CHSHCEE Newsletter

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INSOLVENCY & RESTRUCTURING

The Higher Regional Court of Vienna provides clarification: The repayment prohibition for shareholder loans granted to a company in crisis must not be circumvented by a petition for insolvency proceedings.

If a *debtor* is insolvent or over-indebted (as defined in Sections 66 and 67 of the Insolvency Act respectively), it must file for the opening of insolvency proceedings without undue delay, but no later than 60 days after becoming insolvent.[1]

However, the option of filing such an application is also open to a *creditor* (as laid down in Section 70 of the Insolvency Act). To do so, the creditor needs to confirm its status as an insolvency creditor on the one hand and the insolvency or over-indebtedness of the debtor on the other.[2]

The right of a creditor to petition for the opening of insolvency proceedings was also extended under the Company and Insolvency Law Amendment Act 2003 (*Gesellschafts- und Insolvenzrechtsänderungsgesetz 2003*) and by the corresponding introduction of the Equity Replacement Act (*Eigenkapitalersatz-Gesetz*). Since then, shareholders – within the meaning of the Equity Replacement Act – who have provided an equity-replacing loan are treated the same as insolvency creditors and thus are also entitled to initiate insolvency proceedings in court. The aim is to also give this group of creditors the opportunity to enforce the orderly satisfaction of creditors during insolvency proceedings.[3]

However, it should be noted that claims resulting from an equity-replacing loan do not constitute insolvency claims and are only satisfied as subordinated debts in the event of insolvency.[4] This is also clear from Section 14 of the Equity Replacement Act, which prohibits the repayment of equity-replacing loans, including any interest due thereon, so long as the company has not been restructured. A company is not deemed to have been restructured so long as insolvency, over-indebtedness or a need for reorganisation exists or if one of these circumstances were to arise as a result of the repayment of the equity-replacing loan.[5] At first sight, the fact that shareholders who extend credit to the company in crisis are to be treated the same as (other) creditors with insolvency claims seems both remarkable and astonishing. Nevertheless, Section 70 para. 1 of the Insolvency Act lays down requirements to be fulfilled by creditors wishing to petition for the initiation of proceedings whose claims result from equity-replacing loans; these requirements are identical to those for creditors with insolvency claims. However, by looking at the Equity Replacement Act and Insolvency Act as a whole, the Higher Regional Court of Vienna concluded that this should be seen in a more differentiated way[6].

Accordingly, when assessing whether or not the debtor is insolvent, any claims resulting from equity-replacing loans are to be disregarded – in view of the repayment prohibition enshrined in Section 14 of the Equity Replacement Act. The applicant consequently has to demonstrate its creditor status resulting from an equity-replacing loan and credibly demonstrate that even if its own claim were to be disregarded, the debtor would still be

[1] Cf. Section 69 para. 2 of the Insolvency Act (*Insolvenzordnung*).
[2] Cf. *Feil*, Insolvenzordnung[7] (2010), § 70 Rz 1.
[3] Cf. *Karollus* in *Buchegger*, Österreichisches Insolvenzrecht, 1. Zusatzband (2009), § 14 EKEG Rz 39.
[4] Cf. *Feil*, Insolvenzordnung[7] (2010), § 70 Rz 5.
[5] Cf. Section 14 of the Equity Replacement Act (*Eigenkapitalersatz-Gesetz*).
[6] Cf. the decisions issued by the Higher Regional Court of Vienna on 10 December 2013 in case 28 R 412/13h and on 10 January 2014 in case 28 R 1/14v.

over-indebted or insolvent. In my opinion, the Higher Regional Court of Vienna[7] correctly justified this in its case-law by stating that there would otherwise be a danger of the repayment prohibition being circumvented by a petition to open insolvency proceedings and of a repayment being received even before the debtor has undergone restructuring – even though the debt ranks after (i.e. is subordinate in relation to) insolvency claims, as provided for in Section 57a of the Insolvency Act.[8]

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CHSHCEE | Belarus

New Securities Act

On 5 January 2015, the new Law of the Republic of Belarus No. 231-Z "On Securities Market" (the "Securities Act") was adopted. Entering into force on 11 July 2015, the Securities Act aims to streamline the regulation of securities. At the same time, the Securities Act also introduces clearer and more transparent rules with respect to the disclosure of information, the public offering procedure, and the activity of foreign companies on the Belarusian securities market.

