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CEE newsletter

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AUSTRIA | The Founder's Desire for Control

The decision of the Supreme Court (Oberste Gerichtshof) dated 9 September 2013 in case 6 Ob 139/13d proved highly controversial. In the aforementioned case, the deed of foundation stipulated that the private foundation's advisory board – which was solely comprised of beneficiaries – had the right to dismiss members of the management board and set the amount of remuneration paid to such members, in addition to having rights of approval for matters relating to business management, e.g. determining beneficiaries and the payment of benefits. This decision came in for considerable criticism as it was made following the entry-into-force of the Act Accompanying the Budget 2011 (Budgetbegleitgesetz 2011), which – in the wake of the 2009 decision of the Supreme Court on the rights of advisory boards – strengthened the ability of beneficiaries to exert an influence, even in the context of advisory boards. So, which options does the founder of a foundation still have to control "his/her" private foundation?

Control Organisation

The underlying idea behind the Private Foundation Act (Privatstiftungsgesetz) is that the private foundation is entirely separate from its founder; the founder is no longer the owner of the assets he/she has donated to the foundation. However, so as not to relinquish indirect access to "his/her" assets entirely, the founder will often retain certain rights of influence that are exercisable by it or a body of the private foundation, of which the founder can be a member – sometimes even the sole member. In many cases, the founder's dependants (family members) are members of the advisory board, and usually beneficiaries as well. This is also done with a view to ensuring that the founding family, for whom the private foundation is supposed to provide, retains significant influence over the private foundation, thereby guaranteeing the long-term future of the foundation for successive generations after the death of the founder.

Means of Control

In practice, which rights are usually reserved for the founder or an advisory board?

– *Rights of revocation and amendment:* If the founder retains the right to dissolve the private foundation or amend its deed of foundation, he/she ultimately does not lose access to the assets (Supreme Court decision dated 11 September 2003 in case 6 Ob 106/03m; Supreme Court decision dated 27 May 2004 in case 6 Ob 61/04w). Neither the right of dissolution nor the right of amendment can be transferred (not even to an advisory board) or inherited.

– *Rights of supervision and control:* The founder can exercise considerable influence over the management of the private foundation. This can take the form of rights to issue instructions, rights of approval, or veto rights for matters relating to business management, as well as rights of appointment and dismissal and rights to set the amount of remuneration paid to members of the foundation's management board and rights to select beneficiaries and determine payments made to beneficiaries. Such rights may, however, not be expanded to such an extent that the foundation's management board is de facto reduced to the status of an executive body bound to follow instructions.

– *Membership of a body of a foundation:* The founder can be a member of the management board of the foundation, the supervisory board or (to the extent there is one) the advisory board (Supreme Court decision dated 31 January 2002 in case 6 Ob 305/01y). In so doing, the founder may have the right to cast the deciding vote (in the event of a tie) or it may have multiple voting rights.

– *Rights to information and rights of inspection:* As the Private Foundation Act does not confer any special rights to information or rights of inspection upon the founder, he/she may reserve such rights in the deed of foundation.

Admissible Possibilities to Exert Control

The Private Foundation Act and the Supreme Court (in its decision dated 9 September 2013 in case 6

Ob 139/13d) have restricted the ability of the founder to shape and organise its rights of influence. This applies above all else if the founder is also a beneficiary or a dependant of beneficiaries of the private foundation. This is usually the case with private family foundations.

Which legally admissible possibilities are now still available to the founder?

The founder can reserve – either for itself or for an advisory board – rights of supervision and control of the foundation's management board, such as for example the right to appoint and set the amount of remuneration paid to the members of the foundation's management board and rights of approval for matters relating to business management. However, the rights conferred upon the founder or an advisory board may not degrade the foundation's management board to such an extent that it becomes little more than a purely executive body. Bodies consisting solely of beneficiaries or the majority of whose members are beneficiaries may take decisions neither on the selection of beneficiaries nor on the amount of payments made to beneficiaries. The same applies to founders who are themselves beneficiaries. They may only dismiss the foundation's management board for the reasons laid down in Section 27 para. 2 nos. 1 to 3 of the Private Foundations Act. By repeatedly making reference to its decision on advisory boards and the incompatibility provisions of Section 23 para. 2 of the Private Foundations Act, the Supreme Court has made it clear that, generally speaking, an advisory board with far-reaching rights of supervision and control may not solely consist of beneficiaries nor may the majority of its members be beneficiaries.

