Privacy Shield has been repealed

The Court of Justice of the European Union has delivered a significant judgment in a case to examine whether the Privacy Shield Convention (2016/1250), which governs the transatlantic use of EU citizens' personal data, achieves its intended purpose. As a result of that decision, the EU-U.S. Privacy Shield is no longer a valid mechanism to comply with EU data protection requirements when transferring personal data from the European Union to the United States. The Privacy Shield Convention thus failed to live up to its expectations in much the same way as its immediate predecessor, Safe Harbor, which had previously been challenged in court by the same Austrian activist who also brought the current lawsuit.

With the establishment of Safe Harbor and its successor, Privacy Shield, the main problem is that the U.S. legal system extends constitutional rights only to U.S. citizens, so the EU citizens has no protection against data collection. This means that local state security agencies and government institutions have wide access to the data of EU citizens stored in America. In the present case the Court examined Facebook's practice of what could happen on the community site with personal information related to EU citizens that is transferred to the company's California headquarters. The Court recorded that the Convention does not meet the regulation of the GDPR, therefore came to annulled it.
The court also ruled that Commission Decision 2010/87 remains in force, which sets out the general contractual conditions under which service providers are allowed to transfer personal data to third-country data processors. Following the ruling by the European Court of Justice, the United States and the European Union must conclude another agreement, this time unequivocally guaranteeing that the personal data of EU citizens will enjoy the same protection in the United States as that of American citizens. Until then data controllers are to ensure the safety of transferred data to the US by other means, such as standard contractual clauses.

Restrictions for acquisitions of strategic companies incorporated in Hungary

As part of the "economic protection plan" introduced by the Hungarian Government as an answer to the COVID-19 epidemic the Government Decree Nr. 227/2020. (V. 25.) (hereinafter: "**Decree**") established temporary measures for special transactions related to strategic companies incorporated in Hungary. On the 16th June 2020 the Government ended the state of emergency, however, the protection rules of strategic companies remained in force as part of the Act LVIII of 2020 (hereinafter: "**Act**").

According to the Act, *strategic companies* are limited liability companies and public or private companies limited by shares incorporated in Hungary that conduct activities (as main or other activity) listed in Annex 1 of the Governmental Decree 289/2020, such as:

a) chemical sector: production of pharmaceuticals and other chemicals, manufacture of petroleum products;

b) telecommunications;

c) trade and repair of motor vehicles and motorcycles;

d) retail and wholesale trade;

e) critical industrial sector: manufacture of electronic equipment, electric equipment, vehicles, machines, metal products;

f) defense sector: manufacture of arms and military vehicles;

g) construction of dams and water facilities;

h) energy sector: production, transmission, distribution, and trade of electricity; manufacture, distribution, and trade of gas; steam and air conditioning supply;

i) services related to the current emergency;

j) financial sector: financial intermediating, insurance, pension funds, fund management, ancillary financial activities;

k) transport industry;

l) manufacture of food products and agriculture;

m) IT services;

n) construction: construction of buildings and other infrastructure;

o) hotel services; etc.

within the sectors energy, transport, communication and the sectors listed in Article 4 (1) of Regulation (EU) 2019/452 of the European Parliament as strategically important (referred to as "**Strategic Company"** and "**Strategic Activities**" respectively).

According the Regulation (EU) 2019/452 the following sectors are concerned:

a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;

b) critical technologies and dual use items as defined in point 1 of Article 2 of

Council Regulation (EC) No 428/2009 (15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;

c) supply of critical inputs, including energy or raw materials, as well as food security;

d) access to sensitive information, including personal data, or the ability to control such information; or

e) the freedom and pluralism of the media.

The Act defines the *foreign investor* as:

a) any company registered in Hungary, the EU, the EEA or in Switzerland pursuing a Strategic Activity if their controlling owner is a citizen of or is incorporated in a country other than the areas mentioned above (hereinafter: "**Foreign European Investor**"); or

b) any natural person being citizen of or entity incorporated in a country other than specified above (hereinafter: "**Foreign Third Country Investor**").

Furthermore, without being covered by any definition, also entities incorporated in any other (than Hungary) member state of the EU or the EEA, or in Switzerland are subject of the Act ("European Investor").

The acknowledgment of the Minister of Innovation and Technology must be requested if any Foreign European Investor, European Investor would acquire (directly or indirectly) the majority ownership in a Strategic Company through:

i) acquiring shares or quota;

ii) increasing registered capital;

iii) transformation, merger, demerger;

iv) acquiring convertible bonds;

v) acquiring usufruct right over shares or quota.

All the above transactions will be referred together as "**Strategic Acquisitions**".

Until 31 December 2020 an *acknowledgement* of the Strategic Acquisition by the Minister of Innovation and Technology must be requested, if as a result of an Strategic Acquisition:

a) a Foreign European Investor or a European Investor would acquire controlling share in a Strategic Company;

b) a Foreign European Investor or a Foreign Third Country Investor would directly or indirectly acquire at least *10% of the shares or quota* of a Strategic Company, provided that the relating cumulated investment value reaches *HUF 350 million*; or

c) a Foreign European Investor or a Foreign Third Country Investor would own *15%, 20%, or 50% of the shares or quota* of a Strategic Company; or

d) a Foreign European Investor or a Foreign Third Country Investor – together with any other foreign investor in the Strategic Company – would hold at least *25% of the shares or quota* of the Strategic Company.

Furthermore, an acknowledgement of the Minister of Innovation and Technology must be also requested if the ownership or right of use or operation of infrastructures and assets inevitable for pursuing Strategic Activities are transferred, or such infrastructures or assets are provided as security if such rights are acquired by a Foreign European Investor or a Foreign Third Country Investor or any other entity in which such investors have a controlling interest (hereinafter referred as "**Operative Transactions**").

