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LAW SHOOTER

March 2013

START THE SPRING SEASON WITH SOME LEGAL UPDATES!

This month's newsletter focuses on various legal areas such as EU, tax but also labour law related issues. Furthermore our foreign clients can find out how they can buy a Hungarian residence permit, as the Decree of the Ministry for National Economy has established so called „residency bonds" enabling Third-Country Nationals investments in Hungary to qualify them for an entry.

We at BWSP Gobert & Partners find it vital to inform our valued clients of with legal updates as it is not only our task to solve legal issues but try and prevent them in the best ways possible.. Please do not hesitate to contact us regarding any of the material in this months newsletter, we remain at your constant disposal.

Dr. Arne Gobert
Managing Partner

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CHANGES IN CORPORATE TAXES AND DIVIDEND TAXES IN 2013

Changes regarding the corporate taxes regulated by the Act LXXXI of 1996 on Corporate Tax and Dividend Taxes (hereinafter: "**Act**") affecting the income of persons performing business activity are summarized by us as follows:

Determining of the minimum income

We would like to point out that when determining the minimum income (profit) the whole income will be increased by the 50 per cent of the member's loan exceeding the daily average amount of member's loan existing on the last day of the previous tax year (that is the 50 per cent of the increase of the member's loan for the given year).

The deferred loss

According to Subsection 2 of Section 17 of the Act effective as of 1 January 2012, losses deferred from previous tax years may be deducted from the pre-tax profit up to 50 per cent of the tax base for the tax year calculated without any appropriation thereof. This provision shall be applied to losses created after 2004, since regarding the deferred losses arisen before 2004 are

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ruled by transitional provisions (Subsection 2 of Section 29, Subsection 8 of Section 29/C, and Subsection 2 of Section 29/F of the Act). Therefore in case the tax payer keeps record of deferred losses arisen in various tax years,

- according to Subsection 3 of Section 17 of the Act, firstly the deferred losses arisen before 2004 shall be appropriated;
- by appropriating the deferred losses arisen after 2004, (for determining the limit of 50 per cent) include only the latter losses may not be taken into consideration for the tax base.

Therefore it has not altered that the deferred losses shall be appropriated in chronological order. The negative tax base may be deferred without any time limit.

However, a new regulation has entered into force as of 1 January 2013 according to which following the composition agreement or an arrangement closing the liquidation proceeding, in respect of the taxpayer proceeding its activity will not emerge any duties of corporate taxes related to the arrangement, if the tax payer possesses deferred losses.

It is a new regulation as well that if the taxpayer dissolves without succession within two tax years following its transformation, it is entitled to appropriate the deferred losses even if it has no income arising from activities of its predecessor after the transformation.

It is important to emphasize that in case of company separation the deferred loss of the remaining tax payer is limited as well, and the duty to obtain income will also imply to the remaining tax payer (from which company the separation took place).

Notified intangible asset

A new category has been introduced in the Act as of the beginning of the year: the notified intangible asset, which shall mean not only the acquired assets, but as well assets produced by the tax payer embodying rights to royalties, provided that the tax payer notifies the tax authority concerning the acquisition or production of such assets within 60 days of the date of acquisition. (Attention, this is a forfeit deadline. This means, in case of failure to meet the deadline there is no possibility for an application for extension of the deadline.)

According the new regulations the tax base of the corporate tax may be reduced from the margin of the sale or in-kind contribution of intangible assets, if during the tax year prior to the notice the tax payer has not reduced its before-tax income with the amount coming from the sale of the intangible assets transferred from the profit reserve to the tied up reserve.

Although an unaltered provision is that the capital gains of the sale of intangible assets may be deducted from the pre-tax profit, providing that the tax payer kept its records the intangible asset permanently for at least one year prior to the sale (or transfer) of it.

