CHSHCEE Newsletter

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CHSHCEE Austria

Beneficial Owners Register Act

On 29 June 2017, the Austrian National Assembly enacted new legislation – the Beneficial Owners Register Act (*Wirtschaftliche Eigentümer Registergesetz*) – which transposes into Austrian law an EU directive aimed at preventing the use of the financial system for the purposes of money laundering and terrorist financing. The Beneficial Owners Register Act will enter into force on 15 January 2018.

The Act will establish the legal basis in Austria for a register of the beneficial owners of companies, other legal persons and trusts. Approximately 350,000 legal entities are consequently expected to be recorded in the register.

Legal entities subject to the legislation

The following types of legal entity must be recorded in the register and are required to provide their data to Statistics Austria (*Statistik Österreich*):

- general partnerships, limited partnerships;
- limited liability companies, stock corporations, European Companies, European Cooperative Societies;
- cooperatives, European economic interest groupings;
- private foundations, foundations established under the Federal Foundation and Fund Act, and foundations and funds established under provincial laws;
- mutual insurance associations, small insurance associations;
- savings banks;
- other legal entities that have to be recorded in the Commercial Register;
- associations established under the Act on Associations (Vereinsgesetz);
- "trusts" managed from within Austria; and
- agreements similar in nature to a trust in terms of function and structure and which are managed from within Austria.

However, the following legal entities among others are exempt from registration save where a person other than the person assumed to control it by law directly or indirectly exercises control over the management of the legal entity (Section 6 of the Beneficial Owners Register Act):

- general partnerships and limited partnerships, provided all personally liable shareholders are natural persons;
- limited liability companies, if all of the

shareholders are natural persons;

→ associations established under the Act on Associations (if only the corporate bodies recorded in the Register of Associations exercise control over the management).

Definition of beneficial owner

Companies and associations

In the case of a company (or an association), its beneficial owners are the natural persons who directly or indirectly hold an equity participation in the legal entity, to the extent defined under the Act, or who exercise control over the management of the company. A beneficial owner is any person who:

(i) holds a stake of 25% plus one share or an equity participation of more than 25%,

(ii) has sufficient voting rights in the company, or

(iii) exercises control over the management of the company.

All three groups (categories) of beneficial owner are considered of equal rank to one another, meaning all such persons must be identified as beneficial owners. Where one or more beneficial owners belonging to one group are successfully identified as beneficial owners, this does not mean that all of the other beneficial owners falling under the other categories are exempt from being identified as such.

As a general rule, a company can also be controlled indirectly by a natural person via a chain of companies under his/her control. A stake of 50% plus one share or an equity participation of more than 50% is deemed to give control.

If no natural person can be identified as a beneficial owner on the basis of the rules set out above, those natural persons who belong to the top management tier of the company are deemed to be the company's beneficial owners.

Trusts, foundations and funds

In the case of *trusts, foundations and funds*, the law explicitly states who is regarded as being the beneficial owner(s). This includes in particular (a) the settlor/trustor or the founder(s), (b) the members of the foundation or fund management board or the trustee and protector (in the case of trusts), (c) the beneficiaries, and (d) any other natural person exercising ultimate control over the legal entity.

Reporting obligation

First reporting of information on beneficial owners begins on 15 January 2018 and must be completed no later than 1 June 2018. All information must be submitted electronically via the enterprise service portal (*Unternehmensserviceportal*) (www.usp.gv.at) operated by Statistics

Austria, the service provider selected by the Federal Ministry of Finance (*BMF*) to run the registration authority. Beneficial owners without a registered residence in Austria must upload a copy of their passports to the enterprise service portal.

Any *change to information reported* under the Act must be notified within four weeks of the change becoming known.

First reporting for a *newly-established legal entity* must take place within four weeks of its registration in the respective source register (e.g. Commercial Register).

The legal entity itself is obliged to report the information. However, it is possible for a legal entity to engage the services of a professional representative (e.g. a lawyer) to report the information on its behalf.

A fine of up to EUR 5,000.00 can be imposed to enforce the reporting obligation. Deliberate violations of reporting obligations, for instance by filing incorrect information, are prosecuted as administrative offences of a financial nature carrying a fine of up to EUR 200,000.

