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SCHINDHELM

EDITORIAL

Dear Reader,

Welcome to the 14th edition of our international newsletter, which we have created together with the partner law firms of the Schindhelm Alliance. In this edition, we have also prepared a variety of current topics for you.

We hope you will find it an interesting read and look forward to your comments and suggestions for the next edition.

Your
Schindhelm Team

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Please note: The following explanations are not exhaustive. They are only for initial information and orientation. They do not replace in-depth advice. We would be happy to help you with this.

EUROPE: EUROPEAN COURT OF JUSTICE DECLARES RESTRICTIONS ON THE TRANSFER OF THE REGISTERED OFFICE AS UNLAWFUL

I. BACKGROUND

Until today, the legislation of some Member States of the European Union is very restrictive with regard to the transfer of the company headquarters in other Member States. It is often required that the company in the country of origin must be completely liquidated before the change of domicile. This is therefore inevitably associated with the loss of the legal personality of the company. In addition, deferred taxes must always be taxed in the country of origin (exit tax), so that a tax-neutral transfer of the registered office is not possible and due to the considerable costs, the implementation no longer makes economic sense.

II. ECJ-JUDGEMENT

In its judgment of 25/10/2017 (Case C106-16, Polbud - Wykonawstwo sp. z. o.o.), the European Court of Justice ruled that these restrictions violate the freedom of establishment and are therefore contrary to Community law.

In the specific case, a Polish company had decided to transfer its registered office to Luxembourg, but to keep the place where it actually carries out its economic activity in Poland. Polish company law did not permit the company's entry in the Commercial Register to be deleted without first having liquidated it. The Polish Supreme Court wanted the ECJ to clarify the compatibility of this rule with the freedom of establishment in the preliminary ruling procedure.

In its ruling, the ECJ confirms that the freedom of establishment of a company of one Member State includes the right to transform itself into a company governed by the law of another Member State in which its registered office is being relocated. At the same time, freedom of establishment includes the right to maintain the place of effective economic activity in the country of origin. For the ECJ, the intention to benefit from a more advantageous national regulation of company law (in the specific case of Luxembourg) is not improper per se.

The ECJ notes that legislation which, like Polish law, links the possibility of transferring the registered office to liquidation and thus the loss of legal personality, restricts the freedom of establishment. This is not justified by overriding reasons of general interest, such as the protection of creditors, minority shareholders and employees, since it is a general obligation and less restrictive measures, such as a right of opposition to the transfer of the registered office, as provided for by Spanish law, could have been chosen.

III. CONCLUSION

The judgment deserves full approval because it clarifies that freedom of establishment includes the right to transfer the registered office of the company to another Member State. This is a further step towards harmonising the transfer of the company's headquarters in Europe.

It is precisely in this spirit that the European Commission recently presented a proposal to introduce harmonised procedures for intra-Community transfers, mergers and divisions. The draft will contain "specific measures" to enable national authorities to prevent abuse through ex ante controls.

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BELGIUM: FAIRNESS AND TRANSPARENCY IN ONLINE TRADING

I. BACKGROUND

Online platforms and search engines dominate Internet trading. Unilateral business conditions, non-transparent algorithms and rankings are unfortunately not uncommon. A stop has been put to this in the EU for Companies such as Amazon, Google, eBay, booking.com, etc. On 26/04/2018, the European Commission presented a draft regulation to promote fairness and transparency for business users of online exchange services.

The aim of the Regulation is to ensure a fair, predictable, sustainable and trustworthy online business environment and to simplify market entry. The Regulation will apply if (i) the user is established in the EU and (ii) he offers his products or services to consumers residing in the EU via an on-line exchange service. Therefore, neither citizenship of a Member State nor residence in the EU is required.

II. INCREASED TRANSPARENCY

Providers of online exchange services must in future ensure that their terms and conditions are easily understandable and accessible. Possible reasons for removing or blocking a user from a platform must also be explained in advance. Changes to the terms and conditions require an appropriate minimum notice period. A (temporary) discontinuation must be justified.