Public Offering Procedure

The securities legislation currently in force does not provide clear and uniform rules on the public offering of securities, and this has sometimes led to legal uncertainty. The new Securities Act incorporates relevant provisions from different pieces of securities legislation. Thus, under the Securities Act the public offering procedure includes the following steps:

- The adoption of a resolution on a public offering by an issuer and its corporate approval (if required);
- The registration of the prospectus;
- The certification of brief information on the public offering of securities;
- The registration of an initial or secondary issue of securities with the relevant authority;
- The promotion of the securities;
- Reporting to the relevant authority on the result of the public offering.

The introduction of clear rules on the public offering procedure makes it more straightforward and safer for issuers and subscribers alike.

[7] Cf. the decisions issued by the Higher Regional Court of Vienna on 10 December 2013 in case 28 R 412/13h and on 10 January 2014 in case 28 R 1/14v.
[8] Cf. the decisions issued by the Higher Regional Court of Vienna on 10 December 2013 in case 28 R 412/13h and on 10 January 2014 in case 28 R 1/14v.

Information Disclosure

Under the Securities Act, any information relating to the securities market qualifies as either public or confidential. Confidential information includes (i) insider information (i.e. any information that gives a person a significant advantage on the securities market) and (ii) closed information (i.e. any financial and/or economic information regarding an issuer before its disclosure to the public).

Public companies are now required to publicly disclose the following closed information:

- Quarterly and annual financial reports;
- Transactions amounting to 20% or more of the book value of the issuer's assets;
- Transactions concluded with the issuer's affiliates;
- Transactions amounting to 5% or more of the issuer's common shares;
- The reorganization and liquidation of an issuer or its subsidiaries;
- The initiation of insolvency proceedings;
- A secondary public offering of securities;
- The payment of dividends, etc.

The disclosure of insider information is prohibited under the Securities Act. Any transaction effected on the basis of insider information may be deemed to be null and void by a court. Any person who unlawfully discloses insider information might be subject to administrative penalties or be criminally liable.

The new rules on the disclosure of information aim to streamline Belarusian securities legislation and bring it into line with international securities practice as well as to make the Belarusian securities market more transparent and safer for investors.

Access of Foreign Issuers to the Belarusian Securities Market

Under the current securities legislation, foreign companies are unable to participate directly in the Belarusian securities market. The new Securities Act now grants them such an opportunity. In particular, securities previously issued abroad may be admitted to listing on the Belarusian Currency & Stock Exchange if (i) such securities formally qualify as securities under Belarusian law and (ii) they are assigned the International Securities Identification Number (ISIN) and Classification of Financial Instrument (CFI) Code.

However, the public offering of securities in Belarus by a foreign company is subject to satisfaction of additional requirements, in particular:

- The prospectus must be registered with the Belarusian Ministry of Finance;
- The securities must be placed with a Belarusian depository system;
- The Belarusian Ministry of Finance and the authority regulating the securities market in a relevant foreign state must have entered into an agreement on cooperation in the area of securities markets.

There have never been any rules on the listing and public offering of securities in Belarus by foreign issuers. Thus, the granting of such an opportunity under the Securities Act is a positive and progressive step forwards.

Summary

Undoubtedly, the Securities Act improves the regulation of securities in Belarus providing for more detailed, clear, and transparent rules for participants of the securities market. Thus, the Securities Act is welcomed by the local business community as it would potentially contribute to an improvement of the investment climate in Belarus.

