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AUSTRIA | New flexibility for non-listed stock corporations in Austria

A landmark decision of the Austrian Supreme Court has created a greater degree of flexibility in Austrian stock corporation law.

Previously: Tight limits due to the constraints imposed on articles of association

Until recently, Austrian stock corporation law was characterised by what was referred to as *Satzungsstrenge* (literally, the strictness of articles of association). According to this principle of limited contractual freedom, it was only possible to include provisions in the articles of association of a stock corporation that were explicitly deemed admissible by law. In practice, this meant significant restrictions were imposed. For instance, stock corporation law does not contain any explicit provisions governing pre-emption rights and call-option rights. As such, this prevented such clauses being included in the articles of association. If shareholders wished to reach an agreement on pre-emption rights and call-option rights, they were compelled to do so by concluding a separate shareholders' agreement. However, a shareholders' agreement has no legal effect on third parties, instead only offering contractual protection vis-à-vis the parties to the agreement. Furthermore, shareholders' agreements can be terminated at any time for cause.

Henceforth: New openness for non-listed stock corporations

In a landmark decision, the Austrian Supreme Court has now clearly put the traditional view of the strictness of the articles of association into perspective. In the case of a non-listed stock corporation, the court expressly stated that the inclusion of pre-emption rights in the articles of association is admissible. This new approach has been justified on the grounds that non-listed stock corporations should be recognised as having greater autonomy than listed public corporations.

The decision of the Austrian Supreme Court only related to pre-emption rights. However, given the arguments upon which the decision was based, a lot of provisions which previously had to be set forth in a shareholders' agreement may now be transferred to the articles of association.

All in all, there is now greater freedom to lay down shareholders' rights and obligations in the articles of association of a non-listed stock corporation. As a rule, such clauses in the articles of association are deemed to have absolute and lasting third party effect. They can also grant rights to shareholders that can be exercised outside of the shareholders' meeting.

Within the limits of mandatory law, all manner of transfer restrictions, pre-emption rights and call-option rights are possible, as are voting rights, rights of assent and rights to issue instructions, as well as special provisions governing how profit is determined and distributed.

Increased attractiveness of Austrian stock corporations

As a result, the legal form of the Austrian stock corporation has clearly become more attractive, e.g. for investment companies, joint ventures, holding companies and family-owned companies.

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BELARUS | Antimonopoly Law

Law No. 94-Z "On Countering Monopolist Activities and Promoting Competition" (the "**Antimonopoly Law**"), which was adopted on 12 December 2013, will enter into force on 1 July 2014. The new Antimonopoly Law is aimed at clarifying current competition regulations. Thus, it predominantly restates the provisions of the legislation currently in force. However, it also introduces some new concepts that make it more progressive.

Merger control

The Antimonopoly Law will partly change the filing requirements for different types of M&A transactions. At the same time, it establishes common minimum notification thresholds that will apply to every M&A deal. In particular, a transaction will be notifiable if:

- the book value of a target's assets exceeds 100,000 basic values (approx. EUR 1,000,000); or
- the target's annual turnover exceeds 200,000 basic values (approx. EUR 2,000,000).

Moreover, in addition to the types of economic concentration envisaged by the current law, the Antimonopoly Law will make the foundation of a new company subject to the filing requirement if charter capital for the new company is to be paid in the form of (i) shares or (ii) any other assets of another company.

The Antimonopoly Law will – for the first time – provide an exception for intra-group restructuring. In particular, the approval of the antimonopoly authority will not be required for a transaction between a company and its affiliate where the affiliate controls more than 50% of the voting shares in such a company. In contrast, the current competition regulations do not provide for such a rule, which means it is necessary to file merger control notifications for practically any intra-group M&A transaction.

Vertical agreements

For the first time, the Antimonopoly Law defines a vertical agreement as an agreement between a supplier and a buyer of goods who are not in competition with each other. As a general rule, vertical agreements restricting competition are prohibited. However, this limitation is subject to several exceptions.