In addition, the following information must be specified in the terms and conditions: (i) data access, i.e. which data has been generated and made available by whom under which conditions; (ii) information on the treatment of offering own goods or services on the website in comparison to those offered by users; and (iii) the use of most-favoured-nation clauses.

In addition, general criteria for the ranking of products and services must have been defined.

III. EFFECTIVE DISPUTE RESOLUTION

As users naturally have limited opportunities to enforce their claims against them due to their dependence on online intermediation services, providers of online switching services must set up an internal complaint handling system. This does not apply to small companies due to the costs involved.

For an out-of-court settlement of disputes, the online intermediation services must in future announce in their terms and conditions independent and qualified mediators with whom they cooperate in the case of an out-of-court settlement of disputes.

In addition, associations should have the right to enforce the new rules on transparency and dispute resolution in court on behalf of companies.

IV. CODE OF CONDUCT

Providers of online intermediation services and associations are invited to develop specific codes of conduct on these new rules.

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BULGARIA: NEW REQUIREMENTS FOR COMPANY SALE AND INSOLVENCY

I. BACKGROUND

As in the past, in the case of company sales, the seller has repeatedly neither paid salaries due nor paid social security contributions due for employees, the Bulgarian Commercial Code was amended accordingly by three successive amendments in December 2017, February and March 2018. The aim of the new regulations is to protect the interests of employees. A side effect is the guarantee of timely receipt of social security contributions by the recipient government agency.

II. REQUIREMENTS FOR COMPANY ACQUISITION AND THE PURCHASE OF SHARES

In future, a company acquisition or transfer of shares in a limited liability company can only take place if all wages have been paid and all social security contributions have been duly paid. This also applies to all receivables of this type in connection with employment relationships that were terminated within three years before the company acquisition or share purchase.

The seller must prove that there are no such outstanding claims. This must be done by a written declaration of the seller within the scope of the company acquisition and, in the case of a share transfer, by a joint declaration together with the Managing Director of the company. The declaration must be submitted to the Commercial Register. The Registry shall subsequently notify the Main Labour Inspectorate, which shall verify the accuracy of the information contained in the declaration. If an incorrect or incomplete statement has been made, the case will be referred to the Public Prosecutor's Office.

III. NEW REORGANISATION PROCEDURE

From mid-February 2018, a restructuring plan must also be agreed with employees who still have claims against the company that arose prior to the opening of the restructuring proceedings. This includes both receivables from employees still employed by the company and receivables from former employees.

IV. REQUIREMENTS APPLICABLE TO ALL TYPES OF COMPANIES

In addition, the Anti-Money Laundering Measures Act, adopted in implementation of the Fourth EU Directive on the prevention of the use of the financial system and terrorist financing (2015/849), introduces innovations. Accordingly, from the end of March 2018, each company is obliged to provide current and significant information about the individuals who are the beneficial owners of the company. This also includes detailed information on the rights acquired by these people.

The company is also obliged to disclose this data in cases specified by law. The identity data of beneficial owners and legal entities or other legal entities through which control is exercised, as required by the Bulgarian Money Laundering Act, are subject to registration in the Commercial Register. A separate definition of the beneficial owner is laid down in the Money Laundering Act.

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GERMANY: ECJ ON THE TECHNICAL CONDITIONALITY OF DESIGNS

I. BACKGROUND

Technical solutions can be protected by patents and utility models under certain conditions. By reserving commercial exploitation exclusively to the inventor for a limited period of time, technological progress should be promoted. Once the term of protection has expired, however, in the public interest the technical solution should be freely available to all economic operators.

This may not be undermined by other industrial property rights which in turn have other conditions and objects of protection, such as design law (or formerly: registered design law).

Designs grant protection for the appearance of a product or, as it is called at the DPMA: "a temporary monopoly on the shape and colour design of your product - from cars to lemon squeezers." Design achievements should be protected without compromising the freedom of technical development. Therefore, the monopolisation of only technically conditioned features by designs is excluded.