Inspection of the register

To protect the data protection interests of beneficial owners, it is not intended that the register will normally be open to public inspection. Under strict conditions, however, the registration authority can grant access if a person has a legitimate interest in inspecting the register.

Professional party representatives (e.g. attorneys, auditors) may be granted access to inspect the register for the purpose of advising their clients with a view to determining, checking and reporting the identity of beneficial owners to the authorities. Further, the authorities specified in Section 12 of the Beneficial Owners Register Act (including the registration authority (BMF) and the financial intelligence unit and certain supervisory bodies such as the Financial Market Authority (*FMA*)) are entitled to inspect the register.

Inspection of the register is expected to be open from 2 May 2018.

What action should be taken?

→ Check whether in your capacity as a legal entity you are subject to the reporting obligation under the Beneficial Owners Register Act.

→ Establish who the beneficial owners are.

→ Initial registration in the new register by no later than 1 June 2018.

→ Check on an ongoing basis whether the information reported to the register is still up to date.

Inform the register if the information to be notified has changed (within four weeks of the change becoming known).

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CHSHCEE Belarus

Investment Funds Launch in Belarus

Law No. 52-Z of the Republic of Belarus "On Investment Funds" (the "Law") was adopted on 17 July 2017 and will enter into force on 23 July 2018. Belarus does not currently have any regulation in this area. As a result, investment funds acting in Belarus are usually established in other jurisdictions (for example, Cyprus). The Law aims to introduce the relevant legal framework and facilitate the operation of local investment funds in Belarus.

Forms of Investment Funds

- The Law provides for two main forms of investment funds:
- The first is a joint stock company (the "**JSCIF**") whose shareholders own shares issued by it, participate in its management via general shareholders' meeting and receive dividends;
- The second is a unit investment fund (the "**UIF**") which, unlike a JSCIF, is not a legal entity but an aggregation of monetary funds and other property managed by a trustee on behalf of the participants of such investment fund. The rights of a participant of an UIF are evidenced by a special registered security called a unit. There are two types of UIF:
  - a closed UIF whose members may participate in its management via special meetings and who receive dividends but may not request the buying-out of their units by an UIF;
  - an open UIF whose members may not participate in its management and do not receive dividends. Instead, any participant may request the buying-out of its unit by an UIF.

Investment Assets of an Investment Fund

The investment assets of every investment fund usually consist of monetary funds received as contributions (in the case of an UIF) or in the course of the public offering of shares (in the case of a JSCIF). However, in the course of its activities an investment fund may invest in and acquire the following investment assets:

- Belarusian and foreign securities, other financial instruments;
- jewelry and precious metals;
- real property.

The investment assets must be recorded and kept by a company registered as a special depository. In order to mitigate the financial risks to which investors are exposed in the event of the insolvency of

target companies, the Law establishes certain investment limits. In particular, an investment fund must not invest in more than 10% of the shares of a single company (applicable to an open UIF) or more than 20% of its capital in such shares (applicable to a JSCIF/closed UIF).

At the same time, since the Law intends to intensify local investments in Belarus, it prevents investment funds from investing more than 30% of their capital in foreign financial instruments.

Management of Investment Assets

As a rule, all investment assets of an UIF must be managed by an independent management company, which acts as a trustee under a relevant trust agreement. Such a trust agreement is a contract of adhesion and is automatically entered into between a trustee and every new UIF participant.

In contrast to an UIF, a JSCIF may manage its investment assets on its own. However, in the latter case, a JSCIF must obtain a relevant certificate authorizing it to act as a management company. Otherwise, a JSCIF must enter into a relevant trust agreement with an independent management company.

Summary

Although investment funds have been well known for years in many countries, it is a new and undoubtedly progressive instrument for Belarus. Therefore, the Law is welcomed by the business community as it will potentially attract new investments to the Belarusian economy. However, it is unlikely that an investment rush will happen in the near future since most investment funds active in Belarus have been already established in other jurisdictions for a number of reasons and they might not be willing to relocate their corporate seat to Belarus.

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CHSHCEE Bulgaria

Amendments to the Civil Procedure Code

A number of amendments to the Bulgarian Code of Civil Procedure were published in October 2017, the most important of which are outlined below.

