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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 investment decisions are made.

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News in legislation

Financial Markets: BRRD II - Amendment to the Act on Recovery and Resolution in the Financial Markets

On 14 August, 2021, the Act amending Act No. 374/2015 Coll., on Recovery and Resolution in the Financial Market, amended, and other related acts entered into force.

The main reason for the amendment of the Act on Recovery and Resolution in the Financial Market was the need to implement the rules introduced by Directive (EU) 2019/879 of the European Parliament and the Council of 20 May 2019 amending Directive 2014/59/EU as regards the loss-absorbing and recapitalization capacity of credit institutions and investments firms (BRRD) and Directive 98/26/EC (hereinafter referred to as „**BRRD II**“) into the Czech legal order.

The amendment t was adopted primarily to introduce a revised framework for the recovery and resolution of credit institutions and investments firms within the EU. The purpose of the BRRD II regulatory rules, and hence the amended version of the Act, is to further strengthen the existing regulatory framework for crisis resolution and the resilience of regulated entities to potential economic shocks and to create conditions to ensure the stability, safety, and sufficient resilience of the banking sector and the financial system as a whole.

BRRD II introduces new categories of resolution entities and resolution groups in line with the TLAC standard (total loss-absorbing capacity requirement). A resolution entity is now defined as an entity against which measures are to be applied. A resolution group will then always consist of one resolution entity and entities controlled by the resolution entity who are not themselves resolution entities. Resolution entities are now required to maintain capital and eligible liabilities at the so-called minimum requirement, whereas other entities (within the resolution group) must maintain capital and eligible liabilities at least equal to the so-called internal minimum requirement

The amendment also aligns the way the minimum requirement is expressed with the TLAC standard. The requirement will be expressed as a percentage of the total amount of risk exposure and of the exposure ratio for the calculation of the so-called leverage ratio (a comparison of a company´s combination of debt, equity, assets, and interest). The obliged person must then maintain capital and eligible liabilities at least equal to the higher of the minimum requirement.

For global systemically important institutions and resolution entities with assets in excess of EUR 100 billion, or resolution entities that will be included in this category of institutions after meeting specified criteria by a decision of the CNB, a mandatory minimum subordination requirement of eligible liabilities of 8% of the institution´s total liabilities and capital is set, with the possibility of additional subordination.

The amendment gives the CNB a new power to declare a moratorium on an obliged person, thereby suspending payments and performance of its obligations for a certain period of time in order to prevent further deterioration of its financial situation and to select appropriate measures to resolve the crisis. Compared to the previous national arrangement of the so-called resolution moratorium, the scope of the moratorium as provided for in the Act has been extended and can now be applied, inter alia, to covered deposit claims. According to the amended wording of the Act, the length of the moratorium may not exceed two working days.

Current case law

On the certainty of the prorogation clause under Article 25 of the Brussels I bis Regulation

(Judgment of the Supreme Court of the Czech Republic of 18 May 2021, Case No. 30 Cdo 3344/2019)

Before the District Court in Liberec, the plaintiff claimed EUR6 709 with accessories against the defendant in respect of commission for his activities as a sales representative which he performed for the defendant in the Czech Republic based on a commercial agency contract. However, the defendant argued that the Czech

courts lacked international jurisdiction. The defendant was an Italian company with its registered seat in Italy, and the commercial agency contract in question was concluded under Italian law. The parties to the contract did not agree on the jurisdiction of the courts of any of the Member States under Article 25 of the Brussels I bis Regulation or under Article 23 of the Brussels I Regulation. The commercial agency contract included only an agreement by which the parties referred to the CONFAPI collective economic agreement containing an out-of-court dispute resolution clause giving preference to Italian law.

In its legal assessment of the case, the Court of First Instance relied on Article 7 (1) of the Brussels I bis Regulation and concluded that, in the case of the provision of services in several Member States, the court which has jurisdiction to rule on all claims arising out of a contract for the provision of services is the court in whose jurisdiction the place of the main provision of services is situated, as is apparent from the provisions of the contract, and, in the absence of such provisions, the court in whose jurisdiction the place of the actual performance of the contract is situated. In the present case, although the contract stipulated that the plaintiff was to carry out his activities exclusively in the territory of the Czech Republic, Slovakia, Poland, and Russia, the Court of First Instance concluded, in the light of the facts of the case, that the applicant carried out its activities only in the territory of the Czech Republic and that the plaintiff himself claimed in the present dispute the payment of a commission for activities carried out solely in the Czech Republic. On that basis, the Court of First Instance confirmed the international jurisdiction of the Czech courts to hear and determine the case and, by order, rejected the defendant´s objection that the Czech courts lacked international jurisdiction. The Court of Appeal upheld the order of the Court of First Instance.

