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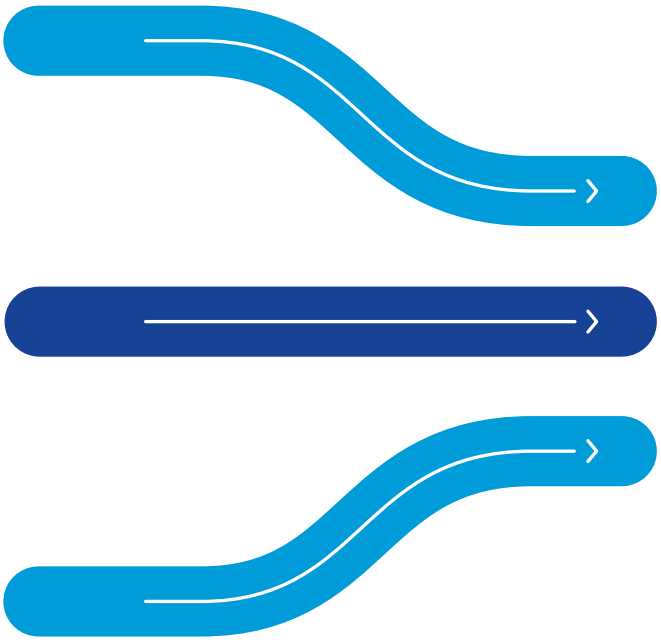
Legal News
October 2018

Central- and Eastern Europe



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GDPR update

GDPR implemented in Hungary

Albeit rather late, the amendments to the Data Protection Act are now in force in Hungary. The amendments basically implement and complement the GDPR and regulate processing situations where the GDPR is not applicable. Besides GDPR, controllers situated in Hungary and controllers of data subjects located in Hungary must take into consideration the provisions of the Hungarian Data Protection Act of which we highlight the following:

- Reducing the administrative burden: in the future data processing need not be reported to the authority, i.e. this register has been terminated.

- We should already put a reminder into our calendar for 25 May 2021. If the law does not specify the term for processing in the case of mandatory processing (e.g. payroll, tax declaration), the controller must review the need for processing every three years, unless the law regulates revision. Preparing appropriate documentation for revision is vital, as the outcome must be preserved for 10 years and must be presented to the authority upon request.

- If a data protection officer (DPO) has been appointed, do not forget to register this at the webpage of the authority and publish the DPO's name and contact data as well. So if a group of companies appoint a joint DPO and one of the companies is a controller in Hungary, the joint DPO must be reported to the Hungarian authority as well. Hungarian law requires DPOs to keep secret personal data, classified information and trade secrets which they acquire during their appointment and also after they leave. The Hungarian authority is proactive and organizes professional conference for DPOs at least once a year.

- The most sympathetic provision of the Hungarian regulation is that in cases of minor first time offences the authority ☐ instead of imposing fines up to a max. of 20 million EUR or 4% of annual turnover ☐ primarily only issues a warning. In the warning the authority instructs the errant controller on the practice to be followed and the actions to be taken.

Although the amendment regulates several issues, in many cases great uncertainty

YOUR CONTACT IN OUR OFFICE

dr. Zsófia Sallai
ügyvédjelölt
Junior Associate

T +36 1 41 33 400
zsofia.sallai@bnt.eu

bnt ügyvédi iroda
Stefánia út 101-103
H-1143 Budapest
Tel.: +36 1 413 3400

remains. We still have to wait for a solution to the most delicate problem: for the revision of sectoral rules to be in line with the GDPR.

Source: Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information

New requirements in Estonia for actual beneficial owners

From 01.09.2018 all companies must disclose information on their actual beneficial owners in the Commercial Register.

The amendment, which entered into force in September, follows from the new version of the Money Laundering and Terrorist Financing Prevention Act, which entered into force on 27.11.2017 and which adopted the EU Money Laundering Directive (EL 2015/849, 20 May 2015) into Estonian law.

The purpose of the amendment is to increase the transparency and the trustworthiness of the business environment, to strengthen the fight against money laundering and terrorism and to limit tax crimes. However, the long-range objective of the directive is to create a pan-European platform that combines national registers and allows for control of actual beneficiaries throughout Europe.

In the case of companies, the beneficial owner is deemed to be a natural person who directly or indirectly owns the company. Direct ownership means that a natural person owns more than 25% of the company. Indirect ownership is when more than 25% of a company belongs to another company that is under the control of a natural person.

