CHSHCEE Newsletter

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Keep up to date with the latest legal developments in Austria, Belarus, Bulgaria, the Czech Republic, Hungary, Romania and the Slovak Republic with our CEE newsletter.

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Disclosed: The Appendix to the Foundation Deed

In its landmark decision of 29 June 2015 in case 6 Ob 95/15m, the Austrian Supreme Court ruled that the registration of an amendment of the appendix to the foundation deed has constitutive effect, thus rejecting the hitherto prevailing doctrine and overturning the previous case-law of the Supreme Court. It also affirmed the formal and substantive powers of examination of the Commercial Court of Registration regarding the voluntary submission to it of an appendix to the foundation deed.

Facts

A founder wished to include a clause in the appendix to the foundation deed giving a yet to be established advisory board the right to issue rules of procedure for the management board, according to which significant transactions would require the approval of the advisory board. The intention was that the founder would definitively set the remuneration payable to the foundation's management board and its advisory board upon the recommendation of these two bodies. The foundation's management board objected to the inclusion of these provisions in the appendix to the foundation deed arguing that as a result the founder would have the foundation's management board on a "leash", as defined in the decision issued by the Supreme Court on 8 May 2014 in case 6 Ob 42/13i.

Constitutive effect of registering the amendment of the appendix to the foundation deed

The effect of registering the amendments of the appendix to the foundation deed with the Commercial Register has been a matter of controversy in literature on the subject. As confirmed by the Supreme Court in case 7 Ob 53/02y, the prevailing view assumed that registration of the amendment of the appendix to the foundation deed has declarative effect. In particular, the arguments put forward by Arnold[1] convinced the Supreme Court in its most recent decision: the wording of Section 33 para. 3 sentence 2 of the Private Foundations Act, according to which the amendment takes effect upon registration, does not distinguish between foundation deed and appendix to the foundation deed. In the legislative materials on Section 33 para. 3 sentence 2 of the Private Foundations Act, there is talk of "amendments" in the plural. It is frequently the case that an amendment of the appendix to the foundation deed only results in registration of the "fact that an amendment has been made" and not in any other registrations being made as the appendix to the foundation deed may not contain any provisions at all that are subject to registration.

Formal and substantive powers of examination of the Commercial Court of Registration

Section 10 para. 2 of the Private Foundations Act does not stipulate that the appendix to the foundation deed must be submitted to the Commercial Court of Registration. It is also not included in the documents collection. No position has thus far been taken, either in the case-law or in the literature, on the question of how this exception from the disclosure obligation should be interpreted. The Supreme Court now states that although registration of the amendment of the appendix to the foundation deed is necessary, such registration is not mandatory to ensure the changes take effect. Section 10 para. 2

[1] *Arnold*, PSG³ (2013) § 33, paragraph 72.

sentence 2 of the Private Foundations Act does not prohibit the management board from submitting to the Commercial Court of Registration the appendix to the foundation deed in order to increase legal certainty regarding the effectiveness of the amended clauses. According to the Supreme Court, a voluntary submission to the Commercial Court of Registration is therefore permitted and even advisable so as to "avoid costly follow-up processes". The Commercial Court of Registration has to check the content of the appendix to the foundation deed and incorporate its findings into its decision on the application for registration of the amendment.

Right to remuneration

According to the Supreme Court, Section 19 para. 1 of the Private Foundations Act is optional. The statutory remuneration rules are therefore mandatory up until the point of non-remuneration. This shows the consistent continuation of the previous case-law of the Supreme Court regarding Section 19 of the Private Foundations Act, according to which the court is only required to set remuneration if this has not already been exhaustively regulated in the deed of foundation.

