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TAX AND LEGAL

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LAW SHOOTER

January 2013

NEW YEAR, NEW CHALLENGES

Our first newsletter of the year has lots to offer; great surprises along with important information regarding vital law alterations.

We start the year by celebrating the success of our Managing Partner, Dr. Arne Gobert who was elected as the President of the German Business Club in Budapest (Deutscher Wirtschaftsclub – www.dvc.hu) as the fourth president in the 20 years history of the club! The Club is a serious business platform available in Budapest for getting information about business, politics and other social and cultural events, which influence business as well as private life. The DWC has an outstanding reputation as one of the most stable and reliable pillars in German-Hungarian business relations, our Managing Partner sees this a great honor and is very excited of the new roles and duties waiting for him.

At the same time, this month's shooter mainly focuses on the corporate and tax law alterations of 2013 which affect a great number of our clients. If you have any questions regarding this important issue please do not hesitate to contact us for advice.

Once again, the BWSP Gobert and Partners team would like to wish you great success for the upcoming year!

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CORPORATE AND TAX LAW CHANGES

(PART 1)

In our present newsletter we would like to draw your kind attention to the following important Corporate and Tax law changes

1./ Deadline of the Court of Registry: **1 February 2013!**

We respectfully draw again the attention to the statutory deadline to fulfil your company's corporate obligation to the Court of Registry.

In the frame of these obligations, among others, the use of seat and the site of the companies need to be certified, the tax number and the date of birth of the members and the managing directors shall be reported to the relevant Court of Registry, in case that these obligations haven't been completed yet in a previous procedure of the company at the Court of Registry.

We offer a quick legal review of your company's registered data in order to avoid any sanction or fine imposed by the Court of Registry, which is a mandatory consequence of the failure in the above obligation.

Should you have any doubts or concerns whether your company has completed the above obligations, please contact us!

2./ Change of the amount limit for audit obligation

According to the Act No. XCVI. of 2011 on the modification of certain economical subject acts, for

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the business year of 2014, the auditing of accounting documents shall not be statutory, if both of the conditions below are satisfied:

a) the company's annual net sales (calculated for the period of one year) ***did not exceed 300 million forints*** – instead of the previously defined 200 million forints – on the average of the two last financial years under review, and

b) the average number of employees of the company of the two financial years preceding the financial year under review did not exceed 50 persons. (There is no change on the limitation of number of employees.)

3./ Easing rules on the settlement of the companies' equity due to foreign exchange loss

According to the Act on Business Associations, if a company does not have sufficient own funds to cover the statutory capital prescribed for its form of business over two financial years, and the members (shareholders) of the business association fail to provide for the necessary own funds within a period of three months after approval of the annual report for the second year, the business association shall adopt a decision within 60 days of this deadline for transformation into a different business association, or for its termination without succession.

With the effect of the date 16 October 2012, the legislator complete above regulation with an exemption, according to which, *the company is released from the above obligation, if within three months after approval of the annual report for the second year, the company can prove with an interim balance that the reason of the application of above regulation is no longer exists*.

4./ New reporting obligation towards NAV from 1st January 2013: VAT Recapitulative statement

Tax Procedure Act has introduced a new obligation with the beginning of this year. All the taxable person of VAT shall prepare a VAT recapitulative report statement, which include the declaration on all invoices of the taxable person, where the amount of VAT is exceeding 2 Million HUF. The taxpayer and the person entitled for the VAT deduction are both obliged to report the recapitulative statement – according to the regulations of the act – to the Tax Authority with the regular tax report together. This obligation applies also in case, if the invoice was modified or cancelled.

This recapitulative statement shall be submitted electronically and from the date of 1st July 2013, it will be available also electronically on the Client Portal ("Ügyfélkapu") of the Tax Authority.

Please note that failure or late reporting, such as the incorrect or false reporting of the above VAT recapitulative statement can be fined up to the amount of HUF 200.000,- in case of private persons, and HUF 500.000,- in case of other taxable persons.

5./ Relieve of penalties regarding the KOCKERD questionnaire

According to a change in the Tax Procedure Act, the KOCKERD questionnaire, which is a risk-analysing questionnaire followed after the tax registration procedure of the new companies, can be now electronically sent to the Tax Authority. This risk analysis procedure shall be conducted within a year after the receipt of the tax number or the personal change at the taxable company.
The Authority brings a decision on the result of the procedure only, if increased tax authority supervision is required on the base of the KOCKERD questionnaire. If no risk was found related to taxable person, the Tax Authority will not bring any formal decision.

In case of the omission of returning the completed KOCKERD questionnaire to the Tax Authority, the tax number of the company shall not be deleted automatically – according to the practice until 1st January 2013 – but call upon the company to fulfil its obligation and impose a fine, which can amount up to HUF 500.000. If the company fails to complete this obligation after the above warning of the Tax Authority, the tax number shall be deleted automatically.