In the case of clear and simple ownership, there will be no problems with fulfilling the obligation. However, in the case of a complex ownership structure, identifying the actual beneficial owners can be quite complicated, especially when the range of owners involves foreign countries. If the actual beneficial owner cannot be identified and all options have been tried, the actual beneficial owner should be a member of the senior management body. In this case, the company must document and keep records of all attempts to identify the actual beneficial owner. Unfortunately, the law leaves open how long and how hard the company must try to identify the real beneficial owner and when it can be said that the beneficial owner could not be identified.

For a new company, data on the actual beneficial owner must be filed at the time of establishing the company together with the application for entry in the Commercial Register. If the beneficial owner changes, the register must be notified within 30 days from the moment the management became aware of the change in the data.

The duty to publish data on beneficial owners does not apply to apartment associations, building associations, publicly traded companies and certain foundations.

YOUR CONTACT IN OUR OFFICE

Anneli Piirat
Office Manager

T +372 667 6240
anneli.piirat@bnt.eu

bnt attorneys Advokaadibüroo OÜ
Tatari 6
EE – 10116 Tallinn

Filing data on the actual beneficial owner on the Company Registration Portal is possible from 1.09.2018 and the information must be filed with the Commercial Register within 60 days.

Source: Money Laundering and Terrorist Financing Prevention Act

A public register of beneficial own-ership will be established in 2019.

Data on beneficial owners of Polish partnerships and companies will become public.

The new Act on Counteracting Money Laundering and Terrorist Financing of March 2018 implements EU Directive 2015/849 and establishes a Central Register of Beneficial Owners in Poland as of 13 October 2019.

Each company or partnership entered in the National Court Register, with the exception of public joint-stock companies, will be obliged to report the data of its beneficial owner, i.e. a natural person exercising direct or indirect control over the company / partnership. In the case of limited liability companies and joint stock companies, persons directly or indirectly holding more than 25% of shares or votes are deemed to be beneficial owners. If it is not possible to determine the beneficial owners based on the above criteria, the beneficial owners of companies are persons holding senior management positions.

In particular, information on the extent and nature of beneficial interest or vested rights should be reported to the register.

New entities have 7 working days from registration in the National Court Register to submit this information. Entities registered by 13 October 2019 must submit their notification by 13 April 2020.

Companies/partnerships should notify changes as to beneficial owners within 7 working days from occurrence of the changes. This will not always be possible. For example, in the case of sale of shares in a company, a Polish entity may learn about the changes long after this 7-day deadline, if at all. The same would apply but even more so in the case of other changes in the capital structure concerning entities in the chain between a Polish company / partnership and its beneficial owners.

However, lack of such knowledge does not release the company / partnership from the obligation to notify, nor from liability.

A company/partnership that fails to report within the required deadline may be fined up to PLN 1,000,000.

YOUR CONTACT IN OUR OFFICE

Dominika Wągrodzka
Adwokat
Partner

T +48 22 373 6550
dominika.wagrodzka@bnt.eu

bnt Neupert Zamorska & Partnerzy sp.j.
ul. Chłodna 51
PL - 00 867 Warsaw

Notification in electronic form should be submitted by a person representing the entity concerned. This means the provisions do not exclude notification by proxy. However, only a central register system will show whether this will in fact be possible.

Information on beneficial owners (as well as on board members and partners) submitted to the register will be available to everyone on-line, without restrictions.

This is an important difference compared to EU Directive 2015/849, which provides for availability of this information in principle only after a legitimate interest has been demonstrated.

Source: Act on Counteracting Money Laundering and Terrorist Financing of March 1st, 2018 (J.L. 2018, item 723)

Personal bankruptcy in Slovakia

Legal prerequisites for bankruptcy tourism and residual debt discharge

Two types of insolvency proceedings are available to natural persons in Slovakia. One is classic insolvency, and the other a payment schedule.

A residual debt discharge is only possible if the last proceedings took place at least ten years ago. This includes insolvency proceedings in other EU member states.

Another prerequisite is the debtor's inability to pay. Natural persons are unable to pay when they cannot discharge their obligations within 180 days. In addition, at least one enforcement claim has to be pending against the debtor.

To file for insolvency, the debtor must be represented either through the Centre for Legal Aid or an attorney. The Centre for Legal Aid will advance the trustee's flat-rate compensation of EUR 500.00. The debtor must repay the advance within three years. The debtor has to attach a curriculum vitae as well as various declarations to the application for insolvency.