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CHSHCEE | Belarus

New Benefits for "Green Energy"

Edict No. 209 issued by the President of the Republic of Belarus "On the Use of Renewable Energy Sources" ("Edict No. 209") was adopted on 18 May 2015 and entered into force on 21 August 2015. It introduced provisions giving preferential treatment to companies producing electricity from renewable energy sources and selling the electricity produced to the state-owned group "Belenergo" for subsequent redistribution to consumers. In addition, certain subordinate legal acts were also implemented to transpose into law the provisions of Edict No. 209, namely "Regulations on the Procedure for Establishing and Distributing Quotas for the Construction of Plants Using Renewable Energy Sources" ("Regulations"), adopted by Resolution No. 662 of the Council of Ministers of the Republic of Belarus on 6 August 2015, and new tariffs for energy produced from renewable energy sources adopted by Resolution No. 45 of the Ministry of Economics of the Republic of Belarus on 7 August 2015.

Quotas for "Green Energy"

As a general rule, quotas are now used for the construction, modernization and reconstruction of renewable energy plants in Belarus. Such quotas are established by the Council of Ministers of the Republic of Belarus on a 3-year basis and can be revised every year, if required.

Quotas are distributed on the basis of the results of a public tender. A company intending to construct a renewable energy plant should submit its application to the relevant local authority. Companies whose tender offers are considered the best are granted the right to construct a renewable energy plant.

However, companies that consume (or intend to consume) all of the renewable energy they produce are not subject to the above-mentioned quotas and may freely construct and use renewable energy plants.

Preferential Treatment for "Green Energy"

A company that has constructed a renewable energy plant is entitled to certain preferential treatment. In particular, such a company may sell the electricity produced to the state-owned group "Belenergo" at the increased rates established by the Ministry of Economics of the Republic of Belarus.

These rates depend on the type of renewable energy source, the capacity of the power plant and its exploiting period. For example, during the first ten years electricity produced by a solar power plant with a capacity of under 300 kWt will be bought by the state-owned group "Belenergo" at 2.5 times the standard rate.

Summary

The adoption of Edict No. 209 and the related subordinate legal acts form part of a long-term strategy aimed at developing the "green energy" sector in Belarus. All these measures, together with certain tax benefits including an exemption for renewable energy plants from land tax and from VAT paid on equipment imported for renewable energy plants, are expected to boost the development of the renewable energy sector in Belarus. The improvement of the legal framework regulating renewable energy is welcomed by the local business community as it will contribute to improving the business climate in Belarus.

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CHSHCEE | Bulgaria

New Insurance Code

A new Insurance Code ("**Code**") has been adopted with effect from the beginning of 2016 as a result of the transposition into Bulgarian law of several European directives, including Directive 2009/138/EC (Solvency II Directive). In addition, the Code aims to provide better protection for the interests of policy holders by improving the regulations on the distribution of insurance products, the requirements applicable to the activities of the insurance agents and the development of regulations applicable to insurance contracts.

Solvency II regime

The Code introduces new requirements with respect to the solvency of insurance companies and the calculation of technical reserves, as well as new principles for the investment of assets to guarantee the financial stability of insurance companies. The powers of the Bulgarian Financial Supervision Commission (FSC) have been extended and it is now entitled to conduct more frequent checks on insurance companies, implement the guidelines of the European Insurance and Occupational Pensions Authority, and observe the implementation of the EU directives. The Code introduces

detailed regulations with respect to the financial requirements and supervision at group level, minimum capital and risk management requirements, and new and more detailed audit and reporting rules.

Insurance Claims

Claims now have to be submitted to insurance companies first and only if such claims are not satisfied may they then be filed with the relevant court. The Code introduces new deadlines for insurance companies to respond to claims that have been made, as well as requirements for additional clarification regarding the grounds and amount of insurance compensation.

Miscellaneous

The Code further introduces the possibility of concluding insurance contracts electronically and brings in improvements to the existing ethical rules and regulations regarding the distribution of insurance products by insurance companies and brokers. In the case of the insolvency of a life insurance company, all claims policy holders may have against the respective company will be covered by a warranty fund up to the amount of EUR 100,000.