It remains to be seen whether the legislator will in future adopt regulations to address the issue of "advisory boards that resemble supervisory boards" once and for all. Until such time as it does, the current view of the Supreme Court will be authoritative. The rights conferred upon founders who also happen to be beneficiaries or upon advisory boards consisting solely of beneficiaries or the majority of whose members are beneficiaries must either be significantly reduced or it must be guaranteed that the rights of supervision and control are conferred upon a body not consisting solely of beneficiaries or the majority of whose members are not beneficiaries and the foundation's management board must not be degraded to that of a mere executive body.

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BELARUS | New Regulations on Financial Lease Activity in Belarus

The President of the Republic of Belarus issued Edict No. 99 "On Issues Relating To The Regulation of Lease Activity" ("**Edict No. 99**") on 25 February 2014. Entering into force on 1 September 2014, Edict No. 99 aims to strengthen control of the National Bank of the Republic of Belarus over the financial lease activity of companies not registered as banks.

Registration of Leasing Companies

Upon Edict No. 99 entering into force, all companies (except banks) intending to conduct financial lease activity must be registered with the Register of Leasing Companies (the "**Register**"). The Register is maintained by the National Bank of the Republic of Belarus. For the purposes of registration, a company has to satisfy certain requirements. Among others, its charter capital must not be less than EUR 50,000.

If a company is not registered, it may not conduct financial lease activity unless:

- a lessor does not conclude more than three financial lease contracts within a year and the total value of leased property does not exceed 10,000 basic units (BYR 1,500,000,000, approx. EUR 105,000);
- a lessor is a foreign company permanently established in Belarus for tax purposes;
- a lessor conducts the financial lease activity based on a special resolution of the President of the Republic of Belarus; or
- a lessor is a bank or a non-banking financial organization.

Strengthening of Control over Leasing Companies

In addition to the registration requirement to which leasing companies are subject, Edict No. 99 also tightens control over the current activities and financial performance of leasing companies.

In particular, registered lessors and foreign lessors permanently established in Belarus for tax purposes are obliged to report their financial performance to the National Bank of the Republic of Belarus. Moreover, registered lessors are also obliged to make this financial information available to the public on the Internet.

Summary

Edict No. 99 most likely will result in a fall in the number of leasing companies operating in Belarus since entering this market would now require a larger investment compared to what was previously the case. For this reason, Edict No. 99 is not welcomed by the Belarusian business community.

BELARUS | Duty Free Shops in Belarus

The regulations governing the activities of duty free shops in Belarus have been amended by Edict No. 175 "On The Activities of Duty Free Shops" issued by the President of the Republic of Belarus on 22 April 2014 (the "**Edict No. 175**"), which came into force on 27 July 2014.

The most important new provisions

Previously, duty free shops were only permitted at the international airport. Upon Edict No. 175 entering into force, duty free shops may also be located at other border crossing points, e.g. on motorways and at railway stations.

However, only companies registered in Belarus may own duty free shops. Moreover, if such a company only has one shareholder, it must be wholly-owned by the Republic of Belarus. Where it has two or more shareholders, 49% of its shares must be state-owned.

Summary

It is expected that the adoption of Edict No. 175 will boost the development of tourism in Belarus. Therefore, Edict No. 175 is highly appreciated.