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CHSHCEE | Bulgaria

Recent amendments to banking bankruptcy regulations

In June 2014 the fourth largest bank in Bulgaria, Corporate Commercial Bank, was placed under supervision by the Bulgarian National Bank. The supervision period, the aim of which is to help a bank that is at risk of insolvency recover, lasted for nearly five months. The bank's licence was revoked by the National Bank in November 2014 and bankruptcy proceedings were initiated. During the supervision period, depositors were unable to withdraw funds and during this period many account holders whose deposits exceeded the guaranteed amount of EUR 100,000 chose to assign their claims against the bank to other debtors of the bank. Such debtors subsequently set-off their claims under the acquired deposits against their obligations under the loans.

Amendments to bankruptcy regulations

With a view to invalidating the aforementioned set-offs and thus affording protection to the creditors of the bankrupt bank, the authorities introduced a series of amendments to the bankruptcy regime applicable to the banking sector. According to the amendment to the Banking Bankruptcy Act from November 2014, the provisions dealing with set-offs relating to insolvent banks were significantly revised. Set-offs performed after a bank has been placed under supervision have been declared null and void with respect to the creditors of the bank, regardless of whether or not the bank was insolvent at that time. Prior to the amendment, a set-off was invalid only if it was performed after the initial date of insolvency. The regulation was further amended in March 2015; the position of an interim trustee at bankruptcy was introduced. The interim trustee manages the insolvent bank until a regular trustee is appointed and is entitled to exercise various rights, including the right to challenge set-offs performed.

Alleged retroactive effect of the amendments

The legal analysis of the amendments shows inconsistencies and leaves room for interpretation. On the one hand, the initial amendment introduced in November 2014 did not specify whether the amendment would have retroactive effect (with respect to set-offs already performed). In light of the wording used, the amendment appears to apply to future set-offs only. On the other hand, the second set of amendments adopted in March 2015 explicitly provide for application of the rules with respect to pending bankruptcy proceedings. Further, the authorities publicly declared that retroactive effect is desired. The amendments were introduced by the authorities as a means of dealing with the large number of set-offs already performed during the supervision period, i.e. prior to the amendments.

The amendments are aimed at protecting the creditors of the bankrupt bank. However, the declared intention to retroactively apply the amendments has met with stiff opposition and has come up against significant criticism and disapproval from within the legal community since it violates a basic legal principle. It has yet to be seen what effect the authorities' controversial approach will have and in particular whether the authorities will attempt to retroactively apply the new rules.

Expected amendment of deposits guarantee regulation

The above bankruptcy also revealed serious deficiencies in the deposit guarantee regime. During the five-month supervision period, depositors were blocked from gaining access to their funds, in contravention of the EU standards laid down in Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes. The Directive provides for much shorter terms for repayment of deposit funds in case a credit institution becomes insolvent. To avoid similar problems in future, the authorities declared their intention to transpose the requirements of the Directive into national law as a matter of urgency.

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CHSHCEE | Czech Republic

New rules for the reduced working hours system in 2015?

First adopted in 2012 in the wake of the economic crisis, the introduction of the so-called reduced working hours system was deemed necessary in order to react to the deteriorating financial situation of some employers and their inability to pay salaries to their employees. At that time, the Government of the Czech Republic adopted the educational programme entitled "Educate yourself to achieve stability", partly funded by the European Union. The goal of this programme was to keep people in work by helping to support employers which due to their financial situation found they were unable to keep some employees on the payroll as agreed. The programme should also help to strengthen the professional knowledge of employees. The re-implementation of the reduced working hours system was approved in November 2014 by the government in connection with the situation in Ukraine and the sanctions imposed on the Russian Federation.