Grid access fees in relation to renewable energy

In relation to the controversial decision of the Bulgarian Energy and Water Regulatory Commission (EWRC), with which in 2012 the EWRC introduced grid access fees for the producers of renewable energy, the Bulgarian Supreme Court of Cassation ruled and confirmed in a recent decision that revocation of EWRC's decision had retroactive effect and thus all access fees already paid have to be paid back by the respective electricity distribution companies. The court also referred to another subsequent EWRC decision by virtue of which EWRC determined final access fees in 2014 and ruled that there is no economic justification or grounds for recognition of the operational costs of the electricity distribution companies for the respective periods and the access fees are equal to zero. The decision of the Supreme Court is final and is mandatory for the first and second instance courts.

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CHSHCEE | Czech Republic

Legal news for 2016 in the Czech Republic

This article describes the most significant changes and legal news from the end of 2015 and other important legislation to be introduced in 2016 which, in particular, will have an impact on tax, administrative and labour law.

Legal news from the end of 2015

a) Reduced working hours

As of 1 October 2015, Czech companies can make use of the so-called reduced working hours system, which helps to cover the cost of paying employees' salaries during a period

of partial unemployment due to unexpected circumstances. To prevent a company from having to dismiss employees, it is allowed to apply for state support of up to 20% of the wages payable to its employees. If certain conditions are met and support is granted by the government, the employer is required to give an assurance that it will not dismiss any employees during the period in which support is provided and it has to provide its employees with 50% of their wage. The employees then receive 70% of their normal wage. The purpose of the reduced working hours system is to help find solutions to situations resulting from natural disasters or a prolonged economic downturn. It can therefore only be used for a limited period of time, currently half a year. This period can only be extended once unless the government decides otherwise.

b) The amendment of the Law on Offences

On 1 October 2015, the amendment of the Law on Offences came into effect and led to significant changes in the length of the limitation period for offences. Under the previous legislation, if the perpetrator was not tried for the offence within a period of one year of its commission, the perpetrator ceased being liable for prosecution. This short period of time was misused by perpetrators who acted in such a way as to prevent the case from going to court. However, this period of limitation still exists, but the limitation period can now be interrupted. If a summons is served on the individual in question requiring him/her to be present during an oral hearing or if a decision is taken in the matter, the one-year limitation period starts to run from the beginning and the administrative body has to hear the case relating to the offence within this period. However, the total length of the limitation period may not exceed two years since the offence was committed.

Tax law

a) Payment of tax on the acquisition of immovable property

In November 2015, the government passed an amendment to the Act on Property Transfer Tax. Currently, the duty to pay tax on the acquisition of immovable property lies with the transferor but can be transferred to the transferee based on an agreement between the parties. The amendment transfers this obligation to the transferee. The transferee is no longer liable for any payment of the tax by the transferor.

b) Land Value tax

The definitions of the main terms used in connection with land (e.g. building plot, etc.) were clarified in the amended Land Value Tax Act. From now on, unfinished constructions will not be subject to taxation until the construction is finished or at least until it is capable of being used. Parcels of land located under buildings being constructed in which units that are subject to land value tax have been created will no longer be subject to taxation. Subsequently, it clearly states that plots in co-ownership are not subject to taxation.

Administrative law

a) Upcoming Act on Procurement Procedures

In April 2016, a new Act on Procurement Procedures that transposes relevant European directives into national law will enter into force and replace the existing Public Procurement Act and the Concession Act. This Act softens the conditions for public tenders. Lowest price will no longer be the sole basis for selecting the winner of a specific public procurement contract. On the contrary, in some cases it will be prohibited for the tenderer who submits the lowest price to be awarded the contract. Furthermore, the rules applicable to the award of so-called small-scale contracts (contracts of up to two million Czech koruna) will be simplified.

Labour law

a) Minimum wage

The minimum wage will be increased in 2016 from the current minimum amount of CZK 9,200 to CZK 9,900. This means the minimum wage per hour will increase from CZK 55.00 to CZK 58.70.

b) Proposal on the abolition of the waiting period

The waiting period, i.e. the first three days of an employee's incapacity to work without receiving sick pay from his/her employer, should be repealed according to a parliamentary proposal. If approved, employers would have to pay their employees for the first three days of incapacity to work, which would lead to additional costs being incurred by employers.

