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# LAW SHOOTER

**April 2014**

## LEGAL NOVELTIES AND THE FIRST GERMAN BUSINESS BALL!

This month's newsletter is filled with numerous updates. We continue our article on new rules on lien, as well as a great article on the control plan of the Data Protection Authority.

Finally we would like to draw your attention to the first German Business Ball, organized by the German Business Club on the 31st of May in the Vigado. The ball will star numerous Hungarian and German guests and performers, such as the Eurovision star Kállay-Saunders András, New Level Empire, the German Supertalent acrobats La Vision, honorary guest will be Leslie Mandoki and Ágnes Szávay. The main patron of the evening will be HR Minister Balog Zoltán! For more information contact us or write an email to [mail@dwc.hu](mailto:mail@dwc.hu).

We hope that you will enjoy this month's newsletter edition. Should you have any questions to any of the articles, please do not hesitate to contact us.

*Dr. Arne Gobert  
Managing Partner*

## CONTROL PLAN OF THE DATA PROTECTION AUTHORITY FOR THE YEAR 2014

The National Authority for Data Protection and Freedom of Information has published (according to Section 91.§ of the Act on the General Rules of Administrative Proceedings and Services) its control plan for the year 2014, which stipulates in writing as well that debt management companies and product presentations will be targeted by inspections this year.

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According to the practice of the authority its expectation in connection with the data processing is the full compliance with the provisions of the Data Protection Act. The first condition is that the legal base for data processing must be appropriate. The legal base for data processing may be a legal provision, consent of the data subject or beside the existence of the conditions of the Data Protection Act the so called "other legal grounds". In case of debt managements and product presentations there is no legal provision, which would regulate mandatory (statutory) data processing, thus exclusively the consent of the data subject may serve as a legal base. Data processing upon legal interest regulated in Section 6. § of the Data Protection Act may only be used in exceptional circumstances, the legal standpoint according to which a company referring to this interest could process the debtors' personal data in high volume may not be defended. The primary condition of the data processing upon legal interest is when obtaining the data subject's consent is impossible or it would give rise to disproportionate costs.

The question of consent causes constant problems in case of debt collecting companies, whereas the debt collection is generally pursued through assignment by these companies. According to the authorities earlier orders its standpoint is unambiguous in the respect that the debt collectors process the data of debtors legally through assignment. "The rules of assignment are contained in the Civil Code.

Handing over the data necessary for claim enforcement is part of the assignment. The debtor must be notified about the assignment. The consent of the obligor of the assigned claim is not necessary for the contract to be concluded. In case of sale of the claims according Section 328 § of the Civil Code the legal base for the transfer is provided by the Civil Code itself, thus the purpose orientated transfer of the personal data pertaining to claims may not be objected data protection point of view".

Whereas the conclusion of the authority is based on the Act IV of 1959 on the Civil Code, question arises as to the above statement may be applied after the entry

into force of the new Civil Code. The Act V of 2013 on the Civil Code regulates the assignment in a more detailed way and in certain cases deems the assignment null and void. 6:193. § ensures constant possibility for assignment, of which base is the contract of the assignor and the assignee. 6:194. § however provides that a claim can be assigned in case when at the time of assignment the legal relationship from which the claim arises exists already. The assigned claim must be determined by indicating the obligor, legal title, the amount and due time or in other such mode, which makes the assigned claim identifiable at the date of assignment, in case of future claims at the latest at the time when the claim is created.

Conclusively, to be able to refer safely by the person pursuing debt management that it is not obligatory to obtain the consent of the debtors, it is necessary to supervise whether the contract between the assignor and assignee is in compliance with the provisions of the new Civil Code as well.

If the legal base is appropriate, data must be processed in accordance with the fundamental principles of the Data Protection Act. From these the most important is the requirement of necessity and proportionality. As the authority's orders in subject underline, exclusively the debtors (relatives, data of the neighbours may not be processed) and exclusively its data in connection with the claim may be processed legally. The condemnatory orders of the authority highlight that the authority does not accept the "investigations" conducted by the debt managers as being legal.

The expectation of the authority in connection with the data processing to be „legal at first sight" is the proper information, which is manifested in the data protection and data security policy, furthermore, in the fact of the reporting to the data protection register. The authority has not accepted the reasoning, according to which, the debtors as customers would constitute exception from the reporting obligation of the data processing.



