GIDE

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Civil law - New Civil Code

After a lengthy legislative process, the Hungarian Parliament adopted Act V of 2013 on the New Civil Code on 11 February 2013. It will replace the former Civil Code, which was adopted in 1959 and modified on several occasions. The New Civil Code enters into force on 15 March 2014 and consists of the following books: General Provisions, The Human as an Entity, Legal Entities, Family Law, Property Law, Contractual Law, Inheritance Law and Closing Provisions. As opposed to the current Civil Code, the new version not only includes the traditional fields of civil law, but also family law and corporate law which are currently regulated separately.

Until the New Civil Code enters into force, an article will be dedicated to the different aspects of the New Civil Code in each issue of our Brief. In this issue, you will find an overview of the new rules on legal entities.

CIVIL LAW

New Civil Code: overview of the rules on legal entities

The rules concerning legal entities are set out at several levels. These include general provisions concerning all legal entities, as well as specific rules applicable to different types of legal entities. Finally, among the different types of legal entities, the law regulates the establishment and operation of companies, for which it sets out general rules that are applicable to all companies and special rules for each company type.

Compared with the current corporate regulations, founders and shareholders of legal entities will enjoy a greater contractual freedom under the New Civil Code. This implies that founders and shareholders of legal entities may for the most part deviate from the legal provisions when drafting or amending the deed of foundation, or laying down the rules concerning their relations, the relations between themselves and the legal entities, and the legal entities' organisation and operation.

This broader principle of contractual freedom will not apply in cases where a deviation is expressly prohibited by the New Civil Code, or where it clearly infringes the interests of the legal entity's creditors, employees or minority shareholders, or where it hinders the supervision of the legal entity's lawful operation. The range of these exceptions, however, is not clearly determined. Although the New Civil Code expressly prohibits deviation from certain provisions, it remains uncertain whether it is possible to deviate from other important provisions - from which a deviation is not expressly prohibited. It currently seems ambiguous whether the deviation from a certain provision infringes the above-mentioned interests or

hinders the supervision of the legal entity's operation. Future case-law will possibly help to clarify the limits of founders' and shareholders' freedom of action. In the meantime, however, it will most probably cause difficulties for legal professionals to establish whether a deviation from the statutory provisions is lawful or not.

Despite the principle of contractual freedom, founders and shareholders will only be allowed to establish those types of legal entities which are regulated by law. Under the New Civil Code, these are: cooperatives, associations, professional associations, foundations as well as business associations (companies) such as unlimited partnerships (in Hungarian: *közkereseti társaság* or *kkt*.), limited partnerships (in Hungarian: *betéti társaság* or *bt*.), limited liability companies (in Hungarian: *korlátolt felelősségű társaság* or *kft*.) and public/private limited companies (in Hungarian: *zártkörűen/nyilvánosan működő részvénytársaság* or *zrt./nyrt*.). The New Civil Code does not introduce any changes to company forms that can be established. Non-profit organisations are not mentioned in the New Civil Code; this does not mean however that companies may no longer operate on a non-profit basis.

Finally, the New Civil Code abolishes the distinction between companies with and without a legal personality, i.e. unlimited partnerships and limited partnerships will have a legal personality under the New Civil Code. It is rather a theoretical change as previously the lack of legal personality for unlimited and limited partnerships did not have any practical relevance.

BANKING & FINANCE

Merger of the Hungarian National Bank with the Hungarian Financial Supervisory Authority

The Hungarian Parliament adopted the Act CXXXIX of 2013 on the Hungarian National Bank on 16 September 2013. The most important provisions of this Act entered into force on 1 October 2013.

The main objective of this new legislation was to merge the Hungarian Financial Supervisory Authority ("**HFSA**") with the Hungarian National Bank ("**HNB**"), the HFSA thereby becoming part of the HNB. Hence, the HFSA ceased to exist on 1 October 2013 and its competences were transferred to the HNB.

As a consequence, the HNB now exercises the functions previously held by the HFSA, such as the supervision of money, capital and insurance markets, as well as consumer protection and market oversight.

It is important to note that the pre-merger rules remain applicable to the on-going administrative procedures initiated prior to 1 October 2013.