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CHSHCEE | Hungary

A Renaissance in Mortgage-Backed Lending?

Background

The financial crisis has shown how risky it can be for financial institutions to use short term sources of financing to provide long term lending: if the short term sources of funding become scarce and their renewal expensive during the term of long term loans, the additional costs will be charged to borrowers who may find they are unable to bear the increased financial burden. In 2015, after foreign currency denominated home mortgage loans were converted to Hungarian forint, the maturity mismatch between the forint denominated assets and liabilities on the banking sector's balance sheet increased significantly. Learning from past experience, the Hungarian National Bank (**HNB**), as the regulator of the local financial market, is now attempting to diversify the sources of financing for long-term residential loans and is trying to induce market participants to gradually increase the level of long-term sources of lending.

Decree on the Mortgage Financing Adequacy Ratio

As a first step, the HNB passed Decree No. 20/2015 (VI. 29.) on the adequacy of forint maturity of financial institutions (**MFAR Decree**). The MFAR Decree obliges financial institutions to obtain, up to a certain degree, the financing needed for residential mortgage loans by issuing mortgage-backed securities. The regulation introduces the Mortgage Financing Adequacy Ratio (**MFA Ratio**), which lays down the minimum ratio of long-term forint liabilities (outstanding primarily against mortgage-backed securities) to the portfolio of HUF retail mortgages with a maturity of more than one year. It is expected that, in addition to mitigating liquidity risks, the application of the MFA Ratio will also promote the development of the market for mortgage-backed securities and lead to a decrease in borrowing costs.

The minimum MFA Ratio is set by the HNB at 15%. This threshold must be achieved by 1 October 2016, the effective date of the MFAR Decree. In the case of groups of financial institutions, compliance with the MFA Ratio will be assessed at the consolidated level. The HNB has communicated its intention to gradually increase the MFA Ratio over time.

Since mortgage bonds can only be issued by mortgage banks and there were only three mortgage banks in Hungary at the time the MFAR Decree was issued, the new regulation prompted the establishment of further mortgage banks by both foreign and Hungarian-owned local financial institutions.

The difficulty in securing the claims of mortgage banks

Mortgage-backed lending typically operates in Hungary as follows: (i) investors subscribe for the mortgage-backed securities issued by a mortgage bank; (ii) the mortgage bank provides the funds generated from the issue of such securities to a commercial bank as a refinancing loan; (iii) the commercial bank uses the funds from the refinancing loan to provide (mostly residential) mortgage loans to (mostly private individual) borrowers. Under this structure, the mortgage created over the borrower's property secures the claim of the commercial bank (as direct lender) but not the claim of the mortgage bank (the latter being a refinancing "indirect" lender). To overcome this problem, the so-called *stand-alone mortgage* was used as security for mortgage loans until recently. This type of mortgage could be transferred by the mortgagee (e.g. the commercial bank) to a third party (e.g. the mortgage bank) without the simultaneous transfer of the secured claim, and the stand-alone mortgage *was not accessory to the initial secured claim* (e.g. repayment of the secured claim by the borrower to the commercial bank did not automatically result in termination of the stand-alone mortgage).

However, the new Civil Code[2], which entered into force in March 2014, no longer permits the creation of new stand-alone mortgages. Instead, it generally permits the transfer of mortgages by the mortgagee to a third party, where such transfer is called "separation" and the transferred mortgage a "separated mortgage". The problem with such separation is that, unlike the stand-alone mortgage, the separated mortgage *will remain accessory to the initially secured claim*, regardless of its transfer. From the mortgage bank's point of view, this means a separated mortgage obtained from a commercial bank is considerably less safe (and, consequently, has a considerably lower security value) than a stand-alone mortgage used to be. This is explained by the fact that if the commercial bank's borrower pays its own debt to the commercial bank, the separated mortgage (being accessory to such debt) will cease to exist by virtue of law, regardless of whether or not the commercial bank also pays its respective debt to the mortgage bank. If the commercial bank fails to pay, the mortgage bank will be left without security for its claims still outstanding and become an unsecured creditor of the commercial bank, which makes the operation of mortgage banks (and also the subscription of mortgage-backed securities issued by mortgage banks) a higher risk business.

