding the exequatur of foreign awards, Law 60/2003 refers to international Conventions, and mainly to the New York Convention of June 10, 1958.[111] The legal regime set forth therein is thus fully applicable in Spain.

103. *See id.*

104. *See id.*

105. Ley 58/2003, *supra* note 97, art. 47.

106. *Id.*

107. Ley Organica 19/2003 (B.O.E., 2003, 309) (Spain), *available at* http://www.boe.es/boe/dias/2003-12-26/pdfs/A46025-46096.pdf.

108. *Id.* at 46088.

109. Ley 60/2003 (B.O.E., 2003, 309) (Spain), *available at* http://www.boe.es/boe/dias/2003-12-26/pdfs/A46097-46109.pdf.

110. *Id.*

111. *Id.*

B. Switzerland

1. *General Information*

Switzerland is a federal country, so legislation from the federal, cantonal (a canton is equivalent to a state), and municipal level must be observed. All federal (and most cantonal) laws are available on the Internet.[112] The Federal Supreme Court publishes its recent decisions on its own web page in the respective language (alternatively German, French, or Italian).[113]

2. *International, Constitutional, and Administrative Law*

a. Law of Nations/International Law

Switzerland has been in the process of negotiating bilateral agreements with the EU. On May 19, 2004, a political consensus was met with respect to the remaining issues, and on June 25, 2004, the EU and Switzerland initialed the agreements. The consultation proceeding within Switzerland regarding these agreements was closed on September 10, 2004, and on October 1, 2004, the Federal Council, Switzerland's executive body, issued its comments on the package of bilateral agreements. The agreements ultimately were signed on October 22, 2004. A public vote is expected to take place later this year.[114]

The eight bilateral agreements cover the following topics:[115] 1) Schengen/Dublin: abolishing the systematic checking of passports and co-operation of police forces and the judiciary; 2) Taxation on interest: levying a withholding tax in favor of EU countries, the rate of which will gradually increase to 35 percent. Furthermore, no withholding tax will be levied on dividend payments from a subsidiary to its parent company under certain conditions. Royalties and interest payments between related companies or permanent establishments will become possible without a withholding tax deduction if certain requirements are met; 3) Fraud: dealing with smuggling and other offenses connected with indirect taxation, subsidies, and public procurement; 4) Processed agricultural products: abolishing certain customs duties and export subsidies; 5) Environment: Switzerland's joining the European Environment Agency; 6) Statistics: harmonizing statistical surveys; 7) Media: giving Swiss cinematographers access to EU promotion programs; and 8) Pensions: abolishing dual taxation of former EU employees now resident in Switzerland.

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112. *See* Federal Authorities of the Swiss Confederation, *Systematische Sammlung des Bundesrechts*, *at* http://www.admin.ch/ch/d/sr/sr.html (last visited July 1, 2005). The federal laws are provided in German, French and Italian on the federal government's web page (one can choose French or Italian in the upper right-hand corner), where one can insert the number of the act or regulation (its "official number"), as indicated in this text; *see also* Federal Authorities of the Swiss Confederation, *The Cantons Online*, *at* www.admin.ch/ch/e/schweiz/kantone/index.html (last visited July 1, 2005). Here, cantonal laws may be found in the respective language of the canton; *see also* Authorities of the Swiss Confederation, *Homepage*, *at* http://www.admin.ch (last visited July 1, 2005). The government's web page is very useful and also provides some information in English.

113. *See* Swiss Federal Courts, *Homepage*, *at* http://www.bger.ch (last visited July 1, 2005). All cited decisions may be found under "Rechtsprechung" and thereafter under "Urteile ab 2000" by entering the case number.

114. *See* Federal Assembly—Swiss Parliament, *Bilateral Agreements II*, *at* http://www.parlament.ch/e/homepage/do-dossiers-az/do-bilateral.htm (last visited July 1, 2005). Further information in English is available on the Parliament's website.

115. *See* Federal Assembly—Swiss Parliament, *8 Bilateral Agreements*, *at* http://www.parlament.ch/e/do-bilateral-abkommen (last visited July 1, 2005).

