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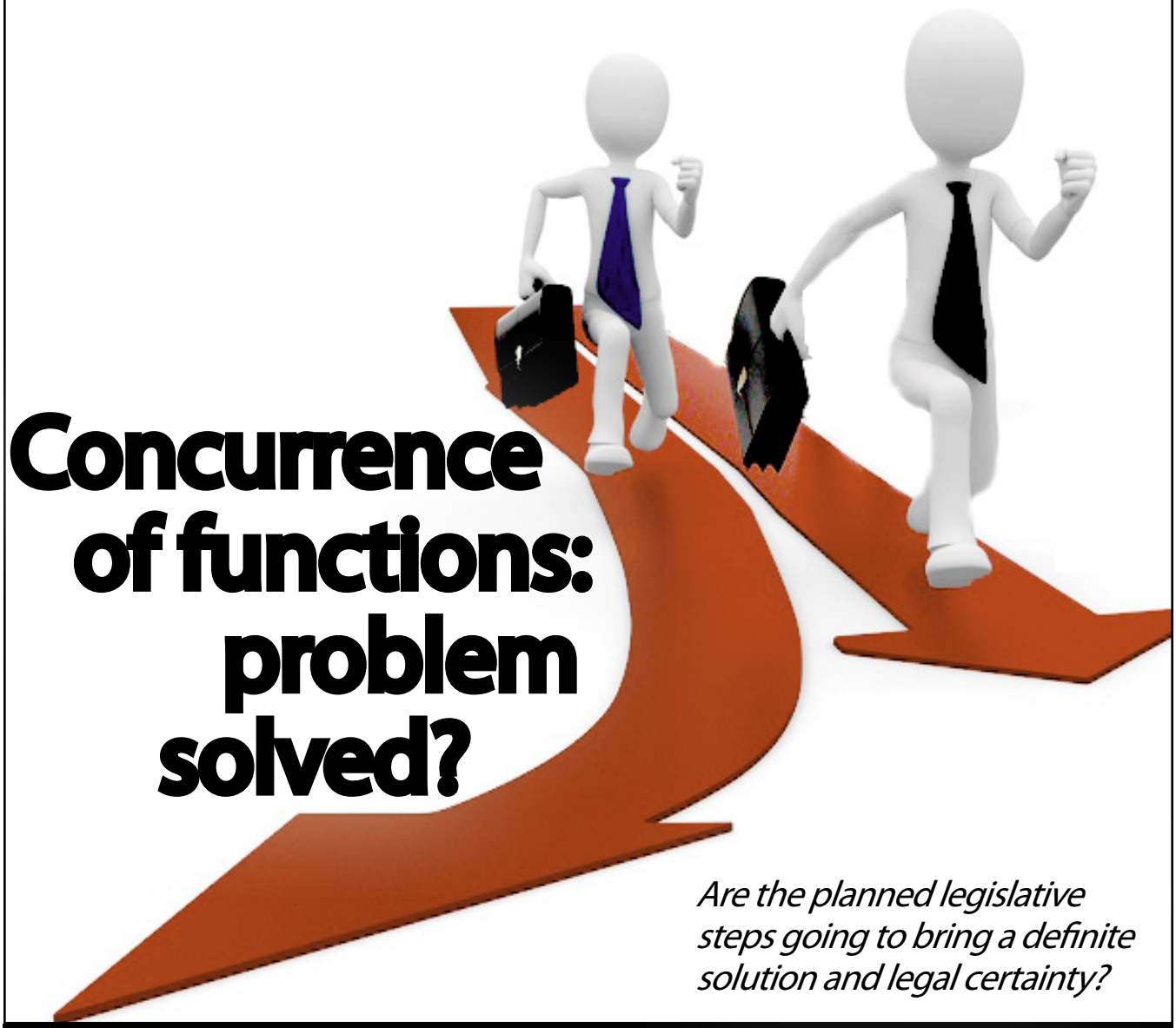
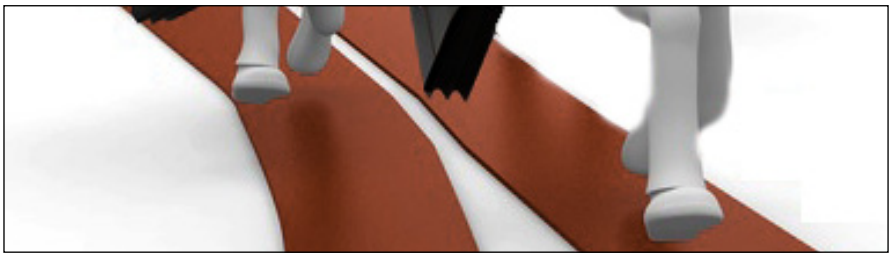


Concurrence of functions: problem solved?

Are the planned legislative steps going to bring a definite solution and legal certainty?