However, the question as to how exactly the term "exclusively technical conditionality" is to be understood remains unclear up to now. For this purpose, the ECJ has now developed binding interpretation criteria (Judgment dated 08/03/2018 - C-395/16 DOCERAM/CeramTec).

II. ECJ-DECISION

The European Court of Justice has rejected the theory of diversity of form, which has been prevalent in Germany up to now. According to this, an exclusively technical conditionality should already be denied due to the existence of design alternatives. After that, however, protection would only be denied if the desired technical effect could be produced exclusively by the one design. However, minor design alternatives are almost always possible. According to the ECJ, by registering several designs of different form, all of which, however, are suitable for achieving a certain technical solution, a position comparable to patent protection can be obtained under this approach without being subject to the conditions applicable under Patent Law.

Rather, the ECJ has joined the so-called causality theory. According to this theory, it is decisive whether a technical function was the only factor determining the appearance of the features and whether design considerations did not play a role. This is to be determined in accordance with all objective circumstances of the individual case from which the motives for the choice of the appearance characteristics would be apparent. However, the purely subjective motives of the designer are not important in this respect.

III. COMMENTS

Companies are well advised to optimally safeguard product innovations by the interaction of industrial property rights. Anyone who goes beyond the purely technical requirements in terms of design will continue to have the possibility of design law protection in the future. Even if the subjective intention of the designer is not the decisive factor, it is recommended to document the individual product development phases for evidential purposes. All these considerations should be part of an IP strategy that cannot begin early enough in the product life cycle.

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GERMANY: FIRST EXPERIENCES WITH THE NEW TRANSPARENCY REGISTER INTRODUCED IN OCTOBER 2017

I. BACKGROUND

In July 2017, the Money Laundering Act (Geldwäschegesetz, GWG) was completely revised in Germany in the implementation of the Fourth Directive (EU) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (2015/849). § 18 of the GWG determines the establishment of the so-called transparency register, which is managed by the Bundesanzeiger Verlag GmbH. The register is the official platform in Germany for data of beneficial owners. Notifications for registration have been incumbent on the reporting agent since 01/10/2017, which is often unrecognised in practice. The primary purpose of the transparency register is to identify the beneficial owner.

II. WHO IS AFFECTED BY THE OBLIGATIONS OF THE TRANSPARENCY REGISTER?

According to § 20 Para. 1 sentence 1 of the GWG, legal entities under private law and registered partnerships are obliged to obtain, store and keep up-to-date the required information of the beneficial owners in accordance with § 19 of the GWG and to inform the transparency register immediately in respect of registration. The following are thus obligated to make reports to the transparency register in particular:

- Private Limited Liability Companies and UG (limited liability),
- Stock companies,
- Partnerships limited by shares,
- Societas Europaea (SE),
- General partnerships,
- Incorporated partnerships,
- Partnership companies,
- Cooperatives,
- Foundations with legal capacity,
- Foundations with no legal capacity, if
- the purpose of the foundation is self-serving from the point of view of the founder,
- Business associations
- Non-profit associations as far as registered.

The reporting obligation always applies to the legal person as such. In order for this information to be obtained from the beneficial owner, § 20 Para. 3 of the GWG stipulates the obligation of shareholders who are beneficial owners or are directly controlled by an economic owner, to provide the necessary information without delay. The first and last name, date of birth, place of residence and the nature and scope of the economic interest are to be stated.

III. BENEFICIAL OWNER

§ 3 of the GWG defines who is the beneficial owner. In principle, the beneficial owner of an enterprise is any natural person, who directly or indirectly

- holds more than 25% of the capital shares,
- controls more than 25% of the voting rights or
- exercises control in a comparable manner.

IV. WHEN IS THE OBLIGATION TO NOTIFY CONSIDERED FULFILLED?

The obligation to report to the transparency register is already considered fulfilled if the required duties to the beneficial owner result from documents and entries which can be retrieved electronically or online from the commercial register, partnership register, cooperative register, register of associations or register of companies.