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## TAX CHANGES 2014

### PART II

## AMENDMENTS OF THE ACT ON CORPORATE TAX AND DIVIDEND TAX

Continuing our series presenting tax law changes, we hereby introduce a summary on the changes related to corporate tax. The amendments, changes of the Act CC of 2013 (hereinafter: *Amendment Act*) related to the Act LXXXI of 1996 on Corporate Tax and Dividend Tax (hereinafter: *CDT Act.*), have entered mostly into effect as of 1 January, 2014, but certain amendments had been already applicable from the day following the announcement.

#### 1./ Notified share

Favourable development is that today is an opportunity to make notification to the tax authority with a share of 10% instead of the previous 30% share. The condition for classification to this respect is that the taxpayer makes the notification to the tax authority within 75 days (previously this deadline was 60 days) following the acquisition of the share.

Notifying the acquisition of the share has significance particularly because the removal of this share from the books is an item modifying the pre-tax profit – in case of certain statutory conditions.

It is important to note that the deadline for notification is a forfeit deadline, meaning no application for continuation may be lodged upon failure to meet it!

#### 2./Definition of the company with real estate holding has changed

The considerable value of the assets shown in the annual account is modified within the concept of the companies with real estate holdings, since instead of the market value of the assets shown on the balance sheet date, it is the book value shown on the balance sheet date which has to be considered as basis. In relation to this value will be examined whether the ratio of the Hungarian real estate property exceeds 75%, because in this case the company is deemed to be a “company with real estate holding”.

#### 3./The sale of real estate qualifies to be a place of business

The CDT Act (4. § 33. d)) stipulates merely for the sake of clarity – although it does not mean contextual change compared to the former practice - that if a foreign person is selling Hungarian real estate (namely pursues business activity), it establishes a place of business by this even if only one time sale is conducted. As from the point of the CDT Act the income arising from this is *mutatis mutandis* subject to tax.

#### 4./The prescriptions of public benefit do not always pertain to public-benefit and non-profit organizations

Public benefit organizations may not just apply the favourable rules pertaining to public benefit organizations in the year when they are deleted from the register of public benefit organizations, but neither in the year in which they qualify to be *an organization with primarily business association activity* (that is when the income arising from economic and business activity reaches or exceeds 60% of their annual total income).

It is particularly important to note the above rule, whereas it comes to the deletion from the register of public benefit organizations typically later than qualifying an organization to have economic-business activity and in such case the tax authority may initiate judicial review proceeding against the civil organization at the competent prosecutor.



5./ New alternative for the affiliated companies to require the R+D allowance

Taxpayers being in affiliated business relation may pass the R+D allowance pursued in own activity partly or entirely – as an item decreasing tax base – to any other member within the group company, if the R+D direct cost relates to the business activity of the given group member as well. The taxpayer and its affiliated company are jointly liable for the fulfilment of the declaration issued in this respect

6./Contribution in kind among affiliated companies

If the foundation or increase of capital in case of a company's pursued in a way that not only to the subscribed capital, but assets are transferred also to the capital reserve, the examination of the fair market price, in case of necessity application of tax base adjustment, or obligation to register fair market price shall arise.

7./Tax base allowance for small businesses has been extended

As of 1 January SME-s may decrease their pre-tax profit with the acquisition value of the right of use of the software products previously not taken into use.

8./Tax allowance upon the interest of the investment loan of small businesses

New rate of allowance has been introduced, as in case of certain conditions the tax allowance to be taken into account by SME-s upon the interest of the loan paid up, 60% may be applied instead of the previous 40% rate. (The legislation remains unchanged in respect that the tax allowance may not exceed HUF 6 million per tax year. CDT Act 22/A.§)

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**RIGHTS OF FILMMAKERS**

**VS**

**LIABILITY OF INTERNET SERVICE PROVIDERS**

A judgment constituting precedent regarding the liability of the telecommunications providers was delivered in the ECJ case law last Thursday. Request for preliminary ruling procedure has been made in the legal dispute between the UPC Telekabel Wien GmbH (UPC) and Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH (Constantin and Wega) two filmproduction companies.

