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Keep up to date with the latest legal developments in Austria, Belarus, Bulgaria, the Czech Republic, Hungary, Romania and the Slovak Republic with our CEE newsletter.

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Slovak Republic	**The differences between directors and procuration holders mean they may no longer act jointly on behalf of a company** In a recently issued judgment, a court ruled that it is unlawful for a director and a procuration holder, who have hitherto jointly signed on behalf of the company, to represent the company as it is in conflict with the Slovak Commercial Code. Jozef Bannert summarises the decision and its consequences. **>> Read full article**

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Austria

Recent decision of the Austrian Supreme Court in relation to group of companies

Austrian corporate law in relation to group of companies is, in contrast to corporate law in general, not thoroughly codified. Therefore, it is mostly derived from case law and from time to time the Austrian Supreme Court (OGH) provides valuable guidance. With a landmark decision of 25 November 2020 (6 Ob 209/20h) the Supreme Court has issued a ruling which affects several aspects of the corporate governance of groups:

- The Supervisory Board of a topco (in the case at hand in the form of a stock corporation – *Aktiengesellschaft*) is responsible for the supervision of the topco management. Since the group management qualifies as a management duty of the topco management board (pursuant to Sec 95 para 1 of the Austrian Stock Corporation Act), the supervisory board has to supervise not only the management board's activities in relation to the topco but also the management board's activities in relation to all group companies. The supervisory board is, therefore, responsible for the supervision of the entire group and has to keep an eye on the development of subsidiaries / group companies insofar as those are of material relevance for the entire group. In this regard it can make use of informational rights and consent requirements customary in Austrian law governed statutes and rules of procedure. Additionally, the supervisory board has to ascertain whether and what control and supervisory measures the topco management board would need to implement to being able to effectively manage the group.
- As Austrian corporate law is strict on the separation of legal entities, the topco's Supervisory Board cannot expand its activities to all subsidiaries but is limited to supervise topco's management board. The Supreme Court confirmed the general opinion among Austrian lawyers that a direct control of subsidiaries by the Supervisory Board – either through reporting requirements, the introduction of consent requirements, the appointment or dismissal of board members – is not permissible.
- From the perspective of a subsidiary and it's management board a consent of the supervisory board of the topco need not be obtained. However, the managing board could be required to obtain the consent of its general assembly which in – in a simple group structure – could be represented by the management board of the topco. In this simplified structure, the supervisory board of the topco could require the topco management board to obtain approvals for certain measures. In complex, multilayer corporate structures approvals would have be sought at every level of the group. It is the responsibility of topco's management board to implement corporate approval requirements in its subsidiaries, thereby taking into consideration the legal and economic requirements. For example, approval thresholds could be modified at the corporate levels so that the threshold at the low level subsidiaries would be much lower than higher up in the group, thereby aligning the consent requirement with the group relevance.

For groups with rather complex, multilayer structures, the Supreme Court decision and the clarifi-

cations provided therein should be used as an opportunity to review the existing corporate governance. In particular, consent requirements at each level of the corporate structure as well as informational rights require a thorough analysis and adaptation, if, for example, direct consent requirements of the topco are provided for.

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Belarus

New advertising regulations in Belarus

Introduction

The current Law of the Republic of Belarus "On Advertising" was amended on 4 January 2021. The amendments come into force on 8 July 2021.

The key points of the new regulations

Under the amended advertising regulations, it will henceforth be possible to use foreign languages in the names of cultural and sporting events as well as in the names of different competitions, awards, and sports teams.

The ban has been lifted on using foreign companies and foreign citizens and their identities to advertise goods manufactured in Belarus. Previously, for example, it was unlawful to use pictures of foreign celebrities to advertise Belarusian goods.

At the same time, a ban on increasing the sound volume of television advertising during the regular TV programming schedule was introduced.

The advertising of tobacco and other nicotine-like substances was liberalized a little. Under the amended regulations, such products can be advertised via the websites of manufacturers and official importers in Belarus.

In addition, the authorities have introduced regulations requiring advertisers to stop sending advertisements to private mailboxes upon the first demand of the relevant recipient, coupled with a ban on advertising via telecom networks (including landline phone and fax communications, electronic mail, and cellular networks) without the prior written consent of the recipient.

Summary

The amended advertising regulations, on the one hand, are opening up the Belarusian advertising market to foreign players and, on the other hand, are keeping up with international privacy standards.

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Bulgaria

Forthcoming amendments to the Bulgarian Protection of Competition Act

The Bulgarian Commission on the Protection of Competition ("CPC") recently proposed draft legislation to amend the Protection of Competition Act. The planned changes are primarily aimed at transposing *Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market* (the "**ECN+ Directive**") *and Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.* The draft further introduces certain best practices established at the EU level and modifies the existing rules on the abuse of a superior bargaining position. The key elements of the proposal are summarized below.

