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LAW SHOOTER

July 2013

A SUMMER FULL OF LEGAL UPDATES AND BIG ANNOUNCEMENTS

Once again our summer newsletter has much to offer; a big announcement along with great legal articles.

Firstly we would like to announce the great success of our Partner, Dr. Soós Andrea who was elected as a board member of the European Employment Lawyer's Association! EELA is an unincorporated association established under German Law and began its activities in 1996. The aims of EELA are to bring together practicing employment lawyers across the European Union, to improve the implementation and understanding of the social dimension, to exchange views on the manner of such implementation and to strengthen links between EU employment lawyers.

At the same time BWSP Gobert and Partners has the perfect summer package for you to keep you updated with useful legal updates. Our summer edition contains numerous articles such as the first chapter of our legal pitfalls of a wedding, in perfect time for the wedding season. We also continue our article on the purchasing Hungarian residence permits as well as a great data protection article on the Hungarian DPA Opinion Prohibiting Transfers of Data outside Hungary. As always, should any questions or comments arise we kindly stay at your disposal.

Dr. Arne Gobert
Managing Partner

HUNGARIAN PERMANENT RESIDENCE FOR YOUR INVESTMENTS?

Referring to our former article published in March, we continue the introduction of the latest news on Hungarian residency bonds.

As we already informed you, the Parliamentary Committee for Economy has

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approved the establishment of companies authorised to buy special state bonds in the amount of EUR 250,000 in the name of third country citizens wishing to obtain permanent residence permit in Hungary.

Currently the below listed companies are the ones, who offer securities for purchase to foreigners as form of investment in the amount of EUR 250,000 issuing in return the certificate necessary for the submission of the application regarding the simplified permanent residence permit available for investors:

- S & Z Program Limited Company registered in Liechtenstein is entitled to participate in transaction of bonds with citizens of the United Kingdom, Switzerland and five African (Egypt, Morocco, Tunisia, Libya, Algeria) and eleven Asian countries (Yemen, Oman, Iran, Qatar, Kuwait, Lebanon, Iraq, Saud-Arabia, Syria, Jordan, Bahrain).
- VolDan Investments Limited registered in Liechtenstein as well will provide services of the bond transfer for citizens applying from Russia, Ukraine, Turkmenistan, Georgia, Belorussia, Uzbekistan, Poland, Slovakia, Czech Republic, Montenegro, Serbia, Bosnia-Herzegovina, Romania and Croatia.
- EURO-ASIA Investment Management Pte Ltd. will be responsible for applications submitted in Singapore, just like
- Discus Holdings Ltd. in Malta will provide similar services regarding applications from South-Africa, Indonesia, Kenya, Nigeria, USA, Thailand and Kazakhstan; and
- ARTON CAPITAL HUNGARY Kft. – established in Hungary is responsible for applications arriving from Bulgaria, Canada and the United Arabian Emirates.

There should be expected the establishment of further companies with similar mandate regarding the transfer of residency bonds. Presently we are in close contact with companies covering the Middle East and the Eastern European region.

The above companies will buy the desired government bonds for the foreign individuals. By making such application at the competent company the applicant receives a residence permit for 6 months during which he/she will be entitled to submit an application for permanent residence permit. Eventually, the applicants have to attach a final and irrevocable declaration of these companies, 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.

Nota bene the buying of these residency bonds will not grant automatically the permanent residence permit, the application still can be denied by the immigration authority. Therefore it is essential to have a due preparation of the transaction with professional help regarding the transaction of bonds and the immigration process itself as well.

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HUNGARIAN DPA OPINION PROHIBITING TRANSFERS OF DATA OUTSIDE HUNGARY

There is cutthroat competition in Hungary among the political parties for gaining access to lists of each other's political supporters. Following a big scandal involving the governing party over its alleged secret collection of data, the National Data Protection Authority (''NAIH'') published a written opinion in March 2013. The written opinion is limited to the collection

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Collection of data on Facebook by the party of the previous prime minister; nevertheless, it provides several general statements. The most important point of the opinion is that the NAIH — controversially — prohibits the transfer of any data to third countries or even other EU member states.

The conclusion of the NAIH is based on the provisions of the United States' Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the USA PATRIOT Act). According to the opinion of the NAIH, the data of Hungarian citizens would not be safe in either the United States or in any other EU member states.

Background of the Case

In accordance with the interpretative provisions of the EU Data Protection Directive (95/46/EC), the Hungarian Privacy Act defines political data as sensitive data. Sensitive data under the Privacy Act means personal data revealing racial origin or nationality, political opinions and any affiliation with political parties, religious or philosophical beliefs or trade union membership, and personal data concerning sex life, health information and criminal data. Any processing of sensitive data requires the expressed consent of the data subject.

