

# Legal Update

November 2018

## Weinhold Legal

### Contents

#### Recent Case Law

A friend may be deemed a close person

Postal error in delivery of a General Meeting invitation

Assessment of the proportionality of a contractual fine arising from a non-compete clause

The information in this newsletter is correct to the best of our knowledge and belief at the time of going to press. Specific advice should be sought, however, before investment and other decisions are made.

For further information, please contact your usual partner/manager or:

#### **Banking and Financial Services:**

Pavel Jendrulek, Ondřej Havlíček

#### **Mergers and Acquisitions:**

Daniel Weinhold, Dušan Kmoch, Dalibor Šimeček

#### **Litigation / Arbitration:**

Milan Polák, Ondřej Havránek, Zbyšek Kordač

#### **Information Technology and Intellectual Property:**

Martin Lukáš, Jan Turek

#### **Competition Law / EU Law:**

Tomáš Čermák

#### **Insolvency Proceedings:**

Vladimír Petráček

#### **Labour Law:**

Ondřej Havránek, Anna Bartůňková

#### **Real Estate:**

Pav Younis, Václav Štraser

© 2018 Weinhold Legal. All Rights Reserved

## Recent Case Law

### A friend may be deemed a close person

*(Constitutional Court Finding No. II. ÚS 955/18 of 9 July 2018)*

In these proceedings, the Constitutional Court dealt with the interpretation of the term “close person” in the meaning of Art. 37(1) of the Charter of Fundamental Rights and Freedoms and for the purposes of conducting criminal proceedings. Pursuant to the foregoing provision, everyone has the right to refuse to give testimony who by so doing would incriminate himself or a close person.

The Constitutional Court had an opportunity to opine on the interpretation of the term “close person” in proceedings on a constitutional complaint in which the complainant defended herself against a disciplinary fine that was imposed due to a refusal to submit an explanation in the context of preparatory proceedings.

The facts of the case consisted in a situation where the complainant was summoned as a witness to submit an explanation in a case involving her friend. When offering her explanation, she invoked her rights and refused to testify, citing the fact that so doing could cause the threat of criminal prosecution of a close person. The complainant considered both the injured and suspected parties as close persons given that both were her friends.

The police imposed a disciplinary fine of CZK 10,000 on the complainant for refusal to provide testimony. In the rationale for their decision, the police stated that the complainant was not a participant (i.e. neither suspect nor injured party) in a familial or other similar relationship that would allow her to experience such injury as injury to herself; thus, these persons cannot, in relation to her, be deemed to be close persons.

The complainant defended herself against the disciplinary fine before the District Court, which concurred with the opinion of the police and rejected her complaint. The Appellate Court shared the opinion of the Court of First Instance and upheld its decision. The complainant thus turned to the Constitutional Court.

The Constitutional Court found that, where no familial relationship exists, close persons may be considered those between whom an emotional relationship exists that is strong enough that injury to one person would be felt equally by the other. In the view of the Court, whether or not such a relationship truly exists must be carefully examined on a case-by-case basis.

The Constitutional Court further stated that the fact the given persons had not seen one another for a long period of time cannot be invoked as a benchmark from which to infer that theirs is not a close relationship, as the District Court had erroneously inferred. Indeed, the strength of a friendship need not depend on the frequency with which the individuals meet. In real life, one often comes across strong friendships in which the given individuals do not see one another on a regular basis.

The Constitutional Court thus acknowledged that a deep and abiding friendship can be accommodated under the definition of the term “close person” and upheld the complaint.

# Legal Update

November 2018

## **Postal error in delivery of a General Meeting invitation**

*(Czech Supreme Court Decision No. 27 Cdo 1725/2017 of 26 June 2018)*

In the proceedings in question, the Supreme Court dealt with the attribution of fault to a postal service in the matter of delivery of a company's General Meeting invitation.