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BULGARIA | Recent Amendments to Banking Regulations

Recent amendments to the Bulgarian Consumer Credit Act, effective as of July 2014, introduced new rules applicable to consumer loans. The act applies to loans of up to EUR 75,000 granted to individuals where the loan is not related to their professional or commercial activity. Some of the rules also apply to consumer mortgage loans. The amendments are important for lenders and consumers alike. The most relevant amendments are as follows:

(a) Early repayment of consumer loans

The amendment mostly affects consumer loans secured by mortgage. Consumers are now able to repay their loans without being held liable for any fees for early repayment (in the form of compensation, liquidated damages, etc.) in those cases where the consumer has already repaid twelve monthly instalments. Otherwise the creditor could charge a fee of up to 1% of the repaid amount of the loan. This amendment also applies to consumer mortgage loans taken out before the new rules entered into force.

(b) Cap on the annual percentage rate charged

The new legislation introduces a cap on the annual percentage rate charged on consumer loans, which according to the amendments may not exceed five times the statutory interest rate. The current cap is approximately 50%. This amendment mainly impacts financial institutions that provide unsecured loans (so-called fast credits) as banks generally never reach such thresholds.

(c) Ban on unilateral amendments to loan agreements

Creditors are no longer entitled to amend the terms and conditions of loan agreements unilaterally and at their own discretion if this would lead to an increase in fees or interest. In case the interest rate is floating, it should only be tied to market indices (such as Euribor, Libor, etc.) or other public indicators which are beyond the creditor's control.

(d) Restrictions on additional fees and charges

According to the amendment, creditors may only charge fees for additional services related to the loan. It is explicitly provided that no fees related to the utilisation or management of consumer loans should be collected from consumers.

The introduced amendments aim to afford greater protection to consumers who are borrowing, but their effect has yet to be felt.

Developments in the renewable energy sector

In its decision dated 31 July 2014, the Constitutional Court revoked a fee imposed by the state for solar and wind-generated energy. The fee, which was introduced in January 2014 by amendments to the Energy from Renewable Sources Act, only applied to solar and wind energy producers and amounted to 20% of the electricity produced that is sold at preferential rates. The state fee had been challenged before the Constitutional Court by the President of the Republic of Bulgaria on the grounds that it was incompatible with the constitutional provisions for equal treatment, the rule of law, and the protection of investments, etc. Despite revocation of the state-imposed fee, investors are unable to claim reimbursement of the amounts already paid, since decisions of the Constitutional Court do not have retroactive effect.

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CZECH REPUBLIC | Can a Managing Director Be Named Employee of the Year?

Following the adoption of new legislation, the question of whether an individual may hold a position in a company specified in its articles of association and at the same time be an employee of the same entity continues to be one of the most frequently discussed topics in the field of corporate law. It should be noted that the new legislation does not provide a clear answer to this question.

It has never been expressly forbidden for the managing director to be an employee of the company. However, the opinion that this is undesirable or even illegal has been expressed over the years. In 2010, this question was answered in a fundamental ruling issued by the Supreme Administrative Court of the Czech Republic, in which the court held that the position of the managing director cannot be performed on the basis of an employment contract. It stated that this function together with its obligations and responsibilities towards society is incompatible with the protective character of employment (limited liability of the employee, protection against termination, etc.).

This opinion was confirmed by subsequent decisions of the Supreme Court of the Czech Republic. Addressing this issue, the latest ruling of the Supreme Court, case no. 21 Cdo 3250/2012 dated 14 November 2013, confirmed the previous conclusions of the Supreme Administrative Court, stating that the concurrence of those functions is not allowed. According to the Supreme Court, the parallel

existence of an employment relationship based on an employment contract and a relationship based on a managing director’s agreement is not possible because when the parties enter into commercial relations after having already concluded an employment contract, it can be inferred that the employment contract was implicitly terminated with effect from the day on which the employee was appointed as the managing director of the company.

A lot of companies did not identify with this view of both courts for a long time and demanded legislative regulations regarding this issue. Consequently, an amendment to the Commercial Code No. 351/2011 Coll., effective from 1 January 2012, was adopted on the basis of which one person was allowed to occupy both positions. However, this amendment was only valid until 31 December 2013 and was annulled upon the New Civil Code taking effect. Because of this, the question of whether the same person can simultaneously perform the duties of the managing director and be employed under the terms of an employment contract for the same company was left unanswered.

