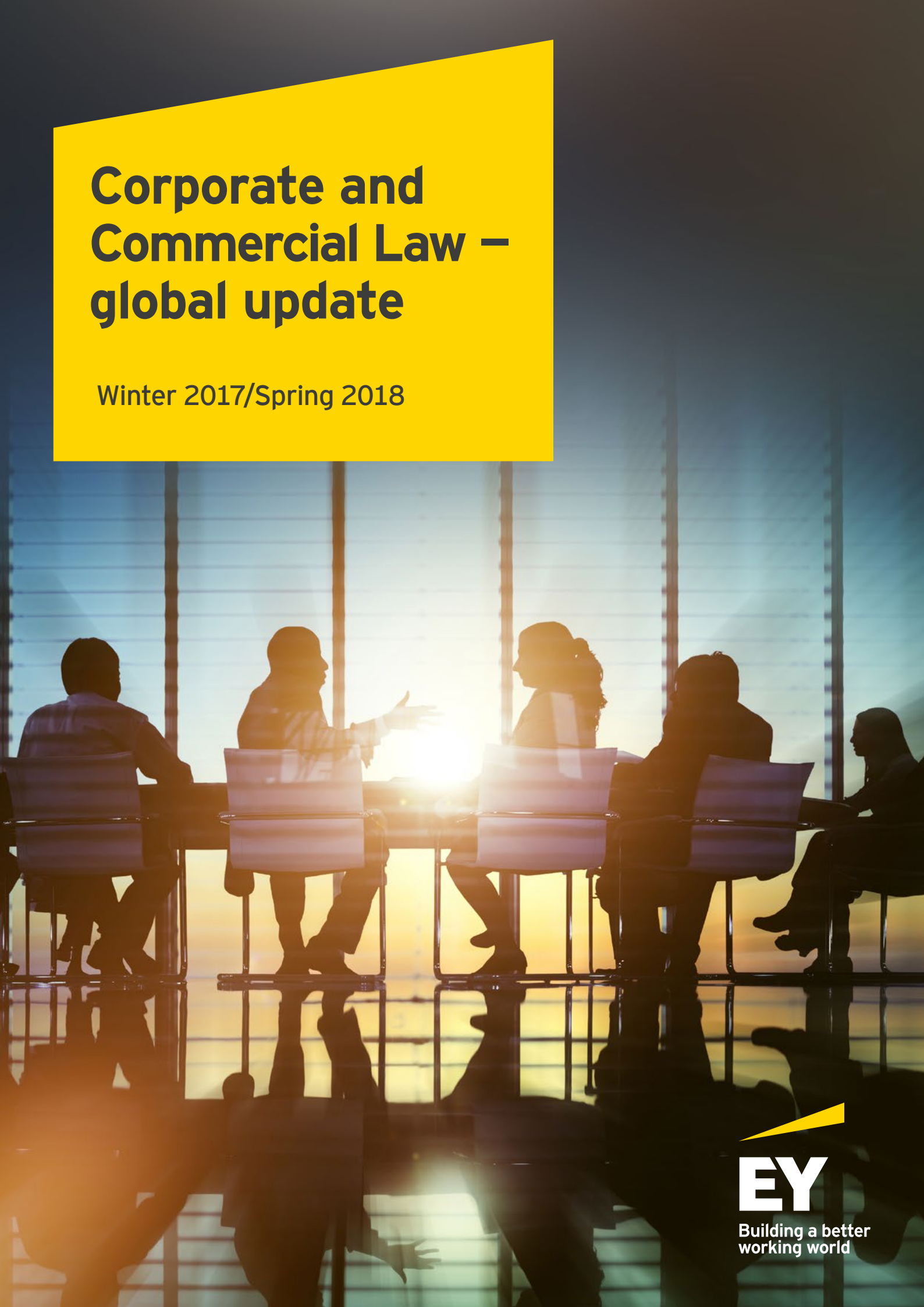
Corporate and Commercial Law – global update

Winter 2017/Spring 2018



EY

Building a better working world

Editorial

Dear reader,

We are pleased to present the Winter 2017/Spring 2018 edition of our Corporate and Commercial Law global update. In this issue, we have articles from a total of 30 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 broad 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 2,100 qualified legal professionals providing legal advice within 80 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 broad 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,

Rutger Lambriex
EY Global Corporate Law Leader
rutger.lambriex@hvglaw.nl
+31 88 40 70425

Stephen d'Errico
Ernst & Young Tax Advisory Services S.à r.l.
Corporate Leader & Editor
stephen.derrico@lu.ey.com
+352 42 124 7188

In this issue ...

This bi-annual publication highlights a range of international corporate law matters and covers recent law developments in specific countries.

Argentina

Become a Simplified Shares Company in Argentina in 24 hours

Law No. 27,349 created the option for a Simplified Shares Company (Sociedad por Acciones Simplificada, or SAS), a new Argentine corporate type that would appeal to foreign and local investors due to its flexibility and simplicity.

The law sets forth that the SAS "may be incorporated by one or more human or legal persons," anticipating the incorporation of the company by a sole shareholder.

The SAS is subject to a regime of incorporation and registration that is faster and more efficient than those provided for other types of companies. In this respect, the law foresees the possibility of incorporating the company by electronic means and digital signature, as well as the possibility of obtaining registration within 24 business hours, if incorporated by adopting the template of the articles of association provided in the General Resolution No. 6/2017, recently issued by the enforcement authority.

The law also provides for electronic means of notification of observations made by the enforcement authority, the obtaining of the SAS tax ID within 24 hours (by filing on the Argentine Tax Authority's website), and subsequently the expedient opening of bank accounts by financial entities by giving proof of registration and the tax ID of the relevant company.

Other interesting advantages associated with an SAS vis-à-vis other current companies in Argentina are, among others, (i) low minimum capital stock (i.e., as of today, about USD950); (ii) electronic corporate books; (iii) only one resident director required; (iv) teleconference meetings.

SASs will be adopted by many companies of all sizes. This new legislation is in line with the current government goals of making Argentina an attractive scenario for new investments.

Jorge L. Garnier
jorge.garnier@ar.ey.com

Pablo Bisogno
pablo.bisogno@ar.ey.com

Belgium

Are you ready for the new Belgian Companies' Code?

In order to modernize and simplify Belgian company and association law and to improve its competitive nature in a European and international context, an extensive legislative reform was launched in 2014 by the Belgian Center of Company Law.

The new legislative texts are currently being discussed in Parliament. The adoption of this new legislation is expected by June 2018, although the exact timing has not yet been confirmed.

The legislator's approach is to realize an all-encompassing reform of the current Companies' Code in part so that nonprofit legislation will be structurally integrated. The draft reform aims at modernizing the current Companies' Code based on three key objectives: (1) a large-scale simplification of the current legislation, (2) opting for more supplementary ("default") rules and flexibility, and (3) introducing new rules to help Belgian companies face European evolutions and new tendencies, such as company mobility.

What are the key modifications?

- **A reduction of different company types.** The following main types will be retained: (i) the partnership, (ii) the private company (BV/SRL), which should become the default company for closely and widely held companies, (iii) the cooperative company to be reserved for those companies that are truly inspired by the cooperative spirit and (iv) the public limited liability company (NV/SA), which should be reserved for the largest companies and listed companies only. Several other types will disappear.
- **Introduction of new civil penalties, replacing ineffective criminal penalties.**
- **More flexibility and default rules for the BV.** The concept of "share capital" will be abolished. Unrestricted transferability of shares will be introduced as well as a more flexible legal framework with default rules for the BV.
- **Revision of management of the NV.** Besides a board of directors, the appointment of a single director will become possible. Besides the one-tier system, a two-tier system (consisting of a management board and a supervisory board) will be an option.
- **The modernization and simplification in view of European evolutions and new tendencies.** The introduction of a more attractive establishment regime by adhering to the "statutory seat theory" (instead of the current "real seat theory") and new rules on cross-border conversions to transfer the statutory seat.

Peter Suykens
peter.suykens@hvglaw.be

Brazil

Brazilian Patent Office modifies rules on registration of contracts related to use of intellectual property, transfer of know-how and franchise agreements

On 11 April 2017, the Brazilian Institute of Intellectual Property (INPI), an agency equivalent to the US Patent and Trademark Office, introduced Normative Instruction (NI) 70/2017, establishing new administrative procedures for the registration of agreements for licensing or transfer of intellectual property, transfer of know-how and franchise agreements with non-Brazilian companies. The NI is effective starting 1 July 2017.