When foreigners want to file for personal bankruptcy in Slovakia, their centre of main interests (COMI) is vital. For entrepreneurs, the assumed COMI is their headquarters. However, this only applies if the debtor's COMI has been located in a country longer than three months before the insolvency filing. For other natural persons, the period is six months. In the insolvency proceedings, the court will also evaluate its competency with regard to the COMI, which can also be checked subsequently. A creditor affected by the insolvency may apply for cancellation of the discharge of residual debt towards the affected debtor within six years from commencement of the insolvency. The court will then evaluate the debtor's integrity. This topic is closely related to so-called forum shopping, which means that a debtor changes the COMI to another country to the disadvantage of creditors in order to be eligible for more favourable insolvency proceedings. To what extent insolvency proceedings come into consideration for foreigners has to be assessed on a case-to-case basis.

Source: Act No. 7/2005 Coll. on bankruptcy and restructuring; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

YOUR CONTACT IN OUR OFFICE

Herman Pikaly
advokátsky koncipient
Junior Associate

T +421 2 57 88 00 88
herman.pikaly@bnt.eu

bnt attorneys-at-law, s.r.o.
Cintorínska 7
SK – 811 08 Bratislava

Stricter prohibition of replacement of posted employees

A posting is not possible if one posted employee is replaced by another posted employee.

In the case of cross-border employment of workers, it must always be clarified which social security system applies. Within the EU, employees can only be subject to the law of a single Member State. This is usually the law of the country in which the employment is carried out.

However, in case of a posting the usual place of work does not change despite the activity abroad. The posted employees continue to be subject to the social security obligation of their home country. The maximum duration of a posting is 24 months. Furthermore, several employees may not replace each other - this is referred to as a “prohibition of replacement “.

Until now, it was the general view that the prohibition of replacement only applied to employees of the same employer. Thus, an enterprise could not use successively different employees abroad for the completion of the same activities.

The European Court of Justice (ECJ) has now ruled that it is not the specific employer that is important in the context of the prohibition of replacement. Decisive is alone whether several posted employees “replace” each other in their domestic position, i.e. carry out the same activities one after the other. The respective employers of the posted employees may even come from different member states.

In such cases, all employees concerned are subject to the regulations of the social security system at their place of work. If this is not observed, there is a risk that the foreign employer will commit social security fraud, which will be punished with considerable penalties.

Source: ECJ, decision of 06.09.2018, Ref. C-527/16

YOUR CONTACT IN OUR OFFICE

Sebastian Harschneck
Rechtsanwalt
Partner

T +49 911 569 610
info.de@bnt.eu

bnt Rechtsanwälte GbR
Leipziger Platz 21
D - 90491 Nuremberg

Applying interim measures in Lithuania: case law is changing

Seizure of debtors' assets: no longer an automatic claimants' privilege

Interim measures are usually the only way to ensure efficient safeguarding of a claimant's interest. The most popular method: seizure of the debtor's assets. If a debtor owns anything valuable, advance freezing is essential for preventing it from dissipating assets so as to frustrate a potential court decision.

In order to obtain interim measures in Lithuania it was usually enough for a claimant to clearly support its claim with written evidence and affirm a reasonable risk that the final decision of the court will be impossible/difficult to enforce due to the poor financial situation of the respondent (especially in the case of a significant amount claimed).

Recently, the Lithuanian civil courts have been changing the standards of evidential requirements for interim measures. Now, following the principles highlighted by the highest Lithuanian courts, judges tend to require substantial evidence proving actual or potential dishonesty of a debtor as a prerequisite. Case law has already drawn preliminary guidelines on what kind of evidence may prove a sufficient level of a debtor's dishonesty. It might be evidence of: unfair previous transfer(s) of the debtor's assets; provision of incorrect information/warranties by the debtor in contractual relations; the debtor's offer(s) for others to buy or take its assets; unfair behaviour by the debtor as found in other proceedings; the debtor avoids complying with other court decision(s); continuing failure by the debtor to produce financial statements, and the like. It is worthy of note that a debtor's refusal to accept a creditor's claim before addressing the matter to a court is not considered as proof of dishonesty according to the prevailing case law.

These new standards ensure greater security for defendants and will certainly be appreciated by those involved in litigation as alleged debtors by unfair claimants (e.g. contractors, competitors) who cover their intentions simply to apply pressure concerning business decisions or other unfair matters of principle. On the other hand, many fair claimants can find it difficult to provide evidence of a debtor's dishonesty and thus face dissipation of the debtor's assets, ending in a meaningless court process and an unenforceable favourable decision. Clearly, the courts are still in search of balance: We await more notable precedents to be created.

