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Legal News
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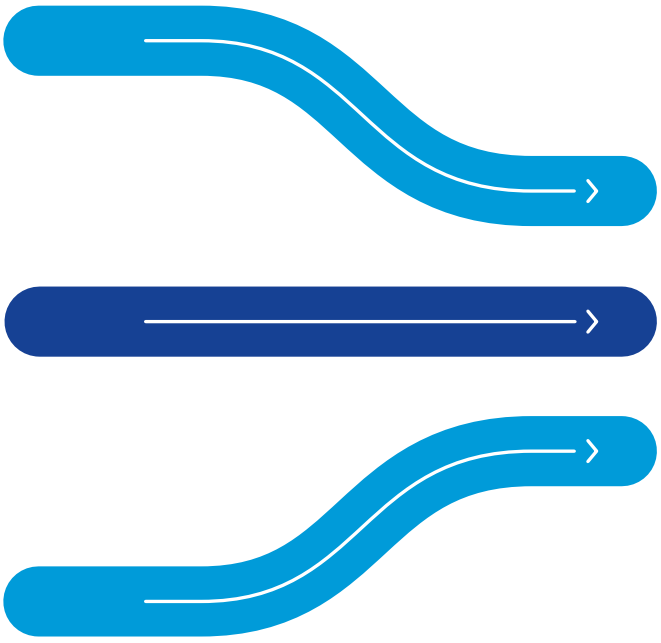
Central- and Eastern Europe



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E-Procurement: transition to compulsory electronic procurement

The electronic public procurement system (EDF) is in force from 15 April 2018

Harmonisation background:

In accordance with EU directives, each Member State should ensure electronic communication in public procurement by 18 October 2018. By implementing the EDF, Hungary fulfils this expectation. It should be emphasized, however, that the law on public procurement has not changed, only the interface has changed from offline to online: from paper-based to internet.

E-Procurement aims:

The aim of e-procurement is to enhance transparency of procurement, streamline procedures, simplify procedural order, reduce administrative burdens and promote public procurement control.

Required migration:

As from 1 January 2018, the use of the EDF was only optional but it is mandatory from 15 April 2018: thus both contracting entities - buyers and bidders – are obliged to take part in public procurement in Hungary only after electronic registration with the EDF,. Registration must be by an individual, who then assigns it to an organization. The registrant is a private individual, a so-called “super user” who can decide which persons within the organization they register and with what kind of authorization they can participate in public procurement procedures.

Using the EDF:

As a registered user, an economic player may freely participate in and bid on any public procurement. In the case of certain procedures, the participant or tenderer will then be able to complete only the declarations and forms set out in the contracting authority’s tender or in the procurement document. Accordingly, only parts of the European Single Procurement Document (ESPD) will be offered only for EDFs to be filled in by the contracting authority in advance.

Practical experience:

In view of the large number of organizations and economic players registered just before the final deadline, the practical side of EDF use is limited. There are

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currently 2062 procedures in the EDF, of which 372 are in the contract completion phase, and a public procurement procedure has not yet been completed.

Availability:

The electronic address of the official interactive platform is: ekr.gov.hu

Source: Government decree no. 424/2017 (XII. 19.) on the detailed regulations of the e-procurement

Fight against money laundering forces banks to take drastic measures

Banks focused on the non-resident market must close accounts of shell companies to ensure compliance with the AML law

Banks in Latvia have been on a rocky road as of late. The anti-money laundering (AML) law has thus been amended, and now explicitly prohibits banks, payment institutions, investment firms, and others from engaging directly with shell companies. Under the AML law, a company meeting even one of the following criteria is now presumed to be a shell company:

- It has no justifiable economic activities and minor economic value or no value at all, unless the bank has proof of the contrary;
- The laws of its home country do not mandate disclosure of the company's financial statements;
- The company has no premises for performing economic activity in its home country.

Triggering the first criterion results in banks and other subjects of the AML law having to investigate the company to determine whether the company truly meets the definition. If the results of the investigation fail to invalidate the presumption, and if the second criterion is met as well, all trading relations must be ended within 60 days, but no later than by 9 July 2018. This has resulted in banks focused on the non-resident market requiring extensive documentation from their foreign clients, and the freezing of those clients' accounts during the in-depth investigation.

The amendments supplement prior changes to the AML law requiring disclosure of companies' beneficial owners, also intended to clean up the financial sector.

This does not, however, mean that shell companies are deprived of their assets. Instead, assets are to be transferred to the company's accounts at a different bank, returned to the originator, or disbursed in cash. Nonetheless, clients of opportunistic banks have seen their account servicing fees and other such expenses skyrocket, indicating potential foul play. In such cases, the respective regulatory authorities must be involved.

