Beauty is in the eye of the beholder. Every individual, every culture, every era has its own conception of Beauty. At the same time, Beauty is universal and timeless. It can be found in the arts, in nature, in other persons and in all forms of human endeavours – including the practice of law. In their work, lawyers must perceive, analyse and present their insights in a process that allows “beautiful” lawyering.

Accordingly, Beauty is the theme of the 2015 edition of roadmap, an annual Schoenherr publication presenting overviews from our lawyers on recent and upcoming legal developments in our core practice areas, as well as critical insights and analyses of these developments.

The concept of Beauty also plays a central role in the artwork of Leo Zogmayer, the Austrian artist whose designs, objects and photographs provide the artistic framework for roadmap15.
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Leo Zogmeyer

Concept

Since Schoenherr’s Roadmap series was launched in 2007, every annual edition has included an artist’s contribution. Leo Zogmeyer has made all of the Roadmap’s 2015 edition his very own specific art project, without limiting himself only to certain assigned pages.

The articles of the various authors have to fit in a special classification system that has been developed by Zogmeyer for Roadmap15. In essence, this system consists of a visual classification based on groups of black and white photographs of Zogmeyer’s art studio, computer-based designs and drawings of his works, as well as a list of his works. Monochromatic colors – which Zogmeyer uses for his glass paintings and wood objects – accompany and mark the individual fragments of Barbara Steiner’s text. Zogmeyer worked together with designer Alfredo Suchomel in implementing the artist’s concept for Roadmap15.

Classification system

a) Animals belonging to the emperor, b) embalmed animals, c) trained animals, d) sucking pigs, e) serpents, f) mythical creatures, g) stray dogs, h) animals belonging in this group, i) those that tremble as if they were mad, j) animals drawn with a very fine camel hair paintbrush, k) etc., l) animals that have shattered the water jug and/or animals that, from afar, resemble flies.

This fictitious Chinese encyclopedia dedicated to the classification of animals may be found in the scriptures of the Argentine writer Jorge Luis Borges, as well as in the scriptures of the French philosopher Michel Foucault. Certain classifications seem unusual as they are based on unfamiliar criteria, while familiar classifications are very soon perceived as being self-evident. What interests Leo Zogmeyer about uncommon classification systems is the fact that they can amaze people or make them laugh. In doing so, they can call into question one’s self-limitations all too quickly muddying the simple act of seeing/looking, which – contrary to “purposive looking” – does not have “knowing” as its primary goal. Works of art can raise awareness of “seeing/looking” and in doing so also encourage appreciation of “beauty” and/or cause the conventions of perception to be placed under close scrutiny. They show the possibility of simply seeing/looking, a way of seeing/looking that raises the question “what if we could always look at things in this manner?” To see the “real” world or, to quote Zogmeyer’s painting, “THE WORLD AS IT IS, appears to be an act that is profoundly utopian and yet at the same time is expressed in a very banal way – namely, in the sense of continuously striving to overcome a perception that is shaped by concepts and to free oneself from prejudices, patterns and self-limitations. To see the world as it is has been the driving force for many artists and philosophers for decades. However, the possibility or impossibility of doing so has been heavily debated not only in the neurosciences, in psychology and in cultural studies, but also in the field of art itself.

Beauty

Leo Zogmeyer interprets beauty in his own way: “schönn” (beautiful) is based on “schauen” (to see/to look), and indicates seeing/looking without assessing: every- thing (visible) is beautiful. In these lines, beauty is linked with perception, entirely in keeping with the Greek sense of the word Aesthesis = perception. Linked as it is to sensual perception and feelings, beauty may thus be found not only in arts, but everywhere. With this point of view, Zogmeyer vehemently disassociates himself from limiting the concept of beauty solely to art. Art may very well make people sensitive to beauty; however, the artist is concerned to clarify that beauty should not bind all attention to itself. Facing the painting “beauty”, a large-scale reverse glass painting, in different positions helps to make this clear: This fragile glass painting – which is perhaps as fragile as the realization of beauty itself – stands or lies on the ground and/or leans against a wall. Set up in front of a glass wall, it enables a look at another artist’s in-situ work behind it. In another installation, the glass painting is leant up next to a white pedestal, holding another one of Zogmeyer’s objects named “layering” – which is indeed a “layering” of white veneered pressboards. While the “lay- ering, positioned on the pedestal, seems to be “elevated” to an extent, leaving its profane origin behind, beauty remains on the ground. In a third instance, beauty is lying on the magnificent floor of a city palace from the 17th Century – as if simply forgotten. In all of the three examples described above, the painting enters into a relationship with its surroundings – with the work of another artist, with the carefully layered pressboards, and/or with the majestic palace. Beauty is reflected in Zogmeyer’s objects, in the works of others, in space and in materials that so far may not have been regarded on the basis of aesthetic criteria. Beauty “flashes” like an elusive added value of the perceivable reality (Zogmeyer). This requires engaging oneself, letting go, letting things happen, seeing/looking and being astonished.

Letting happen

The Chinese languages knows the term "东西" (dong xi), a dissyllabic term for thing / object / matter. Dong xi consists of two parts, the first part 就 (dong) means "to do" or "to make" and the second part xi is a generic term for thing / object / matter. Dong xi of the Chinese term 東西 (dong xi), a disyllabic term for thing / object / matter. Dong xi consists of two parts, the first part "東" (dong) means "east" and the second part "西" (xi) means "west".

The term thus links opposites within one term, making the individual character
Ambiguous
In his works, Leo Zogmayer intentionally creates gaps when it comes to the attribution of meaning – for example, through syllable division (FOR GET) or inherent inconsistencies – such as through the mixture of contrasting terms (CHANGE/NO CHANGE). This approach helps create a space beyond the scope of discursive acquisition – or even more precisely, beyond the scope of conceptual defamiliarization. One could, accordingly, say that Zogmayer is applying linguistic means to ‘cut out’ his ‘artisticism’ regarding the visualization of his art. This may well explain his appreciation of Heidegger, “to unlock language with linguistic means.” However, it is not only at a linguistic level that these gaps and contradictions may be found: The artist also links words/word order/sentences and materials in a changed relationship, for example in a voluminous aluminum cylinder that reads “nothing is visible” on one side and “nothing is invisible” on the other. The titles of his exhibitions are also consciously used to create divergences between word/painting/object: In the exhibition “The word is in order”, Zogmayer showed an arrangement of pictorial objects performing various variations of classifications. Moreover, the titles of exhibitions also appear as the titles for art works, and for Zogmayer’s own texts – not least for the reason that this enables the artist to avoid a clear attribution of titles and art works for purposes of partial realization and use of their works for purposes that might contradict the artist’s own intentions. However, opportunities also arise to redefine and sound out the relationship between art and the economy has itself become an issue, drawing a line between artistic and economic interests has become increasingly difficult. Nowadays, artists are more and more confronted with questions related to the appropriation and use of their works for purposes that might contradict the artists’ own intentions. Economy
The relationship between art and the economy is ever changing. In modern times, this relation was, at least in the western countries, initially characterized by distrust, even hostility. The claim that art exists in a space unrelated to economic considerations motivated the work of many artists over the course of decades. Ever since the economic potential of art and/or of alliances between art and the economy has itself become an issue, drawing a line between artistic and economic interests has become increasingly difficult. Nowadays, artists are more and more confronted with questions related to the appropriation and use of their works for purposes that might contradict the artists’ own intentions. However, opportunities also arise to redefine and sound out the relationship between art and the economy with the aim of encouraging mutual enrichment. Leo Zogmayer’s contribution to the Roadmap should be viewed as an attempt to introduce artistic considerations into the economic sphere and in related fields. Hence when it comes to sharpening one’s perception in general, becoming more open towards beauty in the sense of a “hardly tangible added value of the perceivable reality” (Zogmayer), this also includes the awareness of the ever changing relationship between art and the economy.

Steiner
With her text, Barbara Steiner responded directly to the artist’s concept. Her contribution is an associative sequence of fragments linked to each other by key words. These terms, which are significant for Zogmayer’s work, make it possible to approach the artist’s oeuvre without any codifications. Barbara Steiner, who was born in Dröflis, Lower Austria in 1946, works as a freelance curator and author in a variety of settings; in 2014 alone, she was guest curator at the Cornerhouse in Manchester, UK, and at the Fundació Antoni Tàpies in Barcelona, Spain. She is associated with various art institutions, including the Albertinum in Dresden, the Museum für Moderne Kunst in Frankfurt, and the Kunsthalle in Mannheim. From 2000 until 2008, she was the director of the董事会 Foundation for Contemporary Art in Leipzig. Apart from monographs of artists, Steiner has also published various thematic books on museums, the relationship between architecture, design, art, between public and private, as well as between art and economy.
Secured Transactions in Bosnia and Herzegovina: Challenges in Practice

Milenko Mladić | Petar Kojdić

A new secured transactions platform in Bosnia and Herzegovina has created a number of issues over the years, culminating with problems concerning the pledges made by foreigners.

Introducing the changes

In 2004, a radical new secured transactions system on the pledging of movable assets was introduced into Bosnia and Herzegovina legislation. In the traditionally civil law country, an interesting legal experiment has been unfolding ever since: the 2004 Framework Law on Pledge (Pledge Act) is heavily based on and modelled after the US UCC Article 9 notification system for perfecting security interests.

Since its introduction, the new pledge registration platform and its legal background have been met with a lack of understanding by local legal professionals and their clients. Lawyers with a civil law background have often shown little confidence in the pledge perfection system, which does not feature state authority reviewing all underlying documents and approving the registrations. Coupled with certain software platform and legislation deficiencies, this has led to many issues in the practical application of the new platform, discussed below.

Main characteristics

For a pledge to be enforceable, the Pledge Act requires similar thresholds required for attachment and perfection under UCC Article 9: (i) the value must be given for securing the debt provisions is possible, although not sufficiently tested in practice.

Software platform deficiencies

One of the main practical issues potential creditors face in Bosnia and Herzegovina is the very limited options for searching the Pledge Register database. Existing pledges can be identified based on only three criteria: (i) the pledge registration number, (ii) the machinery serial number, if the collateral has one and (iii) the tax identification number of the debtor. The lack of a search option by keywords is often felt, especially in case of share pledges and other commercial transactions.

Further, although foreign pledgors have been regularly registered with the Pledge Registry since 2004, this option was eliminated in 2013 when Pledge Registry software was overhauled.

At the moment, it does not technically allow pledge registration where the pledgor is a foreign entity – it is impossible to enter any country of the pledgor’s origin other than Bosnia and Herzegovina. Foreign natural or legal persons may own and freely dispose of their assets in Bosnia and Herzegovina, and thus may pledge them in the same manner as Bosnian persons. But due to the technical features of the Pledge Registry software, and possibly a wrong interpretation of the relevant legal framework by the Pledge Registry, pledge registrations where the pledgor is a foreign entity are not feasible in Bosnia and Herzegovina.

Floating lien type of collateral

The regulations allow general assets (opća imovina) to be pledged. General assets are defined as all movable assets owned by the pledgor at the time of signing the pledge agreement and all after-acquired movable assets during the pledge duration. Besides the commercial risk that the pledged general assets may deplete over time (which may be mitigated via collateral management arrangements), there is also a legal risk that the enforcement on the general assets may be protracted or even impossible due to a lack of sufficient practice with this type of “floating” collateral.

Joint creditor as security agent

Bosnia and Herzegovina law does not explicitly recognise the concept of a security agent. As an alternative, joint creditorship (kolidarno posjedovanje) can be devised under the general civil law framework (the Obligations Act) so that the debtor may discharge its obligations by paying to one selected joint creditor.

Turkey: Way Out of Capital Markets Legislation – Squeeze Out and Delisting of Public Companies in a Nutshell

Turuncuk Erdağ

Upon enactment of the new Capital Markets Law (CML), the Capital Markets Board (CMB) has issued new communications providing an insight into the implementation of the new capital market, including exit and delisting principles in 2014.

A change: Squeeze-out right

The squeeze-out right of a majority shareholder was initially introduced by the Turkish Commercial Code (TCC), enacted in 2012. But Article 29 of the CML explicitly omits the application of the TCC to public companies. The CMB issued the squeeze-out communication (Communicate) on February 2014, effective as of 1 July 2014, regulating principles and procedures for exercising squeeze-out right.

Triggering event and process

Either as a result of a mandatory tender offer or through other means (eg, acting in concert, voluntary tender offer), the shareholders may be deprived of the right to sell their shares in the company in the same manner as a minority shareholder.

Under the Communicate, to exercise the squeeze-out right, the majority shareholder should apply to the company within three months upon reaching the 95% voting right threshold. The squeeze-out right lapses if not exercised within three months upon reaching the 95% threshold. Upon application, the board of directors (Boards) of the public company should assess whether (i) the shareholding threshold is met and (ii) the purchase price has been calculated correctly. Upon such assessment, the Board should make a simultaneous application to the CMB and the Istanbul Stock Exchange (ISE). Upon approval of the CMB, the squeeze-out price must be paid to the company's account.

Within six business days upon approval of the CMB, the squeeze-out must be registered in the relevant trade regis-
Assignment of Receivables under the New Czech Civil Code

The New Czech Civil Code has introduced several changes to the assignment of receivables and new instruments for such purposes.

Assignment of receivable

The New Civil Code (Act No. 89/2012 Coll., civil code, as amended; the NCC), unlike the previous one (Act No. 40/1964 Coll., civil code, as amended; the CC), does not require an agreement on the assignment of receivables to be made in writing. It can be made in oral form or implicitly. However, for legal certainty and for better proof of assignment, the written form is recommended.

The assignment agreement must also identify the transferred receivables in a sufficiently specific manner.

Rights attached to the receivable

By assignment of debt, the assignee acquires also appendances to the debt (eg. interest, default interest and costs of enforcement of the debt) and other rights connected to the debt (including security).

Calculation of the squeeze-out price

The calculation of the squeeze-out price is regulated in the Material Transactions Communique. The calculation method differs between listed and non-listed companies.

For listed companies, the squeeze-out price must be equal to the arithmetic average of the weighted average trading prices of the company’s shares within the 30-day period before the public disclosure of reaching/exceeding the 95% threshold by the controlling shareholder. In practice, there have been discussions around the pricing methodology and its being unfair and causing information irregularity between the controlling shareholder and the minority. The CMB therefore announced that the below amendments are being considered for the pricing methodology for squeeze-out and delisting:

“The squeeze out and delisting price will be the highest of the arithmetic average of the weighted average of the company’s shares within a 30-day period, a 180-day period and a one-year period before the public disclosure of reaching/exceeding the 95% threshold by the controlling shareholder and the company’s share valuation determined in an appraisal report to be prepared or in any valuation made on the shares of the company (through acquisition, or merger etc.) during the last year.”

The pricing methodology will likely change soon.

Global cession of receivables

The NCC, unlike the CC, explicitly allows the global cession of a set of receivables. Under this instrument, all receivables, present or future, may be transferred if the group of receivables is sufficiently specified; that is, if the receivables are of a certain type, arise in a specific period of time and are under the same legal title or another sufficient specification of the receivables.

Assignment of contract

A change is that the NCC introduces an instrument consisting of the assignment of a contract or its part. This was not explicitly allowed under the CC, and previously parties generally assigned only rights and transferred the debts from an existing contract. The assignment of a contract is permissible if the nature of the contract does not exclude this, if the other party agrees (also prior approval in the respective contract is allowed) and it was not fully fulfilled.

As of the effectiveness of the assignment, the assignor is released from its obligations to the extent it was assigned. The ceded party might, however, preclude this through a declaration towards the assignor that it refuses the release. Such declaration must be made within 15 days from when the ceded party had or should have had knowledge that the assignee did not fulfil its obligation.

If the ceded party is late with this declaration, it does not change its effect: The ceded party must reimburse any damage from the delay. This might have huge consequences as the assignor will have no certainty that it is released prior to the full fulfillment of the contract. We are of the view that the original parties might agree on a waiver of such declaration directly in a contract.

If the ceded party is late with this declaration, it does not change its effect: The ceded party must reimburse any damage from the delay.

Public companies intending to get off the CMB’s radar and capital markets legislation have started to pursue voluntary tender offers followed by squeeze-out and delisting. Although the communiqué provides detailed provisions on squeeze-out rights, the CMB’s decisions on the calculation of the squeeze-out price will shed light on the process.
How does Hungary Deal with Non-Performing FX-Denominated Loans?

Since 2010, the Hungarian government has aimed at the extinction of FX-denominated loans.

The Situation in Hungary

For the past few years, Hungarian banks have struggled with rising non-performing loan (NPL) rates in both the retail and commercial sectors. The effect of the crisis on the NPL rates was exaggerated by the fact that FX-denominated loans became extremely hard to service for Hungarian families and SMEs when the crisis hit the Hungarian economy and the exchange rates of CHF, EUR and JPY launched skyward. In turn, the Hungarian government launched different programmes to make FX-denominated loans go extinct.

Past efforts

The mandatory prepayment programme, launched in 2011, provided an opportunity to debtors to entirely prepay FX-denominated housing loans in HUF at a preferential exchange rate if the exchange rate at disbursement was lower than the preferential rate. Banks were obliged to accept such prepayment. Another programme running in 2012 aimed to fix the exchange rates for a certain period, thus eliminating the fluctuation risk. The difference between the actual exchange rate and the exchange rate at disbursement was credited against a collection account in HUF. NPLs when the crisis hit the Hungarian economy and the exchange rates of CHF, EUR and JPY launched skyward. In turn, the Hungarian government launched different programmes to make FX-denominated loans go extinct.

Current legislation

Background

In recent years, debtors of FX-denominated loans have initiated numerous lawsuits claiming that the application of the spread (ie, the application of the buying rate to the actual repayments) became very popular during the pre-crisis area. Such FX-denominated loans became extremely hard to service for Hungarian families and SMEs when the crisis hit the Hungarian economy and the exchange rates of CHF, EUR and JPY launched skyward. In turn, the Hungarian government launched different programmes to make FX-denominated loans go extinct.

Past efforts

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Settlement

The overpayment of the debtors, either due to the spread or the unilateral amendment, must be set off against the capital of their debts. Because of the reduced historical amount of the capital, the paid interests must be recalculated and the actually paid amounts. The Act also presumes that all past unilateral amendments are unfair and null and void. The presumption may be contested by the bank at court. So far, no contest has been successful.

Future plans

The Hungarian National Bank announced this summer that it wishes to create a “bad bank”. The bad bank would purchase only corporate NPLs from the banks at a not-yet-defined discount rate. The funding of the bad bank has remained unclear. It is expected that it will be state owned.

Beside the bad bank concept, the Hungarian government, unsatisfied with the results of the efforts aiming at the extinction of FX-denominated loans, announced that the next step will be the mandatory conversion of FX-denominated loans to HUF loans at a pre-fixed rate. The details are yet to be announced, but rumour has it that the conversion will not be beneficial to the financial sector – again.
Compliance presents many challenges for organisations. So far, compliance lacked of global standards that provide guidance for Compliance Management Systems (CMS). Organisations are thus having a hard time recognising those compliance requirements that are necessary, appropriate and capable of serving as indicators of a functioning CMS. It is therefore highly welcomed that the ISO is currently working on a global standard for CMS.

The participating ISO members had the chance to comment and vote on the draft of ISO 19600 until April 2014; they endorsed the draft unanimously. In July 2014, the competent committee (ISO/PC 271) met in Vienna to review the comments, vote and issue a final draft based on their review. ISO 19600 should be published by the end of 2014 or early 2015.

ISO 19600 (the current draft is available at: www.iso.org/iso/catalogue_detail?csnumber=62345) is designed as a flexible guideline without any normative references. It provides recommendations based on the principles of good governance, flexibility, proportionality, transparency and sustainability. It is open for all kind of organisations. Especially small and medium-sized companies benefit from this approach, as they can implement the guideline recommendations according to the size and maturity of their company.

The ISO 19600 guideline also follows a risk-based approach. After establishing the context in which it operates, a CMS must perform a compliance risk assessment. The identified risks (compliance obligations) are the basis for establishing and implementing controls. The performance of those risk treatment measures must then be evaluated and improved upon, as well as communicated both internally and externally.

The structure of ISO 19600 focuses on the different stages of CMS integration, from development to implementation, evaluation, maintenance, and continual improvement. After determining the objectives and the scope of the CMS, the guideline recommends the appropriate measures in accordance with stakeholder interests and good governance.

The guideline emphasises the different roles, responsibilities and authorities within the organisation, and focuses on the establishment of a compliance policy. By doing so, it aims to create an organisational culture in which compliance becomes the general rule – a compliance culture, so to speak.

The ISO standard also recommends measures for establishing controls and procedures to achieve the desired behaviour. The recommended measures should be accompanied by training, internal and external communication, documented information and the top management’s encouraging behaviour. Finally, ISO 19600 pays attention to performance evaluation and improvement upon non-compliance, especially in terms of the escalation process. The recommended measures for non-compliance (react, evaluate, implement any action needed, review effectiveness, make changes if necessary) do a good job of illustrating the principle of continual improvement.

Comparison to ONR 192050

In 2013, the Austrian Standards Institute released its own standard for CMS, called ONR 192050. The ONR specifies minimum standards for the development, introduction and maintenance of a CMS. Since it sets up requirements for a certification, the ONR standard is far less detailed than the ISO standard. Its scope is also narrower than ISO 19600. ONR 192050 is applicable only to the observance of statutory obligations binding on the organisation, whereas ISO 19600 applies to all requirements an organisation must or chooses to comply with.

Both standards are applicable to organisations of all types and sizes. Therefore, they also account for the organisation’s risk and situation. Still, it is striking that the Austrian ONR focuses mostly on the role of the organisation’s top management and compliance officer (whose tasks can be performed by any organisation member), while the ISO guideline aims to create a compliance culture within the organisation by establishing a compliance policy and including all employees.

Other than that, ONR 192050 sets out very basic requirements for assessing, documenting, monitoring, and handling compliance risks, such as “A procedure shall be defined for following up on breaches of regulations detected”. ISO 19600, on the other hand, recommends for such procedure that “(t)he process should specify to whom, how and when issues are to be reported and the timelines for internal and external reporting.”

The combination of ONR 192050 and ISO 19600 works well. Still, the ONR should be adapted according to the ISO, especially with regard to its scope and the definition of terms, so that the national standard can provide requirements for a certification, while the international standard can provide guidance by recommendations. But it is important to emphasise that a CMS implemented according to ONR 192050 does not have to be changed to comply with ISO 19600. There is no conflict and, even if there was, the ISO standard would be compatible with other compliance measures, as long as they lead to the same result.

Comment on ISO 19600

The flexible approach of ISO 19600 is noteworthy. Every organisation can decide independently to what extent the implementation is still deemed proportional (in view of the costs and benefits). The structure combined with the overwhelming principle of continual improvement enables organisations to act in accordance with ISO 19600 in every stage of their CMS development and to improve upon it.

A global standard will add comparability between compliance systems in different jurisdictions and industries. The guideline can be used globally due to its broad scope and its character as a recommendation-only standard. In addition, the guideline brings with it no risk of a conflict with national laws. But it is still unclear how organisations are supposed to prove their implementation of the ISO recommendations to others. Currently, there is no intention of establishing a certification according to ISO 19600 because there are no the provided minimum standards. This is the downside of a flexible guideline that tries to cover a broad spectrum. There are also national standards for CMS, such as the Austrian ONR 192050, which provide certification if their minimum standards are met.

These national standards are not yet harmonised with ISO 19600. So it can happen that a Compliance Officer is confronted with conflicting provisions, especially since the definitions are inconsistent. This is not harmful per se because ISO 19600 is compatible with other compliance measures, but it still counteracts the aspiring global standardisation. This point should be tackled to create a global standard. Since there is no majority to be found amongst the ISO members for establishing a certification according to ISO 19600, at least the national standardisation institutes should coordinate and adapt their respective national CMS standards structurally and conceptually to ISO 19600. However, the ISO standard is adaptable, if the ISO members find a majority, a certification (or at least an affirmation to comply with the guideline) according to ISO 19600 might be possible in future.