End of bureaucracy within cross-border legal disputes in the EU?

■ At the end of the previous year, the European Commission adopted the proposal of a revolutionary reform of the Brussels I. Regulation. Its aim is to enhance the internal market of the EU by the means of limitation of bureaucracy related to the recognition of judgements in the EU Member States. The proposal will be discussed by the European Parliament and the Council of Ministers. Final adoption is expected within the period of two or three years. The Brussels I. Regulation establishes a set of rules to determine which court has jurisdiction in cross-border matters and how the judgements rendered in one EU Member State are *(Read more on page 2)*



Concurrence of functions: problem solved?

(Follow from frontpage)

At the end of the previous year, the Supreme Administrative Court impugned the right of executives and members of boards of directors ("statutory representatives") to health insurance benefits due to the concurrence of functions and showed a manner of argumentation by which, e.g., the right to a retirement pension could be impugned as well. The long-ignored problem has now caused panic due to its publicity in the media. The Ministry of Justice of the Czech Republic has therefore initiated a legislative solution of this problem and is preparing an amendment to the Commercial Code which would allow the concurrence of functions, however only for the future and not retrospectively. Simultaneously, the Ministry of Labour and Social Affairs of the Czech Republic is preparing an amendment to the Act on Sickness Insurance and related laws establishing participation of the statutory representatives in the sickness and pension system. There are only discussions about the concrete proposals and it is not absolutely clear when and in which wording the amendments will be adopted. Equally it is unsure whether the final solution will ensure real legal certainty.

The full removal of concurrence in a company together with the retention of the position of a statutory representative remains the most certain solution from a legal perspective. This solution easily eliminates risks, and it subsequently becomes possible to include most of the rights and benefits arising for the employees from an employment relationship (e.g., the right to paid vacation, severance payment, liability insurance for damages or industrial injuries insurance) in the agreement on the performance of a function.

Consequences and risks

One of the negative consequences of concurrence is especially the invalidity of the relevant employment relationship of the statutory representative; according to the date of conclusion of the employment contract, this invalidity can be either absolute or relative (if relative, the employment relationship is deemed to be valid as long as one of the contracting parties does not invoke its invalidity). The invalidity of the employment relationship can cause risks for both the company and the statutory representative. The relationship between the company and the statutory representative can concern the controversy of the right to performance provided to the statutory representative on the grounds of the invalid employment relationship (remuneration, compensation, vacation, etc.) or eventually the company's right to a refund of this performance. On the other hand, the statutory representative can use the subsidiary regulation of the mandate contract and claim the remuneration in the regular amount for the performance of the function in case he performed it without any remuneration and this remuneration-free performance was not expressly included in the contract on the performance of a function. There is a further risk of the invalidity of legal acts performed independently by the statutory representative by the virtue of his work position in case he is entitled to act only jointly according to the Memorandum of Association. Another consequence results from the different construction of the legal liability of a statutory representative for the damage caused to a company and the liability of an employee. The statutory representative also does not fall under the compulsory insurance of the employer's liability for damage caused to an employee due to an industrial injury or occupational illness. Potential risks in the relationship to the state arise in the sphere of taxes and health and retirement pension insurance. The tax risk rests in the possible non-deductibility of the remuneration paid to the statutory representative as a cost of the company. As regards the above-mentioned insurance, there is a risk that the statutory representative will not participate in the system of health and retirement pension insurance.

End of bureaucracy ...

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recognised and enforced in other states of the EU.

The reform abolishes the declaration of enforcement. The declaration is now a necessary precondition for the recognition of enforcement in respect of a judgement rendered in a state other than the state enforcing the judgement. In the future, the judgements in civil and commercial matters given by a court in one Member State will therefore become automatically enforceable within the whole EU.

Are you not publishing financial statements? You face high financial risk.

■ Although companies are legally bound to regularly publish financial statements in the commercial register, this liability is often ignored even if considerable financial penalties can be imposed for breaking this obligation.

Companies are often motivated to break their legal obligation by their effort to keep sensitive data on their business from being disclosed to the competition. However, starting in 2011, the tax office began to penalise companies that followed this long-tolerated practice. The law allows for the assessment of a penalty up to 3% of the

assets value of a company. In addition to the tax office penalty, companies can also be penalised by the commercial register court for not obeying the requirement to complete the collection of documents with financial statements. The aim of the liability to publish financial results of companies and its more rigorous enforcing by the state authorities is to ensure the possibility for entrepreneurs to investigate their current or potential business partners based on relevant information stated in the commercial register.