3. *Constitutional law*

In 2003 and 2004, the Swiss Federal Supreme Court rendered several decisions regarding the naturalization of foreigners as Swiss citizens. Basically, the Court held that negative decisions regarding a request for naturalization could only be rendered with a reason. Since this is not possible if the decision is taken by ballot vote, such cantonal ballot voting procedures violate the Swiss federal constitution.[116] The Court's decision resulted in much controversy among the interested Swiss citizens. In the aftermath, the Court approved of one canton's ordinance that provided for public votes after a public discussion with respect to naturalization of new Swiss citizens.[117] Since reasons may be given for a negative decision under these circumstances, the Swiss Federal Supreme Court further permitted such proceedings.[118]

4. *Taxes*

The Swiss Federal Council decided in December 2004 to introduce a reporting procedure for cash dividends paid to a mother company by a Swiss subsidiary. Among other conditions for the application of this reporting procedure, the mother company must be domiciled in a country having a double tax treaty with Switzerland. As a result, the Swiss withholding tax deduction will be reduced or eliminated at the source.

To the surprise of Switzerland's legal community, the Swiss Federal Supreme Court has changed its practice regarding the taxation of certain merger and acquisition share deals, in what has already become a famous decision.[119] The Court held that a transaction might qualify as an "indirect partial liquidation" or a "transposition" in the following situation: if a seller holds shares as private assets, such shares are sold to a company or person holding the shares' business assets, the price for the shares is indirectly financed by the target company, and the contracting parties co-operate regarding the removal of assets from the target.[120] As a consequence of this decision, obtaining an individual tax ruling from the authorities for similar deals is now highly recommended.

5. *Companies and Corporations*

On June 1, 2004, the new Mergers Act[121] became effective. The purpose of the law is to regulate restructuring of businesses in a new form, and as such, it governs mergers, demergers, conversions and transfers of assets and liabilities. The new law now regulates mergers of all company forms, associations, and foundations provided for in the Code of

116. BGE 129 I 217, *available at* http://www.polyreg.ch/bgeleitentscheide/Band_129_2003/BGE_129_I_217.html; BGE 129 I 232, *available at* http://www.polyreg.ch/bgeleitentscheide/Band_129_2003/BGE_129_I_232.html. "BGE" indicates that the decision was officially published—otherwise there would be only a number.

117. BGE 129 I 217; BGE 129 I 232.

118. BGE 130 I 140, *available at* http://www.polyreg.ch/bgeleitentscheide/Band_130_2004/BGE_130_I_140.html.

119. No. 2A.331/2003 (decision dated June 11, 2004) (not officially published), *available at* http://wwwsrv.bger.ch/cgi-bin/AZA/MapProcessorCGI_AZA?mapfile=pull/ConvertDocFrameCGI.map&ri=fr&lang=fr&ds=AZA_pull&d=11.06.2004_2A.331%2f2003&pa=5%7e2a%2b331%2b2003%4073%7enr%404%7enr%403%7enr%4010%7enr%401%7e& (last visited July 1, 2005).

120. *Id.*

121. Federal Act on Mergers, Demergers, Conversion and Transfer of Assets and Liabilities, SR 221.301 (Oct, 3 2003), *available at* http://www.admin.ch/ch/d/sr/2/221.301.de.pdf.

Obligations. Further, the new law allows the conversion of a company into another legal form while the existing subject continues to exist. In that case, there is only a change of legal form and no asset transfer. The new rules on demerger distinguish between spin-offs (formations of two or more companies while the existing company continues to exist) and a division (the dissolution of the existing company and transfer of business to other companies). It is now possible to transfer businesses in part or in their entirety. Furthermore, the rules on transfer of assets and liabilities should facilitate the transfer of businesses as well. Finally, the new tax rules are intended to reflect the current tax practice and that there is no negative tax consequence as a result of the proposed restructuring method chosen.[122]

The Swiss Federal Supreme Court rendered a decision on a case involving a corporate officer of a group of companies who executed a credit note in favor of another group company but to the disadvantage of his own company.[123] According to the decision, every corporate officer must observe only the interests of the corporation for which he is responsible and should not act in the interests of the whole group or any other company of the group.[124] In the aftermath of corporate governance discussions, the Swiss federal government has published two proposals for new regulations regarding auditing and transparency of salaries.[125]

6. *Banking, Finance, and Capital Markets Law*

Due to the banking crash of the Spar- und Leihkasse Thun, the Swiss Federal Banking Act has been amended, effective July 1, 2004.[126] The new act contains extensive regulation regarding re-capitalization or liquidation of banks, which is now under the supervision of the Federal Banking Commission.[127] In case of a re-capitalization, a special commissioner must consult creditors and owners and draft a plan which must be approved by the Federal Banking Commission.[128]

