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Anti-corruption act in Slovakia

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Mandatory disclosure of contracts with public authorities and state-owned companies

As from 1 January 2011 the new Act No. 546/2010 Coll. (the **Act**) has become effective in Slovakia, being a measure introduced by the new Slovak Government to increase transparency and curb corruption in the public sector.

Such a step is to be warmly welcomed in light of the significant deterioration of standards in this area in recent years, though there are in our view some complications (which can be fixed) which we highlight in this alert.

The Act introduces fundamental changes to written contracts concluded with public authorities and state-owned companies after 1 January 2011. Such agreements do not become legally effective before being published on the internet. Moreover, due to vague formulations in the Act, it is possible that even privatised companies that are no longer controlled by the state could be caught by the regulation.

MANDATORY DISCLOSURE

The Act specifies two conditions, under which a written agreement must be published online.

- (1) one of the parties is a so-called “**obliged person**”, which includes all state, regional and municipal authorities, entities established by law (e.g. the National Bank of Slovakia) and entities founded by public authorities, such as state-owned companies (e.g. airports, railways, energy distributors); and
- (2) the agreement must relate to public finances, public property or EU funds.

CONSEQUENCES OF NON-DISCLOSURE

Any agreement which has to be disclosed, does not become legally effective before being published. If it is not published within three months, it is considered invalid.

In practice this would mean for example:

- any payments made or services rendered under such agreement must be returned;
- the purchaser does not acquire title to goods and real property and can not on-sell the assets;
- any pledge granted is invalid; and
- the counterparty cannot rely on any contractual representations, covenants, indemnities etc.

UNCLEAR SCOPE

The Act includes all entities “founded by a public authority”. Under a literal reading, this would also include companies originally founded by the state, but now privatised (such as some major Slovak banks and energy companies).

Affected companies may still escape mandatory disclosure if the agreements do not relate to public finances, public property or EU funds. However, even this condition is formulated vaguely and it cannot be excluded that even some formerly state-owned private companies will be caught by the mandatory disclosure requirement of some agreements.

The interpretation that courts are going to adopt is difficult to predict and given the severe legal consequences of non-compliance, the new regulation may, without detailed knowledge of the provisions

and careful management, adversely affect legal certainty in many relationships.

DISCLOSURE BY A COUNTERPARTY

If the agreement is not published by the obliged person, the counterparty may apply for publication of the agreement in the Commercial Gazette.

EXCEPTIONS

The Act exempts certain contracts from the disclosure obligation. This includes for example contracts concluded by the intelligence agencies or contracts relating to securities. However, the carve-outs are drafted narrowly and it always needs to be carefully considered whether a specific contract is exempted.

Moreover, the Act also allows the specific exemption of certain contractual provisions, such as personal information or bank secrecy. Also in this case, the application of the exemption needs to be considered on a case by case basis.

BANK SECRECY

Relying on the bank secrecy exemption where the client of the bank is an obliged person should be considered with extreme caution. The exemption may be construed narrowly, applying only to entities who are both obliged persons and obliged to protect bank secrecy. However, where the obliged person is not also a person subject to bank secrecy, the obliged person would still be obliged to publish the contract. If the obliged person client failed to publish the contract, then the bank would be in the dilemma of needing to publish the contract in order for it to be valid, but being obliged not to by its bank secrecy obligations. Therefore banks will need to ensure that appropriate terms are included in its standard terms and conditions and agreements to ensure that it can publish the contracts without violating bank secrecy, where its obliged person client has failed to publish the contract.

DERIVATIVE TRANSACTIONS

A derivative framework agreement (such as the ISDA Master Agreement) with an obliged person falls within the scope of the new regulation and should be published. On the other hand, a typical confirmation of a derivative transaction is not a "written agreement", but rather a confirmation of an oral agreement entered into during conversation between traders. However, the difference may be too subtle in the eyes of Slovak courts. There is also a requirement that all contracts entered into by municipalities and most of the contracts entered into under the public procurement rules must be in writing.

Therefore, we recommend requiring publication of confirmations in those cases.

TRADE SECRETS

Under the Act, information obtained for public means or relating to public finances, public property or EU funds cannot be considered a trade secret and will have to be disclosed, thus overriding any contractual confidentiality clauses.

LONG-TERM AGREEMENTS

In addition to the mandatory disclosure requirements, the Act also invalidates certain provisions in long-term agreements with public authorities. Automatic prolongations and the impossibility to terminate an agreement for an indefinite period of time are generally prohibited.

CHOICE OF LAW

The new regulation is specifically designed to apply even where the parties opt for a foreign governing law. It remains to be seen whether for example an English court would uphold the mandatory disclosure requirement in a contract governed by English law between an English bank and a Slovak public authority. However, it appears likely that at least within the EU, the mandatory disclosure requirements would be upheld.

HOW TO PROCEED

In particular the following should be considered before entering into a contract with an entity potentially falling under the definition of an obliged person:

- analyzing whether a specific contract falls under the disclosure requirement before every prospective transaction;
- considering whether the mandatory disclosure of trade secrets would prejudice the commercial interests of the counterparty;
- due diligence on whether the requirements have been complied with in past transactions after 1 January 2011 (otherwise, there is no valid agreement);
- considering appropriate conditions precedents and waivers allowing publication, if the obliged person fails to do so;
- applying for publication of the agreement, if the obliged person fails to do so;
- for the sake of legal certainty, always requesting confirmations that the agreement has been published.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

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