Source: Law on the Prevention of Money Laundering and Terrorism Financing

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Significant changes in the statute of limitations of claims

Shorter limitation periods from 2018

As of 9 July 2018, the rules on limitation of claims in Polish law, which have been in place for many years, change. They apply to agreements between Polish contracting parties and also in international transactions when the parties subject the agreement to Polish law or when according to the Rome I regulations Polish law applies (e.g. because the seller's seat is in Poland). The basic limitation period of 10 years is reduced to 6 years. Shorter periods - such as 3 years in contracts between entrepreneurs and for periodical benefits (e.g. interest) and 2 years in contracts of sale –remain unchanged. Introduction of a new way to calculate the limitation period is an important change: under the new rules, the limitation period always ends at the end of a calendar year, unless the limitation period is shorter than 2 years. The principle that limitation periods may not be shortened or extended by contract, as is possible in Germany for example, remains unchanged. Expiry of the limitation period does not mean loss of claim – it can be asserted in court and the claimant only loses the case if the other party raises the objection of limitation and the court dismisses the claim. The new rules introduce a change in this respect: for claims brought against consumers, the court will at its own initiative take into account the statute of limitations and dismiss the claim, unless equitable considerations determine that the time limitation objection should not be taken into account, e.g. due to the nature of the circumstances which led the right-holder not to pursue the claim, including the impact of the debtor's conduct on the delay in pursuing the claim.

Source: Act of 13.04.2018 amending the Civil Code and other laws (J.L. 2018, item 1104)

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How to enforce your claim outside the court: try a notarial deed

Slovak law provides a wide range of options for creditors to secure their claims.

In particular, guarantee, pledge/mortgage or contractual penalty are frequently applied. Given the long-lasting nature of lawsuits, creditors tend to secure their financial claims, such as loans, by applying the concept of acknowledging the debtor's obligation before a notary, who prepares a deed recording the fact. If the notary's deed includes a clause where the debtor declares that he/she agrees with its enforceability, then the deed becomes the enforcement order. This means it is not necessary to initiate a lawsuit for repayment of the claim.

Recently, the Slovak Constitutional Court helped simplify applying a notarial deed with an enforceability clause in practice. In its decision the Constitutional Court stated that in the enforcement proceedings, a notarial deed is reviewed only from the standpoint of whether all formal and material prerequisites are present regardless of the substantive basis. Therefore, if a notary's deed includes all prerequisites prescribed by law, while the fact that it is drawn up by the notary responsible for it must be taken into consideration, any debtor's objections to the claim being enforced, such as the existence of the debt, its amount, maturity, and so on, will not be investigated in the enforcement proceedings. Thus the bailiff can more quickly and efficiently enforce the amount due.

Source: RESOLUTION of the Constitutional Court of the Slovak Republic III. ÚS 8/2018-19

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Protecting employers‘ interests in labour law?

One of the fundamental principles of labour law is that the employee should be afforded special protection, given that the employee is the weaker party to the employment relationship. Of course, this fact is reflected in the case law of the labour courts, whose rulings usually favour the employee. Having said that, the recent decision-making practice of the Czech Supreme Court indicates a trend in the opposite direction: not a few of its decisions actually serve to protect the legitimate interests of employers. In this article, we present one such decision and show how it may benefit other employers in the future.

The relationship between an employee and his superiors had long been strained, and he was eventually dismissed as being redundant. He fought his termination in court and prevailed, and thus returned to his position. The employer also paid him the back pay which it owed him on the basis of having lost the court dispute but chose not to pay him any bonus for the given year. More specifically, the employer assessed that the troublesome employee's bonus should be zero crowns based on the assessment of his work performance during the relevant calendar year. The employee decided to challenge this (in his view) incorrect assessment of his work performance, which he argued qualified as a 'reference' within the meaning of Sec. 314 of the Czech Labour Code, by invoking Sec. 315 of the Labour Code according to which an employee who disapproves of the contents of their employment certificate or their work reference may ask the court to require the employer to amend it. The employee must file a claim to the court within three months from the day on which they learned of the contents of the relevant document.

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However, in the case before it, the Supreme Court ruled in favour of the employer, concluding that documents which contain an assessment of the work performance of an employee may only be considered a 'reference' within the meaning of Sec. 314 of the Labour Code if issued in connection with termination of employment and at the request of the leaving employee for the purpose of informing prospective future employers to whom the leaving employee applies for a job about the previous employer's evaluation of the employee, their qualifications and skills, and other facts and circumstances relevant for a hiring decision. By contrast, an internal evaluation of employees, undertaken by the employer outside the context of a potential dismissal from work - for instance so as to reach a qualified decision on whether to grant a bonus (as in the adjudicated case) - therefore cannot be considered a reference and the employer cannot be forced to change its internal assessment of the employee in any way.

This ruling by the Supreme Court may be useful for employers because it clearly states that employers are entitled to evaluate the results of staff work performance and staff observance of work duties within the context of internal assessment procedures and systems without having to fear that employees will

call these evaluations into question by invoking the procedure set out in Sec. 315 of the Labour Code.