Operative Transactions and Strategic Acquisitions will be referred together as "**Transactions**".

The Foreign European Investor or a Foreign Third Country Investor must submit the application electronically via its legal representative to the Minister within ten days upon the execution of the Transaction (i.e. singing the respective agreement, unilateral statement or corporate resolution).

The Minister may *prohibit* the Transaction if:

i) it potentially infringes or endangers the public interest, public order, public

safety of Hungary or the basic social needs of the citizens of Hungary;

ii) based on its ownership structure or its financing, the applicant is not controlled by an authority of an EU member states;

iii) the applicant has pursued activities related to public order or public safety of a member state of the EU; or

iv) there is a significant risk that the applicant may pursue illegal activities.

The Minister shall issue its decision within 45 days upon the submission of the application and the necessary documentation; this deadline may be prolonged by 15 days. The order prohibiting the Transaction may be challenged in court.

The applicant may request its registration in the book of shares or members list of a Strategic Company only after the Minister has acknowledged the Transaction. This acknowledgment should also be submitted to the court of registration together with the documentation of the respective Transaction and a declaration on the strategic status of the company.

If the Foreign European Investor or a Foreign Third Country Investor breaches its reporting obligation(s), an administrative *fine* amounting to at least HUF 100,000 in case of natural persons and at least 1% of the net turnover of the respective Strategic Company and in both cases up to twice the amount of the Transaction may be issued. Additionally, the legal statement or corporate resolution, which infringes the provisions of this Act is void.

Any and all agreements, unilateral declarations or company resolutions not complying with the provisions of the regulation shall be *void*. The Minister should investigate the unreported Transaction afterwards, and if no obstacles occurred, which would result the prohibition of the Transaction, the Transaction should become (retroactively) valid.

Since the language of the Act is unclear, it is highly disputed whether companies conducting the listed activities outside the listed sectors are concerned by the regulation or not.

The same apply for the acquisition of assets inevitable for pursuing Strategic Activities. It is highly confusing that the definition of Foreign European Investor requires the conduct of Strategic Activities that, furthermore, only relate to share

deals, therefore we take the view that Foreign European Investors may acquire strategic assets without the acknowledgement of the Minister of Innovation and Technology since asset acquisition does not qualify as Strategic Activity.

Since the regulation is very complex, we recommend the review of every planned transaction individually whether it shall be reported to the Minister or not. Please also note that the wording of the Decree is very unclear and highly disputed, see the article published by Portfolio: https://www.portfolio.hu/uzlet/20200531/hatalmas-kerdojelek-a-kulfoldiek-cegvasarlasanak-korlatozasarol-szolo-rendelet-korul-434712

New retail tax in Hungary among governmental COVID-19 measurements

With regard to the COVID19 epidemic the Hungarian Government has progressively implemented certain restrictive measures that may have an

impact on the use of commercial stores. Let us provide you a brief summary below on the implemented measures and the affects thereof on non-residential lease agreements.

The scope of the retail tax does not only concern domestic retailers, but it is also applicable to foreign retailers under certain circumstances, expanding its application by empathising that the foreign persons or entities which do not have a Hungarian registered branch office are also fall under the introduced tax obligation in relation to the goods sold to their customers in Hungary, meaning that the e-commerce activity is also taxable under the new Decree. The Decree lists the activities considered as retail activity based on the Hungarian TEÁOR'08 classification system.

The basis of the retail tax is generally the net sales revenue deriving from the taxable activities with special provisions on the adjustment of the basis thereof.

The retail tax is progressive in nature, the retailers with the tax base of less than HUF 500 million are exempted from the retail tax. The additional rate of the retail tax increases progressively as follows:

- for the part of the tax base exceeding HUF 500 million but not exceeding HUF 30 billion the tax rate is 0.1%;
- for the part of the tax base exceeding HUF 30 billion, but not exceeding HUF 100 billion the tax rate is 0.4%;
- for the part of the tax base exceeding HUF 100 billion the tax rate is 2.5%.

Interestingly, a similar tax obligation was imposed by the Government following the financial crisis of 2008 on telecommunications and retail companies, however the Court of Justice of the European Union ruled that the concerned legislation is compatible with the principle of freedom of establishment and does not constitute discriminatory, therefore it is in compliance with the EU law.

The newly introduced Decree is effective until the termination of the emergency situation declared by the Hungarian Government, although it may remain effective following the emergency situation based on the Government's intention to levy such tax on retailers.

The COVID-19 measures of the Hungarian Government and their effects on non-residential lease agreements

With regard to the COVID19 epidemic the Hungarian Government has progressively implemented certain restrictive measures that may have an impact on the use of commercial stores. Let us provide you a brief summary below on the implemented measures and the affects thereof on non-residential lease agreements.

The measures of the Government

On March 17, 2020, as a first step, the Government implemented strict, stringency measures for hindering the spread of the COVID19 epidemic [**Governmental Decree no. 46/2020. (III. 16.)**].

It is prohibited to stay at premises offering catering services between 3 p.m. and

6 a.m. [non-applicable to (i) employees working therein and (ii) people staying therein for shift-change, take-away, or payment purposes].

Between 3 p.m. and 6 a.m. no person (excluding the employees and the business operators) shall stay in stores that do not sell foodstuff, perfume, drugstore products, household cleaning materials, chemical products or hygienic paper products, or in stores that do not qualify as pharmacies, tobacco shops, petrol stations or stores selling medical equipment.

Due to the decree it is prohibited to visit cultural institutions (theatre, cinema, museums, etc.) and a general prohibition shall be applicable to events as well (excluding religious rites, civil wedding ceremonies, funerals).

On March 18, 2020 the Government introduced special provisions for certain leases most affected by the epidemic [**47/2020. no. Government Decree (III. 18.)]**.