From a regulatory perspective, the registration is a requirement to allow the remittance of any remuneration for the use of registrable intellectual property and to guarantee the contract's enforceability against third parties. Under the current tax rules, the registration with the INPI is also required for royalties to be tax deductible in Brazil. To a large extent, the deductibility of royalties and payments connected to technical assistance agreements made to related parties is limited. The deduction is limited to 1% to 5% of the corresponding net revenue, depending on the nature of the contract.

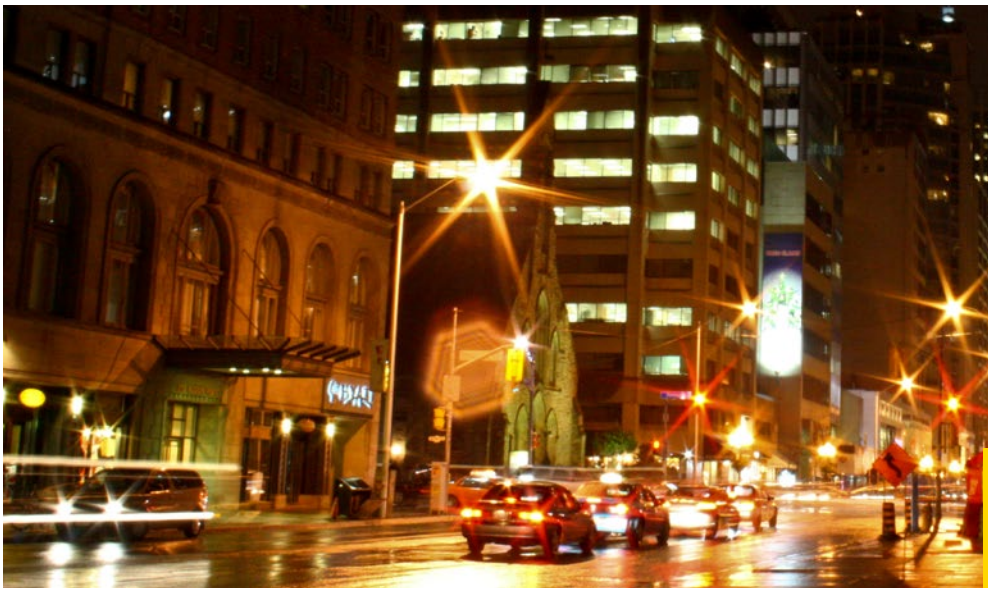
Before NI 70/2017, the INPI reviewed contract terms, taking into consideration the legal protection of the underlying intellectual property and other legal aspects. It also imposed limitations on the payment of royalties abroad, based on the deductibility thresholds set forth by the tax law. Therefore, in practice, the INPI capped the ability to make payments under these contracts pursuant to the corresponding limitation outlined in the tax rules.

Beginning 1 July 2017, the analysis performed by the INPI when registering these agreements will only encompass the formal requirements set forth in the legislation pertaining to intellectual property protection and will ensure the agreements are effective with respect to third parties. The NI also contains a provision that states that the certificate of registration of the contract to be issued by the INPI should contain a note with the following wording: "INPI did not examine the contract in light of fiscal, tax and Central Bank regulations."

Because the INPI will no longer take the tax rules into consideration when registering IP contracts, it is debatable whether the 1% to 5% limitation has been lifted for payment purposes. Our preliminary understanding is that this would allow parties to freely agree, respecting the arm's-length principles and Brazilian Central Bank regulations, on the remuneration to be paid under the contracts to foreign parties, even though the deductibility limits remain unaltered.

Based on this development, taxpayers may want to revisit current IP agreements registered in Brazil to verify if it is possible and/or beneficial to change the royalty percentage to increase potential royalty payments out of Brazil. The corresponding tax treatment and transfer pricing implications should likewise be studied.

Graziela G. Baffa
graziela.g.baffa@br.ey.com



Canada

Amendments to Canada's foreign investment rules aim to encourage investment

Subject to limited exceptions, the Investment Canada Act provides the Canadian government with the power to review significant investments in Canada by non-Canadians (including foreign-controlled companies) and review all investments in Canada by non-Canadians that could be injurious to national security.

Investments resulting in a foreign entity acquiring control of a Canadian business will be reviewable if they exceed C$600 million in enterprise value threshold, and they may not be completed until the minister communicates satisfaction that the investment is of a "net benefit to Canada" (which may include giving enforceable undertakings involving employment levels, economic activity, innovation, global competitiveness and the participation of Canadians in management or on the board of directors). For all other acquisitions of control of a Canadian business or the establishment of a new Canadian business, the investor must submit notice of the investment prior to closing or within 30 days thereof. Non-controlling investments do not require notification under the act but are subject to the national security review along with investments requiring an application or notification to the Canadian government. The threshold is different when the target is a "cultural" business, or if the investor is not part of the World Trade Organization or a state-owned enterprise. In these instances, the investments remain subject to the book value test.

The Canadian Government announced in December 2016 that the foreign investment review threshold would be increasing at some point in 2017 (two years earlier than scheduled) from its current enterprise value of C$600 million to C$1 billion. The updated threshold took effect on 22 June 2017. In addition, under the provisional implementation of the foreign investment review provision contained in the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, the threshold for reviewable investments will increase further to C$1.5 billion for all European Union investors and investors from other free-trade-agreement partners as a result of most-favored nation commitments, including the US, Mexico, Chile, Colombia, Panama, Peru, Honduras and South Korea.

Marcus Hinkley
marcus.hinkley@ca.ey.com

China

China further opens up

Since the introduction of the "opening up" policy as part of its economic reform, China has attracted foreign direct investment to a wide range of industries. A recent series of new policies and regulations made it much easier for foreign investors to have access to the ever-growing Chinese market.

On 28 June 2017, the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) jointly issued the Catalogue for the Guidance of Foreign Investment Industries (2017 version), the seventh revision of the catalogue since its implementation in 1995.

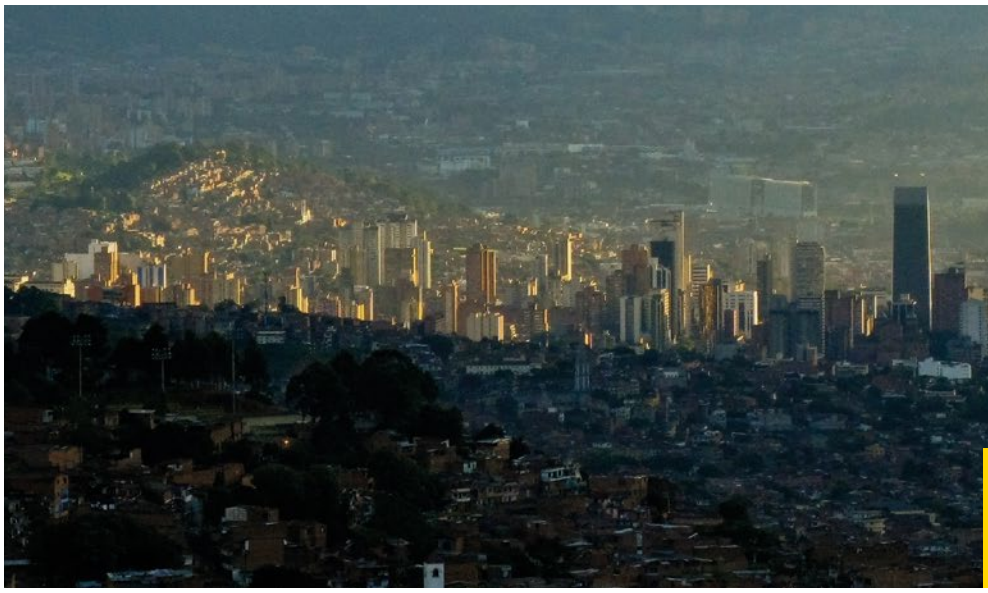
The 2017 catalogue divides industries into two categories: "encouraged," without foreign shareholding requirements, and Special Administrative Measures for the Entry of Foreign Investment (also known as the "negative list"). The negative list is further divided into three categories: encouraged with foreign shareholding requirements, restricted and prohibited.

According to the 2017 catalogue, restricted investments are further reduced to 63 items, down from 93 in the 2015 catalogue. Those opened sectors mostly belong to the manufacturing, service and mining industries. Furthermore, encouraged items have been increased to further encourage foreign investment in areas such as high-end manufacturing, high-tech, energy-saving technologies and environmental protection technologies.

