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on Real Estate

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Keep up to date with the latest legal developments on the real estate market in Austria, Belarus, Bulgaria, the Czech Republic, Hungary, Romania and the Slovak Republic with the special issue of the CHSH CEE newsletter.

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Amendments to the Viennese Building Code

Edda Unfricht and Mark Krenn explain a recent amendment to the Viennese Building Code that aims to decrease rental costs and land prices for subsidized properties. **>> Read full article**

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Change of real estate registration procedure

Sergei Makarchuk highlights some significant changes to the procedure for registering real estate, related rights and transactions. **>> Read full article**

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Matej Bolek discusses a new amendment of the Civil Code that changed the provisions regulating the pre-emptive right of co-owners significantly. **>> Read full article**

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From adjoining land plots to a consolidated plot

Sebastian Bolda illustrates the steps that need to be taken to consolidate adjoining plots and obtain a building permit for residential, retail, and industrial developments. **>> Read full article**

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Termination of a lease in the event of a change of property owner

Jozef Bannert analyses a ruling of the Slovak Supreme Court on the lessee's right to terminate a lease in the event of a change of the owner of the leased property. **>> Read full article**

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CHSHCEE Austria

Amendments to the Viennese Building Code

As in other capital cities, land prices are also increasing in Vienna and this therefore affects the framework conditions for subsidized housing. In this respect, the City of Vienna has taken several measures in recent years to counter this trend, in particular by enacting an amendment to the Viennese Building Code, which is likely to enter into force in early 2019. The new measures aim to decrease rental costs and land prices for subsidized properties.

Based on the most recent court decisions – in which the Austrian Constitutional Court ruled that it is in the public interest to provide affordable housing – the revised version of the Viennese zoning plan will include a new zoning category for subsidized housing. The new "subsidized housing" (*geförderter Wohnbau*) category will replace the "subsidizable housing" (*förderbarer Wohnbau*) category, which only covers aspects concerning energy efficiency and related technology used in the construction of buildings. For building plots categorized as subsidized housing, more than 50% of the building must be set aside for use as subsidized housing. Although similar zoning categories called "subsidized housing" (*geförderter Wohnbau*) are already in use in other Austrian federal states, the combination of rental and selling price limits introduced by the authorities in Vienna is somewhat of a novel solution.

The new zoning category will include several restrictions and obligations for owners.

Firstly, in order to get a building permit, it will be compulsory for the buyer to provide evidence that (i) the purchase price paid for the land is adequate and (ii) a sale restriction has been registered in the land register in favour of the municipality of Vienna. The purchase price is deemed "adequate" within the meaning of the Building Code if a maximum price of EUR 188 per square meter is not exceeded. Evidence showing that the price is adequate could be provided by attaching the purchase agreement to the request for the building permit or a corresponding certificate issued by the local authority (*Bestätigung des Magistrats*).

Secondly, rent for apartments within such a zoning area must not exceed EUR 4.87 (cap) per square meter during the subsidy period (40 years). This amount is adjusted for inflation and linked to the

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Consumer Price Index 2015 (*Verbraucherpreisindex 2015, VPI*) published by the Austrian Office for National Statistics (*Statistik Austria*). During the subsidy period of 40 years, apartments can only be let for a rent not exceeding the cap, as adjusted for inflation. By ensuring a prohibition on selling the land (*Veräußerungsverbot*) is recorded in the land register in favour of the municipality of Vienna, the sale of subsidized property at a high profit will be prevented and this will secure the proper utilization of the subsidy.

According to the Vienna City Council for Urban Planning, the new zoning category will primarily be used for the re-zoning of grassland into building land, but could also be used if a land owner is interested in re-zoning its property from commercial land into residential land.

The restrictions imposed by the new zoning category are not only raising legal concerns, in particular with respect to a possible infringement of property rights of the land-owners, they may also lead to a further shortage of building land for residential purposes.

We will provide an update on this topic once empirical data on the use and factual consequences of the new zoning category are available.

