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Transposition into national law of the Non-Financial Reporting Directive by enacting the Sustainability and Diversity Improvement Act

On 22 October 2014, Directive 2014/95/EU (hereinafter **Non-Financial Reporting Directive**) of the European Parliament and of the Council was adopted, amending Directive 2013/34/EU (hereinafter **Balance Directive**) as regards the disclosure of non-financial and diversity information by certain large undertakings and groups.

The Non-Financial Reporting Directive was transposed into national law in Austria on 6 December 2016 by the entry into force of the **Sustainability and Diversity Improvement Act** (*Nachhaltigkeits- und Diversitätsverbesserungsgesetz*), which introduced amendments to the **Commercial Code** (*Unternehmensgesetzbuch*), the **Stock Corporation Act** (*Aktiengesetz*) and the **Act on Limited Liability Companies** (*Gesetz über Gesellschaften mit beschränkter Haftung*).

The aim of the Non-Financial Reporting Directive is to enhance the relevance, consistency and comparability of the non-financial information already disclosed under applicable law by specifying such information in more detail. It means that from 2017 certain large undertakings defined *inter alia* in the Sustainability and Diversity Improvement Act are required to report their sustainability activities and diversity efforts.

The Sustainability and Diversity Improvement Act distinguishes between non-financial statements and consolidated non-financial statements.

Pursuant to Section 243b para. 1 of the Commercial Code, large undertakings that are simultaneously public-interest entities exceeding on the reporting dates the criterion of the average number of 500 employees during the financial year (Section 221 para. 6 of the Commercial Code) are in future required to include in the management report a non-financial statement, instead of the information specified in Section 243 para. 5 of the Commercial Code. These undertakings are thus subject to a reporting obligation under the Sustainability and Diversity Improvement Act.

Consolidated non-financial statements are regulated under Section 267 para. 1 of the Commercial Code. Such consolidated non-financial statements are issued at the group



level. This regulation applies to public-interest entities which are parent companies that fulfil the criterion on the reporting dates of employing on a consolidated basis on average more than 500 people during the year unless they are exempt from preparing consolidated financial statements under Section 246 para. 1 of the Commercial Code. The consolidated non-financial statement should be included in the group management report instead of the analysis of the non-financial performance indicators.

The non-financial statement within the meaning of Section 243b para. 1 of the Commercial Code and the consolidated non-financial statement required under Section 267a para. 1 of the Commercial Code must contain information necessary for an understanding of the undertaking's/group's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. The analysis must provide an explanation of the non-financial performance indicators with reference to the figures and information shown in the annual financial statement/consolidated financial statement.

The Sustainability and Diversity Improvement Act also regulates the obligation to disclose the non-financial statement or the consolidated non-financial statement. Such statements must be disclosed within the same period as the annual financial statement/consolidated financial statement and an auditor or audit firm will check whether a statement has been submitted.

In implementing the Non-Financial Reporting Directive, the reporting obligation to disclose the diversity policy for large stock corporations required to prepare a corporate governance report has been enshrined in Section 243c para. 2 no. 2a of the Commercial Code. The diversity policy covers the composition of the management and supervisory board, taking into account aspects of diversity such as age, gender, and educational and professional backgrounds. However, small- and medium-sized undertakings – irrespective of their status as public-interest entities – are exempt from the obligation to disclose a diversity policy.

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Increasing the Transparency of the Securities Market

Regulations on the Procedure for Disclosing Information Concerning the Securities Market came into force on 3 October 2016 ("**Regulations**"). The Regulations were adopted by Resolution No. 43 of the Ministry of Finance of the Republic of Belarus dated 13 June 2016 with a view to clarifying the requirements introduced by the Law of the Republic of Belarus "On the Securities Market" ("**Law**"). The Law imposed an obligation on the issuers of securities to disclose certain information in accordance with the requirements laid down by the legislation. Thus, the Regulations were adopted to specify such requirements.

Who is required to disclose information?

Under the Regulations, the following participants on the securities market ("**Participants**") are required to disclose information to the public:

- Belarusian issuers of securities, including banks and non-banking financial institutions;
- foreign issuers of securities, in those cases where the respective securities are admitted to trading on the Belarusian securities market;
- professional market participants (e.g. brokers, dealers, depositories, trust managers, and clearing houses); and
- shareholders holding 5% or more of the shares of one issuer.

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The Regulations however do not apply to the National Bank of the Republic of Belarus, the Ministry of Finance, and local authorities.

Which information must be disclosed?

