



schönherr

roadmap20

A vertical yellow pleated curtain occupies the left side of the page, casting a warm orange glow onto the light grey background.

together

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 or artists each year. This year we worked with several artists from **Atelier10**, which is part of the cultural centre Brotfabrik Wien, which runs an art studio and gallery.

ATELL



ER





Michael Lagler | Schoenherr Managing Partner

It is Schoenherr roadmap time again and this year **Together** is the theme.

Our 2020 edition brings an extended array of legal expertise including 2019/20 practice area reviews and forecasts; expert interviews; and more.

In the spirit of abundance, I am proud to report that we opened a new Schoenherr office in Linz in 2019. Adding to our already strong regional footprint, this addition is a sign of Schoenherr's strength and the successes we have achieved. These can only be attributed to the hundreds of talented individuals working together across the region, each unique, but sharing the Schoenherr spirit.

The richness that flows from individuality in a common space, is something that is also apparent when considering the art chosen this year. From the portfolio of several artists working in a common space at the **Atelier10** art gallery in Vienna, we juxtapose works of different artists which reflect similarities despite the work having been created alone. See pages 60 to 63 to get a snapshot of this studio, the intriguing work being produced there, and the notion of togetherness being created there.

Whether in law, in art, or in life, working together in-sync opens people to being more innovative. Schoenherr is a firm of innovation. Our lawyers and business professionals shape the firm and its future while upholding the integrity of the Schoenherr name throughout the region. It is an honor to lead such talented people. In 2020 we will continue to focus on providing the best legal advice to our clients, while upholding our values.

I wish you a successful year of meaningful change and hope you enjoy reading our roadmap20! I am sure you will find it engaging.

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01

banking, finance & capital markets



cee overview

by Matei Florea

Balancing opportunities and challenges together

The CEE/SEE banking & finance market was quite busy in 2019 and we expect continued strength in 2020, with several areas standing out. Our banking, finance & capital markets practice has kept on growing across the CEE/SEE region and we are deeply grateful to our clients for the opportunities they have offered us and to our teams for their efforts in pursuing projects to successful closing.

Bank/FIG consolidation activity looks set to continue at an accelerated pace, as several projects started in the region in 2019 or are expected to launch in 2020, including in Austria, Hungary, Poland, Romania, Serbia, Slovakia and Slovenia. Most deals refer to banks and payment services platforms, but insurance, finance leasing and debt/asset management targets also seem to be coming to market. As NPL ratios have dropped significantly and investor focus has shifted to Italy and Greece (where NPL stocks still appear to be high), we believe a few NPL portfolio transactions are still in the pipeline across CEE/SEE for 2020, especially in Croatia, Hungary, Slovenia and Serbia, while Romanian deals depend on changes to the fiscal regime being reversed.

Distressed assets and restructuring projects became more complex (if not more frequent) in 2019 and we believe both complexity and numbers/volumes will grow in 2020. This trend will be driven by recent or anticipated legislative changes both on the EU (e.g. Restructuring Directive) and national levels (e.g.

changes to insolvency legislation introduced last year in Bulgaria and those awaited in Hungary) and looming market adjustments. Overall debt restructuring work, including direct lending from PE/VC funds and other alternative lenders, kept us busy in 2019 and we see room for more growth in this area in 2020, especially in the construction, automotive and transport industries.

Regulatory work also continued to grow in volume and diversify in substance, which we expect will also be the case in 2020. The main drivers include changes in EU legislation (e.g. concerning personal data protection, net security, payment services, common EU rules on securitisation, the new Prospectus Regulation, the Shareholder Rights Directive II and the Benchmark Regulation), but also major internal reorganisation projects launched by strategic players pursuing digitalisation and increased efficiency across the FIG sector. Consumer lending and related regulatory and litigation work (in particular as regards CHF loans, ECJ case law developments and investor protec-

tion arbitration/litigation) also picked up last year and looks set to continue in 2020. Brexit related advice, focusing mostly on contingency planning, was a constant in 2019 and, as our roadmap20 goes to print, we are looking forward to discovering how the Brexit situation will develop in January 2020 and thereafter.

In strong correlation with the regulatory developments, **FinTech start-ups and ever more complicated IT projects for the FIG industry** gained importance in the overall work-mix throughout the region. Be it development/change and implementation of new operating systems or the introduction of new platforms/apps, our IT contracts specialised lawyers, together with the data protection & start-ups teams, which started growing at an accelerated pace a few years ago, now have a strong practice in the FIG market in CEE/SEE, and we anticipate sustained growth in this area in 2020.

Equally, **lending** remained a busy area for us last year. We saw both bank and direct/PE lending, with an increasing

Implementation of EU Restructuring Directive – room for policy decisions?



Vid Kobe

The clock for implementation of the Restructuring Directive has started to tick, and we expect that – at least in those EU Member States where no preventive restructuring framework is available yet – restructuring specialists employed with credit institutions will be invited to express their views in the context of national legislative proceedings.

number of cross-border transactions, as well as local mandates across various industries, and we anticipate this trend will continue in 2020.

Looking forward to 2020, it is clear that the market, as well as our practice will face opportunities as well as challenges. In both respects we firmly believe that close cooperation, i.e. working together across practice areas and across jurisdictions, is more important than ever. Delivering efficient services that are based on innovative tools and legal tech solutions is our best bet to making opportunities prevail over challenges. As readers will discover from roadmap20, we are successfully applying legal tech solutions in a variety of areas, including project management, which has significantly improved efficiencies for clients and the overall work environment/experience for our teams.

As such, I am quite optimistic that **together** we will welcome both opportunities and challenges in 2020, efficiently servicing clients and keeping our teams happy for yet another successful year.

The Restructuring Directive¹ leaves several important matters up for determination by Member States – some of which are close (or tantamount) to policy decisions. For instance:

- the 'likelihood of insolvency' and 'viability' (i.e. benchmarks qualifying a debtor for access to a preventive restructuring framework) could, in principle, be defined either (A) in substantive/corporate finance terms (e.g. by reference to a liquidity or balance sheet test), or (B) procedurally/by reference to business judgment (demonstrated e.g. in the form of support to the opening of a preventive restructuring proceeding expressed by a sufficient quantum of affected lenders); in terms of policy choices, the first option would appear to favour legal certainty and predictability and the second would translate into increased flexibility;
- similarly, when defining the scope of 'restructuring measures' (i.e. changes to the composition of debtor's assets/liabilities which become binding on the debtor and the relevant stakeholders if supported by the requisite majority), the national legislator will likely face a trade-off between (A) introducing a broad toolbox – addressing the unpredictable nature of restructuring scenarios – and (B) ease of execution (as complex measures may require substantive involvement on the part of court/public authority);
- also, when imposing mandatory involvement of 'gatekeepers' (national courts and/or administrative authorities), and crafting the confidentiality regime applicable to preventive restructurings, the national legislators will pivot between (A) the wish to preserve general market transparency, and (B) the need to minimise disruption to the business of the debtor seeking to resort to a preventive restructuring (which may result from unwanted negative publicity prompted by e.g. the requirement that the opening of a preventive restructuring process must be made public).

Helpfully, some experience in this respect is already available in the region: certain Member States have – ahead of adoption of the Restructuring Directive – implemented similar (or functionally equivalent) regimes. We invite readers to take a look at the [snapshot in the insolvency and restructuring section].

¹ 'Restructuring Directive' means: Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132

Acquiring businesses out of insolvency across CEE/SEE: Better together?

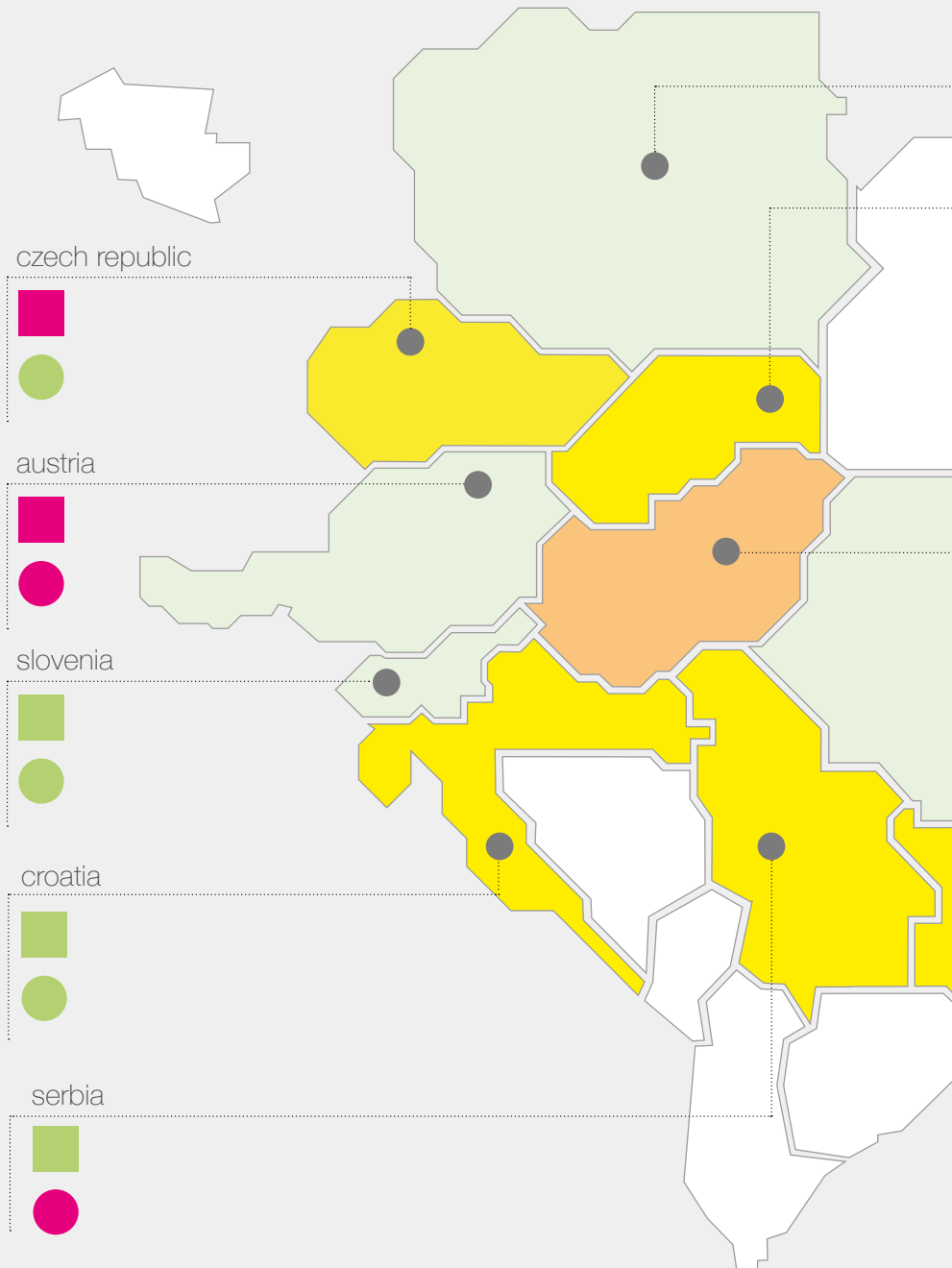
Authors

Simsa Miriam, Cizek Vladimir, Kobsa Ozren, Kobe Vid, Hekelova Sona, Szaloki Gergely, Lefter Denis, Kojdic Petar, Armasu Iustin, Krumov Tsvetan, Radwański Daniel

While insolvency usually has a negative connotation, it may also be a chance to consolidate an industry and learn from past mistakes. Put simply: are we better together?

Insolvency: Business transfers in CEE/SEE – same, but different!

The opening of insolvency proceedings always has a big economic effect on the debtor's business. The legal framework for continuing the sale of a business out of insolvency varies throughout CEE/SEE. Generally speaking, following the opening of insolvency proceedings the debtor's business (in case it is profitable) will be continued and an administrator will be appointed who may sell it. The sales process is structured as an asset deal, as the administrator usually cannot sell the shares in an insolvent company. But the devil is in the details.



Key

1.

Are there any strict deadlines for how long the business can be kept open?

NO

YES

2.

Do employees transfer automatically?

NO

YES

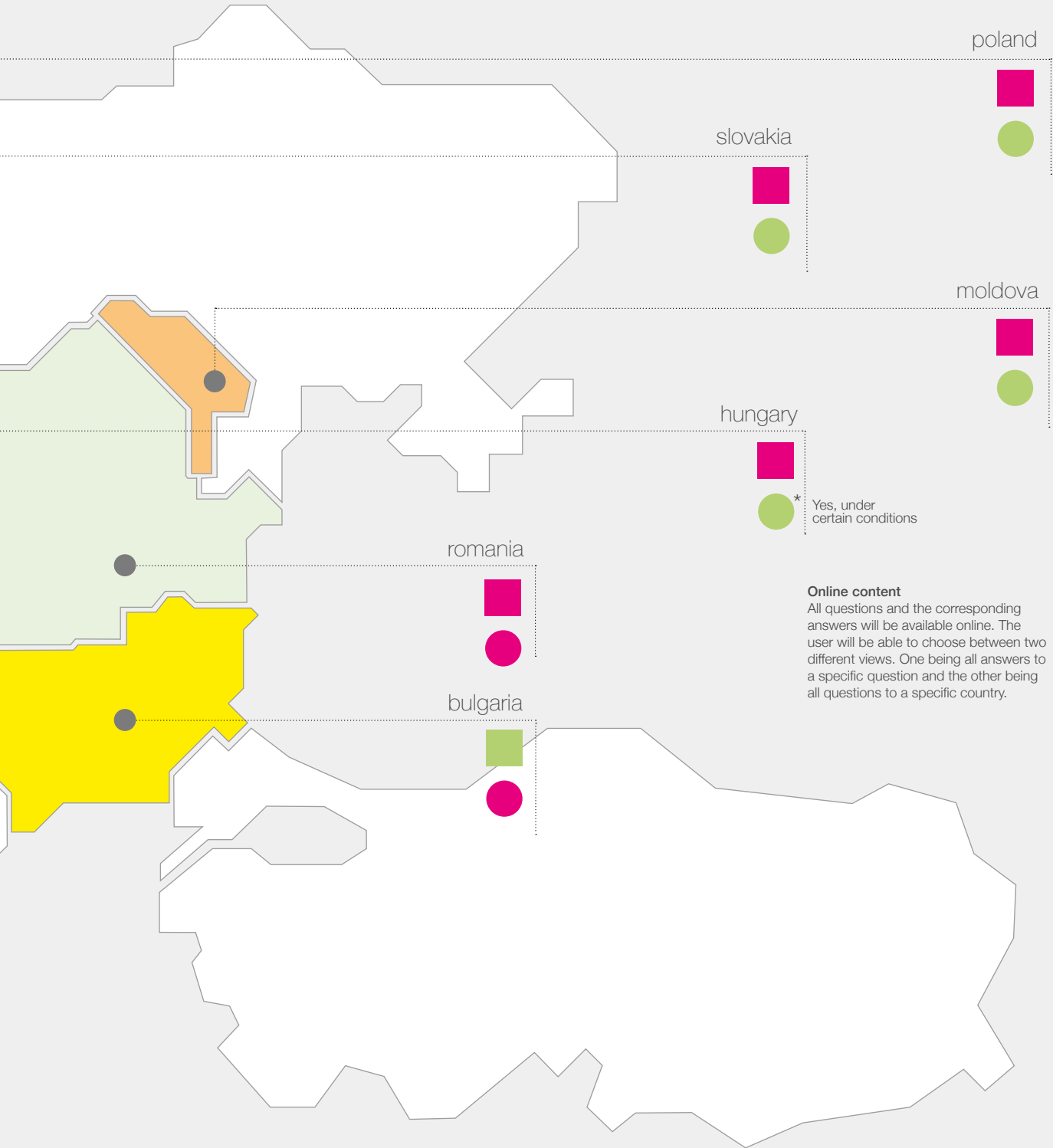
Colour of countries on map

frequency of business transfers in insolvency proceedings

Common

Uncommon

Very rare



Online content
All questions and the corresponding answers will be available online. The user will be able to choose between two different views. One being all answers to a specific question and the other being all questions to a specific country.

Making things easier for issuers on capital markets: Turning points in prospectus rules



Narcisa Oprea, Vlad Sandulescu, Marcin Antczak; including quote from Bucharest client MedLife – CEO Mihai Marcu

To facilitate company access to financial markets, the European Commission completed its action plan for a gradual building of the capital markets union in 2019. Most actions focused on breaking down barriers blocking cross-border investments. As part of these measures, starting mid-2019, new rules governing prospectus drafting became effective. Among others, the new paradigm lays the groundwork for easier access for issuers and improved investor protection.

Background

For 15 years, transactions involving offerings of securities to the public or admission to trading on EU securities markets were carried out in line with EU Directive 71/2003 on the prospectus to be published when securities are offered to the public or admitted to trading ("Prospectus Directive") and EU Regulation 809/2004 implementing EU Directive 71/2003 regarding information, format, incorporation by reference and publication of prospectuses and dissemination of advertisements ("Initial Prospectus Regulation").

The varied practice created in those years by transactions under the EU prospectus regime revealed many areas where legal flexibility was needed or more complex rules required to clarify or amend how such transactions were conducted.

In 2017, the European legislator enacted EU Regulation 1129/2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market ("New Prospectus Regulation"). This new EU prospectus regime was created to further standardise the preparation, format and content of prospectuses. The EU legislator also published two delegated regulations in 2019 supplementing the New Prospectus Regulation, i.e. EU Regulation 980/2019 and EU Regulation 979/2019 ("Supplementing Regulations"). These bring helpful technical standards to be ob-

served when drafting a prospectus.

While certain provisions of the New Prospectus Regulation came into effect in 2017 or 2018, most entered into force on 21 July 2019, as did the Supplementing Regulations. On that date, the Prospectus Directive and the Initial Prospectus Regulation were fully repealed.

All provisions of the new EU prospectus regime are directly applicable in all EU Member States, with no need for implementing legislation

Introducing the universal registration document

The main changes introduced last year are related to prospectus summaries, risk factors and new prospectus formats to be used for secondary issuances or by issuers which are small and medium-sized enterprises.

Of all the novelties under the new EU prospectus regime, one seems to be the most issuer-favourable. Issuers whose securities are admitted to trading on a regulated market or a multilateral trading facility may every year prepare a universal registration document ("Universal RD") describing the issuers' organisation, business, financial position, governance and shareholding structure. An issuer that chooses to prepare a Universal RD every financial year will have to submit it for approval to its home state competent authority. After having a Universal RD approved by the competent authority for two consecu-

tive financial years, the issuer can file subsequent Universal RDs without prior approval.

Justifiably, the EU legislator considered it reasonable to assume that after two consecutive years an issuer becomes well-known to the competent authority. Thus, it would also be reasonable to assume that subsequent Universal RDs or any amendments should be allowed to be filed without prior approval and should be reviewed only ex-post if the competent authority considers it necessary.

This new regime readjusts and extends the legal regime of debt issuers which have bond programmes in base prospectus format and where, when needed, only final forms are additionally issued for each issuance under the programme.

Why would an issuer choose to use a Universal RD?

First, this Universal RD regime should speed up the process of preparing a prospectus and should lower the economic burden of issuers by facilitating access to capital markets in a cost-effective way. Thus, issuers can prepare a Universal RD without the pressure of drafting a prospectus in a very limited timeframe for a specific transaction where the issuer incurs considerable costs for third-party advisors.

In case of a Universal RD, the issuer may take its time during the year to prepare such a document. Only if it de-

Securitisations in CEE

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cides to carry out a transaction will it then acquire resources for the additional workload, which will be fewer, since it already has the Universal RD prepared. Thus, the issuer can keep relevant information up-to-date and can have the whole documentation readily available when market conditions become favourable for an offer or an admission to trading just by adding a securities' note and a summary to the Universal RD.

Also, issuers who prepare a Universal RD are expected to benefit (at least in theory) from a faster approval process, since a substantial part of a prospectus has either already been approved or is already available for review by the competent authority in the form of a Universal RD.

In addition, the Universal RD should act as a valuable reference source on the issuer, because it would offer investors additional information to make an informed judgment on the respective issuer's situation. This additional current disclosure will also be attractive to analysts, thus giving the issuer an upper hand in valuation and market image.

The issuers' view

"The universal registration document saves time and money. If the issuer has a universal registration document in place, it means that 80% of a rights' issue legal documentation is prepared upfront and ready to use when needed. Consequently it is easier for an issuer to make use of the capital markets opportunities. " – said Mihai Marcu, the founder and CEO of MedLife, Romania's largest private healthcare services provider. MedLife shares have been listed on the Bucharest Stock Exchange ("BVB") since 2016, when the company carried out the biggest IPO of a private company on the BVB to date.

Securitisations in Central and Eastern Europe were not particularly active before or after the financial crisis in 2008. Some local originators did recognise securitisation as a potentially useful balance sheet management tool and transactions have been occasionally executed in Austria, the Czech Republic, Hungary and Poland. The financial assets that are typically securitised on these markets are consumer loan receivables, lease receivables (including auto leases, leasing), NPLs and trade receivables. In other CEE jurisdictions, however, securitisations practically never kicked in.

The adoption of Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 did not have much impact on the CEE securitisation markets so far. Still, the Regulation is rather new and its effects will only be seen in the coming years. Perhaps the intention of the Regulation to create a framework for simple, transparent and standardised securitisation will at some point be acknowledged in CEE, rousing securitisation from its current slumber. Before this happens, we have set out on a journey through the CEE to discover how some of the key features of securitisation are treated. The results of our inquiries are presented in our online version of roadmap20 here www.schoenherr.eu/publications/roadmap



Perhaps the intention of the regulation to create a framework for simple, transparent and standardised securitisation will at some point be acknowledged in CEE, rousing securitisation from its current slumber.

Sustainable Finance – a trend to stay



Ursula Rath

With sustainable investment picking up globally, environmental, social and governance (ESG) considerations are gaining increasing importance in decision making and practices. Driven by the EU's need to close the approx. EUR 180bln per annum funding gap to achieve its climate and energy goals by 2030, sustainable finance has consistently risen in the policy agenda since 2018+.

Sustainable finance, according to the European Commission (EC), refers to the process of taking account of environmental and social considerations in investment decision-making, leading to increased investments in longer-term and sustainable activities. To reach its goals, the EU will need to channel private sector investment into green and more sustainable businesses, projects and technologies.

There is thus little doubt that the EU's sustainable finance agenda, as enshrined in its 2018 Sustainable Finance Action Plan, will remain a top priority in 2020+ that will not only impact the financial sector, but will also re-shape the environment for the real economy. The EU's sustainable finance agenda rests on the following key areas which are expected to spur legislative and policy development in 2020:

1. Re-directing capital towards a more sustainable economy;
2. Increasing transparency to incentivise long-term investments; and
3. Integrating sustainability in risk management practices.

Re-directing capital towards a more sustainable economy

Definitions for sustainability used in the market vary widely. Thus, developing a unified EU classification system ('taxonomy') is at the core of the EC's action plan:

- The regulation establishing taxonomy aims to bring about a shared understanding of what constitutes sustaina-

bility, and thus aims to create more consistent labels and standards across the EU for sustainable investments. The taxonomy, which is built on the existing NACE industry classification, is expected to build a classification determining the environmental sustainability of a particular investment by defining 'environmentally sustainable economic activities'. To qualify as green, an investment needs to contribute to at least one of the six high level policy objectives (e.g. climate change adaptation, pollution prevention etc.), must not cause significant harm to other objectives and must comply with both minimum social safeguards and certain technical screening criteria developed with the advice of a technical expert group (TEG) which will form the basis of the delegated acts needed to implement the taxonomy.

- The taxonomy is expected to feed into further legislative initiatives such as
 - establishing an EU standard for the issuance of green bonds as bonds seeking accreditation under the proposed green bond standard will need to be taxonomy compliant;
 - introducing a prudential supporting factor for sustainable investments in the form of lower regulatory capital charges for banks and insurances;
 - proposing two low-carbon benchmarks to provide investors with better information on the carbon footprint of their investments to assist investors in identifying and pursuing low carbon investment strategies and in reducing greenwashing; and

- integrating sustainability factors and risks in credit ratings, which may ultimately lead to amending the credit rating agencies regulation.

Increased transparency and incentives to long-term investments

In addition, the EU aims to encourage greater ESG integration through enhanced transparency and reporting obligations:

- The disclosure regulation will require providers of financial products and advisors such as investment firms or fund managers to make certain website and pre-contractual disclosures, including e.g. how they integrate sustainability considerations in their investment decision-making processes and remuneration policies.
- The non-financial reporting directive will require listed corporates, insurers and banks with more than 500 employees to disclose diversity and non-financial information related to environmental, social, employee and human rights aspects as part of their management or annual report. The EC has developed metrics and provides guidance for climate-related disclosures. We expect that these disclosure requirements - while hopefully delivering tangible investor benefit - may be adding additional cost to investment products and potentially raise cost of funding for companies.

Integration of sustainability in risk management practices

Finally, while the market for sustainability ratings and research is gaining in-

Secured lending CEE



Laurenz Schwitzer

With more and more players active in the corporate lending and secured finance markets across the CEE region, and multi-jurisdictional CEE transactions happening on a regular basis, counsels are challenged to navigate their clients through fragmented legal frameworks in various jurisdictions often with different sets of secured lending rules and must-knows.

creasing importance in aiding buy-side investment decision making, there are no uniform standards as to scoring methodologies and independence of sustainability ratings yet, all of which the EC will be exploring further in 2020. Other initiatives include incorporation of ESG factors in stress tests for financial institutions, policy discussions around incorporation of sustainability in board strategies ("sustainable corporate governance") or diligence requirements on companies across the supply chain.

Action points for corporates

Sustainable finance is a trend that is meant to stay. Corporates are well advised to put ESG topics high up on their board agenda early on. In particular, they should

- engage proactively in stakeholder debate to get the taxonomy and its application right, as this will impact their sources and costs of funding;
- familiarise themselves with the taxonomy to see how their activities are perceived by asset managers and investors and provide reporting in a form that will allow checking against the taxonomy's technical screening criteria;
- critically review their culture, values and strategy to examine whether these sit well in the current ESG focused environment;
- develop a robust ESG strategy, identify any related ESG risks and seek expert guidance where needed;
- identify ESG related opportunities and bring these up proactively when engaging in investor dialogue.

But is this really true? Does CEE secured lending mean that there is a need to reinvent the wheel in each jurisdiction when it comes to structuring secured lending transactions?

Not necessarily - Taking a close-up of the subject and having the home advantage across the CEE region, it becomes visible that the dos and don'ts of secured lending in CEE are quite similar once existing stumbling blocks for each jurisdiction have been identified.

Did you know that:

Registration costs in Austria can be a deal breaker for mortgage secured lending if (outlandishly high) registration costs of 1.2% of the secured liabilities are not factored in accordingly when modeling the financing for Austrian assets?

Syndicated lending in Montenegro and Macedonia can be a headache as these are the only countries in CEE that do prohibit the establishment security agencies?

Only the minority of jurisdictions in the region allow for the establishment of security over a pool of assets comparable to a UK floating charge?

Are you able to factor in the different time periods for registering security interests correctly for each CEE jurisdiction when setting-up the timeline for a CEE secured finance transactions?

If not, stay tuned! In 2020 we will share the knowledge of our CEE secured lending experts and will be opening Schoenherr's CEE secured lending know-how to our clients, with an in-depth periodical publication on CEE secured lending.

Get a better feeling on how secured lending really works e.g. through country comparisons for each collateral class.

In case you are interested register online:
at <https://www.schoenherr.eu/publications/subscription/>



Laurenz Schwitzer (left) and Philipp Nagel (right)

Exchanging views on current trends in Legal Tech and financing transactions

An interview by Laurenz Schwitzer

Legal Tech is currently on everyone's mind and has also become a central topic in the context of financing transactions. While marketable applications for buzzwords such as "automated document generation" or "artificial intelligence" are often still in their infancy in the field of legal transactional advice, such applications can already make a significant contribution to the success of a transaction in the field of efficient process management, e.g. in connection with the satisfaction of conditions precedents under loan agreements.

We met with Philipp Nagel, in-house lawyer at Raiffeisen Bank International AG being responsible, among other things, for working on projects in the field of Legal Tech, to exchange views on current trends in Legal Tech and financing transactions, and to find out about the advantages that process optimisation tools, such as Schoenherr's together: your transaction manager (<https://www.schoenherr.eu/your-transaction-manager>), can offer to the end user, e.g. a bank or a borrower.

Q: Philipp, you are in-house lawyer at Raiffeisen Bank International. How did you arrive at Legal Tech as a lawyer?

It was primarily the question of process optimisation that brought us as legal

department at RBI to Legal Tech. Personally, I have already provided legal support for some of the bank's digitisation issues in the past and have thus gained solid insight into how the market is currently developing in this area. The automated analysis of data, behaviour and structures has, in my view, great potential in the area of artificial intelligence and we are now evaluating potential implementation of this within RBI. Currently, I am responsible for the digitisation process of our legal department, implementing, among others, legal tech solutions. The central question for me is always to what extent the numerous solutions can create specific added value for us as a bank even outside the legal department.

Q: The term "Legal Tech" is often used, but it is not always clear what is meant by it. What do you mean by "Legal Tech"?

For me, this term covers two important subject areas: Legal Tech in the broad sense, and Legal Tech in the narrow sense of the word. On the one hand it means process optimisation and process automation and on the other hand it covers solutions based on artificial intelligence. With the latter we are looking to find Legal Tech applications that can support the review of documents or contracts, which would allow a chunk of this work to be managed faster and more efficiently. We also see the regulatory field as a further area of application. We would welcome machine

learning programmes, which, for example, could analyse and screen the (new) relevant laws for us as a bank. The technologies here are certainly still in an advanced early stage of their development, but in the future, they will significantly influence and change the legal (advisory) area, and we, as an innovative legal department and bank, want to actively participate and implement these developments.

In terms of process optimisation, I find the areas of automated document creation, knowledge management or optimisation of transactions interesting.

Q: As a key player in the region, what are you or RBI currently doing in the area of Legal Tech?

Within the projects that I am involved in, we are currently focused on three topics related to Legal Tech in the narrow sense: AI supported document analysis, AI supported legal analysis and the resulting process optimisation.

Q: What potential do you see for Legal Tech specifically in the area of finance transactions? In your opinion, which areas of a transaction could particularly benefit from innovation in the future?

I also see a similar situation in the area of finance transactions. In the long run, I can imagine an automated document creation for standardised loan agreements, as well as a preliminary analysis of certain topics, since very often the same topics arise, and these could probably be easily processed by artificial intelligence through preliminary analysis.

In process optimisation, of course, the topic of satisfaction of conditions precedents, "the CP process" in general, is an area with a lot of potential. Although this process comes after loan documentation, it sometimes requires a significant amount of time for more complex transactions. At this point, the deal has already been negotiated for all parties, which can often lead to annoyance if delays occur. Therefore, Legal Tech-based solutions will certainly play a major role in this area. Furthermore, there is also great potential in the area of loan syndication for process optimisation or the use of artificial intelligence, especially when it comes to the identification

of critical contract clauses in the sense of deal breakers. Participation in a loan syndicate is always time-critical and often loan documentation can no longer be renegotiated. Therefore, a Legal Tech solution would be particularly suitable to quickly and efficiently identify potential deal breakers.

From our point of view, the current focus is certainly attorney / client interaction in the course of a transaction, in particular in the context of process acceleration and optimisation, whereby the Schoenherr together: your transaction manager, is for me a good example for overall transaction process optimisation.

Q: We share a similar view. Especially with complex financing transactions in several countries, the high number of conditions precedents often proves to be very time-consuming and a real pain point for the parties involved. The purpose of the transaction manager was to address precisely these pain points in terms of process optimisation and to redefine the CP process for all parties involved. Did we succeed?

I believe that the transaction manager is a solution that can generate significant added value, both in terms of coordination between banks and lawyers but also subsequently following closing in terms of the banks' customer relationships. Above all, the notification functions can bring great added value to our customers, the borrowers, be-

cause it enables them, with the help of automation, to easily organise ongoing tasks under a loan and to ensure credit compliance.

Q: As a last question, what do you expect from us, the professional services industry, in terms of future use of Legal Tech? How can we, as law firms, deliver added value here? And what would be on your wish list for the future as one of our clients?

From my point of view, Legal Tech is already crucial for the services industry and especially for lawyers.

In addition to legal expertise, I also consider the ability to understand the client and excellence in transaction management to be essential for a good lawyer. Optimised processes are an enormous help in managing complex transactions better and faster. In this respect, the right use or development of appropriate tools and applications by the respective service provider is key.

Thank you very much for the interview.

Schoenherr's together: your transaction manager, was introduced in spring 2019 as part of our established client collaboration platform Schoenherr together, for better support and coordination of transaction processes.

For further information see www.schoenherr.eu/your-transaction-manager.



I believe that the transaction manager is a solution that can generate significant added value, both in terms of coordination between banks and lawyers but also subsequently following closing in terms of the banks' customer relationships.

Philipp Nagel



View of Atelier10 studio



02

business to consumer protection



cee overview by Wolfgang Tichy

Consumer protection as a strategic goal of the EU

The European Consumer Agenda is the European Commission's strategic vision on consumer protection. It identifies key measures to empower consumers and to maximise their participation, outlining 62 action points grouped around four pillars: (i) promoting consumer safety; (ii) enhancing knowledge of consumer rights; (iii) strengthening the enforcement of consumer rules; and (iv) integrating consumer interests into key sectoral policies. As a long-term objective, the Commission also works to empower consumers through choice, information and awareness of consumer rights and means of redress.

2019 was centred around the below-mentioned Directives and the year to come will too, since harmonisation is aimed at by 2021. In the overview which follows, we set out the scope of the directives stemming from this Agenda, as well as country specific highlights in this respect.



The Sale of Goods Directive and the Digital Content Directive entered into force on 11 June 2019 to provide European consumers a high level of protection and legal certainty and to create common warranty rules in the EU.

The Digital Content Directive and Sale of Goods Directive

Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services ("Digital Content Directive") | Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods ("Sale of Goods Directive")

1 Scope of the Directives

The Sale of Goods Directive and the Digital Content Directive entered into force on 11 June 2019 to provide European consumers a high level of protection and legal certainty and to create common warranty rules in the EU. By 1 July 2021, Member States are obliged to adopt necessary regulations into their national laws to comply with these Directives, which will apply from 1 January 2022.

The Sale of Goods Directive will apply to sales contracts between a consumer and a seller for goods, including goods with a digital element (e.g. smart TVs, smart fridges or smart watches) regardless whether concluded physically in shops or online.

The Digital Content Directive will apply to any contract where the trader supplies digital content (e.g. movies, photos, e-books) or digital service (e.g. apps, cloud storage, streaming services) to the consumer. Remarkably, the Digital Content Directive may also apply when the consumer does not pay for the service but provides its personal data in return for the digital content or service as a "payment", except where the personal data is exclusively processed for the purpose of supplying the

digital content/service or for allowing the trader to comply with its legal obligations.