Leases for non-residential premises in the tourism, catering, entertainment, gambling, film, performance, event and sports sectors may not be terminated until June 30, 2020. The rent under these leases may not be increased during the emergency, even if the lease contract allows.

On March 27, 2020 the curfew restrictions became more stringent by the **Government Decree no. 71/2020 (III.27.)**. According to the decree everyone shall restrict social contact with other people – excluding with people from the same household – to the lowest possible level and maintain at least a 1.5 metre distance from others. The decree prohibited staying at businesses offering catering services (which prohibition is not applicable to employees working therein), however take-away and home delivery services are still possible. People may only leave their permanent, temporary or private residence for valid reasons determined in this decree.

The following shall qualify as such valid reasons:

1. working, other professional duties, or conducting other economic, agricultural or forestry activities and purchasing in stores selling assets, equipment (especially technical goods, building materials and equipment) essential for performing such tasks and duties connected to such activities

2. escorting infants when taking care of groups of children
3. seeking healthcare supplies and medical services, including – beyond the treatment activities – healthcare services aimed at the protection of physical and mental health (especially psychotherapies, physiotherapy treatments, corrective-gymnastic therapy)
4. individual leisure sport activities, recreational walking activities as specified in Article 5
5. family gatherings for the purpose of attending weddings and funerals
6. purchasing in grocery stores selling daily consumer products (hereinafter: Grocery Store)
7. purchasing in stores selling other daily consumer products (perfume, drugstore products, household cleaning materials, chemical products or hygienic paper products) (hereinafter: Drugstore)
8. purchasing in stores selling pet food and animal fodder;
9. purchasing in agricultural stores including stores selling fertiliser, and slaughterhouses;
10. purchasing in markets and local produce markets (hereinafter: Market)
11. purchasing in stores selling medicine, medical equipment (hereinafter: Pharmacy)
12. purchasing at petrol stations;
13. purchasing in tobacco shops;
14. using hairdressing and manicure services
15. using transport, cleaning and hygienic services
16. using repair services of cars, bicycles, agricultural and forestry machines and equipment,
17. using services related to waste management;
18. if necessary, managing administrational duties requiring personal appearance, namely using the services of authorities, banks, financial, insurance companies and the post office;
19. taking care of animals, walking pets in public areas, using services of a veterinarian surgery
20. fulfilling parents' rights and obligations
21. religious activities

Legal consequences

The listed restrictions make a significant impact on the real-estate sector

(especially on the retail branch). The operation of commercial units (which has been profitable recently) has collapsed from one day to the next due to the loss of clients. According to our experiences both the lessors and lessees are seeking survival solutions on the market, including legal arguments serving to protect their interests.

We need to take into account the fact that the Hungarian civil code (hereinafter: "**Civil Code**") does not contain a generally applicable provision for epidemic or for another unavoidable circumstance that qualifies as a *force majeure*. However, (force majeure-type) circumstances non-foreseeable at the conclusion of an agreement can be legally significant:

1. In cases of **claims for damages** due to breach of contract: the party breaching the contract shall be relieved of its liability if it proves that the damage occurred in consequence of an unforeseen circumstance beyond its control, and that there had been no reasonable cause to take action for preventing or mitigating the damage;
2. In cases where the performance of services becomes **impossible**: if none of the parties is liable for the impossibility of the performance, then the parties shall settle the account with each other regarding the performed services but beyond such no claim for damages shall be requested. However, we draw your attention to the fact that the judgement of economic unfeasibility is quite controversial in Hungary;
3. In the case of requesting to **have the agreement amended by the court**: the court is entitled to amend the agreement upon the request of any of the contracting parties if in the long-term contractual relationship of the parties (such as a lease agreement concluded for a term of years) performing the contract under the same terms is likely to harm his relevant lawful interests in consequence of a circumstance that has occurred after the conclusion of the contract, and (i) the possibility of that change of circumstances could not have been foreseen at the time of conclusion of the contract; (ii) the change of circumstances has not been caused by the contracting party requesting the amendment; and (iii) such change in circumstances cannot be regarded as normal business risks. The court shall have powers to amend the contract at the earliest time from the date of enforcement of the right to amend the contract before the court (the actual date of filing the statement of claim), in a manner to

ensure that neither of the parties should suffer any harm to their relevant lawful interests in consequence of any change in the circumstances.

Obviously, the parties can stipulate force majeure clauses in their agreement, the judgement of such cases depends on the applicability of these provisions and the content thereof.

According to the trending of the market, in the current situation the lessees of (commercial) lease agreements reject the payment of rent with reference to paragraph (2) of Section 6.336 of the Civil Code. The referred provision is as follows: "*No lease payments shall be made for the period when the thing cannot be used for reasons beyond the lessee's control.*" The argument is that they can (and shall) conduct solely commercial activities in the store, therefore the usage of the store guaranteed by the lessor incorporates the usage for commercial purposes as well.

The application of the provision referred to above to the current situation generates many interpretational questions to which even the absenting judicial practice cannot answer. According to the argument representing the interest of the lessee, it is a provision that imposes liability to the lessor, regarding the usage of the premises intended to be leased by the lessor for commercial premises, in all cases and for the entire term, in cases where the reason of the absenting usage is within the sphere of interest of the lessee. However, the lessor could argue that since the commercial usage (i.e. the profitability of the lessee) is not subject to the agreement, the lessee shall bear the risk of their own activities (such as in the case of leasing agreements), furthermore the government measures do not aim to close stores, rather "solely" prohibits staying in the stores (excluding the employees working therein). The future court awards to be made regarding these disputes will be available only in several years. In our opinion the final decision may depend on the extent of the commercial-specific clauses the parties stipulated in the lease agreement and that on what extent the lessee can prove that the lessor accepted certain characteristics of the leased premises at the conclusion of the agreement (for example: extent of visiting clients).

