Dear reader,

We are pleased to present the Spring 2017 edition of our Corporate and Commercial Law global update. In this issue, we have articles from a total of 36 jurisdictions on current legal affairs around the globe.

To help clients understand the increasingly complex tax, regulatory and commercial laws of this global economy, the Law teams of EY member firms provide holistic guidance around strategic business decisions, reducing the gap between business advisors and legal counsel, and offering support services that increase efficiency and reduce the costs of legal activities.

In the network of EY today there are 1,800 qualified legal professionals providing legal advice within 75 jurisdictions. Apart from offering specific tailor-made legal advice for a number of business needs, we also cover a wide range of sectors: automotive and transportation, banking and capital markets, consumer products and retail, government and public sector, health, insurance, life sciences, media and entertainment, oil and gas, power and utilities, private equity, real estate and hospitality, technology, and telecommunications. Our lawyers work closely alongside professionals in Assurance, Tax, Transactions and Advisory. Serving you across borders, our sector-focused, multidisciplinary approach means EY member firms offer integrated and comprehensive pertinent advice across the globe.

The articles in this Corporate and Commercial Law global update reflect the global reach of Law at EY as well as the diversity of our legal services. If you wish to receive more detailed information on Law in the global EY network or on the topics discussed in this issue, please feel free to reach out to us. You will find contact details for each of the countries where EY member firms offer Law services at the back of this publication.

Kind regards,

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This quarterly publication highlights a range of international corporate law matters and covers recent law developments in specific countries.
Albania: new bankruptcy law

On 27 October 2016, the Albanian Parliament passed Law No. 110.2016, which will take effect in May 2017 and replace the previous bankruptcy law. The law establishes new proceedings intended to release debtors from their obligations by reorganizing their activities or liquidating their assets and distributing their income. The proceedings are administered by the bankruptcy court – the sole judge of the commercial section near the first-instance court.

The law institutes several changes:

- Including the prosecutor in bankruptcy proceedings to verify claims related to the debtor’s actions
- Making individuals and local administrative bodies subject to bankruptcy proceedings, in addition to legal persons
- Clarifying and distributing competencies and duties among the bankruptcy, temporary and supervising administrators, acting in different moments of the bankruptcy procedure
- Defining the invalidity of any contractual term requiring the debtor to terminate the contract because bankruptcy procedures were initiated
- Introducing administrative penalties for bankruptcy administrators, debtors and shareholders who fail to comply with the law
- Creating a special repayment ranking for creditors’ claims, intended to first satisfy secured creditors by distributing the bankruptcy estate, up to the value of the property used as collateral, and then repay other preferred creditors as defined in the law
- Setting new rules for cross-border bankruptcy proceedings and cross-border cooperation among relevant authorities

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Argentina: criminal liability for legal entities

Argentina is party to several international conventions aimed at preventing corruption, bribery and transnational organized crime. In this context, the Anti-Corruption Agency presented a bill to the National Congress on 20 October 2016 to amend the National Criminal Code. The measure would introduce criminal liability for legal entities for crimes against the public administration (notably, bribery and influence peddling), embezzlement of public funds, corruption and illegal exactions.

The bill provides a system to attribute criminal liability to a legal entity if criminal acts are committed on its behalf, for its benefit or with its intervention. The measure would amend Section 1 of the National Criminal Code to expand the national jurisdiction to cover crimes committed by Argentine citizens and legal entities that are domiciled in Argentina or that carry out their activities mainly within Argentina’s territory.

Parent companies would be severally and jointly liable for economic penalties imposed on the controlled company and for the compensation for damages. The bill specifies the following penalties:

- Fines of 1% to 20% of annual revenue
- Total or partial suspension of the company’s activities
- Suspension of trademarks and licenses
- Total or partial publication of the court’s resolution
- Loss or suspension of benefits or subsidies
- Disqualification from public tenders
- Cancellation of legal status

In exchange for the suspension of prosecution, legal entities can agree to cooperate by shedding light on the events, identifying the perpetrators and recovering the proceeds of the crime.

The National Congress has not yet addressed the bill.
Australia: modernizing the foreign investment regime

Australia continues to experience strong growth in foreign investment, with the total exceeding AUD3 trillion by the end of 2015. In particular, investment by regional neighbors, notably China and India, has surged in recent decades. Given this trend, Australia’s foreign investment framework, as well as its regulator, the Foreign Investment Review Board (FIRB), has faced increased scrutiny from the media, the public and policymakers.

The Australian Government introduced changes intended to provide increased certainty for investors and the community, and it imposed stricter penalties for noncompliance. The changes, effective 1 December 2015, represented the first wholesale revision of the framework in 40 years – part of the government’s much-publicized “modernization package.” Despite the changes, the country’s foreign investment laws remain highly complex.

Key changes to the foreign investment regime include:

- The FIRB has 30 days to make a determination (starting from the receipt of a notice, with the appropriate application fees).
- Acquisitions of securities through “debt capitalizations” now extend, in certain circumstances, to transactions involving a parent company subscribing for further shares in its wholly owned subsidiary.
- Application fees now apply to all notifications submitted to the FIRB on or after 1 December 2015 (fees vary depending on the nature of the application).
- A more formal process is being established for how FIRB handles taxation issues and national interest issues. This includes eight standard conditions involving the input of the Australian Taxation Office, as well as an annual report to the FIRB on compliance with any tax-related conditions that might be imposed.

Foreign investors (including Australian entities with foreign ownership) should carefully review the country’s foreign investment laws whenever they consider investing in Australian businesses, assets or shares, or undertaking a reorganization.

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Austria: addressing gender imbalance on supervisory boards

A new survey issued by the Austrian Chamber of Labour found that women make up 46.8% of the business workforce but only 7.2% of the managing directors of the country’s top 200 companies. The percentage on supervisory boards is slowly rising but amounts to just 18.1%.

In response, the Austrian Government will focus on gender imbalance, announcing an 18-month work program in January 2017 and seeking to legislate a gender quota for supervisory boards.

From 1 January 2018, women must make up at least 30% of supervisory board membership for listed companies and companies with more than 1,000 employees. The mandatory ratio must be maintained when a new member is elected. Details about this regulation are not yet available.

