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LAW SHOOTER

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FIND OUT HOW NEW LEGAL REGULATIONS EFFECT YOU AND YOUR FIRM

This months Newsletter covers numerous legal fields, starting with data protection which concerns us all, in the form of Google street view, and the Hungarian Data Protection Authority's view on the issue. Another very useful topic this month which can be especially interesting for our German clients is the legislation restricting the free use of languages in employment relationships. Last but not least, due to the high number of requests we continue our hot topic of the past months, the New Civil Code. Finally we are excited to share that our next month's newsletter will be focusing on the effective ruling of invoicing which covers fields such as e-invoicing and administrative obligations. We at BWSP Gobert and Partners hope that you will enjoy the following articles, should you have any questions or queries, as always, we are at your disposal.

Dr. Arne Gobert
Managing Partner

HUNGARY'S DPA: GOOGLE STREET VIEW'S BUSINESS INTEREST CAN BE SEEN AS 'LEGITIMATE INTEREST'

After more than three years of negotiations, the Hungarian Data Protection Authority ("DPA") has finally provided "green light" to Google Street View Services ("GSV"), Andrea Soos reports.

Several public governments were involved in the negotiations and as a final "approval" the president of the DPA recalled the statement of the previous data protection commissioner and replaced it with his new opinion. The opinion is publicly available. However the related documents, including the minutes of the negotiations or the supporting letters of the local governments are not public. The main arguments and reasons of the supporters were that the service can promote the tourism in Hungary.

Investigation in 2011

After his official investigation, the previous data protection commissioner issued his detailed criteria for GSV in order to comply with Hungarian law. As preliminary conditions: (i) solely "raw photos" can be transferred to the US, and only if data contained in the raw database does not qualify as personal data, since the explicit consent of the individuals could not be obtained by Google to such transfer; (ii) Google shall register its data processing activity to the mandatory Hungarian data protection registry; (iii) Google's shall make a commitment that it will comply with the

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with the following conditions:

(a) the time and date when and where photographs would be taken should be publicly available in Hungarian at least one week before the commencement of the operation and simultaneously the Commissioner shall be informed on the circumstances of taking the photographs;

(b) the timing shall be scheduled possibly for the dates when few people are present on the streets;

(c)"sensitive" areas like hospitals and social institutes shall be protected and treated particularly carefully;

(d) the recording devices shall be placed in a manner which provide almost the same view as that of street passengers;

(e)before publication, the affected data subjects must be provided with the opportunity to object against the photographs taken, in particular if the photo is of vehicles, real estates;

(f) affected data subjects must have the legal possibility to submit objections against the use of the photos;

(g) any personal information and raw data must be deleted as soon as possible;

(h) the purpose of the storage of raw data must be determined and this purpose shall be made public;

(i) any affected data subjects must be informed on any related data processing or storage.

The new DPA, however, found the above conditions too stringent. In order to change the previous opinion, the DPA referred to the relatively recent decisions of the European Court of Justice in which the ECJ holds the direct effect of article 7 of the Directive.

Arguments of the new DPA

The DPA fully accepted the arguments of Google and found the following purpose for data controlling as valid aims: the preparation of the Google map and the providing of GSV services.

Though the DPA repeats the requirements of the Privacy Act, i.e. that the data processing must be based on either consent or provision of an act , it comes to the conclusion that article 7 of the directive provides "further legal ground" for the legitimate data processing. The relevant provisions of article 7 are the following: personal data may be processed only 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 Article 1 (1).

In its analysis the DPA refers to Opinion 15/2010 of Working Party No. 29. of the EU Commission on the definition of consent. The DPA is of the view that requirement for any consent from the relevant data subjects would be "impossible. Therefore, the DPA examined whether the aim of making the GSV photos was the "legitimate interest" of Google.

The DPA came to the conclusion that the concept of legitimate interest definitely covered the "business interest" of companies. The next step of the analysis was therefore whether the possible restriction in the privacy of the data subjects was proportionate to the aim of GSV services. As a conclusion the DPA found that the possible restriction is acceptable as proportionate.

Conclusion

The criteria of the EU DP Directive for making data processing legitimate is implemented into the Privacy Act. However, in practice, not all subsections of the directive are followed by the Hungarian legislation. The Hungarian wording for the implementation of Article 7 of the directive is as follows:

"Personal data may be processed also if obtaining the data subject's consent is impossible or it would give rise to disproportionate costs, and the processing of personal data is necessary:

a) for compliance with a legal obligation pertaining to the data controller, or

b) for the purposes of the legitimate interests pursued by the controller or by a third party, and enforcing these interests is considered proportionate to the limitation of the right for the protection of personal data.