According to the main proceeding, Constantin and Wega having noticed that a website was offering, without their permission a download or 'streaming' of some of the films which they had produced and over which they hold a right related to copyright. They referred the matter to the Austrian Court with a view to obtaining an order enjoining UPC, as internet service provider, to block the access of its customers to the website at issue. Pursuant to the conclusions of the Austrian Courts the given conduct must be interpreted in the light of *Article 8(3) of the Directive 2001/29 EC on the harmonization of certain aspects of copyright and related rights in the information society* and therefore by giving its customers access to content illegally placed online, UPC must be regarded as an intermediary whose services were used to infringe a right related to copyright. Thus the two filmmakers were entitled to request interim measure be issued against it.

UPC refers in its appeal, that its services could not be considered to be used to infringe a copyright or related right, because it did not have any business relationship with the operators of the website at issue, it disputes that it would be regarded to be an intermediary according to the Directive and in any event claims that the various blocking measures which may be introduced can all be technically circumvented and that some of them are excessively costly as well.

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Taking into account the above the Austrian Court decided to stay the proceedings and to turn to the ECJ. Among the questions referred to the ECJ the national court sought an answer first of all as to whether Article 8(3) of the Directive is to be interpreted as meaning that a person who makes protected films available on its website without the right holder's consent is using the services of the ISPs who is deemed to be intermediary according to the Directive. Determining the liability, it firstly had to define as to whether there is a business relationship between the infringer and the ISP and whether the existence of such relationship is a condition for the impeachment of the latter.

The ECJ declared that taking into account that the filmmakers have the exclusive right to authorize their work making available to the public, it must be stated that the above act infringes copyright and related rights and in order to remedy such a situation of infringement of the rights, the Directive provides for the possibility for right holders to apply for an interim measure against the intermediaries whose services are used by the infringer. And that is because these intermediaries are, in many cases, best placed to bring such infringing activities to an end, since they are increasingly used for infringement.

The ECJ furthermore refers to the Preamble of the Directive, which declares that under the concept of intermediary must be understood every person who mediates through network the infringement caused by third party in respect of the protected creations.

Conclusively, given that the ISP is an actor inevitable to transmit an infringement between one of its customers and a third party over the internet, since, in granting access to the network, it makes possible for its customers to access protected subject film made available to the public on the internet by a third party, the ISP is an intermediary within the meaning of the Directive. The ECJ also points that for the Article 8 (3) of the Directive to be applicable it is not necessary that a contractual link exists between the infringing party and the intermediary, namely no prescription of

existence of a concrete relationship is deriving from the provisions of the Directive, moreover, for the infringement to be declared it is not even necessary to prove that the customers of the ISP has actually accessed the protected films.

Secondly, the ECJ has declared that the fundamental rights recognized by EU law must be interpreted as not precluding an interim measure of a court prohibiting an ISP from allowing its customers access to a website placing protected subjects online without the consent of the right holders. That interim measure is neither contrary to the fundamental rights in case it does not specify the measures which the ISP must take. The ISP can avoid the penalties for breach of that interim measure by showing that it has taken all reasonable measures. The measures taken however may not unnecessarily deprive internet users of the possibility of lawfully accessing the information available. According to the ECJ it is appropriate that those measures have the effect of preventing unauthorized access to the protected subjects or make it difficult to achieve and seriously discourage internet users, the investigation of the latter remains within the scope of the national authorities.

In summary it may be declared that the above decision will launch a new approach and the application of more stringent rules of liability in the world of telecommunications providers.

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## **NEW LIEN RULES - SECOND PART**

In the January 2014 edition of our newsletter, we introduced the renewed rules in connection with the establishment of a lien, lien contract, registration of a lien, claim secured by lien and pledged property and the new rules pertaining to bail.

Hereunder, in our 2014 April newsletter we continue the introduction of further details in connection with the renewed legislation.

### **Lien holder's agent:**

New institution of the New Civil Code (New CC) is the lien holder's agent. In case of high volume syndicate credits where behind the credit of a substantial amount, are typically guarantees of high value, may have importance that instead and on behalf of the creditors, a person appointed by them, a so called agent of the lien holder acts, he is then included in the register and he exercises the rights of the lien holder.

The Act regulates in detail the appointment of the lien holder, his registration into the register and the rules governing the separate management of the assets of the lien holder from those of his own.

### **Claim safeguardable by lien:**

The lien continues to serve typically the securement of a pecuniary claim, which pecuniary claim can be already an existing one, but a future one as well. Lien can be established upon a non-pecuniary claim also in this case the lien secures the claim for damages arising from non-fulfilment that is basically the pecuniary claim.

Arising from the incremental nature of the lien, the pledged property secures the claim only until its extent; however, the scope of the liability for fulfilment covers

the interests of the claim, as well as other costs.