It is unclear whether the requirement applies only to members elected by shareholders or also to members delegated by the works council. Defining large companies with a reference to 1,000 employees gives the legislation a broad scope.

Currently, the Austrian Stock Corporation Act calls for paying reasonable attention to diversity on supervisory boards, including gender, age and, for listed companies, internationality. Beginning in 2018, when the 30% quota takes effect, gender diversity will be mandatory.

Affected companies should consider this now as they prepare to select new members after 1 January 2018.

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Belgium: abuse of rights in the dissolution of a limited liability company

In a decision from 2 April 2015, published in January 2017, Belgium’s highest court explicitly acknowledged the application of abuse of rights in the so-called stop-loss procedure.

The procedure protects stakeholders in limited liability companies. Once a company’s net equity drops below certain thresholds, specific procedures must be followed. The most radical trigger occurs when the net equity drops below the statutory minimum capital. At that point, any interested party can claim the company’s dissolution before a court. Alternatively, the court may grant a respite period.

Under Belgian law, any party can file a legal claim if it has a relevant interest and capacity. As a general principle, this may never result in an abuse of rights.

An abuse of rights is typically deemed to exist when:

- Damage caused by the filing of a claim is disproportionate to the potential advantages for the claimant.
- The filing is intended to cause damage.
- A party has two options to exercise its rights but chooses the more damaging one.

The claimant argued that the stop-loss procedure is part of the Belgian economic public order. Therefore, the court should be limited to either dissolving the relevant company or granting respite and should not make additional assessments (e.g., about the legitimacy of the claimant’s interest).

The Supreme Court strongly disagreed and explicitly stipulated that any party filing the claim, as detailed in Article 634 of the Belgian company code, must have an interest. And it found that a claim may never result in an abuse of rights, even when the exercised right is part of mandatory law or the public order.

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Brazilian Central Bank – compliance matters

Through Circular 3,822 of 20 January 2017 and others, the Brazilian Central Bank (BACEN) established new rules for Brazilian companies with foreign shareholders. They must provide their accounting information – shareholder equity and paid-in capital – to BACEN as follows:

- Annually, for companies with assets or shareholder equity of less than BRL250 million, until March 31, referring to the base date of December 31 of the previous year, regardless of any event that modifies the corporate interest.

- Four times a year, for companies with assets or shareholder equity equal to or greater than BRL250 million (i.e., the declaration must be made by June 30 in relation to the base date of March 31; by September 30 in relation to the base date of June 30; by December 31 in relation to the base date of September 30; and by March 31 of the subsequent year in relation to the base date of December 31).

If the ownership of foreign investors changes, the information on shareholder equity and paid-in capital of the receiving Brazilian company must be updated within 30 days.

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Bulgaria: new procedure seeks to stabilize companies before insolvency

On 1 January 2017, amendments to the Bulgarian Commerce Act (CA) took effect that fill a gap in commercial legislation by providing stabilization proceedings for businesses facing financial difficulties. Bulgaria had been the only EU Member State without such legislation.

The main objective is to help struggling businesses avoid insolvency. To initiate stabilization proceedings, a company must reach an agreement with its creditors on how to repay debt through a restructuring and stabilization plan.

Any company under imminent threat of insolvency can ask the court to open stabilization proceedings. The threat is considered imminent when the company cannot meet certain monetary obligations or may suspend payments within six months of the date it files the stabilization request.

The request must contain a detailed plan for stabilizing the company, including the terms, conditions and structure of payments to creditors, the proposed guarantees and collateral, and other prerequisites prescribed by the law.

All creditors can participate in approving the stabilization plan. The proceedings are complete when the court either approves or dismisses the plan, which should happen within 90 days after the request is filed.

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China opening up to foreign investment

In mainland China, the Government is poised to launch a new round of high-level opening-up by advocating foreign investment and accelerating the liberalization of industries, including service, energy and infrastructure development.

On 17 January 2017, the State Council issued the Circular on Certain Measures for Expanding, Opening up and Actively Using Foreign Investment (Guo Fa (2017) No. 5), clearly signaling current and future foreign investment policy.

The circular emphasizes promoting a fair investment environment both before and after businesses are admitted to the market, leveling the playing field and creating equal opportunities for both foreign and domestic companies.

The circular specifically allows local governments to give incentives to foreign and domestic investors to the extent permitted by law. This will generate a new round of policy competition among regions seeking foreign investment. Special treatment is already sanctioned for foreign enterprises moving to the middle and west regions.

The opening-up will prioritize the service, energy and infrastructure development industries.

For the service industry, the circular:

- Relaxes the limits on foreign investment in financial institutions, securities companies, securities investment fund management companies, futures companies, and insurance institutions and agencies
- Removes barriers to foreign investment in accounting, auditing, architectural design and rating services
- Advocates opening up other sectors in an orderly manner, including telecommunications, internet, culture, education and transportation

This is the first time that China has announced a massive opening of the service sector to foreign capital since it joined the World Trade Organization 15 years ago.

Further liberalization is expected through substantial changes. The competition policy will replace the industry policy to play a fundamental role in allocating production factors in these economic sectors. This is part of a process to enhance regulation methods and public services.
Colombia: changes to the International Investments Regime

The International Investments Regime was amended by Decree 119 of 26 January 2017, with the goal of creating a more modern and efficient legal framework that promotes internationalization and aligns with global standards.

Colombia does not restrict currency negotiation but does apply a series of reporting procedures and obligations to exchange control operations (including foreign investments) so it can keep statistics on the inflow and outflow of currencies.

The requirement to register foreign investment with the Central Bank grants the holder the right to remit abroad the profits from the investment, as well as proceeds from the sale or liquidation of the investment.

The decree eliminates the so-called modalities of foreign investment, which referred to the only operations or assets allowed to register as foreign investment. The scope is expanding to include all investments by nonresidents in Colombian assets acquired at any title and through any legal act, contract or transaction. That includes mergers, spin-offs and, in general, corporate reorganizations.