In the case under discussion, the postal service chosen by the sender (company) erred when delivering a postal item when, after failing to reach the applicant for appellate review (a company partner at the provided delivery address) it left a pick-up notice on which it stated the incorrect first name of the addressee. This error would generally have to be attributed to the sender, but given the circumstances of the case, it was not so serious as to prevent the partner from learning of the content of the delivered postal item or to preclude the assumption that the postal item containing the General Meeting invitation was made available (delivered) to the applicant.

In fact, the partner did not assert that the person with the name and surname stated on the postal pick-up notification would be resident at the delivery address (nor does such fact arise from the findings on which the Appellate Court based its ruling). Nor can we overlook the fact the partner (serving also as company executive) had been asked by another partner to convene the General Meeting and failed to fulfil this request. It must be assumed, therefore, that the second partner availed himself of the authorization accorded him by the provision of § 187(2) of the Business Corporations Act and convened the General Meeting himself (and could therefore assume he had received the letter containing the General Meeting invitation).

Fault for the partner having failed to take the necessary steps to ensure he was familiarized with the content of the postal item must, in the opinion of the Supreme Court, be attributed to that partner.

In concluding its decision, the Court asserted that not every error committed by the company or by the postal service chosen by that company to deliver a General Meeting invitation actually impacts the rights of the partner. A minor error in the delivery process that does not prevent the partner from being familiarized with the contents of the invitation cannot be deemed a defect in the convening of the General Meeting.

The invitation was delivered to the partner, albeit with that partner's incorrect first name, and the effects of delivery occurred on the first day on which he could objectively have familiarized himself with the invitation's contents.

## **Assessment of the proportionality of a contractual fine arising from a non-compete clause**

*(Czech Supreme Court Decision No. 21 Cdo 1922/2018 of 27 June 2018)*

In the proceedings in question, the Supreme Court dealt with litigation brought by an employee who had joined the respondent, as employer, in the position of sales manager. A non-compete clause was agreed in the employment contract whereby the employee pledged that after ending his employment with the employer he would refrain for a period of one year from

performing remunerative activity similar to or competing with the (original) employer's company objects. A contractual fine in the amount of total pecuniary performance provided during adherence to the non-compete clause was agreed for violation of this non-compete clause. Such a contractual fine may generally be deemed reasonable in the view of the Supreme Court.

However, while the non-compete clause was in force, the employee breached his obligation under the clause by working as an employee for a competing company "competitive in nature to the employer's company objects", and the employer was therefore entitled to a contractual fine in the required amount.

The employment with the other employer - competitor lasted just 3 days. After this period, the relationship was terminated by the employee during the probation period. Thus, the violation of the contractual obligation (commitment) ensuing from the non-compete clause was negligible in its scope. For this reason, it is the view of the Court of Final Appeal that the employee cannot reasonably be asked to pay the contractual fine as this would be in violation of accepted principles of morality.

The Court of First Instance reached the same conclusion, and endeavoured to address the obvious injustice by moderating the contractual fine and reducing it to 1/12<sup>th</sup> its original amount. However, the Court of Second Instance, citing the impermissibility of moderating a contractual fine, amended the decision and granted the original employer's entitlement to receive payment of the entire amount of the contractual fine.

One reason the Court of Final Appeal moderated the contractual fine was the meaning of the payment of a contractual fine, i.e. "liberating" the employee from a commitment ensuing from a non-compete clause and allowing him uninterruptedly to perform work for another employer. In this case, however, the penalty of the respondent (employee) is all the more sensible as this "liberating" effect is lacking.

© 2018 Weinhold Legal



ISO 9001 Certificate Holder

We firmly believe you will find *Legal Update* to be a useful source of information. We are always interested in your opinion about our newsletter and any comments you may have regarding its content, format and frequency.

Please e-mail your comments to [david.hlavacek@weinholdlegal.com](mailto:david.hlavacek@weinholdlegal.com) or fax them care of David Hlaváček to +420 225 385 444, or contact your usual partner/manager.