V. FINES

Omitted, incomplete or false reports can lead to prosecution as an administrative offence with fines in the millions.

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ITALY: END OF THE IMPROPER INSOLVENCY SETTLEMENTS?

I. BACKGROUND

In Italy, insolvencies can be settled through composition proceedings between the insolvency debtor and its creditors, the so-called Concordato Preventivo. So far, the assessment of economic feasibility has been the sole responsibility of the creditors concerned. For some years now, however, the courts have been of the opinion that both the legal and the economic and actual feasibility of Concordato Preventivo must be subject to judicial review in order to prevent abuse.

II. THE RULING OF THE COURT OF CASSATION

By order of 20/04/2018, the Italian Court of Cassation has now confirmed the pre-judicial decisions which, based solely on the assessments of the Court Commissioner, refused the admission of the insolvency settlement and at the same time established the bankruptcy of the common debtor.

In the present case, the debtor had filed an application for approval of the insolvency proceedings, subject to the submission of the concrete plan. After examining the subsequent documents, the Commissioner concluded, however, that serious misjudgements had been made in assessing the available assets and also the total debt, so that the concrete feasibility and in particular the paying off of the unsecured creditors in the planned amount was not at all possible. With this justification, the opening of proceedings was refused and instead the bankruptcy of the debtor was declared.

With this decision, the Court of Cassation has for the first time clearly confirmed the opinion of the courts that the control of the economic and thus the concrete feasibility of the insolvency settlement also falls within the jurisdiction of the courts and is not solely incumbent on the creditors concerned.

Following this decision, the Insolvency Court now has to examine both the legal feasibility in terms of compatibility of the plan with mandatory legal norms and the economic feasibility, in particular to the extent that the paying off of the creditors is at all realistically possible in the planned amount.

The Supreme Court emphasised the importance of the Court Commissioner in the early stages of the proceedings. The Court considers that the Commissioner has a qualified duty to report, in particular, on those circumstances which may lead to a refusal to open proceedings and a corresponding declaration of bankruptcy.

III. OUTLOOK

The decision is to be seen in the context of the already initiated reform of Italian Insolvency Law, for which the corresponding legislative implementation acts are now pending. Art. 6 of the Reform Act expressly mentions the examination of economic feasibility as the desired content of the regulation.

As a result, the Court of Cassation anticipated the legislative measure and confirmed it in advance. On the one hand, this removes the existing uncertainties about the judicial power of scrutiny and, on the other hand, by strengthening the role of the court and the Commissioner, prevents the insolvency debtor from submitting unrealistic plans at an early stage for reasons of delay alone.

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AUSTRIA: E-ALLOCATION AND SAFE LINKING BY MEANS OF HASH VALUE

I. BACKGROUND

The electronic transmission of tenders in the award procedure is nothing new and was already standardised in the Federal Procurement Act 2006 both for the classical area and for the area of sector contractors. In the implementation of EU public procurement Directives 2014/24/EU and 2014/25/EU, however, communication in the award of contracts by public authorities and sectoral contractors in the upper threshold range must now take place electronically as of October 2018.

II. INCREASED SECURITY REQUIREMENTS

The current draft of the Federal Procurement Act 2018 should also be seen against this background. Accordingly, in future too, in cases where offers consist of several offer components, the secure linking of offer documents is a method to guarantee the completeness, authenticity and genuineness of the transmitted data records with a quality comparable to the increased security requirements of a qualified electronic signature.

The secure linking of offer documents will therefore continue to play a key role in the future, as it allows tenderers to link non-signable document formats such as Microsoft Word and Microsoft Excel documents with their offers, which in any case must have a qualified electronic signature.

III. SECURE LINKING BY MEANS OF HASH VALUE

The hash value to be determined by the non-signable document format is of particular importance.

The hash function is a non-reversible algorithm that maps an extensive source set to a much smaller target set in the form of a hash value. Every change made to the source document automatically results in a completely new hash value. A special method for forming the hash value is the cryptological hash function, which has a one-way function due to its collision resistance. Put simply, a hash value formed in this way is nothing other than the fingerprint of the file.