Foreigners investing in companies whose shares are listed on the Colombian stock exchange can choose how their investment is treated for exchange purposes. It can be either a direct investment or a portfolio investment, based on whether the intention of the investment is speculative in the market. Both investments have different requirements.

The decree also emphasizes the obligation for foreign investors to appoint an attorney in Colombia to represent them in all issues related to the investments. Decree 119 will take effect once the Central Bank issues procedures for the new regulations – 26 July 2017 at the latest.

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Croatia reshapes public procurement legal framework

In December 2016, the Croatian Parliament adopted the new Public Procurement Act (Zakon o javnoj nabavi, PPA), implementing Directives 2014/24/EU and 2014/25/EU and significantly altering the country's public procurement legal framework.

The new PPA applies to all public procurement procedures initiated after 1 January 2017. Older procedures will follow the provisions in effect at the time.

Important features of the new PPA include the following:

• The sole award criterion is now the most economically advantageous tender (MEAT), placing the quality of procurement front and center. Under the old rules, authorities could choose either MEAT or the lowest price award criterion, which prevailed 98% of the time.

• The European Single Procurement Document (ESPD) is introduced as a self-declaration form for bidders, with the goal of replacing various documents and certificates used to prove that bidders meet the selection and exclusion criteria. Rules on electronic ESPD submissions will apply as of 18 April 2018.

• New types of procurement procedures are introduced (e.g., “innovative partnerships”).

• New rules for financial guarantees apply to economic operators.

• The tender guarantee must not exceed 3% of the estimated tender value (formerly 5%).

Although the new PPA features are intended to improve transparency and efficiency, it remains to be seen whether they will achieve the desired effects in practice.

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Czech Republic amends Civil Code

A recent amendment removes some of the thorniest conflicts that arise when applying the Civil Code, with changes related to:

- Acting on behalf of a legal entity
- Acquiring stakes in companies and cooperatives
- Granting the right of first refusal to purchase real estate

A provision regulating how a legal entity with a collective statutory body must deal with employees is repealed (§164(3) of the Civil Code). The general rules of conduct for statutory body members once again apply to dealings with employees. These legal entities will no longer be obliged to authorize statutory body members to act in dealings with employees and enter them in the commercial register. Voluntary authorization of such members remains possible.

The amendment expressly states that the acquisition of a stake by a spouse does not establish the other spouse’s participation in a company or cooperative, except for housing cooperatives. This change should eliminate some complications associated with requiring a spouse to consent to acquiring a stake forming part of marital community property.

The amendment also establishes the right of first refusal for co-owners of real estate, except for the transfer of real estate to next of kin. Conversely, it abolishes the right of first refusal for owners of land over certain constructions and other objects (formerly “utility constructions”) spread across multiple plots. It also abolishes the right of first refusal for owners of these constructions regarding the land where they are built.

The law became effective on 28 February 2017, with some provisions taking effect on 30 December 2016 and others on 1 January 2018.

Business Corporations Act amended

An amendment to the Business Corporations Act is designed to re-establish mandatory inclusion of employee representatives on supervisory or management boards for joint stock companies.

Under the amendment, only salaried employees of a joint stock company will have the right to elect members to the supervisory board. The same applies to recalling members.

Joint stock companies with more than 500 salaried employees have two years to bring their statutes and board compositions into compliance with the amendment.

The law took effect on 14 January 2017.

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Estonia: a new flexible and tax-transparent investment vehicle

On 10 January 2017, the Investment Funds Act (IFA) took effect, introducing a new investment vehicle in Estonia – the limited partnership fund (LPF).

An LPF has legal personality but is also a fully tax-transparent closed-ended fund that is best suited for private equity and venture capital investments. In a fully tax-transparent regime, investors are treated as if they were investing directly in a target and have access to the double taxation treaties between the investor’s country of residence and the target’s country of domicile.

Investors and investment professionals should find LPFs appealing since the IFA sets out only a few mandatory rules for LPFs.

An LPF should have at least one general partner (GP) and one limited partner (LP). GPs have unlimited liability, whereas LPs have limited liability as long as they are not involved in the daily management of the LPF. An LPF may be managed by either a GP or an external management company, which governs the fund according to a management agreement between a GP and the management company.

An LPF is established after the partners have signed a limited partnership agreement, included a statement by the Estonian Financial Supervision Authority (FSA) and registered the LPF in the Estonian Commercial Register. The FSA must confirm that the GP or the management company has been registered either as a small fund manager or as an alternative investment fund manager at the FSA or other financial supervision authorities in the European Economic Area. The LPF itself does not need to apply for a permit from the FSA.

Estonia

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EU: Court of Justice rules on dynamic IP addresses

The European Court of Justice (ECJ) has weighed in on a long-debated area of data protection law by ruling that the definition of personal data extends to dynamic IP addresses.

In a ruling dated 19 October 2016 (ref.: C582/14), the ECJ found that dynamic IP addresses constitute personal data whenever the website host that processed the IP address has the legal means to obtain additional information from the provider to identify the person concerned.

Internet providers assign IP addresses to their users so that connected devices can be identified. Dynamic IP addresses are reassigned for each new internet connection, making it impossible for third parties to identify users directly.

Objective standard applies

The ruling is particularly noteworthy because the ECJ does not make the decision contingent on whether the information needed to identify the person is in the hands of a single party processing the data (the controller). Instead, it is sufficient for the controller to have the legal means to obtain the information from a third party, regardless of whether these means are actually employed.

Thus, an objective standard applies when identifying whether there is a reference to the person.

Personal data in the EU

The EU General Data Protection Regulation (GDPR), which will apply in all EU states from May 2018, also provides for an objective standard.

In Article 4(1), the GDPR defines personal data as any information relating to an identified or identifiable natural person. Identification can take place indirectly — by reference to an identifier, for example. A determination of whether a person is identifiable should take into account all the means reasonably likely to be used (Recital 26 GDPR).

Therefore, a person is identifiable if the additional information needed for identification is accessible and obtainable with a certain effort. This includes the possibility that the information must be obtained from a third party using legal means.