Conclusion

ISO has created a solid standard for Compliance Management Systems that can also be applied as a module to adapt an existing ISO-certified management system.
Terminating mandate agreements with management

Many companies conclude commercial mandate agreements with their directors, which are subject to the Companies Act and are not safeguarded by the labour legislation in case of dismissal. In the case of Joint-Stock Companies, mandate agreements are the only option of employing managers (administrators and directors) as individual labour agreements are incompatible with a management position.

Companies generally favour the introduction of mandate agreements for managers (the concept was introduced in a 2006 amendment to the Companies Act), in particular due to the increased flexibility of employers to terminate mandate agreements compared to termination conditions in individual labour agreements.

But a company terminating a mandate agreement may become a sensitive matter, especially if the termination is decided by companies unilaterally without good cause.

The Companies Act allows managers to sue for damages if their mandate agreement was terminated without cause. Unlike individual labour agreements, where the employee’s claim may also refer to the company’s duty to re-employ the person dismissed, a manager’s claim in case of termination without cause may consist only of damages. In response, companies tend to minimise the risks of having to pay damages to their managers for early termination by developing broad and comprehensive termination clauses encompassing a wide variety of circumstances that may stand as “good cause” in case of early termination.

Recent case: Damages to a manager for early termination

In a relatively recent decision, the High Court of Justice challenged the termination conditions of a mandate agreement, ruling that, when a mandate agreement has defined the circumstances that may lead to the termination of the agreement, those circumstances should be exhaustively interpreted, and any other situation leading to the termination should be considered termination “without cause”.

In preparing the defence, the company argued that a management agreement has the legal nature of a mandate agreement, and that mandate agreements are revocable. The company further argued that it would be unreasonable to consider that the termination clause has listed the situations enabling termination for good cause in an exhaustive manner, while the Companies Act generally allows companies to dismiss their managers at any time, subject only to a reasonable notice.

The High of Justice further explained the grounds of its decision: A management agreement may indeed be revoked at any time by the company, but whether the termination was with or without cause lies in how the parties contractually defined the cases of termination.

The court concluded that, where termination causes have been defined, they should be interpreted as the limits of termination for “good cause”, and any other circumstance triggering termination should fall under the concept of “without cause” and hence allow managers to claim damages.

The court’s rationale for this conclusion was that there is no legal definition for “good cause”, so it is the parties’ responsibility to fill in the gaps and contractually define when termination of the management agreement may safely occur.

This recent case law has strengthened the importance of well-drafted management agreements. The terms of the management agreement draw the fine line between a company’s right to terminate its agreement with the manager and the manager’s rightful claim for damages in case of early termination.

Since a manager’s success in the company is related to the trust he enjoys from its shareholders, the terms defining “good cause” termination should not be narrowly drafted.

A manager should not be removed from his position only because of incompetence or gross negligence, but also for reasons such as differences with shareholders or other members of the board of directors, insufficient communication with the strategic directions of the company, or inability to adapt to the organisational culture of the company.

As concerns the damages to which a manager is entitled, they would traditionally cover the contractual remuneration of the manager for the period between the date of the unlawful termination of the management agreement and the date when the agreement was scheduled to elapse.

Other reputational damages may also be included in the manager’s claim against its former employer.

According to a recent ruling of the High Court of Justice, dismissing a manager for causes other than those expressly defined in the management agreement may trigger the manager’s right to claim damages from the company.

Conclusion

The recent interpretation given by the High Court of Justice to the terms of a management agreement is expected to change the general perspective of drafting termination clauses and change the approach of having termination clauses listed only as examples to having comprehensively defined circumstances allowing companies to dismiss their managers at no or minimum risks.

Due to the pecuniary significance and sensibilities of this subject in private practice, the parties should align their contracts with the recent case law (by stipulating in their contracts the justified cases of termination of their mandate agreement) in order to avoid other interpretations in the event of litigation or arbitration.

Romania: Hardship Clauses for Hard Times

In the context of the global economic crisis, contract law and contract drafting has increasingly considered unexpected events that dramatically change the landscape of a contract, rendering performance impossible or excessively onerous for the parties.

The new Romanian Civil Code has finally accepted the concept of hardship.

The question of whether the parties should remain bound ad iterum by their obligations irrespective of the evolution of the underlying economical circumstances has deep historical roots, and countries have taken different approaches to it.

Traditionally, the hardship clause has been accepted by national laws in the background of an economical or political crisis. In Europe, hardship started to be applied after the First World War. After the Second World War, many countries west of the Berlin Wall embraced the concept, while the East (predominantly socialist countries) resisted it.

For many years, Romania took the extreme approach of the French law, where no possibility to adapt or terminate a private law contract due to hardship was legally recognised, unless the parties had agreed so. Termination was possible only in cases of force majeure (acts of God) or fortuitous cases.

Romania: What do Companies Risk when Dismissing their Managers?

Under the Romanian Companies Act, mandate agreements governing the relations between companies and their managers are essentially revocable. In recent cases, the courts have taken a position against early termination, awarding damages to managers.

The recent interpretation given by the High Court of Justice to the terms of a management agreement is expected to change the general perspective of drafting termination clauses and change the approach of having termination clauses listed only as examples to having comprehensively defined circumstances allowing companies to dismiss their managers at no or minimum risks.

Due to the pecuniary significance and sensibilities of this subject in private practice, the parties should align their contracts with the recent case law (by stipulating in their contracts the justified cases of termination of their mandate agreement) in order to avoid other interpretations in the event of litigation or arbitration.
In isolated cases, Romanian courts have recognised the application of hardship, which led to debates on how hardship tied in with our absolute legal principle that contracts are mandatory for the signing parties (pacta sunt servanda).

Promoted in the midst of the global crisis, the New Civil Code, inspired by the Canadian Civil Code of Quebec, has adapted itself to the complex economic circumstances in which contracts are now signed. It has thus finally accepted and regulated the effects of unpredictable changes and hardship.

As a result of these regulations, even without a hardship clause in the contracts, a party affected by new external circumstances that severely affect the initial contractual balance between the parties may request that the court take appropriate measures to reinstate such balance.

Circumstances in which hardship may apply

Hardship is conditional upon the fulfilment of the following conditions:
• a change in the contractual circumstances underlying the execution of the contract occurred after signing;
• the change of the contractual circumstances were not, and could not have been, easily foreseen at signing;
• the party claiming hardship has not assumed the risk of a change of the circumstances underlying the contract, nor can it be reasonably considered to have accepted this risk; and
• the party claiming hardship reasonably and in good faith attempted a fair and reasonable revision of the contract.

Effects of hardship

The introduction of hardship in the New Civil Code has increased the vigilance in contract drafting since, depending on one’s contractual position, the contract would remain creased the vigilance in contract drafting since, depending on the provisions of the New Civil Code (which would be redundant) but should contain clear provisions on the remedies applicable should hardship occur.

Choosing a set of remedies instead of termination (or instead of having the court decide on remedies) offers more contractual stability. The remedies for hardship may range between financial adjustment of an agreement with clearly defined terms on the amount and role of a third party in this process, or the parties’ duty to renegotiate the contract on defined terms respecting the process of renegotiation or involving third parties.

Conclusion

By codifying hardship, the New Civil Code has recognised the value of the previous jurisprudence and allowed Romanian law contracts to align themselves to the constantly changing circumstances surrounding the execution of contracts.

A fair contractual protection in case of hardship should include a further enrichment of the legal principles introduced by the hardship concept with the requirement to renegotiate the contract before applying for court adaptation.

With the introduction of the hardship principle in the New Civil Code and the pressure of keeping long-term contracts adapted to economical fluctuations, contract drafting is witnessing an increasing need to define the terms of possible contract adaptations.

Stuck Between a Rock and a Hard Place: The Role of Slovenian Sovereign Holding Managing the Privatisation Processes in Slovenia

Monko Puhelnik | Jolene Malnar

The independence of the decision making of the management of Slovenian Sovereign Holding (SSH) in the privatisation processes in Slovenia became questionable when the Slovenian government passed a shareholders’ resolution instructing SSH to stop sales processes until the a new government was established.

The privatisation wave in Slovenia

Mainly due to the overall macroeconomic crisis in Slovenia, the Slovenian Parliament in June 2013 approved the sale of 15 mostly or majority state-owned companies to be sold off by 2016, starting the second privatisation wave in Slovenia after independence from Yugoslavia in 1991.

With the aim of ensuring transparent sales processes (keeping in mind the strict state-aid rules to be observed) and to avoid political interference, the 100% state owned joint stock corporation / asset management company Slovenian Sovereign Holding (Slovenski državni holding, d.d.; SSH) was established (by way of “transformation” of the Slovene Compensation Fund [Slovenski odškodniški družba; SOD] that has been established by the state in the first mass denationalisation of property in the nineties), and empowered it to manage most of the above privatisation processes on behalf of the Republic of Slovenia (RS) and other state-owned companies.

The legal framework for the functioning of SSH is defined in the special Slovenian Sovereign Holding Act (Zakon o slovenskem državnem holding; ZSDH-1), which has been adopted with the main objective of (i) segregating the state’s role in the management of its capital / financial assets from its fundamental powers and (ii) performing the concerted and transparent management of the state’s financial investments/shareholdings.

Legal framework – Independence of SSH’s management

In general, SSH (a Slovenian joint stock corporation) is subject to the Slovenian Commercial Companies Act (Zakon o gospodarskih družbah; ZGD-1), which (similar to other jurisdictions) grants the management of a joint stock corporation far-reaching independence (particularly, freedom from instructions of the Shareholders’ Assembly and the Supervisory Board) and (ii) envisages a clear separation of powers and duties between the respective corporate bodies, which translates into a prohibition of the Shareholders’ Assembly to interfere in the day-to-day business of the respective joint stock corporation (unless the management board requests a respective shareholders’ resolution).

Further, the ZSDH-1 (again with the aim to prevent political interference and to ensure a frictionless conduct of privatisation processes) emphasises that (the management board of SSH is not bound by any instructions of the government of the RS (or any other third person).

Stuck between a rock and a hard place

Despite the above clear legal framework, it is still hard to draw a clean line between political and economic interests of the state, particularly given that the Slovenian government (as representative of the RS, being the sole shareholder of SSH) still holds all powers in relation to the exercise of shareholders’ rights in SSH (and has been willing to extensively exercise them in the past).

For example, shortly after the dissolution of the Slovenian Parliament in June 2014 and immediately before the subsequent early elections in July 2014, the outgoing Slovenian government (still operating with certain limited powers) initiated and passed a shareholders’ resolution instructing all corporate bodies of SSH (particularly its management board) not to conclude pending privatisations or start new sales processes until a new government was established – thereby ignoring and contravening the above corporate principles.

Although the vast majority of Slovenian legal experts agreed that the shareholders’ resolution was void (given
the obvious contradiction with material principles of Slovenian corporate law, and the Slovenian government at the beginning of August 2014 remedied the resolution, the harm was done. The decision further undermined Slovenia’s business image and international investors bailed out of some early-stage sales processes due to the unclear and instable environment. The resolution also caused some uncertainty at SSH, which led to delays in sales processes about to be completed at that time.

Quo vadis?

To a certain extent trying to correct mistakes made in the past, the new Slovenian government (established in September 2014) stipulated in its coalition agreement that they are planning to continue with the privatisations but in a “prudent and supervised” way. How such “supervised privatisation” should be structured in light of the above legal framework of the ZGD-1 and the ZSDH-1, however, remains to be seen.

In spite of these hiccupps, the temporarily suspended privatisation processes have gained speed again and continue for now. However, the Slovenian state would be well advised to stick with the legal framework in future and limit its political influence over SSH’s management. From past experience (particularly in other jurisdictions), such interventions could significantly impede the successful completion of the pending privatisation processes (which are crucial for the Slovenian economy), not least because they could further impair the credibility of Slovenia as a platform for international investors.

While the Slovenian legal framework sets the stage for a transparent and smooth conduct of pending and upcoming sales processes, the state’s past political interference may seriously endanger a successful completion of the privatisation processes in Slovenia.

Defective (Re-)Appointment of Management Board Members

Management board members of a stock corporation (AG) must be appointed for a definite period of time. A renewal of the appointment requires an express resolution by the supervisory board. What happens if a management board member is not compliantly re-appointed upon expiry of their term but simply continues in his role?

The “rudderless” ship?

Closely held corporations (eg. family offices or companies controlled by family trusts) may not see regular changes to their management boards. If all goes well, continuity is, after all, very much in the interest of both sides. Since such privately held companies will typically also require a less elaborate corporate governance system, it cannot be excluded that a board member’s term may formally expire without the supervisory board immediately taking note. Even outside family companies, a management board member may for example initially be appointed for a shorter term than the five-year statutory maximum that exists in Austria – followed by an extension under which the total term may exceed the five-year maximum.

Why is this relevant? Consider the fact that the annual accounts are drawn up by the management board before being submitted to the supervisory board. What impact does a defective management board appointment have on their legal quality? Or, does it mean that contracts signed by such a board member in the day-to-day business are no longer binding?

The appointment of a management board member who simply continues to act in such capacity beyond the term of office without a compliant re-appointment resolution of the supervisory board is defective.

To remedy all acts undertaken by a board member whose appointment is defective would result in considerable difficulties and legal uncertainty. Hence, the goal must be to find a more general way out that leaves such acts intact and legally valid.

Keep going

The solution is to treat the board member concerned as a so-called de facto management board member. This is possible provided that there has been a valid original appointment and further that the board member continues to act in his capacity as a member of management board beyond the original term. Typically, both criteria are met in the case of a defective re-appointment, because the original (compliant) appointment is deemed to be sufficient to meet the first test and, at least in the examples used in the beginning, the company is generally fine with the board member continuing in his function.

The core consequence of this remedy is that measures undertaken by the management board member whose appointment is defective are valid both within the company concerned and vis-à-vis third parties.

A board member is a board member ...

From the perspective of the management board member, this approach means that they remain subject to the same duty of care they were obliged to provide during their proper appointment and which they would have owed had they been re-appointed in a compliant manner.

At the same time, the general consensus is that such a management board member remains entitled to the agreed compensation (and not “only” a more abstract form of eg. “market level” or “arms’ length” compensation, which may well be lower than what was agreed in a specific case).

Time to put it right

If and when the defective appointment comes to light, the supervisory board must react. It may choose to recall the management board member – in an exception from the general rules applying to stock corporations such a recall does not require a good cause (wichtiger Grund).

Or the decision may well be that what temporarily “survived” as de facto management should be put on sound legal basis (again). In this case, the supervisory board needs to pass a new (re-)appointment resolution – which must then comply with all statutory requirements, in particular the five-year maximum appointment term.

Mistakes in appointing members of the management board may be rare, but the potential consequences are difficult to resolve. Thus, the solution developed and advocated primarily in German legal literature to treat the board member as a “de facto” manager and to uphold the validity of acts undertaken by it is a real lifeline and allows companies, their customers, creditors and other business partners to resolve such situations unharmed.
Corinne M. Hofer

Background

In July 2013, the minimum share capital of GmbHs was reduced to EUR 10,000 from EUR 35,000 in line with European trends and to keep this company form attractive, also for company founders with limited financial resources. After only eight months, the reduction of the minimum share capital led to noticeable tax losses because the amount of minimum corporate income tax is linked to the company’s share capital. At that time, also existing GmbHs could reduce their share capital (and tax burden) and distribute the capital to the shareholders free of any capital gains taxation.

GmbH foundations after 1 March 2014

Under an amendment of the GmbH-Act, as of 1 March 2014, founders can now choose between two options when establishing a new GmbH.

Option 1:
A GmbH can be established with a minimum share capital of EUR 35,000. Half of that amount (ie, at least EUR 17,500) must be paid up in cash upon foundation of the GmbH. If more than half of the share capital amount is contributed in kind, a formation audit is required. Tax on the capital contribution is 1%.

Corporate issues

Privileged share capital contributions may be transferred and split as long as the capital contribution amount does not drop below the minimum amount per share of EUR 70. In case of a capital increase, any additional shareholder’s capital contribution may not be made privileged. It is not settled whether a capital increase by contributions in kind is feasible or whether the privileged GmbH may act as the absorbing company in a merger.

Although the foundation privilege is limited in time and further capital contributions will have to be made, there is no obligation to create retained earnings. As long as the foundation privilege applies, creditors may not claim amounts above the privileged capital contribution – also in case of insolvency.

Tax benefits still apply

For all newly founded GmbHs, the minimum corporate income tax remains at EUR 1,750 annually for the first five years, raised to EUR 1,000 annually for the next five years. Thereafter an annual minimum income tax of EUR 1,750 applies.

Option 2:
Company founders may opt for the “foundation privilege”, lasting for 10 years from foundation of the GmbH. The shareholders will then have to make so-called privileged share capital contributions (privilegierte Stammeinlage) of not less than EUR 10,000, of which at least EUR 5,000 must be paid up in cash. Contributions in kind are, according to law, generally not possible. However, also when opting for the foundation privilege, the minimum stated share capital amount of EUR 10,000 can be reduced to EUR 10,000. This option applies to newly founded GmbHs only, since reference to the privilege must be explicit in the articles of association drawn up at foundation of the GmbH, not added by amendment.

End of privileged status

Shareholders may waive the foundation privilege by amending the articles of association and paying in the missing capital contribution at any time. The foundation privilege expires at most 10 years after the incorporation of the GmbH in the companies register. Then the managing director must collect all missing capital contributions up to the statutorily required minimum cash capital contribution – also in case of insolvency.

LBO/MBO Structures Tested by Austrian Courts

Christian Herbst

Financial assistance rules play a role in particular in the context of acquisition financing transactions, leveraged transactions, group financings and cash pooling arrangements within groups of companies. A 2013 ruling by the Austrian Supreme Court on unlawful leveraged buy-out (LBO) structures will impact transaction structuring as to down-stream or upstream mergers following M&A transactions.

Ground rules on financial assistance

The ground rules follow.

What should be understood as unlawful financial assistance under Austrian law?

Austrian law does not allow repayment of capital to shareholders of GmbHs, GmbH/CaKGs, GmbH & CoAGs or AGs. Shareholders are only entitled to (i) dividends (ie, distribution of the net balance sheet profits of the company or corporation), (ii) funds and assets received in a formal capital reduction, (iii) liquidation surpluses (subject to creditor protection provisions) and (iv) consideration received in arms-length transactions with the company.

What is qualified lawful financial assistance?

Based on the rules set out in the general overview above, shareholders can – and will in particular in the context of acquisition financing – pledge their shares in the target company and pledge or assign their claims to dividends. Upstream or crossstream guarantees are possible when limited to the amount of dividends. Moreover, the pledge over assets of a GmbH or AG (or partnerships where a GmbH or AG is an unlimited partner) to the benefit of banks and other lenders financing the direct or indirect acquisition of the pledging company or corporation is subject to the limitations set by the capital maintenance rules. Are there exceptions to the capital maintenance rules for granting a security interest in the context of acquisition financing?

Austrian courts have determined certain requirements under which pledging of the assets of the target and the granting of upstream and crossstream guarantees may be deemed not to violate the capital maintenance requirements. Pledges, guarantees, sureties, mortgages or other securities granted by the target to the financing banks or other lenders can be compliant if (i) the target receives adequate (ie, arms-length) consideration (case law and legal literature have developed criteria to determine adequacy depending on the financial situation of the lender and the expected profitability of the Austrian target) and (ii) the
management of the target have duly assessed the borrow­er’s capability to repay funds (ie, a proper risk assessment) and (ii) the creation of the security interest is in the interest of the Austrian company (corporate benefit). Financial assistance not within the limits of the rules on capital mainte­nance, as interpreted by the courts, is considered a viola­tion of law. The transaction will be remitted (partially) null and void by operation of law.

What are the legal consequences for violating capital maintenance rules?

Transactions that violate capital maintenance rules are considered (partially) null and void. The company can thus reclaim any payments made to shareholders that are qual­ified as unlawful repayment of share capital and claim relat­ed damages inter alia as a result of negative tax conse­quences. Moreover, the shareholders of a stock corporation will become directly liable to the creditors for the amount received and, in certain circumstances, the shareholders of a limited liability company can be held liable for the amounts received by other shareholders.

Finally, the transaction will be held void also towards third parties, in particular towards financing banks, if these third parties had or should have had knowledge of the violation of the capital maintenance rules.

What is the directors’ liability?
The managing directors or board members could be held liable for having acted negligently for having permitted pay­ments later deemed in violation of capital maintenance rules to shareholders or for having allowed the taking of security or for having made incorrect statements towards the com­panies or having prepared incorrect financial statements.

Merger of leveraged acquisition vehicle with target company

Under a 2013 Austrian Supreme Court ruling, the parties must avoid a structure the courts would consider in viola­tion of capital maintenance rule. The following structure would be considered unlawful: Target (and not acquisition vehicle) takes up the loan. Loan is taken over by acquisition vehicle, not by merger but by contractual arrangement, and target is released from liabilities. Target is then merged into acquisition vehicle upstream. Such transaction plan was known by the financing banks at the time when the loan was granted.

Under the court ruling, such financing structure was illegal and the financing bank had to repay loan payments re­ceived to the bankruptcy estate in the later bankruptcy of the acquisition vehicle.

Acquisition Financing/LBO structures, in particular downstream mergers following acquisitions, must be tailored to comply with court precedents on capital maintenance.

Czech Republic: Regulation of Corporate Groups in the New Civil Law

Effective 1 January 2014, the new Civil Code and Business Corporations Act introduced a modified model of management and operation of corporate groups.

Effective 1 January 2014, the re-codification of the Czech civil law introduced a new system of regulation of corpo­rate groups (koncernů) deviating from the current concep­tual sources in German legal regulation. Corporate groups will now have more flexibility in the management of busi­ness affairs, permitting full utilisation of synergic effects ex­isting within such groups. On the other hand, a number of new duties will be imposed on the members of corporate groups and, unlike under the previous legal regime effective until 31 December 2013, it may be expected that the members of statutory bodies of controlling persons will generally exercise more vigilance and business awareness when making business decisions concerning a corporate group.

Corporate group building blocks

Under the new Czech civil law, a corporate group repre­sents a complex form of management of business groups where one or more persons (controlled persons) are under the influence of another person or persons (controlling per­sons) regarding operations of the controlled person aiming to (for the purpose of the long-term asserting of the corpo­rate group’s interests within a uniform policy of the corpo­rate group) co-ordinate and manage conceptually at least one significant element or activity within the business oper­ations of the corporate group.

Now, a corporate group will be established even if only some elements within business operations of the entire corpo­rate group are subject to uniform policy and direction (eg, financial operations, production, human resources, etc.).

De facto corporate group and controlling agreements

The new legal regulation works exclusively with the concept of a de facto corporate group (faktonický koncern). The exist­ence of the corporate group is then solely based on factual satisfaction of the above outlined corporate group’s build­ing blocks. The new concept also translates into removal of controlling agreements and profit transfer agreements from the new legal regulation, and automatic termination of such agreements entered into until 31 December 2013 by oper­ation of law, all with effects as at the last day of the ac­counting period immediately following 30 June 2014.

Affiliation with corporate group

Along with the de facto existence of a corporate group, the publication of the existence and affiliation with the corpo­rate group on the websites of all corporate group members is an essential condition for reliance on statutory rules on compensation of damage within the corporate group. Without satisfaction of the outlined corporate group’s building blocks, the publication of the existence and affilia­tion with the corporate group alone will not result in estab­lishment of the corporate group.