Both the defendant and the plaintiff appealed the Court of Appeal´s order. The Supreme Court held that it follows from the wording of Article 25 of the Brussels I bis Regulation that a fundamental prerequisite for the international jurisdiction of a court to be established by agreement of the parties is their consensus as to the choice of internationally competent courts or court. The agreement of the parties in this case, which was part of the commercial agency agreement and by which the parties referred to the CONFAPI collective economic agreement, which contained only an agreement on pre-trial dispute resolution and the use of Italian procedural rules and not an expressive choice of court, does not show with sufficient precision and certainty that the parties agreed at all to establish international jurisdiction within the meaning of Article 25 of the Brussels I bis Regulation, let alone to determine precisely the court or courts of a particular Member State which might have international jurisdiction. **The mere reference to the Italian Code of Civil Procedure in the context of pre-litigation dispute resolution cannot, therefore, be regarded as a choice of the Italian courts, since, according to the Supreme Court, it is not a „sufficiently precise"objective criterion which is subject to a clear consensus of the parties**.

The Supreme Court concluded that the essence of Article 25 of the Brussels I bis Regulation is that a party should not be surprised by a prorogation to which it has not consented. Based on the foregoing considerations, the Supreme Court, therefore, concludes that, in the present case, the parties´ consensus on the establishment of the international jurisdiction of the Italian courts based on Article 25 of Regulation I bis is not sufficiently precise and certain and the contractual arrangement of the parties, in this case, is not unambiguous. Consequently, the essential condition laid down in Article 25 of the Brussels I bis Regulation is not fulfilled and, therefore, international jurisdiction cannot be established under that provision.

The shareholder´s right to request an explanation at the General Meeting under Sections 357 to 360 of the Business Corporations Act is conditional upon their attendance at the General Meeting

(Judgment of the Supreme Court of the Czech Republic of 25 May 2021, Case No. 27 Cdo 3812/2019)

In this decision, the plaintiff, as a shareholder of the company, requested that the court order the defendant company to provide the plaintiff with an explanation of what persons close to the members of the board of directors were employed by the Company, what remuneration was paid to these employees in each month of 2017, and an explanation of what benefits were provided to individual members of the board of directors in each month of 2017 and based on what legal title.

On 27 June 2018, the General Meeting of Shareholders of the Company was held, the agenda of which included, among other things, the approval of the final annual accounts for 2017 and the decision on the distribution of profits. The plaintiff did not attend the General Meeting but only wrote to the Company before the meeting to request an explanation. The company did not provide the explanation to the extent requested, in particular claiming the protection of personal data and the applicant´s non-attendance at the General Meeting.

The Court of First Instance dismissed the plaintiff´s claim. The High Court in Olomouc upheld the decision of the Court of First Instance, referring to an earlier decision of the Supreme Court, which held that Section 357 et seq. of Act No. 90/2012 Coll., on Commercial Companies and Cooperatives, as in force until 31 December 2020 (hereinafter referred to as the „**Business Corporations Act**"), provide in principle for the provision of explanations **directly at the General Meeting**, and only those facts which are necessary for the assessment of the matters on the agenda of the General Meeting or the exercise of shareholder rights related thereto. The applicant appealed against the judgment of the High Court.

The Supreme Court concluded that the right to participate in the management of a company is a fundamental right of a shareholder. A necessary prerequisite for the exercise of such a right is then to ensure that the shareholder is informed since without sufficient information the exercise of the shareholder´s rights at the general meeting would be entirely formal and meaningless. **The purpose of the shareholder´s right of explanation under Sections 357 to 360 of the Business Corporations Act is to ensure that the shareholder is informed to exercise his rights at the general meeting or to enable the shareholder to make a qualified and informed assessment of the matters discussed at the general meeting. Therefore, the company must, in principle, provide the shareholder with an explanation at the general meeting. Therefore, a shareholder who does not attend the general meeting cannot receive any explanation from the company.** The Supreme Court thus concluded that even a shareholder who requests an explanation in writing before the general meeting is held is only entitled to receive an explanation if he attends the general meeting.

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