A new standard for merger control

The draft proposes the adoption of the SIEC (significant impediment of effective competition) test for merger control. Currently, the CPC applies the so-called dominance test, thus assessing whether the merger would lead to the creation or strengthening of a dominant position which would significantly impede effective competition on the respective market. The shift towards the SIEC approach is in line with the practice of the European Commission and most Member State competition authorities. It would extend the powers of the CPC to refuse authorization for a merger when a significant negative effect to the competition is likely to occur, without necessarily establishing dominance of the entity on the respective market.

Extended powers of the Bulgarian Competition Authority

If the proposed draft is adopted, the CPC will have the power to carry out dawn raids in non-business premises and vehicles, including in the homes of company directors, managers and employees, if there is reasonable suspicion that relevant business documents of the undertaking being inspected are stored there. In addition to investigating cartels, abuse of dominance and merger control cases, dawn raids can also be carried out in relation to unfair trade practices in the agricultural and food supply chain.

Parental and successor liability

The proposed amendments extend the personal scope of liability for competition law infringements to prevent liability avoidance by way of mergers and corporate restructuring. In particular, the CPC would be able to impose sanctions on the infringer's controlling entity and on any legal or economic successor of the infringing undertaking.

New rules on unfair trade practices in the agricultural and food supply chain

The proposed rules largely transpose Directive (EU) 2019/633, which aims to prevent buyers in the agricultural and food supply chain from exploiting suppliers because of suppliers' typically weaker market position. Subject to certain exceptions, and depending on buyers and suppliers turnover thresholds indicated in the directive, a prohibition is introduced to the unfair trading practices listed in the directive, such as payments later than 30 days for agricultural and food products, short-notice cancellations of perishable agricultural and food products, unilateral changes to the terms of the supply agreement, etc. The pro-

posed amendments however go beyond the minimum requirements of the directive, e.g. by prohibiting most-favoured-customer clauses, unjustified termination without reasonable notice, and exclusive supply agreements.

Any breach of the new rules may be sanctioned with a fine of up to 5% of the company's annual turnover. Merchants would have one year to bring their current agreements into line with the new rules.

Repeal of the rules on the abuse of a stronger bargaining position

The draft proposes a repeal of the existing broader rule on the abuse of economic dependence. The rule was introduced in 2015. It currently applies to all industries and prohibits undertakings with a stronger bargaining position from abusing their power to the detriment of their contractual partners or of consumers. Due to the broad and unclear scope of the prohibition, the CPC acknowledges that the rule failed to achieve the desired result and instead caused legal uncertainty for supply chain stakeholders.

Further, the draft amendments aim to ensure efficient cooperation in cross-border enforcement matters and harmonization of leniency rules at the EU level.

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Czech Republic

Major amendment to the Czech Business Corporations Act

On 1 January 2021, a major amendment to the Czech Business Corporations Act entered into force. This is one of the most important laws regulating the structure, establishment, dissolution and operation of companies and cooperatives. Due to the importance of these changes, we have prepared a brief summary of selected changes.

1. Change of a structure of monistic joint-stock company

Prior to the amendment taking effect, a monistic joint-stock company was able to have either a management board (with the possibility to elect its chairman) or a statutory director as its executive body. The new law has abolished the positions of statutory director and chairman of the management board. Thus, a monistic joint-stock company now has only one main executive body – the management board. The business management and control of the company's management therefore lie within the competence of the management board as a whole. The management board can subsequently distribute responsibility for the performance of individual duties among its members.

2. Agreement on the performance of the function of directors / board members is ineffective until approved by the general meeting

The approval of the general meeting is required in order for an agreement (or its amendment) on the performance of the function of directors / board members to be effective. This change will have a significant impact on directors and board members, as for example it will not be possible to pay remuneration on the basis of the agreement until its approval. The effectiveness of such an agreement will be retroactive to the date of its conclusion, unless the general meeting stipulates otherwise.

3. Pledge of a share and registration of other rights in rem connected with the share

From now on, the conditions for the pledge of a share are no longer obligatorily connected with the conditions for the transfer of the same share. The memorandum of association or the articles of association will be able to set conditions for share pledges that will not affect their transferability at all. According to the new legislation, it will be possible, for instance, to have fully transferable shares, but to exclude their pledge completely. It is also a novelty that other rights in rem to the share will now also be subject to the registration in the same way as the share pledge. Therefore, for example, the creation of an effective pre-emption right that is being established as a right in rem requires it to be recorded in the Commercial Register. Until the date of this registration, the pre-emption right will not exist.