If the rejection of the payment of the rent proves to be justified in accordance with paragraph (2) of Section 6:336 of the Civil Code, then the extent of the rent reduction is questionable as well, as the provision concerned does not help in calculating the extent of the justified rent reduction. Do we need to calculate the

extent of the rent reduction by collating the original opening hours with the opening hours resulted by the restrictions or shall we take a 24-hour base value? Is the extent of the decrease in turnover relevant? In our opinion, the calculation may be made with regard to the rent and the opening hours of the agreement.

We should not forget the fact that the implemented prohibitional measures shall not be applied to the employees of the stores. As a consequence, the store shall not be closed (as the current situation stands) and the operation cost will presumably be borne by the lessee.

We believe that the current circumstances do not entitle the lessee to terminate the lease agreement.

The lessees have another option to manage the situation by having the agreement amended by the court. In this case special attention must be paid to initiate the civil procedure as early as possible since the rent can be amended with retroactive effect only from the date of filing the statement of claim to the court. Although it must be emphasized that the outcome of these statement of claims cannot be clearly foreseen either.

It is also questionable how long the epidemic restriction (state of emergency) will be applicable. Do we need to prepare for a long-term economic crisis or do the restrictive measures create only temporary difficulties? These circumstances will affect the success of the parties' legal tools. It is certain that the restrictions and the commercial consequences thereof burden the entire industry (lessors and lessees as well), therefore we will need risk-sharing techniques aimed at long-term cooperation rather than legal battles in which the consequences are exclusively imposed solely to one of the parties.

New system of the building authories

From 1st of March 2020 significant changes will occur in the field of construction law concerning the structure of the competent building authorities.

Within the framework of the changes, from the above date the previously first instance building authority, namely the notaries of the municipal government (district centre), the notaries of the municipal government of Budapest districts and concerning the areas directly administered by the City Council of Budapest the chief notary of Budapest will replaced by – currently acting as second instance building authorities – the Budapest and county government offices as the general building authorities. According to the reasoning of the concerned act "*the purpose of the reform is the simplification of the structure of the official authority system, the decrease of the administrative burdens, the elimination of the possible overlap and collision of competences*". From the above date, the Budapest and county government offices will – with the exceptions laid down in the concerned government decree (including among others the special types of buildings) – carry out the building authority duties.

In connection with the structural changes, from 1st of March 2020, the currently

second instance building authority proceeding will change to first instance authority proceeding, in the building and construction supervisory authority proceedings, the possibility to appeal against the decision of the authority will cease to exist, only an administrative litigation procedure can be initiated against the decision of the Budapest and county government offices.

New ‘Plaza-stop’ rules

1. Recitals – Plaza-stop I.

The so-called plaza-stop I. rules were effective as a part of Act LXXVIII of 1997 on the Formation and Protection of the Built Environment (hereinafter: “*Act*”) from January 1, 2012 until January 1, 2015, according to which rules the construction of any commercial buildings above gross area of 300 sqm and the expansion of any commercial buildings above gross area of 300 sqm was prohibited unless an exemption was granted by the minister of national economy based on the opinion of a committee formed for the evaluation of such entitlement. The political background of the plaza-stop I. rules was to hinder the expansion of the multinational food chain companies.

Following the expiry of the plaza-stop I. rules, a new set of regulations were introduced as plaza-stop II. rules also as a part of the Act, with effective from February 1, 2015, which has been in force since then.

2. Current regulation– Plaza-stop II.

Acting authority. Although, the size restriction in plaza-stop I. rules (gross 300 sqm) was loosened up to gross 400 sqm, a brand new, special procedure was introduced by involving a special authority. i.e. the Head of the Hajdú-Bihar County Governmental Office (hereinafter: "*Governmental Office*").

Affected constructions. As a main rule the special authority assessment (in Hungarian 'szakhatósági állásfoglalás') of the Governmental Office – vested with nation-wide jurisdiction – is required to the construction, conversion of a commercial building with a gross area above 400 sqm and to the expansion of an existing commercial building to a gross area above 400 sqm provided that these are subject of a building permit.

Assessment forms. The special authority assessment can be obtained as part of the building per-mit procedure or prior to requesting the building permit procedure a preliminary assessment of the special authority (in Hungarian 'előzetes szakhatósági hozzájárulás') may be obtained. The provisions of both procedures are regulated by the Governmental Decree No. 5/2015 (I.29.) (hereinafter: "Decree"). The Governmental Office shall give its special authority's assessment or the preliminary assessment (hereinafter together: "Assessment") within sixty days. The preliminary assessment can be used within one year in a building permit procedure.

Content of application. The application for Assessment shall contain e.g. the details of the re-questor, the planned area, profile, reason why such building is necessary, planned handover date, environmental and traffic details, catchment area, visual design of the commercial building and the related supporting facilities, as well as the key data, proposed dimensions etc.

Special committee's opinion. During the procedure the Governmental Office shall obtain the Assesment of a special committee (formed from delegates of the minister of building and construction regulations and regulatory procedures, and the minister of trade and commerce, the minister of regional development and

land use planning, the minister of environmental protection and the minister in charge of transportation (hereinafter: "*Committee*"). [We note that the name of the members of the Committee is not published.] For the decision of the Committee simple majority of the members is necessary. The Committee shall submit its final opinion to the Governmental Office fifteen days prior to the deadline set to the Governmental Office to issue its Assessment. The Committee issues its opinion based on the set of criteria recorded in annex no.3 of the Decree. The Committee shall reason its opinion.