In addition, pre-establishment national treatment management plus a negative list laid an institutional foundation for the implementation of record-filing for foreign M&As in China. On 30 July 2017, the MOFCOM promulgated the Decision on Revising the Interim Administrative Measures for the Record-filing of the Incorporation and Change of Foreign-invested Enterprises, bringing foreign M&A under the record-filing system if special administrative measures and related-party M&A are not involved in the following situations: merger and acquisition of non-foreign-invested enterprises in China, or strategic investments in listed companies by foreign investors. This is a further step forward since the rollout in China of the record-filing for foreign invested enterprises not subject to the Special Administration Measures since last October.

As more industries welcome foreign investments and the record-filing further simplifies procedural requirements and improves efficiency, we can expect a swift rise in the number and volume of foreign investment in China.

Zhong Lin
zhong.lin@cn.ey.com



Colombia

Legislative changes for the implementation of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace

To implement efficiently the Final Agreement signed on 24 November 2016 by the Colombian Government with the Revolutionary Armed Forces of Colombia (FARC), about 80 legislative changes have been highlighted through the ordinary legislative process and the abbreviated legislative process, the so-called "fast track."

Changes that have a significant impact concern rural real state property, as detailed in chapter one of the Final Agreement. The latter contains a comprehensive rural reform to create a structural transformation of the countryside with a proper balance between existing forms of production and new ones in order to promote an equitable relationship between rural and urban areas.

Such changes target, among others, new processes for land recovery in favor of the nation in cases of occupied public land (baldíos in Spanish) and legal ownership cessation due to non-exploitation of land; the creation of a plan for land assignment and identifying special zones more affected by the armed conflict (known as ZOMAC), granted with tax benefits; limitations to the extension of property up to one family-run agricultural unit (UAF); and development programs with a territorial-based focus (PDET).

Within the next several months, more changes will come. They mainly relate to participation mechanisms, such as prior consultations to communities for the development of certain projects, labor law for rural workers, a multipurpose general cadastral information system and the creation of a rural jurisdiction.

All these changes create a new legal framework and a new way for doing business in Colombia, which require an in-depth analysis of new business opportunities and potential risks as well as further involvement of the business community.

Lorena Garnica de la Espriella
lorena.garnica.de.la.espriella@co.ey.com

Ximena Zuluaga
ximena.zuluaga@co.ey.com

Croatia

Special legislation enacted for the restructuring of Croatia's biggest private company

After years of rapid expansion fueled by excessive loans, the food producer and retail giant Agrokor Group has encountered substantial difficulties to meet its financial obligations and maintain its liquidity. Banks have denied further crediting, leading the largest private company in Croatia and its largest employer to practically become insolvent. This situation has created a threat to the overall Croatian economy.

To prevent Agrokor from entering into an ordinary bankruptcy procedure, the Croatian Parliament passed the Act on the Compulsory Administration Procedure in Companies of Systemic Importance for the Republic of Croatia, also known colloquially as Lex Agrokor, which entered into force on 7 April 2017.

The act provides for a special bankruptcy-like procedure, which aims at giving the Government control over the restructuring process of systemically important companies (primarily Agrokor) and to preserve the company's business. Agrokor (and all its Croatian subsidiaries) entered into the Extraordinary Management Procedure (EMP) on 10 April 2017.

Some of the most important features of the act, as applied to Agrokor, are as follows:

- Agrokor's affiliated companies outside of Croatia (e.g., in Slovenia and Serbia) are not subject to EMP.
- During the EMP, no one is allowed to initiate any bankruptcy, pre-bankruptcy, liquidation proceedings nor any litigation, enforcement proceedings, or out-of-court settlement with Agrokor with respect to relevant debts.
- Creditors may still continue doing business with Agrokor during the EMP.
- Ante Ramljak has been appointed to represent and manage Agrokor as the Extraordinary Trustee. Ramljak has hired reputable international firms to aid him in the overall restructuring process.
- Final settlement with Agrokor's creditors should be reached within a 15-month period.

The act has been prepared and adopted in a very short notice, containing many unclear provisions and raising concern among legal experts on its constitutionality and conformity with EU laws (particularly, regarding state aid). Therefore, it remains to be seen how the act will be applied and interpreted in practice.

Joško Perica
josko.perica@hr.ey.com

Filip Kraljičković
filip.kraljickovic@hr.ey.com

Denmark

Registration of beneficial owners

As of 23 May 2017, most companies are obligated to register their beneficial owners with the Danish Business Authority.

Due to a new regulation, most companies are now obligated to register information regarding their beneficial owner(s) with the Danish Business Authority. Such information is available to the public.

A beneficial owner shall be understood as the physical person(s), who, directly or indirectly, ultimately holds or controls 25% or more of the shares and/or voting rights in a company. However, control of a company also can be achieved through agreement, e.g., a shareholders agreement or authority to appoint members of management – therefore, the company must regularly assess who shall be registered as the company's beneficial owner(s).

If the beneficial owner(s) cannot be identified, or if a company does not have any beneficial owners, due to no one holding or controlling 25% or more of the share capital or voting rights, the company's registered members of management will be registered as the beneficial owners.

The company is responsible for completing the registration. For existing companies, the registration deadline is 1 December 2017. For newly established companies, the beneficial owner(s) must be registered in connection with the incorporation. Furthermore, companies have a duty to, continuously, maintain the registered information and update it as such, as soon as a beneficial owner has become known to the company. If the company fails to comply with these obligations, the company's members of management can be sanctioned by a fine.

The following Danish company types are among others subject to the registration duty:

- Public limited company
- Private limited company
- Limited partnership company
- Partnerships
- Limited partnerships
- Cooperatives (cooperative societies) and other companies and societies with limited liability
- SE company

Henrik Kany
henrik.kany@dk.ey.com

Ecuador

Possible Amendments to the Ecuadorian Corporate Law

The Superintendence of Companies filed a proposal before the Ecuadorian National Assembly whose objective is to reform the Companies Law – allowing for more dynamic and modern corporate procedures and obtaining nimbleness with the inclusion of new technologies and simpler processes.

The main amendments proposed are the following:

- An establishment of differences between dissolution types:

  a) Full right dissolution

  b) By the will of the partners

  c) By decision of the Superintendence of Companies

  d) By enforceable judgment

  These distinctions would allow in some cases that the legal representative can proceed with the liquidation without the necessity of a formal appointment as liquidator, which represents celerity in the procedures.
- An abbreviated procedure of dissolution, liquidation and direct cancellation is suggested. It will allow users whose companies do not have liabilities to dissolve, liquidate and cancel their registration in the Mercantile Register in a single act.
- The figure of the commissary in the corporations is eliminated.
- Announcements published by the press for ordinary and extraordinary meetings are removed; they must be summoned five days in advance by email to the shareholders, duly communicated by the legal representative.
- The attendance at meetings is allowed by telecommunication means, and a recording (digital file) must be added to the company's file.
- For the annual information briefing to foreign shareholders, in the case that the list of partners or shareholders shall include legal persons, the company must provide details about its members, up to the level of the individual shareholder. If in the following years the information has not changed, a sworn statement signed by the legal representative will be enough.
- For the powers granted by foreign companies to their legal representative, the parent company shall declare that the head office must respond to the obligations that its general agent contracts, noting assets that they own or will have in Ecuador and abroad.

It is important to emphasize that the aforementioned amendments are in the early phase of the approval procedure, but if ratified, they will constitute an important and expeditious improvement for corporate procedures in accordance with the global trends in this regards.

Fernanda Checa
fernanda.checa@ec.ey.com

Santiago Andrade
santiago.andrade@ec.ey.com

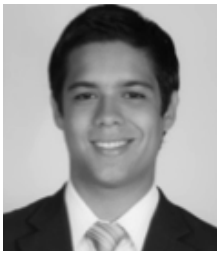
El Salvador

Government launches Virtual Platform for the Incorporation of Companies

Through the Executive Decree No. 90, in force since November 11, 2015, the Government of El Salvador created the Regulatory Improvement Body (OMR), as a part of Fomilenio II, a program that executes the donation of the US entity Millennium Challenge Corporation (MCC). The OMR is in charge of executing a strategy associated with improving the country's investment climate through inter-institutional work with certain government entities providing support so that these entities can adopt principles, ensure transparency and implement improvements to their procedures, with the purpose of reducing costs and times for users, and increasing the quality of the services provided by certain government offices.