Amended scope of cases subject to cassation procedure

Prior to the amendments being introduced, the judgments subject to appeal before the Supreme Court of Cassation were generally those (i) resolved contrary to the practice of the Supreme Court of Cassation; (ii) in conflict with the practice of other courts (except the Supreme Court); or (iii) where the case is relevant to the correct application or development of the law. Further to the amendment, the second group of judgments specified above (those contradicting the practice of other courts) are excluded from cassation appeal. Instead, two new categories of judgment will be subject to appeal: (i) judgments resolved contrary to the practice of the Constitutional Court or the General Court of the European Union, and (ii) judgments which are likely to be deemed null and void or declared inadmissible, or if they are obviously incorrect.

Amendments to enforcement procedure

Various changes were introduced in relation to enforcement. The most significant amendments are summarised below.

a) Creditors who or which have obtained an enforcement title by means of a payment order procedure will need to fully substantiate their claim in regular court proceedings in cases where the payment order was not personally served on the debtor.

b) Debtors will be entitled to challenge more types of acts undertaken by enforcement officers, including the valuation of the assets subject to enforcement.

c) According to a newly introduced requirement, the security measures and enforcement actions undertaken by enforcement officers must be proportionate to the amount of the debtor's obligation. In this regard, debtors are provided with tools to object to disproportionate enforcement.

d) With respect to the valuation of real property, and movables with a value exceeding BGN 5,000, the enforcement officer is obliged to appoint a property appraiser. Each party (including the debtor and creditor) is entitled to appeal against the property valuation and request a second report by a

different appraiser.

e) The changes introduce extended thresholds for debtors' personal income (labour remuneration or pensions) which cannot be seized. In addition, the enforcement costs which must be paid by the debtor are now decreased.

f) The amendments introduce detailed regulation on electronic tenders. At the request of a party or at the discretion of the enforcement officer, debtor's assets can be sold by an electronic tender. The electronic tenders will be carried out via a unified online platform maintained by the Ministry of Justice. The ministry is required to launch the platform within 18 months, as well as to adopt detailed regulation on electronic tender procedure.

g) The amendments also introduce the possibility of enforcement against separate parts of a debtor's going concern, as well as specific rules on enforcement in relation to trademarks, patents, industrial designs and other types of intellectual property of the debtor.

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CHSHCEE Czech Republic

New Law Concerning Damages in the Area of Competition

Act No. 262/2017 Coll. concerning damages in the area of competition, which transposes an EU directive into Czech law, became effective on 1 September 2017 (the "Act"). The Act aims to improve the process for seeking damages through the national courts for a breach of competition law by, for example, introducing longer time-limits for the aggrieved parties and improving the disclosure of evidence. The Act also aims to improve the procedural position of the aggrieved person during the enforcement of their rights even though the Act does not allow for a class action under competition law.

The private enforcement of competition law in the EU has recently altered significantly especially due to the adoption of Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on actions for damages (the "Directive"). The Directive enable the simplification of the process of enforcing damages for both natural persons and entities if they have been subjected to a violation of competition rules such as cartels or an abuse of a dominant position. The main reason for the adoption of the Directive was that the rules of individual EU member states differ significantly and this might lead to legal uncertainty and negatively influence the ability of individuals to seek damages for breach of competition law.

The Act Concerning Damages in the Area of Competition

The Act introduces several innovations to Czech competition law which facilitate the enforcement of claims for breach of competition rules. For instance, the issue of time limitation is governed differently in the Act than under the Civil Code. The Act introduces longer time-limits within which parties can exercise their right to seek damages. The time-limit is 5 years and the period only starts to run from the day on which the beneficiary becomes aware of the existence of such damage, but at the earliest on the date on which the restriction of competition was brought to an end.

The Act further eases the process of obtaining damages because it focuses specifically on the disclosure of evidence which usually makes seeking damages difficult. Under the Act, the plaintiff is entitled to seek the imposition of an obligation on the perpetrator or any third party who possesses evidence which is material to proving the plaintiff's claim. Such an obligation may include making this evidence available to the plaintiff. To use such a tool the claimant is obliged to lodge security for potential damages caused by making those documents available in the

amount of CZK 100,000.

The respective court is entitled to impose a fine of up to CZK 10,000,000 or 1% of net sales of the last accounting period on the person who breached such an obligation imposed by the court or the one who impeded or hindered compliance with such an obligation. Although this obligation applies generally to the documents collected in the file of the competent authority, it is significantly reduced in relation to those documents. This applies for example in the case of the self-defeating documents submitted by the cartel participants under the Leniency Program in exchange for exculpation or a reduction in the fine for their participation in the cartel.

