Legal update

March 2021

Weinhold Legal

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News in legislation

New Registration of Beneficial Owners Act

The current legislation on record-keeping of beneficial owners adopted in the Czech Republic in 2018 is expected to go through a significant change this year. On 3 February 2021, Act No. 37/2021 Coll., on the Registration of Beneficial Owners, effective 1 June 2021, was published in the Collection of Laws. It brings several conceptual changes to this area.

In the first place, the concept of the beneficial owner is re-defined. According to the regulation adopted, it will refer to a natural person who meets the definition of the so-called "**ultimate beneficiary"** or a "**person with ultimate influence"**. A person who may have a direct or indirect substantial part of the benefit created by the relevant legal person from its operations or liquidation, and at the same time does not transfer that benefit, shall be considered to be the ultimate beneficiary. A person with ultimate influence is then defined as a person who can exercise decisive influence directly or indirectly within a legal person.

In the specific case of business corporations, the new statutory scheme works with a presumption that a beneficial owner is a person entitled to **at least a 25%** share of profit, own resources, or any surplus in the event of liquidation, where that proportion passes along no further. The Act also operates with the identification of a replacement beneficial owner, in particular in cases where the beneficial owner cannot be determined after all efforts. In this case, each **member** of the **senior management of the corporation** will be considered as a beneficial owner. Where a person with ultimate influence is a legal person whose actual owner is designated in this way, any person in its senior management is also the beneficial owner of all the corporations in the subsidiary structure of the relationship.

It will also be possible to obtain selected data from the register by **any person**, namely the data identifying the beneficial owner and the underlying facts. The status of notaries who will be entitled to conduct direct registrations within a specified period of three working days from the date of submission of the application shall also increase the process of recording the data.

In contrast to the current legislation, the new legislation provides **sanctions** against those persons who fail to register required data within a legal time-limit or an additional time-limit set by the court and against actual owners not providing the necessary cooperation. In such cases, a fine of up to CZK500 000 may be imposed for this offence. Another significant consequence of the failure to fulfill an evidentiary obligation is that **unregistered beneficent owners** must not **exercise their voting rights** at the general meetings inside the business corporation, and such business corporation **must not pay out their share of the profits**, other own resources, or any surplus in the event of liquidation.

Under the transitional provisions of the new Act, business corporations that have complied with their obligations properly and in due time under the current legislation will have until 1 December 2021 to bring the currently registered data into line with the newly adopted legislation. On the other hand, business corporations that have not complied with their existing obligations are not given the additional transitional period and must fulfill the new obligations without undue delay after the Act enters into force on **1 June 2021**

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Newly published case-law

Exclusion of the pre-emptive right to buy additional shares

(Decision of the Supreme Court of the Czech Republic ref. no. 27 Cdo 155/2019 of 26 November 2020)

The applicant sought annulment of the resolution of the general meeting, which increased the share capital of a public limited company, excluded the pre-emptive right of the shareholders to buy additional shares, and approved a debt-setting agreement for the payment of the share exchange rate of the shares against the claims of the pre-determined candidates for subscription to the company. Two out of the four shareholders of the company at that time, who before the relevant general meeting provided a loan to the public limited company, were to be designated in advance for the subscription of the new shares. The claim thus incurred was then to be capitalized by an increase in the share capital.

The company´s board of directors justified in its report drawn up under the Section 488 Subsection 4 of the Act No. 90/2012 Coll., on Business Corporations and Cooperatives, as amended, the important interest of the company to exclude the pre-emptive right, first by the extinguishment of liabilities vis-a-vis the two shareholders, resulting from the loan agreement and secondly by the increase in „transparency of the shareholder structure“ of the company, where this capitalisation would significantly increase the share of these „transparent“ shareholders in the capital.

The Court of First Instance dismissed the action and found that the resolutions adopted by the general meeting did not infringe the law or the company statutes. The important interest of the company to exclude the pre-emptive right was then justified by the need to ensure sufficient means to carry out its business plans and by the capitalisation of the relevant claims together with the interest in the transparency of the shareholder structure. The Appellate court subsequently upheld the decision of the Court of First Instance as factually correct.

In its decision in the appeal proceedings, the Supreme Court of the Czech Republic stressed that a pre-emptive right constitutes one of the fundamental rights attached to shares, the purpose of which is to enable the shareholders to retain their share of the company´s share capital (and the rights attached to the shares) to the same extent as before the increase in the share capital.

As regards the condition of an important interest of the company, which may justify the restriction of the pre-emptive right, it cannot be represented by the need to obtain funds for the company´s activities. Thus, a public limited company cannot „choose“ which shareholders will provide finance in exchange for shares. On the contrary, the pre-emptive right must be respected in this case. The debt-to-equity swap could also not represent an important interest of the company, given that the shareholder´s claims arose only a week before the company´s board of directors had drawn up their report and were thus merely assigned to justify the procedure of excluding the pre-emptive rights. Finally, the increase in the „transparency“ of the shareholder structure was merely intended to significantly reduce the applicant´s share of the company´s share capital, which, on the contrary, is in direct conflict with the purpose of the existence of a pre-emptive right.

For those reasons, the Supreme Court of the Czech Republic annulled the decisions of the courts of the lower instance and referred the case back to the Court of First Instance for further proceedings.

Determination of the price for a locally unavailable item

(Decision of the Supreme Court of the Czech Republic ref. no. 25 Cdo 2679/2019 of 25 November 2020)

In this case, the applicant claimed compensation by virtue of mandatory public liability insurance against the insurance company of the person responsible for the damage caused to his car as a result of a traffic accident. The subject-matter of the dispute was the method of determining the price of a vehicle with specific modifications ((in this case a convertible) that is not traded on the relevant market in the Czech Republic.

The Court of First Instance has determined the price according to the closest similar vehicles of other brands and a comparable type sold on the relevant market. It refused to take account of the prices for which identical vehicles, just like the damaged one, were sold on the market in neighboring countries (in particular, in Germany), regardless of the applicant´s arguments that the Czech market had operators offering the possibility of their import to the Czech Republic. The Court of First Instance stated that such an approach ignoring the real state of the market would lead to illogical requirements, such as pricing a snowmobile in Equatorial Africa according to the prices achieved in Scandinavia and dismissed the action accordingly. The decision was subsequently confirmed by the Appellate Court.

The Czech Supreme Court summed up, based on the appeal, that, while Section 2969 Subsection 1 of Act No. 89/2012 Coll., the Civil Code, as amended, refers to the moment of determination of the price expressly as to the time of the damage, the question of the geographical delimitation of the location relevant for determining the regular price of the damaged goods is not specified in any detail. Nevertheless, the determination of the local area must respect the principle of full (or maximum possible) compensation to the injured party, which is highlighted by the case-law.

In the light of the existence of a single European market, it is not possible to limit the scope of finding compensation for the damaged goods to the territory of the Czech Republic. In the present case, according to the Supreme Court of the Czech Republic, it could be regarded as a legitimate attempt of the injured to obtain compensation for the damaged vehicle in the form of a vehicle with similar characteristics from a nearby foreign country. It is also necessary to determine whether cross-border trade of the given type of vehicle exists.

For those reasons, the Supreme Court of the Czech Republic annulled the relevant statements of the decisions of the lower instance courts and referred the case back to the Court of First Instance for further proceedings.