Implications for day-to-day business

Based on the ECJ’s ruling and in view of the GDPR, more and more data is likely to be classified as personal data, likely including identifiers or log-in information that can be related objectively to individual persons.

Such data can be processed only with statutory authorization or consent. This is particularly relevant for day-to-day business because companies will have to apply data protection regulations more often.

In response, companies should prepare for a broader application of the regulations and should familiarize themselves with the more stringent requirements of the GDPR.

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Finland plans legislation on three-dimensional real estate

The Finnish Government is drafting a proposal to enable the formation of three-dimensional (3-D) real estate.

3-D means that the real estate has both horizontal and vertical boundaries. At present, real estate can exist only at ground level (2-D real estate). 3-D real estate, by contrast, can be situated below or above 2-D real estate.

Finland has seen increased demand for vertically dividing ownership of urban real estate. With 3-D real estate, ownership can be split between commercial and housing purposes. Underground parking and residential buildings could be effectively separated from commercial shopping centers above, for instance.

Complex building projects have traditionally required several contracts and easements. Having 3-D real estate is likely to simplify the contractual arrangements and easements and make large building projects more straightforward. Allocating contracts and different rights will be easier with 3-D real estate as a unit of ownership and security.

The principles of traditional property will apply to 3-D property, which will be marked in the title and mortgage register.

Developers, property owners and project investors will benefit the most from the new legislation. The proposal is expected to be complete in spring 2017.

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France: new anti-corruption measures

Law No. 2016-1691, dated 9 December 2016, seeks to promote transparency, fight corruption and modernize the economy. Executive directors of companies and of state-owned industrial commercial entities (defined below) “are bound to take steps in order to prevent and detect corrupt practices or bribery (trafic d’influence) being committed in France or abroad.”

The law applies to:
- French companies and state-owned industrial commercial entities with at least 500 employees and revenue exceeding EUR100 million
- French companies (or state-owned entities) belonging to a group whose parent company is registered in France, with at least 500 employees, and whose consolidated revenue exceeds EUR100 million (computed based on both French and foreign subsidiaries)

Executive directors must implement:
- Risk mapping
- Procedures to assess clients, primary suppliers and intermediaries with regard to risk mapping
- A code of conduct
- An internal alert mechanism
- Disciplinary measures for employees who violate the code of conduct
- A training program
- Internal or external accounting control procedures
- A mechanism for creating internal controls and assessing the measures put in place

This program must be in place by 1 June 2017. In addition to executive directors, legal entities are liable for breaches of this obligation.

If a company fails to comply, the director of the new French Anti-corruption Agency can issue a warning to the company’s legal representatives and refer the matter to the agency’s sanctions committee. The committee may require the company and its executive directors to adapt the established program and may impose a financial penalty of EUR200,000 for individuals and EUR1 million for legal entities.

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Greece: simplifying company setup procedures

Law 4441/2016 (Governmental Gazette, issue A’227/06.12.2016) is intended to simplify procedures for setting up companies in Greece.

The law, which took effect on 6 December 2016, adopts specific actions that must be taken within a certain time frame by both the companies and the One-Stop Shop Service (OSSS) – the competent trade registry or the notary public. The measure also introduces the Electronic One-Stop Shop Service (e-OSSS), along with incentives for using the platform.

The law does not apply to banks, insurance companies, portfolio investment and mutual fund companies, or companies that derive from conversions, divisions, mergers, etc.

The e-OSSS is a digital platform that prospective companies can use to establish themselves if their setup does not require a notarial deed. This method employs a template with standardized articles of incorporation.

As a further incentive, the platform provides a 30% fee reduction compared with the standard OSSS. Companies established during the first year of the new law are fully exempt from paying the administrative fee.

The law’s most important innovation is the possibility to use a private document to set up either a societe anonyme (SA) (i.e., a corporation) or a limited liability company (LTD). The template with standardized articles of incorporation must be strictly applied.

Ministerial decisions specifying the law’s provisions have yet to be issued.

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Guatemala: developing a competition law

Bill 5074-2016, now pending before the Congress of the Republic of Guatemala, is one of several measures meant to establish a competition law.

Under an agreement between Central America and the European Union, Guatemala was to issue the package of legislation by November 2016. The current bill focuses on two aspects – prohibitions and compliance. Here’s a look at the key aspects.

A prohibition on agreements between economically related competitors: these are entities that share the same market interest and would benefit from working together to fix prices, divide segments of the market, limit production, etc.

A prohibition on agreements between economically unrelated competitors: these are entities that do not share the same market interest but would be interested in forming an agreement.

A prohibition on the abuse of a dominant position: this is the ability of an individual or a collective economic group to join forces in a way that may affect the economic landscape.

Creation of the Competition Superintendence: this state body would oversee general economic activity, monitor potential threats and promote competition.

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Hong Kong: improved provisions for winding up companies

In the Hong Kong special administrative region of China, a keenly anticipated amendment to the insolvency law in the Companies Amendment Ordinance took effect on 13 February 2017, with the goal of enhancing creditor protection, streamlining the winding-up process and reinforcing the regulations. The previous major amendment to these provisions occurred in 1984.

Changes to the insolvency law include:

- Empowering the court to set aside transactions at an undervalue that the company executed within five years of the start of its winding-up
- Codifying principles on unfair preference (previously provided by reference to the Bankruptcy Ordinance)
- Revising rules on the invalidity of a floating charge created on an undertaking or property of a company within 12 months of the start of its winding-up
- Imposing joint and several liability on directors and past shareholders for share redemption or buyback out of capital
- Expanding the definition of “associate” to include the spouse of a director for the purposes of voidable transactions
- Introducing new provisions on liquidators and provisional liquidators related to conflicts of interest, disqualifications, disclosure obligations, etc.

The industry appears hopeful that these changes will bring a fresh and more pragmatic approach to insolvency, helping Hong Kong remain competitive globally. An additional amendment bill, expected in 2018, will focus on statutory corporate rescue procedures and the insolvency trading law.

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India: mergers and amalgamations under the new company law

On 7 December 2016, the Indian Ministry of Corporate Affairs published the provisions of the Companies Act 2013 dealing with national mergers and amalgamations of companies, effective 15 December 2016.

