roadmap19

schönherr


voices

Since being launched in 2007, the annual Schoenherr roadmap has highlighted significant legal developments in our markets, presenting them in a special context created in partnership with a different artist each year. This year we have incorporated the murals of various street artists spread over the Schoenherr footprint, giving them a platform to voice their messages.

Michael Lagler | Schoenherr Managing Partner

We are proud to present the 2019 Schoenherr roadmap.

Voices is the title of this year's roadmap. A fitting theme considering that a lawyer is the client's voice of reason. He takes a client's instruction, refines it and navigates complexities in line with a system of rules. Ultimately, delivering a clear path to the client.

This year's roadmap provides an array of legal gems. Our experts provide up to date information on litigation funding, new trends in technology regulation, borrower / issuer side representation, cyber security, the impact of the EU anti-tax avoidance legislation, and more.

On the artistic front, we showcase a form of street art – murals, from all of our Schoenherr jursidictions. When communicating an idea through murals, an artist is not only voicing his views on a subject, but very often is also reflecting societal ideas or values. The idea that murals are available to all, free, turns convention on its head – a disruption for society's exclusive art-set. It is interesting to note that there are unwritten rules that all street artists know – they aren't necessarily adhered to, but are in existence nonetheless. Our interview with the head of the Calle Libre organisation in Vienna on page 120 sheds some light on these rules and the street art scene in Vienna and further afield.

The murals, together with our multi-faceted legal updates from all of our offices, make for a kaleidoscopic mix of information for you to take in and enjoy. We hope you find this year's articles instructive and enriching.

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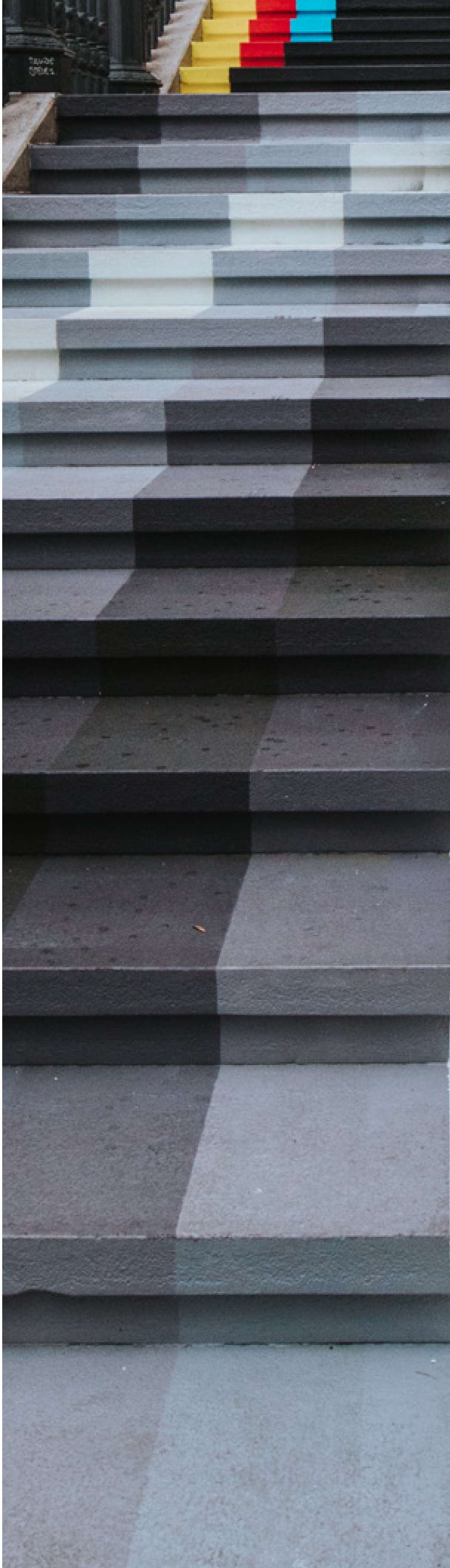
Gudrun Stangl | Partner and Chief Operating Officer

In the last year we have invested in a variety of tech tools in the areas of client collaboration platforms, e-learning software, knowledge management and network security monitoring.

Schoenherr most recently, in conjunction with six other leading law firms in Vienna, moved forward to lead the legal industry into the digital future with a focus on client needs. This vision has been encapsulated in the launch of the revolutionary Legal Tech Hub Vienna, which is open to all interested stakeholders in the legal market and aims to streamline internal efficiency, develop digital services and new business models, digitise existing processes while evaluating and automating new operations. This launch builds on other activities with the aim of enhancing service delivery to clients.

In addition, our IT security efforts work hand in hand with our efforts to make Schoenherr a law firm 4.0 focusing on the digitalisation of certain aspects of the delivery of legal advice; and the use of the technical tools/solutions to optimise day-to-day legal / administrative processes.

We will continue investing in enhancing these projects to further optimise processes and integrate them into the core functions of the firm. We look forward to working with you this year and providing you with the valuable service for which Schoenherr is renowned.



“
We will continue investing in enhancing these projects to further optimise processes and integrate them into the core functions of the firm.

Amon Stiege, Lost.Optics Vienna, Austria

01 banking, finance & capital markets

Selected Aspects of Corporate Finance

Looking beyond the margin: non-financial matters to keep in mind when negotiating corporate debt documentation


Martin Ebner | Vid Kobe

With the successful rebound of the general economy in CEE/SEE and the resultant increase in the supply of debt finance, many companies are looking to borrow additional funds and/or re-finance their existing indebtedness on better terms.

Understandably, overall pricing and, at times, financial covenants required by financiers are the key focal points for a CFO or corporate treasurer. However, the borrower's attention to the financing terms should not stop there: Certain (standard) finance agreement terms which – while often dismissed as technical/boilerplate – may have a profound impact on the corporate's business. After reminding ourselves (under 1) of the background for commonly used debt products, this article (under 2) focuses on selected borrower-/issuer-side topics and then takes a glimpse (under 3) at commonly used debt products from the perspective of modifying a multiparty contractual arrangement.

1 Starting point: Who calls the shots?
These days, terms of debt documents tend to be very much borrower/issuer driven, not only as we move up the credit-spectrum, but also the further we move into products such as sponsor-driven LBOs and real estate finance.

However, it should be borne in mind that customary finance agreement precedents and templates have historically been developed by the lending side of the market and are essentially bank products. This means that the starting point of every finance documentation negotiation is usually a set of documents which has been designed by creditors – with a primary view to protecting themselves. These documents often do not sufficiently take account of the specifics of the particular borrower's financial and business reality, and borrowers should not shy away from critically reviewing and negotiating finance documents – also beyond the financial terms.

Ultimately, finding the "right" balance between legitimate lender protections and the flexibilities needed by the borrowing firm's management to successfully run the business is in the interest of both sides of a financing transaction.

2 Selected points for discussion

Sophisticated finance documents provide an almost endless source for debate between the stakeholders. Analysing arguments for and against particular positions would clearly be far beyond the scope of this publication, so we decided to focus on a few key areas where a critical forward-looking approach to contract terms will contribute to the stable finance platform needed by any successful business.

Before turning to those topics, a brief note on document architecture: as a technical matter, we firmly believe that all commercially relevant contractual stipulations – such as the ones we are going to discuss below – should be contained in the main/principal finance documents and should not be "hidden" in some ancillary (e.g. security) documentation. Having a "single catalogue" of contract terms will facilitate efficient contract monitoring and compliance, and will be crucial for addressing (risks from) finance contracts in corporate risk management and the internal control functions of a business. The areas we will touch upon broadly fall within the following categories: (1) tailoring the finance documents to the needs of the business, and (2) reducing the risk of "hiccups" in business reality spilling over into the capital structure.

The first area covers the most important (dare we say, the only important) topical legal clauses a businessperson needs to focus on when looking at finance documents. The remainder, including the second area of "spill-over control", is clearly for the internal and external legal team to focus on.

Finance documents tailored to your needs

Generally, the further down a borrower finds itself in the credit spectrum, the more its financiers will look for protections – which will translate into more restrictive contract terms. This is true at pre-funding (aka conditions precedent) stages as well as, via undertakings and representations, during the tenor of the financing.

In a typical non-investment grade (or leveraged loan) scenario, the ongoing contractual restrictions in debt documents are manifold. Regarding those weaker credits, loan documentation seeks to protect financiers by generally restricting the borrower's and its group's ability to transact in certain ways, except to the extent a particular transaction is expressly permitted in the contract. Clearly, those undertakings will determine the borrower's room for manoeuvre during the tenor of the financing, and therefore these covenants and the relevant exemptions deserve attention. Negative undertakings

"Ultimately, finding the "right" balance between legitimate lender protections and the flexibilities needed by the borrowing firm's management to successfully run the business is in the interest of both sides of a financing transaction.

within that category relate to restrictions on movement of cash (e.g. limitations on additional indebtedness, distributions to shareholders and business acquisitions) as well as restrictions on dealing with assets (e.g. no-disposal and negative pledge covenants).

Even in the investment-grade realm, where documentation is far less restrictive, borrowers are well advised to take a forward-looking approach to their covenant sets. For example, changes to accounting standards and their impact on financial covenant calculations would ideally be anticipated at early stages of the process. This can be done either (ideally) during documentation stages or (less ideally) later on by proactively pursuing a covenant re-set during the lifetime of a transaction. Recent changes to IFRS 16 will, depending on the nature of the business, have far-reaching effects on financial covenants, for example.

Lately, a new breed of undertakings has arrived, irrespective of a business's credit rating. Driven by EU but also US sanctions legislation, internationally active lending institutions seek to impose ever more restrictive contractual compliance undertakings on their borrowers. Of course, sanctions compliance must be safeguarded, but care must be taken not to contract prohibitions that go beyond what the law requires and, worse, could even violate applicable anti-boycott legislation (e.g. the EU's blocking statute addressed at certain US sanctions against Iran).

Technical safeguards

Experience shows that even the strongest of borrowers are not immune to stress situations.

When these occur, the contractual terms of the debt documents are decisive in containing the impact of singular events on the overall capital structure. In those situations, it will be crucial that revolving facilities remain available for drawdown, for example. Available commitments in such situations often presuppose precise contract language, in combination with a contracting out of statutory draw-stop provisions. Related areas, where forward-looking drafting of finance contracts is essential, include cross-default mechanisms (where otherwise the "lowest denominator" may easily spark a group-wide fire) and cure rights for defaults. Moreover, banking regulation drives lending institutions towards a less "static" approach to their exposures. Tradability of debt may at times not mesh well with the concept of relationship banking and, considering regulatory pressures, it will always be worthwhile for a borrower to take a closer look at the transfer clauses in the debt documents to determine how legally robust the relationship with a particular financier in fact is.

3 Documentary adaptability?

Finally, since nobody can predict the future, the need to amend or waive a particular feature in a finance document (or in the capital structure) cannot be excluded.

Later in this Roadmap (see pages 18 to 23), our colleagues will briefly describe the statutory tools available in CEE/SEE to adjust existing finance contracts in the absence of a majority-based contractual mechanism. As a "sneak preview", however, we performed a document adaptability check of the financing arrangements that appear most popular with medium and large corporates in the region, i.e. (A) syndicated loans, (B) privately placed bonds following the German Schuldschein model, and (C) corporate instrument. Not surprisingly, from the perspective of adapting an existing multiparty arrangement without all parties being available (or willing) to consent, a syndicated loan appears the preferred route, simply because of the contractually agreed majority decision-making in combination with a single point of contact, the agent of the syndicate. Contrary to that, from a contract law perspective, the German Schuldschein constitutes a bundle of bilateral agreements and each affected creditor would need to consent to relevant changes. Corporate bonds, certainly Austrian law ones (and practice differs from jurisdiction to jurisdiction), often do not contain any forum or methodology to amend or waive particular terms so that – absent use of the statutory tools that may be available – a time-consuming exchange offer would often seem the only alternative.

Bottom line

In a nutshell, taking a critical look at the broader set of terms – beyond the margin – is apt to contribute to the resilience of the borrower's business and to improve the efficiency of internal risk management functions. In a similar vein, corporate borrowers are well advised to consider the selection of the financing instrument – and, potentially, the governing law / jurisdiction of borrowing – in light of the fact that business reality may require a degree of flexibility as regards contract terms.

Terms of a loan – set in stone?

Miriam Simsa

The issue.
As an attorney working in restructuring, I hear a recurring complaint from bank's restructuring departments: "Debtors admit financial difficulties far too late. They ring the alarm bell only once the entire house is on fire."

Doubtless, there are many reasons for this, ranging from the unwillingness to accept the facts, to the conviction that the troubles can best be managed internally. Yet one main obstacle is the lack of adequate proceedings to restructure debt outside of judicial insolvency proceedings. In most jurisdictions covered by Schoenherr, the only way for a solvent restructuring is out of court negotiations and the consent of all relevant creditors. There have been success stories but still, out of court restructurings face serious challenges, not at least the necessity of a unanimous agreement for all involved creditors.

Then, why not use insolvency proceedings?
While the introduction of insolvency proceedings was a big step towards providing a legal framework to foster a business-friendly legal environment these proceedings offer very little to a debtor that merely wants to restructure its debt. First, insolvency proceedings frequently require that the debtor is actually insolvent. Being forced to wait until actual insolvency, hinders timely opening of proceedings and therefore reduces the chances for success. Second, insolvency proceedings frequently force a debtor to hand over control of its business to an administrator. Debtors will usually avoid surrendering control of the business for as long as possible. And third, insolvency proceedings involve all creditors, including customers, suppliers and employees. Involving only the financial creditors is normally not an option. Such proceedings will therefore inevitably have a significant negative impact on the debtor's future business, diminishing the chances of successfully continuing the business.

Facade on Hotel Kyjev,
Jakub Markech, Bratislava, Slovakia

The solution.
All of these concerns could be addressed by introducing a legal framework for restructuring proceedings. In order to qualify as such, proceedings should include at least the following elements:

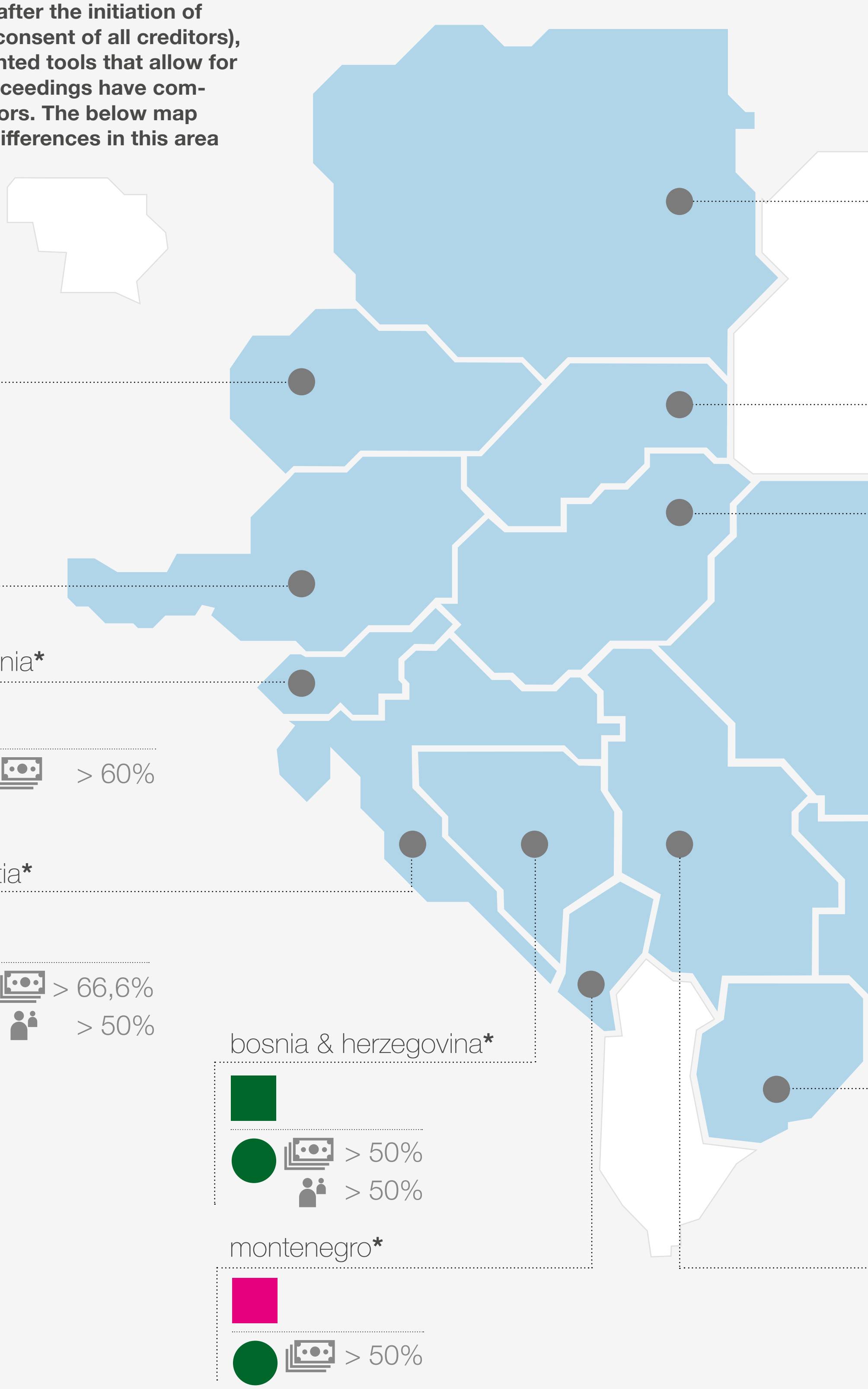
(i) There should be no requirement that the debtor is or claims to be insolvent or in any pre-stage of insolvency.
(ii) The debtor should be allowed to stay in control of its business. As an alternative, debtors could be obliged to engage a restructuring expert as an external advisor, such as an insolvency lawyer or an auditor.
(iii) The proceedings should be confidential until confirmation of the restructuring plan. This element is crucial in order to avoid any negative repercussions for the debtor's business.
(iv) There should be no requirement to involve all creditors – the debtor should have the option to restructure only certain classes of its debt.
(v) Adopting an agreement should not require 100 % consent but only a majority vote in order to reduce the risk of small hold-out creditors sabotaging the restructuring.
(vi) The final agreement should be confirmed by a court in order to safeguard interests of any dissenting creditors.

The proposal by the European Commission for a directive on preventive restructuring frameworks, second chance, and measures to increase the efficiency of restructuring, insolvency and discharge procedures, is a good start. It can only be hoped that the directive will be enacted soon and properly implemented by local legislators. Because under the status quo – as shown in the table on pages 20 to 23 – the debtor only has the choice between muddling through and a unanimous agreement.

"The proposal by the European Commission for a directive on preventive restructuring frameworks, second chance, and measures to increase the efficiency of restructuring, insolvency and discharge procedures, is a good start.

Amending debt terms in CEE/SEE – one region, different regimes

The amending of debt terms is driven by local rules and regional distinctions. Although many CEE/SEE jurisdictions permit amendments to debt terms only after the initiation of court insolvency proceedings (save for consent of all creditors), a number of jurisdictions have implemented tools that allow for amendments also before insolvency proceedings have commenced and without consent of all debtors. The below map and following pages illustrate regional differences in this area across the CEE/SEE region.



Key

1.

NO YES

BEFORE
Possibility of amendments of debt structure (without consent of all creditors) before opening of insolvency proceedings

2.

NO YES

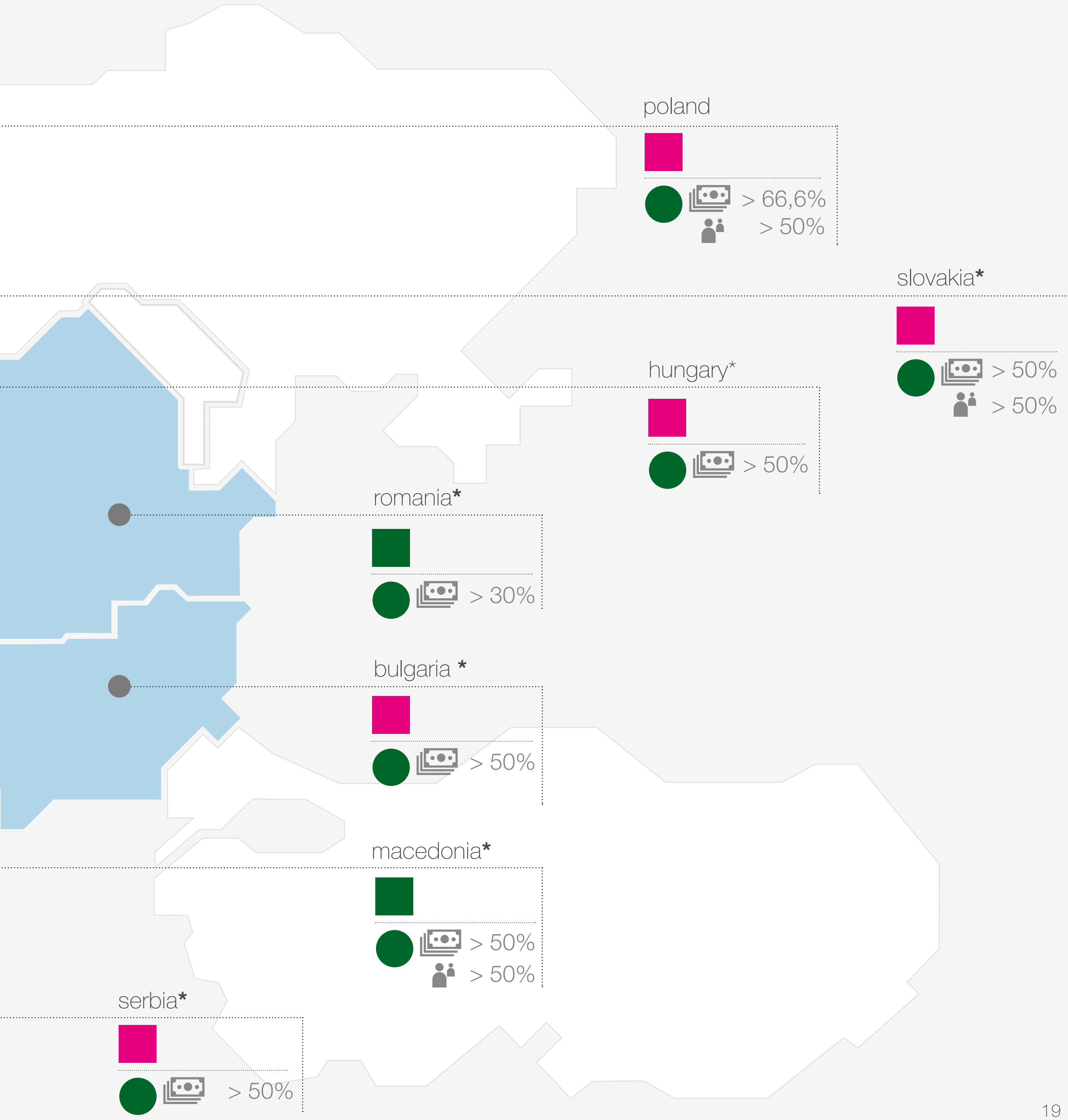
AFTER
Possibility of debt restructuring (reorganisation plan) after insolvency has been filed (in the course of insolvency proceedings)

Required majorities
For approval of reorganisation plan in insolvency proceedings:

% by amount of claims

% by headcount of creditors (if applicable)

* Creditors are divided in several classes (majority qualifications in each class must be reached for the approval of the reorganization plan)



Country Author	**Austria** Matthias Pressler	**Bosnia & Herzegovina** Vladimir Markus	**Bulgaria** Tsvetan Krumov
1. Are there statutory legal tools that allow a debtor together with a certain majority of its creditors outside of insolvency proceedings to amend the terms of its debt which are binding on all creditors (or creditors of a certain class)?	**No.** Austrian law does not provide for any such generally applicable statutory legal tools outside insolvency proceedings. In the absence of contractual arrangements that provide for certain majorities, all affected creditors need to agree on the terms of a financial restructuring or other changes to the debt capital structure. Neither the debtor nor the majority of creditors can force dissenting creditors to participate.	**Yes.** In the Republic of Srpska (i.e. a self-governed entity within the territory of B&H), a debtor or creditor (with debtor's consent) is entitled to file a court restructuring petition to the competent court, due to debtor's threatened illiquidity. Such restructuring is taken prior to the initiation of insolvency proceedings. The court restructuring is a process that regulates the legal status of the debtor and its relationship with creditors and enables the debtor to continue with its business operations. **No.** In the Federation of Bosnia and Herzegovina (i.e. a self-governed entity within the territory of B&H) there are no generally applicable statutory legal tools available outside insolvency proceedings.	**No.** Bulgarian law does not provide for legal tools outside of insolvency proceedings that allow a debtor together with a certain majority of its creditors (having less than 100 % of the claims) to amend the terms of the debt which are binding on all creditors (or creditors of a certain class).
2. Is court (or another public authority's) involvement required to make use of the statutory legal tools described in 1.?	**N/A**	**Yes.** In the Republic of Srpska court restructuring is a court-supervised process that may be initiated by the debtor or creditor (with the debtor's consent).	**N/A**
3. Which legal tools are available to amend the terms of debt after insolvency proceedings have commenced?	In addition to "standard" insolvency proceedings, Austrian law provides for the statutory legal tool of the "reorganisation plan" (Sanierungsplan). Upon insolvency, debtors can prepare a reorganisation plan which will be binding on all (including dissenting) creditors if all conditions have been met. The adoption of such a reorganisation plan requires that (i) the majority of all voting creditors agrees to it (majority by headcount), and (ii) the sum of the approving creditors' claims exceeds half of the total sum of all voting creditors' claims (majority by claim). After the creditors' acceptance (and if certain additional conditions are met), the insolvency court will confirm the reorganisation plan and it becomes binding on all creditors, including those who have not participated in the voting or who have voted against the plan. Often reorganisation plans include a substantial haircut and deferral of debt, the conditions of which apply to all creditors in the same manner. Any less favourable treatment of a particular creditor would require its express consent.	Under the Bankruptcy Act of the Federation of Bosnia and Herzegovina and the Bankruptcy Act of the Republic of Srpska, bankruptcy proceedings are conducted in the form of reorganisation or bankruptcy. Reorganisation is the process of satisfying creditors' claims in accordance with an approved reorganisation plan / pre-packaged reorganisation plan. The applicable legislation provides for two forms of reorganisation: reorganisation based on (i) a reorganisation plan, or (ii) a pre-packaged reorganisation plan. The stage at which either form of reorganisation plan is prepared and negotiated is the crucial difference between the two forms of reorganisation. While the preparation and negotiation of the reorganisation plan is protected from unilateral creditor action, negotiations around the pre-packaged reorganisation plan are not protected from unilateral creditor action, as there is no stay on creditor action until bankruptcy proceedings are opened. The adoption of such a reorganisation plan requires that (i) the majority in each creditor class have voted for the plan, and (ii) the sum of the claims of those who voted for the plan exceeds that of those who voted against it.	Upon commencement of Bulgarian insolvency proceedings, subject to certain exceptions, a reorganisation plan can be proposed. Adoption of the reorganisation plan must first be approved by creditors with accepted claims. Bulgarian law provides for five different classes of creditors and the creditors with accepted claims within each class need to vote separately. The plan is deemed to have been approved by the creditors if (i) the majority of all voting creditors within each class agrees to it (majority by amount of accepted claims), and (ii) creditors with more than half of all accepted claims approve the plan. Secondly, the plan must be approved by the court, where some additional statutory requirements must be met, inter alia that (i) all creditors within a certain class must be treated equally, unless those treated in a worse manner have consented in writing, and (ii) the plan must provide to each non-consenting creditor such payment which it would receive in the general distribution in insolvency.

Croatia
Ozren Kobsa

No. Croatian law does not provide for any such generally applicable statutory legal tools outside insolvency proceedings.

In the absence of contractual arrangements that provide for certain majorities, all affected creditors need to agree on the terms of a financial restructuring or other changes to the debt capital structure. Neither the debtor nor the majority of creditors can force dissenting creditors to participate.

N/A

The Croatian insolvency regime provides for two statutory legal tools of the "reorganisation plan":

i) within pre-bankruptcy proceedings: this voluntary, debtor-in-possession proceeding enables a debtor to avoid bankruptcy by way of a court-overseen procedure which restructures the debtor's finances through a restructuring plan. The trigger for initiating the procedure is an "imminent inability to make payments", which is determined by the court. A reorganisation plan needs to be adopted by (i) a majority of all creditors, whereas (ii) within each group of creditors, the claims of creditors that voted for must exceed by double the claims of creditors that voted against.

ii) within bankruptcy proceedings: adoption of a bankruptcy reorganisation plan requires that (i) the majority of all creditors in each creditors group voted on the bankruptcy plan and (ii) within each group of creditors, the claims of creditors that voted for the plan, have to be double the claims of creditors that voted against it.

Both reorganisation plans almost always include a substantial haircut and deferral of debt and, if adopted, affect all (including dissenting) creditors.

Czech Republic
Natálie Rosová

No. Czech law does not provide for any such generally applicable statutory legal tools outside insolvency proceedings.

In the absence of contractual arrangements that provide for certain majorities, all affected creditors need to agree on the terms of a financial restructuring or other changes to the debt capital structure.

N/A

In addition to standard insolvency proceedings, Czech law provides for the statutory legal tool of reorganisation.

A non-liquidation process is entered, which aims at the continuation of the debtor's business activity. Creditors are satisfied gradually based on a reorganisation plan approved by the creditors and the insolvency court.

Adoption of such a reorganisation plan requires that a majority of the voting creditors within each class having at least half of the total nominal amount of the claims of the voting creditors votes for its approval.

Under specific circumstances, the insolvency court may approve the plan even if it is not accepted by each class of creditors.

Hungary
Gergely Szalóki

No. Hungarian law does not provide for any such generally applicable statutory legal tools outside insolvency proceedings.