Amnesty for the deleted tax numbers in 2012: the deletion of the tax number in year 2012 due to the failure of the returning of the KOCKERD questionnaire, is not an obstacle of receiving a tax number in the future tax registration procedure.

6./ Advantages for the taxpayers registered in the debt-free public database of the Tax Authority

New regulation from 1 January 2013 of the Tax Procedure Act that those taxpayers, who are registered in the debt-free public database of taxpayers are released to use / submit / attach any separate debt-free tax certification in any procedure.

Taxpayers *with only tax identification number* are also entitled to require their registration in the tax debt-free public database.

7./ Limitation of cash-payments
In order to raise the efficiency of tax collections, the Tax Authority aims to widen its instruments for control and limit the uncontrolled cash transactions.

According to the regulation of the Tax Procedure Act entered into force as of 1 January 2013, those taxpayer, who are obliged to have bank account (all companies and enterprises) shall pay the amount of compensation - including VAT, if applicable - in cash only up to the limit of HUF 1,5 Million / month / contract to another taxpayer, who is also obliged to have bank account.

in case of any cash payment above or in the violence of the above regulation, shall be fined with 20% default penalty to both parties (payer and receiver as well.)

Those compensations, which included in separate contracts in order to avoid the application of the above limitation, shall be indeed regarded as one contract and one transaction.

8./ Electronic archiving

According to the new regulation applicable from the beginning of this year, if the company is archiving its books, administration and certificates electronically, the fact thereof shall be reported to the Tax Authority and in case of any investigation or supervision of the Tax Authority, the electronic archive need to be available for the Authority.

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

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AUDIT SERVICES OF THE HUNGARIAN DPA

As from 1 January 2012 the Hungarian DPA opens its services for providing audit services. The audit service is regulated by the Privacy Act, however data controllers and experts still have a lot of concerns regarding the service. In Hungary no other authority has the same entitlement.

According to chapter 39 of the Privacy Act the data protection audit *„is a service provided by the authority designed to evaluate and assess data processing operations in progress or proposed along technical merits, intended to effectively implement a high level of data protection and data security system"*. The unclear wording of the act raises concerns and suggests that it is possible to request that the authority analyze the technical system and safety of the technical equipment used by the data controllers. Proposed data processing operations may be audited if deemed justified based on the elaboration of the data processing concept.

The audit service can be conducted by the Authority solely at the data controller's request. It is not clear, whether it can be requested by any of the controllers if there are more than one controllers, or the controllers shall request it jointly. For the data protection audit an administrative service fee shall be charged in the amount decreed by the relevant minister. This fee is not yet made available to public, however, based on official communications it will be determined on a case by case basis.

The Authority records the results of the data protection audit in also called audit report, however there are no guidelines for the minimum content of such report. The audit report may also contain recommendations for the data controller. The audit report shall be considered public, unless the controller requests otherwise.

It is important to note that the audit service does not qualify as negative clearance, the authority may open any procedure during the audit. However, if the data controller complies with the recommendations of the authority, no fines can be applied for the same conduct.

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HARMONIZATION OF LEGISLATION CONCERNING DATA PROTECTION IN CRIMINAL LAW

The council for harmonization of legislation of the Curia of Hungary declared on the 29th of October 2012 that the perpetrator of the Misuse of Personal Data as in Section 177/A of Act IV of 1978 on the Criminal Code may not only be a data controller pursuant to Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information ("Information Act"), but it may be any person.

The term "controller" has different meanings under the former and the new act. Under the former act, Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public interest controller shall mean a natural or legal person or unincorporated organization that determines the purpose of the processing of data, makes decisions regarding data management (including the means) and implements such decisions itself or engages a processor to implement them. Meanwhile under the Information Act controller shall mean the natural or legal person, or unincorporated body which alone or jointly with others determines the purposes of the processing of data, makes decisions regarding data processing (including the means) and implements such decisions itself or engages a data processor to execute them. The interpretation of the latter is still questionable.

The judicial practice has been divided regarding this issue for a long time. While in some cases the courts ruled that a perpetrator of the above mentioned crime can only be a data controller, in other cases they ruled the opposite. This fact led to a number of contradictory decisions of various courts, therefore a harmonization of legislation was highly required in order to have legal certainty concerning this question. Pursuant to the Information Act, controller shall mean the natural or legal person, or unincorporated body which alone or jointly with others determines the purposes of the processing of data, makes decisions regarding data processing (including the means) and implements such decisions itself or engages a data processor to execute them.

According to the reasoning of the council for harmonization of legislation, if the statutory approach of the Criminal Code sets "any person" as a perpetrator of the crime, the perpetrator may literally be any person, unless followed otherwise from the circumstances of the Code (i.e. a particular chapter of the Code like Military Offenses). The fact itself, that in the Section 177/A the perpetrator "processes data", and the term "data processing" can be found in data protection acts as well, will not make the subjective of the crime a special subjective.