In a significant development, the jurisdiction for mergers and amalgamations has moved from the High Court to the National Company Law Tribunal (NCLT), effective 1 June 2016. Appeals of the NCLT’s decisions will go to the National Company Law Appellate Tribunal.

The act recognizes two kinds of mergers:

- Merger by absorption, in which the undertaking, property and liabilities of one or more companies are transferred to an existing company
- Merger by formation of a new company, in which the undertaking, property and liabilities of two or more companies are transferred to a new company

The act also provides a fast-track procedure for mergers of certain entities, such as the joining of a company with its wholly owned subsidiary. With the fast track, the NCLT’s approval is not required.

The process for filing an application to convene a meeting of members or creditors and then seeking sanction of the scheme through another application has been retained. But the act has changed the procedures for undertaking mergers and amalgamations, listed in the Companies Act 1956.

New provisions detail restrictions on the power of members or creditors to object to the scheme through another application has been retained. But the act has changed the procedures for undertaking mergers and amalgamations, listed in the Companies Act 1956.

The changes are broadly progressive and intended to promote the swift completion of mergers and amalgamations.
Japan: reforms to support M&A and enhance corporate governance

In 2016, Japan continued to see extensive M&A activity, both outbound and inbound, across all sectors. Why? Many Japanese companies view inorganic growth through M&A as a vital means to remain competitive.

Some are pressured to dispose of major assets. Some have partnered with a non-Japanese company or private equity fund and have accepted a non-Japanese management team. As a result, Japan is witnessing transactions that were unthinkable 10 years ago.

To provide additional support to M&A, a set of reforms has been proposed to remove certain tax hurdles in spin-offs and minority squeeze-outs. These changes are expected to encourage Japanese companies to pursue even bolder business transformations.

2016 also brought scandals and other incidents at several well-respected companies, resulting in high-profile investigations, disputes over successor appointments and disputes between the founding family and management.

The Japanese Government – eager to attract foreign investment by demonstrating a robust corporate governance system and culture – published the Stewardship Code in 2014 and the Corporate Governance Code in 2015. The former will be amended in 2017 to improve the transparency of voting behavior and engagement activities by institutional investors and asset managers. The amendments will also cover conflicts of interest among asset managers belonging to a wider financial institution that may have different businesses with contrasting interests.

Together with the proposed introduction of Fair Disclosure Rules (which require prompt public disclosures if listed companies provide material information only to an analyst), these reforms should provide additional comfort to investors.

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Lithuania: new regulations on bondholders and shareholders

The statutory prohibition barring private limited liability companies from offering bonds on the market has been repealed under the Law on Companies, adopted 16 June 2016 and effective from 1 November 2016. Such companies now enjoy more favorable conditions to raise funds.

On 1 November 2016, a new law took effect that protects the interests of those who hold bonds issued by public and private limited liability companies. In particular, the law:

- Requires the issuer to enter into a civil agreement with a trustee of the bondholders to represent their interests before issuing bonds
- Establishes qualification and professional experience requirements for the trustee
- Provides for the procedures and competence of bondholder meetings

Proposal to abolish certain shareholder restrictions

The Draft Law on Companies intends to abolish the restriction on the maximum number of shareholders in a private limited liability company (currently 250) and to reduce the minimum share capital of a public limited liability company from EUR 40,000 to EUR 5,000.

If adopted, these amendments would take effect on 1 October 2017.

Proposal to allow minority squeeze-outs

The Draft Law on Companies would allow minority shareholders to be squeezed out of private limited liability companies — a practice currently permitted only in companies qualified as issuers (e.g., listed companies).

A shareholder who acquired at least 95% of a company’s shares would obtain the squeeze-out right. At the same time, minority shareholders would have the right to a buyout.

If adopted, the amendments would take effect on 1 November 2017.

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Simplified dissolutions: a new legal tool in Luxembourg

The law of 10 August 2016 modernizes aspects of Luxembourg corporate law by enacting a new regime of simplified dissolutions for civil and commercial companies. The measure, which took effect on 23 August 2016, amended the law of 10 August 1915.

Before the law

Certain notaries used to proceed to simplified liquidations if companies had a single shareholder and no debts toward or receivables against third parties (except for intragroup debts and receivables).

After the law

With the simplified dissolutions, companies held by a sole shareholder no longer need to deal with their debts toward or receivables against third parties. All assets and liabilities flow to the sole shareholder as of the date of the notarial deed through a universal conveyance regime. This is similar to the procedures for a merger except the 30-day waiting period does not apply.

How companies should proceed

Companies that want to apply for simplified dissolutions must be up to date on their payment obligations toward Luxembourg social security and tax authorities. A company will not be dissolved unless it obtains certificates from:

- The Joint Social Security Centre
- The Direct Tax Administration
- The Registration and Domains Administration

Within 30 days after the notarial deed is published in the official Luxembourg newspaper, creditors may request safeguards from the President of the District Court. This request does not reverse or stop the simplified dissolutions process.

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The Netherlands: modernizing the partnerships law

The legislation on partnerships in the Dutch Civil Code dates to 1838 and has never been updated or revised. It includes two specific partnerships — the general partnership (vennootschap onder firma) and the limited partnership (commanditaire vennootschap). Despite the lack of legislative revisions, case law has developed the understanding of the rules and regulations for partnerships.

The limited partnership is used for various reasons, including to limit exposure and create hybrid tax-transparent entities.

The legislature introduced a proposed update to the partnerships code in 2002, but it was withdrawn in September 2011. In response, a voluntary working group wrote a report on modernizing the code, including draft legislation to amend it. The report was presented to the Ministry of Security and Justice on 26 September 2016.

It calls for allowing partnerships to hold legal title to assets — a change that should simplify the use and governance of partnerships. Under the current legislation, only partners (jointly) can hold legal title.

