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Pension Reform 2013

People must decide by 30 June 2013 whether to join the so-called 'second pillar'.

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Amendment to the Insolvency Act

Have we finally been handed down an effective tool against unfounded and vexatious petitions?

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Web surfing of employees during working hours – grounds for dismissal?

Supreme Court specifies adequacy criteria for monitoring online activities of staff.

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Pension Reform 2013

The lower chamber of Parliament overruled the President's veto of two laws aimed at the introduction of the 2nd pillar of pension reform, which means that the path for building the 2nd pillar as of next year has been cleared. The President had argued that the reform lacked the necessary consensus in the professional community, on the political stage, and among the public at large. The position of the Social Democratic party also needs to be considered: it is against the 2nd pillar and has already made announcements that following ČSSD's victory in future elections to parliament, it would roll back the system and return the invested funds to the people.

What is the intended outcome of pension reform for citizens? The idea is to establish an old-age safety net composed of three pillars, i.e., pensioners would be drawing income from three sources: state pension (the first pillar), a pension from voluntary pension fund savings schemes (the second pillar), and private savings (including a modified form of complementary pension insurance; the third pillar). Today, retired citizens draw a state pension from the publicly financed social security system, in addition to what they may have saved or invested on their own.

The First Pillar – State Pension

Citizens who do not participate in any pension fund savings scheme (i.e., those who opt out of the 2nd pillar) only have their state pension to rely upon. Citizens who do join the 2nd pillar draw a (smaller) state pension and, in addition to that, receive pension fund payouts.

The statutory prerequisites for being awarded state pension payments are the same for everyone, whether the given citizen chooses to rely on state pensions alone or whether he or she joins the second pillar:

- retirement age is the same for all citizens, and always depends on the year of birth,
- as of 2018, citizens must accrue 35 pension insurance years to become eligible for a state pension.

However, the amount of state pension is being calculated differently for different groups. Those citizens who partake in the voluntary fund savings scheme (2nd pillar) get less, due to a less favorable pension formula. This is because the government anticipates them to draw a private pension from fund investments on top of their state pension.

Joining the second pillar has no impact on disability pension or pension payments to surviving dependents.

The Second Pillar – Voluntary Participation in Pension Fund Savings Schemes

Participating in the second pillar is voluntary but irrevocable – once one has joined the system, opting out is no longer possible. In the first half of 2013, every person of productive age makes the choice of whether to join this particular pillar or not. Those over 35 must join the second pillar (if they so wish) on or before 30 June 2013. After 30 June 2013, only those aged 35 or less have the option to join.

Those who decide to accede to the second pillar will pay a certain percentage of their monthly income into a selected pension fund. Today, all employed persons make contributions in an amount of 6.5 % of their salaries or wages to an account administered by the social security administration. Employees who decide to accede to the second pillar will in the future only have to send 3.5 % of their income to the social security administration – but another 5 % must be paid into the account of a pension fund of their choice. In other words, their contributions to retirement plans overall increase by 2 % even as their obligations towards the government are slashed by almost half.

The actual monthly pension payout which the citizen receives from the pension fund (within the context of his or her 2nd-pillar retirement plan) will differ depending on the number of years and months of their participation, and on the size of their monthly payments.

The Third Pillar – Own Savings, Complementary Pension Insurance

The third pillar is essentially a modification of the current system of private, state-subsidized pension insurance, which will newly be called complementary pension insurance. Government subsidization, tax deductibility, and the option of company pension schemes (i.e.,

pension plans involving a contribution by the employer) all remain preserved.

As of 1 January 2013, the current pension funds will continue to exist in the form of what is known as "transformed funds"; alongside these, new funds will be created in the form of regular investment funds. Citizens who take out complementary pension insurance on or before 30 November 2012 and who make payments into existing pension funds will be asked to choose whether they wish to remain with their (newly transformed) fund or to switch to the new investment funds. Transformed funds will still honor today's arrangement, which entails:

- safeguards against negative earnings on savings,
- government contributions (if in newly defined amounts),
- employer contributions (i.e., company retirement plans),
- early benefits upon satisfying the length-of-participation criterion even before retirement age has been reached; lump-sum option (i.e., a one-time payout of annuity).