If the perpetrator of this crime could only be a data controller under the Information Act, the crime would not be punished when committed by any other person. The result of this interpretation would be against the intention of the legislative body, since the goal is to punish everyone who committed the action described in said section of the Criminal Code.

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THE TERM OF "FAMILY" CANNOT BE LIMITED TO THE RELATIONSHIP OF A MAN AND A WOMAN

The Constitutional Court – with its ruling No. II/3012/2012. – has annulled Section 7 of Act CCXI of 2011 on the Protection of Families, which unduly narrowed the term of family.

The above mentioned act defines the family as *an emotional and economic community in a system of relations*, based on the *marriage of a man and a woman*, or *lineal descendants*, or *guardianship*.

This definition complies with the marriage and family protecting clause of the Constitution (Article L. of the Constitution), however, it only includes a part of the possible and existent family relations. Because it does not follow from Article L. of the Constitution that the relations included in the wider sociological term of family, based on mutual care and permanent emotional and economic community, aiming at the same goal (e.g. like the partners caring about and raising each other's children, partners not wishing to get children, or partners of different sexes who cannot have children through other reasons, the widows, persons caring about their sibling or children of their siblings or other kin, or those caring about an elder kin of the ascending line, etc.) would be excluded from the obligation of the republic on protecting the institution.

Considering, that the family, in a wider sense, is under the protection of the Constitution, the legislator may not enact provisions which narrow the constitutional conception of the family.

Present ruling of the Constitutional Court will have effects in Hungary on the new Civil Code as well as on the subvention system of the families.

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TELEWORKING IN HUNGARY

Chapter 15 of the new Labour Code (LC) includes special provisions relating to employment relationships according to type.

The forms of employment regulated under this chapter of the LC are different from the typical employment in terms of some of the conditions of employment. The telework (distance work) is distinguished from that of the typical one, for instance, by the place of work performance. In case of distance work the work is not performed at a place provided by the employer. The new LC breaks with using the former one's definitions, thus it does not call these forms of employment "atypical", but includes them in one chapter.

Teleworking means that the activities are performed on a regular basis at a place other than the employer's facilities using computer equipment, and the product is delivered electronically. It is important that the employee does not use electronic devices to communicate with his office, co-workers or principals, but because the work itself requires it. These jobs are typically the following: software development, data processing, entering datas, system administration, payroll calculation. In addition to the provisions of the Hungarian Labor code Directive 91/533/EEC is also relevant regarding this type of employment.

Teleworking is voluntary; it is up to the mutual agreement of the parties. Telework may be required as part of a worker's initial job description or it may be engaged in as a voluntary arrangement subsequently. Teleworkers benefit from the same rights as comparable workers at the employer's premises.

The employer is responsible for taking the appropriate measures to ensure the protection of data used and processed by the teleworker for professional purposes, in particular if the teleworker uses his private e-mail. The employer informs the teleworker in particular of any restrictions on the use of equipment and of sanctions in the case of non-compliance. Important rule is, that teleworkers shall have the same access to training and career development and the same collective rights as comparable workers at the employer's premises. No obstacles are allowed to communicating with workers' representatives. As a general rule, the employer is responsible for providing, installing and maintaining the equipment necessary for regular telework unless the teleworker uses his/her own equipment. The employer has the liability, in accordance with national legislation and collective agreements, regarding costs for loss and damage to the equipment and data used by the teleworker.

Regarding health and safety, the employer is responsible for the protection of the occupational health and safety of the teleworker in accordance with applicable laws. In order to verify that the applicable health and safety provisions are correctly employed, the employer, workers' representatives and/or relevant authorities have access to the telework place, within the limits of national legislation and collective agreements. If the teleworker is working at home, such access is subject to prior notification and his/her agreement. The teleworker is entitled to request inspection visits. Within the framework of applicable legislation, collective agreements and company rules, the teleworker manages the organisation of his/her working time. The workload and performance standards of the teleworker are equivalent to those of comparable workers at the employer's premises.

The *pronounced agreement* of the parties regarding the distance work employment is a mandatory element of the agreement. The employer may not order the employee ex parte to perform telework. Although it is not obligatory *to stipulate the place of work*, it is advisable. According to Paragraph 3 Section 45 of LC if the place of

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work is not stipulated, the usual place of work shall be considered as the place of work. The regulations on the labour safety require the employer to verify the place of work and the equipment previous to the employment. In order for the employer to have the possibility to comply with these legal obligations, it is advisable to stipulate the place of work. Otherwise it may happen that the employee changes the place of work extremely often, for example he may perform work in libraries or coffee shops. The new LC does not require stipulating the way of the settling regarding the necessary and justified expenses in connection with the scope of duties as an obligatory element of the employment agreement. According to Paragraph 2 Section 51 of LC employers shall be liable to compensate their employees for justified expenses incurred in connection with fulfillment of the employment relationship. However, it is advisable to stipulate the rules of the settling in the employment agreement in order to avoid subsequent disputes.