Donation

Donation can be provided to public-benefit organizations as well, and it shall be considered as long-term donation. However, we would like to highlight that in case of any subsidy with the legal title of donation, without obligation of repayment, grant, non-repayable liquid assets it is obligatory to receive a *statement* from the recipient stating that his pre-tax profit for the tax year when the benefit was provided will not be negative without the income these benefits represent, and to receive a *certificate* for the determination of the tax base. The certificate shall include the name, seat, and tax number of the issuer and the tax payer, the amount of the donation and the supported goal.

The long-term donation does not increase the corporate tax base, however, this is the case only, if the above mentioned statement and certificate are also available, so it may be considered as an acknowledged expense. Otherwise it increases the before-tax income.

Tax allowance on corporate taxes

a) sponsorship of popular team sports:

For a support to public foundation created for the promotion of popular team sports (football, handball, basketball, water polo, ice hockey) for the costs of participating in competitions, for talent research and development of youth athletes, covering staff costs, and for improvement and renovations of tangible assets, tax allowance is available. The tax allowance may be used unaltered up to the 70 per cent of the payable tax in the tax year of the support and in the following 3 years.

As of 1 January 2013 the tax payer shall not certify that it has no unpaid public dues at the time of the issuance of the certification about the support, but it shall exist at the time of the application for such certificate.

a) supporting the motion picture and the association of performers continues to be an acknowledged expense.

b) development tax allowance:

In the scope of development tax allowance a new regulation as of 1 January 2013 is that the tax payer is also entitled to a development tax allowance, if it invests at least HUF 100 Million in the free enterprise zone (which is an administrative zone coordinated by an economic developer organization marked by the government); furthermore, an investment of at least HUF 100 Million in current prices regarding the installation and operation of investment affecting energy efficiency.

The development tax allowance is still may be used up to the 80 per cent of the corporate taxes.

Tax advance

The obligation of uploading the tax advance of corporate tax and local business tax until 20 December 2013 concerns only those tax

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payers, who had an income of at least HUF 100 Million in the previous year proportionally.

Tax rate (has not been altered)

The tax rate of the corporate tax continues to be 10 per cent up to a tax base of HUF 500 Million, and 19 per cent over this limit.

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HOW TO BUY HUNGARIAN RESIDENCE PERMIT?

As the Decree of the Ministry for National Economy has entered into force on 20 February 2013, it has established the so called „*residency bonds*". Pursuant to the provisions of this Decree - amending the Act on the Entry and Stay of Third-Country Nationals – Third-Country Nationals, whose investments in Hungary qualify their entry and stay as being in the interest of the economy at large may receive a residence permit with preferential conditions.

Previously three years of a continuous Hungarian residency was the pre-condition for a permanent residence permit, moreover such permit had a limited duration of at least three months and not more than two years.

The validity period of this special residence permit - acquired through the residency bonds – shall be **five years** at most, and **it may be also extended by maximum five additional years** at a time. However, it is still a required, that the applicant:

- has a **place of residence in the territory of Hungary**,
- has a **clean criminal record,**
- is **not considered to be a threat to the national security** of Hungary.

It shall be considered as a national economic interest, if the applicant certifies, that he/she or the company in which he/she holds a majority of shares, has bought government bonds worth at least **EUR 250,000,** with a duration of five years. The government bonds are put into circulation by the Hungarian Government Debt Management Agency Private Company Limited by Shares (hereinafter: "**ÁKK**"). ÁKK undertakes that it pays off the full amount of government bond's nominal value at the end of maturity.

Based on the information received from ÁKK, the Parliamentary Committee for Economic Affairs will approve separate enterprises, which will establish contractual relations with the foreign applicants. These enterprises will buy the desired government bonds for the foreign individuals. Eventually, the applicants *have to attach a final and irrevocable declaration of the enterprise, that it will use the applicant's contribution for subscribing the government bond for a nominal value of at least EUR 250,000, and will do so within 45 days after the issue date of the applicant's residence permit. The enterprises will be entitled to make the purchase declarations for a maximum of two trading days per calendar month as predetermined by ÁKK. One series will be introduced to the market per year and the offering price rate is calculated upon the applied interest rate set by ÁKK at the introduction of the given series.*

The bond is issued at a discount price, reduced with the interest, where the discount interest rate at the time the bond is issued is 1.5 percentage points lower,- but no less than 2%- than the most similar five-year secondary market yield of the euro-denominated bond with residual maturity issued by the Hungarian State.