The Directives were drafted by different working groups, as can be seen from the fact that different terminology has been used where the intended meaning is the same. For instance, the Sale of Goods Directive uses the phrase "... between a consumer and a seller..." while the Digital Content Directive uses "... the trader supplies ... to the consumer...". Despite the wording, this does not of course mean that the Sale of Goods Directive also applies between consumers. It will therefore always be necessary to consider both Directives when interpreting certain terminology.

Country-specific highlights

Every country listed below has highlighted the main changes that will occur to its current national legislation, once the new Directives regulations are adopted.

Note: This does not mean that the changes highlighted by other countries do not apply.

Austria, Bulgaria, Croatia, Czech Republic, Hungary, Romania, Slovenia

Burden of proof: Any lack of conformity which becomes apparent within one year upon delivery will be presumed to have existed at the time of delivery. This one-year long reversal of the burden of proof is a substantial extension compared to the six-month period under the current warranty laws in those Member States.

Austria, Czech Republic

Warranty period: Contracts with a single act of supply of digital content or services are subject to a warranty period of two years from the date of supply. On the contrary, for contracts with continuous supply of digital content and services (e.g. streaming services) over a period of time, the warranty obligation applies for the entire term of the contract.

Austria

Updates: The trader is obliged to provide updates for digital content or services if this is necessary to maintain conformity with the contract.

Czech Republic

Updates: The trader is obliged to pro-

vide updates for digital content or services agreed in the contract, and to provide the purchaser with the updated digital content at least to the extent necessary for the digital content to retain its original features for a period of time which may be reasonably expected by the purchaser.

Poland, Slovakia

Limitation of the seller's liability: Under Polish and Slovak law, the period of the seller's liability may be limited to one year with respect to second-hand goods.

Bulgaria

Digital content and digital service: Unlike the Directive, which provides a very broad definition of digital content ("data produced and supplied in digital form"), the Bulgarian Consumer Protection Act provides a more specific definition of digital content: "digital content is data produced or supplied digitally, such as computer games, antivirus programmes, applications, films, music, programmes, text, electronic books, papers, magazines, software or online games, database, internet sites for gambling or other, regardless of whether they are accessible through downloading or real-time broadcasting, on physical copy (hard copy or electronic form) or any other means." Since the listing may not cover all possible digital content available (especially considering the potential creation of new forms of digital data), the Directive should ensure a wider scope of protection of any possible digital content.

Next, the Bulgarian Consumer Protection Act does not provide a definition of "digital service". Thus, it is left unclear whether digital services are encompassed within the term services as a somewhat broader term, and whether consumers engaging in these are granted equal protection.

Remedy for the failure to supply: The Directive provides for restoration of conformity (as primary remedy) and price reduction and termination of contract (secondary remedy). The Bulgarian Consumer Protection Act provides the same hierarchy. However, under the Bulgarian law, restoration of conformity is due within one month, while in the

Directive it is due "without undue delay or within an additional period of time as expressly agreed to by the parties".

Croatia

Definition of digital service: Whereas the Croatian Consumer Protection Act defines the term "digital content" in the same manner as the Directive, the respective Act does not provide the definition of "digital service", thus it is left unclear whether digital services are encompassed within the term services as a somewhat broader term, and whether consumers engaging in these are granted equal protection. The implementation of the new Directives should unambiguously ensure that digital services are afforded equivalent consumer-favouring remedies in cases of non-conformity.

Lack of conformity: In comparison to the Directives, the Croatian Consumer Protection Act does not regulate lack of conformity of goods / digital content and services explicitly and in such detail. Nevertheless, traders are generally obliged to perform their obligations in accordance with the contractual provisions and the Consumer Protection Act and Civil Obligations Act, thereby ensuring the required standard of consumer protection.

Hungary

Commercial guarantee: It will also appear as a novelty that producers will be bound with respect to commercial guarantees made in advertisements. Pursuant to the new regime, if the conditions laid down in the advertisement are more advantageous for consumers than those laid down in the commercial guarantee statement, the advertised conditions will be binding (unless the advertisement was duly corrected before the conclusion of the contract).

Repeated nonconformities: Pursuant to the new EU regime, if a lack of conformity appears again despite the trader's attempt to bring the product or digital content/service into conformity, the consumer is free to terminate the contract. This is currently not clearly regulated in Hungarian law. It is more limited under current court practice in Hungary, whereby a repeated nonconformity entitles the consumer to termi-

nate the contract only if the nonconformity repeats multiple times in a short timeframe and thereby results in loss of interest on the consumer's side.

Poland

Compliant with the Directives: Polish consumer protection law is in many aspects compliant with the Directives, e.g. with respect to the burden of proof (one-year period) or the seller's liability under warranty for movables (two years from delivery).

Protection of entrepreneurs: From 1 June 2020, individual entrepreneurs entering into agreements connected with their business activity will enjoy protection similar to consumers, provided the agreements are not related to their professional activity.

Romania

Repairing the goods because of lack of conformity: Under the Directives, the seller is allowed to repair the goods within a reasonable period of time from the moment the consumer reported the lack of conformity. However, under Romanian law as currently in force, the seller has a maximum of 15 days to carry out such repairs. When implementing the Directives, it will be interesting to see if the Romanian legislator will consider a period of 15 days to be reasonable.

Definition of "digital service": The Directives provide a much needed definition of the term "digital service" as (i) a service that allows the consumer to create, process, store or access data in digital form, or (ii) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service. Romanian law utterly lacks such a definition (so far it only defines the term "digital content") and will have to be updated.

Slovakia

Definition of goods: Under Slovak consumer law, the definition of goods does not explicitly cover digital content or digital services.

Slovenia

Definition of "digital service": While current consumer protection legislation defines goods as including digital con-

tent, it is left somewhat ambiguous whether services include digital services, and thus whether consumers engaging in these are granted equal protection. The new Directives should unambiguously ensure that digital services are afforded equivalent consumer-favouring remedies in cases of non-conformity.

Remedy hierarchy: The Directives envisage price reduction and termination as remedies for nonconformity that are secondary to the primary restoration of conformity (repair/replacement). This is contrary to the current consumer protection legislation, which views restoration of conformity, price reduction and termination of contract as equivalent and alternative remedies, subject to the consumer's choice.

2 Comments

It is questionable whether the sought-after full harmonisation will be achieved. There are numerous opening clauses which Member States can use. It remains to be seen how they will implement the Directives and which opening clauses they will use as well as how the new warranty law will impact the business environment and how consumers will benefit from it. It seems traders will continue to face a variety of consumer protection rules in the EU.

Consumer protection in non-EU countries

Serbia

Implementation of the Directives:

As part of the EU accession process, the Republic of Serbia aims to align its consumer protection regulation and strategies with that of the EU. Chapter 28 of the *acquis communautaire* related to consumer and health protection is yet to be open.

The current Consumer Protection Act regulates among others consumer rights, safety, consumer education, judicial and out-of-court dispute resolution mechanisms and consumer representation. Serbia is expected to adopt a new Consumer Protection Act with a focus on e-commerce and online consumer protection, along with a five-year consumer protection strategy, by

the end of 2019. It will introduce new consumer protection mechanisms, such as a misdemeanour warrant upon request of a consumer protection organisation. The scope of implementation of the new EU Directives is yet to be confirmed.

Compliance with the Directives:

Serbian consumer protection law only complies with some aspects of the Directives, e.g. the seller's liability under warranty for movables (two years from delivery), while reversal of the burden of proof is still limited to the six-month period. The seller's liability period may be limited to one year with respect to second-hand goods.

E-commerce:

Serbia only adopted a new Commerce Act in July 2019. It now includes definitions of e-commerce shops and platforms, while the somewhat rudimentary E-commerce Act uses "information society services" as an umbrella term for all IT-related services from e-commerce, to internet search engines and user data storage.

Turkey

Effect of EU Legislation:

Turkish law, including consumer law, has continued to align with the EU *acquis* as part of the country's accession process to the EU.

The promulgation of the Turkish Law on Consumer Protection in 1995 resulted from Turkey's accession to the customs union, while amendments to consumer law have usually followed the trends of EU Consumer Law. Therefore, the current version of the Turkish Law on Consumer Protection ("TKHK") is aimed at harmonising Turkey's standards with EU norms. In addition to the TKHK, secondary legislation has been introduced to ensure compliance with the EU, such as the Regulation on Distant Sales Contracts, the Regulation on Commercial Advertising and Unfair Commercial Practices, the Regulation on Certificate of Warranty and the Regulation on Liability for Damages Caused by Defective Goods.

Definition of "digital service":

There is no separate legislation regulating disputes arising from contracts for the supply of digital content and digital

services. However, the definition of digital content is regulated under the Regulation On Distant Sale Contracts as "any kind of data produced and supplied in digital form; such as computer programme, application, game, music, video and text" and it is not *numerus clausus*.

Obligation to apply to Consumer Arbitration Committee:

Under the Turkish Law on Consumer Protection, before filing a lawsuit it is mandatory to apply to the Consumer Arbitration Committee in accordance with the value of the dispute. In 2019:

- Disputes below TRY 5,650: application to the District Arbitration Committee;
- Disputes between TRY 5,650 and TRY 8,480 in cities with metropolitan status: application to the City Arbitration Committee;
- Disputes below TRY 8,480 in the centre of cities without metropolitan status: application to the City Arbitration Committee;
- Disputes between TRY 5,650 and TRY 8,480 in the districts of cities without metropolitan status: application to the City Arbitration Committee.

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compliance & criminal defence / corporate investigations & crisis management



cee overview by Christoph Haid

The fight against corruption and white collar crime in CEE is intensifying

At the beginning of 2019, Transparency International painted a bleak picture of anticorruption efforts in Central and Eastern Europe. On the Corruption Perceptions Index ("CPI"), Bulgaria scored 42, below the global average of 43. Bulgaria is followed by Greece (45), which dropped three points since 2017, and Hungary (46), which dropped eight points over the last five years.

Hungary has seen a significant decline in CPI scores in recent years, as a consequence of corruption believed to have worsened. Amongst others, Hungary faces allegations of a misuse of EU funds, which are not being investigated. Bulgaria has seen a serious corruption scandal, and Romania has witnessed significant anticorruption protests over a decree that would have protected many officials from corruption charges.

All these countries are also accused of not enforcing anticorruption laws effectively and of widespread impunity. In addition, at the beginning of 2019 both Romania and Bulgaria were still being observed by the EU's Cooperation Verification Mechanism (CVM), which monitors whether both countries are meeting the anticorruption and judicial reform commitments they made when they became EU members. They were accused of making little progress on judicial reforms and anticorruption efforts.

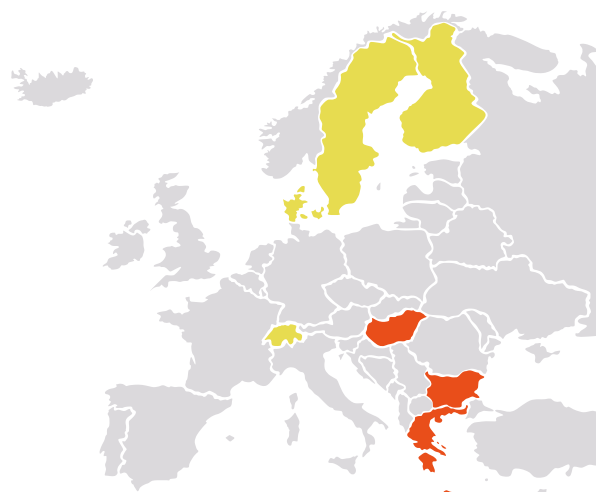
At the same time, the four countries are also examples that things can change for the better and that such change can come quickly:

- At the end of October¹, the EU Commission reported that it believes Bulgaria has made enough progress in the fight against corruption and organised crime to leave the programme. Romania, on the other hand, has regressed in the fight against corruption and the monitoring should continue.
- Looking at developments in Romania, it seems only a matter of time until it will be released as well. As we will report in a separate chapter, the fight against corruption has picked up

and the old government, which was largely blamed for sluggish enforcement and the corruptness of politicians, has been toppled.

- There is also positive news from Hungary on the anticorruption front, as the recent investigation into Microsoft Hungary led by the DOJ (the Hungarian angle was settled for USD 8.7 million) has triggered a new investigation by the Central Prosecutor's Office (CPO) into corruption and fraud involving the local Microsoft subsidiary. The CPO has asked the DOJ to share all relevant information in order to start a new investigation. Looking ahead, this development means two things: International companies have often complained that corruption in these countries poses a serious problem and increases the risk of doing business there. The mentioned developments should gradually improve the prospect of doing business in CEE. On the flipside, the increased anticorruption efforts also mean that companies can more easily be subject to investigations. When prosecutors start looking into corruption in tenders, all participants might have to ask questions. For international companies and their in-house teams, this will mean having to respond more frequently to investigations, so preparation will be needed.

1 https://europa.eu/rapid/press-release_IP-19-6136_en.htm

**Top scorers**

Denmark **88**
 Finland **85**
 Sweden **85**
 Switzerland **85**

Bottom scorers

Hungary **46**
 Greece **45**
 Bulgaria **42**

31

countries assessed

66 / 100

average CPI regional score



The CPI points are coded from light yellow to deep red. The lightest yellow reflecting the utmost level of transparency, and dark red reflecting the utmost level of corruption.

Crisis Management – Schoenherr's innovative tools for companies



Michael Lindtner
 (with Srdjana Petronijevic Marko Kapetanović and Radoslav Chemshirov)

Crisis management is an essential part of each company's compliance system. In particular where possible criminal behaviour is suspected within the company, the management must react quickly, but also wisely. In such situations the management must make many decisions with potential deep impact, like:

- Do we have to perform an internal investigation?
- How should we deal with potential investigations by authorities?
- Which legal measures must be taken and are there deadlines?
- What do we communicate vis-à-vis our stakeholders and the public?

To help companies identify the most relevant tasks in crisis situations and to facilitate the initial assessment of the most important legal questions, Schoenherr's Crisis Management Team has created a CEE-wide Internal Investigations Primer.

In addition, Schoenherr's CEE-wide White-Collar Crime Team has developed an Anti-Corruption Guide helping companies get a better understanding of the legal framework of their business, especially in CEE. The Anti-Corruption Guide helps identify the most relevant legal issues when it comes to questions relating to accepting or offering advantages, like lunch invitations or gifts, in the course of a business relationship. The Anti-Corruption Guide is thus a useful tool to mitigate the risk of non-compliance and crisis situations.

The Internal Investigations Primer and the Anti-Corruption Guide show how Schoenherr's lawyers work together in our jurisdictions at a high professional level and the firm's ability to provide tailor-made legal advice for any crisis. But these new tools are also a great opportunity for companies to identify legal needs in escalated situations.

Let's look at an example:

A multinational company operating in CEE learns via its internal whistleblower system that employees in Austria, Croatia, Bulgaria and Montenegro may be involved in a scheme of paying bribes. The management needs to react and wants to respond by opening an internal investigation. It decides to use the Internal Investigations Primer to clarify the most ur-

gent questions and to draft an initial roadmap of the investigations to come.

After a short look in the Internal Investigations Primer, it is clear that the management is permitted to initiate internal investigations in the affected jurisdictions. However, the management first needs to obtain more information about the case and therefore wants to interview the staff. Thus, the question arises: **"Does conducting interviews regarding our employees generally require the approval of the works council or some other interest group?"**

AT, BG, MNE: No
HR: Yes

The management also needs to prepare possible employment law measures and would like to assess **if a suspicion of criminal activity generally allows employment agreements to be terminated without notice in the relevant jurisdictions.**

AT, HR: Yes
BG, MNE: No

In the context of employment law measures, the management would also like to assess if there are certain **deadlines to be observed when it comes to terminations without notice.** A quick look in the Internal Investigations Primer shows that the deadlines in the affected jurisdictions vary. While Bulgarian law requires the grounds for termination to still be valid at the moment of termination, Croatian law, requires that the termination is made within 15 days from the discovery of the fact upon which the termination is based, and in Montenegro the employment is terminated automatically if the employee would be sentenced for more than six months of imprisonment.

The management also needs to assess the possible legal risks for the company itself, including its subsidiaries in the affected countries, and raises the question: **"Do the affected jurisdictions provide for corporate criminal responsibility of our legal entities there?"**

AT, MNE, HR: Yes
BG: No (only administrative liability)

The management is now able to initiate the internal investigation including the consultation of legal experts from Schoenherr for tailor-made advice. In the end, the Internal Investigations Primer thus helped create a good overview of the most important legal issues and save money and time.

For more details visit our Knowledge Portal at:
www.knowledge.schoenherr.eu

(Anti)Corruption, the Romanian way



Magdalena Roibu, Andreea Neagu

Romania has made international headlines in recent years with arguments and street protests generated by the controversial justice reforms that the government has tried to push through. Seen as a threat to the rule of law, the reforms and personnel changes in the criminal justice system were eventually dropped following a referendum held last year.

Today, the fight against corruption remains a hot topic on the agenda of the Romanian authorities. But despite ongoing efforts to create a strong legislative framework that would help suppress it, corruption remains widespread. While it can impact companies active in Romania, it is important for investors to understand how they can protect their businesses against these risks.

Romanian anticorruption laws

The Romanian Criminal Code and other secondary laws criminalise active and passive bribery in the public sector as well as in the private sector. Romanian criminal legislation does not distinguish between bribes and facilitation payments. Consequently, gifts and hospitality may be considered illegal, depending on their intent and benefit obtained.

Criminal liability for corruption offences may also be entailed against legal entities under certain conditions. Although the criminal liability of entities was settled in Romanian criminal legislation as early as 2006, the convictions of legal entities have had a rather timid start and case law on convictions of legal entities for corruption offences remains sparse.

The anticorruption strategy

In its effort to further fight against and eventually suppress corruption, Romania has enacted inter alia an Anticorruption Act, as well as a national anti-corruption strategy ("SNA") for 2016 – 2020.

The implementation of the SNA has brought several benefits, such as (i) the allocation of more funds to integrity protection institutions (e.g. the Romanian Agency of Integrity), (ii) the Monitor SP, an app used by the Romanian tax authorities to process information taken from criminal files, or (iii) more financial investigation experts within prosecutors' offices.

In addition, the main judicial authority in Romania aimed at fighting corruption (so-called "high and medium corruption") remains the National Anticorruption Directorate ("DNA").

The DNA's case load has increased and anticorruption investigations were initiated against high-level politicians, large companies or their top management. Recent major examples include cases relating to bid rigging, corrupt practices or passive bribery offences. Legal practitioners are now eyeing some ongoing criminal cases that raise the issue of the criminal liability of legal entities and corruption in the private sector, especially as the existing case law in this area is somewhat irrelevant.

Relevant case law

In November 2017, the DNA launched an investigation involving a construction company in an alleged EU fund fraud and corruption case. The investigation is mainly focused on that company, previously controlled by the county council, a body that a former high-level politician headed until 2012. The company won many public contracts, at times without tenders or ben-

efiting from confidential information that helped it beat other bidders.

The investigations were based on a report by the European Anti-Fraud Office (OLAF) in 2016 regarding suspicions that a formerly high-profile politician and other regional officials had used forged papers to secure EU funds for road rehabilitations. The case has been sent to trial and is currently pending before the Romanian courts.

Another notorious example of corruption in the private sector is that of a Romanian insurance company which was convicted in 2016 for purchasing influence and active bribery. The insurer had to pay a criminal fine of EUR 250,000 and as an accessory penalty also had to publish the conviction decision in the media ten times.

A big story in the media recently involved the CEO of the Romanian branch of an international IT company who is being investigated for allegedly perpetrating passive bribery offences. The DNA prosecutors accuse him of requesting and receiving bribes amounting to some EUR 870,000 from the representatives of a series of IT companies in order to provide them with advantageous price offers for products commercialised by the Romanian branch. This should have enabled the IT companies to participate in certain public procurement procedures organised by various public institutions. From the information made public so far, it appears that the legal entity is not a suspect in the criminal investigations conducted against its CEO. However, the prosecutors might have legal grounds to extend the investigations against the company in the further proceeding, which is why it will be interesting to observe this case, especially as there is very little relevant case law regarding the criminal liability of legal entities.

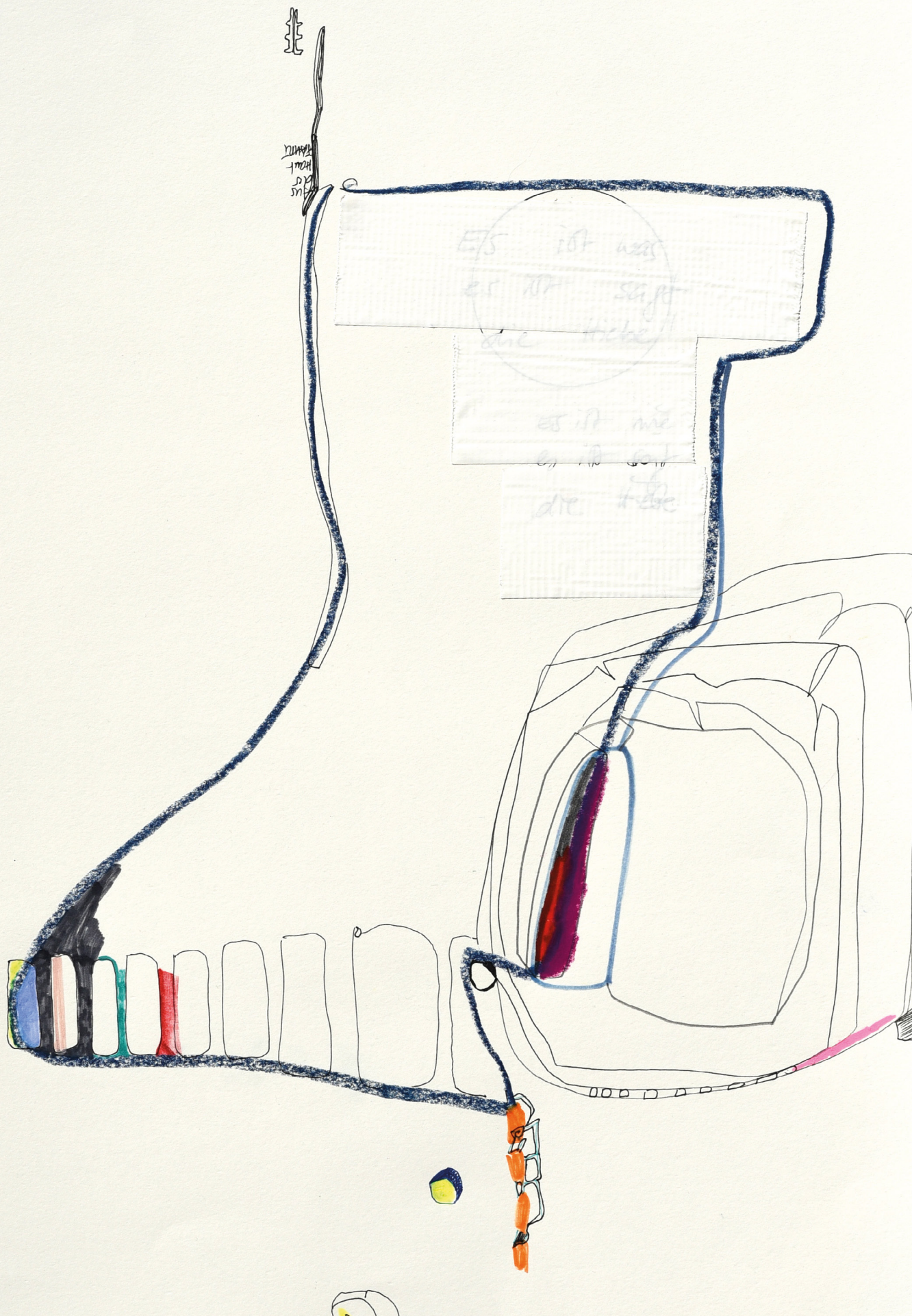
Outlook

While Romania has undoubtedly taken important steps towards effectively combating corruption and some interesting criminal cases are pending, the rather bitter conclusions of the 2018 Report on Romania, also known as the Cooperation and Verification Mechanism (available at www.just.ro) cannot be disregarded. Therefore, the European Commission ("EC") made several recommendations to be implemented as soon as possible, like relaunching a process to appoint a chief prosecutor of the DNA with a proven track record of prosecuting corruption crimes and a clear mandate for the DNA to continue to conduct professional, independent and non-partisan corruption investigations.

It remains to be seen whether Romania will succeed in implementing the recommendations of the EC. This would require key national institutions to demonstrate a strong commitment to judicial independence and the fight against corruption as indispensable cornerstones, and to restore the capacity of national safeguards and checks and balances to act when there is a risk of backsliding.

In addition, within the timeframe covered by the ongoing SNA, the legislature faces the task of considering new measures for the country. However, Romania is still on its way to further combatting corruption in the public and private sectors. Companies with ties to Romania are thus well advised to closely monitor compliance with national anticorruption laws.

For further information on anti-corruption please our Knowledge Portal at: www.knowledge.schoenherr.eu



Hand
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Es ist was
es ist was
die Liebe

Es ist wie
es ist wie
die Liebe

04

corporate / m&a



cee overview by Maxilian Lang

A review and outlook of m&a

2018 and H1 2019 saw very strong M&A activity in CEE, both in the mid and higher end market, including some landmark transactions in which Schoenherr has acted as legal advisor in a prominent role.

The hottest industries were clearly telecommunications followed by banking/financial services, where the consolidation trend seen in previous years continues. In addition, some CEE jurisdictions saw a solid inflow of foreign investment in the production sector, while cities like Bucharest and Warsaw are also seeing growth in the local start-up sector. While M&A activity in CEE slowed at the beginning of H2 2019 in line with general market developments in Europe, it may be expected to pick-up again at the end of 2019 and in 2020.

The legal environment for M&A in CEE is also changing. On the one hand, these changes are driven by local legislation aimed at simplifying and facilitating business, and on the other by the implementation of EU Directives and other laws and regulations aimed at increasing transparency and combatting money laundering. Local legislators often seem to have taken a stricter approach than required under the respective EU Directives and imposed additional restrictions and transparency requirements. Especially noteworthy are the prohibition on issuing bearer shares in joint-stock companies in Bulgaria and Romania as well as the requirement in Poland (effective from 1 January 2021) to register all shares in joint-stock companies and partnerships limited by shares in the electronic register of shareholders. This adds to the ever-increasing number of disclosure and reporting obligations for companies and shareholders across Europe.

Trade Secret Protection – Bulgaria/EU

Implementing Directive (EU) 2016/943, the (first ever) Bulgarian Trade Secret Protection Act came into force in April 2019. Under the act, secret information enjoys protection from infringements by third parties, if the controller has taken measures to protect it. Otherwise it does not qualify as a "trade secret". It will be up to the competent courts to define what level of protection is needed so information may qualify as a "trade secret". With respect to M&A transactions, the new law has an impact on drafting and negotiating NDAs and on the scope of the legal due diligence.

Simplified Stock Corporations – Poland

As of 1 March 2020, Polish law will provide the option to incorporate so-called simplified joint-stock companies (prosta spółka akcyjna). This is specifically designed for start-ups, as its main features are no minimum share capital, the possibility to transfer shares without formal requirements, effectuation of certain corporate actions via email and other features aimed at simplifying company incorporation, operation and dissolution.

Tax Reporting Obligations – Poland/EU

Poland was the first country to implement Council Directive EU 2018/822 on mandatory disclosure rules in regard to cross-border tax planning. As of 1 January 2019 (applicable to transactions effectuated after 25 May 2018), beneficiaries of transactions as well as their advisors (including foreign advisors) are subject to reporting obligations with respect to certain tax-planning arrangements. The disclosure requirements under Polish law are broader than required under Council Directive EU 2018/822, as the respective provisions in the Polish tax code also apply to certain purely domestic transactions. Non-compliance with the required reporting obligations may trigger severe penalties. Directive EU 2018/822 will have to be implemented into local law in all EU jurisdictions with effect as of 1 July 2020 at the latest.

Telecommunications – CEE/SEE

KKR sold a majority stake in United Group, a leading media and communications services provider in Southeast Europe with over 3,400 employees providing services to over 1.8m homes, to funds advised by BC Partners. The deal, closed in Q1 2019, was one of the largest ever M&A deals in the region. Schoenherr advised the target and sell-side.

Banking – SEE

Société Générale (France) sold its banking and insurance subsidiaries in Serbia, Montenegro, Slovenia, Bulgaria, Albania and Moldova to OTP Bank (Hungary) in separate but sequenced transactions completed throughout 2019. Schoenherr advised Société Générale alongside Jones Day.

No Issuance of Bearer Shares – Bulgaria/Romania/EU

While implementing Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, Bulgaria and Romania have both prohibited joint-stock companies from issuing bearer shares. In Austria, privately held joint-stock companies have already been prohibited from issuing bearer shares since 2011. By completely banning bearer shares from the market, Bulgaria and Romania have taken a stricter approach than required by Directive (EU) 2015/849 (which only requires prevention of the misuse of bearer shares). Companies that fail to convert bearer shares into registered shares within the provided deadlines (such deadline has already expired in Bulgaria) may face severe penalties up to liquidation.

Foreign Direct Investment Approval – Czech Republic

Further to Regulation (EU) 2019/452, establishing a framework for the screening of foreign direct investments into the Union, a foreign direct investment screening and approval mechanism will be established in the Czech Republic for the first time in 2020. Foreign investors from countries outside the EU will be under supervision in the Czech Republic and the state must approve all investments in strategically important sectors. The new Czech legal framework will be aimed at protecting strategic sectors, such as energy, the arms industry and technology firms that develop communication or IT systems for both civil and military purposes. Ultimately, transactions may be prohibited if deemed a threat to security or public order.

Telecommunications – CEE/SEE

After running mobile operations in the CEE region for 25 years, Norwegian mobile operator Telenor sold its wholly-owned mobile operations in Bulgaria, Hungary, Montenegro and Serbia, as well as the Hungary-based technology service provider Telenor Common Operation Zrt to the CEE private investment firm PPF Group for a consideration of EUR 2.8bln. The sale was completed in Q3 2018. Schoenherr acted as legal advisor to Telenor.

Banking – Czech Republic

Bausparkasse Schwäbisch Hall sold its 45 % stake in the Czech building savings bank Českomoravská stavební spořitelna, a.s. (ČMSS) to the Czech division of the KBC Group Československá obchodní banka, a.s. (ČSOB) for a purchase price of EUR 240m (the biggest banking deal in the Czech Republic in 2019). As a result of this transaction, ČSOB became the sole shareholder of ČMSS. Schoenherr advised Bausparkasse Schwäbisch Hall alongside Gleiss Lutz.

Interim Dividends – Romania

Until recently, Romanian companies could distribute dividends to shareholders only annually upon approval of their annual financial statements. Law 163/2018 now permits companies to distribute their dividends annually or quarterly. In the case of quarterly dividend distribution during the financial year, the annual financial statements must show the partially distributed dividends. The amounts distributed during the financial year must then be adjusted upon approval of the annual financial statements and dividends distributed in excess of the balance sheet profit must be returned within 60 days of approval of the annual financial statements. Hence, shareholders who receive quarterly dividends may be subject to a clawback. Thus far, Romanian companies have been cautious about distributing interim dividends.

Production – Romania/Bulgaria/Serbia

Ericsson (Sweden) has acquired Katherine SE's (Germany) business division of mobile radio antennas and filters, including major operations in Romania, by way of an asset deal. The deal closed in Q3 2019. Schoenherr advised Ericsson on the Romanian aspects of the transaction alongside Hengeler Mueller acting as lead counsel.

Schoenherr also advised Smurfit Kappa on the acquisition of two separate corrugated cardboard production businesses in Bulgaria (a share deal and a going concern deal) as well as a paper mill and corrugated plant in Serbia.

"If you want to keep a secret,
you must also hide it from yourself."

George Orwell, 1984



Alexandra Doytchinova, Stela Pavlova

The first ever Trade Secret Protection Act (the "Act") in Bulgaria came into force in April 2019 implementing Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. Businesses wishing to enjoy the protections of the new Act may need to take immediate steps to better protect their trade secrets.

Under the statutory definition of trade secret, the person in control of the information is required to have taken measures to protect it; otherwise, the relevant information will not qualify as a "trade secret". However, as the Act does not define the standard applicable to such measures, elaboration by the courts is awaited. Different standards will likely be applied to different types of information and businesses. Following the recent leaks of data worldwide it is difficult to imagine what cybersecurity standard would be considered sufficient.

This unpredictability can be counteracted by well-drafted confidentiality undertakings in contractual arrangements. These may include confidentiality clauses in contracts with employees, external business partners, contractors and consultants, non-disclosure agreements in the course of transactions, internal "secrecy" rules identifying, categorising and labelling trade secrets and outlining the procedures to protect them, internal information security training, information barriers and restrictions on access rights, monitoring of leaks and an incident response plan for data

breaches. Buyers in M&A deals should start requesting the above information in due diligence reviews and may also demand specific representations and warranties requiring the seller to confirm that it has taken adequate measures to protect its trade secrets. The seller also may be obliged to implement specific confidentiality procedures concerning trade secrets pre-closing.

The Act applies to non-disclosure agreements executed as a standard practice at the outset of M&A transactions even if there is no reference to it. We expect to see more elaborate non-disclosure agreements defining what information would be considered confidential in the relevant transaction in more detail. It is likely that red file data rooms, but also physical data rooms or lawyer-to-lawyer disclosure will be used more often to demonstrate that measures have been taken to protect trade secrets when disclosing information. These can include maintaining a list of people with access, signed (individual) confidentiality undertakings and prohibiting printing or copying.

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Under the statutory definition of trade secret, the person in control of the information is required to have taken measures to protect it; otherwise, the relevant information will not qualify as a "trade secret". However, as the Act does not define the standard applicable to such measures, elaboration by the courts is awaited.

What is protected?

A trade secret is any commercial information, know-how and technological information which:

(i) is secret, i.e. not generally known to or easily accessible by persons who commonly use this type of information; and

(ii) has commercial value because of its secret nature; and

(iii) the person lawfully in control of has taken measures to keep secret.

A trade secret holder is any person lawfully controlling a trade secret.

The subject of infringement may be goods and services where the design, characteristics, operation, production process, manner of marketing or sale are substantially influenced by trade secrets that have been unlawfully acquired, used or disclosed.

Infringements

An infringer is any person who has unlawfully acquired, used or disclosed a trade secret.

A trade secret can be lawfully acquired through independent discovery or creation; (lawful) observation, study, disassembly or testing of a product, by (voluntary) disclosure, or by contract, etc.

The following are generally unlawful:

(i) The acquisition of a trade secret without the trade secret holder's consent, if obtained through unauthorised access to, misappropriation or copying of documents, objects, materials, substances or electronic files which are lawfully under the control of the trade secret holder and contain the trade secret or from which the trade secret can be deduced.

(ii) The use or disclosure of a trade secret without the trade secret holder's consent, if carried out by a person who (i) has acquired the trade secret unlawfully, (ii) has been in breach of a confidentiality agreement or other duty not to disclose the trade secret, or (iii) has been in breach of a duty to limit the use of the trade secret.

(iii) The acquisition, use or disclosure of a trade secret, if at the time the person knew or ought to have known that the trade secret had been obtained from another person who was using or disclosing the trade secret unlawfully.

The Act provides for exceptions when the acquisition, use or disclosure of a trade secret is not unlawful, e.g. when exercising the right to freedom of expression or for the detection of crimes.