Accordingly, the procedure for forming the hash value of non-signable file formats for secure linking is based on the procedure used for the qualified electronic signature of the main part of the offer. The secure linking then finally takes place in the form that the hash values of the offer components, which were created in non-signable document formats, are specified in the main part of the offer to be signed in a qualified manner. In this way, the authenticity of the documents can be checked.

IV. CONCLUSION

Although the linking of offer documents using hash values is a complex process from a technical point of view, this does not involve any additional effort for the client or tenderer, as the processes described above are completely automated.

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POLAND: CHANGES IN THE SPECIAL ECONOMIC ZONES

I. BACKGROUND

In Poland, a law to promote new investments is to enter into force in June 2018. The law is intended to create new framework conditions for companies operating in special economic zones ("SEZ"). The new regulations not only modify the conditions for carrying out commercial activities within the SEZ, but also the conditions for claiming the benefits to be granted.

II. OBTAINING APPROVAL

On the positive side, the SEZ benefits, which until now could only be claimed in limited areas, are now to be granted nationwide. As a result, investors have more commercial space available for expansion. However, site planning can still be limited by provisions of local development plans or by recommendations of the administrator of the respective SEZ zone if, in his opinion, another site is more suitable for a specific project. The benefits for entrepreneurs are granted on the basis of the so-called funding decision. Unlike before, the decision must now indicate the exact location of the project. The principles of body tax exemption, however, remain unchanged. However, the amount of aid granted under EU rules may be reduced by national legislation. Furthermore, some of the criteria according to which entrepreneurs are granted licences for their commercial activities within the SEZ have been amended. The decisive factor now is not only the volume of expenditure, but also certain qualitative requirements. These factors, as well as the limitation of the validity of the permit to 10 to 15 years, will certainly enable investors to better assess the respective advantages and disadvantages. The design of the regulations in the draft law suggests that investment projects at locations that have so far been less in demand will theoretically be cheaper and easier to implement. In such regions, investors benefit from good availability of space and manpower, which can ultimately have an impact on the success of the project. However, if the entrepreneur wants to implement his project in an already highly developed region (eg in Lower Silesia), this path is also open to him. However, he has to reckon with higher expenses.

III. IMPLEMENTATION AND MAINTENANCE OF INVESTMENTS

The requirements for the durability of the project remain fundamentally unchanged. Depending on the size of the company, the project must have a duration of three or five years. In view of the current legislative gap, cumulative use of aid on the basis of several authorisations is highly unlikely to be permitted in the future. According to the new legal situation, the investor may only account for the aid granted to him in relation to the investment for which he has received a licence for a commercial activity within the SEZ. Furthermore, the aid can only be used separately once the respective project has been completed. However, investors will have more options in the future to have an existing funding decision amended.

IV. IT PAYS TO INVEST

Although the new procedure for obtaining SEZ authorisation is formally somewhat more complicated, entrepreneurs can count on comprehensive support. Investors can rely on the support of the respective administrators of the special economic zones, who are interested in the development of their territories, as well as advisors specialising in SEZ issues, in order to ensure successful settlement.

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POLAND: EFFECTS OF THE GDPR ON THE EMPLOYER'S OBLIGATIONS

I. BACKGROUND

The EU GDPR came into force on 25/05/2018. The Polish draft law implementing the Regulation leads, among other things, to changes in the area of labour law. In future, employers will be subject to new transparency and information obligations, for example with regard to application and recruitment procedures and the scope of the employee data collected.

II. RECRUITMENT POLICY

According to the new regulations, the employer will only be entitled to require the applicant to disclose his name, date of birth, contact details, education and previous employment relationships. Only the collection of these contact data will no longer require the applicant's consent. However, the employer will no longer be allowed to collect the names of the parents.