Deciding factors. When deciding on the Assessment, the Governmental Office shall elaborate its position on the impacts the commercial building may have on the municipality and its immediate vicinity in terms of environment, transportation, urban planning and urban development issues, to determine whether the commercial building is considered to induce detrimental consequences which are likely to disproportionately exceed its advantages. The Governmental Office shall con-sider the Committee's opinion however its decision can differ from the Committee's opinion.
Appeal. The Assessment of the Governmental Office can be appealed, in such case the Heves County Governmental Office shall proceed in the second instance.

3. Alteration permission

In addition to the plaza-stop II. rules, with effective from August 10, 2018 a new provision of the Act introduced the alteration permission procedure. The detailed rules thereof were specified in the Governmental Decree No. 143/2018. (VIII.13.).
Affected activities. According to the new rule the following building activities are subject to the alteration permission procedure:

- change of the function of any building with a gross area above 400 sqm to commercial function;
- alteration of any building with commercial function as a result of which alteration the gross area of the building will exceed 400 sqm;
- any alteration (regardless whether it is subject to building permit or not) of a building with commercial function with a gross area above 400 sqm.

Alteration means any construction activity carried out on an existing building, building part, individual functional unit or premises in order to change the layout or external appearance – which construction does not increase the internal

volume.

Acting authority. The request for alteration permission procedure shall be submitted to the competent notary (acting as the first instance authority) based on the location of the commercial building that is intended to be altered. The second instance authority is the Governmental Office of Budapest Capital or the given county (depending on the location of the commercial building).
Procedure. Within 5 days from the receipt of the request for the permit, the notary shall send the request to the Governmental Office for the issuance of the Assessment and the same rules and procedure apply as in case of a Plaza-stop procedure (see above in Clause 2).

In case the commercial building is subject to further alteration, which was not covered by the previously issued alteration permit, then a new alteration permit shall be requested by the applicant.
Consequence of non-compliance. Should the alteration of a commercial building be carried out without obtaining the alteration permit, then the first instance authority prohibits the commercial utilization of the building and imposes a fine on the person who should have submitted its application for the permit. The maximum amount of the fine equals to the amount of the procedural fine (this shall be calculated based on the rules on the building fine).

Labor safety

The compliance deadline (**January 8, 2017**) defined in the amendment (Act 79 of 2016 on the harmonization of the employment legislation) of the Act 93 of 1993 on Labor Safety (Mvt.) which brought significant changes regarding the workers' representatives, will expire soon.

Since Juli 8, 2016 a workers' representative for occupational safety shall be elected at all employers **with at least twenty workers** [Mvt. par. 70/A. subpar. (1) point a)]. In companies, where an employer employs less than twenty employees the election of a workers' representative for occupational safety is initiated by the local branch of the trade union or the shop steward, or failing this, by the majority of employees [Mvt. par. 70/A. subpar. (1) point b)]. In both cases, the conditions for the election and conducting the election is the employer's responsibility.

Should you have any questions, do not hesitate to contact our colleague Dr. Miklós Molnár.

What can we do for effectiveness of EU law?

In all areas of business, numerous provisions of EU law confer direct and indirect rights and obligations on businesses and enterprises of the Member States. The law of the European Union has become an integral and equal part of the national legal systems of the Member States. The authorities in each Member State – among them in Hungary – are primarily responsible for implementing EU law into national law and enforcing it correctly.

If an individual or business entity considers any measure or practice attributable to a Member State incompatible a provision or a principle of EU law or a national authority may not ensure the full effectiveness of Union law, they can lodge a written complaint to the European Commission.

The complaints and correspondence submitted will always be examined by the services and departments of the European Commission. Any complaint should be as complete and accurate as possible, particularly as regards the facts complained of in relation to the Member State in question and as far as possible the provisions of EU law which you consider to have been infringed by the Member State.

The Commission will not disclose the identity of the complainants unless they have given it their express permission to do so.

If the Commission that the complaint is well-founded and there may be an infringement of Union law which may require the opening of an infringement procedure, it addresses a letter of formal notice to the Member State concerned. In the light of the reply or the absence of a reply from the Member State, the Commission may decide to issue a reasoned opinion to the Member State and calling on the Member State to take the necessary measures to comply with Union law within a specified period.

If the Member State fails to comply with the reasoned opinion, the Commission may decide to bring the case before the Court of Justice of the European Union. At the close of the procedure, the Court of Justice will deliver a judgment stating whether there has been an infringement of Union law. After announcement of the

judgement the Member State concerned has to take all necessary measures to comply with Union law as decided by the Court of Justice. If the Member State does still not comply, the Commission may again bring the matter before the Court of Justice seeking to have periodic penalty payments or a lump sum payment imposed on the Member State.

However, please note that the national authorities and courts in each Member State are primarily responsible for implementing European Union law into national law and ensuring that it is enforced correctly. Therefore, it is essential that the complainants seek redress from national administrative or judicial authorities.

A well-prepared, complete and accurate complaint is essential for being regarded as well-founded for initiation an infringement procedure against a Member State.

Do you have any further questions? We can help. Please contact us.

Changing corporate laws

As of March 1, 2012 regulations of corporate law have been changed again by the legislator. We would like to briefly summarize the most remarkable corporate law

changes for the companies' decision makers:

