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CHSHCEE Austria

Austrian Supreme Court Ruling on Cash Pooling

Cash pooling is an important instrument for group financing. It makes it possible for the surplus liquid funds of a group of companies to be bundled together and made available to the companies of the group should they need it. The principles of capital maintenance (e.g. the ban on the retransfer of equity) must always be taken into account when designing cash pooling agreements.

Against this backdrop, the Austrian Supreme Court recently issued a decision that dealt with the issue of cash pooling for the first time (17 Ob 5/19 p).

The case concerned a cash pooling agreement concluded within a group of companies, involving a Dutch bank, a Dutch parent company as coordinator and other European subsidiaries. The way in which the agreement was designed gave rise to what is known as "notional" cash pooling, which is characterised by the fact that no liquidity is actually transferred between the participants' pool accounts; instead, the balances of all participant accounts are merely netted – purely in accounting terms – against each other and combined into a joint settlement account. As security, the participants pledge all present and future claims in connection with the pool account to the bank.

After the bank lost confidence, it initially decided to terminate the agreements with the participating subsidiaries, including an Austrian GmbH, and demanded that the parent company balance the participants' accounts. The parent company did not comply with this demand. Subsequently, the bank also terminated the agreement with the parent company, exercised its pledge over the bank accounts and offset the total balance of the participants' accounts against the Austrian company's account balance (approximately EUR 2 million). Insolvency proceedings were opened over the assets of the Austrian company.

Having regard to the ban on the retransfer of equity prohibited under Austrian capital maintenance rules, the court-appointed insolvency administrator sought repayment of the balance debited by the bank.

The question which the Supreme Court had to rule on was whether the defendant, the bank, could be held liable for a breach of the capital maintenance rules.

In the Supreme Court’s decision, it was not definitively clarified whether the

specific design of the agreement was admissible, especially in terms of the requirement to provide security addressed by the Supreme Court in its ruling. In any case, what is paramount for reviewing such cash pooling agreements is not so much the question of whether they were concluded in line with the arm's length principle (as such agreements are hardly ever concluded with external entities), but rather whether such agreements have a corporate benefit from the perspective of the participating entity.

On the question of what effect the ban on the retransfer of equity has also had on third parties – such as the bank in this case – the Supreme Court took the following position: The company and its shareholders are subject to the ban. Agreements under which only one of the parties is subject to the ban therefore remain valid. A general investigation and verification obligation for third parties only exists where there might be a risk or suspicion of abuse. In the case in question, the defendant cannot be accused of anything of such an obvious nature, especially since it is not apparent that the defendant had any knowledge of the internal arrangements within the group.

The bank was hence justified in enforcing its security interest and it does not need to return the balance.

The key finding from this first decision of the Supreme Court on cash pooling is that it is possible for cash pooling agreements to be designed in such a way that they are in conformity with the law, particularly in light of the Austrian law rules on capital maintenance.

However, it all depends on the specific construction and on this the ruling of the Supreme Court contains important information.

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CHSHCEE Belarus

Expansion of Online Gambling Business Opportunities

On 1 April 2019, Edict No. 305 of the President of the Republic of Belarus dated 7 August 2018 "On Improving the Legal Regulation of the Gambling Business" (the "Edict") entered into force in full. The Edict adopted the Regulations on the Specifics of Licensing Gambling Business Activities and the Regulations on Gambling Business Activities.

Key novelties for online gambling business

Only online betting and pari-mutuel betting were permitted in Belarus before the Edict entered into force.

It is now possible to operate a virtual gambling house. The following online games are now allowed in addition to the previous ones: card games (e.g. poker), slot machines, and bingo (i.e. games of chance). Furthermore, players can now play offline games in a casino remotely via live webcast.

A gambling operator must first obtain the requisite license to operate a virtual gambling house. There is a transition period ending on 1 April 2021 for those gambling operators which offered virtual betting and pari-mutuel games before 1 April 2019 on the basis of an offline gambling license. Until then they can offer those two online gambling activities under their existing license.