With this purpose, on August 16 of the current year, the virtual platform **www.MiEmpresa.gob.sv** (which stands for "MyCompany" in Spanish) was launched as the single channel to create companies in El Salvador thanks to the OMR, working together with the Commercial Registry of El Salvador, under the technical and financial supervision, assisted by the United Nations Conference on Trade and Development (UNCTAD), the Government of the Grand Duchy of Luxembourg and the Bureau of International Narcotics and Law Enforcement Affairs (INL) of the US Department of State.

With this modern tool, users may request services for registration of corporations, applications for Tax Identification Numbers (NIT) and obtaining and renewing operating permits for companies, among others. The OMR is also in the process of presenting a bill of reforms to the Code of Commerce before Congress, including among said reforms the elimination of the requirement to present a public deed for the incorporation of a company, and instead, fill out a form that would replace this notarial formality.



Jose Quintanilla Cerrato
Jose.Quintanilla@sv.ey.com

Irene Arrieta
Irene.Arrieta@sv.ey.com

Finland

Updated legislation will facilitate contractual arrangements related to extensive real estate projects

The drafting of legislative changes to enable the formation of "3-D" real estate in Finland is soon in its final stages. The objective is to present the proposal to the Government this autumn and to have the proposal adopted as legislation in the near future of Parliament.

The new provisions would enable the formation of new 3-D real estate – areas below ground level and in the air – covered by a town plan. The property formation would be effected in accordance with the current procedure through parceling out or partitioning a new property from the base property, which exists at ground level. A 3-D property could be a plot of land, a common area or a redemption unit, depending on the purpose allocated to the area in the town plan.

According to the proposal, the required changes can be implemented through amendments to existing provisions. In the current real estate system, real estate is only defined two-dimensionally. After the amendments, registration of titles to areas above and below ground level, as well as the establishment of 3-D encumbrance rights, would be made possible. A 3-D property would be an independent and permanent piece of property, whereby general rules on real estate would apply. Therefore, regulations concerning the sale of real estate, property transfer tax or repossession would not be changed, but they would now also apply to 3-D real estate.

At present, complicated agreements and encumbrances are required in order to divide an area between joint owners and other stakeholders into extensive real estate projects. The expected amendments would simplify such arrangements, although agreements and encumbrance arrangements will still be required to some extent. A 3-D property would be especially useful in extensive projects with several stakeholders. Such projects could include, for example, building complexes in which there is underground parking below a commercial or residential building. As another example, a shopping mall built above a highway would be far easier to execute with 3-D property ownership, rather than with traditional contractual arrangements.

Taina Pellonmaa
taina.pellonmaa@fi.ey.com

France

New compliance obligations with the beneficial ownership register

As part of its anti-money-laundering and counterterrorism financing rules, article L561-46 of the French Financial and Monetary Code (FMC) henceforth requires legal entities registered with the Trade and Companies Registry (TCR) to declare their "beneficial owners."

All companies or economic interest groups that have their registered office in France, French branches of foreign companies, and any legal entity whose registration is provided for in the legislative or regulatory provisions are concerned.

According to article R561-1 of the FMC, the beneficial owner is defined as the individual(s) who (i) holds, directly or indirectly, over 25% of the company's capital or voting rights (ii) or exercises by any other means a power of control over the management, administration or executive bodies of the company or over the shareholders' meeting.

All entities registered with the TCR must obtain and keep accurate and up-to-date information on their beneficial owners. These entities must also file with the Clerk of the Commercial Court a document identifying the beneficial owner, duly signed and dated by the legal representative of the company and containing the nature of the control exercised by the beneficial owner(s) over the company.

For entities already registered in France as of 1 August 2017, the filing requirement must be fulfilled by 1 April 2018 at the latest. Also, an updated document will have to be filed with the Office of the Clerk of the Commercial Court within 30 days of any new fact or event requiring the amendment or filing of additional information regarding the initial filing.

Noncompliant entities could be ordered to file information on its beneficial owner with the TCR. Failure to file the document on beneficial owner(s) or filing a document containing inaccurate or incomplete information may be prosecuted for a criminal offense punishable by up to six months' imprisonment and/or a EUR 7,500 fine.

Besides the entity itself, certain authorities as referred to in articles L561-46 and R561-47 of the FMC, and any person who can show a legitimate interest and is authorized by a judge, can have access to this information.

Frédérique Desprez
frederique.desprez@ey-avocats.com

Céline Chevillon
celine.chevillon@ey-avocats.com

Georgia

Mandatory tender offer under the Law of the Republic of Georgia on Entrepreneurs

Pursuant to Article 53 of the Law of the Republic of Georgia on Entrepreneurs, if a shareholder purchases a lot of shares that results in taking control of more than half of the voting shares of a joint stock company (JSC), the shareholder is obliged to make a tender offer under the Law of Georgia on Securities Market. This means they must offer to buy the outstanding shares no later than 45 days after the above fact, or they must bring down the share quantity to less than half of the voting shares.

Pursuant to the law, the tender offer is applied only when there is an acquisition of securities of a reporting or accountable company – a company that has issued publicly held securities. The crucial question, however, is whether the mandatory tender offer applies to JSCs if they are not reporting companies.

Article 53 does not refer to the tender offer for reporting companies only; it states that this obligation is for JSCs generally. Accordingly, there may be some legal queries as to whether the mandatory offer indeed applies to the acquisition of non-reporting companies. Such queries include: what are the procedures of the mandatory tender offer, since it is not covered by the law? What is the purpose of such offer if the shares are not able to be publicly traded?

Moreover, the law on entrepreneurs does not clearly stipulate what the consequence is for breaching this obligation. Due to the law's ambiguity, a number of misunderstandings could occur if the tender offer applies to all JSCs, possibly causing unreasonable legal outcomes. Therefore, one hopes that the issue of a mandatory tender offer will be well-considered and limited to reporting and accountable JSCs.

Mariam Makishvili
mariam.makishvili@ge.ey.com

George Svanadze
george.svanadze@ge.ey.com

Germany

Capital market-oriented companies must comply with the new amendments to the German Corporate Governance Code (GCGC)

The substantive amendments to the Code in 2017 are characterized by five core themes:

Shareholder communication

For the first time, the GCGC suggested that the chairman of the supervisory board should be prepared to discuss topics relevant to the supervisory board with investors in an appropriate framework.

Compliance management

The management board must ensure appropriate measures (CMS), which are aligned to the risk profile of the company, to set out its basic principles and establish an anonymous whistleblower system.

Management board compensation

The assessment basis for variable remuneration components shall generally be based on a multi-year assessment, and shall be materially related to the future. The multi-year, variable remuneration components should not be paid out prematurely.

Appointment of supervisory board members

The supervisory board shall prepare a profile of skills and expertise for the supervisory board as a whole with regard to the required knowledge, skills and professional experience, and take this into consideration in its proposed candidates to the annual general meeting.

In the Corporate Governance report, the supervisory board shall not only report on the number of independent members representing shareholders which it deems appropriate; it shall also publish the names of these persons.

Accommodating changes to legislation and practical consequences

The GCGC Commission recommends that companies should inform shareholders about business developments in an appropriate form during the course of the year.

The extended obligations of the audit committee as a result of the EU audit reform were adopted into the GCGC.

There is no obligation to adapt the declaration of compliance to the adjustments during the year. However, they must be taken into account in the next regular update.

Daniela Mattheus
daniela.mattheus@de.ey.com

Dr. Anja Pissarczyk
anja.pissarczyk@de.ey.com

Guatemala

Apostille

As of 18 September, the globally known validation certificate commonly referred to as the apostille is effective for use in Guatemalan territory. Guatemala's participation in the Apostille Convention, signed at the Hague on 5 October 1961, represents an important step toward the efficiency of legal procedures that involve multiple jurisdictions. The Apostille Convention removes the necessity of having to certify and legalize documents through consulates and embassies, thus cutting costs, reducing time spent and ultimately ensuring the celerity of the various legal-sector processes that, lacking the approval of the apostille, required a series of steps prior to recognizing the document in Guatemalan territory. This procedure, as stated by the Bureau of Consular Affairs of the U.S. Department of State, serves to "authenticate the seals and signatures of officials on public documents such as birth certificates, notarials, court orders, or other document issued by a public authority, in order for them to be recognized in foreign countries that are parties to the Convention." The apostille was approved in Guatemala by Congress in 2016 and contained in Decree 1-2016.

