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SCHINDHELM

EDITORIAL

Dear Reader,

Welcome to the 15th edition of our international newsletter, which we have created together with the partner law firms of the Schindhelm Alliance. In this edition, we have also prepared a variety of current topics for you.

We hope you will find it an interesting read and look forward to your comments and suggestions for the next edition.

Your Schindhelm Team

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Please note: The following explanations are not exhaustive. They are only for initial information and orientation. They do not replace in-depth advice. We would be happy to help you with this.

EUROPE: SOFTENING OF THE PRIMACY OF APPLICATION OF COMMUNITY LAW BY THE ECJ DECISION „TARICCO II“?

I. BACKGROUND

At the end of 2017, in the legal case C-42/17, the ECJ issued a much publicised decision on the question of the primacy of application of Community Law. The background was an issue referred to the Italian Constitutional Court to determine whether the obligation under Community Law for the effective collection of VAT can prevail over the national statutes of limitations, whereby the Italian interpretation of the statute of limitations is a question of substantive criminal law. In the end, therefore, it was a matter of the application of principles protected under constitutional law of non-retroactivity and the requirement of certainty. In the legal case C-105/14 („Taricco I“), the European Court of Justice had still declared the priority of Community Law in the tried and tested manner, but had not dealt with the problem of the Italian constitutional law. The Constitutional Court thus saw itself forced to provide a more detailed clarification and rather blatantly threatened to apply the doctrine of the so-called „contro limiti“, i.e., the restrictions inherent in the Basic Law on the transfer of sovereignty, which ultimately means without taking into consideration Community Law.

II. THE DECISION-MAKING CONTENT

With an acrobatics rare for its decision-making rich in dogmatic devices, the European Court of Justice succeeded in avoiding the threat of the Constitutional Court to override it, but at the same time, in avoiding every precise definition with regard to the protection of national constitutional identify as laid down in Art. 4 para. 2 TEU, by putting the following point of view, which can be considered quite astonishing from a legal point of view: Based on „Taricco I“, first of all the lack of relevance of the statute of limitations under constitutional law is determined. Quite coherently, the ECJ then postulates the obligation of the member states to make Art. 325 AEUV fully effective; this must be done, however, in full compliance with the basic rights of the accused, without the European Court of Justice determining which basic rights should actually be applied; and in actual fact, it is now becoming creative: The law of national authorities [and] national basic rights are to be applied, if this does not compromise the priority, the unity and the effectiveness of Community Law (!). As if this were not enough, in blatant contradiction to the rationale, it has been determined that it was ultimately a matter of applying Art. 49 of the EU Charter of Fundamental Rights as an expression of the constitutional tradition shared by the Member States. Finally, the national courts are granted the right to disregard the priority of application of Community Law, if the non-compliance with national fundamental rights entails an „uncertainty“ for the defendant, which is likely to apply, without exception, in the case at hand.

III. EVALUATION OF THE DECISION

In view of the line of argumentation shown, it can be assumed that the European Court of Justice was desperate to make an ad hoc decision, and presumably mainly for political reasons, without making any clear commitments for the future. In Taricco II, the ECJ got away with it once again; however, it will certainly not be able to avoid the „crucial question“ of how it can deal with the relationship between Community Law and national constitutional law for much longer.

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EUROPE: BILLIONS IN PENALTIES AGAINST GOOGLE DUE TO MISUSE BY ANDROID

I. BACKGROUND

Throughout Europe, approximately 80 % of smartphones are equipped with the Google operating system, Android. In contrast to the iOS and Blackberry OS operating systems, which may not be used by third-party manufacturers, mobile devices of different manufacturers are operated with the Android system. Third-party manufacturers of mobile devices receive an Android license for this.

II. ABUSIVE BEHAVIOUR

Due to the licensing conditions, the installation of the app store Google Play on a device was subject to the Google Search app and Google Chrome browser also being pre-installed on the device. Google also gave manufacturers of mobile devices and operators of mobile phone networks considerable financial incentives for ensuring that they pre-installed only Google Search on all Android devices of their product range and no other search engine. In addition, in order to be allowed to pre-install Google applications on their devices, manufacturers had to commit themselves not to develop or sell devices that are operated with alternative Android versions, which were not approved by Google („Android Forks").

III. COMMISSION DECISION

In its decision of 18/07/2018, the Commission established that Google has a market-dominating position with a share of over 90 % on the market for general Internet search services, for operating systems subject to a licence fee for intelligent mobile devices and for Android app stores. Through the practices described above, in the Commission's view, Google was able to use Android to consolidate the market-dominating position of its search engine.

By linking the Play Store to the pre-installation of Google Search and Google Chrome, manufacturers were encouraged to pre-install rival search engine and browser apps on their devices. Consumers were thus given fewer incentives to download such apps. The Commission classified the payments from Google to manufacturers of mobile devices and mobile phone networks as illegal. The Commission rejected Google's objections that the payments had been necessary in order to convince manufacturers to create devices for the Android system. The manufacturers' obligation not to develop or distribute devices operated with Android Forks led to a reduction in the development and sale of such devices after the commission's decision. Accordingly, the behaviour of Google kept some manufacturers from developing and selling devices operated with the Android Fork „Fire OS" by Amazon.