Another important provision of the Privacy Act requires that, if a violation affecting sensitive data is alleged, the data protection authority ("DPA") must open an investigation without applying any analysis.

Hungarian DPAs have always paid special attention to the processing of political data. The country's second data protection commissioner, Mr. Attila Péterfalvi, adopted a written opinion in which he prohibited any collection of data from political supporters. In his opinion adopted in 2002, the commissioner argued that there is no legal ground for the collection of political information and that a political party may not contact any citizen even if the data is obtained from public sources.

Hungary's third data protection commissioner, Dr. András Jóri, also subsequently examined the collection of data by the government. He adopted a decision in which he prohibited the collection of certain political information from citizens during a so-called Social Consultation organized and founded by the government. During the Social Consultation, the government sent questionnaires to all citizens over the age of 16 years and asked their opinions about several political questions (such as minimum wages and public work). Dr. Jóri argued that, if a citizen declines to respond to the questionnaire, this in itself is an expression of his/her political opinion, and therefore it is prohibited to collect such information unless the citizen signed a written declaration of consent for the collection of such data. Dr. Jóri's decision is based on Opinion 15/2011 of the EU Article 29 Data Protection Working Party on the definition of consent. The decision of the commissioner was not welcomed by the governing party, which might have been a factor in his subsequent dismissal, which is the subject of a court case that the European Commission initiated against Hungary (see WDPR, January 2012, page 29).

The NAIH, the current DPA, reversed the view of the data protection commissioner. It published a new decision in the same case of the Social Consultation holding that: It is possible to collect the opinions of citizens, provided that 1) proper information is provided regarding the data processing, and 2) it is possible to provide one's opinions anonymously.

Moreover, the government amended the Privacy Act by adding the following provision: It is assumed that the collection of the opinions of data subjects is fair and legal if the person obtaining the information from a data subject visits the data subject in his/her home, provided that the processing of such information is in line with the provisions of the Privacy Act and there is no business interest behind the collection of the information.

Collection of Political Information on Facebook

A political party prepared a special group on Facebook and invited citizens to join the group. The declaration

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of consent agreeing to the collection of information could be downloaded even without registering for Facebook and could be sent via email. After sending such an email, the citizen received an invitation from the political party and could join the group.

In their written declarations of consent, citizens acknowledged that they agreed to the collection and processing of their data, and also to the transfer of such data to any EU member states or to countries operating under the EU Safe Harbour program (including the United States). The political party duly registered its activity in the National Data Protection Register.

The NAIH opened an informal investigation against the political party and published its written concerns.

Objections of the NAIH

In general, the NAIH accepted that it is possible, without raising serious concerns, to create a political group and to collect information through such a group. However, the NAIH found that it had serious concerns about the method of collecting such information by the political party, and said the consent of the data subjects must be amended in order to comply with the Privacy Act.

Proper Information Regarding the Collection of Political Data

According to the Privacy Act, before processing operations are carried out, the data subject must be clearly and elaborately informed of all aspects concerning the processing of his/her personal data, such as the purpose for which his/her data is collected and the legal basis, the person entitled to control the data and to carry out the processing, the duration of the proposed processing operation, if the data subject's personal data is processed in accordance with Subsection (5) of Section 6, and the persons to whom his/her data may be disclosed. Information must also be provided on the data subject's rights and remedies.

The argument of the NAIH is almost the same as the argument put forward by the last data protection commissioner; however, the NAIH does not follow the opinion of the EU Article 29 Working Party. In the opinion of the Working Party (as followed by the former data protection commissioner), if the proper information is not provided in the consent form, or by the data processor, the consent is null and void. It is important to note that there is a significant difference between the conclusion of the Article 29 Working Party and that of the NAIH: In the conclusion of the Working Party, consent that is too broad may not be valid.

The NAIH accepted that the political party provides almost enough information to the registrants. However, it obliged the political party to provide information on its aims, and also on the possible ''successors'' of the political party.

Security Requirements for Controlling Political Data

According to the Privacy Act, controllers must make arrangements for and carry out data processing operations in a way so as to ensure full respect for the right to privacy of data subjects in due compliance with the provisions of the Privacy Act and other regulations on data protection. Further, controllers and, within their sphere of competence, data processors must implement adequate safeguards and appropriate technical and organizational measures to protect personal data, as well as adequate procedural rules to enforce the provisions of the Privacy Act and other regulations concerning the confidentiality and security of data processing.

The NAIH, while making reference to the above requirements of the Privacy Act, prohibited the transfer of any data to any other countries, including EU member states and the United States.