A managing director can be declared employee of the year, but only on condition that the type of work and the content of the work performed by the employee does not overlap in any way with the duties of the same person appointed as managing director in accordance with the statutes of the company. Despite considerable interpretative uncertainty, it should be noted that in the opposite case we believe the concurrent performance of both functions is not possible. When speaking about interpretative uncertainty, we especially refer to different opinions on interpretation of the New Civil Code and the Business Corporations Act. Supporters of the opinion that it is possible for one person to hold the position of managing director whilst at the same time working as an employee of the company, base their claims on the dispositive provisions of Article 1, paragraph 2 of the New Civil Code which states the well-known general principle that what is not prohibited by law is permitted. On the contrary, some legal theorists as well as the existing case-law of the Supreme Court of the Czech Republic and the Supreme Administrative Court of the Czech Republic, as mentioned above, reject this opinion.

Due to the lack of explicit legal provisions addressing this issue and in addition to the fact that the constant ruling of the courts does not support the concurrence of those functions, it can be concluded that, at least until such time as the current case-law is overruled, it is in the best interests of the statutory bodies to enter into managing director’s agreements only (so as to avoid performing their duties for free under the new legislation). It is possible and recommended that provisions regarding all forms of benefit and remuneration for performance of the duties belonging normally to employees under a valid employment contract be included in such contracts concluded with managing directors.

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HUNGARY | The Hungarian Competition Act Was Amended in July 2014

Act CCI of 2013 amending Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices ("Competition Act") entered into force on 1 July 2014. The purpose of the amendment was to bring Hungarian legislation into line with recent developments in EU law and address certain problems and needs encountered in the practical implementation of the act.

Prohibition of implementation in merger control cases

Previously, entities were – in the case of corporate acquisitions subject to merger control – able to implement the transaction before approval had been granted as the implementation prohibition was not explicitly stated in the regulations. With the amendment of the Competition Act, however, a merger can no longer be implemented (i.e. control rights cannot be exercised) until authorisation is granted.

As a new rule, the Competition Act now states that any transactions stemming from an unauthorised merger are invalid, and the Hungarian Competition Authority ("HCA") may impose significant fines for any violation of the implementation prohibition. The amount of such a fine can be as high as 10% of the turnover realised by the relevant company in the previous year.

Apart from explicitly stating the implementation prohibition, the act also includes an option allowing the HCA, in response to a specific request and after consideration of the relevant circumstances, to permit the exercise of control rights before it authorises the merger.

More specific rules on access to case files

With respect to access to case files and the protection of sensitive business information, the amendment specifically states that not only the companies subject to a given procedure but also third parties may be granted access to the documents related to the case. This requires such a third party to furnish proof that it has a legitimate interest in accessing the file. The new rule has practical relevance in that such requests will probably be made with a view to enforcing claims for damages.

The amendments include certain exceptions from third party access. Leniency applications and settlement declarations will not be made accessible to third parties at all; however, documents attached to leniency applications that do not include sensitive business information can be made accessible.

Settlement

The amendment has introduced a new scheme known as settlement, which is modelled after a similar procedure of the European Commission. Under the relevant rules, companies subject to a procedure may decide, in response to the HCA’s inquiry after the completion of the investigation report, whether they wish to participate in the settlement procedure.

If a company chooses to do so, it makes a declaration in which it admits that it has infringed the regulations and discloses the relevant facts to the HCA. The advantage of this process is that the HCA does not have to complete an official procedure that could take years, while the company can expect a 10% reduction of the fine. If a settlement is not reached, the procedure continues in accordance with the general rules.

It is important to note that third parties cannot have access to settlement declarations.

As this is a new scheme, it is at present not known what percentage of companies will take advantage of it.