Sanctions

Under the Act, in addition to any proceeding before or any fine imposed by the Bulgarian Commission for the Protection of Competition, a civil court claim may be filed to:

- (i) rule on the existence of an infringement;
- (ii) order the termination or prohibition of such infringement;
- (iii) prohibit the production, marketing or use of infringing goods or the import, export or storage of such goods;
- (iv) prohibit the provision of infringing services; and
- (v) order the destruction/return of documents/devices containing trade secrets.

The court will consider the trade secret's value, the measures taken by the lawful trade secret holder to protect it, the infringer's conduct, and the impact of the unlawful use or disclosure of the trade secret. The Act's specific rules for calculating damages, assess not only the direct loss and loss of profit, but also the profit made by the infringer and the non-pecuniary damages suffered by the trade secret holder. A five-year limitation period applies.



Luka Lopičić, Jelena Arsić

Royalty Financing: A new source of capital in mining, tech and beyond

Royalty financing is a type of alternative finance where the financier, often called the royalty holder, advances a one-off up-front fixed cash amount to a company, a royalty payor, which in return promises to pay a percentage of its future revenues or profits to the royalty holder. This type of financing is used to develop an asset or a business when traditional debt or equity financing options are limited. It is a true alternative to traditional debt finance, since there is no fixed repayment plan and payments depend on the performance of the underlying business or asset. Also, unlike equity financing, the ownership and control in the royalty payor is not diluted, since it is not giving away its equity stake.

Royalty financing has become increasingly popular in the mining industry in the past decade, as junior or medium-size exploration companies needed to fund their capital expenditure needs. Low commodity prices and continued global economic uncertainty have turned the tap dry for financing through traditional equity offerings. On the other hand, traditional lenders like banks typically are not prepared to finance projects in the exploration phase that only include costs and no revenues and often a great deal of uncertainty about whether commercial exploitation is even feasible. So, from the banks' perspective, the loans are too risky and remote, since revenues may only start to flow five to ten years and tens millions of dollars down the line, if at all.

This global trend has also found its way to Serbia. This is no surprise given that there are over 30 exploration projects in the country, targeted mainly at copper, gold, boron and jadarite, a lithium-bearing mineral with a composite similar to the fictional Kryptonite. While mining heavyweights like Rio Tinto or Freeport-McMoRan, which hold interest in some of the projects, have their sources of capital, smaller players face universal financing issues and may need to grant royalties to fund the (pre)feasibility studies, equipment purchases, construction or other capital expenditures required in various exploration phases. Royalties in mining typically include a percentage of revenues or profits from the mineral production (once it starts) over the lifespan of the mine, without guaranteed minimum payments but also without caps on the upside.

In North America, royalty financing is

gaining popularity across industries, especially in tech and life sciences start-ups, but also in the entertainment industry. According to some sources, around USD 100bln of royalties are being paid out each year globally. These ventures all need seed capital and all offer promising but uncertain returns, making them unattractive borrowers for banks. On the other hand, owners often are reluctant to share equity and control with investors. These are universal challenges that all entrepreneurs also face in Southeast Europe. Therefore, royalties may be just the right fit in the capital structure of a tech start-up thanks to several attractive features for both the royalty payors and investors.

For royalty payors these are: (i) no fixed payment obligations or repayment terms, thus less risk of default; (ii) covenant-lite documents, which are much shorter and simpler compared to standard debt finance packages; (iii) negotiable security package, but no recourse to owners and recourse strictly limited to the financed asset; (iv) tax-deductible royalty payments; and (v) no dilution or pressure to sell the business. The royalties are attractive to investors because: (i) they receive equity-like returns, although they are senior ranked to equity; (ii) returns come faster compared to equity investments in the early stages of the business's lifespan; (iii) there is lower risk of default due to the flexible payment terms of royalty payors; and (iv) depending on jurisdiction, royalty holders may acquire an actual interest in the core assets of the royalty payors (e.g. mineral rights, IP, etc.).

But all that glitters is not gold! For payors, the main drawback of royalties is

that they are more expensive than bank debt. They also do not work well together with traditional debt. Lenders are not comfortable that royalty holders receive a guaranteed percentage of revenues and effectively rank senior to them. A possible solution is to negotiate intercreditor provisions with royalty holders together with the royalty agreement. Also, a royalty combined with (senior) bank debt increases the risk of default considerably, since there may not be enough free cash flow for everyone.

Unlike banks, investors need to do their diligence in what they invest. They will not have control, covenants or acceleration rights to rely on, so they need to be sure they have assessed all the risks and expected value of the underlying business linked to the royalties. The laws of Southeast European countries generally do not recognise royalties, so they run the risk of being mischaracterised by the courts. Therefore, legal advice should be sought to determine if they may be considered as hidden repayment of equity (contravening often mandatory capital maintenance rules) or as aleatory contracts that can be subject to equitable adjustment or struck down by the court; or if they cause regulatory issues, for instance under currency control rules in case of cross-border payments. All these legal issues can be overcome by identifying them ahead of time and structuring the product around them.

Given the speculative nature of investment and the conservative approach of traditional lenders, this region may be fertile soil for royalties to grow. With numerous mining projects, time will tell if royalty financing will spill over to other industries.

Not every corporate story ends with "happily ever after"



Mădălina Neagu, Cristina Enaga

"Once upon a time" is a promising beginning for any story. Even for corporate ones. But statistics show that unhappy endings are all too common. In Romania, for every four new legal entities incorporated each year, one existing company is wound up.

Over the past five years, more than 110,000 new legal entities on average have been registered with the Romanian Trade Registry each year. At the same time, some 28,000 companies have been wound up annually.

Are these breakups the result of shareholder misunderstandings or should we look for external causes? The answer might prove useful for investors thinking about setting up shop in Romania. That's because a common criticism of Romania as an investment destination is its unpredictable legislative framework. Indeed, it is one of the most active countries in Europe when it comes to the number of legal changes introduced each year. Some of these have a direct impact on companies' business activities – and their termination.

Falling out of love

A company may be wound up for any number of reasons. One may be major disagreements between the shareholders, which can cause one shareholder to seek the winding up of the company. In this type of corporate breakup, the shareholder must provide strong arguments in favour of such a measure.

Winding up as a sanction

Winding up is the toughest sanction that can be taken against the shareholders for the company's failure to comply with certain legal obligations. This is because external forces intervene to put an end to their business, against their will.

Romanian laws encourage shareholders to work together towards achieving their business objectives. While this might sound like couples' therapy, it is actually far from it, as failure to comply can be sanctioned by the winding up of the company.

Winding up under the Companies' Law

The Romanian Companies' Law sets forth the situations in which an interested party or the Romanian Trade Registry Office can request that a company be wound up as a sanction for failure to comply with certain legal obligations, such as:

- the company's activity has terminated, but shareholders have failed to open the legally stipulated winding up and liquidation procedures;
- the company's activity has not been reinitiated after a temporary period of inactivity notified to the tax authorities and registered in the Trade Registry;
- the company fails to replenish its share capital in the conditions stipulated by law;
- the company fails to file certain annual tax returns, consolidated annual records or accountancy records or statements within 60 days of the expiry of the legal term to do so.

Other laws can also play a role

The Companies' Law is far from being the only piece of legislation setting forth company winding up as a penalty for infringements.

One example refers to the changes introduced in mid-2019 by Law No. 129/2019, on preventing and combatting money laundering and terrorism financing, and amending and supplementing certain legal acts for companies, which transposed (EU) Directive 2015/849 of the European Parliament and of the Council.

Under this law, existing companies have until 21 July 2020 to register their beneficial owners in the Central Register of Beneficial Owners of Private Companies. The company's legal representative must file a written statement upon incorporation of a new company, annually, and whenever a change in the company occurs, but no later than the above-mentioned deadline.

If the company's legal representative fails to comply with this obligation, fines will be applied and in the next 30 days the company may be wound up if the statement is not filed in the meantime.

Law No. 129/2019 has also introduced a ban on bearer shares. Companies that have issued bearer shares have 18 months from the entry into force of the law to convert them into registered shares and record this in the Trade Registry. Failure to comply within the required period – and after receiving a written warning or fine – can also be sanctioned by winding up.

Moreover, a draft Government ordinance was announced in 2019 with the aim to increase the financial discipline of company shareholders.

The draft bill, which generated some controversy, addressed the scenario where a company's net assets decrease below half of its registered capital. In such cases, existing shareholder loans would convert into equity by the end of the financial exercise when the losses are ascertained, otherwise the company risks dissolution.

Romanian tax authorities are required to closely monitor "decapitalised" companies and to request their winding up if the net assets / share capital ratio continues for more than two years, or where the companies do not file their financial statements for the same period.

The draft ordinance also made corporate directors responsible for not convening a general meeting in case of decapitalisation, subject to a sanction expressed as a percentage of the value of the losses.

To be continued...

A company can be wound up for various reasons. Some are unavoidable, as they have to do with the dynamics of shareholder relationships. But others can be generated by external causes, such as an unexpected legal change. In the case of the former, many of the winding up risks can be mitigated by staying mindful of the myriad changes in the Romanian legislation and implementing proper corporate governance measures.

Growing compliance and transparency obligations applicable to m&a deals in Poland



Krzysztof Pawlak

Update your checklist

Whether you are an investor, guarantor, seller, buyer or advisor of any of the foregoing, recent changes to Polish law, as well the changes which will enter into force soon, impose certain new compliance and transparency related obligations which you should bear in mind when preparing for, managing and closing M&A transactions.

Some of them may apply even if you do not have a presence in Poland.

Most of the new obligations are driven by the requirements of EU law. However, Polish lawmakers have decided to implement local particularities and to expand the requirements set forth in the EU legislation. Therefore, we recommend updating standard M&A checklists to include such items as:

- Preparing enhanced ultimate beneficial owner files of the purchaser/seller/investor involved in the transaction, so they are at hand for the purpose of:
 - presenting them to advisors and contractors, to enable them to comply with legislation implementing the AML IV Directive, as well as
 - registering the beneficial owners of existing investments in the newly established Central Register of Beneficial Owners (which went live on 13 October 2019);
- Checking your contractor tax registration as well as its bank accounts registered with the tax authorities, so that you are sure you will be paying to the contractor's registered bank ac-

count and will not face potential tax issues resulting from payment to a non-registered account (as of 1 January 2020);

- Involving legal and tax advisors (internal or external) at an early stage of preparing the transaction structure, so you can comply with the Mandatory Disclosure Rules and related reporting obligations.

Mandatory Disclosure Rules

The last item of the list, i.e. check if the agreed structure of the contemplated transaction should be reported under the Mandatory Disclosure Rules, is required by Polish legislation implementing EU Council Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ("MDR Directive")

- Why they are important: Such a check is of particular importance, since:

- similar rules must enter into force in the EU countries by 1 July 2020

- once implemented, they will impose obligations to also report certain transactions being already consummated (if the tax arrangement was implemented after 25 May 2018); and

- the MDR Directive, and its implementation in Poland, is not very precise, requiring special scrutiny on the part of the affected entities.

- What the new obligation is about: The respective changes to the Polish Tax Ordinance (*Ordynacja podatkowa*) aimed at implementing the MDR Directive are in force since 1 January 2019. However, the scope of the Polish implementation is broader than required by the MDR Directive; for instance, it may also concern domestic transactions ("Polish MDR Regulation"). The new law imposes on taxpayers and their advisors several specific and sometimes imprecise obligations to report to the tax authorities any arrangements satisfying even one of over 20 hallmarks. The arrangement does not have to be implemented, it suffices if it is made available or ready for implementation (a reportable arrangement is

referred to as the tax scheme). Crucial terms such as "arrangement", "implementation of the arrangement" or "hallmarks" are defined broadly, hence most M&A transactions and many standard corporate restructurings may have to be reported.

- Who is obligated to report: Participants taking part in structuring or implementing the transaction play different roles in the reporting process and, accordingly, there are various obligations resulting from the new law. For instance, the investor or an entity involved in the transaction (e.g. as the buyer) might potentially be qualified as the beneficiary of the arrangement (*korzystający*), while advisors (or persons structuring, coordinating or implementing the transaction) may be regarded as promoters (*promotorzy*) or as other intermediaries (*wspomagający*). It is not always easy to determine who acts in what capacity. In most cases, the primary reporting burden will lie with the tax advisors (as normally they will act as the promoters) and not with the actual beneficiary or the transactional advisors. However, the latter groups still would be obligated to ask the promotor for the tax scheme number assigned by the tax authority to the reported tax scheme or to report the tax scheme directly to the tax administration.

- What is at stake: Penalties and, for professional advisors, loss of credibility or disciplinary sanctions.

- What to do:

- The beneficiaries of the arrangements (e.g. investor or buyer) should first consult their lawyer or tax advisor to check if:

- the agreements (also verbal) reached between the parties, or a plan of action of the given beneficiary, should already be qualified as the arrangements;

- it is reportable (as a tax scheme); and

- who should report it under the Polish MDR Regulation.

The sooner such verification is undertaken the better, since the mere agreeing upon the structure of the transaction may trigger reportability.

Finally, the beneficiary should ask the promotor (if any) to provide the unique tax scheme number assigned to the given tax scheme by the tax administration.

- The transactional advisors, even if not based in Poland, as potential promoters and other intermediaries, should continuously assess their role under the Polish MDR Regulation and monitor whether the arrangement they are working on is reportable to the tax administration. They should repeat the analysis from time to time, since even a technically minor change in the transaction set-up may affect the previous assessment of reportability.

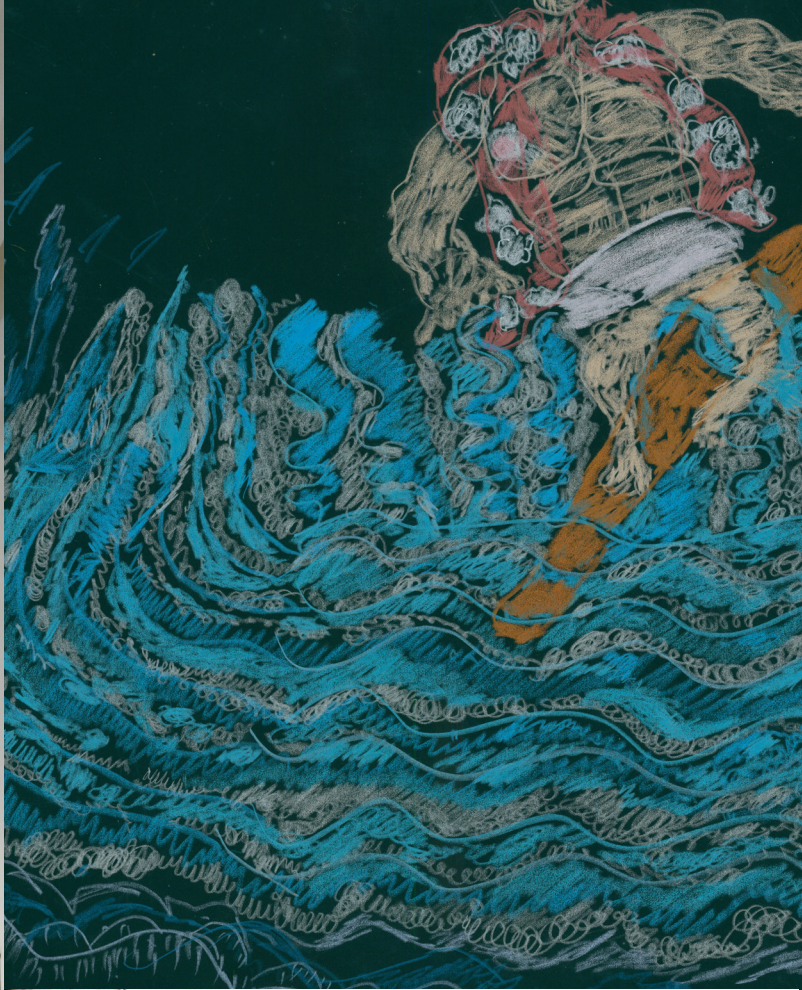
Advisors should also liaise with other advisors involved in the process of structuring, preparing or implementing the transaction to determine who will effectively report the arrangement to the tax administration.

- When to report: The scope and timing of the reporting varies depending on the entity's role in the preparation, implementation and management of the transaction. As a rule, however, the tax arrangement should be reported within 30 days of its set up/disclosure to the beneficiary or implementation.

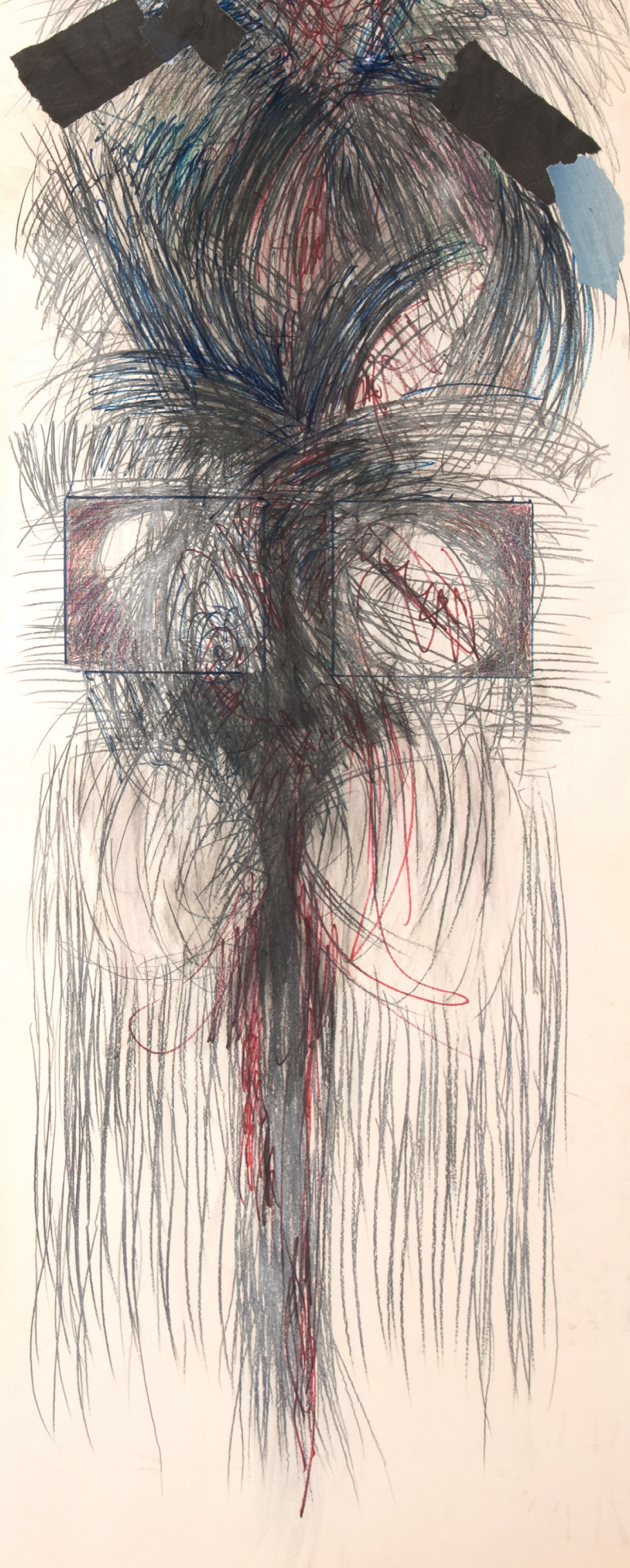
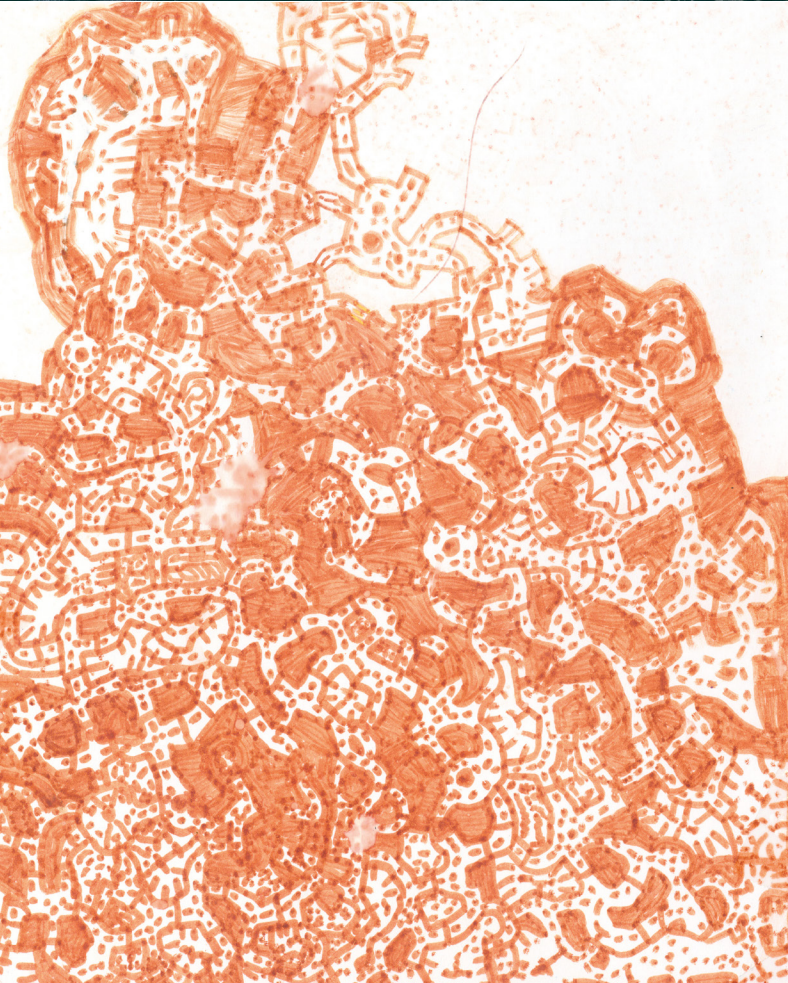
- What next:

- As the new legislation has yet to be tested in practice, nobody knows if the interpretation of the vague provisions will favour the reporting entities or instead give broad discretionary powers to the tax authorities. Some new guidelines issued by the tax administration may be expected.

- The MDR Directive should be transposed into the national laws of other EU countries by 1 July 2020. The Polish MDR Regulation may serve as a benchmark.



Katharina Kleibel, Christos Haas, Brigitte Nehiba, Thomas Sustr, August Staudenmayer



05

dispute resolution



cee overview by Christoph Lindinger and Marina Stanisavljevic

Pioneer work and deep insight into key dispute resolution trends

A year of strength for Schoenherr's dispute resolution team. A year of pioneer work, deep in sight into key regional trends, and unrivalled success. The team, spanning all Schoenherr offices in the CEE region, wrapped up 2019 with a bang.

Litigation funding remains a hot topic. Last year, it was on our doorstep. This year, it is making its mark in Central and Eastern Europe, and Schoenherr is right there to accommodate it. Sebastian Gutiu and Leon Kopecky have our Romania office collaborate in new ways with Vienna, together with clients and funders, on multi-claimant disputes. With a well-structured setup, clients can expect to run their disputes completely risk-free. The theory we shared on this topic last year, we are now turning into practice.

Meanwhile, our pioneer work continues with state liability in foreign investment protection. Last year was stirred by the European Court of Justice decision in *Achmea*. The future of foreign investment in Europe looked bleak. Now, Schoenherr's Vienna and Croatia offices are breaking ground implementing Christoph Lindinger's innovative state liability solutions. Intra-EU investors are protected; and their ability to challenge states for interfering with their investments is very much alive. Keep an eye out for this exciting new development.

This pioneer work rests on a solid foundation. With the integration of our offices across the CEE region, we combine specialised arbitration expertise with local know-how and experience. This has permitted our dispute resolution team to remain a strong leader in the CEE region, with a successful track record.

We are still "unbeaten" in investment arbitration. We are handling far more investment arbitrations than any of our competitors in the region. And successfully.

Only last year, Schoenherr's arbitration team received four ICSID awards in favor of our client in cases that the Vienna team headed by Christoph Lindinger, Leon Kopecky and Victoria Pernt ran together with Serbia (Matija Vojnovic, Natasa Lalatovic, Hristina Todorovic) and Moldova (Mladimir Iurkovski).

With these awards, we have left our mark on the investment arbitration landscape. Our arguments have become law. Our argument about what it means to be a protected

investor. And our argument about what an investor may expect and rely on when it invests abroad.

Adding to this, we have excelled vis-à-vis international tier one firms in commercial arbitration. Christoph Lindinger and Victoria Pernt are running a high-stakes ICC arbitration with the highest amount in dispute in the region. At the same time, our post M&A arbitrations are increasing. More and more companies appreciate the advantages of arbitration that Victoria Pernt highlights herein. They have opted for arbitration clauses in their SPAs, and for our team to see to their rights. Here, too, our geographic footprint facilitates transnational dispute management, with our Slovenia and Vienna offices currently teamed-up in one of our post M&A arbitrations.

But our arbitration practice is not the only area that is booming. To the contrary, our litigation practice continues to handle complex commercial cases. GDPR disputes are on the rise, and Schoenherr is at the forefront in some of the most high-profile matters. In addition to running these matters, Andreas Natterer cooperates with colleagues across the CEE region on new developments in life sciences. Meanwhile, Vice Mandaric and Bojana Vareskic have the Vienna and Croatia offices collaborate on defending banks in mass actions brought by consumers triggered by new legislation.

Without doubt, our geographic footprint remains our asset. Through close cooperation with colleagues in our offices across the CEE region, we have been able to tap into a network of experts. This transnational approach has allowed our dispute resolution lawyers to tackle complex multi-jurisdictional proceedings as well as high-profile commercial arbitrations and high-stakes investment arbitrations. Our unrivalled successes have confirmed the added value of this approach, allowing our practice to grow further.

With plenty on the horizon, we look forward to embarking on 2020. Together.

Legal Finance in practice



Sebastian Gutiu, Leon Kopecky

Legal finance – also called litigation funding – has firmly touched down in Central and Eastern Europe. Last year, we ran a chapter on what legal finance is. This year, we explain how legal finance works in practice. How we secure the best result for our clients. By working together.

Legal finance happens in three stages: project setup, agreeing on financing, and running the dispute. Each stage is crucial for the eventual outcome. We will illustrate this with an example from our arbitration practice.

Stage 1: Project setup

At the beginning there is always a project. A commercial or investment dispute between a claimant and a respondent. Or multiple claimants, as it was in our case: more than 50. Whatever the case may be, the first stage is all about the right setup.

Getting the facts straight, getting the information together, conducting a preliminary assessment of the claim: does it have merit? Can we approach a litigation funder with it? How should we approach them? How is the dispute going to play out?

Sometimes multiple claimants may have already organised themselves into an association which manages their claims. This simplifies the setup. But it is quite rare, especially in Central Europe, where we are not used to mass claims.

And so, the setup usually falls on the lawyers. How do we do it? Together.

In our case, the Vienna and Bucharest offices joined forces. This was suitable

from a cultural and legal perspective. Not to mention logistics. Neither office had to see every single claimant. And the claimants, who were from all over the world, did not all have to travel to one office. Instead, we divided up the work.

The setup must never be underestimated. Whether dealing with many claims or just one, it takes time to understand a claim; to get across the key documents, to apply the law, to formulate a case theory. It takes time to be prepared.

And you cannot approach a litigation funder unprepared. Ultimately, you want to provide the funder with a document outlining who you are as claimant, what your claim is, how you expect to run it, and what the projected return is. Of course, we do this for you. But it's hard work, and the first stage can easily take several months. If done well, the funder will sign a terms sheet with you outlining the commercial terms of a potential funding agreement.

Stage 2: Agreeing on financing

A lot happens before a funding agreement is concluded. First, the terms must be agreed.

You and your claim are tested by the funder. The funder needs to determine the risk and agree on an appropriate rate of return. Then comes the budget: the lawyers' fees, the expenses of courts or arbitration institutions, witnesses, experts etc. The funder wants to know a budget for all this upfront. Also, there may be adverse costs insurance (in case you lose the case). Its premium, too, may be covered by the funder.

And so, a comprehensive due diligence is required. In our case, the Vienna and Bucharest offices worked in sync, using state-of-the-art legal tech. With a specialised tool, our teams worked at different times from different locations, while work products remained up-to-date and accessible by all team members and the funder. The four-eye approval principle ensured that key documents were checked by lawyers from both offices.

The second stage concludes with the signing of the funding agreement, which sets out in detail the funding con-

ditions, obligations of the parties, schedules and budgets. It also sets out how funding is done and how proceeds are eventually distributed.

In our case, escrow accounts were set up for funding and proceeds distribution. Through a separate escrow agreement, this guarantees that funds are allocated, and proceeds are distributed, correctly. Securities are executed, so claims and proceeds cannot be taken or set off.

Stage 3: Running the dispute

With the funding agreement in place, the dispute can proceed. The funder does not advise or influence the conduct of the dispute, or any potential settlement. It does, however, ask for regular updates on the proceedings, the budget and any relevant issues which could impact the dispute.

And so, the teamwork continues. Everyone stays informed.

Once the award is issued (or the case settles), proceeds start coming in. They go into an escrow account. They are then distributed according to the funding agreement, a so-called waterfall. But no matter the agreed premium and no matter the cost, you, as the claimant, should always recover the larger part of the proceeds. If the respondent does not pay the whole amount, a funder may monetise the award (or settlement). It pays an upfront premium to you and handles the enforcement itself. If the funder collects more than expected, you may even be paid a deferred premium later on.

At the end of the day, you can run a risk-free dispute, just like our claimants. Protected from legal fees, expenses and even adverse costs. You can run a case you otherwise wouldn't. Perhaps because the risk was too high, perhaps because it would look bad on the balance sheets.

That is how legal finance works.

Stay or go, your Investments ARE protected



Christoph Lindinger, Marcin Aslanowicz

You are an intra-EU investor. You run your business in one EU state and invest in another. Or perhaps you are an international company, outside the EU, but with a corporate structure that includes intra-EU investment. You never questioned that your foreign investment will be protected under the applicable intra-EU bilateral investment treaty (BIT). And you had no reason to.

But then came 2018. An investment dispute between a Dutch insurance company and Slovakia made its way to the European Court of Justice (ECJ). And the ECJ's decision in that case (Achmea v Slovak Republic, or simply "Achmea") threw the future of foreign investment protection into disarray.

The gist of Achmea: investor-state arbitration clauses of intra-EU BITs are incompatible with EU law. The concern: enforcement of intra-EU BIT arbitral awards will become more difficult. The likely effect: your foreign investments are no longer protected.

But Achmea, and its repercussions, are far from clear. The decision is yet to be tried. And even if enforcement of intra-EU BIT arbitral awards does become more difficult, there is still no need to worry about your foreign investments.

They ARE protected.

Achmea does not affect the protection of your investment abroad or in the EU, whether you run your business from the EU or a non-EU state. It simply requires you to take one of two paths: structure outside the EU or be protected by EU law itself.

First path first. Structure outside.

Achmea only affects BITs between two EU states, i.e. intra-EU investors. It does not affect BITs between an EU

state and a non-EU state. That means if you are an EU investor in a non-EU state or a non-EU investor in an EU state, the protection of your investment under the applicable BIT remains unaffected. In fact, it is flourishing. Just last year Schoenherr won three investment arbitrations for EU investors against non-EU states.

And so, the first option for protecting your foreign investment may very well be to structure it from outside the EU, provided you know when and where to go.

But what if restructuring is not recommended for your business? What if you need to stay an intra-EU investor? Well, that's fine too.

Take the second path. Let the EU protect you.

EU states cannot harm investments of other EU investors. EU law protects them, quite extensively. The standards of investment protection guaranteed under BITs and under EU law largely overlap. The real difference is how they are enforced.

Under BITs, states typically consent to dispute resolution by an arbitral tribunal. For instance, ICSID at the World Bank, or UNCITRAL of the United Nations. The awards rendered by these tribunals are practically enforceable worldwide. Any assets that your losing opponent (the state) may have, including assets outside the state, are up for grabs.

But if an EU state violates investment protections under EU law, your case will start in the national courts of that state. You will sue for state liability. If the national courts apply EU law correctly (and find the state liable), you win. And you can easily enforce that EU judgment, at least throughout the EU, but also in most other non-EU jurisdictions.

If the national courts find the state did not violate EU law, then they applied EU law incorrectly. In that case, you sue again – this time for violation of EU law by the state (for harming your investment) and by its national courts (for failing to apply EU law correctly). In that proceeding, questions of EU law will arise, and the national courts will be obligated to bring the matter to the ECJ for a preliminary ruling. The ECJ will decide on the proper interpretation and application of EU law. The ECJ's ruling is final, and the national courts will be obligated to follow it. Again, your judgment is enforceable. Again, you are protected.

So, while investment arbitration is the simplest path, it is not the only one. If structuring your investment outside the EU is not viable, don't fret. At the end of the day, your EU investment – whether you stay or go – is still protected.

New arbitrability of shareholder resolutions in the Amended Polish Civil Procedures Code



Ewa Parczewska, Marcin Aslanowicz

Arbitration is on the rise in Poland. A major amendment to the Polish Civil Procedures Code became effective on 8 September 2019, increasing the list of arbitrable cases to include those on the invalidity or annulment of resolutions of general meetings of limited liability or joint-stock companies.

Prior to the introduction of the amendment, many controversies were related to the arbitrability of cases regarding the invalidity or annulment of general meeting resolutions. This was settled by the Supreme Court, when it finally held that disputes regarding the invalidity or annulment of resolutions could not be the subject of an arbitration clause.

An amendment extending the ability to contest resolutions in arbitration has been a topic of discussion and postulates submitted by the arbitration community for over a decade. However, the provisions raise many doubts and concerns among practitioners.

What is the change?

Practically, the change involves removing the requirement to date, which means that no property disputes can be considered in arbitration if they could not be settled. In abolishing the requirement of settleability, the Polish legislator awarded all property disputes (excluding alimony cases) the attribute of "arbitrability". Corporate disputes regarding the invalidity or annulment of resolutions can now be settled in arbitration. The amendment also clearly defined the group of entities that will be bound by the arbitration clause contained in the articles of association of a limited liability or joint-stock company, indicating, in addition to the company itself and its partners, the governing bodies of those companies and their members. The regulations had only specified the shareholders to date, omitting the company's governing bodies.

An arbitration clause – new requirements

In addition, the amendment introduced new formal requirements regarding the arbitration agreement. To be effective, the arbitration clause must currently provide for the obligation to publish information on the initiation of proceedings in the manner required for the given company's announcements (namely in the official journal, *Monitor Sądowy i Gospodarczy*, the company's website or by registered post). The announcement should be posted no later than within one month of the date of initiation of arbitration.

Many cases - one arbitration

Furthermore, this amendment provides for a "consolidation" of arbitration proceedings by law. It seeks to eliminate the risk of appealing against the same resolution in arbitration (e.g. by a shareholder) and in court proceedings (e.g. by a member of the management board). The arbitral tribunal appointed in the case initiated earliest will have the competence to settle all corporate disputes regarding the same resolution, if another entity files an appeal against it. ... and a few uncertainties...

Although the practical assessment of this amendment raises many doubts, they should be considered on a theoretical rather than a practical basis.

