# CHSHCEE Newsletter

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# CHSHCEE | Austria

## Constitutional Court confirms constitutionality of reference rent and limitation deduction

In one of its recent decisions[1], the Austrian Constitutional Court reviewed the system for determining the rent charged under rental agreements that fall within the full scope of the Austrian Rental Act[2] (Mietrechtsgesetz). The Court had to rule on the question of whether the so-called reference rent and a limitation deduction with regard to rental agreements concluded for a fixed period are in line with Austrian constitutional law.

### Reference rent

The Austrian Rental Act contains certain rules and regulations for establishing the maximum rent that may be charged. In this regard, a distinction has to be made between the so-called appropriate rent (angemessener Hauptmietzins)[3] and the reference rent.[4] Where Section 16 para. 1 of the Austrian Rental Act that stipulates the applicability of the appropriate rent does not apply, the "adequate rent" has to be established on the basis of a certain reference value[5], taking into account certain surcharges or reductions respectively. A surcharge may especially be levied if the rental property is particularly well located (Lagezuschlag).

Against this backdrop, the reference value applicable to properties located in Vienna has come in for significant criticism from landlords due to it being rather low when

[1] Austrian Constitutional Act No G 673/2015-35* dated 12.10.2016.

[2] The scope of application of the Austrian Rental Act is especially important with regard to the issues of maximum rents. In case a rental agreement does not fall within the full scope of the Austrian Rental Act, the provisions of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*) are applicable and rent, generally speaking, is only limited by the general restrictions of *laesio enormis*. The Austrian Rental Act, on the other hand, protects the tenant by imposing far stricter limits.

[3] Cf. Section 16 para. 1 of the Austrian Rental Act, which stipulates that an appropriate main rent has to be agreed by taking into consideration the size and location of the property, whether it is furnished, etc.

[4] Cf. Section 16 paras. 2 and 4 of the Austrian Rental Act.

[5] This reference value is set forth in a separate Act, the *Richtwertgesetz*.


compared to the reference values applicable in other regions in Austria.[6] Thus, some landlords have increased the rent they charge tenants by arguing that a surcharge is justified due to the property being located in a good area. The validity of such rental agreements was challenged by the tenants and the court decided that such a surcharge may not be levied due to the fact that the property was located in a so-called Gründerzeitviertel (i.e. an area characterized by buildings constructed in a certain epoch), which is one of the good areas in Vienna.

The Austrian Constitutional Court upheld this provision and argued in particular that maintaining the system of maximum rents is in the public interest so as to enable people on a low income to continue living close to the city center. This public interest therefore justifies placing certain restrictions on the property rights of landlords.

### Rent deduction of 25%

In the same decision, the Austrian Constitutional Court also confirmed that the appropriate rent must be reduced by 25% in those cases where the respective rental agreement is concluded for a fixed period.[7] In this case, the Constitutional Court argued in particular that this rent reduction strikes a balance between safeguarding the landlord's interest in being able to dispose over the property again after a certain period of time has elapsed and ensuring that the tenant has a guaranteed right to live in the property for the duration of the rental agreement.

### Conclusion – limitation of property rights may be justified due to public interest

In the decision in question, the Austrian Constitutional Court confirmed the constitutionality of certain provisions of the Austrian Rental Act that limit landlords' rights to increase the rent payable by tenants. The ineffectiveness of such rental agreements may be justified on social grounds as rental provisions which would deny people on a low income the possibility to live close to the city center are prohibited.

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[6] According to the *Richtwertgesetz*, the reference value for property located in Vienna is EUR 5.39 per m².

[7] Cf. Section 16 para. 7 of the Austrian Rental Act.


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# CHSHCEE | Belarus

## New Pledge Register in Belarus

On 1 September 2016, Edict No. 539 issued by the President of the Republic of Belarus "On the Register of Pledged Movable Property" came into force. Previously, only mortgages on real estate in Belarus were subject to registration with the relevant public register in order to guarantee the rights of the mortgagee. However, from 1 September 2016 a pledgee of movable property (i.e. cars, equipment, etc.) also has the opportunity to register a pledge with the special Register of Pledged Movable Property ("Register").