There are a number of licensing requirements that the operators of a virtual gambling house must satisfy. The key requirements are as follows:

- A prospective operator of a virtual gambling house must run an offline gambling business in Belarus for at least two years before applying for a virtual gambling license;
- A prospective operator of a virtual gambling house must open a special bank account and maintain a certain amount of funds on the account. In the event of the insolvency of the gambling operator, the money from the special account can be used for the payment of taxes, penalties, and winnings.

Under the new regulations, the minimum gambling age (including online gambling) is 21 (compared to 18 under the previous regulations). Every virtual gambling house is required by law to check the identity of its clients. This check can be performed by using a webcam to compare the player's appearance with an electronic copy of his/her ID.

The Belarusian tax authorities will also keep a close eye on the operators of

virtual gambling houses with the aid of a special payment control system that enables all transactions to be monitored.

Summary

The Belarusian authorities intend to make Belarus a popular jurisdiction for gambling and are trying to keep pace with new technologies and trends. By regulating online gambling, the government has significantly expanded gambling business opportunities. This legal development is undoubtedly welcomed by the Belarusian business community.

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CHSHCEE Bulgaria

Amendments to the Personal Data Protection Act

In February, the Bulgarian Parliament adopted amendments to the Personal Data Protection Act (Act). The amendments aim to bring the Act into line with the rules enshrined in the EU General Data Protection Regulation (GDPR) and to further elaborate some GDPR provisions.

Below we outline certain important rules introduced by the Act.

Obligations for employers

Employers are required to adopt special internal policies in case they (i) operate a whistleblowing system, (ii) impose restrictions on the use of company resources, or (iii) use systems for access control, control of working time, and labour discipline.

Employers are also required to define and apply a retention period for the personal data of job applicants. This period may not be longer than six months unless the respective candidate has provided consent. In general, after the respective period expires the employer must delete or destroy the documents containing the personal data of applicants. In addition, if in the course of a selection procedure the employer has requested originals or notarized copies of documents evidencing the physical or mental fitness of the respective candidate, his/her qualifications, degree, or length of service, the employer must return such documents to those data subjects who have not been hired within six months of the completion of the hiring process.

Copies of ID

Controllers and processors are not allowed to make copies of identification documents, driving licenses and documents evidencing residence entitlement, unless this is explicitly provided by law. Therefore, the copying of ID documents is prohibited except in the context of certain limited activities (e.g. for the purposes of compliance with anti-money laundering legislation).

Excessive personal data

Where a data controller (or data processor) receives personal data from an individual without there being a legal basis for receiving such data or in contradiction of data protection principles, the controller is required to return such data within one month. If returning the data is impossible or requires disproportionate effort, the controller is under an obligation to erase or destroy it.

Child's consent in relation to information society services

In relation to offering information society services directly to a child, the processing of personal data based on the child's consent is lawful under the GDPR where the child is at least 16 years old. Member States are allowed to set a lower age limit provided the child is not under 13 years of age. In this regard, the age introduced by the Act for Bulgaria is 14 years.

In addition, the Bulgarian Commission for Personal Data Protection is expected to adopt secondary legislation and further guidelines on certain data protection matters.

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CHSHCEE Czech Republic

The new EU framework for screening foreign investment is now in force

The EU framework for screening foreign direct investment (FDI) came into force this April. The new mechanism is intended to coordinate the review conducted by Member States of FDI coming from outside the EU with respect to possible security and public order risks. It can be expected that a number of Member States will introduce their own domestic screening systems for FDI before 2020 when the new screening mechanism will become operational.

Current status of FDI control in the EU

Currently, 14 Member States have national screening mechanisms in place. They are Austria, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Spain, and the United Kingdom. However, individual national mechanisms differ in their design and scope.