For these violations, the Commission imposed a fine in the amount of EUR 4.34 billion and obligated Google to cease the illegal behaviour. In the case of non-compliance, Google would have to pay a penalty of up to 5 % of the average global daily turnover of Alphabet, the parent company of Google. Victims of Google's anti-competitive practices have the option of demanding compensation from Google before the courts of the member states.

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EUROPE: EUGH FOR THE TRADE ACCEPTANCE OF EUROPEAN UNION TRADEMARKS

I. PROCEDURAL PROGRESS

Nestlé is a holder of a 3D EU trademark that corresponds to the „KitKat“ bar marketed by it and protects its design:

The trademark is attacked by a competitor and initially deleted, on request, by the cancellation division of the EU Office for Intellectual Property (EUIPO). The board of appeals upheld the decision on the grounds that although the trademark was not protectable per se (so-called original protectability), following intense use it had become a protectable trademark (so-called trade acceptance). In the following instance, the Court of the European Union (ECJ) again endorsed the view of the cancellation division. The trade acceptance has been proven by Nestlé for only a part of the EU zone. However, in some member states (Belgium, Ireland, Greece, Portugal), there is a lack of findings on the perception of the trademark.

II. ECJ DECISION

Finally, the European Court of Justice (ECJ) has now confirmed the decision of the court of first instance (ruling dated 25/07/2018 - C-84/17 P; C-85/17 P; C-95/17 P). For EU trademarks, it must be proven that they have trade acceptance for each Member State of the EU. Separate evidence for each Member State is not necessary only if the documents submitted allow the conclusion that the trademark has trade acceptance in all Member States. This could apply, for example, if several member states were treated as a single market for the sales and marketing of certain goods. In the present case, the input instance of the EUIPO now must make these pending findings.

III. BACKGROUND AND COMMENTS

The EU trademark is more than a combination of national Trademark rights. With an EU trademark, the owner obtains uniform protection throughout the EU. Therefore, on the topic of trade acceptance, it is correct not to focus on only one part of the EU. The rigid adherence to national boundaries is rather contrary to the concept of a common internal market. However, in this case the ECJ has rejected alternative ways, such as focusing on the perception of the EU citizens in their entirety.

For companies, it will be no easier to provide the evidence of trade acceptance. This is because the appropriate evidence for this such as advertising materials, sales figures, certifications of customers and professional associations as well as public opinion reports must now cover even the smallest countries such as Malta and Cyprus. Especially in the case of shape marks of goods such as the „Kit Kat“ bar that protect and monopolise the design of the products, which is often so important, these efforts can nevertheless be worthwhile. Where there is no Europe-wide evidence, the attention can be diverted to national brands. In actual fact, it is sometimes sufficient for protection in just one relevant market to force a competitor to divert to alternative designs.

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BULGARIA: NEW DEVELOPMENTS IN THE USE AND RECLASSIFICATION OF AGRICULTURAL AREAS

I. OWNERSHIP STRUCTURE CURRENT

Since May 2014, ownership rights for land and soil can only be acquired by natural and legal persons who have resided or been established in Bulgaria for longer than five years. Companies incorporated under Bulgarian law that were founded less than five years ago may be the owners of agricultural areas if their stakeholders or shareholders meet the requirement of settling or residing in Bulgaria for at least five years. Self-employed farmers who are EU citizens and properly registered as such in Bulgaria and would like to establish themselves for this purpose in the country can purchase agricultural land.

The owners are free to select the specific usage, but this must be done in compliance with the agricultural purpose of the land and with the legal requirements. Buildings and annexes can be constructed in compliance with the regional planning act. If the land is not reclassified, however, only greenhouses and, under certain conditions, infrastructure objects (such as pipes for water and electricity) can be built, as well as objects connected with the agricultural purpose of the soil.

II. LEASING

According to the changes in the law concerning ownership and the protection of agricultural areas from May 2018, agricultural land can be leased by owners and co-owners personally, or by specific persons authorised by them, and by persons who are authorised by the owner to use and manage the land. The power of attorney must be created explicitly for this purpose and certified by a notary. A rental, or rather a lease agreement in accordance with the law on agricultural leases, which is concluded for more than one year, as well as any changes, amendments or notice of termination, must be made in writing with notarial certification of the signatures and must be entered in the property section in the local land registry. The notarial certification must take place at the same time for all contracting parties. Such lease agreements can only be concluded by co-owners who hold more than 25 % of the property rights. The law also limits the notarial fee, which is to be paid for the certification of signatures on such rental and lease contracts.

III. RECLASSIFICATION

A reclassification is generally only permitted in exceptional cases and in accordance with the provisions of the Law on the Protection of Agricultural Areas in the event of a proven necessity for reclassification. The changes in the reclassification process have led to the introduction of certain facilitations. In some cases, the preliminary project of a general development plan is no longer required, but only a schema of the property showing the boundaries and surfaces areas. According to the new regulation, the Minister for Environment and Water - as long as the limits of the sand dunes are not registered - must provide a written statement on the surface areas established in accordance with the law on the regional planning on the shore of the Black Sea in the so-called A and B zones, in order to confirm that no sand dunes are located on the land

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CHINA: E-COMMERCE LAW – IMPACT ON CROSS-BORDER ONLINE BUSINESS

I. BACKGROUND

In view of the rapid growth of online trade, the Chinese government adopted the first e-commerce law on the comprehensive regulation of online business on 31/08/2018, which will enter into force on 01/01/2019. All companies that distribute their products in China will be affected. These should familiarise themselves in good time with the provisions of the new E-Commerce Law.

