



BWSP GOBERT & PARTNERS

TAX AND LEGAL

GOBERT ÉS TÁRSAI
ÜGYVÉDI IRODA

Andrássy út 10.
1061 Budapest
Hungary
Telefon + 36 (1) 270 9900
Telefax + 36 (1) 270 9990
office@gfplegal.com

LAW SHOOTER

February 2013

STIMULATING BUNDLE OF LEGAL UPDATES!

This month's newsletter is filled with interesting current tax as well as labour law issues. Read this month's Law shooter to find out who will be most likely in the focus of the National Tax and Customs Administration of Hungary this year! As in addition to statutory control, the state tax authority shall conduct its control operations in accordance with the control guidelines published by its director every year. Furthermore read about whether it is legal or not for an employer to monitor their employees, the history of monitoring as well as the certain conditions that monitoring can be legitimate. Finally, update yourself about the new civil code of Hungary. Find out how the new civil code will affect existing contracts, and see what new areas are now regulated.

As always, we see our main goal to keep our valued partners informed about the current legal issues. Should you have any questions or requests regarding our upcoming events or to any of the articles in this edition we remain at your constant disposal.

Dr. Arne Gobert
Managing Partner

THE NEW CIVIL CODE OF HUNGARY

After several years of preparation (coordinated by different governments and top lawyers) the Parliament finally accepted the New Civil Code (NCC) which will generally change all civil and commercial contracts in Hungary.

Currently the code is waiting for the signature of the president and the entry into force of the provisions will be 1 January. It is expected that a separate act will regulate the entry into force of certain provisions as in case of many other important acts like the Labor or the Criminal Codes.

In our forthcoming editions we will provide our clients with a general description of the new legislation following the chapters of the new code.

General Introduction: how will the NCC affect the existing contracts?

The very basic principles of the civil legislation will remain the same which means that a new act (with mandatory provisions) may affect the existing contract. Moreover a contractual provision may even be void if it is different from a mandatory provisions. This means that by 1 January 2014 all commercial contracts governed by Hungarian law shall be reviewed and revised. We note that there might also be practical reasons for the revision a new legislation is always a good opportunity for the renewal of the existing contracts and starts business negotiations of existing term.

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FIRM INFO

• OUR MAILING ADDRESS:

HUNGARY
1061 BUDAPEST
STERN PALOTA
ANDRÁSSY ÚT 10.

• OUR WEB-PAGE ADDRESS:

WWW.GOBERTPARTNERS.COM

office@gfplegal.com

www.gobertpartners.com



explicit reference to the old code that legislation is also part of the relationship (provided that there is no new mandatory provision in the NCC regulating the same relationship).

Structure of the NCC: what areas are regulated?

The general concept of the necessity for the new legislation was to have a code regulating all civil areas (including family and company law) in one act. After heavy disputes the final structure of the NCC is the following:

- Book 1: Principles;
- Book 2: Human and Fundamental Rights;
- Book 3: Personality of Legal Entities (containing the basic provisions of Company Law);
- Book 4: Family Law;
- Book 5: De Rebus (ownership and title including land registry legislation);
- Book 6: Contractual Law;
- Book 7: Law of Succession
- Book 8: Final Provision: Interpretative provisions, entry into force and application of European Law.

In our next edition: Book 8: entry into force and basic concepts of civil law and changes therein

Contact for further information:

Dr. Andrea Klára Soós, Partner

andrea.soos@gfplegal.com

+ 36 1 270 99 00

CAN WE BE AFFECTED BY THE TAX INSPECTIONS IN 2013?

The general objective of the tax authority is still the widening of burden sharing, the prevention, the suppression of black and grey economy, the spotting and sanctioning of the tax avoidance, as well as to facilitate the abiding of the law, and to facilitate the voluntary compliance of law.

What is indeed that special sphere, who will be most likely in the focus of National Tax and Customs Administration of Hungary (NAV) this year?

According to the Act on the Rules of Taxation, in addition to statutory control, the state tax authority shall conduct its control operations in accordance with the control guidelines published by its director every year - hence in 2013 as well - by the 20th of February.

The achieving of goals is facilitated by the tax authority with risk assessment (e.g. KOCKERD questionnaire), selection, and expansion of the monitoring methods concerning the control, investigation and criminal matters of NAV. The instruments of NAV investigations and control - which have been reinforced in 2012 - will be further improved in the year 2013 in order to detect the crooked

taxpayers and extend the circle of the actual taxpayer.

The focus of **selection** method for inspection:

- risky factors related to various stages of the path of the taxpayer (foundation, operation, transformation, dissolution),
- risky connections of taxpayers.

An accentuate task of the **risk assessment** is the registration of taxpayers introduced in 2012 and the enhanced regulatory supervision, in the course of which the tax authority identifies and follows up the risky taxpayers obliged to a company registration.