Although a recent amendment of the Act on Mortgage Banks[3] provides for certain mitigating measures (e.g. statutory assignment to the mortgage bank of the commercial bank's claims against mortgage borrowers in the case of payment default by the commercial bank), this does not eliminate all the uncertainties currently surrounding the operation of mortgage banks. One of the issues that has come under scrutiny is whether or not the exposure of a mortgage bank secured by separated mortgages can qualify as being "fully and completely secured by mortgages on residential property" under Articles

[2] Act V of 2013 on the Civil Code.
[3] Act XXX of 1997 on mortgage banks and mortgage bonds.

125 and 208 of the Capital Requirements Regulation[4]. Based on the above considerations, a possible re-introduction of the stand-alone mortgage is currently being considered by the government.

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CHSHCEE | Romania

The right of employers to verify whether and how their employees are fulfilling work-related obligations

The European Court of Human Rights (ECHR) ruled against a complaint brought by a Romanian individual against his former employer regarding what he alleged was a breach of his right to privacy and correspondence.

According to the employer's internal regulations, it was strictly prohibited for employees to use the company's computers and resources for personal use. Despite this being strictly forbidden, the employee nevertheless decided to use the company's computer system during working hours to conduct personal conversations, which led the employer to terminate its employment agreement with the employee for failing to abide by and comply with the company's policy on the use of computer systems at work.

Employer's interests

The ECHR assessed whether the Romanian state set a fair balance between the employee's right to privacy and correspondence and the interests of the employer. To this end, the ECHR decided that it is reasonable for an employer to verify whether the employee is completing the professional tasks assigned to him during working hours, even if the employer is unable to prove that the employee's actions actually damage the employer's business activities. Moreover, the employee was given the possibility of putting forward his arguments on the alleged breach of his right to privacy and correspondence by his employer in proceedings before the national courts.

The national courts noted the disciplinary breach by taking into consideration the following main aspects: (i) the employee mentioned in writing that the computer system had only been used for work purposes, therefore the employer was entitled to believe that the information contained in the correspondence was work-related and not of a personal nature, and (ii) the employee had used the company's computer to conduct personal conversations during working hours.

[4] Regulation (EU) No 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

Summary

In its decision, the ECHR ruled by majority that the employee's right to privacy had not been violated even if the employer had accessed the employee's personal correspondence.

The decision of ECHR provides important information on the relationship between the employee's right to privacy and correspondence and the rights of the employer to verify whether and how the employee is fulfilling his obligations under the employment agreement.

The ECHR decision has, in principle, a significant impact on the employment relationship. However, the effects of such decision on national jurisprudence in terms of labour law cannot be foreseen.

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CHSHCEE | Slovak Republic

Amendments to Slovak Corporate Law

Significant changes have been introduced in Slovakia as a result of the adoption of Act No. 87/2015 Coll., which amends and supplements Act No. 513/1991 Coll. Commercial Code. The amendments introduced are directly linked to the "Váhostav" insolvency case. In this respect, the National Council of the Slovak Republic also amended Act No 7/2005 Coll. on Bankruptcy and Restructuring, a matter on which we reported in our newsletter in June 2015.

Some of the provisions already took effect in 2015, but the majority of provisions – including the most important ones – entered into force on 1 January 2016. The provisions with the greatest impact on Slovak corporate law are outlined below.

