



Legal update

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Pavel Jendrulek, Věra Tovey

Mergers and Acquisitions:

Daniel Weinhold, Václav Smetana, Václav Štraser

Insolvency and Restructuring:

Zbyšek Kordač, Václav Smetana

IT, Media & Telecommunication:

Martin Lukáš, Václav Smetana

Real estate:

Pav Younis, Václav Štraser,

Personal Data Protection:

Martin Lukáš, Anna Bartůňková, Tereza Hošková

Labour law:

Anna Bartůňková, Eva Procházková

Slovak law:

Tomáš Čermák, Karin Konečná

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Milan Polák, Zbyšek Kordač, Anna Bartůňková, Michaela Koblasová

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Tomáš Čermák, Jana Duchoňová

Public procurement & Public sector:

Martin Lukáš, Monika Skálová, Tereza Hošková

News in Legislation

Legal regulation of profit share and other corporate resources according to a significant amendment to the BCA

Act No. 33/2020 Coll, which amends Act. No. 90/2012 Coll., on Commercial Companies and Cooperatives ("BCA"), introduces, inter alia, amendments concerning the legal regulation of profit share and other corporate resources.

The amendment effective from 1 January 2021 explicitly regulates a rule which, in the meantime, was reached via case law of the Supreme Court of the Czech Republic, according to which it will be possible to distribute profit and a company's other resources by the end of the accounting period following the accounting period for which the financial statements were prepared. The above rule defined in Section 34 (1) BCA will, contrary to existing case law, also apply to extraordinary financial statements, thanks to which it can be assumed that its usability for the distribution of profit or other own resources will be expanded.

In Section 34 (2) BCA, the rule determining the maximum possible amount to be distributed will be amended and may not exceed the sum of the economic results of the last completed accounting period, economic results of previous years and other funds that the capital company or cooperative may use at its discretion, reduced by allocations to reserve and other funds in accordance with the law and the articles of association. The amendment will transfer the rules currently in force concerning the maximum amount to be distributed, determined both for a limited liability company and for a joint-stock company separately (Section 161 (4) BCA or Section 350 (2) BCA) to Title I of the BCA, which form the rules for all business corporations.

An equally important amendment is the interference in the responsibility of the statutory body for its decision on the payment of profit share and other corporate resources, newly regulated in Section 34 (3) BCA. The amendment brings a rebuttable legal presumption that members of the statutory body who agreed to the payment in violation of the law did not act with due care. Compared to the original regulation, the impact is thus extended to conflict with other applicable laws (the explanatory memorandum mentions, for example, the Banking Act). It is indisputable that in connection with this amendment there will be an increase in responsibility of the statutory body, which will be obliged to check more rigorously whether there is a conflict with other law, even if the conditions for payment of profit and own resources under BCA will be met.

New Case Law

Replacement of simple minutes from the General Meeting with a notarial deed

(Judgment of the Supreme Court of March 10, 2020, file No. 27 Cdo 4108/2019)

In this judgment of 10 March 2020, the Supreme Court of the Czech Republic addressed the issue of replacing simple minutes of the General Meeting with a notarial deed. The plaintiffs, as shareholders of company N., attended two General Meetings in 2014 and 2015, about the course of which notarial deeds were made. The defendant was elected as a record-keeper at both General Meetings.

The district court order the defendant to prepare and send to the plaintiffs the minutes of the General Meetings of company N., as it concluded that, as a record-keeper, he had failed to fulfil the obligations imposed on him by Section 188 (3) BCA (obligation to prepare minutes of the General Meeting and send it to the shareholders).



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The court further explained that notarial deeds made by a notary about the course of the General Meetings do not relieve the defendant of these obligations, as these deeds do not contain all the requirements required by Section 188 (2) BCA (signatures of the record-keeper and chairman of the General Meeting). The court found the defendant's objection of lack of his passive substantive legitimacy unfounded.

The appellate court amended the action by dismissing it, upholding the conclusion of the first instance court that the defendant had passive legitimacy in the dispute, but found the action unfounded. The Court of Appeal stated that if a notarial deed of the course of both General Meetings was made pursuant to Section 77 of the Notarial Code and if this record was sent to both plaintiffs, it is "against the meaning of the law to require the defendant to make notes and make another minutes copying the de facto deed made by a notary". The absence of the signature of the chairman of the General Meeting and the record-keeper on the notarial deed does not change anything.