Despite the wording of the law, the controlled person need not own the internet domain where the website containing information on the corporate group’s existence is located. A reference to its own website should comprise also the website that the controlled person is using based on a valid legal title.

From the territorial perspective, the requirement to publish the existence of the corporate group on a website should not apply to controlled persons governed by a foreign cor­porate status (eg, a German corporation).

Instructions concerning business decisions

A possibility of the controlling person to give instructions to the controlled person concerning business decisions is a basic consequence of the existence of the corporate group. But such instructions must be in the interest of the controlling person or another person that forms a corpo­rate group with the controlling person. Such possibility is a specific exception from a general prohibition to instruct the statutory body of a business corporation on matters con­cerning business decisions.

Compensation of damages within the corporate group

A basic consequence of the corporate group’s existence, and declaration on affiliation with the corporate group, is
the possibility of the controlling person to discharge a duty to compensate for damages suffered by a controlled person under the influence of the controlling person. To use such a possibility, the controlling person must prove that the damage (i) was established in the interest of the controlling person or another person forming a corporate group with the corporate group and (ii) was or will be compensated within the corporate group.

Damages will be deemed compensated if they are settled within the corporate group in an adequate manner or through other demonstrable benefits resulting from membership in the corporate group, all within a reasonable time. Benefits would typically comprise lower costs of external financing, easier access to customers, etc.

A limitation to a damages compensation mechanism would be an instance of insolvency of the controlled person that resulted from the controlling person’s steps.

**Minority shareholders sell-out right**

To reinforce the position of minority shareholders, a new regulation introduces a right of minority shareholders to request that the controlling person buy their shares for an adequate price, if the controlling person exercises its influence over the controlled person in a manner resulting in material aggravation of the position of the minority shareholders of the controlled person or in other material aggravation of their interests — and for these reasons it is not fair to demand that the minority shareholders remain in the controlled person.

The new Business Corporations Act introduces a new concept of regulation of corporate groups, offering a higher level of flexibility and permitting full use of synergic effects existing within corporate groups by allowing the controlling person to compensate for the damages caused to the controlled person upon employment of the influence of the controlling person.

**Seeking Fair Value: Changes to the Polish Mandatory Takeover Rules**

After almost a decade with the current rules on takeovers, a proposal for changes to the system is well advanced. The author looks at the main changes concerning mandatory bids and pricing, and what they mean for the M&A market and investors.

**Takeover rules in Europe have always been a hot topic, and despite a considerable effort to approximate the rules across EU countries, a difference in approach between member states is still visible. Currently Poland is taking a long-awaited step to tighten the regulation and bring it in line with the Directive 2004/25/EC on takeover bids.**

**Current status**

Polish public takeover regulations currently provide for a number of situations in which the buyer of shares in a listed company is obliged to make a takeover bid to the public. Such obligations arise if the bidder intends to acquire a significant portfolio of shares in a short time, or if the intended acquisition will lead to crossing the 33% or 66% vote threshold in a public company. A shareholder crossing the 33% threshold is required to bid for shares carrying up to 66% votes, while crossing the 66% mark triggers a bid for all shares in the company.

**New consequences**

The proposed provisions change the lower threshold from 33% to 33 1/3% of votes, which does not look like a meaningful difference. What is important, however, is that crossing this 33 1/3% threshold will lead to an obligation to make a bid for all outstanding shares in the company. This would correspond with the general understanding that, in a public company, a 33 1/3% stake often conveys control.

**Naturally, the provisions on takeovers safeguard the interest of the investors if a certain minimum price in the bid is guaranteed. As a rule, this price should not be lower than the average market price calculated for a certain period preceding the offer, or than the highest price paid by the bidder during a certain time.**

With respect to the price paid by the bidder, the current provisions refer to a price paid in a direct acquisition only. This leaves out indirect acquisitions, where an entity holding shares in a public company is acquired by the bidder.

**The proposed change makes the regulation tighter by including prices paid also in indirect acquisition; that is, where the bidder acquired shares in a public company by purchasing a company that held such shares. In such case, the bidder must obtain a valuation prepared by an auditor determining the fair value of the shares in a public company that were acquired indirectly. Such price would serve as an additional benchmark for determining the price in the tender offer.**

**Will it work?**

The draft provisions, if adopted, will surely increase transparency and provide better safeguards for minority investors, while limiting certain structuring solutions used in public takeovers in Poland.

Situations where a large portion of the shares (up to 65.9%) are acquired indirectly and a small portion in a tender offer with a significant reduction (at a price not necessarily matching what is paid to the main selling shareholder) will no longer be possible. This may increase the cost of acquisitions on the bidder side, but should provide more comfort for institutional investors holding minority stakes. The proposed ideas are not new and have been discussed for quite some time, but earlier attempts at changing the regulations stalled. It remains to be seen if this proposal is voted into law. If so, how public transactions are structured in Poland will change.
The Nature of the SPA under Bulgarian Law: Endorsement of Registered Shares an Obligation under the SPA

Shiva Ribanchova

Selling registered shares in a joint-stock company under Bulgarian law

Although not required by law, the main document that governs the sale of shares in a joint-stock company is the share sale and purchase agreement (SPA). The SPA typically includes a general sale and purchase clause providing that the seller transfers and sells the shares to the buyer and the buyer purchases the shares from the seller.

But an SPA is not enough to effectively transfer the shares. So the parties to the SPA further agree to do all necessary actions to complete the transfer of the shares. Among these actions are (i) in case of registered materialised shares, the endorsement of the shares, delivery of possession of the printed shares or interim share certificates, and registration of the endorsement in the company’s shareholders’ book; and (ii) in case of registered dematerialised shares, the registration of the share transfer with the Central Depository.

What is a preliminary agreement?

Since the transfer of shares occurs not at the execution of the SPA but at completion of certain other actions, does this make the SPA for the sale of the shares a preliminary or a final agreement, and can the sale of shares be the subject of a preliminary agreement? The doctrine is contradictory.

The Bulgarian Obligations and Contracts Act (Art. 19) introduces the concept of a preliminary agreement for transfer of title. The main difference between the preliminary and final agreement is that the main obligation a preliminary agreement creates is to enter into a final agreement with a certain minimum content while the final agreement lays down the obligation, among others, to transfer certain rights. The preliminary agreement aims to put the relationship between the parties into an initial frame and to mark its parameters, which are to be developed more precisely by a final agreement.

Each party to the preliminary agreement may bring an action before the court to declare the preliminary agreement a final agreement and enforce it. In such case the final agreement is replaced by the court judgment. So, it is the judgment that effectively transfers the title and, if public registration of the title is required, the judgment triggers such registration.

The nature of the SPA – Preliminary agreement or not?

A recent High Court decision holds against the possibility of selling registered shares under a preliminary agreement. Since the SPA creates a contractual obligation to transfer shares on the condition that the endorser (transferor) endorses the shares, the SPA may not be treated as a preliminary agreement. Once the parties have agreed on a share transfer, they have actually entered into a final agreement.

As such, the court may only enforce the obligation on the seller to transfer the shares; that is, to endorse the shares to the buyer.

But a court judgment cannot replace the endorsement itself. If the seller refuses to endorse the shares to the buyer, the buyer may (i) keep to the SPA and ask the court to impose penalties on the seller until the seller endorses the shares to the buyer or (ii) request rescission of the SPA. In either case, the buyer may claim damages for breach.

The difference between the SPA and the endorsement

The endorsement is not an element required for the validity or enforceability of the SPA but a special means of share title conveyance. It is a separate unilateral transaction. As such, the endorsement is executable only by the endorser without the underlying contractual obligation to endorse shares laid down in an SPA.

YOU SHALL NOT PASS”: Consequences of Serbian F/X Restrictions in Cross-Border Loan Transfers

Matija Vojnović  |  Jelena Arsić

Serbian F/X law: Restrictions

This article focuses on pitfalls in the Serbian Foreign Exchange Act (Zakon o deviznom poslovanju; F/X Act) related to cross-border loan transfers.

Cross-border loans to a Serbian borrower are generally transferable among non-resident lenders. The F/X Act, however, provides for borrower-friendly transfer provisions usually not seen in comparable jurisdictions: a transfer is practically dependent on the debtor’s cooperation.

The F/X law: Restrictions

Article 33 of the F/X Act broadly allows for a transfer of a cross-border loan if all of the following conditions are met:

• transfer transactions are performed on the basis of:
  i) an agreement made by all parties (ie, the original lender, the new lender and the borrower) or
  ii) a borrower’s statement confirming notification of the transfer;

• the above documents contain details of the parties, the underlying loan agreement, the currency and amount of transferred claims and debts; and

• the resident borrower (the only one with authority to do so) registers changes of the lender with the National Bank of Serbia (NBS) as the competent F/X regulator (without this formal change, all Serbian commercial banks would refuse to make outbound transfers to the new lender).

Thus, a cooperative borrower is needed (i) when making a three-party agreement or issuing a required statement and (ii) when executing the NBS forms for registering a new lender of record.

Practical consequences of the restriction: Case law

In the wave of the financial crisis and distress in the Eurozone, several countries have experienced a recession that...
induced austerity measures and governmental rescue plans. In one of them, the rescue included restructuring the banking sector where certain banks were wound down and new ones stepped into the shoes of the previous lenders of record. In that case, and where a Serbian resident was a borrower, such change of lender of record had to be registered with the NBS.

We have witnessed cases in practice where borrowers easily obstructed lawful changes of creditors that took place by operation of law or governmental decree. This hidden transfer restriction is blocking the free trade with non-performing cross-border loans and is a major obstacle to the development of a proper NPL market. Where possible, lenders often resort to more cumbersome synthetic transfer structures in attempts overcome local transfer restrictions.

The NBS has acknowledged that the issue exists and has noted that it can be solved only once the primary source of legislation – the F/X Act – is amended. This was/is a cumbersome process requiring the coordination of the Ministry of Finance. Possible solutions and options have been contemplated, including (i) a declaratory ruling from the lender’s jurisdiction court, which would have to be recognised by the Serbian Court, as legal basis for repatriating the proceeds from Serbia and (ii) the initiation of misdemeanour proceedings and putting pressure on the resident debtor. Both paths are time consuming and burdensome. Ultimately, the Serbian FX regime could not adapt to the “non-cooperative debtor” roadblock.

Conclusion

Once the case was boiled down to its main point, the question that remained is not why this particular resident-debtor selected to frustrate registration of a transfer but why the same behaviour should be imitated by others and “tolerated” just because the law is silent. But until the F/X Act is amended, the NBS will continue refusing to register the new lender of record without the borrower’s assistance, meaning the bargaining power remains in the hands of the capricious borrower.

In Serbia, the transfer of a cross-border loan is practically conditioned on the debtor’s cooperation. So the “cooperative borrower” requirement often leads to complications that may hinder, or even block, the loan transfer.

Turkey: Liabilities of Members of the Board of Directors in a Joint Stock Company

Cemre Yelkauz

Liabilities of members of the Board of Directors in a joint stock company are regulated by the Turkish Commercial Code, Tax Procedural Law and Law on Collection Procedure of Public Receivables.

Board of Directors and liability

The Board of Directors (Board) is the administrative body of a joint stock company responsible for the management and representation of the company. It has the right to exercise all powers not delegated to and reserved for other bodies of the company by law or by the articles of association. Board members are liable if they breach their obligations under the laws or articles of association, unless they prove that they are not negligent.

Criminal and legal liability

The Turkish Commercial Code (TCC) has separate provisions for legal and criminal liability for activities conducted while managing and representing a company. The liability under this provision is not exclusive to Board members.

If managers of the company breach such TCC provisions, they may be held legally or criminally liable. Sanctions vary from fines to several years’ imprisonment. The actions are, inter alia, as follows:

- inaccuracy of documents and declarations;
- misrepresentation of share capital and awareness of incapability to satisfy capital undertakings;
- irregularity in valuation of capital in-kind;
- failure to keep company books;
- raising money from the public; and
- breach of obligations regulated under the TCC, laws and/or articles of association.

Limitations of liability

Art. 553 of the TCC regulates the limitation of liability of Board members. Board members are not liable for illegal acts beyond their control. The obligation of supervision and the duty of care cannot be used as grounds for a Board member’s liability.

Another limitation is set forth in Art. 203 of the TCC for Board members of group companies in which the parent has absolute power over the subsidiary. Since the Board members are obliged to follow the instructions of the parent company, they will not be liable for actions taken as a result of the orders or instructions of the parent company.

Release of directors

Under the TCC, shareholders and creditors of the company may file a lawsuit against the Board members. A release of the Board members is one of the mandatory items to be decided in a general assembly meeting. If the shareholders decide in a general assembly meeting to release the Board members, the resolution may not be revoked.

On the other hand, shareholders who attended the general assembly meeting and did not vote for the release of the Board members or rejected the release resolution may file a lawsuit against the Board members within six months from the general assembly meeting. Without the affirmative votes of the minority shareholders, a release to resolve Board members from their liability of incorporation and capital increases may not be adopted.

Liabilities due to non-payment of public debts

The liability of a Board member arising from non-payment of the public debt of the company arises from the Tax Procedural Law and Law on Collection Procedure of Public Receivables.

If the Board members do not fulfill their obligations, taxes and the related receivables, and which are not totally or partially satisfied by the company’s assets, the Board members must pay the amount from their private assets. The law on the Collection Procedure of Public Receivables extends the liability of Board members by contemplating that public debts other than taxes will also be collected from the private assets of the representatives, and that the debts will be paid by the representatives if the company cannot or if it is prima facie evident that they cannot pay such public receivables.

Board members are held jointly and severally liable for taxes and other public receivables that have accrued during their term in office.
THE WORLD AS IT IS
Arbitration in Austria: A New Legal Framework for Setting Aside Proceedings

Anna-Karin Grifi

Following a significant revision in 2006, in 2013 the Austrian legislator continued its efforts to bolster Austria’s international standing as an attractive place of arbitration, with the introduction of additional amendments to the Austrian Arbitration Act, which took effect on 1 January 2014.

Arbitration is a well-established and widely used means to resolve commercial disputes. Unlike litigation, it takes place out of court: The parties select an impartial third party – the arbitrator – and agree in advance to comply with the arbitrator’s decision. They participate in an oral hearing at which evidence and testimony is presented. The arbitrator’s decision (the arbitral award) is usually final and open to review by state courts within strict limits defined by law.

As a matter of principle, arbitral awards may be set aside only if they are affected by severe (formal) defects. Also, as a matter of principle, arbitral awards may be set aside to review by state courts within strict limits defined by the law. The Austrian Supreme Court now also exclusively decides according to Section 50(1) of the Austrian Arbitration Act relating to setting aside proceedings, the Austrian Supreme Court as the first and final instance. The award now falls within the exclusive jurisdiction of the Austrian Supreme Court as the first and final instance. The Austrian Supreme Court is not limited to only determining questions of law but may also, if necessary, conduct proceedings for the taking of evidence. As an important exception (Section 617(8) and Section 618 ZPO), the original model stretching over three judicial instances remains intact for both arbitral proceedings involving consumers and for labour arbitration proceedings in accordance with Section 50(1) of the Austrian Labour and Social Courts Act (Arbeits- und Sozialgerichts- gesetz; ASGG).

Procedures to set aside arbitral awards and to determine the existence or non-existence of an arbitral award are governed by the rules of the Austrian Code of Civil Procedure (Zivilprozessordnung; ZPO) applying to proceedings before the regional courts of first instance (Gerichtshöfe). To all other arbitration-related judicial activity the procedural rules of the Austrian Non-Contentious Proceedings Act (Außerstreitgesetz; AußerStG) apply.

This means that, contrary to general principle, the Austrian Supreme Court is not limited to only determining questions of law but may also, if necessary, conduct proceedings for the taking of evidence. As an important exception (Section 617(8) and Section 618 ZPO), the original model stretching over three judicial instances remains intact for both arbitral proceedings involving consumers and for labour arbitration proceedings in accordance with Section 50(1) of the Austrian Labour and Social Courts Act (Arbeits- und Sozialgerichts- gesetz; ASGG).

A biennial – Costs

While the newest developments have been met with wide enthusiasm, the Austrian arbitration community also agrees that there is one – not insignificant – aspect that casts a shadow over the long-awaited revision: costs.

Together with the revision of the provisions of the Austrian Arbitration Act relating to setting aside proceedings, the Austrian lawmaker introduced significant amendments to the Austrian Court Fees Act (Gerichtsgebührengesetz; GGG). These amendments accommodate the concerns voiced by the Austrian judiciary that the state would forfeit important financial resources for the overall budget of the Austrian justice system by placing setting aside proceedings in the hands of the Austrian Supreme Court as the first and final instance. This sentiment may not surprise considering the sometimes big amounts in dispute in arbitration proceedings.

Under Article 2 SchRÄG, the minimum court fees payable for any arbitration-related proceedings before the Austrian Supreme Court is EUR 5,000. Above that amount, the court fees are set at 5% of the amount in dispute. There is no provision for a cap on the court fees. This means that the costs of initiating setting aside proceedings in Austria can be considerable if an action for setting aside relates to proceedings in which the amount in dispute is EUR 100 mln, the court fees are a striking EUR 5 mln. By comparison, given the same amount in dispute, conducting arbitral proceedings before a three-member arbitral tribunal under the Rules of Arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) costs about one-tenth the amount. One may find consolation in the fact that the aggregate court fees under the original model stretching over three judicial instances were even higher; 5.4% of the amount in dispute. Nevertheless, even considering that court fees constitute a legislative tool for curbing tactical or even frivolous actions for setting aside, the introduction of a cap on such court fees would be in the best interest of (international) users of arbitration and would, above all, safeguard the principle of fair access to legal protection.

Conclusion

It remains to be seen whether Austria will indeed be more attractive as a place of arbitration following the 2013 revision of its Arbitration Act. As concerns the new procedural framework for the setting aside of arbitral awards, the Austrian Supreme Court registered eight cases between January and November 2014. While the final statistical evaluation of the amounts in dispute is still pending, there appears to be no cause for concern as of yet.

Against this background, parties to international commercial transactions are generally well advised to opt for arbitration in Austria and to include tailor-made arbitration clauses in their international contracts. Procedural flexibility and a much shorter duration of proceedings in general are only two of many advantages of arbitration as a dispute resolution method. Also post-award, the advantage of arbitration is evident. Under the New York Convention 1958, also adopted by Austria, arbitral awards are currently enforceable in 149 countries; that is, in many countries that do not recognise judgments of Austrian state courts.

Austria has successfully built a reputation for being “arbitration-friendly”. This reputation has been bolstered by the introduction of the latest amendments to the Austrian Arbitration Act. We will see whether the cost burdens that come with the new legal framework for setting aside proceedings will take a toll on Austria’s attractiveness as a place of arbitration.
Serbia: Investment Arbitration – Is Your Investment in Serbia Protected?

The past decade has been marked with an explosion of investment treaty arbitrations. Foreign investors are increasingly aware of the powerful tool contained in bilateral investment treaties (BIT).

Introduction

Under BITs, foreign investors can seek international protection against the state hosting their investment if the host state is taking certain actions adversely affecting the investment. Such protection presumes the right of the investor to bring a claim directly against the host state in a forum other than the host state’s courts.

The International Centre for Settlement of Investment Disputes (ICSID) has become the most common forum for investment disputes. Its institutional link to the World Bank has further contributed to the growing importance of investment treaty protection.

Finally, such rising significance of investment treaty safeguards has resulted in the availability of investment treaty claims in a jurisdiction becoming an important factor when planning M&A transactions. Thus, much like a favourable tax regime, the transactions are themselves structured to optimise investment treaty protection.

Treaty safeguards in Serbia

Against this background, we will discuss the following questions: What investment treaty safeguards may foreign investors expect when investing in Serbia? Who is protected? What types of investment are covered? Why should foreign investors consider ICSID investment arbitration?

Serbia has ratified the ICSID Convention, which is one of the preconditions for an investment dispute against a state to be conducted before ICSID. An additional prerequisite is the clear and unconditional consent of the host state to this dispute resolution mechanism for specific investment disputes and vis-à-vis certain foreign investors. Such consent of the host state is usually provided in BITs.

Serbia has signed a relatively wide range of bilateral investment treaties. Around 50 treaties of this type are currently applicable in Serbia. Serbia has investment treaty relations with all major countries that are the principal source of foreign investment in Serbia, such as Italy, Austria, Belgium, Greece, Germany, Russia, and more. BITs signed by Serbia usually contain such consent to ICSID arbitration.

Thus, foreign investors investing in Serbia can count on ICSID arbitration as the protection mechanism for their investments if, in addition to the existence of an applicable BIT, two other jurisdictional conditions are met: (i) the investing entity is a “foreign investor” within the meaning of the applicable BIT and (ii) there is an “investment” as defined under the applicable BIT.

Protected investors

The basic principle of a BIT is that only a national of the contracting party is not the host state may bring a claim against the host state. This encompasses both natural and legal persons. For natural persons, treaties usually require that such persons have the same nationality as the other contracting party.

As to legal entities, definitions vary. Some treaties define this category of foreign investors solely by reference to their place of incorporation, while others refer to the seat of management and require that the headquarters or the actual economic activity be located in the territory of that other contracting state.

Other BITs refer to the concept of control and require that the investing entity be controlled by a natural or legal entity having the nationality of the other contracting party. Some treaties even allow claims by companies formally incorporated in the host state if they are controlled by a natural or legal person from the other contracting party.

Protected investment

In terms of categories of investment eligible for protection, BITs applicable in Serbia usually refer to “all kinds of assets” and provide an illustrative, non-exhaustive list of certain protected types of investments, such as movable and immovable property, rights derived from shares, claims to money, intellectual property rights, etc.

Substantial guarantees

BITs provide substantial guarantees for the protection of foreign investments, which assume certain standards of conduct by the host state government vis-à-vis protected foreign investors. BITs applicable in Serbia usually contain typical substantive investment protection standards. For example, they guarantee fair and equitable treatment, national treatment, most favoured nation treatment, protection from expropriation, free transfer of means and full protection and security.

Dispute resolution

Serbian BITs often contain composite settlement clauses and thus provide several alternatives for the dispute resolution procedure. Besides ICSID, ICC or other institutional or UNCITRAL arbitration might also be an option for the settlement of investment disputes. Treaties typically establish a “cooling-off period”: they require the investors to wait for a period of time (usually three to six months) before bringing a claim against the state. Additional pre-arbitration requirements may also be found in some of the treaties.

The respondent in investment arbitration is the host state (or its constituent subdivision or agency in specific cases). Thus, investment arbitration has a political aspect and may, directly or indirectly, affect the credit rating and reputation of the host state, both among other states and among the foreign investors. The commencement of ICSID proceedings is public as data on registration and main steps in the proceedings are published on the ICSID website.

Unlike commercial arbitration, an ICSID investment arbitration is entirely independent of the judicial system of the host state. First, an ICSID award may not be annulled before the courts of any state. Second, it does not undergo the recognition procedure in the state in which it is enforced. It has the legal effect of a final court judgment and can be directly enforced.

When investing in Serbia, foreign investors can count on relatively wide bilateral investment treaty coverage, but should still carefully analyse underlying jurisdictional conditions to ensure in advance the applicability of the relevant treaty.
Poland: Redundancy Selection Criteria – Dismissal of Employees Based on Grounds Connected to the Employer

If the employer intends to terminate an employment agreement for reasons not attributable to the employee, it must apply the selection criteria for dismissal and indicate them in its declaration of will regarding termination of employment.

Reasons not attributable to employees

All companies occasionally consider organisational changes that involve restructuring employment and eliminating positions, and thus dismissing employees.

The basis for such actions are the provisions of the Act of 13 March 2003 on special principles for terminating employment with employees for reasons not attributable to employees (the Act). The Act applies to employers with at least 20 employees and allows the termination of employment agreements for reasons not attributable to employees. These reasons are mainly economic, such as a decrease in orders resulting in redundancy and reduced production; organisational causes, such as reduction of work positions in connection with the reorganisation of tasks; technological changes that result in less demand for workforce; or liquidation of the employer.