By contrast, the new investment funds provide no guarantee that the individual participant's payments will not suffer from depreciation – in other words, negative earnings are possible under a bad-case scenario. In addition, investment funds grant no early payments before retirement age has been reached, and do not pay any annuity to surviving dependents.

As we have seen, everything is ready for the pension reform to be kicked off. However, given the critical response to the reform, it is only reasonable to wonder how the reform plans will fare in practice, and how many people will ultimately join the second pillar.

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Amendment to the Insolvency Act

That the Insolvency Register is open to abuse has been a problem since its inception, i.e., for almost five years, but only now has the lawmaker attempted to put an end to such practices, in the form of act No. 334/2012 Coll. amending the Insolvency Act (Act No. 182/2006 Coll.). After all, the fact that all petitions for insolvency are being made public in the Insolvency Register within two hours from filing has been an open invitation to harassment for anyone who wants to exercise unfair pressure on debtors by filing vexatious insolvency petitions (i.e., petitions for no good reason). Filing an insolvency petition sets in motion the commencement of insolvency proceedings, which in turn triggers a prohibition of any actions by the debtor that could substantially compromise the value of their estate. The situation is aggravated by the fact that the insolvency court raises at least six different public authorities from their bureaucratic slumber (Commercial Register, labor office, social security administration, to name but a few). Also, the public notice of filed insolvency petitions in the Commercial Register and Insolvency Register is of course extremely inconvenient for a debtor who is in fact not at all insolvent, and may have very unpleasant consequences, especially in connection with public tenders (from which the debtor may be barred solely based on the entry in the Insolvency Register), but also in terms of their day-to-day business, for existing debt financing by banks, pending loan requests, leasing contracts, etc.

Given that insolvency petitions are automatically made public in the Insolvency Register (a practice upheld and preserved by the amendment), the lawmaker was reduced to tinkering with the legal consequences of such petitions, by implementing the following measures:

- Petitioners may be required to post collateral if there is reason to believe that the debtor may sustain damage due to the unjustified commencement of insolvency proceedings and the measures that come with it;
- The insolvency court has the authority to dismiss a petition for insolvency if it is manifestly unfounded, though it may only do so within seven days from the day on which it was filed (but apparently no later);

- If the petition for insolvency was dismissed for fault of the petitioner, then the petitioner must compensate the debtor for the damage thus caused (whereas in the event of doubt, the petitioner is held to be at fault);
- Action for damages must be filed within six months from the termination of insolvency proceedings;
- In the case of manifestly unfounded petitions for insolvency, debtors will now be removed from the Insolvency Register within three months from the moment in which the final decision on setting aside the insolvency proceedings has been handed down, as opposed to the previous time period of five years from the moment in which such decisions became final.

We shall see whether this package of measures will really help curb the number of filings of clearly unfounded petitions for insolvency – but for now, some doubt definitely remains:

- while the collateral requirement is surely a helpful idea, the new provisions are silent on the specific amount up to which collateral may be demanded, and do not specify what should happen if no collateral is posted;
- it makes no sense that an insolvency petition may be dismissed as being manifestly unfounded during the first seven days from filing, but not thereafter (e.g. because it is only later revealed that the petition was without good cause);
- while the petitioner's obligation to pay compensation for damages is generally a welcome development, we will have to wait and see whether the lawmaker actually overshot the mark in this particular aspect (by always assuming, in case of doubt, that the petitioner was at fault for proceedings that were set aside);
- it is unclear why a statutory time limit has been imposed for filing the claim for damages; and
- it is hard to understand why a debtor who became the victim of a manifestly unfounded insolvency motion (which was dismissed with final force) is not immediately removed from the Insolvency Register, but only within three months from the date on which the said dismissal became final.