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CHSHCEE Belarus

Change of Real Estate Registration Procedure

Introduction

The restated version of the Law of the Republic of Belarus No. 133-Z dated 22 July 2002 "On the State Registration of Real Estate, Related Rights and Transactions" (the "**Real Estate Registration Law**") entered into force on 22 July 2018. It introduced some significant changes to the procedure for registering real estate, related rights and transactions.

Key Amendments

Authorized Proxy

It is now possible for a new subject – the authorized proxy – to be involved in the registration procedure. The role of the authorized proxy lies in providing services related to preparing relevant applications to be submitted to the real estate registration authority.

The following persons may act as the authorized proxy: advocates, notaries public, real estate agencies, and legal entities issuing documents that constitute the legal basis for registering real estate (for example, construction companies).

The authorized proxy is entitled to prepare applications on behalf of its clients, to collect the documents that form part of such applications, to make electronic copies of the collected documents, and to file the applications – together with the relevant documents – with the real estate registration authority. Such transfer has to be performed electronically.

Before commencing its activity, the authorized proxy must notify the National Cadastral Agency, which is the highest real estate registration authority in Belarus.

Optimization of the Registration Procedure

The registration procedure has been improved in two ways.

First, any registrar in Belarus is now entitled to certify the signatures of the parties on any documents related to the procedure for registering real estate, related rights and transactions regardless of the location of the real estate object (for example, a sale and purchase agreement with respect to an apartment in one city may be certified by a registrar in another city). Such certification has the same legal effect as certification by a notary public.

Previously, only registrars in the area where the respective real estate object is located were entitled to certify the above-mentioned documents. However, one should keep in mind that for perfection of a real estate transaction the documents certified by any registrar in Belarus must still be registered with the real estate registration authority at the location of the real estate object.

Second, the registration procedure has been shortened. Now it takes a maximum of five business days instead of seven.

Summary

The restated Real Estate Registration Law is a good step forward to simplifying existing registration procedures. It provides participants of the real estate market with an opportunity to obtain professional help by means of the newly established authorized proxy institution. Furthermore, the shortening of the registration procedure is hailed by the community as a very positive move.

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CHSHCEE Bulgaria

The main features of lease agreements under Bulgarian law and the effects of a share or asset deal on lease agreements

Obligations and Contracts Act

Both residential and commercial leases are governed by the Obligations and Contracts Act (OCA). However, leases are not mandatorily subject to the vast majority of the provisions of the OCA. Parties are therefore allowed to stipulate various contractual arrangements regarding operating costs, property modifications, termination, etc. One specific feature of Bulgarian law is that no separate rules exist in relation to commercial lease agreements.

Registration

Under Bulgarian law, lease agreements for real property with a term exceeding one year must be recorded in the Land Register administered by the Registry Agency. If they are not, such contracts do not have full effect vis-à-vis third parties such as subsequent acquirers of the property.

Term limitations

A lease agreement cannot be concluded for a term longer than ten years except in the case of commercial transactions, to which no time limitation applies. A commercial transaction is defined under Bulgarian law as a transaction entered into by a merchant that is related to its business.

Costs

Operating costs and costs for carrying out maintenance and repairs may be passed on to tenants based on an agreement between the parties. In the absence of such an agreement, the tenant is only required to bear costs related to normal use of the leased premises. The real estate taxes and waste disposal fees cannot be legally passed on to tenants. Even if it is agreed that the tenant will pay such charges, the legal obligation towards the municipality remains with the property owner.

Sublease

Unless otherwise agreed in the contract, the tenant may sublease the leased property (or parts thereof) without the consent of the landlord. However, the tenant is not discharged from its obligations under the lease agreement towards the landlord. The sub-lessee cannot have more rights than the lessee with respect to use of the leased property.