In the absence of contractual arrangements that provide for certain majorities, all affected creditors interested in a debtor's reorganisation need to agree on the terms of a financial restructuring or other changes to the debt capital structure. Neither the debtor nor the majority of creditors can force dissenting creditors to participate or accept a haircut.

N/A

In an insolvency proceeding, Hungarian law provides for the statutory legal tool of the reorganisation plan.

The debtor can prepare a reorganisation plan which will be binding on all (including dissenting) creditors if all conditions have been met.

Adoption of such a reorganisation plan requires the majority of votes (by amount of claim) of both the secured and unsecured creditors. After the creditors' acceptance (and if certain additional conditions are met), the court confirms the reorganisation plan and it becomes binding on all creditors, including those who have not participated in the voting or who voted against the plan.

Reorganisation plans often include a substantial haircut and deferral of debt, the conditions of which apply to all creditors in the same manner.

Macedonia
Magdalena Petreska

Yes. A debtor may negotiate an out-of-court restructuring of its liabilities towards creditors (of which at least one must be a financial institution) under the Out-of-Court Settlement Act.

Conclusion of an out-of-court financial restructuring plan is only possible if creditors holding a majority of claims vote in favour of the restructuring plan. The measures of the financial restructuring are similar to those typically associated with insolvency reorganisation plans. The adopted restructuring plan is binding on all creditors, except those holding collateral who have not waived their right to separate enforcement against the collateral.

Yes. In Macedonia the restructuring plan must be approved by the Settlement Council which is appointed by the Macedonian Ministry of Economy.

Under the Macedonian Insolvency Act, debt may be amended through the reorganisation process.

Reorganisation is based either on (i) a pre-packaged reorganisation plan filed simultaneously with the petition for initiation of insolvency proceedings, or (ii) a reorganisation plan filed by certain deadlines after the insolvency proceeding has been opened.

The adoption of such a reorganisation plan requires that creditors with a majority of all claims and a simple majority within each creditor's class have approved the plan.

Therefore, cramdown of creditors within a creditor class is possible, while cramdown of a creditor class is not.

Country Author	**Poland** Paweł Halwa	**Montenegro** Jovan Barović	**Romania** Narcisa Oprea; Livia Purice
1. Are there statutory legal tools that allow a debtor together with a certain majority of its creditors outside of insolvency proceedings to amend the terms of its debt which are binding on all creditors (or creditors of a certain class)?	**No.** Generally, Polish law does not provide for such a possibility outside of the insolvency regime. All affected creditors interested in a debtor's reorganisation need to agree on the terms of a financial restructuring or other changes to the debt capital structure. Dissenting creditors cannot be forced to participate or accept a haircut. Additionally, and only with respect to bonds, Polish law provides that in certain cases a meeting of bondholders may amend the elements of issuance terms and conditions if more than half of voting bondholders vote in favour.	**No.** There is only a potential three-month suspension of the initiation of insolvency proceedings in case of a consensual financial restructuring, but no haircut on dissenting creditors. A debtor may negotiate an out-of-court restructuring of its liabilities towards creditors, of which at least one must be a financial institution. The availability of consensual financial restructuring to the debtor and its creditors is conditioned by (i) the state of financial difficulty of the debtor, (ii) the viability of its business, and (iii) the debtor's suitability to be restructured. Consensual financial restructurings are hardly ever used in practice, because they are strictly voluntary and are only binding on parties choosing to participate in them. The sole exception to this rule is that hold-out creditors are prohibited from initiating insolvency proceedings against the debtor for three months as of the signing of the consensual financial restructuring participation accord, provided the accord is signed by creditors holding 75 % or more of the amount of claims.	**Yes.** Only the terms of the debt will be amended, not the nominal amount. Under Romanian law, the composition procedure allows for a certain majority of creditors (holding at least 75 % of the accepted claims) to negotiate and vote for the approval of a composition arrangement, which includes a project and a recovery plan proposed by the debtor together with a court-appointed administrator. If the composition arrangement is duly validated by the court of law, the court can accept the debtor's request to impose a term during which the maturity of claims by creditors who have dissented or did not participate in the composition arrangement is postponed. The above provisions may impact creditors.
2. Is court (or another public authority's) involvement required to make use of the statutory legal tools described in 1.?	**N/A**	**N/A**	**Yes.** In Romania there is a court involvement in pre-insolvency proceedings.
3. Which legal tools are available to amend the terms of debt after insolvency proceedings have commenced?	The Polish insolvency regime, in particular restructuring proceedings, allow for a composition to be concluded between the creditors, which will be binding on all (including dissenting) creditors. Adoption of such composition requires that (i) the majority (by headcount) of all voting creditors agrees to the composition, and (ii) the sum of the approving creditors' claims exceeds two-thirds of the total sum of all voting creditors' claims (majority by claim). After the creditors' acceptance, the restructuring court confirms the composition and it becomes binding on all creditors, including those who have not participated in the voting or who voted against the composition. The composition may include a substantial haircut and deferral of debt, which will apply to all creditors in the same manner. However, if a given creditor is to be treated less favourably in any way, its explicit consent is required.	Under the Insolvency Act, debt may be amended through a reorganisation process. Reorganisation is based on either (i) a pre-packaged reorganisation plan filed simultaneously with the petition for initiation of insolvency proceedings or (ii) a reorganisation plan filed, within certain deadlines, after the insolvency proceeding has opened. A reorganisation plan is approved if a majority of the creditor class vote in favour of its adoption. A creditor class approves the plan by a favourable vote of its members holding more than 50 % of the amount of claims in that class. If the reorganisation plan is adopted by the majority of creditor classes and approved by the court, it will bind dissenting creditors. Therefore, both, creditors within a creditor class and the entire creditor class may be crammed down.	Under Romanian law, debt may be amended through a judicial reorganisation process based on a reorganisation plan. The adoption of such a plan requires that (i) the majority of the classes of creditors vote in favour of its adoption; (ii) at least one of the disadvantaged classes of creditors agrees to the plan; and (iii) creditors holding at least 30 % of the total amount of the claim pool approve the plan. Within a certain class of creditors, the plan is approved by a favourable vote of more than 50 % of the total amount of the claim pool within the respective class. After the reorganisation plan is approved by the creditors and subsequently confirmed by the court, the plan becomes binding on all creditors (including those who have not participated in the voting or who have voted against the plan).

Serbia
Petar Kojdić

No. A debtor may negotiate an out-of-court restructuring of its liabilities towards certain creditors under the Companies (Arranged Financial Restructuring) Act. However, this proceeding is hardly ever used in practice, as it does not permit a cramdown of dissenting creditors. A precondition is that all creditors are willing to negotiate and voluntarily enter into a restructuring agreement.

The debtor and creditors will first enter into a standstill agreement prohibiting the commencement and continuation of any enforcement proceedings or settlement initiated by these creditors. This voluntary standstill should allow for the debtor to negotiate a financial restructuring agreement with creditors. Under the agreement, various restructuring measures may be implemented.

N/A

A debtor may file an insolvency petition accompanied by a pre-packaged reorganisation plan.

In this case, the debtor may avail itself of an expedited proceeding that would likely end with the adoption of the plan, if the debtor has drawn up the plan together with the creditors. If an insolvency case is already opened, a reorganisation plan may also be filed subsequently within certain deadlines.

The adoption of such a reorganisation plan requires that each class of creditors vote for its adoption. A creditors class approves the plan by a favourable vote of its members who hold the majority of the amount of claims in that class. If just one creditor class does not approve the reorganisation plan, the plan will not be adopted.

If the reorganisation plan is adopted by all creditor classes and approved by the court, it will bind dissenting members within the class.

Slovakia
Michal Lučivjanský

No. The Slovak law does not provide for such tool outside of restructuring proceedings.

Therefore all affected creditors must contractually agree on the terms of a finanicial restructucuring or other changes to the debt capital structure, such as a haircut. Without consent of a creditor, changes to respective debt is not possible.

N/A

Slovak insolvency law provides apart from standard insolvency proceedings leading to liquidation of a company also restructuring proceedings (aiming at keeping at solving the pending insolvency status).

Restructuring ends with a restructuring plan which needs first to be approved by the creditors and is afterwards confirmed by an insolvency court. The restructuring plan is also binding on the creditors which voted against the plan (unless statutory exemptions apply) and the claims of creditors which did not participate in the restructuring proceedings within the given statutory period cannot be judicially enforced in full.

Approval of the restructuring plan requires mainly that (i) the majority by amount of claims in each group for secured receivables votes for approval, (ii) the majority by amount of claims in each group for unsecured receivables and (iii) majority of votes of present creditors at the meeting votes for the plan adoption.

In general, in the course of restructuring creditors need to be satisfied at least by 50% of their claims.

Slovenia
Matej Črnilec

Yes. Slovenian law provides for a "pre-emptive restructuring" proceeding aimed at enabling eligible distressed corporate debtors to avoid insolvency by entering into a financial restructuring agreement with its financial creditors outside formal, court-sponsored restructuring proceedings. Notably, the pre-emptive restructuring is designed to only affect financial creditors.

If the requisite majority of financial creditors (30 % as a general rule) agree to the initiation of pre-emptive restructuring, this will result in a statutory standstill for the entire class of financial creditors. Provided that (i) the requisite majority of financial creditors (75 %) then accedes to the financial restructuring agreement, and (ii) the financial restructuring agreement is confirmed by the court, dissenting financial creditors will face a cramdown.

Yes. In Slovenia there is court involvement. The financial restructuring agreement needs to be deposited with a notary public and needs to be approved by an auditor.

The financial restructuring agreement is then confirmed by the court. The court's review is limited to checking whether the formal conditions are met.

In Slovenian insolvency law, the terms of debt can be amended in a compulsory settlement.

As a rule, the compulsory settlement affects all unsecured claims existing at the time the compulsory settlement proceedings were opened, while secured claims remain unaffected. However, the terms of the compulsory settlement proposal can be modified by the initiating party, for example to limit the effects of the compulsory settlement to financial creditors only and/or to extend the effects of the compulsory settlement to secured claims.

If the compulsory settlement is approved by the requisite majority (60% of all affected claims), the terms of the compulsory settlement will be binding on the entire class (cramdown). If the compulsory settlement is modified to also affect secured claims, the vote on the compulsory settlement proposal is carried out in two separate classes whereby a higher, 75% majority is required in the secured claims class.

Digitisation, administration and transfer of registered shares of an unlisted AG on the blockchain

Thomas Kulnigg | Zurab Simonishvili

In the past few years, blockchain has become a "hype" topic for lawyers, as the technology seemingly promises entirely new ways to easily and securely track transactions via a decentralised peer-to-peer computer network.

Due to its secure and decentralised nature, blockchain technology could be the perfect solution to digitise shares in companies, most notably of Austrian Stock Corporations (AG), since their shares are generally meant to be fungible.
Digitisation of shares means that shares are represented by "tokens", and not by paper share certificates. Tokens are digital units that can be created based on a "smart contract", for example, on the popular Ethereum blockchain using its "ERC-20 standard". ERC-20 defines a common list of rules for Ethereum tokens within the Ethereum blockchain. These rules include how the tokens are transferred between addresses and how the data stored on each token is accessed. Tokens can thus have special programm functions, such as a "transfer" function.
Share tokens are linked with registered shares and issued to the shareholders of the AG by transferring the newly created token to the shareholders' cryptocurrency wallets. Each token represents one individual share.
The digitisation of the registered shares of an AG is intended to simplify their transfer. Due to the technical design, it is

possible to eliminate any intermediary and for shareholders to transfer the shares directly against payment of the agreed consideration (delivery versus payment). Digitisation is also intended to make the transfer of registered shares of an AG more secure. The blockchain ensures tamper-proof transfer of tokens. The risk of fraud and errors in the transfer of shares can therefore be further reduced.

Legal requirements

The possibility to digitise shares should be provided for in the articles of association of the AG. For AGs that are not listed, there is greater autonomy regarding the statutes in comparison to a listed AG. Amendments to the statutes of an unlisted AG are generally permissible not only where the law expressly provides, but also where the mandatory law or the nature of the AG is not violated. Now that the digitisation of shares does not automatically qualify the AG as a listed company, respective provisions governing the digitisation of shares can, subject to the foregoing and the following, be included in any non-listed AG's articles of association.

With our recent project for Conda (www.schoenherr.eu/press-releases/press-releases/austria-schoenherr-advises-crowdinvesting-company-conda-on-first-ever-digitalisation-of-shares-via/), we have proven that such changes in the articles of association are admissible. There is no explicit provision in the Austrian Stock Corporation Act prohibiting provisions in the statutes concerning the digitisation, administration and transfer of registered shares of an unlisted AG on the blockchain. These procedures are also in accordance with the principles of stock corporation law. Therefore, provisions in the statutes of an unlisted AG regarding the digitisation, administration and transfer of registered shares are permitted in principle.

How to do it

If it is planned to digitise shares, the company's statutes must first exclude shareholders' rights to the certification of shares. Subsequently, the statutes must authorise the management board to segment the registered shares of the company in the form of tokens and to transfer them to the shareholders. Thereafter, the transfer of shares is only possible according to general civil law principles (by assignment).

Since each registered share is linked to a digital token and each token represents an individual share, the transfer of a token is equivalent to the transfer (assignment) of a share.

When a token is transferred, it is registered in the blockchain that the token was transferred from one shareholder to another person, and therefore the transfer can no longer be manipulated. Since the transfer of a token is equivalent to the transfer of a share, the transfer of the share is thus sufficiently proven for the management board. The management board is informed of this by a computer protocol ("smart contract"). Based on this, the management board can make the corresponding changes in the share register. The transfer of a token is therefore equivalent to the (conventional) transfer of a share.

Outlook

Another digital corporate solution could involve how general meeting resolutions are passed. Electronic voting is already permissible. The advantage of voting via the blockchain is that voting behaviour could be securely stored on the blockchain, meaning voting errors would be further reduced.

In addition, dividends could be paid in the form of cryptocurrency or other tokens. Such distributions legally qualify as distribution in kind, which are only admissible if all shareholders consent. We will see if future legislation will acknowledge (by default) cryptocurrency or other tokens as means of payment of dividends.

“

Due to the technical design, it is possible to eliminate any intermediary and for shareholders to transfer the shares directly against payment of the agreed consideration (delivery versus payment).

The effects of digitalisation on Turkish corporate law

Murat Kutlug

> The system will lead to greater efficiency and synergies, while eliminating paperwork and formalities under Turkish corporate law.

Market expectations are changing on a daily basis as new technologies are developed. The governmental authorities in Turkey are currently working on new systems to ensure compliance with recent developments and to provide investors a more secure environment.

In light of this approach, the Ministry of Customs and Trade (the "Ministry") launched a new digital system called Mersis last year. The main purpose of the system is to modernise filing procedures and replace manual filing processes, including long and harsh bureaucratic procedures. The system will lead to greater efficiency and synergies, while eliminating paperwork and formalities under Turkish corporate law. Thanks to the new system, many transactions in Turkey, such as establishment of joint stock and limited liability companies, mergers and demergers, change of company type and changing management bodies can be done within a very short period of time. At present, physical application at the Trade Registries is necessary to complete these procedures. The Ministry wishes to develop a system that allows all of these procedures to be completed digitally.

Another reason for the new system is to ensure unity between the practices of the Trade Registries. The system provides users several samples and templates to make complex transactions easier and more understandable. The many guidelines in the system eliminate the various approaches and practices by different Trade Registries. More digital support will surely lead to less bureaucratic meddling, which is one of the most controversial issues in Turkey over the last decade.

Databank of trade in Turkey

On the other hand, the new system can be seen as an "e-library of companies". Any user who logs into the system can easily find the most up-to-date information, including tax number, registered address, share capital and authorised representative of a company operating under Turkish Law. In this way, companies can enter into transactions in a safer and more secure environment. With the new developments to be made in the system in the upcoming years, it will no doubt be possible to complete many complex transactions with just a click of the mouse.

Authorised users

Although the system allows everybody to obtain corporate information, transactions can only be made by the legal entities' authorised representatives. The Ministry has announced that in the near future users will be obliged to have e-signatures in order to exercise their authority. The system will thus provide its users a safer and more secure environment.

More than 500 years later, and one of Shake-speare's most famous lines may become a reality...

> The first thing we do, let's kill all the lawyers.

William Shakespeare

Legal tech in m&a – man vs machine?


Christopher Jünger | Maximilian Nutz

"The first thing we do, let's kill all the lawyers."[1] More than 500 years later, and one of Shakespeare's most famous lines may become a reality, not literally of course, but evolving legal technologies and increasingly cost-conscious clients have created the perfect basis for the extinction of legal work as we know it.

The typical m&a transaction

m&a is certainly a hot area for legal tech due to its procedural aspects and the effort to reduce complexity. A typical m&a transaction can be divided into the due diligence phase and the preparation, negotiation and execution of transaction documents.

- In the due diligence phase, lawyers are confronted with a huge amount of data that needs to be reviewed to be able to detect and assess certain legal risks relating to the target company. Reviewing documents and extracting important information requires a high capacity of manpower, especially in the initial phase.
- The transaction documents, especially a share or asset purchase agreement and the closing documentation, must then be carefully drafted and be perfectly aligned with the findings of the due diligence review.

Use of legal tech

Legal tech does not mean that the whole m&a transaction can be completed by a machine. Currently, certain legal tech tools can be implemented in the m&a process to facilitate the lawyer's work and to enhance the outcome for the client with regard to both quality and cost.

AI software

With regard to the due diligence phase, various suppliers basically offer the same kind of tool: software using artificial intelligence ("AI")[2] to review the disclosed data and flag certain documents or provisions (for example, change of control clauses, unusual liability provisions or contract expiration dates). AI can definitely speed up the process and reduce mistakes in such standard clauses. Suppliers of AI software claim, for example, that time spent on due diligence reviews can be reduced by 90 % or that 12,000 commercial contracts can be analysed in a few seconds (equivalent to 36,000 hours of legal work by lawyers) using AI software.[3]

Drafting tool

To enhance the quality of transaction documents and to increase efficiency, Schoenherr has developed a contract drafting tool for Microsoft Word which, for example, automates the verification of references and can be used to implement standard clauses. The tool also imports boilerplates and manages them within your document. The implemented quality check feature helps to avoid typical mistakes when working with documents containing definitions.

Risks

While there are doubtlessly many advantages to using AI software in m&a transactions, there are also risks.

- Lawyers must increasingly deal with new technologies, since AI systems are always influenced by the data that they are trained on. Inadequate "teaching processes" can significantly reduce the impact and benefits of AI software.
- With increasingly rigid data protection provisions, data protection aspects must be borne in mind when processing large amounts of data using AI software.
- AI as software naturally carries the risk to be infringed in case of a cyber-attack. The IT security level both on the user and the company level must therefore always be up to date.

Conclusion

To remain competitive in the future, the use of legal tech is unavoidable. The more the performance of the actual work itself is automated, the more attention must be paid to the correct training and use of the AI software. This will be the decisive factor in how successfully the potential of AI can be applied. In any case, AI should be seen as only an auxiliary tool. Control and responsibility over the m&a process will always remain with the lawyer. It is not man vs machine, but man vs machine-assisted man.

1 Henry VI, Part 2, Act IV, Scene 2.
2 All current AI applications are in fact (just) machine learning applications.
3 www.techemergence.com/ai-in-law-legal-practice-current-applications/.

Machine learning algorithms – is a change in approach to civil liability assessment required?

Krzysztof Pawlak

This overview aims to highlight selected potential Polish law issues related to liability for damages caused by machine learning algorithms (MLA) which an entrepreneur operating, buying or selling a business based on MLA may face and should consider. Needless to say, the civil law liability touched upon here is not the only liability regime which should be borne in mind. For the sake of clarity, however, matters related to specific sector regulation (e.g. for medical devices), intellectual property rights, GDPR as well as criminal liability are not addressed below, although they are equally important for MLA-based business.

All these terms…

Machine learning algorithms, artificial intelligence, robots – all these buzzwords represent the real growing importance of machines able to make autonomous decisions. There are plenty competing definitions of these terms (applying both mathematical terms and psychological or philosophical aspects). This overview focuses on so-called reinforced learning algorithms, i.e. algorithms collecting data without the constant input of an operator and autonomously making decisions (affecting its surroundings) based on a balance between potential risks and profits. These algorithms also act without human supervision.

Where we are

The legal aspects of the development and use of MLA are discussed at the international (e.g. at the forum of UN agencies), European Union[1] and national levels. At the time of writing this overview (September 2018), no regulation addressing the specific concerns raised about the civil law liability or accountability of MLA (or more broadly algorithms and robots) has be implemented or proposed, save for various proposals of codes of ethics which would apply to developers and users/beneficiaries of MLA.[2]

Lack of specific regulation does not mean that there is no regulation. On the contrary, the Polish Civil Code provides for a wide range of possible liability regimes to be applied to MLA, such as liability for dangerous product, tort liability (based on the risk principle) or contractual liability based on the agreed contractual terms.

In some circumstances it is debatable which liability regime applies. For instance, it is discussed if and when MLA constitutes a "product" within the meaning of the provisions related to liability for dangerous products[3] depending on the specific features of the given MLA and on the circumstances of damage. But such features are not unique to MLA, since the aforementioned issues may also arise in cases involving "traditional" machines.

What is specific to MLA as opposed to fully human-controlled machines is its complexity, unpredictability and scale. In other words, it would be difficult in many cases to determine and apply the proper level of due diligence in designing and using MLA, because the due diligence needed in creating autonomous systems is hard to imagine in detail upfront and not all risks can be foreseen.[4] For these reasons, and to address public fears related to lack of control over MLA, strict rules of liability, e.g. based on the risk principle (making it difficult for the accountable user or developer of the MLA to release itself from liability) likely will be applied.

Sometimes, even identifying the developer, user or beneficiary of the MLA's operations will be difficult, if at all possible.[5]

Where we are heading

The solution is not yet clear. The legislation may basically go in two opposite directions:

> It would be difficult in many cases to determine and apply proper level of due diligence in designing and using MLA, because the due diligence needed in creating autonomous systems is hard to imagine in detail upfront and not all risks can be foreseen.

• the model of liability which now applies to traditional machines will only be modified. For instance, MLA developers and users will be obligated to follow specific rules of conduct and due diligence, but generally some level of innovative risk will be accepted. Additionally, individuals affected/harmed by operation of MLA will relatively easily pursue claims for damages, but on the other hand, the liable person/entity developing or using MLA will enjoy viable defences; or

• governments create an authorisation-like system for employing MLA. For example, to apply an MLA, the entrepreneur will need to first seek governmental approval or at least ensure a high premium insurance policy before the given MLA is implemented. Moreover, developers or users will be subject to very strict liability rules (in the worst-case scenario they will be practically unable to release themselves from liability).[6]

The adopted approach will most likely lie in between these extremes.

What should be analysed when assessing liability risks in the short and medium term?

When assessing the liability for MLA, operation risk (e.g. when drafting a contract on purchase or sale of a business developing or using MLA) it is worth being up-to-date with the legislation. In particular, stakeholders should bear in mind that:

• the development and implementation or commercialisation of MLA should – at least until specific legislation is implemented – follow the rules for implementation of other high-risk products currently in force to the furthest possible extent (and with an even higher standard of care in mind). This means that the strict liability for any personal injuries inflicted as a result of MLA should be borne in mind;

• as long as liability for MLA development and operation is not specifically regulated in Polish law, the applicable legal provisions in use for standard machinery should be applied, even if there are doubts about whether they are binding;

• due to the complexity and unpredictability of MLA, it is virtually impossible to adopt a one-fits-all approach;

• the far-reaching effects of MLA and lack of control over it can multiply bias embedded in MLA by developers and hence the damage and the amount of compensation payable;

• the absence of a common approach among potential legislators makes it difficult to predict how the laws affecting MLA will develop, i.e. whether they will be open or restrictive. In any case, a company developing or using MLA may be required to disclose the algorithm and perhaps also explain how it makes decisions. This will limit the company's competitive edge, as other companies may try to apply similar MLA (regardless of whether it constitutes a breach of IP laws or not). Sometimes it will not be possible to easily explain how the "black-box" in-built in the MLA works;

• ongoing changes in sector regulation, for example, concerning road safety if MLA is driving a car.

1 See, for instance, European Parliament resolution of 16 February 2017 on civil law rules on robotics with recommendation to the European Commission. See: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0051+0+DOC+XML+V0//EN

2 The European Commission set up an expert group on liability and new technologies that will help prepare guidance to the new EU directive addressing the liability aspects of the creation and use of algorithms and robots. The aim is to issue such guidance by mid-2019. The first meeting of the expert group took place in June 2018. See: ec.europa.eu/growth/single-market/goods/free-movement-sectors/liability-defective-products_en – read on 12 September 2018

3 On the EU legislation level those provisions are set forth mainly in Directive 85/374/EEC on liability for defective products.

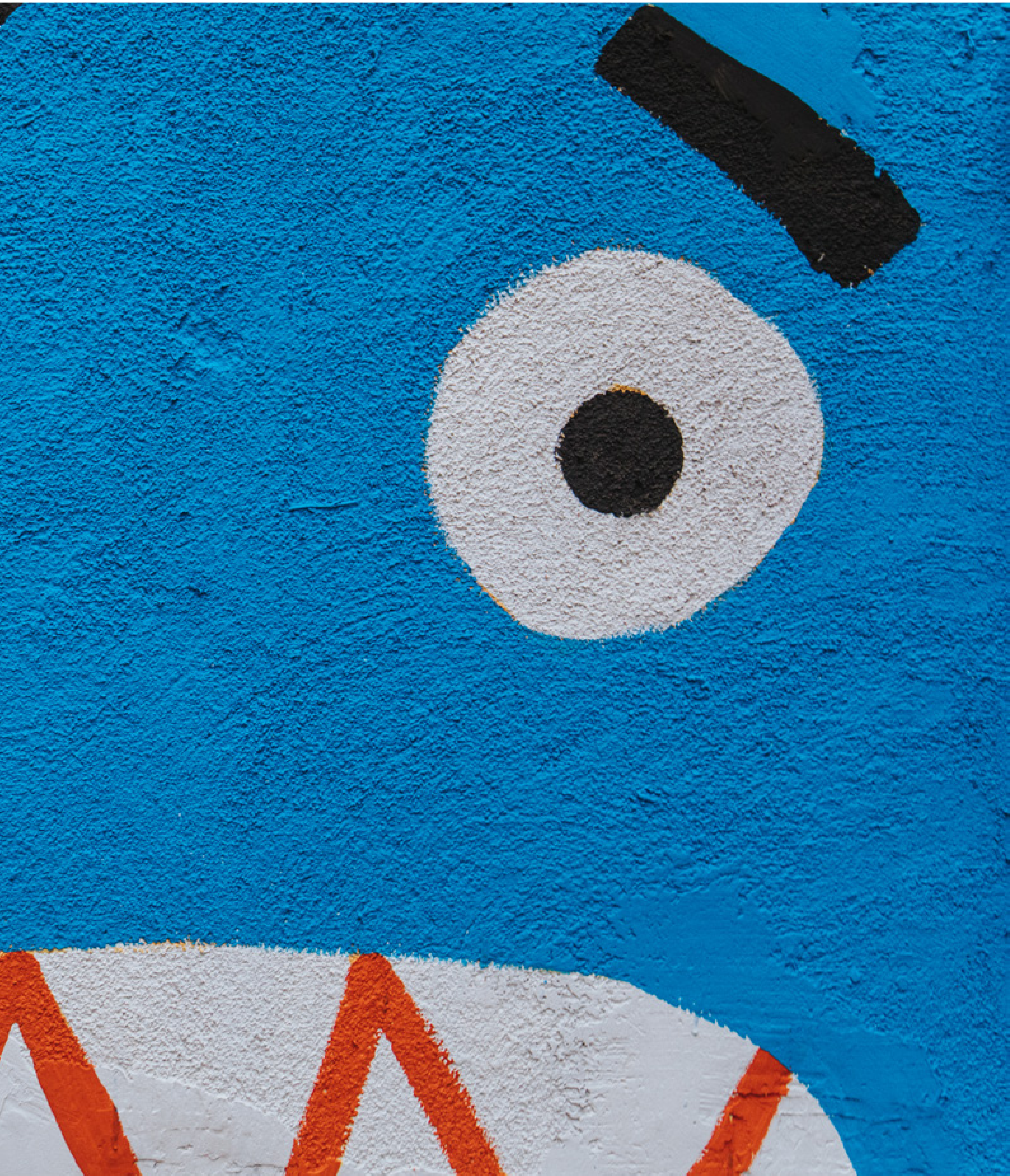
4 That is why there are a number of ongoing projects aimed at establishing basic rules of conduct for MLA developers and users.

5 There are far more potential problems discussed in legal doctrine, for instance, what rules apply if an MLA "acts" in virtual reality only or "contracts" with other MLAs.

6 In October 2017, the European Parliament Research Centre published a first (preliminary) report on public consultation on robotics and AI (dated 13 July 2017). 90 % of the participants opted for regulation in that area and were mainly concerned about industry abuse and data protection issues, while 74 % were concerned about liability rules. See: www.europarl.europa.eu/committees/en/juri/newsletters.html?id=20171005CNW05623&fhch=2fa74fd0eeb79c2b4680133f79ad-de80

The mural featured on our cover page, entitled "The Big Five" painted by Romanian artist SADDO in Vienna, Austria.


SADDO



corporate / m&a
Start-Up & Venture Capital Services

Legal hiccups in start-up financing


Thomas Kulnigg | Sascha Smets

From pre-seed to exit, start-ups are chronically in need of money to ensure their steady growth. Due to lack of access to bank financing, start-ups are typically financed by their shareholders via equity finance or debt. But there are also hybrid instruments that can be used to bridge the gaps between financing rounds or to overcome valuation issues.