EU LAW

EU Regulation Requiring 24-Hour Data Breach disclosures from IPS

The European Commission has adopted new specific rules to ensure that personal data breaches in the telecom sector are notified in the same way in each Member State. The Regulation No. 611/2013/EU on the measures applicable to the notification of personal data breaches under Directive 2002/58/EC on privacy and electronic communications (the

"**Regulation**") entered into force on 25 August 2013, and is directly applicable without the need for implementation through national legislation.

The Regulation clarifies and confirms the measures which telecommunications operators, Internet service providers and other providers of publicly available electronic communication services ("**Service Providers**") are required to take if their customers' personal data (including addresses, bank account details and information about phone calls and visited websites) is lost, stolen or otherwise compromised by unauthorized access.

Service Providers in the European Union are currently subject to national laws implementing the 2002/58/EC on privacy and electronic communications ("**E-Privacy Directive**") which requires that they keep personal data confidential and secure. In the case of a "personal data breach", Service Providers are required by the E-Privacy Directive to notify the competent national data protection authority ("**DPA**"), and in certain circumstances also the affected subscribers and individuals.

The new Regulation specifies that the Service Providers must inform the relevant DPA of any breach within 24 hours following its detection. The information to be disclosed by the Service Provider is set out in Annex I of the Regulation, and includes a summary of the incident, the nature and content of the data affected, and the technical and organizational measures taken by the Service Provider to mitigate the consequences. If complete information cannot be disclosed within the 24-hour deadline, the Service Provider must provide a limited amount of information within the deadline, and disclose the remaining information within 3 days of the initial notification.

As regards the notification of subscribers and individuals, the Regulation prescribes that Service Providers must take into account the type of data compromised by the breach when assessing whether or not to proceed with the notification. This is particularly relevant when the data concerns financial information, location data, Internet log files, web browsing histories, e-mail data, itemised call lists and data that qualifies as 'sensitive data'.

The purpose of these measures is primarily aimed at ensuring that all customers receive equivalent treatment across the EU in the case of a data breach. It also allows Service Providers operating in more than one Member State to adopt a standardized approach across the EU. The new Regulation is likely to be welcomed by Service Providers as it provides a clearer roadmap on how to comply with the obligations set out by the E-Privacy Directive and further specifies the contents of some of them.

EU Commission: Hungary has respected the European Court ruling regarding the unified retirement age for all public servants

On 6 November 2012, the European Court of Justice ruled that Hungary had to modify the regulation establishing a unified retirement age for all publics servants, which was considered as a violation of EU principles on equal treatment and prohibition of discrimination. Hungary reacted by gradually dropping the judges' retirement age from 70 to 65 by 1 January 2023, in line with the general retirement age.

Nearly one year later, the European Commission has not yet addressed the issue of whether Hungary, by adopting the mentioned modification, has indeed complied with the Court ruling and with its obligations under EU law.

On 4 September 2013, the European Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, announced the good news. In her speech about "The EU and the Rule of Law", she declared: "Hungary has respected the legal views of the Commission, [and the judgment of the Court of Justice of November] and has brought its constitution back in line with EU law with regard to all the points raised by the Commission".

This positive feedback comes after a period of tension between the Commission and Hungary regarding the reform of Hungary's constitutional order. The wave of successive constitutional amendments had been criticised by the Commission's representatives.

From a broader perspective, the fact that Hungary has complied with the ECJ judgment rendered against it a year ago serves as an example showing that the integrated EU legal system works and that the primacy of EU law over national law leads to concrete results. This is an important message in the context of the on-going debate regarding the powers and roles of EU institutions in dealing with member state regulations, especially bearing in mind the next Parliamentary elections coming up in 2014.

LABOUR LAW

Deadlines for initiating employment litigation - Opinion of the Hungarian Supreme Court

The Administrative and Labour Law Division of the Hungarian Supreme Court (the "**Curia**") adopted an opinion on the interpretation of the different procedural deadlines applicable to the initiation of employment litigation under the Labour Code.

The fundamental right to initiate an action before court is often limited by statutory deadlines. Under the Labour Code, the general period of limitation during which employment litigation may be initiated is 3 years. In specific cases, the Labour Code provides a much shorter 30-day deadline for filing an action before the competent labour courts.