It remains to be seen whether the measures that were included in the amendment are powerful enough to fight the phenomenon of vexatious insolvency petitions and effectively deter unfair competitors from engaging in such frivolous practices. Sadly, there is good reason to believe that the amendment falls short of this goal.

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Web surfing of employees during working hours – grounds for dismissal?

Employees often make unwarranted use of their employer's information technology for private purposes. "Internet surfing" during working hours, for instance, is a common occurrence that employers have been seeking to counteract by installing tracking software which logs information on websites visited from the employer's workstations. All the same, it was previously a matter of contention whether monitoring one's employees' computer activities during working hours was lawfully possible, or whether it represented undue interference with their privacy. The Supreme Court has now brought light into the question of what kind of monitoring by employers is adequate, by handing down judgment 21 Cdo 1771/2011 of 16 August 2012.

The Labor Code prohibits employees [Sec. 316 (1)] from using their employer's means of production and work tools for personal needs. In this respect, employers have a recognized right to check compliance with this proscription provided that adequate means are being used to this end. Employers may also give consent with the private use of their means of production and work tools - whereas it is entirely at their discretion to determine the scope and degree of allowed use. However the Labor Code [Sec. 316 (2)] prohibits employer "without consequential reason based on the special nature of its activities, interfere with employee´s privacy in the workplace and in the public areas"; it is particularly forbidden open or covert surveillance, wiretapping and recording of telephone calls and inspection of emails or letters addressed to the employee.

The Supreme Court had to decide a case in which an employee had been given notice of dismissal on grounds of a particularly serious breach of work duties: the person had spent more than 60% of their monthly working hours visiting various websites (with no discernible relation to the performance of their work assignments). In this regard, the Supreme Court examined in what manner employers may exercise their right of control in the terms of Sec. 316 (1) of the Labor Code.

Above all, the Supreme Court noted that if employees are prohibited from using employer's property for their personal needs, and if employers are principally entitled to monitor compliance with this rule, then employers must also avail of an actual option to perform such monitoring in one way or another, so as to procure evidence of the contrary if needed. In other words, the employee's right to protection of their privacy finds its limits in the specific character of employment relationships – i.e., the performance of dependent work within the framework of superiority and subordination, on behalf of the employer and in line with the employer's instructions.

Against the backdrop of the above observations, the Supreme Court found in its ruling that monitoring an employee is permissible as long as the objective behind the monitoring procedure is not to determine the contents of e-mail messages, SMS or MMS, but to establish whether the employee complies with the prohibition of personal use of their employer's technology. In the case at hand, detailed logs of the employee's activities on their work computer had been created. The Supreme Court found that in such a case, the monitoring was aimed at protecting the employer's assets and did in no way interfere with the employee's privacy. While it is true that the information which specific websites have been visited reveals certain personal aspects pertaining to the employee's sphere of privacy, the Supreme Court held that the violation of the complainant's privacy (in the form of monitoring their internet behavior by recording the URL of the websites they visited) had been entirely negligible. The Supreme Court therefore concluded that the evidence and excerpt from the monitored computer is permissible.

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Legal News in Brief

- As of 1 November 2012, the internet-based edition of the **Commercial Gazette** has switched to a daily publication frequency. This means a significant shortening of the publication deadlines: notices are now being published as of midnight of the second business day from receipt (i.e., if the editors of the Commercial Gazette receive notice on Wednesday, it will be published on Friday) – with the exception of company liquidations and other notices paid for by way of an advance invoice, which will only be published after the fee payment has been made. The hardcopy edition of the Commercial Gazette, which is scheduled for publication every Wednesday (as previously), contains all notices filed over the course of the respective previous week (from Monday through Friday).

- On 1 January 2013, a far-reaching **amendment to the Energy Amendment Act** (act No. 318/2012 Coll.) will come into force which introduces, among other things, the obligation to compile and present so-called "energy passes" for buildings and apartments upon selling or building them (or after major refurbishments), and which codifies the concept of energy efficiency appraisals and the role of energy efficiency advisors.