Convertible loans
Shareholder loans may be constructed as convertible instruments that provide the investor the right to convert its investment into equity in the respective start-up. The conversion is usually linked to an upcoming investment round, such as when the start-up receives its next valuation, or expiry of time, whatever occurs earlier. The investment itself is typically structured as a subordinated loan or as a "forward equity investment" (i.e. non-recourse investment). Upon conversion, the company issues a new share to the investor calculated according to specific commercial parameters, such as the valuation of the new financing round minus a discount, subject to caps and floors. In the case of convertible loans, the investor would waive the loan receivable in exchange for the new share. The overall concept of convertible loans is not foreseen under Austrian law. It thus has to be implemented synthetically in the underlying convertible loan agreement by obligating the start-up and its shareholders to effect a capital increase upon the occurrence of a conversion event and to allow the lender to subscribe for newly issued shares.[1] However, the fact that no Austrian court has so far ruled on the enforceability of such synthetic constructions leaves behind an unsavoury aftertaste of legal uncertainty.

Participation rights
Participation rights are contractual relationships between the issuer (start-up) and the holder (investor). The holder of participation rights is typically entitled to receive dividends and liquidation proceeds. Further participation rights can be sold and transferred, just like shares. Participation rights are subject to minimal formal requirements and few publicity requirements (i.e. no notarial deed needed; holders are not registered in the commercial register). Participation rights can be structured as an equity instrument (similar to shares without voting rights) or as a debt instrument or hybrid. The structure is important for its qualification under accounting and tax rules.

Silent partnerships
The silent partner initially grants funds (the so-called "contribution") to the start-up and in return receives a participation in the company's profit and loss and sometimes also in its assets, including goodwill. The silent partner is not registered with the commercial register. Similar to participation rights, depending on the actual structure of the silent partnership (in particular regarding repayment terms), the contribution may be set out either as liability, equity or hybrid capital between equity and liabilities in the start-up's balance sheet.

Tax deductibility
Shareholder loans must be thoroughly structured to gain tax benefits from their repayment. If a shareholder loan is granted to a start-up that is founded or continued in the legal form of a limited liability company, the loan must be concluded at arms-length to be set out as liability in the balance sheet and to subsequently deduct the repayment instalments (including accrued interest) from tax. Shareholder loans that are not granted at arms-length are qualified as equity and thus their repayment has no tax benefits.

Banking licence
Lenders (shareholders or third parties) of convertible loans may qualify as "commercial lenders" according to the Austrian Banking Act and thus require a banking licence. Conducting banking activities without a corresponding licence exposes the parties to a risk of administrative fines (up to EUR 5 million or 200 % of the benefits of the loan). Thankfully, the Austrian Financial Market Authority (FMA) has shown a way to mitigate that risk. According to their website [2], the granting of sub-or-

dinated [3] loans does not require a banking licence. However, the subordination may lead to a total loss of the lender's investment if the start-up becomes insolvent.

Capital maintenance rules

Austrian law provides for mandatory capital maintenance rules, meaning that all transactions between a start-up and its shareholders must be concluded and executed at arms-length. With respect to shareholder loans, capital maintenance rules apply to the interest rate, which must be at arms-length. If it is not, the lending shareholder must prove that it would have granted the loan to a third party with the same interest rate anyway or it was justified by operational reasons (betriebliche Rechtfertigung). Legal consequences for breaching capital maintenance rules include the invalidation of the transaction, the affected shareholder's obligation to repay the unlawfully received payments to the start-up and the managing director's liability for any damage caused.

Financing start-ups in a financial crisis

Loans granted by shareholders with a participation in the share capital of at least 25 % or a controlling influence (e.g. through voting rights) to start-ups that are in financial crisis may fall within the scope of the Austrian Equity Compensation Law (EKEG). The applicability of the EKEG would prohibit any repayments of the loan during such a crisis. The lending shareholder must repay the payments unlawfully received during the crisis in full to the start-up. In addition, shareholder loans granted during the crisis are treated like equity in case of insolvency, meaning the affected shareholder may suffer a total loss.

Compliance with grant conditions

Start-ups are sometimes provided with grants from public institutions, such as the Austrian federal promotional bank (aws) and the Austrian Research Promotion Agency. Grant schemes commonly impose strict conditions throughout the funding period and sometimes afterwards. These can include minimum requirements for subsequent financings, such as prohibited repayment (e.g. loans may only be repaid if the company has gained profit) or maximum interest (e.g. the company may only take out financing for a maximum interest rate of 5 %). In such cases, subsequent financings must be coordinated with the respective grant institution to align the financing terms with the applicable conditions of the grant.

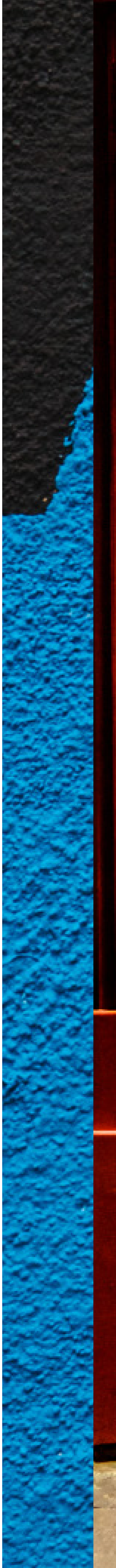
Unclear qualification

Depending on the structure, it may be difficult to clearly qualify the participation right or silent partnership for tax and accounting purposes. This uncertainty may lead to tax risks and accounting errors.

May the Law be with you

In a nutshell, start-ups, their shareholders and third-party investors should choose and structure the preferred financing instrument very carefully. Wrong turns and false decisions can be easily avoided through proper tax and legal advice during the decision-making process and afterwards.

1 C.f. [Kulnigg, Convertible Loans for Austrian Start-Ups].
2 www.fma.gv.at/faqs/was-ist-ein-nachrangdarlehen/.
3 The subordination of a loan means that, in case of a start-up's insolvency, the lender's receivable regarding the repayment of the loan will only be satisfied after all other creditors of the start-up have been satisfied.



the life cycle of a start up

BY THOMAS KULNIGG

opens soon

The life cycle of a startup is defined by its milestones. It is a fast-forward lifestyle aimed at achieving success.

It is also a journey through legal challenges and legal decisions that need to be taken. Here is a quick overview of this life cycle.

1. IDEA / PROOF OF CONCEPT

The ideas that make you leave your 9 to 5 paid job need protection (confidentiality agreements), but also need to be tested. So, be nice to your ideas, and appreciate feedback / learn from failure.

2. FOUNDATION OF THE START-UP

You have your minimum viable product (MVP). Now consider the appropriate legal form from a tax and liability perspective, but also in terms of practicability. Reduce complexity, but think about the next five (not only two) steps. Avoid mistakes that can't be fixed later; saving money in the wrong place ultimately can be very expensive! Properly transfer IP rights and have a suitable founders' agreement / articles of association for your start-up.

3. FINANCING ROUNDS

Find the right partner and determine your relationship, like in a marriage. You will spend a lot of time with your investors, so they should be true partners, not only cash providers. Proper contracts are vital.

4. GROWTH OF THE BUSINESS

As your business grows, take care of all the things you had to ignore at the beginning: proper commercial documents and employment contracts, GDPR, trademark protection, know-how protection, etc.

5. EXIT

There is no gift shop at the exit: when it comes down to a corporate buying your start-up, things get real. Be prepared, anticipate legal, tax and financing issues. Have proper documentation and know your weaknesses and strengths. A good m&a advisor is key to the success of your exit. Fingers crossed!

Start-up acquisitions & exits – where expectations meet reality

Katerina Kaloyanova | Stela Pavlova

Start-ups generally

A typical start-up is usually founded by three or four individuals as a limited liability company or a joint stock company focused on IT or online businesses. As the start-up grows, a number of investors (ten or more) come on board (venture capital funds and angel investors) by acquiring convertible loan instruments, newly issued or existing shares. The start-up company is focused on building up and investing in its team of specialists, which is often its main asset. This explains why employee share option plans are so common. Gradually, the client network expands and the brand is established. And then, a strategic company comes along with a lucrative offer to acquire the start-up.

Facing reality when planning to acquire or exit a start-up

Sometimes what should be a simple deal turns into a costly and time-consuming exercise if the following issues are not handled properly:

1 Cost-cutting above all – Although start-ups (or rather the sellers) generally prefer to avoid the cost of hiring a reputable (or any) lawyer, engaging experienced m&a lawyers on both sides is key to completing the transaction and could save a huge amount of hidden costs in the form of legal fees to the buyer. Sellers often have difficulties understanding standard document request lists, are unable to structure virtual data rooms and/or have no experience in reviewing and negotiating sale and purchase agreements.

2 Start-ups rarely use a lawyer in the early days of business – If the start-up has not been advised and supported by a lawyer for a number of years following its incorporation, there are usually various legal gaps to be filled in and internal issues to be tidied up before entering into a binding sale and purchase agreement with a prospective buyer, such as bringing the book of shareholders up-to-date or arranging for a GDPR gap analysis.

3 Title to shares is key – If there have been partial endorsements of shares in a start-up registered as a joint stock company, the entire chain of transfers of shares to investors could be invalid, as partial endorsements are invalid under Bulgarian law. The inability to prove valid title to shares would affect the transaction structure. Whilst indemnities, retention amounts and other contractual mechanisms may mitigate the financial risk to the prospective buyer, these tools would not resolve the title issue. Possible solutions (to avoid complexity and problems with registration of the transfer with the Bulgarian Commercial Register) are: (i) the purchase of the business as a going concern; or (ii) the transfer of the going concern into another company and a share sale of the new company.

4 Too many shareholders – It is difficult to negotiate with over ten counterparties (founders, funds, angel investors, option holders) based all over the world. Usually, the founders or one of them leads the transaction on behalf of the sellers, and the investors appoint a representative to sign and/or negotiate on their behalf. Given that the signature collection process may be very time-consuming or impossible in case of a notary certified sale and purchase agreement for transfer of shares in a limited liability company, it is advisable that the shareholders either sign for themselves or grant an explicit notary certified power of attorney.

5 Liability of the sellers – Unlike the founders, investors are usually not involved in the day-to-day business and are reluctant to give warranties regarding the business. They would normally warrant their title to shares and capacity to enter into the transaction documents. Moreover, they often hold a firm position that each investor's liability should be limited to the warranties given by them and to such proportion of the purchase price as received by each of them.

6 Retention amount – A retention amount to cover warranty and other claims of the buyer is typically agreed. The sellers' preference is usually to keep such money in escrow, preferably with a bank. Banks, however, are reluctant to assume any responsibility for interpreting an arbitral award or a court judgment in case of a dispute. A joint instruction by both the buyer and the sellers or an instruction by either of them could be difficult to agree on, as one of the parties would always be at a disadvantage. A fair compromise could be an instruction from the buyer only, if any money is awarded to the buyer, and in all other cases, an instruction from the sellers only.

7 Enforceability of indemnities is questionable under Bulgarian law – The English law concept of indemnity is unknown to Bulgarian courts and there is no case law to provide guidance. Under an indemnity, the seller is obliged to compensate the buyer for all damages, loss and expenses suffered by the buyer as a result of an event or breach occurring irrespective of the seller's fault and irrespective of whether the buyer was aware of the potential risk. The closest concept under Bulgarian law is the liquidated damages clause. The only similarity, however, is that the buyer need not prove the amount of the damages suffered as a result of the seller's breach – it is pre-determined or pre-determinable in the sale and purchase agreement. The differences are as follows: (i) a liquidated damages clause ensures the seller's performance of the agreement, but does not protect against a potential liability the buyer knows about; (ii) the amount of the damages to be indemnified is not known at the time of entering into the sale and purchase agreement, unlike the amount of the liquidated damages, which is usually known at the outset.

8 Employee retention plan – Where the start-up is an IT company, often the buyer is mainly interested in acquiring the employees and retaining them for at least three years, which could be crucial to the buyer's business plans. Negotiating an employee retention plan is a key part of the process and could even be linked to the payment of the second and third instalments of the purchase price. The earlier this is agreed, the better, because it may turn out to be a deal breaker. Another point to consider is how to address the loss of employees in the period between signing and completion of the deal. A mechanism could be agreed to allow the start-up company to terminate the employment contracts of certain employees and hire replacements, but only with the buyer's prior approval. While the latter may delay the hiring process, it is necessary to protect the buyer against random selection of employees to fill in numbers.

9 Oral arrangements – Start-up companies often work based on oral arrangements either with regular clients or with their employees about bonuses (including exit bonuses) and share options. Last-minute disclosures before signing a sale and purchase agreement, such as a table of names and promised payments to employees with no underlying written contracts, could be an unwelcome surprise.

10 IP rights – Often there is a complete lack of documents about the author and owner of a website and its contents, or a lack of proper transfer/licence documentation in respect of IP rights over software, databases, etc. An IT company's value would be affected if its employment agreements do not contain a specific clause allowing it to become the owner of – and hence sell or licence – the software produced by its employees.

11 Conversion of loan instruments into shares – Many investors prefer to use convertible loan instruments to invest in start-ups. These instruments are convertible into shares upon a liquidity event, including an exit. The investor's preference may be either to receive repayment of the outstanding principal and interest, together with a surplus (the liquidity preference) upon completion of the exit, or to have its loan converted into shares first and then receive payment of the purchase price for the shares. If the latter option is selected, completion will be subject to a share capital increase, which may further delay completion. Having an idea of what the investors' preferences may be from the very beginning of the process is good for planning the transaction timewise.

12 Difficulties with registration of the transfer with the Bulgarian Commercial Register – Registration of the transfer is required in case of a share sale to a single buyer or changes in the management (which is often the case). In its recent practice, the Bulgarian Commercial Register has been diligent in checking all title documents to prove valid transfer of shares. The start-up company should be prepared to provide originals of trade registry excerpts, powers of attorney, resolutions, cancelled share certificates, etc. relating to all past transfers of the shares, especially where these involved a foreign entity. Also, due to the large number of documents filed in case of a single transaction, it takes much more time for the Bulgarian Commercial Register to process the applications for registration.

Conclusion

Being aware of the typical issues which arise in start-up m&a transactions is key in order to avoid (i) unrealistic expectations on both sides, and (ii) any of those exacerbating issues that could become a deal breaker.

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The authorities responsible for applying the Act are the minister of energy with regard to energy sector cases and the prime minister for other sectors.

What industries do investors in start-ups currently prefer?

An interview by Ilko Stoyanov and Katerina Kaloyanova

From pre-seed to exit, start-ups are chronically in need of money to ensure their steady growth. Due to lack of access to bank financing, start-ups are typically financed by their shareholders via equity finance or debt. But there are also hybrid instruments that can be used to bridge the gaps between financing rounds or to overcome valuation issues. We interviewed Ivaylo Gospodinov, one of the managing partners of the investment fund BlackPeak Capital.

Q: What industries do investors in start-ups currently prefer?
A: In Bulgaria, everything connected to information technology is interesting. Engineering companies, anything that has an added value and potential to develop outside of Bulgaria. Different segments of the economy are interesting for different investors. Investment funds like BlackPeak look at the whole market and decide by means of different indicators where to invest, but what we are looking at are tech companies, not necessarily just software companies. This also includes online trading, innovations, basically anything which will be relevant for investors over the next few years on a global level. In Europe, there is a plan under which a lot of money will be invested in fields like robotics, artificial intelligence, and the like.

Isn't the real reason for such investment the fact that these companies are investing in intellectual capital, meaning they don't have to make huge investments in installations and machinery?
Yes, the more developed parts of the world are focused on innovations. This is the interesting sector – innovations, artificial intelligence, robotics – things that drive progress and move society forward. This is applicable for Bulgaria, too. Recently, a lot has been said about blockchain technology. The question is how this technology will be applied, in what sectors and in what form. Cybersecurity is also interesting in this segment, due to the development of information systems.

How do you find out about the companies you invest in? Do they cold-call you? Does someone introduce you? What is the source of deal flow?
As a team we approach this in several ways. Knowing the local ecosystem, we communicate with the other participants and we look for smaller companies that one of the other funds have invested in and these companies have developed. Another approach is knowing the people who develop various projects or who are at a stage in which

the company has a product or service and a good management team, there is some progress in relation to business development, whether in Bulgaria or on a regional or even global scale. We try to follow these companies and to communicate with them.
There are also companies which come to us. There are people looking for financing. In Bulgaria, and in other countries, small- and medium-sized enterprises at an early stage of development are rarely financed by banks, especially if they are tech companies. These companies must therefore search for other sources of capital. Here in Bulgaria, they often turn to funds like ours. We all know who these funds are.
In the last few years, I have noticed that more and more individuals and established businesses and corporations are setting capital aside and investing with us. They are trying to diversify in this way. These entities have their own main business, have set aside several millions, and are exploring new areas to invest in. Private capital should be used, there's no point keeping money in the bank. This is good, because it helps the economy grow.

There are many co-investors and other entities in this ecosystem. Why is that?
There are many reasons. One of the main ones is generational change. For instance, a man grew a business in the 90s, but now the business is being taken over by his son or daughter who is more familiar with the economic trends in Western Europe and the USA.

How do you go about deciding what to invest in? What is your due diligence process?
We stick to well-established practices. At BlackPeak Capital we have something like a matrix in which we try to fit. Firstly, we are looking for companies with an established business model, not just an idea. The product or service should be sufficiently developed and already be on the market. We also seek out enterprises that have the potential for growth outside Bulgaria, because our market is very small. The third aspect is whether what they are doing has a niche, if it contributes to the development of some other things. Another crucial aspect is people – the founders and managers who have laid the foundations of the business. We make a subjective evaluation, asking "Could this person fulfil the relevant plan?" So we are analysing personal qualities and the qualities of the team, because at the end of the day, nobody can work alone. What is this person's vision? Does he have the capacity to apply innovative corporate practices aimed at structuring the company in such a way that it will have the chance to grow? We gather a lot of information and then decide. The analysis of the company, including structuring the actual relationship and all the legal and financial aspects, can take six to eight months. We never rush to complete a deal. Our most recent deal concerned a Bulgarian company operating in India – a successful business model – and it took us about six months. And this is not an asset-heavy company, but it has added value concerning the services it deploys on the market. Sometimes you have to use experts. Actually, we don't act as experts in most of these companies. We put our trust in people who are experts in the relevant area.

Given that the cost of professional legal advice is often too high for a start-up company, what would a cost-efficient model of cooperation be?
We search for it constantly, because this is unavoidable. With some companies, we reach an agreement to use more reputable law firms, which have more experience. But with other companies we cannot do this for purely financial reasons. We look for the proper balance, not only with regard to legal services, but also financial services. We can perform good financial analysis too, but we also need third-party confirmation for objective reasons. We are able to find a lot of partners in the industry and ways to reach a balanced agreement. This is a daily routine, as everyone is trying to protect their own interests.

Are these expenses usually borne by the start-ups or do you share the costs?
There is potential for conflict. By definition, this should be an expense for the investor. But we try to share them. We are not a huge fund, and if we constantly bear all these costs, eventually we will go out of business. Funds, especially those that work with institutional capital, aren't allowed to receive income from other activities, including sitting on the board of a company, providing consulting services, and so on. It is deductible from the management fee. So, you are restricted with a very clear resource, which you should allocate very carefully for the next 10 years. And there are also administrative expenses, which are not insignificant.

Is that the principle behind management fees? Is the principle the same for a large fund, for instance Blackstone? Do they have a fixed management fee?
Depending on your deal with the fund, how fast you invest or how fast you exit, the parameters for calculating the management fee vary. Generally, there is an upper limit. When you are mainly working with private capital, you can probably agree to add an additional charge towards the company you work with, because the truth is that 80 % of my time is dedicated to the company I work with. It's not only attending board meetings and making decisions, but also conducting m&a, hiring or dealing with suppliers. For instance, we do a lot of work for two companies engaged in the construction of a pair of factories – financing the construction, dealing with the banks, advice on corporate governance, implementing new systems, basically everything. This is a permanent engagement, which other funds would in principle charge additionally.

What do you do immediately after making the investment?
We are quite an active participant. This is why sometimes we are also shareholders, because there are companies which do not need an additional investment of capital, but need a partner. They want someone to help them develop the strategy, fulfil the plan, check their ideas, build an internal structure. If you don't do it, at a certain moment you reach a limit after which you can't grow anymore. Our role is to evaluate these aspects, to determine

what should be done in the next two years. We actively participate in the fulfilment of this plan. Some companies grow not only organically, but also make acquisitions. And we participate actively in the m&a process.

When do boards replace CEOs?

It happened to us only once, actually. I don't have much experience replacing CEOs, but it could happen in case of a total lack of understanding of the business or failure to do something important. This reflects badly on us as investors, because it means we have not made the correct evaluation. Fortunately, we haven't had any events like this. Or there could be gross negligence by the founder – lying, stealing, failure to honour an express agreement. We are minority shareholders, but we try to protect ourselves, if possible, and to establish influence. We have the respective provisions with our fund, but we never enter into any dealings with the feeling that we will have to fight with someone.

Bulgarian start-up investments started a few years ago (2011 – 2012) and a normal investment cycle is between three and five years, sometimes seven years. We have seen very few exits recently. Could we now expect to see a series of exits or are Bulgarian startups not there yet?

It's different for different funds. For some funds – those who are early stage, who invest on an idea level, on an early development level – the hit rate is low. From 10 companies they will manage to realise one; the rest are most likely going to die. If you succeed with two or three companies, that means you've done well.

For investors who look at more developed companies, the idea is to actualise the potential of these companies. The statistics show that you cannot succeed with all of them. The reasons can be many: conflict with the founder, change of market circumstances, a new competitor emerges and destroys you, something happens in the industry and your product is no longer relevant. You can't know all these things. You are looking at potential, trying to make an educated guess that in four to five years' time you will look like this, on this market, with these clients. The only guarantee is the old saying "work hard and work smart", which can potentially lead you to a successful exit. Companies that work well, develop well, whose management have a common vision and are consistent, have a good chance of success.

Are there any companies that are ready for an exit right now?

Yes, there are. Speaking of our investments, there are several companies which offer some interest. For some we have started the process of exiting, which also takes time. For others we are waiting a little bit, because we know that the interest will not dissipate in time, but further development is required. In these cases, you have to make an assessment. Sometimes the founder says, "Wait a second, don't rush, I still have plans that I need to develop". So you adjust to the circumstances. Now people are talking about a new financial crisis on the horizon. I hope it doesn't happen, because when it does, the deals just stop. Everyone stops doing what they are doing and waits for the crisis to pass.

Thank you for the interview.

Read the full version at www.schoenherr.eu/publications/roadmap

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In Europe, there is a plan under which a lot of money will be invested in fields like robotics, artificial intelligence, and the like.

Nyugalom, vagy tombolás? (Chill or Spin?), Cekas - Łukasz Berger, Budapest, Hungary

Disclosure obligations and conflict of interest


Hristina Todorović | Sebastian Lukić

Third-party funding has become a common feature of international arbitration. Yet, despite the upsurge, it still raises many controversial legal questions. The most prominent is whether and to what extent the existence of third-party funding and the identity of the third-party funder must be disclosed to the other party, the arbitrators and the arbitral institution.

After all, only a few jurisdictions (such as Hong Kong and Singapore) provide rules on third-party funding and on any disclosure obligations in this respect. Likewise, the vast majority of arbitral institutions offer no or virtually no guidance with regard to any disclosure obligations incumbent upon the funded party. Only a few arbitral institutions have adopted explicit rules on disclosure obligations in the context of third-party funding. In this sense, one of the most popular institutional arbitration rules, the Rules of Arbitration of the International Chamber of Commerce ("ICC"), do not provide express rules on third-party funding. However, in its "Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules", the ICC deals with disclosure obligations in relation to the impartiality and independence of arbitrators. The ICC advises that the relationship between arbitrators and any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award should be considered when identifying circumstances which may (i) call into question the independence of an arbitrator or (ii) give rise to reasonable doubts as to his or her impartiality.
Indeed, it is precisely the potential conflict of interest scenario that proponents of disclosure have advanced in favour of wide-ranging disclosure obligations. In this respect, two scenarios that may bear the potential of conflict of interest stand out: (i) frequent appointment of individual arbitrators in arbitration proceedings involving the same funder, and (ii) the appointment of an arbitrator by a funded party where that arbitrator already has a relationship with the third-party funder. In contrast, disclosure opponents have advanced primarily pragmatic arguments observing that disclosure may prompt unfounded challenges to arbitrators and meritless requests for security for costs, filed for strategic reasons only. Also, opponents of disclosure have argued that the ex-

istence of third-party funding and the identity of the third-party funder need not be disclosed, as unknown conflicts offer no basis for a successful challenge of an arbitrator or for setting aside an award.
Nevertheless, despite several pragmatic arguments against disclosure obligations, there appears to be broad agreement that, at a minimum, disclosure of a third-party funding arrangement and the identity of the third-party funder is necessary for an arbitrator to properly analyse potential conflicts of interest. In this sense, the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), a soft-law instrument with wide acceptance within the international arbitration community, in 2014 introduced rules on disclosure obligations and conflict of interests in the context of third-party funding. Under Article 7(a) of the IBA Guidelines, a party shall inform the arbitral tribunal, the other parties and the arbitration institution of any direct or indirect relationship between the arbitrator and the party or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. Under the IBA Guidelines, the funded party shall do so on its own initiative and at the earliest opportunity.

Parties who are third-party funded are advised to pay attention to how they disclose the existence of a third-party funding arrangement and the identity of the third-party funder to the other party, the arbitrators and the arbitral institution. They should do so on their own initiative and at the earliest opportunity, even if express rules are missing or the IBA Guidelines do not apply; ultimately, not to raise any concerns about the integrity of the arbitral proceedings. Conversely, parties should avoid disclosing the existence of funders at an inappropriate stage of the proceedings; for example, during the pre-hearing conference call. Needless to say, a disclosure shortly before the evidentiary hearing or at any other inappropriate stage of the proceedings will serve little but to give the other party the opportunity to take a tactical advantage as a result of the late disclosure.

> The vast majority of arbitral institutions offer no or virtually no guidance with regard to any disclosure obligations incumbent upon the funded party.

Process funding in litigation – business with justice


Process funding has reached Europe and is on its way to becoming an integral part of national legal practice. Even more restrictive jurisdictions are seeing the advantages that process funding can offer, marking the start of a flourishing European legal market.

Bojana Vareskic | Marina Stanisavljevic

Rumour has it that pursuing legal action can be expensive. This is especially so given the basic costs principle in litigation: that the losing party must not only bear its own legal costs, but also pay the winning party's. Often this deters parties from pursuing their claims, even when the chances of success are high. To support disputing parties in asserting their legal rights, common practice has developed the instrument of process funding.

How does it work?

The process funder alleviates the claimant's cost risk by reimbursing the procedural costs in the event of a loss. In the event of a win, the process funder receives a share of the amount awarded to the claimant. This share can be freely negotiated, but is usually set at 20 to 50 %.
Financing passive processes is another option. In such cases, the contingency fee is calculated based on the dismissed claim.

What claims will receive process funding?

Process funding is notably focused on monetary claims, but any claim is eligible for process funding, provided its prospects of success can be assessed. This even includes declaratory actions or enforcement proceedings.
Economically speaking, however, claims rather than defences are commonly considered for process funding; provided, of course, that the expected return outweighs the risk. A case will often require a certain minimum amount in dispute in order to attract process funders. This can be achieved either through a single claim or by bundling and pursuing several claims jointly.
Recent tendencies on the establishment and growth of class actions at the European level are presenting new opportunities for process funding. A process funder is more likely to find a financial interest in a mass tort claim than in an individual claim of the same kind.

Regulation of process funding

Several civil law jurisdictions have reservations on pro rata contingency fees. A particular concern is the prohibition of quota litis agreements. In Austria, this is set out in Article 879 (para 2, sub-para 2) of the Austrian General Civil Code ("Allgemeines Bürgerliches Gesetzbuch" – ABGB). Accordingly, contracts where a "legal friend" takes on a dispute entrusted to him, in whole or in part, or in which a part of the amount awarded to a party is promised to the legal friend, are deemed immoral and therefore void. The rationale behind this is to protect the client who is unable to assess the prospects of success and the scope of activities required to enforce the claim.

There is disagreement among legal experts as to whether the prohibition of quota litis also applies to process funding. The Austrian Supreme Court initially applied the provision only to lawyers (1 Ob 194/51) and then extended it to notaries, tax advisors, accountants and auditors. Finally, all persons who unduly conduct activities reserved for those categories of professions should also be covered by this provision (4 Ob 81/99m). This means that by definition, a process funder is not considered a legal friend as long as it does not represent the client in the litigation or provide legal advice. For those services, an independent attorney is required to properly secure the client's interests and to ensure adequate cooperation with the process funder.
If such conditions are met, Austrian courts and even Austrian consumer protection associations will endorse the concept of process funding, especially considering the advantages it can offer to both parties of a dispute, as well as to clients and process funders in general.
Common law jurisdictions, which traditionally prohibited process funding, are also beginning to lower their barriers. The UK is seeing exponential growth in process funding litigation, even though the concept is relatively new to its jurisdiction. At present, process funding in the UK remains self-regulated through the Association of Litigation Funders (ALF), which employs a voluntary code of conduct, but mandates compliance for any funder wishing to become a member.

Future prospects

Process funding has already made its mark, even in more reserved jurisdictions. The process funding market is steadily growing and seeking ways to obtain justice without a heavy-handed cost risk. The growth of class actions at the European level is also likely to open up new possibilities, not just for process funders, but also for clients.
The European market will appreciate it.

How litigation financing works

Philipp Leibfried
UK/European Corporate Counsel
Burford Capital with Leon Kopecky
and Victoria Pernt of Schoenherr

An interview by Leon Kopecky and Victoria Pernt

As third-party funding continues to make headway, close cooperation between law firms and funders becomes ever more important. Schoenherr's Leon Kopecky and Victoria Pernt sat down with Philipp Leibfried of Burford Capital. With over USD 3 billion committed in the legal market, Burford is the best-capitalised provider of legal financing in the world.