Beyond the obligations described in Section 46 of LC the employer shall inform the employee in writing within 15 days of concluding the employment agreement about the following: the rules of the monitoring by the employer, the rules of the restrictions of usage regarding the computer equipment, and the information regarding the business unit, to which the work of the employer connects. The first and the second may be arranged by the agreement of the parties. In this case there is no need for a disclosure. Furthermore, the employer shall cover the costs of the employee getting to the place of work. The employer shall facilitate the employee get in the site of the employer and to communicate with the co-workers. The principle of equal treatment in regard to the distance work means that the employer shall disclose all the information to the employee working in distance, which he discloses to other employees. Above the regulations of the LC, Act XCIII of 1993 on the Labour Safety (LS) specifies disclosure obligation as well (Section 86/A.): The employer shall inform the employee concerning the facilities available for consultation and representation of interests with respect to safety at work, and the names of persons placed in charge of these duties and information as to where they can be reached. Unless otherwise agreed, the employer's right of instruction is limited solely to the definition of duties to be discharged by the employee. This is not more than to giving the tasks. According to these, employee may determine the method of performing the work. The law permits the parties to stipulate otherwise, but it is not very life-like.

It derives from the principles of the LC that the employer provides the equipment necessary for work. This applies to teleworking as well, but parties may stipulate otherwise. If the employer provides the equipment of the employee, he may appoint that the employee may only use it in connection with his work, and not to private purposes. Employer may monitor this obligation of the employee. If during the monitoring the employer finds out that employee does not use the equipment according to rules, for example he uses it against the ruling of the employer for private purposes, this does not permit the employer to obtain these datas about the employee. The employer may call the employee upon removing such datas, and in more serious cases this can be a ground of termination for the employer. The employer may monitor the usage of the equipment even if it is provided by the employee, and if the usage for private purposes is allowed.

According to Section 86 of LS the work place designated for teleworking must be approved by the employer in advance for occupational safety standards. The employee shall be authorized to make any changes of bearing for occupational safety purposes upon the employer's prior consent. The parties may agree on the monitoring of the telework. If there is no agreement, it is within the scope of the employer to regulate the rules of the monitoring. But even in this case the monitoring shall not mean a disproportionate burden on the employee, or for the persons using the same real property. Disproportionate burden is i.e. the monitoring during the night, or if the employer informs the employee about the monitoring only 15 minutes prior to the actual monitoring.

The new LC has no special regulations regarding the liability of the employer and employee, thus the regular liability regulations of the employment shall be applied.

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HOW SHALL THE TESTAMENT BE SIGNED PROPERLY BY THE WITNESS?

This question has been answered by the Curia's Decision of Harmonization of Civil Law No. 3/2012 PJE, which has been promulgated in the Magyar Közlöny on 14 January 2013.

The witness to the testament shall sign the deed in a way he usually signs. The signature of the witness may not be substituted by initials of his name, unreadable characters, or the seal of the attorney-at-law acting as a witness. The witness' identity shall be indicated in the deed itself.

The Pfv. I. judicial council of the Curia started the procedure of harmonization of legislation because of two suits for declaration of invalidity of testaments. In both cases the facts were that the challenged testaments were stamped by the attorney drafting the deeds and he also signed the deed as a witness, indicating his address and his nature of witness. The plaintiffs asked the court to declare the testaments invalid due to the fact that the signature of the attorney contained only a few recognizable characters. According to them this does not comply with the provisions of Subsection B of Paragraph 1 of Section 629 of the Civil Code.

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by witnesses on a testament drafted by a third person is to certify the identity of the testator and to authenticate his signature. To fulfill this role it has to comply completely with the provisions of Subsection B of Paragraph 1 of Section 629, and the lack of complying with it can result in invalidity of the testament.

The witness can only authenticate the signature if his identity and his nature of witness are indicated in the deed itself. The witness complies with these provisions if he signs the deed in a typical and usual, by him regularly used manner. This shall be readable at least to such extent that the identity of the witness can be recognized. It is also acceptable if the witness indicates his readable name next to his unreadable signature. In the absence of this, the unreadable signature is not suitable for authenticating the identity of the witness.

It does not comply - for the same reason - with the provisions of the law if the witness only indicates the initials of his name as a signature. Using the attorney's seal in itself only marks that the deed has been drafted by the attorney. If the attorney drafting the testament acts as a witness as well, the signature at the right place and the indication to the fact that he acts as a witness cannot be set aside.

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