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THE DISTRICT COURT OF MUNICH I DENIES RECOGNITION OF HAASANG AND THE MORATORIUM REFERRING TO LIABILITIES OF HETA ASSET RESOLUTION

On 8 May 2015, the District Court of Munich I issued a judgement against HETA ASSET RESOLUTION AG ("**HETA**"; formerly HYPO ALPE-ADRIA-BANK INTERNATIONAL AG) which triggered widespread media attention. The Court denied recognition of (i) the Austrian statute on restructuring measures for HYPO ALPE-ADRIA-BANK INTERNATIONAL AG ("**HaaSanG**") cancelling certain subordinated debt and (ii) the deferment of maturity pursuant to the moratorium dated March 1st 2015 ("**Moratorium**") of the Austrian Financial Market Authority (Finanzmarktaufsichtsbehörde - "**FMA**") issued on the basis of the Austrian Act on the Recovery and Resolution of Banks ("**BaSAG**"), regarding the liabilities of HETA towards Bayerische Landesbank Anstalt des öffentlichen Rechts ("**BayernLB**") under German law.

The basis of the lawsuit before the District Court of Munich I was a claim by BayernLB for the repayment of loans which BayernLB had granted to HETA before its nationalisation in 2009. The court in Munich ordered HETA to pay EUR 1 billion and CHF 1.3 billion to BayernLB.

Part of the court decision related to the central question whether the claims filed by BayernLB against HETA were subject to repayment or not as the loans, according to HETA, had been granted during the financial crisis of HETA of which BayernLB should have been aware.

The judgement is also of great interest for creditors holding claims subject to German law, which are affected by the measures imposed by the HaaSanG or the Moratorium regarding HETA's liabilities. According to its press release, the District Court of Munich I rejected recognition the effect of both (i) HaaSanG and (ii) the Moratorium based on the BaSAG on the liabilities of HETA towards BayernLB.

The reasoning of the court was that the measures implemented by way of the HaaSanG were, on the one hand, not in compliance with EU directive 2001/24/EG on the reorganisation and winding-up of credit institutions (**Winding-Up Directive**), because they did not aim at the restructuring of a bank but rather at its liquidation. On the other hand, the Moratorium introduced by the Austrian authorities on the basis of directive 2014/59/EG for the recovery and resolution of credit institutions (*Bank Recovery and Resolution Directive* - "**BRRD**") also ran counter to EU law because the aforementioned directive is only applicable to banks and HETA was no longer a bank at the time when

the measures were enacted. Both arguments are in line with the legal position announced in previous *Client Alerts* and in our pleadings in several (court) proceedings (already pending or currently in preparation).

Subject to the court decision becoming final, the judgement is likely to significantly strengthen the legal position of creditors concerned by HETA-liabilities under German Law and with the exclusive or non-exclusive place of jurisdiction in Germany. Regarding exercising a possible deficiency surety granted by the Region of Carinthia and the Kaerntner Landesholding ("**KLH**"), the latest ruling does not seem to have any imminent legal consequence since typically the surety needs to be pursued before the Austrian courts.

For those creditors who have already filed a lawsuit against HETA and the Region of Carinthia in Germany or Austria, the recent decision of the District Court of Munich I represents the first court decision which expressly supports their position, since it appears to suggest that the above-mentioned measures are not compliant with EU law. Such non-compliance will, in principle, also have to be respected by the Austrian courts in pending cases. In this respect, it will be interesting to await the transcript of the judgement and to see whether the appeal court will share the opinion of the first instance court in Munich. Although in the current case before the District Court of Munich I, the question of conformity with European law has not been submitted to the European Court of Justice (ECJ), the German court of appeal may still bring it before the ECJ by way of a request for a preliminary ruling.

For creditors who are affected by the HaaSanG and who have agreed on (or - at least - also) German jurisdiction but have not yet taken any legal action, the current decision may open up new prospects for considering legal measures depending on the individual situation of the respective creditor. Since there is already a number of pending legal and regulatory proceedings, creditors considering taking legal actions may be advised to hurry, as a potential future cancellation of the relevant provisions of the HaaSanG by the Austrian Constitutional Court (*Verfassungsgerichtshof – VfGH*) will only affect the individual cases filed with the Constitutional Court in due course before the latter will issue its decision.

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