If You, or any acquaintance you know is interested in buying residency bonds, or would like to receive more information on the aforementioned, or might need help with any other immigration cases, please do not hesitate to contact us and our experts will be at your kind disposal.

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A MERGER PROHIBITED BY THE EU COMMISSION

The European Commission recently announced its latest decision and its reasoning on Ryanair's proposed takeover of Aer Lingus in which it prohibited the merger of the two companies.

The Commission has examined 16 mergers in the air transport sector in the last few years and only three of them were prohibited by decision of the European Commission, including the latest request of Ryanair to merge with Aer Lingus. This was not the first attempt of Ryanair to achieve a consolidation with Aer Lingus, one of its current competitors on numerous air routes. The first one was in 2007, however in the latest case Commission did not apply merely to its former investigation material. The European Commission carried out a completely new investigation with regard to the current market conditions.

As a result of its investigation in 2012 the Commission came to a conclusion that *"the proposed acquisition of Aer Lingus by Ryanair*

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would lead to the elimination of Ryanair's very close competitor on a large number of routes – 46 in total, including 28 routes where the acquisition would lead to an outright monopoly – and would thus affect a considerable number of passengers who would likely face higher air fares".

The Commission provided a thorough investigation by using all the available means. It conducted extensive market test, contacted the market participants and analysed the internal documents of Ryanair and other air carriers. Furthermore the Commission informed Ryanair about its concerns in a very detailed Statement of Objections. Ryanair had the opportunity to reply to these objections and proposed several types of remedies. They were discussed between the Commission and Ryanair four times within a framework of so called "state of play" meetings following each conducted market test. Ryanair after each discussion improved its proposals for remedies, although the Commission found them insufficient to eliminate the threat of limited competition following the planned merger.

Ryanair proposed to divesture 43 routes in Ireland – which overlapped the activity of Aer Lingus – to Flybe, a stand-alone company, together with transfer of further assets in order to enable Flybe to manage these flights for the future. However, the Commission found these steps insufficient, since even with these assets Flybe (Ireland) would not become a viable and active competitive force against the merged entity.

Another proposed remedy of Ryanair was to enable IAG (British Airways) to operate extra frequencies on London's airports and to make available for this purpose the necessary number of slots at these airports. Following an in-depth assessment, the Commission found that IAG would not be able sufficiently constrain the merged entity after the transaction irrespective of whether IAG would have entered on these routes of Heathrow or Gatwick, the merged entity would have remained dominant in terms of number of frequencies and seat capacity on these routes. In addition, the Commission found that IAG has a different business model focusing more on business and connecting passengers.

The proposed slot divestitures on a limited number of routs and block space agreements on the remaining overlap routes were found insufficient by the Commission to eliminate its competition concerns raised against the planned merger of Aer Lingus and Ryanair despite the several attempts to find an optimal solution in order to generate synergies and savings that would benefit all customers. The European Commission can only approve a merger that raises competition concerns if all these concerns are, with the required degree of certainty, removed by the commitments proposed by the notifying parties.

The competition concerns raised by the contemplated merger were unprecedented. These concerns covered 46 actual overlap short-haul routes and additional short-haul routes which were potential competition between the parties would have been eliminated. This way Ryanair would remove one of its closest competitors on a significant number of routs and it would obtain a monopole position on 28 routes and dominant position on further 18 routes. In this manner passengers would face a limited choice and would become particularly vulnerable to price increases.

In Hungary, the competition authority may also prohibit any merger if it finds that the as a result of the merger the local competition would be significantly less than without it. In practice the Hungarian authority however mostly applies ex ante regulations, for example it orders special conditions for the parties to comply with.