On August 19, 2004, the Federal Banking Commission issued a circular letter that defines the notification duties of Swiss securities dealers.[129] Essentially, every securities dealer is obliged to inform the Federal Banking Commission of all transactions executed in Switzerland regarding Swiss or foreign securities that are admitted to trade in Switzerland and

122. *Id.*

123. BGE 130 III 213, *available at* http://www.polyreg.ch/bgeleitentscheide/Band_130_2004/BGE_130_III_213.html.

124. *Id.*

125. *See generally* Swiss Federal Department of Justice and Police, *Revisionspflicht umfassend neu regeln, at* http://www.ejpd.admin.ch/doks/mm/content/mm_print.php?mmID=2110 (last visited July 1, 2005); The Federal Assembly—Swiss Parliament, *01.082—Zusammenfassung, at* http://www.parlament.ch/afs/data/d/rb/d_rb_20010082.htm (last visited July 1, 2005); The Federal Assembly—Swiss Parliament, *04.043—Geschäft des Bundesrates, at* http://www.parlament.ch/afs/data/d/gesch/2004/d_gesch_20040043.htm (last visited July 1, 2005); Swiss Federal Office of Justice and Police, *Transparenz der Vergütungen, at* http://www.ofj.admin.ch/themen/transparenz/intro-d.htm (last visited July 1, 2005).

126. Federal Banking Act, SR 952.0 (Nov. 8, 1934, *amended* July 1, 2004), *available at* http://www.admin.ch/ch/d/sr/952_0/index.html.

127. *Id.*

128. *Id.*

129. Swiss Federal Banking Commission, Circular No. 04/03 (Aug. 19, 2004), *translated at* http://www.kpmg.ch/library/attachments/tcirculars/04_03_4752465.pdf.

of all transactions executed abroad regarding Swiss and foreign securities which are listed on a Swiss stock exchange.[130] The place of notification is the Swiss stock exchange.[131]

Further, on June 4, 2004, the Swiss Bankers Association issued a new allocation directive for the new issues market, which governs the allocation of equity-related securities distributed via public offering in Switzerland.[132] The directive deals with all public offerings of shares, participation certificates, and dividend-right certificates, as well as convertible bonds and bonds cum warrant offered in Switzerland. The directives became effective as of January 1, 2005.[133]

The revision of the Federal Act on Funds, which will be renamed as the Federal Act on Collective Capital Investments, is not yet complete. However, a first revision of the fund law has already taken place, since the ordinance on funds was amended with effect from August 1, 2004. The new provisions regulate several details with respect to funds but generally aim for improving the compatibility of the Swiss fund market.[134]

7. *Litigation, Civil Procedure, and Arbitration*

On January 1, 2004, the new international arbitration rules for the chambers of commerce and industry of the cantons of Basel, Bern, Geneva, Ticino, Vaud and Zurich became effective, replacing these chambers' former regulations of international arbitration.[135] These rules are generally based on the UNCITRAL arbitration, although two changes and additions were also implemented. First, changes and additions have been made to adapt the UNCITRAL arbitration rules to institutional arbitration.[136] Second, modern practice and comparative law in the field of international arbitration were taken into account.[137] The rules shall govern international arbitrations where an arbitration agreement refers to these rules or to arbitration rules of the aforementioned chambers of commerce and industry.[138] Further information, including a standard arbitration clause in several languages and the rules itself, is available on the chambers' website.[139]

C. Greece

1. *Overview*

The past year was important for Greece. After almost twenty years in power, the Socialist party Pasok lost the national elections to the party of New Democracy, which was elected

130. *Id.*

131. *See generally* Federal Banking Commission, *Homepage, at* http://www.ebk.ch (last visited July 1, 2005); *see also* KPMG Virtual Library: Federal Banking Commission, *Circular Translations, at* http://www.kpmg.ch/library/translations/circulars/index.asp (last visited July 1, 2005).

132. Press Release, Swiss Banking, Swiss Bankers Association Promulgates Allocation Directives for the New Issues Market (June 4, 2004), *available at* http://www.swissbanking.ch/en/medienmitteilungen-040604.html.

133. *Id.*

134. Investment Funds Ordinance, SR/RS 951.311 (Oct. 19, 1994, *amended* June 23, 2004), *available at* http://www.admin.ch/ch/d/as/2004/3535.pdf.