Q: Clients increasingly ask us about the benefits of third-party financing. As the world's leading legal financier, how would you answer this?
A: Third-party financing is a risk management tool. As litigation and arbitration matters grow, so, too, do the expenses. Oftentimes, a client may have a strong case, but not the funds to pursue it. Or perhaps the client has the funds, but is not willing to take on the risk or the negative accounting impact. This is where third-party financing comes in.
By investing in the asset value of legal matters, the external capital provider shifts the costs and risks of the proceedings. This alleviates budget pressures and leads to a better outcome for risk management, accounting, and financial reporting. Third-party financing can reduce the negative accounting impact that proceedings have on operating profits and allow clients to pursue revenue-generating claims.
Simply put, third-party financing makes better business sense.

What factors does Burford consider when deciding to finance a matter?
We look at legal receivables (whether arising from pending claims, resolved claims, or law firm activity) as financeable assets. Based on the value of those receivables, we construct financial solutions for single matters, portfolios of matters, or even bespoke vehicles.
In assessing legal receivables, we often cooperate with high-quality counsel like Schoenherr. They help us seek out meritorious matters, which facilitates our investment decisions. In cooperating with firms like Schoenherr, we are better placed to assess the relevant factors. These factors include risk profile, likely duration, and the balance of financing costs to the amount awarded that will provide a return on our capital investment and, more importantly, also satisfactory compensation for the client.

> Third-party financing can reduce the negative accounting impact that proceedings have on operating profits and allow clients to pursue revenue-generating claims. Simply put, third-party financing makes better business sense.

Does Burford accept financing requests from disputing parties directly?
Most certainly. However, some clients prefer to approach us via law firms (such as Schoenherr), which may already have a relationship with us and will be well-placed to provide an overview of the status of the matter. This may make it quicker and easier for us to decide on a financing request. As a matter of fact, we increasingly invest in portfolios and facilities for law firms and corporations.

Does it matter which law firm represents the client?
One of the relevant factors for a financing decision is the chance of success. Representation by high-quality law firms such as Schoenherr will generally improve that chance. In that sense, legal representation is certainly also a factor highly relevant to our decision.
Also, while third-party financing is rapidly becoming more commonplace across Continental Europe, there are particularly interesting opportunities further to shape the concept in Central and Eastern Europe. Schoenherr's established position in that region naturally puts it in a prime position significantly to contribute to that.

Does Burford leave the case strategy to the lawyers?
Absolutely. We are a passive provider of external legal capital and do not manage or control the cases in which we invest. We do of course expect to be kept informed about progress on the matter on a regular basis. For example, if we are financing a case where Schoenherr is acting as counsel, we will not intervene in the case strategy. We are simply there to finance and alleviate the cost burden for the client. We also do not get any rights to control the settlement of a matter. This remains in the client's hands entirely.

Does third-party financing affect the attorney-client relationship?
Not at all. Clients can rest assured that we take on a passive role as an outside investor who does not in any way alter the attorney-client relationship or put the work product at risk. We trust the lawyers and law firms with whom we work. We do not seek to substitute their role or intervene in their work product. The policy underlying the work product doctrine and the court decisions that have thoroughly considered the matter permit third-party providers of capital to access the work product without any waiver of work product protection.

How much would Burford typically invest in a matter?
It would be unusual for us to invest less than USD 2 million in a single matter, and our average investment is more than USD 10 million. This is the amount of capital we are investing, not the size of the total case damages, which thus need to be considerably larger. This is also why portfolios are an attractive solution for financing smaller claims. There is no upper limit on the amount we can invest, and we have previously committed USD 100 million in one investment.

Does Burford provide financing at any stage of a matter?
Yes. We come on board when the client wants us to. This means at any stage of the litigation or arbitration cycle. We have invested in cases during the commencement stage, as well as at pre-trial, pre-appeal, and post-judgment (enforcement) stages.

What happens if a client's matter is not successful?
Our capital is almost always non-recourse. This means that we will only collect a return on our investment if the outcome of the matter is successful. Clients will feel comfort in knowing that they will not be in debt to us should the underlying proceedings not turn out to be a success.

Can successful clients recover their third-party financing costs from the losing party?
The Essar v Norscot decision seems to be pointing in that direction, but there are still many open questions. The treatment of third-party financing is still developing, and varies across jurisdictions.

Thank you for the interview.

Third-party funding in international arbitration


Sebastian Guţiu | Michael Stimakovits

In recent years, third-party funding has seen a tremendous rise in popularity in investment arbitration and in international commercial arbitration alike. The numbers are constantly increasing: more third-party funders are active in the market, law firms are beginning to cooperate with third-party funders, and an increasing number of cases involve issues relating to third-party funding.

There is a wide range of third-party funding models, and new models continue to enter the market. Third-party funding in international arbitration can broadly be described as a party to an imminent or a pending dispute being provided with funds or other material support in order to finance part or all of the costs of the proceedings (e.g. legal fees, out-of-pocket costs, expert fees, arbitrator fees, etc.). This financing or support is provided in exchange for an agreed return: usually dependent on the outcome of the dispute, or provided in return for a premium payment. Depending on the agreement between the third-party funder and the funded party, even payment of the opposing party's adverse costs (if so ordered by a tribunal), or the provision of security for the opposing party's costs may form part of the deal.

What factors determine whether a case receives third-party funding?

With new funding products being developed and made available to the world of dispute resolution, third-party funding may be used in a greater variety of cases and situations. Certain factors are worth considering when identifying a case suitable for third-party funding:

- **claimant:** predictably, the key recipients of third-party funding are claimants. Their cases usually involve damages, and the return for third-party funders is structured as a percentage of the amount recovered in damages or settlement. While respondents, too, see a growing number of funded cases, it is mostly respondents with a counterclaim who attract third-party funding;
- **quantum:** the quantum of the claim generally plays a significant role when assessing a (single) case for potential third-party funding. While some third-party funders specialise in funding cases with smaller amounts in dispute, cases of EUR 10 million or above are more likely to receive third-party funding;
- **case assessment:** each third-party funder has a different approach and decision-making process, but it is safe to say that all funders apply some kind of case assessment to evaluate the funding opportunity, by evaluating the prospects of the case's merits, the amount in dispute, any jurisdictional particularities, chances of enforcement etc. Some cases will lead to a thorough due diligence check before a funding commitment is made;
- **respondent:** respondents in arbitrations, too, will be on the funder's radar, seeing as an award rendered by a tribunal should ultimately be satisfied. A respondent's ability to pay for the award and the costs of the proceedings, as well as the location of its assets for a potential enforcement, are key information for a funder. This is true especially in investment arbitration and the respective state's willingness to pay.

What are the advantages of third-party funding?

International arbitration can be a cost-intensive endeavour. This is true especially for investment arbitration proceedings and complex international commercial arbitrations.

Efficient handling and experienced counsel may bring about considerable savings; but it is often third-party that gives a claimant the necessary means to pursue its claim, and thereby access to justice. Other claimants use third-party funding as a tool for hedging risks, or as a means of external financing. This enables them to invest their own funds in other projects.

Third-party funders perform a case assessment, or even a detailed due diligence, before deciding whether to fund a particular case. Depending on the depth of this evaluation, the process also shows a claimant whether it has a strong case, or whether it should perhaps refrain from initiating legal proceedings after all.

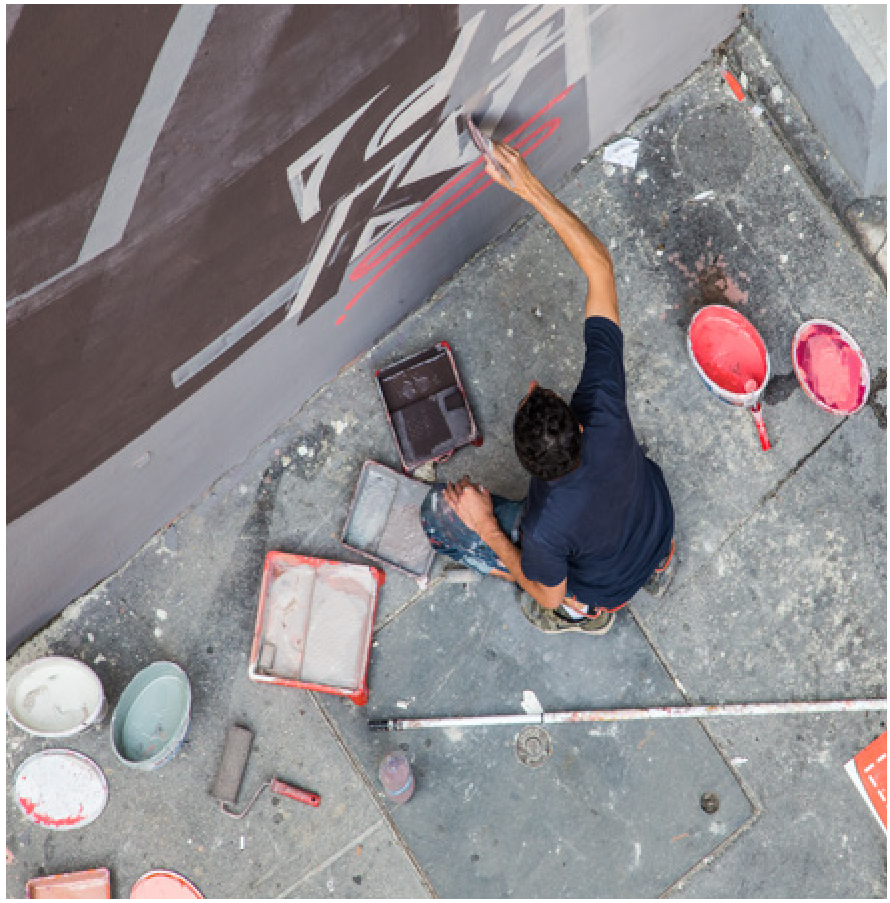
This high level of due diligence pays off: if a case turns out to be strong, the claimant is successful in the arbitration and the third-party funder receives its portion of the award.

The third-party funding debate in international arbitration

The increasing popularity of third-party funding in international arbitration over recent years has led to discussions regarding the potential issues and concerns associated therewith.

The challenges and risks that come with third-party funding include, among others, conflicts of interest (e.g. with arbitrators who may have interest in the funder's business, or act as counsel in another case funded by the same funder), disclosure of the funding agreement (e.g. to prevent conflicts), allocation and security for costs (although a funding agreement does not automatically mean the party is impecunious), and regulation of third-party funding in general.

A detailed analysis of each of these concerns goes beyond the constraints of this article, our colleagues Hristina Todorović and Sebastian Lukić take a closer look at conflicts of interest and the disclosure of funding agreements in their article on pages 47 and 48.



Whether chilling or spinning, it´s all about cooperation

A distorted image of a face and one of swallows adorn two separate walls of the same building at Akácfa Street 27 in Budapest.

These murals were created as a collaboration between two artists, Łukasz Berger, alias Cekas; and Mesterházy Károly, alias Carlos BreakOne, during the Colourful City Strongbow Budapest Festival. According to the organiser Színes Város (www.szinesvaros.hu/en/what-is-it "Colorful City") the artists painted Nyugalom, vagy tombolás? (Chill or Spin?), two antithetical pieces, the theme built on the dichotomy between peace and disruption.

Łukasz, who painted the face mural, is from Poland and started doing graffiti in 1998. Street art soon became his passion. He graduated with a diploma in sculpture from the Academy of Fine Arts in Wroclaw – his hometown. Károly (the artist of the swallows) always loved drawing, and like Łukasz, started his path to murals through graffiti about 20 years ago. Károly has an art background too, with a degree from the Graphic Design programme of the Moholy-Nagy University of Art and Design.

When considering these murals, Színes Város, explained that we should ask which of the two we identify with more. Internal conflict hidden under an attractive visual is what can be perceived. Károly feels that the swallows (which took eight days to paint) represent peace, while Łukasz's piece represents disruption, but the beauty of these pictures is that the meaning is always in the eye of the beholder.

First a drawing of the swallows was designed using pen and pencil on paper, then the image was digitalised and colour was then added. The surrounding architecture had a strong influence on the form and colour of Łukasz's mural. When asked about the popularity of street art, he said "I have the impression that art direction is very much an internet phenomenon that materialises in the real word. The internet has made graffiti, street art and other new directions part of global creations."

Károly distinguishes between street art and wall painting. In the case of street art, everything that appears on the street is 'street art', but these art pieces have some sort of message for society. His work belongs under the category of urban art or murals, in which the characteristic style of the artist appears on walls. The unique vision of the artist comes to life on the walls. In the future, he believes both kinds of art will gain in popularity.

A holiday is on the cards for Łukasz who has been very busy this year. He will start planning a solo exhibition when back. Károly now lives in Portugal as a tattoo artist and seldom has time for wall paintings, but his work still carries the same style characteristics as the wall with the swallows.

Nyugalom, vagy tombolás? (Chill or Spin?), Carlos BreakOne - Mesterházy Károly, Budapest, Hungary


Bistro

04 eu & competition

The Stance of Selected Countries on Foreign Direct Investments in their Merger Control Regimes

FDI in Europe – what to expect?

Volker Weiss | Monica Svikova

I. Introduction

In September 2017, the European Commission ("Commission") tabled a proposal for a new European framework to screen foreign direct investments ("FDI") into the European Union. The proposal is the EU's response to the emerging trend of screening foreign investments. In his State of the Union speech, the president of the Commission, Jean-Claude Juncker, called for greater protection of the EU's strategic interests, while stressing that FDI should be subject to transparent scrutiny. With this initiative, the EU is following a number of jurisdictions that have already implemented FDI screening mechanisms, that are increasingly employed to scrutinise investments. These include major economies such as Australia, Canada, China, Germany, India, Japan, Russia and the USA.

Whilst the EU wishes to retain an open approach towards FDI, which are widely regarded to contribute to economic growth and welfare, recent developments have pointed towards the threat to security or public order posed by certain FDI. These concerns were fuelled by the suspicion that some FDI seem to be (foreign) state-orchestrated attempts to tap into critical European technologies, infrastructure, inputs or sensitive information in the pursuit of a national industrial/geopolitical agenda. This, understandably, puts FDI in sensitive areas into the spotlight. By the same token, the (mostly) unrestricted access to the EU markets was not seen to be reciprocated with equally free access to foreign markets for EU companies.

The debate around FDI gained further traction when the flow of Chinese investments into the EU peaked in 2016, while investments from the EU to China continued to decrease. This led the Italian, French and German ministers in a concerted action to voice their concerns in a letter to the EU Commissioner for Trade, Cecilia Malmström, which set things in motion in the EU.

The inflow of FDI has also led several Member States, such as Germany, France, Poland, Finland and Italy, to step up their FDI screening mechanisms. For instance, the acquisition of the German industrial robot builder Kuka by China's Midea Group is widely regarded as having triggered the tightening of the German FDI screening rules. Since then, Germany has been sending foreign investors a clear message that national security takes priority over economic interests. Indeed, in August 2018, Germany banned the acquisition of Leifeld Metal Spinning, a company producing machines and tools used in the nuclear, aerospace and automotive industries.

At present, there is no uniform let alone harmonised FDI screening mechanism at the EU level. Thirteen Member States have national screening mechanisms: Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, the United Kingdom and Hungary, which adopted its FDI screening mechanism only in October 2018.

These screening mechanisms diverge in terms of grounds for screening, deadlines, scope of application, qualitative criteria and quantitative thresholds. The absence of a comprehensive FDI screening mechanism and of an institutionalised cooperation platform among the Member States prevents effective monitoring of FDI flows into the EU.

What is more, the regulatory / enforcement gap is seen as potentially having adverse implications on the security and interests of the Member States as

well as the EU as a whole. In addition, the divergence of applicable FDI rules creates uncertainty for foreign investors, who are exposed to various screening regimes across the EU.
The now proposed legislation, which comes in the form of a draft regulation (the "Regulation") aims to close this gap.

II. Proposed regulation
The Regulation does not purport to create a harmonised EU FDI screening mechanism, nor does it seek to bestow the Commission with enforcement powers in the area of FDI. By the same token, it does not require Member States to adopt or maintain national FDI screening mechanisms, but aims to span a common framework across the EU that tackles the above shortcomings by enhancing cooperation and information exchange between the Member States and the Commission, setting out common standards and factors to be considered during the screening, while allowing Member States to take account of their individual situation and national circumstances.

(i) Scope of the Regulation
The Regulation covers any kind of investment by a non-EU investor who aims to establish or maintain lasting and direct links with the investee in order to carry on an economic activity in the Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity. Unlike the EU Merger Regulation, it does not set out quantitative thresholds that would trigger the FDI screening.

(ii) Member State screening mechanism
Under the Regulation, Member States may maintain, amend or adopt mechanisms to screen FDI on the grounds of security or public order, provided that the conditions and the terms set out therein are observed. The Regulation provides uniform standards for all national screening mechanisms. As such, the screening mechanisms must:
• be transparent, particularly with respect to the grounds for screening, the applicable procedural rules and the circumstances triggering the screening;
• not discriminate between third countries;
• have a clear timeframe for issuing the screening decisions (taking into account the time limitation for the Member States and the Commission to submit their comments / opinion);
• protect confidential information; and
• allow the parties to seek judicial redress against screening decisions.

(iii) European Commission screening procedure
If the Commission believes an FDI is likely to affect projects or programmes of Union interest due to reasons of public order or security, it may issue an opinion addressed to the Member State where the FDI is planned or has already been completed. Such programmes of Union interest should include those projects and programmes which involve a substantial amount or a significant share of EU funding, or which are covered by Union legislation regarding critical infrastructure, technologies or inputs. The Regulation is accompanied by an Annex listing projects and programmes of Union interest.
The opinion must be issued within a reasonable period of time, but not later than 25 working days from the receipt of the information requested by the Commission or from the day the Commission was notified of the FDI in question. The Commission's opinion should be further communicated to all other Member States, which can follow up with their comments.
The Member State in whose territory the FDI is planned should take utmost account of the Commission's opinion and provide the Commission with an explanation should it decide not to follow the Commission's recommendations.

(iv) Cooperation mechanism
The draft Regulation lays down grounds for allowing the Member States and the Commission to cooperate and assist each other when FDI is likely to affect their security or public order.
To this end, Member States should inform the Commission as well as the other Member States of any FDI that are subject to screening under their national screening mechanisms within five working days from its commencement. Where another Member State considers that the FDI under the screening is likely to affect its security or public order, it may provide comments to the Member State concerned. Similarly, the Commission can issue an opinion. The comments/opinion should be addressed to the Member State no later than 25 working days following the commencement of the screening or the receipt of the requested information.

(v) Non-exhaustive list of factors for the screening process
The Regulation sets out a non-exhaustive list of factors which the Member States / Commission should take into consideration during the screening process. They should pay particular attention to the potential effects on:
• critical infrastructure – including energy, transport communications, data storage, space or financial infrastructure, as well as sensitive facilities;
• critical technologies – including artificial intelligence, robotics, semiconductors, technologies with potential dual use applications, cybersecurity, space and nuclear technology;
• the security of supply of critical inputs; or
• access to sensitive information or the ability to control sensitive information.
As part of the assessment, the Member States and the Commission may also consider whether the foreign investor is directly or indirectly controlled by the government of a third country, including through significant funding.

(vi) Reporting obligation
With a view to maximise the transparency of FDI monitoring within the EU, the Regulation obliges the Member States to notify the Commission of their screening mechanisms or amendments, and to submit annual reports on the application of their screening mechanisms. Member States which do not have any screening mechanisms in place must nevertheless report all FDI that occurred in their territory.

III. Outlook
The proposed Regulation is currently in a phase of interinstitutional consultations among the Parliament, the Council and the Commission (trilogue meetings), after which the final proposal will

be submitted to the plenary of the European Parliament and the Council for the first reading. It was initially envisaged that the Regulation should be adopted by the end of this parliamentary term in May 2019. However, bearing in mind the lengthy nature of EU legislative procedure, this might be delayed into the second half of 2019.
It is already clear that for the proponents of a centralised EU vetting system, the legislation will not meet the hopes that were put into the initiative. Yet, it remains to be seen how the FDI screening will be implemented in practice and what factual weight the Commission will have under the framework which the Regulation aims to set in place. In any event, the legislation signifies a first move into an EU framework for FDI screening.

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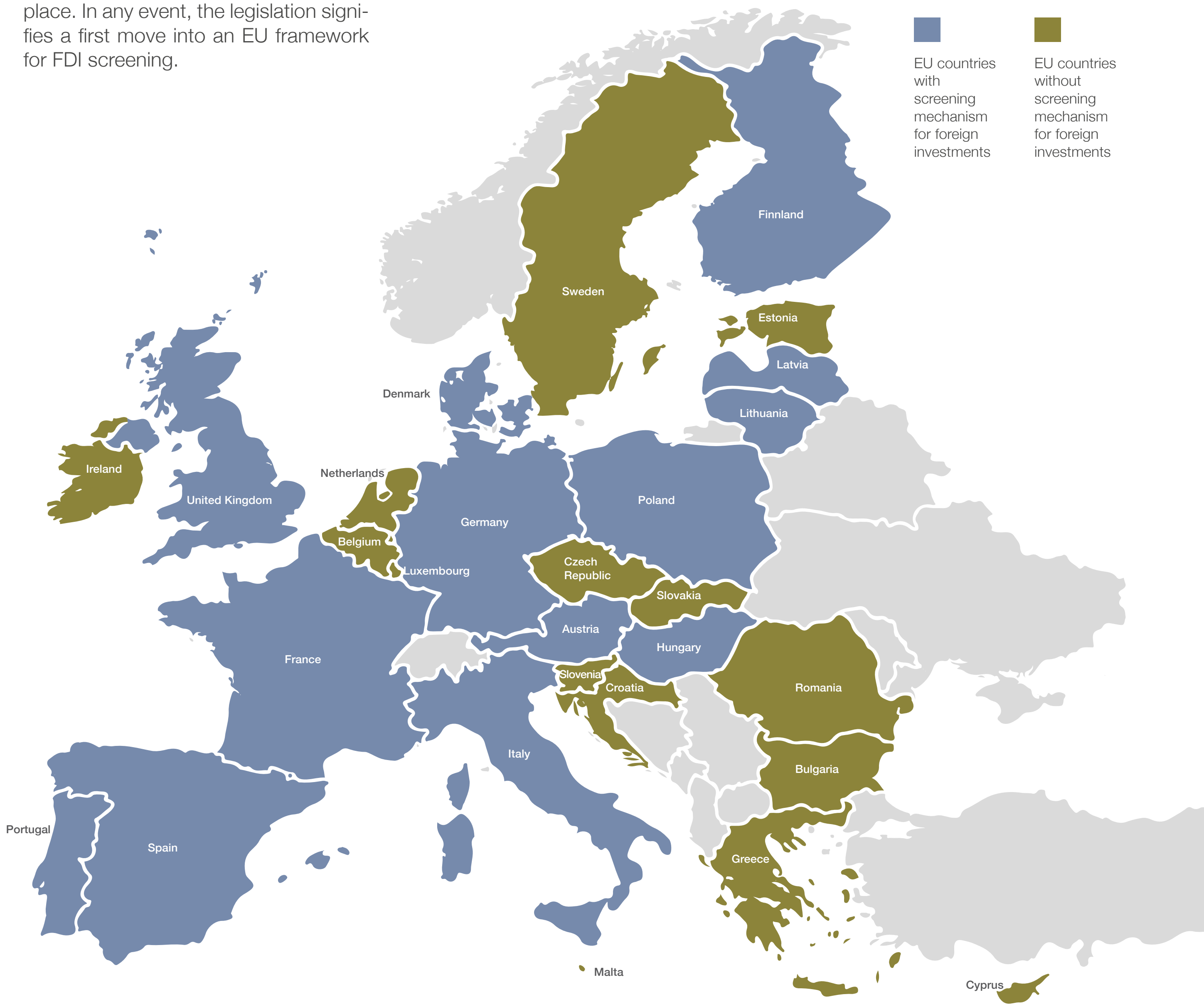

FDIs in Hungary – "sensitive industries" under scrutiny

András Nagy

> At this stage, however, the Act seems to entail significant burdens on compliant market participants, which may easily be evaded by less rigorous undertakings.

In October 2018, the Hungarian Parliament accepted legislation with a rather ominous title. The "Act on Controlling Investments Detrimental to the Security Interests of Hungary" (the "Act") is illustrative of the government's protectionist approach. It seeks to establish further control over EU/EEA-external investments in Hungary. The Act enters into force on 1 January 2019 and introduces significant burdens for investors in industries considered "sensitive".

Concept
The Act covers those transactions which lead to the acquisition of more than 25 % of the shares or decisive influence by a foreign investor in a Hungarian undertaking active in certain sensitive industries. In the case of a publicly listed company, the acquisition of only 10 % of the shares triggers this obligation. The Act also covers the acquisition of rights pertaining to assets and infrastructure necessary for these sensitive industries, and the establishment of Hungarian branch offices with relevant activities. These transactions will require prior approval from the competent minister.

Sensitive industries
Approval is necessary only if certain sensitive industries are concerned. These include examples like arms manufacturing, equipment designed for the secret service, financial, energy and public water services. However, the Act also covers electronic communication and electronic information systems for state and municipal organisations. Industries featuring items used for both civil and military purposes are also affected.

Foreign investor
A foreign investor is a natural person, legal entity or organisation from outside the EU, EEA or Switzerland. Transactions carried out through legal entities from within this area are also covered if the person having decisive influence over the acquirer qualifies as a foreign investor.

Proceeding
The Act requires the foreign investor to present its economic activities and attach all documents relevant for establishing control relations. The competent minister must decide within 60 days whether the transaction is potentially harmful, but may also extend the deadline by up to 60 days. A prohibition decision may be appealed before the Budapest-Capital Regional Court. In case of an omission to notify, the minister may impose a fine of up to around EUR 31,000 on legal entities or EUR 3,100 on natural persons and order divestment. The Hungarian state may also be entitled to pre-emption rights in such cases. The minister's approval also constitutes a prerequisite for other approval proceedings related to sensitive industries.

Impact and comments
It remains up to the government to clarify the detailed rules of the proceedings. At this stage, however, the Act seems to entail significant burdens on compliant market participants, which may easily be evaded by less rigorous undertakings. It is also unclear what constitutes an investment detrimental to national interests. The government may seek to establish more clarity in its upcoming decree.

Statutory restrictions on investing in strategic sectors in Poland

Paweł Kułak

> The authorities responsible for applying the Act are the minister of energy with regard to energy sector cases and the prime minister for other sectors.

The Act on Control of Certain Investments (the "Act") entered into force in October 2015, introducing restrictions on m&a transactions in Poland. The Act created an exception to EU freedom of capital movement, as it empowered the prime minister or minister of energy to object to transactions in which Polish companies operating in sectors deemed strategic for the national economy are involved.

Scope of the Act

Share deals and asset deals are covered by the Act if they result in the acquisition of control over a strategic company or the acquisition of a significant participation in such a company. The Act defines "significant participation" as at least 20 % of the voting rights in the target entity.

The Act applies to companies operating in strategic sectors of the Polish economy, such as telecommunications, power generation and distribution, fuel production, transport and storage, production of chemicals, manufacture and trade of arms, ammunition and military technologies, etc. In order to fall under the control regime provided by the Act, the company active in these sectors has to be enumerated in the Ordinance issued by the Council of Ministers. Seven strategic companies are included in the list at the moment.

Protected entities may be state-owned companies or private undertakings. Investors obliged to comply with the Act include Polish entities and companies registered abroad (EU and non-EU undertakings).

Procedural provisions and sanctions

The authorities responsible for applying the Act are the minister of energy with regard to energy sector cases and the prime minister for other sectors. Investors are obliged to notify these authorities, which shall initiate proceedings lasting up to 90 days and that can be prolonged by requests for additional data (as a "stop the clock" rule, known from merger control proceedings carried out by competition authorities, is applicable). The authorities are empowered to object to a transaction based on reasons of national security or public order, or if additional information was not provided.

A negative decision may be challenged before the administrative court, whereas acquisitions implemented in spite of the objection or without notification are null and void. Additionally, the Act provides severe sanctions for breach of the notification duty: a fine of up to PLN 100 million (approximately EUR 24 million) or imprisonment of six months to five years.

Comment

The Act establishes the prime minister and the minister of energy as authorities empowered to review and ban certain m&a transactions. Potential investments in strategic sectors may therefore require additional notification and approval, and investors should be ready for relatively long proceedings. As the Act does not provide any turnover thresholds and requires the investor to notify the acquisition of at least a 20 % stake in a target, this law can also cover transactions that are not filed to the competition authority, since the acquisition of a minority stake is in principle not notifiable in Poland.


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Brussels Corvus Corone, 2018, Sozy-One in collaboration with CityDev and the ASBL une Ville en Couleur, Brussels, Belgium

Set it free,
TKV, Belgrade, Serbia

05 insolvency & restructuring

Crossing Borders

The fall of Agrokor - a partial history

Borče Malijanski | Ana Marjančić | Miriam Simsa

Like any good crime novel, the fall of Agrokor had it all: the fallen hero turned villain, a looming public crisis, political intrigue and a packed storyline with many twists and turns. We have compiled a timeline with some of the most crucial events from this financial thriller.

2017

February
Moody's downgrades Agrokor's rating from stable to negative due to uncertainties in Agrokor's credit profile.

Agrokor bonds trading at around 29 % of their face value.

March
Russian VTB bank accuses Agrokor's management of falsifying financial statements. Moody's once again downgrades Agrokor's rating from B3 to Caa1 and the value of Agrokor bonds fall to 25 % of face value.

Subsidiary bank accounts blocked, suppliers launch bankruptcy petitions against Konzum.

Agrokor and its six biggest creditors conclude a "standstill" agreement.

The government submits a bill to Parliament on extraordinary administration procedure in enterprises of systematic importance for the Republic of Croatia, popularly referred to as "Lex Agrokor".

