

# The Brief

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## Hungary - Monthly Legal Update

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## EMPLOYMENT LAW

### New legislative package developed by the Ministry of National Economy modifying the absence fee calculation method

In the February edition of our Newsletter, we already informed our readers about the practical problems raised by the calculation method of absence fees (in Hungarian: *távolléti díj*) introduced by the New Labour Code as from 1 January 2013.

The concept of absence fees serves as a basis for calculating remuneration for periods during which employees are exempt from performing work (e.g. holidays, sick leave). The main concerns regarding the new absence fee calculation method were that employees remunerated on a monthly basis may receive a salary which is different from the gross amount set out in their employment contracts depending on the date of taking their holidays. The more working days there are in the month in which employees take their holidays, the higher their remuneration will be. In other words, employees taking holidays in February (with only 20 working days) may earn significantly less, and accordingly those going on holiday in January (with 23 working days) may receive higher remuneration than that agreed with the employer and stated in their employment contract.

The Ministry of National Economy promised to initiate legislative measures to clarify the calculation method. A new legislative package on the modification of several Acts in relation to the calculation of absence fees has recently been developed by the Ministry. The proposal has not yet been discussed by the government; therefore it may still be subject to further changes.

The new proposal returns to the calculation method applied until the end of 2012. Under the proposal, the absence fee calculated for one day would be equal to the monthly basic salary divided by the number of working days in the given month. The absence fee calculated for one hour would be equal to the basic salary calculated for one day divided by the number of working hours on the given day.

The legislative package would only enter into force on the first calendar day of the second month from its promulgation. If the act is promulgated in April, it can enter into force on 1 June 2013. As there will only be 20 working days in June (similarly to February), the introduction of these modifications would already have an impact on the remuneration of employees taking their holidays in June.

## REAL ESTATE LAW

### Completion (Performance) Certification Expert Body

In order to prevent circular debts in the construction industry, a new organisation called 'Completion (Performance) Certificate Expert Body' ("**Expert Body**") will be established as of 1 July 2013 pursuant to Act XXXIV of 2013. The purpose of the Expert Body, to be operated by the Hungarian Chamber of Commerce and Industry, is to act as an independent expert forum in the case of disputes between the participants of a Hungarian construction investment arising from the performance of a design or construction agreement.

The Expert Body, at the request of the party concerned, may provide an expert opinion if the performance certificate has not been issued by the client, its issuance is disputed, or if no payment was made on the basis of the issued performance certificate. Additionally, the Expert Body's competence may also cover the enforcement of a collateral commitment (bank guarantee, pledge or suretyship) securing the contract, if the parties are unable to agree on them.

The Expert Body's opinion must cover whether the contract was duly performed, and must establish the justified amount of compensation, and if necessary, the legitimate amount that may be enforced from the collateral securing the contract. The procedural deadline in which the Expert Body is required to decide is 30 days, and it can be extended once with an additional 30-day deadline in cases where it is justified. The Expert Body must prepare its opinion on the basis of the parties' agreement, and it may also conduct site visits at the venue of the construction.

It is important to note that contractual provisions that exclude or limit the procedure of the Expert Body or attach a negative consequence to the launch of such procedure are invalid.

From 1 September 2013, lawsuits initiated on the basis of the Expert Body's opinion will be considered as "*cases of significant importance*". The new rules will therefore enable the court to order, by way of interim measures, the



payment of an amount not exceeding HUF 400 million, determined by the Expert Body with full certainty as the consideration for completed design, building and construction works.

## **PUBLIC LAW**

### **National Tobacco Stores - Unsuccessful tender in 1,500 towns**

The National Tobacco Trade Plc (in Hungarian: *Magyar Nemzeti Dohánykereskedelmi Zrt.*) has recently announced that its call for tender regarding the concession rights to operate National Tobacco Stores was unsuccessful in approximately 1,500 towns and villages. In the towns concerned, the tenders were either invalid or not filed at all. So far, no new tender announcements have been published.

If the next tender also fails, no National Tobacco Stores will be set up in the towns concerned, making it impossible to buy tobacco in them. The authorities are looking for solutions, such as offering the possibility of itinerant trading or, as another option, the National Free Alliance of Retail Merchants suggested modifying the applicable act in order to allow existing shops to offer tobacco products.

Time is short to find a solution, as the new tobacco distribution system, which restricts the sale of tobacco products to National Tobacco Stores, will start to operate on 1 July 2013.