According to the Regulations and the Law, Participants are required to disclose information both periodically and in cases concerning the following:

- material transactions;
- transactions with affiliates;
- transactions where the volume is equivalent to 5% or more of the shares issued by the Participant itself;
- the reorganization of the Participant, and in case of the reorganization of its subsidiaries;
- the initiation of insolvency or winding-up proceedings;
- the creation of a register of securities holders;
- the reduction of the total number of the Participant's shares;
- the payment of dividends;
- the acquisition of a major stake (as a rule, more than 5%);
- other cases provided by the Regulations.

The above list is indicative and shows examples that apply not to all but rather to different types of Participants.

The required information must be disclosed within the prescribed period, which varies from two days to two months depending on the case in question and on the type of Participant. Information that is subject to periodic disclosure can be disclosed on a monthly, quarterly or annual basis depending on the scope of such information.

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Disclosure procedure

The information must be disclosed (i) through publication in printed mass media or on the Participant's website or on the website of the central depository of the Republic of Belarus (<http://www.centraldepo.by>) and (ii) on the Unified Portal of the Belarusian Securities Market, which can be accessed via <http://www.portal.gov.by>/**Fehler! Hyperlink-Referenz ungültig.**

Summary

The adoption of the Regulations has provided a set of clear rules for the disclosure of information concerning the Belarusian securities market and thus has improved the transparency of this market. For this reason, the adoption of the Regulations has been welcomed by the Belarusian business community.

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Amendments to the Commercial Act

The Bulgarian Parliament adopted significant changes to the Commercial Act (CA) at the end of 2016. The changes relate to additional formalities in relation to corporate resolutions and insolvency proceedings and introduce an entirely new stabilization procedure for pre-insolvent companies.

Notary certification requirement for some shareholder resolutions

Shareholder resolutions for accepting new shareholders, increasing and decreasing the share capital, appointing managing directors, and acquiring and transferring real estate property and the respective rights in rem of limited liability companies now require notary certification, unless the statute of the respective company specifically allows such



resolution to be adopted by a simple signature. Resolutions that do not meet the new formalities are declared null and void. Further, a notary public must verify not only the signatures but also the content of share transfer agreement.

Insolvency procedure

The amendments to the CA introduce new criteria for assuming insolvency, such as the non-publication of the company's financial statements in the commercial register for three consecutive years and where a company has not satisfied a creditor's receivables within six months upon their request during the initiated enforcement procedure.

The amendments also affect the procedures regarding the conduct of voting during the first creditor's meeting, filing of creditor's claims, terms of payment of the purchase price during a public sale and the sale of pledged and mortgaged property or assets securing a third party's receivable.

Stabilization procedure effective as of 1 July 2017

The amendments to the CA further introduce a new procedure for stabilization and avoidance of insolvency.

The procedure can be initiated in relation to companies in immediate danger of insolvency. This includes companies that are not expected to be able to pay their debts within six months of filing the request for initiating the stabilization procedure.

However, the stabilization procedure cannot be initiated in relation to companies:

- which have not published their financial statements for three consecutive years;
- in relation to which the stabilization procedure has already been initiated in the last three years;
- in relation to which the insolvency procedure has been initiated before filing the request for the opening of the stabilization procedure;
- which owe 1/5 of their overall debt to related parties or parties who have acquired receivables from related parties.

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Banks, insurance companies and public companies established by special laws or which have a state monopoly are excluded from the scope of the stabilization procedure.

The CA further imposes restrictions on the company's activities during such a stabilization procedure and regulates the appointment of fiduciaries and controllers and the introduction of a stabilization plan.

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CHSHCEE | Czech Republic

Identification of beneficial owners of corporate entities in Czech public procurement

On 1 October 2016, Act No. 134/2016 Coll., on Public Procurement ("Public Procurement Act"), entered into force in the Czech Republic. One of the changes introduced by the Public Procurement Act is a new obligation to inform the contracting authority of the identity of the beneficial owners regarding the selected tenderer prior to conclusion of a contract. An amendment to Act No. 253/2008 Coll., on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("AML Act"), took effect on 1 January 2017 and implemented some changes to the process of identification and verification of beneficial owners in corporate entities.

1. Obligations regarding the identification of beneficial owners under the Public Procurement Act

Under the Public Procurement Act the contracting authority is obliged to require the selected tenderer (if it is a legal entity) to submit the following documents as a precondition for the conclusion of a contract:



- identification data on all persons who are its beneficial owners pursuant to the AML Act,
- documents that demonstrate the relationship between beneficial owners and the selected tenderer; such documents include, but are not limited to, (i) a copy of an entry in the Commercial Register or other similar records, (ii) a list of shareholders, (iii) a decision made by the governing body regarding payment of a share in profits, and (iv) a memorandum of association, or a letter of formation of articles of association.