In particular, a vertical agreement could be lawful and permitted if:

- the restriction with respect to the price of goods relates to the maximum resale price only; or
- the restriction on selling the goods of competitors is provided for under a franchise contract or another contract for the organization of a sale under a certain trademark; or
- the market share of each party to a vertical agreement does not exceed 15%.

In contrast, the antimonopoly regulations currently in force prohibit any type of agreement that restricts competition. There are no exceptions to this rule whatsoever. As a result, any non-compete provisions in a contract could at present be found to be void by a court. After the new Antimonopoly Law comes into force, certain vertical agreements, as described above, will be valid and enforceable in Belarus.

Summary

Many legal practitioners consider the current antimonopoly legislation outdated. The changes to be introduced by the new Antimonopoly Law will bring Belarusian legislation more into line with European competition regulations and practices and subsequently make Belarusian legislation more understandable for foreign investors. Therefore, the new

Antimonopoly Law is perceived as a progressive legal development and is welcomed by the Belarusian legal and business community.

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BULGARIA | New law imposing restrictions on offshore companies

The "Law on Economic and Financial Relations with Companies Registered in Jurisdictions with Preferential Tax Regimes, the Persons Related Thereto and Their Actual Owners" (the "Law") entered into force on 1 January 2014.

The Law is aimed at preventing companies registered in jurisdictions with preferential tax regimes ("Offshore Companies") using and managing public funds and resources. It also aims to prevent tax avoidance.

Scope of regulation

The Law introduces a ban which prohibits Offshore Companies from performing activities in the most important sectors of the economy and from acquiring companies which perform such activities. It prohibits Offshore Companies, as well as related persons and entities, from participating directly or indirectly in public tenders, privatization transactions, concession tenders, the acquisition of state or municipal properties, and procedures for acquiring licences enabling the holder to act as a credit institution or insurance company. Furthermore, Offshore Companies are also prohibited from performing activities in other industries, such as the gambling industry, industries relating to social security, as well as the mobile telephony, radio and television sectors.

The Law is also aimed at preventing aggressive tax planning and tax avoidance by Offshore Companies and making the real owners of a company visible, thus making it possible to establish connections between affiliates (related persons).

Exemptions

There are certain exemptions to the restrictions imposed on Offshore Companies. Generally speaking, the exemptions relate to Offshore Companies whose real owners (shareholders) can be readily identified by the Bulgarian authorities. An example would be where an Offshore Company is listed on a recognized stock exchange (e.g. a stock exchange in a member state of the European Union) and thus the real owners can be readily identified (e.g. their names are listed in a public register).

Registration requirements and implementation

The Law imposes new registration requirements on certain Offshore Companies. An Offshore Company to which an exemption applies (e.g. one registered on a stock exchange in a member state of the European Union and whose shareholders can be identified) and which is willing to participate in some of the restricted activities would be obliged to register with the Bulgarian commercial register. Such registration also includes providing the names of the real owners of the Offshore Company.

The affected companies have six months to comply with the legal requirements.

Summary

The new legislation is an attempt to significantly restrict the activities of Offshore Companies in a number of major industries. The Law has come in for criticism from the business and legal community for being too restrictive and for the alleged influence lobbyists have had on its adoption. From a legal perspective, both the bans and the exemptions are drafted in quite a broad manner and they are to a certain extent unclear. This may cause some difficulty in terms of its implementation.

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CZECH REPUBLIC | New formal requirements for power of attorney in the Czech Republic

The new Czech Civil Code ("NCC"), which entered into force on 1 January 2014, introduced many important changes to private law. One of the most important changes introduced is the new formal requirement for power of attorney granted to a person which authorizes him/her to represent the grantor at a general meeting of a Czech company. This change has been widely discussed as it can have a significant impact on the ability of foreign shareholders to exercise rights in Czech subsidiaries.

