



GOBERT ÉS TÁRSAI  
ÜGYVÉDI IRODA

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

# LAW SHOOTER

**July 2014**

## EXPRESS LEGAL UPDATES

We at BWSP Gobert & Partners believe it vital to inform our valued customers and partners of legal novelties on a regular basis. In order to maximize the updates our articles will be more compact and precise, creating a perfect beach read or an interesting way to use your coffee break.

Should you have any questions to the articles below, please do not hesitate to contact us.

*Dr. Arne Gobert*  
Managing Partner

## ADVERTISING TAX IS COMING!

On the 17<sup>th</sup> of June 2014 the heavily disputed *Act XXII of 2014 on Advertising Tax* was announced, which introduces an entirely new type of tax in Hungary.

Under the broad scope of the Act, advertisements that are “*predominantly in Hungarian*” will become taxable in the media and entertainment industry (television, radio), publications distributed in Hungary, out-of-home advertising (e.g. posters, billboards, bulletin billboards, aerial banner-towing) and on vehicles, real estate or the internet.

### Who is taxable?

The list contained in the Act confirms that publishers, online advertisers, persons or other legal entities utilising vehicles, printed material or real estate for the purpose of advertising, as well as any “*media content provider settled in Hungary*” are taxable.

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## FIRM INFO

### • OUR MAILING ADDRESS:

HUNGARY  
1061 BUDAPEST  
STERN PALOTA  
ANDRÁSSY ÚT 10.

### • OUR WEB-PAGE ADDRESS:

[WWW.GOBERTPARTNERS.COM](http://WWW.GOBERTPARTNERS.COM)

[office@gfplegal.com](mailto:office@gfplegal.com)

[www.gobertpartners.com](http://www.gobertpartners.com)



The question on who constitutes a media content provider within the latter category has already raised a number of questions as, in this regard; the legislation is contrary to EU directives.

According to the relevant media laws, any media service provider which provides media services on frequencies which belong to the state of Hungary will become taxable, regardless of the location of the company's headquarters.

The European Court of Justice has dealt with the question of territorial scope and jurisdiction on multiple occasions, for instance in the case of *Commission v. United Kingdom* (Case C-222/94), where it was held that if any service provider is established in more than one Member State of the European Union, the Member State having jurisdiction over it is the Member State in which the service provider has the centre of its activities. The situation is different, however, where the media service provider is established in another Member State in order to circumvent the stricter rules of the main country in which it operates.

Extraordinarily high tax rate

The Act introduces progressive taxation. Consequently, if the advertising revenue falls between HUF 500 million and HUF 5 billion the tax rate is 1 percent; where the amount of revenue is over HUF 20 billion the tax rate can reach 40 percent.

Tight deadline for payment

The Act comes into force 31 days after its promulgation and taxes shall be paid immediately thereafter. Accordingly, tax payers are required to assess and declare this year's advance taxes **until 20 August 2014**, and pay those taxes in two equal instalments until **20 August 2014** and **20 November 2014**, respectively.

Accordingly, it is shown that as the law takes effect, questions regarding the interpretation of the Act are expected to affect a broad range of taxpayers. In particular, the geographical scope, the issue of jurisdiction and the purchase and lease agreements of properties used for advertising purposes are all issues

which will undoubtedly be caught in the crossfire.

If based on the above you are unsure whether you are subject to the advertisement tax and regulatory proceedings under the Act, or what you should pay attention to in terms of advertising as lessee or owner of real estate or operator of a vehicle, please contact us and our experts will be entirely at your service!

**Contact for further information:**

**Dr. Réka Ipacs, Partner**

Reka.ipacs@gfplegal.com

+36 1 270 99 00

**POSSIBILITY FOR THE INVESTIGATION OF THE CRIMINAL RECORD IN THE LABOUR CODE**

Child protection provisions have been incorporated in the *Act I of 2012 on the Hungarian Labour Code* (hereinafter referred to as „LC”) as of the 1<sup>st</sup> of July 2014. Accordingly, those employers who employ employees carrying out education activities shall fall under stricter control in the event of analysing the preconditions required for the establishment of an employment relationship. Based on the changes, an employer pursuing activities carrying out the responsibility for providing care, custody, guidance or medical treatment to a person under the age of eighteen years may not enter into an employment relationship with any person, who is registered in the criminal record by virtue of the commission of a crime against a child, who is implicated in a criminal proceeding for the commission of such a crime on substantial grounds, who is under prohibition to exercise his/her profession; or who is undergoing mandatory medical treatment. New provisions regulate the due process to be followed in the lack of preconditions.