If the court concludes that the perpetrator caused damage, the perpetrator is obliged to compensate the aggrieved party to the fullest extent possible. The aim is to return the aggrieved party to the same position as if the breach of competition law had not occurred. Damages in full therefore include the right to damages for actual loss and loss of earnings as well as the payment of interest. However, the payment of damages must not result in the aggrieved party being over-compensated.

Class Actions under the EU Competition Law

The Directive allows for enforcement through individual actions for damages. This means that individual aggrieved parties may initiate a claim for damages directly before the national courts under conditions harmonized by the Directive.

However, sometimes a large group of persons is harmed by one anti-competitive action where the damage caused to individuals is so small that it is not efficient or cost-effective for them to take legal action independently. In these cases, individual actions do not appear to be the ideal means of legal protection. For these reasons, the Commission is seeking to develop a system of collective legal protection that would make it possible to claim damages for violations of competition law rules for a larger number of victims through a single action.

In 2013, the Commission issued a Recommendation on the Common Principles on Collective Redress (the "**Recommendation**") in which the Commission recommends a so-called opt-in system, which means that only those persons who explicitly join the claim are on the plaintiff's side. The opposite of this system is the so-called opt-out, which is typical for class actions in the United States. The opt-out action includes all the aggrieved parties who have not actively expressed their unwillingness to participate in this action. However, the Commission strongly oppose the opt-out system. On the other hand, action brought on an opt-in basis often shows low participation rates. In monetary terms, the claims of individual

aggrieved parties in collective actions are usually too small to encourage the aggrieved parties to devote their time and resources to seeking redress for the anti-competitive behavior that has injured them.

In the Recommendation it is advised that member states take all necessary measures to implement principles contained in the Recommendation by 11 June 2015 at the latest. The Commission further committed itself to assess by 26 July 2017 how member states are implementing the Recommendation and whether it is necessary to propose further measures to harmonize the issue of class actions in the private enforcement of competition law at the EU level. However, the results of implementation of the Recommendation are not yet available.

Conclusion

The Act which transposed the Directive will simplify the way in which persons affected by a breach of competition law can claim damages before national courts, thereby enhancing the procedural status of the aggrieved party in these proceedings. It can be expected that the adoption of the Act will lead to an increase in the number of actions for damages in the area of competition. In the case of class actions, the Commission has decided not to include a binding regulation in the Directive but applies only a non-binding Recommendation. As a result, the Czech Act does not allow for class actions in cases relating to competition law.

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CHSHCEE | Hungary

How fines are imposed under the GDPR?

A new guideline has been published on the application and setting of administrative fines

Art 29 Working Party ("WP29") has just published its guideline on the application and setting of administrative fines for the purposes of the GDPR ("Guideline"). Though addressed to data protection authorities ("DPAs"), it nevertheless gives data controllers and processors an idea of what to expect in the years to come.

Once a DPA establishes an infringement of the GDPR, it identifies the most appropriate sanctions to be imposed, while observing a certain set of principles:

- **Equivalent sanctions should be imposed.** This may mean that a landmark decision (and sanction) in one Member State may strongly impact the decision of a DPA in another Member State.
- **Administrative fines should be effective, proportionate and dissuasive,** meaning that they should respond to the nature, gravity and consequences of the breach.
- **Case-by-case assessment.** WP29 clearly states that the point is not to use fines as a last resort, nor to shy away from issuing fines, but also not to devalue their effectiveness. This already shows that DPAs will probably not refrain from applying fines in future.
- **Active participation and information exchange among DPAs.** Experience and practice in fining should also be exchanged, and therefore decisions made by more experienced DPAs will influence their less experienced counterparts – also in terms of imposing fines.