II. IMPORTANT ASPECTS

The E-Commerce Law confirms the support of the continued development of the cross-border e-commerce business and the improvement of the administrative law provisions with regard to import, customs clearance and taxation as well as payment transactions by the Chinese state. The latter explicitly encourages small and micro-enterprises to participate in cross-border online trading, however, it provides that all retailers generally require a business licence in order to participate in online trading. In addition, online retailers will in the future be obligated to pay taxes on the turnover generated. Operators of online market spaces must therefore check the identity of the online retailers and forward the relevant information to the tax authorities. According to the new law, foreign companies may not participate directly in online trading, but only via Chinese e-commerce platforms; alternatively they must have a branch in China or a Chinese partner in order to participate.

Data protection is also a focal point of the E-Commerce Law. Both online retailers and operators of online market spaces must make their data storage guidelines publicly accessible. Data storage is only permitted with the express consent of the consumer.

Another central aspect is the strengthening of industrial legal protection in online trading business. The law provides that operators of online market spaces must take suitable measures to prevent trademark infringements and false advertising. For example, after receipt of the notification of a legal violation by one of its online retailers, the operator must promptly take appropriate measures, such as the deletion of information, or disabling of links. If the operator of the online marketplace fails to comply with this obligation, then it is jointly liable towards the rights holder for any additional damages incurred, together with the online retailer. The operator also risks being fined up to RMB 500,000.00, in serious cases up to RMB 2 million. However, the law does not specify what a particularly serious case would be.

In view of the ongoing boom for years in online trading with an annual growth of almost 30 %, the regulation of this economic sector was overdue. Competition and trademark infringements in the online trading business have become commonplace, but the fight against these is problematic not least due to the many non-identifiable online retailers. Obligating the Chinese operators of online trading platforms, verifying the identity of online retailers and preventing competition and trademark infringements is an important step towards making online trading business legally safer. It remains to be seen whether the legally prescribed legal protection is effectively implemented in practice.

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GERMANY: NO D&O PROTECTION FOR GMBH MANAGING DIRECTORS FOR PAYMENTS AFTER MATURITY OF INSOLVENCY

I. BACKGROUND

If a Gmbh makes payments after it becomes insolvent, the Managing Directors are personally liable vis-à-vis the company, regardless of the internal allocation of responsibilities. They are not liable if the payment was consistent with the due diligence of a prudent businessman. This legal situation applies equally to the members of the Board of Directors of Aktiengesellschaften [joint-stock companies].

II. DECISION OF THE OLG DÜSSELDORF

In a current, fundamental decision important for practice, the Higher Regional Court of Düsseldorf determined on 20/07/2018 (ref. no 4 U 93/16), that there is no initial obligation for Directors and Officers Insurance (D&O for short), if a claim is asserted against the Managing Director due to such a payment. Such situations occur when the management is late in filing for insolvency, and the court-appointed insolvency administrator asserts the claim for compensation of the GmbH against the Managing director personally in accordance with Section 64 GmbHG [Limited Liability Companies Act].

The court justifies its decision on the grounds that there is no damage eligible for compensation in accordance with the D&O insurance conditions. If a Gmbh still makes payments after it becomes insolvent, any liabilities of the company are generally extinguished, which means that no loss occurs in the usual meaning. In the opinion of the court, the associated impairment of the creditor interests (which follows from the withdrawal of the liability mass) does not constitute any damage according to the D&O insurance conditions. In such cases, the concept of damage in insurance law should be narrowed down as a so-called „claim of its own kind“ in favour of the D&O insurance.

III. PRACTICAL RECOMMENDATIONS

The decision as to whether and when an insolvency application is to be made, normally poses great challenges for the management. After the OLG decision, there is no D&O protection if payments are made after the company has become insolvent. Personal liability within the framework of a subsequent insolvency can usually only be avoided if the Managing Director succeeds in proving the legality of the payments, in other words that the payment was made with the diligence of a prudent businessman and the insolvency application was submitted in a timely manner. The so-called business judgement rule is extremely important in this process. It is decisive whether reliable, current financial and liquidity figures are available in accounting/controlling and to what extent future payments from a business plan prepared by management are predictable.

Early identified crisis situations can often be managed over a longer period without an insolvency application if appropriate preparations are made in the departments and processes are defined. Management must focus on the possibility of insolvency in order to be able to provide exculpatory evidence by means of particularly precise documentation. Difficult cases occur in corporate structures if, for example, a dependent subsidiary in the crisis is still making payments at the instigation of its controlling parent company.

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GERMANY: NEWS ON THE SHAREHOLDER LIST

I. THE PROBLEM

When a new shareholder list must be submitted in the commercial register due to a change, it must satisfy the requirements of § 40 I GmbHG [Limited Liability Companies Act] in the version of 23/06/2017 according to the decision of the BGH [Federal Supreme Court] dated 26/06/2018 – II ZB 12/16.