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NEW LABOUR CODE – NEW EMPLOYMENT CONTRACT?

Given that *Act I of 2012 on the Hungarian Labour Code* ("**LC**") featured numerous novelties, since it has recently entered into force 1 January 2013, therefore it is worth to review among our own companies if there are any contracts which possibly need modification, as well as the applied methods and behavior upon selecting a future employee, equally from an employer and an employee point of view. Additionally, in case of certain legal conditions the already existing employment contracts' modification may be necessary.

I. The right to lie – is lying allowed in an employment relationship?

In the course of establishing a new employment relationship, that is typically in job interviews a large amount of information is exchanged within a short period of time, but what are the limits which are permissible and where is the fine line which stirs up the rules of the expected behavior and the parties' mutual cooperation obligation in such situation?

The data protection commissioner's principle on the right to lie is acknowledged and applied by the judicial practice as well, but let us take a closer look at what all this means.

The most practical example for the above is upon establishing or existing of an employment relationship, if the employer asks questions regarding the employee's family planning intentions, this qualifies as the employer's breach of its cooperation obligation. Given that as a response to such occurrence it is not expectable from the

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employee's side to fulfill the proper cooperation – as this is a question regarding the most private and intimate spheres of the employee - therefore the employee has the right to lie regarding the information on family planning.

Similar questions may be raised regarding the test series used to measure the adequacy to the given field of work. Most employees usually without any questioning undertake such tests, thinking that it is part of their job duties, or expect to acquire the position they are applying for specifically through participating. In these cases also there are permissible factors as well as ones that go beyond what is acceptable.

Psychological and various other types of personality tests, further the analyzing methods thereof are becoming more and more common. However, it is less commonly known that for the employers to receive knowledge on any conclusions from test results which regard the personality of the employee, the previous consent of the employee must be granted.

In practice, the approval of the employee is considered to be granted upon the fact that the employee undertakes such psychological test. However, it is important to know that the employee is entitled to a reservation right. This means that the employee can learn about the personality test results prior to the employer, and based on the results can decide whether the employer should recognize the results of the test already analyzed or not. The precondition for the employee to practice such right to decide on the aforementioned is the proper discretion and cooperation of the human resources (HR) department.

II. New workplace - new employment contract?

It is a novelty in the LC that the compulsory content elements of the employment contract have been modified. Unlike the previous regulation, besides the salary and the job description, the location of where the work is performed, that is the workplace must no longer be determined in the employment contract. Let us take a look at what this means in practice.

If the employment contract was concluded prior to when the new LC entered into force, that is prior to 1 January 2013, and the contracting parties indicated the workplace as a variable workplace, then according to the new labor law regulations the applicable workplace is where the employee usually performs the work.

According to the previous regulations, based on the variable workplace, the employer was entitled – within the legal framework - to unilaterally impose on the employee, when to work in which branch or work site. This type of labour law clause is not legitimate anymore as of 1 January 2013; therefore solely referring to the variable nature of a workplace in employment contracts is no longer possible.

If the parties have previously agreed a variable workplace, however the employer would like to hire the employee for work to be performed previously from one branch in future at another branch permanently, then the modification of the employment contract is necessary. The same case applies when the employer's registered seat is indicated as the workplace; however the registered seat changes in the meantime. These kinds of problems can be prevented with the wording whereas the employer's workplace is determined for example as the "all-time prevailing" registered seat of the employer.

Upon determining the employers "all-time prevailing" registered seat as the workplace the legitimate right of withdrawal must be taken into account. If any significant change regarding the prevailing conditions of the employment contract has occurred since the establishment of the employment relationship, which makes the continuation of the employment *impossible* (*objective circumstance* – for example the daily commute to the workplace would take up more time than the daily work hours), or which would mean *disproportionate harm* (*subjective circumstance* - for example the mother of a young child would not be able to pick up her child on time form the kindergarten), then the employee is entitled to rescission from the employment contract.

