Legal update

October 2021

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The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics listed in this bulletin should be consulted before any decisions are made.

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News in legislation

Amendment to the Act on Banks

On 30 September 2021, Act No. 353/2021 Coll. was promulgated in the Collection of Laws, amending, inter alia, Act No. 21/1992 Coll., on Banks (the „**Amendment**“). The Amendment implements European regulations into the Czech legal system. Most of the provisions entered into force on 1 October 2021.

The Amendment introduces an obligation for banks to record data on credit transactions carried out with members of elected bodies, i.e., with members of the statutory body, supervisory or management board, or with a person related to a member of such a body. The law defines a related person as a spouse, registered partner, child, parent of a member or a legal entity in which the member (or his/her related person) has qualified participation or may exercise significant influence, or holds an executive management position or is a member of its elected body. The bank is obliged to keep records in such a form that it can provide such information to the Czech National Bank on request (the “**CNB**”). The Act does not specify any other requirements.

The CNB has been given powers in relation to auditors. It will now be able to order a bank to change the auditor if the auditor fails to comply with the obligation to inform the CNB of certain negative findings pursuant to Act No. 93/2009 Coll., on Auditors. According to the Act, the auditor is obliged to inform the CNB if, among other things, he or she finds facts that indicate that there has been a breach of legal regulations governing the conditions of the bank´s activities or that have a significant negative impact on the bank´s management, etc.

The principle of equal treatment and non-discrimination between the sexes is further reflected in the Amendment, whereby the remuneration system is subject to the requirement of equal pay for men and women if they perform the same work and work of equal value.

At the same time, in order to reduce the administrative burden, the obligation to submit an extract of all shareholders and trustees from the register of the issuer of book-entry shares to the CNB prior to the General Meeting was abolished.

The Amendment then introduces a new institute of an intermediate controlling person. Large groups with total assets of at least EUR 40 billion are obliged to establish an intermediate controlling person if their parent company has its registered office in a non-EU Member State and they also control at least two subsidiary institutions in one or more EU Member States. The intermediate controlling person can only be a credit institution, a financial holding company, or a mixed financial holding company and must be established in a Member State. The purpose of this regulation is to facilitate supervision by the CNB.

News in case law

On the impossibility of additional “approval “of the acquisition of own shares

(Resolution of the Supreme Court of the Czech Republic case No. 27 Cdo 2731/2019, dated 30 June 2021)

The plaintiff sought a declaration of the apparent invalidity or nullity of a resolution of the general meeting on the acquisition of shares, in particular on the ground that the resolution was adopted outside the competence of the general meeting since the consent to the acquisition of own shares was granted after the fact. He also argued that the resolution was unintelligible since it was not possible to ascertain the details of the resolution which the general meeting has intended to approve.

The Court of First Instance dismissed the application on the ground that it was “*in principle possible* “for the company to publish a public offer of the purchase of share first and have the details of the share acquisition approved afterward; in general, subsequent consent may be given in cases where the previous one is not expressly

required. With regard to the alleged lack of clarity, the Court of First Instance then stated that a public offer for the purchase of participating securities is a special type of public offer and is therefore governed by the principle of autonomy of the will. According to the Court of First Instance, the contested resolution sets out the essential elements and details of the acquisition of shares by the company and therefore does not suffer from the defect of incomprehensibility.

On the appellant´s appeal, the High Court in Olomouc upheld the order of the Court of First Instance, agreeing with its conclusions and stating that

„The general meeting can validly approve the terms of the acquisition of shares according to the previously published public proposal. "

In addition, the Court of Appeal added that, in order to protect the rights of third parties, it would not have declared the resolution invalid even if the contested resolution had been found to be invalid.

The appellant appealed against the decision of the Court of Appeal. According to the Supreme Court, the decision of the general meeting resolving to acquire its own shares must be viewed as a decision authorizing the statutory body to acquire its own shares. This corresponds to the meaning and purpose of the regulation, which is to protect share capital and thus to protect the company's creditors.

The possibility of additional approval of an already implemented acquisition of own shares would allow a situation where the statutory body implements the acquisition without the approval of the general meeting and subsequently effectively present the shareholder with a *fait accompli* with the fact that if the general meeting did not approve the acquisition, there would be adverse consequences for the company (a one-year deadline for the disposal of illegally acquired shares, or the obligation to cancel the shares).

According to the Supreme Court, in order to comply with the meaning of the prohibition on additional approval of previously implemented acquisitions of own shares, such a resolution is a resolution on a matter which the general meeting has no power to decide – it is therefore viewed as if it had not been adopted.