Therefore, the new EU mechanism intends to converge national policies, establish coordination and communication means and also make sure that the relevant threats are taken seriously. Indeed, there have been a number of cases in recent years where foreign investors, mostly from China, pursued very aggressive purchasing policies in relation to advanced technological companies in Europe, such as semiconductor firms and the producers of industrial robots. Some of these transactions were blocked by the national screening mechanisms in Europe as well as, due to connections to the US defence industry, by the US mechanism called CFIUS, which has been screening FDI since the 1970s. In general, FDI control has been becoming stricter in a number of jurisdictions in recent years, for example in Germany, Australia and the US.

The new EU screening mechanism

Under the new framework, which takes the form of an EU Regulation, Member States are allowed (though not obliged) to introduce domestic mechanisms for reviewing FDI, most importantly to establish whether the investment by the foreign entity threatens security or public order, especially regarding key infrastructure and technologies and EU projects. At the same time, the Regulation set certain requirements for Member States in this area, such as transparency, security of confidential information, non-discrimination, and availability of legal remedies for foreign investors. Member States are also required to provide relevant information to the Commission

and to other Member States on screened investments.

On the other hand, the Commission and Member States will be allowed to request additional information and provide comments, while the reviewing Member State must give "due consideration" to those comments, although it will have the final word. Moreover, the Commission will be allowed to issue opinions when an investment could pose a threat to European infrastructure, programmes or an EU project, such as Galileo or Horizon 2020.

With respect to the details, the new Regulation will surely be analysed and commented on in detail in the coming months. One of the key terms is "foreign direct investment", which is defined as covering cases of an investment aiming to "establish or to maintain lasting and direct links" between the foreign investor and the entrepreneur. This will inevitably be subject to intense scrutiny. When compared to the test of "control" under the EU Merger Regulation, it seems to imply a lower threshold.

Further, the key issue will be the criteria under which the investment and the investor will be evaluated. The factors that may be taken into consideration in determining whether FDI is a threat are very broad. The Regulation mentions, for example, the possible influence of the investment on "critical technologies", "access to sensitive information", and "the freedom and pluralism of the media". Furthermore, consideration will also be given to whether the investors are, for example, "directly or indirectly controlled by the government of a third country" and "whether there is a serious risk that the foreign investor engages in illegal or criminal activities". These broad criteria are likely to give rise to intense debate over the next few years.

Next steps and challenges

The new EU legislation establishing the screening framework has now entered into force. Member States and the Commission will have 18 months to put in place the necessary arrangements for the application of this new mechanism. Work has already started on establishing a group of experts within the Commission.

However, the challenges related to the new mechanism lie ahead. Experience with the US system CFIUS shows that national security issues are highly political and it might prove virtually impossible for Member States to abide by the principles set by the Regulation, such as transparency, non-discrimination, and availability of legal remedies. For example, is it possible to share relevant information gained by the national intelligence services in a transparent way? Is it possible to treat every investor without discrimination? For example, in the case of investors from China and the US. Also, is it possible to allow transparent procedures at courts in certain cases of sensitive investments?

Conclusion

The new framework is not an independent, fully-fledged FDI regime, but establishes a cooperation and information sharing mechanism to ensure coordination among EU Member States. It can be expected that several Member States will establish their own domestic screening mechanism in the next two years (as is already intended for example in the Czech Republic) and the whole EU-wide system will become operational in 2020.

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CHSHCEE Hungary

Major changes regarding copyrights in construction documents and the legal consequences of employers' payment delay

Two important changes have recently been made to the regulations concerning construction projects which have relevance for businesses involved in realising such projects.

Copyrights in construction documen ts

Effective from 31 December 2019

The new regulation addresses an issue that has been well-known to practitioners in the Hungarian construction industry. The background to the problem is that copyright protection of architectural designs, and the buildings constructed on the basis of such designs, is incredibly extensive under Hungarian law, which often catches international investors by surprise. Thus, the use of architectural works in the copyright sense has often involved practical difficulties in Hungary, particularly if an alteration of the works (i.e. renovation/rebuilding) became necessary. This issue has therefore necessitated an adequate solution for a long time, and it appears that the Hungarian legislature has made a significant step towards clarifying this matter.