The domestic VAT summary-reports and the processing of these has significant importance relating risk assessment in 2013 concerning the prevention of tax refunds based on fictitious accounts.

Strategic goal is to focus the inspections on the taxpayers with significant risks. For this purpose, the current economical processes will be highlighted with posterior tax supervision, which affects typically shorter periods (relating 1-3 years) in 2013 as well.

The taxpayers shall certainly expect investigation according to the control guidelines of the NAV, if they

- do not comply with the obligations regarding the tax declaration or tax report,
- frequently alter the seat, venue, or ownership,
- minimize the paid taxes,
- are permanently loss-making,
- are suspicious regarding tax evasion.

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The taxpayers shall certainly expect investigation according to the control guidelines of the NAV, if they do not comply with the obligations regarding the tax declaration or tax report, frequently alter the seat, venue, or ownership, minimize the paid taxes, are permanently loss-making, are suspicious regarding tax evasion.

Since the most significant part of the central budget consists of the value added tax, similarly to 2012, it is a significant task to increase the number and the efficiency of inspections relating to the VAT in the scope of posterior supervision.

As of the 1st of July 2012 the inspection of VAT regarding the sale of agricultural products under the reverse charge mechanism will be expanded to the trade performed with taxpayers under special legal status. While with beginning of the 1st of April 2013, the sectors under reverse charge mechanism (trade of swine and forage).



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In the year 2013 an increased number of prior and posterior inspections will be held by the tax body of NAV related to the environmental protection product charges, energy taxes, and public health product charges.

The onsite investigations and compilation of data are focused especially to tax payers affected by change in ownership or venue. In the selection for being inspected the aligned inspections regarding the reveal of sale connections and the thematic inspections in the single sectors play a significant role. In the year 2013 the inspections performed independently by the customs body of the NAV relating to the classical operative inspections like the inspection of fulfilment of obligations regarding invoices and receipts, inspections concerning employees, origin of products, and inspections of inventory will be expanded.

In order to rapidly and efficiently prevent illegitimate demands, inspections prior to transferring will have larger effect relating subsidies and tax refunds.

In respect to the posterior inspections of tax declaration the main purpose continues to be the scouting of fictitious invoices, circular billing and supply chains.

The wealth gain inspections will affect the following persons this year:

- participant in tax evasion-suspicious businesses,
- owners and/or representatives of enterprises terminated in liquidation procedures with significant remainders.

The activities mainly under the focus of the tax authority in 2013 will be:

- the service sector, including the wholesale trade (especially sugar, sweets, animals and meat products, wholesale of electronic and IT products),
- the retail of used goods in stores,
- enterprises concerned with activities of insurance agencies and brokerage.

The inspection guidelines published by the NAV cover the goals regarding the customs and the excise tax as well. The information on the orientation of inspections is available in full at the www.nav.gov.hu homepage.

We hope that the article above was helpful for you. Should you have any questions or unique requests, please get in touch directly with our Law Office.

Contact for further information:

Dr. Réka Ipacs, Partner

reka.ipacs@gfplegal.com

+ 36 1 270 99 00

MODIFICATIONS REGARDING THE LITIGATION PROCEDURE

The Parliament enacted in December several alterations in regulations regarding the litigation procedures. Therefore the following important changes will come into effect as of beginning 2013:

1. Changes regarding the organization of the courts

The names of the courts will change; local courts will change their names to District Councils ("járásbíróság"), in their names referring to the city where they operate. The change of the names does not go along with changes in organization, competence and jurisdiction and will have no effect on the management of cases. The district courts continue to maintain their former names.

Labor courts will be called "administrative and labor courts" in the future. Accordingly, the administrative procedures formerly implied to the tribunals (actions for the review of administrative decisions) will be implied to the administrative and labor courts. In these cases the second instance court will be the tribunal (instead of the Curia, the formerly second instance court regarding these cases). The parties have no obligations regarding these changes in the ongoing procedures.

2. Introduction of electronic communication in litigation procedures

Pursuant to the Act III of 1952 on the Code of Civil Procedure electronic communication in litigation procedures will be introduced progressively. We would like to review the character of these as follows:

In civil procedures started after 1 January 2013 the submission and its attachments, as an optional possibility, may be submitted electronically if the court proceeding in first instance is the tribunal. Thus the communication between the party and the court will only be electronical.

The submission shall be submitted using an electronic form available at www.birosag.hu. The completed forms shall be submitted to the court by the party through his own customer portal. A confirmation about the submission and information on the payment method of duties will be sent to the party.

The court will send the documents via e-mail to the party, about which the party will be forthwith noticed. The notice will be repeated



after three days. Upon the reception of the document an electronically recorded delivery will take place, which will be sent to the issuing court and to the party. This can certify the time of delivery in the future.