If the data subject is unable to give his consent on account of lacking legal capacity or for any other reason beyond his control, the processing of his personal data is allowed to the extent necessary and for the length of time such reasons persist, to protect the vital interests of the data subject or of another person, or in order to prevent or avert an imminent danger posing a threat to the lives, physical integrity or property of persons."

The opinion makes it clear that, in the view of the Hungarian DPA, the term "impossible to acquire consent" may mean that

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the data controller has difficulties in acquiring consent. Further, in the DPA's view business interest can fall under the category of legitimate interest.

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THE NEW CIVIL CODE AND THE INSURANCE CONTRACTS

Hungarian Parliament passed a bill on the New Civil Code (hereinafter: NCC) on 11 February, 2013; the new Act will come into effect on 15 March, 2014.

The Sixth Book contains the provisions related to the individual contracts, such as the insurance contract following the common regulations of obligations and general contractual rules.

The purpose of the new regulation is to reflect to the extraordinary changes that occurred in the past two decades in the field of insurance.

The insurance contract is a traditional commercial contract, thus the new regulation allows possibility to ensure the principle of freedom of contract, requirement of disparities and enforcement of all regulations, which express and guarantee the business and commercial character of this legal relationship.

Notion of the insurance contract

The NCC differs from the current regulation in that it strongly emphasizes that the Insurer assumes the risk, so his primary obligation is of a praestare character.

The regulation is also new in the sense, that it re-regulates the structure of the insurance contracts, dividing the contracts into two categories: damage and amount insurance.

The damage insurance is actually aimed at reimbursing the insured damages, whilst the aim of the amount insurance is to refund the amount previously determined in the insurance contract.

Insurance interest

The NCC requires to all types of insurance contract the existence of an interest of the contracting party. This means that an insurance contract might be concluded only by someone, who, based on personal or financial legal relationship, has interest in the materialization or avoidance of a certain risk, or who is concluding the contract on behalf of the interested party. Lacking the interest the contract shall be null and void, although the new regulation only declares the damage insurance and the group amount insurance being void without such interest.

In case of amount insurance the interest is represented by the consent of the insured person, whereas failing this, the contract will be partially null and void.

Co-insurance and group insurance

Although it is already characteristic of the economic life nowadays, the NCC defines the notion of co-insurance and group insurance for the first time.

(i) In the case of co-insurance, the insurance risk is borne by several Insurers jointly, who perform the insurance service together according to a predetermined ratio. The extent of undertaking the risk has to be determined by the Insurers in advance, if this element is missing the co-insurance contract is null and void.

(ii) In the case of group insurance the risk of the Insurer covers several Insured persons belonging to the same organization. In this case the classification of the Insured is determined by their membership of the specific organization, and the risk of the Insurer covers those Insured persons who were members at the time when the risk materialized, although the Act grants exemption from the rule by stating that the parties may agree, that the insurance shall cover those Insured persons, who are no longer in a legal relationship with the organization at the time when the risk materialized. In the case of group insurance, as a general rule, the Insurer addresses his legal declarations to the organization, as the contracting party - who is then obliged to inform the insured persons belonging to this group.

The creation of an insurance contract

According to the regulation currently in effect, insurance contract may be validly concluded only in a written form.

The NCC also states that the insurance contract is valid only in a written form, however the document certifying the insurance coverage and issued by the Insurer is considered as the typical written form.

The policy holder is eligible to make his proposal also in a verbal form.

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Conclusion of the insurance contract by the implicit conduct of the Insurer

Pursuant to the current regulations, the insurance contract may be created by the tacit consent of the Insurer. According to NCC, the contract is created by the tacit, implicit conduct of the Insurer, if the party making the proposal is a consumer. The consumer is a natural person who is not acting within the scope of his own business, craft, or profession. If the consumer makes his offer, in the possession of the information regulated in laws governing the content of the insurance relationship, on the proposal form issued by the Insurer and according to the schedule of the premium, the insurance contract is created even if the Insurer has not responded to the proposal within fifteen days – sixty days if a medical examination is necessary for the evaluation of the proposal - from its receipt. In such a case the contract is concluded with a content pursuant to the proposal and retroactively as of the date on which the offer is conveyed to the Insurer, on the day following the expiration of the deadline set forth for evaluating the risk. The Insurer may amend or terminate the concluded contract if he becomes aware that it deviates from the general terms and conditions on an essential matter.