### **Reorganisation of the Hungarian Energy Office**

As from 8 April 2013, the Hungarian Energy Office will operate under the name of Hungarian Energy and Public Utilities Regulatory Office (the "**Office**"). The Office's competence has been widened to prepare price regulation in the field of electricity, natural gas, remote heating, waterworks and waste management.

The Office has also been empowered with a right to issue mandatory regulations. Such regulations may not be subject to judicial review. More generally, the Office only has to report to the Parliament, and only acts adopted by the Parliament may modify the scope of the Office's tasks. Moreover, the Office may not be instructed to perform proceedings upon order.

The Office's President will be nominated by the Prime Minister for a period of seven years. The nomination is not subject to a call for applications.

The reorganisation of the Office may be understood as a reply to two court judgments adopted upon the initiative of several electricity and natural gas distribution companies. The undertakings concerned sought annulment of the Office's decisions prohibiting gas and electricity distribution companies from billing their customers the amount of the exceptional taxes due by the undertakings to the Hungarian State. The Office's challenged decisions aimed at implementing the government's intent to reduce people's household expenses by 10%.

The competent courts annulled both decisions of the Office.

## **EU COMPETITION LAW (CASE-LAW OF THE EU COURT OF JUSTICE)**

### **Advocate General Mengozzi approves the state aid granted for investment in the purchase of agricultural land in Hungary (Advocate General's opinion delivered in Case C-121/10)**

State aid for the purchase of agricultural land was established in Hungary prior to its accession to the European Union. The possibility of continuing to grant financial aid to enhance the competitiveness of Hungarian farmers following the country's accession to the EU was approved by the European Commission ("**Commission**") until 31 December 2009.

Nevertheless, in November 2009, the Hungarian authorities requested that aid for the purchase of agricultural land in Hungary be authorised on an exceptional basis with regard to the economic crisis. The Council of the EU granted its consent to the allocation of a maximum HUF 4,000 million in the form of interest subsidies for mortgage loans to eligible private farmers and direct grants for the purchase of agricultural land, all to be distributed between 1 January 2010 and 31 December 2013.

The decision of the Council was challenged by the Commission alleging lack of competence on the part of the Council to adopt the contested decision, misuse of powers, breach of the principle of sincere cooperation between



institutions and a manifest error of assessment. The latter particularly refers to (non)existent exceptional circumstances justifying the authorized aid measures. In this context, debates tried to ascertain whether certain structural problems of the agricultural sector in Hungary, in conjunction with the consequences of the economic crisis, could constitute exceptional circumstances allowing intervention of the state.

In the opinion of Advocate General Mengozzi, the Commission's pleas must be rejected, as the Council was acting within the scope of its competence when it adopted the subject decision. Relying on case-law, the Advocate General further points out that the circumstances surrounding the authorized aid measures are of an exceptional nature and are therefore sufficient to justify the allocation of state aids.

Therefore, Advocate General Mengozzi proposes the Commission's action be dismissed and that the Council's decision be upheld. The judgment of the Court of Justice is expected in the forthcoming months. Lithuania, Latvia and Poland are also involved in similar cases.

Note: Advocates General are members of the Court of Justice and assist the Court's judges. They are responsible for presenting, with complete impartiality and independence, an 'opinion' in the cases assigned to them.

## **DATA PROTECTION**

### **Proposed General Data Protection Regulation**

It seems that data protection reform will be an important area of legislation in the European Union ("EU") throughout 2013, as negotiations on the new European Data Protection Regulation continue to move forward. The new Regulation aims to introduce harmonised and directly applicable data protection law in all EU member states, and to account for changes in technology since the last directive was introduced in 1995. Adoption of the Regulation is planned for 2014 and may become fully effective in 2016, after a 2-year transition period.

It is widely believed that the current Data Protection Directive 95/46/EC no longer provides adequate solutions to personal data protection in the current technological environment, characterized by mobile computing (e.g. smart phones, tablets, wearable mobile devices), cloud computing, and the "Internet of Things" (e.g. data sharing, wirelessly connected devices without human intervention). In addition, many unresolved privacy issues were raised by social network data management (profiling, facial recognition, length of storing personal data), and new data security threats appeared (cybercrime, phishing etc.).

