Legal Update

August 2019

Weinhold Legal

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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.

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Legislative Amendments

Amendment of the Directive on Digitalisation in Company Law

Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending the existing Directive on certain aspects of company law was published in the Official Journal of the European Union on 11 July 2019 (the "Amendment").

The Amendment will greatly facilitate the entire process of company creation from drafting the founding legal act to the steps necessary to register the company in the Commercial Register.

The Amendment obliges Member States to ensure the creation of a company (i.e. the entire process of establishment up to Commercial Register entry) is fully viable online with no need to visit a notary or other similarly authorized person. In this context, it also obliges Member States to ensure that a company's capital can be paid up or other payments made online, and prohibits Member States from making the creation of a company online conditional on obtaining a license or other authorization prior to Commercial Register registration. A company established online must subsequently be registered in the Commercial Register within five or ten business days, respectively.

In the case of the Czech Republic and Slovakia, the possibility of creating an online company applies to limited liability companies. However, a Member State may extend this possibility to other company forms (e.g. joint-stock companies).

No less importantly, the allowing of Commercial Register registration online with no need of physical presence and the prohibition of making registration contingent on obtaining a license or authorization also applies to the registration of a branch or affiliate of a foreign company.

The Amendment is a Union directive requiring transposition into national law. In accordance with the Amendment, Member States are obliged to implement most of its provisions by 1 August 2021, at the latest. It can therefore be expected that from August 2021, it should be possible to establish a limited liability company in the Czech and Slovak Republics without the need to visit a notary.

Amendment of the Contract Registry Act

An amendment of Act No. 340/2015 Coll. on special conditions for the effectiveness of certain contracts, publication of these contracts and on the Contract Registry (Contract Registry Act), as amended, (the "Amendment") was promulgated in the Collection of Laws on 16 July 2019 and enters into effect on 1 November 2019.

The Amendment repeals one of the exceptions to the obligation to publish a contract in the Contract Registry, namely, the exception not to allow contracts in which at least one contracting party is a public limited company whose securities have been admitted to trading on a regulated market or European regulated market and in which the State or a local authority itself, or with other local authorities, has/have a majority shareholding participation, even via another legal entity (§ 3[2][h] of the Act).

As of 1 November 2019, large joint-stock companies, such as ČEZ, a.s. or České dráhy, a.s., will be obliged to publish all private contracts and contracts for grants or repayable financial assistance in the Contract Registry, if they are unable to subordinate the contract to any other exceptions to § 3 of this Act (e.g. a contract with a value of CZK 50 000 or less, exclusive of VAT).

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By the end of 2023, it will also be possible under the Amendment to include an electronic image of the text content of a contract in the Contract Registry, including in an open format allowing full machine processing of the text content (e.g. XML).

Recent Case Law

Invalidity of notice of employment termination

(Supreme Court Judgment No. 21 Cdo 2036/2017 of 7 November 2018)

In this case, the Supreme Court dealt with serving notice of employment termination to an employee. However, its conclusions may also be applied to the delivery of any relevant document pursuant to § 334 of Act No. 262/2006 Coll., the Labour Code, as amended (the "Labour Code"), such as, in particular, documents relating to the establishment, modification and termination of employment or agreements on work done outside employment or wage assessments.

The applicant (employee) was dismissed from two employment relationships with the respondent (employer) for redundancy due to organizational changes pursuant to Section 52(c) of the Labour Code. The applicant subsequently sought a declaration of invalidity of the dismissal, inter alia on the grounds that the dismissal had not been delivered and duly notified. The respondent had tried to serve notice to the applicant at the workplace on Friday, 14 January 2011, but the plaintiff was on vacation and could not be reached there. The respondent therefore sent a notice of termination by post on that same day. The attempted postal delivery on 17 January 2011 was unsuccessful, so a notice to collect the document with instructions was left in the applicant's letter box. However, the applicant did not pick up the document, and it was returned to the sender (respondent).

Although the Court of First Instance and the Court of Appeal deemed the termination notice to have been duly served to the applicant, the Supreme Court disagreed with their conclusion. According to the Supreme Court, an employer does not act at its own discretion when choosing a method of delivery to the employee, but must strictly follow the procedure laid down in the Labour Code. Accordingly, delivery through a postal license holder or other postal service provider may only occur if it is not possible for the document personally to be handed to the employee at the workplace, at his home or wherever he can be reached, or delivered via an electronic communications network or service. In order to assess in a specific case whether or not it was possible for an employer personally to deliver a document into the hands of the employee, the court may take into account, for example, whether the employee was (objectively) available to the employer for delivery by postal means, whether the employer made such an attempt, what the reason was for the unsuccessful delivery, whether it made sense to make another attempt at delivery, how urgent delivery of the document was, whether it could be expected that delivery via a postal operator would be more successful than repeated attempts at delivery by the employer and so on. In the present case, moreover, according to the Supreme Court, the lower courts failed to account for the fact that it was a Friday and that the respondent could have tried to deliver the document to the plaintiff's residence on Saturday or Sunday, or alternatively on Monday, when the plaintiff should have been back at work, while delivery of the notice through a postal operator could not have taken place earlier than on Monday. Therefore, since the respondent did not proceed in accordance with § 334 et seq. of the Labour Code, it is the Supreme Court's view that the notice of termination was not properly delivered and was therefore declared invalid.

In light of the findings of this judgment, we therefore recommend that before conveying notice of termination or some other important document to a postal operator for delivery to an employee, you thoroughly examine, and if necessary consult, whether all the conditions set out in § 334 et seq. of the Labour Code (i.e. in particular, whether it is indeed impossible to deliver the document in person) have been met.

Breach of obligation in the performance of the office of a member of an elected body of a business corporation

(Supreme Court Judgment No. 27 ICdo 62/2017 of 18 December 2018)

Here, the Supreme Court dealt with the applicant's obligations as a member of the supervisory board of a limited liability company (the respondent) in determining the existence of the applicant's claim against the respondent.

The applicant entered into a contract with the respondent for execution of the office of Supervisory Board member; at the date of the contract's conclusion and for its entire duration, the applicant was simultaneously the statutory representative of two other business companies operating in the same field. On behalf of these companies, he undertook acts that could potentially violate the prohibition of competition. The respondent did not pay him the remuneration arising from execution of his duties.

Since the respondent was insolvent, the applicant filed a claim in insolvency proceedings. The insolvency administrator denied the applicant's claim, stating that the applicant was not entitled to payment of the remuneration for breach of legal obligations in connection with the execution of his duties. However, following the applicant's action, the Insolvency Court and the High Court in Prague decided the applicant was entitled to the remuneration, as a possible violation of the prohibition of competition could not result in non-payment of the remuneration.

However, the Supreme Court rejected the conclusions of the lower courts. According to the Supreme Court, a violation of the prohibition of competition is a breach of obligation in the execution of duties (the obligation to comply with the prohibition of competition), which may lead to the denial of remuneration for agreed execution of the role of member of an elected body. Violation of the prohibition of competition will, moreover, generally constitute a violation of the duty of loyalty, which is part of the due diligence duty of care and which a body member is obliged to follow from the start of his tenure until its termination – 24 hours a day, 7 days a week.

The foregoing Supreme Court judgment thus shows a relatively strict view of compliance with the prohibition of competition and the duty of a member of an elected body to act with the necessary loyalty to the company. Although this conclusion was inferred from the ineffective Commercial Code (Act No. 513/1991 Coll.), it must also be taken into account for the currently effective legal regulations.

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We strongly believe that you will find Legal Update a useful source of information. We are interested in your feedback on this newsletter, in particular its content, format and frequency.

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