Ariana Callejas
ariana.callejas.aquino@gt.ey.com

India

De minimis thresholds for the regulation of combinations

The Competition Act of 2002 provides that combinations, which include acquisitions, mergers and amalgamations, are required to be presented to the Competition Commission of India (CCI) for prior approval. The Indian Ministry of Corporate Affairs (MCA), through notification dated 4 March 2011, exempted certain target enterprises from obtaining prior approval. These enterprises (whose shares, assets, voting rights or control were being acquired) were ones that had (i) assets amounting to INR 2.5 billion or less in India or (ii) a turnover of INR 7.5 billion or less in India ("de minimis thresholds").

Through a notification dated 3 March 2016, MCA enhanced the de minimis thresholds to the asset value of INR 3.5 billion or less, and turnover value of INR 10 billion or less ("revised de minimis thresholds").

Under another notification, dated 27 March 2017, the MCA enhanced the scope of the revised de minimis thresholds to include structured transactions, such as mergers and amalgamations. Prior to the 2017 notification, the revised de minimis thresholds were interpreted to be applicable only to those combinations that involved the acquisition of control, shares, voting rights or assets of an enterprise. Other forms of combinations, such as mergers and amalgamations, were excluded from the ambit of the 2016 notification.

Furthermore, the 2017 notification provides that where a combination transaction is only for a portion of an enterprise, the value of assets or turnover of such portion and/or attributable to such portion, shall be considered for the purpose of computation of the revised de minimis thresholds. It has facilitated the ease of doing business by (i) extending the applicability of the revised de minimis thresholds to all kinds of combinations; and (ii) eliminating the requirement of large companies undertaking a combination transaction, in respect to only a portion of their enterprise, to notify and seek prior approval from the CCI.

Nishant Arora
nishant.arora@pdslegal.com

Lithuania

The requirement for registration of shares in private limited liability companies (UAB) with the depository has been abolished

The new version of the Accounting Rules for Financial Instruments and Their Circulation came into effect as of 18 September 2017. The amendment is relevant for transfers of shares that previously required:

i) Transferring the management of shareholders' personal securities accounts to the licensed account manager

ii) Registering shares of a UAB with Nasdaq CSD SE (formerly the Central Securities Depository of Lithuania).

Upon adoption of the rules, the procedure has become more simplified. No registration of UAB shares with Nasdaq CSD SE is required.

In light of the above, the transfer of UAB shares also would be simplified, applying only one mandatory requirement (transferring the management of shareholders' personal securities accounts).

The new requirements laid down in the Law on Companies

On 13 July 2017, the following amendments to the Law on Companies came into effect:

i) The minimum share capital of a public limited liability (AB) has been reduced from EUR40,000 to EUR25,000.

ii) The restriction on the maximum number of shareholders (250) in a private limited liability (UAB) has been removed.

iii) More information about a sole shareholder shall be submitted to the Legal Entities Information System (JADIS).

Granting an additional right for minority shareholders

Beginning 1 January 2018, the Law on Companies of the Republic of Lithuania would allow for minority shareholders of a private or public limited-liability company to have access to the company's commercial (industrial) secrets and other confidential information.

Current legislation allows this kind of access only for shareholders who hold or possess one-half or more shares.

Julija Lisovskaja
julija.lisovskaja@lt.ey.com

Luxembourg

The reserved alternative investment fund: a Luxembourg innovation in the alternative investment fund landscape

Reserved alternative investment funds, or RAIFs, have succeeded in the Luxembourg alternative investment fund market since their entry on 1 August 2016 as a result of the law on Reserved Alternative Investment Funds passing 23 July 2016. They are a specific type of unregulated alternative investment funds similar in characteristics to the well-known Luxembourg regulated specialized investment funds (the SIFs) and risk capital investment companies (the SICARs); the main difference is that a RAIF is not subject to any authorization or direct supervision from the Luxembourg financial supervisory authority (known as the Commission de Surveillance du Secteur Financier, or CSSF).

The main features of RAIFs are the following:

- Eligible investors: the RAIF is reserved for well-informed investors.
- No CSSF supervision: the RAIF benefits from an exemption from CSSF's authorization for its setup and for supervisions regarding ongoing amendments to offering documents during the life of the fund. It is only indirectly supervised through its AIFM.
- Legal form: the RAIF may opt for a variable capital structure and may be created in various legal forms (corporate partnerships and contractual legal forms).
- Corporate governance: since the RAIF qualifies as an alternative investment fund (AIF), it shall only be managed by an authorized alternative investment funds manager (AIFM).
- Segregation of assets: the RAIF may constitute multiple compartments (or sub-funds), with each compartment corresponding to a distinct part of the assets and liabilities of the RAIF. The rights of investors and creditors concerning a compartment or issues related to the creation, operation or liquidation of a compartment are limited to the assets of that compartment, unless a clause included in the constitutive documents of the RAIF provides otherwise.
- Flexibility with respect to the eligible assets: the RAIF law does not provide for specific investment rules or restrictions. In accordance with the risk spreading principle, a RAIF may not invest more than 30% of its assets or commitments to subscribe to securities of the same type issued by the same issuer. However, should the RAIF invest solely in risk capital, it is not subject to the diversification requirements set out above.
- Marketing: being managed by an authorized AIFM, the RAIF will also benefit from all EU AIFM's passporting advantages for the distribution of its units across Europe to professional investors.

Elisa Faraldo Talmon
elisa.faraldo-talmon@lu.ey.com

Mexico

Major foreign investment in Mexico's air transportation sector

Aiming to stimulate investments and competency in the aeronautical sector in Mexico, a reform to the Foreign Investment Law came into full force on 27 June 2017. The core of the reform stipulates that direct foreign investment may acquire up to 49% in capital stock of Mexican companies that provide regular and non-regular domestic air transportation, non-regular international air transportation in air-taxi mode, and specialized air transportation.

The President of the Economy Commission of the Chamber of Deputies pointed out that this reform was driven mainly due to the fact that air transportation is the most restricted economic activity in Mexico for attracting resources and foreign capital. The openness of the aeronautical sector to direct foreign investment offers some of the following benefits:

- A greater participation of foreign investment will improve the aeronautical sector from an operational and financial perspective. It offers a higher margin of financing to strengthen air transportation and create conditions for the integration of alliances with investors, and users may benefit through cheaper tariffs and better services.
- International alliances will be increased, and a bigger participation of national suppliers in this sector is also expected, which will strengthen market competition, provide more routes and more timely flights, and offer operative cost reductions.
- This change will benefit users by creating better service; major penalties will be imposed on companies in case of delayed flights.
- Regulatory barriers inhibiting investments or hampering sector development will be reduced.

As part of this initiative, the plenary of the Chamber of Deputies also approved other amendments to the Civil Aviation Law and to the Federal Consumer Protection Law, intended to extend the rights of airline users.

Marisol Altamirano
marisol.altamirano@mx.ey.com

Netherlands

Mandatory digital litigation introduced

A nationwide overhaul of the judiciary is being implemented in the Netherlands. Dubbed the Quality and Innovation in the Legal System Program (abbreviated to KEI in Dutch), the initiative aims to simplify and digitalize court procedures.

With KEI, digital litigation will become mandatory, except in the case of informal associations and natural persons without professional legal representation.

Changes to court procedures include:

- Courts will use a uniform "procedure initiation" document, eliminating the current distinction between summons and petitions.
- Parties upload their procedure initiations and supporting documents to the judiciary's web portal rather than faxing and/or delivering hard copies, as is still common today.
- The intervention of a bailiff in order to serve a writ of summons is no longer mandatory.
- As a general rule, court cases will consist of one written round and a single hearing.
- Judges are more closely involved from the moment a digital case file is created and are able to provide instructions to the parties and request additional information prior to the hearing.
- Audio and/or video recording will be used as official reports, in addition to written reports.

Besides increasing the total capacity of the courts, it is expected that these measures will allow for a more tailored handling of complex cases.

Digital litigation under KEI had been optional in a number of district courts from late 2016 and has become mandatory in those same courts from September 2017. The Supreme Court adopted KEI for civil cases in early 2017. Full implementation across all districts is expected within the coming two to three years.