**What should the employer do in order to comply with legal requirements?**

The employer is obliged to call the person wishing to establish an employment relationship to verify the existence of preconditions. Therefore, the employee shall provide a judicial certificate verifying that he/she has no criminal record and is not under prohibition to exercise his/her profession. The prohibition to exercise professional activity is a new legal instrument as of the 1<sup>st</sup> of July 2013 in the *Act C of 2012 on the Hungarian Criminal Code* (hereinafter referred to as “**CC**”), which declares that *in connection with any criminal offense against sexual freedom and sexual offenses, if at the time when the crime was committed the victim is under the age of eighteen years, the perpetrator may be banned from the exercise of any professional activity where the responsibility for providing education care, custody or medical treatment to a person under the age of eighteen years is involved, or if a recognized position of trust, authority or influence over such a person is involved.*

The aim of this provision is to protect children, which is especially reasonable against perpetrators of crimes against sexual freedom and sexual morality children suffered of. The legislative intent was to prohibit such criminals from exercising professions related to education, custody, care, medical treatment of children under 18, because it is of societal interest that criminals do not raise, nurse or medicate children.

The next step in terms of child protection enforcement is the *Act CCXLV of 2013 on the changes of certain acts for protecting children* (hereinafter referred to as „**ModAct**”). The incorporation of these provisions in the LC, excludes those from educational and child welfare institutions, who committed crime against children, or are - as main or ancillary punishment - under the prohibition to exercise of their profession. Furthermore, by breaching the presumption of innocence, but keeping in mind the interest of children above all, those are excluded as well, who are implicated in a criminal proceeding for the commission of a crime against children on substantial grounds.

According to the reasoning of the Act, „it is of significant importance that an organisation carrying out the education, custody, care, medical treatment of children under 18, may only establish employment relationship, public servant or public relationship with a person, who is able to verify in terms of crimes against children with an official certificate of criminal history that he/she has no criminal record, is not implicated in a criminal proceeding for the commission of such a crime on substantial grounds, is not under prohibition to exercise his/her profession according to Section 52 Subsection 3 CC, furthermore is not under medical treatment for the reason of commission of such crimes.”

**Validity of the official certificate of criminal history and facts justified in**

The official certificate of criminal history is valid for 90 days from the date of issue. Based on the official certificate of criminal history it may be verified that the applicant

- a) meets the legal requirements determined by law and indicated in the application form,
- b) has no criminal record,
- c) is not under prohibition of matters of general concernment,
- d) is not under prohibition to exercise his/her profession or activity, or
- e) from which profession or activity is he/she prohibited from.

**Who bears the costs of the official certificate of criminal history?**

For the proceeding to issue an official certificate of criminal history an administrative service fee of HUF 3.100,- must be paid. Prior to the establishment of an employment relationship it is the person wishing to establish the employment relationship, who advances and bears for expenses. According to the LC the employer may order the procurement of the official certificate of criminal history during the existence of the employment relationship. However, in this case the



employer has reimbursement obligation if the employee is able to verify that he/she meets the legal requirements unchanged.

**Further changes**

As of the 1<sup>st</sup> of July 2014 the mutual agreement of the parties may not differ from the provisions regarding the employment contract, may not differ from the special preconditions for the establishment of an employment relationship prescribed above, may not differ from the mandatory requirements of the employment contract (such as the salary and the job) neither for nor against the employee.

**Contact for further information:**

**Dr. Timea Szabó, Associate**

[Timea.szabo@gfplegal.com](mailto:Timea.szabo@gfplegal.com)

+36 1 270 99 00

thus not only the counter-value of the service stipulated in the contract, but also the quantity of the services actually pursued for the fulfilment of the contract influences the assessment as to whether the retention money is of unreasonably high amount. Determining the amount of the retention money is closer to a lump sum damage realizing risk maximization than to a counter-value of the vendor's hypothetically potential services.

With view to the lump sum damage nature of the retention money, the rules governing the mitigation of the contractual penalty might be appropriately applied by analogy in case of the reduction of the unreasonably high retention money. Thus, according to the principles deductible from the judicial practise, the comparison of the value of the service with the amount of the retention money used by the court, might be applicable in case of the mitigation of the retention money as well and during the reduction it can also be a perspective that no substantial damage has occurred during the termination of the contract.

**COURT NEWS**

The Curia has concluded statements of principles in the subject of retention money / contractual penalty in the case No. Pfv.V.21.233/2013/4 regarding the mitigation of the retention money.