By the transfer of the secured claim the lien is also transferred to the new entitled of the claim, and the lien holder may transfer the lien without the secured claim too, in the latter case we speak about a seceded lien.

### **The pledged property:**

The pledged property can be any asset that is any object, right or claim.

The subject of the possessory lien can be only movable property, whilst the pledged property can be a movable, immovable property, right or claim.

The pledged property can be defined individually or by description.

This has a special significance because in the economy movables serving as current assets, for example natural resources, stocks etc., may serve as a securement of a credit without it impeding the performance of a regular economy.

The given object is subject to the lien with all its components and in case of doubt it extends to its accessories as well.

The lien furthermore covers the products, fruits, increments, benefits of the object.

In order for the lien to follow the economic flows, the New CC significantly expands the scope of the values replacing the subject of the lien.

Damages due to the loss in the value of the pledged property, or due to the destruction of the pledged property, will replace the pledged property.

Also in case of the expropriation of the pledged property, the compensation due to it, the purchase price due to its sale, or the new object created by its transformation, fusion, blending etc. will replace the



pledged property.

**Rights and obligations of the parties before the right to satisfaction becomes effective:**

The new CC regulates in detail the possession, use of both of the possessory lien and the subject of the mortgage lien, in case of the loss in its value its sale, the monitoring right of the lien holder, the protection of the hypothecated claim.

Within this scope the irregular lien deserves a separate regulation, which is a special case of the lien, when the lien holder acquires ownership on money, security paper or other pledged property, and in such case he is not bound by an obligation for custody, however, when the right to satisfaction becomes effective, he is obliged to return a property of a same value and quantity to the lien obligor.

**The collateral register:**

The mortgage lien established on non-registered properties, rights and claims must be registered to the credit security register. The register is internet based electronic, accessible by anyone.

The new CC regards three things to as such which contain a credit security element, these are the retention of ownership, factoring and financial leasing.

In case these transactions do not pertain to real estate property, but to movables, those are to be registered to the collateral register.

Collateral register is not authentic; nevertheless, the registration does not happen upon lien contract. Essentially it is more of a so called negative authenticity, namely that without registration, effective mortgage lien may not exist towards third parties.

The function of the collateral register is therefore not the authentic proof of the existence of the lien, but to ensure the publicity of the establishment of a lien and

its effect and rank in relation to third parties.

The new CC regulates in detail the content of the declarations necessary for the registration, the method of registration, the content of the register and the deletion of the lien.

Prior to the new CC's entering into effect had been announced the Act CCXXI of 2013 on collateral register, which covers the detailed rules of the register.

**Enforcement of the lien:**

The lien may be enforced exclusively when the underlying claim becomes due.

The enforcement happens invariably through or outside of judicial enforcement.

Enforcement outside of judicial enforcement may happen according to the choice of the lien holder:

- a) through the sale of the pledged property by the lien holder;
- b) acquiring the ownership of the pledged property by the lien holder;
- c) by the enforcement of the hypothecated right or claim.

The new CC regulates in detail the notifying obligation of the lien holder, the right to the transfer of possession of the pledged property, the rules of the sale, the obligation to keep the requirement of reasonable commercial practices and the settlement obligation as the result of the sale.

The lien holder does not acquire automatically the ownership of the pledged property when its right to satisfaction becomes effective, it may only make proposal to the lien obligor on it.

Exception from this main rule is the direct right to satisfaction from the bail, that is because in the case of bail, if its subject is money, payment account claim or



security paper, in the case of the commencement of the lien holder's right to satisfaction it acquires the property of the pledged property.

If the subject of the mortgage lien is a right or claim, the lien holder grants instruction for fulfilment to the obligor or the holder of the claim.

By the sale of the pledged property or by the acquisition of the ownership of the pledged property the lien terminates. Furthermore, terminates the lien when the lien holder waives of the lien and returns the pledged property or the lien is deleted from the register, if the property is destroyed, the claim terminates, the underlying legal relationship terminates or lapses, or when the holder of the possessory lien loses the possession of the pledged property.

In case the termination of the lien the lien holder is obliged to consent to the deletion of the lien or to return the pledged property, or to notify the lien obligor's account manager.

In the above cases the seceded lien terminates as well and the lien is transferred back to the original holder of the claim, who is obliged to settle with the original lien obligor.

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