4. Stricter sanctions for members of statutory bodies if they did not act with due care and thus led the company to bankruptcy

The current legislation only provided a potential guarantee that in event of the company's bankruptcy, the members of the statutory body would be liable for the company's debts if the statutory body's members could have prevented the bankruptcy but failed to do so. The amendment introduces the possibility of requiring a member of the body (who contributed to the company's bankruptcy by violating his/her duties) to return all monetary and other remuneration (e.g., remuneration under executive service agreement) received from the company during the two years preceding the bankruptcy decision. However, it also gives the court the opportunity to decide, if

the company is declared bankrupt, that the member of the body must pay the difference between the sum of the debts and the value of the company's assets.

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Curia judgment on disputed questions regarding direct enforceability

Notarised instruments are extremely important in lending. One of the reasons for this is that a notarised instrument that meets the statutory formal and substantive requirements will allow for the direct enforcement of debts. If a lender is in possession of such an instrument, it does not have to file a lawsuit against its delinquent debtor before seeking enforced debt collection and can simply request the addition of an enforcement clause to the instrument. Consequently, the debt collection procedure will not have to be preceded by a lawsuit that, in any given case, can take quite some time to wind its way through the court system.

The Curia, Hungary's highest court, issued a standard-setting judgment (PJE No. 3/2020) at the end of last year with the aim of ending the controversy about the following key issues associated with the addition of enforcement clauses to notarised instruments. (A standard-setting judgment is a decision made by the Curia on an ongoing case or independently of any particular case in order to standardise court practices in specific matters.)

When adding an enforcement clause, can a notary public examine the existence and validity of the debt included in the instrument?

The Curia argues that it is not for the notary public to conduct such an examination. If the notarised instrument meets the relevant formal and substantive statutory requirements, the notary public has to issue the enforcement clause. Therefore, the notary public may not take into account for example the debtor's claim that the legal relationship that served as the basis for the debt included in the notarised instrument was terminated by it before the creditor requested the addition of the enforcement clause. This is a matter for the courts to decide, and if a court subsequently rules in a final and binding judgment that the debt does not actually exist, the enforced debt collection procedure will be terminated rather than the enforcement clause deleted.

However, notaries public have to ensure that the amount stated in the clause does not exceed the amount and scope of the debt stated in the underlying notarised instrument, and they also have to draw the attention of creditors to any calculation errors.

How can a creditor prove that it has made the debt past due by a unilateral declaration?

If a debt only falls due when a particular condition is met, the enforcement clause may only be issued if the existence of that condition is also confirmed by a notarised instrument. In practice, creditors mostly terminate their loan agreements in private instruments delivered by mail. Some have argued, however, that a notary public can only attest to the termination of an agreement in a notarised instrument if the notice of termination was also notarised and delivered to the debtor by him or her. The Curia disagrees with this. The court argues that there is nothing in the regulations that would prevent a notary public from issuing a notarised instrument attesting that the creditor presented to him or her the notice of termination as well as proof that notice was delivered to the debtor. Therefore, there is no need to incorporate the notice of termination into a notarised instrument (unless this is required under the agreement between the parties). However, the Curia also notes that it can cause problems if the debtor refuses to take delivery of the notice of termination. To prevent such problems arising, it is advisable to include a provision in the agreement

stating that if an attempt at the delivery of a document is properly made, the document will be deemed to have been delivered even if the addressee refuses to take delivery of it.

The standard-setting judgment will be binding on all courts until it is revoked or superseded by another standard-setting judgment.

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Romania

European Court of Human Rights holds Romania liable for violating the rights of transgender persons

On 19 January 2021, the European Court of Human Rights (ECtHR) issued a judgment in a landmark case that is considered essential for creating a clear legal framework for gender recognition in Romania.

The ECtHR ruled that Romania was in violation of Article 8 of the European Convention on Human Rights (right to respect for private and family life) and concluded that Romania lacked a clear and foreseeable procedure for legal recognition of gender identity that would make it possible to amend a person's name and indicated gender on official documents, in a quick, transparent and accessible manner.

The refusal of the national authorities to recognize the applicants' male identity in the absence of surgery amounted, in the opinion of the ECtHR, to unjustified interference with their right to respect for their private life.

Background Information

The action against Romania was brought by two transgender persons. The applicants, both Romanian nationals, were registered as female at birth.

The requests for legal recognition of gender reassignment from female to male were refused by the national courts on the grounds that the applicants must undergo gender reassignment surgery to be recognized as male and consequently to be entitled to request that the civil status records be amended.

Relying on Article 8 (right to respect for private and family life) and on Article 3 (prohibition of inhuman or degrading treatment), the applicants complained that Romania had not established and did not provide a clear legal framework for the recognition of gender reassignment. The applicants argued that the requirements of the Romanian state with regard to gender reassignment surgery as a prerequisite for a change in their civil status had breached their right to respect for their private life.