The report also seeks to facilitate the restructuring of partnerships and the group structures they form. The suggested restructuring facilities are:

- Resignation and change of partners without dissolving the partnership
- Conversion into another type of partnership
- Conversion of a partnership in certain legal entities as listed in Book 2 of the Dutch Civil Code and vice versa
- Legal merger of partnerships (with certain restrictions) with the abovementioned legal entities
- De-merger of a partnership in other partnerships

The new legislation is intended to create more flexibility.
Norway: risks in the event of a seller’s bankruptcy

The Norwegian Supreme Court recently weighed in on the consequences of not registering a change of ownership after a purchase of real property, finding that the buyer’s ownership was not legally protected against creditors because the title was not registered in the Land Registry.

The facts

The appellant, a private limited company, had acquired properties in the Stavanger area in the early 2000s. The properties were transferred to the appellant in several stages, including as part of de-mergers. To save on stamp duty, the appellant did not register the title transfer in the Land Registry.

In 2012, the seller, who was still registered as titleholder, was declared bankrupt. The trustee of the bankrupt estate did not dispute that the appellant was the de facto owner but argued that the properties should be included in the estate because of the lack of title registration.

The decision

The Supreme Court found that a deed of conveyance must be registered even for rights established through de-merger, regardless of de facto ownership. The trustee was thus entitled to seize and sell the properties.

Comments

The judgment confirms that the only path to legal protection of real property is through registering the title in the Land Registry. A deliberate choice not to register to avoid stamp duty can have serious consequences for the buyer.
Poland: restrictions on investment land trade

New rules governing the trade of agricultural land took effect on 30 April 2016 as part of an amendment introducing mechanisms to protect such property from speculative purchases. The change is related to the end of the transition period restricting land purchases in Poland by EU entities until 1 May 2016.

Impact on investment land

The regulations also affect trade in investment land. That’s because agricultural property is broadly defined as any land that can potentially be used for agricultural manufacturing activities unless designated in the local spatial development plan for a purpose other than agricultural.

Restrictions

Only an individual farmer can buy agricultural property (as well as investment land) – namely a natural person with farming qualifications who has lived in a rural municipality for at least five years and has personally managed the farm during that time. Companies, entrepreneurs and most others interested in buying a building or investment plot in an agricultural area will not meet the criteria.

Exceptions

Agricultural properties can be purchased as before if they are subject to a final and binding zoning decision issued before 30 April 2016. The restrictions do not apply to agricultural properties smaller than 3,000 square meters.

Conclusions

Dramatic limitations now apply to the trade of agricultural properties of at least 0.3 hectare. In principle, only individual farmers can buy such properties, shutting out developers. And a company that wants to remove such property from its portfolio must sell it to an individual farmer.

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Portugal: legal framework for crowdfunding

In 2015, Portugal adopted a legal framework for crowdfunding – the financing of entities, businesses or projects with contributions from the public collected through web-based portals.

The regime divides crowdfunding into four categories:

- Donation-based – with no return or with a non-monetary return for investors
- Reward-based – contributions made in return for the financed product or service
- Loan-based – peer-to-peer lending
- Equity-based – purchase of equity interests or other profit-sharing rights

The portals work as mere “payment conduits” between investors and investment beneficiaries. They should not make recommendations, assign investment ratings, conduct portfolio management activities or hold any investor funds or financial instruments.

Loan- and equity-based crowdfunding are governed by the abovementioned law and by a regulation of the Portuguese securities and markets regulator (CMVM). That rule was enacted on 5 May 2016 but will take effect only once the applicable sanctions regime is approved – a date still undetermined.

Management

The management entities of funding portals must be registered with the CMVM, must meet minimum share capital or liability insurance requirements, and must implement internal control and conflict-of-interest prevention mechanisms. The directors and individual shareholders who control or hold a qualified stake in such management entities must be of good repute. And an authorized payment services entity must be involved in crowdfunding investments.

Limitations

Investment beneficiaries must give the funding portal a document with basic information about each offer to be disclosed to investors. Fundraising is limited to EUR1 million per offer, product or activity in a 12-month period. If, however, the offers are restricted to companies or individuals with annual incomes of at least EUR70,000, the limit is EUR5 million.

Investors cannot provide more than EUR3,000 per offer or EUR10,000 overall in a 12-month period unless they are companies, individuals with annual incomes of at least EUR70,000 or qualified investors.

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Russia: personal data operators face new regulatory pressure

Since November 2016, the Russian data privacy authority (DPA) has blocked access to the LinkedIn professional networking site — the first visible example of negative consequences for noncompliance with a rule requiring user data to be stored on Russian servers.

As of 1 September 2015, data operators must comply with the so-called localization requirement by making certain that storage and certain personal data processing occur on in-country databases.

The regulatory pressure continues to rise, with penalties set to increase on 1 July 2017.

New fine structure

Currently, Article 13.11 of the Russian Code of Administrative Offenses stipulates a maximum penalty of RUB10,000 and does not differentiate among data privacy violations. A revision of the article (introduced by Federal Law 07.02.2017 N 13-FZ) provides different fines depending on the violation:

- Processing without a legitimate right or for a purpose other than that stated — up to RUB50,000
- Processing without the data subject’s written consent or using an inappropriate consent form — up to RUB75,000
- Failing to comply with the obligation to publish the operator’s data processing policy — up to RUB30,000
- Failing to comply with the obligation to provide data subjects with information about their personal data — up to RUB40,000
- Failing to comply with a request from the data subject or the DPA related to a subject’s personal data — up to RUB45,000
- Failing to protect personal data held on physical media, resulting in unlawful operations — up to RUB50,000

The new structure makes it possible to impose more than one fine for different violations at the same time. The changes also allow the DPA to impose penalties promptly and independently without having to apply to the prosecutor’s office.

New penalties for internet providers

According to a draft law (No. 1102471-6) that is close to final passage, internet providers may be fined up to RUB100,000 for not blocking a website prohibited by the DPA or for not restoring access to a blocked website when ordered to. The current maximum penalty is RUB40,000.

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Serbia: update on the new Health Care Law

Although the final draft of the new Health Care Law has not been presented to the Serbian National Assembly, it appears poised to fundamentally alter the registration of health care institutions and private practices.

Public discussion was completed in January 2017 on the draft, which would establish a Register of Health Institutions and Unified Records of Health Care Providers to be maintained by the Serbian Business Registers Agency.