II. FACTS

A shareholder of a GmbH [limited liability company] transferred his share to a company established under civil law (GbR). The notary then created a modified shareholder list in which no information was contained on the shareholders of the GbR and submitted this to the Registry Court at the end of 2015. The Registry Court refused to record the list due to the lack of information on the GbR shareholders. The appeal submitted against this was rejected by the appellate court, on the grounds that the legal necessity of this information pertaining to the GbR shareholders stems from an analogous application of § 162 I sentence 2 HGB. During the ongoing legal complaint procedure, § 40 I 2 GmbHG was amended, which now determines that the shareholders of a GbR must be listed by name in the shareholder list.

III. THE RULING OF THE BGH

The BGH confirmed the decision of the appellate court. § 40 I 2 GmbHG was amended with effect from 26/06/2017, with the consequence that the respective shareholders of companies that have not been entered in a register must be included in the shareholder list with their name, date of birth and residence. The application of the new provision is based on the transitional provision enacted for this purpose of § 8 EGGmbHG [German Introductory Act to the German Companies Act]. From the wording of the transitional provision, it is not clear whether the date that is decisive for the applicability of the new provision should – in the case of old companies – depend on the event triggering the obligation to submit a list, on the emergence of an obligation to submit the list, on the actual submission of the list or on the recording of the list in the register folder.

IV. COMMENTS

With the new version of § 40 I 2 GmbHG, legislators have prepared a welcome equivalent to the legal situation in the case of shares held by a GbR in a KG (see § 162 HGB [German commercial code]). It must be noted in the future that if a change in shareholders takes place in the GbR, this will also have direct effects on the shareholder list of the Gmbh. Since in the event of changes in the shareholder structure at the level of a GbR, a notary is not normally involved – the assignment of a GbR company share can be made in any form – in accordance with § 40 I GmbHG, the new shareholder list must be submitted to the Managing Director(s) of the GmbH. The Managing Directors of a GmbH must therefore ensure that they are always informed immediately about any personnel changes in the shareholder GbR.

All shareholder lists that were submitted prior to 26/06/2017 and have not yet been included in the register folder, regardless of the reason, are to be adapted to the requirements of the latest version of § 40 I GmbHG, and also to the specifications of the ordinance on shareholder lists, which entered into force on 01/07/2018.

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ITALY: NEW RULES FOR SMALL LIMITED LIABILITY COMPANIES

I. BACKGROUND

With the large-scale reform of the company law from the year 2003, Italian legislators had simplified the regulations on the *Governance* of limited liability companies. The declared goal was to open the possibility of „streamlining" the management of an LLC (*Srl*) as far as possible, making it similar to a partnership, and thus giving a number of „simple" companies the benefits of limited liability.
In order to be able to recognise the signs of a company crisis at an early stage prior to insolvency, with the law no. 155 dated 19/10/2017, legislators have now turned the wheel slightly backwards and forced the government to adopt a series of implementing provisions on 14 November 2018, which will lead to a significant tightening of the internal control mechanisms.

II. THE REFORM CONTENT

According to the legal situation before now, an internal control committee was only required in an *Srl* if at least two of the following three size criteria were met:

- Total assets in the balance sheet of EUR 4.4 million
- Total annual turnover of EUR 8.8 million
- Average number of employees: 50

These size criteria allowed a variety of smaller *Srls* to get by without an internal control committee and the associated costs.
In the course of reform, the introduction of the internal control committee is now mandatory if even one of the following criteria are met:

- Total assets in the balance sheet of EUR 2.0 million
- Total annual turnover also EUR 2.0 million
- Average number of employees: 10

The obligation to appoint a controlling body (board of statutory auditors – *collegio sindacale* or single auditors – *revisore unico*) only applies if the specified limits are not achieved for three consecutive years.

The failure to appoint a controlling body in spite of the specified conditions being met represents a case of the managing director's liability; in addition, it is now a reason for initiating liability proceedings before the competent court according to Art. 2409 *codice civile* [Civil Code], also in the case of an *Srl* which until now only applied for the joint-stock companies (*Spa*). If the company itself fails to appoint the above body, this can alternatively be done at the initiative of the commercial register office.

III. EVALUATION OF THE REFORM

The drastic reduction in thresholds will, in practice, force a whole series of smaller *Srls*, which had until now been run more like partnerships, to create a significantly more rigid internal structure. Whether the legislative goal of creating a more intensive preliminary control with regard to a crisis or insolvency in the smaller *Srls*, or rather, of making the legal form of the *Srl* less attractive, will only become apparent in the coming years. In any case, many companies will be forced to react to the new legal situation and to review and adapt their partnership agreements. Merely in order to choose between having a controlling body or individual investigators.

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AUSTRIA: LEGAL UNCERTAINTY IN THE CHARGING OF RENTAL CONTRACT FEES

I. BACKGROUND

Tenancy agreements are subject to a statutory fee of 1% to be paid to the tax office. Since 11/11/2017, no fees have been charged on contracts for the rent of residential spaces, while for commercial leases, the fee continues to apply. Based on the latest case law, there is a higher risk that a lease contract that has been concluded for an indefinite period of time may be qualified as a fixed contract (= generally higher fee).