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Effects of an asset or share deal on lease agreements

The following rules apply in the case of an *asset deal* (where title to the leased property is transferred):

- If the lease agreement is recorded in the Land Register, it remains fully valid and binding on the property purchaser.
- If the lease agreement is not recorded in the Land Register but has a verifiable date (e.g. it is notarised), it will be binding on the transferee for the remaining term of the contract, but not for longer than one year from the date of transfer of the property.
- If the lease agreement is neither recorded in the Land Register nor has a verifiable date, it will be binding on the transferee, but only as a normal lease agreement with an indefinite term, which can be terminated by either party by giving one month's notice (i.e. contrary to any termination terms agreed between the parties which deviate from this).

In all of the cases set out above, the landlord is required to pay compensation to the tenant if the latter is deprived of the use of the leased property before the expiration of the lease term due to the transfer of the property.

Unless the lease agreement provides otherwise (e.g. a change of control clause), a share deal (where the shares of the entity holding the property are transferred) would generally have no effect on the lease agreement as the owner of the property legally remains the same (the company).

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CHSHCEE Czech Republic

Pre-emptive right relating to co-ownership and its consequences in practice

Until 31 December 2017, the pre-emptive right relating to co-ownership was significantly reduced and allowed co-owners to transfer their share to a third person almost freely, without restraint. However, as of 1 January 2018, the new amendment of the Civil Code changed the provisions regulating the pre-emptive right of co-owners in relation to property (real estate). From this date forward, a co-owner of a property has a pre-emptive right and thus the seller is required to offer its share to the other co-owner before offering it for sale to any other party.

The offer to the other co-owner has to be made, at the latest, when a purchase contract is concluded for a share of the property. The co-owner may exercise its pre-emptive right within three months of the offer. If the co-owner does not accept the offer within the above mentioned period or rejects the offer, the seller is entitled to sell it to a third party. If a share of the property is being transferred to a close person, such as a spouse, sibling, or child, the pre-emptive right does not apply. Co-owners are now entitled to waive the pre-emptive right with effect for legal successors. A waiver of the pre-emptive right must be recorded in the cadastral register.

If the seller breaches an obligation to offer its share to the co-owner, the purchase agreement ceases to be effective, i.e., the property is transferred back to the purchaser by operation of law and the co-owner is entitled to claim a transfer of the share. Therefore we recommend obtaining a prior written declaration of the rejection of the offer by other co-owners to avoid the consequences highlighted above.

The amendment of the pre-emptive right has caused some complications, particularly in relation to the sale of a residential unit together with a share in a non-residential unit (garage). In this case, the seller of the residential unit is obligated to offer its share of the garage to all other co-owners, and there could be dozens of co-owners. Such a procedure substantially prolongs the sale of a property.

There are some solutions which are applied in practice. The seller can raise the price for a share in a garage to avoid acceptance by other co-owners while the price for the residential unit is proportionately reduced. This way, the purchaser will not pay any extra and will obtain a residential unit together with the parking space.

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The argument was recently made that the pre-emptive right does not apply to a share of a garage selling together with a residential unit because both of them are in additive co-ownership according to the Civil Code. The main characteristic of additive co-ownership is a relation between two or more things, which have to serve a joint purpose and cannot be transferred separately. However, in our opinion the provisions regulating additive co-ownership do not apply to the relation between a residential unit and parking space. The reason for this is that a residential unit and parking space (represented by a share of a garage) can be used and transferred separately. We therefore consider this practice highly risky and believe it could give rise to consequences from the breach of the pre-emptive right.

We consider a waiver of the pre-emptive right as the safest legal solution to avoid the pre-emptive right in relation to selling a parking space together with a residential unit. However, we are aware that this might mainly help new development projects in which the developers are the sole owners of all units. A waiver of the pre-emptive right can be included in the purchase agreements or in the owner's declaration. A waiver of the pre-emptive right can be registered in the cadastral register and will be effective for subsequent co-owners.