Selection criteria

If the dismissal is not covering a whole group of employees but only part of them, then the employer must establish and apply certain criteria for the selection of employees for redundancy. The employer must apply selection criteria in which the employee to be dismissed is compared with other employees in the same working group. In this case, there is no need to compare the employee who is to be dismissed with other employees because all positions in the working group are to be terminated. The same rule applies in case of liquidation of a sole working position related to performing specific tasks.

The obligation to indicate the selection criteria in case of termination of the employment agreement

The case law strengthens the view that, if redundancy leads to the selection of an employee or group of employees from a larger number of employees in the same working group, the employer in a written declaration of will regarding termination of employment must indicate not only the reason for such termination (eg, liquidation of working position as a result of reorganisation of the entire department) but also the adopted selection criteria for the dismissal. This means that such criteria should be indicated in a termination letter to the employee to be dismissed, and they may not be disclosed to the employee later (eg, in court proceedings). This is because the reason for termination is not only a redundancy and liquidation of a working position at which the employee is employed as a consequence but also the situation of the employee to be dismissed, determined by the selection criteria. A lack of selection criteria means that the employee is deprived of the possibility to assess the relevance of the employer’s choices and is thus forced to initiate a court proceeding to discover the reasons for termination.

So, if the employee appeals a termination in which the selection criteria for the dismissal have not been identified, the labour court may rule that the termination was unjustified, the consequences of which are recognition of the ineffectiveness of the employer’s action and reinstatement of the employee, or compensation. The fact that the selection criteria have been in fact determined and applied by the employer prior to the termination of the agreement does not matter in the court proceeding, because such reasons may not be referred to if not specified in the termination.

Decision of the Hungarian Constitutional Court on the Protection of Pregnant Women against Termination

Since June 2014 pregnant women are protected against termination of employment even if, when the termination notice is served, they do not even have knowledge of their pregnancy.

The Court’s ruling

In May 2014, the Hungarian Constitutional Court (Alkotmánybíróság; HCC) ruled that the provision of the Hungarian Labour Code that required women to inform their employers of their pregnancy to enjoy protection against termination was unconstitutional. The same applies to the information requirement about participation in fertility treatments.

According to the ruling, the relevant provisions of the Labour Code were not proportionate and contrary to the employee’s rights. Due to the prior notice requirement, the employees were pressured to inform the employer of the pregnancy or the participation in the fertility treatments already in the early period of the pregnancy, in which there is a higher risk of termination of pregnancy. This information is part of the private sphere of the individual and protected as a personal data. To inform the employer of all problems or details could be humiliating and unnecessary to be eligible for protection in connection with the pregnancy (ie, loss of baby).

The HCC balanced the employee’s interest to share this sensitive data with the employer only when it is suitable for...
Aimed at Labour Market Flexibility?

Croatia: Are Changes to the Labour Law Aimed at Labour Market Flexibility?

Dina Vlahov Buhin

Although accompanied by strong opposition from both unions and employers, the new Croatian Labour Act entered into force on 7 August 2014. It is directed mostly towards encouraging atypical employment forms, improving working time flexibility and making the procedures for lay-offs less complicated.

New Labour Act 2014

The Labour Act as it stood before its amendments in 2014 was perceived as and criticised for being among the strictest employment protection regulations in Europe. Labour market rigidity was seen as a reason for the lack of competitiveness of the Croatian economy and the low level of job creation. The new Labour Act aims to change this perception, enhance flexibility and reduce the cost of workforce restructuring. Further EU harmonisation adjustments have also been included in the new Labour Act.

Compared to the old Labour Act, the amendments are orientated in three ways, mostly concerning (i) less complicated procedures for lay-offs, (ii) more flexible work time and (iii) encouragement of atypical employment forms, such as part-time employment, seasonal employment and temporary agency employment.

Termination of employment

The notice period for termination is no longer on hold during vacation, paid leave or periods of temporary work disability, if, however, a work disability occurs during the notice period, the employment relationship automatically terminates six months from delivery of a resolution on termination. The previous arrangement caused major problems for employers, not only making it impossible for them to monitor the time of the actual termination of employment but also because of potential abuses by employees.

In cases of wrongful termination, the indemnity has been reduced from a maximum of 18 to the maximum of eight salaries. Furthermore, an employer who plans to terminate more than 20 employees need not prepare a collective redundancy plan.

The new Labour Act has also finally clarified the existence of a different termination treatment during the probation period. Now, the courts may not develop the practice that termination during the probation period is as hard as during regular employment.

The amendments primarily aim to enable employers to keep work positions and restructure quickly, as well as to respond to the frequent issue of employee abuses.

Fixed-term employment

The provisions on fixed-term employment have finally been harmonised with the directive 1999/70/EC, making it more flexible and therefore more appealing to the employers. The first employment can now be linked to a condition that limits the time of employment, but this time limit is now prolonged.

Working time

The introduced change concerns the possibility of an employee already fully employed to enter into a second employment agreement with another employer for up to eight hours a week (180 hours a year), but the approval of the employer with whom the employee is employed full time is required.

The maximum overtime hours have been extended to up to 50 hours a week, while the upper limit stays at 180 hours a year. But this can be extended to up to 250 hours a year by the collective agreement. In case of an unequal distribution of working time, an employee can work up to 50 hours or even 60 hours a week if the latter is agreed under a collective agreement, including overtime. In any case, the employee may not work more than an average of 48 hours a week in four consecutive months; however, again this can be extended by a collective agreement up to six months.

Regardless of the above, by a collective agreement, unequal distribution of working time may be extended beyond the limit of 60 hours a week. Yet the total amount of working hours cannot be more than an average of 45 hours a week over six months.

The amendments complicate working time provisions and therefore could produce various interpretations among employers, employees and work inspection, which might result in unwanted problems and tensions.
Atypical forms of employment

New provisions encouraging, for example, temporary agency employment aim to provide a faster movement of unemployed persons into the labour market. Employers are now able to engage an employee of a temporary employment agency anywhere and for any work position. The idea behind the new regulation is to provide legal incentives for temporary employment agencies to hire employees on the basis of permanent rather than fixed-term contracts, thus providing them with income security between assignments.

A more flexible labour market?

The amendments have received plenty of criticism from both sides the unions as well as the employers. The unions have opposed the amendments, arguing that they will undermine the legal protections of employees. The employers have been arguing that fundamental structural changes, necessary to facilitate business and encourage new employment, have not been made, ultimately undermining the needed turnaround in the economy. Employers further point to the disparity of rights between public and private sector employees. That is, the Labour Act still does not apply to civil servants, who enjoy ultra-protective special regulations that do not “punish” them to be efficient, leaving private sector employers to bear all the consequences of the current economic situation.

Frequent changes to the labour law make its successful implementation difficult and harmonisation of the court practice hard to achieve. The practical implementation of the new Labour Act, however, is still expected. Its provisions are useful and, to an extent, should make the Croatian labour market more flexible. A positive surprise would indeed be if the new Labour Act soon produces positive effects on employment, investment and overall development.

The Croatian government expects the new Labour Act to have a positive impact on the labour market and to encourage foreign investment in Croatia. However, unions and employers have strongly opposed the changes and it remains to be seen whether the desired results will be achieved.

Austrian Act Against Wage and Social Dumping – A Sleeping Giant Awakes

Stefan Kühteubl | Susanne Ohl

The Austrian Act Against Wage and Social Dumping introduced high penalties, particularly if the employer does not pay the employee’s remuneration as stipulated in collective bargaining agreements. The provisions of the LSDB-G are becoming subject to more frequent controls of the Austrian authorities who penalise any infringement rather rigorously.

Legal framework

The Austrian Act Against Wage and Social Dumping aims to have a positive impact on the labour market and to encourage foreign investment in Austria, particularly those temporarily posting employees to Austria, the provisions with regard to underpayment also apply to domestic Austrian employers of all industries.

Underpayment

According to section 7i para 5 AVRAG, foreign and domestic employers must pay the remuneration to which the employee is entitled as stipulated by law, regulations or the applicable collective bargaining agreement (CBA).

Until the end of the year 2014, the law only penalised the failure to pay the employee’s “base pay”, which led to criticism as this rather unspecific term did not, according to the legislative materials, include any overtime premiums or the 13th and 14th salary. The government bill recently presented by the Austrian government explicitly refers to the remuneration the employee is entitled to. This includes all parts of the employee’s compensation, e.g. minimum wages, overtime premiums, 13th and 14th salary. Only certain fringe benefits or other payments specifically listed in article 49 para 3 of the General Social Security Act (Augenheilerversicherungsgesetz; ASVG) are not part of the employee’s remuneration.

Consequently, as of January 2015 the failure to pay any part of the employee’s remuneration will be considered as underpayment and will therefore be subject to penalties.

Penalties

Employers not paying the remuneration the employee is entitled to, failing to keep ready documents on salaries or other parts of the employee’s remuneration in store. All documents are to be kept ready in German.

Moreover, all employers must cooperate with the authorities when being monitored with respect to the provisions of the LSDB-G.

Documents on wages and salaries and cooperation with the authorities

As set out in section 7d para 1 AVRAG, foreign employers must have employment contracts, “service notes” (Dienstzettel), pay slips, time records and records of payments as well as other documents that are necessary to verify the salaries their employees are entitled to in store. All documents are to be kept ready in German.

Note however that the LSDB-G does not refer to the employee’s salary as agreed in the employment contract or a shop agreement. Therefore, no wage or social dumping takes place if employers pay their employees less than their contractual salary.

In practice, minimum wages and other parts of the employee’s remuneration are stipulated by CBAs or federal decrees on minimum wages in certain sectors (Mindestlohn). The remuneration to which the individual employee is entitled is to be determined “under consideration of the individual classification criteria”, meaning mainly the work actually performed by the employee as reflected in the CBA’s salary scheme.


Penalties for the failure to pay the remuneration the employee is entitled to vary between EUR 1,000 and 10,000 for every underpaid employee (i), and between EUR 2,000 and 20,000 in case of recurrence or if more than three employees are concerned. In case of recurrence with more than three employees concerned, penalties between EUR 4,000 and 50,000 for every underpaid employee (i) apply. As of January 2015, the same penalties apply for not holding the necessary documents in store or not cooperating with the authorities.

Risks for employers of all industries

Until 31 August 2012, 488 suspected cases of wage and social dumping were reported to the Competence Center for Combating Wage and Social Dumping at the Vienna Health Insurance Fund. In 261 cases, charges were filed against employers for underpayment. ¹

According to our information, the number of charges filed has gone up significantly within the last 12 months. As our recent experience has shown, the authorities particularly perform more frequent controls regarding the LSDB-G within the regular joint audit of wage-dependent levies (GPLA).

Contrary to the common perception, LSDB-G controls have increased not only in the building sector but in all lines of business. Therefore, we advise employers of all industries to review their records on wages and salaries to make sure their employees are paid remunerations as set out by the applicable collective bargaining agreement. Employers, particularly those employing high numbers of employees, should be aware that if several employees are underpaid, fines can easily amount to hundreds of thousands of Euros since the penalties stipulated by law are due for every concerned employee.

Austrian authorities have increased controls relating to wage and social dumping. Failure by the employer to pay employee remuneration pursuant to applicable collective bargaining agreements may be fined with up to hundreds of thousands of Euros in extreme cases.

¹ Statistics of the Vienna Health Insurance Fund
(Source: http://www.hauptverband.at/portal2/portal?portal=portalcontent/contentWindow&contentid=10036.554295&action=show&cacheability=PAGE; 1 October 2014)
State Aid Rules Interfering with Public Financing of Infrastructure

Eva Skufca | Matija Renčelj

It has been long considered that investments in public infrastructure are an integral part of exercising public power and hence escape from state aid control. Recent developments show that, to the contrary, financing of public infrastructure only in very limited cases need not be checked from a state-aid perspective. This brings numerous dilemmas as to how public infrastructure projects should be set up and also means that state aid compliance should be added to the checklist of all public infrastructure projects.

Overview

The general rule contained in article 107 TFEU lays down a clear and broad prohibition of state aid measures: “Any aid granted by a Member State or through State resources in any form whatever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”. This means that each measure that falls under the above definition falls under the scrutiny of the European Commission (EC) and may not be implemented before receiving a green light.

It has long been believed that financing of public infrastructure falls outside of the said prohibition as the member states are expected to remedy the lack of (private) funds and carry out infrastructure projects in the interest of society.

The stance was also confirmed by the EC, which for example established in its 1994 Aviation Guidelines1 that “the construction or enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy, which cannot be controlled by the Commission under the Treaty rules on State aid”. Twenty years later, we are looking at a completely different picture. If in 1994, the EC believed that infrastructure projects, regardless of the intended (economic) activity for which they have been built, fall outside of state aid control, in 2014 even infrastructure projects in the field of culture might be double-checked by the EC.

Construction v operation of public infrastructure

The EC is of the opinion that both the construction and operation of infrastructure constitute economic activities in themselves and are thus subject to state aid rules if the infrastructure provides or will be used to provide goods or services on the market. The dividing line seems to be clear: only infrastructure that relates to an economic activity must be observed for state aid implications, and funding of it is subject to EC control. However, as can be seen from the above, the scope of activities regarded as non-economic is becoming increasingly narrow.

In the construction phase, state aid can be excluded only if financing is in conformity with the market economy investor principle (MEIP). This means that public (co-)financing that addresses a market failure and is provided on terms not in line with the MEIP principle constitutes an advantage and thus aid, and should thus be notified to the EC.

There are no exact guidelines as to how infrastructure built with public funds should be operated, but it can be inferred from the EC’s decisional practice that both the operator selection and the operating agreement will be examined by the EC to see whether they correspond to market terms.

In the recent Leipzig/Halle case, the European Court of Justice (ECJ) confirmed the EC’s stance and provided indications relevant for future cases.3 Most significantly it confirmed that “future use of infrastructure” is the applicable parameter when assessing the relevant scope of state aid rules, meaning the construction itself cannot be isolated from other/future infrastructure purposes. Further on, the judgment clarified two additional important questions. First, it recognised all undertakings that can own, operate or use the financed infrastructure as potential beneficiaries. Additionally, it denounced the importance of the legal status of the beneficiary in question, confirming the general concept of an undertaking in competition law.

The way forward?

The EC is aware that the application of state aid rules is becoming increasingly complicated and recently decided to provide some clarification on key concepts relating to the notion of state aid, including financing of infrastructure. The Draft Commission Notice on the notion of state aid intends to provide practical guidance to identify state aid measures, although the final version of the Notice has not yet been adopted.

In the Notice, the EC takes the stance that “public funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of the State aid rules”, which inter alia covers (i) public roads, bridges or canals made available for public use without consideration and (ii) infrastructure intended for activities that the state normally performs in the exercise of its public powers.4 The EC further clarifies that, when “an infrastructure is used for both economic and non-economic activities, public funding will fall under the State aid rules only insofar as it covers the costs linked to the economic activities.”

We will see how infrastructure financing is addressed in the final text. Looking at the Archeological Museum Messara Crete decision, it seems that the line between economic and non-economic activities remains far from obvious.

For the sake of legal certainty, state aid compliance should be added to the checklist of all public infrastructure projects in the future. Public authorities and undertakings might also want to re-evaluate all projects implemented after the Aéroports de Paris judgment of 12 December 2000 as the EC believes that only financing “granted prior to that judgment did not constitute State aid and that, accordingly, such measures did not need to be notified to the Commission.”

Notes:

1 EC, Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, par. 12.

2 Aéroports de Paris and Groupe ADP v Commission, Case C-404/07, ECJ judgment dated 14.10.2014.

3 Defined as any entity engaged in an economic activity consisting in offering goods or services on a given market.

4 Draft Commission Notice on the notion of State aid pursuant to Article 107 TFEU, par. 37, available on the EC’s website.

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Settlements with the Austrian Competition Authorities: Outlook

Franz Ultschberger | Valerie Ditz

In its recently published guidelines, the Austrian Federal Competition Authority (FCA) outlines the regulatory framework for settlements in antitrust proceedings – a procedural instrument that is becoming more and more attractive in Austria. But do the guidelines provide sufficient incentives for companies to pursue settlements as an “early exit” route, and what are the benefits and pitfalls of such a process?

How does the settlement procedure work in Austria?

The Austrian settlement procedure seeks to simplify and expedite antitrust procedures. As a trade-off for not contesting the results of an antitrust investigation by the FCA, the undertaking concerned is offered a reduction in fine as well as an accelerated proceeding before the Austrian Cartel Court.

In a nutshell, the settlement procedure comprises the following steps:

• First, the FCA and the undertaking concerned must have a general interest in exploring a settlement. If so, settlement discussions may be opened informally by both sides. Such discussions typically take place outside the court room, well in advance of any Cartel Court proceedings.

• Second, during the settlement discussions, the FCA will lay out the key elements of the infringement. Most importantly, the FCA will present the facts and evidence of the case, its legal qualification and the fine to be expected. Eventually, the undertaking must agree with the factual findings of the FCA and refrain from objecting to the FCA’s legal qualification of the conduct as a breach of competition law.

• Third, the FCA will consult with the Austrian Federal Cartel Prosecutor (FCP) and bring the case before the Austrian Cartel Court. During the court proceedings, the undertaking concerned (as well as the FCP) will have the opportunity to comment. If the FCP does not object, the decision of the Austrian Cartel Court may not be higher than the fine settled with the FCA.

Which cases are suitable for settlements?

A settlement can be an interesting option for a number of cases. Unlike at the EU level, the guidelines of the FCA cover not only (hard-core) cartels but also unilateral conduct, such as abuse of dominance or gun jumping in merger control proceedings.

Specific factors that may suggest that a case is eligible for a settlement are (i) the probability of reaching a common understanding with the FCA in a reasonable timeframe and (ii) the prospect of achieving procedural efficiencies. Hence, a settlement is suitable first and foremost for cases that do not require infinite (legal) discussions.

However, in exceptional circumstances also cases that touch upon new legal theories may qualify for a settlement. From a company’s perspective, the most attractive feature to a settlement is financial. In return for the acknowledgement of the facts of the infringement, the undertaking is granted a reduction of up to 20% of the envisaged fine (twice what the European Commission would grant in its settlement practice). The FCA guidelines explicitly note that a bonus for settlements does not exclude a further reduction of the fine for the company’s cooperation (be it as leniency applicant or otherwise). The accelerated settlement procedure also saves legal and consultancy fees and allows the company’s management involved in the proceedings to quickly return to its everyday business.

Furthermore, and in terms of numbers not the least important, a cooperative dialogue with the FCA may well influence the scope and duration of the alleged infringement as the FCA – unlike in litigious cases – is more prepared to focus on key conduct and the key periods in order to achieve a settlement. This will not only reduce the amount of fine to be expected but also limit the information that becomes available to the public. Cartel Court decisions must be published since the most recent antitrust reform that entered into force in 2013. Additionally, coverage in the media and the negative perception of the public may also be significantly lower in a “silent settlement procedure” than in contested cases, which may last for years.

What are the downsides and pitfalls of the settlement procedure?

As a drawback to the “early exit” route, the participating undertaking must accept certain restrictions of procedural rights:

• The FCA guidelines do not foresee specific measures to safeguard the undertaking’s right to be heard in the settlement process before the FCA. In this respect, the participating undertaking depends on the goodwill of the authority.

• As regards the calculation of the settled fine, the overall coherence and consistency of the level of fine will be scrutinised by the Austrian Cartel Court. During the settlement discussions with the FCA, it is therefore advisable to specifically label the mitigating measures that will lead to a reduced fine.

• It is also important to include the FCP at an early stage of the settlement process. Otherwise, there remains a certain risk that the FCP will request a higher fine or subsequently contest the settlement decision of the Cartel Court, if he disagrees with the compromise sought (only in leniency applications is the right of the FCP to request a fine statutorily excluded).

• There is little chance for an undertaking concerned to credibly appeal a settlement decision of the Austrian Cartel Court, if it (correctly) reflects the facts to which the undertaking has consented to vis-à-vis the FCA (even though a waiver of the right to appeal may be requested in advance of the Cartel Court proceedings).

Therefore, a legally binding settlement statement should be made only once the case had been brought before the Austrian Cartel Court.

• Finally, a settlement may backfire in potential follow-on damage claims due to the acknowledgement of facts and the non-objection of its legal qualification, which will be reflected in the settlement decision (a non-confidential version of which will be published by the Austrian Cartel Court). Considering the recently adopted EU directive on antitrust damage actions, the risk of civil cases is likely to increase significantly as the directive is implemented into national law – may lower the burden of proof and facilitate the quantification of harm for which a third party may seek damages. On the plus side, however, settlement decisions are likely to be less detailed than a fully reasoned decision and therefore – at least potentially – of less use as a basis for damage claims.

In determining whether a settlement is an attractive option in antitrust proceedings, an undertaking must balance the risk of increased exposure in follow-on damage claims against the prospect of a reduced fine and less media attention.
New Competition Rules in Poland

On 18 January 2015 significant amendments to the Polish competition law will enter into force (the Amendment). The reform is aimed both at making merger control more efficient and at introducing changes to antitrust regulations.

**Merger control**

The Amendment introduces a two-stage procedure for notifications of concentration. Transactions which do not raise competition concerns will be cleared within a month in stage one. Merger control experts expect that ca 80% of transactions will be covered by this stage. More complex transactions will be dealt with in the second stage, which will last four more months.

The Amendment also foresees that the Office for Competition and Consumer Protection (OCCP) may present any concerns it has about a transaction before issuing the clearance. The involved companies will therefore get a chance to address these concerns and offer modifications to the planned concentration to avoid anti-competitive consequences. The presentation of OCCP’s concerns will be deemed as a phase preceding the establishment of conditions, if a conditional clearance is expected.

The Amendment also aims to eliminate the loopholes in multi-stage transactions (subsequent acquisitions of relatively small parts of a business/subsidiaries by one entity over a certain period of time not longer than two years), which currently fall outside the scope of the obligation of clearance due to the turnover associated with the involved parts of a company’s business/certain subsidiaries. After the Amendment enters into force, if the entire series of transactions exceeds the given turnover threshold, it will be subject to clearance.

**Inspections and searches**

The Amendment will introduce a clear division between inspections and search via provisions that apply to the search and inspections. The inspections of premises and IT systems will be conducted on its basis. Especially important is reference to the provisions of the CPC that guarantee protection of professional secrecy in the course of searches.

**Fines**

The most controversial proposal in the Amendment relates to fines. The reform envisages that the liability for an infringement of the prohibition against anti-competitive activity will be borne not only by an undertaking but also by its directors (board members, managers) whose actions or omissions led to such an infringement. In the latter case, liability will be limited to infringements committed intentionally. The envisaged maximum fine for individuals is PLN 2 mln (ca EUR 500,000) each. The fines imposed on the undertaking and its managing persons will be imposed in the same decision.

**Settlements of Potential Competition Law Violations in Serbia**

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Amendments to the Competition Act, in force as of November 2013, introduced much needed changes to the competition regime in Serbia and now allow undertakings the possibility to effectively settle their potential competition law violations.

**What is a settlement?**

A settlement allows undertakings under formal investigation by the Commission for the Protection of Competition (Commission) for a potential competition law violation to propose measures to remedy the potential violation. If accepted, the Commission will cease its investigation rather than reach a definitive decision on the existence of the violation, which might also entail fines of up to 10% of total annual turnover.

**When can a settlement proposal be made?**

An undertaking under investigation can make a settlement proposal starting from the moment the investigation is formally launched, but only until the Commission issues a statement of objections – meaning a formal notification to the undertaking informing it about the facts and evidence on which it intends to base its decision establishing a violation of competition law.