The Unified Records would contain information on all health care providers – both institutions and private practices. If the new law is adopted as is, it would unify all this information and make it public for the first time. Currently, records are divided among commercial courts, the Serbian Business Registers Agency and the Ministry of Health, and none are publicly available.

Time frame

According to the draft law, the Register and the Unified Records should start operating 12 months after the law takes effect. Serbian health institutions would be obliged to harmonize their registered data with the provisions of the new law and register and publish new articles of association within three months after the Register is established.

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Slovakia introduces simple joint-stock company

An amendment to the Commercial Code, effective 1 January 2017, introduces a new legal form of company in Slovakia – the simple joint-stock company. It is a hybrid capital company, with elements of both limited liability and joint-stock companies.

A closer look

A simple joint-stock company can be established by one or more legal or natural persons. Its registered capital, divided into shares, can be as low as EUR1. The company can issue several types of shares with various individual rights specified in its articles of association. These can include larger voting rights or the right to share profits determined by means other than the ratio of the nominal value of shares to the nominal value of shares of all shareholders – fixed, priority or subordinated shares.

The shares must be in book entry form and registered shares; they cannot be traded on the securities market. The shares are transferable unless the articles of association state otherwise.

Obligations and liabilities

The company, not the shareholders, is liable with its entire property for any breach of obligations. The list of shareholders is publicly available.

The company’s obligatory bodies are a general meeting (the supreme body) and a board of directors (the statutory body). The creation of a supervisory board is optional.

The company must establish a reserve fund when incorporated.

The concept of simple joint-stock companies offers a comprehensive solution for risk investing in companies (e.g., in start-ups). Because of its low capital requirement, this form should be widely accessible to the public. Nevertheless, the initial setup costs are higher than those for a limited liability company.

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Spain: capital increase by in-kind contribution vs. spin-off

When Act 3/2009 of 3 April 2009 – on structural amendments of private companies – took effect, it was understood that all in-kind contributions of assets and liabilities from one Spanish company to another must be executed through a spin-off procedure called segregation rather than through a capital increase.

Both alternatives have the same result in terms of corporate structure. With each, the assets and liabilities to be transferred are considered an independent “economic unit.”

Nevertheless, segregation is considered more formal, time-consuming and expensive because it involves more documents and an opposition period for creditors. The capital increase is considered less formal and, thus, easier and faster. The main difference is that segregation involves the transfer of the economic unit by universal succession, but the capital increase does not. (Transfer requirements for assets and liabilities will vary case by case.)

A binding resolution of the General Directorate of Registries and Notaries – published in the Official Gazette on 19 September 2016 and applied since late 2016 – states that either procedure can be selected. What will differ is whether universal succession will apply.

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Switzerland: update on company law reform

On 23 November 2016, the Swiss Federal Council released an updated draft of the company law reform that would introduce interim dividends and allow share capital in a foreign currency and variable share capital (capital band).

The draft has been submitted to Parliament for debate, with no fixed date for final implementation. Here’s a look at some of the other features of the reform.

**Incorporation.** The measure would simplify the provisions on incorporation, e.g., by waiving the requirement for a public deed in simple circumstances. It also contains the first explicit provisions on the use of electronic means for corporate purposes, including virtual shareholder meetings.

**Recapitalization.** With recapitalization schemes, a liquidity plan would be required in cases of reasonable doubts about solvency. If a company’s solvency is still threatened, appropriate measures must be taken. Submitting a request for a debt restructuring moratorium may be necessary.

**Diversity.** The reform proposes minimum representation by each gender of 30% for the board of directors and 20% for the executive committee.

**Noncompete pay.** The measure would prohibit noncompete compensation if it cannot be justified from a commercial use perspective. It also seeks to facilitate restitution claims for prohibited payments. No sign-on payments will be permitted unless they compensate a financial disadvantage (i.e., only buyouts will be permitted).

**Compensation report.** Companies that hold a prospective shareholder vote on variable compensation must have a consultative shareholder vote on the compensation report. Members of the board of directors, advisory board and executive committee with functions in other listed companies must be disclosed in the compensation report.

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Purchase price adjustment by an independent expert — fast lane or dead end?

In M&A transactions with a post-closing purchase price adjustment, parties commonly ask an expert to determine the adjustment amount if they cannot agree. The expectation is that it’s a faster way to resolve disputes than court or arbitration proceedings. However, this may not be the case in Switzerland.

In Decision 4A_428/2015 of 1 February 2016, the Swiss Federal Court confirmed that an expert can only assess matters of fact, not matters of law. The latter includes disputed issues requiring contract interpretation. For instance, the expert cannot assess the validity of the notice of objection from the party disagreeing with the adjustment calculation provided by the other party. The same applies to contractual agreements on valuation issues (e.g., EBITDA normalization).

Consequently, the party ordered to make an adjustment payment has various avenues to argue that the expert exceeded the scope of his or her competence, forcing the other party to engage the competent court.

Not enforceable

The expert decision does not constitute an enforceable judgment. If a party refuses to make an adjustment payment, the claimant cannot initiate debt enforcement proceedings directly but has to go through the courts.

Therefore, it is questionable whether price adjustment disputes can be resolved swiftly through the expert mechanism. A party that thinks it’s entitled to an adjustment payment should consider filing a lawsuit in the competent court. Parties should also carefully evaluate whether they want to include such provisions in their share purchase agreements at all.

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Turkey: maximizing dividends with interim distributions

Turkish corporate law has been amended in recent years through Turkish Commercial Code 6102 so that it is mostly in line with EU directives on companies.

One major area of corporate law is to provide equivalent protection for both shareholders and creditors in the rules for dividend distributions.

Dividends are based on annual earnings and distributed — usually annually — through a decision made by shareholders at a general assembly meeting. Companies shall convene their ordinary general assembly meeting within three months after the end of the fiscal year (normally the calendar year).

Under the code, each shareholder has a right to participate in the net period profit of the company in proportion to the shareholding ratio. Dividends can also be distributed from the free reserves (retained earnings).