### What is the main function of the Register?

The main purpose of the Register is to establish the priority of claims over pledged movable property. As a rule, priority depends on the order in which pledges are registered with the Register. Thus, the first pledgee to register his/her/its pledge with the Register would have priority over other pledgees registering their pledges subsequently or in those cases where no registration is made at all.

The Register also makes it possible for anyone to check whether certain movable property is pledged or not. In practice, it is possible to carry out such a check before purchasing movable property. A potential purchaser would be able to verify whether certain property is pledged or not, thereby minimizing the risk of third party claims with respect to such property.

Although the registration of a pledge with the Register is mandatory, the lack of registration does not affect the validity of the pledge itself. Thus, it cannot be ruled out that some pledges will not be properly registered. The absence of any record in the


Register does not guarantee that the relevant movable property was not pledged to someone.

## How does the Register work?

The Register is available online twenty-four hours a day at https://www.reestr-zalogov.by. By default, a record should be made in the Register by a pledgee. Such a record may be made online by the pledgee free of charge. Alternatively, the pledge may be recorded in the Register by a notary public or by the company operating the Register. In the latter case, a small charge of EUR 2 for individuals and EUR 5 for legal entities is payable.

Access to the Register is provided on a paid basis. The charge payable for accessing the Register ranges from EUR 8 to EUR 2,100 depending on the period of access and the number of queries made. For courts, notaries public, law enforcement agencies and some other categories of user, access to the Register is provided free of charge.

## Summary

The creation of the Register had been long awaited in Belarus. It is viewed as another tool that will help protect the rights of pledgees. Thus, the establishment of the Register is welcomed by the business community as it makes pledges over movable property more transparent and easier to control.

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# CHSHCEE | Bulgaria

## New Law on Loan Agreements for Consumers Related to Immovable Property

A new Law on Loan Agreements for Consumers Relating to Immovable Property (Consumer Loan Act) has been adopted with effect from August 2016. The Consumer Loan Act transposes into Bulgarian law Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

The new Consumer Loan Act aims to increase the level of protection afforded to consumers concluding loan agreements related to immovable property by providing specific rights to consumers in addition to those rights under general consumer protection legislation.

The Consumer Loan Act applies to loan agreements secured by a mortgage or another comparable security on immovable property, and to loan agreements the purpose of which is to acquire or retain property rights in or to immovable property. It specifies certain types of loan agreement which fall outside the scope of the Consumer Loan Act, such as loans granted by an employer to employees which meet certain criteria, overdraft facilities where the funds have to be repaid within one month, and interest-free loans granted without any additional charges, etc. The Consumer Loan Act applies to loans granted to consumers.

Creditors and credit intermediaries are obliged to provide consumers with personalised pre-contractual information in order to compare the loan offers available on the market, by means of a European Standardised Information Sheet. This information mainly consists of the main features of the loan, interest rate and other costs, the number and the value of payment instalments, early repayment provisions, etc.

The Consumer Loan Act also lays down detailed rules applicable to advertising and the marketing of loan agreements and the information to be included in advertising. It also outlines provisions and formulas for calculating the annual percentage rate charged, as


well as specific rules for conducting a thorough assessment of the consumer's creditworthiness.

Creditors are no longer able to impose sanctions or request compensation from consumers in those cases where the loan is repaid early if 12 monthly instalments have already been paid. Prior to that period, a penalty of up to one percent of the amount repaid early may be charged.

To limit the risks attached to borrowing in a foreign currency, consumers now have the right to convert the currency in which the loan is denominated. In this regard, creditors are obliged to notify consumers in cases where the value of the outstanding debt varies more than 20% from what it would be if the exchange rate applicable at the time of the conclusion of the credit agreement were to apply.