The settlement proposal can be based on the facts in the conclusion launching the investigation as well as the facts established in the course of the investigation. This allows the undertaking to have a detailed overview of the main potential competition concerns investigated by the Commission, and thus tailor its proposal so that it balances the requirement to remove such concerns and its need not to overtly disrupt its business operations.

However, the settlement proposal will be market tested. That is, the settlement proposal will be publicised as a settlement procedure at any stage if, in its opinion, the settlement will not speed up the proceedings. Also, the party to the proceedings will have the right to withdraw from the settlement after notification of the OCCP.

**Leniency programme**

Apart from immunity, the leniency programme will provide for a maximum 50%, 30% and 20% reduction in fines for leniency applicants. Also, it will be supplemented by a “leniency plus” programme, which will apply if an undertaking that files a leniency application discloses to the OCCP information about another anti-competitive practice that had been unknown to the OCCP. In return, an additional reduction in the fine will be granted.

The application of this tool is supposed to lead to an increase in the detection of anti-competitive agreements.
summary of the main elements of the proposed measures, with all interested third parties invited to submit their written observations and opinions of the settlement proposal.

Thus, the potential competition violation, although maybe concerning a limited segment of the market or a limited number of market participants, will become publicised to the entire market through the market test, and thereby also to market participants who had no knowledge or suspicion of the potential violation. This can result in adverse effects on the business ties and operations of the undertaking making the proposal.

What are the possible outcomes of a settlement proposal?

The Commission need not accept the settlement proposal, either as initially proposed by the undertaking under investigation or as market tested. If the Commission is not satisfied that the proposed measures would remove the competition concerns under investigation, it can reject the proposal and run its investigation to the end, potentially also imposing fines.

If, on the other hand, the Commission on the basis of the market test establishes that it is likely that the proposed measures will remove the competition concerns under investigation (it will, in line with the settlement proposal, render a conclusion specifying the measures to be observed by the undertaking, and cease its investigation.

However, the Commission may resume its investigation within three years as of the day it rendered the conclusion if (i) the [market] conditions prevailing at the time of its conclusion significantly change, (ii) the undertaking does not fulfil the conditions stipulated in the conclusion or does not furnish proof of fulfilment of those conditions to the Commission or (iii) the conclusion was based on false or incomplete data provided by the undertaking under investigation.

What are the implications of settlements for undertakings?

The main and most attractive implication of settlements from the perspective of undertakings is that a successful settlement can prevent a decision by the Commission establishing a violation of competition law. Such a decision would, in addition to measures similar to those agreed in the settlement, also entail a fine of up to 10% of total annual turnover of the violating undertaking.

By settling the case with the Commission, undertakings under investigation are able to resolve the investigation much more efficiently and expediently, as well as to influence the design of measures to be undertaken so as to remove competition concerns. Therefore, settlements allow undertakings not only to remove much of the uncertainties and risks that a Commission’s definitive decision at the end of its investigation would have (including the risks of fines) but also to have an important say in how their business operations will look in the future.

EU Competition law has seen a year with landmark developments on the legislative and judicial level, which will lead the way for competition law enforcements in the years to come. The developments span from a new directive on damages, a new facet in the debate on abusive rebates, a proposal to broaden the scope for merger control and, lastly, a new Competition Commissioner.

Proposal for a directive to facilitate private antitrust damages actions

On 17 April 2014, the European Parliament passed the long-awaited directive on private antitrust damages actions (the Directive). The Directive will harmonise national rules with a view to facilitate recovery of damages for victims of competition law infringements, including cartels and abuses of dominant market positions. It will remove a number of practical difficulties which EU citizens and businesses face today when trying to recoup compensation for harm suffered. Victims will obtain easier access to evidence to prove the damage and more time to make their claims. Once officially adopted, EU member states will need two years to transpose the provisions of the Directive into their legal system. The Directive will increase the level of cartel damages recovery that is being seen across Europe today.

Landmark judgment on abusive rebates

The General Court (ECJ) opened a new chapter in the debate on how properly assess rebates by a dominant company. It is no overstatement to say that two ideological views, from the European Commission (EC) and from the court, clashed. The discussion came about following Intel’s appeal against the decision of the EC to impose fines on it of more than EUR 1 billion for abusive rebates. While the court’s judgment comes as a victory for the EC (it upheld the fines), it is from a policy perspective a hefty defeat for the EC’s concept of an effects-based test.

The EC’s thinking on rebates has significantly evolved over the last decade. The so-called “more economic approach” (which focuses on the actual effects of behaviour and less on formal criteria) led the EC to rethink its practice on rebates and consider them as a legitimate way for dominant firms to compete, unless competing undertakings would not be able to match a rebate, leading to a negative effect on competition. This cumulated in a priority paper, which identifies those rebates which the EC will prioritise to go after. The court did not leave doubts as to its thinking on the EC’s theories and restated a formalistic approach. Exclusionary rebates are per se illegal irrespective of whether they exert actual negative effects on competition. As a matter of policy, exclusionary rebates are deemed to be such a severe restriction that no effects analysis is needed.

The competition world after the Intel judgment is one of uncertainty, leaving companies in limbo which test to apply: the EC’s test is perceived to be the “appropriate” test to identify anticompetitive behaviour, while the court judgment manifests the actual legal standard. This uncertainty will remain for a while. Intel appealed against the decision of the court to the European Court of Justice. Another round of debate is ensured.

Review of acquisitions of non-controlling minority shareholdings

On 9 July 2014, the EC published proposals (the White Paper) to reform the European Merger Regulation (Merger Regulation). The White Paper spins forward the public consultation which the EC kicked off based on a Staff Working Document in summer 2013 (see related article in the Schoenherr Roadmap 2014).

At present the EC has limited powers to capture and review non-controlling minority shareholdings. The White Paper now introduces the concept of a “targeted transparency system”. It suggests that minority shareholding in a competitor or directly vertically related company would trigger the EC’s jurisdiction if the acquired shareholding is (i) above 20% or (ii) between 5% and 20%, but combined with “additional factors” (ie, rights that give the acquirer a de facto blocking minority, a seat on the board of directors or access to commercially sensitive information of the target).

The EC of the White Paper was sent to public consultation. It is uncertain whether the new Competition Commissioner (see below) will endorse the legislative initiative launched by her predecessor. If so, the targeted transparency system of the White Paper is likely to be the mechanism we will see introduced into the Merger Regulation. Once adopted the impact is anticipated to go beyond the EU merger control regime. We expect that national legislators in and outside of the European Union may then decide to introduce rules with a view to facilitate recovery of damages for victims of competition law infringements, including cartels and abuses of dominant market positions. It will remove a number of practical difficulties which EU citizens and businesses face today when trying to recoup compensation for harm suffered. Victims will obtain easier access to evidence to prove the damage and more time to make their claims. Once officially adopted, EU member states will need two years to transpose the provisions of the Directive into their legal system. The Directive will increase the level of cartel damages recovery that is being seen across Europe today.

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the EU will review its respective merger regimes with a view to capture non-controlling minority shareholdings.

New EU Competition Commissioner

Margrethe Vestager, former Deputy Prime Minister of Denmark, was nominated by the Juncker’s team to become the new EU Competition Commissioner for an term of five years, beginning 1 November 2014. Her appointment was confirmed by the European Parliament (EP) in October 2014. During the hearing before the EP, Ms Vestager addressed a number of issues that she would like to focus on during her five-year term in office. She confirmed the importance of competition policy to Europe and declared to resist political pressure from the member states, notably when it comes to pressure for protectionism. The enforcement against cartels is said to be a top priority during her term. Moreover, the Competition Commissioner designate welcomed initiatives that encourage private damages actions.

This is in line with the mission letter of Juncker in which he asked Vestager to focus on mobilising competition policy tools and market expertise so that they contribute to the EU’s jobs and growth agenda, including in areas such as the digital single market, energy policy, financial services, industrial policy and the fight against tax evasion.

Little is known about Margrethe Vestager. The Competition community looks forwards to seeing how she shapes competition policy in the EU’s next term.

The competition world after the Intel judgment is one of uncertainty, leaving companies in limbo as to which test to apply.

Discussing Amendments to the Bulgarian Competition Protection Act

The Bulgarian Competition Protection Act (CPA) will be in focus in 2015 because some misbalances in the national supply chain should be resolved. The introduction of the new notion of “abuse of stronger position by negotiation” and certain requirements for food distribution contracts are being discussed, as well as different sanctions and different mechanisms for their imposition.

At this stage it is difficult to predict how exactly the legislator will find the fine balance between the interests of suppliers and distributors. But the discussed amendments to the CPA and the proposals for their refining may give some clues about what we may expect from the CPA.

How the discussions began and the story behind them

The discussions about possible amendments to the CPA began four or five years ago when some misbalances in the relations between suppliers and big retail chain stores started to appear. Within this period mostly local food suppliers raised the issue due to certain practices of the distributors. These practices were similar to those identified by the European Commission in its Green Paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe.

Since the beginning of the discussion, different options for settlement on a national level have been considered. But in the end the Bulgarian legislator decided that amendments to the CPA would be the most efficient tool.

Several drafts for amendments to the CPA have been on the table. In the middle of June 2014, the last National Assembly (NA) adopted the Act for Amendment and Supplement of the CPA, which was suspended by the Bulgarian President (President) and returned to the NA for refining. The Act could not further refine because of the early termination of its mandate. So the amendments to the CPA are still pending. But, as stated, the discussed amendments and the proposals for their refining may give some clues as to what we may expect from the CPA.

Abuse of stronger position by negotiation

The intention of the legislator is to prohibit the abuse of a stronger position that one party may have over the other party in the negotiation process within the supply chain. It is not clear how this will be finally defined. It is expected to be defined as an action or inaction (ie, unjustified refusal to supply or purchase goods or services; imposition of unjustified sever or discriminatory conditions; unjustified termination of commercial relations) of the party with the stronger position. This action or inaction should contradict good business practices and potentially harm the interests of the weaker party. According to the latest proposals for refining the amendments, the weaker party should be a micro, small or medium undertaking.

Whether a party has a stronger position should be defined on the basis of certain characteristics of the market, the commercial relation in hand and the volume of the parties’ business activities. These criteria should be further elaborated in methodology adopted by the Bulgarian Competition Protection Commission (CPC). The envisaged sanction for such abuse may be up to 10% of the turnover achieved from the sales of the goods affected by the abuse but not less than BGN 10,000 (ca EUR 5,000). When no turnover has been achieved, the sanction should be between BGN 10,000 (ca EUR 5,000) and BGN 50,000 (ca EUR 25,000).

Amendments concerning the food sector

The Act for Amendment and Supplement of the CPA also envisages amendments to the Food Act (FA). It is proposed that food distribution contracts be concluded in writing and not include:

• restrictions on same goods or services to be purchased from another supplier;
• restrictions on better conditions offered to third parties;
• sanctions for offering better conditions;
• unilateral amendments to the contract;
• payments and discounts for not provided services;
• transfer of unjustified or non-proportional commercial risk;
• terms for payment longer than 30 days as from the invoice; and
• prohibition on the parties to transfer their receivables to third parties.

Who will control food distribution contracts?

One option is for food distribution contracts to be controlled by the CPC. According to the suspended Act for Amendment and Supplement of the CPA, food distributors with turnover above BGN 50 mln (ca EUR 25 mln) must submit samples of their draft contracts and/or general terms and conditions to CPC. If the samples contradict the CPC, the CPC may investigate and, if a violation is established, impose sanctions of up to 1% of the average daily turnover of the undertaking for the last financial year. However, currently it is proposed this option be removed from the suspended Act for Amendment and Supplement of the CPA.

It is also envisaged that food distribution contracts be controlled by the Bulgarian Food Safety Agency (BFSA) for conformity with the FA and its proposed amendments, mentioned above. The BFSA may impose sanctions on the food distributors of up to BGN 3,000 (ca EUR 1,500). It is proposed that this amendment falls out. Another proposal is that a special institution under the name National Consultative Council, together with Conciliation Commission, be established to settle further disputes between food suppliers and distributors.

It depends on the new National Assembly (elected on 5 October 2014) how the process will end. At the moment it is difficult to predict which interests will prevail – those of the suppliers or those of the distributors. But one thing is sure: The CPA will again be in focus in 2015.
New Initiatives for Pre-Insolvency Restructurings

In financial distressed situations, waiting until the last minute is not a smart idea. Still, insolvency laws do not provide for pre-insolvency restructurings.

Current legal framework for pre-insolvency restructurings

When a company is in financial distress, it is essential that an orderly restructuring process be initiated as soon as possible. The longer the directors of a company wait to address the issues and to start negotiations with the financial creditors, the less likely is a successful turnaround.

In cases where there are several financial creditors involved, the crucial question is how to set up an efficient process for the negotiations between the company and the financial creditors, and how to convince all financial creditors to participate in the process.

Austrian law does not provide for a legal framework for pre-insolvency restructuring negotiations. The proceedings available under the Austrian Insolvency Code (Insolvenzordnung) may be initiated only in case of insolvency or imminent insolvency of the relevant company. The Austrian Company Reorganisation Act (Unternehmensreorganisationsgesetz), despite its promising name, does not contain an adequate process, as it provides neither for the participation of the financial creditors nor for a preliminary moratorium or other measures granting protection to the creditor.

However, two recent developments may address different challenges companies face in pre-insolvency restructurings.

At a workshop of the EBRD-supported Vienna 2 Initiative that took place in Vienna on 23 September 2014, major banks active in the CESEE region called for guidelines for out-of-court restructurings for the whole region. They agreed to team up and implement non-binding guidelines to make cross-border restructurings more manageable. This may be the first step towards a long-overdue, coherent, non-binding framework for restructurings in the region.

The Recommendation by the European Commission

In addition, the European Commission has published a recommendation calling for the implementation of a legal framework for efficient pre-insolvency restructurings. According to the Recommendation, national legislators should provide for out-of-court restructuring proceedings available to debtors who are likely to become insolvent. The objective of such proceedings should be avoiding insolvency rather than just dealing with an existing insolvency. The proceedings should be binding for all creditors, provide for majority decisions of the creditors and contain an option for a temporary stay of enforcement actions.

To facilitate the granting of additional financing, the Recommendation asks for such financing to be exempt from possible voidance or similar claims. The proceedings should be conducted mainly out-of-court, keeping cost and administrative burden at a minimum. Where necessary, the court should be allowed to appoint a mediator or supervisor to ensure successful negotiations and to safeguard the legitimate interests of creditors and other interested parties.

The pre-insolvency restructuring framework outlined in the Recommendation addresses the most pressing issues in each out-of-court restructuring. Implementing such a framework into national law could be a valuable contribution towards more successful pre-insolvency restructurings.

Pre-insolvency proceedings as a way to prepare large-scale insolvencies?

The timely involvement of a court-appointed supervisor could have another substantial advantage as it could be used to prepare large-scale insolvencies before insolvency proceedings open. Recent examples have shown that such a tool is sorely needed.

Currently there is no possibility under Austrian law to coordinate the preparation of insolvency proceedings with the court or the insolvency administrator before such proceedings open. Thus, at the beginning of insolvency proceedings, valuable time is lost while the insolvency administrator is familiarising himself with the business of the debtor. This delay can be quite costly for the creditors as it may ruin a potentially viable business of the debtor.

Conclusion

Even though the Recommendation is not legally binding, there are plenty of reasons why the Austrian legislator should seize the opportunity to review the current legislation and implement an efficient and practicable legal framework for pre-insolvency restructuring proceedings. The new law should be accompanied by a common understanding of the major banks on how to handle out-of-court restructurings to make such processes more efficient and more successful.
Set-Off and Netting Against a Bulgarian Bank Placed Under a Moratorium

The validity of a set-off against a bank in reorganisation has become hotly debated among Bulgarian lawyers in the context of the reorganisation imposed on one of the largest local banks.

Set-off and netting are important risk mitigation techniques for transactions in derivatives, and the enforceability of such techniques is a key aspect of the business decision on whether to enter into dealings with a Bulgarian bank at all.

Their enforceability has become a hotly debated topic in Bulgaria in the context of a special supervision imposed recently by the Bulgarian National Bank (BNB) on the fourth largest Bulgarian bank, Corporate Commercial Bank (CCB). This article briefly outlines the differing arguments in the debate. This debate is important for the financial industry as the enforceability of set-off and netting will determine if the counterparties of CCB may reduce their exposures towards CCB. Such exposures are typically huge under derivatives transactions.

Special Supervision over Corporate Commercial Bank in Bulgaria: Facts

Special supervision is not a type of insolvency proceedings but a reorganisation procedure where BNB has inter alia stopped (смпера) all payment obligations of CCB (Moratorium). Any action of the bank in violation of the Moratorium is rendered void, all enforcement proceedings against the bank must be stopped, it is deemed not to be in default and it owes no interest or liquidated damages for the delay.

Doubts concerning set-off and netting against CCB

As there is no express statutory rule allowing third parties to set-off with receivables towards a Bulgarian bank under a Moratorium, some Bulgarian lawyers insist that such a set-off is impossible. Their rationale is that it is a statutory prerequisite for a set-off that the receivables towards the person against whom the set-off is invoked must be due (изискуеми). And as the receivables towards the bank are, allegedly, not due (because of the prohibition for it to perform its obligations), it is asserted that a set-off during the Moratorium would be void.

These doubts are similarly relevant for netting arrangements since they invariably include contractual acceleration of all mutual obligations (followed by their recalculation and replacement by a single payment obligation for one of the parties). Acceleration means that all obligations of the parties become due either automatically or after a notice (depending on the arrangements), so the problem of the enforceability of the set-off relating to whether the obligations are due (as a prerequisite for a set-off) is equally relevant for netting.

Arguments that set-off and netting may be invoked against CCB

We believe that a Moratorium is not an obstacle for set-off/netting. The Bulgarian statute expressly provides that only the actions of a bank placed under a Moratorium in violation of that Moratorium are void, and no similar rule exists for actions of third parties (eg, those invoking a set-off or netting against the bank).

Similarly, we believe a Moratorium is not an obstacle for the receivables against a bank to become due (and thus it is not an indirect obstacle for set-off/netting). Receivables under Bulgarian law become due at different moments depending on whether there is a maturity date, or an acceleration clause is agreed upon.

The obligations of a bank with a fixed maturity date become due on that date, and as the Moratorium does not prohibit a fiction preventing such date from taking place, it may not be an obstacle for receivables to become due. Obligations of a bank under a Moratorium with a fixed maturity date that have been agreed to become prematurely due as a result of an acceleration notice served to the bank would require a special (case-by-case) analysis, but generally the Moratorium is not an obstacle for them to become due, since there is no prohibition for third parties to serve a notice to a bank under a Moratorium.

Conclusion

Note that the special supervision over CCB takes place in a situation where Bulgaria has not yet implemented the Bank Recovery and Resolution Directive 2014/59/EU (BRRD). The doubts raised by some Bulgarian lawyers as to the validity of a set-off against a bank under a Moratorium, as explained in this article, show how necessary it is to robustly transpose art.77, par.1 of BRRD, which requires EU member states to ensure that there is appropriate protection for set-off and netting agreements.

Bulgarian law provides that only the actions of a bank in violation of the Moratorium are void, which means that actions of third parties (eg, those invoking a set-off or netting against the bank) are not prohibited.

1 For arguments that such obligations are not due, see Damian Simeonov, Assignment of receivables under an account held with a bank that has been placed under a special supervision and a consequent set-off with such receivables, Capital Daily, No 169/2014, 4 September 2014, page 22.
2 For arguments that such obligations are not due, see Prof. Valentina Popova and Tsvetan Krumov, Can an obligor of a bank placed under a special supervision make set-off with a receivable towards that bank?, Capital Daily, No 171/2014, 8 September 2014, page 22, as well as PhD Ognian Gerdjikov, Are set-off operations legal (ie CCB is under a special supervision)? Capital Daily, No 174/2014, 15 September 2014, page 22.
3 This directive must be transposed by EU member states (incl. Bulgaria) by 31 December 2014 and be effectively applied as of 1 January 2015.
4 For example, the close out netting provisions under the ISDA Master Agreements of 1992 and 2000 and the Global Master Repurchase Agreements of 1995 and 2011.
5 This directive must be transposed by EU member states (incl. Bulgaria) by 31 December 2014 and be effectively applied as of 1 January 2015.
6 This directive must be transposed by EU member states (incl. Bulgaria) by 31 December 2014 and be effectively applied as of 1 January 2015.
Austria: Trademarks as Collateral for Financing

Barbara Hager

In recent years, providers of financing are increasingly looking into trademarks (and other intellectual property rights) as collateral to secure the repayment of financing.

What can serve as collateral for financing?
Generally, collateral for financing can be structured as rights in rem or as simple contractual obligations. Pledges are the most common collateral when it comes to tangible objects. However, intangible objects such as intellectual property rights can also be pledged to secure the repayment of financing.

Such intellectual property rights include registered trademarks, trademark applications and unregistered trademark rights. Further, in Austria, a subsequent addition of goods and/or services to the list of goods and services of an already existing trademark registration (as with an Austrian national trademark is possible) may be pledged too.

How to pledge a trademark
Under Austrian Law generally, the creation of a pledge requires (i) a title (ie, a pledge agreement between the owner of the pledged asset and the creditor) and (ii) a modus that is visible to the public (property law performance). For tangible assets, the modus is the handing over of the pledged asset to the creditor or a third party (Faustpfandprinzip). For trademark rights, such modus is not applicable as a trademark is an intangible object (intellectual property right) and cannot be handed over to the creditor. Austrian Trademark law mentions the possibility of the recording of pledges in the trademark register; however, it does not state that the right in rem is acquired thereby. In practice, the most commonly used modus is the recording of the pledge with the competent trademark register. Another modus may be a book entry in the books of the owner of the trademark. Other publicly visible modus may further be applied.

Recording of a pledge
In Austria, the recording of a pledge with the competent trademark registry has only a declaratory effect (ie, the recording is not conclusive evidence of the right in rem to the trademark and cannot confirm the (non-)existence of a prior ranking) right, which is very important for conducting an IP due diligence.

Still, according to the prevailing legal views, the recording of a pledge has the advantage of making third parties aware of the pledge, thereby avoiding that a third party acquired bona fide any rights to the pledged trademark. This legal view is not, however, confirmed by law or case law.

The recording of the pledge is still (in most cases) the preferred modus of creating a valid pledge. Although there is no deadline for recording the pledge with the competent trademark register, it is strongly recommended to request the recording as soon as possible so third parties are aware of it.

Book entry
An entry in the books of the owner of the pledged trademark is another possibility to put third parties on notice of the right in rem. It is reasonable, as creditor, to request such an entry especially, at the stage between filing the request for recording of the pledge (see above) and the actual recording of the pledge.

Pledging of trademark applications
Although there is no specific guidance in Austria, it is possible to request recording of a pledge already in the application stage of a trademark.

Following the informal practice of the Austrian Patent and Trademark Office, upon an application to record a pledge for a pending application, a respective note should be made in the application file (but this is not generally open for public inspection, so there is no general declaratory effect) and the pledge should be recorded upon issuance of the registration of the trademark. No additional application/request should be necessary.

How to apply for a recording of a pledge
Unless the whole pledge agreement is presented, usually a short pledge deed or confirmatory declaration serves as proof of the right in rem. The confirmatory declaration need only state that there is a pledge, and the essential points of the pledge (eg, pledgor, pledgee, maximum amount of the secured debt). In practice, the recording usually only refers to the date of the confirmatory declaration.

It takes some months until the Austrian Patent and Trademark Office issues a decision upon the request for recording the pledge and until the pledge is recorded in the trademark register. This may be because recording only has a declaratory effect anyway. However, once the request for recording the pledge is filed with the Austrian Patent and Trademark Office, a note (“Plombe”) that such request is pending will be visible in the trademark register.