In its arguments, the NAIH stated that, if data is transferred to another country or even to other EU member states, the legislation of the recipient country governs

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Questions and Conclusions

The NAIH concluded that, even in other EU member states, the security of data transferred from Hungary is not guaranteed by national legislation.

This conclusion is in serious contradiction with the EU Data Protection Directive and with international treaties. The main and declared aim of the EU Data Protection Directive is to ensure the free movement of data within the European Union. If, in the Hungarian DPA's opinion, data is not safe in any EU member states, this effectively means that no data can be ''transferred'' from Hungary.

One may argue that, if a data controller is using a technical data processor, this is not a transfer of the data. However, in its written opinion, the NAIH made clear that, even if the processing is only technical data processing, there is a transfer of the data from the data controller to the technical data processor.

The NAIH did not make exact reference to the USA PATRIOT Act or to the special provisions giving free access to government agencies of any data. This approach of the NAIH runs against the main principles of public law, i.e., the legal certainty of the application of laws by a public authority is not ensured. In a possible legal remedy procedure, the absence of exact references may make the decision of the authority vulnerable to cancellation. However, it should be noted that there is no legal remedy procedure against a ''written opinion'' of the NAIH. This fact may seriously violate the right to fair procedure of U.S. companies in Hungary.

As a final note: The extremely stringent position of the NAIH may create a legal risk for all those who ''transfer'' sensitive data outside Hungary, such as, for example, pharmaceutical companies. However, it is highly questionable whether NAIH decisions based on similar argumentation will be upheld by courts.

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ARTICLES TO LOVE - ON THE LEGAL PITFALLS OF A WEDDING

Under engagement we mean the state, when according to the generally accepted (however far from exclusive) customs, the man decides to propose his beloved, woman of his dreams. As a symbol of the commitment, the groom puts the engagment ring on his bride to be1s finger, which is usually followed by cheers and tears of happiness – usually. But what happens if tears of happiness turn to anger and fury? Let us see who gets the last laugh in cases like that.

Examining this event from a legal perspective, when the dialougue „Will you marry me?“ „Yes!“ takes place, a verbal agreement is concluded between the parties, which is traditionally confirmed by putting the ring on the finger, as an implicit behavior.

But what happens if we have already ordered all proprieties of our expensive weeding and the beatific

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„I do“ is only a few days away, but instead of that, one of the parties suddenly backs out from the planned joyful event?

First, we examine as an example the event, in which the bride realizes that she does not want a wedding yet, or she does, but not with the current groom. What happens to the engagement ring in cases like that? Although, if we relay on traditions, the generous gentlemen might be hurt, but he will not ask for the engagement ring he bought back, even though legally he would have an opportunity to do so. The person that gave the engagement ring - usually the man - may ask the other person to return it, if he gave the ring in the sole hope of concluding marriage, and this presumption for which the handover of the engagement ring happened, later – not out of the groom's fault – shatters definitely.

It has to be noted that in the case of a gift bearing a usually common value and in the case of the groom’s forgiveness – for example if the groom does not ask for the engagement ring back for a longer period without a proper reason - a withdrawal of the ring is not allowed.

As a further example let’s look at the situation of the groom backing out of the wedding, especially if this happens only few days before the planned wedding day, which means that all service agreements have been concluded, the wedding dress has been bought with all the accessories thereof, the wedding cake has been chosen, the location already booked. With regard to the fact that in most cases a wedding bears very significant costs for only one day , the question arises how we can enforce our claim for damages?

If the bride could trust in good will that the marriage would be entered into, whilst all steps towards the wedding planning and the undertaking of commitments have happened for substantiated reason, and in addition the steps towards the wedding planning and cancelation of the service agreements were made based on the groom’s behavior affirming the intention of marriage, the bride can claim damages arising from the groom’s engagement, which can be enforced before court.

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EX OFFICIO DECREE OF NULLITY IN THE JUDGMENT OF THE EUROPEAN UNION

Many legal articles have addressed the question of procedural aspects of invalidity, namely the ex officio decree of nullity. It is very important to know how the procedural law handles the stipulations prohibited by substantial law.

On one side, several court judgments have rejected the claim of the litigating party submitted on the basis of referring to nullity, on the other hand we may also find a court order, which has reviewed the reference to nullity in the second instance procedure on the merits.

The judgment of the European Court of Justice (the Court) adopted on 21 February 2013 in the preliminary ruling procedure from the Fővárosi Törvényszék in the

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preliminary ruling procedure from the Fővárosi Törvényszék in the case C-472/11, is of particular importance - also with a view to the controversial domestic judicial practice.

In the main proceedings the subject of the legal dispute was the payment of sums due under a credit agreement in the event of the early termination of that agreement by the lending institution on grounds of conduct attributable to the borrower.