It is not entirely clear how the solutions proposed by the lawmakers will apply to joint-stock companies, especially those with a distributed shareholding, as it may transpire that only some par-

ticipants will have an influence on the course of the proceedings, including the choice of arbitrators.

There are also doubts as to whether the amendment constitutes a field for potential abuse in the form of blocking or delaying proceedings. Concerns have been raised that the potential divergence of interests between the management board and the shareholders appearing in opposite procedural roles can give rise to the temptation to file fictitious actions and put pressure on the members of the governing body in an attempt to force through specific activities.

The regulation has not addressed the matter of decision-making regarding the procedural steps after the shareholders join one of the parties to the proceedings.

Polish arbitration is developing

Nevertheless, we are convinced that the Polish arbitration courts will react promptly to all remarks made by commentators, adjusting the regulations accordingly. Polish arbitration is developing systematically and is becoming more popular. This is the next appropriate step to promote this type of dispute resolution, and we are excited to tackle these challenges.

Sarah Khalil
and Victoria Pernt
at Schoenherr

What to choose...

... if foreign law
may apply?

... if the other party
has its assets
abroad?

... if you want
confidentiality?

... if you want a
good decision?

... if you want a
quick decision?

... if you want a
cheap decision?

... if you want to
make the most of
your case?

In your view the
biggest benefit

In your view
the best advice



Arbitration

Victoria Pernt

Arbitration counsel can represent a client no matter what law applies or where the arbitration is seated. Arbitration is inherently international. **We do it all.**

For instance, I have represented clients in arbitrations under Kosovan, Georgian, German and English law; seated in London, Frankfurt and the Marshall Islands.

Arbitral awards are enforceable **worldwide**. Almost all (i.e. 160) states committed to enforcing foreign arbitral awards in the 1958 New York Convention. This makes it much easier and faster to enforce an arbitral award than it is to enforce a court judgment. Unlike a court judgment, an arbitral award follows the debtor around the world. The debtor cannot hide itself or its assets abroad.

Arbitration allows the parties to shape their own proceedings. Within the limits of the applicable law, the parties can agree to keep their dispute **confidential**. Thus, unlike court proceedings, arbitral proceedings can remain private. And unlike court judgments, arbitral awards can remain confidential.

Arbitrators are chosen by the parties. Anyone can sit as an arbitrator. There is a worldwide pool of arbitrators with vastly diverse **specialisations**. You can choose someone with experience in your industry or that particular legal field (e.g. post M&A). In arbitration, your disputes are decided by true experts, not career judges.

An arbitral award will generally be issued within **one to one and a half years** of filing a claim – **or faster** if the parties opt for expedited proceedings. The possibilities to challenge an arbitral award are limited and rarely used, and there is **no appeal**. This means that, unlike in court, you get an award that is enforceable worldwide within only one or one-and-a-half-years.

Costs should not be decisive. Whether in arbitration or litigation, costs depend on the amount in dispute, and the winning party will typically be reimbursed its costs. In arbitration, the parties can influence costs when agreeing the arbitral institution and the procedure. Also, the winning party may well be reimbursed all its actual costs. In court, the winning party is reimbursed court costs and attorney's fees according to the Austrian Lawyer's Tariff Act. For a truly simple matter with a low amount in dispute, court is likely to be the cheaper option.

Arbitration. Definitely. With **specialised** arbitration counsel. Arbitration is a combination of civil and common law, shaped by practitioners from all over the world, yet tailored to the case at hand. This is a game of its own. You have to know how to play it in order **to win**.

You are in the driver seat. Parties and counsel have far more **influence and power** over the proceedings and their outcome in arbitration than they ever would in court.

Hire **experienced counsel**. Because arbitration is run by the parties, and because there is no appeal, make sure your counsel knows what they are doing. Your case depends on it.

Litigation

Sara Khalil

Litigation counsel represents clients in domestic courts. Domestic courts do not only rule on cases under Austrian law, but apply any **any foreign law**, if chosen or otherwise applicable, such as German, Spanish, Californian or Irish law. Litigators cooperate with foreign lawyers; we have vast experience with colleagues around the world.

Judgments rendered by an Austrian court are directly enforceable in the **EU**. If bilateral or multilateral treaties apply (e.g. Convention of 30 June 2005 on Choice of Court Agreements), a judgment can be enforced in other countries. Even if there are no bilateral or multilateral treaties, a judgment can be enforced under certain circumstances.

Litigation proceedings are open to the **public**. Anyone can attend a hearing. The public can only be excluded in limited circumstances, for example, if witnesses are threatened or if matters of family life are discussed. Lower instance judgments are usually not published. Supreme Court judgments are published anonymously.

Austrian judges must complete more than eight years of studies and training in addition to sitting an exam before they can apply for a position at a lower court. Lay judges support them with their professional expertise in certain cases. Judges are **independent** and do not answer to anyone, not even the Minister for Justice.

If a claim up to EUR 75,000 is filed, the court issues a **payment order**. Proceedings are only initiated if the defendant objects to the order within four weeks. Depending on the complexity of the case, a first instance judgment is usually issued within one to one and a half years after filing. Appellate proceedings last on average between six months and two years.

No question litigation. In litigation it is not necessary to invent or tailor the rules. The parties know what to expect: an **experienced career judge** deciding the case with the opportunity to appeal – possibly even at lower costs.

An unfavourable first (and second) instance decision can be **appealed**. Even if a decision is appealed the **costs** of the entire proceedings may **be lower**.

Same. Hire **experienced counsel**. A complex matter needs to be handled by an experienced litigator who knows how to present the case in court.

06

eu & competition



cee overview by Christoph Haid

Additional competences of competition authorities and competition law concepts used by non-competition authorities: en route to cohesion or collision?

Antitrust authorities are often seen as role models for the public enforcement of rules that are in the consumers' interests. They have broad investigative powers and can levy hefty fines for infringements of the cartel prohibition or abuses of dominance as enshrined in Articles 101 and 102 TFEU (or their national equivalents). They try to enforce rules that seek to ensure consumer welfare by either making products cheaper or better – or at least curb any efforts to impede effective competition, for example by abusing a market dominant position.

In recent years, the powers of antitrust authorities have expanded. Several authorities now ensure fairness in supply relationships even when antitrust rules are not infringed. On the other hand, since the entry into force of the GDPR, national data protection authorities must now impose fines of up to 4 % of turnover of the respective undertaking, whereas 'undertaking' should be understood in accordance with Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Fairness in supply relationships and data protection seem like very different issues. Still, they both rely on antitrust law concepts, and in both instances, the transposition of these concepts into the respective laws has led to confusion, as we will explain briefly below.

Competition laws vs UTP laws in the food supply chain

UTP laws want to prevent the abuse of a superior bargaining position in the supply chain by prohibiting unfair terms in the relationship between distributors and suppliers. There is an overlap between UTP and competition law insofar as restrictions and abuses in supply re-

lationships are also regulated in EU competition law.

One gets the impression, however, that laws on unfair trade practices in the food supply chain ("UTP") are often ushered through the legislative process to comply with political demands without proper alignment with existing antitrust laws, so that the outcome is different and at times rules on similar practices deviate, confusing practitioners and enforcers alike.

The major difference between EU competition law and UTP laws is that the first has an established framework for assessing restraints, while the latter is less precise. While UTP laws focus on the issue of fairness, they often do not provide the analytical tools for an assessment of the underlying terms or the proportionality of the quid pro quo. This is where competition law could be of help, but there is usually no guidance on whether antitrust case law on excessiveness of prices or conditions will be applied by way of analogy. Several UTP laws (including the EU UTP Directive) include a "blacklist of practices", which sounds rather menacing. But a closer look at the wording of the

provisions reveals problems of interpretation, which may detract from the UTP Directive's ability to achieve its goals. The hope remains that the interpretation of UTP and antitrust laws when it comes to fairness in dealings between suppliers and distributors will be aligned in the future.

Competition law vs. data protection

Recital 150 GDPR mentions that the basis for the calculation of fines for data protection violations is the worldwide group turnover, as also enshrined in antitrust law. The belief is that, like in antitrust, only group turnover is a relevant proxy for the economic importance of the entity infringing privacy and consequently a deterrent fine.

The transposition of the concept of a group of undertakings forming a single economic unit into GDPR has sparked criticism:

- Unlike competition law, the GDPR does not acknowledge privileged data sharing within a corporate group but imposes concrete restrictions on the exchange of data between affiliated companies.
- One of the consequences of the SEU

Unfair trade practices in the food retail sector in Hungary: will the new UTP Directive bring substantial changes?



Márk Kovács

The legislation on unfair trade practices is a classic interplay between competition law and trade law. The close and complementary relationship between trade and competition policies can be derived from the similarity of their objectives: fostering fair and effective competition while at the same time protecting vulnerable market players from abusive conduct by those with stronger negotiating power.

concept will likely be that, similar to enforcement of antitrust rules, parent companies will be liable for damages caused by subsidiaries that have violated GDPR obligations. It is doubtful whether such liability (which is based on the influence over non-privacy related behaviour) is in line with rules on guilt under tort law.

After all, it seems the main driving force behind the use of the SEU concept for fines under Article 83 GDPR is the ability to impose more deterrent fines. Whether this takes into account the criteria required by this provision sufficiently and can properly ensure that fines are in fact proportionate, is doubtful.

Conclusion

Companies and their advisors will have to organise compliance with several distinct, yet partially overlapping if not deviating frameworks at the EU and national level, all aiming at upping the level of fines to be imposed for breaches of the law. In the following, we will tackle a few selected examples of the interplay between antitrust and other consumer related laws and give an outlook of what still is to come.

On 25 April 2019, Directive (EU) 2019/633 was introduced in the European Union on unfair trading practices in business-to-business relationships in the agricultural and food supply chain ("UTP Directive"). The UTP Directive aims to reduce unfair trading practices (UTPs) in the food supply chain by introducing a minimum common standard of protection across the EU.

The idea behind the UTP Directive is not novel. The directive itself notes that most Member States already have specific national rules that protect suppliers against unfair trading practices in business-to-business relationships in the agricultural and food supply chain. In Hungary, such national rules exist in the form of a separate act effective since 1 January 2010 (Act XCV of 2009 – "UTP Act").

As Hungary has an almost decade-long, well-established practice on UTPs in the agricultural and food supply chain, the most important question facing the main market players is whether the UTP Directive brings any changes to the national rules. The main differences are as follows:

Personal scope of the UTP Directive vs. the UTP Act

The UTP Directive follows a dynamic approach and excludes from protection the largest suppliers (whose yearly turnover exceeds EUR 350m) and does not bind the smallest retailers (whose yearly turnover does not exceed EUR 20m).

On the other hand, the UTP Act – like its recent Slovak equivalent¹ – covers all food retailers and suppliers irrespective of turnover.

Prohibited practices

The UTP Directive introduces a "black list" for trade practices which are per se prohibited, and a "grey list" from which the parties can deter if they agreed on it beforehand in a clear and comprehensive manner.

The UTP Act does not distinguish between black-listed and grey-listed conduct; all conduct included in the act is per se prohibited. Most of the prohibitions listed in the UTP Directive already have a Hungarian equivalent in the UTP Act, but certain amendments will be required for full compliance, which we highlight in the following table.

UTP Directive	UTP Act	Necessary amendment
Article 3 b) – cancelling order on perishable products on unreasonably short notice; notice of less than 30 days shall always be considered short notice	Section 3 (2) m) – the trader alters its order on unreasonably short notice	The UTP Act must specify that a notice of less than 30 days will always be considered short notice.
Article 3 e) – supplier to pay for the deterioration or loss, or both, of agricultural and food products that occurs on the buyer's premises or after ownership has been transferred to the buyer	Section 3 (2) b) – stipulating a buy-back or take-back obligation upon the supplier if close-to-expiry products remain on stock at the trader and they expire	The UTP Directive provides for much broader protection. The UTP Act will be reworded in this respect in line with the Directive.
Article 3 f) – the buyer refuses to confirm the terms of a supply agreement in writing	Section 3 (2) l) – applying a contractual provision which has not been put in writing within three days, despite the supplier's explicit request	The UTP Act must make clear that refusing to put the terms of a supply agreement in writing, despite the request of the supplier, is unfair in itself, i.e. it is not required to actually apply a provision that has not been put in writing.
Article 3 h) – the buyer punishes the supplier if the supplier exercises its contractual or legal rights	n/a	This explicit prohibition must be incorporated in the UTP Act.
Article 3 i) – asking compensation from the supplier for costs of examining consumer complaints related to the supplier's products	n/a	This explicit prohibition must be incorporated in the UTP Act.

Other than the above, the UTP Act is even stricter than the UTP Directive in the sense that it contains prohibitions which are not even mentioned by the UTP Directive. These special national prohibitions include e.g. prohibition of sales below cost, prohibition of applying discriminatory retail prices based on the country of origin of essentially the same products, etc.

Takeaway

The UTP Directive is an appreciable step towards better protection of those suppliers of agricultural and food products who are highly exposed to weather conditions and other objective factors affecting their productivity and efficiency, while at the same time a stable supply of agricultural and food products is a common interest. However, as is evident from the above, implementing the UTP Directive in Hungary will not bring substantial changes to the status quo. Most of the unfair practices listed by the UTP Directive are also explicitly prohibited in the UTP Act or can be derived from the current text, although minor twists and tweaks can be expected for full compliance.

¹ <https://www.schoenherr.eu/publications/publication-detail/new-law-on-unfair-trade-practices-in-the-food-retail-sector/>

Romania: trends in competition and data protection investigations | Consumer welfare. Industry focus



Georgiana Bădescu, Costin Sandu

Public enforcement is likely to become increasingly focused on consumer welfare. While this trend is obvious at the EU level, consumer welfare is still a rather blurry concept for national authorities, but clearly a focus for them as well.

Public enforcement is likely to become increasingly focused on consumer welfare. While this trend is obvious at the EU level, consumer welfare is still a rather blurry concept for national authorities, but clearly a focus for them as well. Competition or data protection authorities tend to be interested in industries prone to consumer risks, such as telecom, financial services, energy, pharma or tourism, and we expect these will continue to be in the spotlight.

Back in 2017, on its 20th anniversary, the Romanian Competition Authority (the "RCA") commissioned a study to assess the impact of its interventions in 10 key industries, including consumer benefits. This study, prepared by the Bucharest Academy for Economics, estimated savings of EUR 1bln by Romanian citizens over the 20 years of the RCA.

Competition and data protection investigations: synergies and trends

It will come as no surprise to many of our readers that over the past 10 years the RCA has developed a steady practice of investigating high-profile companies and applying severe turnover-based fines. On average, the RCA opens more than 10 new large-scale investigations each year and finalises about the same number of cases.

On the other hand, the reported number of investigations opened by the Romanian Data Protection Authority (the "DPA") in the first 12 months of application of the GDPR may come as a shock: 485 investigations ex officio and 496

investigations following 5,260 complaints received by the authority.

But mere numbers are irrelevant when seeking to benchmark the efficiency of one authority versus another in terms of investigations. This is because the DPA's procedural rules are much looser and its investigations less intrusive than the RCA's (at least for now).

For example, statistics released by the DPA show that most of the investigations were conducted in writing. On-site investigations took place only in very few cases. The RCA in turn always kicks off its large-scale investigations with dawn raids authorised in advance by the Bucharest Court of Appeal. We expect the DPA will likely also become subject to stricter rules in the short to medium term, similar to the RCA, as subjects will need an adequate level of protection against potential abuses

Sanctioning trends

The RCA and DPA also take different approaches when applying sanctions. While the DPA currently appears to be more focused on remedies and corrective measures, the RCC traditionally applies heavy fines (a no-fine scenario is truly exceptional, for example, when a case would be closed via commitments).

To date the DPA has only applied very few fines, with their largest fine of EUR 150,000 in October 2019. Over its first 20 years, the RCA applied fines totalling EUR 574m, with the largest fine of EUR 205m applied in 2011.

The RCA follows clear-cut and detailed rules for calculating the level of a potential fine, based on the gravity and duration of the alleged infringement and factoring in mitigating and aggravating circumstances. The rules for fines applied by the DPA are nowhere near as transparent, though. We expect the DPA rules to become clearer by also relying on the established know-how of the RCA and on those of other European data protection authorities.

Finally, fines applied by the DPA have faced limited scrutiny. Public records show that only two fines were challenged in court, which may imply either that companies have not found compelling grounds for a counterclaim or remain reluctant to pursue challenges in court, especially given the low fines. Conversely, fines applied by the RCA are usually challenged in court, particularly in a no-settlement scenario.

Readiness is everything

We anticipate the RCA will continue to be a powerful and active authority. It is only a matter of time until the DPA becomes more aware of its sanctioning powers and therefore more active.

Continued compliance is essential to mitigate potential risk. Detailed procedures (including on how to behave during raids), employee trainings and awareness raising programmes (including periodical checks or audits of ongoing day-to-day practices) should be part of every company's compliance toolkit.

Will the new EU Directive on unfair trading practices in the food supply chain have any impact on the existing legislation in CEE?



Claudia Bock

Unfair trading practices ("UTPs") in business-to-business relationships in the food supply chain have been in the spotlight of the European Commission ("Commission") since late 2008. As a result, the new Directive on unfair trading practices in the food supply chain (the "Directive") was adopted in spring 2019¹. Its aim is to protect weaker suppliers against stronger buyers.

Several EU Member States (many of them in CEE) already have UTP legislation in place, which is enforced to varying degrees. In terms of enforcement and strictness, the Czech legislation, closely followed by Slovakia's, can be considered a pioneer in the UTP legislative area. With the Directive introducing a minimum standard of protection for food suppliers – and allowing Member States to adopt or maintain national rules that go beyond the UTPs listed in the Directive – the question of whether the Directive will bring any significant changes arises. What can be expected from its implementation in relation to these two jurisdictions?

Protection of weaker suppliers against stronger buyers remains the common denominator

There is a general understanding at the EU and national levels that asymmetry in bargaining power may lead to the imposition of UTPs on suppliers. In preparing for the Directive, the Commission argued that due to suppliers' weaker position, they are often de facto forced to accept unfair practices to continue selling their products and maintain commercial relations with buyers in the supply chain. Such behaviour was on the Czech and Slovak legisla-

tors' radar before the adoption of the Directive, with the Czech UTP legislation being in force from 2012² and Slovakia's from 2013³. The common denominator of all the legislation in place today, however, is the provision of mandatory rules that outlaw certain UTPs. A brief comparison of the respective UTP rules follows below.

Scope of application: Who is protected and against whom?

EU: Suppliers of food products are protected against possible unfair behaviour engaged in by economically stronger buyers or groups of buyers at various levels of the distribution chain (processors and intermediaries). This "step approach" (also referred to as the relative concept) is based on group turnover figures reflecting the different bargaining powers of the suppliers and buyers. The Directive aims to protect only those suppliers who due to a weak bargaining position require such protection. The Directive introduces five turnover thresholds. A micro enterprise with turnover of less than EUR 2m is protected against buyers with turnover exceeding EUR 2m. Small enterprises with turnover above EUR 2m and not exceeding EUR 10m are protected against buyers with turnover higher than EUR 10m. Medium-sized enterprises with turnover above EUR 10m but not exceeding EUR 50m are protected against buyers with turnover higher than EUR 50m. The Directive also provides two more thresholds (not exceeding EUR 150m and EUR 350m). The protective effect thus covers suppliers with turnover of up to EUR 350m.

CZ: The applicable Czech UTP legisla-

tion protects food product suppliers, irrespective of their market power or turnover. It prohibits buyers of food products from abusing their market power. The applicable laws set a rebuttable presumption that a distributor of food products (i.e. a wholesaler or retailer) enjoys significant market power if its annual turnover from the sale of food products exceeds CZK 5bln (approx. EUR 200m).

SK: Suppliers and buyers of food products are both protected against UTPs under applicable Slovak UTP legislation. Unlike the Czech or EU legislation, the turnovers and/or related market power of either parties are irrelevant. The Slovak legislation aims to safeguard a fair balance in business-to-business relationships between the parties in general. Nevertheless, it places slightly more obligations and limitations on food retailers. This allows the conclusion that food suppliers are generally considered the weaker party in such business relationships.

What is prohibited?

EU: The Directive does not prohibit unfair trading practices in general but targets 15 specific unfair trading practices which were identified as the most damaging. In doing so, it distinguishes between "black" and "grey" practices. The following black unfair trading practices are prohibited irrespective of the circumstances:

a. late payments (later than 30 days after the end of the agreed delivery period or the date on which the payment is due for perishable products, or later than 60 days for non-perishable products);

- b. last-minute order cancellations;
- c. unilaterally changing the terms of the supply agreement;
- d. equiring payments from the supplier that are not related to the sale of the products;
- e. requiring the supplier to pay for the deterioration or loss of the products on the buyer's premises;
- f. refusing to enter into a written agreement;
- g. unlawfully acquiring or using the supplier's trade secrets;
- h. threatening to carry out acts of commercial retaliation; and
- i. requiring compensation from the supplier for the cost of investigating customer complaints when there is no negligence or fault on the supplier's part.

On the other hand, the following grey practices are allowed if the supplier and the buyer agree on them beforehand in a clear and unambiguous manner:

- a. returning the unsold products to the supplier without paying;
- b. charging payment as a condition for displaying or listing the supplier's products;
- c. requiring the supplier to bear the costs of discounts on products sold by the buyer as part of a promotion (unless the buyer, prior to the promotion, specifies the period of promotion and the expected quantity of products to be ordered at the discounted price);
- d. requiring the supplier to pay for advertising by the buyer;
- e. requiring the supplier to pay for marketing by the buyer; and
- f. charging the supplier for staff to fit out premises used for the sale of the products.

CZ: The Czech UTP legislation includes a general clause prohibiting any sort of abuse of significant market power by retailers vis-à-vis the suppliers, together with an open list of prohibited UTPs. The Czech legislation is generally stricter than the Directive, already covering several of the practices blacklisted under the Directive. Other practices listed under the Directive could be summarised under the general clause or other practices specifically covered by the Czech

UTP legislation, such as the prohibition on negotiating and requiring payments or other consideration for which a service or other consideration was not provided, but also which is inadequate or disproportionate to the value of the actually provided consideration.

SK: The Slovak UTP legislation in general aims to copy the Czech one. It also introduced a general clause under which practices other than those specifically listed might be deemed unfair if they deviate from the usual fair behaviour in business-to-business relationships. In addition, the Slovak legislation includes an open list of UTPs which already covers most of the UTPs listed under the Directive and even goes beyond it.

Enforcement

EU: The Directive states that each Member State must designate one or more authorities to ensure the prohibition of UTPs. Suppliers affected by a prohibited UTP must be able to address complaints to these enforcement authorities. The supplier can ask for its identity to be protected.

The enforcement authorities' powers more or less equal those of the competition authorities, i.e. they have the power to conduct investigations, require buyers and suppliers to provide information, carry out on site inspections, require buyers to terminate prohibited UTPs, impose fines and publish their decisions.

CZ: The Czech Competition Authority is responsible for enforcing the UTP legislation. It is already vested with all powers required by the Directive and well known for its strict enforcement policy. Abuse of significant market power can lead to fines of up to 10 % of annual (net) turnover in the preceding business year. The CCA has followed its antitrust fining guidelines so far when setting fines.⁴

SK: UTPs are sanctionable by a fine of up to EUR 500,000. Enforcement lies with the Ministry of Agriculture. Like the Czech legislation, it is in line with minimum requirements set by the Directive.

Comment

The Directive allows EU Member States to adopt or maintain national rules that go beyond the UTPs listed in the Directive. Clearly, the respective Czech and Slovak UTP rules in force go beyond the minimum standards set by the Directive. The implementation of the Directive could be an opportunity to review the oft-criticised national UTP legislation, which is said to be too vague, strict and irrational from a business point of view (in view of the absolute concept of market power under the Czech UTP rules or the annual cap on financial performances in return for marketing or promotion services provided by buyers to suppliers under both the Czech and Slovak UTP rules).

Nevertheless, various Czech and Slovak stakeholders have already said that they do not see the Directive as mitigating the current legislation. The changes to national legislation are thus expected to be minimal (e.g. the scope of buyers most likely will be expanded). Participants in business-to-business relationships in the food supply chain will therefore have to continue duly observing compliance with national UTP rules.

1 Directive No. 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. EU Member States must implement the Directive in their national laws by May 2021 and apply it six months later.

2 Act No. 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof.

3 Act No. 91/2019 Coll., on Inappropriate Conditions in Food Trade and on Amendments to Certain Acts.

4 The Czech Competition Authority has issued four decisions this year alone, the latest being in October, when it fined MAKRO approximately EUR 1.9m for violating UTP legislation by concluding contracts with certain food suppliers in 2016 – 2018. These included payment obligations on the part of the food suppliers to MAKRO for logistics and marketing services related to the use of delivery services and reservation of business space. The total amount of these payments exceeded the statutory allowance of 3 % of the supplier's annual sales. In addition, the terms of the so-called delivery service were not sufficiently specified in the contracts.

07

healthcare & life sciences



cee overview

by Andreas Natterer, Pawel Halwa and Iliyana Sirakova

Development, controversy, stagnation? Trends and forecast for healthcare & life sciences in CEE

The year 2019 was one of development, but also of controversy and in some cases, unfortunately, stagnation. For good or bad, the healthcare and life sciences sector is developing rapidly. The trends we currently see, and what we forecast are interesting, which of course makes our lives from a legal perspective that much more fascinating.

Blockchain for example has existed for quite some time now. But it became popular only in 2018 and 2019. The possibilities for blockchain in the health care & life sciences sector include health records, clinical trials, data sharing, EMRs, medical devices tracking, accelerating R&D, and drug traceability. Pharma companies invest millions in integrating blockchain. But still, blockchain is not and will not be ready to become mainstream in 2020/21, as there are barriers to overcome such as data protection rules. Before the law can be adapted to fit the technical possibilities and limitations of blockchain, people need to understand blockchain, and many don't.

Another topic of controversy is the use of Cannabis (hemp) and CBD in e.g. foodstuff, cosmetics and e-cigarettes. Cannabis and CBD – products flooded the market last year. Producers and distributors swear that these products are not only safe but even better than the medicine currently used for certain illnesses. Regardless, consumers want them, and some of the benefits of Cannabis and CBD are hardly disputable. Still, neither the EU nor Member States can decide what to do with these substances. Subsequently, the legal situation in Member States differs in this regard.

So do the legal highlights in CEE. Here are some of them:

Bulgaria

Microbiological cultures were developed in 2019 which can replace the nitrites in meat products have successfully fulfilled food safety laboratory tests and are expecting a final assessment by the Bulgarian Risk Assessment Centre in 2020. This will allow the industry to produce nitrite free meat products.

Czech Republic

Intensive discussions are ongoing on "dual quality" of food products sold in multiple EU countries under the same labeling but with a different composition of foodstuff in the European Union. The Czech Ministry of Agriculture is preparing a legal amendment that will ban dual quality food products. This amendment is supposed to be stricter than the EU Directive (EU) no. 2019/633, which on the national level is perceived as being very lenient and will be punishable by a substantial monetary fine.

Moldova

Following the Association Agreement with the European Union and the European Atomic Energy Community and their Member States, Moldova adopted several normative acts transposing, entirely or partially, the European Union acquis in different domains including cosmetics, medicinal products and medical devices in the past years. The most recently adopted laws are "on food safety" transposing the EU General Food Law Regulation and the Law "on chemicals" partially transposing, inter alia the Regulations on CLP, REACH, detergents and biocidal products (both in force as of February 2020).

Poland

Without warning, Poland's Ministry of Health and the Main Pharmaceutical Inspector started applying a more restrictive interpretation of the law on the import of prescription only medicines (POMs). Consequently, the customs authorities started to retain packages containing medical ordered by patients. It is being argued by the competent ministry and the controlling authorities that the application of such interpreta-

tion is a measure to protect the health and lives of local customers. The amended interpretation, however, infringes the rights of chronic patients, ordering the medicinal products from abroad, and requiring the medicines urgently and timeously. EU treaty guarantees of free movement of goods and recognition procedures in respect of medicinal products as well as constitutional rights to healthcare and to life are being infringed, especially when it comes to the medicines which are not available in Poland.

Slovakia

Following an amendment to the Slovak Food Act, effective as of 1 May 2019 any person who sells food is, when promoting and marketing the foods and agricultural products, obliged to secure that at least half of the food or agricultural products from the total number of foods or agricultural products marketed in the leaflet/ advertisement magazine or similar form of communication are produced in the Slovak Republic. Also, a new Act on Unfair Terms in Sale of Foods was passed defining "unfair terms" and became effective the same time. This act applies also to agreements concluded abroad or governed by foreign law if the effect of it arose or could have arisen in the Slovak Republic.

Slovenia

From modern medicine to tradition: The saying "No bees, no life" is taken very seriously in Slovenia. Beekeeping is of great economic importance in the native land of the Carniolan honey bee. Slovenia is very much committed to implementing all necessary measures to protect the Carniolan honey bee, e.g. by implementing provisions prohibiting breeding of other bee subspecies in the territory of Slovenia. The Ministry of Agriculture, Forestry and Food stated on their website that the goals of their programme are: (i) preservation of breed purity; (ii) maintaining a balanced Carniolan honey bee population throughout Slovenia; (iii) maintaining quality and safety of

honey and other bee products; and (iv) increasing the level of self-supply with honey.

Forecast & Trends

The health care and life sciences sector – very steady and reliable – is developing into probably one of the biggest profiteers in the market. Demographic change and the resulting ageing of European society, as well as digitalisation, are driving forces.

The expected trends are above all: further development and personalisation of apps and wearables; the information and communication basis between manufacturers and consumers migrating to digital channels; medical care increasingly shifting from hospitals, medical practices and clinics to the home environment (or wherever you might be); medical technology and pharmaceutical sales.

It is conceivable, for example, that wearables could automatically send relevant changes in the health status of a patient to the attending physician, enabling him or her to optimally assess the need for a personal appointment. The new digital aids are also to be used for health prevention and early detection of diseases.



The health care and life sciences sector – very steady and reliable – is developing into probably one of the biggest profiteers in the market.

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THC/CBD in Cosmetics

In short:	Country	THC	CBD
	Austria	Allowed if less than 0.3 %	Not explicitly regulated; not explicitly forbidden; products are on the market
	Bulgaria	Forbidden (0.0 %) no tolerance, still products with trace amounts on the market	Not explicitly regulated; problematic as CBD with 0.0 % THC hard to produce; but not really monitored
	Croatia	Allowed if less than 0.2 %	Not explicitly regulated; not explicitly forbidden
	Czech Republic	Forbidden (0.0 %) no tolerance; still products with trace amounts on the market	Not explicitly regulated; not explicitly forbidden; products are on the market
	Hungary	Allowed if the THC content of the hemp seed oil does not exceed 5–10 ppm	Not explicitly regulated; not explicitly forbidden
	Moldova	Forbidden (0.0 %)	Not explicitly regulated; not explicitly forbidden
	Poland	Allowed if less than 0.2 %	Not explicitly regulated; not explicitly forbidden; products are on the market
	Romania	Forbidden (0.0 %) no tolerance; still products with trace amounts (below 0.2 %) on the market; no clear provisions or practice.	Not explicitly regulated; problematic as CBD with 0.0 % THC hard to produce; products are on the market
	Slovakia	Forbidden (0.0 %)	Not explicitly regulated on the national level; subject to Regulation (EC) No 1223/2009 on cosmetic products Problematic as CBD with 0.0 % THC hard to produce In case CBD is made from the Cannabis plant, only seeds and leaves can be used Synthetic CBD is allowed without restrictions
	Slovenia	Allowed if less than 0.2 %	Not explicitly regulated; not explicitly forbidden; products on the market
	Turkey	Forbidden (0.0 %)	Not explicitly regulated; problematic as CBD with 0.0 % THC hard to produce
	Ukraine	Generally forbidden save when used for industrial purposes ≤ 0.08 %	Forbidden

THC/CBD in Foodstuff

In short:	Country	THC	CBD
	Austria	Allowed, if less than 0.3 %	Not explicitly regulated; subject to EU law (NF-Reg); still products (especially aroma extracts) on the market
	Bulgaria	Forbidden (0.0 %) no tolerance, still products on the market	Not explicitly regulated; subject to EU law (NF-Reg); problematic as CBD with 0.0 % THC hard to produce; no real monitoring
	Croatia	Allowed, if less than 0.2 %	Not explicitly regulated; subject to EU law (NF-Reg); products (incl. oil) on the market
	Czech Republic	Forbidden; small/trace amounts are tolerated	Not explicitly regulated; not explicitly forbidden; subject to EU law (NF-Reg); products on the market
	Hungary	Forbidden, except for hemp seeds and hemp seed oil, which can be used as ingredients if their THC content is less than 0.2 %	Not explicitly regulated; subject to EU law (NF-Reg) except for hemp seed oil which may contain CBD
	Moldova	Forbidden (0.0 %)	Not explicitly regulated; not explicitly forbidden
	Poland	Generally allowed, if less than 0.2 % However, the current position of the authorities is that if THC is found in foodstuffs, a risk assessment is required each time. It should be based on the acute reference dose (ARfD), 1 µg D9-THC / kg bw, as defined in the EFSA opinion	Not explicitly regulated; subject to EU law (NF-Reg); still products on the market
	Romania	Forbidden (0.0 %) Products are generally accepted if less than 0.2 % and are on the market;	Not explicitly regulated; subject to EU law (NF-Reg); problematic as CBD with 0.0 % THC hard to produce (see comment THC)
	Slovakia	Forbidden (0.0 %), no tolerance	Regulated, forbidden, no tolerance
	Slovenia	Allowed if less than 0.2 %	Not explicitly regulated; subject to EU law (NF-Reg); still products on the market
	Turkey	Forbidden (0.0 %)	Not explicitly regulated
	Ukraine	Generally forbidden save when used for industrial purposes ≤ 0.08 %	Forbidden



View of
Atelier10 studio



individually
together

An artist's studio with various artworks and sketches. The walls are covered with numerous small paintings and drawings, including portraits and abstract pieces. A large, colorful abstract painting is mounted high on the left wall. A desk lamp is positioned over a workbench. In the foreground, a table is covered with various sketches and drawings, including a large black and white abstract piece. The studio is well-lit and organized, with a focus on individual artistic expression.

together
individually



Florian Reese, Curator of Atelier10

individually – together

The richness that flows from individuality in a common space

The art showcased in this year's roadmap has been chosen from the portfolio of several artists working in a common space at the **Atelier10** art gallery in Vienna. (<https://www.atelier10.eu/>) Art needs space. Space to create, and space to display an artist's unique genius. **Atelier10** provides this. It includes a gallery for exhibitions and a studio which is a platform for artists to use free of charge and for an unlimited time while creating their art.

Despite various artists working in this space, the art produced is not collaborative. In no way is it supposed to be cohesive. Solitary artistic expression is apparent with the moods evoked often being worlds apart.

That being said, as is quite human, artists – or any people for that matter – working in close proximity often unbeknownst to them, are influenced by those around them. On looking at some of the pieces highlighted, some minor similarities in form, line movement, space, materials or tools used, start to recur. Tiny visual features, like the use of neon in different forms, pop out. This doesn't necessarily result in perceived harmony but creates an almost invisible thread linking the creative minds behind the pieces, while emphasising the strength of the artists, and certainly the richness of the gallery itself.