In connection with the rules for capital maintenance, companies cannot distribute dividends before offsetting their previous year losses. Although this restriction does not come with a penalty, a potential tax inspection may view such payments as a loan to a shareholder, triggering disguised dividend distribution (transfer pricing) with additional corporate tax and value-added tax assessments, including penalties.

Dividends can also be distributed from the profit appearing in quarterly financials, not only for listed companies but also for closely held corporations. Advance dividends cannot exceed half the total dividends calculated after certain deductibles are subtracted, such as previous year losses, taxes, funds and legal reserves.

Companies can consider maximizing dividends through advance distributions (i.e., first-quarter profit) on top of the net period profit (after the year-end) and the free reserves.

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UK High Court approves reverse cross-border merger

On 23 January 2017, the UK High Court approved a reverse cross-border merger in which a UK parent company was absorbed by its Italian wholly owned subsidiary. The merger was executed under domestic legislation in both countries that implemented the European Commission directive on cross-border mergers (2005/56/EC).

Such mergers are relatively rare in a group context. Usually, the parent absorbs a wholly owned subsidiary, or sister companies merge and may or may not create a new holding company.

Reverse cross-border mergers have two additional complexities:

1. Potentially violating laws that prevent a company from acquiring its own shares
2. Determining the merger process, since the formalities depend on the type of merger

The UK legislation does not specifically address the situation in which a subsidiary absorbs the parent company or the potential infringement of laws preventing a company from acquiring shares in itself.

What happened?

These two issues were addressed in the following ways:

**Prohibition on a company acquiring its own shares:** Italy, like the UK, bars companies from acquiring their own shares. To address this, all of the Italian subsidiary’s share capital was canceled; its net assets were canceled to create a surplus; new shares were issued to shareholders of the UK parent; and the subsidiary’s share capital was restated to reflect the net assets contributed by the parent. The parent’s share capital was also canceled.

Had this merger involved a UK company acquiring an Italian parent, an equivalent prohibition would have applied, necessitating a reduction in capital under English law.

**Characterization of the merger:** the directive was implemented differently in Italy and the UK. In Italy, the merger needed to follow provisions governing “mergers by absorption of wholly owned subsidiaries.” In the UK, the acquisition constituted a “merger by absorption.”

In this case, the UK court ruled that the laws applicable to the surviving company should prevail. Thus, the formalities associated with mergers by absorption of wholly owned subsidiaries would apply.

**Practical implications**

This case is significant because it confirms how a reverse cross-border merger can be implemented and demonstrates how jurisdictional conflicts in laws can be resolved.

It also highlights another way to cross-transfer activities rather than using other structuring options, such as the transfer of seat using a Societas Europaea or a business transfer and liquidation.

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Ukraine: establishing the Export Credit Agency

The Ukrainian Parliament recently adopted a law to establish the Export Credit Agency (ECA), one of several measures intended to support and develop exports.

By setting up the ECA (by 1 July 2017), Ukraine follows the tendency of most European countries, where ECAs help increase exports and, therefore, gross domestic product.

The ECA’s main functions and work streams are:

• Providing insurance and reinsuranc of export credits given to Ukrainian exporters for performing export agreements, export credits given to foreign buyers of Ukrainian products, contractual bank guarantees, commercial and noncommercial contractual risks of Ukrainian exporters and direct investments in foreign businesses from Ukraine

• Offering guarantees under credit agreements concluded by Ukrainian exporters, as well as counter-guarantees to the banks of Ukrainian exporters

• Guaranteeing tenders (guaranteeing the performance of Ukrainian exporters’ obligations for the purposes of participating in international tenders)

• Participating in programs for partial reimbursement of interests under export credits, etc.

The law also establishes a list of priority spheres supported by the ECA, including production of food, pharmaceuticals, textiles, shoes, machinery, certain equipment, aircraft, watercraft, land transport and furniture.

The ECA will be financed by the state, private and state investors, and international organizations, as well as its own funds. The Ukrainian Government will hold at least 50% plus one share in the ECA.
Venezuela: examining the Exchange Control Regime

One of the main issues that companies must consider before doing business in Venezuela is the Exchange Control Regime.

In January 2003, then-President Hugo Chavez enforced a strict regime that limits purchases of foreign currency. To buy foreign currency, companies must seek authorization from the Venezuelan Central Bank and participate in the official systems.

According to Exchange Agreement No. 35, issued in March 2016, Venezuela has two official systems for buying and selling foreign currency, with different exchange rates:

- The protected exchange rate (DIPRO in Spanish), with a rate of VEB10 per US$1
- The floating complementary exchange rate (DICOM), with a variable rate most recently set at VEB700 per US$1

DIPRO is considered a preferential exchange rate applicable only to the purchase of certain goods associated with production in the health and nutrition sectors.

DICOM has no sector restrictions and no limitations on the amount exchanged. This rate applies to everyone who does not seek DIPRO, but it has not met the demands of the Venezuelan market.

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Vietnam: amendment and supplement to the investment law

The main piece of legislation governing foreign direct investment in Vietnam was recently amended to adjust the list of conditional business lines. Law No. 03/2016/QH14, passed by the National Assembly, took effect on 1 January 2017, modifying and supplementing Article 6 and Annex 4 of the Law on Investment from 26 November 2014.

Here’s a look at the key changes.

Repeal of numerous conditional business lines

More than 20 conditional business lines have been repealed, including insurance agency training services, imports of radio transmitters and transceivers, trade in fishing instruments, trade in art or photography and underground water drilling.

This change reflects the government’s desire to simplify businesses by repealing unnecessary conditional business lines. Investors in these business lines can now operate with fewer restrictions.

Addition of conditional business lines

Where it felt the need to protect the public, the government has added certain business activities to the list of conditional business lines, including apartment building operation services, overseas study consulting services, energy audits and construction experiment services.

The government can now exert greater control over these sectors and see that they meet appropriate safety standards.

Some changes begin on 1 July 2017

Although the amendment took effect on 1 January 2017, certain business lines will become conditional on 1 July 2017, including the manufacture, assembly and import of automobiles. Accordingly, new entrants to the automobile industry in Vietnam will face stricter requirements.

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5 Including Mali.
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