The effective date of insurance coverage

According to the currently effective regulations, the date of cover, in other words the date of the contract coming into effect is linked to the payment of the premium.

According to the NCC, the coverage is the date stipulated by the parties in the contract, otherwise the date of conclusion of the contract. Parties may make a written agreement that the coverage starts before the date of concluding the contract (preliminary coverage).

Preliminary coverage is effective until the conclusion of the contract or until the refusal of the proposal, but for 90 days at most. If the contract is created, the contracting party is obliged to pay the premium for the time of preliminary coverage as well. If the contract is not created, the contracting party is obliged to pay the premium for the time of preliminary coverage, but the amount of such premium is different from the amount of the premium calculated in the case the contract is concluded.

The increase of the insurance risk

In addition to providing a more specific definition, the effective and the new regulation are essentially identical.

If the Insurer becomes aware of any significant circumstance regarding a contract only after the contract has been concluded and, furthermore, if the Insurer is notified of changes in any of the important circumstances specified in the contract, the Insurer shall be entitled to make a written proposal, within fifteen days, to amend the contract or, if it cannot undertake indemnification according to the regulations, terminate the contract with thirty days' notice. If the contracting party does not accept the proposal for amendment or fails to respond to it within fifteen days, the contract shall be terminated on the thirtieth day following the day on which the proposal for amendment was communicated. The insured party shall be warned of this consequence when he submits the proposal for amendment.

As a new rule in the NCC, if the contract has been made to cover more persons or properties, and a significant increase of the insurance risk arises with respect to only a few of them, the Insurer may not exercise his rights of termination and amendment with respect to the other persons and properties.

This new rule limits the unilateral right of the Insurer to amend and terminate the insurance contract in cases when the insurance risk occurs in respect to only some of the insured among more insured property or persons.

Obligation to pay insurance premiums

The NCC basically maintains the currently effective regulations of premium payment.

According to the currently effective regulations, unless otherwise agreed, the first insurance premium shall be due at the time the contract is concluded, and all subsequent premiums shall be due on the first day of the period to which they pertain.

Unless otherwise agreed, the single premium shall be paid at the time the contract is concluded.

According to the NCC, the insurance period shall be one year.

The obligation of premium payment in case of termination of the insurance contract

Under both the currently effective regulations and the NCC, if the insurance contract is terminated due to the occurrence of the insured event, the Insurer may demand the payment of the insurance premium for the entire period.

The NCC sates however, that if the contract is terminated for any other reason, the Insurer may demand the payment of the insurance premium only for the duration of the cover.

Consequences of the failure of the premium payment obligation

According to the currently effective regulations the contract shall be extinguished on the thirty-first day following the premium payment due date if the overdue premium is not paid and the insured has not received a deferment, or if the insurer has not filed for a court action regarding the premium payment.

Insurers shall be entitled to postpone the termination of the contract and the time limit for filing a court action by an additional thirty days, if they issue written payment notice to the contracting party by communicating this circumstance within the aforementioned thirty-day period.

The NCC - for the advantage of the contracting party - stipulates that if the premium is not paid, the Insurer, along f

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with warnings of the consequences, will oblige the contracting party in a written format to pay the premium, with a thirty-day extension of time commenced with the date of dispatch of the notice.

After a fruitless extra time, the contract will be terminated with a retroactive effect, unless the Insurer enforces the claim for premium payment in court, without delay.

Reactivation

The NCC provides for the re-entry into force of an insurance contract, terminated for failure of premium payment.

This may occur when the contracting party requests this within one hundred twenty-days from the date of the termination of the contract and the contracting party pays the insurance premium arrears.

Although this regulation is missing from the currently effective law, in practice this clause is contained in the insurance contracts.

Information obligation of the contracting party

The NCC states that the contracting party shall, if he is not the insured person, inform the insured person about the declarations addressed to him and about the changes in the contract until the risk materializes or until the entry of the insured person into the contract.

Entry into the contract:

The NCC allows the insured person to enter into the contract at any time, in contrast to some restrictive provisions in the currently effective regulations.

It is a subjective right of the Insured person, the Insurer is not required to consent to the entry.

The rule has remained unchanged that in this case the Insured person is jointly and severally liable together with the contracting party for the payment of the insurance premiums. As a new rule, the Insured person shall reimburse the costs of the policy holder.