The applicants argued that the lack of an appropriate legal framework had allowed the authorities to impose an additional requirement on them in order to have their requests granted, in the form of gender reassignment surgery.

Moreover, the applicants argued that this requirement constituted interference without any legal basis which did not pursue a legitimate purpose and was not necessary in a democratic society.

Decision of the ECtHR

The ECtHR noted that the complaint of the applicants concerned the refusal of the national authorities to recognize their male identity and to amend their civil status.

The ECtHR observed that the national courts had presented the applicants with an impossible dilemma: (i) either they had to undergo the surgery, against their better judgement and contrary to their right to respect for their physical integrity, or (ii) they had to forego recognition of their gender identity, which also came within the scope of respect for private life.

The Strasbourg Court reiterated that Article 8 of the ECHR imposes a negative obligation on the States to refrain from interfering with the right to respect for private and family life of individuals as well as a positive obligation to ensure the effective respect of such right, including the protection

of the physical and psychological integrity of individuals. Such a positive obligation may involve the adoption of specific measures, including the provision of an effective and accessible means of protecting the right to respect for private life. The ECtHR reaffirmed that the states have a limited margin of appreciation in relation to a question concerning one of the most intimate aspects of private life, the sexual identity of an individual.

The ECtHR recalled recommendations issued by international bodies against violence and discrimination based on sexual orientation and gender identity calling on states to adopt procedures allowing persons to have their name and gender changed in official documents in a quick, transparent and accessible manner.

It considered that the Romanian legal framework in the matter was not clear and therefore predictable due to the lack of administrative procedures allowing transgender persons to change their personal information, and it also found that Romania failed to provide a fair balance between the interests of the individual and those of the community as a whole.

The ECtHR ordered Romania to pay the applicants a total of nearly EUR 26,000 in damages and to cover their costs and expenses.

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Slovak Republic

The differences between directors and procuration holders mean they may no longer act jointly on behalf of a company

Many Slovak companies have hitherto been represented by a director and a procuration holder who have jointly signed on behalf of the company. Companies employed this system for several years without any public administration authority or contractual counterparty questioning its legality.

As, from a practical point of view, procuration holders enjoy a status similar to that of directors within a company, with both being registered in the commercial register as persons entitled to act on behalf of the company and both usually being appointed by the general meeting, the differences between these roles have in the past been considered mere formalities and have not as a general rule been taken into consideration by many entrepreneurs when deciding how the company should be represented. In this regard, many entrepreneurs have not seen any obstacle to having a procuration holder and director signing jointly.

Until recently, this practice was also supported by the decision-making activity of the commercial registers, which usually accepted this method of representation without objection.

However, the Slovak Supreme Court recently issued a judgment ruling that such a method of representation is unlawful as it is in conflict with the Slovak Commercial Code, drawing its conclusions from the different nature of the roles of directors and procuration holders regulated therein. Under Slovak statutory law, directors are entitled to act on behalf of the company in all matters without limitation, with their signature constituting a direct act by the company as they do not need power of attorney to do so. Procuration holders on the other hand are entitled to act on behalf of the company only in respect of matters regarding the operation of the business, they are not entitled to transfer or encumber real property belonging to the company unless they have specific authorization to do so, and, last but not least, the exercise of their power is not considered a “direct” act by the company, but as an act based on a special type of power of attorney. Based on these differences, the Slovak Supreme Court ruled that the role of the director is superior to that of the procuration holder, concluding that it is not legally acceptable for a director and a procuration holder to sign jointly as doing so would equalize the importance of their roles, in contrast with the will of the legislator as expressed in the law.

In addition to the above, the Supreme Court also stressed that according to Section 13(1) of the Slovak Commercial code “if an entrepreneur is a natural person, he acts personally or through a representative. A legal person acts through its statutory body or through a representative”. The use of “or” in this provision makes it clear that it is impossible for a company to be jointly represented by a director (statutory body) and a procuration holder (representative), as the acting of the second is an alternative to the acting of the first, meaning that it can be used instead of the first, but not jointly.

Since the legal opinions expressed by the Slovak Supreme Court are legally binding on lower courts, we must conclude that for companies still being represented by a combination of directors and procuration holders, it would be advisable to make the necessary changes because to continue to be represented in this way may result in any acts taken by such representatives being

deemed invalid. For the sake of clarity, this discrepancy with the law only concerns constellations where a director acts jointly with a procuration holder. It is possible to have two or more directors represent and sign on behalf of the company (with no procuration holders involved) or to have two or more procuration holders do so (with no directors involved), as such arrangements are explicitly provided for under the Slovak Commercial Code and, in our opinion, they could be considered as adequate alternatives to the practices declared unlawful by the Supreme Court and which it would be advisable to replace.

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