The return of the pre-emptive right in relation to co-ownership under Czech law can give rise to many complications, particularly the prolongation of any acquisition of a share in property, affecting sellers and buyers alike. Co-owners do not have many options to avoid the pre-emptive right, and they have to complete the procedure of offering the share to other co-owners. For new development projects, we recommend that developers regulate the pre-emptive right by means of a waiver and register it in the cadastral register before the first sales take place. From the other side, the buyers of a share in property should require a written declaration confirming that the other co-owners have rejected the offer, particularly in relation to buying a residential unit together with the parking space located in a garage.

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CHSHCEE | Hungary

Tax-free Property Companies?

As part of a 2019 tax package, Hungary's Act CII of 2011 on Real Estate Investment Trusts was amended as of 26 July 2018. The goal of the amendment is to protect the interests of large investors and keep the property market going.

What is a Hungarian Real Estate Investment Trust ("HUN-REIT")?

A HUN-REIT is a special investment form that the government has attempted to make more attractive to investors in a variety of ways in order to encourage property investment and development. A HUN-REIT is defined as being a public company limited by shares that uses the funds it collects from investors to acquire, develop and operate real properties, and distributes the profits from its operations to its shareholders. At least 25% of a HUN-REIT's stock must be listed on the stock exchange.

What are the benefits of a HUN-REIT and what are the amended rules?

HUN-REITs have a preferred tax status, meaning they do not have to pay corporate tax or local business tax, and they only have to pay property acquisition tax at 2% when they buy real property.

Under the amendment, HUN-REITs will be allowed to pursue certain additional activities and issue a new form of shares namely shares with increased voting powers. Additionally, the dividend distribution rules have also been modified, giving more options to shareholders.

While HUN-REITs previously had to distribute at least 90% of their available profits as dividends, the amended rules now allow them to merely propose such a dividend distribution. The newly allowed shares with increased voting powers can offer an opportunity for shareholders to decide whether they want dividends to be distributed. This also means that small shareholders can no longer be certain that they will receive dividends even if the HUN-REIT in which they hold shares was profitable during the year in question. In other words, dividends previously had to be paid every year to small investors who held at least 25% of the shares, and the related taxes also had to be paid; from now on, however, dividend distribution can easily be avoided and taxes will not have to be paid as long as the profits remain within the company.

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What are the conditions for becoming a HUN-REIT and who can benefit from its special status?

A HUN-REIT will be registered by the national tax authority if it is a public company and provided it meets the requirements stated in Act CII of 2011, which are as follows:

- it has an initial capital of at least HUF 5 billion;
- it may only carry on certain specific activities (e.g. sale, purchase and renting of own real estate, property and facility management, etc.);
- insurance companies and credit institutions may not hold more than 10% of its shares;
- it may only issue ordinary shares, shares with increased voting powers and employee shares, where none of the shares can have preferred status with respect to dividend distribution;
- a part of the company's shares (representing at least 25% of the share capital) must be traded on a regulated market, and the company must ensure in connection with the relevant series of shares that none of the shareholders owns more than 5% of the total nominal value of its registered capital;
- its participation in subsidiaries is regulated;
- its management must propose to the AGM that at least 90% of the profits be distributed as dividends.

This form of operation offers an extraordinary opportunity for companies that are already active in the market if they meet the statutory requirements (particularly the requirement concerning initial capital) and are willing to accept a heavy administrative burden in exchange for tax breaks.

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CHSHCEE Romania

Procedure for adjoining plots in view of the creation of a consolidated plot and building permit for residential / retail / industrial development

Due to constant economic growth in recent years, the demand for medium to large plots of land has increased, with developers eager to start new projects.

Before the actual planning and construction phase, plots of land for the project in question need to be acquired. Usually, the target plot is made up of several smaller plots, which are registered separately in the land register and must be purchased separately from their current owners.

1. ADJOINING PROCEDURE

After all the plots required for the project have been acquired, it is necessary to start the technical and legal procedure for adjoining these plots. The adjoining procedure is composed of the following steps:

1.1 Submission of the following documents to the city hall of the locality where the land plots are located in order to obtain an adjoining urbanization certificate:

- Land register references for each plot to be adjoined;
- The consent given by the mortgage creditor (as the case may be);
- Copies of the owner's ID card (for natural persons);
- Trade register excerpt for the company and a copy of the representative's ID card (for legal persons);
- Sketches and blueprints of the properties (if any);
- Forms required for the receipt and opening of the new land book.