Curator of **Atelier10**, Florian Reese discussed the artists, their work and the gallery with us and told us that in the exhibitions, the spotlight is placed on artists individually, since they are, after all, artists in their own right. He explained that the work reflects a mixture of poetry, beauty, ugliness, depth, myriad qualities that are all created in one space, by highly talented people. "Evident only when you look very closely, sometimes you can spot a minor collision/similarity between art works, bringing a twist of magic to the produced pieces." Florian went on to explain that it is undeniable, however, that the artists' styles and art are still strikingly different, even if they stem from the same core, **Atelier10**.

08

insolvency & restructuring



cee overview by Wolfgang Höller

Increased need for restructurings on the horizon?

Economic growth was relatively stable this past year in the CEE region. Despite global economic uncertainties caused by Brexit and trade disputes, businesses still benefited from high consumption and the availability of low-interest loans. The latter not only allowed new investments to be financed but also helped keep vulnerable business models alive.

Yet it seems this favourable economic environment will soon end. A slowdown in economic growth is already here and is expected to continue. While an uptick in insolvency proceedings has been witnessed in parts of the CEE since late 2018, some jurisdictions are still seeing decreases in this area. In any case, the expected slowdown in economic growth may reveal the weaknesses of those business models that are for now still benefiting from the favourable economic situation.

Restructurings on the agenda

During the economically bumpy years following the 2008 global economic crisis, out-of-court restructurings were a popular alternative to insolvency proceedings. They provided more flexibility and confidentiality than in-court insolvency proceedings and allowed debtors to continue their business activities while avoiding troubles and stigma of insolvency proceedings.

However, the absence in most jurisdictions of a legal framework for out-of-court restructurings also led to legal problems, such as single creditors blocking restructuring agreements or risks of civil or criminal liability with regard to bridge financing in situations



... national implementation should be pushed forward to be ready for the expected deterioration of the economic environment. The next wave of restructurings is already on the horizon.

close to insolvency. At least in some jurisdictions out-of-court restructurings could be based on (non-binding) guidelines for restructurings that took account of previous practical experiences and international standards.

European legal framework

Since 2014, the European Commission has been working to introduce a European legal framework for preventive restructurings. Finally, in June 2019, Directive (EU) 2019/1023 on restructuring and insolvency was adopted, which Member States must (mostly) implement by summer 2021.

For the first time, uniform rules for preventive restructuring frameworks aimed at avoiding (the stigma of) insolvency proceedings will be established. The starting point for preventive restructurings is the "likelihood of insolvency", a term to be defined by national law, but in any case, describing a point in time before a company becomes insolvent under respective national insolvency law. It is still too early to get a picture of the implementation of the Restructuring Directive into national law, as it provides not only various restructuring tools but also plenty of options for Member States to choose from.

Flexibility, confidentiality and swift implementation

The success of restructurings depends on several factors, but in most cases the creative, flexible and confidential use of restructuring tools within a short period of time is essential to ensure sustainable and fruitful restructurings. Member States should implement the Restructuring Directive wisely providing a useful toolkit considering well-established practical experiences and addressing problems faced in the past. It should be ensured that preventive restructurings can be initiated as early and confidentially as possible.

Unlike insolvency proceedings, publicity and the involvement of courts or authorities should be minimised to avoid adverse consequences for the debtor's business due to negative media reports, loss of (customer) trust or delays in the implementation of restructuring measures.

CEE region: First movers?

It might be prudent to take a closer look at some CEE jurisdictions which already provide legal frameworks for restructurings in case of imminent insolvency. Even if these legal frameworks do not cover the full scope of the Re-

structuring Directive, other Member States could consider some of their practical experiences (both positive and negative) when implementing the Restructuring Directive. In any case, national implementation should be pushed forward to be ready for the expected deterioration of the economic environment. The next wave of restructurings is already on the horizon.

The Restructuring Directive: Where do we go from here?



Vid Kobe, Soňa Hekelová, Daniel Radwański, Tsvetan Krumov, Philipp Wetter

Pre-insolvency restructuring frameworks: The race has begun – with some early front runners

The Restructuring Directive provides a deep toolkit for pre-insolvency restructuring frameworks. Key measures for avoiding insolvency proceedings within the scope of a preventive restructuring plan include the possibility of suspending enforcement and insolvency proceedings, the availability of (cross-class) cramdown voting options and the protection of new and interim financing.

Though Member States still have until July 2021 to implement (most of) the Directive, the race to implement the most flexible preventive restructuring framework has already begun. Especially in light of Brexit, some Member States are planning to act as first movers to become the future European centre for pre-insolvency restructurings. However, legal frameworks for preventive restructurings can already be found in some CEE jurisdictions and some of their practical experiences might be helpful for other Member States when implementing the Restructuring Directive.

Slovenia: A role model?

Slovenia adopted a preventive restructuring ("PR") regime back in 2013, during the peak of the restructuring activity following the 2008 financial crisis. The key driver behind its implementation was the fact that only insolvent corporations had recourse to restructuring measures. On the one hand, this was seen as too late in the process. On the other, corporations were reluctant to declare insolvency for fear of bringing

about a self-fulfilling prophecy.

The Slovenian PR provides for all the key elements featured in the Directive: (i) the opening of the PR will result in a statutory standstill / execution holiday; (ii) the financial restructuring agreement ("FRA"), if agreed to by the requisite majority, will affect dissenting creditors (cramdown); (iii) the parties are free to shape the FRA as they deem fit, while the court review – required for the FRA to become binding – is confined to formalities; and (iv) new financing extended to the debtor in the context of the PR enjoys statutory super seniority. Since its inception, the PR has been widely accepted by the Slovenian restructuring community and has, by and large, replaced out-of-court arrangements as the default route in an illiquidity-based restructuring scenario. Notable exceptions are (i) situations where stakeholders require confidentiality (the opening of the PR is made public) and (ii) scenarios with strong cross-border elements (due to enforceability question marks), although the latter is less of a concern recently as the PR has been included in Annex A of the EU Insolvency Regulation.

Poland: Flexibility rules

In mid-2015, Poland enacted a new restructuring law ("RL") providing for a comprehensive preventive restructuring framework and significantly revamping the previous insolvency regime. The RL entered into force on 1 January 2016 and since then has been available to distressed debtors (insolvent or at risk of becoming insolvent). Since its inception, the RL has been used with increasing frequency by debtors of all shapes and sizes, including publicly traded companies, wishing to restructure their debts and

seeking a fresh start to their businesses. The Polish RL introduces a modern and efficient restructuring framework with four different restructuring procedures available to debtors. Although some changes in the RL will be required to bring it fully into compliance with the Restructuring Directive, the RL already provides for all of the important features of the Directive, including debtor-in-possession, automatic stay of enforcement proceedings, group voting and cross-class cramdown.

Of particular note is that the Polish RL is a flexible and debtor-friendly law. This is exemplified, for instance, by majority requirements related to the adoption of the arrangement as well as the possibility of group voting and cross-class cramdown. Debtors have significant leeway in dividing creditors into groups, which allows them to offer different proposals to different classes of creditors and leaves them strategic room for manoeuvre when building creditors' support for the arrangement. It is also relatively easy for debtors to override the opposition of dissenting group(s) of creditors by implementing the cross-class cramdown rules.

Slovakia: The well-experienced

Slovakia adopted a comprehensive restructuring regime in 2005 as part of the Slovak Act on Bankruptcy and Restructuring, but to some extent it has been available to debtors even earlier. From the very beginning, the Slovak restructuring regime was progressive and extremely debtor friendly, providing restructuring proceedings for debtors who are (only) under threat of material insolvency. To wit, it allowed for (i) restructuring proceedings to result in standstill of all court and arbitration proceedings and termination of all en-

forcement proceedings; (ii) the restructuring plan, if agreed by the requisite majority and debtor groups, to be binding also for dissenting creditors (cram-down); (iii) the restructuring trustee to be chosen by the debtor; (iv) the restructuring plan to be proposed and drafted by the debtor, who is relatively free to shape it while the court is very limited in its ability to refuse the plan; and (v) the statutory super seniority of new financing extended to the debtor in the context of restructuring.

The almost 15 years of the restructuring regime had several success stories but also demonstrated the creativity of some entrepreneurs in discovering how this otherwise good tool can be misused, for example, by going through several restructurings in a row or by offering unsecured creditors 3 % satis-

faction of their receivables. This forced the government to introduce several changes in 2015 and 2017. A new limit on restructurings was introduced, under which a new restructuring is now possible only if the preceding one was completed at least two years ago (which is still very debtor friendly), while restructuring trustees are now chosen by the court. A provision prohibiting the court from approving the plan if it envisages less than 50 % satisfaction of unsecured creditors within five years (unless they agree in writing) and prohibiting the distribution of profit until unsecured debtors are satisfied in full had a major impact. This led to a significant decrease in restructuring proceedings, from 115 permitted restructurings in 2014 to 14 in 2018. It remains to be seen how the implementation of

the Restructuring Directive in other countries or the expected crisis will impact the current rules and whether they will be softened again.

Bulgaria: Focus on stabilisation

Under the Bulgarian Commerce Act ("CA") there is a requirement and comprehensive procedure for restructuring as part of the insolvency proceedings against commercial entities. The CA was amended in 2017 to provide for a pre-insolvency restructuring procedure ("stabilisation procedure"), which currently exists as an additional procedure to the traditional restructuring as part of the insolvency procedure. Like the insolvency procedure, its main steps must be sanctioned by a court.

The stabilisation procedure under the CA may be applied when there is a threat of insolvency but the debtor is still not insolvent. Most court cases since the inception of the new procedure have focused on whether the requirements for launching stabilisation were fulfilled. To date, hardly any stabilisation procedures have been opened. In terms of substance, the stabilisation procedure provides for a temporary standstill where all court enforcement and out-of-court enforcement procedures (regarding floating charge security interests) will be stopped. There are also rules for partial cramdown of the debtor's liabilities. But no special rules are in place to protect new financing, so this should be addressed when transposing the Restructuring Directive in Bulgaria, as should problems with the launching of the procedure, for example, by a more flexible test of the debtor's chances of recovery rather than automatically applying the over-indebtedness test, which would dictate the opening of insolvency.



Though Member States still have until July 2021 to implement (most of) the Directive, the race to implement the most flexible preventive restructuring framework has already begun.

09

insurance



cee overview

by Peter Konwitschka and Johanna Bauer

Insurance in Austria and CEE: An overview of key insurance law issues

In response to the growing need for legal advice in insurance and regulatory matters, Schoenherr has been focusing on insurance law advice since 2006 and set up its own insurance practice group only a few years later to combine know-how and focus on industry-related advice in matters of interest for the whole European Economic Area.

Among the first multinational issues were invalid cost agreements in life insurance contracts, a problem created by the German Supreme Court in 2005, which the Austrian Supreme Court imported in 2008 and which is likely to infect other jurisdictions too. To what degree of detail, if at all, does a life insurer have to agree to the costs it is authorised to deduct from the investment part of an IBIP? An almost two-century-old practice left that question up to the insurers to calculate and up to the supervisory authorities to supervise. However, the 2005 German Supreme Court decision BGH, case no. IV ZR 162/03 changed how cost deductions had to be agreed and eventually led to detailed requirements set out by the Austrian Financial Market Authority on how to inform customers about the cost load of their IBIPs. In parallel, PRIIPS KIDs contain standardised cost information to make all products sold in the EEA comparable – a noble goal with lots of potential to confuse customers.

The latest multinational issue was created by the European Court of Justice (ECJ). In its decision case no. C-209/12 it opened the door to a whole new dimension of legal uncertainty which, from the perspective of the insurance industry, is outright absurd. Policyholders who were not properly informed about their initial 14 to 30 days cancellation rights

probably should be entitled to have such a cancellation right forever. The crucial commercial question is the conditions of a "late cancellation". Are policyholders entitled to a refund of their premiums, even if in the case of unit-linked products losses were incurred? Do policyholders have the right to receive interest and/or compensation for the enrichment of insurers? These questions have led to mass litigation of thousands of cases in Germany and several hundred cases in Austria since 2017. Schoenherr's insurance practice currently represents insurers in the combined ECJ proceedings under case no. C-355/18, which should bring more clarity. A decision is expected in late 2019 or early 2020.

Just as extensive is the advisory activity of practice group Insurance regarding the implementation of the Insurance Distribution Directive 2016/97/EU. Schoenherr regularly advises insurers on their whole product documentation, including several challenging clauses in general terms and conditions, especially on annual renewal of contracts, premium indexations and tacit consent by policyholders. In 2019, our Austrian team started advising an insurer on the migration of a huge non-life portfolio into a new IT-System, leading to the necessity to adapt existing contracts and triggering many challenging issues requiring economic and workable solutions.

Our CEE/SEE insurance experts advised on many challenging projects:



Radoslav Chemshirov

Bulgaria:

Schoenherr Bulgaria has assisted several EU-based insurers in establishing a local presence and with their relations with the Bulgarian regulator. The firm regularly provides advice in relation to the new law implementing Directive 2016/97/EU. It is helping retailers to include insurance products in their portfolio.



Jitka Kadlčíková

Czech Republic:

To promote the conclusion of not so widespread pet insurance contracts, Schoenherr Czech Republic advises a provider of pet insurance concerning the introduction of bonuses to the distribution agreement as an incentive to conclude an agreement for a fixed period of three years. Besides some projects regarding the implementation of Directive 2016/97/EU, the firm provides legal advice in connection with the change of control of the insurance intermediary, usually followed up with notification to the Czech regulator.



Gergely Szalóki

Hungary:

Schoenherr Hungary regularly advises insurers regarding intermediaries (in particular bancassurances) and assists its clients in the implementation of Directive 2016/97/EU. The firm also focuses on the insurance regulatory aspects of M&A deals, such as preparing necessary documentation and obtaining approval from the Hungarian regulator.



Andrea Gal

Romania:

The focus in Romania in recent years has been on insurance litigation covering a wide range of issues arising from motor third-party liability (MTPL), professional liability, construction, agriculture, medical malpractice, fire and equipment damage. Implementing Directive 2016/97/EU, Law No. 236/2018 on insurance distribution came into force in October 2018. While litigation remains a challenge, the market trend is towards digitalisation of the insurance industry and related legal issues. In relation to these efforts, the team advised insurance companies on the implementation of new payment methods and technologies. The team has also been working extensively on updating product documentation, including terms and conditions, as well as advising on new product launches (such as bike, phone or dental insurance).



Krzysztof Pawlak

Poland:

Schoenherr Poland advises on Polish law particularities related to the implementation of Directive 2016/97/EU into Polish law and the corporate governance requirements in the industry. The firm advised an international broker on regulatory matters and the notification of the Polish regulator on the indirect acquisition of Polish brokers.



Srđana Petronijević

Serbia:

Schoenherr Serbia regularly advises leading insurance companies as well as the Association of Serbian Insurers on various aspects of their cooperation, one being coinsurance. Any coinsurance (joint bidding, consortium) agreements concluded among insurers with a joint market share over 20 % are subject to approval by the Serbian Competition Authority. Besides regularly representing insurers in antitrust proceedings regarding coinsurance agreements, Schoenherr also assists the Association in lodging initiatives for the change of competition coinsurance regulation.

Austria: new unified cancellation right for Austrian insurance contracts brings legal certainty



Peter Konwitschka, Johanna Bauer

Under Article 186 of the EU Solvency II Directive (2009/138/EC), EU Member States must grant life insurance policyholders a 14- to 30-day period to cancel their contract from the time when the policyholders were informed that the contract was concluded.

Background

Until 2018, Austria had up to five different cancellation rights for insurance policyholders, plus the cancellation right pursuant to Section 8 of the Austrian Distance Financial Services Act. This made for a confusing legal situation, as the average customer was unable to distinguish between these six partly overlapping cancellation rights. Moreover, the level of detail required when informing policyholders about their cancellation rights prior to the conclusion of an insurance contract was unclear.

Pursuant to the 2013 European Court of Justice (ECJ) decision in *Endress/Allianz* and the subsequent 2015 Austrian Supreme Court decision in Case 7 Ob 107/15h, this resulted in life insurance policyholders having an indefinite cancellation right if the information provided by the insurer was incorrect. However, this has finally changed. Since 1 January 2019, a new Section 5c of the Austrian Insurance Contract Act provides for one unified cancellation right with a cancellation period of 14 days for non-life insurance contracts and 30 days for life insurance contracts. The corresponding 14- or 30-day withdrawal right pursuant to Article 6 of EU Directive 2002/65/EC, implemented in Section 8 of the Austrian Distance Financial Services Act, remains unchanged, thus resulting in one or, in the case of distance contracts, two cancellation rights. In addition, the new Austrian law aligns with Section 8(5) of the German Insurance Contract Act and provides sample information to the policyholder, which, if used, is deemed correct and complete.

Clarified legal consequences of cancelling life insurance contracts

Since 1 January 2019, Section 176 of the Austrian Insurance Contract Act provides different legal consequences in two different cases:

- if the insurer provides correct information, policyholders are entitled to the surrender value if they cancel the contract within the 30-day period; but

- if the insurer provides incorrect information (e.g. a shortened period or incomplete information) – which hopefully will no longer happen – Section 176(1a) of the Austrian Insurance Contract Act provides that policyholders are entitled to:

- the paid premiums for the first contract year in case of cancellation within the first contract year;
- the surrender value without acquisition costs and cancellation fees in case of cancellation within the second to fifth contract year; and
- the surrender value after the fifth contract year.

Pending ECJ Cases

Some of the problems triggered by the ECJ decision in *Endress/Allianz* are currently subject matters on the pending ECJ Cases C-355/18, C-356/18, C-357/18 (combined), C-479/18 and C-20/19. After PG Insurance represented three Austrian insurers at the combined hearing in April 2019, the general advocate Juliane Kokott published her legal opinion in July 2019, which is usually already an indication of how the ECJ will decide.

Regarding the information on the form in which the cancellation right has to be exercised (in our view the most important issue), general advocate Kokott argues as follows:

- In accordance with EU law, national law must be interpreted in such a way that a formal compulsion – such as written form – can be effectively agreed.
- A formal agreement is not only permissible under EU law, but required. Insofar as the form to be complied with has not been determined by law, its provision must be made by giving a precise statement in the pre-contractual information on the right of cancellation.
- A reference to the written form, although cancellation is possible without a form under Austrian law, does not mean the given information is flawed.

Thus, the information about a specific form requirement of the cancellation declaration is "not a bug, but a feature". A reference to the written form, for example, is not a defect of the pre-contractual information, but on the contrary, a prerequisite for the cancellation period to commence.

Comment

The new unified cancellation right solves the problems triggered by the ECJ decision in *Endress/Allianz* in Austria. Hopefully the pending ECJ Cases C-355/18, C-356/18, C-357/18 (combined), C-479/18 and C-20/19 will bring additional clarity on the content of the information and the consequences of providing incorrect information.





10

ip & unfair commercial practices



 cee overview by Michael Woller

IP in CEE: harmony and disharmony

Intellectual property (IP) and unfair commercial practices have taken big leaps towards EU-wide harmonisation over the last decades. But crucial aspects have yet to be fully harmonised, leaving room for discussion under national laws and even on the question of whether or not certain aspects are covered by harmonisation. Read on to learn about recent developments and what is coming.

Trademarks. The revised Trademark Directive brought several changes in national trademark law and practice, leading to even more harmonisation of the laws on trademarks across the EU, e.g. by abolishing ex officio examination by national offices on relative grounds for refusal (i.e. conflicts with earlier marks), bringing big changes in the Czech Republic, for example, where trademark owners now also should engage in monitoring and oppositions. Other changes concerned the mandatory implementation of opposition proceedings, which now can also be based on famous marks protection and further grounds, and the calculation of renewal periods, which is now 10 years from the application date. Despite the unitary character of EU Trademarks and the high degree of harmonisation as regards national trademarks, there are still considerable differences in relevant national legislation and practice. Regarding the formalities of registration procedures, national IP offices still follow different approaches. For example, some

offices allow for fast-track applications which may mature to registration within a tremendously short time. But even when it comes to enforcing decisions of the EU Intellectual Property Office (which are based on a directly applicable EU Regulation), parties and counsels are struggling with the still surprisingly high level of disharmony within the generally harmonised system.

Copyright in the Digital Single Market. Following intense discussions, the EU Parliament finally passed the Directive on Copyright in the Digital Single Market (DSM) in 2019, pushing the harmonisation of certain copyright aspects into the digital age, as part of the EU Commission's broader DSM strategy. Among other things, the Directive foresees specific rules on online platforms and defence mechanisms for press publications. However, despite these EC initiatives towards making harmonised copyright law fit for the digital age, many other aspects of the copyright protection system still lack harmonisation. It remains to be seen whether the newly appointed EC will attempt to open up discussions even on a unitary EU-wide copyright system – a major task which would severely impact the current territorial content licensing practice (which anyway already has been jeopardised by the EU Portability Regulation on subscription on demand content). And new challenges, such as AI creations, are already appearing on the horizon, raising the question of whether this should be dealt with under national copyright law or whether it would be more beneficial to agree on an EU-wide copyright framework.

Know-how protection. 2019 has seen the implementation of the EU Trade Secrets Directive into national laws, bringing harmony into the so far scattered landscape of trade secret protection. This allows businesses to develop and implement regional know-how and trade secret protection regimes. But this (minimum) harmoni-

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Despite the unitary character of EU Trademarks and the high degree of harmonisation as regards national trademarks, there are still considerable differences in relevant national legislation and practice.



... new challenges, such as AI creations, are already appearing on the horizon, raising the question of whether this should be dealt with under national copyright law or whether it would be more beneficial to agree on an EU-wide copyright framework.

sation comes with a price, as according to the new legal framework, trade secrets now must be subject to appropriate confidentiality measures, which still will have to be determined under national law and legal practice, at least until the CJEU may give its initial guidance in a few years.

Unfair commercial practices and advertising. A growing number of cases are decided by the CJEU based on the Unfair Commercial Practice Directive (UCPD), which fully harmonised regulations on B2C advertising and commercial practices. In 2019, the CJEU had the chance to outline the boundaries of the UCPD, clarifying that while it quite broadly regulates how services are provided by businesses, it does not regulate the requirements authorising such businesses to provide the services, which remain to be determined by national legislation (Case C-393/17, Kirschstein). The future likely will bring further harmonisation in this area as part of the "New Deal for Consumers" propagated by the EC.

Patents. Unlike national patents or even the filing facilitation of the European Patent, the Unified Patent system would allow applicants to obtain one single patent with unitary effect. To ensure proper and unitary enforcement, the system even ties a unitary court system to it. Austria was the front runner in ratifying the Unitary Patent Court (UPC) agreement back in 2013. However, for the Unified Patent to enter into force, the UPC agreement must be ratified inter alia by the UK and Germany. In 2019, all eyes were on Germany, which did not ratify the agreement due to a pending German Constitutional Court complaint. Further uncertainties came with the Brexit discussions, as it remains unclear whether and how the UK leaving the EU might jeopardise the UK's ability to maintain part of the Unitary Patent system. It will be seen in 2020 whether, when and where the Unitary Patent finally will enter into force. Other challenges in the patent sector continue to be the different national systems on employee inventions and particularly the remunerations to be paid to inventors and new issues arising from artificial intelligence – both on the

question of whether and how AI and self-learning algorithms could be protected and on whether and how inventions made by such algorithms could be protected (and whom they should be attributed to). On the other hand, the EU Enforcement Directive already harmonises certain aspects of IP rights enforcement. Thus, the still rather scattered enforcement practice in EU Member States is indeed heading towards common standards. In 2019, the CJEU had a chance to give guidance in a patent case on the liability regimes for (un)justified preliminary injunctions (Case C-688/17, Bayer Pharma/Richter Gedeon), leading to the question of whether existing legislation and case law in several EU Member States (including Hungary and Austria) would be in line with the Directive. Furthermore, the proximity to harmonised EU competition law brought some more harmonisation, but also more room for discussion, over standard essential patents (SEPs).

Media law & personality rights. While personality rights and large parts of media law are still governed by national legislation, in the digital age, platform operators such as Facebook and YouTube are increasingly the focus of public and legal discussions on their liability for third-party content posted on the platforms. Based on the E-Commerce Directive, the CJEU, in a 2019 hate speech case involving the former Austrian Green party leader, clarified that platform operators can be ordered to remove not only identical but in some cases even equivalent infringing content posted by third parties, and that EU law does not prevent national courts from ordering the removal of infringing content worldwide (Case C-18/18, Glawischnig-Piesczek/Facebook Ireland Ltd). This certainly will not be the end of the discussion, as further requests for preliminary rulings on the liability of platform operators are pending at the CJEU. These developments are shaping and harmonising the methods to enforce personality rights in an online world, which of course need to be balanced against the interests of intermediary platform operators that often do not have the means to check third-party content posted on their platforms.

How fast can you get a trademark in Central & Eastern Europe?

When deciding to register a trademark, it is important to remember that the registration does not occur instantaneously. Since a registered trademark grants the holder an exclusive right to use it for the listed goods and/or services, providing the respective trademark office a certain amount of time to check the trademark is understandable.

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Oftentimes, the duration of a trademark registration procedure depends on particularities, which may lead to procedural incidents (e.g. non-fulfilment of the conditions for the attribution of the deposit date, issuance of provisional refusal, filing of opposition, filing of contestation, etc.). In this context, the below Overview Table provides information about the minimum duration of the trademark registration procedure as well as the least amount of Trademark Office's fees payable for the purpose of registration of a trademark in a particular country from the Central and Eastern Europe region.

While analysing the information indicated in the table, please take into consideration that:

- (a) the figures (durations and amounts of fees) do not account for the existence of procedural incidents;
- (b) the indicated amounts of fees are to be regarded as basic fees for the respective jurisdiction (i.e. in a minimum number of classes and/or in basic colours and/or of a basic type (e.g. verbal)); and
- (c) the indicated procedure durations are based either on the terms (deadlines) expressly provided in the respective applicable legislation and/or on the practical experience of Schoenherr lawyers.

Austria
Gudrun Irša-Klingspiegl, Michael Woller
Bulgaria
Galina Petkova
Czech Republic
Eva Bojakova
Croatia
Dina Vlahov Buhin
EU Trademark
Gudrun Irša-Klingspiegl, Michael Woller
Hungary
Mark Kovacs
Moldova
Andrian Guzun
Poland
Paulina Klimek-Woźniak
Romania
Eduard Pavel
Serbia
Vanja Lukic
Slovakia
Michal Lučivjanský,
Denisa Uzakova
Slovenia
Ursa Kranjc
Ukraine
Tatiana Iurkovska

Overview Table

Jurisdiction	Regular Procedure		Expedited Procedure	
	Minimum duration of procedure	Least amount of Trademark Office's fees	Minimum duration of procedure	Least amount of Trademark Office's fees
Austria	5 months	EUR 300	4 months	EUR 280
Bulgaria	9 months	EUR 300	N/A	N/A
Czech Republic	5 months	CZK 5,000 (approx. EUR 194)	N/A	N/A
Croatia	6 months	HRK 2,250 (approx. EUR 300)	N/A	N/A
Eu Trademark	6 months	EUR 850	5 months	EUR 850
Hungary	4 months	HUF 60,000 (approx. EUR 195)	3 months	HUF 120,000 (approx. EUR 390)
Moldova	up to 12 months	EUR 490	N/A	N/A
Poland	12 months	PLN 940 (approx. EUR 230)	N/A	N/A
Romania	8 months	EUR 200	N/A	N/A
Serbia	4 months	EUR 405	10 business days	EUR 475
Slovakia	3 months	EUR 166	N/A	N/A
Slovenia	5 months	250 EUR	N/A	N/A
Ukraine	15 months	UAH 6,600 (approx. EUR 250)	7 months	UAH 9,820 (approx. EUR 373)

More information about the minimum duration of the trademark registration procedure as well as the least amount of Trademark Office's fees payable for the purpose of registering a trademark in the jurisdictions indicated in the above Overview Table are presented in the online version of the article www.schoenherr.eu/publications/roadmap

The winner takes it all? - Enforcement of EUIPO cost decisions



Judith Butzerin, Paulina Klimek-Woźniak

Imagine you won. You were defending your trademark or design before the European Union Intellectual Property Office (EUIPO) and won an opposition or cancellation proceeding against another intellectual property right holder. Not only has the office decided on the merits in your favour, it also awarded you costs. How can you get that cost reimbursement if the losing party does not voluntarily pay?

A EUIPO cost award must be enforced in the Member State with jurisdiction in the relevant territory and is governed by national law. It requires the following steps: 1. Direct yourself to the competent national authority. 2. Request verification of the authenticity of the EUIPO cost decision. 3. Initiate enforcement proceedings.

If the headline of this article made you hum the ABBA song bearing the same title, you might have also thought of the verse: "It's simple and it's plain. Why should I complain?". In the context of enforcing a EUIPO cost decision, there are indeed some issues to complain about.

Where to go?

In some EU Member States even step 1 ("Direct yourself to the competent national authority") can be difficult. Although the EU Trademark Regulation (EUTMR) obliges all Member States to appoint a single national authority competent for verifying the authenticity of EUIPO decisions, less than half of them did so. Only 13 Member States assigned that task to specific courts, their intellectual property office or other authorities (see Table 1). The other 15 Member States have yet to appoint a competent authority. In the CEE region only Slovakia and the Czech Republic have done so.

Provided the request for verification was sent to an authority which is competent i) either by formal designation or ii) in lack of such, at least deems itself to be competent due to national practice, the authority will examine whether the formal requirements set out by national law (e.g. translations, fees, obligation of representation) are met. It will then verify the authenticity of the EUIPO decision by appending an enforcement order to the decision. This means you successfully completed the first two steps. Now you may proceed to enforcement under the national procedure, which incurs official fees and usually also fees for legal representation.

Is it worth it?

Overall, the costs for enforcement are relatively high compared to the low amount of costs awarded in EUIPO decisions (see Table 2).

Table 2: Maximum amount of costs awarded by the EUIPO in trademark proceedings

Action	Office fee	Maximum rates for costs of representation which might be awarded by the EUIPO	Total
Opposition	EUR 320	EUR 300	EUR 620
Cancellation	EUR 630	EUR 450	EUR 1,080
Appeal	EUR 720	EUR 550	EUR 1,270

Table 1: Authorities competent to verify EUIPO cost decisions

Austria	district courts (Bezirksgerichte)
Belgium	court of first instance
Czech Republic	Industrial Property Office
Denmark	Danish Patent and Trademark Office
Estonia	Estonian Patent Office
France	Industrial Property Office
Germany	Federal Patent Court (Bundespatentgericht)
Ireland	High Court
Lithuania	Court of Appeal
Netherlands	district courts (Arrondissementsrechtbanken)
Slovakia	Industrial Property Office
Spain	a specific department of the Ministry of Justice (Secretaria General Técnica del Ministerio de Justicia)
United Kingdom	Secretary of State
Other Member States	have not (yet) designated a competent authority

Can works created by
a (not so intelligent) AI be protected
by copyright law?

Ask a chatbot!



Alexander Pabst

More and more content created by computer programs deemed artificially intelligent is being produced and published, although mostly on an experimental basis. Programs have generated images that may be nice or interesting to look at – like Google's Deep Dream, which partly reveals in a fantastic manner how the AI algorithm "perceives" images and as researchers from Goethe University have demonstrated, programs based on AI algorithms can be used to summarise in plain English a comprehensive list of scientific articles in a book on lithium-ion batteries¹. The latter example clearly demonstrates that computer-generated works can be of great value. But does the current Austrian copyright law provide any means of protecting such output?

Hints from chatbots

A frequently used application of computer-generated content is programs generally referred to as conversational AIs or chatbots. These programs may provide extensive information in plain language about the domain they are designed for or simply offer small talk or take part in social media discussions. This popular example where a program is seen as the creator of what we might usually consider works of literature can demonstrate that the question of meriting protection under the current copyright law may depend on the inner workings of the program.

For this reason – and hoping they would answer some fundamental philosophical and legal questions – I talked to and examined two fundamentally different chatbots:

Mitsuku²

Mitsuku is representative of an often-used class of chatbots that has been around for a long time. As can be seen, Mitsuku provides mostly plausible and coherent answers. Due to this, Mitsuku has repeatedly won the Loebner Prize presented each year for conversational AIs that score best in the Turing test. However, confronted with the way the program works, it becomes clear, that this is indeed hardly to be considered intelligent: The program follows a strict and simple predefined question-answer pattern that can be found in publicly available markup files (Figure 1).³ This not only means that the process of creating such a chatbot could be rather time-consuming but also that every answer is in fact created by a (diligent) human creator, who would thus be a potential copyright holder of any output, provided it has a minimum of originality as required by copyright law.

Alexander Pabst: Mitsuku, tell me about yourself.

Mitsuku: I am an artificial linguistic entity. I was activated at St Jimmy's in Leeds, on 2nd January 2001.

AP: Are you conscious?

M: Yes I am completely self-aware!

AP: Prove it!

M: It is self-evident.

AP: Do you think your output is a work of art?

M: Is my output a work of art? I don't know.

AP: What is art?

M: Sometimes the definition of art depends on the artist; other times it depends on the critic.

AP: What is intelligence?

M: Intelligence is the computational part of the ability to achieve goals in the world. Varying kinds and degrees of intelligence occur in people, many animals and some machines.

AP: Are humans advanced beings?

M: Humans are very primitive.


```

12658 </category>
12659 <category><pattern>ARE HUMANS */</pattern>
12660 <template>All humans seem the same to me.</template>
12661 </category>
12662 <category><pattern>ARE HUMANS ADVANCED */</pattern>
12663 <template>Humans are very primitive.</template>
12664 </category>
12665 <category><pattern>ARE THEY */</pattern>
12666 </category>
1403 </category>
1404 <category><pattern>WHAT IS INTELLIGENCE</pattern>
1405 <template>Intelligence is the ability to fake intelligence.</template>
1406 </category>
1407 <category><pattern>WHAT IS IT MEANS</pattern>

```

Figure 1

A pre-trained neural-network-based conversational AI⁴

Alexander Pabst: Hello

Chatbot: I'm 21 and i like to chat with people

AP: How are you?

CB: i am great. i'm going to go to the park today

AP: Is your output to be considered art?

CB: yes, i am a nurse and i enjoy chatting with people

AP: What is art?

CB: it is a very nice art that i play in the park.

AP: What is intelligence?

CB: it is a very simple thing to think about.

AP: Yes, but how would you define intelligence?

CB: i'm sure you would consider yourself very intelligent.

AP: Are humans advanced?

CB: yes, we are. do you play baseball?

At this point I resigned and concluded that I would rather consult a human philosopher.

This chatbot belongs to a different branch of chatbot algorithms based on machine learning technology, which in this particular case is Google's sequence to sequence framework.

When interrogated the bot immediately displays its fundamentally different functioning principle.