Simon Nienhuis
simon.nienhuis@hvglaw.nl

New Zealand

New Zealand: competition law reform

The Commerce (Cartels and Other Matters) Amendment Bill came into effect in August 2017, making fundamental changes to the cartel prohibitions in New Zealand's Commerce Act 1986.

The bill extends the existing prohibition on price fixing to cover any agreement containing "cartel provisions" – that is, provisions with the purpose, effect, or likely effect, of fixing prices, restricting output or allocating markets. This aligns the New Zealand legislation more closely with the equivalent legislation in Australia.

The bill introduces new exceptions for collaborative activities, vertical supply agreements, and joint buying and promotion agreements. The act also introduces a clearance regime that allows parties to apply to the Commerce Commission to test whether a proposed collaborative activity falls within the exceptions to the cartel prohibitions before proceeding.

Agreements relating to international shipping will be brought within the scope of the Commerce Act after a two-year transition period. However, the act provides a targeted exception, which will permit carriers to provide specified international liner shipping services in cooperation with other carriers. This form of cooperation will improve services supplied to owners or consignors of goods carried at sea.

The Commerce Commission also gains new powers to deal with overseas mergers that are considered likely to have the effect of lessening competition in a New Zealand market. This includes rights to seek a court order requiring a New Zealand corporate body to cease carrying on business in New Zealand, or to dispose of shares or assets following an acquisition by an overseas person.

The act provides a nine-month grace period for existing agreements, meaning that now is a good time for clients with business interests in New Zealand to review their compliance with New Zealand competition law.

Greg France
greg.france@nz.ey.com

Luke Balmforth
luke.balmforth@nz.ey.com

Norway

Foreign creditors with security in accounts receivables belonging to Norwegian entities must comply with the Norwegian Securities Act to have a valid and legally protected security

The Norwegian Supreme Court has in a ruling of 28 June 2017 assessed the questions of judicial powers and the choice of jurisdiction regarding a bankruptcy estate of a Norwegian company claiming that the foreign creditor's lien (security) in accounts receivable i) was invalid, ii) did not have legal protection and iii) that the lien and payments made should be set aside.

The creditor answered that i) the Norwegian courts did not have judicial power, as the creditor was incorporated in Holland, hence the claim should be dismissed, and ii) since the parties had agreed upon the English law as jurisdiction, this law also had to apply for the questions of validity and legal protection for the lien.

The Supreme Court discussed the question of judicial power for Norwegian courts based on the Lugano Convention of 16 September 1988. It was agreed between the parties that the question of the lien and payments made was subject to Norwegian courts due to the exception for bankruptcies in the Lugano Convention, cf. article 1, section 2 (b). Furthermore, the court decided that the question of validity also was covered by this exemption when bankruptcy proceedings were opened in Norway. This fulfilled the necessary connection to Norway and judicial powers to Norwegian courts, even if the creditor was incorporated abroad.

Regarding the choice of jurisdiction, the court concluded that the questions of whether the lien was valid and if it had legal protection were governed by Norwegian law, because Norway is the mortgagor's domicile. In spite of that, the parties had agreed upon English law.

The ruling took only these two questions into consideration. The material questions on whether the bankruptcy estates claims will succeed will likely be tried before the Oslo District Court, nevertheless according to Norwegian law.

Arild Gjelsvik
arild.gjelsvik@no.ey.com

Poland

Dematerialization of shares

At the beginning of 2017, the Ministry of Justice launched a draft act on amending the Commercial Companies Code, introducing fundamental changes regarding joint-stock companies and limited joint-stock partnerships. The act is currently in the initial legislative phase and should come into force as of 1 July 2018. Its main goals shall remain unchanged.

The act introduces a compulsory, non-documentary form for shares of joint-stock companies and limited joint-stock partnerships. In other words, shares existing in documentary form will expire on 1 July 2018 and will be replaced by entries to a company shareholders' register. Currently, the non-documentary form applies only to company shares that are listed on the stock exchange.

The amendment is mainly to ensure that tax authorities receive information about shareholders and to counter money laundering and other frauds often associated with the holding of such shares.

Several obligations are imposed, such as asking shareholders to deposit their share certificates, possessing or creating a website for notification purposes, or having a concluding agreement on keeping a shareholders' register with an entity entitled to hold securities accounts (brokerage houses, banks, etc.).

The act increases operation costs for affected companies by introducing an obligation to use a third party to maintain a shareholders' register. Also, all entries into a shareholders register will be made by a registry keeper based on provided documents. It is assumed, however, that the keeper will not be obliged to verify the veracity of documents unless it identifies reasonable doubts. Such solutions empower the registry keepers who will de facto decide about effectiveness of share transfers, entries of new shareholders, establishment of pledges over shares, etc. They also will be responsible for payment of dividends.

Once the final version of the act is known, joint-stock companies and limited joint-stock partnerships need to take necessary steps to comply. They also need to assess risks and costs connected with the new legislation and consider if a transformation into, for example, a limited liability company, is not a solution to minimize the costs.

Jakub Organ
jakub.organ@pl.ey.com

Justyna Olszowy
justyna.olszowy@pl.ey.com

Romania

Stock options plans now permitted to all types of entities

Beginning in January 2017, the Romanian legislature made several amendments to the fiscal code regulating stock option plans (SOPs). SOPs are scarcely regulated by the capital market laws and the fiscal code. The new regime of SOPs under the fiscal code may also trigger changes in the company law to align the relevant provisions. Previously, only entities organized as joint stock companies and listed on the regulated market or on alternative trading systems were allowed to implement SOPs and to benefit from the relevant fiscal facilities. As a general rule, income derived from SOPs is not taxable, provided all legal conditions are met.

As per the 2017 amendments, SOP is defined as "a scheme initiated by a legal entity which grants to its employees and/or directors, or to those of an affiliated entity, the right to acquire – freely or at a preferential price – a determined number of equity investments issued by the respective entity." "Equity investments" are defined as "any share (acțiune/parte socială in Romanian) of a limited partnership, joint-stock company, limited liability company or any other legal entity or open investment fund." To incentivize employers, the Romanian Government broadened the category of legal entities that may implement SOPs.

The significant change is the possibility to grant SOPs to a limited liability company (SRL), one of the most used legal forms in Romania. Given the current legal regime of an SRL, the tax incentive may be left with little effect unless followed by the amendment of company law. SRLs are private companies, and changes to their shareholding structure are strictly regulated under company law.

In absence of an alignment of company law to the new provisions of the fiscal code, care should be taken when drafting the terms and conditions of the SOP and, if applicable, with the SRL's bylaws. Although SOPs now may be appealing for SRLs, the actual implementation of such schemes may be challenging and risky from a corporate perspective. However, with the appropriate legal guidance, SRLs could equally benefit from the new provisions in the fiscal code.

Raluca Silaghi
raluca.silaghi@ro.ey.com

Russia

New Regulation of Financial Transactions

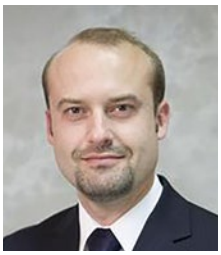
Agreements related to factoring, escrow, bank deposits, bank accounts and loans, as well as other financial transactions, get new regulations after the adoption of Federal Law No. 212-FZ on 26 July 2017, which amends parts one and two of the civil code, the law on banks and banking activity, and other acts. The new law, which goes into effect on 1 June 2018, introduces a new type of agreement – an escrow agreement. Before that, only escrow account agreements were available. Under an escrow agreement, a depositor transfers assets to an escrow agent that keeps the assets and transfers them to a beneficiary once certain conditions are met. An escrow agreement is more practice-oriented than an escrow account agreement since any person may be an escrow agent (for escrow accounts, only banks could act as agents) and any movable assets, including cash, documents and securities may be deposited (for escrow accounts, only noncash monetary funds could be deposited). Moreover, the law adds a new type of account – a public deposit account, which is held by public authorities (courts, bailiff services, notaries, etc.) and where money, collected from debtors, is deposited.

Companies disclose beneficiaries upon requests of tax and financial crimes authorities

Legal entities shall provide the Federal Tax Service and the Federal Financial Monitoring Service with all available information on their beneficiaries or on all actions taken in order to identify beneficiaries within five business days after receiving the request. Requests, replies and other correspondence may be sent in hard copies or in electronic form (see the Resolution of the Government of the Russian Federation, 31 July 2017, No. 913). The resolution goes into effect on 18 August 2017.