Other major changes

The amendment has not transposed into Hungarian law the directive on the enforcement of claims for damages under competition law, which has been adopted by the European Parliament and awaits approval by the European Commission. Therefore, if the directive is approved, the Competition Act will probably be amended once again.

In the light of their practical importance, the rules on access to case files have been applicable to ongoing cases since 1 July 2014, whereas all other amendments will apply to procedures commencing after this date.

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ROMANIA | The New Insolvency Code Applicable in Romania

The new insolvency code, Law no. 85/2014, regarding the procedures for preventing and avoiding insolvency (the "**Insolvency Code**"), has been published in the Official Gazette of Romania. The

Insolvency Code entered into force on 28 June 2014.

New legislation governing the insolvency of legal entities in Romania was needed as Government Emergency Ordinance No. 91/2013 concerning insolvency, which was issued in October 2013, was declared unconstitutional. The old legislation, Law No. 85/2006, was still in force up until 28 June 2014.

The Insolvency Code has been adopted in the context of the economic downturn of the past five years, during which time more and more companies in Romania have been filing for insolvency and more than 95% of the cases have ended in bankruptcy.

The purpose of the Insolvency Code is to establish a collective procedure for the debtor in order to cover the liability of such debtor, with the potential of offering the business the chance of recovery, whenever possible.

According to the Insolvency Code, a company is insolvent if it does not have the funds available to meet its financial obligations. In addition, according to the legal provisions, a company may be presumed to be insolvent or at imminent risk of insolvency.

The procedures provided by the Insolvency Code are applicable to the professionals, as such are defined by the applicable civil regulations. The insolvency procedures are also applicable for autonomous administrations (Romanian term: *regii autonome*) according to the Insolvency Code.

According to the new regulations, the reorganization plan for a company in insolvency lasts for three years and may be extended by one year. In addition, under the Insolvency Code only companies with debts exceeding Lei 40,000.00 (approximately Euro 8,900.00) may file for insolvency. Pursuant to the Insolvency Code, the value of Lei 40,000.00 also applies when creditors request that their debtors be placed into insolvency.

The reorganization plan of the company in insolvency may be extended at any time during the reorganization procedure, without exceeding a maximum of four years from the date of confirmation of the reorganization plan.

The application of the Insolvency Code is governed by fundamental principles of insolvency prevention, including: (i) maximizing asset capitalization and asset recovery, (ii) granting debtors the chance to effectively and efficiently recover the business, (iii) ensuring an efficient insolvency procedure, (iv) ensuring equal treatment for creditors of the same rank and (v) ensuring a high degree of transparency and predictability of the procedure.

The general interpretation is that reforming this legal field is a “healthy” development. In addition, according to media reports, the Principles of the World Bank represent the basis for drafting the Insolvency Code, principles which are widely recognized as being the most fair and judicious approach for both creditors and debtors in this procedure.

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SLOVAKIA | Criminal Liability of Legal Persons in the Slovak Republic

Generally, there are three basic approaches to regulating the criminal liability of legal persons. The first is the direct criminal liability of legal persons. The second is indirect liability for which only natural persons can be held liable provided they acted in the name and on behalf of the legal person, as a consequence of which only some types of sanction can be imposed against the legal person directly. The last is administrative liability, i.e. when law defines administrative torts.

At present and deriving from the legal regulation of 2010, the Slovak Republic has adopted a form of indirect criminal liability for legal persons. The result is the incorporation of two sanctions – confiscation of money or of property belonging to legal persons. However, there are no direct rules

dealing with the criminal liability of legal persons as such. The Ministry of Justice of the Slovak Republic ("Ministry") analysed the applicability of this legal regulation in practice and reached the conclusion that the current status quo is not effective.

Based on international commitments derived from the Slovak Republic's membership of the OECD and its other international commitments, the Slovak Republic undertook to take steps to create a new legal framework.