III. EMPLOYEE DATA

According to the new legal regulations, the employer can request further data from an employee already hired, such as the residential address, the so-called PESEL number (Polish personal identification number), the identity card data, information on another proof of identity and other data, if this is justified by the employee's activity in accordance with employment law requirements. In particular, the employer can then also collect and process information on the employee's children and family members. In addition, the employer remains entitled to collect further data if the corresponding authority can be derived from other legal acts.

Biometric data (eg fingerprints) can only be used for the purpose of access control if particularly important information of the employer must be protected thereby against unauthorised disclosure or premises against unauthorised access.

IV. CONTROL OF EMPLOYEES

On 25th May 2018 also the new Polish Data Protection Act came into force. The Act supplements the regulations of the GDPR and modifies the provisions of the Polish Labour Code regarding possibilities of employees' control at the workplace. For the first time, video surveillance is also be regulated by law. Video surveillance may only be permitted for employee security, property protection, production control or confidentiality of information. Rooms such as canteens, changing rooms or sanitary facilities have to be completely excluded from video surveillance. In exceptional cases, however, cameras can also be installed in such areas. The employer must inform the employees of the type and extent of video surveillance in an appropriate manner (eg in the work regulations and by posting).

Under the new rules, however, the employer still has the power to check employees' emails to ensure that employees do not waste their working time and use equipment properly. The amended provisions also leave it open as to the possibility of introducing other forms of employee control in compliance with certain data protection regulations, among others.

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ROMANIA: LEGAL CHANGES TO THE REGULATIONS FOR THE PAYMENT OF SOCIAL AND HEALTH INSURANCE CONTRIBUTIONS FOR EMPLOYEES

I. BACKGROUND

Under the previous statutory regulation, the employer was obliged to pay 22.87% of the employee's gross salary for social security contributions each month; the share to be paid by the employee was approximately 16.50% of the gross salary.

II. NEW DISTRIBUTION

The Romanian government has substantially changed the obligation to bear the costs of social security and health insurance contributions.

According to Government Emergency Ordinance 79/2017, the employer's contributions to social security, health insurance, unemployment insurance, occupational disease insurance and accident insurance were substantially reduced from a total of approximately 22.87% of the gross salary of the employee with effect from 01/01/2018. In future, the employer will only have to pay a contribution of 2.25% for employment insurance (not to be confused with unemployment insurance). In return, the contributions for social security and health insurance to be paid by employees were increased from 16.50% to 35%. The employer must also continue to pay these contributions. The income tax to be paid as of 01/01/2018 is 10% instead of 16% as before.

As a result of these measures, an employee has to accept a reduction in his net salary while maintaining his gross salary. An increase in gross salary with the consequence that the employee would maintain the same net salary would have no or only minor disadvantages for the employee concerned.

As a result of the above-mentioned changes, there are therefore in practice three variants practiced by employers in response to the rush regulations:

- The gross salary is not increased and the net salary of the employee is therefore considerably lower (in practice, this variant is more of an exception);
- The gross salary is increased so that the employee receives the same net salary;
- The employee receives monthly compensation in the form of bonuses granted by the employer without special consideration.

Since many employers originally practised the last of the above variants, the adjustment or increase in gross salary (second variant) is now predominantly to be found in practice.

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SLOVAKIA: AMENDMENTS TO THE LAW ON THE PREVENTION OF MONEY LAUNDERING

I. BACKGROUND

The Fourth Directive (EU) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (2015/849) has been implemented in Slovakia by the amendment to the Act No. 297/2008 of the ECR on the prevention of the legalisation of the proceeds of crime and terrorist financing. The amendments to the law came into force on 15/03/2018.

II. OBLIGATED PEOPLE AND THE END USER OF THE BENEFITS

In the new regulations, the so-called "obligated people" have first been identified, to whom special obligations have been imposed. These include banks, lawyers, tax consultants, auditors, but also commercial companies that carry out cash transactions in excess of EUR 10,000.00 and legal and individuals who are entitled to broker the sale, rental or sale of real estate.