Amendments to shareholders' rights on access to company's documents

Federal Law No. 233-FZ – effective on 30 July 2017 – provides different access levels to a company's documents depending on the percentage of shares owned: <1%, <25% and >25%. Shareholders owning <25% of shares have to indicate a "business purpose" in order to get information. A company may turn down a request if the requested information is publicly available on the company's website or if the information relates to older periods (three years and more). Moreover, repeated requests are prohibited; for example, shareholders may not file new requests within three years of the company's response to a previous request.



Alexey A Markov
alexey.markov@ru.ey.com

Serbia

Mediation in commercial disputes

In Serbia, as an alternative to court proceedings, mediation is a peaceful way of dispute resolution, regulated by the Law on Mediation in Dispute Resolution.

Mediation procedure consists of negotiations between parties to the dispute, with the assistance of a licensed mediator, of the parties' choosing. The goal is for the parties to settle the dispute by reaching an agreement, as a result of compromise between their opposing interests.

Core principles of mediation procedure include equality, voluntarism and urgency. The procedure is confidential, which helps preserve the parties' reputation and their cooperation. Certain evidence (e.g., opinions, documents) prepared for the purpose of mediation procedure may not be used in court or other proceedings.

In practice in Serbia, court proceedings are often prolonged, expensive and inefficient, with little possibility for the parties to anticipate the outcome or to influence the solution. Main advantages of mediation compared to court proceedings include faster, cheaper and more efficient procedure, as well as avoiding detrimental effects of court proceedings on business operations. Due to its upsides, mediation is especially useful for micro, small- and medium-sized businesses.

It is possible to initiate mediation procedure either before or during court proceedings, thus interrupting the flow of statute of limitations, for a maximum of sixty days.

The agreement concluded as a result of mediation procedure may be considered as writ of execution, which is the basis for initiation of enforcement proceedings.

Having in mind the above, mediation stands out as a superior manner of commercial dispute resolution compared to court proceedings. Moreover, the Serbian Chamber of Commerce encourages use of mediation and offers counsel and assistance in initiation of mediation procedure. However, in practice, business entities have not yet recognized the advantages of this procedure, as a vast majority of disputes are still resolved in court.

Marijanti Babic
marijanti.babic@rs.ey.com

Veljko Cosovic
veljko.cosovic@rs.ey.com

Slovakia

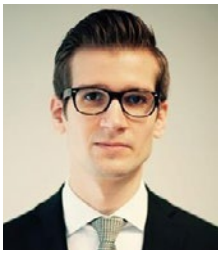
Amendment to the Slovak Commercial Code – the end of "tunneling" in Slovakia?

An important amendment to the Slovak Commercial Code was signed by the President of the Slovak Republic on 2 November 2017. The major part of the new provisions will become effective on 1 January 2018.

The aim of the amendment is to prevent fraudulent mergers of companies and to extend the liability of statutory body members and of shareholders. Its most important changes include the following:

- Companies in liquidation or in cancellation proceedings will no longer be able to participate in mergers and splits, and the surviving entity of a merger or split cannot be placed into a position of negative equity as a result. Additionally, an auditor's report for such transactions will generally be required.
- Liability of a controlling shareholder is opened to the creditors of a controlled company for damage caused by the controlled company's bankruptcy, to which the shareholder substantially contributed. An example would be participation in decision-making of the controlled company's corporate body, without which it would not have become bankrupt.
- Until now, the creation of a company's capital funds from shareholders' contributions and their use have not been properly regulated in Slovakia. The legislation proposes legal requirements for the creation of such capital funds by shareholders and for their later distribution among them.
- If members of statutory bodies or liquidators of companies breach their obligation to file a bankruptcy petition, or are not cooperative during bankruptcy or execution proceedings, they can be disqualified, by a court's decision, for three years.
- The criminal offense of unlawful liquidation is introduced. This is aimed at punishing persons involved in the transfer of ownership of a legal entity in favor of so-called straw men (e.g., homeless people), with the intention of thwarting the proper liquidation of such a legal entity.

Robert Kovacik
robert.kovacik@sk.ey.com



Adam Pichler
adam.pichler@sk.ey.com

Spain

New EU privacy regulations and particularities in Spain

The new European Union (EU) General Data Protection Regulation (GDPR) will come into force in May 2018 and has a significant impact on businesses in all industry sectors. The key changes that the GDPR entails include, among others, an increase of fines for a breach of the new regulations, up to 4% of total annual turnover, and extension of its scope to all data controllers and processors established in the EU as well as organizations that target EU citizens. The GDPR also foresees a mandatory appointment of Data Protection Officers (DPO) in certain organizations, an introduction of a "privacy by design" system and the requirement to provide evidence on compliance for the GDPR requirements.

Moreover, it should be noted that the new rights set out by the GDPR include: (i) the right to be forgotten, meaning the right to ask data controllers to erase all personal data without undue delay in certain circumstances; (ii) the right to data portability and (iii) the right to object to profiling, i.e., the right to not be subject to a decision based solely on automated processing.

Because of the GDPR, the Spanish Government has published a draft law that shall substitute for the current Spanish data protection act, based on the new GDPR and adapting it to Spanish legal order. Among its particularities, a few should be highlighted: (i) the innovative provision of excluding a deceased citizen's personal data from its scope, (ii) the regulation of particular processing of data as professional data, marketing, whistle-blowing and credit information, and (iii) a listing of sectors that are mandated to appoint a data protection officer.

Rodrigo Gonzalez Ruiz
rodrigo.gonzalezruiz@es.ey.com

UK

The UK's new corporate criminal offense of facilitating tax evasion

The UK's new corporate criminal offense of facilitating tax evasion (CCO) came into force on 30 September 2017. Companies and partnerships commit the new CCO when they fail to prevent the facilitation of tax evasion by an "associated person" (i.e., employees or agents of the company as well as any persons who perform services for or on behalf of the company).

Three stages need to be satisfied for the CCO to be committed. First, there must be criminal tax evasion by a taxpayer. Second, there must be criminal facilitation of the tax evasion by an associated person of the company. Third, the company must have failed to prevent the associated person from committing the criminal facilitation act. As the CCO is a strict liability offense, the company will be treated as failing to prevent the criminal facilitation act unless it can show that, when the offense was committed, it had in place "reasonable prevention procedures."

The CCO applies regardless of whether or not the evaded tax is a UK or foreign tax. In the case of foreign tax, two additional requirements must be satisfied. First, the company must have a sufficient connection to the UK and second, there must be "dual criminality" (i.e., where the foreign jurisdiction has an equivalent tax evasion offense at the taxpayer level (the actions of the taxpayer would constitute a crime if committed in the UK) and an equivalent offense covering the associated person's criminal act of facilitation (the actions of the associated person would constitute a crime had they taken place in the UK).

A company guilty of the CCO is subject to a criminal conviction and an unlimited fine. In certain situations, it also may be found guilty of money-laundering offenses. Any company convicted under the CCO is likely to incur significant reputational damage.

To avoid a CCO liability, companies must put in place appropriate prevention procedures. The UK tax authority has published preliminary guidance in this respect. Such guidance is intended to be of general application. Companies within the scope of the new CCO will need to create bespoke prevention procedures, addressing the company's particular circumstances and risks arising from them.

James Hutchinson
jhutchinson1@uk.ey.com

Conor Brindley
conor.brindley@uk.ey.com

Venezuela

Foreign Exchange agreement

In Venezuela today, one of the main issues companies must take into consideration in order to engage in any business in the country is an exchange control regime put forth for the past fifteen years.

On January 2003, the late President Chávez enforced a strict exchange control regime that limits the purchase of foreign currency in the country, whereby any company wanting to purchase foreign currency has the obligation to apply for an authorization issued by the Venezuelan Central Bank and participate by using the official systems created.

The Exchange Agreement No. 38 issued in May 2017 further develops Exchange Agreement No. 35. It establishes that foreign currency auctions through the Floating Supplementary Market Exchange Rate (DICOM) system will be conducted with positions held by individuals and private companies wishing to submit supply or demand bids and positions before the Central Bank of Venezuela. Bids are relayed to a managed floating system with monitored fluctuating bands, where the value to be paid by each bidder will equal its offer, regardless of the resulting exchange rate. Auction will consist of ordinary and contingency auctions. The latter will occur when an ordinary auction for the demanded currency, due to excess supply and demand, is not awarded below the top price or above the bottom price of the defined band. The exchange rate will fluctuate between the upper and lower limit of the monitored band.