The most tangible practical consequences of the changes include the introduction of the 'Register of Construction Copyrights'. The amendment of the relevant copyright law states that in the absence of an indication on the construction document to the contrary, the copyright holder is presumed to be the person listed in the register. Under a related important new regulation, the employer and the designer are required to submit a joint declaration to the entity keeping the Register of Construction Copyrights about the holder(s) of copyrights in the architectural and technical documentation and in the building itself.

Administrative legal consequences of payment delay

Already in effect (since 12 February 2019)

The other legislative development may represent a major issue for employers, as a certain payment delay by an employer can now serve as the basis for the decision of the authorities to block an ongoing construction.

The mandatory reliance by employers on construction trustees as payment intermediaries has been a source of uncertainty ever since its introduction in 2009. The original function of the construction trustee was to securely handle and transfer the fees owed to

contractors in a construction project (i.e. payment does not directly flow between the employer and the contractor) and potentially block the funds if a dispute with a subcontractor is reported to it. Currently, a construction trustee is required to be involved in a construction project if (i) it does not fall under the rules of public procurement and (ii) the value of the works exceeds EUR 5,548,000 calculated on the basis of a statutory formula.

Failure to involve a construction trustee despite the existence of the statutory conditions has been considered a grave infringement in itself and has thus been regarded as the basis for stopping the ongoing works by the construction authority since 2016. This authorization has however been extended in recent legislation. Under the newly-introduced provision, if the construction trustee submits a report to the construction authority stating that an employer has failed to provide the funds required under the construction contract within 30 days of the deadline specified in the contract, the construction authority will order the cessation of the construction works until such time as the infringement is remedied.

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CHSHCEE Romania

Competition Aspects - Prices on Foodstuffs Market

In its report for 2018, the Romanian Competition Council (RCC) has paid special attention to the food sector due to the high number of food products in the shopping baskets of Romanian consumers.

One of the tools used by the RCC to monitor the evolution of the specific markets on which such products are sold is the Monitor for Food Prices, which received a limited launch in November 2016. The objective of the tool is to provide information on food prices, helping consumers to make an informed choice and helping to improve competitiveness on the specific market. Considering the success of the project, the RCC will expand the tool at the national level to cover all foods.

Following an investigation which ended in 2018, the RCC has imposed penalties on seven companies active on the market (three retailers and four suppliers) totalling LEI 87,713,336 (approximately EUR 18.8 million). In the wake of the investigation into price-fixing between retailers and their suppliers during 2010-2016, the sanctions were applied for violations of both national and European competition rules when setting the resale prices for retailer promotions.

The RCC concluded that in some cases the shelf prices of products were not determined in accordance with market rules (i.e. supply and demand). Instead, the supplier and retailer set a fixed or minimum price for the resale of the products to the end customer. The RCC took the view that this practice results in higher prices for the end customer, with the retailer being unable to decrease the price below the limit imposed by the supplier.

This is the second investigation conducted by the RCC, finalized with sanctions, in the food sector. In 2015, the RCC imposed fines amounting in total to approximately EUR 35 million on several retailers and their suppliers for price-fixing between 2005 and 2009.

The food chain industry represents a complex series of inter-related markets where large multi-product retailers have an important role. Thus, to guarantee the overall functioning of the food sector it is essential to ensure competition at different stages of the supply chain. Concerns over competition may relate not only to the issue of selling power, but also to the issue of buying power which can occur in vertical relations at any stage of the food supply chain. All these concerns are considered by a competition authority with a view to avoiding a situation where

high prices are paid by end customers and low prices paid to producers.

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CHSHCEE
Slovak Republic

Amendment of the Slovak Labour Code

(Act No. 311/2001 Coll.)