Communication and change notification obligations:

There is a significant difference between the currently effective regulation and the new one, in addition to the use of new terminology.

The NCC obliges both the policy holder and the insured person to fulfil their communication and change notification obligations, and also requires that the change notification obligation shall not be contingent upon the agreement of the Insurer and the Insured person, but states that both the contracting party and the Insured person are obliged to perform the obligation, by virtue of the law.

The NCC states, as a new regulation, that in the event the contract has been made to cover more properties or persons, and the violation of the communication and change notification obligations arises only in respect to a few of them, the Insurer shall not invoke violation of the communication and change notification obligations with respect to the other properties and persons.

Notification obligation related to the materialization of the risk:

The difference between the regulation currently in force and the new regulation is that the notification obligation related to the materialization of the risk is equally borne by the contracting party and the Insured person. The contracting party and the Insured person shall notify the Insurer of the materialization of the risk in accordance with the deadline set for same in the insurance contract, and shall provide all necessary information, and allow the verification of such information. Should the contracting party or the Insured person fail to act accordingly, and therefore any material circumstance becomes impossible to investigate, the Insurer is relieved of its obligation to perform.

Frustration of contract, loss of interest:

The regulation currently in force and the new regulation, despite the new terminology, has identical provisions for the termination of a contract, or the termination of the corresponding part of the contract in such an event that the materialization of the risk shall have occurred prior to the effective date of cover, or its occurrence has become frustrated or the insurance interest has ceased.

If, during the term of cover, the materialization of the risk is frustrated, or the insurance interest ceases, the contract, or the corresponding part of the contract is extinguished.

Under the new NCC, in the latter case, the contract shall not terminate as of the last day of the month; the new regulation leaves this matter open, and presumably the contract terminates upon the occurrence of the underlying cause.

Under the NCC, legal consequences attached to the cessation of the insurance interest shall not be applicable if such cessation of interest is exclusively the consequence of a property ownership transfer, and the property has been in the possession of the new owner also earlier, under a different title. In such an event the insurance cover is also transferred, together with the title, and the insurance premiums due at the date of the ownership transfer shall be the joint and several liability of the former and the new owner. Any party may terminate the agreement, in writing, within a thirty-day deadline after having become aware of the transfer of ownership.

Unilaterally binding rules of an insurance contract concluded by the consumer:

The NCC protects consumer rights, and declares that if the contracting party is a consumer, then certain provisions of the new regulation are binding, and that the insurer may derogate from these rules only in favor of the contracting party, the insured person and the beneficiary under an insurance contract.

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The binding rules are as follows:

(i) to the conclusion of insurance contract by the tacit, implicit conduct of the Insurer;
(ii) to the significant increase of risk;
(iii)to the consequences of default of premium payment;
(iv) to the supplementation of cover;
(v) to damage prevention and mitigation requirements;
(vi) to the obligation pertaining to communication, change notification, and the materialization of the risk;
(vii) to the settlement between the insured person and the injured person;
(viii)to the payment obligation applicable to the termination of contract;
(ix) to the exemption of the insurer from its service obligation; and
(x) to the rules pertaining to reimbursement of claims.

Unilaterally binding rules of consumer amount insurance and health insurance contracts

Under the NCC, if the contracting party is a consumer, the contract may derogate from the provisions of amount insurance and health insurance not permitting derogation only in favor of the contracting party, the insured person and the beneficiary.

The types of damage insurance and amount insurance will be reviewed in our next news letter.

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THE COURT OF JUSTICE ON LEGISLATION RESTRICTING THE FREE USE OF LANGUAGES IN EMPLOYMENT RELATIONSHIPS

The essential aim of the European Union was to establish a close economic integration in order to boost the economy and raise the welfare of the European nationals. To achieve this goal, enforcement of the four freedoms, free movement of people (workers), goods, services and capital is indispensable.

Thus free movement of workers is a fundamental principle of the EU, allowing the citizens to look for a job in another EU country, work there without needing a work permit, enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages. This principle enshrined in the Founding Treaties, invokes in many cases another fundamental right, the free use of languages and thus indirectly the principle of non-discrimination. The extension of the use of language rights and elimination of the discrimination is designed to promote the realization of the market freedoms. European Union is a multilingual and multicultural community where 23 official and many regional and minority languages co-exist in one area. When crossing state borders, EU citizens are usually also crossing language borders, which can thus become barriers to free movement of people.