The intention behind re-implementing the reduced working hours system

The second version of the reduced working hours system is substantially different in character from the original version introduced in 2012 as the new system is based on state subsidies paid to employers. Such state subsidies are intended to be provided to employers which – due to extreme economic difficulties, sudden natural catastrophes or for other reasons beyond their control – find themselves in such adverse situations that they are not able to assign work to their employees. In such cases, employees should receive 70% of their average salary, 20% of which should be paid to employers by the state with the remaining 50% borne by the employer. This contribution should be provided for a period of six months, with a possible extension of another six months in the most serious of cases. The Government expects this new regulation to bring significant savings in the area of unemployment benefits because for the state it is much cheaper in the long term to pay a part of an employee's salary than incur the costs of paying unemployment benefits.

The reduced working hours system was first introduced in Germany in 2009 (where it is known as *Kurzarbeit*). The German system differs from its Czech counterpart in many ways. Under the German system, employees have reduced working hours. The difference between proportionally shortened salary and full salary is evened out by the state. Apart from this subsidy, the state provides employers with a contribution toward social security payments. As a consequence, it is stated that this has saved German employers from incurring considerable costs, unemployment in Germany has not exceeded 8% and German politics is regarded as being generally successful because it survived the economic crisis in relatively good condition.

In our opinion, the biggest disadvantage to the proposed system is that applications for this state contribution will be reviewed and approved by the Government of the Czech Republic in every single case. Such applications will have to be submitted to the responsible district Employment Office of the Czech Republic which will then pass them on to the Government. As every application will be reviewed by the Government, it follows that the contribution will be provided to employees in only the most serious of cases, if at all. In practice, this would only occur if the reduced working hours system is passed into law. Another disadvantage is that the reduced working hours system is only a temporary solution and if the employer fails to stabilize its economic situation and assign work to an employee as agreed within half year, but no longer than one year, there will be no other option but to terminate his/her employment.

Summary

The re-implementation of the reduced working hours system requires ratification by Parliament and approval from the President of the Czech Republic. New rules are incorporated into the amendment to the Act on Employment, which should be discussed in the months to come. Although it is expected that the new regulation will enter into force in July 2015, it cannot be ruled out that the proposal will be amended or changed during the re-implementation process.

Despite the disadvantages mentioned above, we believe the re-implementation of the reduced working hours system will bring substantial benefits for companies operating in the Czech Republic.

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CHSHCEE | Hungary

How competition law is changing the retail sector in Hungary

A recent modification to Hungary's Act on Commerce and the evolution of the Hungarian Competition Authority's case-law will present unprecedented challenges for large retailers.

Modification of dominant position rules

As part of the "package" that made life hard for retail chains in many other ways, the Hungarian Parliament adopted an amendment to Act CLXIV of 2005 on Commerce. Under the amendment, regulators will – starting from 1 January 2016 (i.e. after a one-year "preparation period") – make the irrefutable presumption that a company has a dominant position on the retail market for "daily consumption goods" if the net sales revenue earned by it alone or together with its affiliated companies from the sale of such goods exceeded HUF 100 billion in the previous year. For the purposes of the Act on Commerce, "daily consumption goods" means food items, beverages, toiletries, household cleaning products and hygienic paper products.

As a result, almost all retail chains in Hungary will *ex lege* qualify as being in a dominant market position from next January, regardless of the intense competition that otherwise exists on the market, and they will therefore be subject to special competition law rules. Classic competition law theory holds that businesses in a dominant market position have a "special responsibility" and therefore may not pursue certain practices that are otherwise not prohibited for other companies. For example, they may not set their prices freely, may only refuse to enter into a business relationship if there is an objective and economically reasonable underlying cause, may not use tying sales, and may only agree on payment conditions with certain limitations.

EU law allows Member States to introduce standards in connection with special cases of market dominance that are stricter than those stated in the Treaty on the Functioning of the European Union. However, this type of regulation of the retail sector is rather unusual, and therefore it is difficult to predict with any confidence what principles the Hungarian Competition Authority (HCA) will use in the enforcement of the new rules.