Under Section 13 (5) of the Labour Code, as amended by Act No. 376/2018 Coll. (indirect amendment of the Labour Code) effective as of 1 January 2019, **"employers must not impose on employees an obligation to maintain confidentiality about their working conditions, including wage conditions and conditions of employment".**

Wage conditions are defined in the Labour Code (Section 119 (3)) as (i) any and all fulfilments provided for work and (ii) the conditions of its provision. Wage is defined by the Labour Code (Section 118 (2)) as a fulfilment provided by the employer to the employee for work, whether it concerns a monetary fulfilment or a monetary value fulfilment. Referring to the wording of Section 119 (3) of the Labour Code, the wage may have different forms and/or components, e.g. the wage is usually divided into a basic wage component and other wage components. Additional (other than basic) wage forms may be, for example, bonuses, rewards/extra rewards, performance rewards, personal valuation, personal bonuses, commissions and the like.

In light of the above and for the purposes of interpreting Section 13 (5) of the Labour Code, it is not – in our opinion – possible to narrow the concept of "wage conditions" only to the basic wage of an employee. In addition to the employee's basic wage, the term "wage conditions" must also include any and all other components and forms of wage provided by the employer to the employee for work. Thus, in our opinion, the abolition of confidentiality also applies to employees in positions with "individual bonuses" or "variable rewards".

If, after 1 January 2019, the employment contract or agreement for work performed outside the employment relationship or another agreement between the employer and the employee (irrespective of when the contract or agreement was concluded) contains a clause (provision) stating that the employee is obliged to keep her/his working conditions confidential, including wage conditions and conditions of employment, the following applies:

1. Pursuant to Section 43 (4) of the Labour Code, such a clause is invalid because it conflicts with legal regulations, namely because

of the conflict with Section 13 (5) of the Labour Code.

2. The respective amendment of the Labour Code does not explicitly impose an obligation on the employer to remove such a clause from the employment contract or from an agreement, for example by concluding an amendment with the employee by which the clause would be removed.
3. However, the Labour Code gives the employee the following options:
   a. the right to file a complaint with the employer regarding its failure to comply with the conditions set out under Section 13 (5) of the Labour Code (Section 13 (6) of the Labour Code), and
   b. the right to apply in court for legal protection if the employee is of the view that the employer has not respected the conditions under Section 13 (5) of the Labour Code (Section 13 (8) of the Labour Code).
4. Pursuant to Section 19 (1) (a) in connection with Section 2 (1) (a) subparagraph 1. of Act No. 125/2006 Coll. on Labour Inspection, as amended, the respective Labour Inspectorate is authorized to impose on the employer a fine of up to EUR 100,000 for breach of an obligation under the Labour Code, i.e. including breach of a duty under Section 13 (5) of the Labour Code. If such a clause has been concluded on or after 1 January 2019, it will most likely constitute a violation of labour law regulations by the employer where the imposition of a fine cannot be excluded. If such a clause was concluded prior to 1 January 2019, a violation of labour law regulations is at least disputable and challengeable in this respect.

In view of the above, we recommend as follows:

1. Such a clause should be removed from all employment contracts, agreements for work performed outside the employment relationship and from any other agreements concluded with employees preferentially and as soon as possible from agreements concluded on or after 1 January 2019 and subsequently, for reasons of legal certainty, also from agreements concluded before 1 January 2019.
2. We recommend that such clauses be removed by concluding a written amendment to the employment contract or other agreements entered into with an employee, which deletes the clause in question from the employment

contract or from another agreement. We recommend that the amendment be prepared by the employer and offered to the respective employee in a provable form (preferably in writing or at least with the participation of a witness) in case the employee refuses to conclude such an amendment (note: the employee is not obliged to conclude such an amendment; if the employee refuses to sign it, the employer needs to have relevant evidence of this fact in order to be able to defend itself, if needed, before the employee/court/Labour Inspectorate).

3. We do not recommend the inclusion of such clauses in new employment contracts, agreements for work performed outside the employment relationship or other agreements with an employee.

If after 1 January 2019 there is a provision in any internal regulation of the employer stipulating that the employee is obliged to maintain confidentiality about her/his working conditions (including wage conditions) and the conditions of employment, given what has been stated above, we also recommend the deletion/removal of such a provision by an unilateral change of this internal regulation by the employer.