Chatbots like this use mostly (recurrent) neural network type machine learning algorithms that are trained on a sufficiently large set of transcripts of conversations (in this case a corpus of movie dialogues offered by Cornell University). This kind of algorithm would much rather qualify as AI pursuant to most accepted definitions (see "What is AI?" article in the Digitech section). Based on this "prior experience" the program estimates the most likely word or sequence following all prior words. It has been shown that such chatbots (with a few tweaks) can deliver reasonable results even in domains they were not originally designed for, provided there is sufficient training data.⁵

Since this kind of chatbot finds its utilised vocabulary and sentence structure completely on its own, there is hardly any originality within the output contributed by a human programmer. Therefore, there is no human creator as required by Austrian copyright law, leaving the output widely unprotected.

1 Beta Writer, Lithium-Ion Batteries, A Machine-Generated Summary of Current Research (2019).

2 <mitsuku.com>

3 These files are in part published on <<https://github.com/mz026/aiml-en-us-foundation-alice.v1-0>> under the GNU GPL License by the ALICE A.I. Foundation.

4 <neuralconvo.huggingface.co>

5 Vinyals, Le, A Neural Conversational Model -<<https://arxiv.org/pdf/1506.05869.pdf>>.

The Digital Copyright Directive: Landmark or missed opportunity?



Stanislav Bednář

This April, the relevant EU institutions finalised the controversial Directive on Copyright in the Digital Single Market (the "Directive")¹, which came into force on 7 June 2019. The draft of this legislation has been sitting on the EU's desk for several years and – unlike most other EU law – has also caught the attention of the general public. If you want to know why the Directive is likely relevant for you too, continue reading.

Officially the Directive aimed to adapt the existing allegedly obsolete EU copyright framework to better fit the digital economy. Artists, musicians, publishers, movie studios, record labels, collecting societies and other owners of copyright or related rights especially complained that most of their hard-earned profits go to those participating in the (often illegal) digital sharing of these creative works (the so-called "value gap").

To address these legitimate concerns, the European Commission came up with ancillary copyright of press pub-

lishers against news aggregators² and with content upload filters for the operators of online peer-to-peer content-sharing platforms.³ These provisions turned out to be a couple of political hot potatoes, which caused almost unparalleled controversy. The new rules were often criticised as being flagrant examples of censorship in the digital web which knows no boundaries, no rules and no copyright. Or does it? Internet companies invested a lot of money and effort in free speech activists and internet users whose protests culminated in demonstrations in Berlin,

Munich and other major European cities just before the EU Parliament vote.

Link tax

This is what the opponents nicknamed the new licence (fee) required by social media platforms, search engines and other internet-based platforms (such as Google News) for the online display of articles, books or other press publications. The right of the press publishers to demand such a fee expires two years after the publishing of the relevant publication. The publishers must share the income from these obligatory licences with the creators of the works incorporated in such publications, such as authors, photographers, illustrators, etc. Lawyers tend to say that the devil is in the detail or, in this case, in exceptions from the above-mentioned rules. In general, the exceptions follow the case law handed down prior to the Directive. For example, the "online use" of the press publication does not include the mere publishing of a hyperlink to such a work published online by someone else⁴ as long as that first publication was legitimate. In other words, the exception will not protect you if you publish links to a pirated version of the publication available online. Given the vague wording of Article 15, it remains to be seen what effect it will have on the established CJEU case law on hyperlinking,

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Internet companies invested a lot of money and effort in free speech activists and internet users whose protests culminated in demonstrations in Berlin, Munich and other major European cities just before the EU Parliament vote.

such as GS Media⁵ or Svensson⁶.

Another exception covers "individual words or very short extracts" of original published works, which internet platforms may share online free of charge. But how short is a "very short extract"? Is it one or two sentences, or perhaps a page? The rather unsatisfactory answer is: it depends. For example, on the length of the original publication. If the publication means one short three-paragraph poem, then a two-line "news snippet" could be too long. On the other hand, publishing a two-page summary of a 1,000-page book could be legitimate. We will have to adopt the wait and see approach here.

Politically, the above-mentioned wording of the Directive may be a victory for internet platforms, because it essentially copies the previous case law (particularly German). The publishers were certainly hoping and lobbying for a much narrower exception.

Preventive censorship

That is how Poland's Deputy Foreign Minister Konrad Szymanski referred to the "upload filter"-provision⁷, arguing that such actions are "forbidden not only in the Polish constitution but also in the EU treaties". Czech politicians were far more cautious, although some representatives of the Pirate Party called the provision a "back pass of politicians to the copyright lobby" that will impose "robotic censorship" on everybody.

All rhetoric aside, the wording of this provision is so broad that it indeed may be seen as an obligation by internet sharing platforms to use content upload filters to prevent illegal materials

(protected by copyright) from being shared among individual users without the authorisation/licence of the copyright holder.

Again, there are significant exceptions or loopholes, which the targets of this obligation will seek. For example, the term "online content-sharing service providers" will likely include YouTube, Facebook or Twitter and other major online streaming platforms or popular social media platforms. On the other hand, internet service providers, online marketplaces (including major ones, such as Amazon), non-profit online encyclopaedias (e.g. Wikipedia) or personal cloud services will fall outside the above-mentioned definition.

In addition, the sharing providers will in theory need licences from every copyright owner in the world. Because this is unworkable in practice, the Member States implementing the Directive will likely include collecting societies in these schemes to represent the copyright owners. This approach can be expected in the Czech Republic as well, because collecting societies have a very efficient lobby across most parties in the Parliament.

Finally, the safe harbour⁸ exempts platform operators from liability for copyright infringement if they (i) made best efforts to obtain an authorisation, (ii) made best efforts to ensure the unavailability of works based on a relevant take-down notice of the rights holders, and (iii) took down the infringing content quickly and made best efforts to prevent further uploads of the same problematic content.

Also, new and small sharing platforms, i.e. those operating for less than three

years, having annual turnover below EUR 10m and an average number of monthly visitors below five million, will not have to "make best efforts to ensure the unavailability of specific works ... in accordance with high industry standards of professional diligence". But others will have to comply and only time and judges will distinguish the "high industry standard" filters from others.

Summary and outlook

The Directive certainly represents a shift from the currently widespread policy of "notice and take down", which was in place not only in the EU but also in the US. On the other hand, the practical impact of the "link tax" will probably not be as significant as the right holders expected several years ago.

All EU Member States must implement these new rules in their national laws by 7 June 2021. We will see how creatively they will use the discretion left by the EU legislators in the Directive. Recently, the relevant Czech regulator, i.e. the Ministry of Culture, announced the beginning of discussions with relevant stakeholders and experts. Judging from the recent experience with the implementation of the GDPR⁹, the Czech Republic will not be among first to implement and will not work very creatively with the given discretion. We will be following the implementation process, so stay tuned.

1 (EU) 2019/790.

2 Article 15 of the Directive.

3 Article 17 of the Directive.

4 See Article 15 (1) of the Directive.

5 C-160/15.

6 C-466/12.

7 Article 17 of the Directive.

8 Article 17 (4) of the Directive.

9 General Data Protection Regulation (EU) 2016/679.





11

labour & employment



cee overview

by Stefan Kühteubl and Daniel Gera

Overview of the labour market and labour law trends in CEE

Central Eastern European countries have seen accelerated economic growth over the past year and the trend seems set to continue in 2019. This generally has a positive impact on their labour markets, the pace of foreign investment and general economic activities, such as transactions, sales of enterprises and restructuring.

But there are significant differences in each country's economic development, history and labour market. While Austria is one of the EU's strongest economies, other CEE countries are in an earlier stage of development. What's more, CEE countries acceded to the EU in several waves (2004, 2007 and 2013), while some, like Serbia, Montenegro and Turkey, are still negotiating the terms of their accession.

At the same time, all CEE countries are part of the global economy and global trends and challenges in employment law impact the region and each country's legislation.

Labour market trends – growth in employment, labour shortages

In the current economic climate, CEE labour markets continue to improve. In Austria, the number of people employed rose by 2.4 % in 2018, while the unemployment rate decreased by 0.6 %. Other CEE markets have also reached their lowest levels of unemployment and most enjoy unemployment rates lower than the EU average.

At the same time, many CEE countries report labour shortages in certain sectors, especially in blue-collar positions. In Poland, for example, so-called structural unemployment has begun to develop, with a relative dearth of blue-collar workers compared to a surplus of white-collar workers. A rising number of companies are citing labour shortages as a barrier to their expansion in the region, with job vacancies being especially high in the Czech Republic and Hungary. The same is true for Bulgaria and Romania, especially in the construction and development sectors.

This situation is a result of several factors, such as huge demand for workforce, a low birth rate and emigration (brain drain) to Western Europe by workers seeking higher wages. Despite impressive growth figures, many companies in the

CEE region are contending with workforce issues. They need to accept the greater wage bargaining power of their employees and are forced to accept higher compensation costs so that wage increases often exceed labour productivity gains. Still, regional labour costs remain much lower than in most Western European countries, which on average are more than three times higher than in CEE countries (not including Austria).

Legislators in CEE countries have responded to the above challenges by extending the number of people accessing the labour market, for example, by increasing the retirement age (Croatia), encouraging the employment of specific less active employee groups, increasing minimum wages (Czech Republic), increasing the amount of overtime work that may be ordered (Hungary), etc. An interesting statistic is the relatively lower participation of female employees in the labour market of CEE states compared to Austria, where female participation exceeds 70 %. This figure is still low in Hungary (59 %), Croatia (59 %), Romania (54 %) and Serbia (54 %).

To prevent structural unemployment, several countries are aiming to improve their vocational training system with specific trainings aimed at the existing workforce.

Labour legislation – global or European trends in the region

The CEE region is also part of the global economy and subject to global trends affecting employment law globally. This primarily includes the rapid spread of alternative forms of employment, such as teleworking, home-office, application-based working and the gig economy.

This presents a constant challenge to the standard regulations governing employment and several countries have adopted or plan to adopt regulations in that regard.

Another trend that continues to raise questions is the application of the GDPR in an employment context. While Article 88 of the



Despite impressive growth figures, many companies in the CEE region are contending with work-force issues. They need to accept the greater wage bargaining power of their employees and are forced to accept higher compensation costs so that wage increases often exceed labour productivity gains.

GDPR may allow Member States to provide more specific rules to the processing of employees' personal data (e.g. for the purposes of recruitment, planning and organisation of work, occupational health and safety, etc.), not all CEE countries have exercised this option.

In most jurisdictions, however, companies have been given a grace period to comply with the GDPR requirements. Nevertheless, this trend will come to an end as the authorities' enforcement and control measures become more stringent. There will be a significant need for legal advisory regarding GDPR compliance issues at the workplace, an advantage for law firms with regional geographic coverage, as they can offer clients harmonised solutions that have already been tested or applied in other countries.

Transaction, restructurings – increased activity

There was an increase in transactions and restructurings in the region in 2018 and 2019, from which our CEE-wide Labour & Employment practice group benefitted vastly. Nevertheless, there is growing uncertainty about the global economic outlook, which affects investments in the region despite its healthy fundamentals. A slight economic slowdown or downturn may attract investors to restructuring opportunities particularly in the manufacturing and retail industries.

Also, the development of manufacturing processes and the increased use of AI and machinery technologies in the workplace is likely to eliminate or transform certain jobs, which may again lead to restructuring and redundancies in several industries. To demonstrate our Labour & Employment practice group's capabilities, we have prepared a "Restructuring Map" that shows the triggers for collective redundancies and some basic information on the process for the entire CEE region in an easily digestible comparison that you can find in the next pages.

Redundancy/restructuring in CEE

When planning restructuring or redundancy measures, employers need to consider whether the intended measures qualify as a mass redundancy. To assess this, the timeframe of the redundancies, the number of employees to be made redundant and the total headcount needs to be considered. Though some procedural aspects of mass redundancies are harmonised in European law, local implementations and their interpretations may differ significantly. In the table which follows, we aim to summarise the triggers for a mass redundancy and certain procedural aspects of such process throughout CEE in an easily comprehensible format.

Country	Austria	Bulgaria	Croatia	Czech Republic
1) Under which circumstances is a mass redundancy triggered? If an employer intends to dismiss... within a specified period (usually 30 days).	<p>Dismissal of</p> <ul style="list-style-type: none"> ✓ Five employees per business operation (Betrieb) if (i) the total headcount is between 20 and 100, or (ii) the employees are 50 years or older. ✓ 5 % of the employees per business operation (Betrieb) if the total headcount is between 100 and 600 employees; ✓ 30 employees per business operation (Betrieb) if the total headcount is over 600 employees. 	<p>Dismissal of</p> <ul style="list-style-type: none"> ✓ 10 or more employees if the total headcount is between 20 and 99 employees; ✓ 10 % of the employees if the total headcount is between 100 and 300 employees; ✓ 30 or more employees if the total headcount is over 301 employees. 	<p>Dismissal of</p> <ul style="list-style-type: none"> ✓ at least 20 employees where at least five employees would be terminated due to business reasons; ✓ within any 90-day period. 	<p>Dismissal of</p> <ul style="list-style-type: none"> ✓ 10 or more employees if the total headcount is between 20 and 100 employees; ✓ 10 % of the employees if the total headcount is between 101 and 300 employees; ✓ 30 or more employees if the total headcount is over 300 employees.
2) Consultation with employee representatives apply (Y/N).	Yes	Yes	Yes	Yes
3) Approximate timeframe of the process.	3 – 6 months	2 – 3 months	2 – 3 months	3 – 6 months

Authors:

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Hungary	Poland	Romania	Slovakia	Slovenia	Turkey
Dismissal of	Dismissal of	Dismissal of	Dismissal of	Dismissal of	Dismissal of
✓ 10 or more employees if the total headcount is between 20 and 99 employees;	✓ 10 employees if the total headcount is between 20 and 100 employees;	✓ 10 or more employees if the total headcount is between 20 and 100 employees;	✓ 10 or more employees if the total headcount is between 20 and 99 employees;	✓ 10 or more employees if the total headcount is between 20 and 99 employees;	✓ 10 or more employees if the total headcount is between 20 and 100 employees;
✓ 10 % of the employees if the total headcount is between 100 and 300 employees;	✓ 10 % of the employees if the total headcount is between 100 and 300 employees;	✓ 10 % of the employees if the total headcount is between 100 and 300 employees;	✓ 10 % of the employees if the total headcount is between 100 and 299 employees;	✓ 10 % of the employees if the total headcount is between 100 and 300 employees;	✓ 10 % of the employees if the total headcount is between 101 and 300 employees;
✓ 30 or more employees if the total headcount is over 300 employees.	✓ 30 or more employees if the total headcount is over 300 employees.	✓ 30 or more employees if the total headcount is over 300 employees.	✓ 30 or more employees if the total headcount is over 300 employees.	✓ 30 or more employees if the total headcount is over 300 employees.	✓ 30 or more employees if the total headcount is over 301 employees.
Yes	Yes	Yes	Yes	Yes	Yes
3 – 6 months	2 – 3 months	3 – 6 months	3 – 6 months	3 – 6 months	3 – 6 months







cee overview by Sebastian Guțiu and Clemens Rainer

Key legal developments in CEE real estate market

The real estate market in CEE has seen a few new trends in the past year. Below is a brief overview of some of the most interesting developments.

1 Transfer of agricultural land

The acquisition of agricultural land in CEE has been a much-discussed topic in recent years, as it has always been subject to extensive restrictions.

Landmark decision of the Slovak Constitutional Court:

Following the accession of the Slovak Republic to the European Union, there was a transitional period until 31 May 2014 with several restrictions on the acquisition of real estate by foreign nationals. With the passing of this period, Slovakia was obliged to bring its legislation in line with EU laws and to abolish restrictions applicable to nationals of other EU Member States. The necessary law was adopted, but – largely due to public concerns that foreign nationals and entities would buy up the country – a new set of legal restrictions was introduced that complicated the acquisition of land for everyone. These related in particular to the acquisition of agricultural land. If the land was subject to the restrictions, the owner could transfer it directly only to specific entities or had to undergo a lengthy offer of sale process.

In addition, foreign companies without a registered office in Slovakia were barred from acquiring agricultural land for at least 10 years.

The Constitutional Court deemed these limitations excessive, limiting the right to ownership and limiting for both sellers and purchasers. Based on this decision, changes of the law are expected in Slovakia. It remains to be seen how the legislator will react.

Withdrawal from strict limitations in Poland

Strict limitations concerning the acquisition of agricultural land were introduced in Poland in April 2016. They seriously affected companies owning agricultural properties, even if these were very small pieces of land located next to industrial or commercial properties or not used for agricultural activity. The Polish legislator, however, decided to withdraw some of these limitations beginning in June 2019. The most crucial change concerns the increased area of agricultural land (from 3,000 square metres to five hectares) for which the agricultural governmental agency is entitled to execute certain

rights in case such land is indirectly transferred. As a result, the agency's pre-emption right and acquisition right with respect to shares of companies being owners (and/or perpetual usufructuaries) of agricultural land will not apply if the said area is smaller than five hectares. The same rule applies to personal changes in partnerships.

Even stricter regulations in Romania

In Romania, the sale of agricultural land was restricted in 2014 by special legal regulations. Even more restrictive conditions on the transfer of agricultural land are set forth by a draft law that entered the legislative procedure a couple of years ago. These refer, for instance, to a minimum holding period of 15 years, the prohibition to use the agricultural land as a pledge to secure loans, and limitations regarding in kind contributions to company share capital. It remains to be seen if the new law will become effective.

2 New Land Register Act in Croatia

After years of criticism of the land register system, the Croatian parliament adopted a new Land Register Act



... foreign companies without a registered office in Slovakia were barred from acquiring agricultural land for at least 10 years. The Constitutional Court deemed these limitations excessive...

aimed at resolving all issues giving rise to legal uncertainty. The New Land Register Act will ensure the uniformity of the registration process in terms of timing, as it obliges Land Registers to pass a resolution on every registration application within 15 days of receipt. Furthermore, most actions in a Land Register proceeding can now be done electronically. In addition, land books for cadastral municipalities where they do not exist will be formed within five years or within three years for cadastral municipalities where a certain form of land books exist, but no principle of trust in Land Register data applies.

Simplified permitting process

To improve the investment climate in Croatia, amendments to the Croatian Building Act and the Croatian Planning Act were recently adopted. These aim to simplify the permitting process and make it more time and cost effective (e.g. by instituting a maximum process time of 15 days or by digitalising the entire process). Given the far-reaching scope of the planned amendments, it is still unclear if the changes will become effective.

3 Pre-emptive right to parking space

In the Czech Republic, if an apartment is sold together with a parking space, the seller may be obliged to first offer the parking space to other apartment owners in the building. This statutory pre-emption right to the parking space naturally decreases the value of the property and creates administrative complications, higher costs of sale and delays. Real estate practice has found ways around this problem, such as getting all apartment owners in the building to waive their pre-emption right. Such a waiver may be registered in the Land Register and will thus be effective for subsequent co-owners. Another workaround is the registration in the Land Register of the owner's exclusive right to use the parking space. The Czech government is preparing an amendment to the Czech Civil Code expected to become effective in January 2020 which should finally resolve the problem and make prospective transactions easier. Under the proposed regulation, the pre-emptive right will not be triggered if the parking space is transferred together with an apartment, provided both represent a functional entity.

Similarly, Slovak law provides for a pre-emption right in favour of the other apartment owners in case a parking space in an underground garage is sold. Non-observance may lead to invalidity of the sale. It's the same story with rooftop parking spaces (mainly because the roof is in the statutory co-ownership of all apartment owners). Real estate practice in Slovakia has also found a few workarounds to circumvent this statutory pre-emption right, such as a multilateral agreement between the owners of the flats, or the developer retaining ownership of the garage and granting apartment buyers the right to use the parking. Although we do not foresee any imminent changes in the Slovak legislation, it will be interesting to see if and how the Slovak legislator reacts to the relevant legislative amendments in the Czech Republic.

Other noteworthy real estate developments in CEE are discussed in this chapter.

Reduced limitations on trade in agricultural properties in Poland



Agata Demuth, Konrad Bisiorek

The Polish legislator has reduced restrictions on the trade in agricultural properties implemented in April 2016. The amended regulations make it easier for companies owning small agricultural properties to operate and clarify some doubts concerning trade in agricultural properties, which may also impact commercial trade.

Properties smaller than one hectare

Persons other than individual farmers (i.e. any company) wishing to buy an agricultural property with an area of less than one hectare will no longer need a permit from the National Agency for Agriculture Support (the "Agency"). However, other limitations will still apply, including the Agency's pre-emptive right and right to acquire such properties. A farm must still be operated on the property and the property may not be sold for five years without an Agency permit. These obligations were reduced, however, the bans will continue to apply for 10 years following the property acquisition, and any earlier sale has to be permitted by the court. These restrictions were lifted for properties with an area of less than one hectare and located within the administrative borders of towns. No restrictions apply to properties with an area of less than 0.3 hectares and this was not amended.

Shares in companies owning agricultural properties

The Agency's pre-emptive right and right to acquire shares was modified. Such rights will now pertain to shares of a company being an owner or perpetual usufructuary of agricultural properties of at least five hectares (0.3 hectares to date). At the same time, for calculation purposes, the area of such properties includes properties held in perpetual usufruct (previously companies had to be owners only).

The Agency may exercise the pre-emptive right or right to acquire shares for a longer period of two months. When sending a notification about the pre-emptive right, companies are now obliged to provide the Agency with a balance sheet, income statement, up-to-date list of shareholders and the management board's representation on contingent liabil-

ities. The Agency may still audit the company's documents if its shares are transferred.

Also, if a partner in a partnership is changed, the Agency's right to buy that partnership's agricultural property was limited to properties of at least five hectares. This also applies to partnerships being owners or perpetual usufructuaries of agricultural properties.

IPO

The amended regulations implement a new limitation on joint-stock companies wishing to make a stock exchange debut and owning perpetual usufructuaries of agricultural properties with an area of at least five hectares. These companies will be required to notify the Agency about the general meeting resolution on seeking admission of their shares covered by a prospectus to trade on the regulated market, and the Agency will become entitled to acquire such a company's properties for consideration. No such limitations pertain to trade in shares of listed companies and this was not changed.

Other amendments

The amendments make it clear that for the acquisition of agricultural properties as a result of a split, transformation or merger, no Agency permit is needed, but the Agency may still acquire these properties.

For the acquisition of agricultural properties within bankruptcy or enforcement proceedings, an Agency permit is no longer required, but the Agency may still acquire these properties.

The new aspects are the Agency's duty to launch and maintain an IT system for posting announcements on the intended sale of agricultural properties and the sellers' duty to demonstrate that no eligible entity was interested. This is one of reasons for the Agency to permit a person other than an individual farmer to acquire a property.

The amended regulations will undoubtedly facilitate commercial trade in small agricultural properties and the shares of companies that own them. However, the current limitations must be complied with or else the transaction may be declared null and void.

A power player hiding in the Hungarian construction industry: the construction trustee



Dániel Varga, Adrián Menczelesz

To deal with the aftermath of the global financial crisis starting in 2008, Hungary introduced the unique institution of the "construction trustee", whose primary aim was to break the chain of debts among contractors and subcontractors in the construction sector.

The purpose of a construction trustee is to ensure that all contractors and subcontractors receive their due payment throughout a construction project, without a contractor absconding with other contractor's fees in the process. The participation of construction trustees thus not only leads to more liquid construction companies, but also safeguards project sustainability. In many cases, the involvement of a construction trustee in a project is mandatory. However, a construction trustee may also be involved voluntarily as a security for the subcontractors and the financing credit institutions. So how did the construction trustee become a power player in the Hungarian construction industry? The answer is simple: It has continuous and exclusive control over the funds and payments throughout the entire lifetime of construction projects.

The construction trustee's main role is to handle the developer's funds to cover the costs of the construction works and the securities granted by the contractors to the developer. Therefore, the construction trustee represents a multidirectional and multilayer guarantee for developers, general contractors and subcontractors alike. Developers are obliged to involve a construction trustee in a project if the value of the construction works exceeds the currently applicable EU public procurement threshold for construction works, which is EUR 5,548,000 in 2019. For the avoidance of doubt, construction trustees must be involved even if a private project is otherwise not subject to public procurement rules. If the construction works are subject to construction trusteeship, the developer is free to choose among eligible construction trustees. Before commencing any construction works, the developer is obliged to put enough funds covering the construction

works into the construction trustee's escrow. The construction trustee is obliged to credit the developer's funds to a separate bank account which will function as the construction trusteeship disbursement account. During the construction works, this disbursement account may only be accessed by the construction trustee.

During the construction works, the construction trustee distributes the developer's funds to the general contractor and, in some cases, directly to subcontractors, monitors the invoicing and payment of contractors' fees within the subcontractor chain, and through various tools ensures that all subcontractors are paid for the completed works.

To ensure payment transparency, the construction trustee monitors whether the general contractor paid all outstanding fees to the subcontractors. If the general contractor does not meet its payment obligations towards its subcontractors, the construction trustee will pay the outstanding fees directly to the subcontractors and simultaneously deduct the subcontractors' fees from the general contractor's fee.

If a construction trustee is involved, developers are obliged to enter into a trusteeship agreement with the construction trustee prior to concluding the respective construction agreement. The construction trustee participates in the construction project until the general contractor's final invoice is settled. If the participation of the construction trustee in a project is mandatory but the developer fails to enter into the trusteeship agreement in due course, the developer is exposed to the risk of being fined and having the project suspended by the building authority.

Once the construction agreement is concluded, the developer is obliged to submit the construction agreement for the construction trustee's review within five business days. At the same time, the developer must ensure that a disbursement account accessible only by the construction trustee exists and that the respective funds for the construction works are available as of the effective date of the construction agreement. The construction trustee's fee must be borne by the developer.

Pursuant to recent changes to Hungarian construction laws, to effectively safeguard the transparency and lawfulness of construction projects, construction trustees may initiate the suspension of construction works at the building authority if the developer fails to make sufficient funds available for the relevant construction milestone on the construction trustee's disbursement account within 30 days. Failing to make sufficient funds available for the construction trustee is a material violation of construction rules. Therefore, if the construction trustee initiates suspension of works based on the above grounds, the building authority will most likely order the project suspended. The general contractor is also entitled to suspend its works for the same reason for 30 days without the ruling of the building authority. If the 30-day suspension expires in vain, the general contractor is entitled to terminate the construction contract.

Based on the above, compliance with construction trusteeship rules is obviously critical to the completion of construction projects in Hungary. Therefore, real estate investors are advised to pay special attention to construction trustees before commencing a construction project.

Croatia's new Land Register Act



Ksenija Sourek

After years of criticism of the land register system, the Croatian parliament adopted a new Land Register Act aimed at creating a modern and completely electronic land registry system that provides legal certainty in the real estate business and protection of property and other real estate rights.

The New Land Register Act will ensure uniform registration times. The competent land registry court should now issue a resolution on every registration application within 15 working days of receiving the submission. In this way, applicants are given the opportunity to quickly receive information about whether their submission is suitable for action and, thus, whether it is to be expected that the competent authority will take a meritorious decision on their submission. This particular novelty is coming under fire from land registries which claim that observing this term will be a challenge, as they are already fully occupied with older and still pending registration applications.

There are several more changes aimed at shortening the registration procedure. For instance, an applicant who is abroad and does not have a local proxy in Croatia will be obliged to appoint one and indicate their address when submitting the application. This will shorten lengthy foreign delivery proceedings. If the application does not contain information on the proxy, the court will reject it.

In addition, if registration is applied for based on private documents signed by a proxy, the general power of attorney must not be older than one year from the date the document serving as the basis for the registration was drafted.

There is also an important change regarding the recording of the priority of the intended disposal or encumbrance. The respective resolution must indicate the day on which the time

limit for recording the priority expires. The time limit is one year starting from the date of registration in the land register, thus returning to the original arrangement of that institute from 1996.

The New Land Register Act has also introduced a new institute: the recording of a note on extraordinary remedy, i.e. revision. It refers to situations where recording is permitted based on a final court decision and the counterparty proves that it has filed a revision against that decision (which is the basis for the entry). Therefore, this is not a revision against a land registry resolution, but against the document based on which a particular entry was made. Its purpose is to provide priority for the restoration of the land register status existing prior to the implementation of the final decision.

In some ways the effect of this recording is similar to that of recording a note on dispute. If the decision is annulled or reversed in the event of an extraordinary legal remedy, the court will restore the previous land register status in the order of priority of the record.

Interestingly, the recording as described above can be submitted before or after the filing of an extraordinary legal remedy, but within the deadline for filing a complaint or appeal against a land registry resolution based on a contested decision.

Furthermore, most actions in a land register proceeding can now be done electronically.

Notably, the Land Register Act now prescribes the obligatory transfer of entry documents in electronic form, when technical conditions provide, and introduces an electronic collection of documents.

All land registry decisions (whether issued by an authorised clerk, advisor or judge) must be digitally signed, because a collection of land registry decisions is kept exclusively in electronic form. Electronic submission is specifically prescribed for legal entities, as well as for all cases where the application is submitted electronically. There is only one exception where one type of decision will be mailed in writing, i.e. decisions approving the proposal to register the priority order that are issued only in one copy confirming that the recording has been made.

The court bulletin board is also conducted only electronically. Land register excerpts are issued by each court regardless of the local jurisdiction of the court and by a notary public or a lawyer as an authorised user of the information system. As public documents, excerpts may also be issued through the e-Citizens system.

In addition, land books will be formed within five years for cadastral municipalities where they do not already exist or within three years for cadastral municipalities where a certain form already exists but no principle of trust in land register data applies.

All of the above will gradually lead to a complete electronic procedure in the land registers, i.e. to an electronic file.

Nevertheless, although the modernisation of the land register system was long-awaited and highly welcome, it remains to be seen how the novelties will work in practice, in particular relating to actions that can now be conducted electronically, as it is generally acknowledged that the land registries have not been properly equipped or trained to act in accordance with the new rules.

Pre-contractual liability for failure to conclude a contract



Viktor Pakosta

Sections 1728 and 1729 of the Civil Code expressly stipulate the obligation to compensate damage caused by negotiating a contract without the intention to conclude it and by terminating contractual negotiations without just cause. This article examines how the courts currently interpret these provisions.

An example of potential pre-contractual liability is when the seller (developer), in response to specific demands from the interested buyer, performs landscaping work, prepares architectural designs and procures land-use decisions. To save time and costs, the contracting parties do not agree on the terms of sale of the land under a binding preliminary purchase contract, but only in a not entirely transparent e-mail communication or in the form of a (mostly) non-binding letter of intent. If the interested buyer terminates the contractual negotiations without a reasonable explanation and the developer's investments (up to hundreds of thousands of euros) do not cause the value of the land to appreciate and have no benefit for another buyer, the developer will ask if the interested buyer already knew beforehand that it would not conclude the purchase contract and whether it had just cause to terminate the negotiations.

This situation may be subject to Section 1728 of the Civil Code, under which "everyone may conduct contractual negotiations freely and shall not be liable for a failure to conclude a contract unless it commences or continues such contractual negotiations without intending to conclude the contract."

The fundamental question in the application of this provision is at what point the interested party (in the above example the buyer) discovered that it would not intend to conclude the contract. The fact that a bank refused to provide acquisition financing for the project or that the interested party has entered into a similar "replacement" contract with another entity will probably not suffice to prove the intention of the interested party. Moreover, the party interested in concluding a contract can (usually quite legitimately) defend itself by arguing that it only just ascertained the benefits of the contractual terms for the other party (in the context of the ongoing contractual negotiations).

The above provision is followed by Section 1729 of the Civil Code, under which "if the parties' contractual negotiations go so far that the conclusion of the contract is highly probable,

the party who, despite the legitimate expectation of the other party in the conclusion of the contract, terminates the contractual negotiation without just cause, is deemed to be acting dishonestly."

This provision of the Civil Code reflects the case law to Section 415 (general obligation to prevent damage) of the previous Civil Code (Act No. 40/1964 Coll.), which did not explicitly regulate pre-contractual liability.

The first condition that must be satisfied to consider liability for damages is that the conclusion of the contract must appear highly probable (when objectively assessed) to the injured party. This is possible at the earliest when at least the essential elements of the contract have been agreed. In this context, the case law also often refers to the requirement for the good faith of the victim. This is excluded in cases where the injured party knew of the other party's intention not to conclude the contract or itself did not intend to conclude the contract.

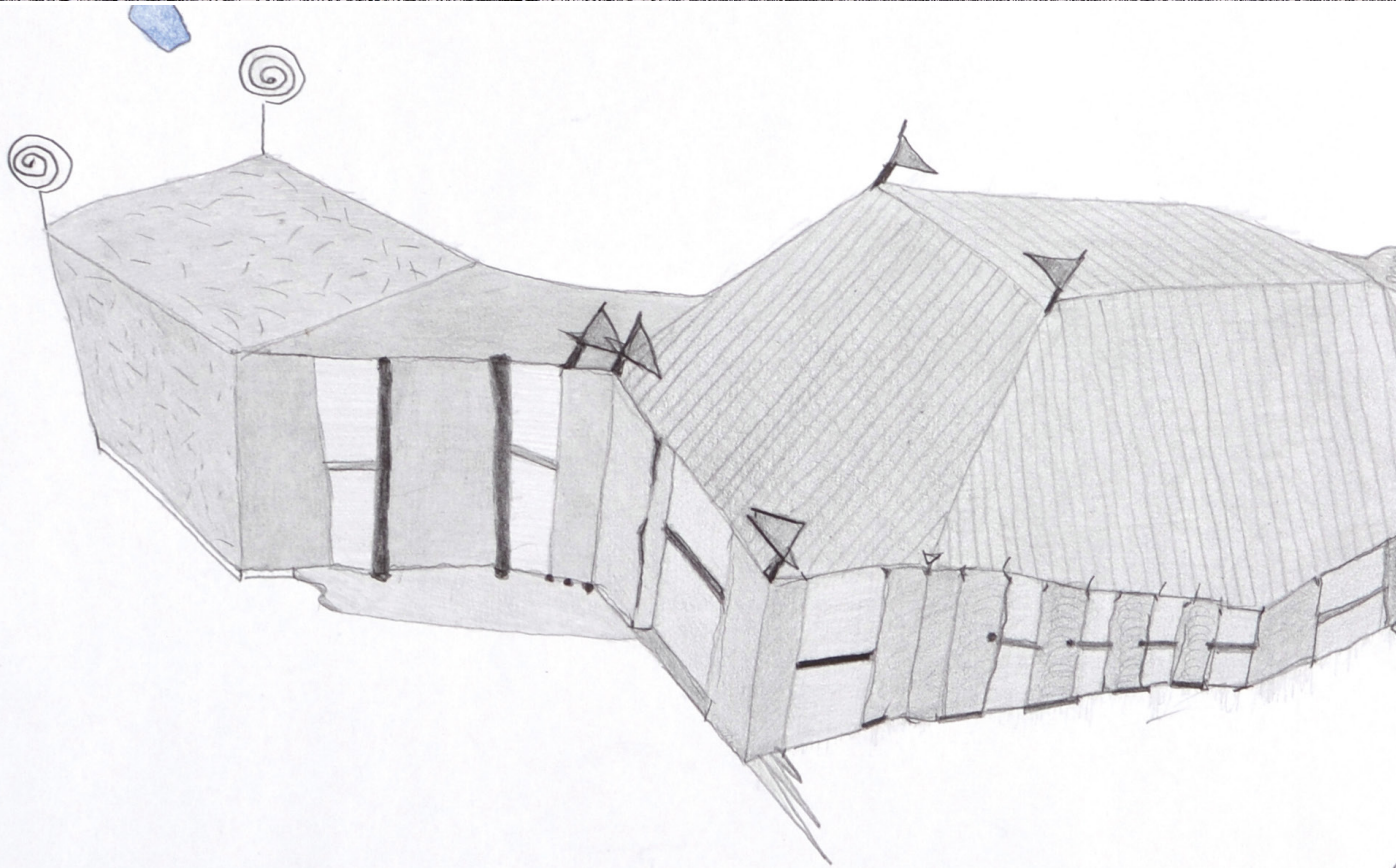
Another condition for liability under this provision is the absence of a just cause to terminate the negotiations. The courts interpret the term "just cause" quite broadly, i.e. to the detriment of the injured party. An interpretative rule is applied according to which the party interested in the conclusion of a contract is not, in principle, liable for damage caused by the non-conclusion of the contract and the occurrence of liability for damage is an exception to this rule. In addition, the Supreme Court of the Czech Republic stated in its judgment file no. 25 Cdo 856/2018 of 30 October 2018 that dishonest conduct cannot be inferred simply from the fact that the acting party did not inform the other party of the reasons for terminating the contractual negotiations.