The Consumer Loan Act also lays down requirements for the establishment and supervision of credit intermediaries and allows for the free cross-border provision of services by credit intermediaries following a notification procedure with the host state authority launched via the home state authority.

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# CHSHCEE | Czech Republic

## New Public Procurement Act in the Czech Republic

On 1 October 2016, **Act No. 134/2016 Coll., on Public Procurement** (the "**Public Procurement Act**") entered into force. The Public Procurement Act transposes into Czech law the public procurement directives adopted at the EU level and it is the key piece of legislation regulating public investments in the Czech Republic. Its main objective is to reduce the administrative burden and to increase the flexibility of the tender procedure. The Public Procurement Act introduces significant changes to the public procurement procedure.

### 1. Simplified below-threshold procedure, small-scale tenders

To simplify the selection of a supplier, the new legislation increases the limit for awarding a tender for construction work under the rules of simplified below-threshold procedures from CZK 10,000,000 to CZK 50,000,000. The contracting authority is in some respects able to choose whether to apply the compulsory rules of the Public Procurement Act applicable to over-limit procedures or whether to use the simplified tender procedure.

The Public Procurement Act retained the financial limit for small-scale public tenders in the amount of CZK 2,000,000 for supplies or services and CZK 6,000,000 for tenders for construction work. If the value of the public tender does not exceed this limit, the contracting authority does not have to proceed under the obligatory provisions of the Public Procurement Act and can choose any procedure to select the bidder it deems appropriate. Only the fundamental principles of the Public Procurement Act have to be respected: the principle of equal treatment, the principle of non-discrimination, the principle of proportionality and the principle of transparency.

### 2. Evaluation of tenders

The former legislation was geared more at establishing which bidder was offering the lowest price rather than determining the quality of the services to be provided by the winning bidder. The Public Procurement Act tends to be based more upon a mix of price and quality (a price/quality evaluation model should be utilised).


What is new is that the contracting authority may use an assessment system that separates the formal (technical) requirements of a tender from the financial part of a tender (tender price). The contracting authority may first compare the tender prices of all bidders and subsequently evaluate the completeness of the tender of only selected bidders. This will significantly shorten the duration of the tender evaluation procedure.

### 3. Disqualification of unreliable bidders, abnormally low tenders and joint stock company bidders without book-entry shares

The Public Procurement Act increases the number of reasons why a bidder may be disqualified from the award procedure. The contracting entity may disqualify a bidder for former professional failures, e.g. if the bidder fulfilled previous contracts but the quality was poor or if its contractual performance was significantly delayed.

If a contracting authority receives a tender which is abnormally low, it can reject that tender. The contracting authority must seek an explanation for the low price from the bidder. The tender can be rejected if the explanation provided does not satisfactorily account for the low price.

The contracting authority must also reject any winning bidder where the bidder is a joint stock company which does not keep an electronic record of the ownership of the shares it issues, i.e. in book-entry form.

### 4. Amendment to existing public contract

The new act provides for explicit regulation concerning changes to signed contracts and eliminates any present doubts in that case. Generally, any substantial change to an existing contract is forbidden with the exception of specific conditions and procedures prescribed by law. It is, for example, inadmissible for a contractual change to be made regarding the person of the supplier; however, the change of supplier as a result of legal succession is admissible provided the successor meets the qualification criteria for the tender.


## Conclusion

The above mentioned changes affect public tenders initiated after 1 October 2016. Public tenders launched before this date will continue to be subject to Act No. 137/2006 Coll., on Public Procurement.

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# CHSHCEE | Hungary

## Major Changes Expected in Hungarian Competition Law

In October 2016, the Ministry of Justice submitted a bill package to Parliament aimed at a comprehensive modification of the Hungarian Competition Act. The new rules will introduce major changes in Hungarian competition law, particularly in connection with merger control and private antitrust claims. The new rules are expected to take effect at the end of this year. The following is a brief summary of the key changes by CHSH Dezső's competition team.