The “Grey Zone” in a Trademark Coexistence Agreement

Sorin Eduard Pavel | Cătălin Gulean

Entering into a trademark coexistence agreement should be carefully assessed to avoid that, instead of solving an issue, it causes further trouble.

The key points of a trademark coexistence agreement
A trademark coexistence agreement (TCA) is a contract whereby two parties settle the use of their trademarks for avoiding a mutual infringement of trademark rights.

However, the conclusion of a TCA is not recommended if:
• a party does not control the trademark rights or other rights agreed not to be exercised against the other party;
• the TCA provisions conflict with national or EU laws in some situations, the nullity of a TCA provision that infringes the law could even trigger the nullity of the whole TCA;
• the business plan of a party is not finalised; or
• the terms and conditions of the TCA are not clear, leading to impossibility to exercise specific intellectual property rights.

Any TCA should contain several compulsory elements, such as:
• a clear identification of the use of the respective trademarks (eg, as stand alone or in combination with other elements, in black and white or in colours, etc.);
• where applicable, an express provision on the use of domain names and alphanumeric characters;
• a clear identification of the territory where the TCA is applicable;
• the consequence for the trademarks’ non-use;
• the procedure to add new elements to the trademarks (eg, new figurative elements, colours, logos, etc.);
• the duration of the TCA;
• the right to review the whole TCA or its termination conditions;
• a clear deadlock mechanism, especially for strategic business decisions; and
• the applicable law and competent authority to judge disputes in case of breach.

The legal effect of a TCA

Overall, under Romanian law TCAs are binding and are taken into consideration by Romanian Courts and by Romanian State Office for Inventions and Trademarks. As regards community trademarks (CTMs), the Office for Harmonisation in the Internal Market (OHIM) considers that a TCA is binding for OHIM, but it may be taken into account, especially when the application of EU regulations is deemed in compliance with the content of the TCA.

**Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU (De Minimis Notice)**

Under Romanian law, a contract executed under private signature needs a court decision to attest its enforceable title. In order to have effect in Romania, such decision issued by a court of a state not a member of the EU should comply with several compulsory conditions out of which (i) the judgment should be final under the law of the foreign state where it was rendered and (ii) there should be reciprocity between Romania and the foreign state in respect of the effects of the foreign judgment.

**OHIM examination guidelines Part C opposition, Section 2 Identity and Likelihood of confusion, chapter 7.**

### TCAs and competition rules

A TCA should comply with competition rules set forth in art. 101(1) of TFEU and in the national legislation. A TCA may neither affect trade between EU member states nor restrict competition within the internal market.

Under section 4(i) of Commission Communication 2014/4291/01, a TCA could infringe EU competition rules if its effects impair trade between EU member states in a considerable manner, estimated either by the market share or by the turnover of the parties in relation to the goods and services provided under the trademarks subject to TCA.

The CJEU confirmed that a TCA could be “lawful and useful” if there is a “serious risk of confusion” between conflicting trademarks and if, by the TCA, the parties intend to settle a dispute in relation with such risk of confusion. However, a TCA infringes EU competition rules if its main goal is to divide the market or restrict competition (CJEU case C-35/83 BAT vs Commission).

Any restriction in the TCA would be assessed taking into account also the competition rules. Such restriction should be linked to the agreement, proportionate and indispensable for obtaining pro-competitive effects. For example, restrictions such as non-compete obligations for products other than the one covered by the TCA and indirect restriction of passive sales (masked as trademark exclusive use) breach EU and national competition rules.

### TMCH services

The TMCH services relate only to sublevel domains exactly added to or removed from the trademarks as registered.

**Specifics and functionalities of the TMCH**

In general, any validly registered trademark can be subject to a TMCH entry, as long as it contains a readable word element. The TMCH entry will then generate a “label” exactly matching such word element; no elements must be added to or removed from the trademarks as registered.

The TMCH services relate only to sublevel domains exactly matching such label. Based on the trademark “ABC” recorded in the TMCH, the trademark owner can claim sunrise services only for the domain name “abc.tld” but not for “abc-shop.tld.” The same applies for other services. The trademark owner will be notified of all applications for domain names that concern a sublevel domain identical to the respective TMCH label.

Note that an entry in the TMCH cannot prevent the delegation of a matching domain name to a third party. It would be up to the trademark owner to take appropriate action once notified, if such delegation may harm the trademark owner’s interests. But first statistics show that the claims service also appears to have a deterrent effect since approximately 90% of all applicants who have been notified during the delegation process that the desired domain name matches a TMCH entry, refrained from moving on with the delegation process.

Which trademarks should be entered in the TMCH?

In general, word marks (ideally without containing any special characters) are best suited for entry into the TMCH. Specific attention should be given to “mutated vowels” (eg, “â”, “ö” or “ü”). Since they can also be part of a domain name, the labels generated by the TMCH will also contain mutated vowels included in the underlying trademark registration. However, internationally operating companies usually use the transcriptions (“ae”, “oe” or “ue”) as part of their domain names to ensure broad accessibility of the domain also from other countries, which would require a suitable trademark that includes such transcriptions. Ideally, trademarks entered into the TMCH should remain valid for the entire term of TMCH entry (one, three, five years, renewable).

If the TMCH entry should mainly allow participation in sunrise periods, trademark owners should enter trademarks exactly matching the desired (sublevel) domain name. Further, to participate in sunrise periods, the trademark owner must prove use of the trademark to the TMCH (including a formal declaration and a sample showing the exactly matching use of the mark).

**New gTLDs? TMCH? What is this all about?**

Until recently, the internet domain name space comprised a rather limited number of top-level domains (TLDs); ie, the extensions after the “.” in internet domain names, such as “.com,” “.at” and “.eu” under which sublevel domain names could be registered (eg, “.schuhcenter.ae”). In February 2014, the first ones of many new generic Top-Level Domains (gTLDs) have been launched. This means that in the future nearly any term can serve as a top-level domain (eg, “.shop”, “.blog”, “.win”).

Along with this development comes the risk that non-authored persons could try to register domain names under these new gTLDs matching existing trademarks, possibly harming the trademark owner’s interests.

### Trying to meet the trademark owners’ concerns, ICANN (the NGO in charge for administering the internet domain name system) introduced the Trademark Clearinghouse (TMCH). The TMCH offers owners of registered trademarks the opportunity to enter their trademarks into its centralised worldwide database. This allows trademark owners to benefit from specific services, the most relevant of which are:

- **Sunrise-Services**: Trademark owners are allowed to participate in “Sunrise Periods” (ie, the preferred upfront delegation of domain names before they become generally available to the public).
- **Claims Services**: The TMCH notifies trademark owners as soon as somebody registers a domain name matching the trademark entered in the TMCH.

### The first new generic Top Level Domains have been successfully launched: “.bike”, “.wien”, “.guru” – nearly everything is possible now. The Trademark Clearinghouse intends to protect trademark owners.

New Generic Top-Level Domains and the Trademark Clearinghouse

Michael Wolker

Renewal of the TMCH

If the TMCH entry should mainly allow participation in sunrise periods, trademark owners should enter trademarks exactly matching the desired (sublevel) domain name. Further, to participate in sunrise periods, the trademark owner must prove use of the trademark to the TMCH (including a formal declaration and a sample showing the exactly matching use of the mark).
Recognition of a Mark as Well-Known in Moldova: Practical Aspects

Andrian Guzun

In Moldova a mark is considered well-known if it is largely known at the date of filing of an application to register a mark or at the date of the priority claimed, in relation to a relevant scope of persons and with regard to the goods and/or services for which such mark is used.

Competent authority

Under the Moldovan Trademarks Act no.38/2008 (Trademarks Act), a mark is recognised as well-known on the basis of a request filed with the Chisinau Court of Appeal or on basis of a counter-claim filed during examination of a statement of claims on protection of rights.

The request on declaration of a mark as well-known must contain:

- the request on declaration of the mark as well known and the date from which the mark is to be considered as well known;
- the name, address and signature of the managing director of the applicant;
- the name and address of the trademark attorney (representative), if the request is filed by a representative;
- the description of the mark requested to be declared as well-known; and
- the goods and/or services for which the mark is used and pursuant to the provisions of the International Classification of Goods and Services.

Basis for the declaration of a mark as well-known

To declare a mark as well-known, the applicant must submit to the court any information that would prove the notoriety of the mark, including:

- the level of awareness of the mark on a relevant market and by a relevant scope of persons;
- the duration (commencement and period), level and geographical area of use of the mark;
- the duration, level and geographical area of promotional activity of the mark;
- the duration and geographical area of registration and/ or any registration application where such registration and/or application reflects the use and/or notoriety of the mark;
- a report confirming the value of the mark;
- the results of the polling performed by the applicant with regard to the mark; and
- additional information that would be helpful for declaring the mark as well-known (Article 32/4 a) Trademarks Act).

In practice, polling is the most common tool used and the most decisive proof when it comes to declaring a mark as well-known. It is therefore very important that the polling is well-prepared. In particular, the applicant must precisely define the geographical area of use of the goods and/or services under the mark, as well as the persons for which such goods and/or services are intended to be provided (eg, age, gender, level of education, occupation, etc.).

Note that for certain types of products, the Trademarks Act requires a minimum level of awareness (eg, minimum 60% of awareness is required for a mark used for goods of technical (industrial) use, Article 32/6(4) Trademarks Act).

Participants in the polling must answer at least the following questions:

- whether they know the respective mark;
- whether they know the holder of the mark or the producer of the good (product) under the mark;
- the date from which the mark has been known to them;
- familiarity with the mark (well-known, known, less known, unknown); and
- estimation of the good (product) (excellent, very good, good, average, unsatisfactory; Article 32/6(6) Trademarks Act).

The judgment on declaration of the mark as well-known will be rejected if:

- the information submitted by the applicant does not correspond to the requirements under the Trademarks Act;
- the applicant’s mark is identical or similar to a mark registered or for which an application for registration has been filed by another person for the same products and/or services, the priority date of such other mark being earlier than the applicant’s;
- the mark became a common name; or
- the mark contradicts the public order or the rules of morality (Article 32/6(7) Trademarks Act).

The judgment on declaring of a mark as well known is notified to the State Agency on the Intellectual Property of the Republic of Moldova, the mark being registered with the Register of well-known marks within three months as of the date of issuance of the judgment. Any party to the process not agree with the judgment of the Chisinau Court of Appeal, such party has a right of recourse. This must be filed within two months with the Supreme Court of Justice of the Republic of Moldova (Article 434 Code of Civil Procedure of the Republic of Moldova).
Cloud Computing: Key Aspects that no Cloud Contract Should Miss

Cloud providers often insist on using standardised contracts. Evaluation of a cloud service needs to include technical, economic and legal aspects, especially if the terms are not negotiable.

Cloud contracts – The basics

The power of negotiation
Negotiating a contract for cloud computing services can be a tedious experience, especially when cloud providers insist that their contracts are based on standard forms that are not negotiable. The vast majority of cloud providers argue that they are offering standardised services for their customers and that their business model is based on scalable but uniform services and technologies, which leaves no room for individually agreed contract terms. Even if this argument is valid, experience proves that cloud contracts are in fact negotiable, at least to a certain extent.

When evaluating the services offered by a cloud provider it is imperative that customers evaluate not only their technical and economic aspects but also the legal conditions under which these services are offered. There are only a few statutory provisions that directly govern the service of a cloud provider. This means that the provider’s services and obligations required by the customer must be set forth in the contract and its annexes, or else the provider will have to perform as required by the customer.

What type of contract?
A typical contract for cloud computing services comprises different elements of standard types of contracts, such as contracts for work (Werkvertrag), contracts for services (Dienstleistungsvertrag) and lease contracts (Mietvertrag).

In order to exactly define the individual obligations of a cloud provider, it is often necessary to differentiate under which of these standard types of contracts a given obligation can be subsumed. This, however, predominately depends on the wording of the contract (eg, an obligation can be worded so that the provider owes a certain result or only a certain level of effort). So again it depends on the exact wording of the contract to evaluate the level and nature of the services a customer is entitled to ask for under a cloud contract.

Both parties to a cloud contract should be aware that a provider’s reluctance to effectively negotiate the content of the contract will likely result in the contract being treated similar to general terms and conditions (Allgemeine Geschäftsbedingungen). In many jurisdictions a party’s freedom to agree or enforce certain provisions if agreed in general terms and conditions is limited in order to protect economically weaker or inexperienced counterparties. This can be used as leverage by the customer.

Cloud Contracts – What to be aware of

Hidden costs
When evaluating and negotiating a cloud contract, a customer should be aware of the following points in order not to be surprised by hidden costs:

- What are the costs of transferring existing licences to a cloud service?
- Will a sophisticated licence control be necessary?
- What happens to existing maintenance contracts (especially for software or hardware redundant after moving to the cloud)?
- How will cloud services and on-premise services play together?
- What are the costs for terminating cloud services and moving them back to on-premise IT?

Topics that need to be addressed
A well thought through cloud contract will also cover the following points – if not, the provider should explain why they can be left out:

- An exact definition of the functionality and capability included in the services (as well as documentation on the interfaces).
- Fees should be usage based, which means they should not only upscale but also downscale; downscaling should not immediately result in cancellation of volume discounts.
- Consider including price caps or thresholds (so that small increases in usage do not trigger higher fees).
- For services that are difficult to implement, providers should offer payment holidays until implementation has been sufficiently tested to be successful.
- Does the provider allow for pooling of storage limits for different services/modules?
- Service levels must be agreed in the contract and not only referenced by an internet link; violation of KPIs should trigger substantial penalties and ultimately result in the right to terminate early.
- Contract term and renewal options should not allow for a unilateral change of the services or prices offered.
- Agreeing on standards for data security means that the customer should first have analysed the categories of data possibly affected by the cloud services and set the standards on how this data must be treated; only if the provider can ensure that these standards are met may data be moved to the cloud.

It is imperative that results of termination as well as termination- and migration-support by the provider be defined in the contract.

Just as with any other type of service, a customer should carefully review the technical, economic and legal aspects of the services offered before entering into a contract. Failure to do so may trigger substantial costs and harm the entire business.

Despite many cloud providers’ arguments to the contrary, contracts for cloud services are often negotiable. It is in the customer’s interest to do so.
THE WORLD IS AMAZING
On 1 January 2015, new regulations of the Civil Code will become fully effective under which a third person will, under certain statutory conditions, be allowed to acquire ownership to real estate from a non-owner. The real owner will, however, have certain limited tools to protect his ownership right against such a third person.

Protection of ownership or protection of good faith?

When acquiring ownership to real estate registered in the land registry, two legal principles apply: (i) the principle of protection of ownership and (ii) the principle of legal certainty and the protection of good faith. Yet, in certain cases, the application of one of these principles leads to the exclusion of the other. In such cases, the question arises as to which of these principles has priority, the ownership right of the real owner or the protection of the legal certainty of a third person acquiring from a non-owner in good faith?

It is the principle of material publicity of public registries under which the conflict between these two principles is resolved. By introducing the principle of material publicity, the legislator opts in favour of the protection of legal certainty by allowing for the acquisition of real estate by third parties from non-owners. The legislator thereby weakens the protection of the real owner and forces him to closely follow entries into the land registry regarding his ownership rights. Failure to do so may result in loss of ownership.

The principle of material publicity does not apply to every situation in which ownership is being transferred from a non-owner to a third person. The principle applies only if certain statutory conditions, described below, are met. Furthermore, the legislator gives the real owner various tools to protect himself against the negative consequences that would otherwise arise under the principle of material publicity.

Protection of ownership from material publicity

Protection of ownership to real estate from a non-owner.

How can the real owner protect himself against loss of ownership?

To prevent the loss of ownership, the Civil Code grants the real owner different defences he may employ to protect his rights. Subject to certain statutory conditions, the real owner may request the land registry office to enter a note on disputability (“note”) and claim the removal of the discrepancy as soon as he finds out that somebody else’s ownership right has been entered into the land registry. In certain cases, the real owner may also dispute entries of ownership carried out prior to registration of the note in the land registry. Also, the real owner must lodge an owner-ship claim with the competent court for his ownership right to be confirmed and then entered into the land registry.

New regulations on cadastral proceedings should benefit real owners’ position

New regulations on cadastral proceedings also aim at the protection of the (registered) owners and the prevention of non-owners acquiring ownership to real estate against their will. The competent land registry office must send the registered owner a notification informing him that the legal relationship of the real estate has been affected by a change – at least within one day after receipt of the deed (agreement). If the owner is represented in the cadastral proceedings on the basis of a power of attorney, the owner’s signature on the power of attorney must be verified. The land registry office may perform the entry of ownership of a new acquirer no sooner than 20 days after sending the notification.

Several conditions must be met for the principle of material publicity to allow the acquisition of real estate from a non-owner.

New Land Transfer Tax System in Austria: Ups and Downs

The Austrian Constitutional Court has declared the old system of the land transfer tax as contradicting the constitution because the differentiation of the assessment basis being basically the consideration and, in certain transactions where no consideration was given, the taxable value (which is only ca one-tenth of the actual value) is not justifiable. The Parliament has introduced a new law from 1 June 2014 that still uses the taxable value as the basis, but only in transactions with the close family or corporate restructurings (eg, mergers, de-mergers), and in all other transactions the consideration or the actual value.

Basic concept

The Act on Real Estate Transfer Tax (Grunderwerbsteuer- gesetz; GErStG) entered into force for transactions concluded after 31 May 2014 when the old provision expired due to the decision of the Constitutional Court. The Constitutional Court has stated that the Act may not differentiate between transactions against consideration (where the basis for the tax has been the consideration) and transactions without consideration (where the basis has been three times the taxable value) because the taxable value deviates extremely from the actual value of real estate (the taxable value is sometimes only one-tenth of the actual value).

As the Constitutional Court on the other hand allowed that certain persons are subject to a lower tax (eg, the close family), the new law now differentiates between transfers of real estate (by contract, inter vivos or inheritance) within the close family and transfers to other, unrelated parties.

Transfers within the close family

The close family is defined as spouses, registered partners, common law spouses (Lebensgemeinschaft – newly added), parents, children (including stepchildren and adopted children), grandchildren and sons- and daughters-in-law. Now the basis for the calculation of the land transfer tax is three times the taxable value but in no case more then 30% of the actual value, and this basis applies to all transactions within the close family irrespective of the fact that they are against consideration or without consideration. The tax rate is 2% of the basis.

Other transfers

Transfers of real estate outside of the close family are subject to a real estate transfer tax of 3.5% of the consideration. If there is no consideration, or if the consideration is lower than the actual value, then the basis for the tax is the actual value.
The transfer of 100% shares in a company that holds real estate to one buyer and the aggregation of all shares in a company with one shareholder also triggers a land transfer tax. In this case, the basis for the tax of 3.5% is three times the taxable value, but in no case more than 30% of the actual value.

Corporate restructuring

The Act on Taxes in Connection with Restructurings (Umründungssteuergesetz) has been upheld and still provides that the basis for the land transfer tax is two times the taxable value. This applies inter alia to mergers, de-mergers, conversions of limited liability companies into partnerships or sole shareholder and contributions in kind.

Changes to the old law

The contribution of real estate to private foundations (Privatstiftungen) and transfers to nephews, nieces and siblings are no longer privileged. The tax basis is no longer calculated against the net value of the contribution, but two times the taxable value. This applies inter alia to mergers, de-mergers, conversions of limited liability companies into partnerships or sole shareholder and contributions in kind.

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The new Act on Land Transfer Tax favours only transactions in the close family and no longer transactions without consideration. The result: Some transfers are cheaper and others more expensive. With respect to corporate restructuring, the situation did not change.

On the other hand, contracts within the close family are subject to a lower tax if they are concluded against consideration, because now the basis is not the consideration but three times the taxable value with a cap at 30% of the actual value. So some transactions are cheaper than in the past, while many are considerably more expensive. With respect to corporate restructuring, the tax benefits have been upheld and the new law does not change the status quo.

Unclear areas

A downside is also the uncertainty as to how the actual value is assessed and whether an evaluation by an expert is necessary to avoid penalties for incorrect assessment and payment of land transfer tax. Furthermore, the new law on the land transfer tax deviates in details from the act on the registration fee for changes of the owner in the land register. This will certainly lead to mistakes in calculating the land transfer tax and the registration fee (in the past the basis was the same).

Outlived Construction Act to be replaced soon

The cornerstone of Slovak construction law, the Construction Act of 1976, should soon pass into the history. Nobody will miss it because the act, originally written for the environment of a socialistic, planned economy, could not react well to requirements of the market economy real estate development and construction sector, despite numerous amendments since 1989.

In its place should come two new acts: the Act on Zone Planning and Construction (New Construction Act) and the Expropriation Act. The Slovak Ministry of Traffic, Construction and Regional Development recently presented the drafts of both acts for discussion among state authorities and community experts. The intended effective date of both acts is 1 July 2015.

Goals: Simplification and acceleration

The ministry proclaimed that simplification and acceleration of proceedings were the main goals in this context. Instead the current four types of zoning proceedings, there will be just two: the proceeding on change of plot use and the proceeding on construction location. According to the New Construction Act, each municipality must procure its zoning plan (currently only about one-third of Slovak municipalities have it) and take care of its regular updating.

The zoning plans should be publicly available through an electronic register. An interesting change is the possibility of establishing in the zoning plan a pre-emption right over the plots if necessary for future construction in the public interest.

A new zoning instrument will be introduced for localities with intense construction activity – the so-called building plan (zastavovací plán), to be prepared by the municipality and describing in detail the conditions for construction on the plots concerned. Without doubt, the building plan will increase legal certainty because it will set firmly the rules of the game for construction in a particular area and will thus replace the current case-by-case decision-making of the local construction authorities. In the future, no zoning proceeding will be required for the constructions in localities covered by the building plan. In addition, simple constructions (even outside the areas covered by the building plan) will not require a separate zoning proceeding because that proceeding will be merged with the construction proceeding into one.

On the other hand, a certain degree of criticism has been aroused due to the increased competences of the state and the higher territorial units within the process of zoning plans preparation, perceived by some municipalities as a dictate by the state.

Speedy procedure creates risks for transparency and participation

Another controversial aspect of the New Construction Act is the attempt to narrow down the group of persons/entities entitled to participate and to raise objections within the construction proceeding, as well as to limit the scope of obligatory publishing of the documents and decisions related to the proceeding.

The Ministry claims that those steps had to be taken to ensure that the construction proceeding runs faster and the claimant for the construction permit bears less of a burden. Indeed, citizens will likely benefit because the duration of a standard construction proceeding should be shortened on average by ca three months. The downside would be the reduced possibilities of the neighbours and the public concerned to question, for example, unwanted industrial construction in their proximity.

Unpermitted structures should get the red light

A big step forward should be the stricter regime for structures built without a construction permit envisaged in the New Construction Act. While the current Construction Act has been permissive towards “black constructions” and their owners or builders, the New Construction Act contains effective preventative and sanctioning mechanisms. If the building inspection finds an unpermitted structure, it...
The Crimean Reality under Two Sovereigns

Omyho Biryuk

Last year’s socio-political developments in Ukraine have brought about new European perspectives for the entire country, except one of its integral territories.

Legal vacuum

Following military occupation, Crimea unconstitutionally seceded from Ukraine and acceded to the Russian Federation. Ukraine still does not – and likely never will – recognise this Crimean transformation. Such treatment accords with the rest of the world. In contrast, Russia and a few other countries do recognise Crimea as Russian territory.

The transition of Crimea has created a myriad of legal intricacies. The principal one: Which legal system is Crimea now subject to, Ukrainian or Russian? On the one hand, Crimea has long been and should still be subject to Ukrainian law. On the other hand, Crimea has subjected itself to Russian law. Likewise, Ukraine and Russia each treats Crimea as its own territory and requires application of its own laws there. So, Crimea is in a legal vacuum, with many unsure which law to apply.