Source: Czech Supreme Court Judgment 21 Cdo 3151/2017 of 20 October 2017

Register of ultimate beneficial owners (UBOs): slowly but surely

The UBO register in Lithuania is due to start functioning in 2019 and it is now time to make the necessary arrangements

Following implementation of EU Directive No. 2017/1371, as of 1 January 2019 every legal entity established in Lithuania must "acquire, update and store" information about its UBOs and file it with the state register by 1 July 2019.

The information includes, for example, name and surname, date of birth, residential address, the state of issue of ID documents, the nature and extent of the beneficial interest.

Although the requirements - and the idea itself - come from the EU and in general are in the best interests of clarity and transparency, in terms of current national regulation they pose problems on several fronts.

First, obligations and liability for compliance are imposed on legal entities (i.e., management) without authorizing them to obtain the necessary information: in practice, management might even be incapable of doing so. This is especially problematic for past events and transactions, where often only the directly participating legal entity is known to the target company.

Additionally, there is no clear indication as to how a company required to report changes of UBOs should ascertain changes not happening directly in the company shareholder structure but in the ownership of a shareholder.

The second concern is about uncertainty as to what extent and to whom the register information should be available. Current regulation provides a fluid statement that information may be provided to someone having a "legal interest". This formulation is open to interpretation and is causing general concern about personal data security. Changes in regulation of this area are still awaited.

To minimize risks, administrative costs and potential inconvenience related to these problems, legal entities should already be considering drafting/amending and implementing internal policies, SHAs or internal regulations to help cope with upcoming requirements.

Source: Law of 29 June 2017 amending the Law on Prevention of Money Laundering and Terrorist Financing of the Republic of Lithuania. No. XIII-568

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A1 certification - limited binding effect

The ECJ has confirmed that the binding effect of A1 posting certificates does not apply without restrictions

If the social authority of one Member State issues an A1 posting certificate for an employee, the social authorities of the other Member States are bound by the content of this certificate. If they have doubts about the accuracy of the certificate, they must contact the authorities that issued it. Only if the issuing authority cancels the certificate this also affects the authorities of the other states.

Up to now, this principle has applied almost without exception. However, the ECJ has now confirmed that the member states may come to their own different assessment if it can be proven from their point of view that the certificate was obtained fraudulently - i.e. through false information - and the issuing authority does not respond to such information.

In the specific case, a Bulgarian construction company had received A1 certificates for its employees by providing false information. The Belgian social authority pointed this out to the Bulgarian social authority and asked them to withdraw the posting certificate. However, the Bulgarian authority simply confirmed the original view and did not even consider the arguments put forward by the Belgian authority.

A Belgian criminal court subsequently convicted the workers for social security fraud. The ECJ confirmed this approach. In the ECJ's view, the binding effect of A1 certificates is limited if they have been obtained in a fraudulent or abusive way. In such cases, the courts of the Member States are entitled to make divergent findings if (i) the issuing authority does not re-examine the matter within a reasonable time and (ii) the accused are guaranteed the right to a fair trial.

It is to be expected that courts will make more frequent use of this possibility in the future, especially as the social authorities of some member states seem to issue A1 certificates too lightly and are not willing to question such decisions critically even in the case of indications of fraud.

Source: ECJ, decision of 06.02.2018, ref: C-359-16

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Arbitration by Estonian bailiffs and bankruptcy trustees

The Estonian Chamber of Bailiffs and Trustees in Bankruptcy begins work as an arbitration court

Throughout our life we enter into diverse legal relations. Unfortunately, not all these legal relations proceed smoothly and often we have to deal with differences and violations of rights. If the parties fail to reach agreement by means of negotiations, other methods are used.

The traditional method for resolving legal disputes is to go to court. The system of courts in Estonia consists of three instances: county and administrative courts at first instance; circuit courts at second instance, and the Supreme Court at third instance. An alternative method is arbitration, which allows legal issues to be heard without involvement in court proceedings.

From May 2018 the Estonian Chamber of Bailiffs and Trustees in Bankruptcy operates as an arbitration court with seven arbitrators. This is a new arbitration court. Amendments to the Bailiffs Act entered into force in January 2018, legalizing the arbitral court of the Chamber as an extra-judicial dispute settlement body. Arbitration is open to contracting parties with disputes over financial claims, with the exception of bailiffs' remuneration claims or financial claims arising from lease, employment or consumer credit agreements. The arbitration court operates on the principle of conciliation in order to allow the parties to reach a mutually satisfactory solution with the help of an impartial person. The purpose is not only to achieve a satisfactory outcome for both parties but to reach a decision in accordance with the law. Arbitration cannot take away another party's right to go to court and comes about only if the parties agree. To initiate an arbitration requires bringing a case to the arbitration court of the Chamber in paper form or using electronic means and paying a registration fee of EUR 250 plus VAT as well as an arbitration fee based on the sum claimed and the number of arbitrators.

Arbitration is a neutral, confidential, fast, less expensive and the most flexible method of resolving legal disputes. Decisions in a court of arbitration enter into force at the moment they are made.

Source: http://www.kpkoda.ee/content/avaliku-poole-lingid/uudised-ja-teated

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