### Mergers

This will be the second major change to have been made to merger control rules within a short period. (The enforcement prohibition – standstill – rule was only introduced back in 2014.) Once the new rules take effect, the current competition supervision procedure will be replaced by a **mandatory reporting system**. What this means for applicants is that concentrations exceeding the threshold figures will have to be reported to the Hungarian


Competition Authority ("HCA") using a new form, subject to a procedural fee of HUF 1 million. Another important development is that the HUF 500 million threshold will be raised to HUF 1 billion.

The report-based system will not be part of the competition supervision procedure, will be subject to fewer rules and will take less time to complete. The investigators will have to make their decision within 8 days of receipt of the application. In the case of mergers where competition concerns are not raised, the HCA will issue an official certificate to inform the applicant that an investigation will not be required and that the concentration can go ahead as planned. However, if the investigators believe the merger raises concerns or insufficient assurances are given that it will not significantly lessen competition, a competition supervision procedure will be launched.

From that point, the procedure will continue with unchanged procedural fees (additional HUF 3 million for Phase I and HUF 15 million for Phase II procedures), with the only new development being that it will qualify as an ex officio rather than an application-based procedure.

Another key rule is that a concentration that remains below the revenue thresholds will also have to be reported to the HCA if it is expected to restrict competition significantly, as long as the sales revenue of all company groups involved exceeds HUF 5 billion. The HCA will also have the power to carry out ex-post investigations into why a merger exceeding the HUF 5 billion threshold was not reported. We would also note that the bill would grant the HCA stronger powers because it would have the right to conduct dawn raids in the case of unreported concentrations or where it suspects that false information was disclosed to it.

Under the new rules, the HCA will only examine the net sales revenue generated by companies in Hungary, and therefore export sales revenues will no longer be included in threshold calculations.

### Private antitrust claims

In order to transpose Directive 2014/104/EU of the European Parliament and of the Council, the bill proposes that two completely new chapters designed to make it easier for victims of competition law infringements to claim compensation be added to the Competition Act. In line with the case-law of the European Court of Justice, the objective


of both the Directive and the modification of the Competition Act is to provide an effective mechanism for all individuals who suffer damage as a result of an antitrust infringement to receive full compensation.

The bill states that in such a lawsuit the infringer must fully compensate the damage in accordance with the general rules applicable to torts.

The bill includes specific rules applicable to the practice known as **'passing on'**, i.e. where the customers of cartel members recharge the price increase caused by the cartel to their own customers. If the cartel members can prove that a pass-on did indeed take place and can quantify its rate, they can reduce the compensation payable by them. If certain conditions are met, SMEs and companies which submit leniency applications and cooperate with the HCA may be exempted from the joint and several liability of cartel members.

In a major new development, the bill is expected to introduce **discovery** of evidence, a procedure that is largely unknown in continental law and has its roots its common law systems. In a lawsuit for compensation in a competition case, the court may at the request of one party compel the other party to disclose evidence (e.g. documents or databases) that is otherwise not available to the requesting party, even if it includes business secrets, on condition there is reasonable cause for the requesting party to believe that such evidence can prove the existence of a relevant fact or circumstance. Naturally, certain safeguards will also be introduced in connection with discovery procedures (e.g. the right of appeal, hearing the party's arguments, proportionality requirement, leniency applications may not be disclosed, etc.). This unprecedented new procedure will give litigants a major new option, but will also represent significant challenges to courts and lawyers alike.

In lawsuits for compensation in relation to competition infringements, courts will have the option of imposing fines of up to HUF 50 million on parties whose actions prevent the establishment of the facts of the case. Under an important rule, courts will be bound by the final and binding resolutions of the HCA and the European Commission in terms of the existence of the infringement, and will have to accept as facts similar decisions of the competition authorities of other Member States. The rules applicable to prescription periods will also be determined in detail, and, for example, the first year following the HCA's adoption of a resolution will not count towards the prescription period.