II. FEES FOR LEASE CONTRACTS

The assessment basis is (i) three times the annual value for contracts with an *unspecified* duration, (ii) in the case of contracts with a set duration, the annual value multiplied by this number of years, at most 18 times the annual value. If a temporary tenancy agreement is converted into an open-ended one, the calculation may be based on 21 times the annual value.

Therefore, whether the contract has a *temporary* or unspecified duration is of key importance. In the process, it depends whether both contractual parts are to be bound to the contract for a specific period or not, irrespective of how the contract is to be classified under contractual law in its entirety.

A contract that, based on the contractual text, has been concluded for an indefinite period, will then be treated as a temporary contract, with regard to fees, if it contains a waiver of termination for both parties. On the other hand, a tenancy agreement that is concluded for a set period of time, that can be resolved by and at the discretion of at least one of the contractual parties, is considered to be an *open-ended* contract.

III. CASE-LAW

In the scope of the Lease Law (MRG), the possibility of terminating a lease agreement by the Lessor is strongly limited by law. Nevertheless, according to consistent case-law, the Higher Administrative Court (VwGH) assumed for a long time that, when agreeing on all grounds for termination of § 30 para. 2 MRG, there is still an insufficient limitation of the termination options that opposes the fee-based classification of the contract as being open-ended. If termination was envisaged for „*individually determined reasons*“, the issue of the fee-based classification of the contract depended on the weight and probability of the agreed grounds for termination being met.

The VwGH applied this verification of probability in one of the latest decisions on this topic in a case in which all grounds for termination of § 30 para. 2 MRG were agreed, thereby leading to legal uncertainty. In a further decision, the courts of the lower instance then invoked the above decision. The VwGH rejected the extraordinary appeal with the justification that the decision of the court of lower instance does not deviate from the case-law of the VwGH.

As a result, when agreeing on all grounds for termination of § 30 para. 2 MRG Act, the weight and the *probability of these reasons being met* can lead to the fee-based qualification as a temporary contract. The fact that the reasons for termination of the MRG are not relevant for the rent of business premises, per se, does not make it easier to argue that a contract should be subject to the payment of a fee.

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POLAND: HIGHER WAGE AND INCIDENTAL WAGE COSTS FROM 2019

I. INCREASE IN MINIMUM WAGE

In the budget planning for 2019, companies should prepare for the expected increase in Polish labour costs. First, the adjustment of the minimum wage must be taken into consideration. Starting in January 2019, employers must pay at least PLN 2250.00 gross per month or PLN 14.70 gross per hour. As a result, the adjustment will mean an increase also when calculating surcharges for night-time work, as well as any compensation that is paid in accordance with the respective employment law regulations.

II. END OF THE CONTRIBUTION CALCULATION LIMIT?

A further measure that could ensure a significant increase in wage incidentals is the planned abolition of the contribution calculation limit for old age pensions and insurance for a reduction in earning capacity. Currently, the salary limit for the deduction of the premiums may not exceed thirty times the forecast average monthly salary for the respective calendar year. In 2018, this income threshold is PLN 133,290.00. This means that the income above this limit is not subject to the payment of contributions. If the planned changes come into effect, in the future, the entire income of the employee will be charged with contributions. In practice, this should be reflected in an increase in salary costs. The salary is stated in the employment contract as a gross salary, but employers would have to reckon with affected employees demanding for a salary increase. Indeed, if the contribution calculation limit were to be abolished, they would be left with less of their salary in their hand.

The adopted amendment to the law was supposed to be effective starting 01/01/2019, but has been brought before the Constitutional Court by the President. A decision about this has not yet been made. However, it cannot be ruled out that the Constitutional Court may deal with the matter by the end of this year, which means the new regulations may take effect in January as planned.

III. OLD AGE SAVINGS PLANS

As of 2019, a new obligation for employers will be introduced in the area of occupational retirement schemes: the so-called employee capital plans „PPK“ (a long-term investment in favour of the employees). The costs for this will be shared equally by employers and employees, whereby the employee will pay contributions of 2 %. The Employer must assign 1.5 % of the gross salary for each employee into the savings plan. This share can be increased voluntarily by a further 2 % for the employee contribution and 2.5 % for the employer contribution. All employees aged between 19 and 55 will automatically be included in the savings plan. At the request of the employee, a waiver of this is possible. Persons subject to mandatory insurance aged between 55 and 69 can join the programme on a voluntary basis.

The law adopted by the Polish Parliament comes into effect from 01/01/2019. However, its application will be planned according to the size of the company. The largest companies with more than 250 employees must apply the relevant regulations from 01/07/2019. For smaller business establishments with 50 to 250 employees, the savings plans should come into force at the beginning of 2020 and for those with 20 and more employees starting on 01/07/2020. Other companies still have until 01/01/2021 to prepare for the introduction of the employee capital plans.

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POLAND: WITHDRAWAL AS SOLE MANAGING DIRECTOR WILL BE SLIGHTLY MORE DIFFICULT FROM 2019

I. BACKGROUND

In the business world, situations often arise in which the only existing managing director wants to leave the company. There is then a real risk that the company may become incapable of action (so-called lack of leadership) and shareholders are not informed about this. The situation is particularly volatile when conflicts arise between the latter and the management. The question of the resignation from office of the only, or rather the last, managing director in case law and legal teaching has been controversial for many years.