In the first step, the limit for cash transactions that the obligated people may carry out with their customers was reduced from EUR 15,000.00 to EUR 10,000.00. It was also introduced in case of cash payments of EUR 1,000.00 or more, the customers/clients must always be identified.

Furthermore, every obligated person must draw up a written programme on his own activities against the legalisation of such income by 15/05/2018 at the latest.

The determination of the "beneficial owner" required by the EU Regulation was defined as the determination/review of the "end user of the benefits". One of the issues to be examined is whether international enforcement measures have already been initiated against the person concerned. The "end user of the benefits" must also be entered in an appropriate register.

With effect from 01/11/2018, all legal entities entered in the Commercial Register (eg commercial companies, non-profit organisations, foundations) must enter the information on the "end users of the benefits". From this date, the information can be registered in the register. Entries must be made by 31/12/2019 at the latest.

However, registration of the "end-user of the benefits" in the competent register does not replace the obligation to identify and further register end-users in accordance with Act No. 315/2016 of the ECR on the Register of Public Sector Partners. Information on end-users must be regularly updated and kept in the register for a period of five years after the end of the "end-user of the benefits" status.

III. SANCTIONS

A person may be fined up to EUR 200,000.00 for a violation of the law and up to EUR 1,000,000.00 for a serious violation. At the same time, the sanctions may be published on the website of the tax office for a period of five years. This should have a significant sanctioning effect for the companies concerned.

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SPAIN: NEW OBLIGATIONS TO IDENTIFY THE BENEFICIAL OWNER OF A LEGAL ENTITY

I. BACKGROUND

The Fourth Directive (EU) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (2015/849) requires Member States to keep a register containing the information provided by the beneficial owners of companies registered in their territory. Spain has not yet fully implemented the Directive despite the deadline of 26/07/2017.

II. PRELIMINARY IMPLEMENTATION

The Minister of Justice has now tried to at least partially implement the Directive. A new form has been added to the ministerial decree requiring companies to indicate their beneficial owner. All companies required to file their financial statements are affected. The requirements for the information on the beneficial owner differ depending on whether the control is indirect or direct. The form only has to be submitted again in the following years if something has changed in the circumstances.

III. OPEN QUESTIONS

The EU Regulation requires Member States to ensure that competent authorities and persons or organisations with a legitimate interest can inspect the register. However, the Ministerial Decree only refers to the fact that disclosure is made in accordance with the Directive without ensuring the possibility of inspection itself. Consequently, under Spanish law, the right of inspection should be open to everyone, even without a legitimate interest, and the possibility of restricting the right of inspection provided for in the Directive should not exist either. It therefore remains to be seen whether the commercial registers will also provide the personal data of the beneficial owners upon simple request, forward the form or prepare the data in such a way that, for example, a specific name search would be possible. In addition, the following problems arise:

- The Managing Directors formally have a **duty of disclosure**. In complex social structures, however, they only have an overview of the companies to which they directly belong.

- It is not yet regulated as to which **sanctions** are threatened if the duty of disclosure is violated. It is currently to be expected that the Commercial Registers will not permit the filing of annual financial statements without the proper submission of the information form. This is sanctioned with fines of between EUR 1,200.00 and EUR 300,000.00. In addition, any entry in the Commercial Register may be denied until an ordinary declaration has been made ("ban on registering").

- It is unclear as to which point in **time**, the duty to provide information refers (end of the business year or filing of the financial statement). Since the Directive stipulates that the information must be up-to-date, the latter must be assumed.

IV. RECOMMENDATION FOR ACTION

Although many questions currently remain unanswered, the identification requirement already applies to the filing of financial statements for the financial years commenced since 01/01/2017. The period is seven months after the end of the financial year. It is therefore strongly recommended that managing directors of Spanish companies obtain the necessary information to fulfil their obligation to identify the beneficial owner.

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THE CZECH REPUBLIC: EVIDENCE OF THE ACTUAL OWNERS

I. BACKGROUND

In the Czech Republic, the Fourth Directive (EU) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (2015/849) has been implemented by Act No. 368/2016 of the ECR. The term "beneficial owner", as standardised in the EU Regulation, is defined here as "actual owner" and an information system of public administration (EVIDENZ) has been introduced.