The Public Procurement Act also enables the selected tenderer to provide the contracting authority with other documents than those explicitly stated above in order to confirm the identity of the beneficial owners; however, according to the opinion of an expert group for public procurement at the Czech Ministry of Regional Development (the central government authority responsible for matters relating to public procurement), such a document cannot be an affidavit.

If the above stated information and documents are not submitted by the selected tenderer, the contracting authority may exclude the selected tenderer from the tender procedure and a contract cannot be entered into with such a corporate entity.

2. Amended AML Act

The Amendment of the AML Act introduced changes to the definition of beneficial owners of the company. Beneficial owners are now defined as any *natural person who factually or legally exercises directly or indirectly a decisive influence in the corporate entity*. The AML Act includes some newly specified supportive criteria in order to establish who those persons are, such as *it is every natural person who receives at least 25% of the profits from the legal entity*. If no persons are identified in accordance with the AML Act's definition, beneficial owners are deemed to be natural persons who hold the positions of senior managing officials or other similar positions. These changes must be taken into account by the selected tenderer in tender procedures when informing the contracting authority of the identity of the beneficial owners (for example, before 1 January 2017 if no persons fulfilled the definition of beneficial owners in the AML Act, the selected tenderer informed the contracting authority that the corporate entity did not have any beneficial owners, whereas now



such a company needs to identify its senior managing officials as the beneficial owners).

The AML Act creates a register of beneficial owners of legal entities and trust funds in the Czech Republic. This register should come into effect on 1 January 2018 and corporate entities entered in the Czech register of companies are obliged to enter their beneficial owners in the new register by this date. This register is not open to the public. Only selected state authorities should have access to the data in the database (for example, courts for their proceedings, tax authorities, the Czech National Bank, among others). This also affects public procurement procedures since from 1 January 2018 the contracting authorities will primarily obtain information about beneficial owners of the selected tenderers from the new register.

3. Conclusion

Corporate entities participating in Czech public procurement tenders now even need to identify their beneficial owners to the contracting authority if they want to successfully conclude a contract on public procurement. This obligation will also extend to other legal entities entered in the Czech commercial register in the future. Especially in cases of companies with foreign equity participation, identifying who the beneficial owners are can be a complicated process and thus the relevant legal entities need to set aside enough time to ensure they meet this obligation.

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Who can sign on a Company's Behalf?

This may seem like a simple question, but, at least on the basis of Hungarian corporate law and judicial practice, the answer is not straightforward at all. The interpretation of the rules on the authority to represent a company and sign on its behalf, and the issue of how such authority can be used to grant powers of attorney in transactions under civil law are far from settled. There are regrettably few court judgments, official commentaries and academic papers that deal with these issues.

The situation is made worse by the fact that a completely new version of the Civil Code was introduced in Hungary in 2014, and corporate law rules, which were previously included in a separate act, now constitute part of a “Legal Entities” chapter in the Civil Code. However, this change has not merely affected how corporate law is structurally positioned within the Hungarian legal system, also it represents a fundamental change in terms of approach, to the extent that rules that used to be mandatory by default are now optional. This paradigm shift has in practice created quite a lot of questions of interpretation. The regulations state that the shareholders of a company may depart from the rules of the Civil Code in terms of (i) the relationship between themselves, (ii) the relationship between shareholders and the company, and (iii) regulating the company's organisation and operation, so long as such departure is not explicitly prohibited by law, or does not violate the rights of creditors, minority shareholders or employees, or does not prevent the court of registration from exercising its compliance monitoring powers properly. The authority to act and sign on behalf of a company typically has relevance in external matters vis-à-vis third parties, and therefore the applicable rules should be mandatory by default. However, some of the official commentaries argue that the rule according to which a limited partner in a partnership may not act as an executive officer of the company (and therefore does not have the authority to act on its behalf) is an optional rule.

On the other hand, the rule according to which a Company Manager (the equivalent of a Prokurist under German law) or another employee authorised to act on a company's behalf may not validly delegate their authority to anyone else (and this rule was included in the Companies Act that was in effect before the introduction of the new Civil Code) is

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generally considered to be a mandatory rule in practice. If broadly interpreted, this leads to the conclusion that the prohibition of delegating the authority of a Company Manager or other employee to act on a company's behalf applies not only to delegation within the company on a permanent basis (where the delegation of the authority would have to be entered in the Company Register) but also to delegation on the basis of a power of attorney granted for one or more specific transactions. While there are a few court judgments arguing that a person who has such corporate authority under the founding document of a company can validly delegate his or her authority for a specific transaction, these judgments were adopted when the old Companies Act was still in force. A commentary on the Companies Act also emphasises that the freedom of a company's representatives would be unreasonably restricted if the prohibition of the delegation of authority extended to powers of attorney for specific deals or transactions.