Action against companies having a dominant position

The lessons learned from investigations conducted by the HCA in the past in connection with significant market power (SMP) might be instructive with respect to its future approach to the new rules. Although it is not clear to what extent the pre-existing SMP rules will be enforced after the introduction of the amendment, they are nevertheless able to give a good indication of the authority's expectations.

In its limited case-law, the HCA has paid special attention to "fixed bonuses". In two decisions (Vj/47/2010 and Vj/60/2012), it ruled that the widely-used market practice where suppliers provide sales-based cash rebates to retailers at the expense of their own margins at the end of a financial period violated the Act on Commerce. The HCA's problem with the arrangement in both cases was that the rebate functioned as a fee without any underlying service and that "it did not have the function of a sales incentive" because it was payable for every product sold. The HCA imposed a fine of HUF 50 million in the first case; however, on the second occasion the fine was HUF 1 billion, due in part to the fact that the first resolution was publicly known. The companies have sought judicial review of the decisions in both cases, but until the courts overturn the decisions, retailers will have to negotiate commercial terms with their suppliers in the light of these resolutions.

Conclusions

Although it is unclear at this time how the dominant position rules will be applied, the decisions discussed above nevertheless show that the HCA has been vigorous in its enforcement of the relevant competition law provisions. Therefore, retail businesses should pay extra attention to ensure that they comply with competition law.

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CHSHCEE | Romania

New Fiscal Code and Fiscal Code of Procedure

The new Fiscal Code and new Fiscal Code of Procedure have been approved by the Romanian Government and the Senate and are now being debated by the Chamber of Deputies.

New Fiscal Code

The Senate approved the new Fiscal Code and referred it to the Chamber of Deputies for final approval.

The purpose of the Romanian authorities when implementing the new Fiscal Code is to exert a positive influence on foreign investment in Romania, increase the consumption of goods by Romanian citizens and reduce inflation in Romania.

Amendments introduced by the new Fiscal Code

The main amendments introduced by the new Fiscal Code are as follows:

(i) The reduction of the standard rate of VAT from 24% to 20%;

(ii) The implementation of different taxation for micro-companies, depending on the number of employees;

(iii) The abolition of dividend taxation, whilst observing criteria expressly provided by law;

(iv) The reduction of the tax levied on income earned by non-residents in Romania starting from 1 January 2019.

Other amendments relating to taxation refer to the reduction of excise duty on alcohol and cigarettes, both of which are an important business sector in Romania. In addition, the new legislation intends to eliminate the levying of tax on special constructions starting from 1 January 2016.

New Fiscal Code of Procedure

The Senate approved the new Fiscal Code of Procedure and referred it to the Chamber of Deputies for final approval.

The Senate made several amendments before it approved the new Fiscal Code of Procedure. One of the main amendments concerns the former provisions regarding professionals, such as lawyers, notaries public, accountants, fiscal consultants, bankers, etc. Such professionals would have been required to inform the fiscal authority on a daily basis regarding the transactions of their clients in Lei or in a foreign currency equivalent to at least EUR 5,000. The Romanian Union Bar and the Chamber of Fiscal Consultants requested that such a legal obligation be removed as it would interfere with the duty to maintain professional secrecy. The Senate approved the new Fiscal Code of Procedure after this obligation had been removed.

Amendments introduced by the new Fiscal Code of Procedure

The main aspects to be mentioned regarding the new Fiscal Code of Procedure are as follows:

(i) The late payment interest per day of delay is reduced from 0.03% to 0.02%;

(ii) A new penalty is provided for any failure to observe the fiscal declaration obligation;

(iii) In case of a dispute, the contesting party has the possibility of providing oral arguments before the fiscal authority commission;

(iv) In the event that its dispute is not settled by the competent fiscal authority within the period prescribed by law, the interested party has the possibility of addressing the competent court on the issue.

In addition, the new Fiscal Code of Procedure implements the institution of the fiscal erasing of a contributor from the fiscal registers.