However Union law refers to linguistic knowledge as a national requirement for practicing a certain profession or for holding a certain post. Directive on the recognition of professional qualifications stipulates that “persons benefiting from the recognition of professional qualifications shall have knowledge of languages necessary for practicing the profession in the host Member State”.

The European Court of Justice (ECJ) has addressed this issue in several cases, such as in Groener and Angonese, where it has established that a language policy requirement affecting free movement of economically active citizens from another Member State is justified “provided that that requirement is applied in a proportionate and non-discriminatory manner”.

In the case Angonese, an Italian citizen, whose native language was German and studied at the University of Vienna, after obtaining his diploma, he applied for a job in a Bank, in Bolzano, Northern Italian region, where German is commonly spoken. Bank required employees to be equally proficient in German and Italian. Mr. Angoneses’ application was refused, because he did not have the required certification of bilingualism, issued by the authorities in Bolzano. Mr. Angonese contested bank's refusal, stating that his university studies should be considered to prove German proficiency. According to the ECJ’s reasoning, the Founding Treaties stipulate that the free movement of employees shall entail the abolition of any discrimination based on nationality. Every requirement, according to which the given language must be obtained in the specific Member State is contrary to the principle of non-discrimination, thus it is against the law of the Union.

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In Groener case, the applicant, a Dutch national, was refused appointment to a post as an art teacher after she had failed a test to assess her knowledge of the Irish language. ECJ stated the Treaties do not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. The implementation of such a policy, however, must not encroach upon a fundamental freedom such as the free movement of workers nor must it discriminate against nationals of other Member States. Language requirement must be reasonable and necessary for the job in question and must not be used to exclude workers, so that advertisements requiring a particular language as a 'mother tongue' are not acceptable.

Moreover most recently, the Flemish community in Belgium has been condemned for allegedly infringing EU freedom of movement by only drafting workers' contracts in Dutch. Under Flemish law on the use of languages, employees must complete their employment contract in Dutch. Failure to comply with the law can result in a cancellation of the contract. ECJ found that the Flemish community had infringed the rights of a Dutch national named Anton Las, who was working for a multinational group whose registered office is in Singapore. His employers terminated his contract, which was drafted in English. The Flemish government said the language law was justified as part of a strategy to "protect and promote the Dutch language."

According to ECJ "Such a restriction is justified only if it pursues an objective in the public interest, is appropriate to ensuring the attainment of that objective, and is strictly proportionate. In such a situation, the establishment of free and informed consent between the parties requires those parties to be able to draft their contract in a language other than the official language of that member state."

According to the European Commission multilingualism is an asset for Europe and a shared commitment, which means multilingual workforce is a distinct advantage that would provide European companies a competitive edge and thus promote prosperity. Consequently, from the citizens' perspective, learning languages increases employability and to this end, Member States should develop the acquisition and recognition of language skills outside the formal education systems.

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THE MANDATORY DATA DISCLOSURE OF FINANCIAL ORGANIZATIONS

The financial organizations which are obliged to report to the HFSA, such as the credit institutions, the voluntary and the mandatory pension funds, the insurance companies, the investment companies, the independent insurance intermediates, etc. fulfil their reporting obligation to the HFSA via electronic form.

These financial organizations fulfil their obligation towards the HFSA via its electronic delivery system, called as ERA.

The Decree in its Appendix is listing the electronic forms which certain financial organizations should use while fulfilling their reporting obligation.

The Decree further determines the deadlines and the duration of the reporting obligation.

The Decree shall come into force on 1 July, 2013.

The President of the HFSA in its **Decrees of 4 on 2013 (V. 2.), 5 on 2013 (V. 2.), 6 on 2013 (V. 2.), 7 on 2013 (V. 2.) and 8 on 2013 (V. 2.)** establishes further rules on the form and the content of the data disclosure for specific financial organizations, and service providers, such as investment management companies, risk capital funds, issuing organizations, securities issuers, etc.

The President of the HFSA in its **Decree of 9 on 2013 (V. 2.)** establishes the rules of the order and the technical conditions of electronic communications and the rules of the operation and the utilization of the delivery storage operated by the HFSA.

The President of the HFSA in its **Decree of 10 on 2013 (V. 2.)** establishes the rules of the reporting obligation in case of deficiencies of the IT system during the fulfilment of the reporting obligation.

These Decrees shall come into force on 1 July, 2013.

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