YOUR CONTACT IN OUR OFFICE

Rasa Grambaitė-Pusčienė
Advokatė
Senior Associate

T +370 5 21 21 627
rasa.pusciene@bnt.eu

bnt Heemann Klauberg Krauklis APB
Embassy House
Kalinausko 24, 4th floor
LT-03107 Vilnius

Overhaul of law on insurance contracts: unwarranted hype?

With the introduction of a new law on insurance contracts, Latvia is attempting to bring its insurance norms up to speed with EU law

On 1 June 2018, the new Law on Insurance Contracts entered into force. While the legislator intended to readjust and straighten the legal order of insurance-related laws, incorporate new EU-level norms and establish a more beneficial system, lawmakers have produced a rather chaotic set of rules.

One of the goals of the Law on Insurance Contracts was to integrate certain provisions previously found in other laws governing insurance in Latvia. Nonetheless, norms directly relating to insurance contracts still to this day remain scattered around other legal sources. Furthermore, promises to fulfil the country's obligation towards the EU by transposing the latest directive on insurance distribution have not materialised. Contrary to the initial draft law, which appeared to be rather promising, the law as adopted contains no references to crucial provisions found in the EU directive. Although the directive's transposition deadline has expired, the Ministry of Finance in charge of the draft issued only a vague announcement that another future law would transpose the EU directive – counteracting at the same time both the aims of the legislator to create a single law for insurance contracts and to transpose EU law. This again would add to the fragmented legal order in the field of insurance undertakings

Notwithstanding, the recent changes are not all bad. For one, lawmakers have now provided an option to conclude insurance contracts digitally. Additionally, substantial improvements have been achieved in relation to consumer rights, as insurance companies are from now on obliged to provide the insured with documents substantiating the company's decision on the insurance compensation. This has the potential to significantly improve the dispute resolution process

In turn, in the fight against insurance fraud, the legislator has provided insurers with specific rights. For example, payment of insurance compensation can be withheld if criminal or administrative proceedings are initiated in relation to an insurance case and if the insurer's decision on payment is dependent on the outcome of the proceedings. Until the final decision in the proceedings, the

YOUR CONTACT IN OUR OFFICE

Niklāvs Zieds
Junior Associate

T +371 6777 05 04
niklavs.zieds@bnt.eu

bnt Klauberg ZAB
Alberta iela 13
LV-1010 Riga

insurer has the right to withhold payments.

Source: Law on Insurance Contracts

Entry of land plots in a European Certificate of Succession issued in Germany

First practical experiences with German-issued European Certificates of Succession are disappointing in the Czech Republic.

The European Certificate of Succession, introduced by Regulation (EU) 650/2012, will simplify legal transactions pertaining to matters of inheritance among EU member states and can be used as proof of inheritance law with authorities, banks, courts, and others within the EU (except three member states). Thus, it eliminates the need of further inheritance proceedings.

Implementation in practice is less encouraging. For instance, German courts were steadfastly refusing to enter the equalization of gains accrued under the statutory matrimonial property regime (within the meaning of Sec. 1371 (1) of the German Civil Code), i.e., a lump-sum share of ¼ in addition to the heir's portion of the inheritance (of e.g. ¼), based on the 'argument' that this was a matter of property law rather than inheritance law. However, the ECJ put an end to this nonsense in its Mahnkopf decision (ECJ judgment of 1 March 2018, C 558/16). In its ruling, the ECJ noted (marginal Nos. 35, 36), that "... the objectives pursued by Regulation No 650/2012... [are] intended to facilitate the proper functioning of the internal market by removing obstacles to the free movement of persons who wish to assert their rights arising from a cross-border succession." For the rest, this purpose clearly follows from Art. 63 (1) of the EU Succession Regulation. On 21 June 2018 the ECJ decided upon questions of competencies (C-20/17 – Oberle) – more details on this decision you can expect in our next newsletter edition. In a different context, difficulties are being encountered regarding land plots in Austria, Hungary and in the Czech Republic. Cadastral offices and public notaries make the transfer of title to land plots conditional upon a precise specification of the land plots in the European Certificate of Succession (i.e., it is not enough to state the heir's portion in the inheritance).

Such specification would in principle be allowable under Art. 68 (L) of the EU Succession Regulation – alas, the German courts (e.g. the Higher Regional Court in Nuremberg in its resolution 15 W 299/17 of 5 April 2017 or the Higher Regional Court in Munich in its resolution 31 Wx 275/17 of 12 September 2017) have seen fit to rule that no specification of land plots should be entered in the certificate.