135. *See* Swiss Rules of International Arbitration 4 (July 2004), *available at* http://www.swissarbitration.ch/pdf/SRIA_english.pdf.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See* Swiss Rules of International Arbitration, *Swiss Chamber's Arbitration, at* http://www.swissarbitration.ch/index.html (last visited July 1, 2005).

on March 7, 2004.[140] In addition, Greece successfully hosted the summer Olympic Games in August 2004.[141] The new government's Prime Minister, Kostas Karamanlis, declared that the government's focus would be on financial development, attracting foreign investment, and safeguarding public integrity and transparency.[142] The laws discussed in this section are indicative of the new government's policy priorities.

2. *Law on the Ministry of Tourist Development and Issues regarding Tourism*

The new government's focus on improving Greece's tourism industry was evidenced by the new Law on Jurisdiction of the Ministry of Tourist Development and Issues regarding Tourism.[143] This law increased the power of the Minister of Tourism Development and provided increased incentives for investment in tourism.[144]

3. *Law on National Council of Competitiveness and Development and Regulation of Other Issues pertaining to the Ministry of Development*

The mandate of the National Council of Competitiveness and Development involves promoting competitiveness in Greece, particularly through: 1) policy proposals improving competitiveness; 2) long-term, intermediate, and short-term planning relating to issues of competitiveness and development; 3) measures promoting competitiveness; 4) policy-making regarding development programs on a national and European Community level; and 5) legislation removing obstacles hindering competitiveness.[145]

4. *Law on Investment Incentives for Economic Development and Regional Convergence*

The Law on Investment Incentives for Economic Development and Regional Convergence (Law 3299)[146] was passed near the end of 2004. For qualifying business plans, Law 3299 provides: 1) government grants covering part of the investment plan; 2) subsidization of leasing required for necessary equipment; 3) tax incentives; and 4) employment costs subsidies up to a two-year period.[147] Business plans qualify according to set criteria pertaining to the regional focus of the investment and the nature of the investment.[148]

5. *Law for Transparency and Against Violations of Law in Government Procurement*

Finally, the Law for Transparency and Against Violations of Law in Government Procurement[149] was also enacted in 2004. This highly controversial new law was already in the

140. *See* Press Release, Hellenic Republic: Embassy of Greece, The Main Opposition Party New Democracy Wins the Greek Election (Mar. 7, 2004), *available at* http://www.greekembassy.org/Embassy/content/en/Article.aspx?office=2&folder=561&article=13066.

141. *Id.*

142. *See id.*

143. Law No. 3270/04, Official Gazette of the Hellenic Republic 187/A/11.10.2004 [hereinafter Law No. 3270/04]; *see generally* Hellenic Republic—Ministry of Tourism, *Greek National Tourism Organization (GNTO), at* http://www.gnto.gr/pages.php?pageID=11&langID=2.

144. Law No. 3270/04, *supra* note 143.

145. *See generally* Hellenic Organization of Small and Medium Sized Enterprises and Handicrafts, Introduction, *at* http://www.eommex.gr/english/SME_in_Ellas/introduction.htm.

146. Law No. 3299/04, Official Gazette of the Hellenic Republic 261/23.12.2004, *available at* http://www.elke.gr/files/Investment%20Incentives%20Law%203299-04.pdf.

147. *Id.* art. 1.

148. *Id.* art. 3.

149. Law No. 3310/2005 (not yet published in the Official Gazette) [hereinafter Law No. 3310/2005]; *see generally* Press Release, Athens News Agency, Commission Formally Asks Greece to Change Primary Shareholder Law (Apr. 27, 2005), *available at* http://www.hri.org/news/greek/apeen/2005/05-04-27_4.apeen.html.

works at the end of 2004 and was passed in late January 2005. The law was proposed to fight corruption in the field of government procurement and public works and seeks to block access to lucrative public contracts by influential media barons. It forbids anyone holding 1 percent or more of a media company's share capital to bid for state contracts worth over a million euros (as opposed to the previous limit of 5 percent).[150] Furthermore, close relatives of such "major" media shareholders are precluded from access to public tenders.[151] To prevent the practice of sheltering businesspeople behind offshore companies, the law requires registration of all holdings in media firms, as well as in companies taking part in tenders for major public works.[152]

150. Law No. 3310/2005, *supra* note 149.
151. *Id.*
152. *Id.*