1.2 The Office of Cadastre and Land Publicity will issue an admission/rejection report. If the report is admitted, a new cadastral no. for the resulting plot will be assigned. The adjoining of plots will be technically finalised at this point.

1.3 Regarding the act of adjoining, the owner (owners) will have it authenticated by a notary public.

1.4 Based on the above mentioned documents, the Office of Cadastre and Land Publicity will order the registration by adjoining the newly formed plot. The newly formed plot will also receive a new land book number.

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The procedure for adjoining plots will take at least 30 working days (including the deadline for issuance of all documents in accordance with Law No. 7/1996 republished (Law on Cadastre and Land Publicity), Law No. 50/1991 republished (regarding the authorization of execution of construction) and Law No. 350/2001 on land and urban planning).

Usually after the adjoining procedure, further parcelling/plotting of the target land is required to form project specific plots (i.e. in parcels for each housing unit, access roads and recreational/green area, for residential projects; parcels for the main store/stores, utilities, access roads, parking spaces and green areas for retail projects; parcels for industrial buildings/facilities, office buildings, technical buildings, deposit areas, parking areas and access roads for industrial projects). In this case, if more than three parcels are required, it should be noted that a Zonal Urban Plan (PUZ) is mandatory and it must be elaborated by the developer. The Zonal Urban Plan (PUZ) is a plan that includes specific detailed regulations of the urban development of an area in the locality (covering all functions: housing, services, production, circulation, green spaces, public institutions, etc.) and ensures the correlation of the complex urban development of the area with the provisions from the General Urbanistic Plan (PUG) of the locality to which it belongs. The PUZ establishes the objectives, actions, priorities, urbanization regulations (permissions and restrictions) to be applied in the use of land and conforming the constructions in the studied area (PUZ represents a precursor to the realization of the investments, the provisions of which will be fulfilled gradually in time, depending on available funds; i.e. first the access roads, then utilities, buildings, green areas, public buildings/spaces, etc.).

Based on this PUZ, an urbanistic certificate can be issued. The Urbanism Certificate is a public document issued by the local public administrative authorities, which discloses to the applicant the elements that characterize the legal, economic and technical regime of a building, established by the existing records, the planning and spatial planning documents - for example: the characteristics of the area where the site is located, the urbanistic requirements to be met (maximum height of the building, the percentage of land occupied by the building, withdrawals from the property limit, etc.), as well as the list of approvals and agreements necessary for the building permit. This certificate is required for the parcelling procedure and for registration with the Office of Cadastre and Land Publicity.

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2. BUILDING PERMIT

The procedure for obtaining the building permit can start following the adjoining procedure. Construction works are allowed only on the basis of a building permit, as regulated by Law No. 50/1991.

2.1 In the case of residential projects, a building permit needs to be obtained for each individual unit, in respect of which the following documents are necessary:

(a) the urbanism certificate;
(b) proof of ownership of the plot and/or buildings constructed thereon or, as the case may be, the updated cadastral plan reference and the updated land book reference, if the law does not provide otherwise;
(c) the necessary legal approvals and authorisation established by the urbanism certificate;
(d) the project for authorizing the execution of construction works;
(e) proof of payment of legal fees.

2.2 In the case of industrial/retail projects, in addition to the documents specified under 2.1 above, the Prior Authorisation of Opportunity to draw up a Zonal Urban Plan (RO: PUZ) must be obtained.

In order for the opportunity authorisation to be drawn up by the specialized body, conducted by the chief architect of the municipality and approved by the Local Council, it is necessary for the following documentation to be submitted:

1. Application regarding the applicant's intention;
2. Urbanism Certificate requesting prior authorisation of opportunity, accompanied by building framing plan and existing situation plan issued by the City Hall;
3. Informing and consulting the public about the intention to develop the PUZ;
4. Documentation to sustain the issuance of the opportunity authorisation.