- Also on 1 January 2013, an **amendment to the Code of Civil Procedure** (act No. 404/2012 Coll.) will come into force which modifies the requirements for proceedings on second-instance appeals, also known as appeals on points of law (dovolací řízení), as one form of extraordinary legal remedy. The primary objective of this amendment is to provide relief to the Supreme Court, which is currently inundated with a flood of such proceedings. In addition, the bill pursues the further electronization of the judiciary in civil matters, introduces conceptual changes regarding involuntary commitment to hospitals, and strengthens the procedural rights of minors.

- The Czech Constitutional Court has **quashed the three-day statutory period for filing objections** against payment summons that are based on a bill of exchange (Sec. 175 (1) of the Code of Civil Procedure), effective as of 1 May 2013; the ruling is referenced as Pl. ÚS 16/12.

- The on-going recodification of private law in the Czech Republic has also necessitated work in the form of **modifications to the rules of procedure**. The idea is that, for the future, the Code of Civil Procedure should only contain rules to do with adversarial proceedings. Major changes concern the jurisdiction of courts: due to the abolishment of the Commercial Code, the subject-matter jurisdiction of regional courts will be curbed substantially, and a number of disputes will henceforth be decided in the competent district court as the first-instance court. The rules concerning non-adversarial proceedings and other special forms of proceedings will be contained in one central act of law: the Act on Special Court Procedures.

Current Events at bnt Prague

Interviews for public interest programming on Czech television

For some time now, bnt has been regularly contributing to the public interest programming of Czech television channels, in the form of expert commentaries on various contentious cases that have garnered media notoriety.

Among the more recent examples are the legal opinion of Markéta Pravdová regarding the issue of withheld pay for occasional work (http://play.iprima.cz/iprima/288724/19724) and the legal opinion of Jan Šafránek regarding customer complaints over a chainsaw (http://www.ceskatelevize.cz/porady/1097429889-cerne-ovce/212452801081017/video/) and over a bed which upon delivery did not meet the promised quality criteria (http://www.ceskatelevize.cz/porady/1097429889-cerne-ovce/212452801081029/video/).

Op-ed by Tomáš Běhounek: On new Civil Code (... or is it the old one?), and the strange way in which architecture is being protected

We would like to draw your attention to an interesting commentary which Tomáš Běhounek provided to the Building Forum platform. The author addresses the old-as-new appearance of the new Civil Code (which is set to come into force on 1 January 2014), and the current, rather quaint way in which legal protection is extended to works of architecture.

Source: http://archnewhome.com

In his trademark style of entertaining polemics, the author informs the reader about how the new Civil Code has come into being, reveals some rather archaic concepts which it contains, and discusses the stupendous number and scope of newly adopted rules and provisions. On another note, the author points out a strange conflict between architecture and copyright (of architects' work) which may come as an unwelcome surprise to quite a number of people.

The entire article can be found at: http://www.stavebni-forum.cz/cs/article/21883/glosar-tomase-behounka-novy-nebo-stary-obcansky-zakonik-a-podivna-ochrana-architektury/.

...other original articles written by our team of lawyers

- **Real estate purchase agreements and agreements on the lease of apartments and houses under the new Civil Code**,
  REALITNÍ MAGAZÍN 9/2012 (www.arkcr.cz), authors: Tomáš Běhounek, Kryštof Kobeda
- **Practical experiences with the amendment to the Labor Code that came into force on 1 January 2012**
  Daně a právo v praxi (www.danarionline.cz), author: Markéta Pravdová
- **Paying a visit to bnt – pravda & partner**
  Epravo.cz (http://www.epravo.cz/clanky-a-komentare/na-navsteve-u-bnt-pravda-partner-85580.html), author: Pavel Pravda
- **Branch managers and the authorization of third parties in court proceedings**
  Právní rádce (http://pravniradce.ihned.cz/), author: Lucie Josková
- **Laesio enormis in the terms of the new Civil Code**
  EPRAVO MAGAZÍN, author: Tereza Chalupová

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