The Ministry prepared a proposal for a separate legal act bringing direct criminal liability for legal persons into the Slovak legal system. This act ("Act") defines criminal liability, provides for various types of punishment and their imposition, and answers some particular questions regarding criminal proceedings. In practice, this means that since legal persons are directly responsible for acts of designated natural persons, in respect of which direct sanctions can be imposed by the court (in some cases even resulting in the dissolution of the legal person). If the Act is adopted by the parliament, the old regulation will no longer apply.

The basic criteria for determining the criminal liability of a legal person can be summarised as follows: the criminal offence must have been committed (i) for the benefit of the legal person, or (ii) in its own name (on its behalf), or (iii) within the performance of its activities, or (iv) through the legal person. A substantive criterion must be added to those enumerated above. The offence must have been committed by:

- a statutory body or its members, or another person entitled to act on behalf of or represent the legal person,
- a body exercising controlling functions or performing supervision, even if there is no other relationship to the legal person,
- persons who are able to exercise a decisive influence over the management of this legal person (e.g. "shadow management"),
- other employees or another person of a similar position within the performance of his/her working tasks.

This results in the direct criminal liability of the legal person if defined natural persons took certain actions. That is to say, such natural persons are not criminally liable unless all legal prerequisites are met, thereby giving rise to their own criminal liability (e.g. if the actions can be considered as having been taken for the benefit of the individual). In such a case, the accusations levelled against the legal person could be heard in joint proceedings with the natural person, but their offences/liability will be considered independently from one another. This regulation attempts to create greater pressure on management, owners, etc. in the process of the appointment and hiring of people authorised to act on behalf of the legal person.

What is important is that criminal liability will be automatically transferable to legal successors (for instance, as a result of mergers, etc.). Moreover, in case of raised conviction, the extent to which a legal act which leads to changes being made to or the dissolution or termination of the legal person will require the approval of a court. Under certain circumstances, the court may decide to impose limitations and security measures, such as an obligation to deposit money or tangible assets into the custody of the court, or it may prohibit particular acts, etc. Legal proceedings will be announced in publicly available registers. The Act also introduces the new term of "legal person's correctness", which will be a new condition for the issuance of various licences, approvals, certificates, etc. Until present such correctness was surveyed just in respect to the natural persons representing the legal person.

Criminal liability not only affects legal persons domiciled in the Slovak Republic, it also applies to criminal offences committed by any legal person within the territory of the Slovak Republic regardless of where the legal person is domiciled. Legal persons not domiciled in the Slovak Republic may also be held criminally liable under Slovak law for any actions taken abroad for the benefit of legal persons domiciled in the Slovak Republic or for the benefit of natural persons holding Slovakian citizenship.

The Act includes a wide range of various criminal offences, e.g. fraud and its various types, defalcation, bankruptcy and restructuring offences, blackmail, data protection violations, the illicit manufacturing and possession of narcotics or psychotropic substances, poisons or precursors and trafficking them, bribery, forgery, fraudulent alteration and illicit manufacturing of money and securities, provision of a false expert opinion, translation or interpretation, etc. The exhaustive list of criminal offences for which a legal person can be held criminally liable is still subject to various discussions and the Act is not definite in this respect.

There are several types of punishment that can be imposed, such as dissolution of the legal person, confiscation of its property/assets, pecuniary penalties (ranging from EUR 1,500.00 to EUR 1,600,000.00), prohibition of performances, prohibition to accept help and support from EU funds, prohibition to participate in public procurement, and an obligation to publish a statement condemning the action taken.

In this connection, we would like to draw your attention to the fact that the Act has not yet been enacted or submitted to parliament for its approval. There are numerous objections against its wording, e.g. the fact the Act excluded and did not reflected "fault" as a basic characteristic of criminal offence. Some authorities proposed that the Act be directly incorporated into the existing Slovak Criminal Code, whereas others objected to the definition of criminal liability, etc. So there is still a considerable way to go before its adoption. If the Act is adopted (likely to occur in the autumn of 2014), it will in all likelihood enter into force on 1 January 2015.

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