YOUR CONTACT IN OUR OFFICE

Stephan Heidenhain
Advokát, Rechtsanwalt
Senior Associate

T +420 222 929 301
Stephan.heidenhain@bnt.eu

bnt attorneys-at-law s.r.o.
Slovanský dům (building B/C)
Na příkopě 859/22
CZ - 110 00 Prague

Suffice it to say that the information cannot very well be superfluous, at least in the above mentioned neighbouring countries, when the cadastral authorities and notaries refuse to make entries based on EU Certificates of Succession which lack information, citing their domestic law which seems to insist on concrete identification of individual land plots.

The solution is either not to apply German law (and to enter the land plot specification in the certificates) or not to apply the cadastral rules (and to transfer the title to the land plots even so). It is for the ECJ to decide which it should be, but so far there is no preliminary ruling from the ECJ.

In any case, though, European Certificates of Succession ought to enjoy priority within the internal market over the cadastral rules of individual EU member states, or else the very purpose of the European Certificate of Succession would be frustrated, which "is for use by heirs (...) who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs", (Art. 63 (1) of the EU Succession Regulation).

Source: Regulation (EU) 650/2012 (EU Succession Regulation)

Compulsory sale of currency earnings abolished

The administrative burden for legal entities and individual entrepreneurs in the form of compulsory sale of foreign currency has been abolished

Previously residents of the Republic of Belarus – both legal entities and individual entrepreneurs – were obliged to sell part of currency (recently 10% of earnings, previously 30% and more) on the domestic foreign exchange market within seven days after receipt of exchange earnings. On 3 August 2018, Presidential Decree of 31.07.2018 No. 301 entered into force and cancelled this obligation. Time will show whether it is only a single-case decision or the Decree lays the foundation for further removal of strict restrictions established by the Belarusian currency legislation.

Source: National legal Internet portal of the Republic of Belarus (NLIP) 02.08.2018, 1/17849

YOUR CONTACT IN OUR OFFICE

Alexander Liessem
Rechtsanwalt
Partner

T +375 17 203 94 55
alexander.liessem@bnt.eu

bnt legal and tax
Revolutsionnaya str. 9A-40
BY - 220030 Minsk

Our Offices

BELARUS

bnt legal and tax
Revolutsionnaya str. 9A–40
BY – 220030 Minsk
Tel. +375 17 2039455
Fax: +375 17 2039273
info.by@bnt.eu

GERMANY

bnt Rechtsanwälte GbR
Leipziger Platz 21
D – 90491 Nuremberg
Tel.: +49 911 569 61 0
Fax: +49 911 569 61 12
info.de@bnt.eu

POLAND

bnt Neupert Zamorska & Partnerzy sp.j.
ul. Chłodna 51
PL – 00 867 Warsaw
Tel.: +48 22 373 65 50w
Fax: +48 22 373 65 55
info.pl@bnt.eu

BULGARIA

bnt Neupert Ivanova & Kolegi adv.dr.
Gladstone 48
BG – 1000 Sofia
Tel.: +359 2 980 1117
Fax: +359 2 980 0643
info.bg@bnt.eu

HUNGARY

bnt ügyvédi iroda
Stefánia út 101–103
H – 1143 Budapest
Tel.: +36 1 413 3400
Fax: +36 1 413 3413
info.hu@bnt.eu

SLOVAKIA

bnt attorneys-at-law, s.r.o.
Cintorínska 7
SK – 811 08 Bratislava
Tel.: +421 2 57 88 00 88
Fax: +421 2 57 88 00 89
info.sk@bnt.eu

CZECH REPUBLIC

bnt attorneys-at-law s.r.o.
Slovanský dům (building B/C)
Na příkopě 859/22
CZ – 110 00 Prague
Tel.: +420 222 929 301
Fax: +420 222 929 309
info.cz@bnt.eu

LATVIA

bnt Klauberg ZAB
Alberta iela 13
LV – 1010 Riga
Tel.: +371 6777 05 04
Fax: +371 6777 05 27
info.lv@bnt.eu

BNT NETWORK OF COOPERATIVE LAW OFFICES

Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Romania, Russian Federation, Serbia, Slovenia, Ukraine

further information:
www.bnt.eu

ESTONIA

bnt attorneys Advokaadibüroo OÜ
Tatari 6
EE – 10116 Tallinn
Tel.: +372 667 62 40
Fax: +372 667 62 41
info.ee@bnt.eu

LITHUANIA

bnt Heemann Klauberg Krauklis APB
Embassy House
Kalinausko 24, 4th floor
LT – 03107 Vilnius
Tel.: +370 5 212 16 27
Fax: +370 5 212 16 30
info.lt@bnt.eu