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EDITORIAL

Dear Readers,
I am pleased to inform you that on 1 August we opened a new law firm called BDO Legal. Our team of skilled legal experts has many years of experience from prestigious law firms and will be at your disposal for all your business needs, from commercial law, M&A, real estate and construction law, to tax law, employment law and financing. As of 1 September, our current legal team has been strengthened by the addition of other specialists, and now 11 experts in Prague and Brno will provide you with legal advice.
The law guides you and your company daily. A major amendment to the Business Corporations Act, effective from 1 January 2021, will bring changes that will affect all companies. The amendment largely reflects the problematic areas that the practical application of the Business Corporations Act has caused, so I hope it will bring us only positive changes and help simplify doing business. Another positive and important bit of news is the July judgment of the Supreme Administrative Court, which, after years of uncertainty and struggle, determined what interest a taxpayer is entitled to when the tax administrator retains excessive VAT deductions and takes an unreasonably long time to examine it. The court explicitly stated that a rate of 14% + the applicable repo rate to be an appropriate rate of interest, which I consider to be fair financial satisfaction.
I believe that you will find our September issue focused on current legal issues to be edifying and I wish the entire BDO Legal team every success.

Miroslav Jandečka
Managing Partner

CONTENT

BDO CZECH REPUBLIC

- Audit, Tax, Accounting & Payroll Advisory, IT and Valuation
- 450 specialists
- 35 Certified Tax Advisers, 30 Certified Auditors, 5 Certified Appraisers
- 6 offices in the Czech Republic

SIGNIFICANT LEGAL CHANGES FOR BUSINESSES: AMENDMENT TO THE BUSINESS CORPORATIONS ACT

On 1 January 2021, the most extensive amendment to the Business Corporations Act will take effect. In this article, we provide an overview of selected changes that this amendment will bring.

Distribution of profit and other own resources

The amendment sets clearer rules for the distribution of profits and other own resources (equity) of companies.

First, the conditions for the distribution of profit and for the distribution of other own resources are being unified. Currently, the system of distribution of other own resources is simpler than the system of distribution of profit. Therefore, the conditions for the distribution of other own resources, such as shareholders' contributions outside the registered share capital, are being tightened.

It will be possible to adopt a new decision on the distribution of profit based on the financial statements until the end of the accounting period following the accounting period for which the financial statements were prepared. Case law has already reached this conclusion in the past and the amendment now enshrines it as a general rule.

An advance on profit sharing may only be paid based on interim financial statements. If it later proves that the amount of profit to be distributed resulting from the regular or extraordinary financial statements does not reach at least the sum of the advances paid per share in profit, it will be necessary for the shareholder to repay this advance. The refund period is three months from the date on which the financial statements concerned were approved or should have been approved.

The amendment also prohibits companies from providing services free of charge to a shareholder or a person close to them, even with the consent of the general meeting. The purpose of this rule is to prevent circumvention of the rules for the distribution of profits and other own resources.

Action for replenishment of liabilities

The amendment replaces the regulation of the liability of members of elected bodies in the event of insolvency by an institute called an action to replenish liabilities. The purpose of this new regulation is clearly to strengthen the possibilities for protecting the creditors of a failing business. **On the proposal of the insolvency administrator, the insolvency court may decide that a member of the elected body is obliged to provide financial performance up to the amount of the difference between the total debts and the value of the business's assets.**

The precondition for this responsibility is that

- a member of an elected body has violated their duty (due managerial care),
- thereby contributing to the insufficient amount of assets, and
- the failure of the business corporation is resolved in the form of bankruptcy.

The current wording of the law allows the court to decide that the members of the statutory body of a company in bankruptcy are liable for the fulfilment of its obligations, if they did not do everything reasonably necessary to avert bankruptcy contrary to duty of due managerial care. However, it is an individual liability against individual creditors who have had to pursue this claim in court, and the courts have tended to dismiss these claims out of caution. As the new funds will be provided directly to assets, the principle of relative satisfaction of creditors will not be violated.