April
Lex Agrokor adopted. Agrokor management submits a request to open an extraordinary administration procedure. Ivica Todorić: "Today, with my signature, I hand everything that I have built over to the Croatian state."

The Commercial Court in Zagreb opens the extraordinary administration procedure over the Agrokor Group and appoints Ante Ramljak as Extraordinary Commissioner.

Interim Creditors' Council ("ICC") appointed – Sberbank (unsecured creditors), Zagrebačka Banka (secured creditors), Kraš (large suppliers), Knighthead Capital (bondholders) and Toni Raič (small suppliers).

Agrokor receives a EUR 80 million loan.

Bondholders offer EUR 400 million of super senior financing.

Slovenian parliament adopts "Lex Mercator" to shield Mercator from Agrokor.

June
ICC meet for second time, discuss new financing proposed by the Extraordinary Commissioner, which would grant participating creditors super senior status for old debt ("roll-up").

ICC accepts the Super-Priority Term Facilities Agreement (SPFA), including the roll-up.

July
Total of 20 lenders participate in the roll-up.

Sberbank opposes UK recognition of extraordinary administration procedure.

Sberbank acquires 18.53 % of Mercator d.d.

A Slovenian court of first instance grants Agrokor's request to recognise the extraordinary administration procedure.

State of Slovenia refuses to recognise the extraordinary administration procedure and actively opposes its recognition with the aim of securing the stability of Mercator, one of Slovenia's largest employers.

August
A Serbian court of first instance rejects Agrokor's request to recognise the extraordinary administration procedure.

ICC approves repayment of up to EUR 120 million of "old-debt" to suppliers.

2018

October
A revised financial statement is published, resulting in the filing of criminal charges by the Extraordinary Commissioner against Ivica Todorić and a warrant for his arrest.

A Montenegrin court of first instance rejects Agrokor's request to recognise the extraordinary administration procedure.

Upon declining Agrokor's appeal, the Serbian appellate court confirms the rejection of Agrokor's request to recognise the extraordinary administration procedure.

The Slovenian court of first instance reverses the recognition and rejects Agrokor's request to recognise the extraordinary administration procedure.

November
Full list of creditors published. Claims in the amount of HRK 41.23 billion are recognised.

The first instance court in Bosnia and Herzegovina rejects Agrokor's request to recognise the extraordinary administration procedure.

December
Ivica Todorić files a proposal to the Constitutional Court in Zagreb to review the constitutionality of Lex Agrokor and a complaint against the Republic of Croatia to the European Commission for breaking the general principles of EU law.

Ante Ramljak presents a draft of the Settlement Plan.

Declining Agrokor's appeal, the appellate court in Bosnia and Herzegovina confirms the rejection of Agrokor's request to recognise the extraordinary administration procedure.

January
The Commercial Court in Zagreb issues a ruling on Agrokor's recognised claims (HRK 41.8 billion) and challenged claims (HRK 14.7 billion).

February
Commissioner Ramljak resigns after protests due to his high advisory fees and the engagement of his former consulting firm in Agrokor. The CEO of Tisak, Fabris Peruško, takes over.

March
Declining Agrokor's appeal, the Slovenian appellate court confirms the reversal of the recognition and the final rejection of Agrokor's request to recognise the extraordinary administration procedure.

May
The Constitutional Court states that Lex Agrokor is in line with the Constitution of the Republic of Croatia, as it was the government's obligation to eliminate the threat to the social system and the destabilisation risk of the entire Croatian economy.

The local portal publishes e-mail correspondence between the Deputy Prime Minister of the Government, Martina Dalić, and CEOs of private brokerage houses, consulting companies and law firms, implying their participation in the preparation of Lex Agrokor, casting doubt on the entire process ("Hotmail Affair").

July
Agrokor's creditors accept the Settlement Plan. The company's ownership structure is irreversibly changed. After months of negotiations with debtholders headed by a government-imposed rescue committee, Agrokor gains approval from more than two-thirds of its creditors, the legally required limit to enable the deal to go through.

The Commercial Court in Zagreb issues a decision accepting the Settlement Plan reached by the majority of creditors' votes (80.20 %). Ninety-two appeals are submitted.

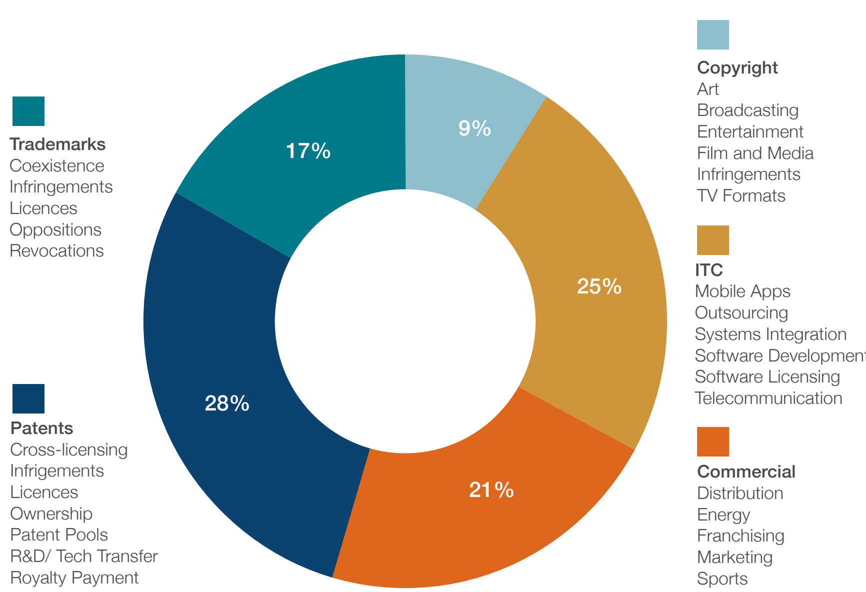
Future
The implementation commencement date ("ICD") will be determined by the Court upon mutual proposal of the Extraordinary Commissioner and the decision of the Creditors' Council. With the implementation of the Settlement Plan, the process of extraordinary administration ends.

IP arbitration on the rise

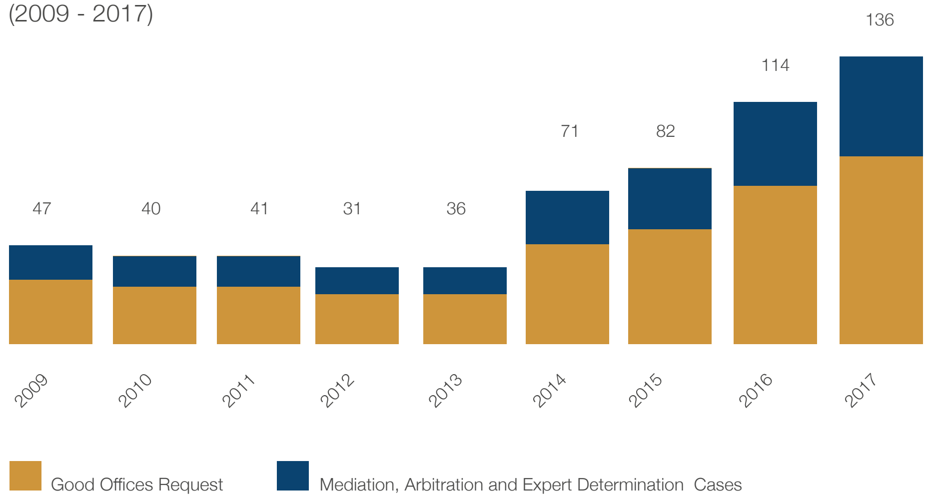
Michael Woller

Intellectual property (IP) is a key factor in today's business world and in society in general – not least through the omnipresent digitalisation of workflows, entire businesses and everyday life. IP-driven transactions, IP asset management and of course disputes over IP are gaining more and more traction. Especially matters involving complex technology issues, particularly those with a multijurisdictional angle, become less suitable for typical IP litigation before national courts. While there is a trend in many countries towards having IP matters decided by specialised IP judges (for example, Austria bundled all first instance IP litigation matters at the Commercial Court Vienna some time ago), matters are gaining complexity, requiring specific in-depth technical expertise, which is not always available "on the bench" but rather outsourced to technical experts.

To meet the particular needs in IP and technology disputes, the World Intellectual Property Organisation (WIPO) established the WIPO Arbitration and Mediation Center (WIPO-Center) and specific arbitration (expedited and non-expedited), mediation and expert determination regimes. Key figures published by the WIPO Center show widespread use of its services in the fields of TMT and IP (WIPO Mediation, Arbitration and Expert Determination Cases) and the number of cases handled by the WIPO Center is consistently growing, showing rising demand for such specialised services:



WIPO Mediation, Arbitration, Expert Determination
Cases and Good Offices Request Filing
(2009 - 2017)



Source: www.wipo.int/amc/en/center/caseload.html

In a nutshell, the key aspects of the WIPO arbitration regime are:

• WIPO Neutrals: the WIPO Center administers a comprehensive list of experts specialised in various fields acting as arbitrators;

• specific rules on interim injunctions: quick suspension of infringements is often key in IP disputes – thus, the WIPO arbitration regime provides specific focus on interim decisions;

• confidentiality regime: IP and technology arbitration often involves secret know-how and trade secrets; the WIPO Rules provide for a specific set of provisions on dealing with confidential information introduced in arbitration proceedings;

• evidence proceedings: the WIPO Rules provide specific sets of provisions on taking evidence via expert witnesses, including arranging for experiments to be conducted during arbitration.

But: IP disputes and arbitration – how do these fit together? When talking about IP arbitration, two main issues must be considered:

• is an arbitration clause in place? A core element of many IP disputes is the IP owner's right to prevent others from using its IP (cease and desist claim). As a matter of fact, usually there is no contract in place between the rival parties. And even if there is (for instance licence agreements, technology agreements, trademark co-existence agreements or even transaction agreements also containing IP-related issues), such agreements often do not contain IP-specific arbitration clauses or any arbitration clauses at all.

• Is the matter of the dispute arbitrable? In IP disputes, the existence, validity, ownership or scope of certain IP rights are at least preliminary questions to be resolved before the merits of a case can be determined. With regard to registered IP (such as patents, utility models, trademarks or designs), the question of whether such IP right has been lawfully registered by the authorities is typically resolved in front of the national courts and authorities, and not by private arbitrators.

This can lead to a situation where company A, which owns patent registrations in several countries, is faced with a competitor, company B, which is marketing potentially infringing products in several markets. A and B become involved in patent infringement litigation before several national courts in order for A to prevent the sale of the competitor's product and in the end to obtain appropriate damages. This may lead to inconsistent national decisions as to (i) the validity of the very same patent in different countries, (ii) whether or not the competitor product infringes the patent, and (iii) the calculation of damages in each market.

Concerning the arbitrability of disputes about the validity of registered IP rights, as long as the preliminary question could also be subject to a settlement between the parties, it is commonly held that this question should be arbitrable. Of course, the result of such arbitration cannot cause any third-party effect and cannot bind national register authorities to carry out any specific acts as to the registration of the IP rights that were subject to arbitration. But an arbitrator may well decide with inter partes effect whether a patent can be enforced against the defendant or not. However, due to uncertainties in this respect, it is important to check whether such circumstances may render an arbitration award unenforceable under certain national laws.

When drafting IP and technology agreements or even when being confronted with a (multijurisdictional) dispute scenario, parties should consider specialised IP arbitration as a valid alternative to court litigation. Nevertheless, careful thought must be given to whether this option indeed is fit for the intended purpose.

Multilingual jurisprudence for a territory bigger than half a billion football fields

Judith Butzerin

An impressive building on the Kirchberg plateau in Luxembourg characterised by the colours gold and black is home to the Court of Justice of the European Union (CJEU), the sole judicial body of the EU, which ensures compliance with the treaties and secondary EU legislation (Art 19(1) TEU). It consists of two separate courts: the Court of Justice (ECJ) and the General Court (GC).

Whereas the ECJ is composed of one judge per Member State and 11 Advocates General, the GC will consist of two judges per Member State, by 1 September 2019. Every member of the CJEU is supported by its own cabinet consisting of assistants and référendaires (law clerks). In total, 537 employees work in the cabinets and another 1,500 are engaged in administrative services, including research and documentation, language service, IT support and the management of the vast Court library, which aims to acquire all legal publications in the field of EU law.[1]

Multilingualism

The CJEU can be addressed in all 24 official languages[2] and case law is disseminated in each of them throughout the EU. Overall, 44 % of the institution's staff work in the linguistic service: 609 lawyer linguists translate judgments and other documents (in total more than 1,1 million pages are translated per year), and 74 interpreters cover hearings and meetings to allow attendees to follow the arguments in their mother tongue.[3] Internally, however, the CJEU sticks to one language, which is French.[4] It is the common language used e.g. in deliberations and in the drafting of preliminary reports, judgments and orders.

Intellectual property before the CJEU

Seven hundred and twenty-seven new cases were brought to the ECJ in 2017. About 10 % of them were related to intellectual property (IP) and deal with industrial property (patents, trademarks, designs, etc.) and copyright. In the same year, the GC was confronted with 917 new cases, about a third (298) of which were IP [5] cases. Basically, there are two ways IP cases get to the CJEU: preliminary references and actions against EUIPO decisions.

Preliminary references = a dialogue with national courts

Every national judge in the EU must apply EU law. If a court is unsure how a certain provision of EU law should be interpreted, it may or – as a last instance – must halt the national proceeding and refer its question to the ECJ by way of a preliminary reference (Art 267 TFEU). By its preliminary rulings, the ECJ clarifies the meaning of EU law and ensures that regulations and directives are interpreted and applied in the same way in all 28 Member States.

Take for example the Christian Louboutin case: The French shoe designer owning a registered trademark in the Benelux area consisting of the colour red applied to the sole of a high heel shoe became aware of a company that also distributed stilettos with red soles. He filed a trademark infringement action before the District Court of The Hague based on his Benelux trademark. In the national proceeding, the defendant claimed that Louboutin's trademark was invalid according to a provision of the EU Trademark Directive, transposed to national law, which excludes from trademark protection signs that consist exclusively of a shape that gives substantial value to the goods. The national District Court was unsure how the word "shape" is to be interpreted within the meaning of the Trademark Directive. Is the concept of "shape" limited to the three-dimensional properties of the goods, such as their contours, measurements and volume – or does it include other (non-three-dimensional) properties, such as colour? As this question was essential to decide the trademark infringement case, the national court referred it to the ECJ (case C-163/16).

Case arrived at the ECJ – whose turn is it?

Once a case has been lodged, it is assigned to a judge-rapporteur. In the written stage of the proceedings, the parties of the main proceedings, national authorities and EU institutions may submit written observations and propose answers to the questions posed in the preliminary reference within two months after notification on the request. After the conclusion of the written part of the procedure, the judge-rapporteur drafts a preliminary report. Based on this internal document, the 28 judges decide in their weekly Tuesday meeting which chamber will deal with the case. Depending on its importance and complexity, the case is assigned to a chamber of three, five or 15 judges; the chambers are not specialised in specific areas of law. The ECJ's general meeting also decides for each case whether an Advocate General will give an opinion on the case.

After the written stage, a public and oral hearing might take place, in which the case is heard by the respective chamber and, if appointed, the Advocate General. They all wear the same claret-red robes, but in order to demonstrate the impartiality and independence of the Advocate General, he leaves some space to the judges' bench. The parties are represented by their lawyers; Member States and institutions are represented by an agent who might be assisted by lawyers and advisors. Those pleading are obliged to wear gowns and must respect the speaking time assigned to them (generally 15 min). After the pleadings, the judges and the Advocate General might pose questions and finally every party has the opportunity to briefly reply to the observations. The hearing is simultaneously translated by interpreters seated in boxes around the court room.

Some weeks after the closing of the hearing, the Advocate General delivers his opinion on the case, providing a legal assessment of the case and proposing a response which is not binding for the judges, but serves as a basis for their deliberations. The judges' deliberations are secret. Thus, neither interpreters nor the Advocate General may assist. After several revisions of the draft judgment drawn up by the judge-rapporteur and discussions among the members of the competent chamber, a reasoned judgment or order is finally adopted and pronounced in open court. The average duration of preliminary ruling proceedings is just under 16 months.

Binding interpretation

The decision is not just binding for the court which referred the question to the ECJ. Every national court within the EU dealing with the same issue must apply the rule as interpreted by the ECJ. Therefore, the decision needs to be translated into all official languages. To ensure the quality of translation of legal documents, translators at the CJEU must not only have (thorough) knowledge of at least three official languages, but also hold a legal education qualification from a Member State. This explains why they are called "lawyer linguists".
Getting back to our example, one can read in 23 languages that a sign consisting of a colour applied to the sole of a high heel shoe does not consist exclusively of a "shape" within the meaning of the Trademark Directive.

What else?

Another competence of the CJEU is to review the lawfulness of decisions adopted by an institution, body, office or agency of the EU. Among other competences, the GC has jurisdiction in actions against decisions of the Boards of Appeal of the European Union Intellectual Property Office (EUIPO).
For example, a German film company applied for registration of the comedy film title "Fack Ju Göhte" as an EU trademark for various goods such as games and clothes. However, the EUIPO refused the application based on a provision of the EU Trademark Regulation that prohibits the registration of trademarks which infringe public policy or morality. The film company disagreed and brought an action against the EUIPO before the GC alleging an infringement of the EU Trademark Regulation (Case T-69/17). About 13 months later, the GC confirmed the EUIPO's decision and rejected the action with its judgment.

Decisions of the GC can be appealed on points of law before the ECJ within two months of the notification of the decision. Currently, an appeal regarding the trademark "Fack Ju Göhte" is pending before the ECJ (case C-240/18 P). Besides this appeal decision (with rather limited impact for practice in general), there are many other CJEU decisions to expect, in particular preliminary rulings, which will be significant for the development of EU law, in IP and beyond.

Conclusion

The CJEU's jurisdiction covers a broad field of legal topics, is the result of intellectual work influenced by a mixture of various legal systems and traditions, accessible in 24 languages, and applicable in a territory bigger than half a billion football fields.

1 CJEU, Annual Activity Report for the Financial Year 2017, 55.
2 Namely in Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish or Swedish. For details on the language regime, see Art 36 ff Rules of Procedure of the Court of Justice and Art 44 ff Rules of Procedure of the General Court.
3 CJEU, Annual Report 2017. The year in review, 15.
4 The use of the French language is an institutional practice based on tradition; it is not laid down in law.
5 CJEU, Annual Report 2017. Judicial Activity, 102f and 208.

What is needed for trade secret litigation?

Dominik Hofmarcher

Trade secret litigation has always been tricky, considering that the rights in sensitive and confidential information shall be enforced without disclosing (too much of) such information in proceedings. While preserving the confidentiality of trade secrets in the course of proceedings without restricting the rights of the opponent means squaring a circle, the EU Trade Secrets Directive ((EU) 2016/943) at least addresses the issue and provides certain (obligatory) basic protection. However, Member States should consider enhancing this protection.

The problem
A trade secret may itself be the subject of the proceedings (in which case it has to be assessed whether the relevant information is protected as a trade secret and whether it was unlawfully acquired, used and/or disclosed) or it may be the subject of evidence in any other proceedings.

In both scenarios, the owner of the trade secret must evaluate whether to put the trade secret at risk by disclosing it in court. Considering the lack of (sufficient) protection, this might in some cases come down to a decision about whether to lose the case or the trade secret. This is far from ideal.

There are two main ways in which to protect a trade secret in court:

(i) **"Legal" protection:** Similar to the protection conferred by an NDA, the disclosed information may be declared confidential, meaning that the opponent and anyone else participating in the proceedings or having access to documents are not permitted to use or disclose this information.

(ii) **"Factual" protection:** Procedural law may foresee an option not to disclose the trade secret via certain persons, which may even include the opposing party ("in camera proceedings").

While the second option is conceivable if the trade secret is "merely" a subject of evidence, not disclosing it via the other party is much more difficult if the trade secret is the subject of the proceedings.

On the other hand, when the trade secret is the subject of the proceedings, the opposing party may be aware of it anyway, so the only remaining question is whether it was acquired, used or disclosed unlawfully. However, even in such a scenario, the defendant might require protection if it needs to disclose confidential information in order to defend itself (e.g. by demonstrating that an alternative manufacturing method was used).

What does the Directive provide?
Under Art 9 of the EU Trade Secrets Directive, Member States "shall ensure that the parties, (…) and any other person participating in legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, are not permitted to use or disclose any trade secret or alleged trade secret which the competent judicial authorities have, (…) identified as confidential and of which they have become aware as a result of such participation or access." According to Art 1 (1), this is even a mandatory provision.

Furthermore, under Art 9 (2) of the Directive, courts must be enabled to restrict access to documents and hearings and to produce a non-confidential version of any judicial decision. While according to the last sentence of this provision at least one natural person from each party and the respective lawyers shall have access to documents and hearings, Art 1 (1) allows Member States to provide for more far-reaching protection than that required by the Directive.

What else is needed?
The legal NDA-like protection foreseen by the Directive is a good place to start and already more than we had, for example, in Austria. But in certain cases, such protection is simply insufficient. If the trade secret concerns certain market information, a disclosure of such information via the other party is irreversible, since the other party cannot be forced to suppress or disregard its knowledge.

What is needed for trade secret litigation is a comprehensible and flexible toolbox containing preservation measures that can be requested on a case-by-case basis. Such a toolbox should also comprise certain forms of "factual protection" (at least within staged proceedings), and may include:

- a lower threshold for substantiation of the complaint; mere conclusive argumentation (as part of staged proceedings);
- a preparatory hearing to discuss the course of the proceedings and which preservation measures will be requested or are necessary; decision by the court (subject to appeal);
- staged proceedings: If possible, the first stage of the proceedings should focus on the question of whether the defendant's behaviour was unlawful. If yes, it may be discussed in the second stage whether the information is in fact a trade secret;
- reversal of the burden of proof, if reasonable;
- disclosure of the trade secret only via the court and an expert witness (if necessary) in the first stage ("in camera proceedings"); the court may order disclosure via the opponent if deemed necessary in the second stage;
- "closed court files" – no access for third parties and, in certain cases, no access for the opponent either;
- a decision by the court that the opponent and others involved in the proceedings or having access to confidential information must not use and/or disclose such information as long as it has not been finally decided that it is not a trade secret and it has not become publicly available; fines for any violation of the prohibition;
- a decision by the court to restrict access to files;
- a decision by the court to restrict access to hearings;
- a non-confidential version of the decision;
- clarification that disclosure of information in court does not affect its status as "secret".

While it is impossible to perfectly preserve the confidentiality of trade secrets in the course of proceedings without restricting the rights of the opponent, a comprehensive and flexible toolbox of possible measures may enable a fair balancing of interests.

Interview with the Acting Vice President for Legal Affairs of the Hungarian Intellectual Property Office

An interview by Márk Kovács

The rapidly changing nature of business in the 21st century means that the EU and global economy relies strongly on intellectual property rights, such as trademarks, designs, patents and others. In this interview, Mark Kovacs discusses the latest developments in Hungary with András Jókúti, Acting Vice President for Legal Affairs of the Hungarian Intellectual Property Office (HIPO).

Q: The new Trade Secrets Act came into force on 8 August 2018, ensuring protection of trade secrets similar to intellectual property rights, especially in the case of an infringement. So, what could motivate inventors and innovative enterprises to give up keeping new developments a secret and turn to the HIPO to acquire a patent or a utility model?

A: When a new – or, in this case, enhanced – action hero is added to the pack, it does not mean that he or she will be the one to beat the villain at the end of each movie. Registered IP, such as patents and utility models, and trade secret protection have very different superpowers, and I would rather call the latter an ideal sidekick (with maybe a few spinoff episodes). But Robin cannot render Batman superfluous.

Let's start from the beginning. Trade secrets were not unprotected in Hungary even before the entry into force of the Trade Secrets Act. In compliance with the country's international obligations in the WTO, there were rules in place to ensure that the unlawful treatment of undisclosed information has civil and competition law consequences. The new act, implementing the 2016 EU Directive, replaces the previously scattered rules with a single framework with clearer concepts, special safeguards and limitations, as well as a reinforced enforcement regime.

This does not change the fact that there are fundamental differences between the very nature of protection conveyed by trade secrets and patents. The legal protection of trade secrets is an important safety net against industrial espionage, breach of non-disclosure agreements and other forms of unlawful divulgation, but only if the necessary measures are taken by the right holder to keep the information confidential.

Patents, on the other hand, mean exclusivity. A valid patent entitles its holder to prevent anyone else from using the invention without their authorisation (i.e. a licence), including even independent developers who may have never heard of the patent or the patentee. In order to enjoy such special abilities, the invention needs to be useful, new and truly inventive in light of the prior art. The "social contract" behind the monopoly of course requires some dampening of these superpowers. Patents are published in order to make scientific advancement possible, and as a general rule, the term of protection is limited to 20 years.

What kind of protection does a company need? It heavily depends on its profile, size, resources, goals, and of course the things they want to protect. If the company's treasure is not patentable (e.g. it is a set of information, such as a client list or a recipe, but not an invention), then there is no real dilemma. If it potentially is, and it can be "reverse engineered" once put on the market (e.g. it is a product whose technical secrets will be revealed if analysed), then the arrows point towards registered IP. If, however, a company wishes to capitalise on its confidential data for more than 20 years and has the means to keep them in a restricted circle, trade secrets may be a viable tool.

Cost may be a factor too, as patenting internationally and paying the renewal fees in each country covered can be expensive. Firstly, the fluctuating levels of trade secret protection in the various territories may pose extra risks in certain

Trade secrets are indeed the best complimentary tools to patents to keep a certain "halo" of know-how confidential around the core technology disclosed in the patent specification.

András Jókúti, Acting Vice President for Legal Affairs of the Hungarian Intellectual Property Office (HIPO) areas for those only relying on confidentiality. Secondly, a working mechanism of secrecy for a truly valuable company asset is not exactly cheap either.

Finally, as I suggested earlier, you don't always have to choose. The best superheroes come in pairs: Robin is not a rival to Batman, but his right-hand man. Trade secrets are indeed the best complimentary tools to patents to keep a certain "halo" of know-how confidential around the core technology disclosed in the patent specification. This way the patented invention can be surrounded by extra features that make the product stand out, potentially even after the core technology has entered the public domain.

Enforcing intellectual property rights, especially industrial property rights, requires a high level of expertise. Judges often have to seek the opinion of expert bodies whose members have up-to-date knowledge about a given field. Can the HIPO help judges and right holders in this regard during enforcement procedures?

Although its role in shaping IP policy includes enforcement, the HIPO is not primarily an enforcement agency. In individual infringement cases, as far as technical expertise is concerned, the HIPO can assist the judges in two ways.

First, the Patent Act sets forth a relatively less-known (and hardly ever used) competence for the office when it says that in disputes pertaining to the exact meaning of the patent specification's text, the courts and other authorities may request the HIPO to give an authoritative interpretation.

An instrument more commonly used by courts, and even private parties, is the Board of Experts on Industrial Property, a body operated by the HIPO. The list of board experts consists of 75 members appointed by the Minister of Justice, some of whom work at the HIPO, myself included. If a court or other authority invites the board to deliver an expert opinion or when an individual mandates the board for the same purpose, the chairperson of the board appoints the members of an ad hoc panel that will get to work on the matter. The expert opinions are based solely on the questions and documents submitted, and even if they are not binding on the court, judges tend to give considerable weight to their findings.

The Board of Experts is competent in disputes concerning patents, plant varieties, utility models, designs, trademarks, geographical indications and trade secrets, as well as unfair competition issues relating to such matters. A typical case where an expert opinion is often sought is about inventors' fees due for service inventions. For such inventions, created in an employment framework, the employer is entitled by law to file for a patent. The inventor, on the other hand, has a right to a fair amount of money, and the law only lays down a vague rule of thumb for the calculation of this fee. Where the employer feels that the inventor should be happy with his regular salary in exchange for the patent rights or offers a sum that the inventor deems too low, sometimes the case ends up in court. In such events, guidance on the due fee, provided by the Board of Experts, is most welcome by the judges.

Enforcement is on the cusp of major changes due to the forthcoming Hague Convention for the Recognition and Enforcement of Judgments. The HIPO has just conducted an open consultation regarding the latest draft of the Convention. What reactions have you received?

This is a very exciting project of private international law, and the negotiations on the possible new Convention put a special emphasis on intellectual property. Notably, not all countries feel comfortable including every type of judgment on all forms of IP in the agreement, as they are wary of recognising and enforcing decisions taken by foreign courts in this field. Another key issue is whether final decisions of IP offices on the validity of IP rights should be recognised the same way as judgments delivered by courts, provided, of course, that IP will indeed be covered.

As regards the feedback from Hungarian stakeholders, we have not seen much turbulence with respect to domestic consultation that the Ministry of Justice has launched jointly with the HIPO, but the major professional organisations have put together a very instructive document that provides a comprehensive summary of the situations that Hungarian parties need to face in case of the various policy scenarios.

The summary makes it clear that the current EU rules and the recently adopted Hungarian Act on Private International Law already open the door to the enforcement of foreign judgments in many IP infringement cases, especially when they are delivered within the European Economic Area. It also highlights the envisaged restrictions on the recognition of validity-type decisions if they were not taken by the authorities of the country of origin of the IP in question.

In conclusion, the submitted comments do not generally oppose the inclusion of IP in the scope of the draft Convention, but call for certain reservations cautiously circumscribing the forms of IP and the types of decisions affected.

I also feel it is important to address a potential misunderstanding at this point. Recognition and enforcement of IP-related foreign judgments by no means have an impact on the validity or infringement of a "corresponding" IP right in a different country than the one where the judgment was delivered. IP rights are essentially territorial, and at the end of the day, the decisive set of applicable rules is the law of the country where the given IP right is relied on. To put it differently: the draft Convention, not dealing with either jurisdiction or applicable law, only has a bearing on the international enforceability of judgments already delivered according to existing rules of private international law.

Thank you for the interview.