The GDPR gives a list of criteria which must be assessed when determining the amount of the fine. These are:

a) **The nature, gravity and duration of the infringement:** The nature of the infringement determines whether EUR 10 or 20 million may be the maximum fine imposed. Even if by its nature a data breach would be sanctioned with a maximum fine of EUR 10 million, in certain circumstances this breach might end up qualifying for a higher tier (EUR 20 million). Thus data controllers processing large amounts of data or sensitive data (such as in the healthcare sector) or who may have a serious impact on data subjects (e.g. financial data) may expect higher fines in case of infringements.

b) **The intentional or negligent character of the infringement:** An intentional breach may take the form of the unlawful processing of data authorised by the top management of the controller, or in spite of concerns raised by the data protection officer ("DPO"), or by showing disregard for existing policies, whereas negligence may be a failure to adopt data protection policies altogether. This indicates that the lack of required policies may affect the amount of the fine. The WP29 emphasized that controllers cannot claim breaches occurred due to a lack of resources.

c) **Any action taken by the controller/processor to mitigate the damage suffered by data subjects:** If a controller becomes aware of an infringement, it is important how (and how fast) it reacts to correct its actions. DPAs tend to show a certain amount of flexibility to those controllers who take responsibility for correcting or limiting the impact of their actions. This is only possible if detailed action plans are at hand.

d) **The degree of responsibility of the controller/processor, taking into account technical and organisational measures implemented by them:** Controllers need to adapt to data protection by design or by default, and to make sure that data protection policies are applied.

e) **Any relevant previous infringements by the controller/processor:** The DPA will take into account the track record of the infringer. Therefore, companies which have already been investigated for possible data protection infringements should be particularly careful to ensure they comply with the GDPR.

f) **The degree of cooperation with the DPA, in order to remedy the infringement and mitigate any possible adverse effects:** Cooperation with the DPA has an influence on the amount of the fine imposed. If as a result of the controller's cooperative manner, negative consequences do not arise or their impact is more limited, this could also be taken into account in the sanctioning process. However, it should be noted that in certain cases, controllers must cooperate with DPAs under statutory provisions.

g) **The categories of personal data affected by the infringement:** The processing of sensitive data (e.g. data concerning health), or where dissemination of data would cause immediate damage (e.g. in the case of financial data), may be aggravating factors when a DPA decides what fine to impose, so controllers in the

healthcare or financial and banking sector should be particularly aware of GDPR compliance.

h) **The manner in which the infringement became known to the DPA is also essential**: It should be noted that not only the notification itself but its scope is also a factor in the sanctioning process. The fact that the controller does not notify all of the details of the infringement may also merit a more serious penalty. Therefore, controllers need a detailed step plan to notify the DPA as soon as possible after a breach occurs.

i) **Where measures have previously been ordered against the controller/processor concerned with regard to the same subject-matter, compliance with those measures:** After a previous breach, DPAs tend to keep controllers on their radar and communicate extensively with their DPOs. Those controllers that "have a history" with the DPA should pay particular attention to data protection compliance.

j) **Adherence to approved codes of conduct or approved certification mechanisms may be used to demonstrate compliance:** Adherence to an approved code of conduct will enable the monitoring body to verify compliance with the code. Where controllers or processors adhere to an approved code of conduct, the DPA may be satisfied that the monitoring body will itself take the appropriate actions against a violator and may decide not to impose additional measures itself. Therefore, it seems reasonable for controllers to adhere to such codes of conduct.

k) **Any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.**

In summary, data controllers and processors should be aware that compliance with the GDPR requires legal and technical preparations to be taken as well as a new mind-set for planning ahead. Companies have to prepare in due course as the fines are excessive and (as indicated above) DPAs will not refrain from imposing fines.

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CHSHCEE Romania

Judgment of the Grand Chamber of the European Court of Human Rights – 5 September 2017

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

The Grand Chamber of the European Court of Human Rights ruled in favour of a Romanian employee who was dismissed for writing personal correspondence at his place of work.

Initially, the European Court of Human Rights ruled against the complaint brought by the dismissed employee. The Court found that the national authorities were correct in deciding that the employee's behaviour did not comply with the employer's internal regulations and that such behaviour constituted a disciplinary breach. Thus, the Court considered the decision of the national courts correct and well-founded.

The former employee appealed to the Grand Chamber. As a result of a thorough analysis of the files and written evidence submitted, the Grand Chamber concluded that the national courts failed to take into consideration the fact that the monitoring of the employee's activity during working hours took place without any prior notice whatsoever. The national courts therefore failed to determine whether the employee had been informed in advance of the nature or the duration of the monitoring and most importantly of the possibility for the employer to access the content of the employee's correspondence. Moreover, the Grand Chamber considered that the national courts should have specified the reasons justifying the need to monitor the employee's personal correspondence.