II. PREVIOUS ECJ DECISION

In accordance with the Polish law of the corporations, it was not clear until now when the official resignation from office of the only managing director of a Polish LLC („sp. z o. o.“) becomes effective and, above all, to whom this should be declared. There were various opinions on this matter. The disputed legal question was decided by the Supreme Court on 31/03/2016 (III CZP 98/15) with a panel of seven judges. In the opinion of the Supreme Court, when the last managing director resigns from office, at the same time he represents the company passively, i.e. he is himself a recipient of his declaration of resignation, and this automatically becomes effective when it is submitted. This view has met with criticism, however. The opinion of the supreme Court of Justice was in particular accused for the lack of obligation to notify the shareholders, which impairs the security of legal and economic transactions.

III. NEW LEGAL SITUATION: MORE EFFORT FOR RESIGNING MANAGING DIRECTORS

According to the new provision law on the commercial companies, the only or last managing director is obligated to declare his resignation from office to against all shareholders. Otherwise, his declaration of resignation is invalid. In this regard, he must convene a shareholders‘ meeting in a timely and proper manner, which then decides on the appointment of a new managing director. The notice of resignation of the resigning managing director must be attached to the invitation to the shareholders‘ meeting.

IV. REPEALED EFFECTIVENESS OF THE RESIGNATION FROM OFFICE

If the only Managing Director wants to leave, as of 2019 he must remember that his resignation from office will only become effective on the day following the shareholders‘ meeting. In the case of the shortest legally permissible convening period of 14 days, this means that the resigning Managing Director must hold his office at least for 15 days, because the resignation from office will only become effective on the 15th day after sending the invitation to the shareholders‘ meeting. This is particularly important when it comes to the obligations and the corresponding managing director liability in the case of imminent insolvency, especially with regard to the deadline for filing for insolvency or the existence of the prerequisites for insolvency.

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ROMANIA: IMPLEMENTATION OF THE GDPR – LAW NO. 190/2018

In Romania, law no. 190/2018, and thus the national implementation of the GDPR, took effect as of 31/07/2018. In comparison with other EU countries, law no. 190/2018 was rather short

I. OBLIGATION TO APPOINT A DATA PROTECTION OFFICER (DPO)

The law is not clear about whether and to what extent a DPO must be appointed, and in this context merely refers to the GDPR.

According to Art. 37 GDPR, a DPO must be appointed if the core activity of the enterprise in question comprises:

1. the execution of processing operations that require extensive regular and systematic monitoring of data subjects based on their nature, scope and/or purposes;

2. the extensive processing of special categories of data or personal data on criminal convictions and offences.

As the majority of enterprises do not have the dissemination of special categories of data or criminal convictions as core activities, it is generally relevant to check that the prerequisites mentioned under 1 are met.

Because the law of 190/2018 contains no further clarifications, the general understanding is to be used, according to which the prerequisites are met if personal data is processed on a large scale or there is a large number of data subjects.

If the prerequisites for appointing a DPO are met, the latter must be registered using a standard form of the Romanian data protection authority. Even if there is the possibility of the appointment of a joint group DPO for the entire group of undertakings, previous (short) practice has shown that the Romanian data protection authority is not favourable to the appointment of a foreign DPO, and prefers a local person to be appointed who is fully proficient in the Romanian language. Such a specification is not contained in the GDPR. Furthermore, in some cases in which the prerequisites for the appointment of a DPO were not met, the Romanian authority has nonetheless requested the appointment of a DPO.

II. DEROGATIONS FOR AUTHORITIES

The law 190/2018 provides significantly lower penalties or sanctions for authorities than for enterprises. The maximum penalty in the case of transgressions on the part of authorities is around 200,000.00 lei, (approx. EUR 43,200.00).

Furthermore, the possibility is only provided for authorities to eliminate any data protection breaches within a grace period of up to three months, based on a predetermined resolution plan.

III. CONCLUSION

Romanian legislators have made minor use of the European opening clauses. On the other hand, exceptions for public authorities that were not very meaningful were included in the national regulations. To what extent these regulations will last also in consideration of EU law remains to be seen.

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SLOVAKIA: NEW CONDITIONS FOR THE EMPLOYMENT OF FOREIGNERS

I. BACKGROUND

Due to the low unemployment rate in Slovakia, employers have recently been confronted with a lack of available workers. Many employers attempt to remedy this deficiency by recruiting employees from third countries (from countries outside of the European Union, hereinafter referred to as „Foreigners"). This situation is also reflected in the Slovakian legislation. Several changes have already been adopted and others are being prepared in order to accelerate and simplify the hiring of foreigners.