If the two pieces of legislation are approved by the Chamber of Deputies, they will enter into force on 1 January 2016.

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CHSHCEE | Slovak Republic

The amendment to Act No 7/2005 Coll. on Bankruptcy and Restructuring

The most recent amendment of the Bankruptcy and Restructuring Act, adopted by the Slovak National Council on 23 April 2015, established several new instruments which provide better protection for creditors and ensure higher proportional satisfaction of their claims by introducing more rigid obligations on the debtors and trustees and by adopting preventative and restrictive measures. This relates in particular to regulating the restructuring process, which was the main objective of the amendment. Restructuring trustees are now obliged to provide more detailed reasoning for the proposed restructuring of a debtor in the restructuring opinion they submit to the competent court. Several new mandatory provisions and annexes, which must be contained and attached with the trustee's opinion recommending restructuring, have been introduced. The trustees are obliged to assess in detail all of the debtor's legal actions vis-à-vis its related parties and provide a list of the debtor's guarantors. The trustee's opinion must now also contain information on profit and own funds distributed to the debtor's members, as well as a statement of an auditor or expert confirming that the debtor's financial statements provide a true and accurate picture of the debtor's accounting and financial status. The amendment prohibits the adoption of a decision on and the recording of the debtor's merger or division in the Commercial Register.

The two new regimes relating to creditors' claims and the prohibition of distribution of profit and own funds are, however, the most important changes made to the restructuring procedure. A debtor may not, following publication of the court's decision on the completion of restructuring, which is the starting point for the restructuring phase in which a debtor must fulfil the restructuring plan, distribute its profit or own funds to its members before all lodged and recognized claims of unsecured creditors are satisfied; in other words, before full (100%) satisfaction of all lodged and recognized claims. In this regard, the amendment has introduced two regimes relating to claims.

Any claim up to 50% of its lodged and recognized amount must be maintained in full and can be enforced by a creditor by means of a standard enforcement procedure directly after due and complete fulfilment of the restructuring plan. This means that in case the restructuring plan provides for a quota lower than 50%, the residual amount of the claim up to 50% can be enforced directly after fulfilment of the restructuring plan. Until such time, or until the court ruling on the ineffectiveness of the plan, this residual amount of the claim is unenforceable.

According to the new regulation, the other 50% of a lodged and recognized claim should be considered as another proprietary right. In case the restructured debtor generates profit, which it does not need for maintaining the operation (of major parts) of its enterprise, the other proprietary right, as stated in the previous sentence, should be satisfied before the profit is distributed to a shareholder. Similar to the residual amount of the claim up to 50%, the other proprietary right is also unenforceable until complete fulfilment of the plan or until the court ruling on the ineffectiveness of the plan. The main difference between the residual amount of the claim up to 50% and the other proprietary right is that the other proprietary right can only be satisfied from future profits of the restructured debtor, whereas the first half of the claim can be satisfied from any property of the restructured debtor.

In case a debtor infringes the prohibition of distribution of profit and own funds before satisfaction of all claims, the restructuring plan becomes ineffective *ex lege* and the creditors are entitled to file a petition for declaring the plan ineffective. Another situation is that the restructured debtor generates profit, but does not distribute it to its members. In such a case, the creditors are entitled to file a petition seeking additional satisfaction of their claims from the profit stipulated in the debtor's financial statements (except from the part of the profit that the debtor needs to maintain the operation (of major parts) of its enterprise).

The new regulation has raised many questions regarding its interpretation. As this amendment serves a political agenda in connection with the pending restructuring of construction company VÁHOSTAV - SK and given that it was to all intents and purposes drafted overnight, it has many imperfections and is contradictory in some respects. Most importantly, it changes the legal regime relating to restructuring proceedings commenced on the basis of the former regulation, which in our opinion is in contradiction with the principles of non-retroactivity and legal certainty.

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