Both plaintiffs appealed against the judgement of the appellate court. The Supreme Court rejected the review of the appeal and ruled that if the company voluntarily (without the law or the memorandum of association regulation) secures a certificate of the General Meeting course by notarial deed pursuant to § 77 of the Notarial Code and delivers this notarial deed to shareholders in accordance with Section 188 (3) BCA (or in accordance with a deviating regulation in the memorandum of association), it provides the shareholders with more than required by law or by the memorandum of association. It is no longer necessary to prepare simple minutes of the General Meeting pursuant to Section 188 (3) and Section 189 (1) of the BCA.

The Supreme Court also commented on the issue of passive substantive legitimacy of the record-keeper (defendant) and found the conclusion of the appellate court incorrect, as the obligation to prepare the minutes of the General Meeting and send it properly and in time to the shareholders is the obligation of the company. If the law stipulates that the record-keeper should do so, it only regulates the question of which person does so (on behalf of the company). In other words, the record-keeper prepares the minutes and sends it to the shareholders as a (legal) representative of the company.

Similarly, for example, the law explicitly regulates who is entitled to convene a General Meeting of the company, however, the invitation to the General Meeting is a legal act of the company, which is represented by an authorized person (as its representative). The fact that this is a legal act of the company is, moreover, explicitly confirmed by Section 193 (2) BCA, which imposes the obligation to convene a General Meeting in accordance with the law and the company's memorandum of association on the company.

Should the company fail to fulfil the obligation to prepare the minutes and send it to the shareholders within the time limit imposed by law in accordance with Section 188 (3) BCA (or in accordance with the agreement contained in the memorandum of association), the shareholders may demand its fulfilment by an action against the company. This would be a procedure pursuant to Section 9 (2) (e) of the Civil Procedure Code, in which the regional courts decide in the first instance.

Registration of an invocation of ineffectiveness of registration of the transfer of a share in the Commercial Register

(Resolution of the Supreme Court of March 17, 2020, file No. 27 Cdo 2025/2019)

In its resolution of 17 March 2020, the Supreme Court of the Czech Republic assessed whether it is possible for a creditor of a shareholder in a limited liability company to demand the entry of a note on an invocation of ineffectiveness of registration of the transfer of a share in

the Commercial Register.

The Municipal Court in Prague ruled in a resolution on the registration of a note on an invocation of an ineffective transfer of a 20 % share in company S. from shareholder J.K. to the acquirer A.Z. in accordance with Section 599 of Act No. 89/2012 Col., Civil Code ("CC"), to the Commercial Register. The court based its decision on the fact that the petitioner is the creditor of the claim against J.K.'s husband. The petitioner demanded that the Registry Court, pursuant to Section 599 CC, note in the Commercial Register that the petitioner had invoked the ineffectiveness of the transfer of a share in the company between J.K. and A.Z.

The Registry Court granted the motion in full, but subsequently the appellate High Court amended the decision of the Registry Court and rejected the motion. In its decision, the Court of Appeal emphasized the need to distinguish between a public list and a public register. While the public register is a register of persons (natural and legal), which the law declares to be a public register, the public list is a register of things. The Commercial Register is a public register, not a public list. The provision of Section 599 (1) CC regulating the entry of a note on an invocation of ineffectiveness of a legal act in the public list therefore does not affect the present case.

The petitioner filed a review of the appeal against the resolution of the High Court, which the Supreme Court of the Czech Republic rejected, because the challenged legal assessment of the Court of Appeal was correct. Furthermore, the Supreme Court of the Czech Republic ruled, similarly to the Court of Appeal, that the Commercial Register is not a public list in which the shares of shareholders in limited liability companies would be registered, but a public register in which persons specified in Section 42 of the Public Registers Act are registered. Within the registration of a limited liability company, the shares are not "registered", but only the data on the amount of the share is given here, or also about its type and about the issue of the common certificate.

The creditor of a shareholder of a limited liability company cannot therefore demand, in accordance with the procedure pursuant to Section 599 CC, the entry in the Commercial Register of a note that he has invoked the ineffectiveness of legal act concerning a certain share in a limited liability company.

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Please send your comments to: Simon.Zlotir@weinholdlegal.com or fax +420 225 385 444 to Šimon Zlotiř, or contact the person you are usually in touch with. To unsubscribe from publications: office@weinholdlegal.com.