It is likely that private antitrust actions will become more frequent in Hungary after the introduction of the new rules (particularly in connection with cartels). This will represent major challenges for judges, corporate executives and lawyers because the application of these rules will require the combined application of economic theory and several different areas of law (such as competition law, civil law and procedural law).

## Other key changes

The bill introduces a definition of "cartel", a term which had not previously been defined in the Competition Act, in connection with de *minimis* agreements. Under the new rule, horizontal agreements designed to restrict competition by object (cartels) may not be treated as de *minimis* and therefore may not be exempted from the prohibition.

The bill aims to make participation in settlement procedures even more attractive because the Competition Council will have the option of reducing fines by as much as 30% for a company that participates in a settlement. In a new development related to whistleblower awards, the HCA will now welcome information from whistle blowers in connection with all types of infringement by object (i.e. information and hub-and-spoke cartels). Additionally, the payment of compensation to the victims of an infringement during the HCA's procedure will be treated as a mitigating factor when setting fines.

Significant changes are also expected in connection with resale price maintenance (RPM), a practice that is considered to be a particularly grave vertical infringement. Once the new rules are in place, an RPM, in line with Community law, cannot be treated as a *de minimis* matter. However, as a sort of quid pro quo, companies will be able to submit leniency applications in connection with RPM infringements as well, so a penitent infringer might receive full exemption from the fine in the case of such vertical practices as well.

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# CHSHCEE | Romania

## New regulation on fiscal obligations resulting from transaction with shares

The Romanian Fiscal Code was modified by Law No. 227 of 8 September 2015 on the fiscal code.

The new fiscal code ("NFC") entered into force with effect from 1 January 2016. One of the important changes introduced by the new regulation is the simplified procedure for declaring the tax on profit in the case of transactions in shares held in Romanian companies.

Under the previous legislation, it was possible for the fiscal obligations to have been borne by either the seller or the buyer, depending on the particularity of each situation, whereas the contracting party which bore the responsibility for calculating, retaining and paying the tax on the profit obtained from a share deal was determined on the basis of the country of residence of the contracting parties and whether the respective party was a natural person or a legal entity.

Compared to the old system, the new regulation provides a simplified procedure under which the seller, as the entity receiving the income, is always liable for the calculation, reporting and payment of the tax on profit regardless of the residence and legal form of the contracting parties.

More specifically, the NFC provides as follows:

1. Where the seller is a natural person who is

(A) deemed to be resident in Romania for tax purposes:

The regulation specifies that the profit/loss related to the share transaction will be determined as per the payment date of the transaction, based on the justifying documents, by the person receiving the income (provided the transaction is not conducted by an intermediary or if the intermediary is not a Romanian resident for tax purposes).

(B) not deemed to be resident in Romania for tax purposes:

The regulation provides the same requirements as applicable to Romanian sellers, i.e. the natural person is obliged to declare his/her income by submitting the declaration either (a) after obtaining a residence permit, a fiscal identification number, or a personal


identification code or (b) after authorizing a Romanian resident to act as his/her fiscal representative to perform fiscal obligations on behalf of the person receiving such income.

2. Where the seller is a legal entity which is

(A) deemed to be domiciled in Romania for tax purposes:

The treatment is the same as it was before the regulation was amended; namely, the potential profit is included in the profit tax calculation.

(B) not deemed to be domiciled in Romania for tax purposes:

The obligation to pay tax on profit generated from shares held in Romanian companies is borne by non-resident legal entities, in any of the following situations: (a) there is no proof of domicile in a state that is party to an agreement with Romania on the avoidance of double taxation; (b) no agreement on the avoidance of double taxation exists between Romania and the country in which the foreign legal entity selling the shares is domiciled; or (c) the Romanian state is entitled to levy a tax, in those cases where the conventions for avoiding double taxation are applicable.