Hybrid system

Transition from one legal system to another (or, so to say, a hybrid combining two systems) raises a wide spectrum of issues for businesses dealing with Crimea. Among the most crucial are deadlocks related to real estate located on the peninsula. Here, Ukraine and Russia have separate legal frameworks.

Under Ukrainian law, acquisition and transfer of titles to real estate located in Crimea are subject to Ukrainian law. Real estate transfer agreements are subject to notarisation. Importantly, rights to Ukrainian real estate are subject to state registration in Ukraine. Registration under Russian law does not satisfy Ukrainian law. Accordingly, any Crimean real estate transaction in violation of Ukrainian law is void and unenforceable in Ukraine.

Moreover, like most developed countries, Ukraine does not recognise Crimean authorities established in contravention of Ukrainian law. Their actions are invalid and have no legal effect in Ukraine.

Since March 2014, Crimea has been disconnected from all Ukrainian public registers, including the State Register of Property Rights to Real Estate. This register thus has no records of real estate rights arising from deals taking place in Crimea under Russian law. Based on Ukrainian law, execution of deals and registration of rights to Crimean realty must take place outside of Crimea, in the Kherson or Zaporizhzhia oblasts of Ukraine.

Dual compliance

On the one hand, Russian law does not explicitly require current owners of Crimean realty to re-register it under Russian law. Such re-registration is voluntary; owners may keep their Ukrainian registration. On the other hand, a lack of Russian registration may preclude owners from disposal of their realty. It would be impossible to transfer the real property title in Crimea without first registering it under Russian law.

Conclusion

In addition to the above deficiencies of the New Construction Act, the environmental impact assessment proceeding (controlled by the Ministry of Environment) continues to be separated from the zoning and construction proceedings, although the EU recommends merging them into one when possible.

Given that the drafts of the New Construction Act and the Expropriation Act have brought five collective objections and 2300 individual objections from the authorities, entities and citizens, it is very likely that the current drafts will see many changes before they are passed into law. Still, whatever its ultimate form is, the new construction law in Slovakia will certainly shift to a new, and hopefully, better, level.

Furthermore, the Crimean legal vacuum brings a risk of double dealing. Sellers particularly can fraudulently sell the same realty twice within the legal systems of both Ukraine and Russia. This is possible because the two countries do not share their registry records. A title or mortgage record in the Ukrainian register would be missing in the Russian counterpart. This is a high risk for buyers. One may, for example, buy a house already sold or mortgaged to a third party.

To be on a safe side, holders of Crimean real estate should strive to comply with the laws of both Ukraine and Russia. First, owners of Crimean realty registered under Ukrainian law should also register their titles under Russian law. Going forward, new owners should attempt to register their real estate rights in public registers of both countries, where technically possible. Such a conservative approach should protect the real estate rights in both countries.

Staying alert

Since its unrecognised transition from Ukraine to Russia, Crimea has rim off the rails of legitimacy. The development of Crimean quasi-legal acts is, in turn, turbulent. Their deletion is unpredictable. This situation will last at least until early 2015 and perhaps further.

As a result, Crimean's destiny is dim. The peninsula might opt out of this ambivalent condition by returning to its legitimate status as an autonomous part of Ukraine. It would thereby regain the global community’s recognition.

Until this happens, however, it is vital for investors to be very careful. For those concerned with their realty in Crimea, it is especially advisable to monitor relevant Ukrainian, Crimean and Russian registry laws. To avoid further uncertainties, investors doing or planning to do business in Crimea should consider shifting it to the continental part of Ukraine.

The new Construction Act and the new Expropriation Act will significantly change the current framework of the construction law in Slovakia.
Perpetual usufruct of real property

Perpetual usufruct of real property is similar to ownership. The perpetual usufructuary has the broadest (except for ownership proper) rights over the real property. In economic terms, the most noticeable difference between ownership and perpetual usufruct is the need to pay an annual fee for perpetual usufruct of the real property to its owner (the State Treasury or a local government unit).

Annual perpetual usufruct fee

The annual fee ranges from 0.3% to 3% of the land value and can be reviewed (once every three years at most) in case of value change. The rate of the fee depends on the reason why the perpetual usufruct was established. For example, perpetual usufructuaries of real properties intended for residential purposes pay 1%, while perpetual usufructuaries of commercial (trade, office, production, warehouse) real properties pay an annual fee of 3%. So it is only perpetual usufructuaries of commercial real properties that can derive the greatest benefits from transformation of perpetual usufruct into ownership. Replacing the duty to pay the annual fee by a single transformation fee may be a method to optimise long-term costs related to use of the real property.

Possibility of requesting transformation

In principle, transformation of perpetual usufruct into ownership must be approved by the real property owner. An important exception is stipulated in the Perpetual Usufruct Transformation into Real Property Ownership Act of 29 July 2005, which provides that such transformation may be requested by the perpetual usufructuary of the real property.

Originally, powers specified in the Act were held, subject to some exceptions, solely by natural persons and housing cooperatives with respect to residential real properties. But on 9 October 2011, the list of eligible entities was extended to include legal persons (including commercial companies), in general, the transformation request can be made if the perpetual usufruct of the real property existed on 13 October 2005. The Act does not apply to certain selected real properties, including real properties for which an expropriation procedure has been instituted.

Eligible entities

In general, the transformation request may be made by entities that on 13 October 2005 were perpetual usufructuaries, and their legal successors. Thus, the transformation of perpetual usufruct into ownership of the real property may be requested by:

- natural persons;
- legal persons and unincorporated organisational entities that have legal capacity granted by laws; eg, commercial partnerships (registered, professional, limited and limited joint-stock partnerships);
- housing cooperatives owning residential buildings or garages;
- owners of premises whose interest in the joint real property includes perpetual usufruct of the real property; and
- for perpetual cousufruct, all perpetual cousufructuaries whose total interests are at least 50% but if at least one perpetual cousufructuary objects to the transformation request filed, then the proceedings are suspended and the majority of cousufructuaries may demand that the transformation request be settled by the court.

Competent authorities, form of the request and documents required

Depending on who owns the real property, the transformation request should be filed with the district governor (sta-

Fee amount, calculation method and payment security

The transformation decision determines the fee for transformation, which is the difference between the market value of the real property and the value of perpetual usufruct of that real property. These values are determined on the basis of property appraisal reports prepared upon the request of the authority carrying out the transformation proceedings. The issue of who pays the costs of such reports is sometimes problematic since some offices attempt to charge these costs to applicants, which is incorrect.

For real properties listed in the historic register, the fee is reduced by 50%. Other discounts may be given on the basis of a regulation of the provincial governor or a resolution of the relevant board or local government assembly. The claim for payment of the fee is secured by a mandatory mortgage established on the real property in question.

Payment of the fee in instalments

The fee can be paid in instalments over a period of 10 to 20 years, although the applicant may request payment in instalments over less than 10 years. Then, the outstanding portion of the fee bears interest charged on the basis of the rediscount rate of the National Bank of Poland. Entrepreneurs applying for payment in instalments or for a discount should bear in mind public aid regulations.

Transformation of perpetual usufruct of real property into ownership can be especially attractive in the long run in the case of commercial real properties.

Agata Demuth | Jan Bagatela
Sell the House, Keep the Land: New Institutions in the New Hungarian Civil Code Affecting Real Property

15 March 2014 marked the end of long discussions when a new Civil Code entered into force in Hungary.

As in other European countries, the Civil Code is the most important collection of rules governing commercial and personal relations of natural persons, associations and legal entities. Compared to the one from 1959, the new Civil Code represents an increased commercial approach to better reflect the true market economy circumstances.

For more than 50 years, the old Civil Code had been successfully applied through the socialist era and two decades of the young Hungarian market economy with the supportive use of case law and court precedents. Now, many useful provisions that stood the test of time and, in some cases, crystallized into practice, have been kept and rephrased, while new legal instruments have been introduced to provide modern legal solutions for the life, trade and business of today.

The new provisions are not a revolution in the field of property law, but there are some interesting new specifics.

Changes to the concept of “aedificium solo cedit”

According to the wording of the previous legislation, the ownership of a building might have been generally and chiefly claimed by the owner of the land, while a separate ownership of a building might have been claimed only by a different person who erected a building on the land, if (i) the law so prescribed (eg, encroachment builder acting in good faith) or (ii) there was an agreement between the owner of the building and the owner of the land to the contrary. Also the rule that the owner of the land has a right of pre-emption for the building, while the owner of the building has a right of pre-emption for the land, is unchanged.

But an entirely new element is that, at the sole discretion of the real estate property’s owner, the building and the land on which it stands may be separately entered in the real estate register as individual properties, even if their owner is the same and even if both the land and the building exist at the time of submitting the (new) ownership registration request.

The new concept eliminates some purposeless restrictions on the right of disposal and opens the door for the separate transfer of ownership title to land and building, which will give much greater flexibility to transaction and tax planning, as well as to the portfolio and ownership structuring of real estate assets. Particularly, the new rules may help a smooth, gradual sale and use of superstructures erected on the same plot by the same developer.

Introduction of the instrument of option to sell and amendments to option rights generally

The new Civil Code has also legitimated with specific provisions the commonly used legal instrument of the sale/put option. The put option, called in the new Civil Code the “right to sell”, gives the owner the right (ie, the obligor of the put option) to sell the underlying asset at a specific purchase price to a contracted entity (ie, the obligee of the put option) with its unilateral declaration. The put option qualifies as the exact opposite of the purchase/call option right, which gives the holder the right to acquire an asset at the previously agreed purchase price by submitting to a seller a unilateral declaration.

The put option, like the purchase option, is considered a sub-category of sale and purchase transactions. Its concept has been well known in practice and, even without specific legislation, has been used on a freedom of contracting basis also in Hungary, also by analogy partly with regulated purchase option rules partly with foreign legal systems’ similar instrument.

A put option may only be established in a written contract, and contracts establishing a put option for real estate must meet the formal requirements of contractual declarations sufficient for real estate registry submission purposes. The put option can be registered in the land registry, and such a registered right is effective vis-a-vis all persons acquiring rights over the same real property after registration of the put option.

The new Civil Code also significantly modifies the general rules of option rights (ie, the re-purchase option, purchase option, right to sell). A key change is that, as opposed to a former maximum term of five years, option rights may be established for an unlimited definite period or even for an indefinite period. The former time limit was not reasonable for real estate transactions, where purchase option rights were often established in favour of banks to secure financing of real estate developments. The attempts of the financing entities to validly prolong the option term by contractual means or re-contract for the purpose of multiplying the lawful maximum term of five years might have been successfully challenged by opposite parties.

In respect of the re-purchase option, the new Civil Code also brought new price determination rules. Contrary to the old civil law rules (prescribing that the repurchase price must be equal to the original purchase price, as adjusted by the useful expenditures of the purchaser or the depreciation of the asset), the parties can now fix the repurchase price in the agreement on granting the repurchase option. Absent a contractual agreement, the holder of the option may repurchase the item at the market value prevailing at the time of exercising the repurchase option.
The New Energy Act: Yet Another Failure to Meet the Expectations of the Slovenian Economy?

After several years in the legislative pipeline, the new Slovenian Energy Act has finally seen the light of day in early 2014. Despite the bar of expectations being raised very high by Slovenian companies and investors, the jury is still out on whether the legislative changes will bring sufficient relief to the struggling Slovenian economy.

Background
Back in the second half of February 2014, the Slovenian National Assembly (Drzavni zbor Republike Slovenije) overrode the veto of the National Council (Drzavni svet) and adopted the new, long-awaited Energy Act (Energetska zakon; EA-1), which entered into force on 22 March 2014 and superseded the one of 1999. The EA-1 is said to be one of the biggest pieces of legislation in Slovenian history. Apart from aiming to comprehensively recast and streamline the legislative framework governing the Slovenian energy market, the EA-1 was adopted to transpose several pieces of EU legislation (mainly pertaining to the Third Energy Package), and so to save Slovenia from being brought before the European Court of Justice for not implementing the EU energy acquis.

While in the legislative womb, the EA-1 set high expectations and attracted the attention of various companies and potential investors, anxiously wondering whether a more incentivizing business environment, facilitating the energy market liberalisation and competitiveness of the recovering Slovenian economy, would (finally) be introduced.

Energy licences (licence za energetske dejavnosti)
Under the previous legislation, most energy industry companies (active, inter alia, in the fields of energy, gas or heat supply, or that conducted activities as transmission or supply, or that conducted activities as transmission or supply) were obliged to acquire energy licences is­sued by the Slovenian Energy Agency (Agencija za energijo Republike Slovenije; Agency). The EA-1 fully abolished the energy licences, relieving companies from the bureaucratic application procedures and simplifying the start-up of energy activities.

Energy efficiency
Following the transposition requirements laid down by the Directive 2010/31/EU on the energy performance of build­ings, the EA-1 imposed the new obligation of large compa­nies to undergo an energy audit (energetski pregled) every four years, determining the existing energy consumption and identifying any energy-saving opportunities of the company’s buildings.

Surprisingly, one of the most controversial innovations of the new act lies in the obligation of building owners (per­taining also to legal entities) to acquire an energy perfor­mance certificate (energetska izkaznica) for new structures being sold or leased after 22 March 2014. Energy perfor­mance activities had been subject to ongoing public dis­cussion throughout the entire adoption procedure. The public’s main concern was understandably the certificate’s (expected high) price, which was somewhat miti­ gated under the Decree determining the maximum prices for issuing energy performance certificates (Uredba o dodobi/najdje cene energetske izkaznice), taking effect also in March 2014.

Renewable energy support scheme
As stated by the government, the EA-1 aims to prevent the unsustainable growth of investments awarded for the use of renewable energy sources (RES), and particularly to prevent another excessive investment boom similar to the one that occurred in the field of photovoltaics. The over­whelmed solar sector saturated in 2012, experiencing a rapid reduction of feed-in tariffs and significant increases of RES support contributions being borne by end-users. While the support scheme remains the key instrument for promoting renewable energy, the EA-1 also introduces a new system of awarding support by authorising the Agen­cy to publish a call to investors for allocation of funds for RES support. Investors are invited to present their projects for generating installations using RES and high-efficiency cogeneration by 1 October each year. On the other hand, the EA-1 authorised the government to determine (and possibly limit) the scope of investments, in light of the goals in the Action plan for RES (Aljazski načrt za obnovljive vire energije) and the availability of resources.

Conclusions
Having regard to the rather uniform opinion of the expert public, the EA-1 has, to some extent, streamlined the (somewhat incoherent) legislative framework governing the Slovenian energy sector, satisfy the requirements of the EU energy acquis and relieving energy companies from ad­ministrative burdens. It has, however, failed to fully meet the expectations of the economy – particularly those relat­ing to the anticipated reduction of electricity contributions and charges, bringing reduced (final) electricity prices for Slovenian industry and facilitating its competitiveness.

Considering that the EA-1 has entirely invalidated several implementing acts, which are to be replaced in the near future, it appears that the Slovenian energy reform has not yet reached its peak. Slovenian companies and potential investors should thus keenly observe the final stages of the Slovenian energy law recast and remain on the lookout for business opportunities arising from the reformed energy framework.

Territoriality Principle on the Horizon

Günther Leissler | Veronika Wolfsbauer

Current international data transfer principles might soon face significant changes.

The ECJ’s ruling
It is commonly known that the European Court of Justice (ECJ) has held the Data Retention Directive invalid.1 The details of the ECJ’s reasoning are not, however, generally known. Moreover, one particular consideration in the judgment’s reasoning has stayed fairly undisclosed. But generally, the ECJ has conceded in its ruling that the retention of data does not by itself adversely affect the fundamental rights to respect for private life and to the protection of personal data. The court further held that the potential disclosure of such data to national authorities principally serves a legitimate general interest: the fight against serious crime and the safeguarding of public security.

However, the ECJ found the Data Retention Directive to infringe the principle of proportionality because it applies to all individuals, communications and traffic data without differ­entiation or limitation. The court has also held other parts of the Directive excessive, such as the fact that the retention period does not differentiate between the stored data categories. But the real spotlight should be on the ECJ’s considera­tions on data security. The court held the Data Retention Directive invalid because it allows the service provider to align the security measures to the provider’s commercial and economic considerations. Most notably, however, the ECJ has also criticised that the Directive does not require the data to be retained within the EU. With this, the Court claimed that the Directive does not sufficiently ensure con­trol rights of an independent authority, as explicitly required by EU data protection law (in particular, the European Charter of Fundamental Rights).2 In the view of the court, such control forms an essential component of the protection of individuals in the process-
Possible impact

What are the effects of this ruling? The ECJ’s arguments might have an impact beyond the case that triggered the ruling. They might in fact touch the privacy aspects of international data transfers as we know them today.

Currently, it is commonly accepted by all EU data protection regulators for international data transfers that an adequate data protection level can be provided through valid and signed EU Model Clauses. But the Model Clauses neither expressly address (physical) server and data storage location requirements nor do they explicitly address compliance control aspects and related supervisory authority competencies.

Given that, it is unthinkable that a national DP regulator, contemplating the ECJ’s reasoning, might question whether the Model Clauses give valid proof for the data in question being stored within the territory of the EU and, with this, under the competency and compliance control of a European (in the view of the Court, sufficiently independent) supervisory authority.

And the answer might be self-evident. Since the Model Clauses do not expressly require the data recipient (in its role as the data importer) to retain the data exclusively within the territory of the EU, the authority might, based on this consideration, require the applicant to amend the Model Clauses, or it might reject the application. In the light of these considerations, the ECJ ruling could have an impact that goes far beyond the court’s reasoning on the retention of personal data. It affects the key principles of the transferring of personal data outside the EU.

Wider implications

And it is not Europe alone that will have to deal with such territorially considerations. Also the Russian Federation is currently eager to amend the Russian Data Protection Act. The amended regulation would require databases that contain personal data of Russian citizens be located only in Russia. This, of course, would require all industries (banks, insurance companies, telecommunications providers, etc.) to store their Russian customer data exclusively on Russian territory.

Things are on the move. Companies will have to wait to see how national DP regulators interpret the ECJ’s reasoning. But the court’s reasoning clearly supports an observable European market trend: the market’s increasing demand that personal data be physically contained within the territory of the EU.

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Currently, it is commonly accepted by all EU data protection regulators for international data transfers that an adequate data protection level can be provided through valid and signed EU Model Clauses. But the Model Clauses neither expressly address (physical) server and data storage location requirements nor do they explicitly address compliance control aspects and related supervisory authority competencies.

Given that, it is unthinkable that a national DP regulator, contemplating the ECJ’s reasoning, might question whether the Model Clauses give valid proof for the data in question being stored within the territory of the EU and, with this, under the competency and compliance control of a European (in the view of the Court, sufficiently independent) supervisory authority.

And the answer might be self-evident. Since the Model Clauses do not expressly require the data recipient (in its role as the data importer) to retain the data exclusively within the territory of the EU, the authority might, based on this consideration, require the applicant to amend the Model Clauses, or it might reject the application. In the light of these considerations, the ECJ ruling could have an impact that goes far beyond the court’s reasoning on the retention of personal data. It affects the key principles of the transferring of personal data outside the EU.

Wider implications

And it is not Europe alone that will have to deal with such territorially considerations. Also the Russian Federation is currently eager to amend the Russian Data Protection Act. The amended regulation would require databases that contain personal data of Russian citizens be located only in Russia. This, of course, would require all industries (banks, insurance companies, telecommunications providers, etc.) to store their Russian customer data exclusively on Russian territory.

Things are on the move. Companies will have to wait to see how national DP regulators interpret the ECJ’s reasoning. But the court’s reasoning clearly supports an observable European market trend: the market’s increasing demand that personal data be physically contained within the territory of the EU.

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Apart from Croatia’s offshore safety and environmental measures described above, further changes are necessary to the Croatian legislation.

In particular, Croatia must fully comply with the new regulatory requirements in relation to (i) safety and environmental considerations relating to licensing, (ii) extension of environmental liability to cover all waters within continental shelf of the Member States, (iii) increased reporting requirements, (iv) appointment of the competent authority to be responsible for regulatory functions and clear separation from any of the regulatory functions relating to the economic development of the offshore natural resources, licensing and revenue management, (v) financial liability of licence holders for environmental damage, (vi) operations outside the EU, etc.

Implications for the offshore business in Croatia

Since Croatia has until 19 July 2015 to transpose the OSD’s requirements into national law, the implementation of the OSD will have implications on the responsibilities and liability of offshore operators and licence holders in Croatia. Operators of planned offshore gas and oil installations and operations in Croatia will have to comply with new national legislation by 19 July 2016. However, existing installations will have until 19 July 2018 to comply with the new regulatory requirements.

Finally, it is still unclear whether additional regulatory requirements to be imposed on both operators and authorities to meet the OSD’s requirements will reduce day-to-day risks of offshore oil and gas accidents.

Although Croatia has until 19 July 2015 to transpose the OSD’s requirements into national law, it remains to be seen whether the introduction of implementing legislation will indeed sufficiently protect Croatia’s coastal and marine environment in light of upcoming offshore oil and gas operations in the Adriatic Sea.

Environmental Impact Assessment for Fracking Projects: European and Austrian Perspectives

Bernold Rapič | Mark Tuttlinger

The exploitation of shale gas by hydraulic fracturing is controversial. Even though the European Council has opposed a mandatory environmental impact assessment for fracking projects, Austria is taking a critical view towards shale gas exploitation.

Given the recent turbulence on the European gas market, the need for Europe’s natural gas autonomy is being discussed more than ever. To satisfy gas consumers’ demands, the exploration and exploitation of Europe’s unconventional gas resources, such as shale gas, is an oft-suggested alternative to gas imports.

Even though Austria has material resources of shale gas, Austrian policy-makers tend to take a critical view to efforts to exploit shale gas resources within Austria.

Shale gas and how to exploit it

Shale gas is a form of natural gas that is trapped within a depth of 1,500 to 3,000 metres beneath the surface within shale formations of the so-called source rock. Due to the tight and impermeable nature of source rock, shale gas accumulates within small pores and fissures of the bedrock (so-called unconventional resources as opposed to natural gas formations that accumulate in large reservoirs).

To release the trapped gas, a mining technique called hydraulic fracturing (“fracking”) was developed. Frac-fluid, consisting of water, sand and chemical additives, is injected with extremely high pressure into a drilling hole, fracturing the bedrock and thereby creating pathways for the natural gas.

Critics of this technique argue that fracking may have a severe detrimental impact on the environment, especially as the frac-fluid contains chemical substances that may drain and pollute ground water resources. These concerns led to a pan-European discussion whether fracking should be subject to a mandatory environmental impact assessment (EIA).

European legislation

Under the EU’s directive on the assessment of the effects of certain public and private projects on the environment as of 13 December 2011 (2011/92/EU; EIA Directive) member states must scrutinise certain intended projects (listed in Annex I of the EIA Directive) for their environmental and public health effects. The results of the wide consulting procedure conducted during the EIA (including the interest of public and experts of all affected fields of science) will form the basis for the authority’s decision whether to licence the intended project. Under the EIA-Directive, projects for the extraction of natural gas exceeding 500 cubic meters/day are subject to a mandatory EIA. However, fracking projects often cannot be submitted under this legal test as the average amount of shale gas gathered through fracking mostly remains under this threshold.