Read the full version at www.schoenherr.eu/publications/roadmap

Lifting the fog in search of a filling station

Andrea Radonjanin

A landmark decision enforces abstract colour marks in Serbia.
Dusk, and there is a light fog. Your fuel gauge signals that the tank is almost empty. Like a shining star, the familiar colour combination of your preferred filling station shimmers in the darkness (perhaps you like the quality of their service, cleanliness, prices or coffee). Expecting your favoured station, you turn off the road and drive toward it. Except now you realise it's a completely different station which only uses a similar colour combination in their signage. Bad luck for you, but also bad luck for the well-known petrol station brand.

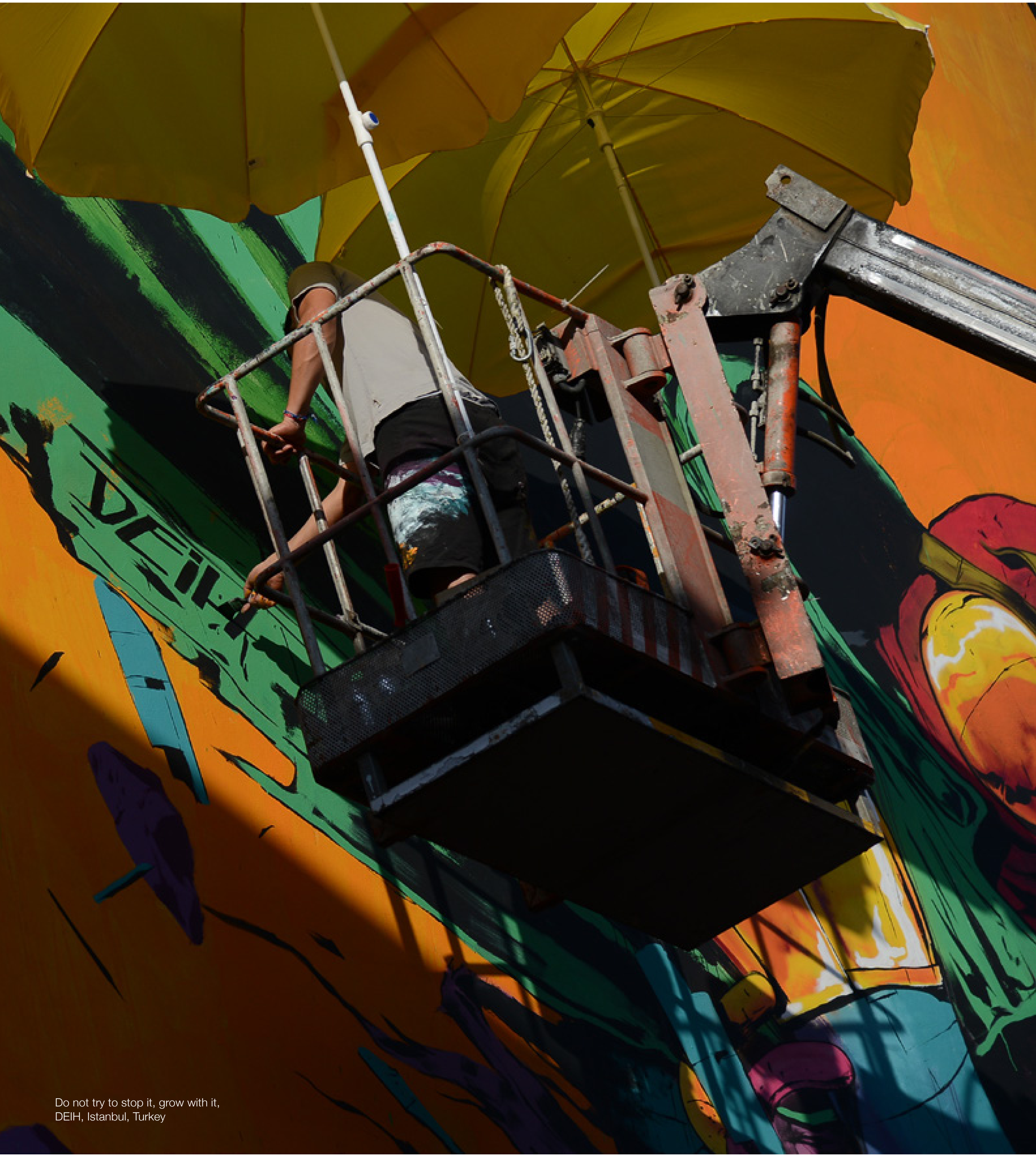
Can the abstract colour combination of a filling station be protected as a brand? Can you sue a competitor who uses a similar colour combination? Following a ground-breaking Supreme Court ruling, this is now possible in Serbia.
So far, Serbian courts have assessed the question of the likelihood of confusion by outsourcing this question to an expert. The expert worked out the (colour) differences between brands and gave his opinion on whether the degree of similarity was sufficient to justify the likelihood of confusion. Usually this was denied unless the appearance was identical or at least showed similarities as to word elements.
Now, for the first time, the second instance court and ultimately the Serbian Supreme Court have put a stop to this practice and decided that in the case of consumer products, the similarity test and examination of the likelihood of confusion must always be assessed by the judge himself:
"The respondent's objection relying on the expertise is thus unfounded. Similarity, i.e. the distinction between two trademarks, is a factual question which the court assesses by assuming the position of the average consumer."[1]

This case concerned the enforcement of an abstract colour combination mark in the filling station sector. The courts made an overall assessment. In filling stations in particular, the perception of the brand depends less on details such as logo or design and more on the colour combination used which you perceive fleetingly as you drive past. The colour combination is registered quickly at first sight and can even be considered the dominant element of the overall appearance.
Leaving behind the inflexible approach of considering similarity based solely on expert opinions, the courts moved towards a more creative and constructive application of the law. The courts chose to see the case through consumers' eyes, or better yet, through the car windscreen. The colour combination is key for deciding whether the average driver can be misled when confronted by similar gas station appearances. Mimicking the basic arrangement and choice of colours at a gas station is not affected by nuances in colour or geometry of specific design elements or decoration. Even subtle changes in nuance within the same colour can no longer be used as an argument that a trademark is not sufficiently similar to rule out any confusion or association.
No doubt, this fundamental decision will have far-reaching significance for the enforcement of abstract colour marks in Serbia in general.

1 Supreme Court of Serbia, Prev. 292/2017

Yellow figures and guitar - "Klimt Figures",
Zesar Bahamonte, Vienna, Austria


Weinschenke



Do not try to stop it, grow with it,
DEIH, Istanbul, Turkey

07 labour & employment
Non-Compete Clauses

Cancellation of non-compete agreements – evolving court practice

Dániel Gera

Post-termination non-compete clauses are a common feature of employment contracts in Hungary. As the obligations prescribed by such clauses become effective only upon termination of employment, the parties' interests linked to the enforceability of the clauses may be completely different.

Can either party unilaterally terminate a non-compete clause if it does not wish to maintain it after the termination of employment? If so, which party may terminate and when such termination can take place must also be assessed.
The legal practice surrounding these questions is constantly evolving. Taking a rather conservative approach, such agreements may only be unilaterally cancelled if stipulated therein and only by the party that is entitled to do so.

Which party may have cancellation rights?
Non-compete clauses are designed to protect the employer's interests after the termination of the relationship. The former employee needs to refrain from any kind of business activity that competes against the employer in exchange for financial compensation. In practice, it is rare for employees to have the option of cancelling the non-compete clause. Cancellation rights are usually stipulated in favour of the employer. Court practice does not recognise employees' cancellation rights in the absence of a specific contractual provision in this regard.

When can a non-compete agreement be cancelled?
Court practice clearly shows that even if the right of unilateral cancellation is stipulated (which is typically exercised by the employer), the cancellation must take place before the termination of the employment.
Recently there have been some rather employee-friendly decisions stating that in the case of a termination with notice, the employer should communicate his or her intention to cancel the non-compete clause upon giving notice. This position is derived from the parties' general duty of cooperation and the protection of the employees' interests. If the cancellation is communicated upon giving notice, the employee can start to look for a similar job already during the notice period.
In a recent highly debated court decision, the employment tribunal declared that the employer may be entitled to unilaterally cancel non-compete clauses before the termination of the employment even in the absence of a contractual clause allowing it to do so.
A unilateral termination (cancellation) by the employer may be acceptable, particularly if a long period of time occurred between the conclusion of the agreement and the termination of the employment. The court derived this rule from the principle of contractual freedom. This employer-friendly decision of the tribunal case has yet to be heard by higher level courts, but it will be interesting to see the direction in which the court practice will evolve.
A taskforce of the Hungarian Supreme Court (Curia) is currently working to synthesise the court practice regarding non-compete agreements.

Comment
Though the further evolution of court practice will certainly be interesting for legal practitioners, for companies it is generally always better to avoid legal disputes. This can be achieved by thinking ahead and setting out clear rules of cancellation in the agreement itself. These clauses should be reviewed by legal counsel before entering into non-compete agreements.

Comparison of the main features of non-compete agreements in CEE

Concluding non-compete agreements or including non-compete clauses in employment agreements is common practice in all jurisdictions in CEE. However, as these covenants are not subject to EU-wide regulations, the rules governing and the jurisprudence surrounding them differ in the various jurisdictions.

This article written by labour law experts in various jurisdictions aims to provide a snapshot of the most important rules governing non-compete agreements in CEE, including the maximum term of the non-compete period, the amount of compensation and the typical sanctions in the event the employee violates the non-compete clause. Below is a country-specific overview of these selected aspects of non-compete clauses.

Austria:

• Maximum term: One year as of the termination of employment.

• Compensation: In principle, no statutory compensation needs to be paid to enforce the non-compete. However, the non-compete obligation generally does not apply if the employment is terminated by the employer. If the employer terminates, it may validate the non-compete obligation by declaring (before the termination or when serving the termination notice) that for the period agreed the employer continues to pay the employee the remuneration he/she was entitled to before the termination (i.e. salary, pro rata special payments, overtime pay, etc.). In other cases (e.g. termination by the employee), there is no (statutory) compensation.

• Sanctions: Sanctions for violating the non-compete clauses depend on the parties' agreement. Parties often agree on a contractual penalty, which may not be higher than six monthly net remunerations. If agreed, the payment of the penalty is the only sanction and damages exceeding it cannot be claimed. If no contractual penalty is agreed, the employer may claim damages.

Bulgaria:

• Maximum term: Post-termination non-compete agreements are not expressly regulated under Bulgarian law. The court practice on their validity is also not consistent. According to some court resolutions, such clauses are null and void, since they restrict the employees' constitutional right to work. In practice, these clauses are usually agreed for a period of up to two years, more often for one year.

• Compensation: No statutory compensation is set out by law. However, if the employer pays compensation, the risk of a court declaring the clauses null and void is lower. Compensation generally depends on the circumstances, but the market standard is around 50 % of the employee's monthly/annual gross salary.

• Sanctions: Sanctions depend on the parties' agreement, but usually the employee may be required to repay the compensation received based on the non-compete agreement or pay a contractual penalty/liquidated damages. The employer also may claim damages exceeding the amount of the contractual penalty/liquidated damages, but these are usually difficult to prove.

All the above, however, would depend on the general validity of the non-compete clauses.

Croatia:

• Maximum term: Two years as of the termination of employment.

• Compensation: Statutory compensation for the non-compete period is 50 % of the average salary paid to the employee in the three-month period prior to the termination of the employment agreement.

• Sanctions: Sanctions depend on the parties' agreement, but usually the employee may be required to repay the compensation received based on the non-compete agreement or pay a contractual penalty/liquidated damages.

Czech Republic:

• Maximum term: One year as of the termination of employment.

• Compensation: The minimum statutory compensation is 50 % of the employee's monthly average earnings for each calendar month of the duration of the restriction (average earnings to be calculated from the last calendar quarter and includes bonus, i.e. it is not only the monthly gross wage).

•Sanctions: Sanctions depend on the parties' agreement, but usually the employee may be required to pay a contractual penalty. If so agreed, the employer also may claim damages incurred, but these are usually difficult to prove.

Hungary:

• Maximum term: Two years as of the termination of employment.

• Compensation: The minimum compensation to be paid is 33 % of the employee's base wage for the term of the non-compete period. The compensation to be paid depends on the circumstances, but the general market practice is 50 % of the base wage for the term of the non-compete period.

• Sanctions: Sanctions depend on the parties' agreement, but usually the employee may be required to repay the compensation received based on the non-compete agreement or pay a contractual penalty/liquidated damages. The employer may also claim its damages exceeding the amount of the contractual penalty/liquidated damages, but these are usually difficult to prove.

Poland:
• Maximum term: The period of a post-termination non-compete agreement is not regulated by law. One to two years are typical durations. The period for which a post-termination non-compete is binding should be justified, because it cannot prevent the employee from working in a given market for unjustified reasons. As a result, the proper duration of a non-compete covenant should be assessed on a case-by-case basis, considering the person's position in the company, knowledge of its operations, time spent in the company and time for which knowledge acquired in the company gives a competitive edge.
• Compensation: The compensation for post-termination non-compete should amount to at least 25 % of the due remuneration which the employee should have received under the employment agreement for a term equal to the non-compete period. In the case of senior executives, the market standard is around 100 %.
• Sanctions: Sanctions depend on the parties' agreement, but usually the employee may be required to repay the compensation received based on the non-compete agreement or pay a contractual penalty. The employer also may claim its damages exceeding the amount of the contractual penalty, if such a clause is included in the agreement.

Romania:
• Maximum term: Two years as of the termination of employment.
• Compensation: Statutory compensation is at least 50 % of the gross average base salary income obtained by the employee during the last six months before the termination of employment. The non-compete compensation must be paid after the termination of the employment, during the non-compete period. Apart from the period and the compensation amount, the non-compete agreement must include the competing activities, the territory where the restrictions apply and the third parties that would benefit from the competing activities performed by the employee.
• Sanctions: If the employee breaches the non-compete agreement, he/she may be required to repay the compensation received based on the non-compete agreement and to cover the damages incurred by the employer. A penal clause anticipating damages to be potentially incurred by the employer is not permitted in employment agreements, so to recover damages, the employer must initiate a court action against the employee and must prove the extent of the damages incurred.

Slovakia:
• Maximum term: One year as of the termination of employment.
• Compensation: The minimum statutory compensation is 50 % of the employee's monthly average earnings for each calendar month of the duration of the restriction (average earnings are to be calculated from the last calendar quarter and include bonuses, i.e. it is not only the monthly gross wage).
• Sanctions: The Parties may (but do not have to) agree on reasonable monetary compensation that the employee is obliged to pay in case of a violation of the non-compete obligation. The amount of monetary compensation must not exceed the total amount of monetary compensation agreed with the employer for the non-compete period and shall be reduced proportionately if the employee complies with the obligation only in part. The employee's obligation to not compete is terminated upon payment of such monetary compensation.

Slovenia:
• Maximum term: Two years as of the termination of employment. Concluding a post-termination non-compete agreement is only admissible in cases of (i) mutual termination, (ii) ordinary termination by the employee, (iii) ordinary termination by the employer due to culpability reasons on the side of the employee, or (iv) extraordinary termination by the employer (save where the employee refuses the transfer to another employer during a transfer of undertaking).
• Compensation: The minimum statutory compensation is 33 % of the employee's average monthly salary in the past three months prior to the termination of employment for the entire non-compete period. Market practices vary depending on the type of work and other circumstances; the amount is generally higher in case of leading employees (e.g. 70 % of the average salary). It is mandatory to state the amount of compensation in the employment agreement, otherwise the non-compete clause is null and void. Also, the employee is entitled to such compensation only if the non-compete agreement prevents him/her from gaining earnings that are comparable to his/her previous salary.
• Sanctions: Sanctions depend on the parties' agreement and may include: repayment of the compensation received based on the non-compete agreement; payment of damages and/or payment of a contractual penalty. Until recently, it was not clear whether the contractual penalty for non-compete breach may be agreed in the employment agreement and the case law in this regard was inconsistent. A recent Supreme Court decision confirmed that a contractual penalty for non-compete breaches can be agreed in the employment agreement and is not non-enforceable per se.

Turkey:
• Maximum term: Two years as of the termination of employment.
• Compensation: No statutory compensation amount is determined under Turkish Law. There is no market standard; the amount to be compensated by the employee is determined by the court, based on the position and financial power of the employee, and the actual damage incurred by the employer.
• Sanctions: Normally damages claims can be enforced, for which there is no upper limit. The employee is obliged to compensate all damages and losses of the employer. In addition, if the amount of the contractual penalty is explicitly regulated under the agreement, the employee will also be liable for the payment of that amount.

As this comparison shows, non-compete clauses are admissible in almost all CEE jurisdictions, but the regulations governing them (if any) and the practical implications differ significantly. For employers operating in the region, it is important to note that standardised solutions are not likely to work in all these jurisdictions. Our regional coverage and expertise allow us to help clients implement legally compliant solutions throughout the CEE region.

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08 real estate & construction

The Short Term Lifestyle

Is the future of Airbnb in Hungary boxed into a corner?

Kinga Hetényi | Adrián Menczelesz

While few would have predicted it just a short while ago, Airbnb's rapid expansion in the Hungarian short-term rental market may soon come to a halt. The reasons include new legal developments and a changing investment environment.

Airbnb has come under fire from market participants, who claim that the accommodation-sharing site does not have to deal with the same regulations as its competitors, i.e. hotels. Some investors are disappointed with Airbnb, either because their property was damaged or simply because the company did not fulfil their expectations. But the loudest criticism comes from neighbours, condominiums and communities.

In response, some municipalities, especially those in the inner districts of Budapest, have adopted stringent regulation applicable to Airbnb. One of the most popular districts, the Eighth District, amended its local townscape regulation. Pursuant to the amendment, unless a local condominium's bylaws explicitly allow the registered use of a given unit to be changed from "residential" to "temporary accommodation", such a change is not permitted. This may present a significant obstacle for Airbnb hosts, as in the absence of explicit permission in the bylaws, they may not be able to start their Airbnb business.

More and more condominiums are amending their bylaws to make Airbnb activity subject to notification of the general meeting of the home owners in the condominium or even to completely prohibit it. While prohibition may seem harsh and unlawful, the recent case law of the Hungarian Supreme Court has confirmed its legality.

The Supreme Court found that a condominium may prohibit or restrict other uses of units to ensure uninterrupted residential use. However, the general meeting of home owners in a condominium, as a quasi-authority, may not impose sanctions or penalties for breach of the bylaws or a resolution of the general meeting. Therefore, a general meeting of home owners in a condominium is not entitled to impose a fine on an Airbnb host, if the host failed to follow a bylaw or a prohibition instituted by the general meeting. To enforce compliance with the prohibition or restriction, the condominium may sue an Airbnb host. This may lead to a lengthy legal procedure during which it may be difficult for the condominium to prove that a certain unit was used for Airbnb purposes. The actual enforcement of a final court judgment prohibiting Airbnb activity may also be difficult. A bailiff will have to carry out an on-site investigation to determine the discontinuation of Airbnb activity. If the bailiff finds that an Airbnb host continues its activity despite the final court judgment, he will draw up a report and submit it to the court. The court may impose fines of up to HUF 500,000 (approx. EUR 1,500) on infringers.

A resolution of a condominium's general meeting does not have retroactive effect according to the respective case law of the Hungarian Supreme Court. Therefore, a host who started leasing his apartment through Airbnb before the adoption of a prohibition resolution may not be restricted or prohibited from continuing such services.

In light of the foregoing, a highly effective restriction on Airbnb or similar activity is not available to condominiums. However, a condominium can raise substantive impediments to investors, which alongside other regulatory requirements, may make this type of investment less attractive.

Hurdles for short-term apartment rentals

Peter Madl

> The essential matter for determining the existence of an accommodation contract is whether the landlord offers services which go beyond the mere provision of living space.

Neighbours and communities don't like it, but apartment owners love it, because they can multiply their income. Short-term rental to tourists or businesspeople who stay for just a few weeks is very controversial. Both courts as well as the legislative bodies of the Austrian provinces have found ways to restrict it.

Property owners are increasingly letting their apartments to people who come to Vienna only for a short period of time, as by doing so, they can earn many times the rent allowed under Austria's rather restrictive rent control rules. But many neighbours complain that such visitors can be messy or unruly, and have had the legitimacy of such rentals checked by the authorities.

Condominiums
In condominiums, the owners decide how each unit in the building will be used, e.g. for residential purposes, as offices, as a shop, etc. When defining a unit as residential in the condominium contract, owners generally have a narrower definition in mind. The possibility of changing to another manner of use is not a feature of the contract.
The Austrian Supreme Court has decided several times that a condominium owner may enter into a tenancy agreement, but that an accommodation agreement constitutes a change of the dedicated use that requires the prior approval of all other condominium owners. The decisive factor in distinguishing between a tenancy agreement and an accommodation agreement is whether the guest is offered certain services in addition to accommodation, such as cleaning and provision of bed linen and cooking utensils, and whether the agreed rent includes the costs of electricity, heating and water. The presence or absence of a trade licence (for hotels) is irrelevant. Therefore, the essential matter for determining the existence of an accommodation contract is whether the landlord offers services which go beyond the mere provision of living space. Whether the guest accepts typical additional services is less important. The reason why the additional services are offered is not decisive; the distinction is based on the mere fact that the landlord offers them.

In a condominium, any single other condominium owner may hinder the use of an apartment dedicated in the condominium contract for residential purposes on Airbnb or the like. If the condominium owner does not respect a judgment, he will be subject to penalties which might – in the case of persistent breach – also include imprisonment. However, the burden of proof that the condominium owner has breached the judgment lies with the party that obtained the judgment.

Tenants
If a tenant offers the apartment he is renting on Airbnb, he clearly does not need it for his (or his close relatives') living purposes and sublets the apartment as a whole. This constitutes a good cause for the landlord to terminate the lease agreement with the tenant.
Therefore, tenants put their lease agreement at risk if they offer the apartment on Airbnb, unless they have specifically rented the apartment for this purpose, which is typically not the case.

Building code
The City of Vienna has decided to amend the building code to avoid commercial use of apartments. Short-term commercial use for accommodation purposes such as Airbnb normally does not take place in apartments and is therefore not consistent with the "residential" zoning. This change in the building code also applies to house owners and to condominiums where all owners have consented to short-term letting. This legislative measure aims to ensure that there is enough rental space available for the inhabitants of Vienna. The bill was passed on 22 November 2018, but has not yet been published in the official gazette (as at 6 December 2018).
Other Austrian provinces are planning similar changes in their building codes, all aiming to secure living space for locals.

Bulgaria:
Welcome to Miami?

Elena Todorova | Dimitar Vlaevsky

"My parents didn't want to move to Florida, but they turned sixty and that's the law," Jerry Seinfeld once said. Now imagine replacing Florida with Bulgaria! Sounds weird? Maybe, for now,...

... but there are a few reasons why this could start to sound logical: the aging of the European population, the good natural, climatic conditions, and the trends on the Bulgarian real estate market.

How about some statistics?

In the European Union, almost one person in five is over the age of 65. This represents 19.4 % of the EU population – an "army" of nearly 100 million people.

According to Eurostat, by 2080 the share of people aged 80 or more should double and it is going to reach 13 % of the European population. Currently, for each person over 65 there are only three people of active working age (15 – 64). The Old Continent is in fact growing older and older.

But aging of the population is not unique to Europe. According to the World Health Organisation (WHO), the rate of population aging is increasing dramatically around the world. By 2020, the number of people aged 60 and more worldwide is expected to outnumber children younger than five.

The WHO has pledged to devote its efforts to developing systems for long-term care (including palliative care) that meet the needs of seniors. It is also working to develop age-friendly cities and communities, including a Global Network of Age Friendly Cities and Communities and an interactive information sharing platform called Age-friendly World.

Why Bulgaria?

We will not dwell on the fabulous natural scenery, pleasant climate and numerous mineral springs in Bulgaria. This information is available in almost every advertising brochure for the country. We will focus on the fact that Bulgaria's real estate market seems to be following the WHO's efforts.

After a boom in the construction of small family-run hotels, the present situation is not as happy as expected. Poor management, lack of experience, and competition from large hotel chains and new rivals like Airbnb have led to a crisis in the segment. Dozens of family-run hotels are up for public auction, unable to pay back loans or other debts. Even in the Black Sea resorts, small hotels are changing hands at bargain bin prices.

But specialists have detected an exciting trend in the Bulgarian market: an increased interest in properties such as old hospitals, small hotels or larger holiday houses that can easily be converted into hospices and centres for elderly care. Doing this is not complicated, and regulation is lax. So far, demand is mostly driven by Bulgarian expatriates wishing to secure care for their elderly relatives. The developers are mainly small groups of medical professionals who are buying up the properties and transforming them into eldercare facilities. The most desirable properties are located near Sofia or other big cities like Plovdiv, Veliko Tarnovo and Varna. Sometimes it is the last way to recoup on a bad investment.

Logical outcome

Years ago, Bulgaria became "the most desirable destination for living", according to British retirees. Today there are small communities of British, Dutch and even Japanese retirees who make wine, participate in golf tournaments or are engaged in other activities which they cannot afford at home.

Given the strong demand for eldercare centres, the duration of active life in Europe, and real estate market trends in Bulgaria, we may predict that it is not far in the future when the market will be dictated by the demand for suitable places for active social life for people beyond their working age.

Blue urban abstract,
Aqualoopa - Igor Chołda,
Warsaw, Poland

09 regulatory
New Trends in Technology Regulation

An article and inverview by Günther Leissler

Connectivity, algorithms, artificial intelligence… more and more digitalisation becomes part of our daily lives. What does this mean from a legal perspective - blessing or curse? Data protection expert Günther Leissler asks Univ Prof Dr. Nikolaus Forgó, Head of the Department of Innovation and Digitalisation in Law, University of Vienna, for his skilled view on the subject.


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6:00 pm
milk
milk
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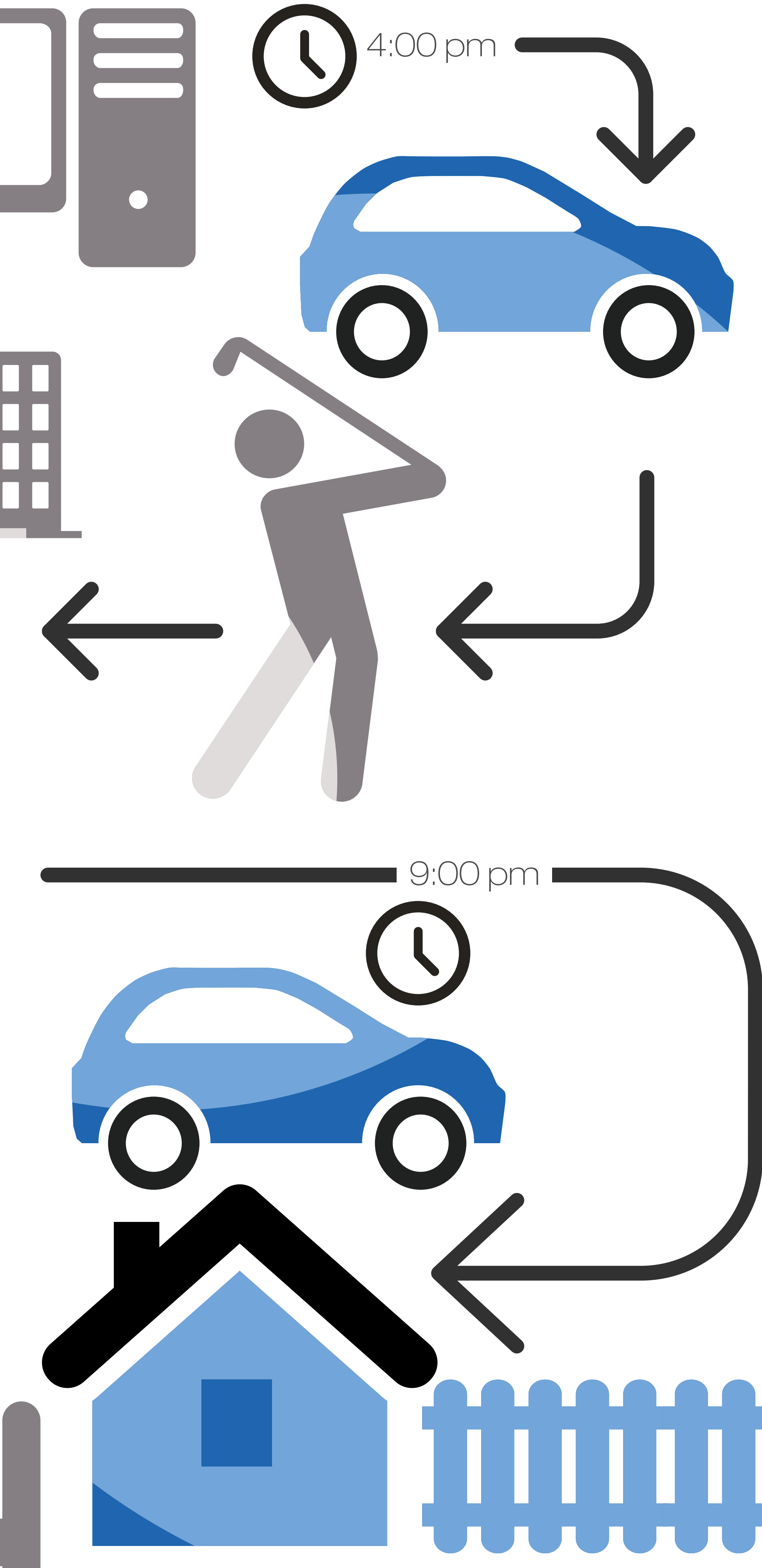


A day in the life
of Stacey Connected:

17 August 2020

- **8:00 am:** Stacey Connected leaves her house and heads off to work. The tracking sensor in her company car records her departure. On arrival at the office, she receives a message from her employer that her journey time has deviated from the predicted travel time. She is asked for an explanation and to make a note in her online business driving log.