Finally, a practice that is even remotely consistent has yet to emerge in connection with the question of who can give authorisation for a specific civil law transaction to whom. For example, can a Managing Director who has joint authority to represent the company but who requires long-term hospital care authorise someone else to sign in his stead jointly with another representative? Or will he need another jointly authorised representative in order to grant such authorisation validly? And can the person so authorised be anyone but a person who already has permanent and joint authority to represent the company? There are many unanswered questions regarding Hungarian corporate law, and therefore we would advise our readers to consult an expert before regulating representation rights in a corporate document and before granting powers of attorney for specific transactions.

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Integrated information system for tracking wood material (SUMAL)

In June 2014 Government decision no. 470/2014 (GD 470/2014) approved the Norm regarding the origin, circulation and trade in timber, the regulation of the storage of such materials and of the facilities for processing round timber and the measures for the implementation of Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market.

GD 470/2014 implemented an integrated information system for tracking timber (SUMAL) for which the Central Public Forestry Authority has responsibility. The use of SUMAL is mandatory for forestry districts (*ocoale silvice*) and for professionals who harvest, deposit, process and trade in timber.

In practice, the applicable legislation was in need of revision and in this respect some legislative amendments to GD 470/2014 were made, starting in December 2016 with Government decision no. 1004/2016 (GD 1004/2016), which was published in the Romanian Official Gazette. The purpose of GD 1004/2016 was to approve the updated norm regarding the origin, circulation and trade in timber, and regulation of the storage of such materials and the facilities for processing round timber, to improve the functioning and operability of and add new features to SUMAL.

The updated norm will enter into force within 120 days of its publication in the Romanian Official Gazette. Until then the old provisions will continue to apply.

The main objectives of the updated norm are to a) reduce or even entirely remove hidden operations during the exploitation and management of timber, b) reduce the time within which information is transmitted; c) simplify the checks performed to ensure compliance with applicable regulation during timber exploiting activities; d) ensure the utilization and management of the national forest fund is transparent at all times; e) ensure an efficient centralization of data throughout the supply chain; and f) create statistics and medium and long-term forecasts.

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As per the updated norm, SUMAL's main applications are (i) Forest Planning; (ii) Agent Electronic Registry; (iii) Wood Tracking; (iv) iWood Tracking; (v) Contraventions; (vi) Reports, (vii) Forest Inspector, etc. The updated norm also provides definitions of each available application, detailed information and guidelines for each user, bearing in mind that some applications are used by public authorities or by the end consumer (e.g. the application Agent – Electronic Registry is used for registering the entries, quantity and dimensions of the received timber which entered the warehouses/temporary warehouses; the Contraventions application is used for the registration and implementation procedure of the contravention reports, etc.).

The implementation of the SUMAL system is definitely a step forward towards improving the tracking of timber in the process of exploiting and managing the national forest fund. However, debates show that the sanctions provided for failure to register the requested information with SUMAL are too lenient and that measures in this respect should be considered by the Romanian authorities acting in the field.

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New Register of Public Sector Partners

The aim of the new Register of Public Sector Partners (the “Register”), in addition to regulating related issues, is to cover all public activities concerning public property. The former legislation, which was limited only to public procurement, has been significantly expanded and the new statutory requirements must be complied with regardless of whether it concerns legal relations with the state and/or public authorities or where a third party receives any performance,



including the sale of state assets. Act No. 315/2016 Coll. on the Register of Public Sector Partners entered into force on 1 February 2017 (the “Act”).

Several definitions of a public sector partner are provided in Section 2 of the Act. Both the positive and negative definitions of this term have one unifying feature: the handling of public resources. A public sector partner is a natural or legal person who or which meets the requirements defined by the Act, is not a public sector entity, but which enters into legal relations with such a public sector entity and receives public resources, including assets, above the specified statutory limit.

