Legal update

March 2023

Weinhold Legal

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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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Upcoming legislation

Act on preventive restructuring

On 24 January 2023, the Government of the Czech Republic submitted to the Chamber of Deputies the Bill on Preventive Restructuring (hereinafter "**The Act**"), which is a transposition of the European Parliament and Council Directive (EU) 2019/1023 of 20 June 2019 on Restructuring and Insolvency (hereinafter "**The Directive**").

The Act implements the institute of preventive restructuring, which, although not completely unknown to the Czech legal environment, has so far been implemented in practice outside the institutionalized framework at the level of general contract law and corporate law. Thus, the normative anchoring of the institute of preventive restructuring is absent in the Czech legal system for the time being, as the only possibility for a similar "restructuring" of a business enterprise is the institute of reorganization under Act No. 182/2006 Coll., on Bankruptcy and Methods of its Resolution (Insolvency Act), which, however, finds its application only in the case of a debtor's bankruptcy situation.

According to the Bill, the measures regulating preventive restructuring will apply only to business corporations that are in good faith in maintaining or restoring the viability of their business through restructuring measures, and are not yet in bankruptcy in the form of insolvency, but, taking into account all the circumstances, it can be reasonably assumed that the financial difficulties of the relevant business corporation are of such severity that their bankruptcy would result if the proposed restructuring measures are not adopted.

The basic measures of preventive restructuring include in particular a change in the structure of assets by selling part of the assets (asset restructuring), a change in the structure of liabilities (debt restructuring), a change in the structure of equity (equity restructuring), or the necessary operational changes to be defined within the restructuring plan, which is the result of negotiations between the company and its creditors.

The restructuring plan, as the key document of the restructuring process, is approved by all creditors according to the Bill, and if all creditors do not approve it (or in other cases specified in the Bill), it must be approved by the court.

The Bill preserves the so-called debtor's dispositive power, and therefore the management of the affected business corporation will continue to be able to dispose of its assets and decide on matters related to its day-to-day operations.

The Bill also allows for the suspension of the enforcement of individual creditor claims, both in a limited form applicable to individual creditors or a certain category of creditors, and in a general form, i.e. applicable to all creditors of the company (a similar method of protection is currently offered by the moratorium under the Insolvency Act). Protection of creditors in this form will be approved by the court and as a result of the provision of protection of creditors, the obligation to file an insolvency application will be postponed for the duration of the measure

Currently, the Bill is under consideration by the Chamber of Deputies, the first reading of the Bill took place on 21 February 2023, after which Bill was referred to the various committees of the Chamber for consideration. According to the Directive, EU Member States were obliged to transpose the institution of preventive restructuring into their national legislation by 17 July 2022 at the latest, and therefore the Czech Republic is already in delay in fulfilling this obligation. For this reason, the Act is scheduled to come into force on the day following the date of its promulgation in the provisions of Section 121 of the Bill.

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Considering the relatively broad support for the Bill, as well as the fact that the Czech Republic intends to fulfil its obligations under EU law through its approval, it is likely that the Bill will be approved.

Case law

Admissibility of contractual exclusion of grounds for withdrawal

(Judgment of the Supreme Court of the Czech Republic of 3 November 2022, Case No. 23 Cdo 2541/2021)

At the end of last year, the Supreme Court of the Czech Republic heard a legal question that had not been resolved in the Court of Appeal's decision-making until then, the subject of which was whether the parties' agreement could completely exclude the possibility of withdrawal from the contract.

The Supreme Court stated that in order to resolve this legal question, it is first appropriate to examine the nature of the norms governing the cases in which a contract may be withdrawn from, their meaning and purpose and, if it is found that they do not preclude a derogatory arrangement (i.e. that they are dispositive in nature), then to assess whether the manner in which the parties in a particular case departed from the dispositive legal regulation is not prohibited by law or contrary to good morals in view of the circumstances of the case for (another reason).

Therefore, the Supreme Court interpreted that the parties in private law relations may contractually deviate from the grounds for withdrawal from the contract set out in the provisions of Sections 1977, 1978 and 2002 of the Civil Code or exclude such grounds for withdrawal from the contract, as these are dispositive legal norms and not absolutely mandatory.

At the same time, however, the Supreme Court also stated that the dispositive nature of the legal norms establishing the possibility of withdrawal from a contract does not mean that it is always possible to deviate from these legal norms without further delay, since in a particular case a contractual arrangement excluding the application of these legal grounds for withdrawal from a contract may be found invalid due to the circumstances of the case as prohibited by law (for another reason) or contrary to good morals.

Finally, it concluded that in order to assess whether a particular arrangement excluding the statutory grounds for withdrawal is contrary to good morals, it is always necessary to carefully consider the overall context of the given contractual relationship and the reasons that led the parties to negotiate such a deviation from the law. It is also necessary to take into account the protective purpose of the statutory withdrawal provision. For example, an arrangement that deprives the creditor of the possibility of protecting its rights without any relevant reason and does not allow it to be rescinded under any circumstances could be considered immoral. It should also be borne in mind that the termination of an obligation by unilateral legal action (i.e. the main purpose of withdrawal) can also be achieved by other legal instruments. The exclusion of the statutory regulation of withdrawal from a contract will therefore not normally be contrary to good morals if the party entitled (whether under the contract or under other statutory provisions) has other instruments at its disposal by which it can achieve the purpose pursued. In contractual relationships, this role may be fulfilled, for example, by notice, agreed severance pay or other agreed instruments. The duration of the contractual obligation also plays a role in assessing the morality of a particular contractual arrangement. While in the case of long-term obligations (or obligations concluded for an indefinite period of time) the interest of the beneficiary in being able to escape from such an obligation and not being forced to remain in it for a long time despite its breach by the other party must be particularly taken into account, in the case of short-term obligations this interest may be disregarded. In addition, other circumstances may also be relevant (e.g. the nature of the main obligations under the commitment, or the nature and manner of performance, which may suggest reasons justifying a greater or lesser need for the stability of the commitment; but also other circumstances not mentioned here).

European Commission's lawsuit against the Czech Republic for lack of legal protection of whistleblowers

The Court of Justice of the EU informed on 16 March 2023 that the European Commission has brought an action against the Czech Republic for the lack of transposition of the October 2019 Whistleblower Directive.

In this context, the European Commission has also asked the Court of Justice of the EU to impose a daily lump sum fine, which the Czech Republic will be obliged to pay until the transposition of the Directive is completed.

Although efforts to legislate whistleblowing in the Czech Republic have been made repeatedly in the past electoral periods, none of the submitted proposals has been adopted so far, and therefore the deadline for the implementation of this legislation in the Czech Republic expired on 17 December 2021. In addition, according to the European Commission, Germany, Estonia, Spain, Italy, Luxembourg, Hungary and Poland are also affected by the breach of their obligations under the EU treaties.

The Czech Government approved the Whistleblower Protection Bill on 23 November 2022, the Bill was delivered to the Chamber of Deputies on 30 November 2022, and the first reading of the Bill took place on 12 January 2023. The second reading of the Bill is then expected to take place at a session of the Chamber of Deputies on 4 April 2023. After that, the Bill will have a third reading in the Chamber of Deputies, consideration in the Senate, signature by the President of the Republic and publication in the Collection of Laws.

The amount of the fine that the Czech Republic will have to pay is not yet known, but the relevant legislation should most likely be approved in 2023