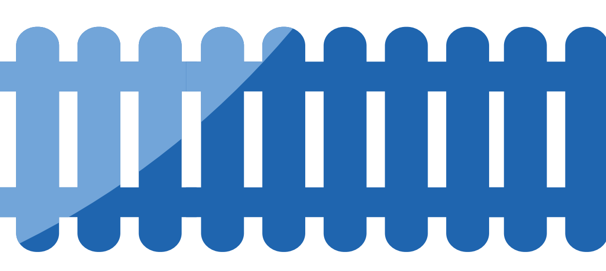
- **4:00 pm:** Stacey leaves the office earlier than usual. She has received a message from her bank's virtual fitness manager which, after having checked the vital parameters stored on her fitness watch, has suggested a round of golf to refresh her individual "body wellness zone".

- **6:00 pm:** Stacey must improvise. Her fridge has sent her an alert that the milk has expired. Before dinner she makes a quick stop at the supermarket and buys fresh milk.

- **7:00 pm:** Stacey is on her way to the restaurant. She is meeting her friend who recently became pregnant. Thankfully, the brand-new Facebook Community Manager is already available. Stacey proudly posts that she was the first to know about the pregnancy.

- **9:00 pm:** The refrigerator sends another report. It has double-checked Stacey's time of online payment against the day's temperatures and identified that the milk had remained unchilled for too long. The refrigerator tells Stacey that it will not accept the milk.

- **11:00 pm:** A shrill alarm from the fridge prevents Stacey from storing the milk. Meanwhile, the milk has indeed turned sour. Stacey has too.



Interview with Univ Prof Dr. Nikolaus Forgó, Head of the Department of Innovation and Digitalisation in Law, University of Vienna

Q: There is a tracking sensor in Stacey Connected's car. With this sensor, her employer records Stacey as soon as she leaves the house. The example shows: Digitalisation might increasingly lead to employers intruding in their employees' privacy. Do you think such an increase is realistic and do you see a need to make labour law "digitalisation-proof"?
A: I don't think labour law deserves particular attention here. Digitalisation creates plenty of new challenges in other areas of law too, such as consumer protection, intellectual property or data protection. Already today, the example of the tracking sensor would only be permitted under current data protection law if Stacey has provided her individual, informed consent.

Many companies are offering more and more services in addition to their core business. Stacey's bank provides a Wellness Manager, which means the bank receives health data of its customers. Do you consider such connectivity legitimate?
Such connectivity is widespread in many areas even today. We have surprisingly quickly become accustomed to business models based on "data in exchange for (seemingly) free services". These models are often based on consent. The GDPR has now established more rigid requirements – at least on paper – by stipulating in Art. 7 para 4 that consent is not to be regarded as voluntarily given if it is given for data processing not required for the contractual service. The meaning and scope of this prohibition to couple consent (Koppelungsverbot) is controversial; recently the Austrian Supreme Court expressed a very rigid view. But I predict that business models such as Stacey's "Wellness Manager" will remain legitimate. Nevertheless, an important legal and economic problem arises from the fact that such tools require enormous data resources, which often are not in the hands of European companies and this might prevent them from market entries. It may be necessary to respond with competition and antitrust laws.

Stacey's refrigerator guides her through her day, forming part of the Internet of Things (IoT) chain. Do you think such scenarios can be expected soon? If so, where do you see the main legal challenges?
Algorithms that take decisions out of our hands or at least influence them are already part of our lives. From Google Maps to shopping recommendations by Amazon, we have become accustomed to our decisions being automatically prepared and simplified. It's only a small step until automatic decisions will be made completely autonomously. This will lead to interesting legal questions, like who will have to take responsibility for damages caused by such systems. This can be the manufacturer (e.g. by amending the product liability law), the user, the owner, the injured party, or even the public. On the other hand, we must consider how much autonomy we want to grant such systems. It must be made clear, for example, whether and under what conditions a person can (and must) overrule machine-made decisions.

Stacey posts about her friend's pregnancy without her friend's knowledge. Is this a violation of privacy and of data protection laws?
Yes, of course. The posting means the publishing of Stacey's

History has proven that despite all distortions, technology and its developments have always been to humanity's advantage.

friend's sensitive personal data. We have known for 20 years that data protection law makes this generally inadmissible, also thanks to one of the first decisions of the European Court of Justice on data protection law (C-101/01, Lindqvist). At that time, it was about a broken leg, not a pregnancy, but the ECJ's considerations are equally if not even more applicable to Stacey's posting.

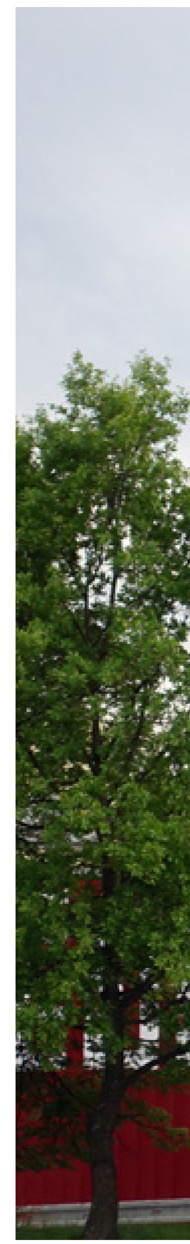
Stacey's refrigerator does not accept the milk she bought. How do you think it should be handled if intelligent devices do not cooperate but block each other?
This will probably have to be decided on a case-by-case basis, primarily against the background of (pre)contractual duties of care. However, I do not expect fundamental problems here, as such questions can be compared with already existing situations of conflicting general terms and conditions – and the legal solutions in place for such conflicts.

Stacey's refrigerator detects that she has not properly handled her milk while she was on the move. From the supermarket's perspective, such a piece of information potentially helps in rejecting warranty claims. Although this example refers to an everyday purchase only, it underlines the value that IoT data could have in the future. Do you think future legal disputes will revolve around the disclosure of data?
The economic importance of data, including raw data, is certainly increasing – so you are right when generally referring to "information". However, in light of the increasing economic value of such information, one should not mistakenly conclude that new legal concepts have to be created, such as data property rights, or even ask for the ABGB to be amended. Questions like who will enjoy legal protection – and why and to what extent – require complex considerations to ensure overall fair use of information. You shouldn't try to solve them hastily. Not least since much of what we are now discussing can be solved with already existing legal instruments.

At the end of the day, despite all the technology that supposedly makes her life easier, Stacey gets annoyed. In your opinion, is digitalisation a blessing or a curse?
Without doubt, a blessing! We have been given useful tools to increase our efficiency, our ability to communicate, and our autonomy. What remains is to use them in a thoughtful manner. History has proven that despite all distortions, technology and its developments have always been to humanity's advantage. Why should it be different this time?

Thank you for the interview.

Surprise,
ETAM, Sofia,
Bulgaria



Koloběh (Circulation),
Chemis, Prague,
Czech Republic

Urban Jungle, Miron Milić, Lubljana, Slovenia

10 tax
Tax Structuring - The Impact of the EU Anti-Tax Avoidance Directive

Tax intermediaries to disclose potentially aggressive tax arrangements to tax authorities


Roman Perner | Marco Thorbauer

On 25 May 2018, the Council adopted a directive forcing tax intermediaries or taxpayers to report aggressive cross-border tax planning schemes to the tax authorities, which may exchange such information with other tax authorities within the EU. The Directive is to be implemented by 31 December 2019 and is applicable from 1 January 2020.

The Directive amends Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation. This step is one of many at the EU level to increase tax transparency, including the automatic exchange of information on financial accounts, advance cross-border tax rulings and country-by-country reporting of multinational enterprises.

Who?
Intermediaries or the taxpayers themselves have to report cross-border arrangements to the tax authorities. Intermediaries are persons that design, market, organise, make available for implementation or manage the implementation of a reportable cross-border arrangement. These include tax advisors, accountants, lawyers, financial advisors or others who provide tax advice. Member States may opt to exclude certain intermediaries from the reporting obligation due to a legal professional privilege (e.g. confidentiality of tax advisors and lawyers). In this case, the intermediaries must notify other intermediaries or the taxpayer about their own reporting obligation. In case intermediaries are not involved (in-house tax schemes) or may not be held responsible (due to a professional privilege or a non-EU intermediary), the taxpayer itself must report the arrangement.

What?
A reportable cross-border arrangement is one with a cross-border element that contains at least one listed hallmark indicating a potential risk of tax avoidance. The general guideline for such hallmarks is whether the main benefit (or one of the main benefits) derived from an arrangement is the obtaining of a tax advantage ("main benefit test").

Generic hallmarks (Category A):
(i) agreed confidentiality in regard to the arrangement and its tax advantage;
(ii) fee amounts that relate to the tax advantage; and
(iii) standardised arrangements for more than one taxpayer.

Specific hallmarks (Category B):
(i) tax loss utilisation arrangements;
(ii) income conversion arrangement schemes; and
(iii) round-tripping of funds arrangements.

Other specific arrangements contain – in certain cases irrespective of meeting the main benefit test – per se a potential risk of tax avoidance due to a tax advantage. Such arrangements are related to cross-border transactions (Category C) based on:
(i) deductible cross-border payments not being sufficiently taxed in the hands of the payment recipient (profit-shifting to low-tax jurisdictions);
(ii) double deductions on the same asset in more than one jurisdiction;
(iii) double taxation relief of income or capital in more than one jurisdiction; and
(iv) value mismatch in regard to the compensation for the transfer of assets.

Other arrangements may be used to (Category D):
(i) circumvent automatic exchange of information rules regarding financial accounts; or
(ii) avoid the identification of beneficial owners through the use of offshore letterbox companies or similar intransparent structures.

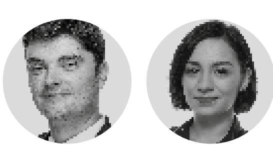
Arrangements may also concern transfer pricing issues by (Category E):
(i) using unilateral safe harbour rules;
(ii) involving the transfer of hard-to-value intangibles between associated enterprises;
(iii) involving an intragroup cross-border transfer of functions, risks or assets resulting in the transferor reducing its projected annual EBIT for a three-year period by more than 50 %.

How?
The intermediary, or alternatively, taxpayers themselves are obliged to file information that is within their knowledge, possession or control on reportable cross-border arrangements with the competent authorities.

When?
The filing has to be made before its implementation, within 30 days at the earlier of the availability, readiness or first step of implementation.

Penalties are for the Member States to decide, but must be effective, proportionate and dissuasive.

Cryptocurrency in Romania. A go or a no-go?



Theodor Artenie | Anamaria Tocaci

In Romania, authorities are yet to create the legal framework that would regulate the taxation of activities related to cryptocurrency. This legislative gap leaves plenty of room for tax avoidance, as even the most well-intentioned taxpayers lack the tools to understand what taxes they need to pay in relation to their cryptocurrency trading.

What are the risks of trading cryptocurrency?
In 2013, the European Banking Authority ("EBA") issued an official warning, highlighting the risks of holding and trading virtual currency. The risks were related to the fact that no authority regulates cryptocurrency. However, one interesting point concerned taxation. Although not in the EBA's area of expertise, the matter comprised two different perspectives: tax on capital gains and value added tax.
Two years after the EBA's warning, the European Central Bank ("ECB") also issued a report on virtual currency schemes that analyses all layers of this "ecosystem". The report centres on the drawbacks cryptocurrency presents for users, which are all based on the apparent lack of transparency, clarity and continuity.

What is the Romanian authorities' position on cryptocurrency?
Subsequent to the EBA warning and the ECB report, the Romanian National Bank issued an official communication stating that any form of virtual currency shall not be considered either a national or a foreign currency and that the Romanian law on electronic currency does not apply to cryptocurrency.
In 2018, the Financial Supervisory Authority issued at least three warnings about the exchange rate risk associated with

the high volatility and the high risk of investment fraud derived from the lack of transparency.

Due to the absence of any regulations, the lack of transparency of the transactions, the apparent anonymity of the players involved in this "ecosystem" and the constant exclusion from all known forms of currency – along with the delayed and insufficient reaction of the banking and financial institutions in Romania – the Romanian tax authorities are not comfortable with the idea of listing the associated tax risks.

Many advisors have stated their opinions, and the similarities are few and far between. In this context, an official position from the tax authorities would be welcome. However, the reluctance of the tax authorities is unlikely to diminish until the source and nature of virtual currencies is better understood. At this point, regulation is not on the horizon.

What do investors need to know about cryptocurrency taxation in Romania?

Although the business environment has proposed amendments of the tax law to the Romanian tax authorities as regards cryptocurrencies, there is still increasing scrutiny from all types of regulatory bodies in Romania.

In the absence of specific provisions, some specialists have adopted the idea that proceeds from cryptocurrency trading should be treated and taxed as capital gains. Others have stated that without clear regulation – and considering the tentative positions adopted by the Romanian regulators – a more reasonable approach is to tax only income from the sale of cryptocurrency as "income from other sources". Obviously, paying tax on income is far less convenient for the taxpayer than paying tax on profit (i.e. a sale at a loss would result in tax, without the possibility to deduct any expenses, such as the acquisition price).

As far as the VAT treatment of activities related to cryptocurrency is concerned, this question will remain unanswered until Romanian regulators (tax and otherwise) decide how to deal with cryptocurrencies and how to qualify them.

In case C-264/14, on the tax treatment of cryptocurrencies, the Court of Justice of the European Union ("CJEU") ruled on the correct VAT treatment for exchange services performed by a trading platform in favour of its clients. The CJEU found that the commission fees were indeed remuneration for the supply of services within the meaning of the VAT Directive, but ruled that these services were exempt from VAT by virtue of Art. 135(1)e of the VAT Directive, which deals with currency-related transactions. This obviously contradicts the position of the Romanian National Bank.

So what is the VAT treatment of activities related to cryptocurrency?

To attempt an answer to this complicated question, it is first important to distinguish between (i) cryptocurrency mining and trading, and (ii) cryptocurrency exchange services.

When one starts mining for bitcoin, one naturally engages all manner of costs (i.e. electricity, mining rigs, software) for the obvious purpose of generating bitcoins that can later be exchanged for goods and services or turned into cash (in the conventional way). It is reasonable that whoever engages in such an enterprise will be a (VAT) taxable person carrying out a business activity. The second question is if the output of this business activity is subject to VAT or is exempt.

For the time being, the above CJEU ruling provides a reasonable approach to exchange services and related fees, i.e. that the respective fees are exempt from VAT without credit. However, we expect the practice to expand and become more nuanced depending on the nature of the tokens being exchanged for cash.

On the other hand, the actual disposal of the cryptocurrency by the person mining it or by the person who had previously acquired the tokens (i.e. trading it for cash or using it to pay for goods and services), raises the following questions, which for the time being remain unanswered: Is the trading for cash a VAT-taxable supply of services, considering how the CJEU released its ruling in case C-264/14 by saying that cryptocurrencies are not securities? Is the trader required to charge VAT on the price of the tokens? Does the exchange of tokens for goods and services qualify as a barter for VAT purposes or as payment?

What's next?

Cryptocurrencies are closely monitored by the Romanian authorities, especially in the current context of increased efforts at the EU level to ensure fair and effective taxation. Moreover, the lack of clear rules may lead to a loss of income for the Romanian public coffers, as many people will see to take advantage of the legislative void concerning the taxation of cryptocurrency, while others will face great obstacles when seeking guidance on how to apply the correct tax treatment.

“The reluctance of the tax authorities is unlikely to diminish until the source and nature of virtual currencies is better understood. At this point, regulation is not on the horizon.

The Interest Limitation Rule under the Anti-Tax Avoidance Directive

Clemens Grassinger | Eugen Maresch

ATAD and BEPS:
In 2016, the European Union adopted the Anti-Tax Avoidance Directive ("ATAD") to combat "aggressive tax planning" as part of the Anti-Tax Avoidance Package. Article 4 of the ATAD includes an Interest Limitation Rule ("ILR") based on the recommendations set forth in Action 4 of the OECD's Base Erosion and Profit Shifting ("BEPS") project.

Article 4 of the ATAD

Under Article 4 of the ATAD, exceeding borrowing costs of corporate taxpayers (entities subject to corporate income tax in an EU Member State) are deductible in the tax year they incurred up to 30 % of the taxpayer's earnings before interest, tax, depreciation and amortisation (EBITDA). However, up to EUR 3 million of such costs remain fully deductible. For the purpose of the ATAD, "exceeding borrowing costs" is defined as the amount by which the deductible borrowing costs of a corporate taxpayer exceed taxable interest revenues and other economically equivalent taxable revenues that the taxpayer receives according to national law.

Aim of Article 4

The main goal of the ILR is to prevent groups of companies engaging in BEPS through excessive interest payments by limiting interest deductibility. That way it should no longer be possible to shift borrowing costs to high-tax countries (to reduce the taxable profits) while at the same time shifting profits to countries with low tax rates.

Calculation of EBITDA under ATAD

Article 4 para 2 of the ATAD provides a calculation mechanism for EBITDA using amounts that are adjusted for tax purposes. These amounts differ from the amounts determined for accounting purposes.

Carry-forward / Carry-back

EU Member States may implement different regimes to carry forward and/or back exceeding borrowing costs which cannot be deducted in the current tax year. Since Austrian tax law generally does not provide carry-back options, Austria is likely to choose a carry-forward option when implementing the ATAD.

Effective date

Member States must implement the ATAD's interest limitation rules into domestic law by 31 December 2018 at the latest, so that they are effective from 1 January 2019. Countries that already have national rules that prevent BEPS and are equally effective to the ATAD's ILR, may delay implementation until 1 January 2024.

Situation in Austria

Austrian tax law currently prohibits the deduction of interest and royalty payments made to group companies in low-tax countries, i.e. ones with an effective tax rate lower than 10 % (sec 12 para 1 no 10 of the Austrian Corporate Income Tax Act – "CITA"). While the Austrian provision only applies to payments made to affiliated companies, the ATAD covers payments made to external companies as well. As Austria considers this prohibition to be of equal effect to the ATAD's ILR, implementation of Article 4 may – subject to the European Commission's pending approval – be delayed until 2024.

Possible changes to Austrian legislation

The prohibition on the deduction of interest and royalty payments under the CITA also covers situations where low taxation is achieved by way of a tax deduction or tax refund. Despite such payments being generally non-deductible, they can still be deducted retrospectively in case no tax reduction or refund took place within five financial years after the payments were made, irrespective of a tax deduction or refund taking place after that five-year period. In order to impede tax abusive structuring, this period will soon be extended to nine years.

ATAD and fundamental freedoms

The ATAD allows EU Member States to introduce exceptions to the ILR, where the taxpayer is part of a group. This exception applies to domestic groups only, which may lead to the adoption of national laws contrary to the fundamental freedoms of the EU, especially the freedom of establishment. It remains to be seen how national laws implementing this exception will be interpreted by the CJEU.

"The main goal of the ILR is to prevent groups of companies engaging in BEPS through excessive interest payments by limiting interest deductibility.

Single EU VAT area. Are you ready?


Theodor Artenie | Alexandra Barbu

The biggest reform of the EU VAT rules in a quarter century is on its way. The current VAT system, which is outdated, will be reviewed, impacting businesses performing intra-Union cross-border trade.

The EU's VAT system needs reform. Every year, EU countries lose up to EUR 50 billion due to cross-border VAT fraud, significantly damaging EU state budgets. The new system is expected to reduce cross-border VAT fraud by around 80 %. At the same time, simpler and clearer VAT rules and procedures will be put in place to reduce costs and red tape for EU companies trading across borders. The principle of the new rules is that domestic and cross-border transactions of goods will be treated in the same way so as to create a robust single European VAT area.

It all started in October 2017, when the European Commission proposed a series of fundamental principles and key reforms for the EU's VAT area, with the aim to improve and modernise the current VAT system. The Commission proposed four "Quick Fixes" to improve the day-to-day functioning of the current VAT system until the definitive regime is fully agreed and implemented. Ultimately, several fundamental principles or "cornerstones" for a definitive VAT regime will be implemented. The Commission also recommended introducing the concept of a "Certified Taxable Person".

Certified Taxable Person

The concept of the "Certified Taxable Person" ("CTP") is to distinguish between reliable and less reliable taxpayers involved in intra-Community trade or in call-off stock arrangements. CTP status would be granted by applying to the national tax authorities and will be mutually recognised by all EU Member States. Although the proposal defines certain guidelines regarding the conditions required for granting CTP status, Member States might have different views in defining the actual conditions, which may lead to administrative complications.

The four "Quick Fixes"

This set of short-term measures is meant to improve the functioning of the current VAT system and address issues requested by both businesses and EU Member States, namely:

1.The simplification of VAT rules for companies storing goods in different Member States to be sold directly to customers there (i.e. "call-off stock arrangements"). This simplification will apply if the transaction takes place between two CTPs, in which case the supplier will no longer need to register and pay VAT in another Member State when they store goods there.

2.The simplification in determining the exempt supply in a chain of transactions which do not involve the physical movement of goods, for example when goods are sold via several traders, but physically the goods move directly from the original seller to the final buyer. More specifically, rules will be put in place for ascribing the transport made by or on behalf of one of the intermediate suppliers in the chain, either (i) to the supply made for that intermediate supplier under certain conditions or (ii) to the supply made by the intermediate supplier to the next operator in the chain. This simplification applies only if both the intermediate supplier and the person who supplied the goods to it are CTPs.

3.New harmonised and uniform rules so that traders can more easily provide proof that goods have been transported from one EU country to another for the application of the exemption to intra-Community supplies. Namely, a list of eight means of evidence of the transport or dispatch is introduced, of which at least two items of non-contradictory evidence must be in the vendor's possession. This simplification is limited to CTPs.

4. Clarification that, in addition to the proof of transport, the VAT number of the commercial partners recorded in VIES is a "substance" condition and is required to apply the cross-border VAT exemption under the current rules.

Cornerstones

1. The charging of VAT on cross-border trade between businesses meaning no more VAT exempt intra-Community supplies from the Member State of departure.

2. One Stop Shop: companies that sell cross-border will be able to make declarations and payments using a single online portal in their own language and according to the same rules and administrative templates as in their home country.

3. The principle of taxation at destination for intra-EU cross-border supplies of goods, based on which the VAT rate of the Member State of destination is charged.

4. The confirmation that generally, the seller should charge and collect VAT on intra-EU supplies of goods, at the rate of the Member State of destination.

5. Less red tape: invoicing rules regarding EU trade will be simplified, as these will be governed by the rules of the seller's Member State.

One thing is clear: the VAT reform is set to benefit honest businesses, governments and end consumers, targeting fraudsters who currently exploit the existing VAT rules.

To get there, action needs to be taken in 2019, when taxable persons need to make sure they observe the new rules regarding the "Quick Fixes" and the possibility to apply for CTP status.

Implementation of the EU Anti-Tax Avoidance Directive (ATAD; EU 2016/1164) into Austrian and Romanian Law

Authors: Roman Perner | Marco Thorbauer | Clemens Grassinger | Anamaria Tocaci

General Remarks

Background: On 12 July 2016, the Council of the EU agreed on a directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD I). On 29 May 2017, the Council adopted ATAD II. The ATAD directives are a result of the OECD's BEPS (Base Erosion and Profit Shifting) project and the CCCTB (Common Consolidated Corporate Tax Base) proposal.
Scope: The ATAD applies to all taxpayers subject to corporate income tax in one or more EU Member States, including permanent establishments of third-country resident entities within the EU ("Company").
Transposition: In principle, the ATAD must be implemented in national legislation by 31 December 2018. However, this deadline has been extended in certain cases (see below).

ATAD Articles

Art 4 Interest Limitation Rule

This provision deals with the deductibility of interest and is basically divided into two parts:
Para 1: Excess borrowing costs are deductible only up to 30 % of the Company's EBITDA.
Paras 2 – 7: These paragraphs regulate exceptions and supplement para 1 (e.g. calculation of EBITDA, the right to deduct excess borrowing costs up to EUR 3 million). Therefore, the Member States have a high degree of flexibility in implementation.

	Austria	**Romania**
National implementation	Partially implemented by Section 12 Para 1 No 10 of the Austrian Corporate Income Tax Act ("CITA")	Fully implemented by Art 40^2 of Law 227/2015 regarding the Fiscal Code ("Fiscal Code")
Entry into force	Austria has equally effective targeted rules The (complete) implementation of Art 4 into Austrian law is required by 1 January 2024 at the latest	1 January 2018
Practical implications	Art 4 extends the scope of non-deductibility of excess borrowing costs	New Chapter III^1 of the Fiscal Code Replaces the former thin capitalisation rules Threshold for unlimited deductibility of excess borrowing costs of EUR 200,000 Limited deductibility of excess borrowing costs within 10 % of EBITDA These low thresholds are currently under debate in the Romanian Parliament and might be increased

ATAD Articles

Art 5 Exit Taxation

The aim of Art 5 is to prevent companies from avoiding tax when relocating assets. Therefore, each Member State is allowed to tax the economic value of any capital gain created in its territory, even though that gain has not yet been realised at the time of the exit. "Exit" means the transfer of tax residence, assets or a permanent establishment to another country.

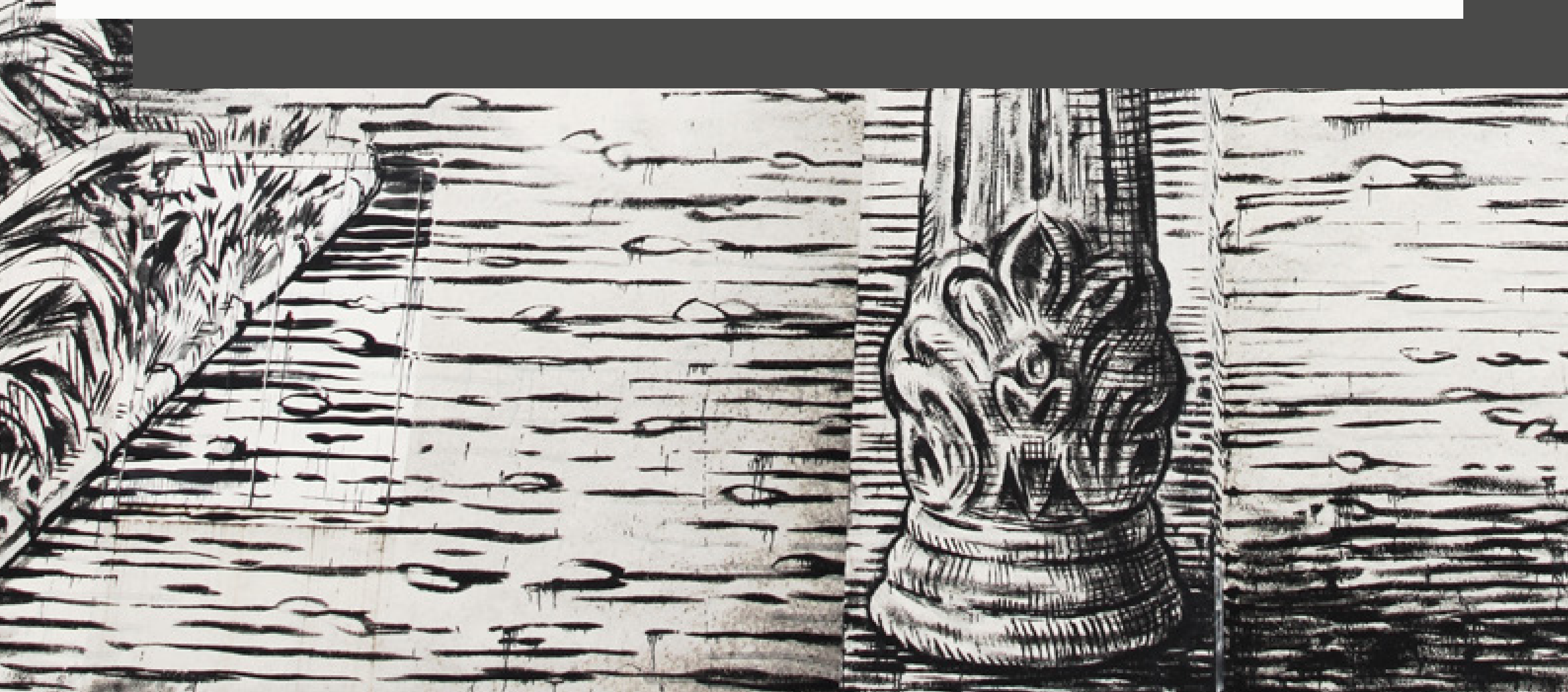
	Austria	**Romania**
National implementation	Section 6 No 6 of the Austrian Income Tax Act ("ITA") Amendment of Section 6 No 6 lit d of the ITA by reducing the instalment period for fixed assets from 7 to 5 years	Art 40^{3} of the Fiscal Code Observance of the Fiscal Procedure Code requirements for benefiting from a 5-year instalment period
Entry into force	Amendment of Section 6 No 6 lit d of the ITA by 1 January 2019	1 January 2018
Practical implications	Under the Tax Amendment Act 2015, the instalment payment concept (Ratenzahlungskonzept) replaced the non-assessment concept (Nichtfestsetzungskonzept) which was applicable in Austria until 31 December 2015 It has therefore not been possible since 1 January 2016 to avoid taxation of hidden reserves in the event of exits, whereas the instalment period for fixed assets is reduced from 7 to 5 years by 1 January 2019	New Chapter III1 of the Fiscal Code The request for instalment payment is conditional upon the taxpayer providing securities (bank guarantees, mortgages, etc.) equal to 100 % of the amount of the tax liabilities so deferred

ATAD Articles

Art 6 General Anti-Abuse Rule

Art 6 provides a general (EU-wide) anti-abuse rule targeting artificial tax-abusive structures. For the purposes of calculating the Company's tax liability, arrangements with the main purpose of obtaining tax advantages shall be ignored.