Vocabulary of used terms

Concurrence of functions means the simultaneous performance of the function of an executive or a member of a board of directors with the work performance in an employment relationship in a position whose scope also covers activities belonging under the management of a company according to the Commercial Code. Prohibition of the concurrence has been repeatedly declared by the higher courts since the beginning of the 90s. While most companies had been ignoring the risks arising out of the concurrence in the past, the issue of concurrence has become topical especially in relation to the recent decision of the Supreme Administrative Court. The concurrence is not accepted in cases when the activities performed in an employment relationship overlap the activities belonging within the management of a company.

The term management of a company, which is a key term for the determination of concurrence, is not defined in the Commercial Code, and we can rely only on its definition by judicial practice and literature. According to the specification, management of a company comprises organisation and management of an enterprise belonging to a company, leadership of employees, making decisions on operational matters, e.g., supply, distribution, publicity, accountancy management, as well as making decisions on business plans. The definition of management of a company is therefore very broad, and it can comprise a broad spectrum of activities. All of these activities should be performed primarily by virtue of the function of a statutory representative, not on the grounds of an employment relationship.

More feasible liquidation and possibility to dissolve a company without a real registered seat

■ The proposal to amend the Commercial Code brings among other things an easier procedure of liquidation of companies and dissolving of a company in case of a missing entitlement to use the premises registered as the company's registered seat. The aim of the proposal is to guarantee that the data in the Commercial Register reflect the real state of things more closely.

The amendment introduces an obligation to be entitled to use the premises for the whole time they are registered in the Commercial Register as the registered seat or the place of business. The declaration of the immovable's owner who gives such entitlement should not be older than three months, and his signature will have to be verified by a public notary.

The specimen signatures of statutory bodies should not be published in the future in order to prevent their misuse. The Commercial Register will not publish the birth numbers of natural persons; only the date of birth will remain accessible.

Liquidation of so-called "empty companies" should be easier. In case a court rules for liquidation and the liquidator will be appointed by a court, it will not be necessary to present the proposal on distribution of the liquidation balance or the report on disposal of the property to the shareholders for approval. However, it will be necessary to file these documents with the Collection of Documents. The amendment could therefore contribute to the disappearance of the long non-existent companies from the Commercial Register.

Article 196a of the Commercial Code, which is discussed a lot in practice, will also be changed. The change should expressly state some aspects related to its application which were already stipulated within the ruling of the Supreme Court of the Czech Republic. A company will be able to grant a security to a member of the Board of Directors, Supervisory Board, etc. only with the consent of the General Meeting. When a liability will be assumed, an expert valuation will not be necessary.

European Business Register – so far, access only through other states!

■ Last year the Czech Republic became a contractual party to the Information Sharing Agreement with the European Business Register (EBR). This register provides access to data of business entities via access to the national commercial registers.

To gain access to the EBR, the customer chooses a distributor from a list and registers with this distributor. Afterwards, the customer obtains free access to basic information about companies or, upon payment of a fee, to more detailed information, e.g., about the shareholders, members of the company's bodies, etc. Twenty-four states are currently information providers, but only sixteen of them are information distributors. The European Commission therefore supports this project and is considering the possibility to use it to connect to the commercial registers of all EU Member States.

The Czech Republic does not have its distributor yet; that is why Czech customers have to use the services of providers and distributors from other countries. However, the Ministry of Justice is about to start work on implementation; consequently, the Czech Republic could become first an information provider and later even a national distributor.

EU broadens protection of mothers – members of company bodies

■ A recent decision of the Court of Justice of the European Union (ECJ) significantly extended the protection of pregnant women, women who are breastfeeding and women who have recently given birth, even far beyond the borders of the employment. The Court further extended the prohibition of being recalled from a position by a company on account of pregnancy even in situations when a female member of a company body cannot be considered as a person dependent on the company. The ECJ reasoned that even if the respective female member of a company body is not in a situation similar to a worker, and the company recalls her from her position on account of her pregnancy, such action of the company is discriminating due to the fact that it is in contradiction to the principle of equal treatment of women and men.

A female member of a company body must be considered as a worker under certain conditions, and for this reason, she comes under the protection of workers in accordance with the applicable European directive. In accordance with the ruling of the ECJ, this protection covers the female members of company bodies if they carry out activity for the company and they are in a so-called dependent position towards the company. The protection under the Directive regulates among other things the prohibition of dismissal – in this case the recall from a position by the company on account of pregnancy. A notice may be served to a pregnant worker (or she can be recalled from the position) due to other reasons than pregnancy, only if such a notice (recall from position) includes duly substantiated grounds for the dismissal in writing, the prohibition of recall from a position was therefore even broadened by the ECJ's decision (However, in the Czech Republic it is not possible to serve notice to a pregnant worker at all except for reasons specified expressly by the Labour Code).

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The newsletter "ADvocate" is prepared by Ambruz & Dark Law Firm associated with PricewaterhouseCoopers

We are happy to answer your questions to any of the themes dealt with at:

advocate@ambruzdark.com, tel.: +420 251 152 911