The Grand Chamber observed that the measure, which was the subject of the claim, *"was not taken by a State authority but by a private commercial company. The monitoring of the applicant's communications and the inspection of their content by his employer in order to justify his dismissal cannot therefore be regarded as "interference" with his right by a State authority"*. However, the State authority did interfere through the national courts, during the trial concerning the employee's dismissal, and the State authority accepted the dismissal decision issued by the private company.

In this respect, as the national courts failed to maintain a balance between the rights of the employee and those of the employer, the Grand Chamber ruled that under Article 8 of the European Convention on Human Rights, the right of the claimant to respect for his private life

and correspondence was not adequately protected by the national authorities.

Applying Article 41 of the European Convention on Human Rights, the Court decided as follows:

With regard to the pecuniary damage claimed by the applicant, the Court did not find any causal link between the violation of Article 8 of the European Convention on Human Rights – a violation found by the Court by eleven votes to six – and the pecuniary damage alleged, and therefore it dismissed the claim. Regarding the non-pecuniary damage claimed by the applicant, the Court – voting sixteen to one – considered that the finding of a violation constitutes sufficient just satisfaction. The Court also held that the Romanian state must pay the applicant EUR 1,365 in respect of the costs and expenses incurred in bringing the case.

Mention should be made of the fact that the separate opinions of the judges mainly regarded the decision of the majority not to award any amounts for the non-pecuniary damage suffered by the applicant. Furthermore, six judges disagreed with the majority regarding the correct approach to the State's positive obligation in the context of the present case.

Following such judgment, national authorities are recommended in future to assess similar cases, to determine more specific and detailed criteria, while judging whether a dismissal decision was correctly issued or not. Doing this should ensure balance is maintained between observing the employee's right to private life and correspondence on the one hand and the employer's right to monitor the activity of its employees and their compliance with internal regulations on the other.

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CHSHCEE Slovak Republic

Amendment of the Commercial Code

On 8 November 2017, a number of amendments to the Commercial Code became effective upon their publication in the Collection of Laws. The amendments mainly concern:

- Extending the responsibility of statutory bodies and shareholders of business companies;
- combating dishonest mergers; and
- establishing rules for the creation and distribution of company capital funds.

The amendments represent a fundamental change to selected aspects of corporate law in particular and should contribute to improving the business environment in the Slovak Republic. In the sense of its explanatory memorandum, the aim of the amendment is to prevent dishonest mergers of businesses, strengthen the responsibility of statutory bodies of businesses and of shareholders who carry out acts detrimental to the company, and specify the rules for the creation and distribution of so-called other own resources. The amendment thus addresses the application problems associated with chain mergers carried out in order to avoid the proper fulfilment of obligations, whether in case of the liquidation of companies or bankruptcy, as well as the different approaches created by the practice in case of capital fund creation, where the possibility of its creation implicitly follows from law, but is not clearly regulated. The amendment specifies the protection of business secrets. Three new terms related to a business secret have been introduced: a) the owner of a business secret, b) the disruptor of a business secret, and c) goods infringing a right to a business secret. The Commercial Code specifies in detail when a business secret is violated. A breach of a business secret means behaviour consisting of the unauthorized acquisition, unauthorized use or unauthorized disclosure of a business secret. In addition, there are exceptions in the Commercial Code where the above mentioned conduct is not considered a breach of a business secret. Moreover, with effect from 2018 specific provisions will be introduced into the Commercial Code which will individually address the protection of business secrets. The amendment introduced an obligation which requires statutory representatives to submit the financial statements to the general meeting for approval so that they are approved by this body within 12 months from the date on which they are drawn up. The introduction of a specific

period of 12 months has helped to remove uncertainties of previous regulation.

Below we address the most important changes introduced by the amendment.