The court of first instance had informed the parties in the procedure pending before it, that it took the view that one of the provisions of the agreement was unfair and invited the parties to make a statement on that matter.

The court of first instance eventually ordered the defendant to pay the creditor bank a sum, which was calculated without the application of the unfair term.

Albeit, the court of second instance decided to suspend the proceedings and referred the following questions to the Court for a preliminary ruling.

1. Are the procedures of the national judge consistent with Article 7(1) of Council Directive 93/13/EC of 5 April 1993 if, where a contract term is held to be unfair, and the parties did not submit a claim to that effect, the court informs them that it holds certain provisions of the agreement between the parties to the proceedings to be invalid?

2. If so, is it permissible for the court to direct the litigating parties to make a statement in relation to the contract term in question, so that the legal consequences of any unfairness may be established and so that the aims expressed in Article 6(1) of the Directive may be achieved?

3. Is it permissible for the court, when examining an unfair contract term, to examine all the terms of the contract, or may it examine only the terms on which the party concluding the contract with the consumer bases his claim?

The Court referred to its previous judgments, in which it held that the national court is required to assess ex officio whether a contractual term falling within the scope of the Directive is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier. Furthermore, the judgment explains that it is not only a possibility, but an obligation for the national courts to assess ex officio the possible unfair character of a contractual term. Moreover, national courts must investigate ex officio whether a term of the contract concluded between the parties falls within the scope of the Directive and if it does, assess ex officio the possible unfair feature of such term.

With reference to its earlier judgments, the Court states, that it is for the national court to establish all the consequences, arising under national law, of a finding that a term is unfair in order to ensure that the consumer is not bound by that term. The Court has, however, stated that the national court is not required to exclude the possibility that the term in question may be applicable if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non binding status.

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The judgment states further, that if the national court finds the term to be unfair under the principle of audi alteram partem, it is required to inform the parties to the dispute of that fact and to invite each of them to discuss them.

Consequently, in relation with the first and second questions, the Court has held, that the provisions of the Directive must be interpreted as meaning „... *that the national court which has found of its own motion that a contractual term is unfair is not obliged, in order to be able to draw the consequences arising from that finding, to wait for the consumer, who has been informed of his rights, to submit a statement requesting that that term be declared invalid. However, the principle of audi alteram partem, as a general rule, requires the national court which has found of its own motion that a contractual term is unfair to inform the parties to the dispute of that fact and to invite each of them to set out its views on that matter, with the opportunity to challenge the views of the other party, in accordance with the formal requirements laid down in that regard by the national rules of procedure."*

Furthermore, the Court has stated that in order to determine wether the contractual term on which the claim brought before it is based on may be unfair, the national court must take all other terms of the contract into account.

Investigating the domestic legal interpretation, we may find a similar opinion in the 2/2010. (VI.28.) PK opinion refering to the 1/2005. (VI.15.) PK opinion.

According to this i) the information about the perception of the grounds for nullity is not regarded prejudicially, the information does not extend to the substantial law content of the action. The court only notifies the parties, that it finds a reason for nullity; such evidentiary procedure may take place and it gives opportunity to the parties to make their statements on the merits.

The opinion also regulates that ii) if the court of second instance finds a reason for nullity, the parties have to be granted the necessary information and it has to repeal the judgment of first instance only in the case, if the parties declare, that they intend to submit a claim in connection with the grounds for nullity.

The domestic legal interpretation, strengthened by the judgment of the Court, points to the direction that the proper standpoint is i) reference to nullity and/or ii) perception of nullity ex officio is on one hand a legal opportunity for the party, on the other hand an obligation for the national court, namely in any phase of the litigation.

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THE NAVS NEW INVASION AGAINST VIOLATORS OF THE LAW

Just when the first sighs of relief from the series of spring controls could be noticed in the country, the NAV launched its new summer controls on 2th of July. It has become a tradition that the tax inspectors and customs

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officers investigate at popular, vastly visited tourist destinations such as beaches, popular resorts, festivals, open-air events and tour-guide services. However, a novelty within the control on a national-basis is that not only the densely visited tourist destinations are inspected, but the control also covers the electronic commerce, the restaurants, the passenger services, as well as the beauty sector.

With these inspections, the NAV puts pressure on the traders and service providers by investigating whether they provide an invoice or receipt of their income, the companies announce employees, the traders account for their goods of origin and whether they comply with the relevant legal regulation regarding the sale of excise goods.

The result of the more than 13 thousand investigations carried out last summer may cause astonishment, as about 28 percent of the controls resulted in infringements. During the controls, the NAV inspectors usually experienced the most abuse in the issuing of receipts and the regularity of employment.

The invasion which begins this summer is planned to last until the end of August.

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