We believe that the legislator's introduction of an action to supplement liabilities clearly gives priority to the protection of creditors and we expect that the number of cases in which the members of the statutory body will be found liable for causing the company's bankruptcy will increase. It will be interesting to see how businesses adapt, and we think that the demand for liability insurance will grow.

Stocks and shares: new possibilities

The amendment establishes **that a share in a limited liability company may be accompanied by the right to appoint a member of an elected body** (for example, an executive or a member of the supervisory board). Likewise, joint-stock companies will be able to issue shares in which this right will be confirmed.

At the same time, it will be possible to create a share in a limited liability company with which voting rights will not be associated. Similarly, a joint-stock company will be able to issue shares without voting rights (also other than preferred shares).

At present, various types or classes of shares are relatively common in the founding documents. However, the law does not regulate how far one can go, especially with regard to unequal regulation of rights. The legislator is now giving clearer guidance, which we welcome.

To achieve the above, the regulation in shareholder agreements is also used, which, however, is binding only on the contracting parties. For many companies, the amendment will present an opportunity to consider transferring the rules agreed in the shareholder agreement to the founding documents so that they are effective for everyone.

Joint attendance at the general meeting

The amendment explicitly allows for the joint participation of a shareholder and a designated third party (for example, a lawyer or another adviser) **in the general meeting.** The current decision-making practice of the Supreme Court concluded otherwise, and the amendment deviates from the court's conclusion.

The provision in question is dispositive and can be modified or completely excluded from the articles of association. Therefore, we recommend considering whether to exclude this rule.

Supervisory board: election and removal of members by employees

According to the current legislation, a third of the supervisory board in joint-stock companies with more than 500 employees is elected by the employees. The amendment maintains this rule and sets out more detailed conditions for their election and recall.

The amendment foresees the release of the electoral law, in which

the process of electing members of the supervisory board by employees will be regulated in detail. The election rules will be prepared and approved by the board of directors upon consultation with the trade union, if one operates in the company.
According to the amendment, only employees of the company (not, for example, employees who have retired) have an active and passive right to vote on the supervisory board. According to the amendment, a proposal for the election or recall of a member of the supervisory board may also be submitted by a trade union, an employee council or at least 10% of employees in an employment relationship with the company.

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CO-OWNER'S PRE-EMPTIVE RIGHT TO PROPERTIES

On 1 July 2020, there was another legislative change in the issue of pre-emption rights of co-owners of real estate, namely its abolition. It is a law that has changed four times in the past 10 years, almost as if the legislator could not decide whether to keep the pre-emption right or not.

Practical implications of the pre-emption right

The basis of the issue is whether the co-owners of real estate, be it land, a building (if it is not part of the land), a housing unit or a commercial space, have a mutual pre-emptive right to their co-ownership shares in case of sale (or other method of alienation).
The right of pre-emption undoubtedly fundamentally restricts the holder of a co-ownership share in real estate in the management of their share. In some cases, this seems natural and logical, for example, when siblings inherit an apartment or house together from their parents or grandparents. It would be absurd to allow the sale of one half of such a property to a stranger by one sibling, without the other sibling being able to buy the share offered preferentially. This is even more true in cases where the immovable property forms one functional unit, such as a cottage.
On the other hand, there are many other cases where the pre-emption right of co-owners brings a disproportionate complication in the management of real estate. This is very common in development projects, where some units (typically garages or cellars) or land (gardens or courtyards) may be co-owned by many, or even all, of the unit owners in the building. A given piece of real estate can have dozens or even hundreds of co-owners. The problem materializes when an owner wants to sell their apartment, including the garage attached to it. The garage parking space is represented by a co-ownership share in the unit (or units) in which the garages are located, and therefore all other co-owners of the garages have a pre-emptive right at the time of the sale.
In practice, this can be resolved in only two ways: either by obtaining a written waiver of the pre-emption right from all co-owners, or by offering all the co-owners the chance to buy the parking space and simply hoping that no one does so, as this would frustrate the sale of the apartment unit. In addition, the correct procedure under the law in such a case would entail sending a purchase offer by registered mail, including the full text of the purchase contract, to all addresses listed on the relevant title deed. Needless to say, where there is a higher number of co-owners, the administration involved is extremely demanding and expensive, especially as the permanent addresses of the co-owners may be all over the world.