- the attorney's seat service supply for companies will not be possible anymore (further seat service cannot be provided, although the already provided services can be maintained);
- the simplified company registration will be probably de facto terminated because of the (i) increased procedural costs (ii) the elongated time of the administration procedure, (iii) and because of the strict, compulsory and objective penalty risk attached to the attorney we take the view that there is no further rational argument for the simplified company registration proceeding;
- mandatorily HUF 50.000 to 900.000 penalty has to be imposed if the 30 days deadline is overrun in the incorporation or in the process of registration the changes of the company (the possibility of submitting a request for excuse because of the omitted deadline is not excluded by the legislator yet);
- in case foreign companies are the members of the company concerned with the changes then their company extract needs to be submitted to the court along with the official translation (we trust that according to the regulations the company courts uniformly will not insist on the OFFI translations);
- in the first registration process when foreign persons are concerned in the procedure (both in incorporation and registering the changes regarding the company) the delivery agent (a mandated person with Hungarian address who takes the consignments over on behalf of the company) needs to be appointed until February 1, 2013 the latest (the member, manager or the member of the supervisory board cannot be appointed as delivery agent).
- at business share transfer if the company's public debt exceeding HUF 15 million then an interim balance sheet needs to be prepared for the day of the transfer;
- in case the company transformation is resolved after March 1, 2012 if the equity of the companies is decreased, then all the companies' creditors can claim for security for the overdue and undue demands (as a result the transformation might be drawn out);
- if the de-merger is resolved after March 1, 2012 the claims needs to be primarily enforced against the legal successor named in the de-merging

agreement, however the other successors have universal responsibility for such claims at the time when the claim becomes overdue (quasi several surety ship instead of the in line successor responsibility);

- in respect of the interim dividend the amount indicated in the balance sheet or in the interim balance sheet can be accepted to 6 months;
- in case the shared capital is reduced at the same time of capital withdrawals (rearrangement of particular capital shares) then all the creditors of the company – and not only those with undue claims – may claim for security for their claims against the company;
- in case of Zrt. (private company limited by shares) every shareholder needs to be listed in the shareholders register.

Compulsory energy performance certificate

From 1 January 2012, an energy performance certificate has to be obtained by the developer, the owner or the landlord when buildings are sold or let.
The certificate will remain valid for 10 years (although in certain cases new certificates will be required.) and it must be prepared by a duly authorised

engineer or professional company.

The requirement of the energy performance certificate has been introduced in order to implement a relevant EU directive. According to the Government Regulation of 176/2008. (VI. 30.), this requirement applies to certain buildings when – if it is a newly-built building – it starts to be used; if it is an existing building, it is bought or sold or is let for a term of more than one year; if it is a state-owned building with more than 1,000 m2 of usable floor space.

A certificate is not required when ownership is transferred before the occupancy permit ("használatba vételi engedély") is granted, or when a co-owner acquires an ownership share.

The buildings affected by this requirement are buildings with 50 m2 or more of usable floor space.

Currently, there is a confusion around the implementation and especially the enforcement of this new requirement. According to the media communication of the Ministry of the Interior, a violation against the energy certificate requirement constitutes a general infringement of Section 31 (1) a) of the Government Regulation 218/1999. (XII. 28.) and a penalty with a maximum amount of HUF 50.000,— can be imposed against the violator. On the other hand, the relevant EU-directive lays down that the penalties provided for must be effective, proportionate and dissuasive. The Hungarian government has the possibility of introducing more effective and dissuasive penalties until 9 January 2013 at the latest, therefore we expect that the maximum amount of the above fine will be increased in order to have a deterrent effect.

New rules for payment order procedure

Pursuant to Act No. 50 of 2009 on the payment order procedure (fizetési meghagyásos eljárás), from the 1st of June 2010, it is a notarial power to enforce due pecuniary claims in payment order procedures. The goal with the new regulation was primarily to relieve the ordinary courts, since more than 400 thousand of these non-litigious procedures were conducted in front of the courts in every year.

According to the new regulation, if the amount of the claim does not exceed over one million forints the due pecuniary claims are to be enforced only through payment orders, provided that the obligor has a known place of domestic residence, a seat or a local representative, and the claim does not arise from employment or other similar relations.

The Chamber of Civil Law Notaries (MOKK) provides a computer system for the notaries to complete their new tasks. They pursue automatic data procession and certain conducts can be done automatically.

As natural persons we can lodge our request for issuing a warrant of payment orally or using the paper-based submission form, whereas the legal persons or

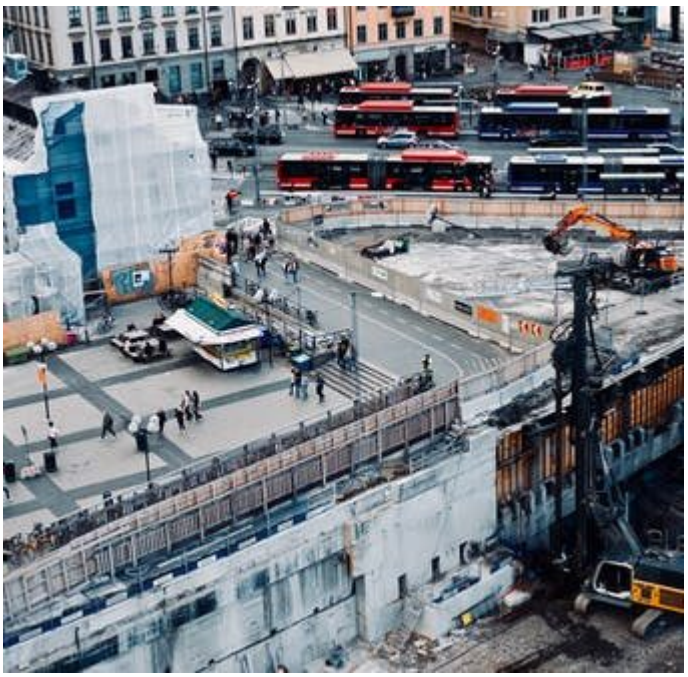
natural persons acting through their legal counsel may do so only electronically. The electronically submitted applications are distributed automatically and equally between the notaries, the ones submitted orally or in a paper based form will belong to competence of the notary they were presented in front of. All notaries have the power to act nationwide.

As an important novelty, the deadlines have been reduced, as the aim was also to have quick and efficient proceedings. The documents received are recorded in the MOKK's system in 3 working days at most. If there is no rejection or transmission of the request, and no need for completion or the requested documents are already completed, the notary will issue the warrant of payment in 15 days (or 3 days in case of electronically submitted request) calculated from the day the request was presented – without the opponent having been heard.