Disqualification orders

Since 1 January 2016, the competent court is entitled to make a disqualification order against a natural person barring the individual in question from holding a position in a statutory body and from being a member of a supervisory body, the head of an organizational unit of an enterprise, the head of an enterprise of a foreign entity, the head of an organizational unit of an enterprise of a foreign entity or a holder of procuration ("*prokurista*").

Disqualified individuals are not allowed to hold the above positions within the period stipulated by the court decision, or for a period of three years from the date on which the disqualification order becomes effective. The disqualified natural person is prohibited from holding the position in question from the time at which the disqualification order takes effect. The court which maintains the Commercial Register is entitled to delete *ex officio* the disqualified individual from the Commercial Register and is also obliged to

check the Register of Disqualified Persons to ensure the person in question is not subject to a disqualification order before registering in the Commercial Register that the individual holds a certain position within a company or organisation.

Presently there are only two court decisions that might be considered orders disqualifying a natural person from holding a certain position: (a) a decision on the violation of the obligation on the statutory body to file for bankruptcy in due time (Article 74a Section 6 of Act No. 7/2005 Coll. on Bankruptcy and Restructuring), and (b) a decision issued in criminal proceedings prohibiting an individual from holding the position in question (Article 61 Section 10 of the Act No. 300/2005 Coll. Criminal Act).

Register of Disqualified Persons

To enable the courts which maintain the Commercial Register to decide whether or not a natural person should be disqualified from holding a certain position, it was first and foremost necessary to establish a Register of Disqualified Persons. The register contains the personal data of natural persons against whom a disqualification order has been made by a court, thereby excluding them from holding certain positions.

The court that makes a disqualification order is obliged to issue a disqualification letter and send it with a copy of the decision on disqualification to the court that maintains the Register of Disqualifications.

The Register of Disqualified Persons for the entire territory of the Slovak Republic is maintained by the District Court of Žilina. The register is not accessible to the public, which means that a natural person is only entitled to apply for an extract from the register that relates to the applicant in question. The District Court of Žilina will issue the extract subject to a fee of EUR 2.50 per page.

Company in crisis

The amendment introduced a new legal concept of "company in crisis" and provided new obligations for companies that fall under the definition of a company in crisis. The provisions of the Commercial Code on companies in crisis are only applicable to limited liability companies, joint-stock companies and limited partnerships ("*komanditná spoločnosť*"), whose partner with unlimited liability ("*komplementár*") is not a natural person.

A company is in crisis if (a) it is bankrupt (according to Act No. 7/2005 Coll. on Bankruptcy and Restructuring) or (b) is at risk of bankruptcy. A company is at risk of bankruptcy if its equity and liabilities ratio is lower than 8/100.

Companies are now obliged to monitor not only whether they are bankrupt, but also whether they are at risk of bankruptcy. In such a situation, the statutory body of a company is obliged to propose measures and take any and all actions to overcome the crisis and improve the company's situation. In this context the amendment allows special payments to be made, thereby replacing own resources of financing. These payments cannot be refunded during a crisis or if the refunding of such payments would cause a crisis. The payment replacing own resources is a loan or similar payment provided to the company by (a) its statutory or supervisory body members, employees under direct authority of the statutory body, procuration holders, the heads of organizational units, (b)

persons with at least 5% share or voting rights in the company, (c) silent partners, (d) persons related to those mentioned above or a person acting on behalf of such persons.

The status of a company in crisis negatively affects the payment of dividends. Prior to paying dividends, the company must assess with due care whether the payment might result in a crisis, and if yes, the company must not pay dividends or it may only pay a portion of each individual dividend which would allow its equity to remain higher than its liabilities with respect to the ratio stipulated above (8/100).

Payment of Registered Share Capital

Since 1 January 2016, shareholders are no longer obliged to pay their monetary capital contributions to a special bank account during the company's incorporation (or in connection with additional capital contributions). The application for registration of the company with the Commercial Register does not have to contain a bank statement proving that the monetary contribution has been paid. Proof of the payment of contributions will be provided, as in the past, in the form of a written declaration issued by the shares custodian, whose signature must be notarized.

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