Extension of responsibility of statutory bodies, liquidators and shareholders

The new regulation has introduced obligations on statutory bodies which are more stringent than those under the previous legislation. By tightening the law, the legislator is seeking to increase the accountability of the statutory bodies of companies, especially in cases of the "factual liquidation" of a business, and to help prevent the use of so-called "straw men" and ensure companies always have a statutory representative. With effect from 2018 the amendment introduces an obligation on a statutory body, also for persons who *de facto* exercise the powers of a statutory body without being appointed or authorized, to perform such a function. Such persons will be especially obliged to act with professional care in accordance with the interests of the company and all its shareholders. In case of a breach of such obligations they will have the same responsibility as a member of a statutory body. From 2018 a former statutory representative will be obliged to file an application for dissolution of a company if he/she does not have a successor.

The introduction of the liability of shareholders for the obligations of a limited liability company and a joint stock company, in specific cases, represents a significant change. The shareholders of capital companies have hitherto not been responsible for the fulfilment of the obligations of their companies or they have only been liable up to the amount of their unpaid contribution (in the case of limited liability companies). Under the new regime, a shareholder with a majority stake in the company (controlling person) is responsible to the creditors of the controlled company for damage caused as a result of the bankruptcy of this controlled company if the shareholder's conduct significantly contributes to the bankruptcy. The shareholder with a majority stake in the company is released from liability if he can demonstrate he acted in an informed manner and in good faith that he was acting for the good of the company. For this purpose, the bankruptcy means not only bankruptcy, but also a situation where it will not be possible to commence bankruptcy proceedings due to the lack of assets or such proceedings will be cancelled on the same grounds or if an execution or a similar enforcement procedure initiated against the company will be terminated for this reason.

Consent of Social Insurance Agency to establish and dissolve a business in liquidation

From 1 September 2018, persons wishing to establish a limited liability company are required to show that they do not have a debt with the Social Insurance Agency. From the same date, a company in liquidation that is being dissolved will be required to obtain the consent of a Social Insurance Agency and apply for the company to be struck off the Commercial Register.

The above-mentioned regulation seemingly represents yet more red tape and bureaucracy, but what is positive is that when establishing a limited liability company, it will not always be necessary to obtain the consent of the Tax Office (which has so far been required in all cases) and the consent of the Social Insurance Agency.

Restrictions on mergers (as well as acquisitions and demergers) of businesses

Specific requirements will apply to the dissolution of a company without liquidation. For instance, as at the date of the merger, acquisition or demerger of a company, the value of the obligations of the successor company may not exceed the value of its assets. Further, the successor company or the company being dissolved cannot be in liquidation, bankruptcy or restructuring. Further, the company being dissolved will be obliged to inform the Tax Office of its dissolution and to obtain a report from the auditor in which the auditor certifies that the value of the successor's equity will not be negative as at the date of effectiveness of the merger. In the case of companies subject to mandatory auditing but whose financial accounts have not been audited, the companies being dissolved are required to arrange an auditor's report which certifies that the receivables and liabilities of the company being dissolved correspond to economic reality as at the day preceding the decisive date. In the case of cross-border mergers, this obligation also applies to dissolved Slovak companies. These provisions became effective on the day on which the amendment of the Commercial Code was published in the Collection of Laws, that being 8 November 2017.

Capital funds

Capital funds, at present not heavily regulated, are addressed by a legislative amendment for the first time and implemented into the Commercial Code. Companies may create such a fund from the contributions of shareholders by including a relevant provision in the Memorandum of Association or in the Bylaws. If a capital fund is created from the contributions of shareholders when the company is being established, such a

fund has to be approved by the founders. If a capital fund is created from the contributions of shareholders at a later stage after the company has already been established, it has to be approved by a General Meeting. The provisions governing contributions are applicable mutatis mutandis to the repayment of shareholder contributions into the capital fund and are considered a capital fund from the moment of its repayment. In the accounts of a shareholder, the contributions paid into the capital fund must be recorded as part of the valuation of a security or as a share in the registered capital.

Unless otherwise specified in a separate legal regulation, repaid capital fund from contributions of shareholders can be used for redistribution to shareholders or for the increase of the registered capital if so provided by the Memorandum of Association or the Bylaws based on the decision of the General Meeting. The capital fund from contributions of shareholders cannot be used for the purposes of redistribution to shareholders if the company is in crisis or if such redistribution would constitute a crisis for the company.

Due to the relatively large scope of the amendment to the Commercial Code and its broad content, it is not possible to provide a comprehensive overview of all impacts the changes will have on companies and on businesses in general. We will be happy to provide you with more detailed information in person.

For more information

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