The defendant has 15 days (as of the delivery) to present his/ her opposition, and hence, the opposition presented in time will transform the non-litigious payment order procedure into a lawsuit before the court. On the other hand a payment order without being contradicted has the same effect as a final, legally binding judgment.

The client requesting the above non-litigious procedure has to pay a court fee for MOKK calculated a rate equal to the amount indicated in the pecuniary claim and with a rate of 3 or 1% depending on whether it is a main proceeding or a procedure for permitting postponement or payment in installations. A stamp fee does not have to be paid except when the case is brought to the court.

Anita Bartal
Do you have more questions? Please contact us.



Significant changes in construction law

The main reason of the changes on the construction activity and construction contracts is to provide higher administrative control over construction projects which are financed by state sources. The new provision shall also apply for private projects.

The provisions of the new government decree are compulsory, this means that the parties may not deviate from it. The main goal of the decree is to control the payment of sub-contractors, the calculation of the contactor's fee, the scope of the employer's, designer's, construction supervisor's, contractor's duties and set forth the mandatory elements (in details) of a construction and design agreement. As of October 1, 2009 agreements on construction works pursued as business activity have to be made in writing, while those falling under the scope of the Public Procurement Act have to be countersigned by an attorney or in-house council.

If the parties agreed that the contractor's fee is a lump sum the contractor may not claim the consideration of the additional works (*többletmunka*). In this case the contractor may be remunerated only in respect of the extra works (*pótmunka*) if any. The decree set forth the definition of additional works (works contained in the construction documents but not considered in the contractor's fee) and extra

works (works not contained in the construction documents). The additional works may be invoiced only (i) in case the contractor's fee is calculated based on the bill of quantities (i. e. itemised settlement of account) and (ii) the contractor certifies with the priced bill of quantities that the given additional work was not included in the budget.

In order to put an end to the debt chain in the construction industry, the payment in larger project will be controlled and made via an external third party (i.e. bank). It will involve the investor/employer, the contractor and the subcontractors to sign a special contract through an external party, such as a bank or other financial institution. The payment manager will handle on the one hand the funds provided by the employer and on the other hand the performance securities provided by the contractor. The engagement of a 'safe hand' is compulsory if (i) the investment falls under the scope of the Hungarian Procurement act and its value exceeds HUF 90 million or (ii) the value of the investment exceeds the European value threshold for public construction works (currently EUR 5.150.000,-). In the later case the value of the investment will be established based on the calculation method published in the regulation on construction fine (and not the amount specified in the general contractor's agreement).

The provisions on the payment management agreement – inter alia – set forth that the (i) the completion protocol issued by the construction supervisor (*műszaki ellenőr*) and (ii) the payment to the general contractor(s) or subcontractor(s) of the amount specified in the invoice issued based on the completion protocol.

The employer must certify that the funds (in form of cash, credit, loan, etc.) covering the entire project are available at the entry into effect of the general contractor's agreement. Until the date of commencement of the given work phase at the latest, the employer must (i) provide the consideration of the given phase, work part etc. is available on the payment manager's account or (ii) must ensure that the funds covering the value of the given phase work part is under the exclusive control of the payment manager, in both cases The payment towards the contractor or subcontractors is conditioned to the approval of the completion protocol by the construction supervisor. Therefore, the employer does not have any control over the payments. The amount of the (partial) contractor's fee may be covered by means of the following sources: (i) treasury bonds/bills issued by one a member state of the EU, (ii) securities, (iii) national or EU funds, (iv) loans or credits or (v) cash deposited on the escrow account of the payment manager.

The payment manager is entitled to retain from the amount payable to the general contractor the consideration due to the subcontractor if the general contractor failed to fulfil its payment obligation towards the subcontractors. Practically, the payment towards the general contractor is conditioned by the subcontractor's confirmation of receipt. The fee of the payment management and all costs related to the payment management is payable by the employer.

If the involvement of a payment manager is compulsory, the subcontractors will be registered in an electronic registry forming a part of the construction diary (log book). The general contractor will enter the data on each subcontractor in the electronic registry. The payment manager will be entitled to retain the amounts due to the subcontractors from the payments towards the general contractor. If employer does not provide the payment manager with the required funds within the pre-agreed deadline, the contractor is entitled to suspend the works for 30 days. If the employer fails to certify that it has ensured the required funds during the time of the suspension the contractor may rescind the general contractor's agreement.

The new regulation provides inter alia for or changes the compulsory content of the construction documents, construction diary, the design, contractor's, subcontractor's and payment management agreement. In addition, if the involvement of a payment manager is compulsory than the employer has to commission a construction supervisor as well. The changes also affect the hand over procedure.

Daniel Kellner
Do you have more questions? Please contact us.

Amendments to the Condominium Act

As one of the most interesting changes of the Hungarian Condominium Act from a real estate developer's aspect, the condominium representative (közös képviselő) may not act in the name and on behalf of the condominium during the various proceedings of the building authority. As a consequence, in the future the building authority shall notify each condominium member having a client status in the building/occupancy permit proceeding separately and thus the period opened for the appeal or waiver of the right to appeal will commence at different dates in case of each owner.

Due to the amendments the operation of the condominiums is placed under the judicial oversight proceedings of the Hungarian Prosecution Service. It is though questionable whether the Prosecution Service possesses the necessary manpower and financial background to deal with its new duty or – in lack of resources – such judicial oversight proceedings will remain an un-exercised right (same as the judicial oversight proceedings of the courts of the courts of registration).

In order to strengthen the transparency of the financial operation, condominiums with a yearly turnover exceeding HUF 10 million or having more than 50 apartments are obliged to appoint a certified public accountant to check the

yearly financial report.