Individuals and private companies wishing to purchase or sell foreign currency on DICOM will submit their positions directly on dicom.gob.ve, stating the origin and destination of funds, and guaranteeing a counter-item in accounts held at the authorized financial institutions. The DICOM system will be managed, regulated and run by the Foreign Currency Auctions Committee, which will be incorporated as provided for in this exchange agreement.

If foreign currency not acquired under this agreement is used for imports of raw material, supplies, semi-finished and finished goods, or for their production, it will be reported to the Foreign Currency Auctions Committee for accounting and recording purposes, thus not being subject to the bid process. The exchange rate to be considered for the cost structure determination will be set by DICOM on the date of system registration. The committee then will issue a certificate on these effects.

Adolfo E Nouel N
adolfo.nouel@ve.ey.com

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Contacts

Corporate and Commercial Law Services – Lead contacts

Albania
Jona Bica
jona.bica@al.ey.com
+355 4241 9575

Algeria
Vincent Lunel
vincent.lunel@ey-avocats.com
+33 1 55 61 10 19

Argentina
Jorge Garnier
jorge.garnier@ar.ey.com
+54 11 4515 2634

Armenia
Levon Gevorgyan
levon.gevorgyan@am.ey.com
+374 10 500 790

Australia
Doug Robertson
doug.robertson@au.ey.com
+61 39 288 8376

Austria
Helen Pelzmann
helen.pelzmann@eylaw.at
+43 1 26 095 2145

Azerbaijan
Arzu Hajiyeva
arzu.hajiyeva@az.ey.com
+99 41 2490 7020

Belarus
Alexey A. Markov
alexey.markov@ru.ey.com
+7 495 641 2965

Belgium
Peter Suykens
peter.suykens@hvglaw.be
+32 2 774 9834

Brazil
Graziela Baffa
graziela.g.baffa@br.ey.com
+55 11 2573 3447

Bulgaria
Boris Smolyanov
boris.smolyanov@bg.ey.com
+359 2817 7100

Canada
Tony Kramreither
tony.kramreither@ca.ey.com
+1 41 6943 2188

Chile
Paola Bruzzone Goldsmith
paola.bruzzone@cl.ey.com
+56 2 676 1832

China[1]
Zhong Lin
zlin@chenandco.com
+86 21 2228 8358

Colombia
Ximena Zuluaga
ximena.zuluaga@co.ey.com
+571 484 71 70

Congo[2]
Crespin Simedo
crespin.simedo@cg.ey.com
+22 13 3849 2222

Costa Rica
Juvenal Sánchez
juvenal.r.sanchez.zuniga@ey.com
+50 64 031 0360

Croatia
Joško Perica
josko.perica@hr.ey.com
+385 1 5800 949

Cyprus
Charalambos Prountzos
cprountzos@pplegal.com.cy
+357 22 669

Czech Republic
Daniel Weinhold
daniel.weinhold@weinholdlegal.com
+420 225 385 336

Denmark
Henrik Kany
henrik.kany@dk.ey.com
+45 2529 3310

Ecuador
Fernanda Checa
fernanda.checa@ec.ey.com
+59 3225 5555 3109

El Salvador
Irene Arrieta
irene.t.arrieta.de.diaz@ey.com
+50 3224 87000

Equatorial Guinea
Alexis Moutome
alexis.moutome@gq.ey.com
+240 09 67 19

Estonia
Ranno Tingas
ranno.tingas@ee.ey.com
+372 611 4578

Finland
Taina Pellonmaa
taina.pellonmaa@fi.ey.com
+358 5054 22900

France
Frederique Desprez
frederique.desprez@ey-avocats.com
+33 1556 11973

Gabon[3]
Fatima-Kassory Bangoura
fatima-kassory.bangoura@ga.ey.com
+24 10 530 1020

Georgia
George Svanadze
george.svanadze@ge.ey.com
+995 32 215 88 11

Germany
Christian Bosse
christian.f.bosse@de.ey.com
+49 71 1988 125772

Greece
Christina Koliatsi
christina.n.koliatsi@gr.ey.com
+30 210 288 6509

Guatemala
Enrique Möller
enrique.moeller.sanchez@ey.com
+502 2268 2616

Hong Kong
Kelly Ho
kelly.ho@laa.hk
+852 26293201

Hungary
Peter Vaszari
peter.vaszari@hu.ey.com
+36 1451 8616

Iceland
Símon Þór Jónsson
simon.jonsson@is.ey.com
+354 5952500

India
Probal Bhaduri
probal.bhaduri@pdslegal.com
+91 11 6623 3270

Italy
Matteo Zapelli
matteo.zapelli@it.ey.com
+39 028 514 3852

Ivory Coast[4]
Eric Nguessan
eric.nguessan@ci.ey.com
+225 20 30 60 50

Japan
Kotaro Okamoto
kotaro.okamoto@jp.ey.com
+81 3350 91669

Kazakhstan
Borys Lobovyk
borys.lobovyk@kz.ey.com
+7 727 258 5960 Ext: 1250

Latvia
Liene Cakare
liene.cakare@lv.ey.com
+371 67043606

Lithuania
Julija Lisovskaja
julija.lisovskaja@lt.ey.com
+37 05 219 9895

Luxembourg
Stephen D'Errico
stephen.derrico@lu.ey.com
+352 42 124 7188

Macedonia
Aleksandar Ickovski
aleksandar.ickovski@mk.ey.com
+389 23113310

Mexico
Francisco Forastieri
francisco.forastieri@mx.ey.com
+52 55 1101 7293

Netherlands
Rutger Lambriex
rutger.lambriex@hvglaw.nl
+31 8840 70425

New Zealand
Christie Hall
christie.hall@nz.ey.com
+64 9 348 8098

Nigaragua
Santiago Alvira
santiago.alvira@ni.ey.com
+505 2253 8438

Norway
Jane Wesenberg
jane.wesenberg@no.ey.com
+47 2400 2391

Panama
Luis E Ocando
luis.ocando@pa.ey.com
+507 2080 144

Peru
Marcial Garcia
marcial.garcia@pe.ey.com
+51 1 411 4424

Poland
Zuzanna Zakrzewska
zuzanna.zakrzewska@pl.ey.com
+48 225 577 816

Portugal
Ricardo Reigada Pereira
ricardo.pereira@rrp.pt
+351 217 653 860

Romania
Dragos Radu
dragos.radu@ro.ey.com
+40 2140 24060

Russian Federation
Alexey A. Markov
alexey.markov@ru.ey.com
+7 495 641 2965

Senegal[5]
Badara Niang
badara.niang@gn.ey.com
+221 338 49 22 17

Serbia
Marijanti Babic
marijanti.babic.rs.ey.com
+381 11 2095 752

Singapore
Mark Wong
mark.wong@pkw.com.sg
+65 6827 5555

Slovakia
Robert Kovacik
robert.kovacik@sk.ey.com
+421 3333 9262

Slovenia
Marc van Rijnsoever
marc.van.rijnsoever@si.ey.com
+386 1 583 1874

South Korea
Kee Woong Park
kwpark@apexlaw.co.kr
+82 2201 80806

Spain
Alfonso Garcia Fuster
alfonso.garciafuster@es.ey.com
+34 9157 25194

Sweden
Paula Hogéus
paula.hogeus@law.se.ey.com
+46 8 5 2058 695

Switzerland
Maja Krapf
maja.krapf@ch.ey.com
+41 58 286 4328

Taiwan
Helen Fang
helen.fang@tw.ey.com
+886 2757 8888

Turkey
Mehmet Kucukkaya
mehmet.kucukkaya@tr.ey.com
+90 212 368 5724

UAE
Alison Hubbard
alison.hubbard@ae.ey.com
+971 4 3324000

UK
Sarah Holmes
sholmes3@uk.ey.com
+44 20 7951 7995

Ukraine
Albert Sych
albert.sych@ua.ey.com
+380 44 499 2011

Venezuela
Saul Medina
saul.medina@ve.ey.com
+58 212 9056 716

Vietnam
Trang Thuc-Minh Ha
trang.b.minh.ha@vn.ey.com
+84 8 3824 5252 – 8348

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[1] Mainland China.
[2] Including the Democratic Republic of Congo.
[3] Including Cameroon, Central African Republic, Chad and Guinea Conakry.
[4] Including Benin, Burkina Faso and Niger.
[5] Including Mali.

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