Retention money is obviously unreasonably high, if its amount significantly exceeds the monetary value of the other party's financial interests related to the fulfilment of the contract, including the damage occurring in case of non-compliance. According to the Curia, the application of the right of withdrawal besides retention money is a "facultas alternative", which is a power terminating legal relationship resulting in the retroactive termination of the legal relationship, meaning that the right of withdrawal applicable besides the payment of retention money terminates the contract in a manner that it separates the compulsorily providable service, and instead, it places the obligation to pay lump sum damages for non-compliance into legal relationship,

**Contact for further information:**

**Dr. Andrea Soós, Partner**

[Andrea.soo@gfplegal.com](mailto:Andrea.soo@gfplegal.com)

+36 1 270 99 00

**FOREIGN CURRENCY DEBT:  
THE NEW ACT PUTS MORE  
STRAIN ON THE BANKS THAN  
EXPECTED**

The bill which purpose is to help the foreign currency debtors was accepted on the 4th of July 2014, this can rewrite many consumer loan agreements, in this case it can put a much bigger strain on the financial institutions than expected. The accepted bill is waiting to be signed



[office@gfplegal.com](mailto:office@gfplegal.com)

[www.gobertpartners.com](http://www.gobertpartners.com)

**For more information please contact us**

Gobert & Partners Attorneys and Tax Advisors

Andrássy út 10., Stern Palota, 1061 Budapest, Hungary

Phone: +36 1 270 9900 Fax: +36 1 270 9990



by the president and is then going to be published by Hungarian official journal.

The act (which was entered into force between the 1st of May 2014 and before this act came into effect) can effect consumer loan agreements, but also loan agreements which are based on HUF and financial leasing contracts. The companies will not be affected, since according to the credit institution law, they are not considered as consumers and oblige to final repayment. Furthermore those persons will not be affected who dedicated their real property to Hungarian National Asset Management Inc.

The aim of this act is to manage the situation of the debtor, to relieve the courts and to give the financial institutions the chance for voluntary compliance.

The act declares the credit gap in foreign exchange rate contracts as unfair and invalid. As well as the use of different buying and selling rates, therefore the official currency rate of Hungarian National Bank is going to be implemented. They presume furthermore the contractual cause which contains unilateral interest raising or charge raising or fee raising as unfair, which is normative in the case of loan and financial leasing contracts. The pending lawsuits and judicial execution procedures are going to be suspended. The contracted agreements are going to be upheld by the act, but to avoid the conditions which are declared as unfair, close deadlines are set to fulfill the obligations by the financial institutions.

- i) The conversion of foreign currency loans have to be carried out 90 days after the bill comes into force, the plan of conversion to the Hungarian financial supervisory authority has to be carried out within 60 days.
- ii) the general contract terms and conditions and unique contract terms and conditions which contain unilateral modification of contracts shall be revised within 30 days after the bill comes into force on top of this, a report has to be made to the Hungarian financial supervisory authority, and at the same time they shall declare whether in their opinion these are unfair or not. If the

Hungarian financial supervisory authority announces this as fair, they can commence a civil procedure against the Hungarian state, they then have a chance to do so 30 days from the time the bill came into force in, in case of HUF currency loans they have a chance to do so between 90 and 120 days. As in the lawsuit there is no possibilities to complete the documents, the burden of proof encumber the financial institutions, this is a vital information for those who are submitting a claim, especially since the act defined the proceeding fee in 1 500 000 HUF.

The act obligates the financial institutions to cut the unfair conditions, under the control of the Hungarian financial supervisory authority.

Should you have any questions or if you enquire any further information, please do not hesitate to contact us. Our professionals are at your disposal.

**Contact for further information:**

**Dr. Miriam Bukovics, Associate**

Miriam.bukovics@gfplegal.com

+36 1 270 99 00



[office@gfplegal.com](mailto:office@gfplegal.com)

[www.gobertpartners.com](http://www.gobertpartners.com)

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Phone: +36 1 270 9900 Fax: +36 1 270 9990



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Your contact for Real Estate, Transaction and  
Commercial Law:

Dr. Arne Gobert, Managing Partner:

**[arne.gobert@gfplegal.com](mailto:arne.gobert@gfplegal.com)**

Your contact for Tax, IT, IP and Corporate Law:

Dr. Réka Ipacs, Partner:

**[reka.ipacs@gfplegal.com](mailto:reka.ipacs@gfplegal.com)**

Your contact for Data Protection, Litigation and Labour  
Law:

Dr. Andrea Klára Soós, Partner:

**[Andrea.soons@gfplegal.com](mailto:Andrea.soons@gfplegal.com)**

***All materials prepared for you by the Attorneys and  
Tax Advisors team of BWSP Gobert & Partners***



**[office@gfplegal.com](mailto:office@gfplegal.com)**

**[www.gobertpartners.com](http://www.gobertpartners.com)**

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