Under the NCC, power of attorney must be granted in written form. However, in cases where a legal act – to be undertaken on the basis of power of attorney – has to be executed in the form of a notarial deed, power of attorney must also be executed in this form.

Below we focus on the requirements for power of attorney granted to persons authorising them to represent shareholders at the general meetings of limited liability companies and joint stock companies in the Czech Republic.

Requirements for granting power of attorney in the case of a general meeting

The reason why there have been heated discussions on formal aspects of the granting of power of attorney is that certain important decisions adopted by general meetings have to be executed in the form of a notarial deed, e.g. amendments to the articles of association, granting approval for share transfers or pledges, giving consent for a merger (demerger, spin-off, etc.), authorising the increase/decrease of registered capital or new shareholders' contributions, etc.

According to Section 441 (2) of Law No. 89/2012 Coll., the New Civil Code, the aforementioned rule would mean that power of attorney issued to a person authorising him/her to represent the grantor at a general meeting at which one of the decisions listed above has to be taken must be issued in the form of a notarial deed. Especially in those cases where the shareholders are foreign companies, such a formal requirement would result in not insignificant difficulties and additional financial costs for the shareholders in question. By way of example, an Austrian/Cypriot shareholder would have to organize a meeting with a notary in his/her country of domicile who would have to draw up power of attorney in the form of a notarial deed (in the case of a Cypriot company, the notarial deed would have to be apostilled as well). Some academics even think that power of attorney would not only have to be drawn up in the form of a notarial deed, but that it would also have to be prepared by a Czech notary public in order to fulfil the mandatory formal requirements.

Fortunately, the Expert Commission of the Czech Justice Ministry issued an opinion that

provides a solution for day-to-day business transactions.

According to this opinion, the legal act in respect of which power of attorney is granted is not deemed to be the decision of the general meeting itself, but the exercising of the shareholder’s voting right. Therefore, based on this interpretation, the power of attorney authorising the person to represent the grantor (i.e. the shareholder) at a general meeting does not have to be granted in the form of a notarial deed. It is sufficient if the signature on the power of attorney is notarized. This interpretation should also be applied in those cases where a Czech company has a sole shareholder, i.e. where the sole shareholder authorizes a representative to make a decision on its behalf.

It seems that the aforementioned interpretation will be generally accepted by notaries and courts and therefore this will enable foreign investors/shareholders to grant power of attorney authorising third parties to represent them at general meetings (e.g. Czech legal counsel), in keeping with the previous practice.

Other cases of power of attorney – a possible solution for foreign persons

The aforementioned interpretation, however, only applies in the case of decisions adopted by a general meeting. In the case of other legal acts that under Czech law must be executed in the form of a notarial deed (e.g. agreements on direct enforceability, certain types of pledge agreements, certain agreements on property between spouses, etc.), power of attorney which grants a person authorisation to sign such contracts/agreements must take the form of a notarial deed.

According to Section 44 (4) of Law No. 91/2012 Coll. on Private International Law, it is sufficient if the power of attorney was granted in the form required under the relevant law, which is valid and which corresponds to the regulations in force at the place of the principal's common office or the place where use is made of the power of attorney.

If one of these legal systems demands a milder statute regarding the form of the legal act than that required by Czech law, power of attorney should also be granted in the form required by this milder statute. In individual cases, it is therefore necessary to establish how this legal issue is affected by the applicable law.

Summary

Power of attorney granted to a person authorising him/her to represent the grantor at a general meeting of a Czech company or to represent a sole shareholder does not have to be executed in the form of a notarial deed.

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HUNGARY | New register of collaterals in Hungary

The new Hungarian Civil Code ("HCC"), which enters into force on 15 March 2014, will introduce major changes to the way in which mortgages and other charges are registered. The HCC will establish a register of collaterals that will replace the current charges register. This represents a change not only in the name, scope, content and function of the register, but also in terms of access to the information recorded in the register. The general public will be able to access the register online free of charge and without having to provide personal identification.