As mentioned above, in addition to public procurement, the Act also defines several types of relations that fall under the definition of a public sector partner:

1. **Acceptance of funds from public budgets** – state budget; state fund; budget of a public institution; budget of a municipality, a higher territorial unit, European structural and investment funds; funds from a legal entity established by law or from a legal entity which is entirely or mostly funded by the state, a municipality, a higher territorial unit or a legal entity established by law which is controlled by the state, a municipality, a higher territorial unit or a legal entity established by law or in which the state, a municipality, a higher territorial unit or a legal entity established by law appoints or elects more than half of the members of its statutory body or supervisory body; funds from a health insurance company, receiving state aid or investment aid.
2. **Acceptance of performance relating to assets, property rights or other proprietary rights** – of a state, public institution, municipality, higher territorial unit, health insurance company or legal entity under point 1 above.
3. **Conclusion of contracts in the public procurement process**
4. **Provision of healthcare** – a healthcare provider with a contract for the provision of healthcare with a health insurance company.
5. **Management of public health insurance funds by a health insurance company.**



6. **Assignment of a receivable towards a public sector entity** – towards a state, state fund, public institution, municipality, higher territorial unit or legal entity established by law.
7. **Sub-contracting of goods and services to entities under points 1 to 5 or acquiring assets, property rights or other proprietary rights from such entities** – a public sector partner is aware or should be aware that the performance provided or the assets, property rights or other proprietary rights acquired are related to the contract pursuant to point 4.

Despite the above mentioned range of legal relations, the Act only applies to persons who exceed the financial limits set out by the Act. Thus, a public sector partner is not:

- a person under points 1, 3, 4, 6 and 7 who receives one-time funding not exceeding EUR 100,000 or in the aggregate not exceeding EUR 250,000 per calendar year, in case of repetitive performance; this does not apply if the amount of state aid or investment aid cannot be determined at the time of registration with the register.
- a person under points 2 and 6 who acquires assets, property rights or other proprietary rights in a one-off transaction, the aggregate general value of which does not exceed EUR 100,000.

Further, a public sector partner is not:

- a person who mostly operates in the non-profit sector; this does not apply if he/she supplies goods or public procurement services under a contract, framework agreement or concession contract in order to gain profit or if such person acquires assets, property rights or other proprietary rights, the aggregate general value of which exceeds EUR 100,000.
- a bank or the branch of a foreign bank if it receives funding from the state or a state fund, from the budget of a public institution, a municipality, a higher territorial unit, a legal person established by law, a legal person completely or mostly funded by the state, a municipality, a higher territorial unit or a legal person established by law which is controlled by a state, a municipality, a higher territorial unit or a legal



person established by law or in which the state, a municipality, a higher territorial unit or a legal person established by law appoints or elects more than half of the members of its management or supervisory body, or from a health insurance company in order to fulfil obligations from a credit or a loan,

- a person receiving payment from the representative office of the Slovak Republic abroad for the supply of goods, performing construction works or provision of services or a contribution within development cooperation or international humanitarian aid.

Thus, public sector partners and natural or legal persons who or which meet one of the above definitions for activities or relations with the public sector are to be entered into the Register. The Register itself is kept by the Ministry of Justice of the Slovak Republic and the District Court Žilina acts as the registration body.

A public sector partner must be registered in the Register for the duration of the contract that gives rise to the registration requirement. The registration itself is made on behalf of the partner by an authorised person who or which must by law be a lawyer, notary, bank, a branch of a foreign bank, auditor or tax advisor having their place of business or registered office in the Slovak Republic and who or which entered into a written agreement under which it is required to fulfil the obligations of an authorised person for the public sector partner.

Filing an application for registration with the Register must be performed electronically by using a form issued by the Ministry of Justice of the Slovak Republic in the form of a decree. Registration must be made for an indefinite period and in case the requirements of Section 4 of the Act are met, the District Court is required to perform the registration within five business days and subsequently issue confirmation.

A natural or legal **person who or which is registered in the register of beneficial owners under the former legislation** is considered a public sector partner registered in the Register of Public Sector Partners under this Act. Such person is obliged to provide verification of the beneficial owner according to the Act and to **file an application for**



registration for the purposes of alignment of registered data by 31 July 2017. Failure to comply with this obligation constitutes grounds for removal of the public sector partner from the Register.

The Act introduces sanction mechanisms, especially in the case of a breach of an obligation to provide accurate and complete information on the beneficial owner as well as in the case of other breaches or in the case of a failure to meet an obligation stipulated by the Act. For this purpose, a fine may be imposed on the public sector partner in the amount of the unlawfully obtained economic benefit, if determinable, otherwise up to the amount of EUR 100,000. The registration authority must take into account in particular the nature, gravity, manner and consequences of the breach of such an obligation. Moreover, a decision on the imposition of a fine serves as grounds for removal of the public sector partner from the Register as well as for registration of the statutory body of the public sector partner with the register of disqualified persons, with all the consequences associated therewith. The authorised person must guarantee the payment of a fine unless it proves it acted with due diligence.

In light of the aforementioned, the Act significantly strengthens the protection of state interests because a final decision on the imposition of a fine gives the state a right to withdraw from the contract. The state is not obliged to fulfil its contractual obligations and will not be in default of performance.

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