In case you need any assistance with respect to any potential actions as recommended or in case of any uncertainties or questions, please contact us.

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Republic of Moldova

New rules on the use of drones in the Republic of Moldova – as seen from the perspectives of aeronautical security and personal data protection

Introduction

The number of drones and their use is steadily increasing. Drones are becoming more accessible and their technical characteristics are becoming more and more advanced. Currently, the popularity of drones is growing in the field of photo services, entertainment, logistics, surveillance as well as the security of civil and industrial buildings, agriculture, etc. The popularity of using drones has given rise to a number of challenges and risks, such as aeronautical security, compliance with the laws on the right to private life, environmental protection, data protection, and liability for damage. The Air Code of the Republic of Moldova, which regulates the use of unmanned aircraft, became effective on 23 March 2019.

The regulation of aeronautical security

The Air Code of the Republic of Moldova transposes the European civil aviation standards into national legislation, and the Civil Aeronautical Authority must implement the European rules for the establishment of national regulations.

The Air Code of the Republic of Moldova expressly introduces the concept of an unmanned aircraft vehicle which is deemed to be an aircraft guided either by an automatic pilot or by remote control from a ground control center or other human-piloted aircraft vehicle.

According to the new regulations, each aircraft must have a registration certificate issued by the administrative authority for the enforcement of the civil aviation policies, containing civil aircraft identification data. By way of derogation from the general rules, which stipulate that the registration certificate will be kept permanently onboard the aircraft, Article 19 para. 6 of the Air Code of the Republic of Moldova provides that, in the case of unmanned aircrafts, the registration certificate must be permanently held by the person operating the aircraft by remote control.

According to Article 33 and Annex no. 2 of the Air Code of the Republic of

Moldova, flights may be performed without the prior permission of the administrative authority for the enforcement of civil aviation policies only in certain cases. An exemption is provided for flights of unmanned aircrafts weighing up to 150 kg in expressly reserved areas.

Article 4 b) of the Law on Airspace Control provides that the airspace of the Republic of Moldova must be used on the basis of written permission issued by the Civil Aeronautical Authority, and for Moldovan civil aircrafts performing aerial photography and filming of the national territory, with the mandatory approval of the Ministry of Defense and the Intelligence and Security Service.

Personal data protection

Using drones may also involve processing a substantial volume of personal data such as images, voice, geolocation, and other data. The risks are high due to the fact that drones may be equipped with modern sensors, may have enhanced storage and transmission capacity, the processing is digitalized, and the information on the identity of the operator and the purpose of the processing is most often unknown to the personal data subject.

Therefore, if the use of a drone involves the processing of the data of an identified or identifiable natural person, this falls under legislation on personal data protection.

In the Republic of Moldova, Law No. 133 of 8 July 2011 is deemed to be the fundamental legal document relating to personal data protection. Accordingly, while processing personal data, the operator is entitled to comply additionally with the principles of processing personal data, has to observe the rights of data subjects and the privacy and security measures for the personal data processing.

In order to comply with the legislation on personal data protection, it is necessary to implement the principle privacy by design and privacy by default, as stipulated by Article 25 of the General Data Protection Regulation (GDPR). In the Republic of Moldova, this principle is not reflected in legislation. Nevertheless, in the draft amendments to the Law on the Protection of Personal Data, passed in the first reading in the Parliament of the Republic of Moldova, the provisions on privacy by design and privacy by default precisely transpose the provisions of the Community acquis.

Conclusions

Drones could be and are used for a wide range of applications. The use of drones can represent a significant economic advantage, allowing the user to have an impact on economic efficiency and competitiveness, and could directly and indirectly contribute to the creation of new jobs. At the same time, it is necessary to follow the new legislative amendments in the field of air as well as

the fundamental people's rights. In this respect, a well-defined legislative framework can contribute to increasing the country's economy, respecting human rights and attracting investment.

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