However, it is not excluded to indicate a broader geographic location, such as a county or city. It is important though to handle even broader definitions than the aforementioned cautiously, whereas in accordance with the judicial practice, such determinations as "Hungary" or "Europe" as workplace are no longer considered as legitimate provisions. In this case the requirements for proper practice of rights and reasonable procedure also prevail.

It is important to emphasize in connection with the workplace, that if the employer's intention for termination notice is due to the employee's ability or reasons related to the employer's operations, then the termination of the employment relationship is considered as legitimate, if within the indicated workplace (or in lack of such determination, where the employee usually carries out the work) there is no opening for any other job which requires the employer's ability, education or experience.

That is, if for example the employer indicated its *work sites* as the employee's workplace, then each and every one of the employer's work sites must be separately examined as per whether there is a possible open position for the employee based on the aforementioned conditions. Therefore, it is worth taking proper care that the employment contract to be concluded bears a realistic content, which includes the actual workplace and reflects the generally usual work circumstances.

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QUESTIONS CONCERNING THE HUNGARIAN PENSION SYSTEM

There are questions, which concern the employer even in the case when employees are about to reach or have already reached the retirement age:

When does the retirement age start? Is there a possibility to terminate the pensioners' employment relationship by notice or are they subject to termination protection? Are the employers entitled for tax allowances when employing a person, who already reached the retirement age?

In order to give appropriate answers to these questions we prepared a compilation on the current pension system.

Statutory retirement age

Depending on the date of birth of the person concerned, the statutory retirement age is between 62 and 65 years. From this age the person is entitled to 100% of the pension payment. The amount of the pension is based on the acknowledged length of service and the average monthly gross income, that has to be taken into account. Beside the age requirement, there are other conditions which need to be fulfilled for the validation of pension entitlement, such as: the person concerned

(i) should disposes of at least 20 years of service,

(ii) is not subject to social security relationship (neither employment or assignment contract) on the day of determining the full pension

Protection in the employement relationship before reaching the retirement age

Pursuant to the legal provisions, the employer may only terminate the employment relationship of the employee within the five-year period before the employee reaches the pension age limit when conditions for the termination with immediate effect are applicable. These conditions are fulfilled in the case, when one party

(i) intentionally or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship; or

(ii) otherwise engages in conduct that would make the sustainment of the employment relationship impossible.

Continued employment of pensioners

The employee who reaches the age limit for pension and is remained employed, is not entitled to the aforementioned protection anymore. In such case the employees' employment relationship can be terminated only upon the general rules of termination. In particular, an employee may be dismissed only for reasons in connection with his/her behavior in relation to the employment relationship, with his/her ability or in connection with the employer's operations. According to the new provisions of the *Act I of 2012 on the Labor Code*, the employer is not required to give written reasoning for terminating the pensioners' employment relationship concluded for indefinite term. Please note, that ground for termination is still needed, but this cannot be the age of the employee, since it would be against the prohibition of discrimination.

Tax-free wage limit – Allowances for the employer when employing an employee, who reached the age of 55

For employees working during the period of pension payments, there is no limit set up to which amount the income is tax-free. Upon the request of the pensioner, there is a possibility to suspend the payment of the pension for the period of employment relationship. If the payment of the pension is suspended, the drawings regarding the wages are different. As for the Employer, such suspension does not constitute benefits or burdens.

As of 1 January 2013, employers employing employees who reached the age of 55, may apply for social contribution tax allowances. The employer may apply for such allowances without a time limit, therefore this is applicable for employing pensioners. Based on the aforementioned, the employer is obliged to pay 12, 5% social contribution tax up to the gross wage of HUF 100,000. As per the wage above this amount the social contribution tax rate is 27%.

Legal statement:

The above is primarily thought-provoking information, providing general analysis, which is not to be considered as legal consultancy. Every case should be examined and analysed in the light of all circumstances specific to the given case.

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