Development of legislation

Before describing the current situation after the latest change, allow us to briefly map the recent history of regulatory developments:

- Until 31 December 2013 there was a legal pre-emption right for co-owners of real estate (with one significant exception in the form of the sale of a share to a close person, when the pre-emption right of the co-owner does not apply).
- As of 1 January 2014, the new Civil Code abolished the pre-emption right of co-owners in its current form, with some exceptions. The amendment was criticised mainly because it did not sufficiently protect the co-owners from speculators and allowed the ownership of unified functional units to be fragmented.
- From 1 January 2018, the pre-emption right of co-owners of real estate was reintroduced in general, with some exceptions. This posed a significant problem in the transfer of units in some apartment complexes, as described above.
- As of 1 July 2020, the pre-emption right of co-owners of real estate was revoked again. There are again a few exceptions, where the co-owners still have the right of pre-emption; for example, when the co-owners acquired the property by inheritance or other similar means, they have a pre-emption right for six months (again with the exception of transfers to loved ones).

We always recommend monitoring the transitional provisions of the relevant amendments, according to which older legislation may continue to apply to some special cases.

In conclusion

Today, we are again in a situation where the pre-emption right of co-owners of real estate does not exist, with some exceptions. We believe that this is a step in the right direction, which will remove countless obstacles for developers, especially when planning the construction of housing projects, and for thousands of apartment owners when selling. On the other hand, we can recommend the establishment of a contractual pre-emption right of co-owners in a number of scenarios, especially where the real estate forms one functional unit. This is best done in a comprehensive arrangement of co-owners' relationships in the use and care of jointly owned real estate. The right of pre-emption can continue to be established as a right in rem and registered in the Land Register, which is effective for everyone and has greater legal force for the beneficiary.

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PROBLEM AREAS OF WORK FROM HOME

Until recently, only a handful of employers offered employees the chance to work from home, and if they did, then only as a benefit. However, with the coronavirus crisis, other employers often had no choice but to adapt and send their employees home. During the rapid transition to home office, many employers did not realise that the Labour Code applies to teleworking in exactly the same way as it does to office working. This comes with a number of obligations for the employer.

Home office is permitted under the Labour Code only by a general provision that introduces the possibility of working from another agreed place and by provisions on so-called home-based employees who, in addition to working from another place, also schedule their working hours themselves. The employee can therefore work, for example, from a café or from a co-working centre.
Home office cannot be ordered unilaterally. Therefore, to establish a home office regime, the employer must sign a written agreement with the employee or arrange this option in the employment contract. The general rules for home office can also be set by the employer's internal regulations. The specific obligations of an employee can only be set out in a bilateral agreement.

What are the responsibilities of the employee and the employer?
As mentioned above, there is no special arrangement for employees working from home (with the exception mentioned above). The parties therefore have relatively more freedom to adjust the conditions of working from home according to their own needs. However, there may be problems with specific rights and obligations in several areas.
The employer has the obligation to assign work and the employee has the obligation to perform the work. However, when working from home, there may be a problem with how work is entered, submitted and checked, as well as with the provision, use and control of entrusted resources (laptop, telephone, etc.). The employer is also obliged to keep records of working hours. However, working from home complicates this obligation to some extent.
Another problematic area is occupational health and safety and dealing with possible work-related accidents. A home-based work regime obliges the employer to provide employees with a safe working environment in the same way as when they are working in the office, even though the employee is outside the employer's effective control. It is therefore essential that the employee's rights and obligations be carefully defined in the agreement or in the employer's internal regulations. In the agreement, for example, employees may be required to be available by e-mail or telephone at certain times each day, to record working hours and send them to a superior employee, and so on. General health and safety obligations common to all employees may be formulated in the internal regulations, for example.