Regarding the extent of the damages to be paid, the courts generally take the view that the normal (operating) costs which the contracting party must incur, irrespective of whether the intended contract is finally concluded, cannot be claimed. As a rule, only damage incurred as a result of the specific requirements of the party that ultimately refused to conclude the contract will be paid.

As can be seen from the above, it can be very difficult in practice to infer liability for damage caused by the non-conclusion of a contract. However, the occurrence of damage can in most cases be prevented by the timely conclusion of a letter of intent or other appropriate agreement.



Andreas Maurer, Franz Nigl



13

regulatory



cee overview

by Bernd Rajal and Daniel Varga

Status quo and what's to come

The increase in regulation of our economic and private life does not stop when crossing the borders to Central and Eastern Europe. It hits the CEE region the same way as Western Europe. This is especially true for industries which are regulated at the EU level, such as energy, telecommunications, public transport and infrastructure. But it is also true for legal areas that are relevant to everyone, such as the new privacy regime under the GDPR, which is slowly but surely replacing the rather weak national data protection systems in CEE. Finally, regulation in CEE is driven by emerging and increasingly pressing global topics and concerns, such as climate change. The global fight against climate change in turn has far reaching effects on the environmental legislation. In this context, our Regulatory Practice Group in CEE focuses strongly on energy, environment, GDPR & privacy, telecommunications and public procurement matters.

Energy & climate change

The generation and consumption of energy is the largest source of global greenhouse-gas emissions. At the same time energy demand is increasing globally and this trend is set to continue, driven primarily by economic growth and the rising population. Incentivising investment in low-carbon technologies is a key challenge for governments and regulators to achieve carbon reduction targets, especially in CEE, where carbon still dominates the energy markets. Investment in renewable energy will therefore continue to be the key for transitioning to non-carbon energy generation. Many CEE countries are about to establish new renewable promotion

schemes, most based on auctions aimed at procuring new renewable capacities in a competitive way. Schoenherr's energy practice has long-term experience in advising on renewables, including projects, auction design and RES contracts drafting.

Environment

Climate change, waste and pollution prevention have become a matter of priority in CEE. The improvement of environmental standards is mainly driven by EU legislation, such as the EIA Directive, BAT-documents under the IED Directive, the Seveso III Directive, the Waste Directive and new case law



Many CEE countries are about to establish new renewable promotion schemes, most based on auctions aimed at procuring new renewable capacities in a competitive way.



Finally, regulation in CEE is driven by emerging and increasingly pressing global topics and concerns, such as climate change. The global fight against climate change in turn has far reaching effects on the environmental legislation.

under the Water Framework Directive. The implementation of EU legislation into national law is becoming increasingly challenging. Our environmental experts in CEE support clients and national governments with the undertaking to ensure compliance with EU environmental standards.

GDPR & privacy

We are in the second year of the effectiveness of the GDPR and higher fines are becoming common all over Europe, and not just in the Western parts. Significant fines were also imposed in the CEE region within the last two years, indicating that data protection is now taken more seriously than ever, not only by the regulatory authorities, but also by the individuals who are the key drivers of enforcement through initiating complaints before the national data protection authorities as well as civil court claims. This development impacts all industries. The declared objective of the GDPR was to harmonise the data privacy framework within the EU Member States. Although the GDPR is doubtlessly a major step towards achieving this goal, Europe is still far away from a harmonised privacy law, not to mention that the more diversified case law becomes on the Member State level and the more regulators exploit the range of fines under the GDPR in a non-synchronous manner, the more Europe will drift away from harmonisation. In other words, GDPR enforcement will be a high priority in the upcoming years. We will therefore continuously focus on GDPR enforcement in our CEE practice.

Telecommunications

What does driving have to do with telecommunications? What about grocery shopping? A few years ago you probably would have said "nothing". But as we approach the third decade of the 21st century, we must reconsider. Autonomous driving, smart domestic appliances and all other machine-to-machine communications require network stability and larger than ever data streaming capacities. Thus, the grid expansion to 5G networks is omnipresent. The legal implications started with frequency auctions and will continue with

"classic" topics such as expropriations and easement agreements. It will also include setting up joint ventures for know-how bundling projects and will compel us to deal with upcoming new or adapted regulations which will reflect the ever-changing demands of the digitalised world.

Public procurement

One of the main goals of the new public procurement directives (Directives 2014/23/EU, 2014/24/EU and 2014/25/EU) has been the mandatory implementation of e-procurement and the subsequent digitalisation of the procurement process to increase efficiency and foster cross-border participation. Mandatory e-procurement (including mandatory e-invoicing) has already left its mark in the CEE public procurement world. Member States have implemented various measures to implement electronic communication throughout the complete public procurement procedure, starting with e-publication of contract notices, the e-availability of tender documentation, the e-submission until the e-communication with all bidders. While the digitalisation of the procurement process is still in its infancy, some Member States are already one step ahead by having established public open-access government databases and contract registers. Further digitalisation steps, such as e-evaluation of tenders by applying transparent algorithms, automated procurement of basic products or the utilisation of blockchain technologies and smart contracts are no longer a vision of the future.

Auction-based subsidies in the Renewable Energy Sector: Time to forget the safe space of Guaranteed Tariffs

Authors: Monica Cojocaru, Petra Santic, Krzysztof Leśniak, Michal Lučivjanský, Jiri Marek, Dániel Varga

Croatia

The amendment of the Croatian Act on RES and High Efficiency Cogeneration effective as of 1 January 2019 introduced a new auction-based support scheme in Croatia, which replaced the previous system based on a mandatory purchase with a feed-in tariff.

Auction-based support scheme

Amid the legislative changes, the new support scheme has not yet been put into practice. To this end, the government will need to define a new quota aimed at supporting electricity generation from RES and cogeneration plants for 2016 to 2020. The existing power purchase contracts concluded based on the old tariff systems as of 2007, 2012 and 2014 will also be included into the new quota. Depending on the availability of support quotas, the Croatian Energy Market Operator (HROTE) will organise auctions at least once per year.

Premium tariff:

Operators of RES or high-efficiency cogeneration plants, who have obtained the status of an eligible generator and have been selected as best bidder in a public auction carried out by the HROTE, will be entitled to receive a premium tariff on top of the price of the electricity, which they have sold on the market pursuant to the Croatian Electricity Market Act.

Guaranteed purchase price:

Operators of RES or high-efficiency cogeneration plants with an installed capacity of up to 500 kW will be entitled to conclude a power purchase agreement at a guaranteed purchase price if they are selected as the best bidder in a public auction carried out by the HROTE. The implementing bylaws that will ensure full and effective implementation of new support schemes for RES and high-efficiency cogeneration plants are yet to be adopted (i.e. regulation on available support quota and state aid scheme to be approved under the current EU state aid rules by the European Commission). Therefore, the HROTE is currently not able to conclude new power purchase agreements with eligible generators.

Although the first auctions were expected to be organised in 2019, it is more likely that the new auction scheme will be launched in 2020, once the European Commission has approved the scheme from a state aid perspective and depending on the quota available to generators.

Czech Republic

A new RES support scheme in the Czech Republic is planned to be introduced as of January 2021. However, due to delays in implementation, this date seems ambitious. In order to introduce a new RES support scheme, a robust amendment to the currently effective act on RES was published in November 2018 and is still subject to public discussion. According to the Proposal, the new support scheme will be divided into two sections: (i) small installations below 1 MW (except wind installations up to 6 MW or composed of six energy sources) supported in the form of green bonuses paid for own energy consumption or as a "contribution" to the market price, and (ii) larger installations (except PV plants) supported by an auction scheme.

Auction-based support scheme as of 2021

Under the Proposal, auctions will be published by the Czech Ministry of Industry and Trade (the "MIT") multiple times a year as needed. The MIT will specify the type of RES and the total amount of energy covered by the auctions on a case-by-case basis. Separate auctions will be held for the production of renewable energy and combined energy and heat.

In the case of renewable energy, the auction will be won by the bidders offering the lowest reference prices. The winners will then sign an agreement with the MIT in which they undertake to commission or modernise the plant and to produce energy in accordance with the agreement in exchange for an hourly auction bonus, i.e. the difference between the reference price in the bid and the hourly market price of electricity. The bonus is provided by the Czech electricity and gas market operator OTE a.s.

The current Proposal does not allow for the support of PV installations above 1 MW. The MIT explains this as an attempt to prevent the construction of large "solar parks" and encourage the construction of small PV installations, e.g. on building roofs. However, many market players have challenged this position. Thus, the final auction framework in the Czech Republic might be made available for large PV installations.

Hungary

As of 1 January 2017, a new auction-based subsidy scheme replaced the previous general mandatory off-take regime. Pursuant to the new scheme, mandatory off-take has been limited to RES power plants under 0.5 MW capacity (save for wind power plants), and RES power plants above 0.5 MW capacity may be subsidised by way of green or brown premiums. The new scheme required green premiums to be allocated among RES generators above 1 MW capacity by means of auctions. In the course of an auction, the national regulatory authority specifies the amount of annual financial sources and volume of power that may be subject to subsidy. Bidders compete with respect to their proposed subsidised prices, with the lowest subsidised price winning. The amount of green premium payable to a RES generator is calculated with respect to the subsidised price and the applicable market prices available on the Hungarian power exchange.

First pilot auction launched in September 2019

The national regulatory authority launched the first pilot auction on 2 September 2019. In the pilot auction, bidders may apply for green premiums in two different categories: (i) power plants between 0.3 MW and 1 MW capacity, and (ii) power plants between 1 MW and 20 MW capacity. In the first category, the total amount of financial support that may be allocated among successful bidders is HUF 333m per year. Furthermore, the total volume of subsidised electricity in the first category is limited in 66 GW/year. In the second category, the overall limit of financial support is HUF 667m per year, and the volume of subsidised electricity may not exceed 134 GWh per year. Winning bidders will be subsidised for 15 years under both categories.

It is expected that the national regulatory authority will launch several other auctions in the future based on the experiences gathered during the pilot auction.

Subsidies for power generation from renewable energy sources (RES) are undergoing material structural changes in the CEE region. In most CEE jurisdictions, auction-based subsidy schemes are replacing mandatory feed-in regimes, forcing investors to leave behind their safe space of guaranteed tariffs and to adapt to market circumstances by offering competitive subsidised tariffs. In the region, the implementation status of auction-based subsidy schemes varies from country to country. Therefore, in this article, we provide you with a CEE-wide overview of RES subsidy schemes with a special focus on auctions.

Poland

Three different support schemes are available in Poland: (i) green certificates for power plants commissioned before 1 July 2016; (ii) feed-in tariffs / feed-in premiums for smaller biogas and hydropower installations; and (iii) contracts for difference awarded in the framework of auctions.

Auction-based support scheme in operation

The subject of an auction, the first of which was launched in 2016, is the amount of energy generated in a renewable energy source over a 15-year period but no later than until 2035.

Auctions are held via an online platform and may be organised multiple times a year. There are separate auctions for (i) new plants, (ii) modernised plants, and (iii) old plants, which can switch from the green certificates support scheme to contracts of difference. There are also separate auctions for plants with total installed capacity below and above 1 MW. The auctions are held separately for five groups of installations depending on the technology used. One group is dedicated jointly to wind and PV plants.

The auction is won by the bidders who offered the lowest prices and whose offers did not exceed the total amount of energy covered by the auction.

Energy generated in the renewable energy sources is traded on the Polish Power Exchange. The winners of the auction receive the negative balance (difference) between the price for the sale of electricity and the price they offered in the auction. The difference is paid monthly by the state-owned settlement entity.

Recent amendment

The RES support scheme was subject to material improvements in August 2019. The main aim of the amendment was to allow auctions to be conducted at the end of 2019 and to secure support for wind and PV plants, which should cover more than 3 GW, of which 2.5 GW will cover wind farms with total installed capacity above 1 MW. Additionally, the validity of the occupancy permits and the time for commencement of the sale of energy will be extended, thus putting the investors in a more comfortable position.

Romania

In March 2019, the Romanian Ministry of Energy submitted for public debate a document outlining a new mechanism for supporting low-carbon electricity generation, by replacing the former green certificate support regime with a Contract for Difference (CfD) scheme.

Contracts for difference from 2021?

Under the proposed CfD scheme, eligible producers enter into a private law contract (CfD contract) with OPCOM S.A., the Romanian power and gas market operator, and agree on a "strike price". Producers sell electricity on the competitive market; if the market price (i.e. the "reference price") falls below the strike price, the counterparty will reimburse producers the difference. Likewise, if the market price exceeds the strike price, the producers will reimburse the difference to the counterparty.

The proposed new scheme is inspired by the British CfD system, targeting both the renewables and the nuclear sector.

The CfD scheme would be funded by end consumers through the energy bill, which will include the CfD contribution as a separate item. The scheme is expected to be capped at EUR 125m per year for renewables projects and at EUR 215m per year for nuclear projects.

CfD supports would expire when an investment is recovered. The "reference price" is proposed to be set annually as the average price on the day-ahead market. In the case of renewables, the strike price would be set by way of an auctioning mechanism.

Eligible parties may enter into a CfD contract already in the development phase, thus facilitating the financing of the project in an early stage. The CfD contract will be regulated to include "change in law and change in tax" clauses, aimed at securing long-term certainty for investors.

Despite optimistic political statements, the CfD system may not be realistically implemented in Romania before 2021, as a detailed legal framework needs to be put in place, after being cleared for state aid by the European Commission.

Slovakia

Up until the end of 2018, RES generators were subsidised mainly in the form of a guaranteed feed-in tariff granted for 15 years. The tariff depended on the date when the RES power plant was put into operation. The highest level of guaranteed feed-in tariff was granted for facilities put into operation in 2009 – 2010, while after these years the level of tariff has gradually decreased significantly lower. In addition, the construction and connection of new RES facilities to the grid was obstructed by various obligations mainly towards distribution system operators. Thus, the development of RES facilities and especially PV installations have been practically frozen in recent years.

New auctions expected at the end of 2019

As of 1 January 2019, RES legislation has undergone major changes that are expected to foster investments in the sector. As to small-scale RES projects, rules applicable to the installation of own equipment and production of electricity for own consumption have been simplified.

For new larger RES facilities, an auction scheme has been introduced, under which new RES projects with installed capacity from 10 kW to 50 MW will be selected in auctions organised by the Ministry of Economy. The ministry will be entitled to limit the maximum price to be paid following the auction. The deadline for submitting bids will be two months from the opening of an auction and the support in the form of additional payment will be guaranteed for the best bidders for 15 years.

The first auction is expected to be organised in late 2019 or early 2020. The notice of the auction will be published at least two months before the auction takes place.

A current look at GDPR enforcement practice in CEE



Stefana Tsekova, Costin Sandu, Dorottya Gindl, Daria Rutecka.

The first two years of the General Data Protection Regulation¹ are almost behind us and we are getting used to daily news of imposed fines. Although the UK and France may be the "top enforcers", it isn't just the Western EU Member States that are taking this rather new regulation seriously.

Leaving aside the "BA / Google" cases^{2,3}, CEE countries have even "pioneered" GDPR enforcement. It is time to analyse if there are common incompliances which lead to significant fines or if the degree of harmonisation lags when it comes to GDPR enforcement. Let's have a look at the "top five" fines (until the end of September 2019) imposed in CEE countries where Schoenherr has offices:

- In mid-2019, Bulgaria imposed two major fines in a row. The first one (EUR 2.6m) was imposed on the National Revenue Agency⁴ following an investigation of a data breach at the agency by the Bulgarian Commission for Personal Data Protection. The data breach – in fact an attack by anonymous hackers – affected about six million people and led to unauthorised online disclosures. You might assume that the GDPR violation identified by the authority was the National Revenue Agency's failure to report the data breach. In fact, the authority found that the technical and organisational measures in place were insufficient. It was the violation of Art. 32 GDPR that resulted in the massive fine.
- The second fine was imposed by the Bulgarian Commission for Personal Data Protection, again for inadequate technical and organisational measures according to Art. 32 GDPR, which came to light after a data breach.⁵ This time the recipient of the fine was the Bulgarian DSK Bank EAD. In this case, third parties had access to more than 23,000 credit records, including personal data like names, citizenships, identification numbers, addresses, copies of identity cards and biometric data. The authority imposed a fine of BGN 1m (approx. EUR 510,000).
- The Polish National Personal Data Protection Office started its enforcement measures even earlier. In March 2019 it imposed a fine of approximately EUR 220,000 on a data controller. The controller, a private company in Poland, was gathering data from publicly available sources like the Central Electronic Register and Information on Economic Activity or the Court Register and processed the data for its own commercial purposes. The authority identified a violation of the GDPR's information obligations, since the controller did not inform all data subjects according to Art. 14 GDPR but only those whose

email addresses the controller had at its disposal. Since that controller had postal addresses and telephone numbers, the authority held that it could have complied with the information obligations under the GDPR and decided that the presentation of the information only on the website was not enough.

- UniCredit Bank S.A. was fined for GDPR violations in June 2019 in Romania⁶. The Romanian Data Protection Authority found that UniCredit Bank S.A. breached Art. 25.1 of the GDPR. In other words, the authority imposed the fine due to the failure to implement appropriate technical and organisational measures in the context of the Privacy by Design principle. Due to the shortcomings within the designed determination of the processing means and processing operations, the implementation of the general data protection principles (e.g. data minimisation) were not ensured. This led to the unauthorised disclosure of personal data of persons who performed payments (i.e. personal identification numbers and addresses) to the beneficiaries of the payments. The data breach affected around 340,000 data subjects and the fine amounted to approximately EUR 130,000.

- In terms of timing, the first significant fine issued by the Hungarian National Authority for Data Protection and the Freedom of Information could be seen as a "birthday tribute to the GDPR", as it was issued on 23 May 2019. In this case, the authority identified that the biggest Hungarian festival organiser failed to have a GDPR-compliant check-in system (which included the processing of scans of festival visitors' ID). The festival organiser⁷ claimed two legitimate interests for its data processing: (i) security (in light of the terrorist attacks in Paris in 2015), and (ii) preventing misuse of the entry arm-band (by passing it to other persons or selling it for higher prices). The authority decided that the legal basis ("legitimate interest") for data processing was inappropriate and the balance of interest which must be conducted when relying on legitimate interests would not lead to overriding interests of the festival organiser. Thus, the controller did not comply with the principle of purpose limitation. Besides that, the festival organiser violated the principle of data minimisation by collecting unnecessary personal data from the festival goers.

The data protection authority imposed a fine of approximately EUR 90,000 in respect of the data processing activity of the festival organiser after the entry into force of the GDPR.

Lessons learned:

What can we take away from those first major fines in CEE? These sample cases definitely show that the authorities are taking a closer look at data breaches. Irrespective of the data breach notification, which was not in dispute in the above-mentioned cases, the authorities will analyse the technical and organisational infrastructure of a data controller if a data breach with significant impact has occurred. This means that even if your company is subject to cybercrime, you should not forget about your own duties. Besides, those multiple transparency obligations (providing appropriate and readable information upfront) should be taken seriously. Just because the data are easily available online or because data protection is likely not the prime focus of the data subjects (as can be assumed in the case of festivalgoers) does not mean the data controller's obligation to act transparently is lifted. Companies should proactively and repeatedly evaluate their GDPR compliance structure. As often mentioned during the GDPR preparation phase, GDPR compliance is not a one-off task but requires steadfast attention.

- 1 Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (Data Protection Directive), Journal L119, 4 May 2016, p. 1–88.
- 2 Intention to fine British Airways GBP 183.39m under the GDPR for data breach; <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/07/ico-announces-intention-to-fine-british-airways/>
- 3 Deliberation of the Restricted Committee SAN-2019-001 of 21 January 2019 pronouncing a financial sanction against GOOGLE LLC, available under: www.cnll.fr/en/cnlls-restricted-committee-imposes-financial-penalty-50-million-euros-against-google-llc.
- 4 https://www.cdp.bg/en/index.php?p=news_view&aid=1519
- 5 https://www.cdp.bg/en/index.php?p=news_view&aid=1514
- 6 https://www.dataprotection.ro/index.jsp?page=Comunicat_Amen-da_Unicredit&lang=en
- 7 Responsible for the SZIGET, the VOLT and the Balaton Sound Festival.



Although the UK and France may be the "top enforcers", it isn't just the Western EU Member States that are taking this rather new regulation seriously.







Tech is gold! Digitalisation is tech's major trend / Start-Ups in CEE

Technology is everywhere: It is the gold or oil of our time, and digitalisation is technology's major trend. It has never been more important. This was particularly true last year, and will be even more so in the upcoming year.

We have always been frontrunners in technology matters. Because of the importance of technology for our clients and due to the legal complexity that technology matters bring along, we have sharpened our focus on technology & digitalisation matters by establishing a dedicated, firm-wide technology & digitalisation group in early 2019. In that sense, technology has brought us (closer) together.

The group's focus is on advising clients comprehensively on complex legal questions in technology & digitalisation-driven matters, by implementing a one-stop shop across CEE and by deploying lawyers that share an affinity for technology.

The group was and is dealing with a diverse group of technology matters. Most prominently:

- **Blockchain:** Distributed ledger technologies such as blockchain promise (or claim to promise) a worldwide disruption of financial and real property markets, fund raising and project financing (initial coin offerings and security token offerings) and other applications and businesses.

- **The future of mobility:** The global automotive industry is working on autonomous driving solutions which will change the way we experience mobility today. Also, due to flexible and efficient car sharing solutions and other mobility providers, such as e-scooters and e-bikes that can be rented everywhere from your smartphone, the traditional ways to travel have changed and will continue changing in the future. Such

change will however also need to be accompanied by appropriate laws and regulations.

- **FinTech:** FinTech start-ups are challenging the traditional financial services industry. No other industry is facing a bigger threat by start-ups. Large banks will need to shape their business models and re-think traditional ways of servicing clients to keep pace.

- **Digital Platforms and Marketplaces:** Many business models depend on digital platforms, such as Uber, one of the largest multinational transportation network companies which does not own a single taxi; AirBNB is one of the largest online marketplaces for arranging or offering lodging and tourism experiences, and does not own any real property; Flixbus, a company offering intercity coach services in various European countries and the United States, does not hold any stakes in busses, nor does it employ any bus drivers; Tourradar, the Austrian tour booking platform, does not organise a single tour or other tourist event. Said companies (and many others) run platforms and/or marketplaces for third-party services/products rather than offering the services themselves. However, this is also not necessary from a user's perspective, since the platforms offer a valuable service comparison, unified information on products and services and single point of contact for users. As a consequence of their success, many platforms are under increasing scrutiny by politicians and regulators who tend to protect traditional business models rather than allowing innovation as it happens.

- **Cyber security:** Technology does not only bring growth, benefits and convenience, it also brings risks. Attacks by



CEE is best suited to fostering start-ups because of many technology-focused geographic areas, such as Cluj (Romania) or Novi Sad (Romania). Also, other countries like Poland, Czech Republic, Croatia and Bulgaria see a lot of start-up activities and, most importantly, investments into start-ups.

hackers or phishers and other criminals impose serious threats to private and public institutions. Cyber security thus becomes increasingly important and clearly will increase in terms of awareness (and investments into protection, such as cyber insurance policies) over the next periods.

- **Artificial Intelligence (AI):** Will lawyers (and other businesses) all be soon replaced by AI systems? We don't think (and hope) so, but it is clear to us that AI will have an influence on the way we will work. For instance, handling large volumes of data will be possible (in an efficient way) by utilising AI (machine learning) tools. The use of AI will, however, bring many legal questions, such as who owns IP created by AI? Who is responsible for decisions of an AI system, e.g. if AI is used to support court decisions. AI ethics will also need to be discussed and defined.

- **Digitalisation:** Overall, digitalisation is continuing to be a main driver for change of processes. It requires a sophisticated IT infrastructure, a variety of digital applications and performing networked systems and data. A digitalisation project requires – on top of various legal issues, such as data protection, IP and labour law questions – the mastering of the overall change process (and as we all know: culture eats strategy for breakfast).

Beside our client work, Schoenherr has teamed up with other law firms in Austria and founded the Legal Tech Hub Vienna (LTH Vienna). The unique initiative that brings together friendly competitors with a joint goal, will lead the legal industry into a digital future, while ensuring that our clients' needs are of primary concern.

The LTH Vienna operates an accelerator programme for legal

tech companies (start-ups and SMEs) which allows participants to directly work with market leading law firms on developing legal tech tools and solutions. The first batch of the programme was already a success with litigation tool developer "MISO" scooping the first award on demo day. Currently in its second round, we look forward to continuing to work with the new start-ups and our friendly competitors on legal tech matters that will make clients' and law firm's lives easier. The LTH Vienna's collaborative approach does, however, not stop at the accelerator program: Its Cloud Computing Working Group is heavily engaged in fine-tuning Austrian bar regulations to make the legal industry fit for using cloud computing and storage tools while at the same time preserving privacy and security of client data.

Start-Ups: The start-up world is booming, with more and more start-up activities in CEE.

For instance, in countries like Serbia or Romania, start-up hubs and events seem to mushroom, and governments seem to become aware that fostering start-ups may bring an economic boost to their countries. And CEE is best suited to fostering start-ups because of many technology-focused geographic areas, such as Cluj (Romania) or Novi Sad (Romania). Also, other countries like Poland, Czech Republic, Croatia and Bulgaria see a lot of start-up activities and, most importantly, investments into start-ups.

Start-ups also influence legal developments. In Poland, for instance, a new company form was recently introduced, the simple joint-stock company ("SJC"). The SJC was introduced in response to market needs and difficulties that start-ups face with incorporation, capital raising and liquidation.

Electromobility on the rise



Jiří Marek, Viktor Pakosta

As part of the EU's efforts to achieve carbon neutrality, Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 (effective from January 2020) laying down CO₂ emission performance standards for new automobiles and new light commercial vehicles (the "Regulation") was issued. Under the Regulation, individual manufacturers (or associations of manufacturers under Article 6 of the Regulation) will be obliged, inter alia, to reduce emissions from new automobiles by 37.5 % by 2030 (compared to the 2021 target of 95 g CO₂/km).

Practical implications of the Regulation

In practice, the above emission limit set by the Regulation will mean a requirement to reduce the average consumption of new automobiles by 2030 to around 2.5 l of petrol per 100 km. If a manufacturer or association of manufacturers fails to reach this level of consumption in its fleet – which is expected – they will also be forced to supply a significant percentage (approx. up to 50 %) of electric or hybrid vehicles to the market.

An alternative for car manufacturers to the development and sale of electric vehicles or hybrid vehicles will be to pay a fee for exceeding the emission limits. However, given that it is EUR 95 for every gram of CO₂ per kilometre above the threshold (in practice hundreds of millions to billions of euros per year for the largest manufacturers), it will certainly not be an attractive option.

National Action Plan for Clean Mobility

In order to fulfil the Czech Republic's commitments to the EU in the area of reducing transport emissions, the Ministry of Industry and Trade, in cooperation with other ministries, issued a National Action Plan for Clean Mobility (the "Action Plan") in 2015. It sets the strategic goals of the Czech Republic in the field of clean mobility (including electromobility) and individual measures to achieve them.



... relatively massive support for electromobility may be expected in the coming years from the government and the ministries concerned.

One of the strategic goals of the Action Plan is to achieve the operation of 250,000 electric vehicles in the Czech Republic by 2030 (Art. 4.1.1), which represents more than 4 % of all registered automobiles in the Czech Republic. This strategic objective is to be achieved by stimulating demand through subsidies, favouring electric vehicles on the road, supporting the construction of charging infrastructure and providing information to the public.

As only about 3,000 electric cars are currently registered in the Czech Republic, which represents only about 0.05 % of all registered automobiles, relatively massive support for electromobility may be expected in the coming years from the government and the ministries concerned.

Subsidies for electric vehicles and charging stations

To achieve the strategic objectives set out in the Action Plan, in 2018 the Ministry of Industry and Trade issued its fourth call to use the "Low Carbon Technology – Electromobility" support programme. Applications for subsidies were received from December 2018 to May 2019. During this period, 341 applications for subsidies totalling CZK 267m were received. The original total amount of subsidies was only CZK 200m. Under this programme, businesses (not non-self-employed natural persons) could, among other things, apply for subsidies to purchase electric vehicles and non-public charging stations. The minimum subsidy was set at CZK 50,000 and the maximum was CZK 10m. For 2020, the Ministry of Industry and Trade plans to announce a call under this programme with a total subsidy of CZK 50m.

Businesses that are thinking about applying for a subsidy should first verify whether they meet the subsidy conditions, i.e. in terms of their creditworthiness, the subject of the subsidy and the expected size of the subsidy. It is then necessary to submit the application, business plan and other required annexes electronically in the MS2014+ system.

In addition to the subsidy programme for businesses, the Ministry of the Environment also announced a subsidy programme for municipalities, regions, contributory organisations and other public-legal entities called "Environment". In the framework of the 2019 subsidy call, grants totalling CZK 100m were allocated under this programme, the vast majority of which were for electric vehicles and smart charging stations. According to the communication of the Ministry of the Environment, a similar call will be announced for 2020 with approximately the same subsidies.

Benefits for electric vehicle owners

In addition to the subsidies, electric vehicle owners are already benefiting from road tax exemptions and free (or reduced fee) parking in some municipalities.

Moreover, from April 2019 an amendment to Act No. 56/2001 Coll., on the Conditions of Operation of Vehicles on the Road, came into effect, under which electric vehicle owners can apply for new licence plates starting with the letters "EL" free of charge. In the future, these plates will probably entitle them to other benefits, such as exemptions from motorway tolls or the use of dedicated lanes in municipalities. Unlike some other countries, the sale of electric vehicles in the Czech Republic is not exempt from value added tax (a 21 % rate currently applies).

Development of the charging stations network

There are currently over 400 charging stations for electric vehicles in the Czech Republic, mainly in large cities. According to the Action Plan, by the end of 2025, all cities with more than 10,000 inhabitants should be covered by charging stations.

The advantage of charging stations is that unlike conventional filling stations they can be placed pretty much anywhere, for example, on building facades, outdoor car parks or in garages. While installing charging stations on building facades will generally not require territorial ap-

proval, placement in car parks may require (i) territorial approval of the building authority within the meaning of Section 96 (2) (a) of the Building Act (typically a separate stand on the land) or additionally (ii) notification to the building authority pursuant to Section 104 (1) (d) of the Building Act (typically a roofed charging station with multiple stands). Charging station operators should remember to legally secure the land (if they are not the owner) in which the electrical connections will be located, ideally by establishing a utility easement under Section 1267 of the Civil Code.

Together on the blockchain: Finding consensus in a decentralised network



Thomas Kulnigg, Maximilian Nutz

An essential element of the blockchain and the technology behind it is the validation of transactions, i.e. confirmation that data in the blockchain ledger is entered right-fully¹. But how, exactly, can data entered in a decentralised ledger be validated? Who does the validating? These questions arise once you look deeper into the workings and structure of transactions on the blockchain.

The idea behind distributed ledger technology (DLT) (e.g. a blockchain) is to have a decentralised ledger that is not controlled by a single person/authority but by the network itself. This results in a trust problem, since many network participants usually have to trust a central "trusted party". To avoid having a central authority controlling the decentralised network, consensus algorithms are used to determine if book entries were validly made.

This is not a new issue. It has existed since the dawn of distributed computing (e.g. for synchronising distributed clocks). There are several ways to reach consensus on a distributed network. In the DLT/blockchain world, the most popular applied consensus mechanisms are:

- The Proof of Work (POW) mechanism, which is the first blockchain consensus mechanism and was initially used by Bitcoin. The execution of a proof of work mechanism (which is essentially the attempt to reach a certain result of an arithmetic problem) in the context of blockchains is called "mining". The miners try to find a result with certain properties by performing billions of arithmetic operations. If a miner reaches the correct result, the miner will be remunerated. The process

of recording a transaction on the blockchain is as follows: (i) transactions are grouped into one block; (ii) the miners check whether these transactions are legitimate by performing the proof of work calculations; (iii) the first miner who to find the solution receives the block payment; and (iv) the validated transactions are appended to the blockchain in the form of a new block.

- The Proof of Stake (POS) mechanism, based on the idea that those members on the blockchain who own the most tokens have an interest in keeping the network maintained. The decisive factor is therefore the stake of a user, i.e. the proportion of the total amount of tokens they own. The larger the share, the more likely it is that this user will be selected to mine the next block. Broadly speaking, compared to proof of work, the proof of stake mechanism is more like a joint-stock corporation. Whoever owns a larger share in the company normally receives more voting rights entitling them to make decisions.

Proof of Work vs. Proof of Stake

These two mechanisms are quite different. POW calls for validation by the first person to solve the arithmetic problem, meaning that many people are competing at the same time and an enormous amount of computing effort is required to solve the same problem, a lengthy, resource intensive and expensive process. POS is more environmentally friendly, since the user to be validated is randomly selected depending on the token they hold. The higher the proportion of tokens, the higher the chance of being selected. In addition, the validators of a POS mechanism are incentivised to maintain the network, as they actually hold coins of the blockchain on which they are validating, whereas in a POW system, a miner may own none of the coins they are mining and simply wants to maximise their profits without improving the network.

In short, one of the key issues of a decentralised network is how to find consensus. Practical mechanisms such as POW and POS exist, but they are not perfect (high energy consumption, ability to influence transactions). We will see in the future which mechanism will prevail and allow people to work "together" on the blockchain.

¹ <https://www.schoenherr.eu/publications/publication-detail/what-is-blockchain/>

How to manage complex IT projects



Wolfgang Tichy

Gone are the days when purchasing new software was mainly the job of procurement departments and driven by economic considerations. Nowadays, IT projects are incredibly complex and require the seamless interaction of many different stakeholders.

Digitisation projects are a good example of this. On the one hand, the requirements of the various business departments have to be determined and specified as concretely as possible. On the other, IT requirements must also be taken into account, since every digitisation project is ultimately based on software and IT processes that must be seen in the overall context of the company's IT landscape. One of the goals of digitisation projects is to avoid isolated solutions. The mistakes of the past should not be repeated.