Collaterals that have to be recorded in the register

The primary objective of the new register of collaterals is to improve the security of transactions by making mortgages, pledges and other forms of financing with loan security elements fully public. For this reason, in addition to charges created over moveable property (such as vehicles), charges created over rights or receivables (such as receivables under lease agreements or insurance contracts and bank account receivables) will also have to be recorded in the register from 15 March 2014. Insofar as the ownership of a tangible asset or right is recorded in another official public register (e.g. in the case of real property, aircraft, watercraft, patent rights, trade marks and shareholdings), the charge will have to be recorded in the relevant register, similar to the current practice.

The register of collaterals will also contain other forms of financing with loan security elements, including factoring contracts, financial leasing agreements, and agreements on the retention of title relating to movable property. Where any of these contracts relate to real property, this will have to be recorded in the property register.

If the registration of a charge or contract is required under the HCC, its non-registration will render the contract invalid vis-à-vis third parties. However, it is not entirely clear how the failure to record a charge in the respective register will affect the enforceability of such charges and the priority of the claims secured by such charges in court enforcement and insolvency proceedings.

Free and universal access

Unlike the current register of charges, which is also operated by notary publics, the new register will be completely electronic and made available online. This will offer a significant advantage in that it will allow simple and quick registration of and access to information. Registrations in and deletions from the register, as well as amendments to existing entries, will be made by the parties themselves, without any official checks being made, by simply filling out an electronic form. Anyone will be able to check the existence of a charge or other form of security on a piece of property or right without having to pay a fee or provide any information to establish his or her identity.

The register of collaterals will however not be considered authentic. Therefore, parties will not be able to use it as evidence for the existence of the charges, factoring contracts, financial leasing agreements or agreements on the retention of title registered in it. It will merely serve as proof that a declaration on collaterals, with the information shown in the register, was made.

Registration and deletion

The registration of collaterals in the new register will be conditional upon all parties involved in the transaction (chargor/chargee) being registered users. It will also be subject to the consent of the chargor, whereas deletion will be subject to the consent of the chargee. It should be noted, however, that if the chargee does not counter the chargor's application for deletion with a declaration of his own within 30 days, the relevant collateral will be deleted from the register. It is likely that this rule will present a major administrative and logistical challenge to credit institutions which provide secured loans in large numbers.

Costs

Although access to the register will be free, registration will be subject to a fee payable to the Hungarian Chamber of Notary Publics and will require prior registration by the applicant and an identity check of the applicant by a notary public. The costs of the registration and the identity check are not known at present.

Summary

Although the public nature of the new register will undoubtedly be in the best interests of providing clarity with regard to the existence of charges, it remains to be seen whether the online application will be user-friendly and whether it will have a clear user interface with quick and simple search options.

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ROMANIA | The law governing the purchase of agricultural land in Romania

Under the European Union Accession Treaty, Romania negotiated a duration of seven years within which European citizens and stateless persons domiciled in Romania and the European Union would be prohibited from acquiring agricultural land in Romania.

From 1 January 2014, it was necessary to establish equal conditions for the acquisition of agricultural land by natural persons (Romanian citizens, citizens of a European Union member state and stateless persons domiciled in the European Union) in accordance with the European Union Accession Treaty.

However, on 1 January 2014, the Romanian authorities issued a draft law on the basis of which they intend to impose restrictions on the acquisition of agricultural land by European citizens and stateless persons.

The draft law, which proposes measures for regulating the sale and purchase of *extra muros* agricultural land by natural persons and the establishment of an administrative authority (the "**Law**"), was adopted by the Senate and the Deputy Chamber in December 2013 and the version to be promulgated was communicated to the President of Romania. However, the President sent the Law back to the Parliament for re-examination.

Regulations regarding the sale and purchase of *extra muros* agricultural land in Romania

Only *extra muros* agricultural land ("*teren extravilan*") will be subject to the Law. Therefore, it will not apply to *intra muros* land ("*teren intravilan*").