However, the acquisition of own shares cannot be identified only with the moment at which the ownership of the shares is to be transferred. It must be assumed that the acquisition of own shares already takes place at the point in time at which the legally binding phase of the process begins. According to the Supreme Court:

„In general, it must be assumed that the acquisition of own shares within the meaning of section 301 of the Corporations Act already takes place at the point in time at which the legally binding phase of the process which is to lead to the acquisition of own shares is initiated. That time point is therefore also the moment at which the public proposal to purchase own shares is made. "

Otherwise, shareholders would face the same choice between healing the process by granting additional approval or exposing the company to the sanctions described above.

For these reasons, the Supreme Court overturned the Court of Appeal´s decision and remanded the case back for further proceedings.

On the effectiveness of the restriction on the transferability of registered shares contained in the articles of association

(Judgment of the Supreme Court of the Czech Republic case No. 27 Cdo 2927/2019, dated 9 December 2021)

The plaintiff, as a shareholder of the defendant, sought a copy of the list of shareholders from the company in an action filed with the Regional Court in Hradec Králové.

The Court of First Instance dismissed the action, and the High Court in Olomouc upheld the lower court´s decision on the plaintiff´s appeal. The courts of both instances proceeded based on the fact that, according to the original wording of the defendant´s articles of association, all transfers of securities were subject to the approval of the board of directors. According to the provisions in the articles of association, as amended by the decision of the general meeting of 20 June 2014, shares are transferable only with the approval of the statutory director. These restrictions on the transferability of shares were never entered in the defendant´s commercial register.

On 16 August 2016, a shareholder of the defendant undertook to transfer shares to the plaintiff. On 15 December 2016, she then asked the defendant to consent to that transfer of shares. On 2 February 2017, the defendant informed her that the company was *„ready to buy the shares if interested* ". On 7 March 2018, the plaintiff informed the defendant by letter that he had acquired the defendant´s shares based on the agreement.

In light of these circumstances, the Court of Appeal held that

„The principle of substantive publicity does not apply in the present case and the facts are decisive for the assessment. "

If the applicant was undoubtedly aware of the restriction on the transferability of the shares, the absence of an entry of that fact in the commercial register could not in itself have given the applicant confidence in the completeness and veracity of the entry. Given the ineffectiveness of the contract, the Court of Appeal held that the applicant could not have become a shareholder and was therefore not even entitled to a copy of the list of shareholders.

The applicant appealed against the decision of the Court of Appeal, arguing that the Court of Appeal had departed from the settled case-law of the Court of Appeal according to which the principle of substantive publicity applies only to entries that have a declaratory effect. He then referred to the Supreme Court the question of the time when the restriction on the transferability of shares, which had previously been laid down in the articles of association, took effect. Provisions of Act No. 513/1991 Coll., the Commercial Code, and Act No. 90/2012 Coll., on Commercial Companies and Cooperatives, relate the effectiveness of the amendment to the articles of association regulating the limitation of the transferability of registered shares to the registration of this amendment in the Commercial Register. The Court of Appeal first pointed out that these provisions are imprecisely worded, where they only regulate the situation where the articles of association are amended by a resolution of the general meeting of the company. The wording of the provisions would then suggest that if an amendment to the articles of association is adopted by agreement of the shareholder, the amendment is effective even without registration of the amendment in the commercial register. According to the Supreme Court, however, there is no reason

„That the above protection should be granted only in the case of an amendment to the articles of association, and even then, only if it is made by a resolution of the general meeting. "

The purpose and intent of this legislation are to provide increased protection to the potential purchaser of shares. The Court of Appeal, therefore, held that **the effectiveness of the articles of association in the part concerning the restriction of the transferability of registered shares is always linked to the entry in the Commercial Register**. In the absence of registration, the shares are freely transferable.

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"*Any knowledge by the purchaser of the shares that the articles of association contain an ineffective provision restricting the transferability of registered shares is of no legal significance.*"

The Supreme Court therefore reversed the decisions of both courts and remanded the case back to the Court of First Instance for further proceedings.

The information contained in this bulletin should not be construed as an exhaustive description of the relevant issues and any possible consequences, and should not be fully relied on in any decision-making processes or treated as a substitute for specific legal advice, which would be relevant to particular circumstances. Neither Weinhold Legal, v.o.s. advokátní kancelář nor any individual lawyer listed as an author of the information accepts any responsibility for any detriment which may arise from reliance on information published here. Furthermore, it should be noted that there may be various legal opinions on some of the issues raised in this bulletin due to the ambiguity of the relevant provisions and an interpretation other than the one we give us may prevail in the future.

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