The opportunity authorisation, drawn up by the specialized body, conducted by the chief architect, will determine the following:

- Territory to be regulated/studied through the Zonal Urbanistic Plan, highlighting the urban zones, non-urban zones, public property zones and private property zones;
- Functional development categories and existing encumbrances.

The documentation submitted to the City Hall Registry in order to obtain the opportunity authorization, will be drafted and signed by qualified professionals, licenced and/or accredited according to the law, in the corresponding field.

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For approval of the PUZ, this documentation will be subject to approval by all interested institutions and bodies provided in the urbanism certificate and will be drawn up in accordance with the guide on the Methodology on Drafting the Zonal Urban Plan approved by the Ministry of Public Works and Territorial Arrangements No. 176/N/16- 08- 2000, including consultations with the population.

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CHSHCEE Slovak Republic

Termination of a lease in the event of a change of property owner

The Slovak Civil Code establishes that a lessee has a right to terminate a lease in the event of a change of the owner of the leased property, even in the case of fixed-term contracts. According to a ruling of the Supreme Court of the Slovak Republic, this termination right also applies to a lease of non-residential premises. Parties are therefore advised to take this legislation into consideration when entering into commercial transactions.

Legal regulation

According to Article 9 Section 3 of Act No. 116/1990 Coll., on the Lease and Sublease of Non-Residential Premises ("Lease Act"), a lessee may terminate a lease agreement concluded for a definite period of time by giving written notice prior to the end of its term in the following instances:

(a) loss of the qualification that entitled the lessee to carry out the activity for which the non-residential premises were leased (e.g. if the lessee loses the licence for conducting banking business, the lessee may terminate the lease);
(b) the leased premises become unfit for the agreed purpose, for which the lessee is not to blame;
(c) the lessor grossly breaches its duty to keep the leased premises in a good condition and fit for the agreed purpose.

According to Article 680 Section 3 of the Act No. 40/1964 Coll. ("Civil Code"), in the event of a change of ownership, the lessee (and only the lessee) may terminate the lease agreement for this reason, even if the agreement was concluded for a definite period of time; in such a case the lessee must, however, terminate the agreement by giving written notice during the next termination period if such a period is stipulated under the agreement or laid down by law.

Significant remarks

In relation to the Lease Act, the Civil Code constitutes a general regulation (lex generalis), whereas the Lease Act is a special regulation (lex specialis). The principle of lex specialis derogat legi generali applies to the relation between a general legal regulation and a special legal regulation where both regulations are of the same legal force and neither is superior to the other and, therefore, if a special regulation provides a different regulation of the same matter, the special regulation prevails. Lex specialis does not invalidate lex generalis; it only excludes its application on the matter

regulated in both regulations. In this context, it should be stated that the Lease Act does not specify any legal consequences for a change of owner and, therefore, according to the above-mentioned principle and in compliance with the case-law, the Civil Code applies to those legal relations not covered by the Lease Act.

Although there is a contradiction in the interpretation of the absolute applicability of Article 680 Section 3 of the Civil Code, according to the prevailing opinion, which is supported by the case-law, a lease agreement concluded for a definite period of time can be terminated by the lessee in the event of a change of the real estate owner. In practice, the application of the respective provision of the Civil Code is frequently excluded by the parties in lease agreements. The prevailing opinion is that excluding the application of the provision is possible and in compliance with the law, as Article 680 Section 3 of the Civil Code is of a dispositive nature and, therefore, the parties may by their agreement exclude its application to their legal relationship.

Conclusion

A lessee's right to terminate a lease in the event of a change of owner has a significant impact on commercial transactions and renders asset deals highly problematic. For this reason, before any such commercial transactions are executed, it is highly recommended that the provisions of a lease agreement be reconsidered and amended accordingly to avoid any negative consequences.

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