It is important to note that the Act is strict concerning the delivery of the documents. Should the addressee fail to take them over within five working days, the document shall be considered as delivered on the next working day.

There is a possibility to switch to paper documentation if the party is acting without a legal representative and certifies that his circumstances have changed in a way that the electronic communication means a disproportionate burden to him.

The goal of the legislative body is to widen the electronic communication in the course of time and to impose the obligation of using it in a wider scope of civil procedures.

Contact for further information:

Dr. Andrea Fialka, Senior Associate

Andrea.fialka@gfplegal.com

+ 36 1 270 99 00

HUNGARIAN DPA'S RECOMMENDATION ON THE MONITORING OF EMPLOYEES

It is constantly disputed whether it is legal or not for an employer to monitor their employees. While the court practice was always flexible, previous recommendations showed that the former DPA was of the view that it was per se illegal to monitor the employees, however in some exceptional cases the employer can justify the monitoring.

The new and digital technologies provide various possibilities for employers to monitor their employees and there is a common need to find the legal way of surveillance. The current Hungarian DPA published its recommendation on the electronic surveillance system.

Illegal monitoring: the Past

In the previous legislation the law was silent about monitoring, while different conclusions were available to the public. The data protection commissioners issued several opinions regarding, inter alia, the employers' monitoring of the employee's use of internet, email, cellular phone or GPS devices.

The second commissioner, Dr. Péterfalvi (currently the president of the data protection office) expressly took the position that monitoring

is not allowed by law and even safety cameras may not record any data of employees. On contrary, the third and last data protection commissioner, Dr. Jóri also addressed the issue of surveillance cameras at the workplace. He did not expressly refuse the possibility of safety cameras at the workplace, however, in his view it is important to regulate to what extent and under what conditions employers may use them, and information must be provided to employees.

Monitoring Legally: the Presence

In the Recommendation the DPA analyses the provisions of the Labour Code, the Privacy Act and the recommendations of the Article 29 Working Group of the EU. It also highlights that in its view, according to a recent decision from the European Court the data protection directive must be applied directly by the authorities.

The DPA expressed its view that in is per definitionem excluded, that an employee may provide any valid consent to in the course of his/her employment relationship, since no freely given consent can be presented during the employment relationship. This conclusion is based on a recent opinion of Article 29 Working Group.

Since no consent can be assumed in the course of an employment relationship any data controlling activity shall be based on an act or on the other legal grounds provided by the privacy act. In the recommendation the DPA makes a test based on article 7 of the Data Protection Directive. Article 7 (f) provides possibilities for the criteria making data processing legitimate without consent if: processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under the directive.

Since the Labor Code expressly allows the restriction of the fundamental rights of the employees the DPA finds that with certain conditions the monitoring can be legitimate.

The conditions are the following:

- the monitoring is necessary and is directly related to the nature of the employment relationship;
- the monitoring does not violate the human dignity of the employees and it may not access the private sphere of the employees (i.e. it is prohibited to control the private life of the employees);
- employees shall be duly and properly informed about the surveillance;
- the employer shall comply with all requirements of the privacy act, it must, in particular, respect the principle of fair and purpose based data controlling.

The DPA gives further guidance on point (c) and expressly lists the minimum content of monitoring policies. In its view the records cannot be archived and can be stored only for 3 days (in limited cases for a longer period as listed by the separate act on the protection of private wealth).

As a final remark in the DPA's view the monitoring system shall be registered in the National Data Controlling registry if other persons are recorded than employees and clients of the employer (for example visitors).



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Conclusions

The application of article 7 (e) of the Directive and the concept of legitimate interest may raise concerns. In particular since article 7 (e) expressly contains that the application of this provision for making a data controlling legitimate is not possible if the legitimate interest of the controller is overridden by the interests for fundamental rights and freedoms of the data subject. However, if an employer complies with the recommendation and prepares a proper monitoring policy, it will mitigate the risk of any employee's claim regarding illegal monitoring. Monitoring without policy or without proper notification to the National Registry would probably be considered illegal. Furthermore monitoring of "private places" (dress cabins, rest rooms or even kitchens) might also be considered unlawful.

Contact for further information:

Dr. Andrea Klára Soós, Partner

andrea.soos@gfplegal.com

+ 36 1 270 99 00

Your contact persons for Corporate and Commercial Law:

Dr. Arne Gobert, Managing Partner:

arne.gobert@gfplegal.com

Dr. Réka Ipacs, Corporate & IT/IP Partner:

reka.ipacs@gfplegal.com

Your contact persons for Labour Law:

Dr. Arne Gobert, Managing Partner:

arne.gobert@gfplegal.com

Dr. Andrea Klára Soós, Labour & Litigation Partner:

andrea.soos@gfplegal.com