II. ACTUAL OWNER

The actual owner is an individual who has the factual or legal possibility of exercising a decisive influence, directly or indirectly, in the legal person. In the case of a commercial corporation, the actual owner is the following individual:

- an individual who, alone or together with other persons acting in accordance with it, holds more than 25% of the voting rights of this commercial corporation or has a share in the share capital of more than 25%;
- an individual who, alone or together with the people acting in concert with him, controls the commercial corporation referred to in paragraph 1;
- an individual who is to be the recipient of at least 25% of the commercial corporation's profits, or
- an individual who is a member of the statutory body, representative of the legal person in this body or in a similar position if there is no actual owner or if it cannot be determined in accordance with paragraphs 1 to 3.

III. EVIDENZ

EVIDENZ is an information system of the public administration and is managed by the register court in electronic form. EVIDENZ is NOT a public register.

The following information about the actual owner is entered in EVIDENZ:

- Name of the person concerned and address of their place of residence, if applicable also the place of residence, if it differs from the place of residence;
- Date of birth and birth reference number, if assigned;
- nationality; and
- information on (i) the share of voting rights if the position of the actual owner relates to the direct participation in the legal person; (ii) the share of distributed funds if the actual owner is the recipient in terms of his position; or (iii) other facts substantiating the position of the actual owner.

Information on the actual owner will be entered in EVIDENZ within five working days from the day on which the application for registration was delivered to the registry court.

The documents proving the facts to be entered must be submitted to the registry court within the framework of the application.

The commercial corporations are obliged to register the actual owner of the respective commercial corporation in EVIDENZ by the end of this year at the latest.

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HUNGARY: FINTECH REGULATION – IMPLEMENTATION OF THE PSD2 DIRECTIVE

I. BACKGROUND

The PSD2 Directive (EU) 2015/2366), an EU directive on the regulation of payment services, was implemented in Hungarian law in October 2017. Law No. 145/2017 entered into force on 13/01/2018 in accordance with the Directive.

II. INTRODUCTION OF OPEN BANKING

The biggest innovation is the introduction of the so-called Opens Banking. As part of open banking, customers will in future be able to carry out transactions not only via their account-managing bank, but also via the FinTech companies as third-party providers ("Third Party Provider"). Using the so-called "PISP" payment triggering service, bank customers can then have payments executed from their own account without having to contact the account-managing institution directly, as well as access the account information of the banks, which was obtained in a standardised manner from the third-party providers (AISP account information services). This enables customers to retrieve information from different accounts fully automated and have it available in real time.

However, open banking without restrictions will not be made available to Hungarian customers until 01/01/2019. In the meantime, the use of third-party providers depends on the willingness of the respective account-holding institutions to enable customers to do so. However, this offer must not be restricted. Therefore, if a bank assures a PISP that it may use its system to send payment orders, the same option must be given to the other PISPs.

III. CUSTOMER AUTHENTICATION AND LIABILITY

Furthermore, careful customer authentication is a prerequisite. The detailed regulations and technical requirements for customer authentication are determined by the control standards ("SCA-CSC RTS"), which are currently being finalised. The PSD2 Directive stipulates that customer authentication must be applied no later than 18 months after the Directive enters into force, i.e. as of 01/09/2019. In contrast, the Hungarian regulation shortens this period by six months and prescribes such customer authentication from 13/01/2019. In the transition period, however, strict liability regulations will already apply. If financial service providers do not perform customer authentication in the event of an unauthorised transaction (eg loss of a credit card or unauthorised access to the account), they are fully liable for damages. In addition, in the event of an unauthorised transaction, the account-holding bank is obliged to refund the amount of the unauthorised transaction to the paying party by the end of the working day following the registration, irrespective of whether the payment was initiated by means of a PISP or not.

Irrespective of the usual, already existing procedures, new, accelerated procedures are being developed for the handling of complaints.

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