How best to cover the related costs?
The Labour Code sets up a system in which the costs of performing dependent work are borne exclusively by the employer. It follows that the employee has the right to reimbursement of all costs incurred in the performance of work at the home office (of course, expediently incurred in relation to the work performed). Reimbursement of costs cannot be included in the employee's salary.
In practice, there are two ways in which costs can be reimbursed. The first is the payment of a lump sum, which can partially cover the reimbursement of costs, but it cannot be used for all costs (such as energy). If a flat rate is used for other costs (such as asset depreciation), it is crucial to determine it based on a calculation of actual expenses. Otherwise, the employer could run afoul of the tax administrator, the social security administration or the labour inspectorate, or the employee could seek compensation in court.
The second way is to reimburse all costs actually incurred to perform the work, based on proof of the relevant documents. For example, the employer pays a portion of the monthly invoice for electricity, depending on the time the employee worked from home. Although this option is more certain and more accurate, in practice it can be administratively complex, especially when calculating the part to be reimbursed by the employer. We therefore recommend that the internal regulations clearly and transparently state which costs will be reimbursed and how.

Can employees be monitored in home office?
In principle, monitoring can take place on two levels: software and physical.
The employer can monitor the employee's activity on, for example, an assigned work laptop or work e-mail, but only to verify compliance with the ban on their use for personal purposes, or for serious reasons, in which case the employee must be informed. It is also necessary to keep in mind the protection of the employee's personal data, and the adequacy and appropriateness of the monitoring.
In terms of physical monitoring at the home workplace, although the employer has a legitimate interest in checking up on the employee, it cannot do so arbitrarily. The interest in protecting the employee's privacy is higher according to the principles of labour law. A procedure similar to a check in the event of temporary incapacity for work is out of the question.
To ensure occupational health and safety before the start of work from home and its possible monitoring, and to investigate possible occupational injuries, we recommend obtaining the employee's consent to the employer entering the home workplace in justified cases by means of an agreement between the employee and the employer.

In conclusion
It is primarily up to the employer to maintain relevant tailor-made agreements and internal regulations concerning home office. This is the only way to set clear rules that both parties can follow and to minimise the risks associated with home office.

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FAIRER COMPENSATION FOR WITHHELD VAT?

In July of this year, the Supreme Administrative Court issued a judgment which, in our opinion, is a turning point in the issue of financial compensation for the withholding of excessive deductions of value added tax. In the case, the Supreme Administrative Court explicitly confirmed that the existing compensation for businesses for whom the tax administrator withholds excessive VAT deductions for months or years is not in line with EU law.

The purpose of the interest for the period of verification of the excessive tax deduction is to compensate for the damage caused to the tax subject by its disproportionately long retention by the tax administrator. Historically (until the end of 2014), its amount was not regulated by law. The courts concluded that in such a case it was necessary to „compensate" the VAT payer with interest at 14% + the repo rate, from the beginning of the fourth month after the end of the relevant tax period until the refund of the excess deduction. The legislator reacted to this judicial creation of the law, and since 2015 it has explicitly enshrined in the law interest of 1% increased by the repo rate set by the Czech National Bank. However, it is precisely this amount of interest that the Supreme Administrative Court has now explicitly declared insufficient in view of the basic principles of the pan-European VAT system.
The verdict of the Supreme Administrative Court sheds hope. However, to what interest is a taxable person now entitled in a situation where the examination by the tax administrator takes an unreasonably long time and the statutory interest is not, according to the court, adequate? The court explicitly identified interest at 14% + the applicable repo rate per annum as adequate interest, i.e. the situation that existed before 2015. The decision thus opens the possibility of obtaining significantly higher financial compensation for the period during which the retained VAT money was not available. In addition, it should be noted that the entitlement to financial compensation can be claimed from the tax administrator up to six years back.
We believe that to obtain fair financial satisfaction, it will be necessary to actively communicate with the tax administrator. We do not expect tax administrators to automatically compensate all VAT payers from whom they have withheld excessive deductions for a long time. Therefore, we recommend that all those to whom the tax office has verified an excessive deduction for at least six months consider taking active steps in this matter.