The new regulation regarding the fiscal aspects related to transactions in shares simplifies and reduces the implementation time of the entire process of the share transfer (e.g. registering the transfer with the Trade Registry, documents regarding the buyer are no longer required). In addition, in case of fiscal inspection, the buyer will be exempt from the obligation to provide justifying documentation, seeing as the entire tax burden is borne exclusively by the seller.

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# CHSHCEE | Slovak Republic

## Slovakia's Constitutional Court rules the solar tax partly unconstitutional

The Constitutional Court of the Slovak Republic has ruled that certain elements of the so-called G-component or G-tariff, a fee imposed on electricity producers in 2013 by the Slovak energy regulator ("**RONI**", the Regulation Office for Network Industries; *Úrad pre reguláciu sieťových odvetví*), are unconstitutional.

The tariff was introduced by RONI, as part of the Decree of RONI Setting Price Regulation in the Electricity Sector, a set of regulations that entered into force on 30 July 2013. Based on the Decree, electricity producers connected to transmission or distribution networks were obliged to pay the fee to power distributors from 2014 onwards. When introducing the new fee, RONI argued that power generators should share in the cost of developing and maintaining the grid. On the other hand, electricity producers have widely criticized the tariff since its introduction because from their perspective it has significantly changed the support scheme introduced by the Slovakian government which should have been guaranteed for the period of 15 years and which in fact was the main incentive for massive development of many renewable energy projects, mostly in the photovoltaic sector, in the period of 2010 and 2011. The tariff was also questioned by the EU, and the Directorate-General for Energy delivered to RONI its written concerns that the tariff will create market distortions, disadvantages for producers, slow down market integration and furthermore that it is not in line with Article 2 of Commission Regulation (EU) No 838/2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging as the tariff applies to all electricity producers connected to transmission or distribution networks in Slovakia which pay 30 % of their reserved capacity.


The tariff was challenged by a group of 45 parliamentary deputies at the Constitutional Court of the Slovak Republic in March 2014. The court ruled on 22 June 2016 that certain elements of the tariff are unconstitutional. The verdict was published in the Collections of Laws on 21 July 2016 and thus became effective. RONI was obliged to bring the regulation (the Decree of RONI Setting Price Regulation in the Electricity Sector) into line with the constitution within six months. The verdict was delivered to all parties to the dispute on 28 September 2016. The court's ruling explained that the RONI Decree is unconstitutional in that part in which it imposes an obligation to pay the tariff on those electricity producers connected to transmission or distribution networks which have not concluded an agreement regarding access to the regional distribution network and distribution of electricity. The Constitutional Court stipulated that RONI went beyond its competence while introducing the G-component. RONI as a regulator is only allowed to perform price regulation and not introduce new fees. The wording of RONI's new Decree reflects the judgment of the court and terminologically it uses the expression "price of access to the network" and not "fee for access to the network". This approach is also reflected in the new heading of this Decree's section entitled "Price regulation of access (…)". According to the new Decree, the G-component is no longer a payment that must be paid by all electricity producers regardless of whether or not they access the distribution network. The G-component has been changed from fee to price, i.e. remuneration for concrete service and that is why the G-component should now be paid only by producers accessing the distribution network on the basis of an access agreement.

As a result of the court's ruling, producers of electricity not only expect that they will not have to pay the tariff but that they are entitled to claim back all fees paid since the tariff was introduced. According to estimates, the total amount in question is approximately EUR 72 million. The position of the regional distribution companies is however different and they refused to accept any claims from producers relating to fees paid before publication of the court's ruling and therefore it is expected that the court's ruling will be subject to detailed legal analysis and subsequent litigation will be initiated by the producers. A lot of legal


controversies and uncertainties have arisen from the wording of the operational part of the court's ruling and the reasoning provided. The reasoning provided for the court's verdict is the most important part of the decision as it provides or may provide the legal basis on which electricity producers can construct an argument that will allow them to claim back previously paid fees. However, it is unclear whether the reasoning provided by the Constitutional Court for its ruling is legally binding.

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