The amendments introduce the presumption of receipt: the condominium member being in arrears with the payment of common costs may not delay or avoid the payment by refusing to take over the payment notice. According to the new provisions on the eight business day reckoned from the second unsuccessful attempt to deliver the payment notice it will be deemed as delivered to the debtor even if the letter returns from the (postal) address of the member with the mark ‘did not look for it’. As a consequence the order of payment procedure may be commenced even if lack of delivery of the payment notice or the condominium representative may initiate the registration of the mortgage on the debtors’ individual condominium unit, provided that the registration is allowed by the bylaws of the condominium.

The Act on Condominiums as amended clarifies the rules on the alienation of the parts of a condominium jointly owned by the condominium members and altogether aims to align the provisions of the Act on Condominiums as to ensure the compatibility with the Act on the Land Registry.

Balázs Vágvölgyi
Do you have more questions? Please contact us.

New taxation on the cafeteria system

The benefits in kind (cafeteria) system has been subject to significant changes as of 2010. Even if most of the changes have an unfavourable impact on the employees (and vice versa: the changes will probably lead to an increase of the state budget), professionals consider that the employers still should implement some sort of cafeteria system instead to pay the amounts allocated for such purpose as part of the base salary.

It is beneficial though that the former yearly limit of the benefits in kind (HUF 400.0000,-) has been abolished and instead each benefit will have its individual limit provided that in all cases the amount exceding the given limits subjects the tax of 98,79%. Also, the circle of the fund allowances (amounts paid by the employer to mutual or pension fund account of the employee) wasn't limited.

The most unfavourable novelty is the change of the former tax (and social security) exempt status of several benefits to a taxable benefit in kind category. As most probably the employers will not takeover such taxes the employees may select the elements of the package from three categories having different tax rates.

The allowance to employees using the Internet at home, life assurance respectively the housing allowance keep their tax (and social security) exempt status and there is no upper limit thereof (first category).

The elements in the second category may be given up to a certain limit and subject to a 'preferential' tax of 25%. The employer may dispense the lunch (hot meal) voucher up to HUF 18.000,-/month, the school allowance up to the 30% of the amount of the yearly statutory minimal salary, local travel pass as per the tariffs of the local public transportation company, the holiday voucher up to the yearly amount of the statutory minimal salary, the voluntary pension fund allowance up to 50% statutory minimal salary/month respectively the voluntary health fund up to 30% statutory minimal salary/month. The reimbursement of the tuition fees of any training is limited to amount of the statutory minimal salary multiplied with 2,5 and is taxable with 25% only (i) if it has been ordered by the

employer and the training offers professional knowledge related to the business activity of the employer (ii) the curricula of the training is related to the given position. Please note that if the value of the certain benefit exceeds the threshold above the difference is subject to a tax of 97,89%.

The elements of the third category (cold meal voucher, culture voucher and gift voucher) do not have an upper limit (but the cafeteria package regulation will provide for such limits) and may be disbursed subject to a normal tax of 54% nevertheless, adding all payroll burdens (levied either on the employer or the employee) it increases to 98,79%.

Benefit	**Limit**	**Tax**
Internet	unlimited	0%
Housing allowance	HUF 5 million	0%
Life insurance	unlimited	0%
Cold meal (lunch) voucher	HUF 18.000,-/month	25%
Holiday voucher	73.500,- /month	25%
Transporation pass	Unlimited	25%
School allowance	22.050,-/year	25%
Voluntary health fund premium	22.050,-/year	25%
Voluntary pension fund premium	36.750,- /month	25%
Training	183.750,-	25%
Cold meal voucher, gift voucher, culture voucher	Unlimited	**98**,79%

Linda Horváth
Do you have more questions? Please contact us.

Amended rules of land transfer tax

With the effect of 1st January, 2010 the Hungarian legislation has adopted amendments to the Act XCIII of 1990 on Duties. The latest amendments intend to eliminate the loopholes of the provisions concerning the new land transfer tax payable upon the sale of the real estate-companies.

The original provisions (Act LXXVII of 2009) prescribe that a purchase of a company that owns directly a real estate in Hungary ("share deal") is subject to the same land transfer tax as a regular asset deal (the general rate is 4%, and, over 1 Billion asset value, 2%). According to the initial version of the new regulation the share acquisition of the affiliated companies in the company that owns directly a real estate in Hungary shall be accumulated. A duty obligation is arisen in case the acquirer's accumulated shareholding is increased on at least 75 % in the company that owns directly a real estate in Hungary.

This regulation may be easily circumvented as according to the original regulation the purchase of a holding company having an ownership ratio of 100% in the project company owning real estate was not subject to the land transfer tax. The explanation was clear stating that the acquired holding company did not own directly a real estate in Hungary.

The new provisions define the "company owning a real estate in Hungary"

("SPV") and – compared to the original provisions – extend the affected share deals significantly as not only the direct real estate owner companies are concerned. A SPV means henceforward (i) a company owning directly a real estate in Hungary, (ii) a company having at least 75% ownership ratio in the company defined in clause (i), or (iii) a company that indirectly owns an ownership ratio of at last 75% the company defined in clause (ii). The indirect ownership ratio is calculated according to the ownership ratio(s) of the affiliated companies between the purchased company and a company owning a real estate directly in Hungary.

The new regulations intend to eliminate the loopholes mentioned above but may not correspond with the logic of the original provisions and there is still some inconstancy. In light of the new provisions the collateral share acquisition of the affiliated companies shall only be accumulated if a SPV-purchase might be identified.

We think that with some creativity of the counsellors and appropriate transaction structure there is a possibility to avoid the payment of the land transfer tax according to the law.

We take the view that system of land transfer tax payment obligation still offers some possibility for investors to optimise their intended transactions.

For more information please contact us.

László Szécsényi