The proposed new data protection regime extends the scope of the EU data protection law to all foreign companies that process the personal data of EU residents. It provides for a harmonization of the data protection regulations throughout the EU, thereby making it easier for non-EU companies to comply with these regulations. However, this comes at the cost of a strict data protection compliance regime with severe penalties of up to 2% of those companies' annual worldwide turnover. This may require non-EU companies not only to comply with EU law, but also to establish a data protection management system, for instance by appointing a European data protection officer who is aware of applicable legal requirements.

The current rights of data subjects will continue to exist, but will be further strengthened and extended, including greater control over their personal information. As a general rule, any processing of personal data will require providing clear and simple information to concerned individuals, as well as obtaining their specific and explicit consent for the processing of their data (opt-in/ privacy by default). In addition, the rights to remedies will be stronger and data subjects will have stronger rights to object, and more emphasis will be put on ensuring transparency in general.

As "cloud computing" became increasingly wide-spread, pragmatic solutions must be provided for data transfer and data security. It seems that the regulations will shift the responsibility towards cloud providers and will impose certain obligations on them, rather than the current rules, under which the responsibility of the data controller.

New privacy rights, including data subject's "right of portability" and the "right to be forgotten", will be established in the EU. The "right of portability" will allow a transfer of all data from one provider to another upon request, for example transfer of a social media profile or email; whereas the "right to be forgotten" will allow people to wipe the history clean. According to certain market actors, claiming for the "right to be forgotten" is a step too far; however, it is an obligation to delete data when a sufficient reason to process them no longer exists. The right to data portability is also a part of the currently existing right to require a copy of any personal data.



Furthermore, the Regulation will provide standard rules for security breach notification, replacing the different practices of separate member states. Accordingly, all companies will be obliged to notify EU data protection authorities of such breaches without undue delay (that is within 24 hours), as well as individuals whose data is concerned by any breaches of data protection regulations or data leaks. The new provision may raise significant compliance and IT costs at the data controller ensuring high data protection standards.

Under the new Regulation, national data protection authorities will be empowered with the right to impose severe penalties (i.e. financial sanctions up to EUR 1 million, or 2% of annual worldwide turnover for companies) to better enforce EU rules at national level. Individuals will have the right to refer all cases to their national data protection authority, even when their personal data is processed outside their home country.

## **TAX LAW**

### **Car registration tax and import duties**

As car registration taxes are relatively high in Hungary, it became a habit among Hungarian individuals to have their cars registered in other EU member countries (such as Germany, Slovakia and Romania) in order to reduce their costs. In an attempt to try to stop this type of tax evasion, the Hungarian Parliament adopted strict restrictions on the use of foreign-registered cars by Hungarian residents as of September 2011.

The originally adopted strict criteria were alleviated in several steps during the course of 2012, and the regulations now allow the use of foreign cars, if the driver received the car for regular work from its non-Hungarian operator, or the driver's usual residence is located outside Hungary, or the driver uses the car in Hungary for a temporary period not exceeding 30 days within six months.

As some people realised that not only Hungarian registration tax, but import custom duty payment may also be avoided, in some cases cars used in Hungary were registered outside the EU, and consequently had "exotic" offshore or African license plates. In one of these cases (C-182/12) a judgment of the European Court established that employees of companies registered in non-EU countries may legally use such cars, and even private use may be allowed, the authorization for such private use must, however, be established in the driver's employment contract. The above-referred decision also established that, in the case of commercial use, an employment relationship is not required, i.e. an authorisation of the owner is sufficient.

### **Act on payment deadlines adopted**

As indicated in the last edition of our Newsletter, the Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions ("**Directive**") imposed an obligation on Member States to amend their national legislation in line with the Directive. The Parliament has therefore recently adopted an act on payment deadlines.

The act amends the Hungarian Civil Code, and introduces a general provision in business transactions stating that unless expressly otherwise agreed by the parties, invoices must be settled within 30 days from receipt. According to the act, parties may agree to a payment deadline of up to 60 days by mutual consent. If the payment deadline exceeds 60 days from the date of receipt of the invoice, such deadline can be challenged and the payer of the invoice must prove that such payment conditions are justified and not unbalanced. The new provisions apply to contracts concluded after the entry into force of the new law, i.e. after 1 July 2013.

### **Internet cash registers**

As indicated in our previous edition, on 15 February 2013 the Hungarian government issued its resolution on the introduction of Internet-enabled cash registers from 1 May 2013.

The list of cash registers that can be used in the transitional period expiring on 30 June and 31 December 2013, depending on whether they are able to record a digital log, is available on the website of the National Tax and Customs Administration.

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