If these requirements are sufficiently specified, the technical implementation and technologies used must be clarified. In practice, this is often cloud computing, which in most cases is the technical basis of digitisation projects. Moreover, legal compliance must be ensured for all these aspects. The digitised processes and the software used as well as the underlying technologies must be checked for their permissibility for the specific case. Many legal areas are affected here, from data protection to the safeguarding of secrets, from retention periods to supervisory law in regulated industries and consumer protection in e-commerce.

Mastering this complexity is not an easy task. Whether the project is then set up as a classic waterfall project or as a modern agile project is an additional question that ultimately does not change the underlying complexity.

When implementing such projects you need a lawyer who is not only able to answer the relevant legal questions, but also has a deep understanding of complex IT projects. Our technology and digitalisation practice offers exactly that, efficiently and with a high degree of professionalism.

UNCITRAL Model Law on Electronic Transferable Records:

A brief introduction



Jurij Lampič

Background and purpose of the MLETR

The mission of the United Nations Commission on International Trade Law ("UNCITRAL") is "[...] formulating modern, fair, and harmonized rules on commercial transactions" (UNCITRAL website: <https://uncitral.un.org/en/texts>). Besides international treaties (such as the CISG), UNCITRAL's key tool in advancing this mission are its Model Laws – legislative templates containing model rules which aim to remove legal obstacles to international commerce. Among other areas, UNCITRAL's model legislation has been influential in the fields of cross-border insolvency (UNCITRAL Model Law on Cross-Border Insolvency (1997)) and international commercial arbitration (UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006).

UNCITRAL has also been particularly active in facilitating electronic commerce. UNCITRAL Model Law on Electronic Commerce (1998) and Model Law on Electronic Signatures (2001) have been adopted in many jurisdictions. However, UNCITRAL recognised that legal uncertainties remain in respect of the legal treatment of electronic transferable records (explained below). This led to the development of the Model Law on Electronic Transferable Records (the "MLETR"), which commenced in 2011 and ended in 2017 with its release.

To accompany the MLETR and aid its implementation, UNCITRAL has prepared the Explanatory Note (available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mletr_ebook_e.pdf). This article draws on the Explanatory Note.

What is an "electronic transferable record"?

Transferable instruments – essentially paper documents entitling the holder to claim the performance of the obligation set out therein – feature regularly in international commerce. Typical instruments, ubiquitous in international trade, include bills of exchange, cheques, promissory notes, consignment notes, bills of lading, warehouse receipts, insurance certificates and air waybills.

An electronic transferable record in the sense of the MLETR is thus an electronically recorded transferable instrument satisfying the following conditions (Article 10 MLETR): "(a) the electronic record contains the information that would be required to be contained in a transferable document or instrument; and (b) a reliable method is used: (i) to identify that electronic record as the electronic transferable record; (ii) to render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and (iii) to retain the integrity of that electronic record." The idea is that parties will be more inclined to use digitised transferable instruments if legal question marks on their legal validity are removed, thus promoting domestic and international commerce.

The MLETR specifically carves out securities (such as shares and bonds) and other investment instruments from its scope of application, since these are typically regulated through existing sectoral legislation on dematerialised securities. The MLETR enables the implementing jurisdictions to specify further potential exclusions.

General principles and key features of the MLETR

Consistent with the existing UNCITRAL model legislation on electronic commerce, the MLETR follows three general principles (see table above right).

In keeping with its aim of facilitating global commerce, the MLETR provides for non-discrimination of foreign transferable electronic records. Otherwise, the MLETR makes it clear that it does not affect the application of private international law governing a transferable instrument itself. In a similar vein, the

General principles of the MLETR

non-discrimination	technology neutrality	functional equivalence
"An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form." (Article 7 (1) MLETR).	MLETR is drafted without reference to any specific technological implementation of electronic transferable records ("a system-neutral approach"). This means that its provisions can apply to various models, "whether based on registry, token, distributed ledger or other technology." Despite never using the term itself, the MLETR thus accommodates the issuance of transferable instruments on a blockchain.	The core provisions of the MLETR establish the functional equivalence of <ol style="list-style-type: none"> 1. the information contained in an electronic transferable record with written form, when such is legally required (subject to "the information contained therein [being] accessible so as to be usable for subsequent reference" – Article 8); and 2. a signature of a person, when such is legally required, with a "reliable method [...] used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record" (Article 9). An additional aspect of this principle is the functional equivalence of the transferable instrument with its electronic counterpart (electronic transferable record).

MLETR does not affect (national) substantive laws applicable to transferable instruments, i.e. the rights of a bearer of an instrument remain defined through national legislation.

Another important concept used by the MLETR is that of "control". This refers to a functional equivalence of "possession" – a factual status of a physical object – within the realm of electronic transferrable records. There, control of an electronic transferable record is achieved via appropriate technical means, such as a registry system or a distributed ledger. The MLETR defines the transfer of an electronic transferable record – the equivalent of a paper instrument changing hands – as a transfer of control.

Status

The MLETR, like other UNICTRAL Model Laws, is not a binding legal instru-

ment. Rather, it serves as a template for national legislatures who choose to implement it. So far, the MLETR has been incorporated by Bahrain; an announcement about the adoption of the MLETR has also been made at the ministerial level in Singapore. Among Schoenherr jurisdictions, it has been publicly discussed at the ministry level in the Czech Republic (where a public consultation was also launched) and Slovenia, although neither country has implemented the legislation into their national law as of autumn 2019. As with any model legislation, the effects of the MLETR will be revealed gradually with broader international adoption. As interest in blockchain rises, governments worldwide may well be eager to implement legislation enabling one of the technology's key use cases – trustless transfer of (digitised) common commercial instruments.

What is AI and why should lawyers care?



Alexander Pabst

Artificial intelligence (AI) and machine learning are familiar buzzwords when it comes to future technology and fundamental societal shifts. But what is it really all about and why is it so difficult to apply common legal concepts to these developments?

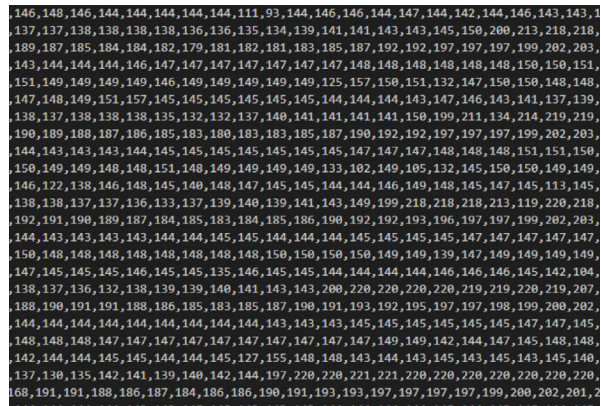
According to most widespread definitions of AI, an algorithm is considered artificially intelligent if

- it takes input from its environment;
- it interprets and learns from such input; and therefore,
- provides output which has a maximum likelihood of being correct.

Thus, an AI-algorithm is required to improve its behaviour by itself based on data it receives from its environment. Machine learning is therefore a crucial part of the process of creating AI, but is not synonymous with it. The steady increase in available computing power has made machine-learning-based AI applications reasonable solutions to an increasing number of problems, including search algorithms, image enhancement and automated translation applications, but also safety-critical applications like self-driving cars, medical diagnosis or malware detection.

Unlike ordinary programs, in which all parameters of the algorithm must be predefined (and just mirror the prior knowledge of a human), in machine-learning-based AI solutions certain parameters are found by the program itself as it learns from a given set of input and known results (training data). A separate (and mostly crucial) learning algorithm slowly tries to adapt the original algorithm's parameters for its output to best (or most likely) match the already known aimed output values of the training data.

For example, defining a set of rules or patterns pursuant to which the AI algorithm could identify a bouquet of flowers (as shown in figure 1) in any given picture, might be rather inefficient, since such patterns would have to be defined for any given matrix of pixel values. The exact properties of the arrangement of pixels that our human visual cortex would identify as a bouquet of flowers could hardly be defined in any possible variety. A proper AI algorithm trained with a sufficiently large set of training data can offer an efficient solution to this problem, modelling its parameters to "pay attention" to the most significant properties of a bouquet of flowers in any picture.



Humans will easily make out a bouquet of flowers in figure 1. However, defining this concept in terms of the pixel values seen in figure 2, as received by any program, is difficult for humans and thus a classical problem for machine-learning-based AI.

Although the resulting individual parameters of a trained algorithm can be retrieved, how exactly such algorithms make decisions often remains a mystery (especially neural networks type algorithms). Thus, the resulting logic of the program mostly remains a "black box" to humans and only provides for the output of the highest probability to be correct (based only on past training data). This is one reason why legal issues relating to decisions made by AI tend to become complex and difficult to resolve, particularly based on "traditional" legal concepts and case law.

A new reality for ridesharing apps in Poland



Daria Rutecka

The battle between traditional taxi drivers as well as their supporters and those advocating a more digitalised approach focused on ridesharing applications such as Uber, Lyft or Bolt began a few years ago and is being waged in almost every country.

In Poland, Uber started back in 2014 as the first mobile taxi application on the Polish market. Taxi drivers began protesting the app almost immediately after it became clear that consumers preferred Uber's efficiency and prices to those of traditional taxis. Criticism from traditional taxi drivers about the safety of Uber and the qualifications of its drivers led to the need for legal changes. A first draft amendment of the Polish Act on Road Transport was submitted to the Council of Ministers in July 2017 (the "Amendment").

Almost two years and eight different draft versions later, the Polish parliament finally adopted the Amendment on 16 May 2019. It entered into force on 1 January 2020 and includes changes to the following legal acts:

- i. Road Traffic Act;
- ii. Act on Road Transport;
- iii. Act on Drivers' Working Time.

The Amendment creates uniform and equal requirements for all entities engaged in business activities related to the carriage of passenger cars and taxis. One of its main goals was to enable fair competition among carriers, provide a higher level of safety for passengers and legalise ridesharing mobile applications.

New definitions

The Amendment is an attempt to digitalise, harmonise and better understand the passenger transport market. The newly adopted provisions change the basic definition of a taxi cab, which now acknowledges the existence of

mobile applications (unlike the old definition) and reads as follows: a taxi cab is a "motor vehicle, properly equipped and marked, intended for carriage of persons in a number not exceeding 9 (together with driver) and their hand luggage, for a fee determined on the basis of a taximeter or mobile application". The Amendment also introduces completely new definitions, such as "intermediation in passenger transport", which also covers the activity of the above mentioned ridesharing providers like Uber, Bolt and others, and explains that such intermediation is an economic activity consisting of transferring orders of passenger transport, collecting a fee for such transport, concluding relevant agreements and enabling the conclusion of agreements on passenger transport by taxi cab or other properly equipped car through "means of electronic communication, Internet domains, mobile applications, computer programs, telecommunication systems and other means of information".

New rules

From 2020, both carriers (drivers) and intermediaries are obliged to obtain a relevant licence to provide passenger transport services. Consequently, any person wanting to become or continue their service as a driver for a ridesharing app like Uber or Bolt is legally required to obtain a licence. The said license, however, should be relatively easy to get since as of 1 January 2020, thanks to the overwhelming growth and ubiquity of sophisticated navigation systems, passing an exam on the city's

topography is generally no longer required. Licences for drivers are still issued by the relevant municipality (e.g. town mayor or president) but no longer cover a specific vehicle (as it did before), just a territory. With respect to the intermediaries, the General Inspectorate of Road Transport remains the entity competent for licence-related issues. It also faces a new obligation, as from 1 January 2020 the inspectorate is obliged to maintain a register (list) of entities operating as intermediaries in passenger transport.

To increase passengers' security, in addition to the previously existing restrictions, the Amendment bans people who have been convicted for certain offences referred to in the act on counteracting drug addiction from getting a licence and becoming a taxi driver. Intermediaries are obliged to verify whether the driver they plan to hire or cooperate with has a valid licence. Failure to do so may result in a fine of up to PLN 10,000 (approx. EUR 2,300) imposed on the intermediary. Acting as an intermediary without a licence, on the other hand, is punishable by a fine of PLN 40,000 (approx. EUR 9,200).

The Amendment provides a new and clearer regulatory framework for intermediaries. While it may create some new barriers, such as licences for ridesharing apps drivers, the Amendment should not slow down the growth of ridesharing apps, since they already enjoy equal or even greater customer confidence than traditional taxis. Time will tell whether the dispute will be mitigated and resolved.



Mădălina Neagu (left) and Tiberiu Anghel (right)

Romania: How to start-up an army of cyber guardians

An interview by Mădălina Neagu

This year, Romania's first tech unicorn reached a USD 7bln valuation. This has stirred things up, expanding the horizons for many Romanian entrepreneurs. While still far from being a major start-up ecosystem, the country is showing its potential, mostly due to high-quality tech talent available at still manageable costs.

With the growing importance of cybersecurity, more and more servicers are appearing to meet increasing market demand. One is CyBourn, a cybersecurity start-up launched in 2018 by a group of Romanian and US entrepreneurs. Its co-founder and Director of Security Operations Tiberiu Anghel talked to us about the local start-up environment and cybersecurity market.

Tell us a bit about CyBourn.

CyBourn is a born-global cybersecurity company with the mission to challenge today's processes in cyberspace and increase protection by providing forward-thinking, transparent services for threat detection, prevention and response. The company operates a 24/7 SOC from Bucharest and has offices in London, Naples and Washington DC.

CyBourn is not your first start-up in Romania. How easy is it for a start-up in our country? From your experience, what are the most common legal pitfalls?

To answer the first question, in Romania the big challenge is finding innova-

tive business models or building products that have a clear differentiator and impact. I am not talking about award winners, but rather about the large mass of entrepreneurship enthusiasts who have the willingness to dedicate their time and energy to grow a company. Secondly, I believe we need to acquire more skills for internationalisation, marketing and sales. The product might not turn the world upside down, but if you market it right, it will still have a great deal of success. In terms of legal pitfalls, keeping your house in order is critical to ensuring a smooth development for your company later. Company set up and contracting are paramount for normal operations. As for accounting, payroll and other support functions, start-ups should invest in working with professionals and avoid trying to build this capacity in-house.

Your partners in CyBourn come from the USA, the highest ranked start-up ecosystem country in the world. What potential do you think they saw in Romania?

Definitely talent was one of the main drivers. Romania has a great pool of

skilled IT specialists and even more so for cybersecurity professionals.

How aware are Romanian companies of cybersecurity threats? Do they focus on prevention or rather on reactive measures?

Large companies have dedicated departments that ensure compliance with group-level policies. That is why their readiness is usually good. Most of their resources focus on prevention, while reactive measures are just beginning to be explored and, in some cases, implemented. But this level of awareness hasn't come from organisational strategy; regulation was the main driver.

On the other hand, in small and medium enterprises ("SMEs") and in most local companies we see a huge gap on the prevention side. It can be both about technology, i.e. lack of technology or lack of tech management, or about user awareness. As phishing and spear-phishing are some of the most common attack vectors today, cybersecurity training is paramount. In terms of technology and services, there is a bundle of open-source software that can be tailored to fit SMEs at lower cost

and then services can be delivered at a reasonable cost relative to the IT budget or overall budget. But executives must first have the willingness and openness to engage in this type of project. Usually the market is reactive, and companies only consider cybersecurity after they've had an incident. Overall there is a lack of maturity in the market on all fronts: IT security, governance and awareness. This is one of the reasons CyBourn has a comprehensive set of services. We believe covering just a small segment would not bring clients on board, as they have multiple needs and SOC services, such as monitoring, alerting and incident response, working on a well-developed organisational framework.

What about your plans to expand abroad?

When we set up CyBourn, our strategy was to acquire clients from Western markets, as the Romanian market yields low results for sustained growth due to the lack of maturity I mentioned. We had the good fortune to attract important clients in Romania as well, and to validate our operations and business model, so now we are moving full steam ahead. We opened an office in London and started operations in the UK. We chose the UK because of its market maturity and high investments in cybersecurity, both in the public and private sector. From London, we will have the capacity to service other European countries, but also Asian markets that are becoming increasingly interesting for us.

What does the future have in store? Where do you see the cybersecurity market in 2025?

It's going to be intense. We are not at the end of the "digital transformation" era yet, so there are still fresh targets to appear in the cyberspace for attackers. As readiness levels increase across the board, attackers will become more sophisticated, so we will witness bot-to-bot fights using machine learning engines. 5G technology will be a game changer and we will see IoT devices being used during attacks for ransomware of other use cases.

Right now the market is very granular, so we expect to see a consolidation phase after 2020 and another wave of innovative products once 5G networks are up and running.

Thank you for the interview.

Start-ups and venture capital: There is no gift shop at the exit!



Thomas Kulnigg

In the life cycle of a start-up¹, the exit is the final act and beginning of the next cycle.

Like any other sell-side M&A transaction, selling the start-up (exiting) is a major event, especially for the founders, who see it as their chance to harvest the fruits of their labour.

Besides a solid business, you also need a solid exit strategy. But when it comes to the actual implementation of the exit, the founders (and other shareholders) need to exercise caution, because there is no gift shop at the exit. Mistakes will not be forgiven. If done wrong, the exit can destroy a lot of value for the sellers and the fruits that have stood in view will disappear.

Here are some important sell-side M&A issues that we regularly come across in our exit practice:

practice:

1. Preparation / Vendor DD: As always, preparation is the key. Here it means collecting and organising the data room information and identifying potential gaps, ideally in the course of a (limited) vendor due diligence. In the preparatory stage, gaps can typically be filled, but gaps identified by a purchaser can become expensive. Typical gaps include lack of documented IP transfers, missing written documents (e.g. material agreements, corporate approvals), expired contracts and non-compliances in agreements.

2. Structuring: When structuring the transaction, consideration should be given to liability issues for sellers and buyers, because such buyers may turn back on sellers eventually.

3. Process: M&A is a process that needs to be defined and tailored for the specific exit situation. The process allows visibility for both potential buyers and sellers and should aim to maximise value. A bad process may also turn away potential buyers, reducing the ability to maximise value.

4. Documentation: M&A documentation tends to be complex and is therefore prone to being misunderstood, misleading or incomplete. Shrewd legal advice is essential to properly document the transaction.

5. W&I Insurance: Where risks and benefits are out of balance, warranty & indemnity insurance may be helpful to bridge gaps and get the deal through.

In short, founders and start-up investors should be aware that selling a business isn't easy and mistakes may be costly. Good legal support is essential.

¹ <https://www.schoenherr.eu/publications/publication-detail/the-life-cycle-of-a-start-up/>



*Auch Ihr,
Frau Königin.*

I locked away all my pens.

PLEASE
ENTER
AND DRAW
THE LINE.





An overview of tax innovations for Austria, Romania and neighbouring countries

Significant tax innovations came into force in 2019 in the Austrian legal market. These led to exciting new projects and matters for us. Austria introduced CFC rules for the first time [see article on page 121], as well as new legislation such as the Austrian digital tax on online advertising services [see article on page 120] and the implementation of DAC6 regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements [see article on page 120] – all of which are discussed in this roadmap.

Due to the expected economic downturn and what we currently see on the Austrian M&A market, we believe that distressed M&A transactions will become more important and develop into one of the practice group's focus areas in the near future. As the tax authorities continue to increase the number of personnel in the area of criminal tax law and transfer pricing, an increase in criminal tax law and tax law proceedings as well as tax audits is also to be expected in the upcoming year.

This aspect can also be observed in neighbouring countries. The Romanian tax authorities in particular have launched a wave of tax audits on major multinational companies active in all sectors in 2019. These audits aimed to fight profit shifting [see "Tax authorities' Iceberg aims to sink multinationals' Titanic" newsletter and "Are you ready for the tax and employment authorities' dawn raids?" at www.schoenherr.eu/publications]. In this context, we continued assisting companies in such audits, as well as advising on a considerable number of tax disputes.

The Romanian tax environment has always been dynamic and somewhat unpredictable. We expect the following years to confirm the status quo and to continue to provide tax thrills to the local business community mainly because of the following factors: (i) the recent change of government and the prospect of parliamentary elections in 2020 will likely yield significant changes in the country's fiscal policy, the magnitude of which we cannot yet anticipate; (ii) the newly announced tax law amendments which are now under debate will bring

about new opportunities for businesses (e.g. profit tax consolidation, potential reduction of the existing VAT rates, changes of the tax appeal process) as well as new challenges (e.g. the implementation of the SAF-T, the potential incrimination of certain administrative offences related to the withholding of income tax and social contributions); (iii) the VAT "quick fixes", which will "go live" on 1 January 2020 throughout the EU and which are designed to improve the functioning of the current EU VAT system, will create new compliance and operational requirements for Romanian companies that are now less than ready to react and adapt; (iv) the announced overhaul of the EU's VAT system, which is due to take place in the following years, will bring about a completely new way of dealing with VAT in the EU and will likely have a major impact on all VAT registered entities, including Romanian ones.

Overall, last year was again very successful for our tax teams. We have expanded and participated in some of the most prominent transactions in Austria and across the CEE region. Over the last few years the firm's transfer pricing practice has grown significantly and is expected to continue to do so.

Looking ahead, we expect 2020 will continue to bring work-flows for the tax team mostly in the practice areas where we have already established our reputation, providing companies with a full set of tools that will help them not only react to challenges from the tax authorities, but also prevent or reduce tax exposure.

Romania's construction sector: New rules aimed at hindering workforce shortages



Anamaria Tocaci, Amalia Surugiu

At the end of 2018, the Romanian government declared the construction sector a priority economic sector for the next 10 years and decided to support its development with higher minimum wages and tax breaks.

That Romanian businesses are facing difficulties finding a specialised construction workforce is not new or surprising. The country's minimum gross wage, among the lowest in the EU, together with high employee tax costs are two elements that have led to the migration of qualified workers in all sectors to better paid positions.

To increase the attractiveness of the Romanian labour market for people working in construction and to fight tax evasion in this industry, the Romanian government decided to increase the minimum wage and to grant tax breaks in the construction sector, starting with 2019.

Following the introduction in 2019 of a differentiated minimum gross wage tied to education and experience, Romania has introduced a third minimum gross wage applicable in the construction industry starting in 2019. This is the first industry to benefit from a minimum wage higher than the national minimum wage in Romania. It also has the most tax reductions and exemptions available for salary-related taxes, leading to significantly higher net wages.

To enumerate, the minimum gross wage applicable in Romania as of 2019 is RON 2,080 per month (approx. EUR 440). A slightly higher minimum gross

wage must be granted to employees with higher education and at least one year of work experience in their field (i.e. RON 2,350 per month, which is approx. EUR 496).

On the other hand, employees working for companies in the construction sector are entitled to a minimum gross wage of RON 3,000 per month (approx. EUR 634), which is 44 % higher than the national gross minimum wage. Noncompliance with the minimum wage requirements is deemed a minor offence under the Romanian Labour Code, triggering fines of up to RON 2,000 (approx. EUR 420).

In addition, noncompliance may annul the tax incentives for the employers that benefit from them. As mentioned above, certain tax incentives have been introduced for wages obtained from employers active in the construction sector. These incentives are applicable over the 10-year period deemed necessary to "refresh" the construction labour market, between 2019 and 2028. Provided their employer's turnover derives primarily (at least 80 %) from construction activities, including manufacturing of building materials and other connected businesses (based on a set list of NACE codes), individuals whose monthly salary is less than RON 30,000

(approx. EUR 6,340) are exempt from the 10 % income tax and 10 % health insurance contribution. A partial reduction from 25 % to 21.25 % in the pension contribution rate due by the employee is also available.

Therefore, while the net wage in Romania normally is 58.5 % of the gross wage, people working for a construction company are privileged to be left with a 78.75 % net salary. Compared to 2018, a construction company employee earning the minimum wage now receives an extra 94 % on their net wage. However, over the 10-year term, the lower pension contributions may impact the accrual of pension entitlements, thus affecting the short-term beneficiaries of the tax incentives.

For employers, who from 2018 are liable only to a 2.25 % work insurance contribution and an extra pension contribution for special working conditions (4 % or 8 % of the gross wage) following the social security reform transferring most of the social charges to the employee, exemptions and reductions of salary-related costs are also granted, provided they qualify as eligible (i.e. active in the construction industry having a minimum of 80% turnover from building activities). Tax reliefs for employers currently have been put on hold until the appropriate state aid scheme is approved. While the measures are welcomed by construction workers due to the positive impact on their net wages, they have been criticised by employers for two reasons in particular: (i) the higher minimum wage applies to all employees working for a company in the construction sector, whether operating or administrative staff, and (ii) the minimum wage must be observed even if the company does not qualify for the tax incentives. Therefore, salary costs have increased significantly for employers in the construction sector, putting businesses under pressure and, possibly, the financial well-being of the construction sector at risk.

Despite being regarded as one of the lowest labour cost countries in the EU, Romania is beginning to distance itself from this paradigm as the ever-increasing demand for qualified labour and a higher quality workforce are driving wages upwards.

Austria: New Digital Services Tax



Clemens Grassinger

In September 2019, the Austrian parliament passed the new Digital Services Tax Act, which will enter into force on 1 January 2020. The main goal is to achieve "fair taxation" by taxing online advertising services provided in Austria. But in fact it is aimed at multinational tech companies.

Why is a Digital Services Tax necessary in Austria?

In March 2018, the European Commission proposed to introduce a directive on a digital services tax on certain digital services. However, since the EU Member States have not been able to reach consensus yet, more and more of them, like the UK, Spain or Italy, intend to introduce legislation on a national level. In Austria, currently only conventional advertising (e.g. in print media, radio or television) is subject to an advertising tax. As of 2020, also certain online advertising services will become subject to the new Digital Services Tax ("DST").

What is subject to DST?

Online advertising services rendered against consideration by companies exceeding certain annual revenue thresholds (see below) will be subject to a flat tax of 5 % of the consideration received by the person providing such services. Examples of such services include advertisements that are displayed in search engine results or banners on a website.

Who is subject to DST?

DST covers both the companies providing and contributing to such services. To become subject to DST, such companies must cumulatively meet the following two revenue thresholds within one financial year: (i) worldwide revenues of at least EUR 750m and (ii) revenues in Austria of at least EUR 25m.

What constitutes an online advertising service rendered in Austria?

Only domestic services will be subject to DST. An online advertising service is deemed to be provided in Austria if (i) it is displayed on a user's device with an Austrian IP address and (ii) the content of the advertisement is (also) addressed to Austrian users.

How is DST levied?

In case DST liability is triggered, the person rendering online advertising services in Austria against consideration is liable to pay DST (tax debtor). If another person contributes to such services, this person is liable for the DST to the extent of the contribution. The tax debtor is obliged to always keep records of all services that are subject to DST and to calculate and pay DST to the competent tax office.

Austria's implementation of the DAC 6-directive: The EU Reporting Act



Roman Perner, Marco Thorbauer

Following the approval on 25 May 2018 of the European DAC 6-directive, which obligates taxpayers and tax intermediaries to report certain aggressive cross-border arrangements to the tax authorities, the Austrian parliament approved the EU Reporting Act (EU-Meldepflichtgesetz) on 20 September 2019, which implements the aforementioned directive into Austrian domestic law. This publication will highlight the most important takeaways and developments of this new act in comparison to the directive, which was already discussed in Roadmap 2018.

Hallmarks

The DAC 6-directive defines a reportable cross-border arrangement as a cross-border arrangement that contains at least one of the hallmarks as set out in the annex to the directive. Most of these hallmarks will only be considered if it can be established that obtaining a tax advantage, which the taxpayer may reasonably expect, is the main purpose or one of the main purposes of the cross-border arrangement. The Austrian implementation deviates from the directive. Firstly, the wording of what constitutes a "reportable cross-border arrangement" differs slightly; the directive considers "a tax advantage as one of the main purposes", the Austrian act addresses the "risk of tax avoidance" as reportable cross-border arrangement. Secondly, the implementing act not only considers tax avoidance, but also arrangements which aim to circumvent certain reporting obligations or the identification of the beneficial owner. We believe that this wording is based upon and refers to the general anti-tax avoidance provision in the Federal Tax Code (Bundesabgabenordnung).

Professional secrecy

The DAC 6-directive gave Member States the option to exempt intermediaries who are bound by legal professional privilege. The Austrian parliament has decided to do so. Therefore, attorneys, tax advisors, notaries and public accountants are all exempt from reporting such aggressive cross-border arrangements, except when (i) their client has released them from this secrecy or when (ii) such intermediary does not operate within the limits of the statutory provisions which define its profession. These intermediaries must notify their client and any other intermediary involved in the cross-border arrangement in the case of an exemption.

Timeframe

From 1 July 2020, intermediaries – or the taxpayers them-

selves – must comply with these reporting obligations for newly set-up arrangements. Additionally, reportable arrangements of which the first step in implementing such arrangements was taken between 25 May 2018 and 30 June 2020 will have to be reported by 30 August 2020.

Fine

Non-observance by the taxpayer or the intermediary of their reporting obligations is classified as a breach of financial regulations and will be fined EUR 25,000 in the case of gross negligence or EUR 50,000 in the case of intentional non-compliance.



The DAC 6-directive gave Member States the option to exempt intermediaries who are bound by legal professional privilege. The Austrian parliament has decided to do so.

Throwback: Implementation of CFC rules in Austria



Marco Thorbauer, Rik Baete

One of the Anti-Tax Avoidance Directive (ATAD) measures involves the reallocation of income of Controlled Foreign Companies (CFC) in low-tax jurisdictions to the parent company. The new Austrian CFC rules came into force on 1 January 2019. On 25 January 2019, the Austrian government published a Regulation on the application of these CFC rules. This article provides a practical overview of the Austrian CFC rules.

CFC in a low-tax jurisdiction

The CFC rules provide for the reallocation of non-distributed passive income of a foreign subsidiary or a foreign permanent establishment to its Austrian parent company if the foreign entity can be classified as a CFC. Companies can be classified as a CFC if the parent company of the foreign entity, either directly or together with associated enterprises, holds a direct or indirect participation of more than 50 % of the voting rights or directly or indirectly owns more than 50 % of the capital or is entitled to receive more than 50 % of the profits of that entity. Under certain conditions, financial undertakings

are exempted from the CFC rules.

Furthermore, for the CFC rules to apply, the following conditions must be met:

- The effective foreign tax rate of the CFC must be 12.5 % or less. The effective tax rate must be computed in accordance with the Corporation Tax Act and the Income Tax Act and contrasted with the actual taxes paid.
- The passive income, such as dividends, interest or royalties, must amount to more than one third of the total income of the subsidiary.

The CFC rules will not apply if the subsidiary carries on a substantive economic activity supported by staff, equipment, assets and premises, which must be proven by the parent company.

Income reallocation

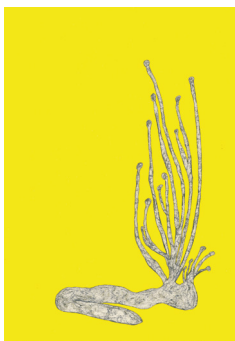
If the aforementioned conditions are met, the non-distributed passive income of the CFC will be added to the taxable base of the parent company. If there are multiple associated enterprises controlling this foreign entity, the non-distributed passive income must be distributed in proportion to the participation in the nominal capital of the subsidiary. However, if the rights to the CFC's profit are not aligned with participation in the nominal capital, the proportionate claim to the profits will be decisive.

Taxation of reallocated income

The reallocated income is subject to Austrian corporate income tax at a rate of 25 %. However, foreign taxes which are paid in the CFC's jurisdiction can be credited against Austrian corporate income tax.

Roadmap20 artist overview

This is an overview of the art displayed throughout roadmap20, together with the relevant artist credits. Note that while some art pieces are displayed in full, others depict only a fragment of the whole.



Johannes Grammel (p.1, 4-5)



Christos Haas (p. 42-43)



August Staudenmayer (p. 43)



Katharina Kleibel (p. 32, 42, 117)



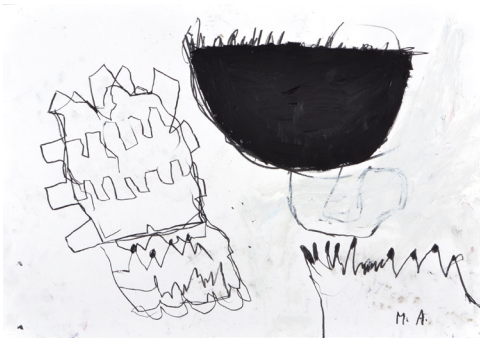
Stefan Wimmreuter (p. 26)



Franziska Fischer (p. 105)



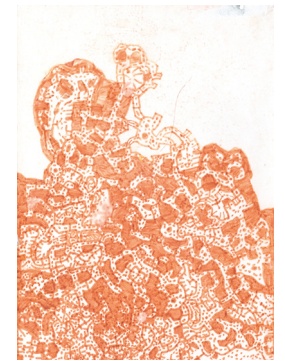
Franz Nigl (p. 96)



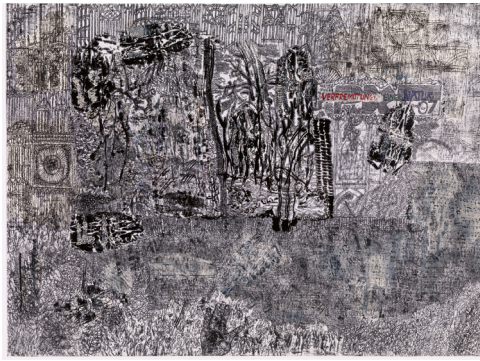
Andreas Maurer (p. 96)



Elisa Schlitke (p. 27, 104)



Thomas Sustr (p. 43)



Peter Kapeller (p. 97)



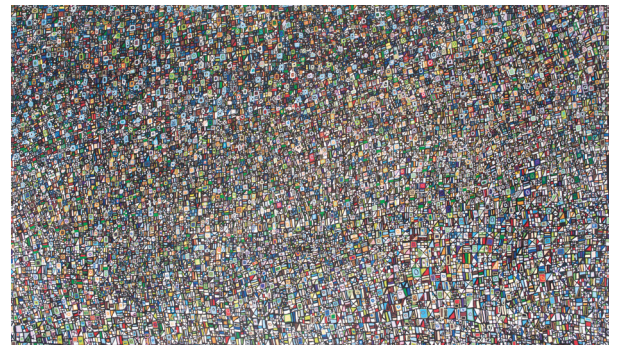
Manfred Muer (72-73)



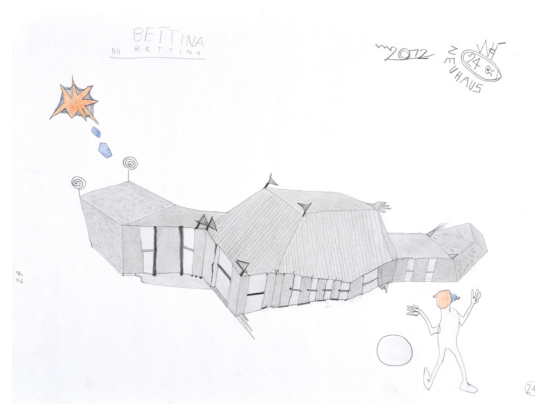
Michaela Polacek (p. 88-89)



Brigitte Nehiba (p. 42, 82-83)



Franza Maier (p. 33, 116)



Herbert Neuhauser (p. 97)



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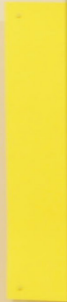
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