	Austria	Romania
National implementation	Amendment of Section 22 of the Austrian Federal Fiscal Code ("FFC")	Art 40^4 of the Fiscal Code
Entry into force	15 August 2018	1 January 2018
Practical implications	Implementation and reflection of Higher Administrative Court case law Special arrangements must have a valid economic reason and reflect economic reality Stricter understanding of the term "abuse": • Previously required: tax avoidance as sole purpose • Now sufficient: tax avoidance as essential/main purpose	New Chapter III^1 of the Fiscal Code Romania had equally effective targeted rules which gave the tax authorities the right to disregard a transaction having no economic purpose based on the substance over form principle Other domestic provisions aimed at safeguarding a higher level of protection for domestic corporate tax bases: • 50 % withholding tax in Romania (instead of the standard 16 %) for income paid in a state with which Romania has not concluded a treaty for the exchange of information and where the payment is deemed to be related to an artificial transaction • non-compliance penalty for undeclared or under-declared tax obligations which are assessed by the tax authorities following a tax audit (approx. 29 % per year)



ATAD Articles

Art 7/8 CFC Rule

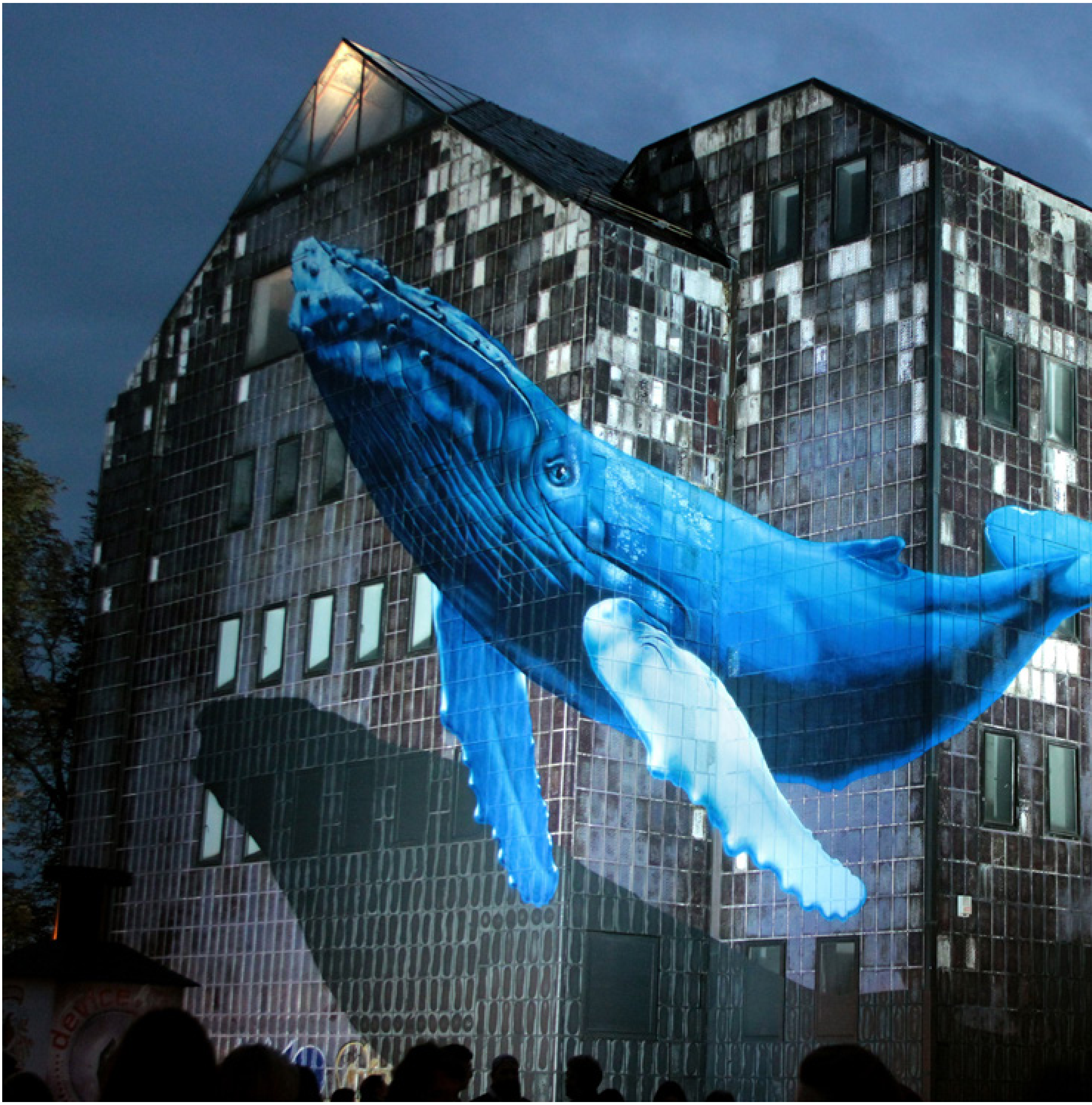
Art 7 and 8 set out detailed rules in relation to controlled foreign companies (CFC), aiming at attributing profits of controlled foreign companies and permanent establishments that are low-taxed or tax-exempt in a Member State to the controlling company. Income covered by the CFC rule includes interest, royalties and dividends as well as income from financial activities.

	Austria	**Romania**
National implementation	Section 10a CITA	Art 40^5 of the Fiscal Code
Entry into force	1 January 2019	1 January 2018
Practical implications	New Section 10a CITA Low taxation of a CFC defined as effective taxation not exceeding 12.5 % Decree setting out further details to be issued by the Ministry of Finance The income of the foreign company must be calculated in accordance with domestic regulations and compared with the effective taxation abroad	New Chapter III^1 Fiscal Code Low taxation of a CFC defined as effective taxation not exceeding 8 % Although implementation instructions for the application of the ATAD are available, there are no clarifications for this particular anti-avoidance measure

Art 9 Hybrid Mismatches

Art 9 tackles hybrid mismatches, ie the exploitation of differences between tax systems to achieve double non-taxation resulting in base erosion. The provision eliminates such hybrid mismatches by allowing only one Member State to grant a tax deduction.

	Austria	**Romania**
National implementation	Not yet implemented	Not yet implemented
Entry into force	1 January 2020	1 January 2020
Practical implications	Legislation based on the OECD's recommendations concerning hybrid mismatches (BEPS Action 2) expected Limitation of aggressive tax hybrid mismatches	Further guidance expected



Blue Whale, Étien, Zagreb, Croatia

Ricardian contracts: A smarter way to do smart contracts?

Jurij Lampič

Smart contracts – self-executing pieces of computer code recorded on a blockchain – have been accused of being neither smart nor contracts. Ricardian contracts revisit contract automation from a different angle, potentially benefiting issuers of financial instruments, parties to derivatives, banks, and beyond.

1 Ricardian Contract 101 – Contract-as-Software

A Ricardian contract can be described as a legal contract whose provisions are recorded in both:

- legal prose written in natural language (English, German, Slovenian, etc.; what lawyers usually produce when asked to draft a contract); and
- structured language readable by computers (which will resemble a programming language; also referred to as "controlled legal natural language").

Please visit www.schoenherr.eu/publications/roadmap/ for an example.

A contract created by this drafting technique is thus readable by both humans and machines. A Ricardian contract should generally be legally enforceable, but will also lend itself to analysis by and interaction with software. A Ricardian contract can (but need not) be recorded on a blockchain, where it will stand as a "single version of the truth."

Sounds great, but why bother? Turn over and refer to frame.

From dead paper to Contract-as-Software: use cases and benefits of the Ricardian approach

1. (Semi-)automated execution / on-click performance of obligations:
- the contract is directly connected to and can manipulate (i) enterprise software controlling payments and accounting, (ii) banks' payment systems; and (iii) asset title and commercial registers;
- the loan contract repays itself (under normal conditions), periodically drawing upon data from the repayment schedule and base interest rate data feed to calculate the margin.

2. Streamlined contract management / parties know what to do at any point of the contract's lifecycle:
- the contract is not (only) a written document, but resembles a software application with user interface for performance, administration and interpretation ("Contract-as-Software");
- alerts parties ahead of milestones or deadlines;
- selective permissions for users to interact (only) with certain provisions, in line with the organisational structure.

3. Easier interpretation / ask the contract what it means:
- the user can ask a contract to create its lifecycle timeline, identify all possible scenarios (a scenario tree), create lists (e.g. "list all conditions precedent", "show all documents required at closing"), etc.;
- interconnection with other Ricardian contracts: answers the question "does this contract conflict with other contracts my company is party to?";
- hovering over a definition instantly reveals its meaning.

4. Simplified compliance / contract interacts with courts and regulators:
- the contract can be plugged into regulators' systems for regulatory reporting obligations or to monitor compliance in real time;
- courts can be granted "judicial override" over the contract, enabling them to reverse transactions or void the contract entirely – "Ricardian judgments";
- interconnection with "Ricardian legislation" – contractual provisions adapt on the fly if relevant legislation changes.

All the above may in turn result in reduced administration, compliance, performance, interpretation and enforcement costs and increased transaction security.

2 Smart contracts vs. Ricardian contracts

For clarity, this article distinguishes between the concepts of Ricardian and smart contracts and considers the latter a computer code deployed on a blockchain which performs a predetermined action upon the satisfaction of predetermined conditions. How, then, do they differ?

2.1 Is a smart contract smart?

Smart contracts are – at least in technical circles – sometimes perceived as superior to the old-fashioned paper variety on the grounds that they are
- immutable: contractual terms cannot be changed once the contract deploys on a blockchain, meaning a party cannot falsify the terms to defraud the other; and
- self-executable: contract performance is automated (pre-programmed). The contract performs what it was told to do when it was drafted (e.g. sends funds to an address on a specified date) without the need for any human action.

Among lawyers, however, these features are bound to raise eyebrows. Take self-executability (immutability may pose a lesser problem). A smart contract will only "self-execute" in the manner that was coded into it at its inception. As such, it cannot reliably regulate for every conceivable scenario which may arise in a sophisticated long-term commercial relationship. "Classic" contracts thus resort to using non-discrete fuzzy terms such as "best effort" obligation, "good faith determination" or stipulating that "consent shall not be unreasonably withheld." These terms may irritate coders but strike a reasonable balance between predictability of counterparty performance and future flexibility. Smart contracts cannot reliably interpret such nuances and consequently remain limited to a very narrow set of use cases (e.g. parametric insurance).

2.2 How are Ricardian contracts smarter?

The Ricardian approach has its cake and eats it too. The drafter can apply just the right degree of automation appropriate for the contractual term in question:
- some (probably few) clauses may be drafted as self-executing (maybe considering an "oracle" data feed), unless overridden;
- other clauses will require humans to interpret and act upon them, but their performance may still be digitised (on-click).

In short, the Ricardian approach realises that contracts can benefit from technology without simultaneously becoming mindless automatons which follow only pre-coded instructions. Self-executability is not a necessary feature of contract automation.

3 Looking ahead

Ricardian contracts, while showing promise, face two key challenges:
- need for standards and infrastructure; particularly the development of a common standard for "controlled legal natural language" will drive adoption; accordingly, governments and private actors (banks, payment systems providers) need to establish infrastructure to realise the full benefits (see use cases above);
- acceptance by courts and legislation: A Ricardian contract is readable by humans (and thus judges) by design. However, certain features may require backing by case law and legislation, e.g. equivalents of the statutory principle of reliance on a public register in some jurisdictions.

Please visit www.schoenherr.eu/publications/roadmap/ for an expanded version of this article with reference materials and sources.

Data Processing Agreements – allocation of liability between parties


Costin Sandu | Carla Filip

Under the GDPR, every data controller that processes personal data through a data processor must conclude a GDPR-compliant data processing agreement with the processor. Parties may seek to negotiate the allocation of liability and shift it towards the other party. When doing this in Romania, we look at the interplay with the rules of the main forms of liability set out in the law.

According to the GDPR, anyone who has suffered material or non-material damage from an infringement of the GDPR is entitled to ask for compensation from the controller or processor. Controllers are fully liable, while processors are liable only for damage caused by their failure to comply with legal obligations or where they acted outside of or contrary to the controller's instructions. Controllers and processors are jointly liable.

Parties will always be interested in reducing or containing their liability. Controllers will not hesitate to pass on liability to their counterparties via contractual provisions, though it remains to be seen whether contractual liability allocation clauses can be applied. While Romanian law allows them, generally, liability for damages caused intentionally or due to gross negligence generally cannot be waived. A contractual limitation or exclusion of liability towards data subjects or public authorities would in any case not be acceptable in practice.

Rules of allocation

Liability for misdemeanours and for violations to the law is personal and cannot be transferred. The same is true for liability for tort. In this case, controllers would be deemed liable for the actions of the persons that they supervise and control (processors usually fall into this category). However, this does not mean that the financial impact of the liability cannot be allocated to the other party contractually. A processor that does not follow the controller's instructions would be responsible for an offence and would take on the entire financial burden of the respective liability. This also applies, in a slightly different way, in circumstances of liability for tort. It also should be valid for processors that do not observe their obligations under the GDPR. It can further be argued that a processor that does not observe its legal obligations (other than those provided for in the GDPR) should assume the financial liability for this failure and the ensuing loss or damages caused to the controller as contractual indemnity to the controller. It is worth investigating if these limits can be pushed even further. Parties can rely on their contractual freedom to establish a more onerous liability regime for one of them, within the limits set out above on damages caused intentionally or out of gross negligence.

Liability clauses in practice

Practice is as yet not very developed. Liability provisions in data processing agreements range from general, standard liability clauses (which must be interpreted for enforcement against the liability allocation rules in the GDPR) to clauses expanding on the processor's liability as described above. We have also seen cases where the data processor caps its liability towards the controller, meaning the controller will not be able to recover the entire damage/fine paid as a result of the processor's actions. Of course, such protection is not bulletproof. If the breach is due to gross negligence or intention, the limitation will not apply.

Some other liability clauses provide that the processor will reimburse the controller for any third-party claims and for any official sanctions as a result of the processor's actions. This may be extensive and could be rendered inapplicable.

Enforcement of liability allocation provisions

Parties to data processing activities will be held jointly liable for damages caused by their processing. Contracts are enforceable and take effect only between the signing parties; therefore, third parties (i.e. data subjects, the data protection authority) cannot be bound by liability clauses agreed by the controller and data processor. Controllers may only request reimbursement of damages paid from the processor. In case of litigation, controllers may request that the processor be a party in the litigation process and the court may eventually oblige the processor to pay damages or fines, relying on the contractual provisions allocating liability.

The Polish Act on Cybersecurity – initial remarks

Daria Rutecka

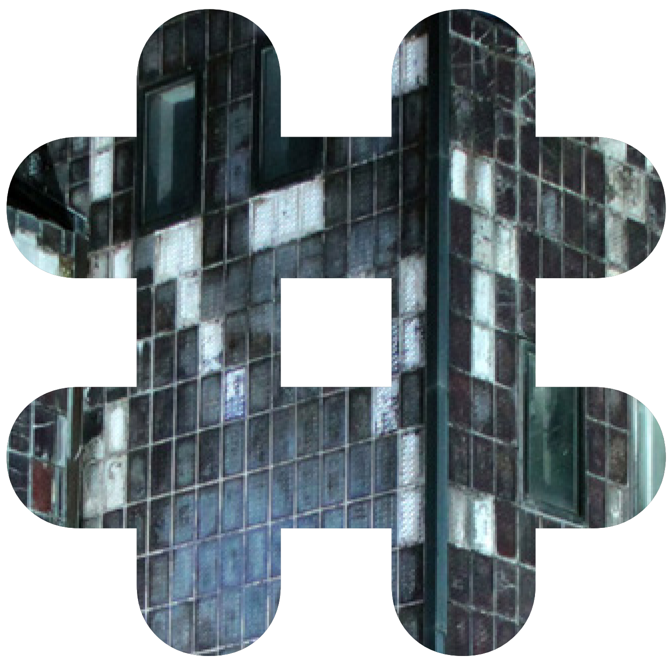
The European Parliament adopted the very first EU-wide legislation on cybersecurity, the Directive on Security of Network and Information Systems (the "NIS Directive"), in June 2016. Theoretically, all Member States had time to implement it into national laws by May 2018. However, some countries, including Poland, encountered certain issues with the implementation, which caused the European Commission to intervene. Then, on 5 July 2018, the Polish Parliament adopted the Act on National Cybersecurity System (the "Act"), which finally entered into force on 28 August 2018.

In light of its main objective, i.e. creating a national cybersecurity system, the Act focuses on a clear and precise distribution of tasks and obligations, as well as ways to prevent and minimise the effects of attacks and threats infringing cybersecurity in Poland. The cybersecurity system consists of national and local government institutions and the biggest entrepreneurs active in key economy sectors. The NIS Directive's provisions are reflected in the Act, which mentions for example (i) the operators of essential services (e.g. the biggest banks, energy companies, air and railway undertakings, ship-owners, hospitals, etc.); (ii) providers of essential services (such as online trading platforms); and (iii) competent authorities. According to the Act, the computer security incident response teams will exist in three Polish institutions: the Internal Security Agency, the Research and Academic Computer Network (NASK), and the Ministry of National Defence. It is not clear at this point whether any other, more sectoral, incident response teams will be created. Keeping in mind the degree to which economic sectors can differ from each other, as well as the necessity to exchange information between EU Member States, the creation of such teams is highly anticipated.

The Act provides for a number of important dates related, for example, to considering a certain entity as an operator of essential services. The competent authorities were under an obligation to issue relevant decisions granting certain entities the status of an operator of essential services by 9 November 2018. This date was also the final deadline for applying to the Ministry of Digital Affairs with a request to enter the identified operators on the official list. On the other hand, the Ministry of Digital Affairs was obliged to inform the European Commission about the list of essential services, as well as their operators. This ministry is also responsible for preparing a cybersecurity strategy for Poland, which should be ready by 31 October 2019.

A good step in the direction of regulating cybersecurity issues and threats in Poland was the obligation to appoint a national (government) cybersecurity representative, whose tasks are aimed at coordination and pursuit of government policy towards the ensuring of cybersecurity in Poland. So far it is difficult to tell whether such representative will indeed have any real power, as its main obligations focus on reporting and commenting on certain security issues. The fines which may be imposed for cybersecurity infringement are restricted to particular amounts, the biggest of which is PLN 1 million (approx. EUR 233,000). This fine may be imposed for infringements which directly and seriously threaten national security and defence.

One of the questions experts have already raised is whether the goals, assumptions and expectations related to the Act will be fully achieved. The Act provides for a fairly tight budget for 2019 – 2027, which may lead to difficulties even in allocating the money into certain projects. The Act is not the only piece of legislation implementing the NIS Directive. Soon it will be accompanied by several additional regulations, which hopefully will help fill in the legal loophole in Polish cybersecurity. Practice will show whether the Act, together with other legal provisions, will be a successful move in striving to improve the level of cybersecurity protection in Poland.



Cybercrime

Serap Aydin

ne #Malware #Ransomware #Phishing
data #Cyberattacks on the German B
vernment authorities #Executive Boar
of EUR 15 million for inadeq

Reports of cyberattacks are increasing rapidly. Companies are falling prey to cyberattacks, data is being compromised, and sometimes companies must halt operations altogether. Just as unpleasant is the issue of executive liability. Has the managing director acted carelessly and must he be held accountable?

How do hackers repeatedly penetrate company systems? Hackers usually select their victims deliberately and launch a targeted attack at a specific company. Technical measures can help, but corresponding processes must be set up in order to react quickly and correctly to an emergency. The legal framework is somewhat vague, however, and can be summarised as follows:

1. The General Data Protection Regulation ("GDPR") and the Data Protection Act ("DSG") stipulate that entrepreneurs must implement technical and organisational measures to ensure IT security, such as pseudonymisation and encryption (Art 32 GDPR). Ultimately, however, companies decide what measures are actually taken. In principle, fines or penalties are directed at the company (Art 83 GDPR, Section 62 DSG), pursuant to Section 9 VStG in conjunction with Section 30 DSG, but can be imposed on the managing director instead of the company. It's also worth remembering that the GDPR and the DSG apply only to personal data processing.

2. On the other hand, the EU Directive on security of network and information systems ("NIS Directive") also prescribes security measures. Here, the concept of "measures" is vague as well. The NIS Directive requires certain "operators of essential services" to take appropriate IT security measures to minimise the security risks for network and information systems, and to manage specific incidents accordingly. These operators are also obligated to report significant disruptions. As operators of essential services, the Directive (and the draft NisG) identifies public or private entities in the energy, transport, banking, financial market infrastructure, healthcare, drinking water supply and digital infrastructure sectors. Also affected by the Directive are digital service providers (online marketplace, online search engine and cloud computing services).

The Directive also requires Member States to set proportionate and dissuasive penalties for infringements. According to the draft report, a fine of up to EUR 50,000 can be imposed for violations of the NisG. Repeat offences can be fined up to EUR 100,000.

Section 14 of the draft NisG stipulates that the Federal Chancellor must identify operators of essential services with a subsidiary in Austria. It therefore remains to be seen which companies will be affected by the NIS Directive or the NisG.

3. Irrespective of the application of the aforementioned laws, liability may also arise in the event of a breach of organisational duties, including IT compliance. A managing director of a GmbH must exercise due managerial care in the performance of his duties (Section 25 GmbHG). If he violates this obliga-

tion, for example by neglecting to introduce adequate IT compliance, he may be liable for damage. In principle, a liability claim only arises in the case of unlawful and culpable damage, i.e. the general conditions for damages under civil law must be fulfilled. Even in the case of slight negligence, damage resulting from successful cyberattacks can result in the managing director being liable to the company. In principle, the company must prove that it has suffered damage because of certain conduct (act or omission) by the managing director. However, if there is an objective violation of due diligence, fault is presumed to have been caused by it, meaning that the burden of proof shifts to the managing director. A comparable standard of due diligence is also provided, for example, for members of the executive board of a limited company (Section 84 AktG).

Since even the most modern security measures do not offer absolute security against cyberattacks and the technical implementation of the legal requirements is at the discretion of the individual company, giving rise to a liability risk, the introduction of an appropriate IT compliance system also includes:
(i) technical standards, such as ISO standards, to guide the adequacy of technical and procedural measures;
(ii) cyber-insurance, for example covering claims for damages due to a breach of data protection or confidentiality or claims for damages due to inadequate network security, limiting the economic impact of a claim; and iii) contractual transfer of risks to counterparties (outsourcing providers).

The introduction of corresponding IT compliance, which also takes the risks of cybersecurity into account, is an absolute must.
An amendment to the Administrative Penal Code (BGBl I 2018/57) provides some relief. From 1 January 2019, fault is no longer presumed by law if the administrative offence is subject to a fine of more than EUR 50,000 (future Section 5 para 1a VStG). This leads to a reversal of the burden of proof. The authority will have to prove the fault of the company or its manager(s). Furthermore, in accordance with Section 371c GewO, the principle of "consulting instead of punishment" is included in the VStG (future Section 33a VStG). The authority will have to call for the establishment of the lawful condition if (i) the fault, (ii) the significance of the legal interest protected under criminal law, and (iii) the intensity of the impairment of the legal interest protected by the offence are low in each case. Initial experience in connection with Section 371c GewO, which came into force in July 2017, can be gained by the Tyrol Regional Administrative Court (LVwG Tirol, 23 August 2018, LVwG-2018/15/0903-6).

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3undestag #Hackers attack US go-
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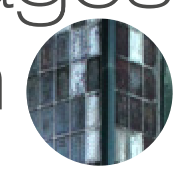
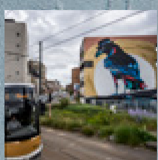
quate compliance organisation 

An overview of murals highlighted in this roadmap per jurisdiction.

brussels, belgium



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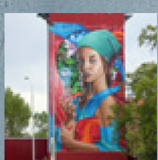
prague, czech republic



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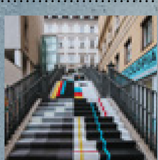
vienna, austria



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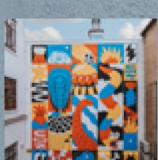

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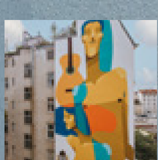

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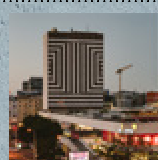
bratislava, slovakia



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ljubljana, slovenia

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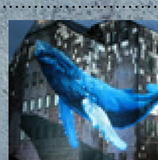
zagreb, croatia



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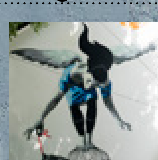
belgrade, serbia



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warsaw, poland
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sofia, bulgaria
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istanbul, turkey
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When art and streets collide:

An interview between Schoenherr's Guido Kucsko and Calle Libre mastermind, Jakob Kattner

Q: Tell us a bit about who you are and what Calle Libre is.
A: My name is Jakob Kattner, I am an independent curator, musician, and the creative mastermind behind the Street Art Festival "Calle Libre" in Vienna (www.callelibre.at).

How would you define street art, and when did it become popular in Vienna?
It is quite difficult to define street art as t here is a very thin line to its related art forms – graffiti and urban art. I think you could say it is a (sometimes illegal) form of appropriation within the public space, using it for art production in any form. It doesn't have to be letter-based but could also be portraits, figurative depictions, posters, 3D objects, installations, adbusting.

Please give us some insight into Zësar Bahamonte's piece featured in this year's roadmap.
You can easily recognise the work of Zësar. His expressive colours and the depiction of his unique characters make him an outstanding representative of the Spanish street art scene. Not only does he design imagery for T-Shirt collections and limited screen-print editions, but also works on exhibitions. Oscillating between Uruguay and Spain, he often travels to participate in festivals. On his wall at Ludwig Hirsch Park, he has painted an homage to Gustav Klimt and Egon Schiele depicting two figures simulating Schiele himself with one of Klimt´s muses.

What can you tell us about the development of street art in CEE?
I haven´t been in the CEE countries that much yet, but I know that they have a very big and strong scene. It is of course massively influenced by the socialist regime and sometimes references old socialist realism.
Right now, we are planning a project in Kiev and I think there is a lot of potential for commenting on socially relevant situations through art, like the current crisis in the Ukraine.

What are the rules in place between street artists as far as where and when they can paint?
There are some unwritten rules that all street artists know, but this doesn't mean they all follow the rules. Normally you are not allowed to paint over someone's painting. Except in the instance where a person paints over your art work, then you are basically allowed to repaint over the art covering your initial work, and you are also allowed to paint over other paintings by this same person. If you want to paint over an older piece, you always have to ask the artist, or be a better artist than he is.

Do street artists usually release their work to the public domain, or do they enforce their copyright when the work is used by others (e.g. as a background for promotion photos)?
There are many Street Artists nowadays who release their artworks through social media or digital platforms. Often the artworks have a short longevity therefore through digital outlets they can be conserved and documented for the future.
I know of a case where a famous international fashion company used a graffiti backdrop for one of their advertisements and were sued by the painter and were ordered to pay him damages. Street Art is often used for promotional use by companies, sometimes even ripping off existing designs from streets. I guess sometimes artists don´t even know about it.

Murals have broadened the public's access to art. What does Calle Libre have in store for us this year?
In 2019 we will have the involvement of artists from CEE, of course there will be many Live Paintings throughout the city, workshops, film screenings and a Guided Street Art Tour. For the first time we will present a book showing the best Street Art walls from the last five years.

Thank you for the interview.

> Normally you are not allowed to paint over someone's painting. Except in the instance where a person paints over your art work, then you are basically allowed to repaint over the art covering your initial work, and you are also allowed to paint over other paintings by this same person.

Jakob Kattner about Street Art unwritten rules

Opposite page:
Jakob Kattner and Guido Kucsko face to face at the Amon Stiege in Vienna by Romanian artist "Lost.Optics".

credits

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Murals

Vienna, Austria
Artist: SADDO (saddo.ro)
Photographer: Jolly Schwarz | Calle Libre (www.callelibre.at)
cover and pages 24, 28, 32, 33, 34, 36

Artist: Zësar Bahamonte (zesarbahamonte.blogspot.com)
Photographer: Jolly Schwarz | Calle Libre (www.callelibre.at)
pages 4, 5, 6, 7, 8, 9, 70, 77, 78, 80, 81

Artist: Lost.Optics (lostoptics.ro)
Photographer: Jolly Schwarz | Calle Libre (www.callelibre.at)
pages 10, 11, 12

Brussels, Belgium
Artist: Sozy-One (www.sozyone.com)
Photographer: Eric Danhier
pages 64, 65

Sofia, Bulgaria
Artist: ETAM (www.etamcru.com)
Photographer: Simeon Noev
page 98

Zagreb, Croatia
Artist: Étien (www.etien.fr)
Photographer: Étien
pages 110, 111, 115

Prague, Czech Republic
Artist: Chemis (www.chemisland.com)
Photographer: Chemis
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Budapest, Hungary
Artist: Cekas (Łukasz Berger, cekasone.blogspot.com)
Photographer: András Farkas & Színes Város | Colorful City (www.szinesvaros.hu)
pages 44, 45, 46, 54, 55

Artist: Carlos BreakOne (Mesterházy Károly)
Photographer: András Farkas & Színes Város | Colorful City (www.szinesvaros.hu)
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Chisinau, Moldova
Artist: Dmitrii Potapov
Photographer: Andrian Guzun
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Warsaw, Poland
Artist: Aqualoopa (Igor Chołda, aqualoopa.com)
Photographer: Tomek Kowalski (tomekkowalski.com)
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Bucharest, Romania
Artist: Obie Platon (obieplaton.com)
Photographer: Obie Platon
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Belgrade, Serbia
Artist: TKV (globalstreetart.com/tkv)
Photographer: Nemanja Maraš
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Bratislava, Slovakia
Artist: Jakub Markech (www.jakubmarkech.com)
Photographer: Jakub Markech
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Ljubljana, Slovenia
Artist: Miron Milić (www.behance.net/Bezum)
Photographer: Urška Boljkovac
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Istanbul, Turkey
Artist: DEIH (www.eldeih.com)
Photographer: Ulaş Olkun
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Photographer Johannes Kerschbaummayr
(www.johanneskerschbaummayr.com)
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