With regard to the 30-day deadline, the Curia held that due to its exceptional nature, this shorter deadline must be interpreted very strictly and can only be applied in cases expressly specified in the Labour Code, e.g. the unilateral modification of an employment contract or of its unlawful termination by the employer.

The opinion underlines a number of interpretation rules as to how the starting date of statutory deadlines must be established or calculated. Firstly, under the Labour Code, if the employment contract is unilaterally terminated by one of the parties, the starting date of the period in which employment litigation may be initiated is the date of communication of the termination notice to the other party. The opinion highlights that the above starting date is not affected by any subsequent negotiations between the parties, which means that the deadline for filing a court action cannot be extended or delayed in any way.

Secondly, if the employment relationship is terminated by implicit conduct (e.g. the employee ceases to perform his work and/or takes his personal belongings home), disputes may arise between the parties concerning the exact termination date of the employment. In such cases, firstly the said date must be determined by the court with regard to all the circumstances of the case with a retroactive effect, and the court may only then decide whether the claim can be regarded as submitted on time.

In its opinion the Curia also clarified certain provisions of the new Labour Code regarding procedural deadlines. As an example, the new Labour Code introduced the possibility for employees to terminate their employment in the case of the employer's legal succession, if certain conditions are met. The new Labour Code, however, did not clearly specify the deadline available to challenge such a termination before court. The Curia came to the conclusion that if the employment is terminated by the employee due to the legal succession of the employer, such termination may be challenged within the general 3-year deadline (as opposed to the 30-day deadline). This interpretation has been integrated into the Labour Code as a part of its recent modification, which entered into force on 1 August 2013.

In addition, the Labour Code prescribes that in the case of a dismissal by the employer, such employer must inform the employee of the available remedies to challenge the dismissal including the relevant deadline. The Curia confirms that if the said information was not provided by the employer, the employee is entitled to turn to the employment court within 6 months following the delivery of the termination notice, instead of the general prescription period of 3 years as it was the case under the former Labour Code.

TAX LAW

New Swiss-Hungarian agreement on double taxation

On 12 September 2013, Switzerland and Hungary signed a new bilateral agreement for the avoidance of double taxation with respect to taxes on income and capital. The new agreement replaces the agreement that has been in force since 1983, and contains provisions on the exchange of information in accordance with the applicable international standards.

Aside from an OECD administrative assistance clause, Switzerland and Hungary agreed to increase the maximum rate of withholding tax on gross dividend amounts to 15%. If, however, a company directly holds a stake representing at least 10% of the capital of the distributing company, the dividends will be exempt from withholding tax. Moreover, there will be no withholding taxes on dividends paid to pension funds. In addition, interest and royalty payments will be taxable only in the state of residence. Finally, gains realized on the sale of shares in real estate companies can now be taxed in the country where the real estate is located.

After the negotiations ended and the agreement was signed, a report on the new agreement was submitted to the Swiss cantons and to the concerned business associations, who approved the signing. The new agreement must however still be approved by the parliament in both countries in order to enter into force.

Constitutional complaint against the registration and payment obligations of business entities to the chamber of commerce and industry

Since 1 January 2012, all business entities are obliged to register and pay an annual fee of HUF 5,000 to the Hungarian Chamber of Commerce and Industry ("**HCCI**"). If all companies duly pay this mandatory annual fee, it represents an annual income of approximately HUF 4 billion for the Chamber.

Several associations and companies have questioned the legality of these registration and payment obligations, so far without success.

The reasons that triggered criticism from business circles are as follows. Firstly, the registration and payment obligations do not allow or require the companies to become members of the HCCI, implying that the payment does not correspond to a membership fee.

Secondly, the mandatory fee was declared to constitute a public charge, meaning that in case of payment default, such fees can be recovered by the tax authority. However, according to the National Association of Hungarian Accountants, the fee payable by all companies to the HCCI cannot be considered as a public charge as the income of the HCCI is not part of the public budget.

For the above reasons, in 2012, a public limited company submitted a complaint to the Constitutional Court, which rendered its decision on 15 July 2013. The complaint was rejected by the Court, which held that the companies' payment obligation must be considered as a contribution to the financing of public services delegated by the State to the HCCI. The Constitutional Court also declared that the amount of the contribution and its independent nature from the companies' financial results cannot be considered as disproportionate and excessive.

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