II. CHANGES TO THE EMPLOYMENT OF FOREIGNERS

The amendment to the law on employment services as of 01/05/2018 resulted in the following changes in particular:

- The employment conditions for foreigners in selected professions and territorial areas were simplified. In districts with an average unemployment rate of less than 5 %, the missing positions (such as machine installer, skilled workers and tradesmen, auxiliary workers) may be occupied by foreigners in the accelerated process. In these cases, foreigners do not need either a work permit nor a certificate for the possibility of occupying a position (i.e. a certificate that the position cannot be occupied by local workers; hereinafter referred to in short as „certificate"), which must normally be issued by the competent employment office. This simplified regulation applies only to employers whose total staff is made up less than 30 % by foreign workers.
- In other cases, if a certificate is required, the deadline within which this must be issued by the competent employment office has been shortened from 30 to 20 days.
- An employer who wants to hire a foreigner must prove that he has not violated the ban on illegal employment; whereby the law amendment has shortened the period for which the employer must fulfil this condition from five to two years.

III. PLANNED MEASURES

The Slovak Republic intends to remedy the current lack of qualified workers on the Slovak labour market through other temporary, extraordinary measures in connection with the employment of foreigners.

In October 2018, the government adopted a strategy for the job mobility of foreigner, which included, for example, simplifying the administrative procedure for processing residence permits for foreigners, the shortening of the deadline for the issuance of a residence permit from 90 to 30 days or the introduction of the authorization of the temping agencies (which until now was generally not permissible).

Some of the proposed changes are expected to be submitted to Parliament for approval by the end of 2018.

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SPAIN: RESIDUAL DEBT DISCHARGE FOR NATURAL PERSONS

I. INTRODUCTION

The residual debt discharge (RDD) was introduced in 2015 as an exception from the principle of general asset liability of the debtor in the insolvency code. Through this procedure, natural persons (both entrepreneurs and consumers) can be discharged from the payment of debts, which they could not settle during insolvency proceedings, if they adhere to certain specifications.

II. PREREQUISITES

In order to be able to benefit from the RDD in Spain, the debtor must have been declared insolvent in Spain and the insolvency proceedings must have ended, either by liquidation or due to a lack of assets. In order to enable the declaration of insolvency in Spain, the main focus of interest of the debtor must be in Spain, i.e. in the case of a consumer, this must be the usual place of residence, or in the case of an individual entrepreneur, this must be the main establishment.

The RDD can only be granted if there is no case of a so-called culpable insolvency (e.g. because the debtor does not file for the opening of insolvency proceedings within two months after becoming aware of the insolvency).

III. TWO ALTERNATIVES

The insolvency code envisages two alternatives for the request of RDD.

The first alternative is intended for insolvency proceedings in which debts incumbent on the assets and privileged insolvency claims have been satisfied. In these cases, the residual debt discharge means that simple and subordinated, non-settled insolvency claims (including liabilities at the tax office and social insurance) are deleted without requiring a payment plan. For this, it is necessary for the debtor to have settled at least 25 % of the simple insolvency claims (the last point is not required if an out-of-court payment plan has been decided or the debtor has offered it formally).

The second alternative is intended in all other situations. In these cases, simple and subordinated, non-settled insolvency claims are deleted, and any remaining claims (including debts incumbent on the assets and non-settled, privileged insolvency claims) will be subject to a payment plan proposed by the debtor and approved by the court. This alternative requires that the debtor has agreed to an out-of-court payment plan and has offered it formally, before the declaration of insolvency. He must satisfy the debts incumbent on the assets and the unsatisfied, privileged insolvency claims within five years after the end of the insolvency proceedings, whereby no interest is incurred for this time. Liabilities at the tax office, social insurance and for maintenance are not deleted, but included in the payment plan.

IV. CONCLUSION

The RDD is a real second chance for the person concerned, but in situations where insolvency is imminent, it is particularly important to heed the strict deadlines in order to be able to benefit from the procedure.

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THE CZECH REPUBLIC: CHANGES IN THE PAYMENT OF SICK LEAVE AND CONSEQUENCES FOR THE EMPLOYER

I. BACKGROUND

In the Czech Republic, as of 01/07/2019, employees should already be entitled to sick leave from the first day of their inability to work. The present amendment to the Labour Code is currently in the House of Representatives of the Czech Republic, but it has already won the support of the government coalition.

II. CURRENT STATUS

In the Czech Republic, the rule is that for the first three working days of the inability to work (however, a maximum of 24 hours of the already arranged shifts) the employee has no right to sick pay and therefore receives no remuneration at all. This system was introduced in 2008 as part of the savings measures during the economic crisis. The Constitutional Court has since repealed this as unconstitutional, but it was again adopted by Parliament in a modified form and has been valid since the year 2009.

For the first 14 calendar days of the inability to work (except for the first three working days), the employer pays the sick pay. From the 15th calendar day of inability to work, the employee receives the sick pay from his/her insurance company.

The previous regulation was often criticised due to the fact that it forces sick employees to work despite being ill, in order to not lose three days of wages; it was especially criticised as such employees also risk passing on infection to their colleagues. On the other hand, the believers in this regulation argued that it has statistically led to a reduction in the inability to work and the misuse of the sick fund, which means savings for the employer.

In practice, numerous companies have introduced so-called „sick days“ during which the employee can stay at home for a short period of time without a reduction in wages without having to submit a certificate of inability to work.

III. DRAFT OF THE NEW LEGAL REGULATION

According to the draft of the amendment to the employment law, employees should once again have the right to sick pay already from the first day of the incapacity for work, namely in the amount of 60 % of the „reduced“ hourly wage (the amount of th e hourly wage is used as a basis for calculation of the sick pay and is reduced gradually, the higher the wage). This calculation of the sick leave is already valid.