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NEW POSSIBILITIES OF SUPPORT FOR BUSINESSES - OPPIK CALLS

At the turn of August and September 2020, the Ministry of Industry and Trade announced three new calls for OP PIK support programmes.

- **Application:** The aim of the call is to support the acquisition of new knowledge needed for the development of new products, materials, technologies and services through the implementation of industrial research and experimental development projects with an emphasis on the civil transport aviation sector. The call is intended for SMEs and large enterprises. Subsidy applications will be accepted from 14 September to 15 December 2020.
- **Innovation project:** The aim of the call is to strengthen the innovation performance of domestic companies and increase their competitiveness by increasing the use of unique know-how created in cooperation with the academic and research sector, expanding the know-how of companies for innovation, and increasing the efficiency of internal processes in the field of innovation management. Subsidy applications will be accepted from 15 October 2020 to 29 January 2021.
- **Potential:** The aim of the call is to support entrepreneurship and increase the number of companies with infrastructure for research, development, and innovation activities. In addition, the whole programme aims to deepen cooperation between companies and research and development organisations, the creation of skilled jobs, and thus the development of a knowledge economy, improving conditions for companies to participate in national and European research and development programmes and permanently increasing the competitiveness of the Czech economy. Subsidy applications will be accepted from 4 September to 23 November 2020.

We will be happy to help you with the preparation of the project plan, the submission of a grant application and the administration of the project implementation.

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MARK IN YOUR CALENDARS: PLANNED SEMINARS AND EVENTS

**We have prepared a number of interesting topics and meetings for you in the near future. Although we would love to meet you in person, health comes first.
Therefore, we are closely monitoring the development of the epidemiological situation in individual regions and throughout the Czech Republic. In case of unfavourable development, we are ready to carry out all our trainings through webinars. You do not need any special computer equipment to participate in the webinars; you can simply connect via a tablet or mobile phone.
We will immediately inform you about any changes in the form or venue.**

WAGE NEWS IN 2021 AND THE NEW LABOUR CODE

- 18. 11. PRAGUE
- 19. 11. BRNO
- 25. 11. PILSEN
- 26. 11. DOMAŽLICE

We will discuss the most important changes in payroll accounting in 2020 and the upcoming changes and news for 2021. We will talk about what changes await us in the field of labour law, taxes, health insurance and social security, changes in payroll deductions and other news related to wages. In addition to the already approved amendments, proposals in the legislative process and the most important court decisions of Czech and European courts will be examined.
In the Labour Code section, we would like to draw your attention to some of the most important changes brought about by the currently approved amendment to the Labour Code. Its aim is to simplify the implementation of the rights of the employer and employee in the performance of work and to support communication between the parties. You can register for the event here.

EXPERIENCE WITH 2020 TAXES AND NEWS FOR 2021

- 13. 11. 2020 DOMAŽLICE
- 18. 11. 2020 TÁBOR
- 19. 11. 2020 PILSEN
- 24. 11. 2020 PRAGUE
- 26. 11. 2020 ČESKÉ BUDĚJOVICE
- 27. 11. 2020 JINDŘICHŮV HRADEC
- 21. 1. 2021 BRNO

Like every year, we have again prepared a seminar for you which sets out to explain all the main amendments in 2021 concerning income tax and value added tax. We will also discuss the most important changes in connection with the filing of tax returns for 2020. You can register for the event here.

CORPORATE FRAUD AND HOW TO PREVENT IT

- 13. 11. 2020 PRAGUE

The scale and amount of corporate fraud has grown significantly in recent years and the ingenuity of the fraudsters is increasing. Although it may appear to be trivial, some cases have caused significant losses to organisations. We will examine the typical features of individual types of financial fraud and present practical examples of how to protect yourself effectively. Another topic of discussion will be whistleblowing, as a new obligation to report violations will affect virtually all companies from 2021 onwards. You can register for the event here.

NEW ACT ON EXPERTS - IMPACTS ON INDIVIDUAL PROFESSIONS

- 19. 11. 2020 PRAGUE

Learn more about the news brought on by the long-awaited Act on experts. For more information and how to register for the event click here.