Moreover, the Law will apply to the following categories of natural persons: (i) Romanian citizens, (ii) citizens of another member state of the European Union, (iii) citizens of a member state of the EEA, (iv) stateless persons resident in the European Union or the EEA and (v) legal persons having the nationality of a state member of the European Union or of the EEA.

Furthermore, the Law grants a pre-emption right – based on the following order of priority – to: (i) co-owners, (ii) tenants, (iii) neighbours, (iv) persons performing agricultural activities within the administrative area of the town where the land is situated, and (v) the Romanian state, at the same price and under the same conditions.

Re-examination requested by the President of Romania

The Romanian President, Mr. Traian Băsescu has sent the Law back to the Parliament for re-examination, given the fact that it contains contradicting provisions that may cause a blockage with regard to agricultural land transactions. The re-examination considerations are mainly the following: (i) application considerations; (ii) term definition considerations; (iii) regulatory authority competence; (iv) pre-emption right issues; (v) methodological norms.

In addition, the principle of reciprocity will apply. More precisely, the Law will apply to the citizens of the European member states where Romanian citizens are lawfully entitled to acquire land.

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SLOVAKIA | Recent Developments in Slovak Commercial Law

e-Government in Slovakia

The long-awaited law on e-Government, Act No. 305/2013 Coll., was published on 8 October 2013. The act seeks to establish electronic communications as a recognised means of communication with and between public authorities with a view to simplifying, accelerating, clarifying, consolidating and increasing the security of communications. The aim here is not to replace the existing legislation (notably the rules governing administrative and/or judicial proceedings), but to provide an electronic alternative to "paper", while maintaining control over the details of specific rules.

Data boxes and the delivery of official documents

The act will establish so-called data boxes as the official means of delivering electronic documents. However, the first stage – which applies to public authorities and which has already been completed – sees the creation of data boxes for all legal entities and branch offices which have their registered office in Slovakia by mid-2015. After data boxes have been introduced, public authorities will deliver official documents to legal entities almost exclusively in electronic form. Regular messages will be considered as having been delivered on the day after the message is uploaded to the data box. Messages that need confirmation of delivery must be confirmed by the addressee before the message is opened. The message is considered as having been delivered following such confirmation. For messages which have to be delivered to the addressee personally, there is a legal fiction of delivery where the message is considered as having been delivered on the 15th day after the message is uploaded to the data box.

Issues surrounding implementation of the new system

There are two issues to be taken into consideration in connection with the electronic delivery of documents.

Firstly, a Slovak ID card is required to access a data box. This is obviously problematic for foreign members of statutory bodies of Slovak legal entities and branch offices. The Ministry of the Interior is already working on a solution: a residence document that will contain the same chip as a Slovak ID which will allow access to a data box. The exact details are not yet known. Requiring a residence document as an alternative to a Slovak ID is not the problem *per se*. The actual problem concerns having to establish residency in order to be issued the alternative ID. Foreign board members might not qualify for residency (e.g., the

law requires them to have secured housing in Slovakia) as some of them may only be in Slovakia sporadically. This might therefore be considered discrimination.

Secondly, the capacity of the data boxes represents another problem. As the data boxes for adult natural persons are part of a pilot scheme, there is practically no limit to their capacity. A reasonable capacity for each data box and the size of each message that can be delivered to the data box will be established in due course. The Government Office of the Slovak Republic has proposed that the capacity of the data box for citizens and legal entities be set at 20 megabytes and this can be increased to 100 megabytes upon payment of EUR 9 per year. It is also proposed that for EUR 90 per year, citizens and legal entities can increase the capacity of a data box to 1 gigabyte. This has come in for heavy criticism, not only from citizens and legal entities, but also some government ministers, firstly on the grounds that 20 megabytes is wholly insufficient and secondly that the proposal seems to suggest that the state hopes to profit from something whose use will in the near future be mandatory by law.

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