The heavy criticism with regard to the effects of fracking also induced a debate in the European Parliament whether to enact a mandatory EIA for fracking projects. With a slight majority, in October 2013 the European Parliament passed an amendment to the EIA Directive under which the exploration and extraction of shale gas by fracking shall be subject to a mandatory EIA, regardless of the amount extracted. However, the Council did not approve the proposed amendment. Therefore, the most recent amendment of the EIA-Directive (2014/52/EU) leaves the European legislation on fracking unaltered. As before, member states enjoy the discretionary right to decide whether deep-drilling projects, such as exploiting shale gas by fracking, shall be subject to an EIA. Consequently, on 22 January 2014 the Commission released a recommendation (2014/70/EU) in which it sets out minimum principles that should be taken into account by member states when applying or adapting their regulations on fracking and the exploitation of shale gas. Among others, the Commission suggests that member states prepare a strategic environmental assessment prior to granting licences for exploration and/or exploitation of shale gas and ensure that an EIA is carried out. However, as this recommendation is not binding, the member states have discretion whether to follow the Commission’s proposals.

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The Austrian legal framework

With a recent amendment (BGBl I No 77/2012) to the Austrian Environmental Impact Assessment Act (Umweltrüflichtprüfungsge setz; UVP-G), Austria opted for an obligatory EIA for fracking projects. However, the Austrian provision is ambiguous as to the scope of its application, leaving it unclear whether only the process of fracturing or already the exploration of unconventional gas resources and respective test drillings is subject to an EIA.

Based on the materials to the amendment, it can be inferred that all activities pertaining to the exploitation of unconventional gas resources are subject to an EIA. Therefore, already exploratory and test drillings for a future exploitation by fracking must be licensed under the UVP-G.

This wide scope of applicability of the UVP-G has led to criticism of stakeholders of the energy industry. They argue that no severe environmental impacts may be expected from exploratory test drillings, especially as frac-fluid is not used at this stage. Still, there is a wide political consensus that fracking projects should be subject to a strict assessment; some politicians also argue for a total prohibition (as discussed in Vorarlberg with connection to fracking projects at the Bodensee / Lake of Constance).

The mandatory EIA has already claimed its first victim. Following the enactment, the Austrian energy undertaking OMV decided to cease its plans to exploit a shale gas resource in Lower Austria due to economic inefficiency. Also due to the political environment, possible future projects face a strong headwind.

Conclusion

With the enactment of the mandatory EIA for fracking projects, Austria expressed its commitment to preserve the environment against possible adverse effects connected with the fracking technique. However, it can be discussed whether it was appropriate to apply the EIA requirement to mere exploration activities. By enacting such strict provisions, Austria seems to be inhibiting attempts to explore and exploit shale gas resources in Austria. This legislation seems adverse to European and national efforts to increase energy autonomy.

By enacting strict provisions concerning the licencing of fracturing projects, Austria seems to inhibit attempts to explore and exploit shale gas resources, which might have adverse effects on efforts to increase energy autonomy.

Austria: The Selling of (Personal) Data – How to Avoid the Pitfalls

Guenter Grassl

Personal data are the “Gold of the 21st century”. To increase earnings, more and more businesses of all sectors consider selling personal data in addition to their main activity. Apart from data protection laws and the role of data in civil laws, possible restrictions and obligations stemming from applicable commercial and professional regulations must be observed.

Authorisations for conducting commercial activities

General regulatory framework

The central source of public professional law is the Trade, Commerce and Industry Regulation Act (Gewerbeordnung: GewO), a federal law often also referred to in English as the “Trade Act” or “Industrial Code”.

In principle, any non-prohibited, self-employed and regularly performed (thus “commercial” or “professional”) activity aimed at gaining an economic advantage by participating in the general exchange of goods and services is covered by GewO. That law sets out rules for the uptake and conduct of a business. However, several commercial activities are explicitly exempted from GewO and largely subject to specific commercial (professional) regulations. Among these activities are agriculture, banking, electronic communication services, entertainment, certain transport industries and health professions.

Processing and transmitting personal data under GewO

Taking up an activity under GewO requires the prior registration of a “trade” and thereby the obtaining of a “trade licence” (Gewerberechtigung). For certain, exhaustively listed trades, GewO require the submission of a certificate of qualification or the preliminary appraisal of reliability, or even a preliminary vetting during the registration proceedings (regulated trades). Starting a business without the required trade licence may lead to administrative penalties and enforcement orders by authorities, and entities competing to claim injunctive relief.

The mere sale of personal data or other previously conducted processing operations are considered free trade. When registering such a trade, however, the envisaged business activity must be described in a sufficiently precise manner. Often the trade is registered as “automatic data processing and information technology” (Automatische Datenverarbeitung und Informationstechnik). Other trades that imply the processing of personal data are “direct marketing agencies” and “address sales companies” (Direktmarketingunternehmen, Adressverlage), including list brokering activities.

As data are generally considered as incorporeal goods, it is controversial whether the purchase and sale of data can be registered as “general trade” (Handelsgewerbe), or if this is only the case if the data are stored on physical media.

Regularity, a business operator already holds one or more trade licences for its main activities. In that case it must be assessed whether the processing and sale of personal data can be linked to the generally recognised profile of the commercial activity (Berufsbild) of the registered trade.

Basically, every holder of a trade has under sec 32 GewO the ancillary right (Nebenrecht) to purchase and sell most goods. Again, it is unclear whether only the sale of data on physical media is covered by that right.

The processing and sale of personal data could in certain cases also be justified as supplementing the other business activities of a trade holder in an economic favourable manner, another ancillary right under sec 32 GewO. However, whenever claiming an ancillary right, the focus of the business must rest with the registered trade(s).

Data processing and transmission in professional activities not covered by GewO

If the main activity of a business is exempted from GewO, it must be assessed whether the applicable commercial or professional regulations cover the processing and sale of personal data. Notwithstanding provisions in the professional laws, the generally acknowledged profile of the profession (even if not specifically regulated at all) must be considered. But professional activity exemptions from GewO must be interpreted restrictively.

Thus, the transmission (and/or processing) of data might require the registration of a trade according to GewO.
Data protection requirements

When processing and transmitting information relating to an identified or identifiable natural or legal person (personal data), the obligations of the Data Protection Act 2000 (Datenschutzgesetz 2000, DPA) must be observed. In Austria those obligations also apply to legal persons processing personal data. DPA in particular requires that any processing or transmission of personal data may only be done for a clear and lawful purpose (legitimate purpose). That legitimate purpose must also be covered by an authorisation to do so as to the provisions of the applicable commercial or professional provisions. In other words, the applicable professional and commercial regulations must allow the conduct of such activities.

Sale of customer databases to direct marketing and address sales companies

Direct marketing agencies and address sales companies process and transmit personal data for marketing purposes of others. To that end, and subject to the data protection rules in sec 151 GewO, they may collect such data from publicly accessible information, interviews and customer databases obtained from others.

If other businesses transmit (sell) their customer databases to direct marketing agencies and address sales companies, they must inform (explicitly and in writing) the data subjects in advance so that they can prohibit such transfer. This possibility to prohibit the transfer of databases could be included in General Terms and Conditions but comply with the requirements of such clauses.

The transmission of such databases to other persons (and thus for other purposes) will, however, usually require the explicit consent of the data subjects. But with “sensitive data”, such as on sexual orientation or religious beliefs, stricter rules apply.

The processing and transmitting of personal data by businesses is permitted only for legitimate purposes. Such purposes must be covered by the necessary authorisation under the respective commercial and professional law. And those laws could introduce even more specific data protection rules.

Czech Republic: The Difficulties of Abnormally Low Tenders

Veronika Hrochová | Mladík Krejčí

Abnormally low tenders constitute a vague legal concept with various problematic consequences, which have not been solved even by the new directive 2014/2004/EU.

Introduction

An abnormally low tender (ALT) is not defined in Czech or EU legislation, nor specified by Czech case law. Czech legislation only sets forth applicable procedural rules for when an ALT is identified.

Although vague, the legal concept of an ALT was introduced by the legislator to protect contracting authorities against undesirable practical consequences, such as (i) the failure to complete the public tender, (ii) the use of cheap and poor quality material to reduce the price and (iii) an increase in the tender price due to the extra work.

The ALT concept also has significant procedural aspects related to various claims, objections and disputes.

Application of the concept falls under the full discretion of the particular evaluation committee assessing the tenders. The following questions are relevant. How can it be ascertained that a tender contains an “abnormally” low tender price? What changes are expected vis-à-vis the 2014/2004/EU (Directive)? How can contracting authorities avoid an ALT?

Verification of an ALT

Whether a tender is abnormally low depends on a final decision of the evaluation committee, which may carry out market research or make use of authorised experts for the assessment.

To identify an ALT, it is necessary to (i) assess the tender price in relation to the subject-matter of the given public contract, (ii) account for the specifics of the given industry, circumstances and conditions under which the public contract would be fulfilled and (ii) consider a notice from other tenderers on ALTs. The main reason for this approach is that the ALT concept is not subject to any numerical criteria or specific guidelines.

If an ALT is identified, the tenderer may not be automatically excluded. First, the contracting authority must request, in writing, details of the relevant elements of the tender and verify the collected data based on the tenderer’s explanations. The request for clarification must be sufficiently precise; otherwise, the Czech Office for the Protection of Competition (Office) may impose various sanctions in the framework of its administrative supervision.

If the tenderer does not provide an explanation, or it is considered as unfounded by the evaluation committee, the tenderer shall be in principle excluded.

As shown, the Czech contracting authorities have full discretion to decide what constitutes an ALT. Without objective numerical criteria, the discretion of the contracting authorities can result in unpredictable decision-making based on double standards. Contracting authorities may have different interpretations of what constitutes an ALT in identical cases.

The impact of the Directive

Difficulties with the verification of ALTs were supposed to have been largely solved by the original draft of the Directive, which must be transposed into national legal orders by 18 April 2016. The original draft Directive set forth the following three numerical indicators to calculate an ALT, whose cumulative existence would require that the contracting authority ask the tenderer to explain the tender price if (i) it is more than 50% lower than the average of other tenders, (ii) it is more than 20% lower than the second-lowest tender and (iii) at least five tenders have been submitted.

After some modifications, these criteria were completely omitted from the final wording of the Directive and replaced with a general provision. So the new Directive has failed to shed light on the verification of an ALT.

Avoiding ALT

To avoid ALTs, contracting authority must properly determine the expected value of the public contract or set a threshold as to what constitutes an ALT in the given case.

The expected value of the public contract must be determined by means of (i) information on public contracts of the same kind, (ii) information gained via market research of the relevant market or (iii) other such objective measure in another suitable form (eg, expert opinion).

Based on the expected value, the contracting authority makes an assessment of realistic expenditures of the tenderers and sets an ultimate limit, where an explanation of the tender is mandatory.

This does three things. First, it motivates tenderers to submit only tenders that reflect the market prices in order to be discharged from the obligation to provide the contracting authority with explanations. Second, it eliminates the possibility of potential exclusion of the tenderers from the tender. And third, it protects the contracting authority against the potential procedural risks mentioned above.

Even the new Directive has failed to shed more light on the verification of Abnormally Low Tenders.
The new Electricity Market Law and market operation activity

The new Electricity Market Law no. 6446, published in the Official Gazette no. 28603 and dated 30 March 2013 (EML) regulates a new market activity (market operation activity) as “operation of organised wholesale electricity markets and financial settlement of activities conducted in such markets, along with other related financial transactions”. Under the EML, market operation activities will be conducted by the Energy Market Operation Company (EPIAS).

Organised wholesale markets are defined as:

- day-ahead markets and intra-day markets where electricity, capacity and retail sale activities are conducted and operated by an intermediary legal entity holding a market operation licence, EPIAS;
- markets where standardised electricity contracts (i.e., capital market instruments) and the derivative markets where derivatives based on the electricity and/or capacity are traded and operated by Borsa (Exchange) İstanbul (Borsa İstanbul); and
- power markets, such as the balancing power market and the ancillary services market, which are organised and operated by the Turkish Electricity Transmission Company (TEIAS), the state-owned transmission company.

Accordingly, the EML refers to aforementioned three market operators: EPIAS, Borsa İstanbul and TEIAS.

What are the main activities of EPIAS?

Under EML, some main activities of EPIAS are (i) the establishment of a stock exchange for the purchase and sale of electricity and (ii) oversight of the financial settlement of operations conducted on the market.

The energy stock exchange will not only enhance the liberalisation of the market but also ensure the transparency and facilitate to maintain a healthy balance between supply and demand once it has become operational.

In addition, EPIAS will be authorised to operate other energy markets, such as the natural gas and oil markets, by the enactment of new regulations in such markets. EPIAS will also determine the market operating tariffs within the scope of the procedures and principles designated by the Energy Market Regulatory Authority (EMRA).

EPIAS’ shareholding structure

EMRA, an administratively autonomous public administration in the energy market, has published the draft Articles of Association (AoA) of EPIAS on its website based on the EML. According to the published AoA, the shareholding structure of EPIAS will be as follows:

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<tr>
<th>Shareholder</th>
<th>Group</th>
<th>Shareholding</th>
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<tbody>
<tr>
<td>TEIAS</td>
<td>A</td>
<td>30%</td>
</tr>
<tr>
<td>Borsa İstanbul</td>
<td>B</td>
<td>30%</td>
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<td>Private sector companies</td>
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The new Electricity Market Law no. 6446 defines a new market activity, “market operation”, and establishes a new legal entity, “EPIAS”, to conduct market operation activities.

EMRA announced that the sub-regulations for the energy stock exchange will be further issued and published in the Official Gazette.

Some major restrictions are regulated under the draft AoA of EPIAS as follows.

- Group C shares may be transferred only to (i) companies that are licenced to conduct electricity production or natural gas wholesale, retail sale, export or import activities, or (ii) Borsa İstanbul.
- Transfer of Group B shares to parties other than C Group Shareholders must be approved by the general assembly with a quorum of 80% of the shareholders present at the relevant general assembly meeting.
Austria Tightens Its Rules for Group Taxation and Deductibility of Intra-Group Interest and Royalties

In light of the BEPS report, discussions on the OECD level and budgetary restraints, in early spring 2014, Austria introduced some significant restrictions, in particular in light of the Austrian group taxation regime and the tax deductibility of intra-group interest and royalty payments made to non- or low-taxed group recipients. These changes may affect international tax structures involving Austrian holdings and should thus be considered thoroughly in order to avoid negative effects.

Introductory remarks
In early spring 2014 some significant changes were introduced to Austrian tax law by the Austrian Tax Amendment Act 2014. Part of these changes was due to discussions on an international level in light of the OECD BEPS report, whereas budgetary restraints may also be brought forward as a reason for introducing these restrictions. The following is a brief summary of some selected changes introduced in the course of these amendments that may affect international tax planning as well as established structures.

Changes to Austrian group taxation regime
Upon its introduction in 2005, the Austrian group taxation regime was quite flexible, enabling foreign subsidiaries to become part of a tax group irrespective of their tax residency if the general criteria were fulfilled. The main advantage of including foreign subsidiaries in an Austrian tax group is to enable the group to consolidate losses suffered by foreign group members with profits achieved by Austrian group entities for tax purposes, thereby reducing the overall tax burden. Although the use of these foreign tax losses claimed to be offset within the Austrian tax group. In the past the quality and reliability of information provided by the taxpayer varied considerably (significantly depending on the residence state of the foreign group member). Group members not resident in an eligible state are automatically withdrawn from the tax group, as of 1 January 2015, with any losses attributed to the top-tier entity in the past being subject to an obligatory recapture to the extent no such recapture had previously taken place. As a relief, the amount of tax losses to be recaptured as a result of this automatic withdrawal are to be spread over a period of three years.

In Austria, a new limitation on the amount of tax losses of (eligible) foreign group members attributed to the top-tier group entity was introduced, thereby limiting such amount to 75% of the positive income of Austrian group members.

Furthermore, the Austrian group taxation regime enabled the taxpayer to claim a tax-deductible goodwill amortisation in case of a share deal in the course of which an Austrian group entity was acquired, thereby limiting such amount to 75% of the positive income of Austrian group members. This new limitation is to be applied from the 2014 financial year onwards. In that year, goodwill amortisation is determined in accordance with the arm’s-length principle. Under the new rules, goodwill amortisation is limited to 75% of the positive income of Austrian group entities. It is doubtful whether such provision was in line with the EC Freedom of Establishment. In tax proceedings these arguments were brought forward to the Austrian Supreme Tax Court. Such appeal may backfire since the Austrian Supreme Tax Court submitted a request to the ECJ, however, with first raising the issue of whether the goodwill amortisation may qualify as a (non-disclosed) state aid. If the ECJ were to qualify goodwill amortisation as state aid, Austrian entities that have claimed goodwill amortisation in the past may face significant repayment obligations.

In light of these developments, goodwill amortisation was completely abolished for acquisitions on or after 1 March 2014. Under specific circumstances, goodwill amortisations claimed in the past may continue to be tax deductible over the 15 years amortisation period.

Limitation on deductibility of intra-group interest and royalty payments
Other than transfer pricing limitations, thin cap rules and a restriction on debt raised for the intra-group acquisition of shares, Austrian tax law did not provide for any further restrictions on the tax deductibility of interest payments. For royalty payments, again transfer pricing rules had to be observed.

As of 1 March 2014, a limitation on the deductibility of intra-group interest and royalties was introduced, mainly targeting payments made to non- or low-taxed foreign corporate recipients of these payments. To determine whether such restriction applies, it is first must be determined which entity is to be treated as the recipient of these interest and royalty payments. For this purpose, the beneficial recipient is decisive, thereby taking into account back-to-back structures as well as risk allocation, substance, etc.

The scope of this newly introduced rule is limited to beneficial recipients that are directly or indirectly part of the same group as the Austrian payer, or directly or indirectly under the control/influence of the same shareholder as the Austrian payer. However, even financing provided by a third party (eg, a bank) may be based on the concept of the beneficial recipient — be covered by this limitation, in particular if a back-to-back scenario is given. This concept is intended to cover scenarios whereby, for example, a third party (eg, an orphan vehicle) grants a loan to the Austrian subsidiary with the foreign (low-taxed) parent providing the financial means to that third party (or the orphan vehicle).

The criteria of non- or low-taxed are defined as follows (note: the fulfillment of one criterion will trigger application of the restrictions):

- **Non- or low-taxed due to a personal exemption or special regime.** This criterion targets double-dip structures where, due to the hybrid nature of a financing instrument (qualification as debt in the residence state of the payer, qualification as equity in the residence state of the recipient), the payments are treated as tax-exempt dividends on the level of the recipient. Such criterion is not deemed fulfilled if no (or low) taxation is the mere result of being part of a foreign group taxation regime where the profit is attributed and taxed on the level of another group entity.
- The tax rate is below 10%. Such criterion refers to the nominal tax rate being applicable to interest/royalty income in the state of residence of the recipient.
- The effective taxation of interest/royalty income is below 10%.

This criterion targets scenarios where the nominal tax rate applicable to interest/royalty income is 10% or more, but the effective tax rate drops below that 10% threshold due to the domestic tax law, providing the possibility to claim fictitious tax expenses or a partial tax relief for such interest/royalty income.

Due to its rather broad wording, the exact scope of this provision and its interpretation is currently subject to ongoing discussions with the Austrian Ministry of Finance. Furthermore, although the wording of this provision does not restrict its applicability to non-Austrian corporations, the fact that only non- or low-taxed entities will effectively be comprised leads to a discrimination of cross-border financing structures, thereby raising doubts as to the provision’s compliance with the EC Freedom of Establishment or EC Freedom of the Free Movement of Capital.

This new provision entered into legal effect as of 1 March 2014, thereby covering interest/royalty payments affected on or after this date, irrespective of when the underlying contractual relationship (eg, loan or licence agreement) has been entered into.

Since therefore also interest and royalties paid under agreements concluded prior to 1 March 2014 are thereby covered (subject to the 10% limitation), a thorough scrutiny (and potentially also a re-arrangement) of existing intra-group financing and licensing schemes is required to avoid the denial of the tax deductibility of interest and royalty payments on the level of an Austrian group company.

In light of the newly introduced restrictions on intra-group interest and royalty payments, financing and licensing arrangements within a group of companies with an Austrian entity as payer being involved must be set up carefully in order to maintain and ensure tax deductibility of these payments in Austria.
Corporate Holding Regime in Romania: “New Entry” in the International Tax Arena

The Romanian corporate holding introduced in 2014 is a viable option for local and regional businesses to create tax-efficient corporate structures.

As of 1 January 2014, Romania has introduced a participation exemption regime to encourage local and international businesses to set up corporate holding companies in Romania. This new tax regime, coupled with the wide double tax treaty network available and lower administrative costs, could make Romania an important hub for corporate holdings in the region and an important competitor with other European jurisdictions with a long tradition in this area, such as the Netherlands, Luxembourg, Cyprus and Switzerland.

Similar to the participation exemption regime in other jurisdictions, the one in Romania allows tax exemption for dividend income, capital gains and liquidation proceeds derived from subsidiaries, under certain conditions. These tax incentives could translate into reduced costs for financing within the group, a tax-efficient exit from businesses and a more flexible structure allowing for more effective operational management for various lines of business.

Taking advantage of the tax relief provided by the corporate holding regime is a tool available to new businesses in their initial set-up and existing ones that can restructure their operations.

Conditions for the application of the participation exemption regime

Three conditions must be met for the participation exemption regime to apply.

The first pertains to the tax residence of the subsidiary. The participation exemption applies only to income derived from subsidiaries that are resident for tax purposes in another EU member state or in a state with which Romania has concluded a double tax treaty (DTT). Considering that Romania has currently in place over 80 DT Ts, the participation exemption regime allows for a broad application.

Furthermore, unlike the participation exemption regime in other jurisdictions, the one in Romania has the advantage that it applies not only to international participations but also to domestic ones. This in turn creates a good incentive for local businesses to create their own corporate holding structure in Romania rather than using foreign jurisdictions, with considerably higher administrative costs attached.

The other two conditions pertain to the minimum shareholding percentage and minimum holding period. For the participation exemption to apply, the holding must have owned at least 10% of the share capital of the subsidiary for an uninterrupted period of at least one year at the moment of deriving the income from the subsidiary. The participation exemption regime applies to all Romanian companies that have substantial holdings in other companies.

Besides the above three conditions, no other qualifying criteria apply. For example, there is no need for the Romanian company claiming these tax benefits to carry out only corporate holding business or to be incorporated under a specific legal form.

Why to choose a Romanian corporate holding

A Romanian corporate holding could secure the same tax and commercial benefits as any other holding in a foreign jurisdiction, such as tax-free distribution of dividends, tax efficient financing and exit from subsidiaries or consolidation of financial results.

As compared to traditional locations, such as Benelux countries, Switzerland and even compared to Cyprus and Malta, the Romanian corporate holding is most appealing for local and regional businesses that could achieve important cost savings from having a holding company in Romania. This is because of proximity, shorter travel distances and relatively lower set-up and administrative costs in Romania. Further, the participation exemption regime in Romania is fairly general, straightforward and easy to implement. It is not conditioned by any active business test and does not require a specific company status, as is often the case with holding legislation in Western Europe.

Such cost savings could be most significant for the groups of Romanian companies that would no longer have to cope with financial and time costs related to traveling abroad for shareholders’ resolutions; could better control the activities of the holding; could more easily comply with substance requirements; and could achieve significant economies of scale for administrative costs.

Potential downsides of Romanian holding structures

Investors interested in setting up a Romanian holding should be aware that the tax law is one step ahead of the company law as regards the corporate holding structures. If a Romanian company is set up for a Romanian group of companies in the form of a limited liability company, the company law restricts it to act as sole shareholder in more than one Romanian company, which means that a minority shareholder must be brought in for all subsidiaries but the first one. This is not a significant impediment, but it will require more effort to adequately plan a proper structure and could render the structure more complex.

Another restriction of the company law inconsistent with a smooth corporate holding regime is that a Romanian company (and hence a Romanian holding) may not make interim distribution of dividends. So it may require more time to distribute profits out of a Romanian holding.

This new tax regime, coupled with the wide double tax treaty network and lower administrative costs, could make Romania an important hub for corporate holdings in the region.
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