According to the assessment by the Ministry of Occupational and Social Affairs, the change in the health insurance system means a direct increase in wage costs for the employer by CZK 2.9 billion in 2019 and possibly an additional CZK 5.1 billion in relation to the expected increase in the cases of incapacity for work. The increased costs of the employer should be compensated by the reduction of the taxes paid on health insurance, which the employer must pay, by 0.2 % of the gross salary.

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TURKEY: THE DECREE TO PROTECT THE VALUE OF THE TURKISH CURRENCY – LIMITATION OF FOREIGN CURRENCY AND FOREIGN CURRENCY INDEXED CONTRACTS

The presidential decree no. 32 issued on 12/09/2018 to protect the value of the Turkish currency („Decree“) sets the limitation of foreign currency and foreign currency indexed contracts and stipulates that these contracts must be converted within 30 days into Turkish Lira (“TL”). This is a measure of the Turkish government and was taken to cope with the ongoing loss in value of the Turkish currency and also applies to contracts that were completed before the decree was issued.

I. AFFECTED CONTRACTS

The contracts that meet the following conditions are affected:

1. The contracting parties are natural or legal persons who are resident in Turkey;

2. The subject matter of the contract is the purchase, sale or leasing of immovable assets (purchase and rental contracts for vehicles and construction machines excluded), or involves a work, service or work contract;

3. The contract does not fall under the exceptions which were determined with a communiqué issued on 06/10/2018.

II. EXCEPTIONS

According to the communiqué, certain exceptional contracts, such as employment contracts and service contracts executed abroad, the parties to which do not have Turkish nationality, can continue to be concluded in foreign currency or be foreign currency indexed.

III. CONVERSION OF THE CONTRACTUAL VALUES

If the parties to a contract that must be converted into TL cannot reach an agreement on the new TL value, the contractual value will be converted as follows: The sales price for effects of the Turkish central bank of 02/01/2018 will be assumed as the index value and the resulting contractual value in TL will be adjusted in the amount of the increase rate for consumer prices between 02/01/2018 and the renewal date. The increase rate will be calculated on the basis of the rate of increase of the consumer prices determined monthly by the Turkish statistics institute („TÜFE“).

For the conversion of rental contracts, the rental price will be defined for a term of two years in TL. If the parties cannot achieve an agreement on the new TL value, the rent will be increased from the conversion date to the end of the lease year by the TÜFE value for the first year after the end of the lease year in which the conversion took place. If the contracting parties can likewise not reach an agreement in the subsequent lease year, the rent will be increased by the TÜFE value of the preceding year. The rent converted into TL will be valid until the end of the two-year period.

IV. SANCTIONS

No specific sanctions have been established for a violation of the regulation stipulated in the decree, but persons who violate the regulatory measures issued by the presidential body can be sentenced to a fine of TL 3,000.00 to TL 25,000.00 in accordance with Article 3 of the Law on Protection of the Turkish currency (which will be doubled with repeated violation).

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HUNGARY: NEW LAW CONCERNING THE PROTECTION OF KNOW-HOW – IMPLEMENTATION OF THE KNOW-HOW DIRECTIVE

I. INTRODUCTION

The EU Directive on the regulation of confidential know-how and business information (know-how directive) was implemented in Hungary in July 2018. The corresponding law no. LIV. 2018 on the protection of business secrecy came into effect on 31/07/2018.

II. BACKGROUND

The decision of the EU Directive was necessary due to the growing risk of unlawful acquisition of foreign know-how. This can be done, for example, by: unauthorised copying or industrial espionage. The EU Member States had previously established various protection levels, which led to a splitting of the internal market with regard to know-how and trade secrets. It was feared that the innovation companies within the EU are less economically active on a cross-border level as long as there is no uniform protection provided by the Member States. The goal of the directive is thus to ensure the smooth functioning of the internal market by creating sufficient and comparable legal protection in cases of illegal acquisition or illegal use or disclosure of a business secret and know-how.

III. BACKGROUND OF THE HUNGARIAN REGULATION

Prior to the entry into force of the law implementing the directive, know-how and business secrets were regulated in the „Personal law“ section of the Civil Code, and know-how was accordingly protected as a personality right. According to Hungarian law, this cannot be transferred, but the know-how for legal transactions was treated as a transferable asset; In addition, permission to use the know-how could be granted. Due to the contradiction between the law and practice, know-how could not continue to be regulated as a personality right in the Civil Code. Therefore, the Directive was implemented in Hungary by issuing a new law.

IV. THE NEW REGULATIONS

The new law contains the definition of know-how and business secrets established by the EU Directive, as well as the non-protected cases and the new sanctions system. This resolves the aforementioned contradiction between the protection of know-how and personality rights. Know-how and business secrets are now transferable. In addition, legislators have established new regulations regarding the procedures to be followed for civil legal disputes regarding know-how and business secrets. In a potential procedure, the disclosure of know-how or business secrets cannot be avoided by legal provisions, but the disclosure of know-how and business secrets can also not be ruled out in a judicial or administrative procedure.

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